



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILES: 2006-0136 AND 0138

OTTAWA, DECEMBER 20, 2007

RAYMOND KILBRAY & RON WERSCH

COMPLAINANTS

AND

**DEPUTY HEAD OF SERVICE CANADA, AS PART OF THE DEPARTMENT
OF HUMAN RESOURCES AND SOCIAL DEVELOPMENT**

RESPONDENT

AND

OTHER PARTIES

MATTER	Complaints of abuse of authority pursuant to paragraph 77(1)(b) of the <i>Public Service Employment Act</i>
DECISION	Complaints are dismissed
DECISION RENDERED BY	Sonia Gaal, Vice-Chair
LANGUAGE OF DECISION	English
INDEXED	<i>Kilbray and Wersch v. Deputy Head of Service Canada et al.</i>
NEUTRAL CITATION	2007 PSST 0049

REASONS FOR DECISION

INTRODUCTION

[1] The complainants, Raymond Kilbray and Ron Wersch, are complaining that they were not appointed to the position of Manager Technical Services (CS-04) by reason of abuse of authority. They complain that the respondent, the Deputy Head of Service Canada, abused its authority in choosing a non-advertised appointment process and in selecting Ms. Sharon Hoffmueller to fill this acting position.

[2] For the purposes of the hearing and the decision, the Tribunal is consolidating both files in accordance with section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6.

[3] A hearing on the merits of this case was held in Winnipeg, Manitoba, on October 16 and 17, 2007. This decision includes a summary of the relevant evidence, documents submitted at the hearing and documents on file.

BACKGROUND

[4] On September 11, 2006 an Information Regarding Acting Appointment notification was posted on *Publiservice* regarding the acting appointment of Sharon Hoffmueller as Manager Technical Services (CS-04) in the Department of Human Resources and Social Development (HRSD) (process number 2006-CSD-NA-NHQ-9376-0015).

[5] This appointment process was to fill a temporary vacancy for a one year period. Warren Reynolds, the Director, Business Development, Service Canada, Winnipeg, decided to fill the position through a non-advertised acting appointment process. He established a Statement of Merit Criteria and found Ms. Hoffmueller qualified for the position. She was appointed on an acting basis from September 5, 2006 to September 4, 2007.

[6] On September 22, 2006, Raymond Kilbray filed a complaint with the Public Service Staffing Tribunal (the Tribunal) under paragraph 77(1)(b) of the *Public Service*

Employment Act, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*) about the non-advertised process for the acting appointment of Ms. Hoffmueller.

[7] On September 25, 2006, Ron Wersch filed a complaint under the same grounds for the same process.

SUMMARY OF RELEVANT EVIDENCE

[8] Both complainants testified. Mr. Kilbray, a CS-03 in Technical Services since 1998, thought that Ms. Hoffmueller's acting appointment affected the employees' morale in Technical Services. He testified that there was a belief that management had no faith in the people in the unit. Furthermore, Mr. Kilbray stated that her appointment limits the acting opportunities of current employees in Technical Services. He also discussed the Client Services' role in the Information Technology Centre (ITC).

[9] Mr. Wersch is a CS-02 in Technical Services. He described the work in Technical Services as dealing basically with the server, the "back end" of the system. He stated that his career path is limited as it is a small office. This was the first opportunity for him to obtain extensive acting experience. If a CS-03 had been appointed to act as CS-04 instead of Ms. Hoffmueller, he could have been appointed as an acting CS-03.

[10] In his view, employees in Technical Services did not believe Ms. Hoffmueller had the experience or education to perform the functions of the position. The employees requested a meeting with Mr. Reynolds to discuss the acting appointment. However, they were not satisfied with the answers he provided to explain his decision.

[11] Both Mr. Kilbray and Mr. Wersch took many courses that often lasted one week to improve their knowledge and skills for work.

[12] The complainants attempted to have Lyne Morin, Section Head of the Classification Department, Professional Institute of the Public Service of Canada (PIPSC) testify as an expert in classification to demonstrate to the Tribunal that the qualifications for the position do not meet the classification standards. Her testimony was aimed at explaining how to determine if a position should be in the Computer

Services (CS) or Administrative Services (AS) group, as well as the impact of job duties on classification.

[13] The respondent objected to the testimony for the following reasons. First, there was no expert report provided as usually required when experts testify. Secondly, it is not relevant as this is a staffing issue, not a classification issue. This testimony would not assist the Tribunal in rendering a decision on the merits of the complaints. The Tribunal has no authority to scrutinize policies and standards set by the employer, including a classification standard. Finally, Ms. Morin is not an independent expert as she is employed by the union that represents the complainants and acts as their advocate.

[14] The Tribunal heard Ms. Morin on her qualifications and did not qualify her as an expert. The Tribunal determined that Ms. Morin was an advocate, not an expert in classification in the federal government.

[15] Mr. Reynolds testified at length for the respondent. He was the Director of the ITC, classified as a CS-05, in Winnipeg from 1998 until the spring of 2007. He is now in a different position.

[16] There were three main groups that reported to him: Client Services, Technical Services and Operations. Ms. Hoffmueller was the Manager of Client Services, AS-06, prior to her acting appointment.

[17] Mr. Reynolds explained the role of the Client Services group as being an internal first level resolution group for the ITC in Service Canada. It is a multi-faceted organization that coordinates all IT functions and information with the other groups and is an important part of ITC.

[18] Client Services provides a number of services, the main one being the Service Desk that is responsible for taking calls or responding to emails of clients when they have a problem with their computer system. The Service Desk Agent who takes the call will ask questions to try to assist the person. If the problem cannot be resolved immediately, it is referred to the Technical Services unit via a "ticket" with as much

information as possible. It is then assigned to a Technical Support Analyst (CS-02) or Technical Support Team Leader (CS-03) to resolve it. The Client Services unit also assigns codes and passwords for IT security and access to the mainframe.

[19] All employees in the Client Services unit, other than the Project Officers (OM-03), are in the AS group, ranging from AS-02 to AS-06. The employees in the Technical Services unit who are assigned “tickets” are in the CS group.

[20] In February 2006, the management group in ITC completed a plan whereby, within three years, there would be two managers instead of three. There was also discussion about a salary shortfall in the directorate as a whole so they were looking to keep the salary requirements status quo and not add to the salary cost. Shortly after this, the Manager of Technical Services accepted a one year assignment outside the ITC. There was therefore a need to fill his position on a temporary basis.

[21] According to Mr. Reynolds, he needed a strong manager and leader with a proven track record to take over the unit for a smooth transition. He looked at what he thought might happen with the flattening of the organization and recognized that the needs and qualities he identified for this position were therefore important. Mr. Reynolds had personal knowledge of the position to be filled, and the day-to-day requirements of the work.

[22] In preparing the Statement of Merit Criteria, he looked at the previous staffing file for this position, which was staffed in 1999. He also went on *Publiservice* to see recent examples of notices from departments, including Industry Canada and Environment Canada. Specifically, Mr. Reynolds wanted to see if they allowed for equivalencies instead of the two year post-secondary diploma requirement and found many of them did. He also reviewed the CS-04 work description and discussed the requirements of the position with other ITC managers, two ITC Directors and his own manager to address what they believed was important or germane for the future. He did not look at the classification standard when he developed the Statement of Merit Criteria for the acting position.

[23] Mr. Reynolds said that Ms. Hoffmueller acted in his position as a CS-05 in February and March, 2006 when he took a six-week assignment. She did well and was very effective with the group according to the feedback from other ITC managers.

[24] He considered various options, such as putting Mr. Kilbray or other employees in the position, but arrived at the conclusion that he needed an experienced "generic" manager to fill the role rather than someone with good technical skills. He was not looking for an expert in IT, but rather an excellent manager. In his view, the technical expertise could be found with the CS-02 and CS-03 employees who reported to the position.

[25] Furthermore, if he appointed a CS-03 to act as a CS-04, he would need to appoint a CS-02 to act as a CS-03 and then recruit a CS-02 as he could not leave a CS-02 position vacant since the staff complement and service level require all the positions at the CS-02 and CS-03 level be filled.

[26] He testified further that there was more flexibility with a manager's position being vacant if tasks were reassigned among the remaining managers. This would be less costly than having to backfill the CS-02 and CS-03 positions. Therefore, it was decided that Ms. Hoffmueller's AS-06 position would not be filled. However, she would still perform some of her former functions. Part of her duties as Manager, Client Services were reassigned to the other manager, and Mr. Reynolds also took some of her duties. There were thus two managers instead of three, which conformed to the plan discussed in February 2006.

[27] The ITC was going through substantial changes and someone with less experience could not address the issues they would face. Mr. Reynolds believed that the position needed someone with leadership, planning, organization experience, project management and good communication skills. Those skills were needed to have a cohesive group that works well and meets their obligations.

[28] According to Mr. Reynolds, the primary responsibility of the position is to assimilate, understand and make sound management decisions based on information

collected in the unit. It is also important to have sufficient general knowledge to understand the various situations that may arise in the day-to-day work.

[29] Mr. Reynolds explained that a Manager of Technical Services (CS-04) is not necessarily a specialist or expert for technical resolution. The Manager provides advice but will use whatever resources are available to gather the information and will know where to go to analyse recommendations. Generally, a CS-04 is a manager and does not always possess the specialized knowledge; very few CS-04s are specialists.

[30] During his testimony, Mr. Reynolds was cross-examined on the Work Description document dated October 3, 2001 and linked the key activities found in the document with the Statement of Merit Criteria to demonstrate that the position described in the Statement of Merit Criteria does perform the duties of the IM/IT Manager, CS-04. He also explained that the list of key activities encompass everything a CS-04 does over a period of time, which may be over the course of a fiscal year.

[31] He decided to use a non-advertised appointment process as he had a candidate, Ms. Hoffmueller, who could do the assignment. He thought it was better to choose someone who knew the ITC rather than someone who did not.

[32] Mr. Reynolds assessed Ms. Hoffmueller against the Statement of Merit Criteria and determined that she met all the essential qualifications as her experience, training and education were acceptable in lieu of the two year post-secondary program. She also met or exceeded all the asset qualifications. Mr Reynolds's written assessment of Ms. Hoffmueller against the Statement of Merit Criteria was introduced into evidence where he explains in more detail her experience for each criterion.

[33] A document entitled Criteria for Non Advertised Internal Staffing written by Mr. Reynolds was also introduced in evidence at the hearing. The document sets out the following reasons for the decision to use a non-advertised appointment process and choosing Ms. Hoffmueller:

- this is a temporary staffing action to cover the incumbent's one year assignment

- there will be a “collapse” of the three current units into two units within three years
- the manager is well qualified and experienced which is a critical factor because the ITC is going through considerable change
- the directorate is facing a critical salary shortfall and this will keep the salary requirements status quo and not add to the salary shortfall

[34] Mr. Reynolds testified that he believed that Ms. Hoffmueller had good leadership skills and was a good manager. She was a decisive communicator and she had experience working in complex organizations. She had a diverse group in Client Services which worked well. She managed different groups prior to coming to ITC. Mr. Reynolds thought that she had the relevant and necessary skills for the position.

[35] When cross-examined about Ms. Hoffmueller’s education background, Mr. Reynolds testified that an education level does not qualify anyone as an expert. According to Mr. Reynolds, there are qualities other than education that are very important and required for the position. He believed that Ms. Hoffmueller’s experience as a manager and in leading teams was necessary for this position. She was a very experienced manager who had ITC knowledge since she had been the Manager of Client Services for a number of years.

ISSUES

[36] The Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority when it chose a non-advertised appointment process?
- (ii) Did the respondent abuse its authority when it appointed Ms. Hoffmueller to the position?

ARGUMENTS OF THE PARTIES

A) COMPLAINANTS' ARGUMENTS

[37] The complainants raised several arguments in support of their position that there was abuse of authority in the choice of a non-advertised process and in the appointment of Ms. Hoffmueller.

(i) **Jurisdiction**

[38] The complainants submit that the Tribunal has jurisdiction to review the establishment of the merit criteria by the respondent.

[39] Paragraph 77(1)(a) of the *PSEA* refers to the Commission or the deputy head. Subsection 77(1) and paragraphs 77(1) (b) and (c) refer only to the Commission, even if there is delegated power to the deputy head. The reference to deputy head in paragraph 77(1)(a) would be rendered meaningless if it was included with the Commission.

[40] In addition, paragraph 77(1)(a) refers to subsection 30(2), the meaning of merit section. In paragraph 30(2)(a), the establishment of the essential qualifications rests with the deputy head, whether there is a delegation or not. Parliament must have intended that there can be an abuse of authority in the establishment of the essential qualifications. Paragraph 30(2)(a) does not give the deputy head unbridled authority to establish the essential qualifications; it ties merit to "the work to be performed." The essential qualifications must be based on the work description for the particular position.

[41] It could not have been Parliament's intention to permit departments to leave out key duties when establishing essential qualifications. If the qualifications do not match the duties in the work description, then the appointment cannot be made on the basis of merit, and the respondent abused its authority in setting the essential qualifications.

(ii) **Inadequate essential qualifications**

[42] The complainants allege that the respondent established inadequate essential qualifications. The position is classified as a CS-04. This is a highly technical position,

which requires the incumbent to be an expert. The application of computer systems knowledge is the fundamental reason for the position; therefore, knowledge of IM/IT should have been an essential qualification. However, the only reference to such IM/IT knowledge is found in the asset qualifications under abilities/skills. The applicable asset qualification in the Statement of Merit Criteria reads: "Ability to analyze IM/IT requirements and formulate options and recommendations."

[43] As well, the establishment of minimum level education requirements applicable to an entry level position is not appropriate for this position. It is an abuse of authority to establish merit criteria which do not reflect the true requirements of the position to be staffed. The complainants believe that the lower education qualification set for this position is not for a CS-04 position, but for a CS-03 or CS-02. A person occupying a CS-04 position should be required to have a post-secondary degree in a relevant field.

[44] The complainants refer to the Classification Rationale document which establishes that the knowledge required for the CS-04 position is normally attained through "university graduation and eight years of related and progressively more responsible experience."

[45] The complainants argue that there is no evidence that Ms. Hoffmueller possesses a university degree, let alone two years post-secondary education in computer sciences.

[46] The essential qualifications of the position must reflect the duties in the work description which is not the case here. If they do not, it is an abuse of authority as explained in paragraphs 73 and 74 of *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008. There cannot be an appointment on the basis of merit when the duties do not match the work to be performed.

(iii) Ms. Hoffmueller does not meet the experience criteria

[47] The complainants allege that Ms. Hoffmueller does not meet the experience criteria in the Essential Qualifications of the Statement of Merit Criteria, namely: "Experience in the day-to-day supervision of a technical operations group."

[48] The complainants submit these are skilled IM/IT professionals in the CS group. Ms. Hoffmueller did not supervise any employee from the CS group as the unit she managed provided Service Desk, Security and Client Services functions where the employees were mostly in the AS group. Since she does not have the background or the experience in IT, the employees she will supervise (CS-02 and CS-03) will not be able to go to her for guidance on IT matters.

(iv) Non-advertised process

[49] The complainants argue that the respondent abused its authority in using a non-advertised appointment process. The justification provided by the respondent for this decision does not measure up to scrutiny. For example, the collapsing of three units to two ceases to have any value if the incumbent returns to the position.

[50] Furthermore, this is an organizational need that was not identified in the Statement of Merit Criteria. As for the manager's qualifications, to simply state that the manager is "well qualified and experienced," it is impossible to determine whether the appointment has been made on the basis of merit. This is an irrelevant consideration.

[51] According to the complainants, an advertised process would have resulted in a qualified employee being appointed.

(v) No identified organizational needs

[52] There is no organizational need identified in the Statement of Merit Criteria for the position. The salary shortfall is an organizational need that should be in the merit criteria and not decided at the time the appointment is made. The complainants believe it would have been less expensive to have a CS-03 act as a CS-04 than put an AS-06 in the position.

[53] It is an abuse of authority to apply organizational needs in a staffing process such as reducing the number of managers or salary shortfalls when none have been identified in the Statement of Merit Criteria.

(vi) Narrowing the area of selection

[54] The complainants say that the respondent narrowed the area of selection during the staffing process. In the Information Regarding Acting Appointment notification, the area of selection was: "Employees of Systems Branch....occupying a position in the Winnipeg ITC and Systems Branch of the Manitoba regional office." However, during the selection process, it was limited to people occupying a managerial position in the area of selection.

[55] The complainants provided the Tribunal with court decisions which reviewed appeal decisions under the former PSEA.

[56] The complainants submit that these facts constitute abuse of authority and they seek a declaration from the Tribunal that there was an abuse of authority in the acting appointment of Ms. Hoffmueller.

B) RESPONDENT'S ARGUMENTS

[57] The respondent submits that the issue is simple: did the respondent abuse its authority when it did not appoint the two complainants?

(i) Jurisdiction

[58] The respondent submits that the discussion on classification is irrelevant. The Tribunal is not the proper forum for any kind of analysis of group and classification level. The Tribunal should not decide "turf wars" between unions on boundaries between groups. According to the respondent, the *PSEA* is about staffing positions with qualified people.

[59] Sections 30 and 31 of the *PSEA* refer to work to be performed; at no point did the drafters of the legislation use the words "work description" or refer to classification rationale. The complainants' argument is predicated on having the Tribunal equate work to be performed with work description. Furthermore, a manager may now consider present and future needs as there is more flexibility under the *PSEA*.

(ii) Inadequate essential qualifications

[60] On the issue of the qualifications, the respondent submits that the establishment of qualifications, conducting the assessment and determining whether the appointee met the essential qualifications are Mr. Reynolds' responsibility. It is not the complainants' subjective assessment that determines the qualifications for the position, whether they are qualified and whether they should have been considered or appointed. The fact that the complainants do not agree with Mr. Reynolds' decision does not in and of itself constitute abuse of authority.

[61] The respondent submits that, in his testimony, Mr. Reynolds was able to link the Statement of Merit to the key activities in the work description which are more specific and detailed. The written assessment completed by Mr. Reynolds demonstrated that the appointee met all of the essential qualifications, including knowledge, for the position.

(iii) Ms. Hoffmueller does not meet the experience criteria

[62] The respondent submits that Mr. Reynolds had a vacancy for a manager's position. He proceeded to staff it with a non-advertised appointment process as provided for in section 33 of the *PSEA*. He established the essential and asset qualifications as per subsection 30(2) of the *PSEA*.

[63] Ms. Hoffmueller was assessed by Mr. Reynolds and found to meet all the essential, as well as asset, qualifications found in the Statement of Merit Criteria. Thus, according to the respondent, Mr. Reynolds followed the spirit and intent of the *PSEA*.

[64] The respondent argues that the complainants are incorrect in their assumption that only a CS can apply for the CS-04 position. There is nothing in the evidence, nor have the complainants referred to any legal requirement, to support this assumption.

(iv) Non-advertised appointment process

[65] The respondent submits that the choice of a non-advertised appointment process cannot in itself be said to constitute an abuse of authority. The *PSEA* stipulates in section 33 that either an advertised or non-advertised process may be used in making

an appointment. Furthermore, subsection 30(4) of the *PSEA* provides that there is no requirement to consider more than one person for an appointment based on merit.

[66] The respondent argues that the appointment was made in accordance with the *PSEA*, the *Public Service Commission's (PSC) Assessment Policy* and the *Department's Criteria for Non-Advertised Appointment Processes Policy* which was introduced into evidence. It was determined that a non-advertised process was appropriate to meet the needs of the organization.

(v) Narrowing the area of selection

[67] The respondent submits that section 34 of the *PSEA* provides that the deputy head, as delegated by the PSC, establishes the area of selection. This issue is beyond the scope of a complaint made under subsection 77(1) of the *PSEA*.

[68] The respondent argues, as it did in *Pugh v. Deputy Minister of National Defence et al.*, [2007] PSST 0025, that abuse of authority should be limited to bad faith, personal favouritism or similar misfeasance.

[69] The respondent submits 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. In addition, there is no evidence that there was abuse of authority in the appointment of Ms. Hoffmueller.

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

[71] The respondent submits that the complaints should be dismissed.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[72] The PSC did not make any submissions on the facts of this case.

[73] The PSC argues that, to constitute abuse of authority, an act in an appointment process 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. The PSC provided case law and excerpts from legal texts in support of its position.

ANALYSIS

Issue I Did the respondent abuse its authority when it chose a non-advertised appointment process?

[74] The complainants brought their complaints under paragraph 77(1)(b) 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);

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

[75] Section 33 of the *PSEA* provides for both advertised and non-advertised appointment processes: “In making an appointment, the Commission may use an advertised or non-advertised appointment process.”

[76] In *Kane v. Deputy Head of Service Canada et al.*, [2007] PSST 0035, the Tribunal found that 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.

[65] (...) There is nothing in either the *PSEA* or the *PSER* 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.

[66] (...) The *PSEA* makes no distinction between a new or reclassified position and there is no mandatory use of either an advertised or non-advertised process.

[77] Thus, the complainants cannot allege there is abuse of authority simply because a non-advertised appointment process was chosen. They have to prove that the

decision itself to choose a non-advertised process constitutes an abuse of authority. See also *Robbins v. the Deputy Head of Service Canada et al.*, [2006] PSST 0017.

[78] The respondent submits that its *Criteria for Non-Advertised Appointment Processes Policy*, as well as the Criteria for Non-Advertised Internal Staffing prepared by Mr. Reynolds, which is listed above in paragraph 33 demonstrate there is no abuse of authority in choosing a non-advertised process and appointing Ms. Hoffmueller.

[79] The Tribunal finds that Mr. Reynolds was a credible and straightforward witness who answered well both in direct examination and a lengthy cross-examination. He explained in detail the criteria for the non-advertised process listed in paragraph 33.

[80] Although the complainants do not agree with the choice of the non-advertised process, they are unable to establish that this decision was an abuse of authority.

[81] Therefore, the Tribunal finds that the complainants have failed to prove that there was an abuse of authority in the choice of a non-advertised appointment process.

Issue II Did the respondent abuse its authority when it appointed Ms. Hoffmueller to the position?

[82] The complainants have the burden of proof on a balance of probabilities as explained in *Tibbs, supra*, and other decisions. The complainants must therefore demonstrate that the respondent abused its authority under subsection 30(2) of the *PSEA* in appointing Ms. Hoffmueller in the position.

[83] 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

(...)

[84] In *Rinn v. Deputy Minister of Transport, Infrastructure and Communications et al.*, [2007] PSST 0044, the Tribunal reiterated that despite the flexibility afforded to managers in the *PSEA*, the person appointed must meet the essential qualifications for the position:

[35] Merit now relates to individual merit where the person to be appointed must meet the essential qualifications for the work to be performed. There is considerable flexibility in selecting the person to be appointed; however, **the fundamental requirement in appointing a person on the basis of merit is that the person must be qualified for the position.**

(emphasis added)

[85] To succeed, the complainants must show that Ms. Hoffmueller does not meet the essential qualifications for the position and must establish that her appointment was an abuse of authority.

(i) Jurisdiction

[86] The complainants allege that the Tribunal has jurisdiction to determine whether the essential qualifications in the Statement of Merit Criteria meet the qualification standards and classification rationale for the position.

[87] This case has some similarities to *Rinn, supra*, a case dealing with the interim appointment of an Acting Regional Manager in System Safety, Civil Aviation. It was alleged in *Rinn* that the essential qualifications for the interim position did not require a valid pilot's licence which was an essential qualification for the indeterminate position.

[88] In *Rinn, supra*, the argument was made that the Tribunal did not have jurisdiction to consider and dispose of a complaint challenging the classification of the position. The Tribunal found as follows:

[40] Subsection 31(2) of the *PSEA* stipulates that the essential qualifications established by the deputy head for a position, and used in making an appointment based on merit, **must meet or exceed** the qualification standards established by the employer. Section 31 reads as follows:

31. (1) The employer may establish qualification standards, in relation to education, knowledge, experience, occupational certification, language or other qualifications, that the employer considers necessary or desirable having regard to the nature of the work to be performed and the present and future needs of the public service.

(2) The qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i) must meet or exceed any applicable qualification standards established by the employer under subsection (1).

[41] Subsection 31(2) refers back to paragraph 30(2)(a) and subparagraph 30(2)(b)(i) and, therefore, must also be included in the criteria for making an appointment on the basis of merit. Thus, the Tribunal has jurisdiction to hear a complaint that the deputy head abused its authority by establishing essential or additional asset qualifications that do not meet or exceed the applicable qualification standards established by the CPSA for the employer.

[42] Mr. Paquette testified that, in accordance with the *Classification System and Delegation Authority Policy*, the authority to classify positions is delegated by the CPSA to deputy heads. In effect, when a delegated deputy head classifies a position, he does it on behalf of the employer. The decision to delegate the classification authority to deputy heads and how the delegation is exercised is not within the jurisdiction of the Tribunal. Thus, the Tribunal does not have jurisdiction to determine if a position is validly classified under the applicable classification standards.

[43] Therefore, whether the respondent respected the classification standard is not an issue that can be determined by the Tribunal.

(emphasis in original)

[89] Thus, the Tribunal has jurisdiction to examine whether the qualifications in the Statement of Merit Criteria for the Acting Manager of Technical Services meet or exceed the qualification standards for the position.

(ii) Inadequate essential qualifications

[90] The complainants have also argued that by removing the post-secondary education requirement, and lowering the education standard to a minimum, it is no longer a CS-04 position but rather a CS-02 or CS-03. The complainants firmly believe that computer systems knowledge is a requirement for the CS-04 position.

[91] The education requirement for the position identified in the Statement of Merit Criteria was the following:

Successful Completion of two years of an acceptable post-secondary educational program in computer science, information technology, information management, or another specialty relevant to the position **or an acceptable combination of education, training and experience.**

(emphasis added)

[92] The document entitled Computer Systems (CS) Group Qualification Standard by the Canada Public Service Agency introduced into evidence lists the minimum

education standards for CS as “successful completion of two years of an acceptable post-secondary educational program in computer science, information technology, information management or another specialty relevant to the position to be staffed.” However, it also has the following note on an acceptable combination of education, training and /or experience:

At the manager’s discretion, an acceptable combination of education, training and/or experience may serve as an alternative to the minimum post-secondary education stated above. Whenever the minimum education is met via this alternative, it is met for the specific position only and must be re-assessed for other positions for which this alternative has been specified by the manager.

[93] The Tribunal finds that Mr. Reynolds acted within the acceptable standards when he determined that Ms. Hoffmueller’s experience as a manager was sufficient to compensate for the lack of completion of two years of an acceptable post-secondary educational program. His requirements were for an experienced manager rather than a technical expert for this one year acting position.

[94] Mr. Reynolds’s testimony was corroborated by his written assessment of Ms. Hoffmueller. With respect to the education requirement, he wrote:

Sharon meets the above criteria. She has management and service delivery expertise. She has been working at the ITC for five years and has gained considerable knowledge of systems operations and management. She has received a lot of management related training and is very capable of managing the unit.

[95] Furthermore, in his view, she met the asset qualification for the ability to analyze IM/IT requirements. She was familiar with IM/IT since she had been managing the Service Desk which deals with IT issues.

[96] The Tribunal finds that the complainants have failed to prove that Mr. Reynolds abused his authority in his assessment of Ms. Hoffmueller for this acting position.

[97] As found in *Rinn, supra*, the Tribunal has no jurisdiction to review whether the position is properly classified as a CS-04.

(iii) Ms. Hoffmueller does not meet the experience criteria

[98] The complainants argue that Ms. Hoffmueller has insufficient experience to manage the CS group in Technical Services.

[99] Mr. Reynolds testified that he chose Ms. Hoffmueller because she had the experience he needed for the position as the ITC was going through changes. He needed more of a “generic” manager than a technical one for that period of change. He chose to appoint someone who was familiar with the ITC rather than someone who was not.

[100] The Statement of Merit Criteria for experience were the following:

Experience in the day-to-day supervision of a technical operations group;

Experience in human resource and financial management

[101] These two criteria are general and support Mr. Reynolds’ testimony that he needed a “generic” manager, as opposed to someone who is a specialist in IT, during the year as the area would be going through changes.

[102] Mr. Reynolds assessed Ms. Hoffmueller against the essential and asset qualifications and found that she met or exceeded them. In his view, she had the required experience to fill the position for the one year period.

[103] Mr. Reynolds explained in his testimony that the experience described in the Statement of Merit Criteria is found in the work description. The Tribunal finds that while the experience criteria could have been more detailed, the complainants have not proven abuse of authority in the use of these general terms in the Statement of Merit Criteria.

(iv) No identified organizational needs

[104] The complainants have argued that, since organizational needs were used as part of the rationale for the use of a non-advertised process, the organizational needs should have been identified on the Statement of Merit Criteria.

[105] The Tribunal is not satisfied that a failure to do so constitutes abuse of authority. What is critical is that an appointment be based on merit. The evidence in this case has clearly demonstrated that Ms. Hoffmueller met the essential qualifications for this acting appointment.

(v) Narrowing the area of selection

[106] The complainants have also argued that the respondent abused its authority by narrowing the area of selection. The area of selection is described above in paragraph 54.

[107] The Tribunal found in *Umar-Khitab v. Deputy Head of Service Canada et al.*, [2007] PSST 0005, that it does not have jurisdiction to deal with the appropriateness of the area of selection:

[15] Although the complainant believes the area of selection is not reasonable, it is not the Tribunal's role to assess whether the area of selection is reasonable or meets the criteria and considerations identified in the Area of Selection Policy and Operational Guidelines. The Tribunal's mandate is found in subsection 88(2) of the *PSEA*:

88. (...)

(2) The mandate of the Tribunal is to consider and dispose of complaints made under subsection 65(1) and sections 74, 77 and 83.

[16] None of these sections allow complaints about an area of selection.

[108] Nevertheless, the Tribunal can determine whether an employee is within the area of selection identified by a department. See *Scott and Moore v. Deputy Minister, Health Canada et al.*, [2007] PSST 0012.

[109] Subsection 2(1) of the *PSEA* states: “‘employee’ means a person employed in that part of the public service to which the Commission has exclusive authority to make appointments.”

[110] Ms. Hoffmueller was an employee employed in the Systems Branch in ITC in Winnipeg and was within the area of selection. The respondent did not narrow the area of selection by appointing her; the fact that she was a manager was irrelevant.

[111] In conclusion, the complainants have not proven on a balance of probabilities that the respondent abused its authority by appointing Ms. Hoffmueller as Manager Technical Services in September 2006.

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

DECISION

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

Sonia Gaal
Vice-Chair

PARTIES OF RECORD

Tribunal Files:	2006-0136 and 0138
Style of Cause:	<i>Kilbray and Wersch and Deputy Head, Service Canada et al.</i>
Hearing:	October 16 and 17, 2007 Winnipeg (MB)
Date of Reasons:	December 20, 2007
APPEARANCES:	
Neil Harden	For the complainants
Karen Clifford	For the respondent
Angie Paquin	For the Public Service Commission