



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**FILE: 2006-0191**

**OTTAWA, JUNE 6, 2007**

**BARRY PUGH**

**COMPLAINANT**

**AND**

**THE DEPUTY MINISTER OF NATIONAL DEFENCE**

**RESPONDENT**

**AND**

**OTHER PARTIES**

<b>MATTER</b>	Complaint of abuse of authority pursuant to paragraph 77(1) (a) of the <i>Public Service Employment Act</i>
<b>DECISION</b>	The complaint is dismissed
<b>DECISION RENDERED BY</b>	Sonia Gaal, Vice-Chair
<b>LANGUAGE OF DECISION</b>	English
<b>INDEXED</b>	<i>Pugh v. Deputy Minister of National Defence et al.</i>
<b>NEUTRAL CITATION</b>	2007 PSST 0025

## REASONS FOR DECISION

### INTRODUCTION

[1] On October 27, 2006, Mr. Barry Pugh filed a complaint with the Public Service Staffing Tribunal (the Tribunal) under paragraph 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*). The complainant applied for the position of Manager, Ministerial Correspondence Unit (AS-07) (process number 06-DND-IA-Ottawa-048769) in the Department of National Defence.

[2] The complainant alleges abuse of authority by the respondent, the Deputy Minister of National Defence, for failing to respect the timeline which had been told to the participants for the oral presentation during the interview process.

[3] In accordance with subsection 99(3) of the *PSEA*, the Tribunal decided this complaint without holding an oral hearing. The decision is rendered based on the parties' submissions which were reviewed in detail and summarized below.

### BACKGROUND

[4] The facts are not in dispute and can be easily summarized. As part of the assessment method for the internal advertised process for the position of Manager, Ministerial Correspondence Unit, seven candidates, including the complainant, participated in the Senior Managerial Simulation Exercise (857). This exercise is designed by the Public Service Commission (the PSC), more specifically, the Personnel Psychology Centre (the PPC).

[5] The guidelines established by the PPC for the simulation exercise allow each candidate four hours to analyze a set of managerial problems, complete a summary of actions and prepare a 30 minute oral presentation to the assessment board.

[6] On August 31, 2006, the assessment board met with Daniel Bentley, a representative of the PPC, who informed them that the 30 minutes for the oral presentation was a guideline that could be altered to whatever the assessment board believed was appropriate. The assessment board members, by consensus, then decided to limit the oral presentation to 25 minutes.

[7] All the candidates were provided with the background information one week in advance. On the day of the simulation, all the candidates were provided with another package for which they had four hours to prepare a three page summary as well as a 30 minute presentation to the assessment board members. The candidates were told at least twice during the day that the oral presentation was to last 30 minutes.

[8] However, at the beginning of the presentation portion of the exercise, each candidate was advised by the assessment board that the allotted time for the presentation had been shortened to 25 minutes instead of 30 minutes as they had been initially told.

[9] The complainant was told on October 26, 2006 that he had dealt with only six of the approximately 20 items contained in the pre-simulation package in his 25 minute presentation and the additional five minutes would not have enhanced his performance.

#### ISSUE

[10] Did the assessment board abuse its authority when it shortened the oral presentation from 30 minutes to 25 minutes (5 minutes)?

#### ARGUMENTS OF THE PARTIES

##### A) COMPLAINANT'S ARGUMENTS

[11] The complainant's argument is twofold. Firstly, the complainant begins by explaining that "it is a universal premise of common justice and common sense

that no individual or entity in authority is legally or morally allowed to establish a rule, publish it, declare it verbally and formally –and this repeatedly—and later change their own rules, virtually without notice or caveat to the detriment of those concerning whom the rules were established.”

[12] According to the complainant, the respondent violated this rule by changing the time without sufficient notice for the presentation from 30 minutes to 25 minutes in a “desire to expedite the process for its own purposes (an invalid reason), and this to the detriment of the competition candidates.”

[13] The complainant explains that the Government requires that “applicants adhere strictly to all rules regarding federal job competitions, including not submitting applications after 23:59 hours on the cut-off date.” However, the Government can “change its own rules on a whim, with insufficient notice, without caveat and to the detriment of Canadians.” He submits this is not proper, acceptable or moral.

[14] Secondly, the complainant was told that he had covered a limited number of issues during his presentation. However, he argues that he may have addressed the remaining items in the five minutes that were denied to him and he may have organized his time differently.

[15] The complainant requests “to be given immediate access to (screened into) a competition process within DND at the AS-07 group and level.”

[16] The complainant also submitted as part of his submission a number of emails and correspondence dealing with another file before the Tribunal in which he raises concerns and complaints against specific Tribunal staff. He is asking the Tribunal to investigate this complaint against the staff.

#### B) RESPONDENT’S ARGUMENTS

[17] The respondent begins by reviewing the concept of abuse of authority as defined in subsection 2(4) of the *PSEA* which includes bad faith and personal

favouritism. The respondent submits that, according to the accepted rules of statutory interpretation of the limited class rule (*ejusdem generis*), the scope of the term abuse of authority may be limited to a genus or class to which specific listed items, in this case bad faith and personal favouritism, belong.

[18] For the limited class rule to apply, there should be a shared characteristic or feature of the specified class items.

[19] The respondent submits that the shared characteristics among the specific terms of bad faith and personal favouritism require discernment by the deputy head as between right and wrong as both represent very serious degrees of misfeasance. The respondent gives as examples to fit the limited class the terms corruption, extreme lack of care, personal hostility.

[20] The respondent further submits that the test found in Jones and de Villars, *Principles of Administrative Law* (Toronto, Carswell, 2004) is merely a guideline in reviewing abuse of discretion in the absence of a statutory framework. The judicial authorities that have relied on the Jones de Villars test examined a broad discretion where the enabling statute provided neither guidelines nor fetters on the exercise of discretion nor any statutory parameters upon which to base a review. However, abuse of authority in the context of the *PSEA* is distinguishable as there is a statutory framework.

[21] An allegation of abuse of authority is very serious and can be damaging to a deputy head's reputation and future career. The complainant does not explicitly make the serious allegation of bad faith, personal favouritism or any other term that might fit the limited class.

[22] As for the assessment board's decision to reduce the oral presentation, it was a relatively minor change applicable to every candidate. The assessment board operated fairly and within its authority as the 30 minutes is merely a guideline. There was no legal requirement imposed on the assessment board by either statute or regulation to strictly adhere to this time limit.

[23] Furthermore, a criterion of assessment for this position was “ability to work under pressure.” The change in the allocated time provided the assessment board with a real-time opportunity to complete its assessment of each candidate on this criterion.

[24] The complainant has failed to establish on a balance of probabilities with clear and cogent evidence that the change to shorten the oral presentation from 30 to 25 minutes was an error, serious or otherwise.

[25] Finally, the remedy sought by the complainant to be screened in to a competition process within the Department of National Defence is not within the Tribunal’s authority. Any remedy starts with the revocation of the appointment. The successful candidate is qualified and her appointment was not made by reason of abuse of authority. In addition, the complainant does not seek the revocation of the successful candidate’s appointment.

[26] The complaint should be dismissed as the complainant failed to establish abuse of authority on the part of the assessment board.

C) PUBLIC SERVICE COMMISSION’S ARGUMENTS

[27] The PSC submits that the *PSEA* provides a complete staffing structure for public service appointments, dispute resolution and recourse with accountability from the deputies to the PSC and to Parliament. There is thus no void that needs to be covered by an expansive definition of abuse of authority.

[28] In *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17, the Supreme Court of Canada found that where there is a determination of serious recklessness or carelessness, there may be a finding of bad faith.

[29] The expansive definition based on the Jones de Villars *Principles of Administrative Law* categories for abuse of discretion is not required.

[30] In conclusion, for an act in a selection process to constitute abuse of authority, it must include disregard of an official duty along with knowledge that the misconduct is likely to injure the complainant. There must be an element of intention such as bad faith or personal favouritism.

D) COMPLAINANT'S REPLY

[31] The complainant provided a detailed reply where he addressed separately both the PSC and the respondent's submissions, commenting on almost every paragraph. There is no need to summarize in great detail the complainant's reply as he was essentially reiterating the same arguments raised in his submission, albeit in answer to the respondent and the PSC.

[32] The complainant argues for a broad interpretation of abuse of authority and asks the Tribunal to make a finding of abuse of authority.

[33] He submits that he suffered a potential financial loss of at least \$18,033 being the difference between his current salary and the starting salary of the position at issue. This is due to the respondent's action to reduce the time allotted for the oral presentation and influencing the outcome of the test which was likely to injure the complainant, his career and his livelihood.

[34] The complainant confirms that he is seeking the revocation of the appointment.

ANALYSIS

[35] The Tribunal's authority is found in 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);

(...)

[36] The burden of proof is discussed in *Tibbs v. Deputy Minister of National Revenue et al.*, [2006] PSST 0008, which was followed in other Tribunal decisions:

[50] (...) If the onus was with the respondent to prove that there was 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.***

(Emphasis added)

[37] Mr. Bentley of the PPC told the three members of the assessment board that they could alter the time allotted for the oral presentation. The assessment board decided by consensus to reduce it to 25 minutes and told each candidate at the beginning of their presentation. The respondent claims that the action taken was justified by the fact that this is a position for which the person works under pressure.

[38] The Tribunal notes that the Job Opportunity Advertisement English Preview posted on *Publiservice* listed as an Essential Qualification: “Experience in preparing documents of complex, sensitive and ***urgent nature*** for senior management” (emphasis added). Furthermore, the Statement of Merit Criteria and Conditions of Employment, also posted on *Publiservice*, which contains more details on the position, has that same condition under “Essential Qualifications” as well as “Ability to manage conflicting priorities and ***meet deadlines***”; and, “Ability to work ***under pressure.***” (emphasis added).

[39] This position is at the AS-07 level, which is a senior position in that classification as evidenced by the title of the simulation exercise: “Senior Managerial Simulation Exercise”. For the position in dispute, Manager, Ministerial Correspondence Unit, it is expected that people will work under pressure and work quickly when required. The Tribunal finds that it is reasonable



for the assessment board to want to observe the candidates make their presentation under pressure. Changing the length of time by notifying each candidate just before their respective presentations would allow this essential qualification to be appropriately assessed. This approach is consistent with the importance of the position and its duties. Since the candidates were told at the beginning of the presentation and not at the end of 25 minutes, the reduction of five minutes was not excessive and allowed the candidates to manage their priorities.

[40] It is important that all seven candidates were treated in a similar fashion as this demonstrates that the decision by the assessment board was not made in bad faith or to provide an advantage to a specific candidate based on personal favouritism.

[41] As for the complainant's argument that he may have provided all the information in the missing five minutes, this is purely conjecture on the part of the complainant and he has provided no evidence to substantiate this claim. Even if he had, the Tribunal is not in a position to evaluate the quality of his presentation. This was the assessment board's role and the Tribunal will not interfere in its evaluation of the complainant's presentation. As the Tribunal stated in *Portree v. the Deputy Head of Service Canada et al.*, [2006] PSST 0014, at paragraph 56: "Simply disagreeing with the final result does not constitute evidence of wrongdoing on the part of the assessment board."

[42] Furthermore, even if the complainant had succeeded in the oral portion of the simulation exercise, this is not a guarantee that he would be selected for the appointment. As stated in a number of Tribunal decisions, the choice of a successful candidate under the *PSEA* is no longer based on relative merit, but on the candidate who is the "right fit" for the position. See, for example: *Aucoin v. President of the Canada Border Services Agency et al.*, [2006] PSST 0012; *Portree v. Deputy Head of Service Canada et al.*, *supra*; *Visca v. Deputy Minister*

*of Justice et al.*, [2006] PSST 0016; and, *Robbins and the Deputy Head of Service Canada et al.*, [2006] PSST 0017.

[43] Finally, the Tribunal's powers are limited under sections 81 and 82 of the PSEA. Thus, the Tribunal cannot order the respondent to "screen in" the complainant in another AS-07 process, or award monetary damages based on the salary the complainant would make on the remote possibility he might have been successful.

[44] The Tribunal finds that the complainant has failed to provide any evidence that would support his allegation of abuse of authority. There is no evidence whatsoever of bad faith or personal favouritism involved in the assessment board's decision to reduce the oral presentation. The complaint is dismissed.

[45] Since the Tribunal dismisses the complaint as there is no evidence of abuse of authority, there is no need to address the respondent's and the PSC's arguments.

[46] The Tribunal is not addressing the emails referred to in paragraph 16 above, submitted by the complainant that relate to another file which is not before this member. The Tribunal has no authority to deal with this issue.

[47] The Tribunal wishes to comment on the tone and content of the complainant's reply as it finds many of the observations were offensive and disrespectful to the respondent and the PSC. He often submits that the PSC and the respondent's arguments are "gratuitous", "irrelevant" "arrogant", "self-serving". For example, in his reply to the PSC, the complainant states :

"Competent Canadian jurists may 'disagree with' and be embarrassed by the Canadian Bar's decision to give lawyers status to whatever legal counsellor recommended that the PSC put forward this irrelevant and nonsensical 'argument', yet no matter how justified the jurist's objection might be from a subjective standpoint, the jurist's dismay cannot and should not affect that lawyer's professional status."

[48] The following is another offensive comment directed to the respondent: “The laziness and unwillingness of the respondent to perform the task that the Canadian public paid the Respondents for is still without explanation or excuse.”

[49] Veiled threats to the Tribunal are also not acceptable. In referring to the emails addressed in paragraph 16 above, the complainant in an email to the other parties and the Vice Chair makes this statement: “By addressing and not ignoring that matter, the PSST may avoid the prospect of the matter being dealt with at a more intrusive and public level.”

[50] Documents submitted to the Tribunal by any party should never contain insults, ridicule the other parties, or threaten a course of action. These actions would not be acceptable in an oral hearing; they are equally unacceptable in a paper hearing.

#### DECISION

[51] For all of these reasons, the complaint is dismissed.

Sonia Gaal  
Vice-Chair

PARTIES OF RECORD

Tribunal File:	2006-0191
Style of Cause:	<i>Barry Pugh and the Deputy Minister of National Defence et al.</i>
Hearing:	Paper hearing
Date of Reasons:	June 6, 2007
APPEARANCES:	
Barry Pugh	For the complainant
Simon Kamel Lesa Brown	For the respondent
Lili Ste-Marie	For the Public Service Commission