

FILES: 2006-0189 AND 0190

OTTAWA, MARCH 30, 2007

LORI-ANN SCOTT AND TANIA MOORE

COMPLAINANTS

AND

THE DEPUTY MINISTER, HEALTH CANADA

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 *Scott and Moore v. Deputy Minister, Health Canada et al.*

NEUTRAL CITATION 2007 PSST 0012

REASONS FOR DECISION

BACKGROUND

[1] On October 25, 2006, Ms. Lori-Ann Scott (PSST file 2006-0189) and Ms. Tania Moore (PSST file 2006-0190) both filed a complaint under paragraph 77(1)*b*) of the *Public Service Employment Act*, S.C. 2003, c. C-22, sections 12 and 13 (*PSEA*). They allege abuse of authority by the department of Health Canada, in choosing a non-advertised process for the acting appointment for the position of Medical Transportation Program Specialist (process number 06-NHW-BC-ACIN-085).

[2] They received the “PM-03 – Notification of Appointment or Proposal of Appointment” by email on October 10, 2006. The email read:

The following notification is open to employees of Health Transfer and Benefits Directorate **and** First Nations and Inuit Health, Health Canada, occupying a position in Vancouver, BC.

(emphasis added)

[3] The respondent in both files is the Deputy Minister, Health Canada.

[4] On February 8, 2007, the respondent filed a motion to dismiss on the grounds that the complainants are outside the area of recourse and do not enjoy a right of recourse for this appointment. The area of recourse indicated in the official Notification of Appointment or Proposal of Appointment of the department of Health Canada (the Notification) reads:

Open to employees of the Health Transfer and Benefits Directorate, First Nations and Inuit Health Branch, Health Canada, occupying a position in Vancouver, BC.

[5] On February 16, the Tribunal requested further details from the complainants which were provided. A hearing by way of teleconference call took place on March 19 to consider the motion to dismiss.

[6] For the purposes of this decision, the Tribunal is consolidating files 2006-0189 and 2006-0190 in accordance with section 8 of the *Public Service Staffing Tribunal Regulations*, SOR 2006-6 (the *PSST Regulations*) and issues only one decision.

[7] The motion to dismiss is granted.

ISSUES

[8] The Tribunal must decide the following:

- (i) Are the complainants within the area of selection?
- (ii) Does the Tribunal have jurisdiction to deal with the complaints?

ARGUMENTS OF PARTIES

A) RESPONDENT'S ARGUMENTS

[9] The respondent submits that the area of selection for this position is clearly stated on the Notification. This Notification is the respondent's official document which reflects the determination of the area of selection.

[10] Since the complainants do not work in the Health Transfer and Benefits Directorate, they cannot file a complaint. The fact that the Notification can be seen by people outside the area of selection does not mean they have a right to complain. The complainants were advised during the exchange of information on January 15, 2007 that the email sent on October 10, 2006 contained a typing error and that the correct area of selection was to be found in the Notification. They were also advised of the pending motion to dismiss.

[11] Finally, the Tribunal does not have jurisdiction to examine a complaint pertaining to the area of selection.

B) COMPLAINANTS' ARGUMENTS

[12] The complainants recognize they do not work in the Health and Transfer Benefits Directorate. However, they received an email on October 10, to advise them of the Notification. They submit that when reading the area of selection in the email, they interpreted it in this manner:

“it was interpreted as a listing of workplaces, separated by commas, moving from the preferred specific area of selection, the Directorate, to the next preferred area of selection, the Branch (which was listed on the posting as the location for the position), and finally to the general department in Vancouver, rather than as an address for Health Transfer and Benefits Directorate (...) it appeared evident that it was open to other employees outside of this program and Directorate”.

[13] They further question why they would receive the email if it was not intended for them to be in the area of recourse. They read the email as providing them with the right to “appeal”.

[14] The complainants basically argue that the receipt of the email along with the area of selection in the email demonstrate they are in the area of selection and can file a complaint.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS:

[15] The Public Service Commission (PSC) argued that the Notification is the formal notice that should be relied upon for the area of selection, not the email sent to the complainants.

ANALYSIS

Issue I: Are the complainants within the area of selection?

[16] The respondent sent an email to the complainants and attached the Notification. The email described a different area of selection than the one found on the Notification. The complainants view the information in the email as the area of selection, thus allowing them to file the complaints.

[17] It is clear on the Notification that the area of selection was limited to the employees of the Health Transfer and Benefits Directorate who were the only ones who could file a complaint to the Tribunal.

[18] The only difference between the two areas of selection on the Notification and in the email is that the email has the word “and” between the words “Directorate” and “First Nations”.

[19] It is unfortunate that the email contained the word “and” which was interpreted by the complainants as including other employees in the First Nations and Inuit Health Branch. However, the Tribunal finds that the Notification is the document that must be relied upon to determine the proper area of selection.

[20] The Notification is a standard formatted document containing a number of boxes that describe the information on the appointment and position itself (box 1), the criteria for use of a non-advertised process (box 2), the notification period (box 3), who may complain and area of selection (box 4), how to file a complaint (box 5) and the person to contact about the appointment (box 6). Furthermore, the department of Health Canada’s logo appears at the top of the page.

[21] The Tribunal notes that the fourth box on the Notification is entitled “Who may Complain: Area of Selection“. It lists the area of selection described in paragraph 4 above. It also states that “If you are within the above Area of selection you may file a complaint as described below prior to the Complaint Period Closing Date.”

[22] The Notification is a complete document that contains all the information concerning the non-advertised appointment. On the other hand, the email only refers to the area of selection.

[23] The Tribunal is of the opinion that the Notification, in this case, is the primary source of information to advise the employees of the appointment.

Clearly, the email with its brief reference to the area of selection cannot be viewed as superseding the Notification that contains comprehensive information.

[24] Thus, the area of selection's information on the Notification reflects the respondent's true intent and must have priority over the email's area of selection.

[25] The complainants do not work in the Health Transfer and Benefits Directorate and are therefore not in the area of selection to file a complaint before the Tribunal.

Issue II: Does the Tribunal have jurisdiction to deal with the complaints?

[26] The Tribunal's jurisdiction when dealing with a complaint for an internal non-advertised appointment is found in paragraphs 77(1)*b*) and 77(2)*b*) 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

(...)

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

(...)

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

(...)

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

(emphasis added)

[27] The respondent has the authority under section 34 of the *PSEA* to determine the area of selection “by establishing geographic, organizational or occupational criteria.” The respondent identified a specific Directorate in Vancouver, i.e. the Health Transfer and Benefits Directorate, as the area of

selection which is the basis of the Tribunal's jurisdiction in accordance with subsection 77(2)b) of the *PSEA*.

[28] The Tribunal addressed the area of selection for a non-advertised process in *Umar-Khitab v. Deputy Head of Service Canada et al.*, [2007] PSST 0005. The Tribunal found it did not have jurisdiction to deal with the complaints as the complainant was not in the area of selection. The area of selection was for employees occupying a position in the Information Technology Centre, Belleville, Ontario. The complainant worked in Kingston, Ontario.

[29] Although the complainants here are in the same geographical area, Vancouver, as opposed to the circumstances in *Umar-Khitab, supra*, they do not meet the respondent's organizational criterion as they do not occupy a position in the Health Transfer and Benefits Directorate. The Tribunal finds the principles outlined in *Umar-Khitab* are also applicable in this case.

[30] In *Umar-Khitab* the Tribunal found:

[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.

[31] The Tribunal does not have jurisdiction to consider complaints brought by persons who are outside an area of selection for an internal non-advertised process. The complainants do not meet the organizational criterion established by the respondent.

DECISION

[32] For all these reasons, the motion to dismiss is granted. Consequently, the complaints are dismissed.

Sonia Gaal
Vice-president

PARTIES OF RECORD

Tribunal Files:	2006-0189 and 2006-0190
Style of Cause:	<i>Lori-Ann Scott and Tania Moore and the Deputy Minister, Health Canada et al.</i>
Hearing:	March 19, 2007 (by way of teleconference)
Date of Reasons:	March 30, 2007
APPEARANCES:	
Christine Dockman	For the complainants
Martin Desmeules	For the respondent
Lili Ste-Marie	For the Public Service Commission
N/A	For the other party