Guideline: Review of Employment Decisions

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Government of South Australia

Office of the Commissioner for Public Sector Employment

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ABOUT THIS GUIDELINE

Who is covered by this Guideline?

This Guideline is for public sector agencies as defined by *the Public Sector Act 2009* and should be adopted and applied by individual agencies.

Introduction

This Guideline is intended to inform and assist employees and managers to deal with grievances by employees against reviewable employment decisions.

The Guideline is relevant only to agencies and employees to whom sections 59 to 64 within Part 7 of the *Public Sector Act 2009* (the Act) apply.

The Commissioner for Public Sector Employment is empowered under section 14(d) of the Act to issue guidelines relating to public sector employment matters.

The Guideline is written with the following Objects of the Act in mind:

- *to encourage public sector agencies and employees to apply a public sector wide perspective in the performance of their functions;*
- *to make performance management and development a priority in the public sector;*
- *to ensure accountability in the public sector; and*
- *to provide the framework for the State's Public Service and the effective and fair employment and management of Public Service and other public sector employees.*

The following public sector principles from the Act have also informed the content of the Guideline:

Public sector principles

Employer of choice

In accordance with section 5(5), of the Act, public sector agencies are to:

- *treat public sector employees fairly, justly and reasonably;*
- *prevent unlawful discrimination against public sector employees or persons seeking employment in the public sector;*
- *ensure that public sector employees may give frank advice without fear of reprisal;*
- *encourage public sector employees to undertake professional development and to pursue opportunities throughout the public sector;*
- *set clear objectives for public sector employees and make them known;*
- *acknowledge employee successes and achievements and address under performance;*
- *ensure that public sector employees may join, or choose not to join, organisations that represent their interests; and*
- *consult public sector employees and public sector representative organisations on matters that affect public sector employment.*

Ethical behaviour and professional integrity

In accordance with section 5(6), of the Act, public sector agencies are to:

- *be honest;*
- *promptly report and deal with improper conduct;*
- *avoid conflicts of interest, nepotism and patronage;*
- *treat the public and public sector employees with respect and courtesy;*
- *make decisions and provide advice fairly and without bias, caprice, favouritism or self interest;*
- *deal with agency information in accordance with law and agency requirements;*
- *avoid conduct that will reflect adversely on the public sector;*
- *accept responsibility for decisions and actions; and*
- *submit to appropriate scrutiny.*

Legal requirements

In accordance with section 5(7), of the Act, public sector agencies are to:

- *implement all legislative requirements relevant to the agencies; and*
- *properly administer and keep under review legislation for which the agencies are responsible*.

This Guideline is not a substitute for specialist human resource management, industrial, employee relations or legal advice.

If agencies choose to issue policies or guidelines in relation to the resolution of grievances by employees against reviewable employment decisions, it is important they are consistent with the Act, the *Public Sector Regulations* 2010 (PS Regulations) and this Guideline.

Public service or declared public sector agency/employment

This Guideline refers to the rights of review of employees employed under Part 7 of the Act. That is, employees in the Public Service or declared public sector employment.

A Public Servant is a person employed under Part 7 of the Act in an administrative unit or attached office who is not excluded from the Public Service by section 25(2) of the Act. Part 7 of the Act also applies to employment in agencies outside the Public Service to the extent provided by another Act or the PS Regulations,[1] or in instances where former Public Service employees were transferred into non-Public Service agencies with terms of transfer that provide that Part 7 of the Act continues to govern their employment in the relevant roles.

For more information, refer to the *Commissioner's Guideline - Management of Misconduct* or seek assistance from a HR or Employee Relations specialist.

[1] See section 41 of the Act, regulation 13 of the PS Regulations and section 21B of the *Courts Administration Act 1993*.

Reviewable employment decision

Subdivision 2 of the Act is entitled ‘Review of employment decisions (other than dismissal)’.

It provides a scheme for the review of certain employment decisions.

‘Employment decision’ is defined in the Act as:

> ***employment decision*** *means an administrative decision relating to the employment of a person, including an administrative decision relating to the engagement, promotion, transfer, remuneration, entitlements or termination of employment of a person and a decision to take disciplinary action against a person;*

‘Administrative decision’ is defined in the Act as:

> ***administrative decision*** *means:*
>
> *(a) a decision; or*
>
> *(b) failure or refusal to make a decision,*
>
> *in the exercise or purported exercise of administrative authority;*

A wide range of employment decisions may be subject of an employee grievance and review under the Act. It is important to refer to regulation 25 of the PS Regulations in respect of matters excluded from the right of review. To be a reviewable employment decision, it must be one that affects an aggrieved employee directly and not be excluded from review by regulation 25. Regulation 25 states:

Certain matters excluded from right of review (section 59(2) of Act)

Part 7 Division 4 Subdivision 2 of the Act (Review of employment decisions (other than dismissal)) does not apply to the following decisions:

> *(a) a decision of a Minister;*
>
> *(b) a decision of the Commissioner under Part 4 of the Act;*
>
> *(c) a decision to the extent that it affects an executive employee;*
>
> *(d) a decision to the extent that it affects a casual employee;*
>
> *(e) a decision not to re-engage a term employee at the end of the employee's term of employment.*
>
> *(f) a decision to select an employee as a consequence of selection processes conducted on the basis of merit to the extent that it affects an employee other than an employee who made due application in accordance with the selection processes for the particular duties and was eligible for appointment;*
>
> *(g) a decision to engage, transfer or promote an employee in accordance with the Act and these regulations to the extent that it affects another employee (but not so as to limit the right to apply for review of a decision to select an employee as a consequence of selection processes conducted on the basis of merit);*

(h) a decision to change the duties of an employee to the extent that it affects another employee;

(i) a decision to suspend an employee from duty under section 57(1) of the Act (but a decision under section 57(3) of the Act that the suspension is to be without remuneration is subject to review);

(j) a decision to give a direction under section 69(2) of the Act for reduction in salary arising from an employee's refusal or failure to carry out his or her duties.

Note

Section 59(2) of the Act provides that Part 7 Division 4 Subdivision 2 (Review of employment decisions (other than dismissal)) does not apply:

(a) to the dismissal of a public sector employee; or

(b) to a decision to select a person who is not a public sector employee as a consequence of selection processes conducted on the basis of merit.

Conciliation

Public sector agencies must attempt to resolve employee grievances (of reviewable employment decisions) by conciliation under section 60 of the Act. This obligation exists regardless of whether an employee has submitted an application for Internal or External Review. The obligation falls generally upon management and not exclusively the role of Human Resources in an agency. On most occasions, Human Resources should provide advice to local level management as opposed to conducting conciliation processes. The obligation exists in so far as it is reasonably possible to resolve a particular grievance. Management should always commit its best endeavours towards attempting to conciliate grievances however if and when it becomes clear that the positions of the employee and decision maker are irreconcilable, there need not be further efforts at conciliation.

Conciliation is different to mediation. Mediation is a form of alternative dispute resolution where, with the assistance of a third party (mediator), parties identify the issues in dispute, develop options, consider alternatives and endeavour to reach agreement on a solution. Conciliation in the context of grievances about employment decisions involves informal discussions between the parties in an endeavour to resolve the grievance and may involve the assistance of a third party but typically does not.

The object of a conciliation process is resolution of a dispute or grievance in so far as is possible. There is no mandated way of attempting to conciliate a grievance. However, it should occur in as informal and timely a manner as possible in the circumstances and the focus should be on open and transparent communication.

Internal Review

Employees may apply for Internal Review of reviewable employment decisions under section 61 of the Act and in accordance with regulation 26 of the PS Regulations. Application is made in a form approved by individual agencies.

Internal Reviews should be conducted by persons with an appropriate level of seniority and knowledge. The reviewer should not have been involved in the decision under review and not have an interest in the matter. Where the chief executive of an agency has personally made the decision the employee is aggrieved about, an Internal Review must be conducted by a person outside of the agency. Conduct of Internal Reviews by external contractors or consultants should occur rarely and in exceptional circumstances. Where it is necessary that a person outside the agency conduct an Internal Review, agencies should seek the assistance of appropriate employees in other agencies.

An employee who is aggrieved by a merit based selection process must apply for Internal Review within seven days after the day they are notified of the decision by the agency. See regulation 26(1)(a).

In the case of other reviewable employment decisions, an application for Internal Review must be made within 21 days after the day on which the employee was notified of the decision by the agency. See regulation 26(1)(b).

An agency may extend the time limit for the making of an application for Internal Review in particular cases. There is no exhaustive list of circumstances where it may be appropriate for an agency to do so. Essentially, it is a question of whether it would be industrially fair and reasonable to extend time. Employees who seek an extension of time should be invited to provide reasons in writing as to why they claim to have been unable to submit an application within time.

An employee who has submitted an application for Internal Review may withdraw it by notice in writing signed by the employee and delivered to the relevant public sector agency. That notice can be delivered per email with a PDF version of the signed notice.

An Internal Review must commence within 21 days of the making of the application by the employee. See regulation 26(4).

An Internal Review must be completed within 21 days after the employee has finished providing information and making submissions on the application. See regulation 26(5).

A public sector agency may extend the time for completion of an Internal Review but only if there are special reasons in the circumstances of the individual case for doing so. See regulation 26(6). It is not possible to be exhaustive about what would amount to special reasons. Generally, it would be where there are issues of particular complexity, voluminous documentation or where employees who might provide relevant information are unavailable.

Internal Reviews are to be conducted as quickly and with as little formality as proper consideration of the matter allows; and in accordance with the rules of natural justice/procedural fairness. See regulation 26(8). Also see the *Commissioner's Guideline - Management of Misconduct* for more information on the concept of natural justice/procedural fairness. Basic steps towards ensuring natural justice/procedural fairness will be ensuring that the employee has had a reasonable opportunity to be heard as to how they are aggrieved by the relevant employment decision. That will also require the employee to be given a reasonable opportunity to respond to information relied upon by management in making the decision under review.

Persons conducting Internal Reviews are generally to be provided by management all documents relevant to the decision under review except documents subject to privilege or immunity - for example, legal advice is protected by legal professional privilege and is usually not to be provided to the reviewer. In specific and limited circumstances, where a decision relies upon legal advice, it may be appropriate to waive legal professional privilege and provide such advice to both the reviewer and aggrieved employee.

Advice should be sought from the Crown Solicitor's Office where this is contemplated. Similarly, where there is otherwise doubt about whether a document should be provided to a reviewer, advice should be sought.

Persons conducting Internal Reviews should promptly identify and dismiss grievances that are frivolous or vexatious.

It is not necessary to conduct a hearing. Internal Reviews may usually be conducted on the basis of documents alone. It is essential, however, that the person conducting a review makes personal contact with the aggrieved employee - either in person or by telephone - to generally discuss the matter and explain the process. It is also desirable that employees and management representatives are personally informed of decisions following review. It is fundamental that employees be provided with the written findings of an Internal Review. Findings of reviewers are to be written to and for the benefit of both the aggrieved employee and the relevant chief executive or delegate. It is not for a reviewer to determine if a decision was harsh, unjust or unreasonable. However, it is relevant for them to consider whether, on external review, the South Australian Employment Tribunal (SAET) might find the decision harsh, unjust or unreasonable.

It is fundamental that a person conducting an Internal Review is acting independently and not on behalf of a chief executive or delegate. If the reviewer is a public sector employee, all the usual ethical obligations apply to them. They are conducting an impartial, objective assessment of the decision under review.

Where the reviewer does not have greater delegated authority than the original decision maker – including if they are not an employee in the agency where the decision occurred – they should issue recommendations to the decision maker, chief executive or other delegate as appropriate (that are also to be provided to the aggrieved employee). The chief executive or a reviewer who has delegated authority can overturn the original decision and replace it with a decision they view as appropriate. Alternatively, they may ensure that relevant processes are undertaken with a view to a new decision.[2]

Each matter will turn on its individual facts. Therefore, parties to a grievance and persons conducting Internal Reviews, must carefully address the specific facts relevant to the decision under review.

External Review

An employee who remains aggrieved following an Internal Review may apply for External Review by the SAET. In certain circumstances, an employee may apply directly for External Review without Internal Review having occurred.

The powers of the SAET upon External Review of a reviewable employment decision depend on whether the decision under review is a prescribed decision. A 'prescribed decision' is defined in section 62 of the Act as:

> prescribed decision means—
>
> > *(a) a decision to take disciplinary action; or*

[2] Of course, where an Internal Review is about a refusal or failure to make a decision, a chief executive or delegate may act to ensure a decision is made or implement processes with a view to making a decision.

(b) any decision to reduce an employee's remuneration level; or

(c) a decision to transfer an employee, or to assign an employee to different duties or a different place, made in conjunction with a decision to take disciplinary action or reduce an employee's remuneration level; or

(d) a decision to transfer an employee, or to assign an employee to a different place, that reasonably requires the employee to change his or her place of residence.

A decision to suspend someone without remuneration pursuant to section 57 of the Act is not a prescribed employment decision. It is not a decision to assign an employee to different duties; or a decision to take disciplinary action; nor a decision to reduce an employee's remuneration level. A decision to take disciplinary action is taken under sections 54 or 55 of the Act - 'Termination' or 'Disciplinary action' and a decision to reduce an employee's remuneration level taken under section 53 of the Act - 'Reduction in remuneration level', which may be as a consequence of the employee's misconduct. This is different to cessation of remuneration during suspension.

Regulation 27 of the PS Regulations governs the conduct of External Reviews.

An employee aggrieved by a reviewable employment decision may apply directly to the SAET without having applied for Internal Review of the decision where:

- the decision was made on Internal Review; or
- the decision is a decision to select an employee as a consequence of selection processes conducted on the basis of merit (where the application for External Review to the SAET is per section 63 of the Act - 'Special provision for review of selection processes'); or
- an application for Internal Review was made after the time allowed and the appropriate review body is of the opinion that the refusal by an agency to extend the period for application was unreasonable; or
- an agency has extended the time for completion of an Internal Review and the appropriate review body is of the opinion that the extension was unreasonable.

See regulation 27(1) and 27(3).

An application for External Review must be made:

Without having applied for Internal (or further Internal) Review:

- where the decision to be reviewed is the outcome of an Internal Review, within twenty one days after the day the employee is notified of the outcome of the review; or
- in the case of a decision to select an employee as a consequence of selection processes conducted on the basis of merit, within seven days after the day on which the employee is notified of the outcome of the processes.

Where Internal Review has been completed:

- in the case of a decision to select an employee as a consequence of selection processes conducted on the basis of merit, within seven days after the employee has been notified of the decision; or

- in any other case, within 21 days after the employee has been notified of the decision. See regulation 27(2) and 27(5).

The SAET may decline to review a decision:

- where the application for review is frivolous or vexatious; or
- if the applicant for review has made a complaint under the *Equal Opportunity Act 1984* in respect of the decision; or
- in circumstances prescribed by the regulations. See section 62(3).[3]

On review, the SAET must examine the decision under review on the evidence or material before the agency (decision maker) but may, as it thinks fit, allow further evidence or material to be presented to it. See section 62(4)(a).

The SAET must determine whether, on the balance of probabilities, the decision under review is harsh, unjust or unreasonable. See section 62(4)(b). For information on the concept of harsh, unjust or unreasonable decisions, see the *Commissioner's Guideline - Management of Misconduct.*

On review, the SAET may:

- affirm the original decision. See section 62(4)(c)(i);
- in the case of a prescribed decision – rescind the decision and substitute the decision with a decision the SAET considers appropriate (including a decision restoring any entitlements lost up to the time of the decision). See section 62(4)(c) (ii);
- remit the matter to the agency where the decision was made for consideration or further consideration in accordance with directions or recommendations of the SAET. See section 62(4)(c)(iii).

Where the decision under review is not a prescribed decision, the SAET is not empowered to rescind or overturn the decision under review or replace it with its own decision. Nor can it issue directions or recommendations that require an agency to make a particular decision or are tantamount to requiring it to do so. By way of example, the SAET may direct the agency to remake the decision taking certain factors into consideration, or by giving greater weight to a particular factor(s).

Recommendations of the SAET must be related to the decision under review which may prohibit it from making recommendations as to the potential resolution of an issue where such recommendations are not related to that decision.

[3] No circumstances are currently prescribed in the regulations.

Application for review does not operate as a stay (hold on decision)

Although an application for Internal or External Review does not operate to stay - or put on hold - the decision that is the subject of the review (or the consequences of it)[4] it is important that management adopt a reasonable and sensible approach.

Chief executives or delegates should favourably consider suspending the implementation of decisions where there would be no prejudice to the agency in doing so or when the employee may suffer prejudice or other disadvantage if the decision was implemented.

Chief executives or delegates should take extreme care when pushing ahead with decisions in the face of applications for review where to do so might mean it is not possible to properly remedy the situation should the decision be found to be harsh, unjust or unreasonable. Each matter turns on its individual facts and specialist advice should be sought as necessary.

Grievances about non-reviewable employment decisions

Grievances about employment decisions that are not reviewable should not simply be disregarded by agencies on the basis the employee is not entitled to access the rights of review in the PS Act. This includes, but is not limited to, decisions affecting executive employees.

In line with the public sector principles in the PS Act and in the interests of industrial harmony, genuine efforts should be made to resolve legitimate grievances of employees in relation to non-reviewable decisions directly affecting them.

Executive employees have a crucial role in the management of the public sector workforce. They have significant ethical obligations, including to model appropriate conduct. It is vital that executive employees display leadership in ensuring that employee grievances are managed appropriately.

References

Public Sector Act 2009

Public Sector Regulations 2010

Commissioner for Public Sector Employment Guideline – *Management of Misconduct*

South Australian Employment Tribunal Rules 2022 – rule 136

[4] It does not require that the 'status quo' prevail as is the case with industrial disputes under the *Fair Work Act 1994*.

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