



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

FILE: 2007-0151

OTTAWA, AUGUST 2, 2007

**WAYNE HAGERTY**

**COMPLAINANT**

**AND**

**THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY**

**RESPONDENT**

**AND**

**OTHER PARTIES**

**MATTER** Motion to dismiss

**DECISION** Motion is denied

**DECISION RENDERED BY** Merri Beattie, Member

**LANGUAGE OF DECISION** English

**INDEXED** *Hagerty v. President of the Canada Border Services Agency et al.*

**NEUTRAL CITATION** 2007 PSST 0036

## REASONS FOR DECISION

### INTRODUCTION

[1] The respondent, the President of the Canada Border Services Agency, requests that the Public Service Staffing Tribunal (the Tribunal) dismiss a complaint filed pursuant to subsection 77(1) of the *Public Service Employment Act*, S.C. 2003, c.22, ss.12, 13 (the *PSEA*).

### BACKGROUND

[2] On March 27, 2007, Wayne Hagerty, the complainant, filed a complaint with the Tribunal pursuant to subsection 77(1) of the *PSEA*, concerning appointment process number 06-BSF-IDA-GTA-GTEC-PM-002. The complaint was filed further to a notification dated March 13, 2007 of six persons who were appointed or proposed for appointment.

[3] Another notification, dated March 22, 2007, proposed or appointed two more persons and on June 6, 2007, a third notification of five persons who were appointed or proposed for appointment was issued. The complainant was proposed for appointment in this last notification and he was issued a letter of offer on June 12, 2007.

[4] On June 26, 2007, a request was filed with the Tribunal on behalf of the respondent to dismiss this complaint on the ground that the Tribunal has no jurisdiction since the complainant has been proposed for appointment and, therefore, does not enjoy the right to complain.

[5] The complainant did not respond to the respondent's motion to dismiss his complaint and, on July 10, 2007, was directed by the Tribunal to inform the Tribunal and the parties whether he intended to pursue his complaint. On July 16, 2007, the complainant stated his intent to pursue the complaint.

## ISSUE

[6] The Tribunal must answer the following question:

(i) Does the Tribunal have jurisdiction to consider and dispose of a complaint where the complainant was eventually proposed for appointment?

## SUBMISSIONS

[7] The respondent submits that, since the complainant has now been proposed for appointment and offered a position, he does not have the right to file a complaint to the Tribunal. The respondent bases its position on the argument that section 77 of the *PSEA* permits a person to complain that he or she was not appointed or proposed for appointment. The respondent further submits that, since the complainant does not have the right to complain, the Tribunal does not have jurisdiction to hear this complaint.

[8] The complainant did not make submissions that were directly related to this issue; he did confirm his interest in pursuing the complaint.

## ANALYSIS

[9] The sections of the *PSEA* that are relevant to this issue are sections 48 and 77. They read, in part:

**48.** (3) (...) the Commission may appoint a person or propose a person for appointment, (...), and the Commission shall so inform the persons who were advised under subsection (1).

**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);

(b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; or

(c) the failure of the Commission to assess the complainant in the official language of his or her choice as required by subsection 37(1).

(2) For the purposes of subsection (1), a person is in the area of recourse if the person is

(a) an unsuccessful candidate in the area of selection determined under section 34, in the case of an advertised internal appointment process; (...)

[10] Under section 77 of the *PSEA*, an unsuccessful candidate in an internal advertised appointment process has the right to complain that he or she was not appointed or proposed for appointment by reason of abuse of authority. The Tribunal has established in *Czarnecki v. Deputy Head of Service Canada et al.*, [2007] PSST 0001, that the right to file a complaint pursuant to section 77 is subject to the preliminary condition that an appointment has been made or proposed in an internal appointment process.

[11] Subsection 48(3) of the *PSEA* requires that those who have the right to file a complaint are informed that an appointment has been made or proposed. A notification made under subsection 48(3) starts the period in which a complaint can be made to the Tribunal under section 77, and section 10 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 sets the deadline for making a complaint.

[12] With each notification of one or more appointments or proposed appointments, there is a corresponding right to file a complaint to the Tribunal under the *PSEA*. Therefore a complainant's right to file a complaint is determined in the context of each notification, not within the overall context of an appointment process.

[13] There have been three opportunities to file a complaint related to appointment process number 06-BSF-IDA-GTA-GTEC-PM-002, since three notifications of appointment or proposed appointment have been issued. The complainant was not entitled to complain following the third notification since he was proposed for appointment and, therefore, was not an unsuccessful candidate.

[14] There is no dispute that the complainant was an unsuccessful candidate when the first notification was issued and he filed his complaint. Therefore, he had the right to make a complaint to the Tribunal and the Tribunal has jurisdiction to consider and dispose of this complaint.

DECISION

[15] For the reasons stated above, the respondent's motion to dismiss this complaint is denied.

Merri Beattie  
Member

PARTIES OF RECORD

Tribunal File:	2007-0151
Style of Cause:	<i>Wayne Hagerty and the President of the Canada Border Services Agency et al.</i>
Hearing:	Written request, decided without the appearance of the parties
Date of Reasons:	August 2, 2007