

FILE: 2006-0028

OTTAWA, DECEMBER 6, 2006

LLOYD ROBBINS

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
LANGUAGE OF DECISION	English
INDEXED	<i>Robbins v. the Deputy Head of Service Canada et al.</i>
NEUTRAL CITATION	2006 PSST 0017

REASONS FOR DECISION

BACKGROUND

[1] Mr. Lloyd Robbins filed a complaint on May 8, 2006 with the Public Service Staffing Tribunal (the Tribunal) under section 77(1) of the *Public Service Employment Act* (the *PSEA*), S.C. 2003, c. 22, ss. 12, 13. He alleges “appearance of/or actual abuse of process” in an internal non-advertised selection process (number 2006-CSD-INA-ONT-INS-B-SC-46) for the Regional Insurance Consultant PM-04 position in Toronto, Department of Human Resources and Social Development – Service Canada, (the respondent).

[2] In accordance with subsection 99(3) of the *PSEA*, the Tribunal decided this complaint without holding an oral hearing. The decision is rendered based on the parties’ submissions which were reviewed in detail and summarized below.

FACTS

[3] In December 2005, Mr. Rick Cathrae, Manager Entitlement and Appeals Approval, prepared and submitted a business case to the Human Resources Management Committee (the HRMC) to appoint Ms. Angela Coyle to the PM-04 position in Toronto. The HRMC is composed of the Assistant Deputy Minister, the Director of Human Resources and senior management.

[4] On May 25, 2005, Ms. Coyle had previously qualified for a PM-04 position in Belleville, Ontario, identical to the position at the centre of this complaint, and was placed on an eligibility list for the Belleville position. The list was valid until May 25, 2006.

[5] Although Ms. Coyle ranked first on the eligibility list, she could not be offered an appointment because the position for which the eligibility list was established was transferred to Toronto.

[6] The HRMC approved the PM-04 appointment on December 21, 2005 and advised that the process would start after the coming into force of the *PSEA*.

[7] The Statement of Merit Criteria for the position was established in March 2006 by Mr. Cathrae and Ms. Pat Walcott, Director General, Insurance. Ms. Walcott is a member of the HRMC and has sub-delegated authority to make the appointment.

[8] Mr. Cathrae assessed Ms. Coyle and determined she was qualified for the position. Mr. Cathrae was her manager since October 2005. Although he was not a member of the original selection board where she qualified for the PM-04 position, he believed that the quality of the board process that initially assessed Ms. Coyle and placed her on a PM-04 eligibility list, used tools that were still relevant for this position such as assessing knowledge, abilities and personal suitability. Furthermore, as her manager, he was able to evaluate and monitor her skills and was satisfied with her work performance in being a leader. He also took into account the detailed discussions he had with the original selection board's Chairperson as well as Ms. Coyle's manager prior to October 2005.

[9] Mr. Cathrae and Ms. Walcott approved the narrative rationale for using a non-advertised process. Ms. Walcott also approved Ms. Coyle's appointment.

[10] On April 29, 2006, a Notification of Consideration was posted advising that Ms. Angela Coyle was being considered for a position as Regional Insurance Consultant, PM-04, for an indeterminate period.

[11] The Notification of Appointment of Ms. Coyle was posted on June 2, 2006.

[12] On June 5, 2006, Ms. Coyle was appointed to the position.

ISSUES

[13] The Tribunal must decide the following issues:

- (i) Was there abuse of authority in the choice of a non-advertised process?
- (ii) Was there abuse of authority in the selection of Ms. Coyle?
- (iii) Can the Tribunal order the deputy head (the respondent) to appoint the complainant to the position?

SUBMISSIONS

A) COMPLAINANT'S POSITION

[14] The complainant has two main arguments. Firstly, Mr. Rick Cathrae, the hiring manager, who wrote Ms. Coyle's assessment, the appointee, seems to be the manager who has sub-delegated authority. However, his name did not appear in the Notification of Appointment or Proposal for Appointment. The only name and contact on the Notification is Ms. Lara Mousley who is a Human Resources Service Representative. Therefore, a review of the Notification does not indicate who has delegated authority in this case. He concludes "the employer is seeking to circumvent the principles of fairness and equitable treatment relative to the principles of access, transparency, fairness and equitable treatment in staffing under the new *PSEA*."

[15] The complainant believes that the delegated authority does not rest with the manager but rather with the HRMC as the committee determines if a particular appointment will take place since it controls the staffing budget. As a result of this, the people who make the staffing decisions do not deal with the consequences of their decisions.

[16] He argues that the non-advertised process is secretive and denies him the opportunity to apply before March 27, 2006 which is the effective date of the indeterminate appointment.

[17] Secondly, the appointee, Ms. Angela Coyle was measured under the criteria of the former PSEA as her selection was based on her placement on a previous PM-04 list. The list was extinguished with the coming into force of the new PSEA.

[18] The complainant submits the use of the previous eligibility lists relieves the manager of his obligation to ensure the person appointed meets the essential qualifications. This was done for convenience and expediency purposes for the employer rather than meeting the criteria for selection in the PSEA. The complainant is also concerned about the "shelf life" of this previous assessment, i.e. how long in the past the assessment might have been carried out.

[19] The complainant asks the Tribunal to amend the Notice of Consideration to show his name. He also requests the Tribunal "to order the promotional appointment of the complainant (Lloyd Robbins) to the position of indeterminate Regional Insurance Consultant (Toronto), PM 04 classification effective March 27, 2006 or January 1, 2000 [sic] or December 31, 2005 the date the Public Service Employment Act came into force."

B) RESPONDENT'S POSITION

[20] The respondent addresses the complainant's allegations in detail.

[21] The respondent submits that the PSEA allows the use of a non-advertised process and does not create a preference between advertised and non-advertised processes. Furthermore, it cannot be inferred that using a non-advertised process is an "abuse of process" in itself.

[22] There is no express or implicit right or entitlement to apply or to be considered in an appointment process in the *PSEA*. In addition, there is no obligation to establish a rank between candidates or to do a comparative assessment of them or to consider more than one person.

[23] In response to the complainant's argument about the eligibility list, the respondent argues that the fact Ms. Coyle ranked first on the list for an identical position was one factor considered in her assessment, but not the only factor. Ms. Coyle was assessed against the Statement of Merit Criteria by Mr. Cathrae who believed that she was qualified for the position.

[24] The *PSEA* allows discretion to a department in the assessment of candidates who may use any method it chooses to determine if a person meets the qualifications for the position.

[25] There is no requirement for the sub-delegated authority to conduct the assessment in totality or in part. Therefore, Mr. Cathrae, the manager could conduct the assessment even if he was not the sub-delegated staffing authority.

[26] There is no need to find the most qualified candidate as long as the chosen person meets the qualifications, operational needs and future requirements in accordance with subsection 30(2) of the *PSEA*.

[27] The complainant has the burden to prove there was abuse of authority. He failed to establish that he was not appointed by reason of an abuse of authority.

[28] The complainant does not establish that choosing a non-advertised process or considering only one person was an abuse of authority.

[29] Finally, the complainant asks to be considered for appointment and be appointed to the position. The respondent submits the Tribunal cannot order such a remedy.

C) PUBLIC SERVICE COMMISSION'S POSITION

[30] The PSC reviews the applicable statutory provisions:

- section 15 – Exercise of powers and functions by deputy heads;
- section 16 – Compliance with appointment policies;
- section 30 – Appointment on basis of merit;
- section 33 – Appointment processes;
- section 47 – Informal discussion with employee;
- section 48 – Persons being considered for appointment; and
- section 77 – Grounds of complaint.

[31] The PSC then explains its Appointment Policy Framework (the PSC Policy) and is of the view that the respondent's staffing process is consistent with the *PSEA* and the PSC Policy.

[32] The PSC also submits there is insufficient evidence to conclude there was abuse of authority in the respondent's staffing process.

ANALYSIS

Issue 1: Was there abuse of authority in the choice of a non-advertised process?

[33] The complainant filed his complaint under subsection 77(1) of the *PSEA*. Of particular interest is paragraph 77(1)(b) 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

(...)

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

[34] As explained in *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008, in order to succeed, the complainant has to demonstrate on a balance of probabilities that there was abuse of authority in choosing between an advertised and a non-advertised internal appointment process:

[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)

[35] Section 33 of the *PSEA* is clear that the PSC or its delegate, in accordance with subsection 15(1) of the *PSEA*, may choose an advertised or non-advertised process to make an appointment:

33. In making an appointment, the Commission may use an advertised or non-advertised appointment process.

[36] Thus, the complainant cannot allege there is abuse of authority simply because a non-advertised process was chosen. The complainant has to prove that the decision itself to choose a non-advertised process constitutes an abuse of authority.

[37] The complainant alleges that the non-advertised process is secretive and denies him the opportunity to apply but has not submitted any facts nor evidence to prove how or why it was secretive. Conversely, the process has not been secretive considering the documents filed such as the assessment of Ms. Coyle

and the Non-Advertised Appointment Processes Form which includes the narrative rationale justifying the appointment of the candidate.

[38] The respondent provides the department's *Criteria for Non-Advertised Appointment Processes Policy* in its Book of Documents. It outlines in its Policy Statement that "a written rationale must be prepared for each non-advertised process to demonstrate that the appointment values and criteria have been applied."

[39] The respondent submits the written rationale by Mr. Cathrae and Ms. Walcott, to justify using a non-advertised process to appoint Ms. Coyle. In the narrative rationale, they explain that Ontario is implementing a one-workload approach to employment insurance (EI) claims processing. This process requires lead staff with recent field experience, experience in managing a processing unit, experience in developing processes for regional and national implementation and superior knowledge of the computer programs used to process EI claims.

[40] Another argument raised by the complainant is the "shelf life" of a previous assessment. In the *Criteria for Non-Advertised Appointment Processes Policy*, the circumstances in which a non-advertised process might be justified are indicated in the "Considerations" section. One of these circumstances is "a previous process [that] already identified persons satisfying very similar merit criteria (...)". In this case, a previous process was held where Ms. Coyle qualified for an identical PM-04 position on May 25, 2005. She was appointed to her present position on June 5, 2006. Surely, the time span of one year hardly indicates that she is no longer qualified for the same PM-04 position. Accordingly, the Tribunal rejects this argument.

[41] The Tribunal finds the complainant has not raised any facts to support his complaint nor proven on a balance of probabilities that there has been an abuse of authority by the respondent in choosing a non-advertised process.

Issue 2: Was there abuse of authority in the selection of Ms. Coyle?

[42] In *Aucoin v. President of the Canada Border Services Agency et al.*, [2006] PSST 0012, the Tribunal outlines the differences between a selection process held under the former PSEA and the new *PSEA*:

[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). (...)

[43] Thus, a candidate must meet the established essential qualifications. There is no requirement to compare candidates. Furthermore, section 30 of the *PSEA* provides that there is no need to go through a selection process and interview many people in order to make an appointment:

30 (4) The Commission is not required to consider more than one person in order for an appointment to be made on the basis of merit.

[44] In addition, section 36 of the *PSEA* allows discretion in choosing methods to assess candidates for appointment:

36. In making an appointment, the Commission may use any assessment method, such as a **review of past performance and accomplishments**, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i). (Emphasis added)

[45] In this instance, Mr. Cathrae and Ms. Walcott reviewed Ms. Coyle's past performance in being a leader, experience and placement on the eligibility list for the identical PM-04 position in the Belleville competition as factors to appoint her. Mr. Cathrae also took into account the detailed discussions he had with the original selection board's Chairperson as well as Ms. Coyle's previous manager. Whether this was done for expediency and convenience purposes is irrelevant as long as the successful candidate meets the essential qualifications and the respondent can justify its decision. This is in accordance with section 36 and with the following excerpt of the preamble of the *PSEA*:

delegation of staffing authority should be to as low a level as possible within the public service, and should afford public service managers the **flexibility necessary to staff**, to manage and to lead their personnel to achieve results for Canadians; (...) (Emphasis added)

[46] The Tribunal finds that the respondent, in these circumstances, chose appropriate methods to assess Ms. Coyle to determine whether she met the essential qualifications of the position of Team Leader, PM-04.

[47] Moreover, the respondent provides a written rationale where Mr. Cathrae and Ms. Walcott review Ms. Coyle's experience. She was the acting manager of the Ontario regional centralized processing unit in 2004 and acting manager of the Ontario one-workload group until September 2005. Ms. Coyle began working on regional procedures for virtual claims processing in September 2005. She is part of a national committee on standardized claims processing and another committee on data imaging. She also participated as a regional representative on audit visits on the operation of four different processing centres.

[48] According to Mr. Cathrae and Ms. Walcott, Ms. Coyle has the experience, knowledge and skills to step immediately into the position to lead a

transformation process. She has demonstrated her qualifications for this position in the recent competitive process for a PM-04 position and has been acting in the position since September 2005.

[49] The respondent's narrative rationale explains why Ms. Coyle was selected for the position. The Tribunal finds this decision was made after a careful examination of the requirements for the position as well as Ms. Coyle's qualifications and experience. The selection of Ms. Coyle does not indicate there was abuse of authority by the respondent.

[50] As for the argument raised by the complainant on delegation of authority, the respondent explains that there is no requirement for the sub-delegated authority to conduct the assessment in totality or in part. The fact that Mr. Cathrae assessed Ms. Coyle does not invalidate the process and certainly does not amount to abuse of authority. Mr. Cathrae has been working with Ms. Walcott, who has sub-delegated authority to staff, during the entire process and who ultimately approved the decision. Therefore, the Tribunal rejects this argument.

Issue 3: Can the Tribunal order the deputy head (the respondent) to appoint the complainant to the position?

[51] Although the Tribunal has determined that the allegations of abuse of authority are not substantiated, it will address the corrective action requested by the complainant to be appointed to the position.

[52] The Tribunal's powers when dealing with complaints under section 77 are found in sections 81 and 82:

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.

82. The Tribunal may not order the Commission to make an appointment or to conduct a new appointment process.

[53] Therefore, even if the complainant had been successful in his complaint, the Tribunal could not order the deputy head (the respondent) to appoint the complainant or anyone else in the position. The Tribunal is bound by sections 81 and 82 of the *PSEA* and has no authority to grant such corrective action.

DECISION

[54] For all these reasons, the complaint is dismissed.

Sonia Gaal
Vice-chair

PARTIES OF RECORD

Tribunal File:	2006-0028
Style of Cause:	<i>Lloyd Robbins and the Deputy Head of Service Canada as part of the department of Human Resources and Social Development Canada et al.</i>
Hearing:	Decided without the appearance of the parties
Date of Reasons:	December 6, 2006