Public Service Staffing Tribunal
Tribunal de la dotation de la fonction publique

DECISION: 06-0015

FILE: 2006-0015

OTTAWA, SEPTEMBER 28, 2006

JEANNETTE TIBBS

COMPLAINANT

AND

THE DEPUTY MINISTER OF NATIONAL DEFENCE

RESPONDENT

AND

OTHER PARTIES

MATTER	Complaint of abuse of authority pursuant to para. 77(1)(*a*) of the *Public Service Employment Act*
DECISION	The complaint is dismissed
DECISION RENDERED BY	Guy Giguère, Chairperson
HEARING DATES	August 29-30, 2006
INDEXED	*Tibbs v. Deputy Minister of National Defence et al.*
NEUTRAL CITATION	2006 PSST 0008

REASONS FOR DECISION

BACKGROUND

[1] Jeannette Tibbs is complaining that she was not appointed to a position of Production Manager at the Department of National Defence (DND) by reason of abuse of authority. She alleges that the selection board for this process abused its authority by being very lenient in assessing the person that was appointed as Production Manager (the appointee), while being very strict in assessing her.

[2] On February 20, 2006, the complainant applied for the advertised position of Production Manager at the Canadian Forces Aerospace Warfare Centre – CFB Trenton. On March 8, 2006, she was informed that she was screened out of the appointment process on the ground that she failed to meet one of the essential qualifications for the position, namely, acceptable experience in supervision, office and budget management. On March 27, 2006, she filed a complaint with the Public Service Staffing Tribunal (the Tribunal) under paragraph 77(1)(*a*) of the *Public Service Employment Act* (the *PSEA*), S.C. 2003, c. 22, ss. 12, 13.

[3] The complainant states that there has been abuse of authority by the selection board in two respects. First, the appointee does not meet two of the essential qualifications for the position. The complainant argues that the appointee does not meet the essential qualification of education, which called for a "University degree in computer science, information technology, information management OR an acceptable combination of education, training and/or experience." Furthermore, in allegations filed with the Tribunal on May 4, 2006, the complainant also submits that the appointee did not demonstrate on her application that she met the essential qualification for acceptable experience in supervision, office and budget management.

[4] Secondly, the complainant states that the decision of the selection board to screen her out of the appointment process for failing to meet the essential qualification of "acceptable experience in supervision, office and budget management" constitutes abuse of authority.

PRELIMINARY MATTERS

[5] A pre-hearing conference was held on August 23, 2006. At that time, the complainant submitted that the burden of proof lies with the respondent to establish that the appointment was done on the basis of merit. The respondent disagreed with this position. The parties were advised that they could present their arguments on this issue at the hearing. Meanwhile, in order to facilitate the hearing process, it was determined that presentation of evidence and arguments would start with the complainant.

[6] The complainant also voiced the concern that, in its reply, the Public Service Commission (PSC) stated that, in its view, the appointment had been made in accordance with the merit principle. The complainant noted that if revocation of the appointment were ordered in these proceedings, the appointee would have a right to complain against a new appointment under section 83 of the *PSEA*. In her complaint, the appointee could rely on the PSC's opinion that the original appointment was made in accordance with the merit principle.

[7] The PSC submitted that, like any party to these proceedings, it can take a position on an appointment and that it is up to the Tribunal to make a final determination. The PSC confirmed that its reply indicates that it was only providing a preliminary assessment based on the limited information available. It also noted that the PSC does not intend to take an active role at hearings with respect to issues of fact, but will present arguments only on issues of law.

[8] Counsel for the respondent noted that he understood the complainant's concern with respect to the PSC taking a position on a complaint. The respondent requested guidance from the Tribunal as to the role of the parties at a hearing. The respondent suggested that the PSC's role could be akin to that of *amicus curiae*, a friend of the court.

[9] As I explained to the parties at the hearing, the role of the PSC cannot be that of *amicus curiae* since it is a party under the *PSEA.* The party status of the PSC is even more pronounced in complaints where the PSC has not delegated its staffing authority. In these cases, the PSC is the respondent before the Tribunal.

[10] It should also be noted that there is no obligation or necessity for the PSC, in its replies to complaints, to take a position, especially where it believes that it may not have all the relevant information to do so. However, a submission on the applicable legislation, precedents and policies by the PSC at this stage of the complaint process can be very useful. At the hearing, all the relevant facts and information are available, and the PSC may then wish to make a submission on the merits of the complaint. Regardless of any party's submission, under the *PSEA* the final determination of a complaint rests with the Tribunal.

SUMMARY OF RELEVANT EVIDENCE

[11] A job opportunity as Production Manager (No. 06-DND-IA-TRNTN-036513) at CFB Trenton was posted on February 9, 2006 on the Publiservice Web site. This indeterminate position is at the IS-04 group and level. The area of selection was limited to civilian employees of DND occupying a position at CFB Trenton. It was specified that it was the applicants' responsibility to clearly demonstrate on their application that they met all of the essential qualifications. The complainant testified that she understood this.

[12] The two key relevant essential qualifications contained in the advertisement which are at issue here are:

- University degree in computer science, information technology, information management OR an acceptable combination of education, training and /or experience.

- Acceptable experience in supervision, office and budget management.

[13] There were two applicants for this position, Anne Pennington and the complainant, Jeannette Tibbs. Each applicant provided a cover letter and résumé in support of their application. Their applications were reviewed by a selection board composed of Lt.-Col. Blair, who chaired the board, Maj. Arsenault and Ms. Markman. Ms. Markman, as a Human Resources Officer, was there to advise the other members of the board and did not screen the applicants.

A) EVIDENCE ON THE EDUCATIONAL REQUIREMENT

[14] Ms. Tibbs testified that she understood the educational requirement to mean that applicants should have a degree in computer science or, if not, there would be a preference for applicants who, in combination with their training and/or experience, were working towards a degree. She has a two-year Computer Programmers' college diploma and completed more than half the credits towards a Bachelor of Science Degree in Computing and Information Systems at Athabasca University. She believes that the appointee does not meet the educational requirement because the appointee has pursued a Bachelor of Arts Degree which is not related to a computer science degree.

[15] Lt.-Col. Blair testified that initially the job opportunity poster showed the position to be an AS-06 with the requirement of a university degree in computer science. His concern was that this wording overemphasized the technical functions and underestimated the more important supervisory functions of the position. Therefore, this essential qualification was changed to a degree in

computer science “OR an acceptable combination of education, training and/or experience.” By indicating “OR an acceptable combination …,” management was looking for applicants with a broader set of skills and abilities who would have an acceptable combination of education, training and/or experience. For those reasons, there was no requirement or preference to be given to a person with education leading to a degree in computer science.

B) EVIDENCE ON THE SUPERVISION, OFFICE AND BUDGET MANAGEMENT REQUIREMENT

[16] A document entitled “Profile of Ideal Candidate” was prepared prior to the screening of applicants. It outlined the criteria that would guide the selection board at the different steps in the appointment process. The following criteria were listed for consideration by the selection board for the application component of the appointment process:

- Suitable education
- Publishing experience (weighted more heavily than education)
- Previous management of a Publishing Section
- Knowledge of Program Management

[17] Lt.-Col. Blair testified that he and Maj. Arsenault separately completed a screening report for each candidate and, thereafter, compared results. Both screening reports for Ms. Pennington showed that she met all of the essential qualifications. Lt.-Col. Blair wrote the following comments on the screening report for Ms. Pennington with respect to acceptable experience in supervision, office and budget management: “spokesperson for section, acting manager for a year, developed business plan, coached and mentored individuals as a volunteer caregiver, coached a fellow employee during a stressful period.”

[18] Both screening reports for the complainant indicated that she met all of the essential qualifications except one; she lacked acceptable experience in supervision, office and budget management. Handwritten comments on the screening reports explained why the complainant was assessed as not having acceptable experience in supervision, office and budget management. Maj. Arsenault wrote: “more technical than supervisory - no office management experience or training identified - limited budget management experience with regard to size/scope of responsibilities.” Lt.-Col. Blair’s comments were: “lacks supervisory experience managing the production and distribution of CF/DND publications - managed supply budget at 426 Squadron - lacks general office management - has not supervised DND personnel.”

[19] Ms. Tibbs met with Lt.-Col. Blair and Maj. Arsenault for an informal discussion on March 13, 2006 after she was screened out of the internal appointment process. She asked them to explain to her about those areas on which they felt that she did not have the necessary experience. They confirmed that it was in the area of supervision. The complainant talked about her experience in supervision of term employees at DND, and her supervisory experience prior to joining DND. The selection board members indicated that she would have had to have supervised DND personnel and/or had voluntary supervisory experience. She asked them if they would have found it acceptable experience in supervision had she signed a Performance Evaluation Report. They indicated that this would have been acceptable. Ms. Tibbs testified that her volunteer work did not have supervisory functions.

[20] During the informal discussion, Lt.-Col. Blair asked Ms. Tibbs whether she had any examples of supervision that she had not included in her résumé on which she could expand. Lt.-Col. Blair testified that she did not offer any further examples. Maj. Arsenault also told her that she did not have acceptable experience in budget and office management. After this meeting, both Maj. Arsenault and Lt.-Col. Blair separately reviewed their notes and Ms. Tibbs’

application letter and résumé. They met again and concluded that the complainant should be screened out.

[21] Ms. Tibbs was upset when she learned that Ms. Pennington was to be appointed to this position because she believes that they have the same level of experience in supervision, budget and office management. Ms. Tibbs has worked since 2000 as Information Technology Officer/Webmaster with the Civilian Human Resources Service (Ontario) at the group and level of CS-02. Prior to this employment, she worked for 14 years with the appointee at the 426 Training Squadron, as a Publication Production Computer Operator, at the group and level of OCE-02. The appointee's position was Courseware Developer/Trainer, which was then classified at the group and level of OCE-03 and later reclassified as GT-03.

[22] Ms. Tibbs acted twice in the appointee's position while she was away on maternity leave. During that period, the complainant supervised two term employees that were replacing her in the OCE-02 position. The complainant explained that she was not suggesting in any way that the appointee cannot do the job. Yet, she cannot understand why she would be screened out with this experience whereas the appointee, who has stayed in the same position for the last 20 years, would be found to have acceptable experience in supervision.

[23] During the exchange of information, the complainant asked how the appointee met the requirement for supervision. The respondent pointed out that the appointee had acted for a year as the section manager. Ms. Pennington had provided this information in her application letter. Ms. Tibbs testified that Lt.-Col. Blair talked about the Commendation for Ethics of the Ombudsman for National Defence and Canadian Forces that the appointee received. He told her "this is why she is a successful candidate" and seemed impressed by this award. Lt.-Col. Blair was not cross-examined on this point.

[24] In testimony, Lt.-Col. Blair went through Ms. Pennington's application letter and résumé and explained in detail how she met all of the essential qualifications for the position, including the requirements related to education and acceptable experience in supervision, office and budget management. He pointed out that she had acted for over a year as the section manager, which was an important responsibility as she was responsible for all subsections. She also had considerable supervisory experience in her volunteer work, was responsible for a business plan and had experience in office management. However, he testified, in cross-examination, that there was almost no indication of supervisory functions in the work description of Courseware Developer/ Trainer.

[25] Lt.-Col. Blair went through Ms. Tibbs' application letter and résumé and explained why she did not meet the essential qualification of acceptable experience in supervision, office and budget management. He pointed out that the complainant, as a webmaster, is a one-person office where she does not have any subordinates and her budget responsibilities are very limited. He explained that the position of Production Manager requires a person with demonstrated ability to supervise a full team of employees, and, Ms. Tibbs' experience in supervision does not show this.

ISSUES

[26] The Tribunal must answer the following questions:

(i) Who has the burden of proof with respect to complaints before the Tribunal?

(ii) Did the actions of the selection board in screening out the complainant and screening in the appointee constitute abuse of authority under section 77 of the *PSEA*?

COMPLAINANT'S SUBMISSIONS

[27] The complainant submits that when a complaint is brought, the deputy head should first have to establish how the appointee meets the essential qualifications. The deputy head has access to and control of all the information and documentation on the staffing process and it is, therefore, logical that it provide that information to the complainant. It would also be expected that the documentation be forwarded to the PSC to prepare its response. The deputy head and PSC's response should address the substance of the allegations and not contain merely "motherhood statements." The complainant could then decide whether or not to pursue the complaint. At the hearing, the burden of proof would be on the complainant to prove that abuse of authority has occurred.

[28] The complainant further submits that abuse of authority is not a catch-all standard for actions that do not seem "fair". She acknowledges that abuse of authority requires wrongdoing. She noted, for example, that the Judge Advocate General of the U.S. Air Force has defined abuse of authority as an arbitrary or capricious exercise of power that adversely affects the rights of any person or results in a personal gain or advantage to the abuser.

[29] The complainant argues that the application of a definition of abuse of authority would be far too limiting. Rather, the Tribunal should look to the five generic types of abuse enumerated by David Philip Jones & Anne S. de Villars, *Principles of Administrative Law* (Toronto: Thomson Carswell, 2004), and referenced in *Tucci* v. *Canada* (*Revenue, Customs, Excise and Taxation*), (1997) 126 F.T.R. 147, [1997] F.C.J. No. 159 (T.D.)(QL) at para. 8:

> Nevertheless, unlimited discretion cannot exist. The courts have continuously asserted their right to review a delegate's exercise of discretion for a wide range of abuses. It is possible to identify at least five generic types of abuses, which can be described as follows. The first category occurs when a delegate exercises his discretion with an improper intention in mind, which subsumes acting for an unauthorized purpose, in bad faith, or on irrelevant considerations. The second type of abuse arises when the delegate acts on inadequate material, including where there is no evidence or without considering relevant matters. Thirdly, the courts sometimes hold that an abuse of discretion has

> been committed where there is an improper result, including unreasonable, discriminatory or retroactive administrative actions. A fourth type of abuse arises when the delegate exercises his discretion on an erroneous view of the law. Finally, it is an abuse for a delegate to refuse to exercise his discretion by adopting a policy which fetters his ability to consider individual cases with an open mind.

[30] The complainant submits that the first type of abuse mentioned above has been demonstrated in this selection process. Lt.-Col. Blair agreed with the educational requirement in the statement of merit criteria, yet had no intention of selecting an individual with a university degree in computer science.

[31] According to the complainant, the selection board erred in its interpretation of the educational requirement as stated in the merit criteria. In the complainant's view, the proper interpretation is that if applicants do not have a degree in computer science, they must have some education and training related to a degree in computer science. In her application documents, the appointee did not demonstrate that she had followed courses directly related to, or associated with, a degree in computer science.

[32] The complainant further submits that the second type of abuse mentioned above took place when the selection board acted on inadequate material and without considering relevant matters. The appointee failed to demonstrate in her application documents that she had experience in supervision, office and budget management. Lt.-Col. Blair mistakenly relied on an award that the appointee had received, namely, the Commendation for Ethics of the Ombudsman for National Defence and Canadian Forces as demonstrating the necessary acceptable experience in supervision.

[33] According to the complainant, the third type of abuse mentioned above occurred because there was an improper result, including unreasonable and discriminatory administrative actions that were taken. The appointee has never supervised colleagues and, yet, will have the responsibility of supervising senior editors and other staff. While the complainant concedes that the appointee has

demonstrated that she has experience in guiding, coaching and mentoring, these skills do not equate to supervisory experience.

[34] Conversely, the complainant submits that she has supervised term employees and provided guidance to colleagues. Yet, unlike the appointee, this supervisory experience was not considered acceptable. The complainant was found not to have acceptable experience in budget management because she is responsible for a small budget. However, the appointee is also responsible for a small budget.

RESPONDENT'S SUBMISSIONS

[35] The respondent submits that the burden of proof rests on the complainant as it is settled law that "he who asserts must prove." Arbitral jurisprudence is clear in the private sector that the employee challenging a denial of a promotion has the onus of proving that he or she should have been promoted: Morley R. Gorsky, S.J. Uspich & Gregory J. Brandt, *Evidence and Procedure in Canadian Labour Arbitration* (Toronto: Thomson Carswell, 1994) at 9-15, 9-24.

[36] Furthermore, the language of section 77 of the *PSEA* emphasizes that the burden is on the complainant. An employee complains that he or she was not appointed because of abuse of authority. It is a matter of establishing abuse of authority, not finding fault in the process of an appointment as was the case under the former PSEA.

[37] Under the former PSEA, the most meritorious candidate had to be appointed. The manager had the burden of proving that the staffing was a flawless process that led to the appointment of the most meritorious candidate. This is no longer a requirement. Under the new regime, a complainant could establish that he or she is the most meritorious candidate and still not demonstrate that there has been abuse of authority. An appointment will stand unless it is proven that there has been abuse of authority. The *Public Service*

Staffing Tribunal Regulations, SOR/2006-6 (the *PSST Regulations*), also emphasize that the burden is on the complainant. After the complaint is filed, information is exchanged and the complainant has to provide allegations. Then the deputy head replies to the allegations.

[38] The respondent argues that the term “abuse” applies only to very serious transgressions. Subsection 2(4) of the *PSEA* states that abuse of authority “shall be construed to include bad faith and personal favouritism.” These two concepts pertain to the use of extraneous considerations. Under our legal system, bad faith cannot be presumed and this supports the proposition that abuse of authority refers only to serious transgressions.

[39] In external appointment processes, the PSC may revoke an appointment pursuant to section 66 of the *PSEA* on the grounds of error, omission or improper conduct. The threshold for the PSC to revoke an appointment is lower than that required in cases of abuse of authority under section 77 of the *PSEA*. Given this, according to the respondent, Parliament must have intended that more than errors or omissions are required for the Tribunal to find that there has been abuse of authority and order a revocation.

[40] Under the former PSEA, the ground for an appeal was that relative merit was not achieved. The process was prescriptive and ranking was mandatory. Any discrepancy in the process could lead to an appeal being granted as it was the staffing process that was “on trial.”

[41] An employee can complain of abuse of authority, in the exercise of the deputy head’s authority to make an appointment on the basis of merit, under paragraph 77(1)(*a*) of the *PSEA*. The parameters of this authority are found in the definition of merit contained in subsection 30(2) of the *PSEA*. However, unlike the former PSEA, there is no requirement to rank candidates, establish an eligibility list, or to consider more than one person. The new concept of merit requires only that the person appointed meet the essential qualifications. It is no

longer a matter of dissecting an appointment process to find a discrepancy. Thus, the respondent submits, the *PSEA* recognizes that staffing is not an exact science and that personal judgment is part and parcel of the exercise. In addition, the respondent argues, Hansard records indicate that Parliament has chosen to remove the prescriptive language of the former PSEA so that the public service is not burdened by staffing processes that consume inordinate resources and time.

[42] With respect to the expansive interpretation of abuse of authority found in *Tucci, supra*, the respondent argues that this interpretation has not been adopted or mentioned in subsequent cases on deployment where the concept of abuse of authority was discussed, namely: *Canada (Attorney General) v. Hasan*, (1998) 157 F.T.R. 175, [1998] F.C.J. No. 1672 (T.D.) (QL), and *Laidlaw v. Canada (Attorney General)*, (1999) 166 F.T.R. 217, [1999] F.C.J. No. 566 (T.D.) (QL). For the respondent, only the first type of abuse would find application in the context of the *PSEA*, that is, improper intention, which subsumes acting in bad faith, or on irrelevant considerations. Thus, the respondent contends that, in order for the Tribunal to substantiate a complaint of abuse of authority, the Tribunal must find that there was intent on the part of the respondent.

[43] The respondent concluded that even if the Tribunal were inclined to find some inspiration from Jones & de Villars, *supra*, the meaning of abuse of authority should be taken from the provisions of the *PSEA*, and not from either the former PSEA or jurisprudence that Parliament has chosen to put behind it by enacting the *PSEA*.

[44] The respondent submitted that the complaint should be dismissed as there was no evidence of improper intention and no abuse of authority occurred in this appointment process.

PUBLIC SERVICE COMMISSION' S SUBMISSIONS

[45] The PSC submits that the complainant should initially bear the burden of proof as it is making the allegation of abuse of authority. As a first step, the complainant should adduce, at a minimum, evidence of elements indicating that abuse of authority has occurred in the appointment process. As a second step, the burden could shift to the respondent, as it is in possession of all the documents and information related to the appointment. The respondent should be required to respond on errors that might have occurred and explain why the appointment does not constitute abuse of authority. In the third step, the burden could shift back to the complainant to prove beyond a doubt that abuse of authority has occurred in the appointment process.

[46] The PSC submits that the modern principle of interpretation of statutes requires that a statute be read in its ordinary sense harmoniously with its scheme and objects and the intention of Parliament. In interpreting abuse of authority under section 77 of the *PSEA*, subsections 2(4) and 15(3) should also be taken into account. Subsection 2(4) of the *PSEA* states that abuse of authority includes bad faith and personal favouritism. Under subsection 15(3) of the *PSEA*, the deputy head may revoke an appointment after investigation, if an error, omission or improper conduct affected the appointment process. According to the PSC, simple error, error or omission should not constitute abuse. Therefore, abuse of authority should be narrowly circumscribed and reserved for the most serious situations.

[47] Like the respondent, the PSC argues that the interpretation of abuse of authority found in *Tucci*, *supra*, has no application under the *PSEA* except for the first type of abuse enumerated by Jones & de Villars, *supra*. In its view, there would be abuse of authority when the delegate has an improper intention in mind, is acting in bad faith, or on irrelevant considerations.

ANALYSIS

Issue I: Who has the burden of proof with respect to complaints before the Tribunal?

[48] This complaint is brought under 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).

[49] The general rule in civil courts and in arbitration hearings is that the party making an assertion bears the burden of proving this assertion rather than the other side having to disprove it. For example, in labour law, a grievor complaining that the employer has breached the collective agreement bears the burden of proving the assertion.

[50] In this case, the complainant is alleging under paragraph 77(1)(*a*) of the *PSEA* that she was not appointed by reason of abuse of authority when the deputy head exercised his or her authority under subsection 30(2) in the appointment of Ms. Pennington. 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.

[51] The complainant agrees that she has the onus to prove that abuse of authority has occurred in the appointment process. However, the complainant argues that the deputy head has access to and control of all the information and

documentation on the staffing process and that it is logical that it be provided to the complainant. Thus, for the complainant, the deputy head should first have to establish how the appointee meets the essential qualifications.

[52] Section 16 of the *PSST Regulations* provides for an exchange of information between the complainant and the respondent of all relevant information within 25 days following receipt of the complaint. The exchange of information is done in the interest of facilitating the resolution of the complaint. Many complaints are resolved at this early stage, without the further intervention of the Tribunal or involvement of other parties. However, if the information is not provided, the respondent or the complainant can ask for an order by the Tribunal to produce the relevant information (subsection 16(3) of the *PSST Regulations*).

[53] The PSC suggests a three-step shifting onus, culminating in a complainant having to prove "beyond a doubt" that abuse of authority has occurred in the appointment process. I cannot agree that the standard of proof required is greater than the civil standard, namely, the balance of probabilities, at any stage of a hearing. The party with the onus on an issue must prove the matter on the civil standard of a balance of probabilities. Accordingly, if the evidence is such that the Tribunal can say that it is more probable than not, then the burden is discharged.

[54] While it is open to the respondent, for its part, to simply deny the assertion, once the complainant has presented some evidence in support of his or her assertion that abuse of authority has occurred, then the respondent will likely wish to raise a positive defense to the assertion. Moreover, it is open to the Tribunal to draw reasonable inferences from uncontested facts and, thus, if the respondent does not present evidence to explain its reasons for a particular course of action or conduct, it risks being faced with an adverse finding by the Tribunal, namely, a substantiated complaint: Gorsky, Uspich & Brandt, *supra*, at 9-15, 9-16.

[55] Therefore, complainants have the burden of proof with respect to complaints of abuse of authority before the Tribunal.

Issue II: Did the actions of the selection board in screening out the complainant and screening in the appointee constitute abuse of authority under section 77 of the *PSEA*?

[56] Abuse of authority is not defined in the *PSEA*. Subsection 2(4) of the *PSEA* does provide guidance. It reads as follows in English and in French:

> 2(4) For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.
>
> 2(4) Il est entendu que, pour l'application de la présente loi, on entend notamment par «abus de pouvoir» la mauvaise foi et le favoritisme.

[57] Where bad faith and/or personal favouritism have been proven, a complaint of abuse of authority will be substantiated by the Tribunal. Yet, it is significant that in subsection 2(4), the word "including" precedes the terms bad faith and personal favouritism, and in the French version "*notamment*" appears before "*mauvaise foi*" and "*favoritisme*". It is clear that by the use of such inclusive language Parliament intended that the concept of abuse of authority not be limited to bad faith and personal favouritism.

[58] The question remains: what constitutes abuse of authority for the purposes of the *PSEA*? *Black's Law Dictionary*, 8th ed., 2004 at 10 defines abuse as a "departure from legal use or reasonable use; misuse." Authority, in turn, is defined at 142 as "the power delegated by a principal to an agent." The terms abuse of authority, abuse of power and abuse of discretion are used interchangeably in the jurisprudence and by learned authors in administrative law. The relation between these concepts has been summarized very well by Macauley and Sprague: Robert W. Macauley & James L.H. Sprague, *Practice and Procedure before Administrative Tribunals*, vol. 1 (Toronto: Thomson Carswell, 2004) at 5B-1:

> However when the legislature leaves the agency a choice as to some or all aspects of the exercise of the authority, the grant of authority is referred to as a "power" and, to the extent that the agency has choice, it is said to have discretion.
>
> (…) The nature of discretion is that in its exercise the wielder of the authority has the ability to exercise the discretionary aspect of the authority according to his or her judgment.

[59] For example, the *PSEA* provides those with staffing authority, the power to make an appointment. Those who have this power will use their discretion in making an appointment; they will make a choice between the qualified candidates according to their judgment. The subject matter coming under review when the Tribunal considers a complaint of abuse of authority is essentially this exercise of discretion in staffing processes. A broad definition of abuse of authority in the context of the *PSEA* could, therefore, be misuse or improper use of the discretionary power in staffing processes. However, this definition is too vague to be particularly helpful.

[60] Moreover, I agree with the complainant's submission that the Tribunal should not be circumscribed by a definition of abuse of authority. The fact that Parliament chose not to provide a definition of abuse of authority and has established this Tribunal to interpret the concept of abuse of authority in the context of section 65, section 77, and section 83 complaints lends support to the idea that it was not Parliament's intention to have a static definition of abuse of authority.

[61] In construing the meaning of abuse of authority in the context of *PSEA* complaints, the Tribunal must look at the whole scheme of the *PSEA*, including the preamble. Preambles are optional components of legislation; Parliament has chosen to include a preamble in the *PSEA*. A preamble is "considered an integral part of the Act" and can assist with the determination of legislative purpose: Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at 296.

[62] An examination of the preamble of the *PSEA* helps to reveal its legislative purpose. The preamble of the *PSEA* is clear and of considerable assistance in interpreting the concept of abuse of authority. The following section is of particular note: "delegation of staffing authority (…) should afford public service managers the flexibility necessary to staff, to manage and to lead their personnel to achieve results for Canadians."

[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.

[64] However, this does not mean that the *PSEA* provides for absolute discretion. The preamble clarifies the values and ethics that should characterize the exercise of discretion in staffing. It also supports another key legislative purpose of the *PSEA*, establishing new recourse mechanisms on appointment issues before a neutral and independent body, the Tribunal. The relevant section of the preamble reads as follows: "the Government of Canada is committed to a public service that (…) is characterized by fair, transparent employment practices, respect for employees, effective dialogue and recourse aimed at resolving appointment issues."

[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.

[67] Parliament has identified in the *PSEA* the recourse available to those concerned about the exercise of discretion in staffing processes. For example, a person in the area of recourse can complain to the Tribunal under paragraph 77(1)(*a*) of the *PSEA* that he or she was not appointed or proposed for appointment because there was abuse of authority when the selection board exercised its discretion under subsection 30(2) and made a selection from those candidates who applied for a particular position.

[68] Discretion in staffing processes must be exercised in accordance with the nature and purpose of the *PSEA*. As Justice Rand wrote in the landmark case of *Roncarelli v. Duplessis,* [1959] S.C.R. 121 at 140; [1959] S.C.J. No. 1 (QL):

> (…) there is no such thing as absolute and untrammelled "discretion," that is that action can be taken on any ground or for any reason that can be suggested to the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.

[69] More recently, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at 853; [1999] S.C.J. No. 39 (QL), the Supreme Court of Canada reaffirmed that discretion in administrative decisions must be "exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre" contemplated by Parliament as outlined in *Roncarelli*, *supra*. The Court also indicated, at 854, that discretionary decisions should be

reviewed only on limited grounds according to the "general principles of administrative law governing the exercise of discretion and consistent with the *Canadian Charter of Rights and Freedoms*."

[70] As highlighted in the complainant's submissions, Jones & de Villars, *supra,* have identified five categories of abuse found in jurisprudence. As the learned authors note at page 171, these same general principles of administrative law apply to all forms of discretionary administrative decisions. The five categories of abuse are:

1. When a delegate exercises his/her/its discretion with an improper intention in mind (including acting for an unauthorized purpose, in bad faith, or on irrelevant considerations).

2. When a delegate acts on inadequate material (including where there is no evidence, or without considering relevant matters).

3. When there is an improper result (including unreasonable, discriminatory, or retroactive administrative actions).

4. When the delegate exercises discretion on an erroneous view of the law.

5. When a delegate refuses to exercise his/her/its discretion by adopting a policy which fetters the ability to consider individual cases with an open mind.

[71] What these five types of abuse all have in common is that Parliament could not have intended to delegate the authority to act in such an outrageous, unreasonable or unacceptable way: Jones & de Villars, *supra*, at 169; Macauley & Sprague, *supra*, at 5B.3(a). As the Supreme Court explained in *Roncarelli*, *supra*, unless there is express language in the legislation to indicate the contrary, it is implied that Parliament could not have intended the delegate to exercise discretion in these ways.

[72] As noted, the respondent argues that, in order to find abuse of authority, there must be intent and, therefore, only the first type of abuse outlined above is applicable in the context of a section 77 complaint. Jones & de Villars, *supra* at 169 have categorized abuse: the first type requires improper intention; in the other types, there may be situations where a delegate acted in good faith, but still will have abused his or her discretionary power. In the *PSEA*, there is no express language which authorizes delegates to exercise their discretionary power in these abusive ways, even unintentionally. Therefore, and as outlined in the previous paragraph, the *PSEA* does not support the interpretation that a finding of abuse of authority requires improper intent.

[73] While abuse of authority is more than simply errors and omissions, acting on inadequate material and actions which are, for example, unreasonable or discriminatory may constitute such serious errors and/or important omissions to amount to abuse of authority even if unintentional.

[74] To require that a finding of abuse of authority be linked to intent would lead to situations that clearly run contrary to the legislative purpose of the *PSEA*. It could not have been envisioned by Parliament that, for example, when a manager unintentionally makes an appointment that leads to an unreasonable or discriminatory result, there would be no recourse available under the *PSEA*. When a manager exercises his or her discretion, but unintentionally makes an appointment that is clearly against logic and the available information, it may not constitute bad faith, intentional wrongdoing, or misconduct, but the manager may have abused his or her authority.

[75] The complainant argued there were three types of abuse demonstrated in this selection process: improper intention; acting on inadequate material or without considering relevant matters; and, improper result. However, I consider that in this complaint, the allegations raised by the complainant against the selection board can be considered more appropriately under the generic type of

abuse of acting on inadequate material, which includes where there is no evidence, or without considering relevant matters.

[76] The complainant has failed to prove that the selection board acted on inadequate material when it screened her out of the appointment process. The essential qualification was acceptable experience in supervision, office and budget management. It is clear from the individual screening reports that the selection board members were not satisfied that the complainant had acceptable experience in any of these categories—let alone all three. The testimony of Lt.-Col. Blair confirmed this.

[77] Similarly, the complainant has failed to prove that the selection board acted on inadequate material when it screened in the appointee. The complainant's allegations are essentially two-fold: first, the appointee failed to demonstrate in her application documents that she met the education qualification for the position; and, secondly, the appointee failed to demonstrate that she met the qualification of acceptable experience in supervision, office and budget management. For the reasons set out below, I find that the complainant has failed to prove either of these allegations.

[78] I cannot agree with the complainant's interpretation of the educational requirement as outlined in her submissions. Both the advertisement for the position and the statement of merit very clearly indicated that the position called for either a university degree in a related field or an acceptable combination of education, training and/or experience. It does not require, as the complainant suggests, that a candidate for this position had to have taken (or be taking) courses directly related to, or associated with, a degree in computer science. There was ample support in the application documentation submitted by the appointee for the respondent to exercise its discretion to screen her in on the education qualification on the basis that she possessed the requisite combination of education, training and/or experience that the respondent was looking for in a

candidate. This finding is further buttressed by reference to the “Profile of Ideal Candidate” document which confirmed that experience was to be given greater weight than education.

[79] I am not satisfied that the complainant has proven on a balance of probabilities that the selection board acted on inadequate material in screening in the appointee. On the contrary, based on the documentary and *viva voce* evidence tendered at the hearing, I am satisfied that the selection board had adequate material to screen in the appointee. The appointee provided sufficient information concerning the essential qualification of experience in all three areas (supervision, office management and budget management) in her application documentation which was deemed acceptable to the selection board.

[80] Experience in supervision seemed to cause the complainant the greatest concern. She suggested that the selection board simply based its decision that the appointee had the requisite experience in supervision on an award that the appointee had received. I cannot agree. I am satisfied, based on both the respondent’s documentary evidence and the testimony of Lt.-Col. Blair, that the appointee’s application documentation provided the respondent with adequate material on which to determine that she had acceptable experience in supervision, office management and budget management.

[81] Finally, to return to the other types of abuse argued by the complainant, I found no evidence that the selection board exercised its discretion with any improper intention or improper result. Lt.-Col. Blair’s testimony was straightforward and the actions of the selection board were transparent. The position did not require a degree in computer science and the advertised job opportunity clearly reflected this. I am also satisfied that there is no improper result in this appointment. The complainant recognized this as she indicated that she was not suggesting in any way that the appointee cannot do the job. The

appointee has experience in supervision, including having acted as manager of her section for a year.

[82] Therefore, the actions of the selection board in screening out the complainant and screening in the appointee do not constitute abuse of authority under section 77 of the *PSEA*.

DECISION

[83] Given that the complainant has failed to prove, on a balance of probabilities, her allegations of abuse of authority, the complaint is dismissed.

Guy Giguère
Chairperson

PARTIES OF RECORD

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APPEARANCES:	
Marija Dolenc	For the complainant
Michel LeFrançois Martin Desmeules	For the respondent
Gaston Arseneault Marjolaine Guay	For the Public Service Commission
N/A	For the other party