



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2006-0199

OTTAWA, OCTOBER 24, 2007

CHANTAL GILBERT

COMPLAINANT

AND

THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

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	The complaint is dismissed
DECISION RENDERED BY	Sonia Gaal, Vice-Chair
LANGUAGE OF DECISION	French
INDEXED	<i>Gilbert v. Commissioner of the Royal Canadian Mounted Police et al.</i>
NEUTRAL CITATION	2007 PSST 0040

REASONS FOR DECISION

INTRODUCTION

[1] On November 1, 2006 Chantal Gilbert filed a complaint with the Public Service Staffing Tribunal (the Tribunal) pursuant to paragraph 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the *PSEA*). The complainant had applied for the position of Coordinator of Management Services, AS-01, at the Royal Canadian Mounted Police (process number 2006-RCM-IA-CR-CM-MTL-001).

[2] The complainant alleges abuse of authority by the respondent, the Commissioner of the Royal Canadian Mounted Police, because in her opinion, the assessment criteria were subjective and were applied negatively to her, in particular in the form of comments by two references. Her immediate supervisor, who was one of the references, showed a lack of impartiality towards her.

[3] The hearing on the merits of the case took place in Montreal on September 10, 2007.

BACKGROUND

[4] The complainant took part in an advertised internal appointment process to fill the position of Coordinator of Management Services. The assessment board consisted of two members: Nicole Allard, Regional Manager, Management Services, who chaired the board; and Rachelle Redden, Staffing and Labour Relations Advisor.

[5] The board decided to assess the candidates in three stages, consisting of a written exercise, an interview and a reference check of three names provided by the candidates. The assessment board proceeded in the same manner for all candidates.

[6] A total of thirteen individuals applied for the position, and six, including the complainant, moved on to the interview stage.

[7] The complainant gave the name of three references as requested. These were Ms. Allard, who has been her immediate supervisor since November 2001, Sherry Dupuis-Gareau, who supervised her from November 1999 to March 2001, and Jean Frenette, who was her supervisor from July 1994 to February 1995.

[8] The complainant also provided the assessment board with letters of praise from clients.

[9] The complainant explained that her supervisors between 1995 and 1999 had left the public service. That is why she gave the name of Mr. Frenette as a reference, even though her professional relationship with him dated back several years.

[10] The complainant passed the three stages of the assessment, and qualified as part of the pool of candidates for the position. Two other individuals were also part of the pool. The assessment board chose Ms. St-Laurent, the appointed person, to fill the position.

SUMMARY OF THE EVIDENCE

A) COMPLAINANT

[11] The complainant submits that she was not offered the position because Ms. Allard and Ms. Dupuis-Gareau, in their written response to the reference check questionnaire, made negative comments about her regarding chit-chat and gossiping at work.

[12] The complainant alleges that Ms. Allard lied and showed bad faith. As chair of the assessment board, she knew that this would affect the complainant's chances of obtaining the position because she was the deciding member.

[13] The complainant explained that Ms. Allard works in Ottawa but she travels to Montreal regularly to meet staff. She was thus not able to know personally that the complainant was chatting and gossiping. This allegation was thus

hearsay, all the more so as the complainant was not the only one to chat and gossip; there are some 30 women in the office.

[14] The complainant asserts that Ms. Dupuis-Gareau was influenced by Ms. Allard concerning her, since the two women are friends and have lunch together when Ms. Allard is in Montreal. The complainant is sure that Ms. Dupuis-Gareau and Ms. Allard talked about her, because Ms. Dupuis-Gareau's comments were also lies and had a negative impact on the complainant's application.

[15] On the other hand, the third reference, Mr. Frenette, who does not have any connection to Ms. Allard, offered very favourable comments.

[16] The complainant also says that she had a heavy workload, and sometimes complained about it to colleagues and managers. Some of them mentioned this to Ms. Allard. At some point, the workload increased as a result of a colleague passing away.

[17] The complainant refers to the fact that Ms. Allard mentioned her union activities in her written comments. According to the complainant, the respondent withdrew some interesting work duties after she was appointed president of the union around March 2005.

[18] Finally, the complainant asserts that her performance was never appraised by Ms. Allard or Ms. Dupuis-Gareau and that no corrective measures were ever taken regarding her. Ms. Dupuis-Gareau did not tell her that she talked too much.

B) NICOLE ALLARD

[19] Ms. Allard testified for the respondent. The position was created in December 2005 following restructuring at the branch. Ms. Allard wrote the work description in accordance with the respondent's needs, and established the essential qualifications.

[20] Since Ms. Allard knew that she would be acting as a reference for candidates, she asked Ms. Redden, who was her colleague on the assessment board, to develop questions for the references. In so doing, she wanted to avoid any appearance of a conflict of interest.

[21] The references provided their answers in writing. On cross-examination, Ms. Allard testified that the assessment board did not have to follow up with any of the candidates' references, because the documents contained enough details and examples.

[22] Ms. Allard always supervised the complainant from a distance, but she did go to Montreal approximately every four weeks or more often, if necessary, and met with employees.

[23] Ms. Allard states that the complainant often told her colleagues that she was overwhelmed with work. To lighten the complainant's load, Ms. Allard removed the complainant's duties of taking notes for various committees and preparing meeting reports. The complainant was doing much more note-taking than her colleague, and Ms. Allard wanted to share this task more equitably between the two women. Removing these duties had nothing to do with the complainant's election as president. Ms. Allard had to meet the complainant twice to discuss her decision.

[24] According to Ms. Allard, she sometimes has lunch with Ms. Dupuis-Gareau when she is in Montreal, but she also lunches with other colleagues. The relationship she has with Ms. Dupuis-Gareau is strictly professional. The two women did not discuss the comments they had each made as the complainant's references.

[25] Ms. Allard spoke to six Montreal managers regarding the complainant's interpersonal relations. A number of people thus evaluated the complainant regarding this essential qualification.

[26] As for performance appraisals, Ms. Allard has never prepared any for her employees and has never herself received any since she has been employed. However, performance appraisals are now a requirement for the Centre Region, and all employees will henceforth have a performance appraisal, with objectives to be met.

[27] Ms. Allard stated that she had conversations with the complainant about chatting.

ISSUES

[28] The Tribunal must answer the following questions:

- (i) Did the assessment board abuse its authority by taking into account the references' negative comments about the complainant?
- (ii) Was there abuse of authority by the chair of the assessment board, who also served as a reference for the complainant?
- (iii) Did the chair of the assessment board influence one of the complainant's references, who was a former supervisor, and thus abuse her authority?
- (iv) Did the assessment board abuse its authority by not contacting additional references for the complainant?

ARGUMENTS

A) COMPLAINANT'S ARGUMENTS

[29] According to the complainant, Ms. Allard lacked impartiality towards the complainant because she made negative comments without the complainant's knowledge. This was an official, untruthful statement. Ms. Allard never told the complainant about the conduct for which she was criticized, but she knew "the impact and the results that this would have on the competition process" [Translation]. She

made these comments in bad faith, all the more so as she was the deciding member on the assessment board.

[30] Since the complainant had never received a performance appraisal from Ms. Allard, she had no knowledge of any negative comments. Furthermore, since she had never been told about any problems regarding her conduct, she did not have the opportunity to improve her conduct.

[31] The assessment criterion associated with the references is subjective. There is no objective assessment grid for this criterion, which shows that Ms. Allard reserved the right to give this criterion the scoring that suited her. This was an abuse of authority.

[32] The complainant argues that Ms. Dupuis-Gareau also abused her authority because she knows Ms. Allard well and the two women worked together. Ms. Dupuis-Gareau made negative, untruthful comments that were never mentioned in performance appraisals.

[33] According to the complainant, Ms. Allard abused her authority by influencing Ms. Dupuis-Gareau so that “she would also give me a negative assessment, contrary to what I had demonstrated to the assessment board (letter of praise)” [Translation].

[34] Since Ms. Allard was on the assessment board and had provided negative comments, she should have contacted another reference.

[35] There is a lack of transparency in the appointment process; there is abuse of authority and bad faith.

B) RESPONDENT'S ARGUMENTS

[36] The respondent submits that the complainant has not proved Ms. Allard's lack of impartiality. Ms. Allard gave her opinion on the complainant, and her comments are not in themselves particularly negative.

[37] According to the respondent, there is no evidence that the process was manipulated to put the complainant at a disadvantage. The same process was followed for all candidates.

[38] Under section 36 of the *PSEA*, great deference is shown to assessment boards. Furthermore, the fact that a person sits on the assessment board does not prevent him or her from acting as a reference. The Tribunal must defer to the assessment board's decision because there is no evidence that Ms. Allard did not provide an honest assessment of the complainant.

[39] The respondent argues that there is likewise no evidence that Ms. Allard and Ms. Dupuis-Gareau colluded and discussed negative comments about the complainant. There is no reason to doubt their opinion.

[40] As for Ms. Allard's comment in the reference check questionnaire regarding the complainant's participation in the union, Ms. Allard made this comment to assess the complainant's reliability and to demonstrate that the complainant knew how to keep information confidential.

[41] Ms. Allard testified that the complainant's participation in a union was never a consideration in withdrawing duties from her. It was rather the complainant's heavy workload that had motivated Ms. Allard to make this decision. There is no evidence to show that the duties were withdrawn because of the complainant's union activity.

[42] Even though no performance appraisal exists, it is clear that the complainant's actions did in fact take place since managers observed them. The fact that negative comments were made without the complainant's knowledge

regarding chatting and gossiping is not a reason for not having the assessment board take them into account. A negative comment provided by a reference is not a sign of partiality, any more than a positive comment.

[43] As argued in *Pugh v. Deputy Minister of National Defence et al.*, [2007] PSST 0025, the respondent submits that abuse of authority requires a negative intent. The respondent also provided case law and excerpts from other doctrine in support of its position.

[44] The complainant must provide clear evidence that the respondent abused its authority and acted in bad faith in not appointing her. On the contrary, the complainant's testimony reflects her personal opinion and her disagreement with the respondent's decision.

[45] The respondent argues that there is no evidence of any wrongdoing in the assessment of the complainant or any evidence which renders Ms. St-Laurent's appointment invalid. Moreover, there is no allegation suggesting that Ms. St-Laurent is not qualified.

[46] The complaint must be dismissed because the complainant has not succeeded in discharging her burden of proof under paragraph 77(1)(a) of the *PSEA*.

C) PUBLIC SERVICE COMMISSION'S (THE PSC) ARGUMENTS

[47] According to the PSC, the complainant raises four points in her allegations: lack of impartiality; her union involvement; the fact that she did not have a discussion about her performance; and, finally, that the respondent did not carry out other checks with her references.

[48] The PSC submits that the complainant has not discharged her burden of proof regarding lack of impartiality all the more so as Ms. Allard testified that she did not write the questions for the references in order to avoid an appearance of a conflict of interest.

[49] In the references' comments on the complainant's union activities, the only comment made is positive and concerns respect for confidentiality. The complainant has not proven that the withdrawal of some of her duties regarding note-taking had an impact on the assessment of her skills for the position.

[50] A distinction must be made between performance and comments on chatting and gossiping. The references by Ms. Dupuis-Gareau and Ms. Allard state that the complainant does good work and that her relationships with clients are good. They note, however, that the chit-chat and gossip does raise concerns.

[51] According to the complainant, the respondent should have checked with another reference because the comments made by Ms. Allard and Ms. Dupuis-Gareau were negative. The PSC replies to this argument by stating that there was no other reference to whom the respondent could turn because the complainant herself had to resort to a reference who had supervised her in 1994 and 1995 to satisfy the board's requirement that she provide the names of three references.

[52] The PSC submits that there is no evidence to link abuse of authority to the fact that the complainant was not appointed to the position.

[53] The PSC argues that there must be intent, or carelessness or lack of concern to constitute abuse of authority. The PSC also provided case law and excerpts from other doctrine to support its position.

ANALYSIS

Issue I: Did the assessment board abuse its authority in taking into account the references' negative comments about the complainant?

[54] The complaint was made pursuant to 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);

(...)

[55] According to the Tribunal's case law, the complainant must prove, on the balance of probabilities, that there has been abuse of authority. She thus has to prove that she was not appointed to the position because of the negative comments made about her by the references, and that these comments constitute abuse of authority. It is not sufficient to assert this; the complainant must explain how these actions demonstrate abuse of authority, as the Tribunal held in *Portree v. Deputy Head of Service Canada et al.*, [2006] PSST 0014:

[43] When filing a complaint under paragraph 77(1)(a), a complainant must now explain that because of some action or inaction he or she was not appointed to a position. Furthermore, this action or inaction must arguably demonstrate that there might or could be an abuse of authority.

[56] The complainant submits that Ms. Allard abused her authority because she was chairing the assessment board and provided negative comments without the complainant's knowledge, knowing that these comments would be harmful to the complainant. The comments were untruthful and demonstrated bad faith.

[57] First and foremost, the Tribunal notes that the complainant is not challenging the positive comments that Ms. Allard made concerning her work. The Tribunal notes that Ms. Dupuis-Gareau also made positive comments regarding the complainant, which sometimes resemble those made by Ms. Allard. These comments are not challenged by the complainant. According to the complainant, only the negative comments about chatting and gossiping are false and untruthful, and constitute hearsay.

[58] The Tribunal notes Ms. Allard's positive comments about the complainant's work, to list a few:

Generally speaking, Chantal takes constructive criticism well.

Chantal is well organized. Her files are always in order, and she is always prepared for every meeting in which she has to participate (take notes). She makes sure that all the required documents are ready. She is very familiar with the duties that she must perform and she performs them without difficulty.

Chantal has no problem in prioritizing her work. She is very logical, and takes into account all aspects of the duties being considered before deciding on the order in which she must undertake these duties. (...)

[Translation]

[59] In the statement at the end of the questionnaire, Ms. Allard concludes by saying: "Yes, I would hire her again." [Translation]

[60] In its evaluation, the assessment board must consider all comments, both positive and negative, to reach a decision. To accept only positive comments, as the complainant is proposing, might indeed produce the opposite of what Parliament intended. If the assessment board only accepted positive comments, it could rightly be accused of showing some favouritism towards the complainant. The Tribunal is of the opinion that in considering all the comments of the references, the assessment board acted in a reasonable manner, and thus prevented the complainant's assessment from being marked by favouritism.

[61] In its review of the process used to gather the references' comments, the assessment board obtained the references' comments through questionnaires. The evidence shows that Ms. Allard consulted various individuals before making her comments.

[62] The complainant has not proved that she was not appointed to the position because of the negative comments made by Ms. Allard concerning her, nor has she proved that the comments were made in an abusive manner.

[63] The complainant disagrees with the negative comments, which do not, however, constitute abuse of authority. The Tribunal heard the complainant's testimony in evidence, but that testimony does not prove that the comments were untruthful and made in bad faith, as she alleges. Her evidence on this point is clearly insufficient.

[64] In *Portree, supra*, the Tribunal determined that, while a complainant may not agree with an assessment board's decision, this in and of itself does not constitute abuse of authority:

[56] (...) Simply disagreeing with the final result does not constitute evidence of wrongdoing on the part of the assessment board. The fact that she does not agree with the marks allocated by the assessment board does not constitute abuse of authority.

[65] The Tribunal thus concludes that the negative comments were not made in an abusive manner and that taking them into account did not constitute abuse of authority.

[66] The Tribunal finds that the assessment board did not abuse its authority when it considered the references' negative comments about the complainant.

Issue II: Was there abuse of authority by the chair of the assessment board, who also served as a reference for the complainant?

[67] Again, on a balance of probabilities, the complainant must prove that she was not appointed to the position because of the comments made by Ms. Allard, the chair of the assessment board, who sat on the assessment board and also served as a reference.

[68] The complainant submits that Ms. Allard committed an abuse of authority because she chaired the assessment board and also provided negative comments without the complainant's knowledge, knowing that these comments would harm the complainant. Furthermore, Ms. Allard was the deciding member of the board.

[69] In *Visca v. Deputy Minister of Justice et al.*, [2007] PSST 0024, the Tribunal determined, in the circumstances of that complaint, a member of the assessment board who used his personal knowledge of a candidate was not abusing his authority:

[56] (...) In addition, care should be exercised to ensure that the selection board member's knowledge of the candidate is relevant to the merit criteria being assessed and is treated similarly to a reference check.

[57] The Tribunal does not find that there was an abuse of authority in the assessment of the judgment criterion, ***or in the fact that personal knowledge of a selection board member was used in this assessment.***

(Emphasis added)

[70] In the present case, Ms. Allard used her personal knowledge of the complainant, at the complainant's request. When the assessment board asked the complainant to provide three references, she gave Ms. Allard's name as one of these references.

[71] Although the complainant does not agree with Ms. Allard's comments, the fact remains that the complainant had agreed to Ms. Allard providing comments about her. In fact, the complainant suddenly questioned Ms. Allard's good faith when she learned that there were negative comments. The complainant said, in the course of her testimony, that she would not have given Ms. Allard's name if she had known that Ms. Allard would make negative comments about her.

[72] Furthermore, Ms. Allard herself took certain steps to avoid being in a conflict of interest situation. She did not write the questionnaire since she wanted to avoid any appearance of conflict of interest.

[73] Ms. Allard thus did not abuse her authority when she made negative comments about the complainant, even though she was chairing the assessment board. On her own initiative, the complainant agreed to Ms. Allard providing comments, whether they were positive or negative.

Issue III: Did the chair of the assessment board influence one of the complainant's references, who was a former supervisor, and thus abuse her authority?

[74] According to the complainant, Ms. Allard influenced Ms. Dupuis-Gareau to make negative comments concerning the complainant's chatting and gossiping. The complainant suspects that Ms. Allard and Ms. Dupuis-Gareau colluded in making the negative comments about her.

[75] Here again, the complainant must prove that Ms. Allard committed an abuse of authority in negatively influencing Ms. Dupuis-Gareau, and that, consequently, she was not appointed to the position because Ms. Allard and Ms. Dupuis-Gareau colluded against her.

[76] However, there is absolutely no evidence to prove that Ms. Allard influenced Ms. Dupuis-Gareau. Ms. Allard testified, on cross-examination, that she and Ms. Dupuis-Gareau did not discuss the complainant's situation and references. This evidence was not refuted the complainant. The Tribunal considers Ms. Allard's testimony to be credible.

[77] There is no evidence of collusion between Ms. Allard and Ms. Dupuis-Gareau to make negative comments about the complainant. The Tribunal finds that the complainant has not proven that Ms. Allard tried to induce Ms. Dupuis-Gareau to make negative comments about the complainant's chatting and gossiping and that there was abuse of authority.

Issue IV: Did the assessment board abuse its authority by not contacting additional references for the complainant?

[78] The complainant submits that the assessment board committed an abuse of authority because it should have contacted other references. Ms. Allard's comments were negative and Ms. Allard was a member of the assessment board.

[79] In order To prove her allegations, the complainant had to demonstrate that the assessment board should have contacted other references. However, the complainant has not submitted any provision of a statute or regulation that would compel an assessment board to contact other references. An assessment board has the discretion to decide whether it has enough information to make an informed choice regarding an appointment.

[80] In this case, Ms. Allard indicated, on cross-examination, that the assessment board had not followed up with the candidate's other references because the initial references had provided enough details and examples. The same approach was applied to all candidates.

[81] The complainant's position amounts to asking an assessment board to "shop" for a favourable reference, which is not its role. In *Portree, supra*, the Tribunal stated:

[59] First, the assessment board's decision to speak only with Ms. Higgs is not abuse of authority. As stated above, the assessment board was in the best position to assess whether they had sufficient information on the complainant. Once the questions are answered for their purposes, an assessment board should not be "shopping" for a favourable or unfavourable reference.

[82] This approach could indeed be interpreted as favouritism on the part of the assessment board if it turned out that the board was trying to find favourable or unfavourable references for a candidate.

[83] In the Tribunal's opinion, the assessment board did not abuse its authority in assessing the complainant when it decided not to contact other references. The assessment board did not commit an abuse of authority in relying on the comments provided by the three references.

[84] The Tribunal will not address the allegation concerning the withdrawal of some of the complainant's work duties because that issue does not concern the challenged appointment process and was not a reason for not appointing her.

[85] The Tribunal wishes to thank the parties for their fine presentations and for the professionalism that they displayed throughout the hearing.

DECISION

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

Sonia Gaal
Vice-Chair

PARTIES OF RECORD

Tribunal File:	2006-0199
Style of Cause:	<i>Chantal Gilbert and the Commissioner of the Royal Canadian Mounted Police et al.</i>
Date and Place of Hearing:	September 10, 2007 Montreal, Quebec
Date of Reasons:	October 24, 2007
APPEARANCES:	
Helen Friel	For the complainant
M ^e Martin Desmeules	For the respondent
M ^e Lili Ste-Marie	For the Public Service Commission