

FILE: 2006-0096

OTTAWA, NOVEMBER 30, 2006

RICK VISCA

COMPLAINANT

AND

THE DEPUTY MINISTER OF JUSTICE

RESPONDENT

AND

OTHER PARTIES

MATTER Request for order for provision of information

DECISION The request is denied

DECISION RENDERED BY Guy Giguère, Chairperson

LANGUAGE OF DECISION English

INDEXED *Visca v. Deputy Minister of Justice et al.*

NEUTRAL CITATION 2006 PSST 0016

REASONS FOR DECISION

INTRODUCTION

[1] The complainant has asked the Public Service Staffing Tribunal (the Tribunal) to order the respondent to provide him with certain requested information.

BACKGROUND

[2] The complainant, Mr. Visca, participated in an advertised selection process (No. 06-Jus-Tor-CC-29431) for a position of Senior Practitioner, Drug Prosecutions, at the LA-2B group and level in the Department of Justice Canada, Federal Prosecution Service (the FPS) in Toronto. Twenty applications were received. While screened in and placed in a pool of qualified candidates, Mr. Visca was not appointed to a position of senior practitioner as a result of this process. Three candidates were appointed to positions from the pool.

[3] The complaint was filed on August 22, 2006. The complainant states that the selection process did not give due consideration or effect to a majority of the established merit criteria; according to him, only one of fourteen merit criteria was applied in his case. The complainant further claims that the use of multiple selection boards to conduct interviews compromised the integrity and neutrality of the selection process.

[4] The complainant initiated the exchange of information by sending an email on September 12, 2006 requesting that information be provided by the respondent. The complainant received some of the information. On September 25, 2006, the complainant filed this request with the Tribunal. In his request, the complainant asked that a number of items of information be provided to him. The requested items are summarized below as follows:

- I. the number of candidates;
- II. the number of candidates screened out and in;
- III. the year in which each candidate reached the LA-2A group and level;
- IV. the assessment of each candidate screened in with the notes of the screening board;
- V. the date on which Mr. Goldstein was appointed as a LA-2B,
- VI. an acknowledgement or admission that the complainant was placed on the Revenue Prosecution Team at the urging of the FPS Director;
- VII. an admission or position regarding which team the complainant would have been assigned if he had not been placed on the Revenue Prosecution Team;
- VIII. an acknowledgement or admission that the complainant was screened out of an interview for the Revenue Prosecution LA-2B competition being conducted at the same time as the Drug Prosecution LA-2B competition; and,
- IX. an explanation regarding which teams within the FPS, the successful candidates were part of at the time of their appointments in this appointment process.

[5] The respondent provided Items I and II on September 28, 2006. On November 2, 2006, the Tribunal directed the parties to provide it with copies of all documents exchanged and to confirm whether they had met during the exchange of information period. The Tribunal also asked the respondent for a copy of the merit criteria.

[6] The Tribunal received more than 150 pages of information that had been provided to the complainant on September 25, 2006. Included in this package of information was documentation and emails on the following matters: how the merit criteria were established; the need for multiple panels to conduct interviews; instructions to the panel members on how to assess each merit criterion; the assessment of the complainant for each merit criterion with the notes of each panel member; and, details of the final selection process. A rating

guide and other documents indicated that recent experience was ranked as number one of eleven essential qualifications, and three assets qualifications, that were considered in the merit criteria.

[7] As noted previously, of particular interest was a confirmation that the complainant was found qualified in the present staffing process and had been placed in a pool of qualified candidates for possible future vacancies. As well, a further document indicated that “seventeen (17) candidates successfully met the qualifications of the advertised process and remained a part of the pool of candidates.”

ISSUE

Is the information requested relevant to the complaint?

SUBMISSIONS

[8] The complainant submits that the Tribunal should apply a low threshold to its determination of whether requested information is relevant. According to the complainant, “[s]o long as the information sought can be said to logically assist in advancing the inquiry, then it is ‘relevant’.”

[9] The complainant claims that it is an abuse of authority to establish and/or apply merit criteria that prejudice an applicant's ability to effectively participate in a selection process. The complainant is particularly concerned with the criterion “extensive and recent experience in conducting complex prosecutions under the Controlled Drugs and Substances Act, including prosecutions involving intercepted communications.” The complainant emphasizes that it is the requirement of “recent” experience that is most problematic. The complainant submits that the FPS Director assigns counsel to work in teams of specialized areas of practice and these assignments limit their ability to apply for positions when the criterion is recent experience.

[10] The complainant argues that the establishment and/or application of the merit criterion of “recent experience” impacts a larger segment of the LA-2A group within the FPS. As such, Item III, namely, the year in which each candidate reached the LA-2A level, is relevant to his claim that the abuse within the FPS is pervasive.

[11] According to the complainant, Item IV is relevant, to the manner in which the statement of merit criteria was applied to each candidate. At a minimum, the complainant submits that he should be able to compare his assessment with the assessments of the successful candidates.

[12] The complainant and another counsel, Mr. Goldstein, participated in a staffing process in 2001 for a position of senior counsel and were put on an eligibility list for a LA-2B position in February 2002. The complainant submits that Item V, the date when Mr. Goldstein was promoted to a LA-2B position, is relevant because it serves as an example to demonstrate how the complainant was negatively impacted by the present selection process.

[13] Finally, the complainant submits that all of the successful candidates were drawn from the Anti-Organized Crime prosecution team and, therefore, Items VI to IX are relevant to establish that the complainant was prevented from working on that team during the year and half prior to this appointment process.

[14] The respondent submits that Items III and IV are not relevant as they concern other applicants who were not appointed. Under subsection 77(1) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*), a person can complain that he or she was not appointed. However, a complainant has no standing to represent other employees in the area of recourse who may have been unsuccessful in an appointment process. They must file their own complaints with the Tribunal.

[15] The respondent submits that Item V, the date of another employee’s appointment that was not the subject of this appointment process, is not relevant.

As for Items VI to IX, the respondent states that the information requested does not exist and did not form part of the appointment decision.

[16] As the Tribunal issued the decision *Tibbs v. the Deputy Minister of National Defence et al.*, [2006] PSST 0008, after the complainant had filed the request for an order, he submitted a reply to the respondent's submission. He argues that the only alternative to securing the information sought by consent, or by way of order, is to compel the attendance of witnesses at the hearing. The complainant suggests that this would be time consuming and would run against the spirit of resolution in the new complaint process.

[17] The complainant reiterates that he is not seeking to advance complaints on behalf of other unsuccessful candidates. However, he explains that he recently received information that only two out of twenty applicants "were initially screened out of an interview for the 3 positions offered." He submits that the assessment of each candidate is relevant as it may be that up to fifteen of the remaining eighteen applicants, including himself, were "effectively screened out" after the application of only one of the fourteen merit criteria, namely, recent experience. As such, the complainant argues that this information may assist him in satisfying the Tribunal that the abuse in this appointment process is so pervasive as to require the appointment process to "be voided in its entirety."

[18] The complainant further submits that the term "information" should be interpreted broadly to cover not only information that exists in writing. He suggests that in the absence of any express provision in the Tribunal's regulations for compelling attendance of witnesses, introducing this evidence through testimony might not be an option. As well, the exchange of information is found in the sections of the regulations dealing with *Alternate Dispute Resolution Processes* and if the respondent provided Items VI to IX, it would help to facilitate the resolution of the complaint.

ANALYSIS

[19] The terminology used by the complainant in his submissions is somewhat confusing and needs to be clarified at the outset of this analysis. While the complainant is referring in his submissions to being screened out of an interview, the documents exchanged point out that he was interviewed for the position. In fact, the documents confirm that the complainant was found qualified in this staffing process. The complainant met the merit criteria and specifically the essential qualification of recent experience. He was placed in a pool of seventeen qualified candidates, from which three candidates were appointed.

[20] Therefore, as the complainant was found to be qualified, the crux of his complaint is essentially twofold: first, it is an abuse of authority that recent experience was established as the number one merit criterion for rating the candidates in the qualified-pool; and, secondly, in the context of the FPS, the application of this merit criterion is an abuse of authority as he was precluded from working on the Anti-Organized Crime prosecution team by the FPS Director which, in turn, meant that he was unable to acquire this recent experience.

[21] As stated in the recent decision *Oddie v. the Deputy Minister of National Defence*, [2006] PSST 0009, the party making a request for an order bears the onus of demonstrating to the satisfaction of the Tribunal that the requested information is relevant. In *Oddie, supra*, the Tribunal set out the proper test for relevance as follows:

[22] (...) The [party making the request] must demonstrate to the Tribunal's satisfaction that there is a clear nexus or, in other words, concrete linkage between the information sought and the matter at hand. In addition, the request must be sufficiently specific so there is no dispute as to what is desired. Finally, the Tribunal must be satisfied that disclosure of the information will not cause undue prejudice.

[22] The complainant requests Item III, the year in which each candidate reached the level of LA-2A, to establish the degree and scope of the LA-2A population impacted by the merit criteria.

[23] Paragraph 77 (1)(a) of the *PSEA* 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).

[24] In subsection 77(1) of the *PSEA*, the words “*a complaint to the Tribunal that he or she was not appointed or proposed for appointment,*” clearly stipulates that a complaint must be personal to the complainant. A person can only complain “that he or she was not appointed” and cannot complain that other persons were not appointed. The complaint cannot be about how other unsuccessful candidates were treated, but how the merit criterion of recent experience was established and applied to the complainant. Given the above, the Tribunal is not satisfied that the complainant has met the test for relevance with respect to Item III of his request.

[25] The complainant also requests Item IV, the assessment of each applicant interviewed. The following synopsis of this appointment process is helpful to understand this complaint: twenty applications were received; two candidates were screened out; one was appointed Team Leader; seventeen candidates were found to have met the merit criteria, including “recent experience”, and placed in a pool of qualified candidates; and, three of these qualified candidates were appointed to the position of Senior Practitioner. The crux of the present complaint is about the establishment and application to the complainant of the merit criterion of recent experience. There is no claim that the complainant was assessed differently. The assessment of the seventeen applicants found qualified is not relevant to this complaint. Therefore, the complainant has not established that the assessments of the seventeen candidates who were placed in the pool, but not appointed, are relevant to the complaint.

[26] The complainant has submitted that he should be able, at a minimum, to compare his assessment with the assessment of the successful candidates. In the former PSEA, when an appointment was appealed, the assessment of the successful candidate was routinely disclosed because it would be relevant to establish whether the most meritorious person had been appointed. However, as explained in *Tibbs, supra*, the old system of relative merit no longer exists and the definition of merit in subsection 30(2) of the *PSEA* provides considerable discretion to choose the person who meets the essential qualifications and is the right fit.

[27] The *PSEA* does not require ranking of the qualified candidates, or otherwise establishing a comparative assessment of these qualified candidates. Therefore, comparing the results with the successful candidate is generally not required unless it is relevant to a specific complaint. For example, in a complaint where differential treatment is alleged such as the complaint raised in *Oddie, supra*, some information about the person who was appointed could be relevant to the complaint. However, in the present case, the complainant has not suggested that he was treated differently in the assessment or that any of the three successful candidates was assessed differently from him.

[28] The documents provided by the respondent to the complainant during the exchange of information period include documentation explaining how the merit criteria were established. As well, the rating guide and other documents were provided and indicate that recent experience was ranked as number one of eleven essential qualifications, and three asset qualifications. The complainant was also provided with documents showing how the merit criteria were applied to him and, in particular, that he met the essential qualification of recent experience.

[29] To reiterate, the crux of the present complaint is about the establishment and application to the complainant of the merit criterion of recent experience. The complainant suggests that, by all being members of the Anti-Organized Crime prosecution team, the successful candidates were appointed because they

had acquired more recent experience than him related to the position. However, the complainant is not alleging that the criterion of recent experience was applied differently to the successful candidates than to him. Thus, the complainant has not established that the assessments of the successful candidates are clearly linked to his complaint.

[30] The complainant is also seeking the provision of Item V, the date when Mr. Goldstein was appointed to a LA-2B position. As the appointment of Mr. Goldstein relates to a different appointment process, the Tribunal is not satisfied that this information is relevant to this complaint. The complainant has failed to demonstrate that there is a clear nexus between the information sought and the complaint.

[31] The complainant submits that the term “information” should be interpreted broadly to cover not only information that exists in writing. As such, he argues that Items VI to IX, namely, admissions or explanations relative to his assignment by the FPS Director to the Revenue Prosecution team should also be provided.

[32] The power of the Tribunal to make regulations in relation to the exchange of information is derived from s. 109(e) of the *PSEA* which reads:

109. The Tribunal may make regulations respecting

(...)

(e) the disclosure of information obtained in the course of an appointment process or a complaint proceeding under this Act.

[33] Section 16 of the *Public Service Staffing Tribunal Regulations*, SOR/2006 6 (the *PSST Regulations*) reads as follows:

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.

(2) The exchange of information must be completed no later than 25 days after the date by which the Executive Director acknowledges receipt of the complaint.

(3) If the complainant and the deputy head or the Commission do not complete the exchange of information of all relevant information as required by subsections (1) and (2), the Tribunal may order the parties to complete the exchange of information within a time specified by the Tribunal.

[34] The complainant urges the Tribunal to adopt a broad interpretation of “information”. However, the Tribunal’s power to order parties to exchange all relevant information must be read in light of the specific powers granted to the Tribunal by Parliament. Specifically, pursuant to paragraph 99(1)(e) of the *PSEA*, the Tribunal has been granted the following power:

99. (1) The Tribunal has, in relation to a complaint, the power to

(...)

(e) compel, at any stage of a proceeding, any person to produce any documents and things that may be relevant;

[35] While the exchange of relevant information could include more than written documents and a party should provide verbal explanations, where appropriate, the Tribunal does not have the power to compel a party to provide another party with what may amount to “admissions” or “acknowledgements”. A party may choose to do so, but it cannot be compelled to by the Tribunal.

[36] The information sought in Items VI to IX can be more appropriately addressed during direct and cross-examination of witnesses at the hearing. The compelling of witnesses before the Tribunal is specifically provided for in paragraph 99(1)(a) of the *PSEA* which reads as follows:

99. (1) The Tribunal has, in relation to a complaint, the power to

(a) summon and enforce the attendance of witnesses and compel them to give oral and written evidence on oath in the same manner and to the same extent as a superior court of record.

[37] Also, in order to streamline the hearing process, the Tribunal will generally hold pre-hearing conferences prior to hearings and the need to summons a witness can be raised at the pre-hearing conference if required.

[38] As a final note, as the complainant rightly points out, the sections in the *PSST Regulations* dealing with the exchange of information are found under the heading *Alternative Dispute Resolution Processes*. The exchange of information is an opportunity for both parties to meet to discuss the complaint, listen to each other's concerns and cooperate in disclosing all relevant information. This is also an occasion for complainants to get a better understanding of how staffing processes are conducted. As concerns are discussed and misunderstandings clarified, many complaints are resolved and withdrawn at the exchange of information meeting.

[39] The preamble of the *PSEA* sets the tone for the exchange of information as it indicates that the public service "is characterized by fair, transparent employment practices, respect for employees, effective dialogue, and recourse aimed at resolving appointment issues." Parties involved in the exchange of information should engage in a dialogue, and the best way to ensure this is by a face to face meeting or, when not possible, at minimum, a telephone conversation. To reinforce transparent employment practices, all relevant information should be disclosed, and not only the specific documents that are requested by the parties.

[40] The exchange of information requires more than the transmittal of a list of the requested information, and copies of these requested documents. As explained, to work effectively, the exchange of information requires that both parties meet and discuss the complaint. Having the hiring manager or a member of the selection board, and a staffing officer present at this meeting should provide answers to specific or general questions on the staffing process. As well, the exchange of information is a "two way street," where not only the respondent will disclose information, but also the complainant will explain his or her complaint and could be asked to provide copies of documents when applicable. It is not too late for the parties in this case to have this meeting.

DECISION

[41] The request for an order to provide items I and II is unnecessary as the respondent has already provided the complainant with this information.

[42] The request for an order to provide Items III to IX is denied.

Guy Giguère
Chairperson

PARTIES OF RECORD

Tribunal File:	2006-0096
Style of Cause:	<i>Rick Visca and the Deputy Minister of Justice et al.</i>
Hearing:	Written request, decided without the appearance of the parties
Date of Reasons:	November 30, 2006