



# ARBITRATION AWARD

IN THE PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL  
BARGAINING COUNCIL HELD AT BLOEMFONTEIN

COMMISSIONER: C L DICKENS  
CASE NO. : PSHS 193-11/12  
DATE OF AWARD: 8 February 2012

In the Arbitration between:

PSA obo A VAN ZYL

APPLICANT

and

DEPARTMENT OF HEALTH: FREE STATE

RESPONDENT

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ARBITRATION AWARD

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## 1. DETAILS OF HEARING AND REPRESENTATION:

- 1.1 An Arbitration hearing was scheduled for the 9<sup>th</sup> of January 2012 at Bophelo House, Cnr. Harvey and Charles Streets, Bloemfontein.
- 1.2 The Applicant, Mr. Van Zyl, was represented by Mr. Greeff of PSA. The Respondent, Department of Health: Free State, was represented by Me. Jones in the hearing, and the written submission were submitted by Mr. Mapena, Senior Labour Relations Officer.
- 1.3 The parties requested to submit written arguments only. The parties agreed that the Applicant would submit their arguments by the 18<sup>th</sup> of January 2012. The Respondent would submit their opposing papers by the 25<sup>th</sup> of January 2012. The Applicant would then be able to reply by the 27<sup>th</sup> of January 2012 if necessary.

## **2. ISSUE TO BE DECIDED:**

2.1 The Applicant has referred a dispute relating to the interpretation or application of a Collective Agreement, being Resolution no 1 of 2002. I am required to determine whether the Applicant was entitled to an acting allowance for the periods 1<sup>st</sup> of April 2007 to 31<sup>st</sup> of August 2007 and from 1<sup>st</sup> of September 2007 to 31<sup>st</sup> of March 2008.

## **3. BACKGROUND TO THE ISSUE:**

3.1 It is common cause that the Applicant was at the level of a Principle Human Resources Officer: FSPC on salary level 7. The Applicant was required to act in the post of Chief Human Resources Officer: Provisioning Services on salary level 8 from the 1<sup>st</sup> of April 2007 until the 31<sup>st</sup> of August 2007.

3.2 It is further common cause that the Applicant acted in the post of Chief Human Resources Officer: Conditions of Service Section on salary level 8 for the period 1<sup>st</sup> of September 2007 to 31<sup>st</sup> of March 2008.

3.3 The Applicant was not remunerated for the full period that he acted.

3.4 It is further common cause that the Applicant was not personally advised that he will not be remunerated for the period during which he acted.

## **4. SURVEY OF EVIDENCE AND ARGUMENT:**

### **4.1 SUBMISSIONS ON BEHALF OF THE APPLICANT:**

**4.1.1 *Mr. Greeff* argued that the dispute goes about the interpretation and application of GPSSBC Resolution 1 of 2002, Clause 3.1.1 (a) and (b).**

4.1.2 He stated that the Applicant was at the level of a Principle Human Resources Officer: FSPC on salary level 7. The Applicant was required to act in the vacant and funded post of a Chief Human Resources Officer: Provisioning Services Section, on a salary level 8 from the 1<sup>st</sup> of April 2007 until the 31<sup>st</sup> of August 2007. The second acting period was when the Applicant was required to act in the post of a Chief

Human Resources Officer: Conditions of Service Section on salary level 8 from the 1<sup>st</sup> of September 2007 to the 31<sup>st</sup> of March 2008. He stated that the Applicant acted for the periods uninterrupted.

4.1.3 He held that the Resolution is very clear at Clause 3.1.1 (a) and (b) as follows:

*“An employee appointed in writing to act in a higher post, by a person who is duly authorized, shall be paid an acting allowance provided that: - a) the post is vacant and funded; and - b) the period of appointment is uninterrupted and longer than 6 weeks.”*

4.1.4 He stated that the late Mr. STC Mohapi, the then CEO of the FSPC appointed the Applicant. He stated that he had the authority being the Accounting Officer of the institution and the budget of the institution. In the case of the Applicant the posts were vacant and funded and he was appointed by Mr. Mohapi in writing to act for both periods in question.

4.1.5 He held that PSA is of the opinion that the Applicant by virtue of the Collective Agreement and the acting letters, that he is entitled to the acting allowance for the two periods. He referred to similar matters where the commissioners found that the acting allowance must be paid. He held that the same Ruling will be required for the Applicant.

4.1.6 Mr. Greeff held that the quantification for the period is R 23 386-15 (TWENTY THREE THOUSAND THREE HUNDRED AND EIGHTY SIX RAND AND FIFTEEN CENTS).

4.1.7 He stated that the relief which they are seeking is an Award to be made that the PSA's interpretation of the Collective Agreement is correct. Secondly that an Award be made that the Applicant's acting allowance in the amount of R 23 386-15 (TWENTY THREE THOUSAND THREE HUNDRED AND EIGHTY SIX RAND AND FIFTEEN CENTS) be paid with immediate effect, together with interest.

4.1.8 In reply he held that the PSA fails to understand that the late Mr. Mohapi did not have authority to allow Mr. Van Zyl to act in the two positions. Mr. Mohapi was in control of the budget of the institution and had the necessary authority to authorize such

payments out of his cost centre. He argued that the Applicant was never placed under the impression that Mr. Mohapi did not have the authority to appoint him. He was given the letter to act and performed the duties accordingly. He argued that it is extremely unfair to now come and argue only when payment is due, that the CEO did not have the necessary authority.

#### 4.2 SUBMISSIONS ON BEHALF OF THE RESPONDENT:

4.2.1 **Mr. Mapena** argued that it is not in dispute that the Applicant was appointed in writing by the CEO from the 1<sup>st</sup> of April 2007 until the 31<sup>st</sup> of August 2007 in the post of Chief HR Officer and further was appointed by the CEO in the post of Chief Personnel Officer Statistics and Staff Establishment for the period of the 4<sup>th</sup> of June 2007 until the 31<sup>st</sup> of August 2007 followed by another appointment to act in the post Chief HR Officer Conditions of Service for the period of the 1<sup>st</sup> of September 2007 until March 2008.

4.2.2 He held that it is their argument that, according to the Collective Agreement on acting, the following requirements must be met:

- He was appointed in writing to act in a higher post;
- By a person who was duly authorized;
- The post is vacant and funded;
- The acting period is longer than 6 (SIX) weeks;
- He accepted the acting in writing.

4.2.3 Mr. Mapena held that the first requirement was met as there are appointment letters to that effect.

4.2.4 He argued that in relation to the second requirement, an exercise has to be undertaken to identify the powers of the late Mr. Mohapi CEO of the FSPC and whether he was duly authorized to appoint the Applicant to act in a higher post. He referred to Section 32 of the Public Service Act which reads as follows:

*“Assignment of other functions to officers and employees*

*An executive authority or head of department, branch, office or institution may direct any officer or employee under his or her control temporarily to perform duties other*

*than those ordinarily assigned to such an officer or employee or appropriate to the grade, design or classification of his or her post, and he or she shall comply with such a direction.”*

4.2.5 He held that this Section therefore allows the Head of the Institution like the Free State Psychiatric Complex to assign extra duties to employees at the institution to be performed temporarily. He held that this is not a typical acting appointment as will be seen later. He held that it is only for the purposes of asking employees to perform certain duties temporarily without any monetary implication. He held that in addressing this argument, read with Public Service Regulation of 2001 B.5.4 read in terms of regulations officials who can compensate an employee for acting in a post is the Head of the Department after the requirements have been met.

4.2.6 He held that according to Resolution 1 of 2002:

*“An employee appointed in writing to act in a higher post, by a person who is duly authorized”*

4.2.7 He stated that it was discovered that the late Mr. Mohapi acted ultra vires in appointing the Applicant to act in the two posts.

4.2.8 He held that Mr. Mohapi was an employee of the Department of Health, and could only perform functions and duties allocated to him by the Department of Health or in certain instances by legislation.

4.2.9 He stated that they have to look at the delegations regime that existed at the time of the Applicant's appointment. He stated that at period A there was already the interim Human Resource Management Circular no 33 of 2007 signed on 10 April 2007 where it is clearly stated that there should be a written submission to request approval from the Head: Health to appoint officials from level 1 to 8, due to the reasons indicated in the above mentioned Interim Human Resources Delegations. By the time CEO of FSPC appointed the Applicant to act there was already another interim Human Resource Delegation Circular no 57 of 2007 on the second period. The Circular was signed by the MEC dated the 13<sup>th</sup> of June 2007 one month after an appointment of the Applicant's first appointment on the 1<sup>st</sup> of April 2007. In the

circular everyone including Heads of Institutions was made aware that appointment of an official to act in a higher post is done by:

*(i) Level 1-8 by the Head of the Department*

*(ii) Level 9-15 by the MEC: Health*

4.2.10 He argued that it is confirmed that the Applicant was at level 7 and that he was therefore appointed to act on level 8. On that note the CEO: FSPC was not duly authorized to appoint the Applicant to act in those two posts.

4.2.11 He stated that the Applicant has requested the Commissioner to order the Respondent to pay the Applicant's acting allowance. He held that they wish to counter argue the argument of the Applicant, that the CEO acted ultra vires and therefore the Respondent can not be held responsible.

4.2.12 He argued that according to the Administrative Law the exercise of an administrative power for any unauthorized purpose amounts to ultra vires in the sense that the furtherance of power that purpose does not have a statutory basis in other words, the administration does not have a statutory authority for his actions. Administrative action which serves an un-authorized purpose is ultra vires, no matter how commendable or laudable the purpose may be and even in circumstances where the administrator has acted completely bona fides quoted from Burns Y: Administrative Law under the 1996 Constitution Second Edition.

4.2.13 He concluded by saying that Mr. Mohapi was not duly authorized to appoint the Applicant to act. That the appointment of the Applicant was ultra vires in terms of Resolution 1 of 2002. That the Applicant is not entitled to an acting allowance for the periods indicated.

## **5. ANALYSIS OF EVIDENCE AND ARGUMENT:**

5.1 It is common cause that there is a Collective Agreement in place, Resolution 1 of 2002, which deals with acting allowances. This Agreement was signed on the 8<sup>th</sup> of May 2002 and is still binding.

5.2 The Clause which I am required to interpret is Clause 3.1.1 (a) and (b). For ease of reference I will quote the Clause hereunder.

***“3. Policy on acting allowance***

***3.1 Noting that Public Service Regulation Chapter I, Part VII / B.5 and paragraph 5.1 of PSCBC Resolution 9 of 2001 provides the framework for the compensation of an employee acting in a higher post, the parties agree as follows:***

***3.1.1 An employee appointed in writing to act in a higher post, by a person who is duly authorized, shall be paid an acting allowance provided that -***

***(a) the post is vacant and funded; and***

***(b) the period for appointment is uninterrupted and longer than six weeks.”***

5.3 In terms of this Clause, there are four requirements which need to be met before an employee can qualify for an acting allowance. They are the following:

- An employee appointed in writing to act in a higher post;
- by a person who is duly authorized;
- the post is vacant and funded; and
- the period for appointment is uninterrupted and longer than six weeks.

5.4 I will deal with each of these requirements hereunder.

**5.4.1 The employee must be appointed in writing to act in the higher post.**

5.4.1.1 It is common cause that the Applicant was appointed in writing, by Mr. Mohapi, the CEO of Free State Psychiatric Complex for two periods, being 1 April 2007 to 31 August 2007 and 1 September 2007 till 31 March 2008.

**5.4.2 Was Mr. Mohapi duly authorized to appoint the Applicant to act in the two positions?**

5.4.2.1 It is common cause that the Applicant was appointed at a salary level 7 and that both posts in which he was requested to act were salary level 8.

5.4.2.2 The Respondent argued that Mr. Mohapi was not authorized to appoint the Applicant to act in the said positions. Mr. Mapena argued that Mr. Mohapi was an employee of the Department of Health and that he had to act within the delegations assigned to him.

5.4.2.3 He argued that Interim Human Resources Delegation dated the 1<sup>st</sup> of March 2007 was applicable at the time that the Applicant was appointed to act.

5.4.2.4 The relevant Section of the document reads as follows:

***“In order to ensure that accountability is vested in the correct levels, it is proposed that the Human Resources Delegation, as an interim arrangement, be withdrawn, and vested in the levels as follows:***

<b><i>Levels:</i></b>	<b><i>Recommendation</i></b>	<b><i>Approval</i></b>
<b><i>13 to 15</i></b>	<b><i>MEC: Health</i></b>	<b><i>MEC: Health</i></b>
<b><i>9 to 12</i></b>	<b><i>Head: Health</i></b>	<b><i>MEC: Health</i></b>
<b><i>1 to 8</i></b>	<b><i>Senior Manager or equivalent level”</i></b>	<b><i>Head: Health</i></b>

5.4.2.5 Mr. Mapena argued that according to this Resolution approval should have been granted by the Head: Health and that Mr. Mohapi therefore did not have the power to make the appointment.

5.4.2.6 The second document which Mr. Mapena referred to is titled: Health Human Resources Management Circular No. 57 of 2007. The relevant Section of this letter states:

<b><i>“Human Resources Powers/Functions Appoint an employee to act in a higher vacant posts</i></b>	<b><i>Interim Powers Delegated to MEC Levels 9-15 HOD Levels 1-8”</i></b>
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5.4.2.7 It is clear that the delegation of powers is the same as in the first directive. In terms of both documents, the HOD has to authorize the appointment of employees to act in higher positions.

5.4.2.8 Mr. Greeff argued in reply that PSA fails to understand that Mr. Mohapi did not have the authority to appoint the Applicant to act in the two positions. He stated that the Applicant was never placed under the impression that Mr. Mohapi did not have the necessary authority to appoint him. He stated that it is extremely unfair now only when payment is due the Respondent states that the CEO did not have the authority.

5.4.2.9 After having considered the arguments before me, it is clear that Mr. Mohapi was not duly authorized to appoint the Applicant to act.

#### **5.4.3 Was the post vacant and funded?**

5.4.3.1 It is common cause that the post was vacant and funded.

#### **5.4.4 Was the period for appointment uninterrupted and longer than six weeks?**

5.4.4.1 It is undisputed that the period of acting exceeded six weeks.

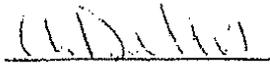
5.5 Having considered all four requirements, it is clear that the Applicant will not be entitled to the acting allowance as Mr. Mohapi did not have the authority to appoint him to act.

### **6. AWARD:**

6.1 The Applicant, Mr. A van Zyl, is not entitled to an acting allowance for the period 1 April 2007 to 31 August 2007 or for the period 2 September 2007 till 31 March 2008, as Mr. Mohapi did not have the authority to appoint him to act.

6.2 No order as to costs is made.

**SIGNED AT BLOEMFONTEIN ON THIS 8<sup>th</sup> DAY OF FEBRUARY 2012**

A handwritten signature in black ink, appearing to read 'C L Dickens', is written over a horizontal line.

**SENIOR COMMISSIONER**

**C L DICKENS**

**PHSDSBC**