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File: 561-02-200

Citation: 2008 PSLRB 93

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

MARTIN OUELLET

Complainant

and

PATRICE LAPLANTE
AND
TREASURY BOARD
(Correctional Service of Canada)

Respondents

Indexed as
Ouellet v. Laplante and Treasury Board (Correctional Service of Canada)

In the matter of a complaint made under section 190 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Marie-Josée Bédard, Vice-Chairperson

For the Complainant: Himself

For the Respondents: Neil McGraw, counsel

Heard at Orford, Quebec,
September 23, 2008.

I. Complaint before the Board

[1] Martin Ouellet ("the complainant") works for the Correctional Service of Canada (CSC or "the employer"). On November 22, 2007, he filed a complaint with the Public Service Labour Relations Board ("the Board") against Patrice Laplante and the CSC ("the respondents").

[2] The complaint was made under paragraphs 190(1)(*a*) and (*g*) of the *Public Service Labour Relations Act* ("the *Act*"), which refer respectively to a failure to comply with section 56 (duty to observe terms and conditions) and an unfair labour practice within the meaning of section 185.

[3] In support of his complaint, the complainant made the following allegations:

> [Translation]
>
> *26/10/2007 A closed competition for a WP-04 position for a term of four months or less was cancelled. The decision to cancel was made after three or four qualified candidates had applied, the most qualified of which is an ex-WP-04, a criminologist who had been demoted to the linen room. He meets all the pre-selection criteria. Management's decision to cancel the closed competition and replace it with another competition managed by regional headquarters to find qualified candidates for WP-04 positions of terms of more than four months is a strategy to prevent the ex-WP-04 from getting the position.*
>
> 1. *Unfair labour practices + duty to observe terms and conditions of employment*
>
>   (a) *Deliberate failure to inform the candidate, M. O. (ex-WP-04), that the closed competition was cancelled — the candidate was informed only after he insisted on receiving an acknowledgment of his formal application for the vacant WP-04 position.*
>
>   (b) *Contradictory statements about the ex-WP-04 on 8/11 and 9/11 from P. Laplante, a representative of the employer. Mr. Laplante claimed that M. O. would have the same chances of obtaining the WP-04 position through the second competition but then told M. O.'s union representative that M. O. had already been rated as unqualified to perform the duties of a parole officer (WP-04).*

> *(c) The decision to cancel the first competition is inconsistent with effective practices recognized by human resources management experts for the following reasons:*
>
> - *the process costs more, takes longer and is not guaranteed to be effective (the competition is open to the same employees)*
>
> - *an attitude of flagrant discrimination against the qualified candidates who applied for the first closed competition of 18/10/2007.*
>
> - *there is no need for candidates for a longer period since there is no long-term position to fill and acting assignments have already been made.*
>
> *(d) The employer's decision is a strategy to buy time to find a candidate that meets its expectations while shutting out the most qualified candidate, who is already trained and has 20 years of experience as a WP-03 and WP-04 parole officer, both in the community and in institutions.*

[4] The respondents raised an objection to the Board's jurisdiction to deal with the complaint. The respondents first claim that the sections cited in support of the complaint "[translation] . . . do not correspond to the situation that is the subject of Mr. Ouellet's complaint and cannot be used to support his allegations. . . ." The respondents also maintain that the complainant cannot challenge a staffing process by filing a complaint under section 190 of the *Act*, that staffing processes are governed by the *Public Service Employment Act* and that only the Public Service Commission has jurisdiction to intervene in such matters.

II. Summary of the evidence

[5] The hearing took place on September 23, 2008, in Orford.

[6] The complainant explained that he had held a professional position as a parole officer (WP-04) at Drummond Institution for 12 years. In February 2004, he was demoted to a position as a linen attendant. Unhappy with the position to which he had been demoted, the complainant indicated that he wished to improve his situation. He asserted that he applied for various positions after being demoted but did not get invited to any interviews.

[7] The complainant noted that he lost contact with the professional community after being demoted and that it was through emails that he found out about the notice of interest about the acting parole officer position for a term of less than four months.

[8] On October 16, 2007, Mr. Laplante emailed a notice of interest to all employees at the institution. The email, which the respondents filed and the complainant acknowledged, reads as follows:

> [Translation]
>
> . . .
>
> *Hello, we are seeking people who are interested in working at our institution as acting parole officers for a term of less than four months. We are looking for bilingual or unilingual candidates. Interested employees must meet the minimum requirements below and indicate their interest by emailing Patrice Laplante on or before October 19, 2007.*
>
> . . .

[9] On October 18, 2007, the complainant responded to the notice of interest and applied for the position, believing that he met all of its criteria and requirements. The complainant asserted that, of the four people that applied, he thought that he was the most qualified with respect to the experience and education required. The complainant viewed the notice of interest as a way to change positions in a relatively short period since he thought that the staffing process for a position lasting less than four months would be quick.

[10] On October 26, 2007, not having received any response, the complainant emailed Mr. Laplante requesting an acknowledgment of his application. On the same day, he received the following reply from Mr. Laplante:

> [Translation]
>
> . . .
>
> *Please note that a decision has been made not to follow up on the notice of interest that was sent out internally for an acting assignment as a parole officer for less than four months at Drummond since management has requested that a notice of interest for a parole officer position for less than four months or for a longer period be posted on the intranet. Therefore, please see the "Publiservice" section of our*

> *intranet to find out about that notice of interest and to apply for the position as indicated on that site.*
>
> . . .

[11] The complainant testified that he was not informed that the notice of interest had been cancelled and replaced with a larger competition until he requested an acknowledgment of his application for the first competition and until he received Mr. Laplante's reply. By the time the complainant received Mr. Laplante's reply, the competition had already been changed.

[12] The complainant asserted that, in his opinion, the second competition involved a much longer process that could last a year or even a year-and-a-half. Having turned 60 in 2007 and desiring to regain the status he had had before being demoted, he thought that the process would take too long for him to achieve his goal. However, the complainant confirmed that he applied for the second competition anyway.

[13] The complainant stated that he informed André Fortin, his union representative, of his actions. He asserted that Mr. Fortin would have told him about having had two conversations with Mr. Laplante about the complainant's application and the change to the competition. Mr. Fortin allegedly said that, during the first conversation, Mr. Laplante said that the complainant had no chance of getting the parole officer position. During the second conversation, Mr. Laplante allegedly said, "[translation] it doesn't matter that the first competition was cancelled since the complainant would have the same chance as the other candidates."

[14] Mr. Laplante, Manager, Assessment and Interventions, CSC, also testified. He has worked for the CSC since 1994. He sent out the notice of interest on October 16, 2007. Mr. Laplante stated that the notice of interest was issued at the request of his immediate superior, Mr. Vanhoutte, who had just started as the operations manager.

[15] Sometime after the notice of interest had been sent out, Mr. Laplante discussed workforce requirements with Mr. Lanoix, Deputy Director, and Mr. Vanhoutte. During the discussions, Mr. Lanoix allegedly mentioned that the pool of employees suitable to be acting parole officers would expire in January 2008 and would have to be renewed. Since that employee pool is used for acting assignments of both less and more than four months, it was agreed to cancel the notice of interest for assignments of less than

four months and to initiate a single process to renew the employee pool for acting assignments of all durations.

[16] Mr. Laplante indicated that the length of a notice of interest process was similar to that of an internal selection process and that it could last a few months. Mr. Laplante also stated that he was not involved in the second competition process.

[17] Mr. Laplante remembered having two conversations with Mr. Fortin about the selection process and the complainant's application. With respect to the first conversation, he denied having suggested that the complainant would have no chance of obtaining the position. He admitted that he had wondered how the complainant's previous demotion would affect his application for the parole officer position and stated that he may have told Mr. Fortin about his thoughts. As for the second conversation with Mr. Fortin, Mr. Laplante asserted that he had reassured Mr. Fortin that the complainant would have the same chance as other employees, regardless of the process.

[18] As to the acknowledgment of the complainant's application in response to the notice of interest, Mr. Laplante said that he was surprised that an acknowledgment had not been sent before he received the complainant's request. He went on to say that he could not remember exactly what had happened but that it is possible that no acknowledgments were sent to the candidates because the process was not a formal competition but simply a notice of interest.

III. Summary of the arguments

A. For the respondents

[19] The respondents submitted that the facts alleged by the complainant do not correspond to circumstances that can provide a basis for a complaint under paragraphs 190(1)(*a*) or (*g*) of the *Act*.

[20] The respondents argued that paragraph 190(1)(*a*) of the *Act*, which refers to section 56, sets out the duty of an employer to maintain the terms and conditions of employment in specific circumstances that relate to filing an application for certification. However, the facts alleged by the complainant do not relate in any way to such circumstances. The respondents also argued that section 56 and

paragraph 190(1)(*a*) do not provide for the filing of a complaint by an employee but instead reserve that right to a bargaining agent.

[21] As for paragraph 190(1)(*g*) of the *Act,* the respondents submitted that the complainant's allegations do not correspond to circumstances that could constitute unfair labour practices within the meaning of the *Act.* The cancellation of a notice of interest to meet acting labour-force requirements does not fit the definition of unfair labour practice. Moreover, the respondents submitted that the subject of the complaint, which involves a staffing process, does not provide a basis for a complaint under the *Act* since staffing is governed exclusively by the *Public Service Employment Act.* The respondents also maintained that a notice of interest is not a formal selection process within the meaning of the *Public Service Employment Act.*

[22] The respondents therefore claimed that the facts, even if they were proven, could not provide a case for an unfair labour practice complaint.

B. <u>For the complainant</u>

[23] The complainant perceived the employer's attitude and the decisions made in the selection process as unfair labour practices against him that were used to exclude him from the selection process. The complainant found it unacceptable that he was not informed that the notice of interest had been cancelled at the time that decision was made, especially since he had no way of finding out what was happening through informal channels because he was no longer part of a professional circle. He was informed about the cancellation of the notice of interest when Mr. Laplante responded to his request for an acknowledgment of his application. The complainant stated that he was certain that he would never have been informed about the cancellation of the notice of interest had he not requested an acknowledgment.

[24] The complainant also stated that he did not understand why the employer cancelled the notice of interest and initiated a competition that would take much longer. In his opinion, a formal competition would not meet short-term needs and would take a number of months. He believes that the employer should first have proceeded with the notice of interest process to meet short-term needs and then initiated a second competition to meet long-term needs. That would have been even more desirable since the complainant had all the qualifications required to meet the short-term needs and did not require lengthy training to become productive.

[25] The complainant also perceived Mr. Laplante's contradictory statements on his chances of obtaining the parole officer position as unfair labour practices against him. Finally, the complainant claimed that there was a link between this complaint and another complaint filed with the Board (PSLRB File No. 561-02-159) and that the facts alleged in his complaints were consistent with the way the employer had treated him for a number of years.

C. Respondents' reply

[26] The respondents stated that the complaint was based on the complainant's perceptions and that there was no evidence of any unfair labour practices, reprisals or actions against the complainant. The notice of interest was cancelled and replaced by a selection process for management reasons completely unrelated to the complainant. The complainant not having received an acknowledgment of his application to the notice of interest does not constitute an unfair labour practice. Counsel for the respondents submitted that it is up to the employer to determine the appropriate procedure when a notice of interest is issued and that the Board does not have jurisdiction to discuss or assess the merits of the procedure.

IV. Reasons

[27] The Board's jurisdiction with respect to the complaint filed by the complainant is restricted and limited by the parameters of section 190 of the *Act.* If the alleged circumstances in a complaint do not correspond to those set out in the various subsections of section 190, the Board does not have jurisdiction to hear the complaint.

[28] In this case, the complainant based his complaint on paragraphs 190(1)(*a*) and (*g*) of the *Act.* At the hearing, the complainant emphasized the unfair labour practice issue.

[29] Paragraph 190(1)(*a*) of the *Act* provides for the filing of a complaint when it is alleged that "the employer has failed to comply with section 56 (duty to observe terms and conditions)." Section 56 prohibits an employer from altering the terms and conditions of employment that are applicable to the employees in a proposed bargaining unit once the employer has been notified of an application for certification. The obligation imposed on the employer applies only in the specific context of filing an application for certification. However, the context of this complaint and the

allegations that it contains do not involve certification. The complaint therefore cannot be based on paragraph 190(1)(*a*).

[30] Paragraph 190(1)(*g*) of the *Act* provides for the filing of a complaint when it is alleged that an employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185. "Unfair labour practices" within the meaning of section 185 are limited to practices set out in subsections 186(1) and (2), sections 187 and 188 and subsection 189(1). Some of the provisions deal with certification agent duties and do not apply to this complaint.

[31] Subsection 186(1) and paragraphs 186(2)(*b*) and (*c*) of the *Act* deal with the employer being prohibited from interfering in union matters and do not apply to the circumstances of this case.

[32] Paragraph 186(2)(*a*) of the *Act*, which refers to various circumstances, reads as follows:

> *(2) Neither the employer nor a person acting on behalf of the employer, nor a person who occupies a managerial or confidential position, whether or not that person is acting on behalf of the employer, shall*
>
> > (a) *refuse to employ or to continue to employ, or suspend, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person, because the person*
> >
> > > *(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of an employee organization, or participates in the promotion, formation or administration of an employee organization,*
> > >
> > > *(ii) has testified or otherwise participated, or may testify or otherwise participate, in a proceeding under this Part or Part 2,*
> > >
> > > *(iii) has made an application or filed a complaint under this Part or presented a grievance under Part 2, or*
> > >
> > > *(iv) has exercised any right under this Part or Part 2;*

[33] The facts alleged by the complainant do not relate to any of the circumstances described in those paragraphs and therefore cannot be used as the basis for a complaint that the Board would have jurisdiction to hear.

[34] I do not doubt that the complainant has perceived certain actions of the employer or Mr. Laplante as being unfair labour practices. I also understand the complainant's disappointment since he wishes to regain the parole officer position. However, the circumstances and the facts that are alleged in the complaint and that the complainant explained in his testimony are outside the parameters set out in the *Act* for providing a basis for an unfair labour practice complaint. The Board therefore does not have jurisdiction to deal with the complainant's complaint.

[35] Even if the Board had jurisdiction to deal with the complaint, I would have found that neither the employer nor Mr. Laplante had carried out reprisals or actions against the complainant to prevent him from obtaining an acting parole officer position.

[36] There is no evidence to suggest that the employer wished to exclude the complainant from a selection process for acting positions. The evidence clearly showed that the decision to cancel the notice of interest and replace it with a formal selection process to create an employee pool for acting assignments of various lengths was made for legitimate management reasons. The decision was unrelated to the complainant and was not intended to exclude his application. As for him not receiving an acknowledgment, the evidence does not show that Mr. Laplante deliberately failed to inform the complainant that the notice of interest had been cancelled. As for the allegations of contradictory statements by Mr. Laplante, I am of the view that those statements were of no consequence, regardless of the version considered. In the first place, it is clear that, in the second conversation between Mr. Laplante and Mr. Fortin, Mr. Laplante clearly stated that the complainant would have the same chance as the other candidates, and I did not sense that Mr. Laplante felt any animosity toward the complainant. Second, Mr. Laplante asserted that he was not involved in the second selection process and therefore had no influence on the manner in which the complainant would be treated in that process.

[37] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[38] The objection to the Board's jurisdiction is allowed. The Board concludes that the complaint is inadmissible.

November 5, 2008.

Marie-Josée Bédard,
Vice-Chairperson