



**MINISTRY  
PUBLIC SERVICE AND ADMINISTRATION  
REPUBLIC OF SOUTH AFRICA**

Private Bag X916, Pretoria, 0001, Tel: +27 12 336 1677/6, Fax: +27 12 336 7802  
Private Bag X9148, Cape Town, 8000, Tel: +27 21 469 5450, Fax: +27 21 469 5466

**TO: ALL EXECUTIVE AUTHORITIES OF NATIONAL DEPARTMENTS, PROVINCIAL DEPARTMENTS AND GOVERNMENT COMPONENTS**

**REQUESTS FOR DEVIATIONS FROM THE PUBLIC SERVICE REGULATIONS, DETERMINATIONS AND/OR DIRECTIVES ISSUED BY THE MINISTER FOR THE PUBLIC SERVICE AND ADMINISTRATION**

1. The DPSA has recently been inundated with requests from executive authorities for deviations from either the Public Service Regulations, 2016, Determinations and/or Directives issued by the Minister for the Public Service and Administration (the MPSA) in terms of the Public Service Act, 194.
2. In an effort to limit the number of requests for such deviations to just those matters justifying such request, it has become necessary to provide guidance on the factors and circumstances under which such deviations will be considered by the MPSA. This guidance will hopefully provide clarity to departments so that these requests are kept to a minimum and limited to only those requests that the MPSA is able to legally consider.
3. At the outset, it is imperative that attention is drawn to the principle that a public authority taking an administrative action must be authorised to do so (*Affordable Medicines Trust & Others v Minister of Health & Another* 2006(3) SA 246 (CC)). It therefore flows that, if there is no authorisation for the action, the action taken will be unlawful. Therefore any decision taken by the MPSA must be within what is

authorised or permissible in terms of the Public Service Act, which includes its regulations, determinations and/or directives.

4. Section 197 of the Constitution of the Republic of South Africa, 1996 (the Constitution) stipulates, amongst others, that within the public administration there shall be a public service that must function, and be structured, in terms of national legislation and that the terms and conditions of employment in the public service must be regulated by national legislation. The Public Service Act seeks to give effect to section 197 of the Constitution.
5. In terms of the Public Service Act, it is incumbent on the MPSA, among other responsibilities, to set norms and standards across the public service to ensure a consistent approach to employment related matters of public servants. These norms and standards find themselves in the Public Service Regulations, Determinations and Directives issued from time to time by the MPSA.
6. Regulation 4 of the Public Service Regulations allows the MPSA to-
  - (a) under justifiable circumstances, authorise a deviation from any regulation; and
  - (b) if necessary, authorise a deviation contemplated in paragraph (a) with retrospective effect for purposes of ensuring equality.
7. Similar provisions authorising the MPSA to approve deviations are found in some, not all, Determinations and/or Directives.
8. Therefore, taking into account the principle articulated in paragraph 3 above, it is evident that regulation 4 of the Public Service Regulations permits the Minister to approve a deviation from any regulation however, the MPSA may only exercise the power to deviate from Determinations and/or Directives if that particular Determination and/or Directive contains an express provision authorising the MPSA to deviate.
9. Therefore, in the event that a Determination and/or Directive does not provide that the MPSA may deviate from its contents, such a request to so deviate addressed

to the MPSA is superfluous as the MPSA will not be legally permitted to consider same regardless of the reasons proffered by the requester.

10. In circumstances where the MPSA is authorised to deviate from the Public Service Regulations, Determinations and/or Directives, such power is exercised with circumspect due to the impact which the deviation may have on norms and standards set by the MPSA. Deviations ultimately have the potential to erode, negate or change policy, in this case the norms and standards determined by the MPSA, and to set precedents such that future similar matters must be dealt with similarly thereby having the potential to, through stealth, detrimentally alter regulations, determinations and/or directives.
11. The discretionary power to deviate from the Public Service Regulations, Determinations and/or Directives is therefore only exercised by the MPSA where *justifiable circumstances* exist and in assessing such justifiable circumstances, the requesting department is required to demonstrate to the MPSA that, amongst other considerations,-
  - (a) the approval of the deviation will not result in a conflict with or derogate from the provisions of the Public Service Act or any collective agreement;
  - (b) compliance with the Public Service Regulations, Determinations and/or Directives is not possible under the circumstances;
  - (c) exceptional circumstances exist;
  - (d) irreparable harm will be suffered by an employee, department or the public service generally, if such a deviation is not considered;
  - (e) no unfair advantage to any person or department will be created should the deviation be granted; and
  - (f) the financial implications have been considered and the department is able to absorb such financial costs, if any.
12. In addition to the general power of deviation afforded to the MPSA in the Public Service Regulations, the MPSA is also empowered to authorise such a deviation from a regulation with retrospective effect for "*purposes of ensuring equality*". This therefore means that the power of the MPSA to approve a deviation with retrospective effect is limited to instances where the requesting department is able to demonstrate that equality will be achieved by the deviation. The right to equality

is enshrined in the Bill of Rights in the Constitution and provides that, amongst others, everyone is equal before the law and that equality includes the full and equal enjoyment of all rights and freedoms and the State may not unfairly discriminate directly or indirectly against anyone. This means that employees are required to be treated equally. The determination of equality is subjective and each matter will have to be determined on its own merits. The test adopted by the Constitutional Court in the matter of *Harksen vs Lane and others (CCT9/97) (1997) ZACC12* is whether the differentiation amounts to discrimination and if it does, whether such differentiation amounts to unfair discrimination.

13. Therefore any request for a deviation from the Public Service Regulations must satisfy the requirement that it is justifiable and if the request is that the deviation must be retrospective then an additional test must be met to determine whether the deviation will be for the purpose of ensuring equality.
14. In summary it is essential that departments recognise that deviations to the Public Service Regulations, Determinations and Directives issued by the MPSA are an exception and should not be requested unless absolutely necessary and as a last resort. Departments are urged to ensure that any requests for deviations take into account the guidance provided in this circular before being submitted to the MPSA.

Kind regards,



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**Ms Ayanda Dlodlo, MP**

**Minister**

**Date:** 05/04/2018