

Review of actions

Role of the Parliamentary Service Merit Protection Commissioner

The office of Parliamentary Service Merit Protection Commissioner (PSMPC) is an independent statutory office established under section 47 of the *Parliamentary Service Act 1999* (the Act). The PSMPC also currently holds the office of Public Service Merit Protection Commissioner. Parliamentary Service reviews of actions are handled by the Australian Public Service Commission on behalf of the PSMPC.

What actions or decisions are reviewable?

Under section 33 of the Act, employees are entitled to reviews of actions or decisions that relate to their Parliamentary Service employment. However, not all employment actions or decisions are subject to review:

- section 33 of the Act provides that action to terminate employment is not subject to review; and
- *Parliamentary Service Determination 2013* (the Determination) exempts certain other employment actions and decisions from review and provides that review rights are not available to Senior Executive Service (SES) employees.

Note: The *Fair Work Act 2009* has rules and entitlements that apply to termination of employment.

For further information on the limits on review see clause 95 and Schedule 3 of the Determination. A copy of the Determination is at <http://www.comlaw.gov.au/Details/F2013L01201>.

Making an application for review does not prevent a department from proceeding with an action or implementing a decision.

Primary and secondary reviews

For the majority of employment-related decisions and actions, the Determination requires an employee to apply to his or her department head for review in the first instance.

Reviews conducted within departments are called primary reviews. Applications for primary reviews are made under clause 96 of the Determination.

When a department receives a valid application for a review of actions or decisions it is required to:

- review the action and attempt to resolve the employee's concerns;
- advise the employee in writing of:
 - the outcome;
 - the reasons for the decision; and
 - any action the department intends to take; and
- advise the employee of his or her right of review by the PSMPC.

If the employee is dissatisfied with the outcome of the department's review, or the department has advised that the matter is not reviewable, the employee may apply to the PSMPC for secondary review. Applications for secondary review are made under clause 101 of the Determination.

Applications for primary review can be made directly to the PSMPC in certain circumstances prescribed in clause 96 of the Determination. These are:

- for review of a decision that the employee has breached the Parliamentary Service Code of Conduct (the Code of Conduct)—each department has procedures for determining suspected breaches of the Code of Conduct);
- for review of a sanction imposed for a breach of the Code of Conduct—other than the sanction of termination of employment, which is not reviewable under section 33 (see above);
- if the employee’s department head was directly involved in the relevant action or decision;
- where it is not appropriate, because of the seriousness or sensitivity of the action, for the department head to deal with the review application; or
- where the employee claims that the relevant action or decision is victimisation or harassment because of having made a previous application for review.

Time limits for review applications

There are time limits in clause 95 of the Determination for making applications for review. Applications received outside the time limits will be reviewed only if the PSMPC or the department head considers there are exceptional circumstances to explain the delay in making the application for review. These time limits are:

- primary review by a department;
 - 120 days from the date of the action to lodge an application for primary review with a department; or
- primary review by the PSMPC;
 - 60 days from the determination of a breach of the Code of Conduct (see note below);
 - 60 days from the imposition of the sanction; or
 - 60 days from the date of the action (for example where the department head was directly involved in the action); or
- secondary review by the Merit Protection Commissioner
 - 60 days from the date the department tells the employee of either the outcome of the primary review or that the matter is not reviewable.

A decision by a department head to accept an out-of-time primary review application does not oblige the PSMPC to accept a subsequent request for a secondary review even if it is within 60 days from the department’s decision. The two decisions are separate and the exceptional circumstances consideration must be met on both occasions.

Note: The PSMPC has observed that employees who are under investigation for suspected misconduct frequently wait until they have received a sanction decision before making an application for review. The decision that an employee has breached the Code of Conduct and the sanction decision are separate decisions and a separate time limit for review applies to each decision.

If there is a delay between the department’s breach decision and sanction decision, an application for review of the breach decision may be outside the 60 day time limit. In this case, the PSMPC may be able to review only the sanction decision and not the decision that the employee has breached the Code of Conduct.

How do you apply for review?

Contact your department's human resources or corporate services section for advice on how to make a review application to your department head.

Applications for primary review by the PSMPC (see primary and secondary review above) can be made directly to the PSMPC. These should be addressed to:

The Parliamentary Service Merit Protection Commissioner
Australian Public Service Commission
PO Box 20636
World Square Post Office
SYDNEY NSW 2002

or by email to review@apsc.gov.au.

Applications for secondary review by the PSMPC must be made through your department head. This means that you need to address the application to your department head advising that you wish the matter to be reviewed by the PSMPC. Your department should then forward your application and the relevant department papers to the address above.

All applications must:

- be made in writing (including by email);
- state why the review is sought; and
- state the outcome sought.

How will your application for review be handled?

Reviews conducted by the PSMPC are required to have regard to procedural fairness, be conducted in private and be finished as quickly, and with as little formality, as a proper consideration of the matter allows.

First, staff assisting the PSMPC will acknowledge your application and advise you whether it has been accepted. Then, if papers have not already been received from your department, the reviewer will ask for copies of all relevant papers. In some cases, it may be possible to conduct the review solely by an examination of the papers. Where necessary, the reviewer may investigate further by seeking additional information from your department and by interviewing you and/or other persons. Generally, interviews with a reviewer are done by telephone.

While you are welcome to have a person support you throughout the review, you are able to be represented by another person only with the approval of the PSMPC. If you wish to have someone represent you, you will need to make a formal request to the PSMPC stating your reasons.

In most cases, a review by the PSMPC will address the following issues:

- whether your department's procedures for dealing with the particular matter in question were substantially complied with in your case;
- whether the requirements of procedural fairness were substantially observed in your case; and
- whether the action or decision under review was appropriate or reasonable in the circumstances of the case.

Further detail

These guidelines cover the more significant provisions about review of actions. Employees considering applications for review of actions are encouraged to read clauses 94 to 108 of the Determination.

Outcome of the review

The PSMPC can make recommendations to your department head about the matters under review. The PSMPC cannot impose an outcome on your department nor can the PSMPC substitute a decision different from that made by your department.

When the review is finished you will be advised of the result and the PSMPC's recommendation. If it is concluded that the department's actions were appropriate, the PSMPC will explain to you why that view was reached.

On the other hand, if the PSMPC is satisfied that the decision under review was in some way inappropriate or unreasonable, the PSMPC may recommend that the department:

- set aside the decision and re-consider the matter concerned;
- vary the decision;
- review any procedures or processes that led to the decision; or
- take some other appropriate action.

A department cannot be required to do what the PSMPC recommends. If a department decides not to act on a PSMPC recommendation, the department must advise the employee of the reasons for this decision.

If the PSMPC is not satisfied with the department's response to a recommendation, the PSMPC may report the matter to the relevant Presiding Officer, or Presiding Officers, for presentation to the Parliament.

What if you are still not satisfied?

There is no further right of administrative review under the Act or the Determination.

To take the matter further, you would need to apply to a court for judicial review, under the general law or the *Administrative Decisions (Judicial Review) Act 1977*. In such cases, it would be prudent to seek independent legal advice.

Who to contact

Inquiries should be directed to the Review Team, Australian Public Service Commission Sydney, on telephone: 02 8239 5330 or by email to review@apsc.gov.au.