



Policy on the exercise of the discretion not to review a matter under the Public Service Regulations

Purpose of document

The Public Service Regulations 2023 provide that an 'employment action' is not (or ceases to be) reviewable, if the reviewer considers that review, or further review, is not otherwise justified in all the circumstances.¹

The purpose of this policy is to explain the Merit Protection Commissioner's policy on the exercise of this discretion for reviews undertaken by her office. This policy provides examples of the types of situations in which the Merit Protection Commissioner may exercise this discretion.

The policy is not intended to be binding or to limit a decision maker in the exercise of their discretion.

Agencies may find the policy useful when applying the regulations to a review application. Review applicants may find the policy assists in understanding the decisions made in their case.

Context

The overall aim of the review of actions scheme is to provide for a fair system of review in which employees' concerns are dealt with quickly, impartially and fairly (subsection 17(3)).

The processes used to conduct reviews are not intended to be highly formal (section 47). For example, the Regulations contemplate the use of alternative dispute resolution methods to assist in reaching satisfactory outcomes (subsection 17(4)).

When making decisions, the Merit Protection Commissioner takes the policy objectives of the review scheme into account. The decision maker should consider the circumstances of the individual case and assess whether conducting a review will assist in resolving the employee's concerns quickly, impartially and fairly.

Subsection 37(1) defines 'reviewable action' broadly as an APS action for which the affected employee is entitled to review under subsection 33(1) of the Act. This broad definition is then narrowed in subsection 37(2) to (6) of the Regulations.

Clause (g) of subsection 37(4) gives a broad discretion to decide that an application is not, or ceases to be, reviewable on the basis that a review cannot be justified in all the circumstances. It allows the decision maker to take into account all relevant issues in deciding whether to review a matter.

Relevant issues are not confined to the merits of the review applicant's case. In the view of the Merit Protection Commissioner, the merits may be, but do not have to be, considered in exercising the discretion not to review under subsection 37(4)(g). The circumstances in which review is not justified can be external to the matters under review.

This discretion may be exercised at the beginning of the review process or at any stage during the review where it becomes evident that further review cannot be justified.

The Merit Protection Commissioner will not necessarily notify the review applicant or seek their views, if considering exercising this discretion. However, the review applicant will be informed of the decision and given reasons.

¹ See: subsection 37(4)(g). An extract from the regulation is attached to this document.

Situations in which review may not be justified in the circumstances

The following are examples of the types of situations in which this discretion may be used. This list is not exhaustive.

No outcome to be achieved

The Merit Protection Commissioner may refuse to conduct a review where, in the decision maker's view, review, or further review of a matter, would be unlikely to deliver an outcome that would assist in resolving the employee's concerns.

This is likely to occur in the circumstances such as:

- the Merit Protection Commissioner considers that the agency's initial investigation or review has been comprehensive and the outcome appropriate
- further investigation or review is unlikely to uncover additional material evidence and for this reason there is little, if any, utility in conducting a review
- the outcome being sought by the review applicant has been overtaken by other events and/or
- the review applicant has asked for an outcome that is unrealistic.

Example 1: The outcome sought is overtaken by events

An employee is seeking review of a decision not to allow the employee to attend a training course and the application was made after the training course finished.

Example 2: The review applicant has asked for an unrealistic outcome

An employee is seeking to have a colleague disciplined because of a perceived injustice and is unwilling to consider any other outcome.

Example 3: The review applicant wants to be proven right

Where an employee has no substantive objective other than 'obtaining justice' or 'being proven right', consideration may be given to exercising the discretion that review is not justified in all the circumstances.

Outcome has already been achieved

A related circumstance is where the review applicant has already been granted an outcome by their agency that effectively resolves their concerns about the actions under review. This could include, with respect to example 1 above, where the applicant has been sent on a later training course.

It could also include circumstances where the review conducted by the agency has substantially addressed any errors in decision making or corrected any unfairness towards the review applicant.

Applicant is not assisting with their case

It is the responsibility of the review applicant to present their case. The Merit Protection Commissioner is not required to make the review applicant's case for them once an application for review has been made.

In some cases, review applicants may fail to assist the reviewer by failing to: return phone calls; provide information when requested; or make themselves available for interview. While a single incident of this nature will not normally be sufficient to indicate that the person has abandoned their case, a pattern of incidents with no reasonable explanation may indicate otherwise.

An applicant may act also in ways that are unhelpful to the completion of the review. This can include a pattern of delays in responding to requests for further information made by the Merit Protection Commissioner. It could also include an applicant who is argumentative, or obstructive, or who fails to act in good faith during the review.

The Merit Protection Commissioner may decide that further review is not warranted in the circumstances where a review applicant engages in a pattern of behaviour which undermines completion of the review within a reasonable time frame.

The resources required to review matter cannot be justified

Available resources are one of the circumstances that can be taken into account in deciding whether a review should be commenced and completed. Review may not be justified when the resources needed to complete the review are large and where the best outcome that could be provided to the review applicant is negligible.

Example 4: A review applicant has provided a large amount of documentation but has not been able to articulate how the documentation is relevant to their application, except in the most general sense. As previously mentioned, it is not the role of the Merit Protection Commissioner to make the review applicant's case for them. Nor is it the role of the Merit Protection Commissioner to assess large amounts of unstructured documentation in order to identify the actions under review where the review applicant has not stated clearly why the review is sought.

The inherent seriousness of the issues raised in the review application

The Merit Protection Commissioner may decide that review is not justified in the circumstances where a review applicant is seeking review of a minor incident in the workplace which has had a negligible impact on the review applicant's employment situation, when taking a reasonable view of the circumstances.

Example 5: A single incidence of a minor negative interaction with a colleague that has been effectively addressed by management action.

Reviews of decisions not to investigate an APS employee for misconduct

A decision by an agency to investigate an employee (the respondent) for misconduct is primarily a matter between that employee and the agency. That decision may, in certain circumstances, affect the interests of another employee who seeks review of the agency decision (the review applicant).

The Merit Protection Commissioner may decide that review is not justified in the circumstances where:

- the review applicant's complaint about the respondent have been investigated by the agency
- a decision has been made not to investigate the respondent for misconduct
- in the view of the Merit Protection Commissioner, that decision appears to be the appropriate decision in the circumstances
- the circumstances of the case do not warrant revisiting the agency decision, which may include where
 - the respondent and review applicant no longer work together
 - there are no additional lines of inquiry that could reasonably be pursued on review.

Extract: Subsection 37 (4) Public Service Regulation 2023

Also, the action is not, or ceases to be, reviewable action if the person who is, or would be, conducting the review considers that the action should not be reviewable for any of the following reasons:

- a) the application by the affected employee for review of the action is misconceived or lacking in substance;
- b) the application by the affected employee for review of the action is frivolous or vexatious;
- c) the affected employee has previously applied for review of the action under this Division;
- d) the affected employee has applied to have the action reviewed under Division 2 of this Part;
- e) the affected employee has applied, or could apply, to have the action reviewed by an external review body and review by the external review body would be more appropriate than review under this Division;
- f) the affected employee does not have sufficient direct personal interest in review of the action;
- g) review, or further review, of the action is not otherwise justified in all the circumstances.