



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2006-0102

OTTAWA, FEBRUARY 4, 2008

PAUL CHAVES

COMPLAINANT

AND

THE COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA

RESPONDENT

AND

OTHER PARTIES

MATTER Complaint of abuse of authority pursuant to paragraph
77(1)(b) of the *Public Service Employment Act*

DECISION The complaint is dismissed

DECISION RENDERED BY Francine Cabana, Member

LANGUAGE OF DECISION English

INDEXED *Chaves v. Commissioner of the Correctional Service of
Canada et al.*

NEUTRAL CITATION 2008 PSST 0003

REASONS FOR DECISION

INTRODUCTION

[1] The complainant, Paul Chaves, filed a complaint because he was not appointed nor proposed for appointment to the position of Parole Officer by reason of abuse of authority by the respondent, the Commissioner, Correctional Service Canada. He alleges abuse of authority in the choice of a non-advertised appointment process and in the application of the merit criteria for the position.

BACKGROUND

[2] In October 2005, the respondent conducted a non-advertised appointment process to staff positions of Parole Officer, at the WP-04 group and level, on an acting basis. A letter of interest was sent to employees. Approximately 15 individuals demonstrated interest, including the complainant. Because there were more interested individuals than the number of available positions, the decision was made to assess individuals against the Statement of Merit Criteria and recommend the best seven candidates for appointment.

[3] Seven candidates were appointed on an acting basis between October 2005 and April 2006. Two of these candidates had been appointed to a previous acting position in August 2005. Their appointments were actually extensions of the initial acting appointments. In August 2006, the seven acting appointments were extended until November 30, 2006.

[4] The complainant was found not qualified and was not proposed for appointment. On August 31, 2006, the complainant filed a complaint with the Public Service Staffing Tribunal (the Tribunal) under paragraph 77(1)(b) of the *Public Service Employment Act*, S.C. 2003, c.22, ss.12, 13 (the *PSEA*).

[5] On March 21, 2007, the Tribunal issued a decision on a request for order for provision of information where the Tribunal also dealt with a question of jurisdiction that had been raised by the respondent. The Tribunal decided it had jurisdiction to hear and

dispose of the complaint of Mr. Chaves concerning the acting appointments of J. Rutley, K. White, M. Tudor, K. Patterson, A. Vanhorn and L. Flanagan and ordered the provision of information.

SUMMARY OF RELEVANT EVIDENCE

[6] The complainant testified and explained that he started his career with Correctional Services Canada in November 1991. He is presently the incumbent of a Social Programs Officer position at the WP-03 group and level. As a result of a previous selection process, he had performed the duties of a Parole Officer on an acting basis on two separate occasions—in 1994, for a period of four months, and from July 2004 to September 2005.

[7] In September 2005, the complainant was informed that his acting appointment was to come to an end. The complainant was told that, in accordance with the departmental guidelines outlined in the *Bulletin on Acting Appointments* (the Bulletin), the acting appointment had to be ended since he had been acting for more than 12 months. The complainant accepted this explanation at the time.

[8] On October 13, 2005, the complainant sent an email to the Acting Unit Manager, Ms. Caroline Rueberer, informing her he was still interested in being considered for further acting assignments in the Parole Officer positions.

[9] The complainant stated he was not informed of the reasons he was not considered, nor was he informed of any non-advertised process in progress. He only found out after the fact, when individuals started acting in the positions. He further stated that no notification of appointments, including the right to complain to the Tribunal, was posted as a result of the non-advertised appointment process.

[10] When asked under cross-examination if he was alleging bad faith or personal favouritism, the complainant stated it was difficult to do. He further stated that there was a pattern in acting opportunities and that this pattern could be evidence of abuse of authority.

[11] As for favouritism, the complainant's response was that the departmental guidelines on acting appointments were not applied with the same rigour for others as they were for him.

[12] The complainant stated that the actions themselves spoke to bad faith and personal favouritism. The reasons given, (i.e. consistency and experience), to justify the extensions of acting appointments were unfair since he was a serious contender for the position as a seasoned and experienced Parole Officer who performed the duties for over a year.

[13] Mr. Bruce Somers, Acting Warden, testified that he had been Deputy Warden since June 2006 at Millhaven Institution. He explained that his main responsibilities were to manage the general operations, case management and security at the institution

[14] Mr. Somers explained that when he arrived in June 2006 he was given a clear mandate to eliminate the backlog in completing the correction plans and bring the compliance rate to 100 percent. Completing correction plans on time is essential to determine the placement of inmates. Failure to do so has consequences such as inmates having to stay longer at Millhaven Institution, bed shortages on a daily basis, delays for the completion of the correction measures and the release of the inmate. Mr. Somers also stated that another serious consequence of not having a compliance rate of 100 percent is that the department cannot meet its mandate as the inmate is not back in society for lack of programming and remains incarcerated longer because of not being placed in the system in a timely fashion.

[15] Mr. Somers explained the rationale for choosing the non-advertised process. He referred to the Warden's letter of August 2006 which he stated explained the rationale for the initial appointments: the Department was faced with a backlog and faced the prospect of not having enough cells to accommodate the number of new admissions from Ontario. The Warden developed an action plan where he indicated that

maintaining additional resources would reduce the backlog and ensure full compliance with the completion of timely correctional plans.

[16] He also stated that the same rationale was used for the decision to use the non-advertised process for the extensions of acting appointments because the same situation continued to exist. He further stated that the target date to meet the 100 percent compliance rate was November 2006.

[17] Mr. Somers testified that removing the individuals in the acting positions to appoint different individuals would have had a serious impact on the objective because it would have taken approximately four months for individuals to be fully operational in the positions. He went on to say that when June came around it became paramount to maintain momentum to eliminate the backlog on time since the incumbents were meeting the targets as for the number of cases completed.

[18] Finally, Mr. Somers stated there was no favouritism on his part as he did not know any of the individuals and his reason to continue and extend the acting appointments was for operational purposes only in order to ensure the November 2006 deadline was met.

[19] Ms. Caroline Rueberer testified and explained why and how she conducted the non-advertised process.

[20] Ms. Rueberer became the Acting Unit Manager of the Millhaven Assessment Unit in October 2005. Her main responsibilities are the overall operations of the intake assessment unit. More specifically, she is responsible for the security and the management of inmate cases. She supervises approximately 140 employees in various categories: 30 Parole Officers, three case management supervisors, four administrative staff, four CX supervisors, 100 CX officers and one Aboriginal Liaison Officer.

[21] Ms. Rueberer stated that when she arrived in the unit she was given the mandate to bring the unit up to 100 percent compliance of the correction plans. At the time, the compliance rate was at 19 percent. There was an insufficient number of Parole Officers

and there was an increase in the number of inmate intake. There were more inmates than the number of beds.

[22] Additional resources were made available on a temporary basis and Ms. Rueberer sent out, in late October or early November 2005, a letter of interest to employees asking if any were interested in acting appointments as Parole Officers. She could not clearly remember how many demonstrated interest. She remembered that the complainant had demonstrated his interest earlier and decided to include him in this non-advertised process.

[23] Ms. Rueberer assessed the individuals against the Statement of Merit Criteria, more specifically on the following criteria :

- Education: degree in criminology, sociology or education in similar areas;
- Orientation training;
- Experience: individuals with past intake experience;
- Performance: any performance issues;
- Leave usage.

[24] Ms. Rueberer explained that some individuals were screened out because they did not have the orientation training. Candidates who did not meet one of the criteria would be screened out.

[25] Ms. Rueberer went on to say that the complainant was considered for this process but was screened out because he did not meet the education criteria. The complainant did not have a degree in criminology, sociology or education in similar areas. The complainant's résumé indicates he has a degree in Economics. He could not and was not considered further in this process.

[26] The assessment board identified the seven employees who were the "best fit" for the position. Their names were submitted to the Warden who confirmed the selection and signed the letters of offer. Once the appointments were confirmed, Ms. Rueberer explained she sent an email to all who expressed an interest to inform them of the

results. She also confirmed in her email that no right to recourse under the *PSEA* was indicated.

[27] As for the subsequent extensions, Ms. Rueberer spoke with the Warden, and in order to meet the 100 percent compliance objective, it was decided not to rotate individuals into the acting positions. The rationale was provided to the Warden on the choice of a non-advertised staffing process and the same rationale was used to justify the decision not to rotate the acting appointments. In addition, it would take four to five months for individuals to reach their full potential and be fully functional. The Warden then allowed and approved the extension of the acting appointments.

[28] Ms. Rueberer also confirmed that all acting assignments came to an end, with the exception of one, in November 2006. The one acting situation which was not terminated was to replace someone away on leave. This opportunity was offered to the complainant with the condition that he would have to work over the Christmas holiday. The complainant refused the opportunity.

[29] Ms. Rueberer finally stated that the acting opportunity was offered to the complainant because she was attempting to have the education criterion changed but she was not successful in doing so.

[30] Ms. Rueberer was asked if she exercised any personal favouritism in this process and her answer was she did not and she relied on the supervisors and the Deputy Warden's assessments. She did not know any of the individuals.

[31] Ms. Cornelia Biscaro also testified. Ms. Biscaro is the Regional Manager Resourcing at the Regional Headquarters in Kingston since August 17, 2005. Her responsibilities include staffing, classification, human resources programs on equal opportunity and official languages, human resources planning, and awards. Ms. Biscaro stated she was involved in this staffing process on the initial appointments under four months.

[32] Ms. Biscaro explained that this process was treated as if it were under the old PSEA: a right of appeal had been posted instead of a right to complain under the *PSEA*. She further stated having made an honest mistake because at the time there was a bit of confusion and they were treating the process as if it were under the old legislation instead of the new legislation.

[33] Ms. Biscaro also confirmed that no notification under the *PSEA* was made. When questioned on the fact that there were no rights of appeal for certain appointments, Ms. Biscaro stated that all staffing was being regionalized. Therefore, the notices could have been missed. The staffing process was never, in their mind, treated as a process subject to the *PSEA*. They always considered the process as being under the old PSEA, which explains why no right to complain was issued in accordance with the *PSEA*.

ISSUES

[34] The Tribunal must answer the following questions:

- (i) Did the respondent abuse its authority in choosing a non-advertised staffing process to extend acting appointments for several individuals?
- (ii) Did the respondent abuse its authority in eliminating the complainant on the ground that he did not meet the education requirement, one of the essential qualifications?
- (iii) Did the respondent abuse its authority in failing to notify the persons in the area of selection of the appointments and their right to complain under the *PSEA*?

Issue I: Did the respondent abuse its authority in choosing a non-advertised staffing process to extend acting appointments for several individuals?

SUBMISSIONS

A) COMPLAINANT'S SUBMISSIONS

[35] The complainant alleges that the respondent was accountable for complying with the departmental guidelines for choosing a non-advertised process. The guidelines are found in the Bulletin which describes the process to be followed to extend acting appointment periods beyond one year. The complainant submits that the respondent had to provide written reasons, not only to the Deputy Commissioner in the region, but this rationale had to be sent to National Headquarters.

[36] The complainant submitted in evidence a list of individuals who were acting in positions and the periods for each of them. The complainant claims that the respondent did not apply the same rigour on the application of the departmental guidelines to these appointments as it did to his appointment on the issue of acting appointments. In his opinion, this constitutes abuse of authority and personal favouritism.

B) RESPONDENT'S SUBMISSIONS

[37] The respondent submits that the complainant's removal from the acting position is clearly beyond the jurisdiction of the Tribunal and that it is not the issue before the Tribunal.

[38] The respondent submits that both Mr. Somers and Ms. Rueberer provided the context in which the decision was made, a reasonable rationale and that no evidence was adduced to demonstrate that the respondent's behaviour could be perceived as "outrageous". If anything, the respondent submitted that both the respondent's witnesses demonstrated good faith and willingness to achieve the departmental mandate to meet the 100 percent compliance rate.

C) PUBLIC SERVICE COMMISSION'S SUBMISSIONS

[39] The Public Service Commission (the PSC) argues that subsection 15(3) of the *PSEA* allows an employee who has concerns to request that the deputy head

investigate these concerns. Although the deputy head does not have to investigate every request, it is a potential mechanism to address a problem in a staffing process. The PSC adds that the PSC's power to investigate and take corrective action under subsection 67(1) of the *PSEA* is provided to the deputy head under section 15.

[40] For an act in an appointment process to constitute abuse of authority, it 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 favoritism.

ANALYSIS

[41] The complaint was made under paragraphs 77(1)(a) and (b) of the *PSEA*. Subsection 77(1) of the *PSEA* reads as follows:

77. (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Tribunal's regulations — make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of

(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);

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

(c) the failure of the Commission to assess the complainant in the official language of his or her choice as required by subsection 37(1).

[42] This subsection provides for the right to file a complaint if a person has not been appointed or proposed for appointment by reason of abuse of authority in the application of merit, in choosing between an advertised and a non-advertised internal appointment process and the failure to assess the complainant in the official language of his choice.

[43] According to section 33 of the *PSEA*, the PSC or its delegate may choose an advertised or non-advertised process to make an appointment: "In making an appointment, the Commission may use an advertised or non-advertised appointment process".

[44] Thus, the complainant has the onus of proving that in choosing a non- advertised process, the respondent abused its authority. Although the complainant challenges seven acting appointments, there are only two where the appointments exceeded one year. In these two cases, both appointees were initially appointed in August 2005 and were extended several times until August 2006. In August 2006, a further extension was granted until November 2006. These are the extensions challenged by the complainant.

[45] In order to prove his allegation, the complainant relies on the department's Bulletin. The complainant contends that to extend acting appointments, the respondent should have abided by the guidelines found in the Bulletin for two of the acting appointments, which have exceeded the one-year period.

[46] The Bulletin outlines the following:

A written rationale demonstrating the decision-making process, including why the choice of rotational assignments or an advertised process was not used and in the case of an advertised appointment process, how the area of selection was established.

(Emphasis added)

[47] The only written rationale filed as evidence is a letter from the Warden to the acting Assistant Deputy Commissioner, Corporate Services, which sets out the reasons why the acting appointments should be extended. These reasons are further explained below.

[48] The Bulletin also outlines the information which must be included in the written rationale. According to Section 7 "Requirements", the justification for acting appointments extending beyond 12 months must include:

- whether the position is vacant or encumbered;
- the staffing strategy;
- the choice of appointment process for the initial acting including the area of selection;
- the reasons why the acting should be extended addressing both the impact on the organization and employees.

[49] The Tribunal has reviewed the evidence adduced on the respondent's staffing strategy and finds that the respondent had clearly met its guidelines. Back in October 2005, the Department was faced with a backlog regarding the number of new admissions from Ontario and faced the prospect of not having enough cells to accommodate new inmates. Both Ms. Rueberer, in October 2005, and Mr. Somers, in June 2006, were given clear mandates to eliminate the backlog and bring the unit from 19 percent to 100 percent compliance in completing the correction plans. The target date to meet the 100 percent compliance rate was November 2006.

[50] Therefore, a decision was made to hire additional Parole Officers on an acting basis to address the backlog to avoid the consequences that could result from it. A non-advertised appointment process was chosen for the initial acting appointments to address the backlog.

[51] On August 2006, the Warden developed an action plan where he indicated that maintaining existing resources, the acting Parole Officers, could reduce the backlog and ensure full compliance (the 100 percent target rate) with the completion of on time Correctional plans. It was then determined that the acting appointments would be extended and two of these, beyond 12 months. At this time, employees were already occupying the Parole Officer positions on a temporary basis.

[52] Since the backlog still existed in August 2006, the same rationale was used for the decision to use the non-advertised process for the extensions of acting appointments. Removing or rotating the employees in the acting positions to appoint different employees would have had a serious impact on the objective to eliminate the backlog.

[53] The respondent explained the reasons why the acting appointments should be extended as well as the impact on the department and employees. Failure to complete the correction plans would delay the completion on the correction measures for inmates and, subsequently, the release of inmates. These facts as well as the staffing strategy clearly demonstrate the urgency of the situation for the department and employees: a

prolonged backlog could create a difficult situation to manage and put even more stress on employees.

[54] Moreover, since the department had a clear mandate to meet, there was no time to train new employees. It would have taken approximately four to five months for employees to be fully operational in the Parole Officer positions.

[55] The Tribunal finds that the respondent based its decision on operational and organizational needs. The evidence shows that urgent needs existed and immediate action was required in order to meet the target of 100 percent compliance of inmate intake, and that additional temporary resources were obtained to allow to meet the department's mandate and objectives.

[56] The Tribunal is satisfied that proper justification was provided in support of the use of a non-advertised appointment process and that this justification meets the requirements outlined in the Bulletin.

[57] The complainant failed to provide evidence to demonstrate that the rationale provided by the respondent had no basis or was unreasonable. The complainant did not challenge the rationale provided by Mr. Somers and Ms. Rueberer on the backlog in the compliance rate for inmate intake and the crisis caused by this backlog.

[58] The complainant also claims that other individuals were extended while he was not. According to the complainant, the respondent did not apply the same rigour on the application of the Bulletin towards other employees. Indeed, the complainant was told that, in accordance with the Bulletin, the acting appointment had to be cancelled since he had been acting for more than 12 months. Although the complainant alleges he was treated unfairly, the explanation provided was not the reason why he was not selected for appointment. The complainant was not selected because he did not meet the essential qualification of education. This issue is addressed below.

[59] The complainant has not met his burden of proving abuse of authority in the choice of a non-advertised appointment process.

Issue II: Did the respondent abuse its authority in eliminating the complainant on the ground that he did not meet the education requirement, one of the essential qualifications?

SUBMISSIONS

[60] The complainant submits that even though he was eliminated because he did not meet the education requirement, he was still offered an acting opportunity in the position of Parole Officer in November 2006 to replace an employee on leave.

[61] The respondent submits that the complainant did not meet the education requirement. Ms. Rueberer tried to change this requirement in order to relax the specificity of the education criteria, but did not succeed in doing so.

[62] The PSC did not make submissions on this issue.

ANALYSIS

[63] In the Statement of Merit Criteria, one of the essential qualifications required is education. The requirement is as follows:

Graduation with a degree from a recognized university in a field that focuses on understanding and assessing human behaviour, such as in Sociology, Psychology, Social Work, Criminology or Education **or** graduation with a degree from a recognized university and an additional combination of post secondary studies in a field that focuses on understanding and assessing human behaviour

[64] Ms. Rueberer testified that the complainant did not have a degree in criminology, sociology or education in similar areas. This evidence is unchallenged. Moreover, the complainant admits that he does not meet the education requirement. Clearly, the complainant did not meet one of the essential qualifications.

[65] The complainant insists that although he did not have one of the essential qualifications, he was still offered an acting opportunity in the position of Parole Officer. Ms. Rueberer stated in her testimony that the reason why the complainant was offered the acting opportunity in November 2006 was that she was attempting to modify the education requirement for this position, but she was not successful in doing so. The

complainant introduced no evidence to show that he should have been included in the pool of candidates to be considered for the acting appointment. In addition, the complainant refused the acting opportunity that was offered and did not provide reasons.

[66] The Tribunal cannot agree with the complainant's position that because he was offered the acting opportunity in November 2006, the respondent abused its authority. The complainant still had to meet the education requirement.

Issue III: Did the respondent abuse its authority in failing to notify the persons in the area of selection of the appointments and of their right to complain under the *PSEA*?

SUBMISSIONS

[67] The complainant claims that the respondent should have granted rights to recourse under the *PSEA* for all the acting appointments immediately upon the coming into force of the *PSEA*, on December 30, 2005. The complainant further claims that the respondent should have put an end to the acting appointments made prior to December 30, 2005, redone the process in accordance with the provisions of the *PSEA* and issued a notice of appointment indicating a right to complain. The complainant claims that not doing so constitutes abuse of authority and bad faith.

[68] The respondent submits that the Tribunal has already dealt with this issue in another decision. The respondent is of the view that this mistake was rectified by the Tribunal taking jurisdiction and therefore granting the right to complain.

[69] The respondent drew attention to Ms. Biscaro's testimony that some errors occurred. The Department was in a transition period and was not clear on how to proceed. Ms. Biscaro also stated that it was an honest mistake which was corrected following the issuance of the Tribunal's decision in *Wylie v. President of the Canada Border Services Agency et al.*, [2006] PSST 0007.

[70] The PSC did not make submissions on this issue.

ANALYSIS

[71] The complainant is asserting that the respondent's failure to notify persons in the area of selection of their right to complain constitutes abuse of authority. When the Tribunal rendered an interim decision in this case (see *Chaves v. Commissioner of the Correctional Service of Canada et al.*, [2007] PSST 0009), it had to consider a jurisdictional issue and in so doing determined that certain persons in the area of recourse had not been given proper notice. This was an error. However, the fact that the Tribunal determined that Mr. Chaves could bring his complaint has cured the defect with respect to notice. Therefore it is unnecessary for the Tribunal to address the issue.

DECISION

[72] For all these reasons, the complaint is dismissed.

Francine Cabana
Member

PARTIES OF RECORD

Tribunal File:	2006-0102
Style of Cause:	<i>Paul Chaves and the Commissioner of the Correctional Service of Canada et al.</i>
Hearing:	August 15 and 16, 2007 Kingston, Ontario
Date of Reasons:	February 4, 2008
APPEARANCES	
Ken Veley	For the Complainant
Stéphane Bertrand and Lesa Brown	For the Respondent
John Unrau	For the Public Service Commission