

FILE: 2006-0102

OTTAWA, MARCH 21, 2007

PAUL CHAVES

COMPLAINANT

AND

THE COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA

RESPONDENT

AND

OTHER PARTIES

MATTER Request for order for provision of information

DECISION The request is granted in part

DECISION RENDERED BY Helen Barkley, Member

LANGUAGE OF DECISION English

INDEXED *Chaves v. Commissioner of the Correctional Service of Canada et al.*

NEUTRAL CITATION 2007 PSST 0009

REASONS FOR DECISION

INTRODUCTION

[1] The complainant seeks an order from the Public Service Staffing Tribunal (the Tribunal) for the provision of information relating to a complaint filed pursuant to subsection 77(1) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*). The respondent asserts that the Tribunal lacks jurisdiction to hear this complaint.

BACKGROUND

[2] On August 31, 2006 Paul Chaves filed a complaint with the Tribunal concerning acting appointments made to nine positions of Parole Officer (WP-04) at Millhaven Institution, Bath, Ontario, with the Correctional Service of Canada. The complaint was against the acting appointments of Frederic Héran, Joanne Rutley, Kevin White, Margaret Tudor, Kathryn Patterson, Andrew Vanhorn, Rose Spicer, Louise Flanagan and Paul Pindred.

[3] The complainant is currently a Social Programs Officer at Millhaven Institution. The complainant states that he was provided with acting appointments as Parole Officer from July 2004 to August 2005. Despite his interest in further acting appointments, the complainant says that he was denied further opportunities, while others were granted a number of additional acting opportunities.

[4] In his complaint, the complainant claims that there has been an abuse of authority in the application of the merit criteria and the choice of process related to the staffing of these acting appointments.

[5] The Commissioner of the Correctional Service of Canada (the respondent) says that six of these appointments (Frederic Héran, Joanne Rutley, Kevin White, Margaret Tudor, Kathryn Patterson, and Andrew Vanhorn) were

initially made in 2005 under the former *Public Service Employment Act*, R.S.C. 1985, c. P-33 (the former PSEA), and extended in 2006.

[6] An exchange of information meeting did take place between the parties. At this meeting, the complainant was provided with some of the information requested, namely, information about the acting appointments, dates and copies of statements of qualifications/merit criteria, and copies of notices of each right to appeal for the acting appointments.

[7] The complainant was not provided with other information that he had requested. The complainant has requested that the following information be provided: the posters for the acting assignments/extensions; the screening process taken in determining who the successful candidates were (including the evaluations/notes taken during the process); any summaries done on each candidate (including the complainant since he says that he was in the initial candidate pool); confirmation as to whether the candidates met the required qualifications; and, the names of the individuals who were considered in the selection pool for these positions.

[8] The respondent takes the position that the information requested is not relevant to the complaint. It also claims that the Tribunal has no jurisdiction over the six acting appointments made under the former PSEA. Furthermore, the respondent says that the complaint with respect to the acting appointments of Rose Spicer, Louise Flanagan and Paul Pindred, made under the *PSEA* are untimely. The respondent has requested that the complaint be dismissed.

ISSUES

[9] The Tribunal must answer the following questions:

(i) Does the Tribunal have jurisdiction to consider the complaint with respect to the acting appointments of some or all of the following individuals: F. Héran, J. Rutley, K. White, M. Tudor, K. Patterson and A. Vanhorn?

(ii) Is the complaint with respect to the appointments of R. Spicer, P. Pindred, and L. Flanagan untimely, and, if so, should an extension be granted?

(iii) If the Tribunal does have jurisdiction to hear the complaint, should an order for provision of information be granted?

COMPLAINANT'S SUBMISSIONS

[10] The complainant submits that he was never notified of any of these acting appointments. He states that no public notices were posted and that he searched the Government of Canada's *Publiservice* website for the notifications. He searched under both the Public Service Staffing Advertisements and Notifications (new *Public Service Employment Act*) and the Public Service Staffing Notices (prior to the new *Public Service Employment Act*) links. The complainant argues that his complaint should be considered valid and timely because proper notice was not provided by the respondent.

[11] On the third issue, the complainant submits that all of the information that he has requested is "a vital part of us presenting an accurate and honest and factual case based on all the related facts surrounding this complaint." Thus, the complainant asserts that all of the requested information is relevant to his complaint.

RESPONDENT'S SUBMISSIONS

[12] The respondent submits that F. Héran, J. Rutley, K. White, M. Tudor, K. Patterson and A. Vanhorn were appointed on an acting basis under the former PSEA and their acting appointments were subject to a right to appeal under that Act. Mr. Héran was appointed from an eligibility list, with the right to appeal posted in July 2006. Notices of the Right to Appeal for the other appointments were posted in May 2006. On October 24, 2006, the Public Service Commission ruled that the complainant's appeal against Mr. Héran's acting appointment was moot and the appeals against the remaining acting appointments untimely,

because they were not brought within the period prescribed in section 21 of the *Public Service Employment Regulations 2000*, SOR/2000-80. As these appointments were made under the former PSEA, the respondent submits that the Tribunal has no jurisdiction over Mr. Chaves' complaint concerning these appointments.

[13] The respondent further submits that R. Spicer, L. Flanagan and P. Pindred were appointed on an acting basis under the *PSEA* in 2006, but that the complainant failed to exercise his right to complain within the period established for filing a complaint (May 2 to 15, 2006 and June 1 to 15, 2006). Mr. Chaves filed his complaint against all nine appointments on August 31, 2006.

[14] The respondent submits that, while notices are not sent to employees individually, the practice of notification has not changed from the way it was conducted under the former PSEA, namely, that an electronic system is used to inform employees of all appointments. As the respondent states in its reply: "Past practice, which consisted of electronic notices to employees in the area of selection and more recently in the area of recourse, remains unchanged."

[15] The respondent asserts that its notice procedures for all of these acting appointments met the requirements of section 13 of the *Public Service Employment Regulations*, SOR/2005-334 (*PSER*), namely, the notices informed persons in the area of recourse (employees of the Correctional Service of Canada occupying a position within the Ontario region, including the complainant), in writing of the names of the persons being proposed for appointment or appointed, and of their right and grounds to make a complaint. Thus, unlike the situation that arose in *Sherif v. Deputy Minister of Agriculture and Agri-Food Canada et al.*, [2006] PSST 0003, the notices in question were neither incomplete nor defective.

[16] The respondent contends that it was the responsibility of the complainant to make a complaint in a timely fashion. The complainant was at work during the

period when the notices were issued; he had access to the notice system, but failed to bring any complaint within the time periods indicated in the notices. The complaint is untimely and the complainant has not demonstrated any exceptional circumstances to warrant the extension of time for filing his complaint.

[17] Finally, on the last issue, the respondent submits that since the Tribunal must determine that it does not have jurisdiction with respect to the first six appointments, and the complainant is out of time for filing a complaint concerning the latter three appointments, there is “no useful purpose to providing the information requested.”

PUBLIC SERVICE COMMISSION’S SUBMISSIONS

[18] The Public Service Commission (the PSC) submits that the appointments of F. Héran, J. Rutley, K. White, M. Tudor, K. Patterson and A. Vanhorn resulted from staffing processes started under the former PSEA and were not appointments over which the Tribunal has jurisdiction.

[19] With respect to the appointments of R. Spicer, L. Flanagan and P. Pindred, the PSC submits that the complainant filed his complaint almost two months after the limitation period and has not requested an extension from the Tribunal for late filing. The PSC suggests that the complaint be dismissed in its entirety.

ANALYSIS

Issue I: Does the Tribunal have jurisdiction to consider the complaint with respect to the acting appointments allegedly made under the former PSEA of some or all of the following individuals: F. Héran, J. Rutley, K. White, M. Tudor, K. Patterson and A. Vanhorn?

[20] Since these six acting appointments were initially made prior to December 31, 2005, but continued after that date, it is necessary to examine the

transitional provisions of the *Public Service Modernization Act*, S.C. 2003, c. 22 (the *PSMA*). Sections 70 and 71 of Part 5 of the *PSMA* read as follows:

70. The coming into force of subsection 29(1) of the new Act does not affect any competition or other selection process being conducted under the amended Act.

71. An eligibility list made under the amended Act that is valid on the coming into force of subsection 29(1) of the new Act continues to be valid for the period provided for under subsection 17(2) of the amended Act, to a maximum of six months after the coming into force of subsection 20(1) of the new Act.

[21] Thus, an appointment made after December 31, 2005 could fall under the former PSEA if a selection process was being conducted on December 31, 2005, or if an appointment was made from an eligibility list valid on that date.

[22] The respondent has indicated that the acting appointments of Mr. Héran were made as a result of competition number 05-CSC-ONT-401-CC-40. These appointments spanned a period from October 31, 2005 until Mr. Héran was appointed indeterminately on July 31, 2006. The last acting appointment was made on May 31, 2006. The Tribunal finds that the eligibility list was valid on December 31, 2005 and when the last acting appointment was made on May 31, 2006. Therefore, Mr. Héran's appointment was made under the former PSEA. The Tribunal has no jurisdiction to consider a complaint with respect to that appointment.

[23] Initial acting appointments of Ms. Rutley, Mr. White, Ms. Tudor, Ms. Patterson and Mr. Vanhorn were made without competition under the former PSEA, in late 2005. The respondent contends that the acting appointments of these individuals made after December 31, 2005 were mere extensions of the initial acting appointments and, therefore, were made under the former PSEA.

[24] The Tribunal considered the issue of the nature of an “extension” of an acting appointment in the case of *Wylie v. President of the Canada Border Services Agency et al.*, [2006] PSST 0007, at paragraphs 19 and 20:

[19] A reading of section 58 of the *PSEA* makes it clear that extensions of acting appointments are appointments. Section 58 of the *PSEA* reads as follows:

58. (1) Subject to section 59, an employee whose appointment or deployment is for a specified term ceases to be an employee at the expiration of that term, or of any extensions made under subsection (2).

(2) A deputy head may extend a specified term referred to in subsection (1), and such an extension does not constitute an appointment or a deployment or entitle any person to make a complaint under section 77.

(3) This section does not apply in respect of appointments made on an acting basis.

[20] While subsection 58(2) of the *PSEA* permits the extension of an appointment for a specified term to be made without the need to make a new appointment, subsection 58(3) specifically excludes this flexibility in respect of extensions of acting appointments. Thus, the Tribunal is of the view that each appointment made on an acting basis and each extension of such an appointment constitutes an appointment subject to the requirements of the *PSEA* and its regulations, including recourse.

[25] In this case, the following acting appointments were made:

J. Rutley:	March 14 to May 31, 2006 and June 1 to August 31, 2006;
K. White:	March 9 to May 31, 2006 and June 1 to August 31, 2006;
M. Tudor:	March 9 to May 31, 2006 and June 1 to August 31, 2006;
K. Patterson:	March 14 to May 31, 2006 and June 1 to August 31, 2006;
A. Vanhorn:	March 7 to May 31, 2006 and June 1 to August 31, 2006.

[26] The Tribunal finds that the acting appointments of J. Rutley, K. White, M. Tudor, K. Patterson, and A. Vanhorn were all made under the *PSEA*. Since these acting appointments extended the cumulative period to more than four months, these acting appointments are subject to complaint under section 77 of the *PSEA*.

[27] The respondent did give notice of these appointments in May 2006 by posting notice of the right to appeal to the Public Service Commission through an

electronic system to all persons in the area of recourse. By doing this, the respondent followed the wrong notice procedure.

[28] Section 13 of the *PSER* sets out the requirements for the notification of an acting appointment to persons in the area of recourse:

13. The Commission shall, at the time that the following acting appointments are made or proposed, as a result of an internal appointment process, inform the persons in the area of recourse, within the meaning of subsection 77(2) of the Act, in writing of the name of the person who is proposed to be, or has been, appointed and of their right and grounds to make a complaint:

(a) an acting appointment of four months or more;

(b) an acting appointment that extends the person's cumulative period in the acting appointment to four months or more.

[29] The Tribunal concludes that persons in the area of recourse, including the complainant, were not given proper notice of their right to complain to the Tribunal and the grounds to make a complaint.

[30] As explained in *Sherif v. Deputy Minister of Agriculture and Agri-Food Canada et al.*, [2006] PSST 0003, if notification is incomplete or incorrect, it is not considered to be proper notification. Where the notification has been improper, a complaint is not considered as having been filed late.

[31] Given that Mr. Chaves was not given proper notification of his right to complain to the Tribunal concerning the acting appointments of Ms. Rutley, Mr. White, Ms. Tudor, Ms. Patterson and Mr. Vanhorn made in 2006, the complaint with respect to these acting appointments is considered timely. Accordingly, the Tribunal has jurisdiction to hear his complaint with respect to these acting appointments. As explained in *Sherif, supra*, there is no need for the Tribunal to delay the review of these appointments until proper notification has been completed under section 13 of the *PSER*.

Issue II: Is the complaint with respect to the appointments of R. Spicer, P. Pindred, and L. Flanagan untimely, and, if so, should an extension be granted?

[32] The respondent has indicated that these appointments were made pursuant to the *PSEA*. It has provided the Tribunal with copies of Notification of Appointment for R. Spicer and P. Pindred. The respondent states that notices were issued to those in the area of recourse through an electronic system. The period for bringing a complaint against the appointment of R. Spicer was from May 12 to 26, 2006 and for P. Pindred from June 1 to June 15, 2006. The respondent provided no information regarding the acting appointment for Louise Flanagan, other than to indicate that the cumulative period was from January 16 to May 31, 2006.

[33] The complainant argues that there has been no public notice of these acting appointments. Therefore, his complaint concerning these acting appointments cannot be considered untimely. Section 10 of the *Public Service Staffing Tribunal Regulations*, SOR 2006-6 (the *PSST Regulations*), reads as follows:

10. A complaint by a person may be made to the Tribunal

(a) except where paragraph (b) applies, no later than 15 days after the day on which the person receives notice of the lay-off, revocation, appointment or proposed appointment to which the complaint relates; and

(b) if the notice of the lay-off, revocation, appointment or propose appointment to which the complaint relates is a public notice, no later than 15 days after the date of the notice.

[34] What is required is that persons in the area of recourse are notified of the appointments and that, in the case of acting appointments, the requirements for providing notice under section 13 of the *PSEER* are met. Neither the *PSEA* nor the *PSEER* specify how the notice must be conveyed to persons in the area of recourse.

[35] The Tribunal finds that the notices posted on the respondent's electronic system relating to these acting appointments constituted public notices and, thus, the complainant was required to comply with paragraph 10(b) of the *PSST Regulations*.

[36] The complainant brought his complaint on August 31, 2006 and, therefore, it is untimely with respect to the appointments of R. Spicer and P. Pindred. Should the Tribunal exercise its discretion under section 5 of the *PSST Regulations* to extend the 15 day time limit for making a complaint with respect to acting appointments of R. Spicer and P. Pindred? This issue was considered in the case of *Casper v. Deputy Minister of Citizenship and Immigration Canada et al.*, [2006] PSST 0010. At paragraph 22 of this decision, the Tribunal stated:

[22] It is important for the parties to know that the time limits are respected and adhered to in order for the process to function properly. In the interest of fairness, the Tribunal may extend the strict time limits for filing a complaint. The complainant has the onus of providing reasons for the request for extension. Unless there are exceptional circumstances to extend the time limits, the Tribunal will not grant an extension.

[37] The Tribunal is satisfied that the complainant was informed of these appointments by the usual departmental method of an internal electronic system. He has failed to present any exceptional circumstances to explain why his complaint was not brought within the proper time frame. No extension of time will be granted.

[38] The acting appointment of L. Flanagan was for a shorter period of time. The respondent has indicated that she was initially appointed on an acting basis from January 16 to April 13, 2006. That appointment was "extended" on April 14 until May 31, 2006, a cumulative period of greater than four months. Thus the respondent was obliged, in accordance with section 13 of the *PSEER*, to notify persons in the area of recourse of the person appointed and their right and grounds to make a complaint. Given that Mr. Chaves was not given proper notification of his right to complain to the Tribunal concerning the acting appointment of Ms. Flanagan, the complaint with respect to this acting

appointment is considered timely. It is, therefore, not necessary to consider whether an extension should be granted under section 5 of the *PSST Regulations* concerning this appointment.

Issue III: If the Tribunal does have jurisdiction to hear the complaint, should an order for provision of information be granted?

[39] Section 16 of the *PSST Regulations* requires that the deputy head and the complainant exchange all relevant information regarding the complaint. In *Oddie v. Deputy Minister of National Defence et al.*, [2006] PSST 0009, the Tribunal stated, at paragraph 22:

[22] (...) The complainant must demonstrate to the Tribunal's satisfaction that there is a clear nexus, or in other words, concrete linkage between the information sought and the matter at hand. In addition, the request must be sufficiently specific so there is no dispute as to what is desired. Finally, the Tribunal must be satisfied that disclosure of the information will not cause undue prejudice.

[40] The crux of this complaint is that in 2005 the complainant was removed from a series of acting appointments as a Parole Officer after a period of one year, whereas other employees have had longer acting appointments. The complainant wants to know if he was considered for any further acting appointments and why he was never given another opportunity to act.

[41] Thus, the crux of the complaint is that the complainant was not chosen for a further acting appointment while nine others were so chosen (emphasis added). He has not alleged that there were improprieties in the establishment of the merit criteria. As the Tribunal determined in *Visca v. Deputy Minister of Justice et al.*, [2006] PSST 0016, ranking or comparative assessment is not required under the *PSEA*. Accordingly, the assessments of those who were appointed are not automatically relevant to a complaint. A complainant must demonstrate a clear linkage between the complaint and the assessments of others in order to establish relevance. The complainant is alleging that there has been an abuse of authority in the application (or lack of application) of the merit

criteria to him. He has not met the onus of establishing that the information regarding the screening, assessments, notes and summaries relating to the appointees is relevant to his complaint.

[42] An additional difficulty in this case is the lack of specificity of the request for documents. The complainant does not specify which documents have already been provided by the respondent, nor does he specify exactly what documents are still required.

[43] The complainant has already received copies of the notices of appointment (which he has called posters) and statements of merit criteria. As his complaint relates to why he was not chosen for another acting appointment, the Tribunal is satisfied that information, if any, relating to the consideration or evaluation of the complainant for any of the acting appointments of J. Rutley, K. White, M. Tudor, K. Patterson, A. Vanhorn and L. Flanagan is relevant to his complaint.

DECISION

[44] The Tribunal has jurisdiction to hear and dispose of the complaint of Mr. Chaves concerning the acting appointments of J. Rutley, K. White, M. Tudor, K. Patterson, A. Vanhorn and L. Flanagan.

[45] The Tribunal has no jurisdiction to hear the complaint of Mr. Chaves regarding the acting appointments of F. Héran, R. Spicer and P. Pindred.

[46] The complainant's request for an order for provision of information is granted in part.

ORDER

[47] The Tribunal orders that the respondent provide to the complainant all information relating to the consideration or evaluation, if any, of Mr. Chaves for

the selection processes which resulted in the acting appointments of J. Rutley, K. White, M. Tudor, K. Patterson, A. Vanhorn and L. Flanagan. If information is available, it is to be provided to the complainant within 10 days of the date of this decision.

[48] The respondent has 15 days from the date of this decision to file its reply to the allegations. Other time frames are adjusted accordingly.

Helen Barkley
Member

PARTIES OF RECORD

Tribunal File:	2006-0102
Style of Cause:	<i>Paul Chaves and the Commissioner of the Correctional Service of Canada et al.</i>
Hearing:	Written request, decided without the appearance of the parties
Date of Reasons:	March 21, 2007