



ARBITRATION AWARD

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

CASE NO: PSHS224-10/11

In the matter between:

PSA obo S. RABIE

APPLICANT

and

DEPARTMENT OF HEALTH

RESPONDENT

AWARD

1. DETAILS OF HEARING AND REPRESENTATION

- 1.1 The hearing was held on 22 November 2010, Mr. Greef of the PSA represented the Applicant, S. Rabie and Mr. Malokoane the Respondent.
- 1.2 The parties filed Heads of Argument on 2 December 2010.

2. THE ISSUE TO BE DECIDED

- 2.1 The Application or Interpretation of a collective agreement, Resolution 3/2007, in particular Clauses 3.2.5.3 (i) and (iii) thereof.

3. BACKGROUND TO THE ISSUE

- 3.1 The Applicant was an Assistant Director: Nursing at Free State Psychiatric Complex until the advent of the Occupational Specific Dispensation (OSD).
- 3.2 Before the advent of the OSD, she was appointed to act in the position of Manager: Nursing and CEO: Free State Psychiatric Complex and was duly paid an acting allowance.
- 3.3 Subsequent to the advent of the OSD, she was translated to Professional Nurse (PN-B4).
- 3.4 She was unhappy regarding her translation and lodged a grievance and subsequently referred a dispute in the instant case.

4. SURVEY OF THE ARGUMENT

APPLICANT'S CASE

The following argument was presented on behalf of the Applicant:

- 4.1 That by virtue of the fact that the Applicant was appointed to act as Deputy Director: Nursing, she performed the functions. Irrespective of her qualifications and experience, the fact that she was in the position at 30 June 2007, she automatically qualified to be translated from Assistant Director to Deputy Director: Nursing.
- 4.2 The Respondent therefore cannot differentiate between the Applicant and other staff merely because there is no such a post.

RESPONDENT'S CASE

The following argument was presented on behalf of the Respondent:

- 4.3 It cannot be said that because the Applicant was acting, then she was in the position of a Manager: Nursing, as at 30 June 2007. Thus the notion that she was occupying a Manager's post is misleading. Otherwise every Official who acted

would have a claim in this regard and this was never the intended purpose of the Resolution.

- 4.4 The Resolution was intended to be used as a retention strategy of nursing occupational classification.
- 4.5 Furthermore, the Resolution was never intended to create a position where there is no need and to promote. It is therefore incorrect that the Respondent is differentiating the Applicant from other staff members. There is no official who benefited in the same and / or similar circumstances.
- 4.6 In terms of the Free State Psychiatric Complex Structure, the position of Deputy Manager: Nursing (PNA-8) is non existent. The Assistant Managers report to Head: Nursing and the same structure is the one that is supported by the Resolution. The Applicant was therefore correctly translated to PN-B4 as in terms of the Resolution the Assistant Manager position shall report to the Manager: Nursing.
- 4.7 It is correct that the Applicant signed a job description of the PNA-8 Professional Nurse General, however, this job description was signed around May 2009 and at the time the classification of the institutions was not done yet.
- 4.8 Subsequent to a dispute of interpretation and application declared by organised labour, the award ordered the parties to establish a task team which will oversee the implementation. The Psychiatric Complex was declared a "speciality".
- 4.9 The award came into effect around August 2009 and the Respondent came with a model on how to implement the award around November 2010.
- 4.10 The award nullified any other process that was not in line with the Resolution and therefore the fact that the Applicant signed the job description of PNA-8 / Professional Nurse General, is not an issue now.

4.11 The Applicant referred a dispute of interpretation or application of a collective agreement, however, contrary to this dispute, the Applicant seeks to be promoted. The Council would therefore lack jurisdiction on the relief sought by the Applicant.

5. ANALASYS OF THE ARGUMENT

5.1 Clause 3.2.5.3 of the Resolution states as follows:

“(i) a Professional Nurse (Registered Nurse) who occupies a post in a nursing speciality and who –

(a)

(b) is not in a possession of a post-basic Clinical Nursing Qualification listed in Government Notice R212, as amended, but who has been permanently appointed in a post in a speciality unit and has been performing the duties of the speciality post satisfactorily on 30 June 2007, shall be translated as a once-off provision to the first salary scale attached to the production level;

(ii)

(iii) A professional nurse (registered nurse) who is Managing a Nursing Speciality Unit and who is not in possession of a post-basic Clinical Nursing Qualification listed in Government Notice R212 as amended, but who has been performing these duties of managing the Speciality Unit satisfactorily on 30 June 2007, shall be translated as a once-off provision to the appropriate salary scale attached to the Corresponding Management Level.”

5.2 While Resolution 3/2007 is silent on an acting capacity, what can be gleaned from the argument is that the Applicant acted as Manager: Nursing and was duly compensated for it.

5.3 The Applicant now seeks to use the Resolution as a vehicle for her translation, over and above the acting allowance that she had received for acting in the post.

- 5.4 I am inclined to agree with the Respondent's submission that every Official who has acted would have a claim in this regard, whereas, the Resolution was intended to be used as a retention strategy of nursing occupational classification. Moreover an acting position is but temporary.
- 5.5 I am also of the view that the Resolution was never intended to create positions where there is no need to promote or translate and forego other recruitment and selection policies and prescripts in the Public Service.
- 5.6 It is trite that when the Applicant signed the job description of Manager: Nursing during May 2009, the Psychiatric institution where she is currently employed had not yet been classified, it is common cause that it was subsequently classified as a Speciality Institution.
- 5.7 The relief that the Applicant seeks is that she be promoted to the Deputy Director: Nursing (PNA-8). It is trite that this position does not exist.
- 5.8 In *SAPS v SSSBC & Others (2010) 8 BLLR 892 (LC)* the Court *inter alia* held that the following principles are to be applied when considering a promotion dispute:

(1) the decision to promote or not to promote falls within the Managerial prerogative of the Employer;

- (v) The mere fact that an Employee is already in a post, does not give him or her an automatic right to a promotion even if such a position becomes available. At best it gives such an Employee the right to be heard. In the instant case the position that the Applicant seeks to be promoted to does not exist and is therefore unavailable.

- 5.9 Lastly, the Applicant has been translated to Assistant Manager: Nursing (PNA-4). However, she is unhappy about this translation.

6. **AWARD**

I make the following award:

6.1 The Applicant has not established that the Respondent incorrectly applied or interpreted Resolution 3/2007 and her application is dismissed.

6.2 There is no order for costs.



JEROME MTHEMBU
PHSDSBC PANELIST

DATE: 7 DECEMBER 2010