AWARD

Panellist/s: **Eddie Tlhotlhalemaje**

Case No.: **PSCB383-11/12**

Date of Award: **22 MARCH 2012**

In the ARBITRATION between:

HOSPERSA OBO KENNETH KEVIN MAISTRY
(Union/Employee)

And

THE DEPARTMENT OF HEALTH & SOCIAL DEVELOPMENT-GAUTENG
(Employer)

Employee's Representative:	MR. S. KHANYEZA
Union/Applicant's address:	48 SONNIG STREET KLOPPER PARK 1601
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Respondent's representative:	MR. S. MAZIBUKO
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DETAILS OF THE HEARING AND REPRESENTATION:

[1] These arbitration proceedings were held at the premises of the Employer in Johannesburg on 15 March 2012. The Employee, KK Maistry was represented by Mr. S. Khanyeza from HOSPERSA. The Employer was represented by Mr. S. Mazibuko (GBOH). The proceedings were digitally recorded.

BACKGROUND TO THE DISPUTE AND ISSUE TO BE DETERMINED:

[2] The dispute was referred to the Council in terms of s24 (2) and s24 (5) of the LRA pertaining to the interpretation or application of the provisions of Resolution 1 of 2004 of the CCPGP. It was contended that the Employer had failed to comply with the provisions of the Resolution in regard his performance management/evaluation in respect of the 2010/2011 financial year, resulting in him not being entitled to a performance bonus for that financial year.

[3] In his referral, the Employee seeks an order that he be allocated a "5" for all incidents/evidence/motivations he had submitted (in respect of his performance assessment). This basically would enable him to receive a performance bonus for that particular financial year.

[4] The issue to be determined is whether the Employer has failed to comply with the provisions of Resolution 1 of 2004 CCPGP in regard to the performance assessment of the Employee, and if so, whether he is entitled to the relief he seeks.

THE EVIDENCE AND ARGUMENTS:

[6] The following factors are common cause;
The Employee is employed as an Asset Manager by the Respondent and is based at the Rahima Moosa Mother & Child Hospital. The management of performance of all staff members within the Gauteng Provincial Government at salary ranges 1 to 12 is regulated by the Policy on Performance Management and Development. The policy aims to provide a uniform performance management system for the Gauteng Provincial Government and was signed by the Gauteng Provincial Government together with employee representatives including HOSPERSA.

[7] In terms of this policy, employees are required to enter into a performance agreement with their direct supervisors to achieve objectives (outputs/outcomes) according to standards (measures), which are aligned with the individual department's strategic plan, the employee's job description/work plan and available

resources. These agreements are developed on an annual basis before 1 April and performance reviews are supposed to occur quarterly. Three of the reviews shall be in the format of an abbreviated performance review whilst the last one shall be recorded on the formal performance evaluation form. Each employee shall be subjected to an annual formal performance evaluation. The policy provides for an evaluation criteria in terms of which include looking at the extent to which the employee staff member produced each outcome which he/she had agreed to deliver during the performance period under evaluation as well as the standard on which such outcome was agreed to be delivered in accordance with his/her agreement; the staff member's proven ability to comply with the performance elements in a manner that contributes to the effective and efficient delivery of services.

[8] Thereafter weightings are to be allocated to each outcome according to the priority of the outcome and the time investment required to execute the outcome. The final score would then be calculated according to the weightings. The allocation of performance rating to a staff member is then made according to a five-point rating scale of Clearly Outstanding (5); Very effective (4); Effective (3); Meets some requirements/Developing (2) and Not yet effective (1). Once the evaluation is finalised the relevant staff member's questionnaire which shall have been completed, rated and signed shall then be submitted to a Head of the Unit and which in turn shall be forwarded to the Directorate of Human Resources Management. It was common cause that a rating of 3 to 4 entitled a staff member to a notch/pay progression. A rating of 4 to 5 entitled a staff member to a pay progression and a once off incentive bonus.

[9] For the period 2010 - 2011 the Employee had entered into a PMDS agreement with his supervisor. His supervisor, Qaasam Bowes testified that the way he evaluated the Employee was such that he had given him the questionnaire to complete and rate himself in respect of the outcomes and outputs as per the agreement. Having seen the ratings that the Employee had given himself, which gave an overall rating of a score of 4, Bowes had then sat down with him and discussed areas he was not satisfied that the Employee had rated himself properly. As he was not satisfied that the Employee had correctly rated himself, he had then required him to furnish evidence to support his conclusions in respect of those areas. The Employee had then provided Bowes with evidence in regard to those areas where there were concerns. Still Bowes was not satisfied and had then given the Employee an overall rating of 3. He had then on 07 April 2010 submitted the questionnaire to the CEO of the Hospital who was Bowes' direct superior. Bowes had contended that ordinarily he would not have forwarded the documents to the CEO but directly to the Human Resources. However since there was a disagreement between him and the Employee, he had done so. The CEO having looked at the overall rating had then suggested to Bowes that he should amend one aspect of the rating and up it to a 4. This still however did not give the Employee an overall rating of 4.

[10] Under cross-examination, Bowes had denied that the CEO had at any stage interfered with the overall rating to disadvantage the Employee. The CEO had instead recommended an upping of a score on a particular outcome and had also agreed with him that the Employee needed to motivate and furnish further evidence for a rating of 4. He conceded that ordinarily and in terms of the policy, he would have sent the documents directly to the HR. He further conceded that in terms of the policy, it was not required for a motivation to be given in the event that a rating of 4 was given. He further conceded that the final documents were not signed by the Employee as required. He however contended that the final rating of 3 was implemented in any event and notwithstanding disagreement by the Employee.

[11] The Employee's testimony was that a quarterly performance review was not done as expected in terms of the policy. In terms of the final review, Bowes had given him a blank questionnaire to complete and to rate himself. Thereafter they together went through the document and the rating that the Employee had allocated himself. Bowes was unhappy with some of the scores and had asked him to provide further evidence and motivation to justify those scores. He had done as requested. Bowes had then consulted with the CEO and informed him that further motivation and evidence was required to justify a high rating, more specifically in respect of certain outputs. He had again furnished further evidence. Notwithstanding, Bowes had thereafter told him that having consulted with the CEO he could not be given an overall rating of 4. Despite the Employee's attempts to discuss the matter with Bowes and the CEO, the overall rating of 3 was maintained. He had not even signed the final documents as these were not given to him. His contention was that based on feedback from Bowes, he was under the impression that it was the CEO that had changed the rating. His further contention was that Bowes had refused to give him a rating of 4 as he had himself not qualified for an incentive bonus.

<u>ANALYSIS OF THE SUBMISSIONS AND ARGUMENTS:</u>

[12] From the oral and documentary evidence presented, and also emanating from the arguments, the following appears to be common cause;

[13] The Employee was not subjected to a quarterly performance management review prior to the final evaluation for the period 2010 to 2011. When he was supposed to be finally evaluated, Bowes, contrary to the conventional way of doing such evaluations, had asked the Employee to evaluate and rank himself. Having given himself an overall rating of 4 which would have entitled him to receive both a pay progression and an incentive bonus, Bowes had then ultimately went through the evaluation with him and disagreed with his overall rating. Bowes had specifically indicated the areas where he was of the view that the Employee did not deserve a higher score and had required him to motivate or furnish further evidence to justify a higher score.

[14] A dispute over the interpretation of collective agreements exists when the parties disagree over the meaning of a particular provision. (See John Grogan: Workplace Law, 7ed, Juta Law (2003) on page 324). In this case, notwithstanding the Employee's assertions, there was never an agreement between him and Bowes in regards to the scores that he had given himself. This can be borne out by the fact that the draft documents they were working on in evaluating him are merely drafts and not signed by both parties. Secondly, it was common cause that Bowes had asked the Employee for further motivation and evidence after he had given himself a rating of 4. The Employee's contention was that a rating of 4 does not require a motivation or further evidence in terms of the policy. The policy provides that a rating of 2 requires concrete and conclusive evidence in substantiation thereof as well as proof of remedial steps taken to address or eliminate the performance hindrance. The policy further provides that where an official disagrees with a rating allocated by the supervisor under any element or capability factor, such official shall provide concrete and conclusive evidence in substantiation of alternative rating. Where she/he cannot provide such, the rating allocated by the supervisor shall be maintained. The policy also requires substantive, concrete and conclusive evidence where a rating of 5 is allocated.

[15] It is my view that the interpretation of clause 5.3.6 of the policy as understood by the Employee and Mr. Khanyeza on his behalf is incorrect. It could not have been envisaged by the policy that staff members or supervisors for that matter would willy-nilly allocate high scores and ratings without being required to submit substantive, concrete and conclusive evidence irrespective whether the score is a 3, 4 or 5. It would make a mockery of the policy for staff members to be given any rating without supporting evidence. To countenance a situation where ratings are allocated without evidence and motivation would be an invitation to abuse the rating system more specifically in view of the benefits that accompany a higher rating. The policy clearly states that *"where an official disagrees with a rating allocated by his/her supervisor under any element or capability factor, such official shall provide concrete and conclusive evidence in substantiation of alternative rating".* Thus the onus is on the official who disagrees with *<u>any</u> (my_emphasis)* rating and the policy could not have been envisaged to confine such a requirement only to a higher rating of 5 or a lower rating of 2. Thus in respect of any rating where there is a disagreement, the official would be required to give further evidence. In this case, this is what Bowes had required the Employee to do and rightly so as enjoined by the provisions of the policy. To the extent that Bowes was not satisfied that there was a justification for a rating of 4 or 5, the original rating was maintained, and the Employee's recourse lay with the lodging of a formal grievance or a dispute.

[16] To further elaborate on the above point, the provision requiring concrete evidence in respect of a rating of 2 and 5 places an onus on the supervisor to justify such a rating. This implies that the supervisor must justify such a rating as the policy clearly states that where the supervisor cannot provide such (evidence), a rating of

3 in the case where a 2 was allocated would be allocated, and in the case where a 5 was allocated, a 4 would be allocated where evidence cannot be provided.

[17] Another factor raised by the Applicant was that the CEO had altered the original ratings agreed upon between himself and Bowes. Firstly, I have already pointed out that at no stage was there an agreement on the ratings between the two. Secondly, there was no evidence to suggest that the CEO had interfered in the ratings. At most, and in the light of Bowes' testimony, the CEO had recommended that some output be raised to a 4 even though ultimately this did not up the overall rating to a 4. The Employee, on his own version, had merely thought or suspected that the CEO had altered the ratings after Bowes had consulted with him. Nothing prevented the Employee from subpoenaing the CEO to come to these proceedings to explain whether the ratings were in any event interfered with or not. The Employee's mere suspicions about whether or not the CEO had interfered with the rating are of no assistance to his case. Furthermore, to the extent that the overall rating submitted to the CEO by Bowes was still an overall 3, as it is clear that there was never an agreement on a rating of 4, there is no substance to the allegation that the CEO had indeed interfered with it to the disadvantage of the Employee.

[18] The Employee's other contention was that he deserved more than a rating of 4 as he was not an average employee. In fact he had contended that he was entitled to a rating of 5. In the course of interpreting the provisions of this policy or Resolution as contemplated under s24 of the Labour Relations Act, and given the nature of the events that led to a dispute, it is not the function of this Council to substitute the rating as allocated by Bowes. It is further not the function of this Council to determine whether the Employee should be allocated any particular rating on the basis of the outputs and outcomes as this requires an elaborate exercise of evaluating evidence and motivations in that regard. The sole purpose of this Council in determining disputes of this nature is merely to decide whether the policy and the Resolution were properly interpreted and applied by the Employer, and this requires a purposive approach. To the extent that the Employee and Mr. Khanyeza's interpretation of the policy is incorrect (i.e. that there was no requirement for a motivation in respect of a rating of 4), and further to the extent that there is no evidence to suggest that the CEO had interfered with the rating, or that there was at any stage an agreement on a rating of 4, it cannot be found that the Employer had incorrectly interpreted or misapplied the provisions of the Resolution. Thus the Employee is not entitled to a rating of a 4 or 5, and/or any relief.

AWARD:

i. The HOSPERSA/Employee's application is dismissed.
ii. There is no order as to costs.

Dated and signed at Johannesburg on this the day of 22nd day of March 2012

E. Tlhotlhalemaje

Panellist: