

State Service Act 2000

Commissioners Direction No.5

PROCEDURES FOR THE INVESTIGATION AND DETERMINATION OF WHETHER AN EMPLOYEE HAS BREACHED THE CODE OF CONDUCT

OPERATIVE DATE: 1 January 2009

[Replaces and supersedes Commissioner's Direction No.5, operative from 19 February 2007, which is hereby revoked]

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Procedures for the investigation and determination of whether an employee has breached the Code of Conduct.

Operative Date: 1 January 2009

1. APPLICATION:

- 1.1 This Direction is issued in accordance with section 20 of the *State Service Act 2000* (the Act) and applies to all Agencies.
- 1.2 This Direction is binding on all officers and employees.

2. PURPOSE:

- 2.1 In accordance with section 10(3) of the Act, the State Service Commissioner establishes in this Direction the procedures for the investigation and determination of whether an employee, senior executive, equivalent specialist or Prescribed Officer (hereinafter referred to as an employee) has breached the State Service Code of Conduct (the Code).
- 2.2 A finding that an employee has breached the Code may only be made in accordance with these procedures.
- 2.3 These procedures do not apply to alleged breaches of the Code by Heads of Agencies. Such breaches will be dealt with by the Commissioner in accordance with section 18(1)(f) of the Act.

3. INTRODUCTION:

- 3.1 Under section 9 of the Act, the Code establishes the conduct requirements for all employees. The Code complements the State Service Principles and may be supplemented by Agency specific standing orders made under section 34(2) of the Act.
- 3.2 The Minister may impose a sanction on an employee who is found to have breached the Code (section 10 of the Act). The Minister may delegate this power.
- 3.3 A Head of Agency, with the exception of the Head of Agency of the Department of Health and Human Services, must not delegate the powers and functions conferred by this Direction to another person or persons.
- 3.4 Wherever Head of Agency appears in this Direction, with the exception of sub-Clause 2.3 and Clause 6, it should be read to include the delegates of the Head of Agency of the Department of Health and Human Services.

3.5 The onus of establishing any fact is on the party asserting it, and proof is to be on the balance of probabilities¹.

3.6 These procedures are to be applied with procedural fairness, natural justice and in a timely² manner.

4. ALLEGATION AND INVESTIGATION:

4.1 Should a Head of Agency have reasonable grounds to believe that a breach of the Code may have occurred, the Head of Agency must appoint, in writing, a person (the Investigator) to investigate the alleged breach of the Code in accordance with these procedures. The Investigator must be impartial and must report to the Head of Agency in accordance with Clause 4.9 on the outcome of their investigation.

4.2 Where a Head of Agency becomes aware that an employee has been convicted of a crime or an offence in Tasmania which is punishable by imprisonment for a term of 6 months or more, or has been convicted elsewhere than in Tasmania of a crime or of an offence which, if committed in Tasmania, would be a crime or an offence so punishable, the Head of Agency may, after affording the employee procedural fairness and natural justice, determine whether the Code has been breached without the need for an investigation.

4.3 Where an investigation of an allegation of a breach of the Code is likely to require interviewing a child, the Head of Agency must ensure that the processes involving the child are sensitive and appropriate, bearing in mind the age, maturity and personal circumstances of the particular child. Before interviewing a child, consideration must be given to such issues as the permission of the parent or guardian, the child being accompanied by a parent, guardian or support person and, where appropriate, keeping the child informed of the progress of the investigation.

4.4 Prior to the commencement of the investigation or in circumstances outlined in Clause 4.7, the Head of Agency must inform, in writing, the employee suspected of committing a breach of the Code:

(a) of the substance³ of the alleged breach of the Code;

(b) of the intention to investigate the alleged breach;

(c) who will investigate the alleged breach;

(d) that the employee may seek his or her own advice and can be assisted by a person of the employee's choice throughout the process; and

¹ A fact is proved on the 'balance of probabilities' if the decision maker is satisfied that its existence is more probable than not.

² "Timely" means within a reasonable time and free from unreasonable delay.

³ 'Substance' means the essential elements that have given rise to the allegation of the breach of Code and the specific parts of the Code allegedly breached.

- (e) of the possible implications for the employee if the matter proceeds to a determination by the Head of Agency that the employee has breached the Code.
- 4.5 During the course of the investigation, the employee suspected of committing a breach of the Code is to be given the opportunity to be interviewed and, if he or she wishes, to provide documentary evidence to the Investigator.
- 4.6 Before being interviewed, it should be made clear to the employee that anything said may be used as evidence if the matter proceeds to determination. The employee is to be given the option of having another person of the employee's choice present at interview to assist the employee through the process.
- 4.7 If, during the course of an investigation, the Head of Agency has reasonable grounds to believe that further breaches of the Code may have occurred, the Head of Agency must inform the employee of those alleged further breaches in accordance with Clause 4.4. Investigation of the additional allegations may then proceed, either as part of the current investigation or as a new investigation.
- 4.8 At any time during the investigation the Head of Agency may decide to take no further action on the allegation or to deal with it otherwise than as a breach of the Code. In such case the Head of Agency shall advise the employee in writing of this decision, including the reasons for the decision.
- 4.9 The Investigator must provide a written report(s) to the Head of Agency on the outcome of the investigation.

The report(s) must:

- (a) provide evidence (if any), relevant to the circumstances relating to each alleged breach of the Code of which the employee was informed in accordance with Clause 4.4;
 - (b) include as attachments any relevant submissions, statements, records of interview or other documentary material; and
 - (c) only include those matters relevant to each alleged breach of the Code of which the employee was informed of in accordance with Clause 4.4.
- 4.10 The Head of Agency shall provide the employee with a copy of the Investigator's report(s) and provide the employee with an opportunity to respond to the report(s). The employee may choose to provide this response in writing or otherwise and may provide any other relevant documentary evidence. This response must be provided to the Head of Agency within a period determined by the Head of Agency provided that this period is not less than 14 days.

4.11 If the response provided by the employee in accordance with Clause 4.10 contains information/evidence not previously known, and/ or information/evidence which is viewed by the Head of Agency as being of relevance to his/her determination pursuant to Clause 5, the Head of Agency may request the Investigator to undertake further investigations in relation to those matters, and to provide a further report concerning them within a reasonable time.

5. THE DETERMINATION BY THE HEAD OF AGENCY:

5.1 The Head of Agency must make a determination as to whether or not an employee has breached the Code.

5.2 When required to make a determination as to whether or not an employee has breached the Code, the Head of Agency must:

- (a) regulate his or her own procedure;
- (b) consider the Investigator's report;
- (c) consider the employee's response;
- (d) act fairly and without bias;
- (e) ensure at all times during this process the employee receives procedural fairness and natural justice; and
- (f) act according to equity, good conscience, and the merits of the case without regard to technicalities or legal forms.

6. IMPOSITION OF SANCTION:

6.1 If the Head of Agency, determines that the employee has breached the Code, the Head of Agency (as the Minister's delegate), may impose a sanction in accordance with section 10 (1) of the Act.

6.2 Where a delegate of the Head of Agency for the Department of Health and Human Services determines that the employee has breached the Code the delegate (as the Minister's delegate) may only impose a sanction in accordance with section 10(1) (a) to (f) of the Act.

6.3 Where a delegate of the Head of Agency of the Department of Health and Human Services determines that the sanction of termination should be imposed, then such a sanction may only be imposed by the Head of Agency to whom the Minister has given the power of termination of a permanent employee in accordance with section 44 of the Act. In such circumstances, the Head of Agency will not be required to make any further determination in order to impose the sanction of termination.

7. NOTIFICATION OF DETERMINATION:

- 7.1 If a determination is made in accordance with Clause 5.1, the Head of Agency must advise the employee in writing of:
- (a) the determination made and the reasons for that determination;
 - (b) any sanction imposed, the reasons for that sanction and the operative date; and
 - (c) the employee's rights of review.
- 7.2 The reasons for determination and sanction must be in sufficient detail to enable the employee to ascertain the facts found and the appropriate arguments that were accepted or rejected in arriving at the determination and sanction.

8. REVIEW:

- 8.1 If the Head of Agency determines the employee has breached the Code and:
- (a) the sanction imposed in accordance with section 10 of the Act is that the employee's employment is terminated, any dispute will be dealt with by the appropriate industrial tribunal; or
 - (b) the sanction imposed in accordance with section 10 of the Act is other than termination of employment, the employee will have a right of review pursuant to section 50 (1) (b) of the Act and in accordance with Commissioner's Direction No 7.
- 8.2 In lodging a review pursuant to section 50(1)(b) of the Act, the onus is on the applicant to establish that the determination was flawed and/or the sanction imposed was not commensurate with the breach of the Code.

9. REQUIREMENT TO KEEP RECORDS:

- 9.1 The Head of Agency must keep a true and accurate record of all proceedings under this Direction, including:
- (a) the instrument of appointment of the person appointed to investigate the matter;
 - (b) investigations conducted under this Direction;
 - (c) determinations where it was found that an employee had breached the Code including the section(s) of the Act that were breached;
 - (d) determinations where it was found that no breach of the Code had occurred;
 - (e) discontinued investigations and the reasons for discontinuation; and
 - (f) any sanction imposed in accordance with section 10 of the Act.

9.2 These records must be made available to the Commissioner as and when required.

10. OPERATIVE DATE:

10.1 This Commissioner's Direction will be operative on and from 1 January 2009.

10.2 Where an investigation has commenced under the previous Commissioner's Direction, but has not been completed as at 1 January 2009, the matter shall be finalised in accordance with this Direction.

Issued on 5 December 2008 by authority of the State Service Commissioner pursuant to section 20 of the *State Service Act 2000*.

Robert J. Watling

STATE SERVICE COMMISSIONER