

DECISION: 06-0012

FILES: 2006-0012 AND 0013

OTTAWA, SEPTEMBER 29, 2006

GREGORY SCHELLENBERG AND ROBERT NYST

COMPLAINANTS

AND

THE DEPUTY MINISTER OF NATIONAL DEFENCE

RESPONDENT

AND

OTHER PARTIES

MATTER	Determination of jurisdiction
DECISION	Complaints are dismissed
DECISION RENDERED BY	Sonia Gaal, Vice-Chair
LANGUAGE OF DECISION	English
HEARING DATE	September 6, 2006 (by way of teleconference)
INDEXED	<i>Schellenberg and Nyst v. Deputy Minister of National Defence et al.</i>
NEUTRAL CITATION	2006 PSST 0005

REASONS FOR DECISION

INTRODUCTION

[1] On March 8, 2006, the Department of National Defence (the respondent) posted a Notice of Information Regarding Acting Appointment advising that Mr. Kevin Jones had been appointed Geomatics Technician EG-04 for the period of July 4, 2005 to March 31, 2006 (Selection Process Number: 06-DND-ACIN-ESQ-045418). This was a non-advertised process.

[2] As a result of this notice, Mr. Gregory Schellenberg filed a complaint under paragraph 77(1)(b) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*) to the Public Service Staffing Tribunal (the Tribunal) on March 20, 2006 (file number 2006-0012). Mr. Robert Nyst also filed a similar complaint on March 23, 2006 (file number 2006-0013).

[3] The complainants filed their allegations on April 20, 2006 and April 25, 2006. The respondent filed its reply on May 11, 2006. The PSC also filed its reply to the allegations on May 11, 2006. In accordance with section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6, the Tribunal consolidated both files on April 28, 2006 and advised the parties accordingly. This decision therefore applies to both complaints.

BACKGROUND

[4] The following information was gleaned from the allegations and reply. In July 2005, there were three individuals working on the Digital Nautical Charts (DNC) Management Project: the appointee, Mr. Jones; the complainant, Mr. Gregory Schellenberg; and, a contractor. The contractor left in July 2005; his duties were then assigned to Mr. Jones.

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[5] In October 2005, Mr. Jones was assigned further additional tasks to his responsibilities.

[6] Since the Superintendent, Mr. Jonathan Purdie, believed that there was an ongoing need to have the tasks completed, he created a new position identical to an existing position classified at the EG-04 level and submitted the work description for classification in October 2005.

[7] In February 2006, the classification process was completed and the position was classified at the EG-04 level.

[8] Mr. Purdie determined that Mr. Jones had been performing the full range of duties of the EG-04 level and, therefore, assessed him against the statement of merit criteria on March 3, 2006.

[9] On March 8, 2006, Mr. Purdie appointed Mr. Jones to the position on an acting basis for the period of January 3, 2006 to March 31, 2006. However, remuneration was retroactive to July 4, 2005.

PRELIMINARY MATTER

[10] On September 1, 2006, the respondent filed a motion for a preliminary ruling on the basis that the Tribunal does not have jurisdiction to hear the complaints.

[11] The parties' representatives were convened by teleconference call on September 6, 2006 to provide their submissions on the respondent's motion.

[12] The following individuals participated in the call:

Mr. Gregory Schellenberg and Mr. Robert Nyst, the two complainants, and their representative, Ms. Sharon Brine,

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Mr. Karl Chemsî accompanied by Mr. Martin Desmeules and Mr. Andrew Hill for the respondent and,

Mr. John Unrau with Ms. Lili Ste-Marie and Ms. Cathy Black for the Public Service Commission (the PSC).

[13] On September 7, 2006, the parties were advised by letter that the Tribunal had decided that it did not have jurisdiction to hear the matter and that written reasons would follow. This decision contains the reasons which address arguments raised by the parties and the PSC.

ISSUES

[14] The Tribunal must decide the following:

- i. Did the selection process, which resulted in the appointment of Mr. Jones, begin in 2005 or 2006?
- ii. If the acting appointment was made in 2005, which legislation is applicable?
- iii. If the acting appointment was made under the new *PSEA*, in 2006, was it for a period of less than four months?

ARGUMENTS OF THE PARTIES

[15] The respondent presented its written arguments in support of its position on the matter. First, the respondent alleges that the acting appointment was from January 3, 2006 to March 31, 2006 which is less than four months and is, therefore, excluded from recourse under section 77 of the *PSEA* by virtue of subsection 14 (1) of the *Public Service Employment Regulations*, SOR/2005-334 (the *PSER*).

[16] Secondly, the respondent argues that if the Tribunal finds that the acting appointment began in 2005, the *PSEA* is not applicable and the Tribunal does not have jurisdiction to hear the complaints. In the alternative, the respondent alleges that the matter is moot as the acting appointment ended on March 31, 2006. Finally, in the further alternative, the respondent submits that even if the Tribunal has jurisdiction, the complainants should not be awarded compensation for work they did not perform.

[17] On September 5, 2006, the PSC provided its written submissions prior to the conference call. The PSC submitted that the Tribunal does not have jurisdiction to hear the matter and addressed the two arguments raised by the respondent.

[18] First, in the event that the Tribunal finds that the acting appointment or selection process started in 2005, the PSC refers to the *Public Service Modernization Act*, S.C. 2003, c. 22 (the *PSMA*), and, in particular, section 70 found in Part 5, Division 3, where the coming into force of subsection 29(1) of the new *PSEA* does not affect a selection process started under the former or amended *PSEA*.

[19] Subsection 29(1) of the *PSEA* provides that the PSC has the exclusive authority to make appointments, to or from within the public service, of persons for whose appointment there is no authority in or under any other Act of Parliament.

[20] The PSC submits that section 70 of the *PSMA* confirms that the *PSEA* does not apply to a selection process started under the former or amended *PSEA*. In other words, the PSC is of the view that, in these circumstances, the Tribunal has no jurisdiction to consider and dispose of a complaint filed pursuant to section 77 of the *PSEA*.

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[21] In the alternative, even if the Tribunal finds that the acting appointment began in 2006, it was for a period of less than four months and, thus, is excluded from the complaint process by virtue of subsection 14(1) of the *PSER*.

[22] During the conference call, counsel for the PSC also submitted that there is a presumption that legislation is not retroactive and there is nothing in the wording of the *PSEA* which would override this presumption.

[23] The complainants' representative submitted that the Notice of Information Regarding Acting Appointment states that the acting period was from July 4, 2005 to March 31, 2006. It also mentions that anyone wanting to file a complaint with respect to the appointment should do so with the Public Service Staffing Tribunal. This is the reason why the complainants filed their complaints with the Tribunal.

[24] She added that the acting appointment took place partly under the former or amended *PSEA* and partly under the *PSEA*. However, the Tribunal has jurisdiction to deal with the portion of the acting period that took place in 2006, the period from January 3, 2006 to March 31, 2006.

ANALYSIS

ISSUE I: DID THE SELECTION PROCESS, WHICH RESULTED IN THE APPOINTMENT OF MR. JONES, BEGIN IN 2005 OR 2006?

[25] In July 2005, Mr. Purdie had assigned some additional duties to Mr. Jones and further duties in October of that year. By doing so, he had effectively selected Mr. Jones to perform the duties of a new position, which he submitted for classification in October 2005.

[26] While the position was formally classified at the EG-04 level in February 2006, and Mr. Jones assessed on March 3, 2006, these were merely final steps in a selection process that began in 2005.

[27] Furthermore, the respondent indicated the acting period to be from July 4, 2005 to March 31, 2006 in its Notice of Information Regarding Acting Appointment dated March 8, 2006.

[28] The Tribunal finds that the dates of July 4, 2005 to March 31, 2006 reflect the length of the acting appointment. The Tribunal further finds that the selection process began in October 2005 when Mr. Purdie assigned the additional duties to Mr. Jones.

ISSUE II: IF THE ACTING APPOINTMENT WAS MADE IN 2005, WHICH LEGISLATION IS APPLICABLE?

[29] Since the selection process started in October 2005, the Tribunal must address the issue of transition between the former or amended PSEA and the new *PSEA*.

[30] Section 70 of the *PSMA* states:

70. The coming into force of subsection 29(1) of the new Act does not affect any competition or other selection process being conducted under the amended Act.

Subsection 29(1) of the *PSEA* reads as follows:

29. (1) Except as provided in this Act, the Commission has the exclusive authority to make appointments, to or from within the public service, of persons for whose appointment there is no authority in or under any other Act of Parliament.

[31] The *PSEA*, including subsection 29(1), came into force on December 31, 2005. Therefore, a selection process being conducted before December 31, 2005 falls under the former or amended *PSEA*.

[32] In the present case, the selection process was being conducted under the former or amended PSEA. Accordingly, the appointment falls under the former or amended PSEA as per section 70 of the *PSMA*.

ISSUE III: IF THE ACTING APPOINTMENT WAS MADE UNDER THE *PSEA*, IN 2006, WAS IT FOR A PERIOD OF LESS THAN FOUR MONTHS?

[33] The complainants' representative submitted that the Tribunal has jurisdiction to deal with the portion of the acting appointment that took place in 2006, which is from January 3, 2006 to March 31, 2006.

[34] Subsection 14(1) of the *PSEER* is applicable to complaints under section 77 before the Tribunal:

14. (1) An acting appointment of less than four months, provided it does not extend the cumulative period of the acting appointment of a person in a position to four months or more, is excluded from the application of sections 30 and 77 of the Act.

[35] As explained above, the Tribunal finds there was one acting period that took place from July 4, 2005 to March 31, 2006. The fact that one acting period overlaps two calendar years does not mean that it can automatically be severed as suggested by the complainants.

[36] Nevertheless, even if the Tribunal were to only take into account the part of the period from January 3, 2006 to March 31, 2006, this period is less than four months. It is clearly excluded from the application of the current *PSEA*.

[37] The Tribunal has reviewed the alternative arguments raised by the respondent and the PSC. As the Tribunal has determined that it does not have jurisdiction, these arguments do not need to be considered further.

CONCLUSION

[38] The Tribunal finds that it does not have jurisdiction to hear the complaints since the selection process began in October 2005 and was being conducted under the former or amended PSEA.

[39] Even if the Tribunal were to take into account the portion of the acting appointment in 2006, it is for a period of less than four months and is excluded from the application of section 77 of the current *PSEA*.

[40] For all these reasons, the complaints of Mr. Schellenberg and Mr. Nyst are dismissed.

Sonia Gaal
Vice-Chair

PARTIES OF RECORD

Tribunal Files:	2006-0012 and 0013
Style of Cause:	<i>Schellenberg and Nyst v. Deputy Minister of National Defence et al.</i>
Hearing:	September 6, 2006 (by way of teleconference)
Date of Reasons:	September 29, 2006
APPEARANCES:	
Sharon Brine	For the complainants
Karl Chemsí Martin Desmeules	For the respondent
John Unrau Lili Ste-Marie	For the Public Service Commission
N/A	For the other party