

# REVIEW OF ACTIONS

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## Authority and Application

This policy applies to Victorian Public Service Departments and Administrative Offices (Employers) and their Employees covered by the *Victorian Public Service Enterprise Agreement 2020* (Agreement), *Public Administration Act 2004* and *Public Administration (Review of Actions) Regulations 2015*. The policy does not apply to Court Services Victoria.

## Overview

This policy outlines how Employees may apply to their Employer for an initial review of an employment related action that directly concerns them and that they consider is unfair or inconsistent with the *Public Administration Act 2004* or the employment standards.

The initial review is the internal process specified in clause 13.9 of the Agreement, as the internal dispute resolution process that a matter must first be dealt with before proceeding through the formal dispute resolution process set out in clause 13.10 – 13.13 of the Agreement.

## Related provisions

- Clause 13 of the Victorian Public Service Enterprise Agreement 2020;
- Sections 62, 64 and 65 of the *Public Administration Act 2004 (Vic)* (PA Act);
- *Public Administration (Review of Actions) Regulations 2015* (regulations); and
- *Standards for Application of the Victorian Public Sector Principles*.

## Guidance

### 1. Definitions

- 1.1. **Decision Maker** – The Decision Maker is the person with delegated authority to consider the recommendations of the Reviewer following an initial review and to determine which will be implemented.
- 1.2. **Employment related action** – Actions or inactions concerning matters such as appointments or promotions, roster changes, leave applications, progression pay and performance management outcomes, salary and allowance entitlements, job classifications, training and development, higher duties and disciplinary decisions, excluding termination of employment.
- 1.3. **Reviewer** - The Reviewer must be skilled in conducting reviews and independent of the action or investigation being considered. The Reviewer may be an Employee, an independent contractor or a body comprising Employees and/or independent contractors.
- 1.4. **Representative** – A Representative (including a union representative) may speak on the Employee's behalf at meetings and make submissions. The parties are generally not represented by a legal practitioner unless the Reviewer considers that they would otherwise be at a significant disadvantage.
- 1.5. **Registrar** – The Registrar is the person with delegated authority to accept or decline an Employee's application for an initial review, and if accepted, to refer the application to a Reviewer and explain the process to all parties.<sup>1</sup>
- 1.6. **Support Person** - A Support Person may be a friend, colleague, relative or union representative who may attend meetings to provide moral support.

### 2. Principles

- 2.1. The following principles apply to an initial review:
  - 2.1.1. The process is communicated to all Employees including the steps involved and their rights and responsibilities. The roles and responsibilities of each of the parties is appropriately addressed so that there is clear accountability.
  - 2.1.2. The process must adhere to the rules of natural justice. This means that the parties must have a reasonable opportunity to present their cases and to answer any allegations against them (fair hearing rule). The matter must be conducted and decided impartially (bias rule).
  - 2.1.3. The parties must genuinely attempt to resolve the workplace concern and act in good faith including maintaining confidentiality.
  - 2.1.4. Reviews must be conducted as quickly as possible and with as little formality as a proper consideration of the matter allows. A review commences from the time the Registrar accepts the Employee's application.

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<sup>1</sup> Please note the Merit Protection Board is the applicable entity to conduct a review of action for the Department of Education and Training.

- 2.1.5. The process must encourage the parties to resolve workplace concerns locally and informally before applying more formal local or external processes. The parties may therefore be invited to participate in mediation for example.
- 2.1.6. The Employee must first raise their workplace concerns with their immediate manager or, if this is not appropriate, with another nominated manager or the Registrar.
- 2.1.7. The Registrar may accept a late application if justified by the circumstances. These include the seriousness of the matter, unavoidable delays in decision-making processes or the unavailability of any of the parties.
- 2.1.8. Reviews are based on a consideration of all relevant facts and evidence that are available after reasonable enquiries have been made.
- 2.1.9. The review report is provided to both parties in full unless there are valid confidentiality reasons for not doing so. In such cases, the fair hearing rule requires that the substance of the information be provided in summary form to the parties.

### **3. Application for an Initial review**

- 3.1. Before making an application for an initial review to the Registrar, the Employee should make every reasonable attempt to resolve their concerns with the person involved in the employment related action. For example, an Employee who believes that a selection process was flawed may first discuss their concerns with the selection panel.
- 3.2. The Employee may apply for an initial review within seven days of being notified or becoming aware of a proposed appointment or promotion where the selection process had a significant deficiency. For all other matters the time frame is 28 calendar days.
- 3.3. If the employment related action concerns unsatisfactory work performance process (clause 24.13 of the Agreement), the Employee must wait until the outcome is finalised before applying for an initial review.
- 3.4. If the employment related action concerns misconduct (clause 25.14 of the Agreement) the Employee must wait until the outcome is finalised before applying for an initial review, unless six months has elapsed from the beginning of the investigation and the Employee considers that the delay has been unreasonably caused by the Employer.
- 3.5. The Employee must make their application in writing to the Registrar, for example by completing the Review of Actions application form, specifying the employment related action they are concerned about, when it occurred, the name of the person who took the action, and the remedy they are seeking.
- 3.6. An application for an initial review of a proposed appointment or promotion can only be lodged on the grounds of a significant deficiency in the selection process.

### **4. Thresholds for accepting an application**

- 4.1. The threshold grounds for refusal of an application are set out in the regulations at Regulation 6(8) and 10(6).
- 4.2. A Registrar may refuse an application they consider is frivolous, vexatious or lacking in substance:
  - 4.2.1. Frivolous means having no reasonable grounds for the application.
  - 4.2.2. Vexatious means the act of applying for a review without sufficient grounds for success, purely to cause trouble or annoyance to the other party.
  - 4.2.3. Lacking in substance means the application discloses no arguable case. The Federal Court has described this as a claim where there is 'no more than a remote possibility of merit and which does no more than hint at a just claim'. Reviews can be refused under this ground where there is an untenable position of law or fact.

4.3. A Registrar may also refuse an application for review where the Employee lacks sufficient personal interest in the matter. Circumstances where an applicant does not have sufficient personal interest include where:

4.3.1. The decision does not directly affect the applicant;

4.3.2. The decision may apply to a number of employees or be of broad general application to employees.

The context of the situation will determine whether the Registrar assesses that there is sufficient personal interest.

4.4. Finally the Registrar can refuse an application for an initial review where the matter could more appropriately be the subject of proceedings in a court or tribunal (for example termination of a person's employment, discrimination under the *Equal Opportunity Act 2010*, discrimination under the *Disability Discrimination Act 1992* (Cth), alleged contravention of the *Fair Work Act 2009* (Cth) on the basis of the exercise of a workplace right or a person's protected attribute).

## 5. Initial review process

5.1. If the application is accepted, the Registrar will consider which approach to take:

5.1.1. By agreement, the parties may participate in mediation or other alternative dispute resolution process.

5.1.2. If a more formal process is warranted, the Registrar may refer the matter to a Reviewer after considering the parties' views on choice of Reviewer.

5.2. The Reviewer will determine how an initial review is conducted. The review may be based on written submissions from the parties, possibly supplemented by interviews, or a combination of written and oral submissions at a review hearing.

5.3. The Reviewer must allow sufficient time for the parties to review materials or matters raised by the other parties. Where the facts are in dispute, the Reviewer will look for corroborating evidence and make findings based on the balance of probabilities.

5.4. The Reviewer will consider all relevant policies, procedures and legal requirements when making their findings and recommendations in a report. The Reviewer will include reasons for their findings and may recommend for example that a decision be reconsidered or that the Employer's processes be changed. The Decision Maker may accept or reject the recommendations.

5.5. A review must take the time required for the Reviewer to give a proper consideration of all relevant facts and evidence, but ideally should be completed as expeditiously as possible.

5.6. The Decision Maker must give written reasons within 28 days to the Victorian Public Sector Commission (VPSC) and the parties for not accepting a recommendation.

5.7. The Registrar distributes the Reviewer's report together with the Decision Maker's decision to the parties.

## 6. Application to the Victorian Public Sector Commission

6.1. Following an initial review, an Employee may apply to the VPSC where they consider that the Employer's initial review process was unfair or contravened the Act, regulations or standards.

6.2. Employees may apply directly to the VPSC without undertaking an initial review of an employment related action in three circumstances:

6.2.1. the Employer fails or refuses to commence an initial review within 30 days of receiving the Employee's application;

6.2.2. the Employee alleges that the Employer personally took the action or was the primary decision maker; or

- 6.2.3. the Employee alleges that they were victimised or harassed for previously applying to the VPSC for a review.

## **7. Application to the Fair Work Commission**

- 7.1. An Employee may refer a matter to the Fair Work Commission, if the matter is within its jurisdiction. If an Employee refers a matter to the Fair Work Commission before the Employer's initial review is finalised, the Employer will discontinue its review.

## **8. Interaction of clause 13 of the Agreement (resolution of disputes) with the initial review process**

- 8.1. Where the Employee's dispute relates to the application or interpretation of a clause under the Agreement, a party is entitled at any time to elect to use the dispute resolution procedure under clause 13 of the Agreement.
- 8.2. The initial review is the internal process specified in clause 13.9 of the Agreement.
- 8.3. Matters which may be resolved using clause 13 of the Agreement include any dispute or grievance arising from a clause under the Agreement.
- 8.4. Matters that clause 13 of the Agreement do not apply to include:
  - 8.4.1. a dispute regarding a matter or matters arising in the course of enterprise bargaining; and
  - 8.4.2. a dispute about termination of employment.
- 8.5. There are also limits relating to the scope of dispute resolution in relation to:
  - 8.5.1. clause 24.13 of the Agreement – management of unsatisfactory work performance; and
  - 8.5.2. clause 25.14 of the Agreement – management of misconduct.

## **9. Interaction of clause 25.14(a) and (b) of the Agreement (resolution of disputes) with the initial review process**

- 9.1. Any dispute arising under clause 25.14 of the Agreement may only be dealt with in accordance with clause 13 (resolution of disputes) when any of the following are placed on the Employee's personnel file (including in respect of whether procedural fairness has been afforded the Employee in the Employer reaching a decision under clause 25.6):
  - 9.1.1. A record of formal counselling;
  - 9.1.2. A formal written warning;
  - 9.1.3. A final written warning; or
  - 9.1.4. A record of discipline outcome.
- 9.2. Where the Employee is a party to a misconduct investigation, they may use clause 13 of the Agreement (resolution of disputes) where:
  - 9.2.1. A misconduct investigation has not been completed within six months of the Employee being advised of alleged misconduct; and
  - 9.2.2. The Employee considers the delay to be unreasonably caused by the Employer.
- 9.3. An initial review is the internal process specified in clause 13.9 of the Agreement.
- 9.4. A party causes unreasonable delay where they are not committed to completing the process as quickly as practicable (for example intentionally delaying the process). Action or inaction may result in an unreasonable delay. Examples include:
  - 9.4.1. being deliberately unresponsive;
  - 9.4.2. being unduly unresponsive without reasonable cause;

- 9.4.3. being deliberately or unduly unclear or unhelpful; or
  - 9.4.4. refusing or failing without reasonable cause to participate constructively.
- 9.5. The Misconduct Common Policy requires that Departments notify employees of expected timeframes for an investigation and provide reasons for any delay.
- 9.6. Any application referred to the Registrar under this clause will be dealt with according to sections 3 and 4 of this policy.

### **Making decisions under this policy**

Under section 20(1) of the *Public Administration Act 2004*, the public service body head has all the rights, powers, authorities and duties of an Employer, which will usually be delegated to Employees within their Department or Administrative Office. Employers should ensure that any actions under this policy are only taken by an Employee with the delegation to do so.

## **Further Information**

For further information and advice please contact your Human Resources Unit.

## **Related policies or documents**

### **Employment Standards**

Please see - <https://vpsc.vic.gov.au/wp-content/uploads/2017/01/Standards-for-the-Application-of-the-Public-Sector-Employment-Principles-2017.pdf>

### **Clause 13 of the [VPS Agreement](#)**

Authorised by Industrial Relations Victoria:

<b>Key Details</b>	<b>Date</b>
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