Jessica Hughes
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From:	Peter McGrath
Sent:	Thursday, 15 May 2014 10:24 AM
To:	Jessica Hughes
Subject:	FW: ASI and Volkers

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From: Peter McGrath
Sent: Wednesday, 12 March 2003 3:12 PM
To: Glenn Tasker (Glenn.Tasker@swimming.org.au)
Subject: FW: ASI and Volkers

Dear Glenn

Sam Wimsett from my office has had a look at this matter and I forward his advice set out below.

If you require any clarification plase call me.

Regards

Peter

ADVICE ON RISK MANAGEMENT FOR VOLKERS

Volkers is employed by the QAS.

ASI subcontract his services from the QAS.

ASI and Volkers have a Memorandum of Understanding that sets out the aims, objectives, conditions and responsibilities of the Head Coach.

Not stated in the MOU is the essential requirement that the Head Coach be contemporaneously working in a high performance swimming environment. As it stands, Volkers satisfies this requirement by way of his employment at the QAS.

Clause 6 of the MOU deals with Termination.

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Clause 6.1 could be construed as giving either party the right to terminate with 30 days notice. This clause is independent, it is not reliant on the conduct described in clauses 6.2 and 6.3.

Under clause 6.2, ASI may terminate the agreement if it considers that Volkers has not provided the agreed services or if he breaches the MOU. However, the MOU does not define what the agreed services are. Therefore we have to rely on the job responsibilities outlined at clause 5.

Under clause 6.3, ASI may terminate the agreement where conduct by Volkers causes eminent and serious risk to the health and safety of a person; or the reputation, viability or profitability of ASI.

The problem with this clause is that there needs to be 'conduct' by Volkers. If charges were not brought, dropped or if Volkers was not convicted, there could potentially be a lack of 'conduct' on his part.

Your suggestion to stand Volkers down on full pay pending the outcome of the investigation is the preferred option in light of the lack of a specifically applicable termination clause other than clause 6.1.

In the event of a subsequent adverse finding, it would be open for ASI to terminate under either clause 6.1 or 6.3. It is also a possiblity that clause 6.2 will be breached as it seems probable that Volkers will not be able to perform the duties outlined in clause 5.

A question that needs to be answered is, if Volkers is stood down from the QAS, can he still perform the tasks outlined in clause 5? On my reading it appears that he could. Is this correct? If the answer is no however then he will be in breach of his obligations under clause 5 and consequently clause 6.2 will apply.

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