

DECISION: I-06-0029-01

FILE: 2006-0029

OTTAWA, SEPTEMBER 27, 2006

JEFFREY WYLIE

COMPLAINANT

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

RESPONDENT

AND

OTHER PARTIES

MATTER	Determination of jurisdiction
DECISION	The Tribunal has jurisdiction to hear the complaint
DECISION RENDERED BY	Merri Beattie, Member
LANGUAGE OF DECISION	English
INDEXED	<i>Wylie v. President of the Canada Border Services Agency et al.</i>
NEUTRAL CITATION	2006 PSST 0007

REASONS FOR DECISION

INTRODUCTION

[1] The Public Service Staffing Tribunal (the Tribunal) has been asked to decide whether it has jurisdiction to consider a complaint filed pursuant to subsection 77(1) of the *Public Service Employment Act*, S.C. 2003, c. 22, s. 12, 13 (the *PSEA*) concerning an acting appointment within the Canada Border Services Agency (the CBSA).

BACKGROUND

[2] On May 5, 2006, the CBSA posted a Notice of Information Regarding Acting Appointment on the Public Service Staffing Advertisements & Notifications Web page of the Publiservice Web site which stated that Roger Rose had been appointed Superintendent at the PM-04 group and level, as a result of a non-advertised appointment process (number 06-BSF-INA-3931-NOR-17). The complaint period was May 5, 2006 to May 23, 2006.

[3] On May 23, 2006, Jeffrey Wylie, the complainant, filed a complaint with the Tribunal and, subsequently, filed allegations on July 4, 2006.

[4] On July 19, 2006, the reply to the allegations was provided on behalf of the President of the CBSA, the respondent. On July 25, 2006, the respondent made a written request to the Tribunal that the matter of jurisdiction be addressed by the Tribunal as a preliminary matter. On August 10, 2006, the Tribunal directed the respondent to provide to the Tribunal and to all parties to this complaint, copies of documents relevant to each appointment or extension of appointment of Mr. Rose.

[5] In its reply to the complainant's allegations, the respondent states that Mr. Rose's name was placed in a pre-qualified pool as a result of a competitive process (as it was formerly called) that concluded in June, 2003. Based on these

results Mr. Rose was initially offered an acting appointment of nine months duration, from June 30, 2003 to March 31, 2004. The respondent provided a copy of the notification of right to recourse. The respondent states that, upon extending Mr. Rose's acting appointment effective April 1, 2004, no notice of recourse was issued as this was an extension to the acting appointment and not a new appointment.

[6] Documents provided by the respondent show that Mr. Rose's acting appointment was extended six times. Apart from the initial notification of right to recourse, the only other notification of right to recourse is in respect of the final extension of acting appointment from April 1, 2006 to June 16, 2006.

[7] On July 31, 2006, the Public Service Commission (the PSC) provided its reply to the complainant's allegations and made submissions on the issue of jurisdiction. The PSC also made submissions concerning the relevance of a review and decision by the Tribunal since the acting appointment ended on June 16, 2006.

ISSUES

[8] 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, does the fact that Mr. Rose's acting appointment ended prior to the Tribunal's consideration of this complaint render the matter moot?

SUBMISSIONS OF PARTIES

[9] The respondent submits that the notice of appointment and recourse that was issued on May 5, 2006, in respect of the extension of Mr. Rose's acting appointment, was not required and was issued in error. The respondent further submits that the

acting appointment ended on June 16, 2006. No further submissions were made by the respondent on this point.

[10] The PSC submits that the transitional provisions of the *Public Service Modernization Act*, S.C. 2003, chapter 22 (the *PSMA*) and the PSC's Transition Guide should be used to determine whether the *PSEA* or the previous legislative framework, namely, the *Public Service Employment Act*, R.S.C. 1985, c. P-33, as amended (the former *PSEA*), applies in the case of Mr. Rose's acting appointment. Referring to the Transition Guide, the PSC submits that the matter of whether Mr. Rose's acting appointment is an appointment under the *PSEA* depends on when Mr. Rose was assessed against the merit criteria for the position. The PSC submits that, if Mr. Rose was assessed for the position at the time of the extension effective April 1, 2006, the proper recourse is that provided under the *PSEA*. If, however, the last assessment of Mr. Rose's qualifications for the position was done prior to December 31, 2005, then the proper recourse is that provided under the former *PSEA*.

[11] The PSC further submits that, since the acting appointment ended on June 16, 2006, none of the corrective measures available to the Tribunal could be applied, rendering the matter moot. The PSC relies on the case of *Noël v. Canada (Minister of Employment and Immigration)* (1992), 136 N.R. 398, [1991] F.C.J. No. 937 (F.C.A.) (QL), in support of its position. In *Noël, supra*, the Federal Court of Appeal determined that, since there was no longer an appointment, confirmation or revocation of the appointment was no longer possible, thereby making the appeal itself moot. The PSC further submits that, even if the Tribunal were to find that the complaint is substantiated, none of the corrective measures provided for in subsection 81(1) of the *PSEA* could be applied since the acting appointment no longer exists, thereby rendering the exercise moot.

[12] The complainant did not make any submissions on the preliminary matter of jurisdiction.

ANALYSIS

i. JURISDICTION

[13] Section 70 of Part 5 of the *PSMA* provides for a transition from the former *PSEA* to the *PSEA*, without disruption to appointment processes already underway at the time of the coming into force of the new legislation. Section 70 of the *PSMA* reads as follows:

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.

[14] Subsection 29(1) of the *PSEA*, which authorizes the PSC to make appointments, 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.

[15] The question of whether an appointment is made in accordance with the former *PSEA* or the *PSEA* turns on whether a selection process was being conducted at the time of the coming into force of the new legislation, namely, December 31, 2005. The PSC, in its Transition Guide, has provided guidance to departments in determining when a selection process should be considered as having started. In Section 3.2 of its Transition Guide, the PSC has explained that a 'without competition process' (as it was formerly called) could be considered to have started when the individual has been assessed.

[16] Policies and guidelines have been created by the PSC to assist those with delegated authority in applying the *PSEA*. However, these policies and guidelines are not binding on the Tribunal. While acknowledging the appropriateness and value of such guidance, the Tribunal is responsible for determining its jurisdiction.

[17] The selection process that resulted in Mr. Rose being appointed on an acting basis from June 30, 2003 to March 31, 2004 concluded in June 2003. Although Mr. Rose's acting appointment was extended three times prior to

December 31, 2005, and was extended again effective December 31, 2005, the respondent provided no evidence to indicate that the CBSA conducted any selection processes related to these extensions. On the contrary, the CBSA treated Mr. Rose's extensions as something other than appointments, stating in its reply that no recourse rights were issued on the first extension "as this was an extension to the acting appointment and not a new appointment." The respondent has failed to establish that a selection process was being conducted at the time when subsection 29(1) of the *PSEA* came into force on December 31, 2005. Therefore, as per section 70 of the *PSMA*, the *PSEA* is the governing legislation.

[18] Mr. Rose's acting appointment was again extended from April 1, 2006 to June 16, 2006 and a Notice of Information Regarding Acting Appointment was posted on the Government of Canada's Publiservice Web site. In the notice, a complaint period was established from May 5, 2006 to May 23, 2006.

[19] A reading of section 58 of the *PSEA* makes it clear that extensions of acting appointments are appointments. Section 58 of the *PSEA* reads as follows:

58. (1) Subject to section 59, an employee whose appointment or deployment is for a specified term ceases to be an employee at the expiration of that term, or of any extensions made under subsection (2).

(2). A deputy head may extend a specified term referred to in subsection (1), and such an extension does not constitute an appointment or a deployment or entitle any person to make a complaint under section 77.

(3). This section does not apply in respect of appointments made on an acting basis.

[20] While subsection 58(2) of the *PSEA* permits the extension of an appointment for a specified term to be made without the need to make a new appointment, subsection 58(3) specifically excludes this flexibility in respect of extensions of acting appointments. Thus, the Tribunal is of the view that each appointment made on an acting basis and each extension of such an appointment constitutes an appointment subject to the requirements of the *PSEA* and its regulations, including recourse.

[21] The courts have recognized the need for flexibility to assign federal public service employees to functions on a temporary basis without this giving rise to the application of merit and the right of recourse. The case of *Doré v. Canada*, [1987] 2 S.C.R. 503, is illustrative of both this principle and its limitations.

[22] Subsection 14(1) of the *Public Service Employment Regulations*, SOR/2005-334, (the *PSER*) provides for this necessary flexibility, within limitations, by excluding short-term acting appointments from the application of merit and the right of recourse. Subsection 14(1) reads as follows:

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.

[23] Each extension of Mr. Rose's acting appointment made on or after December 31, 2005, could constitute an appointment. Further, each of those appointments could have had the effect of extending the cumulative period of acting appointment to four months or more. Neither of these possibilities was raised by the parties. Therefore the Tribunal will limit its considerations to the complaint before it, which concerns the acting appointment effective April 1, 2006 to June 16, 2006.

[24] The Tribunal finds that the appointment of Mr. Rose on an acting basis from April 1, 2006 to June 16, 2006 had the effect of extending the cumulative period of the acting appointment to four months or more. This appointment does not fall under the exclusion provided by subsection 14(1) of the *PSER* and, accordingly, it is not excluded from the application of section 77 of the *PSEA*.

ii. MOOTNESS

[25] In *Noël, supra*, the Federal Court of Appeal held that, because an acting appointment had been terminated and there was no longer an appointment, no confirmation or revocation of the appointment was possible, rendering the appeal moot.

[26] *Noël, supra*, was decided under the former PSEA. Subsection 21(2) of the former PSEA authorized the PSC to take limited remedial action, depending on the outcome of an appeal. Subsection 21(2) of the former PSEA reads as follows:

21. (2) Subject to subsection (3), the Commission, on being notified of the decision of a board established under subsection (1) or (1.1), shall, in accordance with the decision,

(a) if the appointment has been made, confirm or revoke the appointment; or

(b) if the appointment has not been made, make or not make the appointment.

[27] In the case of *Lo v. Canada (Public Service Commission Appeal Board)*, [1997] 222 N.R. 393, F.C.J. No. 1784 (C.A.) (QL), the Federal Court of Appeal determined that an appointment had been made and, although the incumbent had left the position, the contested appointment had not been revoked by the PSC and should be dealt with. The Court, in *Lo, supra*, was dealing with amendments made to section 21 of the former PSEA, which came into force in 1993 (S.C. 1992, c. 54, s. 16). Subsection 21(3) reads as follows:

21. (3) Where a board established under subsection (1) or (1.1) determines that there was a defect in the process for the selection of a person for appointment under this Act, the Commission may take such measures as it considers necessary to remedy the defect.

[28] Accordingly, the Court, in *Lo, supra*, determined that the fact that the appointment no longer existed did not render the PSC powerless to take corrective action. The Court further determined that departments should not be able to circumvent the review of an appointment process by simply ending an appointment, or moving an incumbent to another position.

[29] Section 81 of the *PSEA* authorizes the Tribunal to take broad remedial action. Section 81 reads as follows:

81. (1) If the Tribunal finds a complaint under section 77 to be substantiated, the Tribunal may order the Commission or the deputy head to revoke the appointment or not to make the appointment, as the case may be, and to take any corrective action that the Tribunal considers appropriate.

(2) Corrective action taken under subsection (1) may include an order for relief in accordance with paragraph 53(2)(e) or subsection 53(3) of the *Canadian Human Rights Act*.

[30] The powers of the Tribunal under section 81 of the *PSEA* are broader than those given to the PSC under subsection 21(3) of the former *PSEA*.

[31] In considering this issue, it is also important to look at the purpose of recourse. The appeal system that existed under section 21 of the former *PSEA* was a limited one. Its purpose was to prevent an appointment being made contrary to the merit principle.

[32] The *PSEA* has significantly changed the system of recourse related to appointments in the federal public service. Section 77 of the *PSEA* provides recourse for employees that is specifically designed to protect their right to treatment that is free from abuse in internal appointment processes. Section 77 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);

(b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; or

(c) the failure of the Commission to assess the complainant in the official language of his or her choice as required by subsection 37(1).

[33] The fact that the acting appointment has ended does not render the Tribunal's consideration of this complaint moot. In accordance with the *PSEA*, the current scheme of recourse is not, as it had been in the past, the challenge of an appointment made or about to be made. The mandate of the Tribunal concerning complaints filed pursuant to section 77 of the *PSEA* is to determine whether an abuse by the delegated staffing authority resulted in a person in the area of recourse not being appointed or proposed for appointment in an internal appointment process.

Moreover, if a complaint is substantiated, the Tribunal has the power, in addition to ordering a respondent to revoke or not make an appointment, to take any corrective action that the Tribunal considers appropriate. Thus, while revocation is no longer an appropriate remedy in this case, if the matter proceeds to hearing, and the complaint is substantiated, the Tribunal will consider submissions from the parties, and order appropriate corrective action.

DECISION

Issue I: Does the Tribunal have jurisdiction to hear this complaint?

[34] For the reasons outlined above, the Tribunal does have jurisdiction to hear this complaint.

Issue II: Does the ending of Mr. Rose's acting appointment prior to the Tribunal's consideration of this complaint render such review moot?

[35] For the reasons outlined above, the consideration of this complaint by the Tribunal is not rendered moot by virtue of the ending of the acting appointment.

CONCLUSION

[36] The Tribunal has jurisdiction to hear Mr. Wylie's complaint regarding the acting appointment of Mr. Rose and will consider and dispose of the complaint accordingly.

Merri Beattie
Member

PARTIES OF RECORD

Tribunal File:	2006-0029
Style of Cause:	Jeffrey Wylie and the President of the Canada Border Services Agency <i>et al.</i>
Hearing:	Written request, decided without the appearance of the parties
Date of Reasons:	September 27, 2006