

PARLIAMENTARY COUNSEL

Procedure No. 6.8.1 Underperformance

Document release 3.0

Date of issue: May 2022

Next review: May 2025

Contents

Procedure No. 6.8.1 Underperformance	1
Introduction	1
Addressing performance concerns	2
Initial Support Process	3
Formal Underperformance Process	4
Application.....	4
Overview	4
The Plan phase	5
The Supervisor Assessment phase	6
The Review phase	6
The Further Assessment phase	7
The Outcome phase	7
Outcomes	8
Record keeping and privacy	8
Resolving concerns	9
Legislative and Other Requirements	9
Responsibility of First Parliamentary Counsel	9
Responsibilities of supervisors	10
Responsibilities of employees	10
Procedural Fairness.....	10
Related documents	11
Review	11

Introduction

1 OPC 6.8 Achieving Capability and Excellence Program (the ACE Program) is OPC's performance management program. The purpose of the ACE program is to empower OPC's people to develop their skills to do their best work. One of the objectives of the ACE program is to address performance issues promptly, sensitively and actively.

2 Another objective is promoting a feedback culture. Sharing feedback includes affirming feedback, where a supervisor notices, recognises and appreciates skill, effort and outcomes; as well as adjusting feedback, when the work behaviour or performance is not up to organisational standards and the supervisor wants the employee to consider 'what they could do differently next time'. Both are important, and sharing both is part of everyday work. The presence of areas needing development or opportunities for growth does not automatically mean there is cause for concern about performance. In some cases it is evidence that the employee is stretching themselves and working at their 'growing edge'.

3 Support from [People Services](#) team is available for supervisors in providing feedback and in supporting improved performance. Managing performance concerns, including conduct, can be complex, in particular when there is a need to distinguish between performance, conduct and health related issues, and involves additional time and work. Supervisors and employees are encouraged to seek guidance from the [People Services](#) team and the intranet when addressing these issues.

Addressing performance concerns

Note: This section duplicates OPC 6.8 ACE Program paragraphs 17-21.

4 Where a supervisor is concerned that an employee's performance may not be meeting expectations, these concerns **must** be raised by the supervisor with the employee as early as possible, and can be raised at any point throughout the ACE cycle. A shared understanding of the cause of the performance concerns should be sought¹.

5 Performance concerns **must** be addressed, following a decision made by the supervisor about the most appropriate response in the circumstances. The supervisor and employee must work together to identify and implement actions to address the causes and to achieve sustained improved performance. The supervisor should document the issues, actions and feedback provided, and give the employee the opportunity to add their comments to those documents².

6 The employee **must** engage constructively with their supervisor and People Services in resolving the performance issues and acting on performance feedback³. The employee may, if they wish, be accompanied by a support person or employee representative to assist in resolving the performance issues and acting on performance feedback.

7 There are four options to address performance concerns:

- (a) **Time to address personal issues:** If the performance concerns arise from personal issues, the supervisor provides an agreed time period for the employee to address the personal issues that are impacting on their performance. Risk mitigation strategies are put in place to address the impact of the poor performance on team members and clients, and/or on work quantity, quality or timeliness.
- (b) **Modified duties:** If the performance concerns arise from personal issues, the supervisor modifies the duties of the employee for an agreed time period while the personal issues that are impacting on their performance are resolved, to enable the employee to continue to contribute effectively. Examples include adjusting workload or re-assigning duties.
- (c) **Initial Support Process:** The supervisor commences a less formal process to support improved performance as described below.
- (d) **Formal Underperformance Process:** The supervisor, with FPC approval,

¹ APS Commissioner's Directions 2022 50 (g)

² APS Commissioner's Directions 2022 50 (g)

³ APS Commissioner's Directions 2022 51 (f)

commences OPC's formal Underperformance Process as described below. It would be expected that usually, the Formal Underperformance Process would be immediately preceded by the **Initial Support Process**. However, in some circumstances, that may not be appropriate. For example:

- (i) where an employee has undertaken several Initial Support Processes and improved their performance, and subsequently their performance no longer meets expectations.
- (ii) where an employee has successfully completed an Formal Underperformance Process but has been unable to sustain good performance for a period of up to 12 months.

8 This document provides instruction on implementing the Initial Support Process and the Formal Underperformance Process.

9 The Initial Support Process and the Formal Underperformance Process apply to APS 1-6, Executive Level 1-2, APC 1-3 and Senior Executive Service employees.

Initial Support Process

10 Initially, the supervisor must have a conversation with the staff member and outline their concerns regarding the performance, clearly describing the areas that need improvement. In this conversation, the supervisor will clearly state that the conversation is part of the Initial Support Process.

11 Consistent with the *Australian Public Service Commissioner's Directions 2022*, it is the responsibility of the employee and the supervisor to work closely together, seeking to identify the causes for the reduced performance.

12 It is the responsibility of the employee to engage constructively in resolving performance issues and act on performance feedback. The employee must develop a written Initial Support Plan to make the needed improvement within a timeframe that is at least four weeks and not longer than three months. The supervisor should test the feasibility of the Plan proposed by the employee. The employee must implement the agreed Initial Support Plan. Information is available from [People Services](#) team.

13 The Initial Support Plan may include informal support from the supervisor, such as on the job support, development activities, and or more frequent conversations to allow for the provision of feedback. The supervisor must not unreasonably refuse to provide informal support.

14 The supervisor should document the issues, actions and feedback provided during the Initial Support Process, and the employee can add their comments to those documents.

15 The outcome of the Initial Support Process should be provided by the supervisor to the employee in writing. If the employee has been unable to meet or sustain the performance expectations, the Formal Underperformance Process as outlined below should be commenced.

Formal Underperformance Process

16 Continued underperformance will be addressed through a formal process designed to support the employee to return to sustained performance in their current role, and if that is not possible, take timely action to remove the employee from the role.

17 For the purpose of the ACE Program and this document, underperformance by the employee is performance that is not meeting expectations as outlined in the employee's Performance Agreement, job description (if available) and relevant Work Level Standards⁴. Performance that is not meeting expectations can arise at any point in the ACE Cycle. Commencing the Formal Underperformance Process does not automatically follow the assignment of any ACE rating.

Application

18 The Formal Underperformance Process does not apply to employees who have health related incapacities where those incapacities have a significant bearing on performance, and are being actively managed under other arrangements. However, it does apply to employees who have health related incapacities where those incapacities have no significant bearing on performance.

19 The Formal Underperformance Process does not apply where concerns arise with an employee's performance against the requirements of a classification higher than their substantive classification, such as when they are on higher duties.

20 The Formal Underperformance Process does not apply to employees on probation or on a non-ongoing contract.

Overview

21 The Formal Underperformance Process consists of five phases: Plan, Supervisor Assessment, Review, Further Assessment, and Outcome.

22 If an employee is participating in the Formal Underperformance Process at the time of the ACE end of cycle period, an ACE rating of **Needs Improvement** should be assigned.

23 During the Formal Underperformance Process, an employee may apply for planned leave in accordance with the OPC 7.1 Leave, and approval will be determined by FPC. In making a decision on whether to approve leave, FPC will consider the impact of the leave on the individual and on the Formal Underperformance Process.

24 Delay or suspension of the Formal Underperformance Process:

- (a) may be approved by FPC for occasions of approved planned leave, if FPC is satisfied it is appropriate;
- (b) may be approved by FPC for periods of approved unplanned leave of greater than five days, or on the advice of an independent medical examiner;

⁴ [Non SES Work Level Standards](#) and [SES Work Level Standards](#)

- (c) will not be approved by FPC for actions such as Code of Conduct investigations, complaints, or Review of Action/Decision requests.

25 During the Formal Underperformance Process, the employee may, if they wish, be accompanied by a support person or employee representative to assist in resolving the performance issues and acting on performance feedback.

26 The [Employee Assistance Program](#) is available to provide support to employees, supervisors and Assessors.

The Plan phase

27 During the Plan phase:

- (a) FPC will satisfy themselves that the employee has had a reasonable opportunity to respond to performance concerns raised by the supervisor during an Initial Support Process or previous Formal Underperformance Process and the risks to the employee's welfare have been considered.
- (b) FPC will give approval for the commencement of the Formal Underperformance Process.
- (c) FPC will, with input from the supervisor, determine the support to be provided by OPC during the initial 3 month period of supervisor assessment⁵ and the frequency with which feedback will be provided to the employee. Consideration will be given to the employee's individual circumstances.

28 The supervisor will advise the employee in writing of the performance expectations that are required and the way in which the employee's performance has not met those expectations⁶.

29 The employee will have seven (7) days to comment⁷.

30 A written Performance Improvement Plan will be developed by the supervisor with input from the employee, which:

- (a) Outlines clear performance expectations that are consistent with the employee's Performance Agreement, job description (if available) and relevant Work Level Standards⁸.
- (b) Describes how achievement of the performance expectations will be assessed, stating the period of assessment.
- (c) Describes what additional development will be undertaken by the employee, if relevant. This is remedial action for the purposes of Enterprise Agreement 2016-2019 17 (3) and SES Enterprise Agreement 2016-2019 17 (3).

⁵ Enterprise Agreement 2016-2019 17 (3); SES Enterprise Agreement 2016-2019 17 (3)

⁶ Enterprise Agreement 2016-2019 17 (1); SES Enterprise Agreement 2016-2019 17 (1)

⁷ Enterprise Agreement 2016-2019 17 (1); SES Enterprise Agreement 2016-2019 17 (1)

⁸ [Non SES Work Level Standards](#) and [SES Work Level Standards](#)

- (d) Describes what support will be provided by the supervisor.
- (e) Outlines an agreed working pattern that does not result in the overall accumulation of flex credits to a level higher than at the commencement of the process (for employees who are eligible for flextime).
- (f) Outlines the possible outcomes if the employees performance does not meet the performance expectations outlined in the Performance Improvement Plan during the Formal Underperformance Process.

The Supervisor Assessment phase

31 There will be an initial period, usually of 3 months, of assessment that will be undertaken by the employee’s supervisor⁹. For SES employees, the initial period of assessment may be undertaken by a 2PC¹⁰.

32 The Supervisor Assessment period may be reduced if the Initial Support Process extended for 3 months, and FPC is satisfied that the reduction is appropriate.

33 During this period of assessment:

- (a) The employee must strive to attain a level of performance consistent with the work level standards for the employee’s classification and the Performance Improvement Plan, including undertaking any necessary training, or remedial or corrective measures as directed¹¹;
- (b) The supervisor must support and encourage the employee to improve performance, including by giving clear, honest, timely feedback;
- (c) Regular feedback meetings between the employee and the supervisor will be convened by People Services; and
- (d) The supervisor will assess the performance of the employee against the work level standards for the employee’s classification and the Performance Improvement Plan.

The Review phase

34 If, at the end of the Supervisor Assessment phase, the supervisor determines that the employee has attained and sustained the required standard of performance outlined in the Performance Improvement Plan and the performance issues have been satisfactorily resolved, the supervisor should recommend to FPC that assessment should be discontinued and the Outcome phase should commence.

35 If, at the end of the Supervisor Assessment phase, the supervisor determines that the employee has not attained or not sustained the required standard of performance outlined in the Performance Improvement Plan and the performance issues have not be satisfactorily

⁹ Enterprise Agreement 2016-2019 17 (3); SES Enterprise Agreement 2016-2019 17 (3)

¹⁰ SES Enterprise Agreement 2016-2019 17 (4)

¹¹ APS Commissioner’s Directions 2022 51 (f)

resolved, the supervisor should recommend to FPC that a further period of assessment take place¹².

36 On accepting the recommendation for further assessment, FPC should assign an assessor who is not the employee's supervisor¹³. If the employee is an SES employee, the reviewer will be FPC or a 2PC. For other staff, the reviewer will be a person other than the employee's supervisor.

37 A further Performance Improvement Plan will be developed by the supervisor with input from the employee and assessor, which meets the requirements outlined in paragraph (30).

The Further Assessment phase

38 The further assessment phase is a period, usually of 3 months, of assessment that will be undertaken by an assessor other than the employee's supervisor¹⁴.

39 During this period of Further Assessment:

- (a) The employee must strive to attain a level of performance consistent with the work level standards for the employee's classification and the Performance Improvement Plan, including undertaking any necessary training, or remedial or corrective measures as directed¹⁵;
- (b) The supervisor must support and encourage the employee to improve performance, including by giving clear, honest, and timely feedback;
- (c) Regular feedback meetings between the employee, the supervisor and the assessor will be convened by People Services; and
- (d) The Assessor will assess the performance of the employee against the work level standards for the employee's classification and the Performance Improvement Plan.

40 At the end of further assessment phase the Outcome phase will commence.

The Outcome phase

41 During the Outcome phase:

- (a) The assessor (or the supervisor if no Further Assessment phase has occurred) will prepare a report for FPC which outlines the finding of the assessment of the employee's performance against the Work Level Standards for the employee's classification and the Performance Improvement Plan;

¹² Enterprise Agreement 2016-2019 17 (3); SES Enterprise Agreement 2016-2019 17 (3)

¹³ Enterprise Agreement 2016-2019 17 (3); SES Enterprise Agreement 2016-2019 17 (3)

¹⁴ Enterprise Agreement 2016-2019 17 (3); SES Enterprise Agreement 2016-2019 17 (3)

¹⁵ APS Commissioner's Directions 2022 51(f)

- (b) Based on the assessment of the employee's performance in accordance with the Formal Underperformance Process, FPC will determine appropriate action to be taken, which could be:
 - (i) return to usual work and performance management under the ACE Program, or
 - (ii) one of the outcomes outlined below, or
 - (iii) some other action (an example could be re-assessment, if FPC believes the assessment has not been properly undertaken).

42 FPC will advise the employee in writing of the action they propose to take, providing a copy of the Assessor's report, and inviting the employee to respond to the proposal within a reasonable time period that is not less than 7 calendar days.

43 FPC will consider any response the employee makes within the time period and advise the employee in writing of the action they will take. FPC will then implement that action.

Outcomes

Reassignment of duties

44 FPC may reassign the employee to other duties at level in accordance with subsection 25 of the *Public Service Act 1999*. FPC may determine the salary entitlement of an employee whose duties have been reassigned within the salary range applicable to that classification.

Assignment to a lower classification

45 FPC may assign the employee to a lower classification in accordance with subsection 23(4) of the *Public Service Act 1999*. FPC may determine the salary entitlement of an employee within the salary range applicable to the lower classification.

SES employees—Incentive to Retire

46 FPC may give a notice to an SES employee stating that the employee will become entitled to a payment of a specified amount if the employee retires within a period specified in the notice. Such notice will be given in accordance with section 37 of the *Public Service Act 1999*.

Termination of employment

47 FPC may terminate the employee's employment in accordance with section 29 of the *Public Service Act 1999*, and for SES employees, with section 38 of the *Public Service Act*.

Record keeping and privacy

48 Consistent with the *Privacy Act 1988*, any personal information collected as part of the Formal Underperformance Process will be used for the purpose of managing performance.

49 All documentation regarding the Formal Underperformance Process will be placed by People Services on an electronic file marked “Sensitive: Personal”.

50 This information may be accessed by the employee, the supervisor involved in the Formal Underperformance Process, FPC, an assessor for the person and People Services staff.

51 This information will be managed in accordance with the requirements set out by the National Archives of Australia in the Administrative Functions Disposal Authority, which authorises destruction of records about the development and review of individual employee performance agreements and assessments 3 years after action is completed¹⁶.

52 Office Procedural Circular No. 2.13 *Privacy Management Framework* outlines how individuals can access the personal information that is held by OPC in relation to them.

Resolving concerns

53 If an employee is concerned about any aspect of the Initial Support Process or Formal Underperformance Process, the employee should raise the concerns as set out below and seek resolution. The employee may, if they wish, to be accompanied by a support person or employee representative when taking any steps to resolve concerns.

54 In the first instance, the employee should discuss the issue and possible resolutions with their supervisor, and/or with People Services.

55 Where a concern cannot be resolved, the steps to resolve the matter will be in accordance with Office Procedural Circular No. 5.10 *Resolution of disputes and grievances*.

Legislative and Other Requirements

Responsibility of First Parliamentary Counsel

56 The *Public Service Commissioner’s Directions 2022* (the Directions) at subsection 49(2) require that the Agency Head upholds the APS Employment Principle 10A(1)(d) by ensuring that:

- (a) the Agency’s performance management policies and processes dealing with unsatisfactory performance are available to supervisors and APS employees in the Agency, and include information that clearly sets out:
 - (i) the responsibilities of supervisors; and
 - (ii) the possible outcomes if an APS employee’s performance is considered unsatisfactory; and
 - (iii) that if an APS employee’s performance is considered to be unsatisfactory, the employee has a responsibility to engage constructively with their supervisor and other relevant persons (including the Agency’s human resources area) in resolving the performance issues and acting on performance feedback;
- (b) those policies and processes are applied in a timely manner if an APS employee’s performance is considered unsatisfactory.

¹⁶ [AFDA Express Version 2 class](#) 62635 viewed 15 November 2021

Responsibilities of supervisors

57 Supervisors are to promptly and actively manage underperformance in accordance with this procedure, including by:

- (a) identifying the nature of the underperformance at the earliest opportunity, and
- (b) engaging with the employee to discuss and develop a shared understanding of the underperformance, and
- (c) engaging with People Services and the supervisors' manager, and
- (d) maintaining appropriate records¹⁷.

Responsibilities of employees

58 Employees must engage constructively to deal with the underperformance, including by:

- (a) cooperating with his or her supervisor and others (including People Services) to resolve the issues relating to the underperformance in a timely manner, and
- (b) undertaking any necessary training, or remedial or corrective measures as directed¹⁸.

Procedural Fairness

59 Procedural fairness is an important principle that underpins this underperformance procedure. Procedural fairness means that if the employee is told of anything adverse about them:

- (a) they are given a time in which to respond to that adverse information, and
- (b) that their response is considered in a way that is free from pre-judgement or bias.

60 In relation to underperformance, key features of procedural fairness include:

- (a) the employee receiving a written advice about underperformance that identifies the performance issues;
- (b) the advice makes it clear that the employee's employment is at risk unless performance improves, this includes reference to the relevant sections of applicable legislation;
- (c) the employee is given a genuine chance to improve their performance;

¹⁷ APS Commissioner's Directions 2022 50 (g)

¹⁸ APS Commissioner's Directions 2022 51 (f)

- (d) if a decision is subsequently made to remove the employee from their role, the employee is advised of this and given a chance to respond, for example, to outline any extenuating circumstances such as illness; and
- (e) decision makers are free from bias. This means anything that evidences a “closed mind” or a pre-judgment of facts and includes perceived bias. Examples of bias include but are not limited to personal connections, financial or family relationships, participation in another role in the decision-making process, or anything else that would give rise to an independent observer questioning the independence of the decision maker.

Related documents

61 The following document is related to this policy:

- (a) Policy No. 6.8 - Achieving Capability and Excellence (ACE) program

Review

62 This procedure will be reviewed at least every three years.

Meredith Leigh
 First Parliamentary Counsel

Document History		
Release number	Release date	Document number
1.0	April 2007	s06pq470.v05.doc
2.0	27 March 2017	s06pq470.v09.docx
2.1 - renumbering only	August 2017	s06pq470.v12.docx
3.0	May 2022	S20TP197.v16.docx

Note: Before May 2017, this OPC was called Office Procedural Circular No. 37. Before May 2022, this Procedure was called Office Procedural Circular No. 6.5 Managing unsatisfactory performance.