



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2007- 0124

OTTAWA, DECEMBER 20, 2007

JEFFREY CHARTER

COMPLAINANT

AND

THE DEPUTY MINISTER OF NATIONAL DEFENCE

RESPONDENT

AND

OTHER PARTIES

MATTER	Complaint of abuse of authority pursuant to paragraphs 77(1)(a) and (b) of the <i>Public Service Employment Act</i>
DECISION	Complaint is dismissed
DECISION RENDERED BY	Helen Barkley, Member
LANGUAGE OF DECISION	English
INDEXED	<i>Charter v. Deputy Minister of National Defence et al.</i>
NEUTRAL CITATION	2007 PSST 0048

REASONS FOR DECISION

INTRODUCTION

[1] The complainant, Jeffrey Charter, filed a complaint with the Public Service Staffing Tribunal (the Tribunal) on March 20, 2007 alleging that he was not appointed to the position of Aviation Support Technician (AS-01) with the Department of National Defence in Ottawa, Ontario, because of an abuse of authority by the respondent, the Deputy Minister of National Defence.

BACKGROUND

[2] The Department of National Defence advertised an internal appointment process (07-DND-IA-OTTWA-056565) for the position of Aviation Support Technician, (AS-01). The complainant applied for the position but was found not to meet two of the essential qualifications:

- Experience in developing, maintaining and amending various reports and publications such as Jeppesen, DoD and assorted British Flight publications (referred to as “experience 3”);
- Experience in researching and responding to Access to Information and Privacy (ATIP) requests (referred to as “experience 4”).

[3] Donna Charron was proposed for appointment on March 7, 2007.

[4] The complainant alleges that the position was a reclassification of his position (a CR-05 position) in the 412 Squadron. He further contends that the respondent abused its authority by choosing an advertised process, and in eliminating him from the appointment process at the screening stage. For the past 15 years, he has performed the core duties of the Aviation Support Technician. He considers that he meets all of the essential qualifications for the position.

SUMMARY OF RELEVANT EVIDENCE

[5] The complainant stated that his substantive position is in 412 Squadron, within the same unit as the Aviation Support Technician. The 412 Squadron has the responsibility for flying four airplanes to transport senior officials. He stated that he has the required experience for the position by virtue of his position as Operations

Administrator. The complainant is currently on a secondment to the Department of Transport, but his substantive position remains with the Department of National Defence.

[6] The assessment board was composed of Maj. Daigle, the complainant's supervisor, and Capt. Matthew Dillon, who worked with Maj. Daigle. According to the complainant, they were well aware of his experience.

[7] With respect to the qualification experience 3, the complainant explained that maintaining reports and publications such as Jeppesen and DoD was part of his substantive position. These publications contain flight information, airport procedures and diagrams that are used by pilots to prepare for flights. For example, the Jeppesen publications are a series of leather-bound paper books for which amendments are received bi-weekly. His job entails removing and replacing pages to keep these books up-to-date. The DoD publications are hard-bound books which need to be removed from their boxes and distributed to each aircraft. Most publications are now received electronically. He had been performing these exact duties since 1991, and specifically in 412 Squadron since 1993.

[8] As for the qualification experience 4, the complainant forgot to note his experience researching and responding to access to information and privacy (ATIP) requests in his application for the position. However, according to the complainant, the assessment board was aware of this experience. In support, the complainant introduced an email exchange between Maj. Daigle and Capt. Dillon in which it was confirmed that the complainant "(...) would be the one to handle this one and any future ATIs".

[9] The complainant explained that one or two ATIP requests came to the 412 Squadron every second month. As the keeper of the files, he would research and draft an answer for the Commander to sign. He collected documents and would send them to the Director of Privacy. At first, he was choosing exemptions that were appropriate, but later he was sending the documents to the Director of Privacy to decide on exemptions.

[10] Under cross-examination, the complainant acknowledged that the job advertisement for this position stated that "[a]pplicants must clearly demonstrate on their

application that they meet all the following essential criteria (...). He further admitted that he had not mentioned his ATIP experience in his application. The assessment board would have known from his application that under the heading "Professional Experience" that "Operations Administration for 412 (Transport) Squadron" encompassed maintaining reports and publications, the required experience 3. He had been doing this job for 14 years and the assessment board members were well aware of it.

[11] Maj. Daigle testified, on behalf of the respondent, that he had been the 412 Squadron Operations Officer since April 2006. He stated that the complainant ultimately reported to him, but he had delegated the day-to-day supervision of the complainant to Capt. Dillon.

[12] Maj. Daigle testified that he was not very familiar with Public Service employment, and thus he had consulted the Human Resources Advisor at every step. He had been tasked with finalizing and staffing the position of Aviation Support Technician in August 2006. He stated that he wanted to use the simplest mechanism possible, which human resources advised was a non-advertised process. He spoke to his commanding officer, Lt.-Col. Dagenais, who overruled him and insisted that an advertised process be held to have an open and fair process.

[13] The position was advertised with the closing date of February 7, 2007. Candidates were required to submit an electronic application.

[14] The assessment board received 34 applications. Maj. Daigle and Capt. Dillon assessed candidates for the experience requirements. They both concluded that only one person met all the experience qualifications for the position. The complainant did not demonstrate that he had the required qualifications to meet experience 3 and experience 4.

[15] Maj. Daigle testified that the experience 3 qualification contained two components. The first component was developing, maintaining and amending various reports such as how much time the 412 Squadron had flown a particular type of

mission. The second component was maintaining the amendments to publications, which the complainant described in his testimony.

[16] With respect to the experience 3 qualification, there was nothing in the complainant's application that demonstrated that he had the required experience. Maj. Daigle testified that he was looking for a statement that referred to the key words listed in the experience 3 qualification, such as "Jeppesen".

[17] Maj. Daigle stated that he found out after the fact that the complainant did have experience in researching and responding to ATIP requests, which was the required experience 4. However, the last request the complainant dealt with was in 2004, two years before Maj. Daigle arrived in the workplace. He was also informed by Capt. Dillon that when asked about ATIP requests, the complainant replied that it was not his job, but was the job of the class B reservist in the Squadron.

[18] The complainant contacted human resources once he was informed on February 21, 2007 that he had been eliminated. The Human Resources Advisor informed the complainant that he could submit further information within a five-day period. No information was received. Maj. Daigle was only contacted by the complainant to discuss the issue after the final notification of appointment on March 7, 2007. Maj. Daigle stated that it was not his job as a member of the assessment board to contact the complainant and ask if he had presented full information in his application. Had he received an email from the complainant outlining his experience more fully within the five-day period, Maj. Daigle would have considered it in the board's assessment.

[19] On cross-examination, Maj. Daigle stated that the need for the Aviation Support Technician position was identified in 2005. The 412 Squadron had been receiving funding for a reserve class B position which was expected to end that year (2005-2006), although it was subsequently extended for another fiscal year. A consultant was engaged to develop a work description and to have the position classified. Maj. Daigle was told that the complainant had had some involvement with the development of the job description. In August 2006, Maj. Daigle was asked to finalize the position and staff

it. It was a new position and not a reclassification of the complainant's substantive position.

[20] Maj. Daigle acknowledged that the complainant trained the appointee, Ms. Charron, in the position she had held as a class B reservist. Ms. Charron's contract with the 412 Squadron came to an end in March 2007, which meant that Maj. Daigle had to have someone in place on April 1, 2007. When asked by the complainant's representative if the staffing of the position was timed to the end of Ms. Charron's contract, Maj. Daigle replied "absolutely not".

ISSUES

[21] The Tribunal must determine the following issues:

- (i) Was there an abuse of authority in the choice of an advertised appointment process?
- (ii) Was there an abuse of authority in the decision not to appoint the complainant to the position?

ARGUMENTS OF THE PARTIES

A) COMPLAINANT'S ARGUMENTS

[22] The complainant argues that the position was a reclassification of his substantive position which he still occupies, although he is currently seconded to Transport Canada. Maj. Daigle had the authority to run a non-advertised process and appoint him to the position.

[23] The complainant asserts that it is incumbent on the Tribunal to consider a broad definition of abuse of authority, as was set out in *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008. In this case, Maj. Daigle's discretion was fettered by Lt.-Col. Dagenais, who insisted that an advertised process be conducted. Maj. Daigle testified that he wanted to proceed directly to an appointment, but was overruled by his superior. This action constitutes abuse of authority as set out in *Tibbs, supra*, at paragraph 70, which states: "When a delegate refuses to exercise his/her/its discretion

by adopting a policy which fetters the ability to consider individual cases with an open mind.”

[24] With respect to the application of the merit criteria, the complainant alleges that it is clear that the assessment board acted on inadequate material. The assessment board had the authority to consider the work the complainant had done in his many years in 412 Squadron. While the complainant admitted he forgot to set out his ATIP experience in his application, the board had the authority to look further than his application.

B) RESPONDENT’S ARGUMENTS

[25] The respondent stated that section 33 of the *PSEA* gives the Commission or its delegate discretion to choose an advertised or a non-advertised appointment process. In this case, the respondent chose to give access to more than one person to be considered for the position. That decision was open to the respondent. There was no evidence to show that the decision to run an advertised process was made in bad faith or motivated by personal favouritism. Had the respondent chosen to conduct a non-advertised appointment process, there is no evidence to indicate that the complainant would have been appointed. Two decisions of the Tribunal, *Robbins v. the Deputy Head of Service Canada et al.*, [2006] PSST 0017, and *Kane v. Deputy Head of Service Canada et al.*, [2007] PSST 0035, confirm that the *PSEA* does not establish a preference for advertised or non-advertised appointment processes.

[26] The respondent contends that the choice of process was not the reason why the complainant was not appointed. Rather, the complainant did not meet two of the essential qualifications for the position. Maj. Daigle testified that he concluded that the complainant met the first two experience qualifications, but he could find no reference to experience 3 and experience 4 in the complainant’s application. Experience 3 could not be implied from the job title “Operations Administrator”. The complainant needed to indicate what experience he actually had. With respect to experience 4, Maj. Daigle testified that the complainant had not dealt with any ATIP requests while under Maj. Daigle’s supervision. Maj. Daigle only learned of his experience after the appointment

results were made known. It is up to a candidate in an appointment process to satisfy an assessment board that he or she has the requisite experience.

[27] The respondent asserts that the complainant failed to demonstrate that there was any error or omission in this appointment process, let alone establish that there was abuse of authority. That being the case, the complaint should be dismissed.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[28] The Public Service Commission (PSC) provided general written submissions on the concept of abuse of authority and how the PSC suggests the Tribunal focus its approach to abuse of authority. The PSC submits that, to make a finding of abuse of authority in an appointment process, the Tribunal must make a finding of improper intention on the part of the respondent. Errors or omissions do not constitute an abuse of authority, unless a party has shown "serious carelessness or recklessness" such that bad faith may be presumed.

[29] With respect to this particular case, the PSC states that the complainant asserts that Maj. Daigle had the authority to choose between an advertised and non-advertised process. There was no evidence to support this statement in that no one established at the hearing who had the delegated staffing authority for the Aviation Support Technician position. Maj. Daigle indicated that he discussed the process with Lt.-Col. Dagenais, who made the decision that an advertised process would be conducted. The *PSEA* is clear that the choice of process rests with the deputy head. The mere fact of making a choice cannot constitute abuse of authority, in the absence of bad faith, personal favouritism or serious carelessness or recklessness.

[30] The PSC contends that for accountability in staffing to be effective, all parties in the process have to assume their responsibilities. When an individual chooses to apply, he must explain clearly how he meets the qualifications. To simply state that he forgot to mention one of the experience requirements, means that the candidate is not acknowledging his responsibility in the process. The PSC submits that it has no concerns about the integrity of this staffing process.

ANALYSIS

Issue I: Was there an abuse of authority in the choice of an advertised appointment process?

[31] Section 33 of the *PSEA* sets out the discretion of the Commission or its delegate in choosing between an advertised or non-advertised appointment process. It reads as follows: “In making an appointment, the Commission may use an advertised or non-advertised appointment process.”

[32] In *Kane v. Deputy Head of Service Canada et al.*, [2007] PSST 0035, the Tribunal was faced with a similar situation in that Mr. Kane contended that he should have been appointed to his reclassified position through a non-advertised appointment process. The Tribunal held that in order to succeed in this type of allegation, a complainant must establish, on a balance of probabilities, that the decision itself to run an advertised appointment process was an abuse of authority:

[60] The mere choice of conducting an advertised or non-advertised process is not abuse of authority in itself as it is specifically allowed in the *PSEA*. As the Tribunal held in *Robbins v. Deputy Head of Service Canada et al.*, [2006] PSST 0017:

[36] Thus, the complainant cannot allege there is abuse of authority simply because a non-advertised process was chosen. The complainant has to prove that the decision itself to choose a non-advertised process constitutes an abuse of authority.

[65] (...) There is nothing in either the *PSEA* or the *PSEER* which requires a deputy head to utilize a particular selection process depending on whether the position at issue is either a new or reclassified position. On the contrary, section 33 of the *PSEA* clearly provides that the deputy head has the discretion to use an advertised or a non-advertised appointment process.

[33] In this case, Maj. Daigle testified that he wanted to staff the position of Aviation Support Technician as quickly as possible, as the 412 Squadron was losing the funding for its class B reservist position on March 31, 2007. When he discussed this with his superior, Lt.-Col. Dagenais, he was told to run an advertised process to keep the process open and fair.

[34] The Tribunal finds that the complainant has not proven, on a balance of probabilities, that there was an abuse of authority in choosing an advertised process. The evidence indicates that Maj. Daigle was asked to staff the position, which he

wished to do as quickly as possible. He had no expertise in Public Service staffing, and therefore he sought advice from the assigned Human Resources Advisor on a number of occasions. He discussed the choice of process with his superior who directed him to run an advertised appointment process to be open and fair. These facts do not establish any evidence of bad faith, personal favouritism or the adoption of a general policy that fetters the decision maker's ability to consider individual cases with an open mind. On the contrary, it demonstrates that Lt.-Col. Dagenais was sensitive to potential candidates' desire for promotional opportunities and the desire to conduct a transparent appointment process. Therefore, the Tribunal finds no evidence of abuse of authority in the choice of process.

Issue II: Was there an abuse of authority in the decision not to appoint the complainant to the position?

[35] The complainant contends that the members of the assessment board knew he had the required experience as he had worked directly with them at 412 Squadron until November 2006. Alternatively, the complainant argues that the assessment board acted on inadequate material, and should have sought further information from him before concluding he lacked the required experience 3 and experience 4.

[36] Under section 36 of the *PSEA*, the Commission or its delegate, has broad discretion to choose assessment methods to determine whether a candidate meets the qualifications that have been established for the position. Section 36 reads as follows:

36. In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).

[37] In order for a candidate to be appointed to a position, he must demonstrate through the chosen assessment process, that he meets the essential qualifications for the position. In this case, the assessment board used a common assessment method to evaluate education and experience, that is, asking candidates to submit an application outlining how they met those qualifications. The advertisement for the position stated as follows:

Essential Qualifications

Applicants must clearly demonstrate on their application that they meet all the following essential criteria and are within the area of selection. Failure to do so may result in the rejection of your application.

A secondary school diploma or PSC approved alternatives: a satisfactory score on the PSC test approved as an alternative to a secondary school diploma; or an acceptable combination of education, training and/or experience.

EX1: Experience in providing administrative support services.

EX2: Experience in maintaining and tracking various software amendments.

EX3: Experience in developing, maintaining and amending various reports and publications such as Jeppesen, DoD and assorted British Flight publications.

EX4: Experience in researching and responding to Access To Information & Privacy (ATIP) requests.

[38] Unfortunately, the complainant did not demonstrate in his application how he met the essential qualifications experience 3 and experience 4. He made the assumption that Maj. Daigle and Capt. Dillon would infer from the general phrase "Operations Administration for 412 (Transport) Squadron, the Administrative Flight Service to the Government" that he had experience in developing reports and maintaining publications such as Jeppesen, DoD and assorted British Flight publications and consequently, that he met experience 3.

[39] The complainant admits that he forgot to list his experience researching and responding to ATIP requests (experience 4). The evidence is clear that Maj. Daigle did not know that the complainant had this experience and the complainant did not demonstrate this in his application. The email dated June 26, 2006 between Capt. Dillon and Maj. Daigle indicates that Capt. Dillon was thinking of assigning an ATIP request to the complainant. It is not evidence that the complainant actually had that experience. Furthermore, upon elimination from the appointment process, the complainant was informed by human resources that he could submit further information within five days. The complainant did not provide further information as to his qualifications, nor did he contact Maj. Daigle at that time.

[40] The Tribunal concludes there is no evidence of abuse of authority in the application of merit, as the complainant did not demonstrate he possessed experience 3 and experience 4 when those qualifications were evaluated by the assessment board.

DECISION

[41] For the above reasons, the complaint is dismissed.

Helen Barkley
Member

PARTIES OF RECORD

Tribunal File:	2007-0124
Style of Cause:	<i>Jeffrey Charter and Deputer Minister of National Defence et al.</i>
Hearing:	September 27 and November 2, 2007 Ottawa, ON
Date of Reasons:	December 20, 2007
APPEARANCES:	
Paul Dagenais	For the complainant
Jennifer Champagne	For the respondent
Lili Ste-Marie	For the Public Service Commission