

State Service Act 2000

Commissioner's Direction No.6

PROCEDURES FOR THE INVESTIGATION AND DETERMINATION OF WHETHER AN EMPLOYEE IS ABLE TO EFFICIENTLY AND EFFECTIVELY PERFORM HIS/HER DUTIES

OPERATIVE DATE: 1 January 2009

[Replaces and supersedes Commissioner's Direction No. 6, operative from 19 February 2007, which is hereby revoked]

Commissioner's Direction No. 6

Procedures for the investigation and determination of whether an employee is able to efficiently and effectively perform his/her duties.

Operative date: 1 January 2009

1. APPLICATION:

- 1.1 This Direction is issued in accordance with Section 20 of the *State Service Act 2000* (the Act) and applies to all Agencies.
- 1.2 This Direction is binding on all Officers and employees.

2. PURPOSE:

- 2.1 In accordance with section 48(3) of the Act, the State Service Commissioner establishes in this Direction the procedures for the investigation and determination of whether an employee, senior executive, equivalent specialist or Prescribed Officer (hereinafter referred to as an employee) is able to efficiently and effectively perform his/her duties.
- 2.2 A finding that an employee is unable to efficiently and effectively perform his/her duties (the inability determination) may only be made in accordance with these procedures.
- 2.3 These procedures do not apply to the ability of Heads of Agencies to perform their duties.

3. INTRODUCTION:

- 3.1 The Minister may take one or more actions in accordance with Section 48(1) of the Act in relation to an employee who is found, under these procedures, to be unable to efficiently and effectively perform his/her duties (inability). The Minister may delegate this power.
- 3.2 A Head of Agency, with the exception of the Head of Agency of the Department of Health and Human Services, must not delegate the powers and functions conferred by this Direction to another person or persons.
- 3.3 Wherever Head of Agency appears in this Direction, with the exception of sub-Clause 2.3 and Clause 6, it should be read to include the delegates of the Head of Agency of the Department of Health and Human Services.

3.4 The onus of establishing any fact is on the party asserting it, and proof is to be on the balance of probabilities¹.

3.5 These procedures are to be applied with procedural fairness, natural justice and in a timely² manner.

4. INVESTIGATION:

4.1 Should a Head of Agency have reasonable grounds to believe that an employee is unable to efficiently and effectively perform his/her duties, the Head of Agency must appoint, in writing, a person (the Investigator) to investigate the alleged inability in accordance with these procedures. The Investigator must be impartial and must report to the Head of Agency in accordance with paragraph 4.9 on the outcome of their investigation.

4.2 Where an investigation into alleged inability is likely to require interviewing a child, the Head of Agency must ensure that the processes involving the child are sensitive and appropriate, bearing in mind the age, maturity and personal circumstances of the particular child. Before interviewing a child, consideration must be given to such issues as the permission of the parent or guardian, the child being accompanied by a parent, guardian or support person and, where appropriate, keeping the child informed of the progress of the investigation.

4.3 Prior to the commencement of the investigation the Head of Agency must inform, in writing, the employee who is to be subject to the inability procedure:

- (a) of the substance³ of the alleged inability;
- (b) of the intention to investigate the alleged inability;
- (c) who will investigate the alleged inability;
- (d) that the employee may seek his or her own advice and can be assisted by a person of the employee's choice throughout the process; and
- (e) of the possible implications for the employee if the matter proceeds to a determination by the Head of Agency that the employee is unable to efficiently and effectively perform his/her duties.

4.4 During the course of the investigation, the employee who is subject to the inability procedure is to be given the opportunity to be interviewed and, if he or she wishes, to provide documentary evidence to the Investigator.

¹ A fact is proved on the 'balance of probabilities' if the decision maker is satisfied that its existence is more probable than not.

² "Timely" means within a reasonable time and free from unreasonable delay.

³ 'Substance' means the essential elements that have given rise to the allegation of alleged inability.

- 4.5 Before being interviewed, it should be made clear to the employee that anything said may be used as evidence if the matter proceeds to determination. The employee is to be given the option of having another person of the employee's choice present at interview to assist the employee through the process.
- 4.6 Where it is considered that an alleged inability may be caused by a medical condition, a Head of Agency may direct the employee to undergo a medical examination by one or more medical practitioners nominated by the Head of Agency. An employee so directed must submit to such examination(s).
- 4.7 Where the medical practitioner nominated by the Head of Agency requires the employee to submit to a further examination(s) by another person(s) having, in the medical practitioner's opinion, relevant qualifications, the employee must submit to such examination(s).
- 4.8 At any time during the investigation the Head of Agency may decide to take no further action on the matter or to deal with it otherwise than as inability. In such a case the Head of Agency shall advise the employee in writing of this decision including the reasons for the decision.
- 4.9 The Investigator must provide a written report(s) to the Head of Agency on the outcome of the investigation.

The report(s) must:

- (a) provide evidence (if any), relevant to the circumstances relating to the alleged inability of which the employee was informed in accordance with Clause 4.3;
 - (b) include as attachments any relevant submissions, statements, records of interview, medical reports or other documentary material; and
 - (c) only include those matters relevant to the substance of the alleged inability.
- 4.10 The Head of Agency shall provide the employee with a copy of the Investigator's report(s) and provide the employee with an opportunity to respond to the report(s). The employee may choose to provide this response in writing or otherwise and may provide any other relevant documentary evidence. This response must be provided to the Head of Agency within a period determined by the Head of Agency provided that this period is not less than 14 days.
 - 4.11 If the response provided by the employee in accordance with clause 4.10 contains information/evidence not previously known, and/or information/evidence which is viewed by the Head of Agency as being of relevance to his/her determination pursuant to clause 5, the Head of Agency may request the Investigator to undertake further investigations in relation to those matters, and to provide a further report concerning them within a reasonable time.

5. THE DETERMINATION BY THE HEAD OF AGENCY:

- 5.1 The Head of Agency must make a determination as to whether or not an employee is able to efficiently and effectively perform his/her duties.
- 5.2 When required to make a determination as to whether or not an employee is able to efficiently and effectively perform his/her duties, the Head of Agency must:
 - (a) regulate his or her own procedure;
 - (b) consider the Investigator's report(s);
 - (c) consider the employee's response;
 - (d) act fairly and without bias;
 - (e) ensure at all times during this process that the employee receives procedural fairness and natural justice; and
 - (f) act according to equity, good conscience, and the merits of the case without regard to technicalities or legal forms.

6. ACTION TAKEN:

- 6.1 If the Head of Agency determines that the employee is unable to efficiently and effectively perform his/her duties, the Head of Agency (as the Minister's delegate) may take an action in accordance with section 48(1) of the Act.
- 6.2 Where a delegate of the Head of Agency for the Department of Health and Human Services determines that the employee is unable to efficiently and effectively perform his/her duties, the delegate (as the Minister's delegate) may only impose a sanction in accordance with section 48(1) (a) to (e) of the Act.
- 6.3 Where a delegate of the Head of Agency of the Department of Health and Human Services determines that the action of termination should be taken, then such action may only be taken by the Head of Agency to whom the Minister has given the power of termination of a permanent employee in accordance with section 44 of the Act. In such circumstances, the Head of Agency will not be required to make any further determination in order to take the action of termination.

7. NOTIFICATION OF DETERMINATION:

- 7.1 If a determination is made in accordance with clause 5.1, the Head of Agency must advise the employee in writing of:
 - (a) the determination made and the reasons for that determination;
 - (b) any action to be taken, the reasons for that action and the operative date; and
 - (c) the employee's rights of review.

7.2 The reasons for determination and action to be taken must be in sufficient detail to enable the employee to ascertain the facts found and the appropriate arguments that were accepted or rejected in arriving at the determination and action.

8. REVIEW:

8.1 If the Head of Agency determines the employee is unable to efficiently and effectively perform his/her duties and:

- (a) the action taken in accordance with section 48(1) of the Act is that the employee's employment is terminated, any dispute will be dealt with by the appropriate industrial tribunal; or
- (b) the action taken in accordance with section 48(1) of the Act is other than termination of employment, the employee will have a right of review pursuant to section 50 (1) (b) of the Act and in accordance with Commissioner's Direction No 7.

8.2 In lodging a review pursuant to section 50(1)(b) of the Act, the onus is on the applicant to establish that the determination was flawed and/or the action taken was not commensurate with the inability.

9. REQUIREMENT TO KEEP RECORDS:

9.1 The Head of Agency must keep a true and accurate record of all proceedings under this Direction, including:

- (a) the instrument of appointment of the person appointed to investigate the matter;
- (b) investigations conducted under this Direction;
- (c) determinations where it was found that an employee is unable to efficiently and effectively perform his/her duties;
- (d) determinations where it was found that there was no inability;
- (e) discontinued investigations and the reasons for discontinuation; and
- (f) any action taken in accordance with section 48(1) of the Act.

9.2 These records must be made available to the Commissioner as and when required.

10. OPERATIVE DATE:

10.1 This Commissioner's Direction will be operative on and from 1 January 2009.

10.2 Where an investigation has commenced under the previous Commissioner's Direction, but has not been completed as at 1 January 2009, the matter shall be finalised in accordance with this Direction.

Issued on 5 December 2008 by authority of the State Service Commissioner pursuant to section 20 of the *State Service Act 2000*.

Robert J. Watling
STATE SERVICE COMMISSIONER