



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2007- 0093

OTTAWA, AUGUST 1, 2008

LOUIS CANNON

COMPLAINANT

AND

THE DEPUTY MINISTER OF FISHERIES AND OCEANS

RESPONDENT

AND

OTHER PARTIES

MATTER	Complaint of abuse of authority pursuant to subsection 77(1) of the <i>Public Service Employment Act</i>
DECISION	The complaint is dismissed
DECISION RENDERED BY	Francine Cabana, Member
LANGUAGE OF DECISION	French
INDEXED	<i>Cannon v. Deputy Minister of Fisheries and Oceans et al.</i>
NEUTRAL CITATION	2008 PSST 0021

REASONS FOR DECISION

INTRODUCTION

[1] The complainant, Louis Cannon, is an indeterminate employee (deckhand – crew member) of long standing with the Canadian Coast Guard (CCG), a special operating agency within the Department of Fisheries and Oceans. He filed a complaint with the Tribunal on the basis that he was not given an acting appointment to the SO-MAO-04 commander position in the CCG as a result of an abuse of authority by the respondent, the Deputy Minister of Fisheries and Oceans.

[2] The complainant alleges that the respondent abused its authority by using a non-advertised appointment process to make an acting appointment to the commander position. He further alleges that the respondent abused its authority in applying the essential qualifications. He is challenging the acting appointment of Alain Guimont from March 31, 2007 to March 31, 2008 following a non-advertised appointment process.

[3] Following the pre-hearing conference between the complainant and the respondent, the Tribunal decided to render its decision without an oral hearing, in accordance with subsection 99(3) of the *Public Service Employment Act* (the *PSEA*). The decision is based on the submissions of the parties and the documents on file.

SUMMARY OF RELEVANT EVIDENCE

[4] In order to address a shortage of officers, the CCG initiated a succession strategy in February and March 2006 to staff a number of officer positions at various levels. The strategy took the form of advertised internal and external processes. The results of the internal advertised appointment process (2006-DFO-QC-IA-918166) for the position of SO-MAO-04 commander were released in July 2007, and only one candidate qualified for the position. However, this candidate accepted another commander position as a result of another staffing process. Consequently, no officer pool could be established.

[5] In planning workforce deployment in the Quebec Region, Jean Du Sablon, Acting Marine Superintendent, became aware of a pressing need to staff the commander

position on the *Cap Rozier*, a CAP rescue ship of 33.8 gross registered tons (GRT) operating between Matane and Gaspé.

[6] Realizing that the CCG's operational requirements could not await the results of advertised process 2006-DFO-QC-IA-918166, Mr. Du Sablon decided to staff the SO-MAO-04 commander position on the *Cap Rozier* temporarily by means of an acting appointment following a non-advertised appointment process (06-DFO-ACIN-MTJ-919916). In determining the essential qualifications, Mr. Du Sablon chose a master's certificate restricted to 60GRT, since the process was for a specific vessel, the *Cap Rozier*, with a GRT below 60.

[7] In April 2006, Mr. Guimont was appointed on an acting basis as *Cap Rozier* commander for four months less a day. He has a master's certificate restricted to 60GRT valid on the *Cap Rozier* for service between Rimouski and Carleton up to 50 miles offshore. Since the results of the advertised appointment process were not available until July 2007, Mr. Du Sablon extended Mr. Guimont's acting appointment from August 10, 2006 to March 31, 2007, and subsequently from March 31, 2007 to March 31, 2008. CCG employees were informed of Mr. Guimont's acting appointments by notices dated September 14, 2006 and February 19, 2007 posted on board each CCG vessel, at the Trois-Rivières hovercraft base and at the Operations Office in Québec City.

[8] On March 2, 2007, the complainant, who has a 350GRT master's certificate, filed his complaint with the Tribunal.

[9] There are two main classes of position on CCG vessels: Ships' Officers (SO), the group to which Mr. Guimont belongs, and Ships' Crew (SC), the group to which the complainant belongs.

[10] Ships' officer positions are managed from an assignment pool, rather than by vessel. The Qualification Standards established by the Canada Public Service Agency (CPSA) stipulate that the minimum certification standards for positions in the CCG are governed by the *Canadian Coast Guard Fleet Orders* (CGFOs). In order to make an indeterminate appointment to the position of SO-MAO-04 commander in accordance with the CGFOs and the CAP skills profile, candidates must have a 350GRT master's

certificate, since the person selected is appointed from the assignment pool and may subsequently be assigned to various vessels anywhere in the Québec Region.

[11] With respect to term or acting appointments, the CGFOs state that the certification required to meet the vessel's CAP skills profile may be less than that required for an indeterminate appointment, while still satisfying Transport Canada's legal requirements:

Certification requirements for term or temporary staffing

For term or temporary staffing, the minimum certification for given operations or voyages is the minimum level established in the vessel's skills profile, unless otherwise indicated in these Orders.

Skills profiles for CCG vessels indicate, for each position on board, a certification level that meets or exceeds the requirements of the *Crewing Regulations* of the *Canada Shipping Act*.

The certification required to satisfy the vessel's skills profile may therefore be less than is required for an indeterminate appointment.

With respect to term or temporary staffing, every crew member must meet the qualifications required by the vessel's skills profile, unless an exemption from these requirements is granted in accordance with the following rules.

[Emphasis added] [Translation]

[12] The CAP skills profile indicates that for the position of commander, a 350GRT master's certificate **or** a master's certificate restricted to 60GRT is required. However, there is a note that accompanies the master's certificate restricted to 60GRT to the effect that the certificate holder is limited to operations in Canada's minor waters.

ISSUES

[13] Did the respondent abuse its authority in choosing a non-advertised appointment process to extend Mr. Guimont's acting appointment from March 31, 2007 to March 31, 2008?

[14] Did the respondent abuse its authority in establishing and applying the essential qualifications with respect to Mr. Guimont's acting appointment?

ARGUMENTS OF THE PARTIES

A) COMPLAINANT'S ARGUMENTS

[15] The complainant alleges that Mr. Guimont does not meet one of the essential qualifications for an acting appointment to the position of commander, namely, possession of a 350GRT master's certificate, as required for the advertised appointment process for an indeterminate position (2006-DFO-QC-IA-918166). However, he states that he is not questioning Mr. Guimont's competence as a navigation officer. He explains that Mr. Guimont's case is being used only as an example, and that he chose this case in particular because it is a position with which he is familiar and for which he has the skills and qualifications.

[16] The complainant states that he is opposed to the respondent's repeated use of non-advertised appointment processes which, in his view, seem to have become the norm in staffing in his region in recent years, thus depriving employees of the opportunity to apply for many positions on CCG vessels. According to the complainant, the respondent systematically and repeatedly offers acting assignments and extensions at its discretion, often to the same people. He is of the view that this situation is against his interests and is hindering his career progression within the CCG.

[17] The complainant states that during the period from August 2, 2007 to March 7, 2008, there were six appointments resulting from an advertised appointment process, more than 30 appointments resulting from a non-advertised appointment process, and over 100 extensions of such appointments.

[18] The complainant refers to the Public Service Commission's (PSC's) *Appointment Policy Considerations* in order to demonstrate that the respondent has abused its authority by using a non-advertised appointment process. He points out that the respondent is not respecting the core and guiding staffing values of merit, impartiality, fairness, transparency, access and representativeness.

[19] As corrective action, the complainant requests:

- (i) revocation of Mr. Guimont's acting appointment;
- (ii) that the respondent cease its repeated use of non-advertised appointment processes;
- (iii) that the respondent allow persons whose skills and qualifications meet the criteria and requirements determined by the director general to be given priority for selection;
- (iv) that the respondent exercise its discretion to use a non-advertised appointment process for permanent employees who meet the criteria and certification requirements by applying the on-the-spot employment offer process developed by the PSC in 2007;
- (v) that his candidacy for a permanent position as commander of a search and rescue vessel be considered.

B) RESPONDENT'S ARGUMENTS

[20] The respondent argues that Mr. Guimont is an officer who was available when the appointment was made, and who possesses all the essential qualifications required, including the master's certificate restricted to 60GRT, to occupy the position of SO-MAO-04 commander on the *Cap Rozier*. The respondent adds that the acting appointment is based on merit and does not constitute an abuse of authority.

[21] The respondent points out that Mr. Du Sablon determined the essential qualifications for the position with reference to the Fisheries and Oceans policy on non-advertised appointment processes ("the departmental policy"), the PSC Appointment Policy, the CPSA Qualification Standards and the CAP skills profile. According to the respondent, the departmental policy repeats the principles stated in the PSC Appointment Policy. Mr. Du Sablon also relied on the CAP skills profile with respect to the minimum requirement for the master's certificate.

[22] The respondent submits that Mr. Du Sablon assessed Mr. Guimont's abilities against the essential qualifications for the *Cap Rozier* commander position in accordance with subsection 30(2) of the *PSEA*. In doing so, he used several assessment methods, in accordance with section 36 of the *PSEA*. For example, Mr. Du Sablon took into account Mr. Guimont's work experience with the CCG, his own observations of Mr. Guimont, and Mr. Guimont's file.

[23] Moreover, according to the respondent, the requirement for a master's certificate restricted to 60GRT meets or exceeds the applicable qualification standards set by the employer. In particular, the skills profiles for CCG vessels indicate, for each deck position, a level of certification that meets or exceeds the requirements of the *Canada Shipping Act*, R.S.C. 1985, c. S-9 (the *CSA*), and its *Regulations*. The CAP skills profile for vessels like the *Cap Rozier* states that the commander must have the master's certificate restricted to 60GRT prescribed by the *CSA*.

[24] The respondent asserts that the master's certificate restricted to 60GRT held by Mr. Guimont, awarded under ministerial seal, states that it is valid on the *Cap Rozier*. The respondent further argues that the area specified on the master's certificate, namely, from Rimouski to Carleton, exceeds the *Cap Rozier's* area of operations, namely, from Matane to Gaspé. According to the respondent, these references make it quite clear that Mr. Guimont's master's certificate restricted to 60GRT constitutes valid professional certification under the *CSA* to command the *Cap Rozier*.

[25] The respondent submits that requiring a 350GRT master's certificate in advertised process 2006-DFO-QC-IA-918166 does not obligate the respondent to require it in all subsequent processes. Moreover, the respondent points out that the circumstances of the advertised process are different from those of the non-advertised process that is the subject of this complaint. In contrast to the advertised process, the respondent submits that Mr. Du Sablon was not seeking candidates able to work on various vessels in the CCG fleet. He, therefore, chose to require a master's certificate restricted to 60GRT, because this non-advertised process was for the *Cap Rozier*, and her gross registered tonnage is under 60.

[26] The respondent maintains that Mr. Guimont's appointment meets all the requirements of the PSC Appointment Policy, and the departmental requirements, and is consistent with the CCG's 2007 Human Resources plan. Moreover, the respondent adds that it is bound by the collective agreements applicable to CCG vessels, and by the union-management agreement stating that acting appointments at the higher levels will be offered first to officers who are available and have the qualifications required for the position.

[27] The respondent explains that Mr. Guimont's appointment is in accordance with the departmental guidelines which require a written rationale showing how the decision met the policy requirements. Such a rationale for the period from April 10, 2006 to March 31, 2007 was provided and attached to the file for this appointment. A written assessment of Mr. Guimont was also prepared for the same period, based on the merit criteria and conditions of employment. The respondent points out that, since circumstances had not changed since the last extension, Mr. Du Sablon re-used the documentation for the extension of Mr. Guimont's acting appointment from August 10, 2006 to March 31, 2007 for the extension from March 31, 2007 to March 31, 2008, without changing the dates. A Personnel Action Request was also supplied for the extension of the acting appointment from March 31, 2007 to March 31, 2008.

[28] The respondent also argues that there is no requirement to consider more than one person in making an appointment as stated in subsection 30(4) of the *PSEA*. It further submits that the complainant has not shown that the decision to choose a non-advertised appointment process constituted an abuse of authority. The respondent therefore requests that the Tribunal dismiss the complaint.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[29] The PSC submitted general arguments concerning the concept of abuse of authority, and how the Tribunal should address that issue.

ANALYSIS

Issue 1: Did the respondent abuse its authority by choosing a non-advertised appointment process to extend Mr. Guimont’s acting appointment from March 31, 2007 to March 31, 2008?

[30] Section 33 of the *PSEA* gives the PSC, or its delegate under section 15 of the *PSEA*, discretion in choosing between an advertised or non-advertised appointment process. However, this discretion is not absolute, and a complaint may be filed with the Tribunal for abuse of authority with respect to the choice of process under paragraph 77(1)(b) of the *PSEA*. The onus is on the complainant to show, on a balance of probabilities, that there has been an abuse of authority, as established by the Tribunal’s caselaw. The relevant provisions of the *PSEA* read as follows:

33. In making an appointment, the Commission may use an advertised or non-advertised appointment process.

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; (...)

[31] The Department’s Policy Statement reads as follows under the headline “Document for Staffing File”:

Managers proceeding with a non-advertised appointment process must provide:

- a. a written rationale demonstrating how their decision meets the requirements of section 5.1 stated in this policy;
- b. a written narrative assessment of the proposed appointee against the merit criteria and conditions of employment.

[32] The evidence shows that a written rationale for the use of a non-advertised appointment process, and a narrative assessment, were provided for the extension of Mr. Guimont’s acting employment until March 31, 2007, and that the same documentation was re-used to justify the extension until March 31, 2008. Mr. Du Sablon

provided the following rationale for using a non-advertised appointment process in this case:

Policy principles satisfied (reference: section 5.1):

(i) This appointment is a result of the domino effect caused by vacancies in commander positions at level SO-MAO-04. An advertised internal process is under way, and should be completed by the end of the fiscal year. (...)

Circumstances considered: (...)

(ii) This is a case of a staff shortage, as defined in the HR plan. (...)

[Translation]

[33] Moreover, CCG employees, including the complainant, were informed of Mr. Guimont's acting appointments by means of notices posted on every CCG vessel, at the Trois-Rivières hovercraft base and at the Operations Office in Québec City.

[34] The Tribunal finds that the complainant has not submitted evidence to show that the rationale and narrative assessment provided by the respondent were unfounded or unreasonable. The circumstances—a staff shortage, and an uncompleted internal appointment process—required that Mr. Du Sablon staff the position on an urgent basis. A non-advertised appointment process was chosen for its speed, given the pressing operational requirement to staff the *Cap Rozier* commander position. Mr. Du Sablon prepared a rationale and a narrative assessment as required by the departmental policy when he initiated the non-advertised appointment process.

[35] Subsection 58(2) of the *PSEA* states that the extension of a specified term does not constitute an appointment and does not entitle any person to make a complaint under section 77. However, subsection 58(3) states that this section does not apply in respect of appointments made on an acting basis and, consequently, the extension of an acting appointment constitutes an appointment that can give rise to a complaint. See *Chaves v. Commissioner of the Correctional Service of Canada et al.*, [2007] PSST 0009, and *Wylie v. President of the Canada Border Services Agency et al.*, [2006] PSST 0007.

[36] In this case, when Mr. Guimont's acting appointment was extended from March 31, 2007 to March 31, 2008, this was a new appointment within the meaning of the *PSEA*. However, a new rationale and narrative assessment were not prepared when

the acting appointment was extended. Since the extension of the acting appointment constituted a new appointment, the Tribunal finds that a new rationale and narrative assessment for the period from March 31, 2007 to March 31, 2008 should have been prepared in accordance with the departmental policy.

[37] As the Tribunal has established in its caselaw, abuse of authority constitutes more than mere errors or omissions. See *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008. In this case, the Tribunal finds that this was a technical error only and not an abuse of authority. The evidence shows in fact that the circumstances had not changed since the last extension, and that no candidate had been identified in the selection process at that date.

[38] While the failure to provide a new rationale and a new narrative assessment does not in and of itself constitute an abuse of authority here, the Tribunal is of the view that it is preferable that a new rationale and a new narrative assessment be prepared when an acting appointment is extended. In this case, the extension of an acting appointment constitutes an appointment that is subject to a complaint to the Tribunal under section 77 of the *PSEA*.

[39] Given all these facts, the Tribunal finds that there was no abuse of authority when the respondent chose a non-advertised appointment process.

Issue 2: Did the respondent abuse its authority in establishing and applying the essential qualifications with respect to Mr. Guimont's acting appointment?

[40] It is important to distinguish clearly between the internal advertised appointment process (2006-DFO-QC-IA-918166) and the non-advertised process (2006-DFO-ACIN-MTJ-919916). The advertised appointment process was to staff positions from the assignment pool and, thus, required a 350GRT master's certificate since candidates could be working on various vessels in the CCG fleet with differing GRT ratings. The non-advertised appointment process for the acting appointment to the commander position sought, rather, a candidate assigned to work on a specific vessel—the *Cap Rozier*—for which a master's certificate restricted to 60GRT is sufficient.

[41] The following provisions apply here:

30. (2) An appointment is made on the basis of merit when

(a) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and

(b) the Commission has regard to

(i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,

(ii) any current or future operational requirements of the organization that may be identified by the deputy head, and

(iii) any current or future needs of the organization that may be identified by the deputy head.

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

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

[42] In *Rinn v. Deputy Minister of Transport, Infrastructure and Communities et al.*, [2007] PSST 0044, the Tribunal analysed these provisions in the context of a similar complaint in which it was alleged that the person appointed on an acting basis lacked an essential qualification for the indeterminate position, namely, piloting experience. The Tribunal stated:

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

[43] Thus, subsection 31(2) of the *PSEA* states that the essential qualifications established for a position by the deputy head and used in making an appointment based on merit must meet or exceed any applicable qualification standards established by the CPSA for the employer.

[44] The only essential qualification contested by the complainant involves Mr. Guimont's lack of appropriate certification, namely, a 350GRT master's certificate, as required in internal advertised appointment process 2006-DFO-QC-IA-918166.

[45] The Tribunal finds that the respondent did not abuse its authority in determining the essential qualifications for an acting appointment to the position since the qualifications are consistent with applicable standards set by the CPSA. The skills profiles for CCG vessels indicate, for each position, that the certificate must meet or exceed the requirements of the CSA and its Regulations. The CAP skills profile for vessels like the *Cap Rozier* indicates that the commander must have a master's certificate restricted to 60GRT as prescribed by the CSA. Moreover, the CGFOs clearly state that the certification required by the vessel's skills profile may be less than is required for indeterminate staffing. Thus, a master's certificate restricted to 60GRT is sufficient for an acting appointment, as in this case.

[46] Mr. Du Sablon opted for the master's certificate restricted to 60GRT, a decision that complies with the CPSA Qualification Standards, the CSA, the CGFOs and the CAP skills profile, since the purpose of the non-advertised appointment process was to staff an acting position on the *Cap Rozier*, whose GRT rating is less than 60, as opposed to an indeterminate position requiring a 350GRT master's certificate.

[47] Under subsection 30(4) of the *PSEA*, the respondent is not required to consider more than one person in making an appointment based on merit. Mr. Guimont was appointed in accordance with the merit criteria and conditions of employment, since he holds a master's certificate restricted to 60GRT, a qualification prescribed in the CGFOs and consistent with the CPSA Qualification Standards.

[48] The Tribunal finds that the essential qualifications, as established by the respondent, were consistent with the applicable qualification standards set by the CPSA, and that the respondent did not abuse its authority in applying these essential qualifications in the acting appointment of Mr. Guimont. The complaint of abuse of authority on these grounds is not substantiated.

DECISION

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

Francine Cabana
Member

PARTIES OF RECORD

Tribunal File:	2007-0093
Style of Cause:	<i>Louis Cannon and the Deputy Minister of Fisheries and Oceans et al.</i>
Hearing:	Written request, decided without the appearance of the parties
Date of Reasons:	August 1, 2008