



West Chester University

**Human Resources**

## **Introduction to the Misconduct Policy**

The development of the Misconduct Policy was undertaken to provide an avenue to effectively address problem behavior when other University processes prove inappropriate or ineffective in addressing the concern; such as: collective bargaining grievance procedures, Social Equity complaints procedures, and honest efforts among the parties and supervisors.

Careful consideration will be given by University officials to determine if the complaint should be addressed in one of the following ways:

1. Through the existing collective bargaining process, particularly for issues concerning the implementation of related procedures,
2. Through an informal discussion with the parties involved to facilitate a resolution,
3. Through the existing Sexual Harassment or Discrimination Policy,
4. Through the Misconduct Policy, or
5. Through rejecting the complaint due to the information presented not likely to lead one to believe that a violation has occurred.

Complaints referred for consideration through the Misconduct Policy should meet the following factors:

1. There is first-hand information by the complainant or witness concerning the alleged misconduct,
2. There is sufficient detail to articulate the alleged behavior which could constitute misconduct,
3. There is the identification of specific actions which relate to the alleged misconduct,
4. The complaint is filed within 30 days of the alleged misconduct,
5. There is an opinion that the complainant, witness and or/supporting materials could be judged to be credible and reliable, and
6. There is an opinion that if one were to believe the allegation, there could be a violation of the University's Misconduct Policy.

(Consideration should be given to identifying managers who could become trained resources to assist others in the process. In addition, it is understood that training programs should be developed to discuss and provide guidance in the implementation of the policy).

**Approved:**

Dr. Madeleine Wing Adler  
President

October 25, 2004

# **Misconduct Complaints against West Chester University Employees**

## **West Chester University**

### **I. Purpose:**

The purposes of this policy are: 1) to provide notice to its employees that misconduct in the form of behavior which unreasonably disrupts efficiency, productivity or teamwork, or falls below the published ethical standards of a profession, is unacceptable and should be avoided; and 2) to clarify the venues by which complaints of behavior in violation of this policy may be pursued in order to encourage prompt review and correction if they do occur. **This policy is not intended to limit employee rights protected by the First Amendment or operate in conflict with relevant collective bargaining agreements.**

### **II. Definitions:**

- A. Clear and Convincing:** A standard of proof which requires a showing of proof in excess of a preponderance of evidence but less than the criminal standard of beyond a reasonable doubt, well-founded evidence.
- B. Complaints:** Allegations of misconduct.
- C. Informal Resolution:** Informal resolution is a non-disciplinary process. When available, its intent is to solicit cooperation from the employee to adjust his or her behavior without the University reaching a determination as to whether or not it was actionable. Written record of an informal resolution should be forwarded to the Associate VP for Human Resources. This record may not be used as evidence of prior disciplinary in any subsequent investigation of misconduct.
- D. Investigation:** A systematic collection of all reasonably, ascertainable, relevant facts in a fair and objective manner. An assigned investigator conducts an investigation, including investigatory interviews of witnesses, the employee making the complaint and the employee accused of misconduct. The investigator prepares a fact-finder's report at the conclusion of the investigation.
- E. Just Cause for Discipline:** The just cause standard requires that the subject employee have had prior notice that the behavior was wrong or otherwise prohibited, that the employee was given the opportunity to speak in his or her defense after understanding the charges, that a thorough and objective investigation was conducted, that a conclusion based on reliable and sufficient evidence be made, that the rule in question was applied evenly by the organization, and that if found to have committed the offense, the sanction or remedy issued was consistent with the relative severity of the offense. This policy recognizes the American Arbitration Association's 7 tests for just cause as its model.
- F. Misconduct:** Misconduct is intentional work behavior which is disruptive in the context of having the direct effect of unreasonably impairing or destroying teamwork, productivity, or efficiency; or behavior which falls below published ethical standards of a profession.
- G. Preponderance of Evidence:** It is more likely than not, based on the totality of evidence, that the behavior alleged did occur.
- H. Pre-Disciplinary Conference (PDC):** A meeting scheduled to afford an employee an opportunity to provide relevant information toward the question of whether or not he or she should be disciplined. This, like notice of the charges, is an element of procedural due process.

### **III. Policy:**

The University expects all employees to conduct themselves at work in a manner: 1) which reflects courtesy and respect toward others and their viewpoints, even when in disagreement, 2) which is consistent with the established ethical standards of their discipline or profession when they exist, 3) which avoids other forms of disruptive behavior intended to intimidate, demean, exploit or retaliate against others, 4) and which does not violate state or federal civil or criminal

laws, Management Directives or Personnel Rules of the Office of Administration relating to employee behavior. While the University's primary objective is to prevent these types of behaviors from occurring by giving employees clear notice that they are wrong, if they do occur, the University's remedial goals are to solicit voluntary future avoidance of the behavior as an informal resolution if appropriate; but in the absence of voluntary correction or under circumstances where informal resolution itself is inappropriate, provide for reasonable disciplinary penalties to strongly discourage future occurrences. If the alleged misconduct relates to sexual harassment or any other form of discriminatory behavior the complaint should be referred to the Office of Social Equity. If the alleged misconduct relates to behaviors that are potentially sexually harassing and the manager decides to solicit voluntary correction by the employee through informal resolution, a representative of the Social Equity Office should be present for the informal meeting.

#### **IV. Procedure:**

All employees of the University enjoy procedural due process rights when they have been accused of misconduct. They include notice and opportunity to be heard. For union employees these rights are imbedded in their rights as citizens and in their respective collective bargaining agreements. For managers they are embedded in their constitutional rights as citizens and the SSHE Administrative Manual and Resource Guide for University Managers (copy on reserve in Library).

**A. Complaints:** Complaints are allegations that an employee has engaged in misconduct and may be made by a student, a colleague, a supervisor, or a member of the public. When possible, complaints should be reduced to writing. Where a written statement of allegation exists, it is advantageous to have it signed by the party making the allegation. Complaints constitute a notice to the University that someone thinks misconduct has occurred. Given notice, written or otherwise, the University is obliged to look into the matter to the extent it can in order to attempt to determine if the allegation is supported by facts. The degree of ability to investigate an allegation is strongly correlated to the degree of detail contained in the allegation. Details like date(s), time(s), place(s), frequency, and witnesses are all beneficial toward validating allegations. Allegations without much detail are very difficult to investigate, much less prove. A presumption of innocence must exist unless evidence supports an allegation.

**B. Employees Represented by APSCUF:**

- 1. CBA Guidance:** Article 43 of the APSCUF Agreement provides guidance. Complaints against faculty, whether made by colleagues, other employees or students, should be brought to the Dean's attention directly or through the Chair, or may be brought to the attention of the Human Resources Office.
- 2. Informal Resolution:** Under circumstances when it is appropriate, the complaint should be discussed with the faculty by the Dean or by the Dean with the participation of the Chair. The faculty member should be afforded the opportunity to voluntarily adjust his or her behavior or provide an explanation satisfactory to the Dean. If the behavior is not adjusted or the explanation is unsatisfactory, the formal resolution process should be engaged without delay. The determination of a complaint's appropriateness for informal resolution is the sole discretion of the University.
- 3. Formal Resolution:** The process of Article 43 notice letter, Article 43 investigation, and PDC resulting in a finding and when appropriate a disciplinary sanction, should be engaged. Absent unusual circumstances, the decision to conduct an investigation must be made within 20 days of receipt of the complaint. In this process, the Provost typically issues the Article 43 letter and assigns the Dean or another as investigator. The Associate VP for Human Resources typically facilitates the PDC, and the President issues a finding and disciplinary action when appropriate, considering all relevant evidence. The article 43 letter should remind that faculty member that he or she has the choice of representation by APSCUF, if desired.

4. **Appeal Rights:** Appeal rights exist through the grievance procedure outlined in Article 5 of the CBA.

**C. Employees Represented by AFSCME and Other Unions:**

1. **CBA Guidance:** Article 28 of the AFSCME Master Agreement provides that a showing of “just cause” is required to discipline employees subject to the agreement. Article 14 of the SCUPA/SUA Agreement contains nearly identical language, as do the other collective bargaining agreements for Public Safety Officers, Nurses, and Coaches. Complaints against AFSCME employees should be brought to the attention of the employee’s department or division head or to the Human Resources Office.
2. **Informal Resolution of Complaints:** Under circumstances when it is appropriate, the complaint should be discussed with the employee by his or her department or division head, and the employee should be afforded the opportunity to explain the behavior or voluntarily adjust it. Should the behavior not be satisfactorily explained to the department or division head, or persist, the formal process should be engaged without delay. The determination of a complaint’s appropriateness for informal resolution is the sole discretion of the University.
3. **Formal Resolution:** An investigation should be conducted by the department or division head, and if warranted, a PDC should be scheduled and conducted by the department or division head and the Human Resources representative. Notice of the PDC should be issued by the department or division head to the employee advising him or her of the specific nature of the charges and reminding him or her of the right to be represented by the union if desired. If the behavior meets the just cause for discipline test, disciplinary action should be taken. Typically, disciplinary action short of suspension or discharge is issued by the department or division head, while suspensions, conditions of continued employment (COCE) and discharges are issued by the Associate VP for Human Resources.
4. **Appeal Rights:** Appeal rights exist through grievance processes outlined in the pertinent Articles of each CBA. AFSCME’s are contained in Articles 37 and 38 and SCUPA/SUA’s in Article 13, for example.

**D. University Managers:**

1. **Guidance:** The SSHE Administrative Manual and Resource Guide for University Managers provides guidance. Complaints against University managers should be brought to the attention of the University manager’s immediate supervisor or division head, or to the Human Resources Office for review and possible action.
2. **Informal Resolution:** Under circumstances when it is appropriate, the complaint should be discussed with the University manager by his or her department or division head, and the University manager should be afforded the opportunity to explain the behavior satisfactorily to the department or division head, or voluntarily adjust it. If the behavior is not satisfactorily explained or persists, the formal resolution process should be engaged without delay.
3. **Formal Resolution:** A letter should be issued to the University manager advising him or her of the specific nature of the charges. An investigation should be conducted by the department or division head, and if warranted, a notice should be issued to the employee, inviting him or her to a pre-disciplinary conference where the University manager will have the opportunity to speak to the concern. The department or division head, in conjunction with the Associate VP for Human Resources, will ensure that all relevant evidence is considered in making a determination as to whether or not disciplinary action is warranted. The department or division head will issue the disciplinary action to University managers.
4. **Appeal Rights:** University managers should use chain of command, for instance, if the disciplinary decision was made by the department head, a request for review would go to the division head. If the division head made the decision, the request for review would go to the President, etc.

**E. Special Considerations Relating to the Investigation Process, Documentation and Recordkeeping:**

**1. Investigation Considerations:**

- a) As a general statement, investigations should be timely, thorough and impartial.
- b) An investigation should not be initiated without written notice to the subject employee, to include the purpose of the investigation.
- c) The details of the investigation and any records associated with the investigation should be kept confidential during the investigation and retained by the investigator.
- d) The investigator(s) assigned should not be a person(s) who is (are) witnesses to material facts in the matter or who is referenced as interested parties in the accusation.
- e) First Amendment and Academic Freedom issues should be recognized and SSHE Legal Counsel should be involved by the investigator to assess them as necessary.
- f) The investigator has an impartial role and acts on behalf of the University, not the subject employee or his or her accuser.
- g) The relevant collective bargaining agreement should be referenced to determine union notice and representational requirements. Human Resources should be consulted as necessary regarding collective bargaining agreement implication.
- h) Creating a timeline for the conduct of the investigation is usually helpful in keeping on schedule, especially when the charges will involve interviewing multiple witnesses.

**2. Investigatory Interviews:**

- a) Always conduct witness interviews in an area where there is good privacy.
- b) Type up notes from interviews as quickly as possible. Do not overly rely on memory.
- c) Remind interviewees, whether the complainant, the subject employee or witnesses, not to discuss the investigation with others.
- d) At the conclusion of the accused employee's interview, he or she should be reminded that retaliation against an accuser is forbidden and subject to discipline as a separate offense, if it occurs.
- e) There may be times when an employee seeks to be represented at an investigatory interview (or a pre-disciplinary conference) by legal counsel. The University subscribes to the position that investigative interviews (and pre-disciplinary conferences) are internal matters which do not provide for participation of external legal representatives. Employees whose positions are covered by collective bargaining units, however, may request advocacy from their respective unions.
- f) During an investigative interview, the interviewee is expected to answer the questions, not his or her representation. The employee may consult with the union representative prior to answering a question, however.

**3. Documentation:**

- a) An investigation file should be established separate from the employee's personnel file.
- b) Only factual information should be kept in the investigation file, aside from the allegations of the complaint and investigative interview documents. These files are generally discoverable and writings containing idle speculation or other subjective thoughts and observations should not be created.
- c) Discard early drafts of writings after they have been replaced with final versions.
- d) Any written statements given by witnesses should be included in the investigation file.
- e) As a general rule, recording devices are discouraged. They tend to inhibit candor. There may be a rare circumstance when a recording device may be used with the permission of the interviewee due to probable non-availability later in the process.

and in the absence of a written statement, but the Associate VP for Human Resources should be consulted for advice if this is contemplated.

- f) Never write on or doodle on documents. Keep them clean and number them for better organization.

**4. Pre-Disciplinary Conference (PDC):**

- a) Reasonable notice should be given to the employee accused of misconduct that a PDC is being scheduled. Since its purpose is to hear from the employee, a certain amount of preparation on the employee's part will normally be required.
- b) It should be further understood that an employee accused of misconduct should be afforded a specific understanding of the charges against him or her. Fact-finder's reports should be provided to the employee at the time that notice of the PDC is given. Other documentation requested by the subject employee should be considered on a case-by-case basis.
- c) When an employee's position is within a bargaining unit, an employee has a right to representation by that union at this meeting should the employee desire representation.
- d) The employee who chooses to have union representation at the meeting may consult with the union representative during the meeting and before answering questions, but the intent of the meeting is to hear from the employee directly. Legal counsel representing an employee may not participate in a PDC.
- e) Flexibility should be shown when possible when scheduling PDCs. Availability of the parties is critical.

**5. Quantum of Proof:**

- a) Be clear on the standard of proof being used. (As a general rule, a preponderance of evidence is sufficient, although a higher standard of "clear and convincing" evidence should be used if the allegation would likely result in a suspension of 10 days or more or dismissal).
- b) Be cognizant of hearsay, bias and other issues which could undermine the credibility of statements other evidence.

**6. Fact-Finder's Report:**

- a) Review notes and determine if all relevant facts have been gathered, all witnesses have been interviewed, and all relevant documents have been obtained. If anything in the report is unclear, the decision-maker may consult the fact-finder directly.
- b) Make a list of all facts and the data supporting each.
- c) Evaluate each fact and determine if the majority of evidence supports it or refutes it.
- d) A chronology and an index of attachments are helpful.
- e) Consult SSHE legal counsel as necessary. The Associate VP for Human Resources should also be involved in the discussion.
- f) Avoid drawing conclusions to questions of law. Focus on findings of fact.
- g) Prepare a summary report articulating the allegation(s), credibility determinations, and the findings of fact.
- h) Forward the report with all documents in the file to the decision-maker.

**7. The Decision:**

- a) The decision-maker should evaluate the facts ascertained from the investigation and determine if sufficient cause exists to proceed with a PDC. If it is determined that a PDC is appropriate, it is the role of the decision-maker, after the PDC, to determine whether or not the standard of proof has been met in order to conclude that employee misconduct has occurred.
- b) If the decision-maker concludes that the misconduct has occurred, then the decision-maker should consider what form of discipline is appropriate.
- c) The decision-maker should take the necessary time to thoroughly understand the issues, consider the facts ascertained by the investigation and the PDC, solicit any

additional information he or she believes necessary to make an informed decision, and then decide whether or not reasonable cause exists to discipline the employee.

- d) Where decisions involve a question of law, that question should be reviewed by both the Associate VP for Human Resources and SSHE legal counsel before issuing a decision.
- e) The level of discipline should bear a relationship to the seriousness of the misconduct. Proven prior infractions of a similar nature should be considered when determining the level of discipline to be administered, but not to determine whether or not the misconduct occurred.
- f) The Associate VP for Human Resources should review all disciplinary actions before they are issued.
- g) All decisions should be issued in writing by the decision-maker.
- h) The investigative file, including the written decision, should be forwarded to the Human Resources Office or other approved repository for confidential file retention separate from the employee's personnel file.

**8. Implementation of Sanctions/Voluntary Remedial Action:**

- a) The goal of any disciplinary sanction or voluntary, non-disciplinary, remedial action is to eliminate the problematic behavior.
- b) The department head, dean or division head is responsible for ensuring that any disciplinary action is enforced and any remedial requirements associated with the disciplinary action are fulfilled.
- c) Generally speaking, counseling and memorandum of instruction are considered non-disciplinary alternatives to correct minor problems. Traditional progressive discipline normally follows and oral and written reprimand approach, followed by suspensions without pay and ultimately dismissal. More serious problems might avoid the reprimands in favor of suspension or dismissal. Alternative disciplines not listed above, including remedial training, or an alternate work assignment might also be considered substitution ally or in tandem with other disciplinary measures.

**9. Recordkeeping:**

- a) Notice of the results of the informal resolution of misconduct should be forwarded to the Human Resources Office.
- b) Fact-finding/investigatory records should not be placed in an employee's personnel file. They should be forwarded to the Human Resources Office for retention, however,
- c) Disciplinary action notices do become a part of the employee's personnel file.

**F. Additional Resources:**

The Human Resources Internal Consultant assigned to service each particular area is available to provide more detailed process information or general assistant to managers who may be uncertain as to how to proceed with an issue. Additional written guidance is identified below. These written resources are available upon request through the Human Resources Office:

1. **Investigatory and Pre-Disciplinary Conference Procedures, Working Draft VI**, dated 11/04/02.
2. **Investigatory Interview Guidelines**, SSHE
3. **7 Tests for Just Cause**, American Arbitration Association

**G. Appendix:**

**1. Guidelines for the Informal Article 43 Process for Faculty:**

- a) Faculty may voluntarily choose to participate in an informal complaint resolution process, should a complaint be filed against them. The process will provide them with knowledge of the complaint and an opportunity to provide a response to it.
- b) Testimony and notes provided as part of the informal process will not be used in a subsequent, formal process, should the formal process later be determined to be necessary per Section IV.B.2 of this policy.

- c) At a point where either the dean or the faculty member determine that the informal process risks becoming a formal investigation, either may terminate the informal process.
- d) If the informal process moves to the formal process per Section IV.4.2 of this policy, the faculty member will be advised by the University that he or she may ask for APSCUF representation.
- e) Should the informal process reach a resolution of the complaint based on the faculty member providing a satisfactory explanation of the behavior, no record of the complaint will be placed in the faculty member's official file. Should the informal process reach a resolution of the complaint based on the faculty member voluntarily adjusting the behavior, a summary of the informal resolution will be kept in the faculty member's official record for a period of 12 months, provided no other related complaints occur in that period of time.
- f) If the alleged misconduct relates to sexual harassment or any other form of discriminatory behavior, the complaint should be referred to the Office of Social Equity. If the alleged misconduct relates to behaviors that are potentially sexually harassing and the manager decides to solicit voluntary correction by the faculty member through informal resolution, a representative of the Social Equity Office should be present at the informal meeting.
- g) The dean convening the informal process will provide the faculty member being interviewed with an understanding of Section IV.G.1.a-f.