



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

FILES: 2006-0087, 2006-0088, 2006-0089 AND 2006-0090

OTTAWA, FEBRUARY 26, 2008

THOMAS A.C. BROWN, GLORIA W. FRY, TOBY LYNN MEADE, JOY H. HUBLEY

COMPLAINANTS

AND

THE DEPUTY MINISTER OF NATIONAL DEFENCE

RESPONDENT

AND

OTHER PARTIES

<b>MATTER</b>	Complaints of abuse of authority pursuant to paragraph 77(1)(b) of the <i>Public Service Employment Act</i>
<b>DECISION</b>	Complaints are dismissed
<b>DECISION RENDERED BY</b>	Sonia Gaal, Vice-Chair
<b>LANGUAGE OF DECISION</b>	English
<b>INDEXED</b>	<i>Brown et al. v. Deputy Minister of National Defence et al.</i>
<b>NEUTRAL CITATION</b>	2008 PSST 0005

## REASONS FOR DECISION

### INTRODUCTION

[1] The complainants, Thomas A.C. Brown, Gloria W. Fry, Toby Lynn Meade and Joy H. Hubley, filed complaints on August 18, 2006 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*).

[2] The complainants allege that the respondent, the Deputy Minister of National Defence, abused its authority in choosing a non-advertised process for the acting appointment of Anne McGuinness (PG-04) (process number 06-DND-ACIN-HALFX-052395).

[3] In accordance with section 8 of the *Public Service Staffing Tribunal Regulations*, SOR 2006-06, the Tribunal consolidated complaint files 2006-0087, 2006-0888, 2006-0089 and 2006-0090 for the purposes of the hearing and the decision.

[4] A hearing on the merits of these complaints was held in Halifax, Nova Scotia on October 23, 24 and 25, 2007. This decision includes a summary of the relevant oral and documentary evidence introduced at the hearing and documents on file.

### BACKGROUND

[5] The complainants all work in the Formation Logistics branch of the Department of National Defence (the DND) in Halifax at the PG-02 group and level.

[6] The DND held competitions to staff Senior Contracts Officer positions at the PG-03 and PG-04 level in the Formation Logistics branch. There was a closed competition in August 2004 and an open competition in June 2005 to staff the PG-03 position; an open competition was held for the PG-04 position in June 2005. In the fall of 2005, the PG-04 position was again advertised.

[7] On February 13, 2006 Anne McGuinness was deployed into the PG-03 Senior Contracts Officer position. On the same day, the respondent appointed Ms. McGuinness to act in the PG-04 Senior Contracts Officer position until May 31, 2006 while

arrangements were being made to complete the appointment process to fill the PG-04 position on an indeterminate basis.

[8] Grievances were filed on Ms. McGuiness' deployment.

[9] The PG-04 acting appointment for Ms. McGuiness was extended for the period June 1, 2006 to September 29, 2006.

[10] The *Information Regarding Acting Appointment* notice regarding this extension was issued on August 15, 2006.

#### SUMMARY OF RELEVANT EVIDENCE

[11] The complainants Toby Lynn Meade and Gloria Fry testified.

[12] Ms. Meade testified that she had applied unsuccessfully for a PG-03 position in August 2004; she applied again for a PG-03 position in June 2005, was screened in, but was not successful. She also applied for the PG-04 position in June 2005, was screened in, but withdrew on September 15, 2005 for personal reasons.

[13] Ms. Meade testified further that she attended CCD Section Heads meetings as a CAR Supervisor. Minutes of the following CCD Section Heads meetings were introduced at the hearing: September 7, November 2, 2005; January 25, February 8 and February 22, 2006. The Minutes show that Ms. Meade was in attendance at all but the last of these CCD Section Heads meetings.

[14] Ms. Meade says that she first heard of Ms. McGuiness' acting appointment as a PG-04 during the January 25, 2006 meeting. There is a notation in the minutes of this meeting which states: "PG04 (acting) – Anne McGuiness will be here on 13 Feb."

[15] According to Ms. Meade, she had requested this PG-04 acting appointment by email, but never received a response to her request. She was shocked to find out that Ms. McGuiness had been appointed, especially since Ms. McGuiness was not even in the PG classification. She added that the position Ms. McGuiness was deployed to had been vacant for 1 to 1 ½ years.

[16] The complainant Gloria Fry testified as well. She had applied in the 2004 and 2005 competitions for the PG-03 and PG-04 positions, but was unsuccessful.

[17] Ms. Fry attended the February 8 CCD Section Heads meeting on behalf of her supervisor where those in attendance were informed of Ms. McGuiness' deployment. The minutes of this meeting reflect her attendance and contain the following reference: "Anne McGuiness - Anne will (sic) here on 13 Feb in the PG03 position. – Will be on assignment in the PG04 position."

[18] According to Ms. Fry's personal notes of the meeting, Ms. Zwicker said that Ms. McGuiness was coming "after three years of arm twisting". Ms. Fry was surprised and hurt that she was not considered for the PG-03 position as it is one step higher than her PG-02 position. She viewed it as a missed working opportunity that was taken away from the employees in the branch without any real discussion or consideration for their work and dedication.

[19] In July 26, 2006, Ms. Fry wrote to Christine Lynds, her supervisor, to express her interest in an acting appointment for the PG-04 position. Ms. Lila Zwicker, the complainants' manager, met with her in August and explained that only PG-03s would be considered for acting against the PG-04. However, Ms. Zwicker informed her that PG-02s can act in PG-03 positions as requirements arise.

[20] Ms. Lynds testified. She is a PG-03 Senior Contracts Officer in the branch. Ms. Lynds applied for the PG-04 position in June 2005, but withdrew on September 27, 2005.

[21] Ms. Lynds testified that when she found out that Ms. McGuiness was coming as a PG-04, she asked for the position but was turned down. She filed a grievance on the deployment and was afterwards offered an acting appointment for the PG-04 in April 2006. She says that she refused it for personal reasons, namely, that it is a very stressful job. Ms. Lynds stated that she never saw any email exchanges in which she was to share the PG-04 position on an acting basis.

[22] Ms. Lynds said that she felt worthless when she found out about the deployment and thought people could at least have been asked if they were interested in the position.

[23] Anton Topilnyckyj testified. He is a Human Resources Officer for the DND. As part of his responsibilities, Mr. Topilnyckyj provides advice to managers about staffing rules, regulations and various options available in staffing positions. He was involved in the August 2004 (PG-03) and both June 2005 competitions (PG-03 and PG-04).

[24] He testified that the DND had run two unsuccessful competitions for the PG-03 position. He looked at different options to fill the position. He made inquiries with the Department of Public Works and Government Services Canada and other departments/agencies to see if there was anyone interested in the position. He had no success. He finally spoke with a contact person at the Public Service Commission (the PSC) and found no one in the priority system with an interest in the PG-03 position. He told management that he had exhausted all his options to find an employee to fill the PG-03 position and then mentioned deployment.

[25] Initially, an acting assignment was envisioned for Ms. McGuiness. However, as the discussions about her acting assignment as a PG-04 were not successful, Mr. Topilnyckyj spoke with Ms. Zwicker about the possibility of a deployment for Ms. McGuiness to the PG-03 position around November or December 2005. The PG-04 position was not discussed at this time. He believed that Ms. McGuiness had shown some interest in coming back to the branch since she had applied, but had not been a successful candidate, for the PG-04 position.

[26] Anne McGuiness, the appointee, also testified. Prior to her deployment, she was an AS-04 in Internal Audit at the DND. She applied for the PG-04 position only in June 2005 as she stated that the PG-03 was at the same level as an AS-04. She was unsuccessful.

[27] Ms. McGuiness testified that Ms. Zwicker approached her in the fall of 2005 to come back to the branch on an acting assignment in the PG-04 position. Since no date could be established with her supervisor for her to begin the acting assignment, she

was then deployed to the PG-03 position on February 13, 2006. Ms. McGuinness further testified that she did not perform the duties of the PG-03 position as she began acting in the PG-04 position on the day she arrived. Ms. McGuinness' résumé was introduced into evidence at the hearing.

[28] Lila Zwicker testified on behalf of the respondent. She has been a PG-05 for the last ten years. She is the Contracts Coordination Manager for the branch.

[29] She explained the reorganization that took place in the branch which involved changes to both the position numbers and the positions themselves. At times, eighty percent (80%) of the positions that reported to her were vacant due to retirements, promotions, etc. Many of the vacant positions were filled on a temporary basis through acting appointments. However, the high level of vacant positions affected her own workload and there were times when she would be working over 100 hours of overtime per month.

[30] She discussed with Mr. Topilnyckyj the work description for the PG-04 Senior Contracts Officer position in May 2005. The competition was then posted in June and a knowledge exam was administered in September. However, there were no successful candidates. She asked Mr. Topilnyckyj to assist with other options to fill the position.

[31] Ms. Zwicker was concerned that the level of service to clients would be affected by the reduced staff. She decided to fill the PG-04 position on an acting basis. According to Ms. Zwicker, this is a standard procedure in the branch when a non-entry level position needs to be filled on a short-term basis. Those chosen to act would usually be acting in a position one level above their current level; for example, a PG-02 would act as a PG-03, and a PG-03 as a PG-04. In rare situations, someone may act at two levels higher for a short period of time.

[32] Ms. Zwicker testified as to how the person would be selected to act as the PG-04 Senior Contracts Officer. She would choose the person who had the highest mark on the exam, even if the person was not successful. She also needed someone who had management skills and could take some of the workload off her desk.

[33] Ms. Zwicker knew Ms. McGuinness who had worked for Ms. Zwicker in the past as a Contracts Officer. She believed that Ms. McGuinness had the required skills for the PG-04 position since she needed to have management skills to become an AS-04 in Internal Audit. Although Ms. McGuinness had failed the knowledge exam for the PG-04, she had the highest mark.

[34] Ms. Zwicker began discussions with Ms. McGuinness in October 2005 concerning the possibility of an acting assignment in the PG-04 position. She spoke with Ms. McGuinness' supervisor in Internal Audit for a date to report, but there was no set date established.

[35] Ms. Zwicker confirmed that Mr. Topilnyckyj spoke with her in December 2005 about staffing the positions and a deployment for Ms. McGuinness in the PG-03 position as no date could be established with her supervisor for her to begin the acting assignment.

[36] Ms. Zwicker stated that there had been discussions since November, 2005 about the PG-03 and PG-04 positions at the CCD Section Heads meetings attended by CAR supervisors. Minutes of these meetings are provided to section heads, who are then responsible for disseminating the information to their staff.

[37] Ms. Zwicker informed those in attendance at the CCD Section Heads meeting of January 25, 2006 and again at the February 8 meeting that Ms. McGuinness would be arriving on February 13 to act in the PG-04 position. In cross-examination, Ms. Zwicker stated she probably made the comment at the February 8 CCD meeting about the "arm twisting" as she had been seeking Ms. McGuinness to return to the area.

[38] Ms. Zwicker explained that she could authorize acting appointments for less than four months. She testified that her intention was to finalize the staffing process for the PG-04 position during the time period of the acting appointment. Ms. Zwicker was aware that if the position was not filled within this time period, Ms. Lynds, the other PG-03 Senior Contracts Officer, should also be given the opportunity to act in the PG-04 position.

[39] An email dated April 19, 2006 from Major Johanne Charest, to Ms. Zwicker informed her that the PG-04 position was to be shared by both Anne McGuinness and Christine Lynds. This was followed by another email on April 25 from Major Charest to Commander Steele; Ms. Zwicker and Mr. Topilnyckyj were copied on the email. The April 25 email is reproduced below:

I spoke to Lila this morning and the plan for the A/PG4 will be as follows:

- Ann (sic) will remain A/PG4 until Chris has taken the Contracting Course and has gotten some OJT training.
- Date that Chris will be A/PG4 is TBD as it will depend on when she achieves the completion of the above mentioned training.
- Once Chris takes over, she will be given the opportunity to be A/PG4 for the same amount of time as Ann (sic) was.
- PG4 competition will be completed once the acting assignment has been shared between both members.
- Any queries may be directed to the undersigned.

[40] Ms. Zwicker and Ms. Lynds had discussed during the month of April 2006 the possibility of Ms. Lynds acting in the PG-04 position. Ms. Lynds was to undertake the Introduction to Contracts course and receive some "on the job" training. However, at the end of May, while they were at a conference in Ottawa, Ms. Lynds told Ms. Zwicker that she was no longer interested in the acting opportunity.

[41] Ms. Zwicker then informed Mr. Topilnyckyj and the Executive Director of Ms. Lynds' decision and that she would extend Ms. McGuinness' acting in the PG-04 position. Ms. Zwicker believed the position had to be staffed as she could not carry on both positions to keep up with the work by herself.

[42] Ms. Zwicker further explained that the initial document she signed on June 5 recommending that Ms. McGuinness' acting be extended from June 1 to September 29, 2006 was lost. She completed another one on June 23, which had to be resigned by the appropriate people and then submitted to Human Resources. It was signed by Mr. Topilnyckyj on August 15.



[43] Ms. Zwicker testified that Ms. McGuiness was assessed against the Statement of Merit Criteria for the PG-04 Senior Contracts Officer position and found to have met all the essential qualifications. The written assessment of Ms. McGuiness completed by Ms. Zwicker, and the Rationale for Acting Appointment Exceeding 4 Months document were introduced into evidence.

[44] Finally, Ms. Zwicker testified that if Ms. McGuiness had not been successful in the PG-04 process, she would have returned as a PG-03 in the division.

#### ISSUES

[45] The Tribunal must determine the following issues:

(i) Did the respondent abuse its authority when it deployed Ms. McGuiness to the PG-03 position and then placed her in an acting appointment of less than four months as a PG-04?

(ii) Did the respondent abuse its authority in selecting Ms. McGuiness for the acting appointment as a PG-04 when it extended her appointment for more than four months?

(iii) Did the respondent abuse its authority when it chose a non-advertised process for the acting appointment of June 1, 2006?

#### ANALYSIS

**Issue I:** Did the respondent abuse its authority when it deployed Ms. McGuiness to the PG-03 position and then appointed her on an acting basis for a period of less than four months as a PG-04?

#### A) COMPLAINANTS' ARGUMENTS

[46] The complainants refer to *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008, and in particular the five categories of abuse outlined in paragraph 70. The complainants believe that all five categories apply in this case.

[47] The complainants produced a number of documents relating to deployment both from the respondent and central agencies. They then reviewed the evidence in relation to the documents on deployment. The complainants submit that the respondent did not follow proper procedures outlined in these policies when it deployed Ms. McGuiness.

[48] They also provided case law under the former PSEA dealing with deployment and lack of notice. The complainants relied specifically on *Laidlaw v. Canada (Attorney General)*, [1999] F.C.J. No. 566, which was rendered in respect of a decision of a Deployment Investigator.

[49] They also submit that Ms. McGuiness' deployment resulted in a promotion as she was immediately appointed to a PG-04 position and never worked as a PG-03.

[50] In accordance with the categories of abuse of authority found in *Tibbs*, they argue that Ms. Zwicker acted on inadequate material as she should have been aware of the requirements of the policies on deployment.

[51] In addition, the complainants submit that Ms. Zwicker exercised her discretion on an erroneous view of the law as she did not follow the Treasury Board and departmental policies and directives on deployments.

#### B) RESPONDENT'S ARGUMENTS

[52] The complaint before the Tribunal is whether Ms. McGuiness' acting as a PG-04 constitutes an abuse of authority under the *PSEA*. It is not to provide the complainants with a forum to revisit their grievances on the deployment.

[53] The respondent argues that under the *PSEA* the deputy head has direct authority to deploy as opposed to the delegated staffing authority.

[54] The respondent submits that, in accordance with sections 51 and 53 of the *PSEA*, the Tribunal does not have jurisdiction to deal with the deployment.

[55] Therefore, the evidence, documents and jurisprudence produced by the complainants on the deployment are irrelevant to the complaint and there should be no weight placed on them.

## ANALYSIS

[56] The complainants argue that Ms. McGuiness' deployment to the PG-03 position was not done within the applicable guidelines and policies and resulted in a promotion since she was assigned an acting appointment as a PG-04 on the day of her arrival in the branch.

[57] Under the former PSEA at section 34.3, employees could complain to the deputy head if they were concerned that a deployment was not authorized or made in accordance with the act or constituted an abuse of authority. If they were not satisfied with the deputy head's response, they could refer the matter to the PSC under section 34.4 for an investigation. However, these provisions are not found in the *PSEA*.

[58] In the *Laidlaw* decision, a potentially surplus employee in Halifax was deployed to a newly created bilingual position at a PM-04 level, the rationale given for the deployment being that no one else met the bilingual requirements. However, the employee was assigned to another position at a PM-06 level and never worked in the new bilingual position. The Court found that the deployment was not transparent as the assignment at the PM-06 level was inconsistent with the rationale for a deployment which was the ability to provide bilingual services in the PM-04 position. The court determined that it was an abuse of authority to use deployment to circumvent the constraints imposed by the former PSEA on appointments; most notably the requirement for appointments to be based on relative merit.

[59] In this complaint, the department has been candid about its reasons for Ms. McGuiness' deployment. The *Laidlaw* decision dealt with different legislation and cannot support the complainants' position that the respondent committed an abuse of authority under the *PSEA*.

[60] Under the *PSEA*, an appointment is based on merit when the person to be appointed meets the essential qualifications for the work to be performed. Discretion is given to managers to choose the person who is the right fit amongst the candidates that meet the essential qualifications, see *Rinn v. Deputy Minister of Transport, Infrastructure and Community et al.*, [2007] PSST 0044, at paragraph 35. Recourse for

abuse of authority is focussed on the use of this discretion. As explained in *Visca v. Deputy Minister of Justice et al.*, [2007] PSST 0024:

[34] A key legislative purpose found in the preamble of the *PSEA* is that managers should have considerable discretion when it comes to staffing matters. To ensure the necessary flexibility, Parliament has chosen to move away from the previous staffing regime with its rules-based focus under the former *PSEA*. There is no set of strict rules in the *PSEA* on how qualifications should be established, what method of assessment should be used, or how a candidate who meets the essential and asset qualifications is chosen for appointment. Rather, Parliament has provided those with staffing authority with the means to exercise the discretionary aspects of their authority, according to their judgment. However, as the Tribunal has stated in *Tibbs v. Deputy Minister of National Defence*, [2006] PSST 0008, there is no such thing as absolute discretion where any action can be taken by managers in staffing matters for any reason and on any ground, however abusive, where the exercise of discretion is contrary to the nature, purpose and intent of the *PSEA*.

[61] The requirement for appointments to be based on relative merit and consequently the need to ensure this requirement is not circumvented by use of deployment, are simply not issues under the *PSEA*.

[62] Other provisions of the legislation are significant with respect to the Tribunal's role in this complaint. Subsection 88(2) of the *PSEA* establishes the Tribunal's mandate which is to consider and dispose of complaints made under subsection 65(1), sections 74, 77 and 83. The complainants filed their complaints under paragraph 77(1)(b) – the choice of an advertised or non-advertised appointment process, which is addressed in Issue III.

[63] The Tribunal found in *Czarnecki v. Deputy Head of Service Canada et al.*, [2007] PSST 001, that there must be an appointment or proposed appointment prior to a complaint under section 77 of the *PSEA*. See also *Tennant v. President of the Canadian International Development Agency et al.*, [2007] PSST 0006. In other words, there must be an appointment or proposed appointment otherwise a complaint cannot be filed under section 77 of the *PSEA*

[64] Part 3 of the *PSEA* deals with deployments. Subsection 53 (1) reads:

Deployment not an appointment

**53.** (1) A deployment is not an appointment within the meaning of this Act.

[65] Since a deployment is not an appointment, and a complaint cannot be filed under section 77 of the *PSEA* if there is no appointment or proposed appointment, it follows that the Tribunal does not have jurisdiction to hear a complaint based on a deployment. See *Smith v. President of the Canada Border Services Agency et al.*, [2007] PSST 0029, where the Tribunal determined that it does not have jurisdiction to consider and dispose of complaints involving deployments; see also *MacIntosh v. Commissioner, Correctional Services of Canada*, [2008] PSST 0001, (not yet reported). It should be noted that the complainants filed grievances on the deployment and these matters should be dealt with in another forum.

[66] Likewise, a complaint cannot be filed under section 77 of the *PSEA* against the initial acting appointment of Ms. McGuiness in the PG-04 position as this appointment was for a period of less than four months. As explained in *Wylie v. President of the Canada Border Services Agency et al.*, [2006] PSST 0007, subsection 14(1) of the *Public Service Employment Regulations*, SOR/2005-334, (the *PSER*) provides for flexibility to assign federal public service employees to functions on a temporary basis without this giving rise to the application of merit and the right of recourse, within limitations. It excludes short-term acting appointments from the application of merit and the right of recourse.

[67] Subsection 14(1) of the *PSER* reads as follows:

14. (1) An acting appointment of less than four months, provided it does not extend the cumulative period of the acting appointment of a person in a position to four months or more, is excluded from the application of sections 30 and 77 of the Act.

[68] Therefore the Tribunal does not have jurisdiction to consider the deployment and the initial acting appointment.

**Issue II:** Did the respondent abuse its authority in selecting Ms. McGuiness for the acting appointment as a PG-04 when it extended her appointment for more than four months?

A) COMPLAINANTS' ARGUMENTS

[69] The complainants argue that Ms. Zwicker exercised her discretion with an improper intention in mind as her intent was for Ms. McGuiness to be assigned the PG-04 position. This is an abuse of authority as defined in *Tibbs*.

[70] Furthermore, they argue that there was an improper result which is an abuse of authority in accordance with the *Tibbs* decision as Ms. Lynds was treated differently than Ms. McGuiness. They submit Ms. Lynds was required to take the training prior to being allowed to act while Ms. McGuiness was taking the training while in the acting position.

[71] In addition, Ms. McGuiness' acting appointment began on February 13, 2006; the four-month period ended on June 13, 2006; and, yet, the notification was posted on August 15, 2006.

[72] The complainants submit that the respondent's failure to inform the employees at the end of the first acting period in June 2006 is a contravention of section 13 of the *PSER*.

B) RESPONDENT'S ARGUMENTS

[73] The respondent submits that Ms. Zwicker offered Ms. Lynds, the only other PG-03 in the branch, the same opportunity as Ms. McGuiness for the PG-04 acting appointment. Ms. Lynds refused it.

[74] According to the respondent, Ms. McGuiness met the essential qualifications for the position and Ms. Zwicker prepared a written assessment accordingly.

[75] The respondent submits that the complainants' arguments concerning Ms. Lynds being treated differently are not relevant as Ms. Lynds did not file a complaint. There was no abuse of authority in the decision to appoint Ms. McGuiness.

[76] In response to the complainants' argument on the date of the notification, the respondent acknowledges that the *Information Regarding Acting Appointment* notice was posted on August 15, 2006 while Ms. McGuiness' acting appointment was

extended in June 2006. However, the respondent submits that the complainants were not prejudiced by the delay in posting the notice, nor deprived of their right to complain.

[77] Ms. Zwicker explained the loss of the initial document which the respondent submits was not done in bad faith. Ms. Zwicker made efforts to ensure that the proper documentation was prepared as soon as she found out.

[78] The respondent adds that this is not a proper ground of complaint as it occurred after the appointment was made and is not an abuse of authority.

[79] In the alternative, if the Tribunal finds that the delay in posting the notice is an error, it is an administrative error that does not invalidate the process and is not an abuse of authority.

#### ANALYSIS

[80] In order to determine if this action constituted an abuse of authority, it is useful to review the relevant facts to understand the respondent's decision to extend Ms. McGuiness' acting appointment.

[81] There were unsuccessful attempts to find someone for the PG-03 position in August 2004 and June 2005.

[82] There was also an unsuccessful competition for the PG-04 in June 2005. A new process was underway in 2006, but there was an operational requirement to have someone act in the position until it was completed. Ms. Zwicker referred to her heavy workload and the need for assistance to relieve her of some of her tasks.

[83] Ms. Zwicker explained her decision to initially appoint Ms. McGuiness to act was based on operational requirements. Ms. McGuiness had worked for Ms. Zwicker in the past and she was satisfied with her work. In addition, Ms. McGuiness had the highest mark in the exam for the PG-04 albeit she did not pass. Ms. McGuiness also had demonstrated managerial skills as she was an AS-04 in Internal Audit. Ms. Zwicker believed that Ms. McGuiness could perform the duties and assist her until the position was filled. Once it was no longer an option to bring Ms. McGuiness in on an

assignment to act as a PG-04, it was decided that she would be deployed as a PG-03 and then act as a PG-04. This was addressed openly in the CCD meetings in January and February 2006. As stated above in Issue I, the Tribunal has no jurisdiction to make any findings on the deployment.

[84] The operational requirements that needed to be met were not disputed by the complainants. The evidence demonstrates that it was impossible to get an agreement for an assignment for Ms. McGuiness and therefore deployment followed by an immediate acting appointment was the solution found.

[85] An acting appointment following a deployment does not, in and of itself, amount to abuse of authority. Given the circumstances and the difficulties in staffing the PG-04 position, the Tribunal finds that these facts do not support the complainants' allegations of an improper intent constituting abuse of authority.

[86] The initial acting appointment for Ms McGuiness was effective on February 13, 2006 and was to be for a period of less than four months. Ms. Zwicker discussed in April 2006 with Ms. Lynds the opportunity to act as PG-04 for an equal amount of time as Ms. McGuiness. Ms. Lynds refused this offer in late May. Ms. Zwicker then used her authority under section 33 of the *PSEA* to continue Ms. McGuiness's acting appointment since Ms. Lynds declined the acting opportunity.

[87] When it was extended on June 1, 2006 to September 2006 it became subject to a right of recourse under section 77 of the *PSEA*. See *Wylie*, where the Tribunal found at paragraph 20 that "(...) each appointment made on an acting basis and each extension of such appointment constitutes an appointment subject to the requirements of the *PSEA* and its regulations, including recourse."

[88] Since the acting appointment was now exceeding four months, Ms. Zwicker testified that she assessed Ms. McGuiness against the Statement of Merit Criteria for the PG-04 position and that she met all the essential qualifications. Ms. Zwicker used various assessment tools to assess Ms. McGuiness including her results in the June 2005 PG-04 competition, her *curriculum vitae*, her observation on the job and her previous work experience.



[89] In *Rinn*, the Tribunal emphasized 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)

[90] Ms. Zwicker's written assessment of Ms. McGuiness against the Statement of Merit Criteria was tendered in evidence. This document corroborates Ms. Zwicker's oral testimony that Ms. McGuiness was selected on the basis of merit; she met all of the merit criteria set out in the Statement of Merit Criteria.

[91] The complainants provided no evidence to refute this finding that Ms. McGuiness' acting appointment was based on merit. They further confirmed that there was no allegation of personal favouritism in the decision to appoint her.

[92] The complainants also argued that Ms. Lynds was treated differently than Ms. McGuiness which led to an improper result. The complainants appear to focus on the perceived injustice to Ms. Lynds who is not one of the complainants and did not file a complaint to the Tribunal in relation to the process in question.

[93] In previous decisions, the Tribunal has dealt with the requirement that a complaint be personal to the complainant. In *Visca*, for example, the Tribunal held:

[24] In subsection 77(1) of the *PSEA*, the words "*a complaint to the Tribunal that he or she was not appointed or proposed for appointment,*" clearly stipulates that a complaint must be personal to the complainant. A person can only complain "that he or she was not appointed" and cannot complain that other persons were not appointed. The complaint cannot be about how other unsuccessful candidates were treated (...).

[94] Accordingly, the complaint cannot be about Ms. Lynds being treated differently than Ms. McGuiness as Ms. Lynds did not file a complaint.

[95] Finally, on the issue of the date of the notification, the *PSEER* provides for the notification of acting appointments of four months or more:

13. The Commission shall, at the time that the following acting appointments are made or proposed, as a result of an internal appointment process, inform the persons in the area of recourse, within the meaning of subsection 77(2) of the Act, in writing of the name of the person who is proposed to be, or has been, appointed and of their right and grounds to make a complaint:

(a) an acting appointment of four months or more;

(b) an acting appointment that extends the person's cumulative period in the acting appointment to four months or more.

(Emphasis added)

[96] In *Chaves v. Commissioner of the Correctional Service of Canada et al.*, [2007] PSST 0009, the Tribunal held:

[34] What is required is that persons in the area of recourse are notified of the appointments and that, in the case of acting appointments, the requirements for providing notice under section 13 of the *PSEER* are met. (...)

[97] Ms. Zwicker acknowledged in her testimony that the initial document recommending the extension of Ms. McGuiness' acting appointment was lost, and a new document had to be completed.

[98] The Tribunal, therefore, finds that the respondent did not inform the complainants, and other persons in the area of recourse, of their right and grounds to make a complaint at the time of the extension of Ms. McGuiness' acting appointment in June 2006 as required in section 13 of the *PSEER*. However, failing to provide this notification in a timely manner does not, in and of itself, amount to abuse of authority. There is no evidence to establish that this constitutes more than an error as explained by Ms. Zwicker.

[99] The Tribunal believes it is important that departments adhere strictly to the requirements of the *PSEER* by providing notification of the acting appointments in a timely manner. Employees have the right to be informed at the time of the acting appointment and not after the fact.

[100] As explained above, the *PSEA* has changed considerably. Therefore, the Tribunal finds there is no need to address the cases submitted by the complainants under the former *PSEA* dealing with lack of or inappropriate notice of the deployment as they are not applicable to this case under the *PSEA*.

[101] In conclusion, the Tribunal finds there was no abuse of authority established in appointing Ms. McGuinness in the acting appointment as a PG-04 once it exceeded four months.

**Issue III:** Did the respondent abuse its authority when it chose a non-advertised process for the acting appointment?

A) COMPLAINANTS' ARGUMENTS

[102] The complainants argue that the acting appointment was detrimental to the complainants and others in the branch since they were at a disadvantage when it came to the appointment process to fill the indeterminate PG-04 Senior Contracts Officer position. For example, Ms. McGuinness received the delegated authority for financial contracting. In addition, she gained experience with the on-the-job training and the Introduction to Contracts course, which she would not have otherwise received.

[103] The extension to Ms. McGuinness' acting appointment provided her with an advantage in meeting the essential qualifications, even if she failed the previous knowledge examination for the PG-04 position in 2005.

[104] Finally, in accordance with the last category of abuse found in *Tibbs*, the complainants argue that Ms. Zwicker adopted a policy that went against the principles of fairness, transparency and access found in the Appointment Policy of the PSC. Ms. Zwicker admitted that she wanted Ms. McGuinness to come back to the unit for the last three years. No other candidate had the opportunity to exhibit their own merit.

[105] As stated above, the complainants specifically clarified to the Tribunal that there was no allegation of personal favouritism towards Ms. McGuinness.

B) RESPONDENT'S ARGUMENTS

[106] Section 33 of the *PSEA* provides that a deputy head may choose an advertised or a non-advertised process. The respondent submits that it is not an abuse of authority simply because a non-advertised process is chosen.

[107] Both Ms. Zwicker and Mr. Topilnycky testified that there was an active search to find a PG-04 Senior Contracts Officer.

[108] Ms. Zwicker explained the operational challenges during the period and the need for an experienced employee to fill the PG-04 position on an acting basis until the process for the indeterminate PG-04 was completed.

[109] It was not until Ms. Lynds refused the acting opportunity that Ms. Zwicker extended Ms. McGuiness' appointment which then exceeded the four-month acting appointment.

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

[111] The respondent submits that the complainants have not raised any facts which would support a finding of abuse of authority.

#### C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[112] The PSC did not participate in the hearing.

[113] In its written submissions, the PSC argued 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

[114] 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

(...)

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

[115] As explained in *Tibbs*, to succeed, the complainants have to demonstrate on a balance of probabilities that there was abuse of authority in choosing between an advertised and a non-advertised internal appointment process.

[116] 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."

[117] In *Kane v. Deputy Head of Service Canada et al.*, [2007] PSST 0035, at paragraph 65, 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: "(...) section 33 of the *PSEA* clearly provides that the deputy head has the discretion to use an advertised or a non-advertised appointment process." See also *Rozka et al. v. Deputy Minister of Citizenship and Immigration Canada et al.*, [2007] PSST 0046.

[118] Thus, the complainants cannot allege that 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, for example: *Robbins v. the Deputy Head of Service Canada et al.*, [2006] PSST 0017; and, *Kilbray and Wersch v. Deputy Head of Service Canada et al.*, [2007] PSST 0049.

[119] The initial acting period was not to exceed four months as it was anticipated that the staffing process for the PG-04 would be completed within that timeframe. It was later determined by Major Charest that the acting period was to be shared equally between Ms. McGuinness and Ms. Lynds. It was not until Ms. Lynds turned down the acting opportunity at the end of May 2006 that Ms. McGuinness' acting appointment was extended beyond four months which necessitated the posting of the notification.

[120] Given the limited resources, the efforts undertaken to staff the positions and Ms. Zwicker's heavy workload, the Tribunal finds that, on a balance of probabilities, not advertising the acting opportunity for the PG-04 position while the staffing process was underway was reasonable.

[121] The evidence does not demonstrate that the respondent chose a non- advertised appointment process in bad faith or without reason. Ms. Zwicker needed assistance as soon as possible and advertising the acting position would have delayed having someone assisting her quickly. Ms. Lynds was offered the acting opportunity, but later refused it. A reasonable solution was then to extend Ms. McGuiness' acting appointment.

[122] The complainants also raise the question about whether, as PG-02 employees, they should have been given the opportunity to act at the PG-04 level. They question the reason why Ms. Zwicker's "policy" did not allow PG-02 employees to act in the PG-04 position.

[123] The Tribunal accepts that Ms. Zwicker had valid and legitimate reasons for only offering the acting appointment to the two PG-03s. The complainants Meade and Fry, who testified, were not qualified for the PG-03 position or the PG-04 position. Ms. McGuiness also did not qualify for the PG-04 position in June 2005. However, Ms. Zwicker needed someone urgently and she chose the candidate with the highest mark for the PG-04 position, which was Ms. McGuiness. In addition, Ms. McGuiness had management skills as an AS-04 and experience as a Contracts Officer. Moreover, this approach was consistent with the branch's usual procedures of offering an acting assignment of only one level higher than the current level of the employee.

[124] The Tribunal finds the complainants have not raised any facts to support, nor proven on a balance of probabilities, the allegation that the choice of a non-advertised appointment process in these circumstances was an abuse of authority.

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

DECISION

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

Sonia Gaal  
Vice-Chair

PARTIES OF RECORD

Tribunal Files:	2006-0087, 2006-0088, 2006-0089 and 2006-0090
Style of Cause:	<i>Thomas A.C. Brown, Gloria W. Fry, Toby Lynn Meade, Joy H. Hubley and the Deputy Minister of National Defence et al.</i>
Hearing:	October 23, 24 & 25, 2007 Halifax, Nova Scotia
Date of Reasons:	February 26, 2008
APPEARANCES:	
Alan Phillips	For the complainants
Lesa Brown	For the respondent
N/A	For the Public Service Commission