

PROCEDURES FOR THE MANAGEMENT OF CONDUCT AND PERFORMANCE WHERE THERE IS AN IMPAIRMENT

Implementation document for Management of Conduct and Performance policy

Policy document number: PD-2006-0335-02-V1.0.0

Implementation date: 27 January 2021

Applicable from: 27 January 2021

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Document history

Version	Date	Description	Approved by
V1.0.0	27-01-2021	First publication	A/Chief People Officer

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1 Application

These procedures apply to permanent and ongoing employees of the NSW Department of Education.

2 Introduction

On occasion, an employee's health condition and/or impairment can cause or contribute to matters of misconduct or unsatisfactory performance.

In appropriate cases, the department may allow a permanent or ongoing employee one opportunity to participate in an impairment pathway, as an alternative to a formal investigation, improvement program and/or disciplinary processes. An impairment pathway aims to allow the employee an opportunity to address the underlying cause that has led to the misconduct or poor work performance, by participating in a treatment and health management plan.

Participation in an impairment pathway is voluntary but is of benefit to those employees who actively address their health condition and/or impairment in terms of mitigating a more serious outcome that may otherwise be applied in their matter.

Decision-making about an employee's eligibility and ongoing suitability to participate in the impairment pathway sits with the executive director and directors from the Professional and Ethical Standards directorate (PES).

This procedure:

- sets out the principles that apply when an employee's physical or mental impairment, disability, condition or disorder (including substance abuse or dependence) is linked to matters of misconduct and/or unsatisfactory performance
- confirms the responsibility of employees to actively manage any physical or mental health condition that may be negatively impacting their conduct and/or performance at work
- outlines the circumstances where it may be appropriate to divert matters involving permanent employees from a misconduct investigation process and/or performance improvement program to instead focus on a treatment and health management plan
- outlines circumstances where a misconduct investigation and/or improvement program will remain necessary and explains how steps taken by an employee to address their health will be considered when determining an appropriate disciplinary or remedial outcome
- outlines the roles of, and supports available from, PES and the Health and Safety directorate when an impairment pathway is taken
- provides case studies to illustrate the interplay between impairment and misconduct and/or unsatisfactory performance and the application of the available discretionary pathways.

3 Guidance about misconduct and unsatisfactory performance, and Professional and Ethical Standards' role

The Professional and Ethical Standards (PES) directorate undertakes misconduct investigations, takes action following serious offence convictions and oversees improvement programs in line with either the [Guidelines for the Management of Conduct and Performance](#) (and related employment

laws) or the [Government Sector Employment Act](#). The guidelines and employment laws allow for alternative pathways to investigations and improvement programs.

Guidance about misconduct and the circumstances where a report to PES is required can be found at [Guidance on Misconduct](#) and the [Reporting Guide](#).

Guidance about procedures to address employee performance can be found at [Performance Improvement Programs](#) and the [PES Reporting Guide](#).

4 Misconduct

Some allegations of misconduct involve employees who have a related physical or mental health condition. A connection between the alleged misconduct and an impairment may be apparent when the allegations are first made (see examples at the appendix of this document).

If the PES director is satisfied on the initial information available that a permanent employee's health condition is a key contributor to the alleged misconduct or criminal offence, they may decide to divert the matter from an investigation or disciplinary process to a diversionary impairment pathway that focuses on treatment and health management.

To inform the director's assessment, PES staff may seek information about any relevant diagnosed illness or injury, including non-work-related illnesses or injuries, from the employee on a voluntary basis and from other sources, such as the principal or workplace manager.

An employee is encouraged to disclose any health condition impacting their conduct. However, there is no entitlement to a diversionary pathway and there are often competing factors to carefully consider (see section 6).

Employees will be ineligible to participate in the diversionary pathway if they are the subject of:

- physical assault allegations involving an injury (or potential injury) beyond a minor scratch, bruise or graze
- sexual misconduct or sexual offence allegations.

5 Performance

An employee's performance may be adversely impacted by the employee's physical or mental health condition. A connection between an employee's unsatisfactory performance and an impairment may be identified during a period of individualised and targeted support (or earlier), including via a disclosure from the employee.

An employee is encouraged to disclose any health condition impacting their performance. The principal or workplace manager may request information from the employee on a voluntary basis about any relevant diagnosed illness, condition or injury, including non-work-related illnesses or injuries.

The principal or workplace manager consults with an employee performance officer in these circumstances. Appropriate matters are then assessed by the employee performance director, who may refer the employee to the diversionary pathway rather than commence an improvement process,

if satisfied on the initial information that a health condition is a key contributor to the unsatisfactory performance.

There is no entitlement to a diversionary pathway and there are often competing factors to carefully consider (see section 6).

6 Discretionary factors

The paramount consideration when assessing allegations of misconduct and unsatisfactory performance remains the protection of children and ensuring a safe environment for students at all times.

Factors in favour of a diversionary pathway include, but are not limited to, an employee's:

- prior good conduct and/or performance
- prior demonstrated commitment to rectify areas for improvement identified during performance and development cycles
- agreement to participate in a treatment program, or apparent willingness to do so
- known history to cooperate or comply with health provider's treatment plans
- admissions to the conduct or concerns, particularly where the allegation requires a 'reportable conduct' finding to be made under the Children's Guardian Act 2019
- acknowledgement of not demonstrating the required level of performance for the position held.

Factors that may weigh against a diversionary pathway include, but are not limited to:

- the seriousness of the alleged misconduct
- adverse impacts of the conduct and/or unsatisfactory performance on students, other employees and/or the department's reputation
- ongoing risk to students, other employees or the department evident from the reported conduct and/or unsatisfactory performance
- an employee's denial of the allegations or critical facts, particularly in reportable conduct matters
- an employee's denial that there may be any health condition adversely impacting their conduct or performance
- an employee's prior refusal to engage in good faith with their manager or other areas of the department to address impairment concerns or possible health conditions and/or their conduct
- in performance matters, an employee's refusal to engage with or accept a period of individualised and targeted support.

Where an employee has prior misconduct findings or has previously participated in an improvement program, this has the potential to operate both as a factor in favour of, or against, a diversionary pathway. For example, previous lower-level conduct concerns may lend weight to an assessment that an employee's impairment is the primary reason for their unacceptable conduct, and that they may benefit from a diversionary pathway. In contrast, where there are more serious prior disciplinary matters and the new report relates to the employee's failure to comply with a previous warning or caution, an investigation will likely be required.

A determination that misconduct has occurred or a determination that performance is unsatisfactory does not have to be made for an employee to be referred to the diversionary pathway.

7 How the diversionary pathway operates

Professional and Ethical Standards (PES) will inform an employee in writing if a decision is made to refer them to a diversionary pathway as an alternative to a misconduct investigation, improvement program or disciplinary process.

As part of the decision to proceed with an alternative to a misconduct investigation, improvement program or disciplinary process, PES will request the Health and Safety directorate (HSD) to prepare a treatment and health management plan in consultation with the employee, their medical practitioner/s and their workplace manager (if appropriate).

Only the details of the misconduct investigation, improvement program or disciplinary process relevant to the creation of a treatment plan or managing the employees' health will be shared with Health and Safety.

The health and wellbeing advisor will contact the employee to discuss the diversionary pathway and obtain consent to access relevant information. Without consent, the department will be unable to obtain the appropriate health information to adequately develop and monitor the plan, and the misconduct investigation, improvement program or disciplinary process will proceed.

The health and wellbeing advisor develops the fixed period plan to support the employee's recovery in consultation with the employee's treating medical practitioner/s. The length of the plan will depend on the nature of the health condition.

The employee will be required to participate in the clearly documented plan. The employee will need to:

- provide ongoing consent for the health and wellbeing advisor to communicate with their treating doctor/s about the impairment
- with guidance from the health and wellbeing advisor, apply for leave as per the department's leave policies, if appropriate
- agree to take whatever other action Health and Safety and the employee's treating doctor and other professionals recommend as part of the recovery plan
- take agreed steps to actively manage their illness or health condition
- proactively provide monthly updates to the department on their progress, including providing reports from treating doctors, pathology reports and other medical records.

Health and Safety will closely monitor the employee's progress and compliance with their treatment plan and health management.

A case officer from both PES and Health and Safety will track the employee's progress via the diversionary pathway and will meet monthly to share information so that regular assessments are made as to the employee's ongoing suitability to participate in the pathway.

Health and Safety and PES will consider information provided by principals and other workplace managers about the employee's progress (if they remain on duty during the plan) at each monthly review. They will also update the employee and their manager following each assessment decision.

Sometimes it will be appropriate to extend the period of the plan. However, an extension will not be accommodated if it is likely to cause significant disruption to school performance and/or service delivery.

If an employee fails to actively manage their condition, comply with the agreed plan or delays in providing a monthly feedback from their treatment providers, they will jeopardise their ongoing eligibility to participate in the program (see section 9).

8 Where a misconduct investigation or improvement program is required

As detailed in section 6, a range of competing factors may arise when allegations of misconduct and/or unsatisfactory performance and questions of impairment intersect.

Where the circumstances require a misconduct investigation, improvement program or disciplinary process to commence, the employee is still required to take proactive steps to manage their health condition and routine health and safety provisions will apply. This may involve taking appropriate leave, consulting medical practitioners, engaging in rehabilitation programs and seeking advice from Health and Safety.

An employee will have the opportunity to explain the link between any impairment and alleged misconduct/unsatisfactory performance and to detail the steps they have taken to address the health condition when making submissions at various stages of the investigation, performance improvement and/or disciplinary process (for example, in response to a letter of allegation or in response to a letter outlining proposed action).

In appropriate cases, the decision maker may decide to impose less serious disciplinary action and/or to implement a remedial action, where the employee demonstrates they have successfully taken steps to manage their health condition and improve their conduct and performance during the investigation or improvement program.

9 Return to an investigation and/or disciplinary process

At any stage after the diversionary pathway commences, a PES director can decide that a misconduct investigation, improvement program and/or disciplinary process is required. This is likely to occur where:

- the employee objects to the diversionary pathway
- new misconduct allegations arise
- further information about the original allegations indicate that a diversionary pathway is no longer appropriate
- the employee does not actively manage their health condition or impairment
- the employee does not actively participate in the treatment plan, including by not attending medical appointments or failing to undertake testing
- the employee does not provide monthly evidence to the department to demonstrate they are managing their health condition and participating fully in the treatment plan
- new medical evidence indicates there is no impairment
- new information indicates that treatment of the employee's condition will take longer to complete and the time involved is likely to cause significant disruption to school performance and/or service delivery
- the employee does not engage with their principal or workplace manager in good faith.

Principals and other workplace managers should notify the Health and Safety and PES case officers of any further incidents or other information that may require a review of the employee's ongoing participation in the diversionary pathway.

If the diversionary pathway ends because of the employee's deteriorating health, routine health and safety provisions will apply.

10 Health conditions disclosed during the investigation or performance process

These procedures encourage and support employees to disclose and address any impairment impacting their conduct and/or performance as soon as possible.

On occasion, an employee will nominate impairment issues and/or notify the department of a health condition when an investigation, improvement program or disciplinary process is well advanced. In these circumstances the decision maker will consider the evidence the employee provides as part of the usual submission and decision-making processes under the guidelines and the relevant improvement procedures. At all times, the employee is responsible for providing the evidence and information about their health condition, including the steps they have taken to manage the condition.

An employee's disclosure of a possible impairment in the final stages of a disciplinary process is unlikely to persuade a decision maker to take an alternative course.

11 Illness or health conditions that arise during the investigation or performance process

An employee may become unwell, take sick leave or request to take other leave after being informed that their conduct is under investigation or that an improvement program is required.

Routine health and safety provisions, including the department's leave procedures, apply in these instances where a reported change in the employee's health or wellbeing occurs in response to the process (as opposed to a pre-existing condition).

12 Confidentiality

Information about an employee's participation in the diversionary impairment process will be restricted to those who genuinely need to know. Written consent from an employee, including the information consents noted at section 7, will guide what and how medical information can be shared.

Appendix: Case studies

Table 1 Examples where direct management action is appropriate

Scenario	Course of action
<p>A School Administration Officer (SAO) is frequently late for work over several weeks, repeatedly 'snaps' at colleagues during discussions about work tasks and appears unkempt. The SAO then fails to attend work for several days without notifying their supervisor. When the SAO finally calls the school, they explain that they are struggling with depression and are on a waiting list to see their psychologist.</p>	<p>The School Administration Manager (SAM) encourages the SAO to take sick leave and to access EAPS while awaiting the psychologist appointment.</p> <p>No report to Professional and Ethical Standards (PES) required.</p>
<p>A permanent School Learning Support Officer (SLSO) is seen in the staffroom before school commences, slurring their words and appearing intoxicated. The supervising teacher consults with the principal and then meets with the employee. The employee says they drank heavily the night before and into the early hours and smells strongly of alcohol during this discussion. The principal assists them to safely return home and/or see a doctor. There are no prior reports of the SLSO attending work impaired.</p>	<p>The principal asks the SLSO to provide a medical certificate stating they are fit to work before returning to school.</p> <p>Once the SLSO returns to school they are issued with a letter of direction that they must not attend work impaired and a local monitoring system is established.</p> <p>No report to PES required.</p>

Table 2 Examples where a diversionary pathway is appropriate

Scenario	Course of action
<p>A well-regarded assistant principal had performed satisfactorily until a recent relationship breakdown.</p> <p>The principal received a report that the assistant principal has been acting erratically in the town centre on the weekend. They were observed late at night taking off their clothes, kicking bins and shouting at police.</p> <p>The assistant principal was admitted to the local Mental Health Unit after self-harming in the presence of police and was discharged three days later.</p> <p>The assistant principal provided their principal with a letter from their doctor advising that they had been diagnosed as having reactive depression with schizoaffective disorder. The employee explained they were attempting to get their mental illness under control and were hopeful of being sufficiently well again to return to work.</p>	<p>Report is made to Professional and Ethical Standards (PES).</p> <p>PES assesses the allegations and impairment information. Rather than commence a misconduct investigation, PES diverts the employee to the impairment pathway.</p> <p>Health and Safety prepares a treatment and health management plan requiring the employee to provide the department:</p> <ul style="list-style-type: none"> • a copy of their current treatment plan • consent to talk to their doctor about their progress • a report from a psychiatrist at the conclusion of their plan as to their suitability to return to work. <p>The assistant principal cooperates fully with the plan, providing monthly updates from the doctor and other information about the other measures they are taking to deal with their mental health issues.</p> <p>They take sick leave to engage with the mental health plan. Some of the leave is on sick leave without pay. They provide evidence that they are fully compliant with their medication regime.</p> <p>After six months, the assistant principal provides the required evidence of their mental health. They are assessed to be sufficiently well to work full-time again. They agree to have their conduct monitored by the school executive as a condition of their return to work.</p> <p>PES and Health and Safety close their files.</p>
<p>A General Assistant (GA) is charged with high range drink-driving. The offence occurred during a period of approved sick leave to address alcohol dependency and depression. The GA immediately reports the criminal charge to his principal.</p>	<p>Report is made to PES.</p> <p>PES assesses the criminal conduct and impairment information. Rather than commence a disciplinary process in response to the criminal conviction, PES diverts the GA to the impairment pathway.</p> <p>Health and Safety prepares the treatment and health management plan in consultation with the GA's treating medical practitioners, who continue to recommend weekly urinalysis and specialist outpatient treatment. The GA continues the period of pre-approved sick leave.</p> <p>After six months, the employee is assessed to be sufficiently well to return to work full-time.</p> <p>PES and Health and Safety close their files.</p>

Scenario	Course of action
<p>The work performance of a Grade 7/8 clerk in a corporate directorate has been of concern for months. Their attendance is erratic. They are often late for work, have long lunches and leave early. Their manager has met with them about their attendance and expectations for work practices. The employee always seems to have an excuse for the concerns.</p> <p>The manager has liaised with Employee Performance at PES regarding ongoing concerns for the employee's performance, including inaccurate reports, not meeting deadlines and publishing work without approval that contained spelling and grammatical errors.</p> <p>When the employee is advised that they are moving from monitoring to a formal improvement program, they break down crying. They disclose they have been gambling, have a problem with recreational drugs and suffer from depression. The employee says they want to turn their life around and have an appointment with a psychologist scheduled for the next week.</p>	<p>Employee Performance, PES permits the employee to divert to the impairment pathway rather than commence a formal improvement program.</p> <p>Health and Safety prepares a treatment and health management plan requiring the employee to comply with the treatment plan developed by their psychologist (which includes taking a period of sick leave), consent to talk to their doctors about progress and provide monthly reports detailing their participation and progress in the relevant programs. The employee complies with these requirements and makes good progress.</p> <p>After four months, the employee provides evidence that their health has sufficiently improved, including that the previous addictions are now well managed. The employee is assessed to be sufficiently well to return to work full-time.</p> <p>The employee returns to work and is managed under the performance development framework.</p>

Table 3 Examples where a return to misconduct investigation/performance improvement program is appropriate after a diversionary pathway commences

Scenario	Course of action
<p>Several staff have reported to their principal that a teacher may have a drinking problem. Their observations include that the teacher smells of alcohol at school, disappears at lunchtime, is never in the staff room and appears to be sleeping in the afternoons. Most recently there have been two lessons where the teacher was observed by a School Learning Support Officer (SLSO) and students to be very unsteady on their feet and swearing repeatedly. During the last lesson, the teacher repeatedly thumped their fist on a student's desk and threw a stack of books to the ground, upsetting students.</p> <p>The principal approaches the teacher who acknowledges that their drinking has recently increased and that there has been a family breakdown because of their alcoholism. The teacher has left the family home and is sleeping in their car.</p> <p>The teacher admits to swearing at students, thumping their fist and throwing the books. The teacher apologises and tells the principal that they are scheduled to enter a residential drug and alcohol program and intend to give up drinking and get their family back.</p>	<p>Professional and Ethical Standards (PES) assesses the allegations and impairment information the school has documented.</p> <p>Rather than commence a misconduct investigation, PES diverts the teacher to the impairment pathway.</p> <p>Health and Safety prepares the recovery plan in consultation with the teacher's treating medical practitioners.</p> <p>For the first two months, the staff member is on sick leave and involved in a residential addiction program. The teacher is then discharged with supports.</p> <p>On the recommendation of the staff member's doctor, Health and Safety requires weekly urinalysis for a period of three months in addition to weekly reports from the teacher's doctor as to progress. The urinalysis comes back twice but then not again. Reports from the doctor stop coming in and when Health and Safety request information from the doctor, they are advised that the teacher has not been attending booked appointments.</p> <p>The teacher is removed from the diversionary impairment pathway and the misconduct investigation commences.</p>
<p>A Clerk Grade 5/6 is currently in the second week of a Performance Monitoring Support Plan. The plan addresses concerns around their handling of RMLs and briefings, poor time management, low output of work, unreliability with completing work tasks and balancing work priorities.</p> <p>Since commencing in the role six months ago, the staff member's mood has fluctuated between being highly animated and lethargic.</p> <p>During the performance support meeting, the staff member confides with their manager that they have a diagnosis of bipolar mood disorder. The staff member explains that they did not keep a recent appointment with their treating psychiatrist and had trialed cutting down their medication without guidance from a doctor. They say they love their job and wants to take steps to improve things.</p>	<p>Employee Performance, PES permit the employee to divert to the impairment pathway and the Monitoring Support Plan is placed on hold.</p> <p>Health and Safety prepares a treatment and health management plan requiring the employee to take sick leave, to meet with their psychiatrist, to comply with the treatment plan developed by the psychiatrist and provide consent for Health and Safety to talk to the employee's doctors about their progress. The employee does not attend scheduled appointments with the psychiatrist and refuses to provide consent for Health and Safety to talk to their doctors.</p> <p>The employee insists they are well and provides a basic medical certificate from a doctor saying they are fit. The employee says they have successfully adjusted their medication and want to recommence the Performance Monitoring Support Plan as they are confident they have what it takes to improve.</p> <p>The diversionary pathway ends.</p> <p>The support plan continues. The employee's performance does not improve and the employee insists there are no health impediments at play. A Performance Improvement Program commences.</p>

Table 4 Examples of allegations where a misconduct investigation is required

Scenario	Course of action
<p>A young and inexperienced teacher is observed at school to be overly familiar with students, often sitting with students during lunch and sharing information about their social life in a highly animated manner. Their supervisor provides guidance and instruction as to appropriate boundaries. The teacher is receptive to the feedback and acts in a more professional manner at school over the next week.</p> <p>The following week, a student asks to meet with their year advisor and shares pictures from social media of the teacher at a nightclub on the weekend with Years 11 and 12 students. There are pictures of the teacher kissing one of the students.</p>	<p>A report is immediately made to Professional and Ethical Standards (PES) and to police.</p> <p>When the teacher is interviewed by police, they disclose a diagnosis of bipolar mood disorder and a cocaine addiction. They do not remember anything about what happened at the nightclub.</p> <p>The alleged victim refuses to participate in a police investigation.</p> <p>As the allegations involve sexual misconduct and the misuse of prohibited drugs, a diversionary impairment pathway is not appropriate.</p> <p>PES commence a misconduct investigation, following clearance from police.</p>
<p>Staff report concerns to the principal about the Head Teacher Welfare. They describe erratic behaviour, unsound decisions and extreme mood changes.</p> <p>The principal has been working with the Teacher Performance Management and Improvement Principal Coordinator to address the Head Teacher's performance. This work is in the early stages and a performance and development plan discussion is planned.</p> <p>Reliable evidence is then discovered that shows the Head Teacher has been administering medicines to students instead of school administration staff and has regularly taken student medication from the medicine cabinet for their own use.</p> <p>Discrete inquiries with the Regional Learning and Wellbeing Officer reveal that some parents have complained about having to frequently replace their children's medication, expressing concern about potential overdosing.</p>	<p>The principal makes a report to PES.</p> <p>As the conduct involves a criminal allegation, a report is made to NSW police. The Head Teacher makes full admissions to the police, explaining that they have recently been diagnosed with severe sleep apnea. They say they were self-medicating with the children's dexamphetamine to stay on top of things at school and to help with the fatigue. The police decide that it is not in the public interest to charge the Head Teacher and return the allegations to PES for action.</p> <p>PES decides that the allegations are not suitable for a diversionary pathway, noting the seriousness of the allegations and the various risks at play.</p> <p>The misconduct investigation commences. The process is expedited by the Head Teacher's admissions.</p> <p>At the outset of the investigation, the Head Teacher is encouraged by PES and their principal to take proactive steps to manage their health condition. They take a period of sick leave and consult with their medical practitioners about a graduated return to work and medication regime.</p> <p>During disciplinary submissions, the Head Teacher expresses remorse and provides substantial evidence about the steps taken to successfully remedy their misuse of dexamphetamine and manage their sleep apnea.</p> <p>The decision maker finds that evidence compelling and extends leniency to the Head Teacher, by issuing a caution and reprimand, rather than taking more serious action such as demotion. The decision maker also implements remedial action (monitoring) to support the principal.</p>