

FILE: 2006-0021

OTTAWA, NOVEMBER 21, 2006

BRENDA PORTREE

COMPLAINANT

AND

**THE DEPUTY HEAD OF SERVICE CANADA AS PART OF THE DEPARTMENT OF
HUMAN RESOURCES AND SOCIAL DEVELOPMENT CANADA**

RESPONDENT

AND

OTHER PARTIES

MATTER	Complaint of abuse of authority pursuant to para. 77(1)(a) of the <i>Public Service Employment Act</i>
DECISION	The complaint is dismissed
DECISION RENDERED BY	Sonia Gaal, Vice-Chair
HEARING DATE	October 5, 2006
LANGUAGE OF DECISION	English
INDEXED	<i>Portree v. Deputy Head of Service Canada et al.</i>
NEUTRAL CITATION	2006 PSST 0014

REASONS FOR DECISION

INTRODUCTION

[1] Brenda Portree is complaining that she was not appointed to an acting PM-02 position by reason of abuse of authority. She alleges that the assessment board abused its authority in its application of the merit criteria to her candidacy for the position.

[2] A hearing was held in Winnipeg on October 5, 2006.

BACKGROUND

[3] Ms. Portree, the complainant, applied for an acting position of Universal Agent PM-02 in the Department of Human Resources and Social Development – Service Canada (the respondent). It was an advertised internal process, selection process number 2006-CSD-CC-MAN-4121-SC-I-0013.

[4] On April 28, 2006, the respondent posted on Publiservice a Notice of Information Regarding Acting Appointment for six employees. Ms. Portree was unsuccessful.

[5] Ms. Portree filed a complaint on April 18, 2006 with the Public Service Staffing Tribunal (the Tribunal) alleging abuse of authority in the application of merit under paragraph 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*).

[6] The following is taken from the complainant's allegations and the respondent's reply to same.

[7] The respondent determined that the assessment of the essential qualifications identified for the position of Universal Agent PM-02 would be done by an interview and reference checks.

[8] The questions as well as the competency definitions and criteria were provided to the candidates two weeks in advance of the interview date to assist them in their preparation. The interview was aimed at assessing each candidate against all of the essential qualifications as outlined in the statement of merit criteria. The candidates were allowed to bring their prepared notes to the interview, but they were not submitted to the assessment board and were not part of the assessment process.

[9] The candidates were asked to provide the name and telephone number of their current supervisor as well as one other recent work-related reference. The assessment board members developed the questions and expected criteria used for the reference checks. They also determined that the members would contact the current supervisor and if more information was required, they would go to the second work-related reference.

[10] The rating was carried out by reviewing the candidates' responses to the interview questions against the pre-established criteria. The reference check information was then reviewed against the criteria to determine the candidates' overall marks for each qualification. The assessment board used the same scale and expected criteria for all the candidates.

[11] The complainant failed one question in her interview dealing with "Decisiveness". A 70% pass mark was required; the complainant was rated at 50%. Since this was an essential qualification for the position, the complainant was not placed in the pool of qualified candidates.

EVIDENCE

[12] The complainant did not testify. Ms. Gaylene Higgs, who was called by the complainant to testify, was the only witness at the hearing. Ms. Higgs is the complainant's current supervisor and provided a reference to the assessment board for the complainant.

[13] Ms. Higgs testified that the complainant was working in an acting PM-02 position which had been extended in March 2006. The management team believed that it was fair to offer Ms. Portree an extension as it determined that she could do the job with some mentoring and she showed potential in her previous job.

[14] In cross-examination, Ms. Higgs stated that she thought she had sufficient information to provide a reference for the complainant. She added that if she had any concern about being a reference, she would have advised a member or the chair of the assessment board that they should speak with someone else who knew the complainant better.

[15] The complainant submitted a number of documents which were entered by consent of the parties. Most of these documents were provided to the complainant by the respondent and consisted of information on the process, as well as handwritten notes from the board members for the complainant's answers to the question on Decisiveness.

[16] The following documentary evidence was also submitted by the complainant on consent:

- answers on the Decisiveness question by one of the successful candidates, Ms. Del Briscuso;
- answers of Ms. Briscuso on the question dealing with "Interpersonal Awareness";

- email from Ms. Yvette Simpson, the chair of the assessment board, to the complainant explaining the assessment and the reason why she did not receive a passing mark on the Decisiveness question;
- written reference by Ms. Higgs;
- supervisor's reference for Ms. Briscuso for the Decisiveness question;
- the Adjectival Scoring Guide; and,
- Ms. Higgs' register of approved leaves.

[17] The respondent and the Public Service Commission did not call any witnesses.

ISSUES

[18] The Tribunal must determine the following issues:

- (i) Did the assessment board abuse its authority when it did not allocate higher marks for the Decisiveness question and, as a result, did not select the complainant for an acting PM-02 position?
- (ii) Did the assessment board abuse its authority when it did not conduct another reference check for the complainant?

SUBMISSIONS

A) COMPLAINANT'S POSITION

[19] The complainant submits that the assessment board did not fully understand her answer on the Decisiveness question, took words out of context, made assumptions and failed to seek clarification from her during the interview. According to the complainant, this contravened the merit principle and, thus, amounts to abuse of authority.

[20] The assessment board determined that the complainant did not demonstrate in her answer that she had made a difficult decision in a short time frame. However, the complainant believes that her answer showed that she had made such a decision and that she dealt with the issues that were addressed in the question. The complainant maintains that she provided a very good example and her marks should have reflected this. The complainant claims that these further actions, errors and/or omissions by the assessment board also contravene the merit principle and amount to abuse of authority.

[21] The complainant further argues that the assessment board abused its authority when it awarded more weight and significance to Ms. Briscuso's responses on Decisiveness than to the complainant's response. According to the complainant, both candidates had the same example and Ms. Briscuso's answer paralleled the answer given by the complainant.

[22] The assessment board abused its authority when it established criteria or an expected response on Decisiveness, but asked a question that was not clear and did not elicit the required information from the candidates.

[23] Finally, on this aspect of the complaint, the complainant submits that Ms. Higgs' reference for Ms. Portree was positive with respect to the question on Decisiveness which shows she met this qualification.

[24] The assessment board members also abused their authority when they failed to contact another supervisor who supervised the complainant for a longer period of time than Ms. Higgs to respond to the assessment board's questions.

[25] The complainant submits that Ms. Higgs, an acting supervisor, had been absent from work for a significant period of time. She supervised the complainant, who herself was in an acting position, for four months which was a disadvantage to the complainant as there was a learning curve for both. In

comparison, Ms. Briscuso's supervisor, who was there for three years, was a better reference.

B) RESPONDENT'S POSITION

[26] The respondent submits that the complainant has the burden of proving there was abuse of authority and this burden is much higher than showing errors, omissions and/or improper conduct. The respondent emphasizes that the complainant has not submitted any evidence in support of her allegations. Furthermore, the complainant does not allege that Ms. Briscuso should not have been screened in.

[27] The respondent believes that the complainant is asking the Tribunal to review her answers on the Decisiveness question, compare them to Ms. Briscuso's answers and decide if her answers deserve a higher mark than the one awarded. However, it is not the intent of the legislation to give the Tribunal the power to review, interview and/or assess the marks of a complainant.

[28] In addition, the respondent claims that the complainant's arguments are based on documents submitted by herself and on her opinion of the interview questions and answers. There is no evidence concerning the job itself, including the duties or the tasks involved.

[29] The assessment board made a decision on the complainant's answer on Decisiveness. While the complainant might disagree with this decision, this does not make it an error, let alone abuse of authority. The respondent emphasizes that the complainant did not even testify to explain the nuances and distinctions in her answer.

[30] There should be deference shown by the Tribunal towards the assessment board members who are experienced in the field. There should be a presumption that they know the duties and requirements of the position and are qualified to assess the candidates.

[31] In summary, the respondent claims that the complainant did not submit any evidence of bad faith, favouritism or wrongdoing. In fact, the complainant has failed to provide any evidence whatsoever that any of the actions constitute an abuse of authority.

C) PUBLIC SERVICE COMMISSION'S POSITION

[32] The Public Service Commission (the PSC) did not take a position on the facts of the case, but addressed the legislation and the changes to the *PSEA*.

[33] The PSC submits that the preamble of the *PSEA* gives prime responsibility to the deputy heads within a system of accountability to the PSC, which is directly accountable to Parliament.

[34] The *PSEA* now has an accountability system for internal staffing that leaves no void that needs to be covered by an expansive definition of "abuse of authority." There is a complete staffing structure for public service appointments, dispute resolution and recourse. For example, by specifically including the elements of error, omission or improper conduct in subsection 15(3) of the *PSEA*, the legislation creates a forum in which such matters may be addressed by the deputy head, who may revoke an appointment and take corrective action if necessary.

[35] The PSC argues that the five generic categories of abuse of authority set out in *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008 and enumerated by David Philip Jones & Anne S. de Villars, *Principles of Administrative Law* (Toronto: Thomson Carswell, 2004) are not applicable to the *PSEA*. By accepting these categories, the Tribunal risks defeating the system of accountability envisioned by Parliament, as set out in the preamble of the Act.

[36] The PSC further submits that there is a distinction between "abuse of authority" and "abuse of discretion." The Jones & de Villars, *supra*, five generic types of abuse deal with abuse in the exercise of discretion. The PSC submits

that the notion of abuse of discretion applied by the Tribunal in *Tibbs, supra*, must be set aside as section 77 of the *PSEA* provides for complaints based on “abuse of authority” and not “abuse of discretion.”

[37] There is a well recognized principle of statutory interpretation that when Parliament uses a particular expression, one must examine what that expression means. Subsection 77(1) of the *PSEA* refers to “abuse of authority” as opposed to “abuse of discretion”. According to the PSC, the French version of the Act also supports that “abuse of power” is not equivalent to “abuse of discretion.”

[38] The PSC finally submits that “abuse of authority” in subsection 77(1) of the *PSEA* does not include errors and omissions, but will include some form of improper conduct which is associated with intentional wrongdoing. Thus, according to the PSC, the Tribunal should interpret “abuse of authority” in accordance with the Supreme Court of Canada decision in *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at par. 23, where the Court analysed the tort of misfeasance in a public office. In this case, the Court determined that there must be a deliberate disregard of an official duty along with knowledge that the misconduct is likely to injure the plaintiff for a finding of misfeasance to be established.

ANALYSIS

Issue I: Did the assessment board abuse its authority when it did not allocate higher marks for the Decisiveness question and, as a result, did not select the complainant for an acting PM-02 position?

[39] There is no dispute that the *PSEA* changed the staffing process in the federal public service. Whereas the former *PSEA* provided that people were chosen on the basis of a relative merit system, the *PSEA* gives more discretion to managers to select the candidate who is the “right fit” for the position as outlined in subsections 30(1) and (2) of the *PSEA*, which read in part as follows:

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;

(...)

[40] The Tribunal's decision in *Tibbs, supra*, addresses this new framework as follows:

[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.

[41] The Tribunal's mandate is clearly defined in the *PSEA*. Subsection 88(2) of the *PSEA* reads as follows:

The mandate of the Tribunal is to consider and dispose of complaints made under subsection 65(1) and sections 74, 77 and 83.

[42] The complainant filed her complaint pursuant to paragraph 77(1)(a) of the *PSEA*, which reads as follows:

77. (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Tribunal's regulations — make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of

(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);

[43] When filing a complaint under paragraph 77(1)(a), a complainant must now explain that because of some action or inaction he or she was not appointed to a position. Furthermore, this action or inaction must arguably demonstrate that there might or could be an abuse of authority.

[44] The complainant has not alleged that there was an abuse of authority in the establishment of the merit criteria used by the assessment board for this position. The complainant has alleged, however, that the assessment board abused its authority in its assessment of the merit criteria to her candidacy. Specifically, the complainant has alleged that the assessment board abused its authority when it assessed her vis-à-vis the essential qualification of “Decisiveness.”

[45] Although there is no definition of abuse of authority in the legislation, subsection 2(4) of the *PSEA* provides some guidance:

2. (4) For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.

[46] The inclusion of bad faith and personal favouritism in subsection 2(4), together with the language used in other provisions of the *PSEA* such as subsection 15(3), indicates that a serious act, error, omission or improper conduct is required to substantiate a complaint of abuse of authority by the Tribunal. As stated in *Tibbs, supra*, abuse of authority will require more than simply errors and omissions:

[65] It is clear from the preamble and the whole scheme of the *PSEA* that Parliament intended that much more is required than mere errors and omissions to constitute abuse of authority. For example, under section 67 of the *PSEA*, the grounds for revocation of an appointment by a deputy head after an investigation are error, omission and improper conduct. These grounds for revocation are clearly less than those required for a finding of abuse of authority. Parliament's choice of different words is significant: Sullivan & Driedger, *supra* at 164. Abuse of authority is more than simply errors and omissions.

[66] As the complainant has acknowledged, abuse of authority requires wrongdoing. Accordingly, abuse of authority will always include improper conduct, but the degree to which the conduct is improper may determine whether or not it constitutes abuse of authority.

[47] An allegation of abuse of authority is a very serious matter and must not be made lightly. In summary, in order to succeed before the Tribunal, a complaint for abuse of authority must demonstrate on a balance of probabilities a serious wrongdoing or flaw in the process that is more than a mere error, omission or improper conduct that justifies the Tribunal's review and intervention.

[48] Although the *PSEA* gives the Tribunal broad powers in relation to any matter before it, it is not an investigative body. Accordingly, it is not mandated to go on a fact-finding mission on behalf of a complainant. The role of an adjudicative body or quasi-judicial tribunal was examined by the Canada Industrial Relations Board (the Board) in *Virginia McRae Jackson et al.*, [2004] CIRB No. 290 (QL). This is a lengthy decision reviewing in detail the Board's role when considering complaints of breach of the duty of fair representation by individuals against their union under section 37 of the *Canada Labour Code*, R.S. 1985, c. L-2. The Tribunal finds this analysis is useful to examine the question at hand.

[49] Employees who allege that there has been an abuse of authority and, thus, a contravention of the *PSEA* and who wish to obtain a remedy for that contravention must present convincing evidence and arguments to be successful. It would seem prudent in most cases for the complainant to start his or her case by testifying as to the circumstances that they believe constitute an abuse of authority, as well as submitting documentary evidence to support their case. At an oral hearing, a complainant must present evidence, usually through a combination of his or her testimony, the testimony of witnesses, and supporting documents, to prove, on a balance of probabilities, the facts necessary to support a conclusion by the Tribunal that an abuse of authority has occurred. However,

the complainant did not testify at the hearing and almost no evidence was provided to substantiate her complaint.

[50] An employee must understand that a complaint is more than merely stating a perceived injustice. The complaint must set out the facts upon which the complainant relies in proving his or her case to the Tribunal. A complaint goes beyond merely alleging that the respondent abused his or her authority. The allegations must allege serious facts and a chronology of the events, times, and dates and any witnesses if applicable.

[51] Paragraph 77(1)(a) is not intended to be the “catch all” recourse for complainants who allege abuse of authority whenever they are not satisfied with the results of a selection process. A complainant must not treat the Tribunal as a forum of last resort to appeal a deputy head’s decision on the appointment or proposed appointment simply because he or she was not selected. As stated above, unless of a serious nature, wrongdoing in the form of an error, omission or improper conduct will not be sufficient to constitute abuse of authority.

[52] As explained in *Tibbs, supra*, the preamble of the *PSEA* highlights the assessment board’s discretion in making an appointment. Ratings are no longer required or necessary under the *PSEA* and a candidate that would have fewer points among qualified candidates could be appointed if the selection board determines that he or she is the “right fit”. Therefore, the Tribunal’s role is not to reassess a complainant’s marks on a given answer or review responses given during an interview simply because a complainant does not agree with the decision regarding an interview question. Thus, in the circumstances presented here, the Tribunal will not interfere as there is no evidence that there was a serious error, omission or improper conduct in the manner in which the interview was conducted.

[53] Notwithstanding the lack of evidence presented by the complainant at the hearing of this matter, the Tribunal finds that the respondent conducted a fair

process with the interviews and written references. All the candidates were provided the same questions prior to the interview, the references were provided in writing and the complainant had the opportunity to meet and discuss her interview.

[54] The fact that the complainant disagrees with the assessment board's rating of her answer on Decisiveness and the fact they did not clarify her answer does not amount to abuse of authority. This is a "judgment call" by the assessment board which was in the best position to determine if it needed further clarification on that specific question during the interview.

[55] Furthermore, the email by Ms. Simpson to the complainant dated April 11, 2006 attempts to explain in detail the reason why she did not get a passing mark of 70% on the Decisiveness question. Ms. Simpson reviews both examples provided by the complainant during the interview with the assessment board's interpretation and the deficiencies in her responses. It is noteworthy that Ms. Simpson concluded her email by congratulating the complainant for the perfect scores she obtained for "Client Focus" and stated that her example for that question was "most definitely the highest quality of service we could hope to provide to our clients."

[56] The complainant does not accept that she was unsuccessful on the Decisiveness question despite the detailed explanations provided by Ms. Simpson, the meeting she had with the assessment board members and the information provided by the respondent during the exchange of information period. However, the complainant has not provided any evidence to support findings by the Tribunal that would substantiate a complaint of abuse of authority. Simply disagreeing with the final result does not constitute evidence of wrongdoing on the part of the assessment board. The fact that she does not agree with the marks allocated by the assessment board does not constitute abuse of authority.

Issue II: Did the assessment board abuse its authority when it did not conduct another reference check for the complainant?

[57] The complainant's other concern relates to Ms. Higgs' reference. On the one hand, she submits that Ms. Higgs did not know her sufficiently to provide a favourable reference. However, on the other hand, she submits that Ms. Higgs' response to the Decisiveness question provided an example relating to the complainant which she believes should have supported a higher mark.

[58] The Tribunal is faced with contradictory arguments by the complainant concerning the same witness. The complainant cannot have it both ways depending on her position, either Ms. Higgs was appropriate as a reference or she was not.

[59] First, the assessment board's decision to speak only with Ms. Higgs is not abuse of authority. As stated above, the assessment board was in the best position to assess whether they had sufficient information on the complainant. Once the questions are answered for their purposes, an assessment board should not be "shopping" for a favourable or unfavourable reference.

[60] Secondly, Ms. Higgs herself testified that she felt comfortable providing the reference for the complainant and that if she had not, she would have advised the assessment board accordingly. The Tribunal finds that Ms. Higgs' answers in cross-examination on this point were truthful and made in good faith.

[61] Lastly, the assessment board determined that the members of the board would contact the candidates' current supervisor and, if more information was required, they would go to the second work-related reference. The complainant has provided no evidence to support a finding that the assessment board ought to have contacted a second reference check, let alone that its failure to do so constitutes an abuse of authority. On the contrary, Ms. Higgs' testimony supports the finding that, in the case of the complainant's reference check, the

assessment board acted entirely consistently with what it said it would do at the outset of the process.

DECISION

[62] For these reasons, the Tribunal dismisses the complaint.

Sonia Gaal
Vice-Chair

PARTIES OF RECORD

TRIBUNAL FILE:	2006-0021
STYLE OF CAUSE:	<i>Brenda Portree and the Deputy Head of Service Canada as part of the Department of Human Resources and Social Development Canada et al.</i>
DATE AND PLACE OF HEARING:	October 5, 2006 Winnipeg, Manitoba
DECISION OF THE TRIBUNAL DATED:	November 21, 2006
APPEARANCES:	
Kelly Drennar	For the complainant
Karl Chemsí Martin Desmeules	For the respondent
Marjolaine Guay	For the Public Service Commission
N/A	For the other party