



AUSTRALIAN PUBLIC SERVICE COMMISSIONER
STEPHEN SEDGWICK

Ms Christine McDonald,
Secretary
Senate Finance and Public Administration Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms McDonald

I write to correct evidence I provided to the Committee at the Budget Estimates hearing on 24 May 2011 about the issuing of certificates under section 38 of the *Public Service Act 1999* (the Act). I will also address questions that have been taken on notice in relation to my responsibilities in issuing section 38 certificates.

Section 38 of the Act provides for the Public Service Commissioner to consider certain matters and issue a certificate before an Agency Head may proceed to terminate the employment of an SES employee. A decision by the Agency Head to terminate the employment of an SES employee may be made in a range of circumstances as detailed below (see question 2).

I indicated at the hearing that I had not issued any certificates under section 38. However, I am advised that since becoming Public Service Commissioner in December 2009 I have issued three section 38 certificates. The first certificate was issued on 8 December 2010 in the Department of Families, Housing, Community Services and Indigenous Affairs, the second on 5 January 2011 in AusAID, and the third on 16 February 2011 in the Department of Education, Employment and Workplace Relations. Unlike the matter under discussion at the hearing, each of these cases was not contentious. I was satisfied that the SES employees concerned had had sufficient opportunity to be heard, and had indicated their clear agreement to an acceptance of the termination action proceeding. Two cases satisfied section 29(3)(d) of the Act (see below) and one met section 29(3)(a).

The following questions were taken on notice at the above hearing:

1. *What are the grounds for issuing a certificate of dismissal?*

If a request is received from an Agency Head to consider a matter under section 38 of the Act, the Commissioner is required to consider whether the relevant requirements of the Public Service Commissioner's Directions 1999 (the Directions) under section 36 of the Act have been satisfied in respect of the proposed termination and whether the proposed termination is in the public interest.

2. *What has to be satisfied?*

The Directions were tabled at the hearing. In considering whether the relevant requirements of the Directions are satisfied Direction 6.8 is the primary relevant Direction, although Directions 6.1 and 6.2 are also relevant.

Direction 6.8 sets out certain minimum requirements for the Agency Head to observe in considering possible termination action in respect of an SES employee. Direction 6.8 requires an Agency Head to have due regard to procedural fairness in making an assessment that termination of the employee's employment is justified on one or more of the grounds in section 29(3) of the Act, and that the employee has been given information about other employment in the agency that the Agency Head considers could be made available.

Section 29(3) of the Act states that, for an ongoing APS employee, the following are the only grounds for termination:

- (a) the employee is excess to the requirements of the agency;
- (b) the employee lacks, or has lost, an essential qualification for performing his or her duties;
- (c) non-performance, or unsatisfactory performance, of duties;
- (d) inability to perform duties because of physical or mental incapacity;
- (e) failure to satisfactorily complete an entry-level training course;
- (f) failure to meet a condition imposed under subsection 22(6) (e.g. security or health clearances);
- (g) breach of the Code of Conduct;
- (h) any other ground prescribed by the regulations.

3. *What is the time line?*

The legislation does not prescribe a time line for the issuing of a section 38 certificate.

4. *Is formal counselling required?*

The legislation does not prescribe that formal counselling is required.

5. *Are a fixed number of written warnings or sanctions required prior to issue?*

The legislation does not prescribe that a fixed number of warnings or sanctions are required prior to a section 38 certificate being issued.

6. *Once a certificate has been issued what are the conditions?*

Once the Commissioner has issued a section 38 certificate the Agency Head may proceed with the termination process under section 29 of the Act. The Agency Head must provide the affected employee with a notice in writing terminating employment and stating the grounds for the termination. Public Service Regulation 3.12 requires that a decision to terminate the employment of an SES employee under section 29 of the Act must be notified in the electronic APS Employment Gazette.

7. *How long does the certificate give an officer before their dismissal is actioned?*

A section 38 certificate is a precondition to the termination of employment by the Agency Head. It does not prescribe any time line in relation to the termination of employment. Whether or when to proceed to termination after a certificate has been issued is a matter for the Agency Head.

8. *What are the terms of a dismissal certificate regarding payment of accrued leave and entitlements etc...?*

The section 38 certificate does not determine the payment of entitlements on separation. These matters are handled by agencies in accordance with the relevant authority, eg legislation, contracts and determinations.

9. Does the officer have the opportunity to explain their situation or action?

In considering a request from an Agency Head to issue a section 38 certificate, the Commissioner would in most circumstances offer the SES employee the opportunity to be heard on the relevant matters by presenting their case as to why a certificate should not be issued. In circumstances where the employee has indicated clear agreement with the proposed termination action the Commissioner may not seek further comment from them.

The section 38 process is distinct from the process in the agency leading up to the proposal to terminate the employment. Agency termination decisions must comply with procedural fairness obligations. There may also be other obligations imposed by relevant agency procedures to offer opportunities to an employee to put forward their view on the matter.

10. Provide the committee with a breakdown of requests made and those granted by month and agency since November 2007

Since November 2007 the following section 38 certificates have been issued:

- March 2008 in the Great Barrier Reef Marine Park Authority
- March 2008 in the Department of Treasury
- August 2008 in the Australian Research Council
- December 2008 in the Department of Innovation, Industry, Science and Research
- March 2009 in the Defence Material Organisation
- March 2009 in the Department Foreign Affairs and Trade
- August 2009 in the Australian Taxation Office
- December 2010 in the Department of Families, Housing, Community Services and Indigenous Affairs
- January 2011 in AusAID
- February 2011 in the Department of Education, Employment and Workplace Relations

In addition requests by the Department of Resources, Energy and Tourism, and the Australian Radiation Protection and Nuclear Safety Agency have been received but not resulted in a certificate being issued.

I will separately answer questions taken on notice in relation to the case of Ms Jane Wolfe at a later date.

Yours sincerely

Stephen Sedgwick
8 June 2011