

FAQs – review of acting or secondment at higher classification level

Effective: 1 March 2023

What priority should be given to the different conversion reviews when they are undertaken at the same time?

There is no specified priority for considering reviews for multiple employees under the directives relating to review of acting or secondment at higher classification level and review of non-permanent employment. Each review must be considered individually and in accordance with the criteria and timeframes that apply under the relevant directive and provisions of the *Public Sector Act 2022* (the Act).

The directives do not allow for an agency to use a comparative process where there are multiple employees eligible for review.

What is included in documented and unresolved performance concerns?

Clause 9.1(c) of Directive 03/23 Review of acting or secondment at higher classification level (directive) provides that a public sector employee is to be considered suitable to perform the role where:

- the employee is not subject to any unresolved and documented conduct or performance matters that have been put to the employee in writing, and
- where required, managed in accordance with a relevant directive, such as the directives relating to positive performance management or discipline.

It would be at the discretion of the decision maker to determine whether the employee meets this criteria, with context being relevant in each circumstance in terms of what would be reasonable in that circumstance.

However, at the very least, specific performance concerns need to have been raised in writing with the employee and they need to have had an opportunity to address the concerns. Where a structured process to manage unacceptable work performance has been commenced (such as a formal performance improvement plan), the decision maker must be satisfied that the process has been managed in accordance with the requirements of the directive relating to positive performance management.

Are there any appeal rights for deemed decisions?

A deemed decision refers to circumstances where a chief executive does not make a decision in the relevant timeframe provided for under the Act, and consequently, the chief executive is taken to have decided not to employ the person at the higher classification on a permanent basis. A written notice is not required to be prepared to support a deemed decision.

However, within 14 days of a deemed decision occurring, a chief executive must inform the employee in writing of:

- the employee's right to make an additional request for employment on a permanent basis under section 121 of the Act, if the deemed decision occurred under section 120(6) of the Act
- any relevant appeal right available to the employee.

The employee may have the right to appeal a deemed decision in circumstances where the employee had been acting at, or seconded to, the higher classification level for a continuous period of at least two years as per section 131(1)(a) of the Act.

Note that under section 132(1)(k) of the Act, a decision under section 120 not to employ a public sector employee in a position at a higher classification level on a permanent basis is not appealable if the employee has been acting at, or seconded to, the higher classification for less than 2 years.

Does the supporting employees affected by workplace change directive apply when conducting a review of acting or secondment at higher classification level?

No. Clause 3.3 of the directive provides that any requirement to advertise a role in a directive dealing with recruitment and selection does not apply when permanently employing an employee under this directive.

What is the same role? Does it mean the same position number? Can it be the same role at different classification levels?

Same role is not defined in the directive, and it is intended that the ordinary meaning of the term applies.

Determining an employee's eligibility to make a request to be employed in the position at the higher classification level based only on their position number should be treated with caution. For example, an employee may have performed the same role but have been allocated against different position numbers.

However, in conducting a review, the public sector entity is only required to determine whether a person should be permanently employed at the higher classification level in the position held at the time of requesting the review (as identified by the title and classification and the position number). There is no requirement or expectation for a public sector entity to identify similar positions to the role the employee is engaged in at the time of the review.

Can an employee acting at the SO or SES level apply to be appointed to that higher classification level?

No. Section 119 of the Act states that the provisions do not apply to an employee who is seconded to or acting in a position that is ordinarily held by a non-industrial instrument employee. Senior officers (SO), senior executives (SES) and chief executives (CEO) are nonindustrial instrument employees.

This means that an employee who is acting in, or seconded to, a position that is ordinarily held by a SO, SES or CEO is not eligible to make a request for employment in the position at the higher classification level on a permanent basis under the Act or directive.

Does the employee making the application have to be engaged in the acting or secondment arrangement in the role following an advertised recruitment process?

No, it is not a requirement of the Act or directive for the employee to have been selected to undertake the acting or secondment arrangement as a result of an advertised recruitment process. Rather, the employee must be considered suitable to perform the role.