



IN THE PUBLIC SERVICE COORDINATING BARGAINING COUNCIL

HELD AT KIMBERLEY

ON 6 AUGUST 2014

IN THE MATTER BETWEEN:

PSA obo Makhethe T K

AND

DEPARTMENT OF HEALTH-FREE STATE

PSCB 119-14/15

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

1. The present dispute between PSA obo Mr. Makhetha (hereinafter referred to as the applicant) and The Department of Health-Free State (hereinafter referred to as the respondent) was referred to Arbitration in terms of Section 24 (2) of Act no 66 of 1995, as amended (the Act). At the Arbitration hearing which was scheduled to be held at the Boardroom of the applicant union in Bloemfontein on 6 August 2014, the applicant was represented by Ms. C Els of PSA and the respondent was represented by Ms. C de Beer.
2. At the onset of the arbitration the parties were assisted in a pre-arbitration meeting and a signed minute was handed up.
3. The applicant was afforded the opportunity to submit her founding argument by no later than 13 August 2014. The respondent was to oppose by no later than 20 August 2014. Should the applicant wished to reply, such reply was to reach Council by no later than 27 August 2014. Hence, being the last date of the arbitration.
4. The respondent failed to file a submission by 20 August 2014 as per the pre-arbitration minute entered into between parties.
5. I was nonetheless inclined to accept the late filing of the submission by one day since the delay was not considerable and that the reason tendered for the delay was plausible. Moreover the late filing of the submission was not objected to by the applicant and that the applicant would not suffer any prejudice.
6. Indeed I have the discretion to determine an arbitration in any manner I deem fit in terms of the provision in Section 138 (1) of the Act, which provides that a Commissioner may determine a matter fairly and speedily with the minimum of legal formalities.
7. Herewith brief reasons for my decision in terms of Section 138 (7).
8. Should any of the arguments not be included in the award hereunder, it does not mean that it was not considered.

THE ISSUE

9. The issue to be decided by myself is the interpretation and application of Resolution 3 of 1999 and as such whether the applicant is to be upgraded from level 9 position to that of a level 11 position.

SURVEY OF SUBMISSIONS

APPLICANT'S SUBMISSION

10. Essentially, the applicant argued that the respondent failed to upgrade the applicant into a Deputy Director: Transport and Fleet Management salary level 11. The applicant currently acts in the position without any remuneration since 12 February 2007.
11. The applicant's current position is that of an Assistant Director: Transport on salary level 9.
12. The Exco (a forum of HOD's) approved the upgrade of the post the applicant occupies to the level of Deputy Director, salary level 11 on 2 December 2013.
13. To date the respondent has failed to initiate the process and or failed to provide reasons for not initiating the upgrade. In the meantime the applicant continues to perform the functions and duties of the post. He suggests that it is grossly unfair and that the equal pay for equal work does not apply.
14. The applicant submitted that Resolution 3 of 1999 in Clause 4.3 reads "*If a job evaluation as provided under the Public Service Regulations indicates that a job has been under graded the employer shall either*
 - a) *Within a reasonable time, endeavour to upgrade the position of an incumbent employee, or*
 - b) *With the agreement of the affected employee, restructure his or her duties to reflect the grade determined by job evaluation.*"
15. He contends further that the Provincial Policy on Job Evaluation provides as follows: *Posts can be upgraded when the job evaluation system indicates that the job was graded incorrectly and if the Department's budget and the medium term expenditure framework provided sufficient funds.*
16. He argued that since the upgrade was approved on 2 December 2013, the respondent had failed to communicate with the applicant hence suggesting that there was nothing wrong with the decision to upgrade the applicant.
17. He insists that he is entitled to the upgrade since 1 January 2014, the first day of the month following the decision of the Exco on 2 December 2013. The time lapse was excessive and unreasonable and in direct contravention of Resolution 3 of 1999.
18. The applicant sought to be upgraded from 1 January 2014 to the position of Deputy Director: Transport and Fleet Management on salary level 11 without loss of benefits or salaries.

RESPONDENT'S SUBMISSION

19. The respondent explained that the process of Job Evaluation as follows that when a job evaluation application is submitted, the respondent needs to evaluate the weight of a post to determine the salary level according to the functions attached to the post. Only the post is evaluated and not the incumbent in the post. The MEC has the delegated powers to approve same. After the weight of the job is determined and approved by the MEC, it should be established whether the incumbent of the post is on the correct salary level. The HOD is the delegated authority to approve the upgrading of the incumbent into the job evaluated post without following the normal recruitment procedure.
20. She cited Public Service Regulation 2001 in Chapter C5: *"An executing authority may increase the salary of a post to a higher salary range in order to accord with the job weight, if-*
 - a) *The job weight as measured by the job evaluation system indicates that the post was graded incorrectly; and*
 - b) *The department's budget and the medium term expenditure framework provide sufficient funds.*
21. She argued that in light of the above, the upgrading of the post was not approved by the HOD given the financial situation of the respondent and that the post in question, that of Deputy Director is not in existence on the organogram. The letter issued by the HOD does concede that indeed there are additional responsibilities carried out by the applicant but makes no mention of a Deputy Director Post as alleged by the respondent. She further suggests that the respondent is under administration.
22. She argued that an executing authority **may** increase the salary and that there was no obligation to implement the upgrade. She insists that the upgrade is subject to affordability or the availability of funds.
23. She continues to submit that the respondent had not conducted a job evaluation and even if one was done, and it was approved by the HOD, the determining factor would still be whether the department will be able to afford the upgrade or not.
24. She cited the Instruction note issued by the Treasury as Annexure D, that "all upgrades have been suspended".
25. The respondent continued to regurgitate the provision in Resolution 3 of 1999 as cited in Clause 14, above in the applicant's submission, and again insisted that the HOD had not approved the upgrade. She provided documentary evidence as per Annexure A.
26. She argued that many requests for upgrade were made however due to the budget constraints and the Administration and Instruction of the Treasury all upgrades are put on hold. She further

argued that an upgrade was neither an entitlement nor an automatic right and is subject to affordability and therefore it is reasonable for the respondent to decline the implementation of the job evaluations.

ANALYSIS OF SUBMISSIONS

27. I am persuaded towards the approach of the respondent as opposed to that of the applicant.
28. I am of the opinion that indeed Resolution 3 of 1999 must be read with Public Service Regulation 2001 as the Resolution indicates that *"If a job evaluation as provided under the Public Service Regulations indicates that a job has been under graded the employer shall either*
 - c) *Within a reasonable time, endeavour to upgrade the position of an incumbent employee, or*
 - d) *With the agreement of the affected employee, restructure his or her duties to reflect the grade determined by job evaluation."* It allows for a job evaluation as provided under the Public Service Regulations.
29. Therefore Public Service Regulation of 2001 must be considered with the above Resolution and in Chapter C5 it provides: *"An executing authority may increase the salary of a post to a higher salary range in order to accord with the job weight, if-*
 - a) *The job weight as measured by the job evaluation system indicates that the post was graded incorrectly; and*
 - b) *The department's budget and the medium term expenditure framework provide sufficient funds.*
30. The sum of which is that an executing authority **may** increase the salary of the post. There is clearly no obligation to increase the salary of the incumbent.
31. Further to the above, the Public Service Regulation impedes on the Resolution by providing that *"the department's budget and medium term expenditure framework provide sufficient funds"*. I have before me undisputed proof that indeed the respondent is under administration of the Treasury. The directive of the Treasury indicates that *"In terms of the stringency measures all upgrades have been suspended"*. Clearly the respondent suffers severe financial constraints and under these circumstances the Public Service Regulation which gives impetus to the Resolution does not allow for an upgrade in these circumstances.
32. Moreover the applicant had not undergone a job evaluation process. The applicant's submission is that he was upgraded as a result of a unilateral decision by the forum of HOD's. Hence the Resolution in respect of an upgrade as a result of a job evaluation process cannot be applicable to the applicant.

33. I am of the opinion that a job evaluation process is indeed a pre-requisite of an upgrade in terms of Resolution 3 of 1999. It is a job evaluation which determines whether the job done by an employee is under graded. Therefore the applicability of Resolution 3 of 1999 cannot be applicable in the absence of a job evaluation.
34. In lieu of the brief reasons above I am inclined to make the above order.

AWARD

35. Resolution 3 of 1999 is not applicable to the applicant.
36. There is no order as to costs.

Signed at Kimberley on this 6th day of September 2014



**PSCBC COMMISSIONER
SHIRAZ MAHOMED OSMAN**