



File:
2007-0174

Issued at:
Ottawa, July 30, 2007

F. WADE BERGLUND

Complainant

AND

THE DEPUTY MINISTER OF NATIONAL DEFENCE

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:

Berglund and the Deputy Minister of National Defence et al.

Neutral citation:

2007 PSST 0034

REASONS FOR DECISION

INTRODUCTION

[1] The complainant, F. Wade Berglund, has asked the Public Service Staffing Tribunal (the Tribunal) to order the respondent, the Deputy Minister of National Defence, to provide him with certain requested information which he claims is relevant to his complaint.

BACKGROUND

[2] The complainant applied on an internal advertised appointment process for an EL-06 position as an Underwater Systems Electronic Technologist, which was part of a larger selection process to staff a number of Electronic Technologist positions (selection process 06-DND-IA-HALFX-052717).

[3] The complainant was screened in, interviewed on February 21, 2007 and placed in a pool of qualified candidates.

[4] By letter dated March 5, 2007 the complainant was informed that the Statement of Merit Criteria (the SOMC) with respect to this selection process had been amended. The explanation provided was: "Critical experience factors for each type of electronic technologist positions were inadvertently placed in the 'Asset' criteria and not under 'Essential' Qualifications."

[5] The particular "critical experience factor" for the Underwater Weapons Systems Electronic Technologist position appeared on the amended SOMC as follows: "Acceptable current experience in the technical support and maintenance of submarine under water weapons systems" (underline as it appeared on the amended SOMC).

[6] The complainant was not selected as the "right fit" for this position from the pool of qualified candidates. On April 11, 2007, he filed a complaint under subsection 77 (1) of the *Public Service Employment Act*, SC 2003, ss. 12, 13 (the *PSEA*) claiming that he felt the staffing process was handled unfairly.

[7] On June 7, 2007 the complainant filed his request for an order for provision of information explaining in detail how the requested information is relevant to his

complaint. For convenience, the information requested is itemized and listed verbatim below:

1. Proposed appointee's current Canadian Forces members Personal Record Resume (MPRR).
2. The proposed appointee's cover letter and resume (copy sent to FMFCS HR personnel on or about 11 September 2006).
3. Screening reports created by selection committee for the proposed appointee and myself.
4. Any pertinent information from the members of the selection committee and HR personnel regarding the proposed appointee's Essential Qualifications, including the new SOMC (Statement of Merit Criteria) that was sent out on the 5 Mar 2007.
5. Proposed appointee's first and second draft of his Asset Qualification answers which were sent to a Mrs. Joan Rafuse of (sic) a Mrs. Carol Anderson. These were in response to a questionnaire sent by FMFCS HR personnel to all applicants on or around 29 Nov 2006.
6. Any information sent out or received by the proposed appointee, Mr. Ian Cobb (Job manager) and or Mr. Brad Smith (Member of the Selection committee) requesting or suggesting that the proposed appointee should receive submarine training due to his lack of essential qualifications.
7. Access to or a copy of the selection/screening matrix from all of the members of the selection committee for both the proposed appointee and myself.
8. Dates and a list of ONLY the underwater weapons system trials done on the submarines HMCS Windsor and HMCS Corner Brook. The dates are between Jan 2005 and Sept 2006 inclusive. This information must NOT include the trial results because these findings are classified and would be in violation of sub. 17(1) of the PSST Regulations. This list should also verify whether the proposed appointee participated in any of the trials between the aforementioned dates.

[8] On June 12, 2007 the respondent filed its submissions on the motion. In its submissions, the respondent confirmed that it had complied with the complainant's request in part, by providing him with items 2, 3, 5, and 7. The respondent also partly met the complainant's request with respect to item 4. The respondent refuses to provide items 1, 4 (in part), 6, and 8 set out in paragraph 7 above, taking the position that the information is not relevant to the complaint.

[9] This decision will only address the remaining information requested by the complainant, namely, items 1, part of item 4, 6, and 8.

ISSUE

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

ARGUMENTS OF PARTIES

COMPLAINANT'S ARGUMENTS

[11] The complainant submits generally that the person appointed to the position of underwater weapons systems electronic technologist was assessed differently than the other candidates.

[12] He claims that the appointee does not meet one of the requisite essential qualifications for the position, namely, "acceptable current experience in the technical support and maintenance of submarine under water weapons systems."

[13] The complainant asserts that he has known the appointee for over 20 years and, as such, has knowledge of his postings, career advancement and technical abilities. He claims that the appointee has never sailed on any Canadian submarine, nor has he taken any courses that would have enabled him to acquire the requisite knowledge of submarine under water weapons systems.

[14] In its reply submissions, the respondent indicated that the required experience of submarine under water weapons systems had by error been listed as an asset qualification in the SMOC. This was corrected by listing it as an essential qualification in the amended SMOC which "better reflected the experience essential to the performance of the duties of the position." The respondent asserts that this amendment had no impact on the assessment results as both the complainant and the appointee were screened into the selection process, assessed and found qualified.

[15] The respondent submits generally that all of the other information requested by the complainant is not relevant to the complaint as it was not used in the assessment of the appointee. The respondent relies on *Smith v. Commissioner of the Correctional Service of Canada et al.*, [2006] PSST 0013, arguing that the complainant's additional requests amount to a "fishing expedition" since the "mere speculation that something might be uncovered is insufficient to warrant an order for the provision of information."

ANALYSIS

[16] There should be no element of surprise at a Tribunal hearing and fairness requires that parties have the necessary information to address the issues raised in a

complaint. A party having in its possession information that is relevant to a complaint should share it with the other party even if it is not specifically requested. All information that is arguably relevant to the issue of a complaint must be disclosed at the exchange of information.

[17] If the parties cannot agree on the relevance of the information, then the requesting party can ask the Tribunal for an order for production of information. The requesting party bears the onus of establishing a clear link between the information sought and the complaint.

[18] In *Akhtar v. The Deputy Minister of Transport, Infrastructure and Communities*, [2007] PSST 0026, the Tribunal confirmed its reasoning in *Smith, supra*, that it will not order the provision of 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.” In addition, the Tribunal also confirmed that the threshold test in considering a request for an order of provision of information is arguable relevance. The Tribunal further explained the lower threshold in establishing arguable relevance in the context of requests for orders for provision of information. The Tribunal stated as follows:

[28] (...) 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.

[19] The Tribunal will now address each of the outstanding requests by summarizing the respective arguments of the parties, and providing its analysis for each request.

Item 1: Proposed appointee’s current Canadian Forces Members Personal Record Resume (the MPRR)

[20] The complainant contends that this document is relevant as one of the essential qualifications for this position is possession of the requisite occupational certification identified in the SOMC, and amended SOMC, and the MPRR will show whether the appointee is in possession of the submarine qualification, or technical courses to fulfill this essential qualification.

[21] The respondent says that the appointee's MPRR was neither before the assessment board, nor was it used in the assessment of the appointee. Moreover, the respondent asserts that it contains personal private medical and family information that should not be subject to disclosure.

[22] The actual education requirement for this position as stated in both the SOMC and the amended SOMC is as follows:

Secondary school diploma and completion of an accredited technologist level program in electronics at a technical institution or an acceptable combination of education, training, and experience.

[23] For the Tribunal to be satisfied that the threshold test of arguable relevance has been met, the complainant must demonstrate a clear nexus between the information in the MPRR and the subject-matter of the complaint. The Tribunal is satisfied that the complainant has done so here in part. The complainant is claiming that the appointee did not have the essential qualifications for this position and argues that the MPRR will show definitively whether or not the appointee had the "occupational certification" for this position. As the SOMC and the amended SOMC confirm, appropriate certification is one way that a candidate can meet the requisite educational requirement for the position. The other way is for the candidate to demonstrate "an acceptable combination of education, training, and experience." The complainant has demonstrated a clear nexus between information found in the MPRR and the crux of his complaint, namely, that the appointee did not have the essential qualifications to have been screened in to this appointment process, and later chosen as the "right fit".

[24] The Tribunal finds however, that the release of the complete MPRR is not relevant as there may be personal medical and family information in the document, and the release of the complete MPRR could be unduly prejudicial to the appointee. Accordingly, the respondent will be required to provide the complainant with an edited version of the MPRR which is to be limited to showing all educational and technical certifications of the appointee, along with all courses that the appointee has taken.

[25] Pursuant to section 18 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 (the *PSST Regulations*), the edited MPRR may be used only for purposes of this complaint.

Item 4: Any pertinent information from the members of the selection committee and HR personnel regarding the proposed appointee's Essential Qualifications, including the new SOMC (Statement of Merit Criteria) that was sent out on the 5 Mar 2007.

Item 6: Any information sent out or received by the proposed appointee, Mr. Ian Cobb (Job manager) and or Mr. Brad Smith (Member of the Selection committee) requesting or suggesting that the proposed appointee should receive submarine training due to his lack of essential qualifications.

[26] As both requests relate to information on the appointee's qualifications, including submarine experience, they can be analyzed together. The request for "any pertinent information from the members of the selection committee and HR personnel" and "any information sent out and received" is broad. However, it must be recognized that the complainant does not have access to most of the information as it is under the control of the respondent and, therefore, it is difficult for him to specify which document he is seeking. While it is unclear if "any pertinent information" and "any information sent out and received" exists, there is no dispute as to what he is seeking. The complainant has clearly identified the nature and the source or destination of the requested information.

[27] The complainant explains that the requested information would establish if the persons involved in this staffing process were aware of any problems with the appointee related to meeting the essential qualifications, including submarine experience. If so, he argues that this could be evidence of abuse of authority.

[28] The respondent submits that information not used in the assessment is not relevant to the complaint. The respondent indicates that information regarding training for the appointee in order to meet the essential qualification does not exist, and then goes on to say that information "regarding the "appointee's training plan in general is not relevant to the complaint (and) has nothing to do with the reasons the complainant was not appointed."

[29] The respondent cannot be ordered to create documentation that it says does not exist. However, the Tribunal is of the view that information that may not have been used in the assessment may be arguably relevant to the complaint. The complainant is claiming that the appointee does not meet the essential qualifications for the position. If there are documents from the selection committee and/or HR personnel which indicate concerns with the appointee's qualifications, then this information would be arguably relevant. Similarly, if training requests from the appointee to Mr. Ian Cobb or

Mr. Brad Smith, or training suggestions to the appointee from Mr. Ian Cobb or Mr. Brad Smith, related to submarine under water weapons systems, exist then that information would also be arguably relevant.

[30] The Tribunal is satisfied that the complainant has established a clear link between the information sought and the issues of this complaint and, therefore, has met the test of arguable relevance. The Tribunal is also satisfied that the request is sufficiently specific, and there would be no undue prejudice to either the respondent or the appointee in its disclosure.

[31] Accordingly, the respondent will be required to provide the complainant with any information from the selection committee and HR personnel pertaining to the appointee's qualifications, including the new SMOC, if such information exists. The respondent will also be required to review and provide copies of any training requests from the appointee to Mr. Ian Cobb or Mr. Brad Smith, or any training suggestions to the appointee from Mr. Ian Cobb or Mr. Brad Smith related to submarine under water weapons systems.

Item 8: Dates and a list of ONLY the underwater weapons system trials done on the submarines HMCS Windsor and HMCS Corner Brook. The dates are between Jan 2005 and Sept 2006 inclusive. This information must NOT include the trial results because these findings are classified and would be in violation of subs. 17(1) of the PSST Regulations. This list should also verify whether the proposed appointee participated in any of the trials between the aforementioned dates.

[32] The complainant submits that this information is also relevant as it would clearly demonstrate if the appointee has current and acceptable knowledge of the submarine under water weapons systems.

[33] The respondent submits, again, that this information is not relevant as it was not information before the assessment board and was not used in the determination of whether he met this experience criterion. The respondent has not informed the Tribunal that it is refusing to provide this information under section 17 of the *PSST Regulations*.

[34] The Tribunal is satisfied that the complainant has met the test for arguable relevance concerning this request for information. He has set out a clear nexus between the information and the crux of his complaint, the request is sufficiently specific, and the respondent has raised no argument based on undue prejudice. Again,

as the Tribunal has held in *Akhtar, supra*, the threshold test to establish relevance is broader at this stage of the complaint process than at hearing.

[35] The respondent will be required to provide the complainant with this requested information. Pursuant to section 18 of the *PSST Regulations*, this information may be used only for purposes of this complaint.

DECISION

[36] The Tribunal is satisfied that the complainant has met the onus of establishing arguable relevance for items 1, part of 4, 6, and 8. Accordingly, the complainant's request for an order for provision of information is granted in part, and subject to conditions.

ORDER

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

1. An edited version of the appointee's MPRR which is to be limited to showing all educational and technical certifications of the appointee, along with all courses that the appointee has taken. Pursuant to section 18 of the *PSST Regulations*, the edited MPRR may be used only for purposes of this complaint.
2. Any information from the selection committee and HR personnel pertaining to the appointee's essential qualifications including the new SMOC, if such information exists.
3. Any documents referencing training requests from the appointee to Mr. Ian Cobb or Mr. Brad Smith, or training suggestions to the appointee from Mr. Ian Cobb or Mr. Brad Smith related to submarine under water weapons systems.
4. Dates and a list of the underwater weapons system trials done on the submarines HMCS Windsor and HMCS Corner Brook between January, 2005 and September, 2006 inclusive. The respondent is also required to verify whether the appointee participated in any of these trials between the aforementioned dates and inform the complainant accordingly. Pursuant to section 18 of the *PSST Regulations*, this information may be used only for purposes of this complaint.

Guy Giguère
Chairperson

PARTIES OF RECORD

Tribunal File:	2007-0174
Style of Cause:	<i>F. Wade Berglund and the Deputy Minister of National Defence et al.</i>
Hearing:	Written request, decided without the appearances of the parties.
Date of Reasons:	July 30, 2007