



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

DECISION: I-06-0048-01

FILE: 2006-0048

OTTAWA, JULY 21, 2006

NIHAL SHERIF

COMPLAINANT

AND

THE DEPUTY MINISTER OF AGRICULTURE AND AGRI-FOOD CANADA

RESPONDENT

AND

OTHER PARTIES

MATTER	Request for a determination on the issue of timeliness
DECISION	Proper notification of the acting appointment was not given, therefore, the complaint is considered timely
DECISION RENDERED BY	Guy Giguère, Chairperson
INDEXED	<i>Sherif v. Deputy Minister of Agriculture and Agri-Food Canada et al.</i>
NEUTRAL CITATION	2006 PSST 0003

REASONS FOR DECISION

BACKGROUND

[1] On June 19, 2006, Nihal Sherif filed a complaint with the Public Service Staffing Tribunal (the Tribunal) in respect of the acting appointments of Todd Hunter as Deputy Director, Export Competition in December 2005 and on May 29, 2006, as Deputy Director, Market Access. The complainant alleges that the appointment in December 2005 was not posted on the Publiservice Web site, in accordance with regulations. Ms. Sherif further alleges that the acting appointment of May 29, 2006, was not posted on either the Publiservice Web site or on the Agriculture and Agri-Food Canada (AAFC) "News at Work" Web site.

[2] Ms. Sherif included with her complaint a copy of an email dated May 25, 2006, announcing that, effective the next Monday, Mr. Hunter would take on the role of Acting Deputy Director of Market Access.

[3] Ms. Sherif submits that she should not be considered to have missed the 15-day time limit, as she did not receive notice of her right and grounds to make a complaint in accordance with regulations. Alternatively, she requests an extension of the 15-day deadline for filing a complaint if the email that she received was considered notification for the acting appointment.

ISSUES

[4] Two preliminary matters have been raised with respect to this complaint:

(i) Does the Tribunal have jurisdiction to hear this complaint?

(ii) If the Tribunal has jurisdiction, was proper notification given to the complainant, or should the complainant's request for an extension of time for filing a complaint be granted?

I) JURISDICTION ISSUE

[5] On June 27, 2006, the Deputy Minister, Leonard J. Edwards, submitted that this complaint is against an acting appointment made under the previous *Public Service Employment Act*, R.S.C. 1985, c. P-33 (old PSEA). Therefore, the Tribunal does not have jurisdiction to hear this complaint and the request for an extension of time cannot be granted. Mr. Edwards nevertheless expressed his concerns with this complaint and others made by Ms. Sherif and indicated that he was undertaking an internal investigation of these matters.

[6] On July 5, 2006, Steve Tierney, Assistant Deputy Minister of Human Resources, informed the Tribunal that, following the investigation of Ms. Sherif's complaints, a series of steps would be undertaken to address the concerns raised. Specifically, the right to appeal against the acting appointment of Mr. Hunter would be posted.

[7] On July 11, 2006, the Public Service Commission (the PSC) presented its submissions on the issue of the Tribunal's jurisdiction. It first submitted that these are two separate acting appointments for two different positions. The acting appointment of December 2005 was made under the old PSEA and that proper recourse would be under the old PSEA. Secondly, as for the appointment of May 29, 2006, the PSC submitted that if the appointment is for a period greater than four months, the Tribunal has jurisdiction.

[8] After these submissions were made, the complainant and respondent amended their submissions after receiving new information. It was clarified that there were two distinct appointments. Mr. Hunter was first appointed as Acting Deputy Director, Export Competition from December 2004 to April 2005. Subsequent acting appointments were made and Mr. Hunter continued to act in this position until he was appointed on May 29, 2006, as Acting Deputy Director, Market Access. The second appointment is for a period of six months.

[9] On July 18, 2006, Mr. Tierney, on behalf of the Deputy Minister, submitted that the Tribunal does not have jurisdiction to hear a complaint on the first appointment as it was made under the old PSEA. He also submitted that the Tribunal clearly has jurisdiction to hear a complaint on the second appointment as it was made under the new *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (*PSEA*). Mr. Tierney indicated that a notice of information would be posted in the near future for this second appointment.

[10] In the response she sent to the Tribunal on the same day, Ms. Sherif withdrew her complaint on the first appointment. She submitted that the Tribunal should not delay its review of the second appointment, as she was not provided with any timeframe on when the notification on the second appointment would be made. She also submitted that, if necessary, the time to file a complaint be extended.

[11] The complainant has withdrawn her complaint on the first appointment and both parties have agreed that the Tribunal has jurisdiction to address the complaint on the second appointment of Mr. Hunter to Deputy Director, Market Access. Therefore, jurisdiction is no longer an issue and the issue of extension of time limit can be addressed.

II) PROPER NOTIFICATION OF THE SECOND APPOINTMENT AND REQUEST FOR AN EXTENSION OF THE TIME LIMIT TO FILE A COMPLAINT

[12] Ms. Sherif submitted that she did not receive proper notification of the second appointment as she was not notified of her right and grounds to make a complaint and, therefore, her complaint should be considered timely. The complainant explained that she was informed of this acting appointment by an email of May 25, 2006, but did not file a complaint within 15 days as she expected that a formal notification would be posted on either the Publiservice Web site or on AAFC's "News at Work" Web site. This expectation was based

on two other acting appointments that had been posted by AAFC for this work area and she expected that this would occur for the present acting appointment.

[13] The respondent's initial response was that the Tribunal did not have jurisdiction to hear this complaint and, therefore, the request for an extension of time could not be granted. The amended respondent's submission now indicates that the Tribunal has jurisdiction to hear a complaint on the second appointment. No additional submission was made on the timeliness of the complaint. It was only noted that a notice of information would be posted for this second appointment in the near future.

[14] The complainant's amended submission of July 18, 2006, indicated that she had not been given a timeframe on when a notice on the second appointment would be posted on the Publiservice Web site. She submitted that the Tribunal should not delay its review of the second appointment, and should extend the time if necessary.

[15] The *Public Service Staffing Tribunal Regulations*, SOR/2006-6, (the *Regulations*) provide that a complaint may be made to the Tribunal no later than 15 days after the day the person is notified of the appointment or proposed appointment to which the complaint relates. Section 10 of the *Regulations* reads as follows:

10. A complaint by a person may be made to the Tribunal

(a) except where paragraph (b) applies, no later than 15 days after the day on which the person receives notice of the lay-off, revocation, appointment or proposed appointment to which the complaint relates; and

(b) if the notice of the lay-off, revocation, appointment or proposed appointment to which the complaint relates is a public notice, no later than 15 days after the date of the notice.

[16] The *Regulations* do not specify the manner in which an employee is to be notified of an appointment. However, under section 13 of the *Public Service*

Employment Regulations, SOR/2005-334, the notification of an appointment must include both the name of the person being appointed, and the rights and grounds to make a complaint. Section 13 of the *Regulations* reads as follows:

13. The Commission shall, at the time that the following acting appointments are made or proposed, as a result of an internal appointment process, inform the persons in the area of recourse, within the meaning of subsection 77(2) of the Act, in writing of the name of the person who is proposed to be, or has been, appointed and of their right and grounds to make a complaint:

(a) an acting appointment of four months or more;

(b) an acting appointment that extends the person's cumulative period in the acting appointment to four months or more.

[17] The Federal Court of Appeal addressed the issue of notice in the context of a notice provision contained in predecessor regulations of the old PSEA. In *Healey v. Canada (Public Service Commission Appeal Board)*, [1982] 1 F.C. 792, the Federal Court of Appeal determined that a notice of appeal should not be regarded as having been given after the time to appeal has expired since the notification of appointment failed to comply with the notice requirements contained in the governing regulations. The Federal Court of Appeal further clarified in *Bova v. Canada (Public Service Commission)*, [1990] F.C.J. No. 1032 (QL), that where the notice fails to comply with the requirements contained in the notice provision, it cannot be considered proper notice at all. The Court found that "this does not entail (...) that the (...) notice of appeal is premature, because the Regulations establish the latest date for a notice of appeal (...) but no earliest date, so that if an unsuccessful candidate does not for some reason receive a notice of appointment at all, he/she can still file a notice of appeal ..."

[18] The same principle applies in the present case. Ms. Sherif should have received notice not only of the appointment of Mr. Hunter but also of the right and grounds to make a complaint. If the notification is incomplete, then a complaint should not be considered as having been given after the time to file a complaint has expired.

[19] It is, therefore, not necessary to consider the request for an extension of the time period to file a complaint pursuant to section 5 of the *PSST Regulations*.

[20] Section 10 of the *Regulations* establishes the latest date when a complaint must be filed, but not the earliest. The complaint is timely and there is no need for the Tribunal to delay the review of this appointment until proper notification has been completed under section 13 of the *Public Service Employment Regulations*, either by posting on the Publiservice Web site or otherwise.

[21] Given the above, the Tribunal accepts Ms. Sherif's complaint regarding the second acting appointment of Mr. Hunter and will consider and dispose of the complaint accordingly.

Guy Giguère
Chairperson

PARTIES OF RECORD

Tribunal File:	2006-0048
Style of Cause:	Nihal Sherif and the Deputy Minister of Agriculture and Agri-Food Canada <i>et al.</i>
Hearing:	Written request decided without the appearance of the parties
Date of Reasons:	July 21, 2006