

EMPLOYMENT INSTRUCTION NUMBER 6

INABILITY TO DISCHARGE DUTIES

1. SCOPE AND PURPOSE

This Employment Instruction identifies the issues which must be addressed when the Chief Executive Officer is of the opinion, on reasonable grounds, that an employee is not able to discharge his or her duties as set out in section 44 of the *Public Sector Employment and Management Act* (the Act).

This Employment Instruction also refers to action which should be taken prior to commencing the formal process under the Act. This "preliminary" process would normally occur outside any regular performance management procedures but may have resulted from a performance problem identified in the performance management process.

2. LEGISLATIVE BASIS

Sections 44 to 47 and Section 57 of the Act.

3. OTHER SOURCES OF INFORMATION

The following should be read in conjunction with this Employment Instruction:

- Employment Instruction Number 3 - Natural Justice;
- Employment Instruction Number 4 - Performance Management;
- Employment Instruction Number 5 - Medical Incapacity;
- Employment Instruction Number 7 - Discipline; and
- Investigation Handbook.

4. REPORTING REQUIREMENTS

Section 18(2)(c) of the Act requires the Commissioner to report annually on the extent to which inability procedures have been invoked in the Public Sector.

Chief Executive Officers shall provide to the Commissioner the information necessary for the Commissioner to comply with this reporting requirement.

5. AGENCY ACTION REQUIRED

Chief Executive Officers may establish procedures regarding inability to discharge duty within their agency which are not inconsistent with the Act, Regulations, By-Laws or Employment Instructions.

6. INABILITY TO DISCHARGE DUTIES

Inability is a situation where an employee is not performing his or her duties as defined by the relevant job description, duty statement and/or any competencies determined for the job, to the standard required by the agency.

Generally, inability differs from discipline, as the performance problem may be due to factors which are outside the employee's control. Indications of inability usually occur over a period of time whereas breaches of discipline arise from specific acts or omissions.

It is important that action arising from a conclusion of inability is regarded as a potential remedy for an identified inability and not as a penalty which may be construed incorrectly as a disciplinary outcome.

7. PRELIMINARY INABILITY PROCESS

7.1 Consideration of Informal Action

The following process should be considered prior to implementing formal action pursuant to section 44 of the Act:

- the employee's performance and the perceived deficiencies have been brought to the notice of the employee by the employee's supervisor by verbal or written notice and the performance problem has been discussed with the employee;
- the perceived deficiency has been discussed with the employee in relation to the duties set out in their Job Description and/or with reference to the level of performance or professionalism expected in the performance of those duties;
- the parties have attempted to reach agreement as to the action to be followed by both parties to remedy the inability and, where this occurs or where agreement is reached, expected outcomes have been accurately recorded;
- where an agreement on remedial action has been reached, a time frame should be established for review of the employee's performance and review of any need to modify the agreed remedies (such action may include assistance with on the job training, temporary transfer, mentoring, temporary reallocation of tasks, referral to outside medical or advisory services, etc.); and

- the agreed process and outcome have been brought to the notice of, and endorsed by, the agency's Human Resource Manager or other appropriate person who can assist in appraising the options considered by the parties and, if appropriate, suggest alternative remedies.

7.2 Action by Human Resource Manager or Other Appropriate Person

In a case where an employee denies there is an inability issue to address or where agreement to resolve the matter cannot be reached between the parties, the Human Resource Manager or other appropriate person should be fully informed and he or she shall recommend a course of action. Such actions, in the first instance, should outline appropriate strategies to raise the employee's performance to the necessary standard. If circumstances indicate that such actions would be inappropriate, the Human Resource Manager or other appropriate person may, after documenting his or her reasons for believing that to be the case, recommend the initiation of the formal inability process.

7.3 Recommendation to Initiate Formal Inability Process

Where a remedial action to address an inability has been undertaken by agreement between the employee and supervisor, or has been recommended by the Human Resource Manager or other appropriate person, and the required performance improvement has not been achieved within the period, the Human Resource Manager or other appropriate person may recommend the initiation of the formal inability process.

8. FORMAL INABILITY PROCESS

8.1 Chief Executive Officer Advice to Employee & Employee Response

The Chief Executive Officer must advise the employee in writing of the suspected inability and the grounds on which the opinion has been formed.

The employee must be given 14 days to explain the circumstances of the suspected inability. Where the Chief Executive Officer decides, after considering any response from the employee, that action is to proceed or no further action is required, the employee is to be advised accordingly.

An investigation will not be required if the employee, in writing, agrees with the opinion of the Chief Executive Officer regarding the inability to discharge duties. However, a Chief Executive Officer may decide an investigation will be appropriate on the same or different grounds to determine all the facts of the inability to discharge duties, and in such case the employee will be advised in writing that an investigation will be arranged.

8.2 Suspension and Transfer

It may be appropriate for the employee to be removed from the workplace by suspension (with or without pay) or transfer prior to or during an investigation.

A Chief Executive Officer has wide discretion in determining when it is appropriate to suspend or transfer an employee. For example, if it is considered that the employee, or other employees, may be at risk, or service to the public may be affected by the employee remaining in the workplace, then it may be appropriate to suspend or transfer the employee.

An employee should be invited to make a submission to the Chief Executive Officer in relation to the proposed suspension or transfer before a decision is made.

8.3 Arrangement of Investigation

As soon as practicable after the expiration of the 14 days referred to in 8.1 above, the Chief Executive Officer, if not satisfied with the employee's explanation or where it is deemed appropriate, shall arrange for an investigation by one or more persons.

Written terms of reference, detailing the particulars of the perceived inability, should be provided to the investigator(s).

The investigator(s) will be required to conduct and document the investigation and report the findings and reasons for those findings to the Chief Executive Officer. The report will in most cases be the key source of information on which the Chief Executive Officer ultimately makes his or her decision.

Investigators:

- must be impartial;
- would normally (but not always) be from an agency other than the agency in which the employee is normally or currently employed; or
- may be from outside the Public Sector; and
- should have appropriate qualifications and experience to enable them to carry out the investigation.

The Office of the Commissioner for Public Employment can provide assistance in the selection of investigating persons and has produced a handbook which provides guidelines for conducting employment related investigations.

The investigator(s) should consider all the available evidence, such as the description of duties normally undertaken by the employee, supervisors' reports, records of counselling, any agreed or identified performance standards, any information gained during the preliminary process and, if appropriate, medical reports obtained or obtainable (see Employment Instruction Number 5 - Medical Incapacity for processes relating to arranging medical examinations and access to medical information).

8.4 Investigating Persons Reporting Requirements

The report to the Chief Executive Officer should cover:

- the matter under inquiry;
- the terms of reference;
- the investigation process; and
- the findings of the investigation and the reasons for the findings.

8.5 Action of Chief Executive Officer after Investigation

- (i) Not later than 14 days after receiving the investigation report, the Chief Executive Officer shall advise the employee of the findings and reasons for the findings.
- (ii) Where, after considering the investigation report, the Chief Executive Officer decides that his or her opinion of the employee's inability under section 44 of the Act is not substantiated, the Chief Executive Officer shall notify the employee accordingly in writing.
- (iii) Otherwise, the Chief Executive Officer should, at the time of providing a copy of the findings and reasons for the findings in accordance with paragraph (i), invite the employee to make a written submission in relation to the findings and reasons for the findings.

Where, after considering the investigation report and the submission of the employee (if any), the Chief Executive Officer remains of the opinion, on the same or different grounds, that there is an inability to discharge duties, the Chief Executive Officer shall advise the employee in writing of:

- the Chief Executive Officer's decision, with reasons;
- the actions available to the Chief Executive Officer under section 46(1) of the Act; and
- the action foreshadowed by the Chief Executive Officer as the most appropriate (this may include a combination of actions available);

and invite the employee to make a submission on the foreshadowed action and any other action available to the Chief Executive Officer.

Following consideration of any submission from the employee, the Chief Executive Officer will advise the employee of:

- the Chief Executive Officer's decision;
- the action to be implemented;
- the date of effect; and
- his or her appeal rights.

The Chief Executive Officer's decision does not take effect unless the employee has:

- (a) waived his or her right of appeal in accordance with section 46(2) of the Act and section 57 of the Act; or
- (b) the appeal period has expired; or
- (c) an appeal has been disallowed or withdrawn.

Where the employee is to be transferred and/or a variation is to be made to designation or salary, a case management plan may be appropriate to provide support and assistance and to monitor and evaluate the success or the change.

The time which should be provided for the employee to make the submissions referred to in this subsection is not specified but must be reasonable and the Chief Executive Officer should be prepared to allow extensions of time if requested so as to permit the employee to properly respond. A good guideline would be 14 days such as is provided in section 44 of the Act for the employee's response to the notice of inability.

D J HAWKES
COMMISSIONER FOR PUBLIC EMPLOYMENT

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