

FILE: 2006-0022

OTTAWA, NOVEMBER 10, 2006

DAVID AUCOIN

COMPLAINANT

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

RESPONDENT

AND

OTHER PARTIES

MATTER	Request for order for provision of information
DECISION	The request is granted in part
DECISION RENDERED BY	Sonia Gaal, Vice-Chair
LANGUAGE OF DECISION	English
INDEXED	<i>Aucoin v. President of the Canada Border Services Agency et al.</i>
NEUTRAL CITATION	2006 PSST 0012

REASONS FOR DECISION

INTRODUCTION

[1] The complainant, Mr. David Aucoin, requested production of documents relating to a standardized test called “Supervisor Simulation Exercise 428”, information relating to the training of the selection board members to administer the standardized test, notes made during the complainant’s assessment under the Supervisor Simulation Exercise 428 and notes taken during the assessments of the four successful candidates.

BACKGROUND

[2] Mr. Aucoin filed a complaint on May 4, 2006 under section 77(1)(a), 77(2)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13, (the *PSEA*) concerning three acting appointments and one indeterminate appointment (Selection Process Number: 06-BSF-IA-ATL-NSD-PM-40) for positions of Superintendent, at the PM-04 group and level with the Canada Border Services Agency (the respondent) in Halifax.

[3] As part of the selection process, the complainant participated on March 7, 2006 in the Supervisor Simulation Exercise 428 which was used to select candidates for the four positions. He was advised on March 30, 2006 that he did not meet the essential merit criteria and would not be considered further in the appointment process.

[4] The complainant met with two of the three selection board members during the informal discussion which took place on April 4, 2006.

[5] The exchange of information took place with the respondent’s representatives on June 30, 2006. Dr. David Forster, a Senior Psychologist from the Personnel Psychology Centre (the PPC) of the Public Service Commission

(the PSC) was also present to address specific questions relating to the Supervisor Simulation Exercise 428.

[6] During this exchange, the complainant was provided with the board members' notes with the final rating and a detailed behaviour rationale for each one of the ratings he received. He also had a discussion with Dr. Forster.

[7] On July 10, 2006, the complainant filed detailed allegations and requested production of information regarding the standardized test. He asserted that this information will assist in determining the rating applied to the written and oral parts of the test, given the subjectivity in applying standardized tests.

[8] The respondent provided its reply on July 25, 2006 and the PSC submitted theirs on August 4, 2006. Both addressed the merits of the complaint as well as the issue of production of information.

[9] Following the complainant's request for access to the standardized test, the Tribunal wrote to the parties on August 15, 2006, asking them to specifically address the Federal Court decision *Canada (Attorney General) v. Gill*, (2001) 107 A.C.W.S. (3d) 429; [2001] F.C.J. No. 1171 (QL), which deals with disclosure of documents used in a standardized test. The Tribunal asked the complainant to identify the documents he required and advise whether he had a representative.

[10] On August 22, 2006, the complainant sent his response which outlined further documents and informed the Tribunal that he was represented from now on by a union representative of the Customs Excise Union Douanes Accise (CEUDA) of the Public Service Alliance of Canada (the PSAC).

[11] The PSC and the respondent submitted their positions on September 7 and 8, 2006 respectively.

[12] On September 28, 2006, the Tribunal wrote to the PSC asking further clarification on documents they listed in their response. The PSC provided the additional explanations on October 5, 2006.

ISSUES

[13] The Tribunal must decide the following issues:

- (i) Should the Tribunal order the production of documents relating to the Supervisor Simulation Exercise 428, including the Assessor's Manual?
- (ii) Should the Tribunal order the production of documents relating to the selection board members' training to administer the Supervisor Simulation Exercise 428, if such documents exist?
- (iii) Should the Tribunal order the production of notes made during the complainant's assessment under the Supervisor Simulation Exercise 428, if such notes exist?
- (iv) Should the Tribunal order the production of the selection board members' notes relating to the four successful candidates?

SUBMISSIONS

A) COMPLAINANT'S POSITION

[14] The complainant requested a copy of the the Assessor's Manual for the Supervisor Simulation Exercise 428 to determine whether the selection board members followed the directives and protocols contained within the Assessor Manual. He alleged that the three selection board members were not trained in Human Resources Management.

[15] Furthermore, the complainant alleged that the selection board members were not qualified to administer the Supervisor Simulation Exercise 428. He

therefore requested information regarding the type and duration of training they received in administering the Supervisor Simulation Exercise 428, the date it was received and whether they were successful.

[16] Moreover, the complainant requested copies of the selection board members' notes made during the Testing phase, the written responses, the verbal presentation as well as the notes taken in the Questioning phase. However, he stated further that no notes were made except for some short notations when a particular board member asked a question during the Questioning phase of the Supervisor Simulation Exercise 428.

[17] He submitted that the absence of notes is indicative that the selection board cannot justify its ratings. It would also raise the question of fairness and transparency of the process and be indicative of the board members' inability to administer the Supervisor Simulation Exercise 428.

[18] Finally, the complainant requested copies of the selection board members' notes on the written, oral and questioning phases and subsequent ratings for the four successful candidates to assist him in ascertaining whether the board members applied the same rationale and process to all candidates.

B) RESPONDENT'S POSITION

[19] The respondent submitted the Tribunal must first decide if the requested information is relevant.

[20] With respect to production of information related to the Supervisor Simulation Exercise 428, the respondent pointed to paragraph 17(1)(c) of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 (*PSST Regulations*), which deals with the refusal to provide information relating to standardized tests.

[21] The respondent noted the standardized test is owned by the PPC, a part of the PSC. The respondent deferred to the opinion of the PPC on the access

and communication of standardized tests materials but agreed that the parameters set out in *Gill, supra*, are still relevant.

[22] Furthermore, the respondent submitted that the information related to the complainant's assessment on his qualifications is relevant.

[23] Finally, the respondent submitted that the information related to the other candidates is not relevant to demonstrate that there was an abuse of authority in reaching the conclusion that the complainant does not possess an essential qualification.

C) PUBLIC SERVICE COMMISSION'S POSITION

[24] The PSC provided the Tribunal with the general rules and guidelines applicable previously under the former PSEA when dealing with standardized tests. The PSC indicated it was prepared to allow the complainant's representative to review the documents that relate directly to his complaint provided certain conditions were met. In essence, no copies of the standardized test would be provided but other conditions such as those applied previously, following the decision in *Gill, supra*, would be ordered.

[25] With respect to information regarding the selection board members' training in administering the standardized test, the PSC submits it is not relevant. Furthermore, the PSC notes that it advised the complainant during the exchange of information that there is no mandatory training for selection board members to undertake prior to administering a standardized test.

[26] The PSC also points out that if notes were made during the complainant's assessment, they would have been made by the department, not by the PSC. As a result, the PSC states it is not in a position to comment on their existence.

[27] Finally, the PSC submits that notes relating to candidates other than the complainant are irrelevant.

ANALYSIS AND DECISION

Issue I: Should the Tribunal order the production of documents relating to the Supervisor Simulation 428, including the Assessor's Manual?

[28] In *Gill, supra*, the Federal Court stated that "confidentiality of test materials is (...) an important aspect of the merit principle." The Federal Court also asserted the following at para. 7 (QL):

(...) this Court has consistently recognized the importance of maintaining the confidentiality of standardized tests on the grounds that disclosure of confidential test materials to public servants and others likely to take such tests could place them in a position to acquire information concerning expected responses and to use that information in future competitions or disseminate it to others, either intentionally or unintentionally.

[29] Paragraph 17(1)(c) of the *PSST Regulations* reads as follows:

17. (1) Despite section 16, the complainant or the deputy head or the Commission may refuse to provide information referred to in that section if providing that information might

(...)

(c) affect the validity or continued use of a standardized test or parts of the test or affect the results of a standardized test by giving an unfair advantage to any individual.

[30] In *Gill*, the Federal Court considered section 24 of the former *Public Service Employment Regulations* which reads as follows:

24. (3) Despite subsections (1) and (2), the deputy head concerned may refuse to allow access to information or a document, or to provide a copy of any document, if the disclosure might

(...)

(b) prejudice the continued use of standardized test owned by the department or commercially available; or

(c) affect the results of such standardized test by giving an unfair advantage to any individual.

(4) Despite subsections (1) and (2), the Commission or the Commission's representative may refuse to allow access to any information or document, or to provide a copy of any document, if its disclosure might

(a) prejudice the continued use of a standardized test owned by the Commission or commercially available;

(b) affect the results of such a standardized test by giving an unfair advantage to any individual.

[31] As these sections and both Regulations' objectives are practically identical, the Tribunal finds that the principles established in *Gill* under the former PSEA are applicable under the new PSEA.

[32] The first issue to determine is whether the material pertains to the complainant and should be disclosed by reason of its relevance. In this case, the Tribunal finds this information relevant to the complaint.

[33] The second issue is whether providing access to the confidential materials may affect the validity or continued use of a standardized test or part thereof by giving an unfair advantage to any individual. The Tribunal recognizes that the production of these materials may result in the complainant being able to familiarize himself with the answers and consequently, improve his performance should he take the Supervisor Simulation Exercise 428 again in the future. In these circumstances, the complainant would have an unfair advantage over other candidates by consulting the Assessor Manual. Therefore, the continued use of the standardized test would be prejudiced and the results, when the exercise is administered in the future, could be affected by an unfair advantage.

[34] The third issue is whether the prejudice to the future use of the test can be avoided through the imposition of conditions such as allowing only the complainant's representative to access the materials. The Tribunal finds that the conditions for the disclosure of information regarding standardized tests as decided in *Gill, supra*, apply in the instant case. The PSC is also in agreement with this reasoning.

[35] The PSC agreed to provide the background information for the simulation relating to the fictitious organization and the role to be played by the complainant

(Envelope A) and the simulation items to which the complainant was asked to respond during the Testing, Presentation and Questioning phases of the simulation (Envelope B) as well as the complainant's written summary to the complainant and his representative. Furthermore, the PSC agreed to have only the complainant's representative examine the Assessor's Manual and any notes prepared by the selection board members that refer to protected information contained in the Assessor Manual.

[36] The production of these documents and information is subject to a number of conditions described in the Order that is part of these reasons.

Issue II: Should the Tribunal order the production of documents relating to the selection board members' training to administer the Supervisor Simulation Exercise 428, if such documents exist?

[37] The *PSST Regulations* specifically address the issue of exchange of information between the parties at subsection 16(1). The information must be **relevant** to the complaint:

16. (1) In the interest of facilitating the resolution of the complaint, the complainant and the deputy head or the Commission must, as soon as possible after the complaint has been filed, exchange all **relevant** information regarding the complaint. (emphasis added)

[38] The *Canadian Oxford Dictionary*, 2004, defines the word "relevant" as follows: "bearing on or having reference to the matter in hand". In other words, this means the requested information must have bearing on the crux of the complaint and be essential for the adequate preparation of the case. This is what the complainant must demonstrate to the satisfaction of the Tribunal. To simply assert that one requires the information is not sufficient.

[39] The complainant alleged that the selection board members were not qualified to administer the standardized test and requested information regarding the type and duration of training they received. The PSC's response is that there is no standard mandatory training for assessment board members to undertake prior to administering the standardized test. The PSC must approve the use of a

standardized test and will determine, at its discretion, the level of training required, if any. The PSC's Personnel Psychology Centre assessment consultant or regional psychologist will make this determination based on the board's previous experience with simulations, level of knowledge of simulations and behavioural assessment in general and related factors. The Tribunal finds that it is not necessary for it to order the production of this information. The request is therefore denied.

Issue III: Should the Tribunal order the production of notes made during the complainant's assessment under the Supervisor Simulation Exercise 428, if such notes exist?

[40] Notes concerning the complainant's assessment are relevant and may be accessed by the complainant and his representative. The Tribunal, therefore, concludes that any notes, if such notes exist, made by the selection board members during all phases of the complainant's assessment may be accessed by the complainant and his representative.

Issue IV: Should the Tribunal order the production of the selection board members' notes relating to the four successful candidates?

[41] The *PSEA* changed the manner in which staffing is conducted in the federal public service. The Tribunal's recent decision in *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008 addresses well the new vision of the *PSEA*, where the preamble is of considerable assistance:

[62] (...) The following section is of particular note: "delegation of staffing authority (...) should afford public service managers the flexibility necessary to staff, to manage and to lead their personnel to achieve results for Canadians."

[63] This section of the preamble reinforces one of the key legislative purposes of the *PSEA*, namely, that managers should have considerable discretion when it comes to staffing matters. To ensure the necessary flexibility, Parliament has chosen to move away from the previous staffing regime with its rules-based focus under the former *PSEA*. The old system of relative merit no longer exists. The definition of merit found in subsection 30(2) of the *PSEA* provides managers with considerable discretion to choose

the person who not only meets the essential qualifications, but is the right fit because of additional asset qualifications, current or future needs, and/or operational requirements.

[42] Employees are no longer chosen by competition through a process based on relative merit where the “most qualified” candidate is appointed to the position but rather through a selection process where the candidate, who is the “right fit”, is selected for the position as outlined in subsection 30(1) and paragraph 30(2)(a):

30. (1) Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.

(2) An appointment is made on the basis of merit when

(a) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and (...)

[43] The *PSEA* no longer requires the establishment of a rank between candidates and does not require a comparative assessment of candidates in order for a position to be filled. The only requirement of the *PSEA* is that the person appointed must be qualified for the job as stipulated in paragraph 30(2)(a). Employees do not need to compare their results with those of appointees in order to ascertain whether they had better answers that affected their marks, standing or ranking in the selection process. Therefore, the Tribunal fails to see how the board members’ notes for the four successful candidates are relevant to his case.

[44] Employees must prove, on a balance of probabilities, that they were not selected or assessed as meeting the qualifications as a result of abuse of authority. As determined in *Tibbs, supra*, the onus rests with the complainant to prove an allegation of abuse of authority:

[50] (...) If the onus was with the respondent to prove that there was no abuse of authority, this would lead to a presumption of abuse of authority in all appointments, which without a doubt is not what Parliament intended. The general rule in civil matters should be followed and ***the onus rests with the complainant*** in proceedings before the Tribunal to prove the allegation of abuse of authority. (emphasis added)

[45] The Tribunal fails to see how the selection board members' notes for the four successful candidates can help the complainant meet the onus of proof, as outlined in *Tibbs, supra*. There is no need for the complainant to compare his results and answers with those of the successful appointees.

[46] Under the former PSEA, this same issue was addressed in *Gill*. The Federal Court determined that providing access to the test papers of all successful candidates would undoubtedly assist the employees should they take the test again, therefore, affecting the results. It would also significantly increase the risk that the information would be communicated to others. In the present instance, such access would prejudice the continued use of the test or affect future results by giving an unfair advantage. Thus, the same reasoning set out in Issue I of this decision applies.

[47] Finally, the complainant has not identified any incident or irregularity that might raise a doubt about the conduct of the process or how he was disadvantaged compared to the four successful candidates.

[48] Given all the reasons explained above, this request is denied.

ORDER

[49] In accordance with the principles set out in *Gill, supra*, the Tribunal orders a two-step exchange of information process outlined below.

[50] Step 1: The complainant and his representative, Mr. Bruno Loranger, Technical Officer at CEUDA (the PSAC), are to be given access to the following documents:

- the Background Information Booklet (Envelope A);
- the Simulation Items (Envelope B) that relate directly to the complainant;

- the complainant's written summary;
- the selection board's members' documentary notes, if such notes exist, taken during all phases of the complainant's assessment.

[51] During Step 1, the departmental representative and/or selection board members, as needed, are to explain how the Supervisor Simulation Exercise 428 was used in the appointment process under complaint, namely, what qualifications were assessed by the simulation, how the results were used and why the complainant received the marks he did, without describing the expected answers or rating guide.

[52] Step 2: This step is to be conducted in the absence of the complainant. The complainant's representative will be allowed to examine:

- the Assessor Manual for the Supervisor Simulation Exercise 428; and
- any notes prepared by the selection board that refer to protected information contained in the Assessor Manual.

[53] The Tribunal is satisfied that Mr. Loranger, the complainant's representative, is not an employee of the Public Service as he is employed by CEUDA (the PSAC).

[54] Both Step 1 and Step 2 are subject to the following conditions:

- a) All exchange of information pertaining to the simulation contents must take place on the employer's premises, under the supervision of the departmental representative during a reasonable period of time agreed upon by both parties.
- b) The complainant and his representative shall return all materials to the departmental representative at the conclusion of the meeting.
- c) All materials relating to the Supervisor Simulation Exercise 428 must be returned to Ms. Andrée Verville, Director General, Personnel Psychology Centre, immediately after the exchange of

information meeting, using appropriate means for transmittal of protected test material.

- d) No copy, photocopy or reproduction of the above documents is to be allowed.
- e) The complainant and his representative shall undertake not to disclose information obtained to any person, except during portions of the PSST hearing when any conditions imposed under subsection 17(5) of the *PSST Regulations* respecting the exclusion of persons from the hearing are in effect.
- f) During Step 1, the complainant and his representative are allowed to take personal notes during the exchange of information meeting, provided that such notes do not amount to a transcription of test materials. At the end of this meeting, all of the complainant's notes will be turned over to his representative who will keep them, together with his own notes, until the date set for the hearing. All handwritten notes by the complainant and his representative must be showed to the departmental representative prior to leaving to ensure there is no transcription of the test materials.
- g) During Step 2, the complainant's representative is allowed to take personal notes during the exchange of information meeting, provided that such notes do not amount to a transcription of test materials. All handwritten notes by the complainant's representative must be showed to the departmental representative prior to leaving to ensure there is no transcription of the test materials.

[55] As per section 18 of the *PSST Regulations*, the information obtained through Steps 1 and 2 relating to the Supervisor Simulation Exercise 428 may be used only for purposes of the complaint.

[56] The parties are invited to contact Dr. David Forster, the Senior Psychologist, Personnel Psychology Centre to initiate the exchange of information.

[57] The parties are to advise the Tribunal of the date where the meetings for Steps 1 and 2 are to take place.

[58] Fifteen days after the exchange of information, the complainant will provide the Tribunal with any additional comments regarding his complaint.

[59] The respondent and the PSC will have the opportunity to respond. The Tribunal will advise the parties of the exact dates once it is informed as per paragraph 56.

Sonia Gaal
Vice-Chair

PARTIES OF RECORD

Tribunal File:	2006-0022
Style of Cause:	<i>David Aucoin and the President of the Canada Border Services Agency et al.</i>
Hearing:	Written request, decided without the appearance of the parties
Date of Reasons:	November 10, 2006