

(1) Distinction between Section 38 and Section 39 agencies

The HSE funds a range of service providers under either section 38 or section 39 of the Health Act 2004.

The HSE (the Executive) is required by statute to manage and deliver, or arrange to be delivered on its behalf, health and personal social services. The Health Acts, 1947 to 2013 empower the Executive to enter into an arrangement with the Provider to provide health and personal social services.

Annually the Executive provides funding of approximately €3bn to almost 3,000 agencies for the delivery of a range of services. The bulk of this funding €2.44bn goes to some 44 agencies (known as Section 38 agencies) primarily in the acute hospital and disability sectors.

Section 38 arrangements involve organisations that are funded to provide a defined level of service on behalf of the HSE, while under Section 39 the HSE grant-aids a wide range of organisations, to a greater or lesser extent.

The employees of agencies that are funded under **Section 38 of the Health Act 2004** are **classified as public servants**. They are subject to the standard salary scales for the health sector as well as having access, in the main, to a public service pension scheme. The employees are included in public service employment numbers. The Central Remedial Clinic (CRC) is a **Section 38** Agency.

The employees of agencies that receive grant-aid from the HSE under **Section 39** are **not public servants and are not specifically subject to the pay-scales approved for public servants**. The employees of such organisations are not included in public service employment numbers. REHAB is a **Section 39** Agency

(2) Top Up Payments in Section 38 Bodies – Audit

- Salary rates for HSE employees and those employed in voluntary bodies which receive significant state funding under service agreements with the HSE are approved by the Minister for Health with the consent of the Minister for Public Expenditure and Reform. They are listed in the consolidated pay scales for the Health Sector which are published and form a significant element of government public service pay policy.
- While deviation from standard pay scales can be sanctioned to meet particular needs or requirements in limited cases, such cases are subject to approval of the Minister for Health with the consent of the Minister for Public Expenditure and Reform.
- Unsanctioned payments that have not been appropriately sanctioned can give rise to contractual expectations or demands which may compromise public service pay policy.
- While the Department of Public Expenditure creates the policy on payments, and sanctions the salary rates within the Health Sector, it cannot monitor implementation or audit compliance. The latter is properly a matter in the first instance for the Department of Health and HSE, to ensure that Government policy on pay is being complied with.

- A situation whereby a publicly funded body in the voluntary sector can generate significant increased costs which ultimately fall on the public purse without appropriate sanction is not tenable. We support the view of the Minister for Health that departures from public service pay policy are unacceptable. This is underscored by the fact that such payments have on occasion been paid on a pensionable basis, thereby accruing an ongoing cost to the State.

Audit:

Regarding the recent revelations in relation to additional unsanctioned (by definition unsanctioned payments did not carry the sanction of the Department of Public Expenditure and Reform) payments being made in the Health Sector, this Department has supported the work of the Department of Health and the HSE, in addressing the payment of unsanctioned amounts being made in the Section 38 (Health Act) Agencies and will continue to do so as appropriate.

Update

In line with the pay policy, and as part of the ongoing process to reach compliance, organisations seeking to make a business case for the continuation of an unapproved allowance were invited to submit their business cases for consideration by the HSE. Business cases were also required for the continued payment of allowances which are not encompassed by or in line with the Department of Health Consolidated Salary Scales but may have been sanctioned in the past. A total of 202 business cases have now been received. These business cases are currently being reviewed by the HSE.

Did DPER know that these payments were being made?

- (i) Two cases (one each in 2009 and 2010) came to the attention of DPER when the Department of Health sought sanction for payment of accrued pension entitlement for previously unsanctioned amounts in long term payment to two retiring employees of separate voluntary bodies.
- (ii) The payments were sanctioned on the basis that Department of Health were to initiate a sectoral review of remuneration rates in payment with a view to identifying the extent of such practice in the voluntary sector and the liabilities arising for the Exchequer, and take steps to address any problems identified
- (iii) The Department of Public Expenditure and Reform on foot of correspondence from the Comptroller and Auditor General also raised the issue in one case of additional payments from non-Exchequer resources to an employee of a voluntary body. In that instance no charge to the pension fund arose.
- (iv) The Department in 2011 also sanctioned payment of a salary to an individual who was being appointed to a role on a secondment basis, and whose salary package by the seconding employer was indicated by the Department of Health to include a payment derived from a private source.

- (v) While DPER creates the policy on payments, and sanctions the salary rates within the Health Sector, it cannot monitor implementation or audit compliance. The latter is properly a matter in the first instance for the Department of Health and HSE, to ensure that Government policy on pay is being complied with.

Why were sanctions not followed up in relation to measures required to identify and address the problem?

In so far as follow up to the initial sanction in 2009, this was addressed when subsequent application made in 2010. Proposals were in place in 2010 to undertake review by Dept Health and following that in context of correspondence with C&AG in July 2011 we were made aware that Dept Health had initiated measures to address issue. The HSE Internal Audit report indicates the chronology of the attempts made to obtain detailed information on the nature and extent of problem.

What is position on the Pensionability of Personal (Top Up) Remuneration?

Provision of current state scheme provides only sanctioned pay rates considered for pensionability. On this basis only sanctioned rate would be pensionable under state scheme. Secondment/temporary transfer arrangement does not change this fact.

Is this a case where DPER are responsible for policy but policy and DPER has been ignored?

Outcome to audit is not welcome and highlights where policy has been avoided or bypassed. Reality is that while references at times in correspondence and media to additional unsanctioned payments it was not until after many different attempts to determine extent of problem that dedicated audit has brought full details of problem to light. The Internal Audit Report by HSE illustrated the challenges met in obtaining comprehensive information on the nature and extent of the payments identified.

Where particular issues were brought to attention of DPER/Finance appropriate policy response of seeking to determine extent of problem and putting in place measures to support adherence to policy were made conditions of sanction.

DPER fully supports approach of HSE to outcome to audit.

Does DPER have a policy on additional remuneration for public servants?

- (i) Firstly it has to be emphasized that these payments do not appear to have been submitted in advance to the Department for sanction.
- (ii) However in some instances it may have been that bodies were or considered themselves entitled to sanction additional payments having regard to the powers of the Boards of the bodies in question. This was not the case when the payments were pensionable; the instances that came to the Department's attention were requests to sanction pensions calculated on the basis of unsanctioned payments.

- (iii) Correspondence of 18 January 2006 in relation to public servants receiving more than one salary sets out policy in relation to public servants receiving more than one salary:

“the Minister is prepared to sanction payment in cases where it is established to his satisfaction that each of the following conditions is met:

that the duties involved are neither a part nor an extension of the officer’s normal duties, and that a rigid insistence on the principle of one person-one salary would deny scarce skills to the State, and

that payment is permitted for one additional appointment only, and

that the approval of the Department of Finance for additional payments is required in each case, and

that in no case should payment exceed the normal fee for the activity concerned, and that the duration of such payment should be limited to one term or 5 years whichever is greater.

In any case where a Department is satisfied that each of the conditions is met, application for sanction should be made to this Department, with supporting reasons. The application will be examined and a decision will be given by reference to the conditions quoted above.

In the assessment of any request for sanction, the consideration of condition 1 above is particularly critical. By way of guidance, I would advise that where an appointment is formally or informally ex officio in nature payment will not be approved.

It is the responsibility of the Department with responsibility for the board or other body or position to which appointments are being made to ensure that the rules on the payment of fees to public servants are correctly applied and, in any case where it considers that payment should be permitted, to seek the necessary sanction.”

The Department would in considering any request for sanction of additional/separate lines of remuneration would wish to have complete information in relation to both duties and remuneration that may attach to a post in order to satisfy itself that both sets of duties are mutually exclusive and warrant separate lines of remuneration. With respect to CEOs, an indication of the Department’s general approach to what is expected is suggested in the following standard term of the model CEO of State Agency contract:

“In pursuance of his/her duties hereunder, the Chief Executive shall perform such services and accept any office in any trade, sectoral body or association as the Agency may from time to time reasonably require without any further remuneration unless otherwise agreed with the Minister for XXX, given with the consent of the Minister for Public Expenditure and Reform.”

Furthermore the Department has recently issued a revised policy in respect of public servants sitting on boards of public bodies that:

“It will now be a requirement that public servants:

who sit on state boards in an ex officio capacity or on behalf of their parent Department/organisation or who may be nominated to such board positions independently of their public service employment

should not be paid remuneration in the form of board fees when serving in such a representational capacity. Accordingly, the criteria previously used to determine the eligibility of public servants to receive board fee payments will no longer apply in any such cases.”

Payment to Board members in bodies

- (i) It is firstly a matter for the relevant line Minister to determine whether members of particular boards of organizations should receive a fee or not. If a submission is made it can be considered.
- (ii) However, while fees are payable in principle to board members, it is now policy to first invite a member to waive their fee. Furthermore, board members who are employees of the public service or the wider public sector are subject to the OPOS principle which means that they should not be paid remuneration in the form of board fees.

Rehab Group (Section 39 Body).

- The Board of the Rehab Group has been informed in recent days of the decision by Angela Kerins to retire from her post as Rehab Group Chief Executive.
- Two subsidiary companies of the Rehab Group, Rehabcare and National Learning Network (NLN), receive approximately €50m from the HSE under Section 39 of the Health Act 2004 to provide services to people with disabilities, mental health issues and child and family services.
- Staff in organisations funded under Section 39 such as Rehabcare and NLN are not classified as public servants, not counted in public service numbers, don't have public service pensions and not bound by the Department of Health Consolidated Salary Scales.
- HSE funds more than 2,600 agencies through 4,100 individual service level arrangements under Section 39 of the Health Act 2004.
- On the request of the Minister for Health, the HSE wrote to all CEOs of Section 39 agencies outlining health sector pay policy and requesting each to have due regard to public pay policy, in particular in respect of senior management.
- In accordance with service level arrangements, since 2013 the HSE requires all funded agencies to disclose senior manager remuneration.