

FILES: 2006-0157 AND 0158

OTTAWA, AUGUST 23, 2007

BRENDA CARLSON-NEEDHAM AND TRACY BORDEN

COMPLAINANTS

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 *Public Service Employment Act*

DECISION The complaints are dismissed

DECISION RENDERED BY Sonia Gaal, Vice Chair

LANGUAGE OF DECISION English

INDEXED *Carlson-Needham and Borden v. Deputy Minister of National Defence et al.*

NEUTRAL CITATION 2007 PSST 0038

REASONS FOR DECISION

INTRODUCTION

[1] On October 5, 2006, Ms. Brenda Carlson-Needham 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 Compensation Team Leader position, AS-03, (process number 06-DND-IA-EDMTN-050672) in the Department of National Defence.

[2] On October 6, 2006, Tracy Borden filed a complaint under the same grounds for the same process.

[3] Both allege abuse of authority by the respondent, the Deputy Head of National Defence, arguing there was personal favouritism in the selection of the successful candidate, Ms. Dawn Neufeld.

[4] On April 20, 2007, the Tribunal issued a letter decision informing the parties that the files were consolidated in accordance with section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6.

[5] A hearing on the merits of this case was held in Edmonton, Alberta, on June 27 and 28, 2007. This decision includes a summary of the relevant evidence.

SUMMARY OF RELEVANT EVIDENCE

[6] Ms. Diane Law, Manager Compensation Services, who testified at length on behalf of the respondent, was responsible for the Compensation Team in the Edmonton office; however, her office was located in Winnipeg. She testified that she went to the Edmonton office about three to four times per year on average. Ms. Law acted as Team Leader for the Edmonton office until she got permission to appoint someone to act in the position, which she did.

[7] The position of Compensation Team Leader (referred to hereunder as "Team Leader") in Edmonton was advertised on Publiservice with a closing date of July 26, 2006.

[8] The assessment board was composed of Diane Law, Geneviève Ménard, Human Resources Officer and Arlene McLafferty, Compensation Manager at Public Works and Government Services Canada.

[9] It was determined that the assessment of the candidates would be done through a knowledge test, along with the Public Service Commission's (PSC) standardized test "Supervisor Simulation Exercise (428)" (referred to hereunder as the "standardized test") and reference checks.

[10] The complainants participated in the internal advertised appointment process for the position.

[11] Ms. Carlson-Needham passed the knowledge exam and the standardized test. However, upon contacting her references the assessment board determined that the complainant did not meet the essential qualifications, more specifically the "Effective Interpersonal Relationships" qualification. She was therefore not considered further in the process.

[12] As for Ms. Borden, she was successful in the knowledge exam but failed the standardized test so there was no need to contact her references since she was no longer part of the process.

[13] Ms. Dawn Neufeld was appointed to the position of Team Leader on October 3, 2006.

[14] Before Ms. Neufeld's appointment, the position had been vacant from 2004 to 2006.

[15] There was a previous competition for the Team Leader position in 2003. Both complainants were screened out as they lacked the supervisory experience

which was an essential qualification at the time. The successful candidate in the current process, Ms. Neufeld, qualified for the position in 2003 and was placed on an eligibility list.

[16] Ms. Neufeld acted in this position from August 3, 2004 to March 31, 2005, and then, for the period of May 24 to August 19, 2005.

[17] Ms. Law explained that she appointed Ms. Neufeld to act as Team Leader during the first acting period as she was on the eligibility list for the position, which was still valid.

[18] As for the second period, from May 24 to August 19, 2005, Ms. Law was on leave at that time. Her Director, Mr. Murray, placed Ms. Neufeld in the position for a period less than four months. He did not ask for Ms. Law's input on this decision.

[19] Ms. Borden, who testified on behalf of the complainants, said that the complainants asked Ms. Law why they were not considered for an acting position when Ms. Neufeld was on leave. Ms. Law told them that it was because they had not made the eligibility list in 2003.

[20] The Edmonton office moved to its new location in April 2005. On May 31, signs were ordered for doorways for the various areas such as Human Resources, Mechanical Room, Lunch Room, etc. Some signs had a slot underneath the name of the area in order to slip in the name of the person occupying the office space. For example, the name plate of the successful candidate, Dawn Neufeld, was ordered for office 005, "Compensation Team Leader" since she was acting Team Leader during that time. The office 005 was a closed office as opposed to an open space with dividers where the Compensation Advisors had their desks.

[21] Ms. Law explained that even if the Team Leader position was vacant, she wanted someone to physically sit in the "Compensation Team Leader" office.

She told the staff to work it out amongst themselves but she wanted someone in that office. She was concerned that if the office was not occupied, the Department might lose the office as the walls would be taken down to become part of the larger open space. She believed it was important to keep a closed office for the position. Thus, Ms. Neufeld used the office while she was acting.

[22] Ms. Law testified that she told some Compensation Advisors that if they had a problem with Ms. Neufeld occupying the office, she would move her out. They apparently had no concerns. She admitted she did not notice Ms. Neufeld's name plate under the Team Leader office sign when she went to the Edmonton office once the acting period was over. She also testified that she would have removed it if someone had complained about it.

[23] There was a request made to Ms. Law in January 2006 that Ms. Neufeld move back with her colleagues as the acting period had ended. Ms. Law refused and sent an email on January 13, stating that it was the "status quo in the office".

ISSUE

[24] The Tribunal must answer the following question:

(i) Did the respondent abuse its authority and demonstrate personal favouritism when it appointed the successful candidate?

ARGUMENTS OF THE PARTIES

A) COMPLAINANTS' ARGUMENTS

[25] The complainants argue mainly two points to demonstrate there was personal favouritism in the appointment of Ms. Neufeld.

[26] First, Ms. Neufeld had two acting periods which gave her an advantage for the standardized test as no one else was allowed to act, even when Ms. Neufeld was on leave. Since there are few acting opportunities for people in

the office, this made it apparent she was the preferred candidate and that the process was predetermined.

[27] The complainants believe that if more employees could act in higher positions, this would provide them with the opportunity to advance their careers in the public service. There is no legislation or regulations stating that only people on the eligibility list for a position can perform acting duties.

[28] Secondly, another indication that there was personal favouritism towards Ms. Neufeld was the fact that she was sitting in the closed office with her name plate under the "Compensation Team Leader" sign even though there had been no appointment yet and she was no longer acting.

[29] According to Ms. Borden, there was a perception by the employees and the Human Resources staff that Ms. Neufeld was the Team Leader as she was in the office. This was condoned by many people who visited the Edmonton office, such as Ms. Law and her Director, Mr. Murray. No one made the effort to remove her name plate when she was no longer the acting Team Leader.

B) RESPONDENT'S ARGUMENTS

[30] The respondent's chosen process in this case demonstrates that the outcome was not predetermined in favour of Ms. Neufeld. For example, supervisory experience was not required as an essential qualification, as it had been in 2003, which led to both complainants being screened out at the time. It was now an asset qualification. The supervisory experience, had it been an essential qualification, would have favoured Ms. Neufeld as she was one of the few who had that experience.

[31] The respondent could have limited the process to the Department of National Defence employees only. However, the area of selection was "Employees of the Public Service occupying positions in Edmonton AB ..."

[32] Finally, the respondent could have chosen a non-advertised process to appoint Ms. Neufeld as subsection 30(4) of the *PSEA* provides that it is not necessary to consider more than one person to make an appointment on the basis of merit.

[33] However, Ms. Law testified that she was hoping to have as broad a pool of candidates as possible. She had gone through the process in 2003 and knew what she wanted for the Edmonton position. These facts are not indicative of having a specific individual in mind when going through the process.

[34] The complainants' argument that acting in the position provided Ms. Neufeld an advantage in the standardized test is not supported by the fact that the complainant Ms. Carlson-Needham was also successful in the standardized test even if she did not act in the position.

[35] Section 36 of the *PSEA* allows the use of assessment methods that are considered appropriate for the position. In this case, the assessment board decided there would be the knowledge exam, the standardized test and the references checks. The standardized test and the use of references are recognized methods to assess candidates. As for the knowledge exam, it was not done capriciously or on a whim. Ms. Law testified that it took about two years to prepare it with the Team Leader in Winnipeg in anticipation that the Edmonton position would be filled. The respondent submits there was a clear link between the assessment methods chosen and the qualifications the assessment board was looking for.

[36] The respondent referred to the Tribunal's case law to the effect that the complainants have the burden of proof. The complainants failed to prove on a balance of probabilities with clear and cogent evidence that they were not appointed because of abuse of authority by the respondent.

[37] The respondent submits that there is not one shred of evidence that there was abuse of authority in the appointment of Ms. Neufeld. In fact, both

complainants recognized that Ms. Neufeld meets the position's qualifications. In addition, both Ms. Law and Ms. Ménard, who was also a witness, testified that they had no personal relationship with Ms. Neufeld and there was no personal favouritism in her appointment.

[38] As for the use of the Team Leader Compensation office, this was not part of the staffing process. It was not an essential qualification to sit in the office in order to be appointed as Team Leader.

[39] The respondent argues that the first acting opportunity given to Ms. Neufeld, August 3, 2004 to March 31, 2005, was as a result of her placement on the eligibility list in 2003. According to the PSC regulations at the time, they had to appoint for acting from the eligibility list. As for the second period, May 24 to August 19, 2005, Ms. Law was not involved in the decision. It is difficult to attribute personal favouritism in that regard.

[40] The respondent also referred to Tribunal case law in support of the position that the *PSEA* now provides flexibility and latitude for staffing.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[41] The Public Service Commission (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.

[42] 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*. The PSC argues that subsection 15(3) allows an employee who has concerns to request the deputy head to investigate these concerns. Although the deputy head does not have to investigate every request, it is a potential mechanism to address a problem in a staffing process. The PSC adds that its power to

investigate and take corrective action under subsection 67(1) of the *PSEA* is delegated to the deputy head under section 15.

[43] The PSC submits that sections 15, 67 and 77 of the *PSEA* address potential problems in a staffing action. Subsection 15(3) and section 67 use the words “error”, “omission” or “improper conduct” while subsection 77(1) refers only to abuse of authority. Subsection 77(1) is not meant to include errors and omissions since a venue to remedy errors and omissions is provided by subsection 15(3) and section 67.

[44] In conclusion, for an act in an appointment 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 PSC’S ARGUMENTS ON SUBSECTION 15(3) OF THE *PSEA*

[45] The respondent submits that there is no recourse available under subsection 15(3) of the *PSEA* as it is not complaint driven. There is nothing in the *PSEA* to suggest there is another layer of complaint available other than section 77. It is contrary to the intent and spirit of the *PSEA* to have multiple avenues to address the same issue. The intent is for one recourse to the Tribunal. There is no forum to scrutinize the appointment process on a lower threshold than the Tribunal.

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

ANALYSIS

Question: Did the respondent abuse its authority and demonstrate personal favouritism when it appointed the successful candidate?

[47] The complainants brought their complaints under paragraph 77(1)(a) of the *PSEA*. This provision 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);

(...)

[48] The complainants have the burden of proof on a balance of probabilities as explained in *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008. The complainants must therefore demonstrate that the respondent abused its authority under subsection 30(2) of the *PSEA* in appointing Ms. Neufeld for the position, for reasons based on personal favouritism.

[49] Subsection 30(2) of the *PSEA* reads as follows:

30. (1) Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.

(2) An appointment is made on the basis of merit when

(a) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and

(...)

[50] Personal favouritism is not defined in the *PSEA*. Subsection 2(4) of the *PSEA* states that “[f]or greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism”.

[51] The Tribunal further emphasized, in *Portree v. Deputy Head of Service Canada et al.*, [2006] PSST 0014, the required type of evidence for the complaint to be successful:

[49] Employees who allege that there has been an abuse of authority and, 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. (...)

[50] An employee must understand that a complaint is more than merely stating a perceived injustice. The complaint must set out the facts upon which the complainant relies in proving his or her case to the Tribunal. A complaint goes beyond merely alleging that the respondent abused his or her authority. The allegations must allege serious facts and a chronology of the events, times, and dates and any witnesses if applicable.

[52] In order to be successful in a complaint alleging personal favouritism in an advertised appointment process, a complainant must appear before the Tribunal with convincing evidence demonstrating personal favouritism and not merely make an allegation based on perceptions and irrelevant facts.

[53] In *Black's Law Dictionary*, the term "favoritism" is defined as a "preference or selection, usually invidious, based on factors other than merit". Examples mentioned are nepotism, patronage and discrimination.

[54] Thus, a complainant must prove, on a balance of probabilities, that the person was appointed because of personal favouritism based on factors other than merit. In other words, the complainant has to prove that a respondent's actions lead to the conclusion that the person appointed was appointed for reasons of personal favouritism.

[55] The Tribunal will now address both issues raised by the complainants separately, namely Ms. Neufeld's acting opportunities and her use of the closed office space.

(i) Acting Opportunities

[56] The complainants argue that Ms. Neufeld's two acting assignments gave her an advantage when she did the standardized test. This is an indication the respondent was favouring her for the Team Leader position.

[57] However, the complaints before the Tribunal do not deal with the acting assignments that took place in 2004 and 2005. It is therefore not necessary for the Tribunal to determine whether the PSC regulations or guidelines for acting

assignments prior to the *PSEA* were properly administered. Similarly, it is not necessary to determine whether the complainants could have been appointed to act as Team Leaders in 2004 and 2005. It would serve no useful purpose to do so as this took place prior to the *PSEA*.

[58] The issue is whether Ms. Neufeld's prior acting assignments as Team Leader provided her with an advantage for the standardized test and support the complainants' allegation that she was the favourite candidate.

[59] Upon review of the evidence, the Tribunal finds there is no merit to this position. The strongest proven fact against it is that Ms. Carlson-Needham, one of the complainants, was successful in the standardized test despite the fact that she had no acting opportunities as a Team Leader. This proves that it is possible to pass the standardized test without having acted as a Team Leader. In fact, Ms. Law testified that the standardized test assesses the ability to supervise and that there is no need to have supervisory experience to do well on the standardized test. Moreover, Ms. Law testified that there were three other candidates who passed this standardized test in addition to Ms. Carlson-Needham and Ms. Neufeld.

[60] The fact that Ms. Neufeld acted in the position was not a guarantee that she would be successful in the standardized test, let alone the other components of the assessment, namely the knowledge exam and the reference check.

[61] There are additional facts that do not support the complainants' allegations that Ms. Neufeld was the preferred candidate. For example, the respondent chose to advertise the position and expanded the area of selection to the federal public service in Edmonton. A larger area could possibly attract more qualified candidates and thus more competition for Ms. Neufeld which would not be the preferred outcome if she was indeed the favourite candidate. This is not indicative of a process where there is a specific candidate in mind.

[62] Furthermore, the position did not require supervisory experience as an essential qualification but rather as an asset qualification. This point is particularly important as supervisory experience was an essential qualification in the 2003 competition which led to the two complainants being screened out. If the respondent wanted Ms. Neufeld in the position, as the complainants allege, supervisory experience could have been an essential qualification, thus eliminating the two complainants and possibly others from the process. Also, it would have narrowed the pool of qualified candidates to favour Ms. Neufeld and reduce the number of candidates.

[63] Finally, if the respondent specifically wanted Ms. Neufeld in the position, one option might have been to appoint her through a non-advertised process under section 33 of the *PSEA*. The *PSEA* allows for both advertised and non-advertised processes and a deputy head may choose whichever process best meets the department's requirements. There is no preference in the *PSEA* for one or the other.

[64] The evidence at the hearing and the documents on file do not support the allegation of personal favouritism. In fact, there were many components in the process that could have gone either way for Ms. Neufeld and any other candidate for that matter. The respondent's course of action does not demonstrate personal favouritism towards Ms. Neufeld, to the contrary.

(ii) Use of Office Space

[65] There was much evidence on the use of the closed office space and Ms. Neufeld's name sign with some contradictory testimony as to whether staff complained to Ms. Law about it or not. However, since nothing turns on this specific point, it is not necessary to make a finding of credibility on this issue.

[66] The complainants believe this was an indication that Ms. Neufeld was preferred for the position and that she was perceived as the Team Leader by some staff who would go in her office to ask her questions. The fact that

Ms. Law's office was located in Winnipeg may have added to this situation as she was physically not present to defuse or deny any such statements.

[67] Nevertheless, whether staff had this perception cannot be interpreted to mean that Ms. Neufeld was the respondent's preferred candidate in this process. It is difficult to understand how sitting physically in the office of the Team Leader or even answering questions from colleagues can provide an advantage to any candidate who must still meet all the position's essential qualifications to be appointed.

[68] Despite the fact that Ms. Neufeld's presence in the closed office appears to have caused some resentment amongst the Compensation Specialists, the Tribunal cannot make a link between this situation and her appointment. Ms. Neufeld had to go through the same assessments as the other candidates and had to be successful in all three components to be appointed.

[69] A review of the respondent's process as outlined above clearly demonstrates that she was not the preferred candidate from the outset. Ms. Law testified that she wanted as many qualified candidates as possible and the process supports this statement, in particular the expanded area of selection and the supervisory experience now being an asset qualification as opposed to an essential qualification.

[70] The Tribunal therefore finds that the respondent did not abuse its authority and the appointment was not tainted by personal favouritism. Ms. Neufeld's acting opportunities in the Team Leader position had no bearing on the appointment process and neither did her use of the Team Leader office.

[71] In conclusion, the complainants have not proven on a balance of probabilities that the respondent abused its authority by appointing Ms. Neufeld as Team Leader in October 2006.

[72] 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 other arguments.

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

DECISION

[74] For all these reasons, the complaints are dismissed.

Sonia Gaal
Vice Chair

PARTIES OF RECORD

Tribunal Files:	2006-0157 and 2006-0158
Style of Cause:	<i>Brenda Carlson-Needham and Tracy Borden and the Deputy Minister of National Defence et al.</i>
Hearing:	June 27 and 28, 2007 Edmonton, Alberta
Date of Reasons:	August 23, 2007
APPEARANCES	
Elaine Haas	For the Complainants For Brenda Carlson-Needham
Randy Walker	For Tracy Borden
Karen Clifford	For the Respondent
John Unrau	For the Public Service Commission