



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2007-0058

OTTAWA, JUNE 11, 2007

MUHAMMAD AKHTAR

COMPLAINANT

AND

THE DEPUTY MINISTER OF TRANSPORT, INFRASTRUCTURE AND COMMUNITIES

RESPONDENT

AND

OTHER PARTIES

MATTER	Request for order for provision of information
DECISION	The request is granted in part
DECISION RENDERED BY	Guy Giguère, Chairperson
LANGUAGE OF DECISION	English
INDEXED	<i>Akhtar v. Deputy Minister of Transport, Infrastructure and Communities et al.</i>
NEUTRAL CITATION	2007 PSST 0026

REASONS FOR DECISION

INTRODUCTION

[1] The complainant, Muhammad Akhtar, has asked the Public Service Staffing Tribunal (the Tribunal) to order the respondent, the Deputy Minister of Transport, Infrastructure and Communities, to provide him with certain requested information.

BACKGROUND

[2] The complainant works in Ottawa as a Manager, at the TI-08 group and level, with the Department of Transport, Marine Safety. He applied on two internal advertised appointment processes in British Columbia (BC) for the position of Manager, Inspection Services, Marine Safety at the same TI-08 group and level: selection process 06-MOT-CCID-VAN-07987 (the first appointment process); and, selection process 06-MOT-CCID-VAN-009443 (the second appointment process).

[3] In the first appointment process, the complainant was screened in as one of five candidates being considered for the position. In the second appointment process, the complainant was one of two candidates who reached the interview stage of the process. He was not selected as the successful candidate in either appointment process.

[4] The complainant did not file a complaint to the Tribunal with respect to the first appointment process; he has provided an explanation for not filing which will be examined later in this decision.

[5] On January 28, 2007 the complainant filed a detailed complaint to the Tribunal under section 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*) concerning the second appointment process. The complainant alleges that the selection criterion was changed to favour Mr. Tewari, the successful candidate, and that the selection board also

manipulated the marks in the written and oral examination also to favour him. He claims that one of the selection board members is biased against him and was instrumental in placing Mr. Tewari in his former job at the Transportation Safety Board of Canada (the TSB).

[6] Finally, he alleges discrimination on the basis of religion and explains why he feels victimized. He worked in the BC regional office for over seven years, with almost four of these years in Inspection Services where the position is located. Although he works in Ottawa, his family is still located in BC and he has requested a deployment or lateral transfer, but it has been refused. Only one appointment was made in the first selection process where he was found qualified, despite the job advertisement having clearly indicated that two positions were anticipated. As for the second selection process, according to the complainant, it was initiated to discriminate against him.

[7] On April 10, 2007 the complainant filed this request for an order for provision of information. For convenience, the information is itemized by consecutive number. The information requested is as follows:

For the First Appointment Process:

1. Mr. Akhtar's marked written papers and oral assessment including all working copies of written paper and oral assessment of both board members notes, marking scheme (including who marked the written papers) assessment criteria, selection criteria, and any reference checks. Further any correspondence with other parties with respect to this process i.e. Human Resources, etc.
2. Mr. Sultan Virani's (successful candidate) marked written papers and oral assessment including all working copies of written paper and oral assessment by both board members and notes, marking scheme (including who marked the written papers) assessment criteria, selection criteria and any reference checks. Further any correspondence with other parties with respect to this process i.e. Human Resources etc.
3. Mr. Aloak Tewari's (unsuccessful in the first competition) marked written papers and oral assessment (if any) including all working copies of both board members notes, marking scheme (including who marked the written papers) assessment criteria, selection criteria any reference checks. Further any correspondence with other parties with respect to this process i.e. Human Resources, etc.

For the Second Appointment Process:

4. Mr. Akhtar's marked written papers and oral assessment including all working copies of written and oral assessment of both board members including notes, marking scheme (including who marked the written papers) assessment criteria, selection criteria, any reference checks. Further any relevant correspondence, regarding this process with other relevant parties i.e. HR or between the board and the regional director marine or vice versa.
5. Mr. Aloak Tewari's (successful candidate in the last competition) marked written papers and oral assessment including all working copies of written paper and oral assessment of both board members including notes, marking scheme (including who marked the written papers) assessment criteria, selection criteria, any reference checks. Further any relevant correspondence, regarding this process with other relevant parties i.e. HR or between the board and the regional director marine or vice versa.
6. A statement of the merit criteria for the position.
7. Also the HR strategic plan for Pacific region related to Marine Branch.
8. TC's policy on the choice of process.
9. Copies of work descriptions for Vancouver and Nanaimo, etc.

[8] In the documentation accompanying his request, the complainant included a copy of a memorandum dated April 2, 2007 from the respondent's Human Resources Advisor to the complainant's representative. The memorandum provided the respondent's response to the complainant's request for information arising during the exchange of information.

[9] The April 2, 2007 memorandum outlined the items of information that the respondent was, and was not, prepared to provide to the complainant. The memorandum also stated that copies of this information were attached. In terms of the second appointment process, according to the memorandum, items 4, 6, 7, 8, and 9 have already been provided. In addition, the memorandum further stated that additional information related to the second appointment process had been included, namely: a copy of the final scores obtained for Mr. Akhtar; and, the rationale for determining "right fit" for the position.

[10] The memorandum also stated that "any relevant correspondence, regarding this process with other relevant parties *i.e.* HR or between the board

and the regional director marine or vice versa” has already been provided. Thus, the only outstanding information concerning the second appointment process is limited to a portion of item 5, namely: the assessment information for the successful candidate. The respondent maintains that this information is not relevant to the complaint.

[11] The respondent refuses to provide items 1-3 related to the first appointment process, again taking the position that the information is not relevant to the complaint.

[12] This decision will only address the remaining information requested by the complainant, namely: items 1-3, and the first part of item 5.

ISSUE

[13] Is the information requested relevant to the complaint?

ARGUMENTS OF PARTIES

COMPLAINANT'S SUBMISSIONS

[14] In his request, the complainant submits that favouritism and other acts of abuse of authority were used to ensure that he did not get appointed to any positions. He maintains that the positions in both appointment processes were the same and that he should have been appointed from the pool of qualified candidates in the first appointment process rather than the respondent running a second appointment process. According to the complainant, the information requested will help support this claim.

[15] He claims further that the second appointment process was contrived to exclude him and give preference to the successful candidate, who had failed in the first appointment process, and an assessment of the marking criteria is essential to assist the complainant in substantiating this claim.

[16] The complainant submits that the marking for all candidates in both processes will demonstrate that favouritism and other acts of abuse of authority were prevalent in both processes. The complainant states that the provision of the questions and answers related to both processes is necessary to ensure that they were the same and that the same standard was applied in all assessments.

[17] With respect to the second appointment process, the complainant states that the selection board used "highest score" to determine the successful candidate. The complainant provided a copy of a memorandum from one of the selection board members to the respondent's HR Advisor dated December 1, 2006 which the complainant says confirms that this was the method used to choose the successful candidate. The complainant submits that, without access to the marking scheme and answers for all successful candidates, it cannot be determined who met the established criteria. According to him, this information is also relevant to his claim of bias in how the marking was applied.

[18] The complainant believes that the information requested will allow him to determine if he was treated differently by the different selection board members and/or if he was treated differently from other successful candidates.

[19] The complainant takes the position that he has provided an account of events preceding, during and following the appointment process and has laid a foundation for why he believes that the selection board was biased against him.

RESPONDENT'S SUBMISSIONS

[20] The respondent provided its submissions on April 16, 2007. The respondent submits that none of the information requested pertaining to the first appointment process is relevant to this complaint.

[21] According to the respondent, the first appointment process was conducted to staff two anticipated vacancies from among three Manager – TCC positions in the Pacific Region (Nanaimo, Prince Rupert, and Victoria). It was not advertised

or intended for use in staffing other Manager – TCC positions in locations not noted on the advertisement, *i.e.*, Vancouver.

[22] Unsuccessful candidates were notified of their right to file a complaint concerning the first appointment process as required by section 48 of the *PSEA*. The complainant chose not to exercise his right to complain concerning the first appointment process. Any information pertaining to the first appointment process is not relevant to this complaint.

[23] With respect to the information sought concerning the second appointment process, the respondent submits that it is not for the respondent to satisfy the Tribunal that the information is irrelevant. The onus rests with the complainant to satisfy the Tribunal that the information sought is relevant.

[24] The respondent claims that the complainant has failed to meet the onus of establishing that the information is relevant. The respondent states that the complainant's request must be specific and demonstrate a clear linkage between the information requested and the complaint. The respondent relies on the Tribunal's decisions in *Oddie v. Deputy Minister of National Defence et al.*, [2006] PSST 0009, and *Visca v. Deputy Minister of Justice et al.*, [2006] PSST 0016.

[25] The respondent further submits that the information sought pertaining to the successful candidate's assessment in the second appointment process is not relevant. The fact that the complainant believes he is perhaps "better qualified" than the person selected cannot form the basis of a complaint of abuse of authority. Therefore, the exercise of analyzing and comparing notes taken and marks awarded to various candidates during the assessment process is futile. The respondent says that the concept of "relative merit" no longer exists under the new *PSEA* and relies on the Tribunal's decision in *Aucoin v. The President of the Canada Border Services Agency et al.*, [2006] PSST 0012, in support of its position that the information sought is irrelevant.

ANALYSIS

[26] As the Tribunal indicated in *Visca, supra*, the exchange of information is an opportunity for the complainant and the respondent to meet, exchange relevant information and discuss the complaint. This meeting will often lead to the resolution of the complaint by the parties. The parties should exchange all relevant information that they have in their possession and not only the specific documents that are requested. There should be no element of surprise in the Tribunal complaint process and both parties should have the necessary information to address the issues raised by a complaint.

[27] If the parties cannot agree on the relevance of the information requested, or if a party objects to its disclosure, the party making the request can ask the Tribunal to issue an order for the provision of the information. The threshold test in considering a request for an order for provision of information is arguable relevance. It requires that there be some relevance and the requesting party bears the onus of demonstrating a nexus, or a clear link, between the information sought and the complaint. The Tribunal will not order the provision of the information where a party only raises a suspicion that some documents may be relevant, without more, as such a vague request amounts to a “fishing expedition”. As the Tribunal stated in *Smith v. Commissioner of the Correctional Service of Canada et al.*, [2006] PSST 0013 :

[11] The relevance of the information that is sought is, therefore, the key determination to be made. The requesting party, in this case the complainant, must demonstrate to the Tribunal's satisfaction that there is a clear linkage between the information sought and the matters raised in the complaint. The information must be arguably relevant to the complaint, and the requesting party bears the onus of demonstrating that relevance.

(...)

[13] (...) In addition to the need of the requesting party to demonstrate arguable relevance, a further factor is that “the [Tribunal] should be satisfied that the information is not being requested as a ‘fishing expedition.’” (...) The complainant's speculation that something might be uncovered if she is permitted access to the requested information is insufficient to warrant an order for provision of that information.

[28] While the complainant cannot seek information pertaining to the first and second appointment processes unless he can establish relevance, it is open for him to try to satisfy the Tribunal that the information requested is **arguably relevant**. It is important to recognize that the threshold test to establish relevance at this stage of the complaint process is broader than that at the hearing. It may be found that the information produced will lead to the realization that other information not yet produced is relevant and should be provided. As well, information produced may lead to the realization that it is not useful to the party requesting it.

DOCUMENTS RELATED TO THE FIRST APPOINTMENT PROCESS

[29] Mr. Akhtar provided an explanation for why he did not file a complaint concerning the first appointment process. Copies of the various staffing notices pertaining to the first appointment process were enclosed with his complaint. According to these documents, the advertisement concerning the first appointment process was posted on May 31, 2006. It specified that the location for the position was “British Columbia - Vancouver” and it indicated that it was for anticipatory staffing in which two positions may be filled. A subsequent advertisement with the identical selection process number was entered on June 1, 2006. It specified that the location for the position was “British Columbia – Nanaimo, Victoria and Prince Rupert.” It appears that this change in location is the only amendment to the advertisement.

[30] The complainant was one of five candidates identified on the Notification of Consideration in the first appointment process. The complainant says that he was in the “pool of qualified candidates” and was waiting for the second position to be announced. By the time he was told that there would be a new appointment process to staff the second position, it was too late to file a complaint to the Tribunal concerning the first appointment process.

[31] Having examined the Notification of Consideration and the Notification of Appointment related to the first appointment process, it is clear, as the respondent contends, that proper notice was provided by the respondent as required by section 48 of the *PSEA*.

[32] In terms of item 1, had the complainant filed a complaint concerning the first appointment process, this information would clearly have been provided to him during the exchange of information. The respondent argues that since he did not file a complaint concerning the first appointment process, nothing related to that process is relevant to the complaint before the Tribunal.

[33] The Tribunal finds that if the complainant wished to challenge the first appointment process, he should have filed a complaint within the time required to do so under the *Public Service Staffing Tribunal Regulations, SOR/2006-6* (the *PSST Regulations*). He did not, but this does not mean that documents from the first process cannot be relevant to the second appointment process. The Tribunal has to determine if the complainant has established the necessary linkage between the information sought – his assessment information related to the first appointment process – and the subject-matter of his complaint.

[34] One of the claims raised by the complainant in both his complaint and this subsequent request for order is that a member of the selection board, who was the only board member who participated in both appointment processes, has shown bias against him in both appointment processes. In his complaint, the complainant states, in part:

[The selection board member] was always on the board as a key member marking the papers, establishing the process and advising the senior management in decision making. Further he was always a key player in making the final decisions on all the Marine Safety Pacific Region selection boards. Normally what he says before the competition processes, it becomes official results after the process.

[35] The Tribunal is satisfied that the complainant has demonstrated that item 1 is arguably relevant to establish whether or not this selection board member was biased against the complainant.

[36] The Tribunal will now address the request for information item 2, namely, the assessment information pertaining to the successful candidate in the first appointment process, Mr. Sultan Virani. Having examined the complaint and the complainant's further submissions, the Tribunal is not satisfied that the complainant has established a clear nexus between the information sought concerning the successful candidate in the first appointment process, Mr. Sultan Virani, and the subject-matter of the complaint.

[37] The crux of the complaint is that the second appointment process was set up in such a way as to enable the selection board to choose their favourite candidate, Aloak Tewari, at the expense of the complainant. The Tribunal is not satisfied that the complainant has established the necessary link between the information pertaining to Mr. Virani and the present complaint to demonstrate relevance and, therefore, no order will be made concerning this information.

[38] However, as explained in *Oddie, supra, and Visca, supra*, in a complaint where differential treatment is alleged such as a complaint of favouritism, information related to the successful candidate is relevant to an allegation of difference of treatment and, therefore, relevant to the complaint. It is clear from the complaint that the complainant believes that he has been treated differently than the successful candidate and that this differential treatment is rooted in a pattern of favouritism concerning the successful candidate.

[39] The Tribunal is satisfied that the complainant has established that item 3, the assessment information of Mr. Tewari in the first selection process is arguably relevant to establish whether or not Mr. Tewari was appointed as a result of personal favouritism, and/or another form of abuse of authority. According to the complainant, Mr. Tewari does not have departmental experience in marine safety or significant ship inspection experience. Mr. Tewari failed the written examination in the first appointment process. However, in the second appointment process which followed only a few months later, he was selected for appointment as he received the highest marks from the selection

board. There is a clear nexus between the information sought under item 3 and the subject-matter of his complaint.

DOCUMENTS RELATED TO THE SECOND APPOINTMENT PROCESS

[40] The requested information concerning the second appointment process is: the assessment information for the successful candidate, at item 5. The respondent relies on the Tribunal's decision in *Aucoin v. The President of the Canada Border Services Agency et al.*, [2006] PSST 0012, to support its position that since the new *PSEA* does not require a comparative assessment of candidates, the provision of information related to the successful candidate would be "futile".

[41] The circumstances of this complaint are different from those found in *Aucoin, supra*. In this selection process, a comparative assessment of the candidates was used to determine the successful candidate. The complainant submitted a copy of a letter from a selection board member which indicated that the candidate with the highest score from the total of essential qualifications and assets would be selected for appointment. This information was neither contradicted nor further explained by the respondent.

[42] Under the former *PSEA*, on request, the successful candidate's assessment information would be disclosed to the appellant. This information was then relevant as the ground for an appeal was that relative merit was not achieved. As answers were rated and ranking was mandatory, the successful candidate's assessment information would be disclosed before the appeal board.

[43] Now, under subsection 30(2) of the *PSEA*, merit is defined. The only requirement for an appointment to be made on the basis of merit is that the person to be appointed meet the essential qualifications. Considerable discretion is given to choose, between qualified applicants, the person who in the manager's judgment is the **right fit** for the job. Accordingly, there is no requirement to rank candidates or rate answers. The Tribunal is of the view that

the former practice of ranking candidates should be discouraged as it does not reflect the spirit of the *PSEA*. However, a manager is not precluded from ranking, and this does not in and of itself constitute an abuse of authority.

[44] When ranking is used to select the successful candidates, and depending on the nature of the complaint, the assessment information of the person that was appointed may be arguably relevant.

[45] The crux of the complaint is that the complainant was treated differently than the successful candidate in the second appointment process. He has framed his complaint as one of personal favouritism toward the successful candidate and bias against him and raised a number of assertions to support his complaint, including: his perceived performance during the interview vis-à-vis the responsiveness of the selection board; the method of choosing the successful candidate based on highest score which was subject to possible manipulation by the selection board; one of the two selection board members in the second appointment process was on the selection board for the first appointment process and was very instrumental in placing Mr. Tewari in his job at the TSB and now that he is leaving Transport Canada, Marine Services, he wanted to make sure that Mr. Tewari replaced him there as well; and, the assertion that the successful candidate does not possess the essential and asset qualifications for the position as his substantive position was as an investigator with the TSB.

[46] According to the complainant, there was a deliberate pre-determined plan to ensure that Mr. Tewari was chosen as the successful candidate in the second appointment process. The complaint is replete with claims that the second appointment process was manipulated to make this happen.

[47] As explained above, in a complaint where differential treatment is alleged, the information related to the successful candidate is arguably relevant to the allegation of difference of treatment. The Tribunal is satisfied that the issues raised by the complainant are sufficiently detailed and are arguably relevant to

warrant the disclosure of the assessment information pertaining to the successful candidate in the second appointment process, item 5. Finally, while the Tribunal is of the view that the release of this information is not unduly prejudicial to the respondent, it is also satisfied that any potential prejudice to the successful candidate in releasing this information can be addressed by placing appropriate conditions on its release.

[48] The Tribunal notes that the complainant has alleged discrimination on the basis of religion. Section 78 of the *PSEA* and section 20 of the *PSST Regulations* require the complainant to notify the Canadian Human Rights Commission where a complaint raises an issue involving the interpretation or application of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. Accordingly, the complainant must notify the Canadian Human Rights Commission if he intends to pursue the human rights issue that he has raised in his complaint.

DECISION

[49] The Tribunal is not satisfied that the complainant has met the onus of establishing arguable relevance for item 2; it is satisfied that the complainant has met the onus with respect to items 1, 3 and 5. Accordingly, the complainant's request for an order for provision of information is granted in part.

ORDER

[50] The respondent shall provide the complainant with the following information within seven days of the date of this decision:

1. The complainant's marked written papers and oral assessment, including all working copies of written papers and oral assessment of both board members' notes, marking scheme (including who marked the written papers), assessment criteria, selection criteria, and any reference checks related to the first appointment process.

2. Any correspondence with other parties in the first selection process with respect to the complainant and Mr. Tewari.
3. For the first and second appointment process: Aloak Tewari's marked written papers and oral assessment, including all working copies of written papers and oral assessment of board members including notes, marking scheme (including who marked the written papers), assessment criteria, selection criteria, and any reference checks.

[51] Pursuant to subsections 17(5) and (6) of the *PSST Regulations*, the Tribunal sets the following condition: the complainant and his representative cannot divulge or share with anyone who is not a party to this complaint any information provided by the respondent concerning the successful candidate.

[52] In addition, pursuant to section 18 of the *PSST Regulations*, information obtained as a result of this order may only be used for purposes of the complaint.

Guy Giguère
Chairperson

PARTIES OF RECORD

Tribunal File:	2007-0058
Style of Cause:	<i>Muhammad Akhtar and the Deputy Minister of Transport, Infrastructure and Communities et al.</i>
Hearing:	Written request, decided without the appearance of parties
Date of Reasons:	June 11, 2007