



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILES: 2007-0230 AND 2007-0361

OTTAWA, MAY 5, 2008

ANGELA HENRY

COMPLAINANT

AND

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

RESPONDENT

AND

OTHER PARTIES

MATTER	Complaints of abuse of authority pursuant to paragraph 77(1)(a) 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>Henry v. Deputy Head of Service Canada et al.</i>
NEUTRAL CITATION	2008 PSST 0010

REASONS FOR DECISION

INTRODUCTION

[1] The complainant, Angela Henry, who is employed by Service Canada which is part of the Department of Human Resources and Social Development, was screened out of an internal advertised appointment process for a Team Leader (PM-03) position. The assessment board determined, based on her application and covering letter, that she did not meet the education qualification for the position. She contends that the assessment board failed to assess her on the basis of the education requirement established in the Statement of Merit Criteria (the SMC), and set out on the job opportunity advertisement. As such, she claims that there has been abuse of authority by the respondent, the Deputy Head of Service Canada.

BACKGROUND

[2] A job opportunity advertisement was posted on Publiservice with the purpose of creating a pool of candidates for staffing the position of Team Leader, Service Delivery Team Leader/Coach, Insurance Program Advisor in the Department of Human Resources and Social Development in various locations in New Brunswick (2006-CSD-IA-NB-REG-STJ-118). The candidates submitted their applications online to the respondent.

[3] Since two separate appointments were made from the established pool of candidates, two different complaints were filed by the complainant under paragraph 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*). The first one was filed on May 14, 2007 and the second one on July 20, 2007.

[4] Given that Ms. Henry's two complaints are similar in nature and relate to the same job advertisement, the Tribunal consolidated both files on October 26, 2007 in accordance with section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6.

[5] In accordance with subsection 99(3) of the *PSEA*, the Tribunal decided this complaint without holding an oral hearing. The decision is rendered based on the

parties' submissions and documents on file which were reviewed in detail and summarized below.

[6] The essential qualifications for the education requirement as stated on the SMC read as follows: "Successful completion of two years of post-secondary school from a recognized educational institution or an acceptable combination of education, training **and/or** experience" (emphasis added). However, prior to the posting of the job opportunity advertisement and SMC on Publiservice, the members of the assessment board, Robert Cormier, Service Delivery Manager, and Roland Langis, Human Resources Consultant, determined that in the absence of the successful completion of two years post-secondary education, an acceptable combination of education, training **and** experience would have to be demonstrated by candidates in order to meet the education qualification.

[7] The complainant's covering letter indicated that she gained extensive training and experience in analyzing and applying employment insurance (EI) legislation. She listed some training on her résumé, but did not indicate on her application that she had two years of post-secondary education.

[8] Given this, she was assessed on the basis of whether she had an "acceptable combination of education, training and/or experience" to meet the education requirement of the essential qualifications. The assessment board determined that she did not meet the "training" component of this combination and, therefore, screened her out for failing to meet the education qualification.

[9] Mr. Langis sent the complainant a letter on November 7, 2006 to inform her of this decision, and to offer her the option of an informal discussion with a member of the assessment board.

[10] The complainant replied on November 9 to inform him that she had completed a one year program at New Brunswick Community College, and she had extensive experience and training. She also listed some training courses. She stated she believed that she met the education factor as she had extensive experience and training.

[11] There were two informal discussions with the complainant, one on November 9 with Mr. Langis, and the other on November 10 with Mr. Langis and Mr. Cormier. During both discussions, Mr. Langis explained that the education factor was “successful completion of two years post-secondary education or an acceptable combination of education, training **and** experience” (emphasis added). He further explained that she did not have the “training” portion of this three part combination. The complainant maintained that she only needed two of the three factors listed on *Publiservice* since the SMC stated an “acceptable combination of education, training **and/or** experience” (emphasis added) rather than specifying an acceptable combination of education, training **and** experience.

[12] Mr. Langis wrote to the complainant on November 10. He confirmed their informal discussions and the assessment board’s approach of requiring a combination of education, training **and** experience. He explained that this was the approach used by other assessment boards to evaluate education equivalencies for concurrent processes for the same types of positions. He further mentioned that the complainant failed to demonstrate on her application the training she had received.

ISSUES

[13] In order to resolve this complaint, the Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority by requiring an acceptable combination of education, training **and** experience to meet the education requirement despite the fact that the job opportunity advertisement and the SMC used the terminology “an acceptable combination of education, training **and/or** experience”?
- (ii) Did the respondent abuse its authority when it screened out the complainant from the process?
- (iii) Did the respondent abuse its authority when it did not change its initial assessment after the informal discussion?

ARGUMENTS OF THE PARTIES

A) COMPLAINANT'S ARGUMENTS

[14] The complainant alleges that, during the exchange of information for the first complaint that took place on July 3, 2007, Mr. Langis told the complainant that further to her November 10, 2006 email, she met the education factor. However, because she did not list all of her training on her application, the assessment board could not accept the information after the fact.

[15] The complainant alleges that, by refusing to correct the error during the informal discussion, the assessment board did not exercise its discretion in a fair or transparent manner.

[16] According to the complainant, there was no indication on the SMC describing the type of acceptable training, nor how much training was required to meet the education factor. The complainant listed two courses that were applicable to the PM-03 positions.

[17] The complainant referred to Service Canada's instructions to its employees on résumé writing found on the respondent's intranet site. The site cautions applicants not to list every course they have taken. The complainant submits that this is the reason she stated in her covering letter that she had received extensive training within the department and listed only two courses in her résumé.

[18] The complainant believes the respondent altered the definition of the education requirement by assessing all three components for the acceptable combination for education rather than two out of three as stated on the *Publiservice* job opportunity advertisement. Furthermore, since the decision to assess the three components was made prior to the posting of the job opportunity, the complainant contends that the SMC should have read "and" instead of "and/or" for the acceptable combination for the education requirement of the essential qualifications.

[19] The complainant maintains that since the assessment board assessed candidates in a manner different than what was posted, it altered the definition of the education requirement after the fact. There was no justification in using the words

“and/or” when they were assessing the three components as it was misleading and demonstrated bad faith. As such, this action constituted abuse of authority by the respondent and was not transparent.

[20] The complainant states that she informed the members of the assessment board during the informal discussions of some of the various training she received. However, she asserts that they chose not to correct the error. According to her, this training demonstrated that she met the education qualification. The complainant submits that accepting her training would have qualified her as a candidate at this stage of the process.

[21] The complainant is of the view that by refusing to alter their decision and accept the additional information provided during the informal discussion, the members of the assessment board ignored the purpose of informal discussion. She contends that the assessment board’s failure to take into account this additional information was wrong, and provides further support for her claim of abuse of authority.

[22] The complainant refers to the five categories of abuse found in *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008, in support of her position. In particular, she alleges that categories 2 to 5 outlined in *Tibbs* apply to this complaint:

Category 2: “When a delegate acts on inadequate material (including where there is no evidence, or without considering relevant matters)”: The complainant submits that the reason given by the respondent for not accepting the additional information provided during informal discussion is that it would not have been fair to other unsuccessful candidates who may have had similar concerns.

Category 3: “When there is an improper result (including unreasonable, discriminatory, or retroactive administrative actions)”: The complainant states that the respondent admitted that the additional information on her training did in fact demonstrate that she met the essential qualifications.

Category 4: “When the delegate exercises discretion on an erroneous view of the law”: The complainant alleges that the assessment board had the option to

accept the additional information provided by her during informal discussion. However, she contends that, by ignoring vital and relevant information that would have corrected an alleged error or omission, the assessment board upheld its decision not to screen her into the appointment process.

Category 5: “When a delegate refuses to exercise his/her/its discretion by adopting a policy which fetters the ability to consider individual cases with an open mind”: The complainant states that the assessment board did not want to correct the alleged error or omission since it could lead to additional work if other unsuccessful candidates wanted the same consideration. She believes that this resulted in a total disregard for her individual case and, thus, contrary to law.

[23] The complainant asks as corrective action that her qualifications be fully assessed in order to be screened in the pool of PM-03 candidates. She is not seeking the revocation of the acting appointments.

B) RESPONDENT’S ARGUMENTS

[24] The respondent argues that abuse of authority should be limited to bad faith, personal favouritism or similar misfeasance. It is of the view that the terms share the common feature of requiring discernment as between right and wrong, and are of a serious nature.

[25] The respondent refers to the Tribunal’s decision in *Portree v. Deputy Head of Service Canada*, [2006] PSST 0021, in support of its position:

[47] (...) a complaint for abuse of authority must demonstrate on a balance of probabilities a serious wrongdoing or flaw in the process that is more than a mere error, omission or improper conduct that justifies the Tribunal’s review and intervention.

[26] Furthermore, the respondent argues that the five categories of abuse outlined in *Tibbs* merely provide a guideline in the absence of a statutory framework, and should not be the definitive test for determining abuse of authority under the *PSEA*. It contends that abuse of authority in the context of the *PSEA* is distinguishable from the review of ministerial discretion in terms of one or more of these five categories of abuse.

[27] The respondent submits that management enjoys a broad discretion to determine the qualifications for a position, and that the establishment of the essential qualification for the education requirement in this appointment process was a proper exercise of the manager's discretion.

[28] The respondent states that the SMC identified "training" as an element of the education qualification regardless of whether it was followed by the conjunction "and" or by the conjunction "and/or." According to the respondent, the wording used was sufficient to alert applicants of their responsibility to provide all the relevant information to meet the "acceptable combination" threshold.

[29] According to the respondent, there is no obligation on management to inform candidates of the complete details as to how a particular qualification will be assessed. The respondent is of the view that the education qualification itself was sufficiently detailed so that the candidates knew what they had to demonstrate on their application.

[30] The job opportunity advertisement on Publiservice stated that candidates must clearly demonstrate on their application that they meet the essential qualifications of Education and Experience, and that failure to do so could result in the rejection of their application.

[31] The respondent submits that notwithstanding what was said during informal discussion, the fact remains that the complainant's application did not demonstrate any relevant training she may have received. Furthermore, the training was only one of the three elements that were considered as an "acceptable combination" for the education qualification.

[32] The respondent argues that there is a broad discretion to choose assessment methods to determine whether a candidate meets the qualifications. In addition, it states that applicants must demonstrate that they meet the essential qualifications.

[33] The respondent submits that the complainant did not provide the information pertaining to all the elements of the essential qualifications on her application. After reviewing her application, the assessment board determined that she did not meet the

educational requirement, more specifically the two years of post-secondary school, or the acceptable combination of education, training and experience. As such, it believes the information submitted for her training was insufficient to meet the “acceptable combination” for the education qualification.

[34] The assessment board decided it would not accept the additional information provided by the complainant during the two informal discussion meetings because she did not provide this information in her application. In the respondent’s view, there was no mistake to rectify during the informal discussion since the information was not on her application. Furthermore, the respondent relies on the Tribunal’s decision in *Rozka et al. v. Deputy Minister of Citizenship and Immigration Canada et al.*, [2007] PSST 0046, and states that the purpose of an informal discussion is not to reassess a candidate’s qualifications.

[35] The respondent submits that the complainant has not produced evidence to support a finding of abuse of authority. The respondent therefore requests that the complaint be dismissed.

C) PUBLIC SERVICE COMMISSION’S ARGUMENTS

[36] The Public Service Commission (the PSC) submits that, for an act in an appointment process to constitute abuse of authority, there must be an element of intention such as bad faith or personal favouritism.

[37] The PSC argues that there is no positive obligation identified in the *PSEA* or in the PSC policy on informal discussion stating that a manager must correct any perceived error brought to his or her attention in the context of an informal discussion.

D) COMPLAINANT’S REPLY TO THE RESPONDENT

[38] The complainant is not disputing the respondent’s right to establish the education requirements for the position. Her concern is with the change in the advertised education requirement “education, training and/or experience” and the manner in which it was assessed, using “education, training and experience.”

[39] She maintains that the job opportunity advertisement on Publiservice did not state with certainty what would happen if candidates did not clearly demonstrate on their application that they met the essential qualifications. The applicable portion read as follows: “Applicants must clearly demonstrate on their application that they meet all the following essential criteria and are within the area of selection. Failure to do so may result in the rejection of your application.” The complainant submits that this statement provides direction and suggests what could happen if an applicant did not follow those directions. The complainant alleges that the respondent should not rely on such a meagre statement to justify screening her out, especially since it later determined in the course of informal discussion that she in fact met the education requirement.

ANALYSIS

Issue I: Did the respondent abuse its authority by requiring an acceptable combination of education, training **and** experience to meet the education requirement despite the fact that the job opportunity advertisement and the SMC used the terminology “an acceptable combination of education, training **and/or** experience”?

[40] The respondent chose to assess the essential qualifications by asking candidates to submit an application outlining how they met the essential qualifications. The job opportunity advertisement published on *Publiservice* on September 7, 2006 contained the following sentence in italics immediately under the Essential Qualifications requirements: “*Applicants must clearly demonstrate on their application that they meet all the following essential criteria and are within the area of selection. Failure to do so may result in the rejection of your application.*”

[41] The complainant submits that the respondent misled the candidates by using the conjunction “and/or” for the education qualification when it had been pre-determined by the assessment board that it would use all three components.

[42] *The Canadian Oxford Dictionary* defines the conjunction “and/or” as “either or both of two stated possibilities.” (*The Canadian Oxford Dictionary*, 2d ed., s.v. “and/or”.)

[43] *Stroud's Judicial Dictionary of Words and Phrases*, at p.130, states:

Where statements or stipulations are coupled by "and/or" they are "to be read, either disjunctively, or conjunctively"

(*Stroud's Judicial Dictionary of Words and Phrases*, 7th ed., s.v. "and/or".)

[44] In *Jardine v. General Hydrogen Corp.*, [2007] 6 W.W.R. 518; [2007] B.C.J. No. 143 (QL), the British Columbia Supreme Court reviewed the use of the "or" and "and". The Court stated, at paragraphs 25 and 26, that "'or' will ordinarily be given a disjunctive interpretation unless there is a reason to give it a conjunctive interpretation" and that "and" is logically used in the conjunctive sense.

[45] In *Zellers Inc. v. Group Resources Inc.*, [1995] 21 O.R. (3d) 522; [1995] O.J. No. 5 (QL), the Ontario Court (General Division) made the following comments on the use of "and/or":

[76] In a situation where the maker of a document or a writer uses and/or it is also clear that the oblique line is intended to mean the word "or".

[77] In the case of *R. v. Simpkin*, [1933] 3 W.W.R. 580, 41 Man. R. 527 (C.A.), the Manitoba Court of Appeal was obliged to interpret the meaning of a by-law which used the phrase "and/or". At p. 586 Richards J.A. set out as follows:

The combined use of the conjunctions "and/or" makes a difficulty. I take it that it is intended that either may be used in construing the sentence.

[46] As defined in the *Canadian Oxford Dictionary*, in *Stroud's Judicial Dictionary of Words and Phrases*, and explained in the jurisprudence, the use of the conjunction "and/or" indicates that the assessment board had the option to assess either or all of the stated components. Candidates should, therefore, not assume that the use of "and/or" in a job opportunity advertisement is to be interpreted as "or" as there is a distinct possibility that all components will be required and assessed.

[47] The Tribunal finds that candidates were clearly informed in the job opportunity advertisement that they had to include all the information on their application. If they did not, there was the risk that their application would be rejected.

[48] The Tribunal considers that the assessment board did not alter the qualifications by requiring an acceptable combination for education required education, training and

experience. The Tribunal also finds that using “and/or” in the conjunctive sense of requiring all three components when establishing and assessing the essential qualifications of this position is within the broad discretion provided to managers under subsection 30(2), and section 36 of the *PSEA*. See *Jolin v. Deputy Head of Service Canada et al.*, [2007] PSST 0011.

[49] However the use of the expression “and/or” on job opportunity advertisements and corresponding SMC should be avoided so that there is no ambiguity for candidates and what is required is set out in a clear, precise and transparent way.

Issue II: Did the respondent abuse its authority when it screened out the complainant from the process?

[50] The complainant did not possess the two years of post-secondary school as she had completed a one year program at the New Brunswick Community College. Therefore, it followed that she would be assessed on “an acceptable combination of education, training and/or experience.”

[51] In addition to high school and the one year program listed above, the complainant chose to list only two courses on her résumé, namely: “Successful completion of Agent II training in 1998;” and, “Successful completion of Agent I training in 1992.” She mentioned in her covering letter that she had “gained extensive training and experience within the department,” but did not list any particular course in the letter.

[52] She explains that she followed the suggestion found on the respondent’s intranet site dealing with Résumé Writing, which indicated that candidates should not list every course they have taken. She therefore listed only the two courses she believed were relevant to the positions.

[53] The job opportunity advertisement indicated without any ambiguity that it was the applicant’s responsibility to clearly demonstrate on their application that they met all of the following essential qualifications. Irrespective of the respondent’s intranet page on Résumé Writing, the complainant was required to demonstrate to the assessment board

in her application that she met all three components of the acceptable combination for the education requirement.

[54] Candidates should not take for granted that assessment boards will follow-up with them to ensure they have listed all the elements required to meet essential qualifications. There was no such obligation for the assessment board in the circumstances of this complaint. Similarly, if an application is incomplete, a candidate should not assume that an assessment board will use its personal knowledge of a candidate to screen him or her in. An assessment board can screen out an applicant who does not meet the essential qualifications. See *Neil v. Deputy Minister of Environment Canada et al.*, [2008] PSST 0004.

[55] The Tribunal finds that it was the complainant's responsibility to ensure that the application was complete and contained all the information necessary to demonstrate that she met all the essential qualifications. As the Tribunal stated in *Charter v. Deputy Minister of National Defence et al.*, [2007] PSST 0048:

[37] In order for a candidate to be appointed to a position, he must demonstrate through the chosen assessment process, that he meets the essential qualifications for the position. (...)

[56] As in *Charter*, the chosen assessment tool here was the candidates' applications. After reviewing the complainant's application, the assessment board decided the complainant did not meet the training component and, therefore, did not screen her into the process.

[57] The Tribunal has stated in previous decisions that its role is not to reassess a complainant's qualifications, but rather to examine if there was an abuse of authority in the manner in which the assessment board reviewed the complaint. See *Portree v. Deputy Head of Service Canada et al.*, [2006] PSST 0014; *Robbins v. the Deputy Head of Service Canada et al.*, [2006] PSST 0017; *Broughton v. Deputy Minister of Public Works and Government Services et al.*, [2007] PSST 0020 and *Oddie v. Deputy Minister of National Defence et al.*, [2007] PSST 0030.

[58] The Tribunal finds that the assessment board did not abuse its authority when it made the decision that the complainant's application did not meet the education

qualification as she did not have an acceptable combination of education, training **and** experience.

Issue III: Did the respondent abuse its authority when it did not change its initial assessment after the informal discussion?

[59] The complainant submits that she expected the assessment board to reassess her qualifications and in particular her training based on information that was not on her application, but provided during the informal discussions. The complainant argues that, once it had the additional information, the assessment board should have reconsidered its decision to eliminate her from further consideration in the appointment process.

[60] While informal discussions are an opportunity for an assessment board to correct errors there is no requirement to reassess a candidate. The Tribunal addressed the issue of informal discussion in *Rozka*:

[76] Informal discussion is intended primarily to be a means of communication for a candidate to discuss the reasons for elimination from a process. If it is discovered an error has been made, for example, if the assessment board did not consider some information listed on a candidate's application, this provides the opportunity for the manager to correct that mistake. However, Informal discussion is not an opportunity to request that the assessment board reassess a candidate's qualifications.

(emphasis added)

[61] Moreover, section 47 of the *PSEA* which deals with informal discussion is not prescriptive. This section reads as follows :

Where a person is informed by the Commission, at any stage of an internal appointment process, that the person has been eliminated from consideration for appointment, the Commission may, at that person's request, informally discuss its decision with that person.

(emphasis added)

[62] Although the Tribunal strongly encourages departments to conduct informal discussion with unsuccessful candidates, the *PSEA* does not make it a mandatory step in a complaint process.

[63] The Tribunal finds there was no abuse of authority when the assessment board did not reassess the complainant's training following the informal discussion. The Tribunal reiterates that the complainant was required to demonstrate on her application

that she met all the essential qualifications. Therefore, the Tribunal is satisfied that the respondent relied on the proper material, which was the complainant's application, when it decided to eliminate her from further consideration in the appointment process.

DECISION

[64] For these reasons, the complaints are dismissed.

Sonia Gaal
Vice-Chair

PARTIES OF RECORD

Tribunal Files:	2007-0230 and 2007-0361
Style of Cause:	<i>Angela Henry and the Deputy Head Service Canada, as part of the department of Human Resources and Social Development Canada et al.</i>
Hearing:	Written request, decided without the appearance of parties
Date of Reasons:	May 5, 2008
Appearances:	
Kathryn-Ann Leger	for the complainant
Lesla Brown	for the respondent
Lili Ste-Marie	for the Public Service Commission
n/a	for the other party