



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2006-0165

OTTAWA, FEBRUARY 9, 2007

BARRY K. PUGH

COMPLAINANT

AND

THE DEPUTY MINISTER OF ENVIRONMENT CANADA

RESPONDENT

AND

OTHER PARTIES

MATTER Determination of jurisdiction

DECISION The complaint is dismissed

DECISION RENDERED BY Helen Barkley, Member

LANGUAGE OF DECISION English

INDEXED *Pugh v. Deputy Minister of Environment Canada et al.*

NEUTRAL CITATION 2007 PSST 0003

REASONS FOR DECISION

BACKGROUND

[1] On October 13, 2006, Barry Pugh filed a complaint with the Public Service Staffing Tribunal (the Tribunal) pursuant to section 74 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*) concerning the revocation of his appointment. Mr. Pugh had entered into a secondment agreement to perform the duties of Editor and Adaptive Writing Specialist (IS-04), Ministerial Correspondence Unit, Environment Canada, which he contends was ended unjustly, without justification and in bad faith.

[2] The Tribunal informed the respondent that the complainant had requested an extension of time to file his complaint. On November 30, 2006, the respondent objected to the extension of time, and further submitted that no revocation of appointment had taken place.

[3] The complainant made a further request for an order to obtain the IS-04 job description of his predecessor and the names and contact information for the eight or so predecessors in the position he had occupied at Environment Canada.

ISSUES

[4] There are two preliminary matters before the Tribunal:

- (i) Does the Tribunal have jurisdiction to hear this complaint?
- (ii) If the Tribunal does have jurisdiction, should the complainant's request for extension of time to file his complaint and for an order for provision of information be granted?

SUBMISSIONS ON JURISDICTION

[5] The respondent submits that no revocation of appointment occurred and questions the Tribunal's jurisdiction to hear this complaint. The complainant was offered and agreed to an acting appointment for a one year period from July 10, 2006 to July 9, 2007. The complainant remained in his substantive position at the Department of National Defence while temporarily performing the duties of a higher level position with Environment Canada. The acting appointment was terminated before the end date, due to operational considerations. On September 20, 2006 the complainant was advised of the termination of his acting appointment and that he would return to his substantive position at the Department of National Defence.

[6] In his complaint, the complainant indicates that he responded to an urgent call for an IS-04 at Environment Canada and was selected as the top candidate. He commenced a one year secondment on July 10, 2006. He further states that he was informed by his supervisor on September 13, 2006 that his secondment was being terminated and he was to return to his substantive position at the Department of National Defence on September 27, 2006. The complainant states that he was asked to sign an addendum to the secondment agreement accepting the termination of the secondment. He signed that document on a "without prejudice" basis. He alleges that his secondment was ended unjustly, without justification and in bad faith.

[7] The Public Service Commission filed submissions, stating that the issue of jurisdiction should be considered along with the issue of whether or not the events as set out constitute a revocation of appointment.

ANALYSIS

[8] In order for the Tribunal to have jurisdiction to hear this complaint, it must be shown that first, an appointment was made and secondly, that the

appointment was subsequently revoked. Section 74 of the *PSEA* sets out the Tribunal's jurisdiction to consider complaints when the Commission or a deputy head has revoked an appointment. Section 74 reads as follows:

74. A person whose appointment is revoked by the Commission under subsection 67(1) or by the deputy head under subsection 15(3) or 67(2) may, in the manner and within the period provided by the Tribunal's regulations, make a complaint to the Tribunal that the revocation was unreasonable.

[9] In this case, the complainant's placement at Environment Canada involved two actions – a secondment and an acting appointment. The secondment agreement was signed by the complainant, and representatives of the Department of National Defence (the home organization) and Environment Canada (the host organization). According to the agreement, while Mr. Pugh's group and level is IS-03, he was to act at the IS-04 level. The duration of the agreement was from July 10, 2006 to July 10, 2007. There is a termination clause which states:

This assignment may be terminated upon request of either the host or home organization for reasons based on operational requirements. Any resulting costs will be paid by the party requesting termination. The assignment may also be terminated for reasons such as unsatisfactory performance by the employee, for personal reasons such as serious family illness or when the personal development goals of the participant are not being met. These resulting costs (if any) will be subject to negotiation by the parties involved. In all cases, early termination of the assignment requires a minimum of 2 weeks written notice.

[10] The complainant provided the Tribunal with a copy of a letter of offer from Environment Canada dated July 27, 2006. The letter states that the complainant was being offered an acting appointment from July 10, 2006 to July 9, 2007. The letter further states: "Notwithstanding the foregoing, your appointment may be for a shorter period depending on operational requirements." The letter of offer was accepted by the complainant on August 9, 2006.

[11] The complainant also filed the addendum to the secondment agreement document referred to above, which indicates that his secondment agreement terminated as of September 27, 2006. In addition, he filed a document entitled "Notes for meeting with Barry Pugh, October 24" in which the Director General,

Corporate Secretariat of Environment Canada set out the reasons communicated to the complainant's home department to explain the termination of Mr. Pugh's assignment:

For operational consideration and incompatibility with the team:

- The incompatibility with the team being Mr. Pugh's inability to overcome the resistance of some of his colleagues and to foster a harmonious and productive working relationship
- The operational consideration being the deteriorating atmosphere within the unit.

[12] One of the difficulties highlighted in this case is with the use of language; the terms "secondment", "assignment" and "acting appointment" appear to have been used interchangeably. The Federal Court of Appeal has commented on the problems associated with using these terms interchangeably: see, for example: *Canada (Attorney General) v. Pearce*, [1989] 3 F.C. 272 (C.A.). As the Federal Court of Appeal has held in *Kennan v. Canada (Public Service Commission)*, [1989] 3 F.C. 643 (C.A.):

For purposes of this judgment, it is unnecessary to attempt to define the terms "secondment", "assignment" and "appointment" in a comprehensive way. The material distinction between the first two is that a secondment involves the installation, to adopt a neutral term, of a person from another department or agency in a position while an assignment involves a person from within the same department or agency. The jurisprudence makes amply clear that either may, or may not, be an appointment depending on the particular circumstances... the question is an arguable one very much dependent on the circumstances of each case.

[13] A secondment is a temporary placement of a public servant in another department, to perform duties pursuant to a formal interdepartmental agreement, and for a specified period. The person seconded remains an employee of the home department, is paid at his/her substantive group and level, and at the end of the specified period returns to the substantive position in the employee's home department. In this case, the Tribunal finds that Mr. Pugh was seconded to Environment Canada on July 10, 2006 for a period of one year.

[14] In addition, the complainant was offered and accepted an acting appointment one level higher than his substantive position. While “acting appointment” is not defined in the *PSEA*, it is defined in section 1 of the *Public Service Employment Regulations*, SOR/2005-334, as follows:

“acting appointment” means the temporary performance of the duties of another position by an employee, if the performance of those duties would have constituted a promotion had they been appointed to the position.

[15] The letter of offer of acting appointment specifies that Mr. Pugh’s appointment would be subject to recourse to the Tribunal. On the evidence presented by the parties, the Tribunal is satisfied that the complainant was appointed, on a temporary basis to the position of Editor and Adaptive Writing Specialist.

[16] It is clear that the complainant’s acting appointment and his secondment at Environment Canada came to an end in September 2006. Should this be considered to be a revocation of his acting appointment within the meaning of section 74 of the *PSEA*, or is it the result of the host department, Environment Canada, applying the termination clause of the secondment agreement and that of the acting appointment offer?

[17] In this case, the complainant’s appointment was made by the deputy head’s delegate of Environment Canada. Thus, for the Tribunal to have jurisdiction to consider and dispose of the complaint, the appointment would have to have been revoked under either subsection 15(3) or subsection 67(2) of the *PSEA*:

15. (3) Where the Commission authorizes a deputy head to make appointments pursuant to an internal appointment process, the authorization must include the power to revoke those appointments and to take corrective action whenever the deputy head, after investigation, is satisfied that an error, an omission or improper conduct affected the selection of a person for appointment.

67. (2) The Commission may, at the request of the deputy head, investigate an internal appointment process that was conducted by a deputy head acting under subsection 15(1), and report its findings to the deputy head and the deputy head may, if satisfied that there was an error, an omission or improper conduct that affected the selection of the person appointed or proposed for appointment,

(a) revoke the appointment or not make the appointment, as the case may be; and

(b) take any corrective action that he or she considers appropriate.

(emphasis added)

[18] Under either subsection 15(3) or 67(2) of the *PSEA*, an investigation and a decision by the deputy head is required. The deputy head must decide that an error, an omission or improper conduct affected the selection of a person for appointment (emphasis added).

[19] The complainant was appointed on an acting basis for a period of one year. The appointment might have been revoked, had the deputy head had concerns about improprieties in the selection of Mr. Pugh for the acting appointment. However, none of the parties is contending that there was anything improper about the complainant's selection for the position. Moreover, there was no investigation and subsequent decision by the deputy head concerning the selection of Mr. Pugh. The reasons for ending the acting appointment were set out above, and relate to the complainant's performance in the position, and operational considerations. The Tribunal concludes there has not been a revocation of Mr. Pugh's appointment within the meaning of the *PSEA*. Thus, if recourse is available in this situation, it does not fall within the jurisdiction of the Tribunal under the *PSEA*.

[20] Mr. Pugh's acting appointment was not revoked pursuant to either subsection 15(3) or subsection 67(2) of the *PSEA* and, therefore, the Tribunal has no jurisdiction to hear his complaint.

CONCLUSION

[21] The complaint of Barry K. Pugh is dismissed.

[22] Since the Tribunal has dismissed the complaint, it is not necessary to address the complainant's request for an extension of time to file his complaint, nor his request for an order for the provision of information.

Helen Barkley
Member

PARTIES OF RECORD

Tribunal File:	2006-0165
Style of Cause:	<i>Barry K. Pugh and the Deputy Minister of Environment Canada et al.</i>
Hearing:	Written request decided without the appearance of the parties
Date of Reasons:	February 9, 2007