Misconduct and unsatisfactory performance policy

**Acknowledgement**

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We acknowledge Aboriginal and Torres Strait Islander people as Australia’s first peoples and as the Traditional Owners and custodians of the lands and waters on which we rely. We pay respect to Elders past and present of the lands where we conduct our work and recognise their ongoing contributions as the first educators on the land now known as Victoria.

Authorised and published by the Victorian Curriculum and Assessment Authority  
Level 7, 200 Victoria Parade  
East Melbourne VIC 3002

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1. Overview

The Victorian Curriculum and Assessment Authority (VCAA) holds a responsibility to ensure that employees maintain high standards of conduct and performance. This policy outlines the procedures in handling misconduct and unsatisfactory performance involving employees. It is important to note that this policy does not regulate the routine management of everyday workplace issues.

This policy applies to all employees within the Victorian Curriculum and Assessment Authority (VCAA). For the purposes of this policy, the term 'employees' encompasses VCAA employees of the direct workforce, as well as any individuals or groups undertaking an activity for or on behalf of the VCAA, including:

* all employees (fixed term, casual, sessional) employed under Ministerial Order No. 1451 – Victorian Curriculum and Assessment Authority employees (Employment Conditions, Salaries, Allowances, Selection and Conduct) Order 2023 (referred to as ‘The MO’)
* Board members

1. Objectives

* **Maintain high standards and compliance:** Ensure all employees adhere to expected standards of behavior and performance, compliant with the MO, relevant legislation, regulations, and VCAA policies.
* **Fairness and transparency:** Provide a clear, consistent, and transparent process for managing instances of misconduct and unsatisfactory performance, ensuring actions taken are fair and unbiased.
* **Support and development:** Offer support and development opportunities to employees to address and rectify performance issues, fostering their growth and improvement.
* **Confidentiality and continuous improvement:** Protect the privacy of all parties involved while maintaining accurate records and using outcomes to drive continuous improvement in policies and practices.

1. Principles
   1. Natural justice

Ensure that all processes adhere to the principles of natural justice, including the right to a fair hearing, the right to be informed of allegations, and the right to respond to those allegations.

* 1. Proportionality

Ensure that any actions or disciplinary measures taken are proportionate to the nature and severity of the misconduct or unsatisfactory performance matter.

* 1. Timeliness

Address and resolve issues of misconduct and unsatisfactory performance promptly to minimise disruption and ensure that issues do not escalate unnecessarily.

* 1. Non-retaliation

Protect employees from any form of retaliation or adverse consequences because of raising concerns or participating in the misconduct and performance management processes.

1. Roles and responsibilities
   1. The employer

The responsibilities of the employer include:

* where the employer becomes aware that an employee may have committed an act of misconduct, the employer may investigate the matter in accordance with the principles of natural justice
* ensuring confidentiality throughout the investigation, allowing the respondent an opportunity to respond, and maintaining privacy as required
* ensuring detailed documented records that outline steps taken within the investigation
* notifying the employee of the decision in writing
* outlining the required standards of performance to employees and raising any issues or concerns in a timely manner
* providing ongoing feedback of an employee’s performance as any issues or concerns arise
* documenting all conversations with an employee during an informal process for unsatisfactory performance as well as supports provided
* initiating a formal process for unsatisfactory performance if, after a reasonable time, there is no improvement in an employee’s performance
* ensuring that individuals affected by the alleged misconduct are provided with appropriate support.
  1. Employees

Employees must:

* cooperate with investigation procedures, respond to allegations or concerns within specified timeframes, and adhere to established guidelines
* understand the outcomes and decisions made by the employer or relevant authorities, and respect confidentiality where applicable.

1. Expectations
   1. Grounds for action under Division 4 of the MO – Misconduct and unsatisfactory performance

Where the employer becomes aware that an employee may have committed an act of misconduct, the employer may investigate the matter in accordance with the principles of natural justice.

If the employer is satisfied, following investigation under 3.4.1. subclause (1) of the MO, that an employee has committed an act of misconduct, the employer may take one or more of the following actions against the employee:

* issue a reprimand
* reduce the employee’s classification, or
* terminate the employee’s employment.

This clause does not affect the right of the employer to immediately dismiss an employee in cases of serious misconduct or criminal action. The employment of an employee may end or be terminated without notice when the employer believes on reasonable grounds that the employee’s conduct is sufficiently serious to justify immediate dismissal.

Such serious misconduct includes:

* theft, fraud, or violence
* serious breaches of occupational health and safety procedures
* willful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment, or
* the employee being intoxicated at work.
  1. Misconduct

Misconduct, as termed in 3.4.1 (1) of the MO includes but is not limited to an employee:

* conducting themselves in a disgraceful, improper or unbecoming manner in an official capacity or otherwise
* being convicted or found guilty, during the employee’s period of service, of a criminal offence punishable by imprisonment or a fine
* being negligent or incompetent in the discharge of the employee’s duties
* contravening a provision of the *Education and Training Reform Act 2006* (Vic) (the Act) or a Ministerial Order made under the Act
* contravening or failing to comply with a lawful direction, without reasonable excuse, given to the employee by a person with authority to give the direction
* being absent from the employee’s duties, without reasonable excuse, or
* being unfit on account of character or conduct to discharge the employee’s duties.
  1. Examples of misconduct
* **Harassment and victimisation:** includes acts such as sexual harassment, bullying, or victimisation directed at employees, or individuals
* **Reportable conduct:** allegations of serious misconduct involving a child, such as sexual offenses, physical violence, emotional harm, or neglect
* **Racial or religious vilification:** engaging in discriminatory or vilifying behaviour based on race or religion
* **Physical harm and damage:** encompasses striking or harming another employee or individual, endangering lives, or wilfully damaging property
* **Unlawful and inappropriate behaviour:** engaging in unlawful discrimination, criminal offenses, improper use of information or resources for personal gain, refusal to obey lawful instructions, alcohol or drug misuse affecting job performance, serious negligence, and inappropriate use of information technology resources.
  1. Managing misconduct

At any stage of a formal misconduct process, an employee is entitled to be represented and/or supported by an individual of their choice, which may for example be a manager, authorised delegate, friend, colleague, or family member. The role of a representative or support individual can include:

* providing practical support and guidance to the employee
* attending meetings with the employee and taking notes on their behalf.
  1. Procedural fairness to apply throughout the misconduct process

Any investigation and determination in respect of an employee's alleged misconduct will comply with the following principles:

* natural justice, including the right of an employee:
* to know the allegation(s) being made against the employee, and
* to be treated fairly and to be heard in respect to the allegations
* procedural and substantive fairness, including:
* providing an employee, a reason why the employee is at risk of being disciplined or dismissed, and
* in appropriate circumstances, giving an employee a reasonable chance to rectify the problem.
  1. Misconduct procedure

Any investigation and determination of an inquiry under Division 4 of the MO in respect of alleged misconduct of an employee must comply with the principles of natural justice.

* + 1. First stage: informal processes

In some instances, the employer holds discretion to consider if an informal process is appropriate, such as:

* mediation
* negotiation
* open communication, or
* reaching an agreement.
  + 1. Second stage: initial assessment

An initial assessment is part of the misconduct procedure but is not in itself a formal investigation of alleged misconduct. The employer holds discretion whether to conduct an initial assessment to determine if an investigation is required. The employer may undertake an initial assessment where it will:

* ensure sufficient information is available to establish a reasonable belief that misconduct has taken place and properly draft allegation(s), or
* not prejudice any formal investigation of the alleged misconduct.

The process of undertaking an initial assessment should remain relatively simple and may involve some basic information-gathering, including speaking with relevant individuals, depending on the sensitivity of the potential allegation(s), and ensuring that there is a reasonable basis on which to proceed to investigation.

* + 1. Third stage: investigation

The employer may decide to commence an investigation after undertaking an informal process and/or an initial assessment. The employer may otherwise decide to proceed directly to an investigation where there has been an allegation of misconduct.

An employee who is subject to an investigation must be notified in writing of the allegation(s) and particulars in support of each allegation and, at the appropriate time, who has been appointed to conduct the investigation.

The employer will ensure that the allegation(s) are sufficiently clear as to ensure that the employee understands what is alleged to have occurred.

During investigation of alleged misconduct, the investigator may interview the parties and any witnesses.

The investigator is required to advise any witness participating in a misconduct investigation that their response will form part of an investigation into alleged misconduct and that the information provided may form part of the information given to the respondent employee. Parties and witnesses should also be advised that direct or indirect discussion with, or approach of, any individual in connection with the alleged misconduct matter, including the respondent employee, is inappropriate and may subsequently be subject to management of misconduct.

The parties and witnesses must ensure confidentiality and not discuss/disclose the alleged misconduct matter with any other individuals, including colleagues.

The investigator will ensure appropriate confidentiality and privacy of witnesses is maintained, subject to the need to inform the employee of the substance of the information provided to ensure procedural fairness.

* + 1. Fourth stage: opportunity to respond

After the investigation process has been completed, the employee will be provided with sufficient details about the findings of the investigation and the employer’s proposed disciplinary outcome to allow the employee a reasonable basis to respond.

The employee should provide their response to the findings and the proposed discipline outcome in writing. If no response is received, the process will continue, and the matter will be determined based on the available information.

* + 1. Final stage: determination of disciplinary outcome

After considering the employee's response, the employer will determine an appropriate disciplinary outcome. In determining the appropriate disciplinary outcome, the employer should ensure that the outcome not be disproportionate to the seriousness of the misconduct. Relevant factors in determining the outcome may include:

* the nature and seriousness of the misconduct
* whether the alleged misconduct poses a current risk to health and safety, and
* the employee’s service and performance history, including any previous disciplinary outcomes provided if it is relevant and given appropriate weighting.
  1. Unsatisfactory performance

Unsatisfactory performance, as termed in 3.4.3 of the MO in relation to an employee, means the repeated failure of the employee to discharge their duties in the manner expected of the employee at the employee’s classification in the employee’s position, as evidenced by one or more of the following:

* the negligent, inefficient or incompetent discharge by the employee of the employee’s duties
* the failure by the employee:
* to exercise care and diligence in performing the employee’s duties, or
* to perform any of the employee’s duties
* the employee engaging in unsatisfactory conduct that impacts the discharge of the employee’s duties including, without reasonable excuse:
* contravening or failing to comply with a lawful direction given to the employee by a person with authority to give the direction, or
* being absent from the employee’s duties without permission.

The purpose of implementing unsatisfactory performance procedures is to improve an employee’s performance to a satisfactory level.

* + 1. Examples of unsatisfactory performance
* **Missed deadlines:** Consistently failing to meet project or task deadlines
* **Low quality work:** Regularly producing work with errors or subpar quality
* **Low productivity:** Inefficient use of work hours, resulting in incomplete tasks
* **Disobedience:** Disobeying instructions and showing disrespect to superiors
* **Colleague complaints:** Consistently receiving negative feedback from colleagues
* **Poor communication:** Ineffective communication causing misunderstandings and conflicts
* **Resistance to feedback:** Refusing to accept and act on constructive feedback.

* 1. Unsatisfactory performance procedure

The purpose of implementing unsatisfactory performance procedures is to improve an employee’s performance to a satisfactory level. The process should be completed as early as possible.

The unsatisfactory performance procedures will be conducted in accordance with this schedule and any procedures determined by the employer. Any procedures determined by the employer must ensure that the employee:

* is advised of their unsatisfactory performance
* is advised that they may have a support person or representative of their choice attend any meetings
* has the opportunity to respond, and
* is provided with a period of monitoring and support.

Where the employer considers that an employee’s performance is unsatisfactory the employer may commence unsatisfactory performance procedures set out in this policy.

* + 1. Informal process

Managers and/or authorised delegates should outline to the employee their required standards of performance and raise any issues or concerns in a timely manner and provide ongoing feedback of an employee’s performance as any issues or concerns arise.

Managers should keep a record of all informal process regarding performance including a recording of all conversations with the employees and any supports that were provided.

If after a reasonable time there is no improvement in performance, managers should proceed to the formal procedure set out below.

* + 1. Formal procedure

If informal processes to resolve unsatisfactory performance are not successful, a formal unsatisfactory performance procedure may commence in accordance with Schedule 1 of the Ministerial Order No 1451. The process should be completed as early as possible.

At any stage of a formal unsatisfactory performance process, an employee is entitled to be represented and/or supported by an individual of their choice, which may, for example, be a manager or authorised delegate, friend, colleague, or family member.

* + - 1. First stage: advising the employee

The employer will advise the employee in writing:

* that their performance is unsatisfactory
* the particular areas of unsatisfactory performance
* the required standard of performance
* the consequences of continued failure to meet the required standard of performance.
  + - 1. Second stage: employee response

An employee has 5 working days (or such longer period as the employer considers reasonable in the circumstances) to explain any reasons for their unsatisfactory performance.

* + - 1. Third stage: consideration of employee response

After consideration of the employee’s response or failure to respond within the period set by the employer under subclause (1)(e) of this clause, the employer will notify the employee of the decision in writing that:

* performance is satisfactory and no further action will be taken, or
* performance continues to be unsatisfactory, and a support period will commence (being not less than 10 working days) for the employee to improve their performance to the required standard. In this case the employee is to be advised that they may appeal the decision however an appeal will not delay the continuation of these procedures.
  + - 1. Fourth stage: support period

Where the employer has informed the employee under the third stage that a support period will commence, the employer will set the duration of the support period. Depending on the circumstances, the support period would normally be between 2 and 8 weeks.

During the support period the employee’s performance will be monitored regularly, including providing feedback, support and opportunities to discuss progress. It is important that an employee be given opportunity and appropriate support to improve their performance. While support should be tailored to the specific needs of the individual it is provided in an overall context which recognises that individuals are ultimately responsible for their own performance.

The employer will ensure that a written record of the support that is provided, including meeting records, is maintained and copies provided to the employee in a timely manner.

At the completion of the support period the employer will assess the performance of the employee. Following the assessment, the employer will advise the employee in writing that:

* performance is satisfactory and no further action will be taken provided that the employee’s performance continues to be at or above the required standard, or
* performance continues to be unsatisfactory and that the employee has 5 working days (or such longer period as the employer considers reasonable in the circumstances) to explain any reasons for the continued unsatisfactory performance.
  + - 1. Final Stage: decision

After consideration of the employee's response or failure to respond within the period set by the employer under the fourth stage of this process, the employer will notify the employee of the decision in writing that:

* no further action will be taken provided that the employee’s performance continues to be at or above the required standard, or
* performance continues to be unsatisfactory and a second support period will be put in place on the basis that the employer considers that a realistic opportunity exists for the employee’s performance to improve to a satisfactory standard during the second support period, or
* performance continues to be unsatisfactory and the employee’s employment will be terminated.
  1. Dispute resolution and right of review

An employee who is directly affected by a decision made in accordance with this policy may seek to resolve their concerns by submitting a grievance in accordance with this policy.

* 1. Support and assistance

Support is available to all employees, and individuals involved in reporting and managing a complaint, even after the matter has been resolved.

The employer encourages all employees to speak to their manager to discuss any questions or concerns they may have regarding the conduct of any other employee.

Employees can also seek support through the Employee Assistance Program (EAP).

1. Managing this policy
   1. Authorisation

This policy is issued under the authority of the Chief Executive Officer.

* 1. Accountability for the policy

The owner for this policy is VCAA Human Resources. The owner reports to the Chief Executive Officer on the management of this policy.

The owner is responsible for:

* development and regular review of this policy
* development of protocols, processes and guidelines to support implementation
* monitoring compliance of applicable employees, organisational units, and/or locations.
  1. Important dates

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| --- | --- |
| Date of adoption: | July 2024 |
| Date of last amendment: | July 2024 |
| Date of next review: | July 2026 |

1. Related documents

* Ministerial Order No 1451.