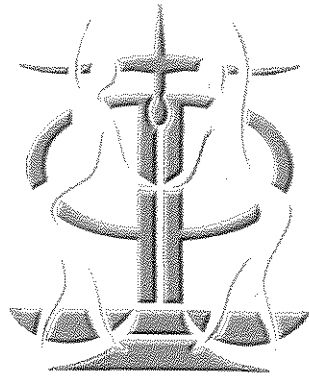


**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF
SECTION 182(1)(b) OF THE CONSTITUTION OF THE
REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF
THE PUBLIC PROTECTOR ACT, 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

REPORT NO. 29 OF 2010/11

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS THAT THE
DEPARTMENT OF EDUCATION IN THE EASTERN CAPE PROVINCE
FAILED TO SUBMIT CORRECT EXIT DOCUMENTS FOR
MR K W NYAMANI TO THE GOVERNMENT EMPLOYEES PENSION FUND.**

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Executive Summary

- (i) The Complainant (Mr Nyamani) was employed by the Department of Education (the Department) in the Eastern Cape, as a watchman based at Inyathi Senior Secondary School, from 12 April 1990 to 30 June 2007, when he retired.
- (ii) According to the Complainant, after his retirement date, he raised the matter of payment of his retirement pension benefits with the Department's District Office in Cradock in 2008 and 2009, and was informed that he was no longer on the persal system and therefore would not receive his pension benefits.
- (iii) The Public Protector's finding is that:
 - (a) The Department was responsible for the undue delay in submitting duly completed exit documents relating to the Complainant's pension benefits to the Government Employees Pension Fund (GEPF).
 - (b) The Provincial Department erred in terminating the Complainant's services on grounds of abscondment, instead of retirement.
 - (c) It was found that there is no system in place within the Department to monitor and verify the information submitted to process the retirement application.
 - (d) The Complainant suffered prejudice as a result of the acts and omissions of the Department.
- (iv) The remedial action to be taken is that:
 - (a) The Department must review the circumstances of this matter and present a plan of action by 31 January 2011 on the measures to be taken in order to avoid a recurrence of this incident.

- (b) While it is recorded that the Department has already taken remedial action to the extent of paying all outstanding remuneration and pension benefits to the Complainant, the Department must issue a letter of apology to him for the distress caused by the delay.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS THAT THE DEPARTMENT OF EDUCATION IN THE EASTERN CAPE PROVINCE FAILED TO SUBMIT CORRECT EXIT DOCUMENTS FOR MR K W NYAMANI TO THE GOVERNMENT EMPLOYEES PENSION FUND

1. INTRODUCTION

- 1.1 This report is submitted to the Member of the Executive Council responsible for Education in the Eastern Cape Province, the Head of Department, the Chief Executive Officer and the Director: Cradock District Office of the Department of Education, in the Eastern Cape Province, in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution) and section 8(1) of the Public Protector Act, 1994 (Public Protector Act).
- 1.2 A copy of the report is provided to Mr K W Nyamani (the Complainant) in terms of section 8(3) of the Public Protector Act.
- 1.3 The investigation relates to an allegation that the Eastern Cape Department of Education (the Department), informed the Complainant that he would not receive retirement pension benefits due to him, as he was no longer active on the Department's persal system.

2. THE COMPLAINT

- 2.1 The Complainant lodged a complaint with the Public Protector on 20 January 2009, alleging that he was informed by the Department that he would not receive retirement pension benefits due to him as he was no longer active on the Department's persal system.
- 2.2 The Complainant further stated that he had, for a period of two years been trying to resolve the matter with the Department without any success.



- 2.3 When Complainant's efforts to resolve the matter with the Department were unsuccessful, he then requested the Public Protector's intervention.

3. JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1 Section 181(1) of the Constitution provides that the Public Protector has the power to investigate any conduct in state affairs or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice.
- 3.2 On conclusion of the investigation, the Public Protector has to report on the conduct investigated and take appropriate remedial action.
- 3.3 In terms of section 6(4) (a) (ii) of the Public Protector Act, the Public Protector has the power to investigate any alleged abuse of power or other improper conduct by a person performing a public function.
- 3.4 The Department of Education is an organ of state which performs a public function.
- 3.5 The Public Protector therefore has the jurisdiction to investigate the complaint.

4. THE INVESTIGATION

The investigation was conducted in terms of sections 6 and 7 of the Public Protector Act.

4.1. Key Sources of Information

- 4.1.1 Perusal of the documents submitted by the Complainant;

- 4.1.2 Consultation, telephone conversations and correspondence with the Complainant;
- 4.1.3 Correspondence and telephone conversations with officials at the Provincial office of the Department;
- 4.1.4 Meetings, telephone conversations and correspondence with officials from the Cradock District and Provincial offices of the Department;

4.2 Summary of the Investigative Process and Evidence

4.2.1 Perusal of documents submitted by the Complainant

- 4.2.1.1 On perusal of the documents submitted by the Complainant, it was established that:
 - 4.2.1.1.1 On 7 July 2005, he wrote to the Cradock District office, of the Department, informing them that he intended to retire on 30 March 2006, in order for his application to be processed;
 - 4.2.1.1.2 The school principal had been requested to confirm the contents of the letter dated 9 October 2008 addressed to the Deputy Director: Finance Section (Mrs T Njumba) at the District Office of the Department as to whether the Complainant had absconded. She responded in a letter dated 9 October 2008, that the Complainant never absconded whilst working at the school;
 - 4.2.1.1.3 The Complainant had previously raised the matter with Mr Mabuya, at the District Office, who then informed him that he would not receive retirement pension benefits due to him as he was no longer active on the Department's persal system;
 - 4.2.1.1.4 The Department acknowledged that the Complainant's services had erroneously been terminated on grounds of abscondment.

4.2.2 Consultation, telephone conversations and correspondence with the Complainant

4.2.2.1 On 13 May 2009, the investigator phoned the Complainant who advised that he has met with officials from the District Office in Cradock who informed him that he was to be reinstated with full back pay.

4.2.2.2 On 25 May 2009, the Complainant visited the Public Protector's office and had in his possession letters which he had received from the Department's Cradock District Office addressed to the Provincial Office:

4.2.2.3 The first letter dated 29 January 2008 reads as follows:

"Please be informed that Mr Nyamani Kholisile William ID Number 440325 5495 08 9 has assumed duties for the Department, with effect from 1990.04.12. Therefore his services has been erroneously terminated on grounds of desertion, our office is busy handling the matter and the payment of pension dues."

4.2.2.4 The second letter dated 11 December 2008 reads as follows:

"the above mentioned general worker retired from his post in 2007, he has not yet been paid pensions and leave accruals due to certain delays within the Department, therefore the office of the national treasurer is still busy preparing his pension dues that can be paid in this bank account at any given time."

4.2.2.5 The third letter dated 15 April 2009 reads as follows:

"Mr.K.W. Nyamani worked as a watchman at Inyathi Senior Secondary School in Ntabethemba (Thornhill). Due to a

misunderstanding his services were terminated (abscondment) when he went on retirement. Letters by the principal (9 October 2008) and the CES (IDM&G) (27 January 2009) have produced no reversal of this termination by Mr Kgalasi. In the mean time we cannot process this person's pension or leave gratuity. Your urgent attention to this matter will be appreciated".

4.2.2.6 The fourth letter dated 11 September 2009, reads as follows:

"Mr Nyamani retired from his post as a watchman at Inyathi High School in 2007, therefore our Office is unable to payout his pension and leave gratuities as his termination has been erroneously terminated by the Head Office as abscondment instead of retirement. This has been liaised with the Head Office for rectification no progress has been made to date. Attached please find copies of correspondence referred to the Head Office."

4.2.3 Correspondence and telephone conversations with officials at the Provincial Department of Education

4.2.3.1 On 19 February 2009, the Public Protector raised the matter with the Provincial office of the Department in Zwelitsha and was informed by Mr Kgalasi that the matter of Mr Nyamani was still under investigation.

4.2.3.2 After various telephone calls to the Provincial Office of the Department to enquire about progress, it was only on 1 April 2009 that positive feedback was received, when Mr Kgalasi advised that the matter had been referred to the Human Resources Department for a decision. A response from that section was still awaited.

4.2.3.3 On 12 May 2009, the Public Protector received correspondence from the Provincial Office addressed to the District Office in Cradock, stating the following:

"Kindly be informed that this Directorate (Human Resource and Administration) has been instructed by Director: Labour Relations to reappoint Mr Nyamani after his supervisor has confirmed in writing that the said officer has never absconded from duty. Since he falls under the jurisdiction of your district you are requested to arrange for reappointment of Mr Nyamani. His termination reason of "desertion" has been changed to "resignation" in order to process his appointment."

4.2.3 Meeting with officials from the Cradock District and Provincial Offices of the Department of Education

4.2.3.1 On 20 May 2009, a meeting was held at the Eastern Cape Provincial Office of the Public Protector with officials from the Provincial and District Offices of the Department.

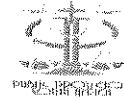
4.2.3.2 The meeting was attended by the following officials from the Public Protector's office:

- (i) Mr M K Ndlebe, Investigator;
- (ii) Mr V Magwebu, Senior investigator; and
- (iii) Ms V Poro, Administration Assistant.

4.2.3.3 The officials from the Department were:

- (i) Mr C Peters, Labour Relations, and Mr Mabuya, Human Resources from the Cradock District Office; and
- (ii) Mr T Chekwane, Labour Relations and Ms Ngalo, Assistant Director from the Provincial Office of the Department.

4.2.3.4 Mr Mabuya informed the meeting that the Complainant would be reinstated, following which the termination of his services would correctly be recorded as a retirement, not abscondment, in order for him to be entitled to his full pension benefits.



4.2.3.5 Inquiries were made by the investigator about the allegation made by the Complainant that notice of his retirement had been given in July 2005. The allegation was denied by Mr Mabuya, but he reiterated that the Complainant was to be reinstated.

4.2.3.6 The investigator enquired where the allegation that the Complainant had absconded came from. Mr Mabuya stated that the Department did not know the source of the claim. Ms Ngalo responded that, it had been discovered that the Complainant was placed under an unknown component. Mr Chekwane then informed the meeting that the Human Resource Department attempted to rectify the situation and some of the posts were advertised in the Daily Dispatch (local newspaper) in an attempt to locate the people that occupied posts such as that of the Complainant. He also stated that some people came to collect their monies at the Provincial Office. He also conceded that there was a challenge in verifying or locating such employees, as a result advertisements were made for the purpose of locating them.

4.2.3.7 The meeting then resolved that:

- (i) The reinstatement will be effective as from 2007;
- (ii) The Complainant's exit from service will be by way of retirement;
- (iii) The timeframe for resolution of the matter will be 28 May 2009;
- (iv) The matter was to be attended to by the District Director until it was resolved.

4.3.4 Further consultation, telephone conversations and correspondence with the officials from the District office and the Complaint

4.2.4.1 On 4 June 2009, the Public Protector received correspondence from the District office dated 29 May 2009 and addressed to the Provincial Office. Another letter was addressed to the Public Protector dated

4 June 2009. A computer printout reflecting the amendment of the reason for termination of service, was also received.

4.2.4.2 The letter dated 29 May 2009, reads as follows:

"Mr. Nyamani's service termination was erroneously terminated by the Head Office on grounds of desertion instead of retirement, we have been able to change the termination type but struggle to change the term date from 2007/07/22 to 2007/07/31. Therefore we humbly request your intervention in this regard. Attached please find confirmation letters from the School principal and the CES".

4.2.4.3 The letter dated 4 June 2009 reads as follows:

"We have reliably advised our Head Office in writing for the rectification of the day of the last day of service for the above mentioned from 22 July 2007 to 31 July 2007 as we are unable to do so at the level of the District Office, we only managed by power to rectify the termination type from desertion to retirement (faxes: our first fax was on the 29th May 2009 second one on the 04 June 2009. Leave gratuity BAS entity form in respect of the above mentioned was submitted to the Head Office on the 29 May 2009". Progress was then reported to the Complainant.

4.2.4.4. On 10 June 2009, the Public Protector received a letter from the Department's Cradock office which reads as follows:

"this problem is receiving a special attention as it is long overdue, therefore the Deputy Director- Finance will visit our Head Office on Friday 12th to collect the outstanding cheques and be deposited into his bank account. Applicant has already been notified".

- 4.2.4.5. The investigator then phoned the Complainant and he confirmed having been phoned by an official at the District office who informed him that cheques were to be deposited into his bank account.
- 4.2.4.6 On 7 July 2009, Mr Mabuya advised that payment of outstanding remuneration and benefits have been made.
- 4.2.4.7 On 9 July 2009, the Public Protector received a letter from the Complainant stating that he received his leave gratuity on 24 June 2009. In the letter he also thanked the Public Protector for the assistance provided.
- 4.2.4.8 On 8 October 2009, Mr Mabuya confirmed submission of the Complainant's requisite documents to the provincial office of National Treasury.
- 4.2.4.9 On 9 October 2009, the Public Protector received two letters from the District office, one dated 30 June 2007, stating that the Complainant's retirement was approved, and the other dated 9 October 2009, advising that the Department has finally managed to process and finalise the long outstanding pension claim of the Complainant. Further, that the claim has been submitted for payment to Pensions Administration in Bhisho on 8 October 2009. The claim covered pension contributions from the commencement date of his employment, being 12 April 1990, until the Complainant's date of retirement in June 2007.
- 4.2.4.10 On 14 October 2009, an enquiry was made to the Office of the Provincial Treasurer, as to whether they have indeed received the pension requisite documents of the Complainant. Mrs Bacaza confirmed receipt and advised that the documents have been forwarded to Pretoria for processing. Progress was then reported to the Complainant.

4.2.4.11 On 26 January 2010, the Complainant confirmed receipt of all benefits that were due.

4.3 Evaluation of evidence

4.3.1 Correspondence between the Provincial and District offices of the Department corroborates the assertion by the Complainant that he indeed retired in June 2007.

4.3.2 It is also evident that the Department erroneously recorded the reason for termination of service as abscondment, instead of retirement.

5. REGULATORY FRAMEWORK

5.1. The regulatory framework within which this matter was assessed is as follows:

5.1.1 The Law

5.1.1.1 The Constitution

(i) In terms of section 195(1) of the Constitution, public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

"(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) ...

(d) Services must be provided impartially, fairly, equitably and without bias."

5.1.1.2. The Government Employees Pension Law, 1996 and the Rules of the GEPF

- (i) The GEPF is regulated in terms of the Government Employees Pension Law, 1996 (GEP Law), and the Rules of the GEPF (Proclamation 21 published in Government Gazette 17135 of 19 April 1996).
- (ii) The GEP Law governs when payment should be made to an employee and states as follows:

"26. Period within which payment of benefits shall commence. -

(1) Notwithstanding anything to the contrary in any law contained, a benefit payable in terms of this Law shall be paid to the member, pensioner or beneficiary entitled to such benefit within a period of 60 days [after the date on which the Board receives a duly completed statement in the prescribed form or, if the Board receives such statement before the date on which a benefit is payable to the member or pensioner concerned in terms of this Law, within a period of 60 days after the date on which such benefit is so payable]...

(2) [If a benefit is not paid within the period referred to in subsection (1), interest] shall be paid by the Fund to the member, pensioner or beneficiary on any part of the amount of the benefit not paid within the period of 60 days referred to in subsection (1), at the rate prescribed, ...

(3) For the purpose of section 12 (1) of the Prescription Act, 1969 (Act 68 of 1969), a benefit payable to a member, pensioner or beneficiary in terms of this Law shall be deemed to be due on the date following the date on which a member's benefit becomes payable in terms of subsection (1) for the period after expiry of 60 days."

- (iii) The Rules of the GEPF distinguish between payment of retirement and payment of resignation benefits as follows:

“14.2 Discharge after at least 10 years pensionable service.

14.2.1 If a member who has at least 10 years pensionable service to his or her credit is discharged on account of a reason mentioned in rule 14.1.1 there shall be paid to him or her-

- (a) a gratuity calculated at 6,72 per cent of his or her final salary multiplied by the period of his or her pensionable service;
- (b) an annuity calculated at one fifty-fifth of his or her final salary multiplied by the period of his or her pensionable service; and
- (c) a supplementary amount of R360 per year:

Provided that a member's final salary shall for this purpose not be less than his or her pensionable emoluments as on the day immediately before the commencement date.

14.2.2 *The member may elect, in writing when he or she retires or is discharged, to have either the gratuity in rule 14.2.1 (a) or the annuity in rule 14.2.1 (b) reduced in favour of the increased spouse's pension entitlement in terms of rule 14.6.2. In this case either:*

- (a) *the gratuity in rule 14.2.1 (a) will be substituted for a gratuity calculated at 5,85 per cent of his or her final salary multiplied by the period of his or her pensionable service; or*
- (b) *the annuity in rule 14.2.1 (b) will be substituted for an annuity of one fifty seventh of his or her final salary multiplied by the period of his or her pensionable service.*

14.2.3 *Notwithstanding anything to the contrary contained in the rules, a gratuity which is payable in terms of rule 14.2.1 (a) and rule 14.2.2 (a) to a member who is a member of the South African National Defence Force and who is discharged in terms of any law*



before he or she attains the age of 53 years, shall be increased by 12 per cent of such gratuity.”

14.4 Benefits on resignation or discharge

“14.4.1 A member who resigns from his or her employer's service or is discharged from his or her employer's service because of misconduct or ill-health occasioned by his or her own doing or for a reason not specifically mentioned in the rules and who is not entitled to receive benefits provided elsewhere in the rules, is entitled, on the written choice of the member, to-

(a) a gratuity calculated at 7,5% of his or her final salary multiplied with the period of his or her pensionable service, and increased by ten percentage points for each full year of pensionable service between 5 and 15 years; or

(b) a transfer benefit to an approved retirement fund equal to the aggregate of-

(i) the amount referred to in paragraph (a), which amount shall become an entitlement of the member on the condition that he or she deposits the amount into the approved retirement fund immediately upon becoming entitled thereto; and

(ii) the difference between the member's actual interest in the Fund and the amount referred to in paragraph (a), if any. Interest shall be added to the transfer benefit to account for any delay in payment thereof to the approved retirement fund. Such transfer shall be made subject to the rules of the approved retirement fund specifying that, with reference to the transfer benefit, any subsequent lump sum benefit payable by that fund or any successor fund to the member and/or his beneficiaries shall be limited to one third of the said transfer benefit, with interest. The balance of the member's transfer benefit with interest, after deduction of any lump sum payment referred to above, shall be applied for the purchase of an annuity, albeit immediately or upon the member's ultimate retirement.”

5.1.2 The Batho Pele Principles

5.1.2.1 The following Batho Pele Principles are relevant to the matter:

- (a) Service Standards: Citizens should be told what level and quality of public services they will receive so that they are aware of what to expect;
- (b) Courtesy: Citizens should be treated with courtesy and consideration;
- (c) Information: Citizens should be given full, accurate information about the public services they are entitled to receive;
- (d) Redress: If the promised standard of service is not delivered, citizens should be offered an apology, a full explanation and speedy and effective remedy; and when complaints are made, citizens should receive a sympathetic, positive response.

6. CONCLUSION

- 6.1 The Department has a deficiency in that it does not have a system in place to ensure that retirement applications are correctly captured.
- 6.2 The lack of a system in processing exit documents resulted in the Complainant's exit from service being recorded as abscondment, whereas he had retired.
- 6.3 The Complainant's exit documents were only submitted to the GEPF office in Bisho on 8 October 2009, two years after the Complainant's retirement had been approved.

- 6.4 The Department was obliged to deliver the relevant pension documents to the GEPF within a reasonable time after the retirement of the Complainant, as the GEPF calculates pension benefits according to the information received from the employer department.
- 6.5 The Department has remedied the situation as far as the Complainant is concerned and he has been paid all benefits due to him.

7. FINDINGS

- 7.1 The Department was responsible for the undue delay in submitting the correct exit documents relating to the Complainant's pension benefits to the GEPF.
- 7.2 The Provincial Department erred in terminating the Complainant's service on grounds of abscondment instead of retirement.
- 7.3 It was found that there is no system in place within the Department to monitor and verify the information submitted to process the retirement application.
- 7.4 The Complainant suffered prejudice as a result of the acts and omissions of the Department.

8. REMEDIAL ACTION

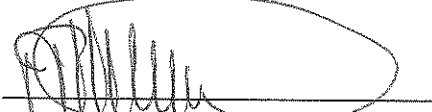
- 8.1 In terms of the provisions of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act the remedial action required is:
- 8.1.1 The Department must review the circumstances of this matter and present a plan of action by 31 January 2010 on the measures to be taken in order to avoid a recurrence of this incident.

8.1.2 While it is recorded that the Department has already taken remedial action to the extent of paying all outstanding remuneration and pension benefits to the Complainant, the Department must issue a letter of apology to him for the distress caused by the delay.

9. MONITORING

9.1 The Department should provide the Public Protector with a response to this report, including planned action, indicating timelines, within 30 days of the issuing of this report.

9.2 The Public Protector will monitor the implementation process on an ongoing basis.



ADV T N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 06/12/2010

Assisted by: Mr M K Ndlebe, Investigator: Eastern Cape