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MANAGING UNDERPERFORMANCE & MISCONDUCT POLICY

Best Practice – Quality Area 4

PURPOSE

This policy sets out the procedures and guidelines for managing underperformance and conduct issues.

The purpose of this policy is to guide the Educational Leader, HR Officer(s) and Executive Committee of Rowen Street Kindergarten Inc. in managing problems or concerns about an employee's work performance or conduct.

Issues related to employee work performance or conduct will normally be raised and addressed, in the first instance, by the Educational Leader through day to day feedback and interactions with employees, before proceeding to a formal and structured performance management procedure that will involve the HR Officer(s) and RSK President (or other identified members of the Executive Committee).

The rights of all parties to confidentiality must be respected. The procedures set out in this policy will be implemented within the context of rights and obligations on both employers and employees under relevant awards, industrial agreements or legislation.

SCOPE

- This policy applies to the employer (the Committee of Management of Rowen Street Kindergarten Inc.) and all employees.
- In implementing this policy, the employer (specifically, HR Officer(s) and RSK President) and the Educational Leader will act in accordance with the requirements specified under relevant awards, industrial agreements or legislation (as applicable), and in a fair and equitable manner.
- Employees are to act in accordance with this policy

Performance evaluations vs performance counselling: While mid-year and annual performance evaluation meetings (also known as performance appraisals) provide an ideal opportunity to review and confirm work expectations with each employee, serious or ongoing performance or conduct related concerns should be dealt with as a separate process, known as performance counselling. Generally, performance concerns should be dealt with as soon as they arise and the employer should generally not wait for the mid-year review or annual performance evaluation to conduct performance counselling.

What is underperformance? Underperformance is evidenced when the employee persistently performs work or duties below the standard expected of the role. This may include demonstrating behaviour that: • affects their productivity e.g. excessive absenteeism, lateness or excessive work breaks, poor work planning or time management, poor work quality • affects other employees' productivity or is disruptive e.g. continually being interrupted by non-work-related matters (non-work emails, social media, socialising).

PROCEDURES

Conflict of interest

Persons with a conflict of interest including those who have lodged a complaint or have been personally involved in the matter should refrain from any involvement in the investigation, discussion or decision-making process relating to the complaint, or in implementing required action. Employers should ensure these requirements are communicated to the relevant employees.

In the event of a conflict of interest, the RSK President may select a committee member (or two) to support the performance procedures. In the event of performance or conduct issue that relates to the Educational Leader, the investigation and managing underperformance procedure will be managed by the RSK President, HR Officer(s) and a selected Executive Committee member.

Investigation and verification of the issues to be raised

In relation to complaints about an employee's work performance or conduct the employer will ensure that the issues and concerns can be substantiated. They or an independent third party will investigate the nature of the complaint and determine best course of action. This includes identifying appropriate and specific examples of those issues or concerns prior to any action being taken. It may also include consideration of any written complaints.

Executive approval

No formal disciplinary action in relation to complaints or work performance/conduct issues of an employee will occur without the prior approval of the RSK President or their delegate from the Executive Committee. All parties involved will respect the confidentiality of the information discussed.

Record of meetings

Where appropriate the content and any specific outcomes or requirements identified during meetings with an employee relating to underperformance or conduct will be recorded in writing and a copy given to the employee. In situations where interviews or meetings are conducted with employees as part of the underperformance procedure, an appropriate written record of the meeting will be prepared by the HR Officer(s) and a copy given to the employee. Maintaining confidentiality surrounding all performance issues is important for a proper and fair process. A failure to maintain confidentiality by a committee member or staff,

may compromise the integrity of the investigation

Informal discussions For perceived minor problems with performance/conduct that persists despite feedback provided by the employer, early intervention through an informal process is more likely to be successful in reaching resolution. Examples of minor issues where this approach may be appropriate include the following:

- a change in performance or conduct compared to past conduct demonstrated by the employee
- low motivation for no obvious reason
- recent examples that suggest a lack of skills or expertise to perform the employee's role.

If underperformance relates to issues such as those identified above, the process may involve a discussion with the employee concerned, outlining:

- the performance/conduct that is being observed or reported and which is not in line with standards and expectations
- its impact on the service or other employees
- the employer's expectation and time frame with regard to improvements in performance and conduct; and
- the support that may be made available to the employee to help make improvements.

Informal discussions: enable the employee to participate fully in the discussion and, as an outcome of this meeting, the employee can clearly understand the employer's position in relation to performance concerns, the impact on service quality and delivery, the employer's expectations, and any potential consequence for repetition of the misconduct/underperformance.

Pre-counselling steps for VECTEA employers: Prior to commencing any formal unsatisfactory work performance process, VECTEA employers should have (in accordance with clause 12.3):

- explained the standards of performance required of the employee;
- provided informal support to the employee to meet the standards;
- considered the organisational or personal factors that play a role in the employee's unsatisfactory work performance; and
- considered alternatives to the formal support process to address the problems.

Performance counselling: also referred to as performance management is another process available to an employer to address issues of underperformance. Counselling alone should not be used where the actual or the potential consequences of underperformance or misconduct are serious, such as a threat to safety or health of the children and other employees at the service, financial repercussions, damage to property or a threat to the employer's viability or reputation. These are better dealt with as misconduct issues and an employer should follow a formal disciplinary process, as outlined later in this resource. Performance counselling involves a discussion between an employer and an employee that sets out and reinforces the standard or level of performance/conduct that is required, but which also explores causes of the problem in a constructive manner and identifies possible remedial action.

MANAGING PERFORMANCE PROCEDURE

Step 0 – Resolution of issues prior to implementing formal procedure

It is acknowledged that the Educational Leader and teachers (in respect of their designated groups) in carrying out their day-to-day roles at the service may be involved in the resolution of performance and/or conduct issues related to an employee, prior to implementing the formal steps below.

Where issues are managed without the input of the HR Officer(s) and/or RSK President (ie prior to implementing the steps below), the Educational Leader should ensure that these matters are reported to the HR Officer(s) on a regular basis. Having awareness of such matters may be relevant where the HR Officer(s) and RSK President subsequently assist with managing performance and/or conduct issues of the relevant employee(s).

Step 1 - Identify the problem

It is important to understand the key drivers of underperformance or conduct issues related to an employee. Through discussion and investigation of the issues raised, the Educational Leader together with the HR Officer(s) and/or RSK President need to clearly identify the performance or conduct issue. This may involve:

- Interviews with employees, parents or committee members.
- Review of relevant materials (e.g. meeting minutes, emails, performance reviews, written complaints, etc).

Step 2 — Assess and analyse the problem

The Educational Leader together with the HR Officer(s) and/or RSK President should determine:

- How serious the problem is.
- How long the problem has existed.
- How wide the gap is between what is expected and what is being delivered.
- Who needs to be involved in the performance meeting(s) (i.e. Educational Leader, HR Officer(s), RSK President or any other identified members of staff or the committee).

Once the problem has been identified and assessed, a meeting should be organised with the employee to discuss the problem. Ideally this would be arranged by the Educational Leader, depending on conflict of interest. Otherwise the HR Officer(s) and/or RSK President.

The employee must be notified in writing of the date, time and venue of the meeting and the nature of issues to be discussed/complaints made. They may wish to have a support person of their choice or a union representative to the meeting but must notify the Educational Leader, HR Officer(s) and RSK President in advance if this is the case.

Step 3: Write to the employee to advise of performance concerns

The Employer should write to the employee to formally address areas of underperformance prior to holding the meeting. The written correspondence may address the following:

- a date and time for the work performance counselling meeting, where the employee can respond to the alleged unsatisfactory performance
- that the employee can bring a support person/representative to the meeting or can elect to respond in writing.
- the areas of unsatisfactory work performance, including a description and examples
- the required standards of performance and/or expectations of the employee's role
- the proposed training/counselling, coaching, feedback, professional development or other support proposed to be provided by the employer to assist the employee to meet the standards

- a copy of the applicable clause of the employee's contract or award (if relevant - clause 12 of the VECTEA)

Step 4 — Conduct initial work performance counselling meeting

The discussion should focus on the perceived underperformance as well as its impact on the service and other employees (if applicable). It is also an opportunity to provide the employee with a performance improvement plan which will form the basis of their formal support period. The employer's concerns should be discussed openly and frankly, and the employee should be afforded the opportunity to put their views forward and explain their conduct/actions. Specific examples of the underperformance should be provided and, where possible, supported by objective facts and documented evidence. In addition to clarifying the standard of work or conduct that is expected, counselling aims to assist the employee to understand the adverse effects of the current performance/conduct on the service, other employees, and the workgroup, as well as the implications it may have for the employee's career.

The following are important considerations:

- care must be taken to involve only those who need to be involved in the discussion
- procedural fairness must be ensured by providing the employee with adequate notice of the meeting and details about the matters to be discussed at the meeting to allow the employee time to prepare. The employee should be offered the opportunity to have a support person at this meeting
- the meeting should be confined to discussing only matters related to the underperformance
- the proposed performance improvement plan can be discussed with the employee during the meeting, with a final version being subsequently provided to the employee
- providing reasonable notice prior to convening a work performance counselling meeting.

Step 5: Jointly Develop a performance improvement plan

Where possible, it is important that a solution is jointly devised with the employee. An employee who has contributed to the solution will be more likely to accept and act on it.

The improvement plan should detail:

- the required standards of performance and/or expectations of the employee's role not being met
- the training, counselling, coaching, feedback, professional development or other support, proposed to be provided to help the employee to meet the standards
- how the employee's work performance will be monitored and measured; and
- the schedule of meetings to provide the opportunity to discuss progress, and receive advice, support and feedback.

For VECTEA employers, the formal support period cannot commence until the employee has been provided with a copy of their agreed improvement plan.

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Step 6: Commence initial formal support period and monitor performance

The employer should monitor the employee's performance and continue to provide feedback and encouragement. A meeting to review and discuss the employee's performance should be held even if there is no longer an issue. This enables both parties to acknowledge that the issue has been resolved. More serious action may need to be taken if the employee's performance does not improve including further counselling, issuing formal warnings and ultimately if the issue cannot be resolved, termination of employment.

Matters to explore during the conversation include but are not limited to:

- any changes to the scope of the job performed or roles and responsibilities
- circumstances beyond the employee's control that may have impacted on performance-specific improvement sought
- Employers should ensure that the improvements sought are realistic and achievable and that the timeframes agreed for improvements are compliant with any industrial agreement

At the conclusion of the work performance counselling meeting, the employee will begin their formal support period. VECTEA employers should note that the initial formal support period must be no less than 12 weeks in duration.

A formal support period is an opportunity for the employer to monitor the employee's performance against objectives established in the performance improvement plan (as provided to the employee).

The employer should also implement any agreed mentoring, training, or professional development to ensure the employee's improvement is actively supported. This may include regularly scheduled meetings with their direct manager (i.e. their Educational Leader/Director) to provide feedback about progress and address any other issues that have arisen.

Step 7: Hold review meeting and provide an outcome

At the conclusion of the formal support period, it is recommended to meet with the employee to review and provide a formal outcome (with their support person or representative). The purpose of this review is to formally advise the employee that: that they meet the standards and the formal support period has ended; or

- no sufficient progress has been made.
- Issue a warning of unsatisfactory work performance
- After meeting with your employee, and should sufficient progress not be made, the employee is issued a written warning.

The written warning letter will:

- outline the standard expected
- where and how the employee is not meeting this standard
- provide the employee with an opportunity to respond within a reasonable timeframe; and
- outline the consequences if the employee fails to improve their performance including that continued unsatisfactory work performance may result in termination of employment.

Step 8: CONTINUED UNSATISFACTORY AND FORMAL SUPPORT PERIOD

Should the employee's performance not improve following the initial formal support period, a further support period of no less than four weeks will commence. Given the nature of the employee's underperformance, you may elect to provide one or more additional formal support periods.

Step 9: ISSUE A DETERMINATION OF UNSATISFACTORY WORK PERFORMANCE

Following this second formal support period, and with continued unsatisfactory work performance, you write to the employee to advise a formal Determination of Unsatisfactory Work Performance. (clause 12.7 of the VECTEA 2020). In this letter the employee to outline:

- where and how the employee is not meeting this standard.
- that the employer is proposing to terminate the employee's employment for unsatisfactory work performance, and
- that the employer will provide a further opportunity to respond in person or in writing.

After considering the employee's performance and response, the employer will determine the final unsatisfactory work performance outcome (clause 12.8 of the VECTEA 2020). The possible outcomes are:

- extending the formal support period for a further period; or
- termination of the employee's employment.

ISSUING A FORMAL WARNING

Warning letters are useful to confirm and address a serious performance with an employee. A warning letter is usually issued to an employee after the employer has met with them to discuss the problem (i.e. after Step 4, if the performance or conduct issue is deemed serious enough).

There is no legal requirement to provide formal written warnings or a certain number of warnings. However, to determine whether an employee was unfairly dismissed, the Fair Work Commission will consider if the employee was:

- warned about performance or conduct issues, and
- provided a reasonable opportunity to improve their performance and conduct.

Ensure that the employee receives the warning letter and the employer should document the details of providing the letter (e.g. the time, date, who was there, what was said, etc.). It is important that the employee reads and understands this letter and the consequences of not adhering to the actions set out (i.e. another warning, termination of employment, etc.). A copy of the letter should also be kept on their records.

MISCONDUCT BY EMPLOYEES

What is misconduct? Misconduct is different from underperformance and is of a more significant or severe nature. Misconduct can be defined as either misconduct or serious misconduct depending on its severity. Where an employee's conduct results in a breach of established or expected standard, procedure, or policy; then an employee's conduct, if substantiated may warrant misconduct. Minor issues of misconduct may instead constitute underperformance, as the employee is not meeting the standards and expectations of their role.

Serious misconduct: Serious misconduct is defined under Regulation 1.07 of the Fair Work Regulations 2009 (Cth) and is the most severe form of misconduct in the performance of an employee's duties. If investigated and substantiated, serious misconduct may warrant summary dismissal (termination) without notice. Serious misconduct as defined in the Fair Work Regulations includes both of the following:

- wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment; and
- conduct that causes or has the potential to cause a serious and imminent risk to:
 - the health or safety of a person; or
 - the reputation, viability, or profitability of the employer's business.

The employer is required to promote an environment that is free of any harassment, intimidation or abuse. Employees shall not treat children, parents, visitors or other employees in a manner involving any form of harassment, intimidation or any treatment of a demeaning, threatening or abusive manner. Staff will at all times act in accordance with the requirements of the *Children's Services Act 1996* and *Children's Services Regulations 2009*.

Conduct that falls within the scope of unacceptable behaviour that justifies immediate disciplinary action and that may result in termination of employment including instant dismissal, includes, but is not limited to:

- verbal abuse or threats
- any form of physical abuse or corporal punishment
- remarks that could be seen as offensive or constitute sexual harassment
- intimidatory behaviour
- treatment, particularly of children, that involves frightening, threatening or demeaning techniques
- a serious breach of the *Children's Services Act 1996* or *Children's Services Regulations 2009*.

Specific examples relating to an early childhood service include:

- failing to take every reasonable precaution to protect children from any hazard likely to cause injury
- failing to ensure that any child is adequately supervised
- subjecting children to any form of corporal punishment
- any discipline of children that is unreasonable in the circumstances
- endangering the health and safety of the children
- fraud and theft
- attendance at work while under the influence of alcohol or non-prescription drugs.

In the event of a suspected breach of this policy related to unacceptable conduct, an investigation will be undertaken by the Educational Leader, HR Officer(s) and RSK President. If there is a conflict of interest with the parties involved, the Executive Committee may appoint

a committee member to help conduct the investigation.

Where the employer has reasonable grounds to conclude that a breach of this policy may have occurred, the employee may be suspended from duty without loss of ordinary pay, pending an investigation. The employee will be given an opportunity to respond to the matters raised before the employer makes any final decision.

The Executive Committee will meet as soon as possible after the investigation has been completed and, based on the report received from the subcommittee, will decide action to be taken and refer this back to the subcommittee for implementation.

The employer will notify the employee in writing of the outcome of the investigation and any decision or actions to be taken by the employer.

STEP 1: DETERMINE THE NATURE OF THE CONDUCT AND INVESTIGATE

Receiving a complaint: The need to deal with issues through a formal disciplinary process is triggered by the receipt of a complaint by the employer on the employee's performance or misconduct, or an event or behaviour witnessed by the employer.

Investigating a complaint: It is important to undertake appropriate investigation into the complaint to establish the facts before initiating the disciplinary meeting. Maintaining confidentiality surrounding all disciplinary activities is important for a proper and fair process. A failure to maintain confidentiality by a committee member or staff, may compromise the integrity of the investigation

STEP 2: OUTLINE THE ALLEGATIONS OF MISCONDUCT TO THE EMPLOYEE IN WRITING

Once an investigation has been conducted and identified that disciplinary action may be necessary the employer must write to the employee to advise:

- the instances of misconduct and/or serious misconduct that is alleged to have occurred.
- That should the alleged misconduct and/or serious misconduct be substantiated (proven); disciplinary action may be taken.
- The employer must notify the employee in writing of the date, time and venue of the disciplinary meeting, and the matters to be discussed.

STEP 3: PROVIDE THE EMPLOYEE WITH AN OPPORTUNITY TO RESPOND

Meetings should be scheduled during work hours and paid. The employee should be informed of who will represent the employer at this meeting. If possible, the employee should be consulted in relation to when the meeting will be held and provided with the opportunity to bring a support person to the meeting. The role of the support person is to listen and provide support, but not to participate in the discussion.

The employer must outline the allegations or concerns one-by-one, outlining the employer's understanding of the issues involved, the investigation undertaken, and the facts as demonstrated by evidence gathered during the investigation. After hearing the employee's response, the employer must consider if there are mitigating circumstances or new information

that must be considered or further investigated. If so, it is important for the employer not to form any conclusions at this stage, but to advise the employee that the meeting will be rescheduled to allow for further consideration/investigation of the information presented by the employee. In some circumstances, or due to the nature of the allegations, it may be more appropriate to require the employee to respond in writing instead of attending a disciplinary meeting.

STEP 4: CONSIDER THE EMPLOYEE'S RESPONSE

At the conclusion of the meeting, depending on the discussion and evidence presented, the following outcomes are possible:

- If the information presented by the employee at the meeting needs further investigation, the employer must schedule a further meeting(s) to discuss the findings and make a decision; or
- If the misconduct is established, the employer may convene a further meeting to provide a formal outcome and attempt to form an agreement on required improvement and appropriate disciplinary action; or
- No further action is required, as the allegations have not been substantiated on the balance of probabilities (proven).

STEP 5: PROVIDE AN OUTCOME TO YOUR EMPLOYEE

Where the misconduct/underperformance has been substantiated, established with evidence at the meeting, a formal written warning may be provided to the employee. The warning must be provided verbally and in writing to the employee. The letter should clearly:

- state that it is a formal warning letter
- set out the misconduct/underperformance being addressed
- summarise the discussions from the disciplinary meeting
- quote the employee's response in the meeting or reference the employee's written response (paraphrases should be avoided as they may increase the risk of misinterpretation of the employee's meaning).
- outline the expectations of the employer with regard to changes to be demonstrated by the employee to address the misconduct.
- state the consequences for lack of improvement of the misconduct/underperformance within a stated timeframe, including informing the employee that their employment may be terminated
- list support/development measures for the employee, as identified at the disciplinary meeting, and the timelines within which the employee should undertake such measures
- indicate any follow-up processes agreed to between the employer and employee or required by the employer.
- that the written warning will remain on the employee's personnel (HR) file in accordance with the employer's policies or industrial agreement.
- All records relating to the disciplinary meeting and subsequent actions must be signed by the employer, kept confidential and stored at the service in accordance with the legal requirements for the storage of records. Copies should be made available to the employee where appropriate.

AUTHORISATION

This policy was approved on 4 March 2024 by the Committee of Management of Rowen Street Kindergarten Inc.

REVIEW DATE: MARCH 2028