

COMMISSIONER FOR PUBLIC SECTOR EMPLOYMENT GUIDELINE: POWER TO REQUIRE MEDICAL EXAMINATION

Public Sector Act 2009
Updated: March 2014

COMMISSIONER FOR PUBLIC SECTOR EMPLOYMENT GUIDELINE: POWER TO REQUIRE A MEDICAL EXAMINATION – SECTION 56 OF THE *PUBLIC SECTOR ACT 2009*

INTRODUCTION

Who is covered by this Determination?

This Guideline applies only to public service or declared public sector agencies and their employees.

The Commissioner for Public Sector Employment is empowered to issue guidelines relating to public sector employment matters pursuant to section 14(d) of the *Public Sector Act 2009* (the PS Act).

This Guideline should be read in conjunction with the:

- *Public Sector Act 2009*
- *Public Sector Regulations 2010*
- *Commissioner for Public Sector Employment Guideline: Management of Unsatisfactory Performance (Including Misconduct)*
- *Code of Ethics for the South Australian Public Sector*

Section 56 of the PS Act provides that a chief executive or their delegate may direct an employee to undergo a medical examination by an independent medical practitioner where the employee is performing their duties unsatisfactorily and it appears that such unsatisfactory performance may be caused by mental or physical incapacity.

Decision-making

Wherever possible, chief executives should personally retain the power to decide whether to refer an employee for a medical examination under section 56 of the PS Act.

Tact, discretion and sensitivity

Referring an employee for a medical examination under section 56 of the PS Act can be distressing for the employee and other employees of the agency, and sometimes the family of the employee.

Chief executives and delegates – as well as managers involved in the consideration of possible reliance on section 56 of the PS Act – must ensure that in so far as is reasonably possible, processes are conducted with tact and discretion and the employee subject of a possible direction is treated sensitively and with respect. This includes any managerial decisions taken before a direction under section 56 of the PS Act is considered or issued, such as consideration of assigning or transferring employees to different duties or a place(s) to carry out such duties (under section 47 or 9 of the PS Act) or requiring them to remain absent from the workplace due to occupational health, safety and welfare considerations.

Early and informal intervention

As with many situations involving the unsatisfactory performance of employees, informal and timely discussions between management and an employee may resolve concerns about the employee's performance. Consultation with the employee and the employee's doctor (only with the employee's consent) may provide information to enable effective management of

the employee's performance thus that there is no need to seek to rely upon section 56 of the PS Act.

Open Communication

Management must, in so far as is reasonably possible, communicate openly with an employee where reliance on section 56 is being considered. Information should be shared in a respectful, timely and appropriate manner, and dealt with in view of its confidentiality, and stored securely.

Procedural fairness etc

In accordance with the details contained within the Guideline regarding Management of Unsatisfactory Performance (Including Misconduct) where consideration is being given to reliance upon section 56 of the PS Act, management, should wherever possible provide an employee with:

- Information as to the manner in which their performance is alleged to be unsatisfactory, and a reasonable opportunity to respond to such allegations and to remedy such unsatisfactory performance.

Where section 56 is relied upon and an employee is directed to undergo independent medical examination:

- The information provided by management to the medical practitioner chosen by the employee to conduct an examination of them, is provided to the employee prior to them attending the medical examination.

Section 56 of the PS Act requires that the chief executive or delegate is to provide a copy of any report containing the results of a medical examination under the section. Employees are also to be provided with not less than 14 days from receipt of such medical report(s) to provide the chief executive or delegate with any medical reports obtained by the employee. Decision-makers should wherever possible be generous with the time provided to furnish such reports, taking into account the relevant circumstances.

The chief executive or delegate must allow an employee the opportunity to respond on any course of action proposed under the PS Act (sections 53, 54 and/or sections 47 or 9) based on their unsatisfactory performance and related medical information.

Employees must be permitted the opportunity to be accompanied by a support person of their choosing throughout any formal performance management process including any relating to the reliance or possible reliance on section 56 of the PS Act.

Decision-makers and any managers involved in processes relating to the management of performance by an employee alleged to be unsatisfactory are at all times to act without bias and to make decisions that are reasonable based on the facts and circumstances.

Practical application of section 56 of the PS Act

A chief executive or delegate must be satisfied on reasonable grounds that a public service employee is not performing their duties satisfactorily (interpreted in a broad manner) and suspect on reasonable grounds that such unsatisfactory performance may be caused by mental or physical incapacity. These factors are questions of fact and clearly decision-makers are reliant on evidence in respect of an employee's performance. Evidence may

consist of medical reports in management's possession and/or statements of witnesses to conduct and/or documentation of formal performance management processes.

As stated, the suspicion that unsatisfactory performance is caused by mental or physical illness or disability must be reasonably held. Evidence may include (but is not limited to) a significant change in behaviour or demeanour, inability or difficulty by an employee in performing physical aspects of their role, excessive or frequent absences from the workplace, threats of harm to others or of self-harm or emotional outbursts by an employee.

Reliance on section 56 of the PS Act must not be used as a substitute for normal performance management strategies. Managers are to make reasonable efforts to address incidents of unsatisfactory performance without resort to section 56 of the PS Act.

What process should be followed?

By way of guidance, the following approach should be adopted in circumstances where reliance on section 56 of the PS Act is being considered:

1. Wherever possible, begin with an informal approach

Wherever possible, in circumstances where a management believes on reasonable grounds an employee's performance is unsatisfactory and believes on reasonable grounds that the unsatisfactory performance may be caused by physical or mental incapacity illness or disability, an informal approach should be adopted by management as an initial step. This may provide an opportunity for an employee to volunteer information about any issues that may be affecting their performance. Such information may assist in developing a mutually satisfactory workplace solution (e.g. agreement to modify duties and/or the workplace in the short-term or to assist the employee to identify appropriate alternative duties).

As with any process for managing alleged unsatisfactory performance by an employee, they must be provided with information adverse to them and provided with a reasonable opportunity to respond.

There may be benefits to both the employee and the agency if the employee's treating doctor is able to provide information that assists in managing the situation. Indeed, it will usually be the case that information from an employee's treating practitioner is sufficient and where this is provided, section 56 of the PS Act need only be relied upon where it is clear that such medical reports are at odds with other information available to management.

2. Reliance on section 56 of the PS Act

Under section 56 of the PS Act, a chief executive or delegate may require an employee to undergo a medical examination by an independent medical practitioner selected by the employee from a panel of medical practitioners nominated by the decision-maker (further information is provided within *Commissioner for Public Sector Employment Guideline: Management of Unsatisfactory Performance (Including Misconduct)*).

As indicated, given the sensitivity associated with the referral of an employee for medical examination under s56, it is strongly recommended that chief executives retain the authority to initiate processes under section 56 of the PS Act and that in any event, they not delegate such authority below executive director level or equivalent.

Where a direction is given to an employee, it should be to undergo examination by a relevant independent medical specialist – not a General Practitioner.

The medical practitioner must be provided with comprehensive written information in respect of an employee's alleged unsatisfactory performance and the basis upon which it is believed such performance may be caused by mental or physical incapacity. This may include, but not be limited to, a description of the employee's role, duties, outline of the work environment (if relevant) and a chronology of events and a summary of witness evidence.

The request to the relevant medical practitioner must request that the medical practitioner provide an opinion on:

- whether the employee is suffering from a mental or physical incapacity;
- whether such mental or physical incapacity is the cause of the employee's unsatisfactory performance;
- a prognosis for recovery by the employee from the incapacity in the short, medium and long term; and
- any changes to the employee's duties and/or workplace that might reasonably be made so as the employee can perform the inherent requirements of their role or an indication of other duties that the employee might reasonably be capable of performing in the short, medium or long term.

Management should provide medical practitioners with a copy of section 56 of the PS Act and explain that where an employee is required to undergo examination under that provision, the relevant relationship is between the agency and the medical practitioner (thus no issues of doctor-patient confidentiality arise).

3. Advising an employee that independent medical examination under section 56 of the PS Act is required

The chief executive, delegate or other management involved in the management of an employee, should advise them verbally and in writing of the requirement to submit to a medical examination by an independent medical practitioner under section 56 of the PS Act.

As already outlined, chief executives and delegates considering possible reliance on section 56 of the PS Act must ensure that the employee is notified using tact and discretion. Such notification should include advice to the employee that they may be accompanied by a support person of their choice throughout any process relating to the reliance or possible reliance on section 56 of the PS Act. Decision-makers may also wish to refer employees to the agencies' Employee Assistance Program provider. It is further recommended that decision-makers provide any such notification to the employee in a timely manner that affords the affected employee sufficient opportunity to consult with a support person should they wish to utilise this option.

After an employee has chosen a practitioner from the panel provided by the decision-maker, management will make an appointment for medical examination by the practitioner of the employee. Management should be as flexible as possible with the timing of such appointments.

Chief executives or delegates should provide employees with as much notice as possible of the time of any medical appointment (a minimum of five working days wherever possible).

A chief executive or delegate requiring an employee to undergo an independent medical examination under section 56 should assure the employee that information relevant to the process will be managed in a confidential and secure manner. They are to provide the employee with all information provided to the medical practitioner except information that is covered by any privilege (i.e. legal professional privilege) or immunity.

The employee must be advised that they have the right to seek Internal Review of a decision to require them to undergo a medical examination under section 61 of the PS Act and if they remain aggrieved after such review, an External Review under section 62 of the PS Act.

Employees are required to submit to a medical examination. If an employee fails to do so, without reasonable excuse, they may be suspended from duty, without remuneration and accrual of leave entitlements (see *Commissioner for Public Sector Employment Guideline: Management of Unsatisfactory Performance (Including Misconduct)*).

4. Consideration of medical and other information and of available options

Reports of independent medical practitioners obtained under section 56 of the PS Act are to be provided to the relevant employee. The employee is to be provided with no less than 14 days to furnish to the chief executive or delegate any medical reports obtained by them. Decision-makers should be as generous as possible in the circumstances with the time permitted to an employee to provide medical reports to them.

Following consideration of all relevant information pertaining to an employee's unsatisfactory performance and any medical incapacity they are suffering that has caused such unsatisfactory performance, the options available to a decision-maker include:

- continue or initiate action to manage unsatisfactory performance in the normal manner if the unsatisfactory performance is not caused by a mental or physical incapacity;
- consideration of modifications to the employee's duties and/or workplace to allow them to perform the inherent requirements of their role;
- consideration of agreeing with the employee to amend the terms and conditions of their employment in the short, medium or long term – i.e. part time arrangements or employment in a different role;
- reduction in the employee's remuneration level under section 53(1)(b) of the PS Act (combined with assignment or transfer of them to duties under section 47 or 9) but only after the agency has made reasonable endeavours to find and has failed to find suitable alternative public sector employment into which the employee may be assigned or transferred that maintains their substantive remuneration level; or
- termination of employment under section 54(1)(b) but only after the agency has made reasonable endeavours to find and has failed to find suitable alternative public sector employment into which the employee may be assigned or transferred that maintains their substantive remuneration level and only after the agency has complied with section 54(3) (report to the Commissioner for Public Sector Employment etc).

Further information regarding procedural fairness can be found within *Commissioner for Public Sector Employment Guideline: Management of Unsatisfactory Performance (Including Misconduct)*.

5. Employee's rights of review

An employee who is aggrieved by a decision to require them to undergo an independent medical examination under section 56 of the PS Act – or an employment decision associated with that requirement (i.e. a direction to remain absent from the workplace) may seek an Internal Review of that decision under section 61 of the PS Act. Where the employee remains aggrieved after Internal Review, they may seek External Review by the Public Sector Grievance Review Commission.

Where an employee is aggrieved with a prescribed employment decision following a process under section 56 of the PS Act, they may seek Internal Review under section 61 of the PS Act and if they remain aggrieved following Internal Review, External Review by the Industrial Relations Commission of South Australia (IRCSA). A 'prescribed decision' means:

- a decision to take disciplinary action; or
- any decision to reduce an employee's remuneration level; or
- a decision to transfer an employee, or to assign an employee to different duties or a different place, made in conjunction with a decision to take disciplinary action or reduce an employee's remuneration level; or
- a decision to transfer an employee, or to assign an employee to a different place, that reasonably requires the employee to change his or her place of residence.

Agencies have a duty to attempt to conciliate employee grievances under section 59 of the PS Act that remains on foot where the employee has chosen to seek Internal or External Review under section 61 or 62 of the PS Act.

An employee whose employment has been terminated and who believes that the termination was harsh, unjust or unreasonable, may apply for relief to the IRCSA pursuant to section 106 of the Fair Work Act 1994 (SA).

Further information regarding rights of review for affected employees can be found within *Commissioner for Public Sector Employment Guideline: Management of Unsatisfactory Performance (Including Misconduct)*.

References:

1. *Public Sector Act 2009* -
<http://www.legislation.sa.gov.au/LZ/C/A/PUBLIC%20SECTOR%20ACT%202009.aspx>
2. *Public Sector (Honesty and Accountability) Act 1994*-
[http://www.oper.sa.gov.au/files/PublicSector\(HonestyandAccountability\)Act1995.mht](http://www.oper.sa.gov.au/files/PublicSector(HonestyandAccountability)Act1995.mht)
3. *Code of Ethics for the South Australian Public Sector*.
<http://www.oper.sa.gov.au/page.php?id=351>
4. *Commissioner for Public Sector Employment Guideline: Management of Unsatisfactory Performance (Including Misconduct)*:
http://files.oper.sa.gov.au/files/Managing_Unsatisfactory_Performance.pdf