



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2006-0066

OTTAWA, JULY 3, 2007

LORRIE ODDIE

COMPLAINANT

AND

THE DEPUTY MINISTER OF NATIONAL DEFENCE

RESPONDENT

AND

OTHER PARTIES

MATTER	Complaint of abuse of authority pursuant to paragraph 77(1)(a) of the <i>Public Service Employment Act</i>
DECISION	Complaint is dismissed
DECISION RENDERED BY	Sonia Gaal, Vice-Chair
LANGUAGE OF DECISION	English
INDEXED	<i>Oddie v. Deputy Minister of National Defence et al.</i>
NEUTRAL CITATION	2007 PSST 0030

REASONS FOR DECISION

INTRODUCTION

[1] On July 13, 2006, Ms. Lorrie Oddie 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 Human Resources Officer's position, PE-04, (process number 06-DND-IA-KGSTN-045000) in the Department of National Defence.

[2] She alleges abuse of authority by the respondent, the Deputy Minister of National Defence, because the selection process was flawed. She also alleges favouritism in the selection of the successful candidate, Ms. Cheryl Hogan.

[3] The Tribunal issued a prior decision on October 3, 2006 dealing with a request for an order for provision of information: *Oddie v. Deputy Minister of National Defence et al.* [2006] PSST 0009.

[4] A hearing on the merits of this case was held in Kingston, Ontario on May 9, 10 and 11, 2007.

BACKGROUND

[5] The complainant participated in an internal advertised appointment process for the Human Resources Officer's position. The two-member assessment board determined that the assessment of the candidates would be done through an interview and reference checks. Ms. Jane Adams-Roy, the Human Resources Manager for Eastern Ontario, chaired the assessment board. The assessment board put heavy weight on interpersonal skills because it was absolutely critical for the Human Resources Officer's position.

[6] The interviews were conducted by Ms. Adams-Roy and Ms. Sweeting, her counterpart for Western Ontario. However, three candidates could not be interviewed during this period: the complainant, who was on vacation, and two candidates in Western Ontario. Ms. Adams-Roy and Ms. Sweeting decided that

they could meet the candidates separately with the assistance of a senior Human Resources Officer from their respective region. Ms. Sweeting then met the two candidates from her region and Ms. Adams-Roy met the complainant with Ms. Judy Faubert for the interview.

[7] The candidates were told that there would be a 360-degree reference check conducted to determine the personal suitability of the candidates. As a result of this, the candidates were asked to provide the names of subordinates, supervisors, peers and clients.

[8] However, candidates were also told there could be a “snow ball” reference check which is when one referee mentions another person who may also provide a reference for the candidate.

[9] The complainant provided the names of referees as requested. Ms. Adams-Roy contacted eleven referees for the complainant and six for the successful candidate, Ms. Cheryl Hogan.

[10] After conducting the interview and reference checks, the assessment board concluded that the complainant did not meet the “Effective Interpersonal Relationships” factor (PS2) which was part of the personal suitability assessment. She was rated 5/10 which falls into the scale’s “Poor” category. She was thus eliminated from the process and the other abilities and skills were not assessed.

SUMMARY OF EVIDENCE

[11] The majority of the complainant’s testimony was to address and explain the circumstances surrounding certain negative comments from some referees in an effort to demonstrate that the assessment board did not accurately reflect the referees’ comments. She also explained some of the answers she gave during the interview which were interpreted negatively as well as her relationship with the referees, particularly with two of them.

[12] For example, the complainant testified about her assignment in the community in 2003 which appeared to have caused issues in her workplace due to a misunderstanding of her role in the assignment. Once it was addressed with her colleagues, the minutes of the staff meeting where it was discussed were changed and all understood, it was no longer a problem.

[13] She addressed an incident referred to by Ms. Teresa Westfall, now a warden of a federal institution in Kingston, who spoke with Ms. Adams-Roy, but was not one of the referees' names provided by the complainant. Ms. Westfall mentioned that the complainant was rude with one of her employees. According to the complainant, Ms. Westfall was not present during this exchange and the complainant was not rude. Furthermore, the employee involved did not even remember the incident.

[14] The complainant had few interactions with Ms. Westfall and met her about one year ago. She believed Ms. Westfall should not have been contacted given she did not fit into any of the categories for a 360-degree reference check such as a subordinate, supervisor, peer or client. She also did not fit into the definition of "snow ball" reference check.

[15] In cross-examination, the complainant stated she had the utmost respect for Ms. Hogan, the successful candidate, but if there were a finding of abuse of authority, the remedy would be revocation and that would not be her decision.

[16] The complainant's interpersonal skills and various work relationships were discussed, particularly with her supervisors. It appeared that there were sometimes problems with her interpersonal skills in dealing with colleagues.

[17] Ms. Ruth Hoard testified on behalf of the complainant. Ms. Hoard is a colleague who declined to provide a reference to Ms. Adams-Roy. Ms. Hoard explained that she had been a federal employee for 20 years and had never given a reference during that period. She had no issues with the complainant but just did not want to provide a reference.

[18] Ms. Leslie King, a colleague, also appeared before the Tribunal. She explained that she could not remember using the expression “get her back up” in reference to the complainant in her discussion with Ms. Adams-Roy as she recognizes this can have a negative connotation. These words appear in the “Reference Check Questions” completed by Ms. Adams-Roy under the “Team Player” (PS6) topic.

[19] Ms. Jennifer Walcott, also a colleague, testified that she was misquoted in the “Reference Checks Questions” document, also under the “Team Player” (PS6) topic. She said “she doesn’t let it stew”, not “she lets it stew”. She explained that the complainant would volunteer to help, phone her back and show her how to do things.

[20] Ms. Walcott explained that the comment about her “hemming and hawing” found in the same document in relation to the complainant’s area to improve was taken out of context. She did not want to give a bad impression of the department as she is proud to work there; she wanted to give an accurate example. However, this is how she speaks: she takes time to answer; she “hems and haws”.

[21] Ms. Jane Adams-Roy was the only witness on behalf of the respondent.

[22] Ms. Adams-Roy testified that she did not know the complainant or the successful candidate prior to the appointment process. She conducted the reference checks for the complainant as well as each candidate after that person’s interview.

[23] Although the notice on Publiservice dealt with one PE-04 position, Ms. Adams-Roy said there were in fact two positions to be filled at either a PE-03 or PE-04 level and one temporary position to backfill. The process was an attempt to fill both. However, the PE-03 position was not filled at that time. According to Ms. Adams-Roy, the PE classification is a “demographically challenged” one and the officers are valuable commodities.

[24] Following the complainant's interview, Ms. Faubert and Ms. Adams-Roy both had concerns about some comments made by the complainant.

[25] Ms. Adams-Roy explained that it appeared from the various referees that the complainant has excellent technical skills and is knowledgeable. She has a good relationship with her clients and subordinates. The problem appears to be her interpersonal skills, which is one of the essential qualifications for the position.

[26] Ms. Adams-Roy said that she spoke with one Assistant, Ms. Birtch, who gave a good reference. She also spoke with one client, Mr. Townson, who was very positive about the complainant's work.

[27] She contacted a total of five colleagues. Since this is a voluntary process, two of the colleagues refused to give a reference, Ms. Marshall and Ms. Hoard, although Ms. Marshall provided a reference for Ms. Hogan, the successful candidate.

[28] Ms. Adams-Roy interpreted the refusals as being negative references for the complainant. In her opinion, it was a reasonable inference that the reason why individuals refuse to give a reference is because they have nothing good to say about that person. Therefore, rather than be negative, they find it is better to say nothing. She added that she does not ask people why they refuse to give a reference as it is intrusive to go further once they decline to talk.

[29] Ms. King and Ms. Walcott, the complainant's colleagues, provided Ms. Adams-Roy overall positive references. Ms. Kelly, a former colleague whose name was not provided by the complainant, referred to an incident where she overheard a conversation that took place four years ago with a third party during which the complainant "snapped" at the third party. Ms. Adams-Roy explained that this was more of a "hallway" discussion with Ms. Kelly. It was not very influential in the process and did not carry much weight in the decision not to appoint Ms. Oddie.

[30] Ms. Adams-Roy spoke with three supervisors. Ms. Joyce was a good reference. Ms. Biscarro, the second supervisor provided a “balanced” reference but raised concerns about the complainant’s interpersonal skills and gave examples. Finally, Mr. Stolfa, who supervised the complainant about four or five years, also provided examples that caused some concerns to Ms. Adams-Roy in the area of the complainant’s interpersonal skills.

[31] While checking references for Ms. Hogan, Ms. Adams-Roy spoke with Ms. Westfall, one of her referees, who provided a very positive reference. At the end of her conversation with Ms. Westfall, Ms. Adams-Roy mentioned the complainant had also applied for the position and asked Ms. Westfall if she knew her. Ms. Westfall said she did but she was uncomfortable speaking about the complainant so Ms. Adams-Roy told her she would not take notes and that “my pen is down”. Ms. Adams-Roy took no notes and testified “on memory” about her discussion with Ms. Westfall. Ms. Westfall was never a peer, supervisor, subordinate or client of the complainant. According to Ms. Adams-Roy, she was a “snow ball” referee and it was not a favourable reference for the complainant. Ms. Adams-Roy stated that she did not see a conflict by asking the same person references for two candidates.

[32] In cross-examination, Ms. Adams-Roy explained that they are not limited to the four quadrants of references when checking references as she was trying to get an accurate picture of the complainant. She stated that she put her pen down when speaking with Ms. Westfall as she could sense that Ms. Westfall was “extremely hesitant” talking to her about the complainant and she wanted her to speak candidly and honestly.

[33] Ms. Adams-Roy explained that since there were two positions to fill, she discussed with Ms. Faubert and Ms. Sweeting about the possibility of bringing in the complainant at a PE-03 level and providing her with training and mentoring. However, they decided they were not sure they could succeed in overcoming the interpersonal skills issues. Ms. Adams-Roy said she had a hard time “closing the

door” on the complainant as she had good technical skills and they needed to fill the positions.

[34] The Public Service Commission (the PSC) had no witnesses.

ISSUES

[35] The Tribunal must determine the following:

(i) Did the assessment board abuse its authority when it contacted referees whose names were not provided by the complainant?

(ii) Did the assessment board abuse its authority when it spoke with a referee, provided by the appointed person, for a reference towards the complainant?

(iii) Did the assessment board abuse its authority when it made a negative inference from employees declining to provide a reference?

(iv) Did the complainant meet the burden of proof that the assessment board abused its authority when it did not appoint her?

ARGUMENTS OF PARTIES

A) COMPLAINANT’S POSITION

[36] The complainant’s representative submits that the reference calls were made for Ms. Hogan before the complainant’s interview, which put the complainant at a disadvantage.

[37] The references for Ms. Hogan were positive whereas the first contact for the complainant was negative as Ms. Adams-Roy spoke with Ms. Westfall while checking references for Ms. Hogan. Ms. Westfall was positive for Ms. Hogan but negative for the complainant.

[38] The complainant believes that the assessment board contacted many referees for the complainant in an attempt to confirm a negative first impression given by Ms. Westfall.

[39] Ms. Adams-Roy stepped outside the guidelines established by the PSC when she stated she put her pen down while talking with Ms. Westfall. It was an "off the record" discussion. She could only go on memory as she had nothing written down to substantiate the negative assessment other than a comment that the complainant was rude to one of Ms. Westfall's middle managers and there were issues on interpersonal skills.

[40] There was no relationship whatsoever between the complainant and Ms. Westfall as she was not a colleague, subordinate, client or supervisor of the complainant. This was not a true "snow ball" reference, it was a front-end reference. Her comments were not based on direct knowledge but on an opinion, second-hand information and rumours. Ms. Westfall could not have witnessed the incident where the complainant was allegedly rude with a middle manager as she was never present at any time with the complainant.

[41] According to the complainant, the tone and demeanour of the assessment board for Ms. Hogan was quite different than the one for the complainant. The complainant points out that negative comments made by Ms. Hogan were not analyzed in the same fashion as ones made by herself. There were "flags" for the complainant but none for Ms. Hogan despite some of her negative comments. This demonstrates leniency for Ms. Hogan. In addition, there were 11 references contacted for the complainant and six for Ms. Hogan.

[42] Ms. Kelly provided an example that is four years old which is disputed by the complainant. It was viewed negatively by Ms. Adams-Roy. Ms. Kelly should not have been contacted either.

[43] Ms. Adams-Roy noted as negative the fact that two colleagues did not want to provide references. However, she did not clarify the reason of their

refusal. Ms. Hoard explained why she did not want to provide a reference and it was not for a negative reason. The refusal to provide a reference should not be interpreted as a negative reference.

[44] In general, the references were positive but Ms. Adams-Roy kept on seeking other references to confirm a negative impression. The Tribunal found in *Portree v. Deputy Minister of Human Resources and Social Development et al.*, [2006] PSST 0014, that an assessment board should not shop for favourable or unfavourable references.

[45] These actions constitute abuse of authority under the *PSEA*.

B) RESPONDENT'S POSITION

[46] The respondent argues that there is no evidence to establish when the first reference for the complainant took place as it was not dated. In all cases, the reference checks were done after each interview.

[47] Ms. Adams-Roy was not shopping for negative references; in fact, the complainant received some positive references. The complainant is asking that the assessment board look only at the positive references but this is the information that was provided by the referees.

[48] Ms. Adams-Roy had to determine if the concerns raised during the complainant's interview were founded or not. Her experience led her to certain conclusions based on the interaction with the referees.

[49] The complainant wants the Tribunal to analyse the meaning of the words recorded by the assessment board and substitute its judgment for that of the board. However, the Tribunal cannot second guess the assessment board. The complainant may disagree with the board's interpretation but this is the board's role. There is no evidence to suggest that the information was purposely modified or flawed to the point of rendering it meaningless. There is no requirement to write down verbatim the discussions or to tape-record them. The

essence is there which outlines the concerns on the complainant's interpersonal skills.

[50] The complainant also attempted to provide clarification on past events. It is not the Tribunal's role to determine if the events were accurate. Similarly, she tried to compare herself with Ms. Hogan to find discrepancies. The new *PSEA* avoids this as people are no longer appointed under the relative merit system. Furthermore, even if a candidate has strong technical skills, this does not entitle that person to a position if other qualifications like interpersonal skills are lacking.

[51] The three witnesses who appeared on behalf of the complaint did not add much information to the process. Ms. Adams-Roy made her decision based on the information she had at that time and this information was not available then.

[52] Ms. Adams-Roy had two positions to fill and didn't have to choose between Ms. Hogan and the complainant. She could have chosen both but did not because of the concerns about the complainant's interpersonal skills. In addition, there is no evidence that Ms. Hogan did not meet the essential qualifications.

[53] The respondent presented case law and excerpts of textbooks to address the concept of abuse of authority. The respondent submits that the Tribunal should look at the limited class rule to assist in the interpretation of abuse of authority. The rule requires that terms like abuse of authority include bad faith and personal favouritism or words that fit in that category. There must be some sort of discernment which represents various degrees of misfeasance to constitute abuse of authority, such as corruption, lack of care, dishonesty.

[54] The complainant must demonstrate by clear evidence that the respondent abused his authority and acted in bad faith when he did not appoint the complainant. The fact that the complainant was not appointed does not mean there is bad faith. The respondent also refers to *Portree, supra*, in support of its position that there is no evidence of abuse of authority and that Ms. Adams-Roy

was “shopping” for bad references. She wanted to be sure that she picked someone who would fit well within the team.

[55] The complaint should be dismissed as the complainant has failed to meet the burden under paragraph 77(1)(a) of the *PSEA*.

C) PUBLIC SERVICE COMMISSION’S POSITION

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

[57] Furthermore, abuse of authority does not include errors or omissions since a venue for errors and omissions is provided in subsection 15(3) of the *PSEA*.

[58] 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.

[59] The expansive definition based on Jones and de Villars’ categories for abuse of discretion in *Principles of Administrative Law*, is not required. The authors rely on *Tucci v. Canada (Revenue, Customs, Excise and Taxation)*, [1997] F.C.J. No. 159 (F.C.) (QL) to identify the five generic types of abuses in the exercise of discretion. In *Tucci, supra*, the Federal Court reviewed a discretionary decision, not abuse of authority. The facts of this case took place in a completely different context where there was no statutory framework constricting the definition. Furthermore, the *Tucci* decision has not been judicially considered since it was rendered in 1997.

[60] 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) RESPONDENT'S REBUTTAL TO THE PUBLIC SERVICE COMMISSION'S SUBMISSIONS ON SUBSECTION 15(3) OF THE *PSEA*

[61] The respondent begins by stating that whether there is recourse under subsection 15(3) of the *PSEA* is not relevant to the determination of the complaint.

[62] After a review of the *PSEA*, the respondent submits that there is no recourse available under subsection 15(3) of the *PSEA* as it is not supported by the words of the Act, its structure or the legislative intent of Parliament to create a new flexible and efficient staffing regime. Such recourse would be to recreate the very rigid, complex and unduly lengthy system that existed under the old *PSEA*.

E) COMPLAINANT'S REBUTTAL

[63] The complainant reiterated the position that she believed that Ms. Adams-Roy spoke with Ms. Westfall before the complainant's interview. In addition, there is no real account of the accuracy of their discussion as Ms. Adams-Roy took no notes. As a result, there is a problem when an assessment board makes a negative determination based on incomplete information.

ANALYSIS

Issue I: Did the assessment board abuse its authority when it contacted referees whose names were not provided by the complainant?

[64] 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)

(...)

[65] The complainant believes that the assessment board contacted more referees than necessary in an attempt to find additional negative comments about her. Furthermore, the assessment board should not have contacted people who were not on the list of people she submitted, in particular Ms. Westfall and Ms. Kelly.

[66] The Tribunal found in a number of decisions such as in *Portree v. Deputy Head of Service Canada et al.*, [2006] PSST 0014, and *Robbins v. the Deputy Head of Service Canada et al.*, [2006] PSST 0017, that its role is not to redo an appointment process or assess whether the answers were correctly evaluated. The Tribunal's role is to examine the **process** used by a deputy head to ensure there is no abuse of authority. In this case, the Tribunal believes that it can review the reference checks' process and the impact on the decision not to appoint the complainant.

[67] The parties filed by consent a document created by the PSC called "Checking References: a Window Into the Past", tendered as an exhibit in the proceedings. Although this is a reference document which has no legislative authority, it is a useful guide for people who are checking references.

[68] The document addresses the topic "The issue of consent":

(...) When the reference check is used to assess a qualification other than reliability/security, consent is **not** required when the referee is from within a federal institution. Consent is required to contact referees from outside the Public Service. (...)

(Emphasis added)

[69] It also provides this advice for the choice of referees which confirms that there is no need to obtain consent for referees within a federal institution:

(...) Also check references that were not given by the candidate. This is one way of avoiding talking only to “friendly” references. In addition, be open to contacting persons who were suggested by your original referees or persons who can help in resolving discrepancies between other referees’ account. (...)

[70] There was no evidence before the Tribunal that the reference checks for the complainant were required to assess her reliability/security. To the contrary, it appeared obvious that the references were to assess the qualifications identified on the Statement of Merit Criteria & Conditions of Employment Notice posted on Publiservice. Therefore, Ms. Adams-Roy did not require the complainant’s consent to speak with Ms. Westfall and Ms. Kelly as they are both within the federal government.

[71] Furthermore, the candidates were aware in the Job Opportunity Advertisement that “reference checks may be sought”. By applying for the Human Resources Officer’s position, candidates implicitly consent to the reference check.

[72] The assessment board did not commit an abuse of authority when it contacted Ms. Westfall and Ms. Kelly or any others who were not on the list the complainant provided Ms. Adams-Roy.

Issue II: Did the assessment board abuse its authority when it spoke with a referee provided by the appointed person, for a reference towards the complainant?

[73] The “Checking References” document referred to above offers this advice on taking notes: “**Write down as much as you can:** Good notes are very useful when the time comes to evaluate the information (...).” (Emphasis already in text)

[74] It is not disputed that Ms. Adams-Roy did not take notes when speaking with Ms. Westfall and told her she put her pen down; thus inferring it was an “off the record” conversation. It is common knowledge that an “off the record” conversation is often interpreted as a conversation that never took place and its information is not to be used elsewhere.

[75] The Tribunal believes that an “off the record” discussion with a referee should not be considered when making a decision to appoint or not to appoint a candidate, especially when there are few notes of the conversation. An assessment board should have sufficient information from the referees to be able to substantiate its decision.

[76] Ms. Adams-Roy did not explain the weight of Ms. Westfall’s reference in the assessment board’s decision. Furthermore, her testimony before the Tribunal was based on memory of their discussion as she had basically no notes to refer to.

[77] There are also no dates for the reference checks which likely took place between March 21 (closing date of the process) and June 29, 2006 (date of Ms. Hogan’s appointment), a number of months before the hearing.

[78] This reference does not make it a very valuable source of information to support the assessment board’s conclusion that the complainant had interpersonal issues. Furthermore, the complainant explains that Ms. Westfall never supervised her directly and has no first hand knowledge of the complainant’s work.

[79] Therefore, the Tribunal finds that the assessment board committed an error when it took into account Ms. Westfall’s reference, whether it gave any weight to it or not.

[80] The Tribunal has established in *Tibbs v. Deputy Minister of National Defense et al.*, [2006] PSST 0008, that an error, omission or improper conduct does not constitute an abuse of authority. Therefore, this error does not invalidate the appointment process especially since Ms. Adams-Roy contacted other supervisors and a record of their comments was made to support the assessment board’s decision.

Issue III: Did the assessment board abuse its authority when it made a negative inference from employees declining to provide a reference?

[81] Ms. Adams-Roy explained to the Tribunal that she came to the conclusion that Ms. Hoard and Ms. Marshall's refusals to provide a reference for the complainant were negatively interpreted against the complainant.

[82] The Tribunal heard Ms. Hoard who explained in her testimony why she refused to provide a reference in a voluntary process. She had nothing negative to say about the complainant. She has just never given a reference during her 20 years as a federal employee.

[83] The Tribunal recognizes that Ms. Adams-Roy did not have this information when she came to her negative conclusion. However, Ms. Adams-Roy would likely have obtained this information if she had asked Ms. Hoard the reason for her refusal. Similarly, Ms. Adams-Roy could have asked Ms. Marshall why she did not want to provide a reference. Upon having this information, Ms. Adams-Roy could then have determined whether the refusals were for negative or other reasons.

[84] The Tribunal finds that Ms. Adams-Roy committed an error when she concluded that the refusals were for negative reasons without knowing the reason for the refusals.

[85] Here again, as explained in Issue II above, an error is not an abuse of authority and this does not invalidate the process or render it flawed. The Tribunal finds this error was not the deciding factor in the decision not to appoint the complainant.

Issue IV: Did the complainant meet the burden of proof that the assessment board abused its authority when it did not appoint her?

[86] The burden of proof is discussed in *Tibbs, supra*, 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)

[87] The Tribunal in *Portree, supra*, addressed the type of evidence required by a complainant in order to succeed:

[49] Employees who allege that there has been an abuse of authority thus, a contravention of the *PSEA* and who wish to obtain a remedy for that contravention must present convincing evidence and arguments to be successful. (...)

[52] As explained in *Tibbs, supra*, the preamble of the *PSEA* highlights the assessment board's discretion in making an appointment. Ratings are no longer required or necessary under the *PSEA* and a candidate that would have fewer points among qualified candidates could be appointed if the selection board determines that he or she is the "right fit". (...)

[88] As explained above in Issues II and III, the Tribunal found that the assessment board committed two errors during the process. The first one was to take into account Ms. Westfall's reference even if there is no evidence of the weight given to it. The second error was to infer that the refusal of two employees to provide references was for negative reasons.

[89] However, despite the assessment board's errors, they do not invalidate the process. The Tribunal finds that the assessment board's process was fair and unbiased. Ms. Adams-Roy did not know Ms. Hogan or the complainant and acted in good faith when she contacted the referees. There was no evidence whatsoever of personal favouritism. Ms. Adams-Roy believed that issues raised in the interview with the complainant needed to be explored further through the references. She needed someone who would fit well in the existing team and it was important for her to be certain about Ms. Oddie's interpersonal skills.

[90] Although Ms. Adams-Roy had concerns regarding the complainant's interpersonal skills, she even discussed with Ms. Faubert and Ms. Sweeting the possibility of appointing the complainant to a PE-03 level, provided she would be trained and mentored. Ms. Adams-Roy testified she had a hard time "closing the

door” on the complainant as she had good technical skills and she needed to fill two positions. This hardly demonstrates bad faith coming from the respondent.

[91] The assessment board made its decision not to appoint the complainant based on her interview and the reference checks. There were some concerns raised during the interview which were confirmed by some of the referees. The assessment board already had the references of three supervisors to assess the interpersonal skills, two of which, Ms. Biscaro and Mr. Stolfa, had raised concerns with regard to these skills. The Tribunal finds that the three supervisors’ references were considered by the assessment board to make a decision based on the information it collected.

[92] However, the Tribunal will not reassess the content and accurateness of the referees’ answers as the assessment board is in the best position to interpret them. Similarly, the Tribunal will not re-evaluate the scoring during the interview process as stated in *Portree, supra*:

[52] (...) Therefore, the Tribunal’s role is not to reassess a complainant’s marks on a given answer or review responses given during an interview simply because a complainant does not agree with the decision regarding an interview question. (...)

[93] 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.

[94] The Tribunal wishes to thank the parties for their good presentations and professionalism during the hearing.

DECISION

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

Sonia Gaal
Vice Chair

PARTIES OF RECORD

Tribunal File:	2006-0066
Style of Cause:	<i>Lorrie Oddie and the Deputy Minister of National Defence et al.</i>
Hearing:	May 9-11, 2007 Kingston, Ontario
Date of Reasons:	July 3, 2007
APPEARANCES:	
Ken Veley	For the complainant
Simon Kamel Brian Harvey	For the respondent
John Unrau	For the Public Service Commission