



This Guideline will assist in achieving best practice when undertaking an employee performance and inability process under the *Public Sector Employment and Management Act* (the Act). The Guideline is to be read in conjunction with Part 7 of the Act and Employment Instruction Number 6 (Employee Performance and Inability), but does not form part of the legislation.

Note:

Part 7 (Employment Performance and Inability) of the Act does not apply to fixed period (including Executive Contract Officers) employees or casual employees. Chief Executive Officers should apply the general principles contained in the Act, EI 3 (Natural Justice), EI 6 and this Guideline when considering their options for taking action in relation to the employee's continued employment.

1. Agency Procedures

A Chief Executive Officer may develop employee performance and inability procedures consistent with the Act, its subordinate legislation and any relevant award or enterprise agreement.

2. Preliminary Action

Before commencing action pursuant to Part 7 of the Act, a Chief Executive Officer should satisfy him or herself that performance management strategies in accordance with Employment Instruction Number 4 (Employee Performance Management and Development Systems) have been exhausted and that there is no reasonable prospect of rectifying the perceived deficiencies within a reasonable timeframe.

3. 'Other relevant matters' under section 44(3)(c) of the Act

The Act sets out the matters a Chief Executive Officer must have regard to in determining whether there are inability or performance grounds for an employee. These include the performance and conduct principle, the employee's performance record and any other matter the Chief Executive Officer considers relevant. In relation to 'any other matters', examples include (but are not limited to):

- the circumstances leading to, and the nature of, the performance or inability grounds;
- leave and absence records;
- outside employment activities;
- medical or health advice provided by a relevant health practitioner (e.g. the requirement to undertake light duties if on a return to work program);
- relevant personal circumstances (e.g. ongoing carer's responsibilities); and



- 'preliminary action' taken or not taken to improve the employee's performance.

4. 'Reasonable Opportunity' under section 44(5)(b)(ii)

The particular circumstances of each case should be taken into account when determining what constitutes a "reasonable opportunity" for an employee to show why the action should not be taken. Relevant factors include (but are not limited to) health issues affecting the employee's ability to respond, the complexity of the matter, or the seriousness of the remedial action contemplated.

5. Suspension with or without remuneration

Under the Act a suspension may only be imposed if a Chief Executive Officer is of the opinion that the suspected inability or performance grounds are of such a serious nature that the employee should not continue performing his or her assigned duties pending the making of that decision.

In considering suspending an employee, a Chief Executive Officer should have regard to the following:

- any possible alternatives that may be appropriate in the circumstances (e.g. a transfer to perform other duties under section 35 of the Act);
- the employee's work performance history and relevant employee records; and
- the risk that retaining the employee in the workplace could be potentially injurious to the employee or others.

Suspensions without remuneration should generally only be considered if the grounds are of such a nature, that if proven, they would lead to termination of the employee's employment and strong evidence pointing to this outcome already exists.

The particular circumstances of each case should be taken into account when determining what constitutes a reasonable opportunity for an employee to show why the foreshadowed suspension should not occur. Relevant factors include (but are not limited to) health issues affecting the employee's ability to respond, the complexity of the matter, or the seriousness of the remedial action contemplated.

Extensions or variations to an employee's suspension should be actioned by a Chief Executive Officer in a timely manner, noting that such variations may require approval from the Commissioner.

A period of suspension cannot be backdated. If a suspension period lapses a new suspension process will need to be carried out.

6. Transfers

In considering whether it is appropriate to transfer an employee a Chief Executive Officer should have regard to:

- the nature of the performance grounds;
- the risk that transferring the employee may escalate the performance grounds; and
- whether transferring the employee poses any risk to the employee or others.

For example, it may be appropriate in some circumstances to transfer an employee who is required to perform light duties during a return to work program. However, such a transfer may not be appropriate if it:

- is likely to exacerbate the performance issues; or
- poses a risk to the health and safety of the employee or others;

due to the employee being required to perform duties for which he or she is not suitably trained or qualified.

7. Support Person

Employee requests for a support person to be present at performance and inability meetings should be accommodated wherever possible. The support person is a person nominated by the employee, and may include his or her union organiser or delegate.

The role of the support person is to provide emotional support and act as a witness for the employee. If the support person fails to effectively perform his or her role (e.g. being disruptive), the agency may suspend the meeting and reschedule. In such cases, the employee may decide to nominate another support person.