



ARBITRATION AWARD

Case Number: PSHS518-10/11

Panelists: Malusi Mbuli

Date of Award: 17-08-2011

In the **ARBITRATION** between

DENOSA obo N. E. Matyholo

(Applicant)

And

Department of Health – Eastern Cape Province

(Respondent)

DETAILS OF THE HEARING AND REPRESENTATION

1. The matter came before the PHSDSBC for arbitration under section 24{2} 24 {5} as an Interpretation and Application of a Collective Agreement. It was set down for arbitration hearing at the Department of Health, Nelson Mandela Hospital in Umtata.
2. The applicant Mrs. N.E. Matyholo attended the hearing and was represented by Mr. X. Rafana an official of the applicants trade union DENOSA.
3. The respondent Department of Health was also present at the hearing and was represented by Mrs. T. Jubase, an official of the respondent.
4. The matter was finalized on the same day and the parties agreed to file their closing arguments on the 12th of August 2011.

ISSUE TO BE DECIDED

5. I am required to Interpret and Apply the Collective Agreement, and determine whether the applicant was entitled to receive acting allowance beyond 6 months period.

SURVEY OF EVIDENCE

6. The parties did not lead any evidence on the matter but submitted closing arguments because the facts in this dispute were common cause. It follows that the matter was not recorded and the parties arguments will form the record of the proceedings.
7. Issues that are common:
 - That the applicant was employed by the respondent since 2004 at level 10 and was appointed to act as a Nursing Service Manager with effect from the 01st of September 2006 after the previous manager vacated the position.

- She acted in this position and was later after a period of six months translated from the level 10 in previous position to a position equivalent or at the same level after the introduction of OSD in July 2007.
- When she was chosen to act in the aforesaid position she was not advised in the letter when her acting will be terminate but the parties agree that the acting of a person in the Department of Health is governed by the Eastern Cape Department of Health Acting Allowance Policy.
- At the time when she was acting, which period is in dispute the applicant was performing the work of the Nursing Service Manager which was previously level 11 before it was translated as a result of the introduction of the OSD.
- It is also common cause that the Department of Health paid the applicant acting allowance for a period of 6 months from September 2006 to March 2007.

8. Issues that are in dispute:

- Whether the applicant was still acting as a Nursing Services Manager grade 11 after March 2007.
- Whether the applicant was entitled to be paid acting allowance after March 2007 to the date of the award.

ANALYSIS OF EVIDENCE AND ARGUMENT

9. Both the applicant and the respondent filed their arguments in this matter. The applicants representative argues that the applicant was issued with a letter appointing her to act in the level 11 position, a position of the Nursing Services Manager. This letter indicated that the applicant was going to act from September 2006 but it did not indicate when the applicant was going to complete her acting.
10. The applicants representative agree that there is a period of six months that is refereed to in the policy for acting but argue that it was not mentioned in the letter of appointment to act of the applicant that she was acting for a period of six months and that is why she did not bother to inquire about this period. He submits that this was an error on the part of the department. He also submits that in terms of clause 7.5 of Public Service Regulation, Chapter 1 Part (vii) “the acting allowance will be paid for the period the staff member occupies the vacant post”.

11. The applicants representative argues that the applicant has been acting in the aforesaid position from September 2006 up to the date of the hearing and she should be paid her acting allowance from September 2006 to the date of the arbitration hearing.
12. The respondent on the other hand argues that Mrs. N.E. Matyholo was never appointed to level 11 but was acting in that position and was translated as a level 10 when the OSD was introduced in July 2007. The respondents representative argues that the applicant was acting at the level 11 position for a period of six months and she was paid her acting allowance for that period.
13. She further argues that this is the maximum period that a person can act in terms of the Department of Health Eastern Cape Acting Allowance Policy. The employer representative also argues that the applicant is a manager and is aware of the Departmental Policies.
14. The employer representative also indicated that the Department was willing to offer the applicant an additional difference of six months pay which was also offered at Conciliation and rejected by the applicant.
15. The acting and payment of the acting allowance of the Department of Health Eastern Cape is regulated by clause 11 of the of the Eastern Cape Department of Health Acting Allowance Policy. Clause 11.1 provides that a member may only act in a higher post for a maximum uninterrupted period of 6 months. The acting allowance maybe paid to an acting member for a maximum of six months, after which only permanent appointment will be considered for the relevant vacant and funded higher post unless prior approval is obtained from the relevant Executing Authority for re-appointment of the acting member or appointment of a new member in the said post in an acting capacity.
16. Clause 11.2 provides that the fact that the member has been appointed in an acting capacity does not create a right or legitimate expectation to be appointed when such vacant post is advertised.
17. It is clear from the wording in clause 11.1 of the policy refereed to above that a member who is acting cannot do so over a period of 6 months and that she will only receive acting allowance for the period of six months. The words "*may only act for an uninterrupted period of 6 months*" mean that a member can only act for a period of three consecutive months only. The applicant acted for this period and was paid her acting allowance by the Department of Health.

18. There is however an exception to this clause to the effect that a further period of acting should be authorized by the Executing Authority and this was not the case with the applicant as no Executing Authority authorized the further acting of the applicant. This simply means that the applicant was entitled to be paid her acting allowance for a period of six months from September 2006 to March 2007. The applicant was not acting in the said position after March 2007 because she is the employee of the Department of Health and is therefore bound by its policies.
19. The fact that the applicant was not advised that the acting will come to an end after six months does not mean that the policy is not existing and applicable to the applicant. Any person appointed to act by the Department of Health is appointed to act in terms of the acting allowance policy and the clauses dealt with above are applicable.
20. The employer representative has indicated that the Department is willing to give the applicant a further acting allowance for the period of six months. This came as a proposal at Conciliation and it was rejected by the applicant thereby subjecting herself to a win or lose or an all or nothing type of a situation. I cannot order in this award the employer to pay the applicant a further acting allowance for another six months because I have no basis to do that in this award.
21. The employer however can do that outside this arbitration award as there will be no need to justify on what basis the amount was paid except for a without prejudice offer which the applicant rejected before arbitration.
22. I therefore make the following award.

AWARD

23. The words (may only act for an uninterrupted period of 6 months) as discussed above mean that the applicant was only appointed to act in that position for a period of 6 months and any duties she performed beyond this period were not done in her acting capacity because she was not authorized to continue acting by the Executing Authority in terms of the acting allowance policy.
24. The applicant is therefore not entitled to any further acting allowance beyond the period ending March 2007.



Signature: _____

Commissioner: **Malusi Mbali** _____