

FILES: 2006-0233 AND 0286

OTTAWA, FEBRUARY 21, 2007

SOHAIL UMAR-KHITAB

COMPLAINANT

AND

**THE DEPUTY HEAD OF SERVICE CANADA AS PART OF THE DEPARTMENT OF
HUMAN RESOURCES AND SOCIAL DEVELOPMENT**

RESPONDENT

AND

OTHER PARTIES

MATTER Determination of jurisdiction

DECISION The complaints are dismissed

DECISION RENDERED BY Sonia Gaal, Vice-Chair

LANGUAGE OF DECISION English

INDEXED *Umar-Khitab v. Deputy Head of Service Canada et al.*

NEUTRAL CITATION 2007 PSST 0005

REASONS FOR DECISION

INTRODUCTION

[1] On November 22, 2006, Dr. Sohail Umar-Khitab filed two complaints with the Public Service Staffing Tribunal (the Tribunal) under paragraph 77(1)(b) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*) relating to two selection processes in the Department of Human Resources and Social Development – Service Canada, (the respondent). Both complaints concern non-advertised acting appointment processes in Belleville, Ontario. File 2006-0233 deals with process 2006-CSD-AP-IITB-20, while file 2006-0286 addresses the process 2006-CSD-AP-IITB-ITCB-21.

[2] In accordance with section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6, the Tribunal has consolidated the complainant's two files and issues the following reasons for decision.

PRELIMINARY MATTERS

[3] On January 10, 2007, the respondent filed a motion to dismiss on the grounds that the complainant is outside the area of selection and does not have a right of recourse for these two appointments. Both notices of Information Regarding Acting Appointment stated that the Area of Selection was comprised of "Employees of Human Resources and Social Development occupying a position in the Information Technology Centre, Belleville." The complainant works in Kingston, Ontario.

[4] By letter dated February 12, 2007, the Tribunal advised the parties that the complaints were dismissed with reasons to follow.

ISSUES

[5] The Tribunal must decide the following:

- (i) Is the complainant within the area of selection?
- (ii) Does the Tribunal have jurisdiction to decide the complaints if the complainant is outside the area of selection?

ARGUMENTS OF THE PARTIES

[6] On January 17, 2007, the Tribunal asked the complainant and the Public Service Commission (the PSC) to make submissions on the respondent's motion.

[7] The complainant was provided with a copy of the respondent's Area of Selection Policy and Operational Guidelines. In his submission, he stated: "[I]t is conceded that, on the face of it, he [the complainant] is not within the Area of Recourse." However, the complainant argued that, when establishing an Area of Recourse, the Area of Selection did not take into account the various criteria found under the following headings of the Policy: Policy Statement, Policy Objectives, Policy Application and Other Requirements. The complainant concluded that the Area of Selection was not "reasonable".

[8] The PSC argued there were two separate issues relating to the Tribunal's jurisdiction. The first one was the area of selection. The two Information Regarding Acting Appointment notices identified the area of selection as being Belleville. The complainant works out of the Kingston office and is therefore not within that area.

[9] The second issue concerns the length of the appointments. The PSC submitted that the Information Regarding Acting Appointment notices indicated the acting periods were less than four months. They are, therefore, excluded

from the application of the *PSEA* by subsection 14(1) of the *Public Service Employment Regulations*, SOR/2005-334.

[10] The respondent replied that the complainant's submissions are irrelevant as he is addressing the reasonableness of the area of selection. The *PSEA* does not provide a right to complain to the Tribunal on the establishment of the area of selection.

ANALYSIS

Issue I: Is the complainant within the area of selection?

[11] An area of selection for an appointment process is determined in accordance with subsection 34(1) of the *PSEA* which reads as follows:

34. (1) For purposes of eligibility in any appointment process, other than an incumbent-based process, the Commission may determine an area of selection by establishing geographic, organizational or occupational criteria or by establishing, as a criterion, belonging to any of the designated groups within the meaning of section 3 of the *Employment Equity Act*.

[12] The authority to determine an area of selection is delegated to the deputy head if the PSC delegated the staffing authority by virtue of subsection 15(1) of the *PSEA*.

[13] The respondent also provided the Tribunal with its Area of Selection Policy and Operational Guidelines which came into force on December 31, 2005. The documents include questions, considerations, objectives, etc. that should be taken into consideration when establishing an area of selection. The authority to determine an area of selection is further delegated to a manager, or sub-delegated official.

[14] In the case before us, the area of selection is defined as "Employees of Human Resources and Social Development occupying a position in the Information Technology Centre, Belleville." It is agreed that the complainant

works out of Kingston; he is, therefore, outside the area of selection for these appointments.

[15] Although the complainant believes the area of selection is not reasonable, it is not the Tribunal's role to assess whether the area of selection is reasonable or meets the criteria and considerations identified in the Area of Selection Policy and Operational Guidelines. The Tribunal's mandate is found in subsection 88(2) of the *PSEA*:

88. (...)

(2) The mandate of the Tribunal is to consider and dispose of complaints made under subsection 65(1) and sections 74, 77 and 83.

[16] None of these sections allow complaints about an area of selection.

Issue II: Does the Tribunal have jurisdiction to decide the complaints if the complainant is outside the area of selection?

[17] The Tribunal's jurisdiction when dealing with a complaint for an internal non-advertised appointment is found in subsections 77(1) and (2) of the *PSEA*:

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).

(2) For the purposes of subsection (1), **a person is in the area of recourse if the person is**

(a) an unsuccessful candidate in the area of selection determined under section 34, in the case of an advertised internal appointment process; and

(b) **any person in the area of selection determined under section 34, in the case of a non-advertised internal appointment process.**

(emphasis added)

[18] These complaints involve non-advertised internal appointment processes. Therefore, paragraph 77(2)(b) of the *PSEA* is the applicable provision to consider. This provision makes it clear that the area of recourse for a non-advertised process is the area of selection determined under section 34 which, in this case, is identified by the deputy head's managers, or sub-delegates. As stated above, for the purposes of recourse in these appointment processes, one of the criteria chosen was that the person be working in the Belleville, Ontario office. The complainant was working in Kingston and, thus, he was not within that area of selection.

[19] Since only a person within the area of selection for a non-advertised internal process is in the area of recourse and thus may file a complaint with the Tribunal, the Tribunal does not have jurisdiction to determine these complaints.

[20] There is no need to address the second argument raised by the PSC dealing with the length of the acting appointments as the Tribunal has determined that it lacks the jurisdiction to deal with the two complaints.

DECISION

[21] The Tribunal does not have jurisdiction to consider complaints brought by a person who is outside an area of selection for an internal non-advertised process. The complaints are dismissed.

Sonia Gaal
Vice-Chair

PARTIES OF RECORD

Tribunal Files:	2006-0233 and 0286
Style of Cause:	<i>Sohail Umar-Khitab and the Deputy Head of Service Canada as part of the Department of Human Resources and Social Development et al.</i>
Hearing:	Written request, decided without the appearance of the parties
Date of Reasons:	February 21, 2007