
DELEGATION OF POWER TO SUSPEND

Clause 13 of the South African Local Government Bargaining Council's Disciplinary Code Collective Agreement provides as follows:

- “13.1 The employer may at any time before or after an employee has been charged with misconduct, suspend the employee or use him temporarily in another capacity should the municipal manager be of the opinion that it would be detrimental to the interests of the employer if the employee remains in active service.
- 13.2 If the municipal manager intends to suspend an employee he shall give notice of such intention and afford the employee with an opportunity to make representation as to why he should not be suspended. The enquiry shall be done by means of the summary procedure as provided for herein.
- 13.3 The suspension or utilisation in another capacity shall be for a fixed and pre-determined period and at any rate shall not exceed a period of three months. Any suspension affected shall be on full remuneration”.

The question that arises is whether the employer, i.e. a municipal council may lawfully delegate the authority to suspend an employee in terms of clause 13.1 of the collective agreement to, for example, the municipal manager.

Arguments against delegation

The arguments against delegation are twofold, as follows:

- ★ The collective agreement is an expression of the parties to the agreement's consensus. Delegation by the employer of its powers in terms of the agreement is tantamount to unilateral amendment of the agreement.
- ★ The collective agreement does not expressly or by implication authorise the employer to delegate its power in this regard. If the parties to the agreement wanted the employer to be able to delegate its powers, it should have said so in the agreement as it has done on several instances in respect of the municipal manager.

Arguments for delegation

No collective agreement confers powers, functions or duties upon a municipality/council. The powers, functions and duties of municipalities/councils derive from the Constitution itself and from national and provincial legislation.

In terms of section 160(1)(d) of the Constitution a municipal council may employ personnel that are necessary for the effective performance of its functions. It could thus be accepted that each municipal council is the employer of the persons that work for the municipality. In terms of section 156(5) of the Constitution a municipality has the right to exercise any power concerning

a matter reasonably necessary for, or incidental to, the effective performance of its functions. Section 160(1)(a) of the Constitution declares that a council makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality. One could therefore safely assume that a council is clothed with all the powers, functions and duties conferred by law (including the common law) upon the employer.

Section 160(2) of the Constitution forbids a council to delegate its powers in respect of the passing of by-laws, the approval of budgets, the imposition of rates and other taxes, levies and duties and the raising of loans. Barring similar limitations in other legislation, a council may therefore delegate any of its “employment powers” to any of its political structures, political office-bearers, councillors or employees.

Section 59(1)(a) of the Local Government: Municipal Systems Act 2000 commands a municipality to develop a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances. A municipality is empowered to delegate any of its powers, duties and functions, excluding a power mentioned in section 160(2) of the Constitution and the power to set tariffs, to decide to enter into a service delivery agreement in terms of section 76(b) of the Municipal Systems Act and to approve or amend the municipality's integrated development plan, to any of the municipality's other political structures, political office bearers, councillors, or staff members. Clearly section 59 of the Municipal Systems Act do not refer only to powers, functions and duties conferred on a municipality in terms of the Municipal Systems Act – it generally applies to any powers, functions and duties of municipalities.

Conclusion:

- A municipality and its council derive their powers, functions and duties from the Constitution and from national and provincial legislation. It does not derive its powers, functions or duties from collective agreements.
- A municipal council has the legal authority in terms of section 59 of the Municipal Systems Act to delegate any of its powers, functions and duties except those expressly reserved for the council.

It is common cause that the act of delegation does not denude the delegating authority from its power. The delegating authority retains its power. It may exercise its power at any time and it may instruct the delegated body not to exercise its delegated power but to refer the matter to be resolved to the delegating authority.

Section 59(3) of the Municipal Systems Act empowers a council to review any resolution taken by a delegated body in terms of delegated powers and to set it aside, to vary it or to confirm it, subject to any rights that may have accrued. The council also has the authority to instruct a delegated body to reconsider its own decision taken under delegated powers.

In terms of section 63 of the Municipal Systems Act delegated bodies must report to delegating authorities regarding the exercise of their delegated powers. A council therefore has some form of control over the decisions that its municipal manager may make if the power to suspend employees has been delegated to her/him.

Any person who reckons that her/his rights have been affected by a resolution taken under delegated powers may appeal against the decision. The authority who considers the appeal may confirm, vary or revoke the decision, but such variation or revocation may not detract from any rights that may have accrued as a result of the original decision.

Conclusion:

- ✘ The current legal framework for delegation contains adequate checks and balances to avoid abuse of delegated powers.
- ✘ Delegation of the power to suspend an employee cannot be viewed as a unilateral amendment of a collective agreement as the “employer” (council) is not denuded of its power and it has adequate opportunity to review and to change, confirm or revoke any such decisions.

It is clear that the power to suspend an employee from active duty for a period may be exercised only in relation to suspected or alleged misconduct. In this regard section 55(1)(g) of the Municipal Systems Act determines that the municipal manager is, subject to the policy directions of the municipal council, responsible and accountable for, amongst other things, “... the maintenance of discipline of staff ...”. It may be argued that the SALGBC, in formulating clause 13 as it did, purported to assign a duty vested in the municipal manager to the manager’s employer. It could therefore be argued that delegating the “employer’s” powers to suspend employees as expressed in clause 13.1 of the collective agreement would merely ensure that the municipal manager is able to discharge her/his duties in terms of section 55(1)(g) of the Systems Act.

Conclusion:

- ✓ Delegation of the power to suspend employees for a specified period from active service will be consistent with section 51(1)(g) of the Municipal Systems Act.