

OTTAWA, FEBRUARY 2, 2009

FILE: 2008-0225

**STEVE WALL**

**COMPLAINANT**

**AND**

**THE DEPUTY MINISTER OF FISHERIES AND OCEANS**

**RESPONDENT**

**AND**

**OTHER PARTIES**

<b>MATTER</b>	Complaint of abuse of authority pursuant to paragraph 77(1)(a) of the <i>Public Service Employment Act</i>
<b>DECISION</b>	Complaint is dismissed
<b>DECISION RENDERED BY</b>	Helen Barkley, Member
<b>LANGUAGE OF DECISION</b>	English
<b>INDEXED</b>	<i>Wall v. Deputy Minister of Fisheries and Oceans et al.</i>
<b>NEUTRAL CITATION</b>	2009 PSST 0002

## REASONS FOR DECISION

### INTRODUCTION

[1] Steve Wall, the complainant, participated in an internal advertised appointment process for the position of Chief Cook (appointment process 07-DFO-IA-NFLD-926777) with the Canadian Coast Guard (CCG). He was assessed and was one of 29 qualified candidates. He was not one of the nine candidates selected from this pool for appointment. The selection was based on one asset qualification and three essential qualifications.

[2] On April 9, 2008 the complainant filed a complaint with the Public Service Staffing Tribunal (the Tribunal) alleging abuse of the authority by the respondent, the Deputy Minister of Fisheries and Oceans Canada, on two grounds. The complainant did not pursue the part of his complaint with respect to the choice of process under subsection *77(1)(b) of the PSEA*. Therefore this decision addresses only the complaint that the deputy head abused his authority in the application of merit.

[3] The complainant alleges that the appointment process was ambiguous in terms of exactly what type of Chief Cook positions were to be filled. He contends that because he had some unpleasant dealings with selection board members, he was not looked at fairly. He also alleges that the board did not take into account all information he had submitted and that the board improperly assessed his experience as Chief Cook.

### ISSUES

[4] The Tribunal must determine the following issue:

Did the respondent abuse its authority in the application of merit when it assessed but did not select the complainant for appointment?

## BACKGROUND

[5] An advertised appointment process was initiated by the respondent to fill Chief Cook positions (SC-STD-05) on Canadian Coast Guard (CCG) vessels in late 2007. The assessment board was composed of Patrick Boland and Mike Haydon, Logistics Officers, and Karen Lucas, Regional Human Resources (HR) Officer. Candidates were asked to complete a Behaviour Based Assessment (BBA), in which they gave examples of how they demonstrated each of the three abilities and the four personal suitability qualifications that were essential for the position. References were also contacted to assess the ability factors.

[6] To determine who would be selected for appointment from among the qualified candidates, the selection board, composed of Don Llewellyn, Superintendent, Marine Division, Wade Stagg, Acting Supervisor, Fleet Services, Mr. Haydon and Ms. Lucas, applied the first selection criterion, which was one of the asset qualifications: "experience in the duties and responsibilities of a Chief Cook onboard a ship or commercial establishment." The selection board decided that the minimum cut-off point would be two years' experience. Crew on CCG vessels generally work 28 days on and 28 days off, so the board sought two years in the position which would mean one full year working as Chief Cook.

## SUMMARY OF RELEVANT EVIDENCE

[7] The complainant stated that he was first hired as a Steward by CCG in 2002. His substantive position is that of Steward, although he frequently performs the duties of Second Cook and Chief Cook for CCG. He became an indeterminate employee of CCG in June 2006.

[8] Prior to joining CCG, the complainant had attended university for several years. He had worked in group homes with the severely disabled. He had also been self-employed and had a number of transferable skills.

[9] The complainant testified that he had had some unpleasant dealings with two of the selection board members, Mr. Llewellyn and Mr. Stagg, and he believed they had

not looked at his candidacy fairly. He stated that he had meetings with them about three years ago. At these meetings, they were concerned about his attitude.

[10] On cross-examination the complainant stated that he perceived these meetings as disciplinary, because Mr. Llewellyn stated he would contact the union and have the complainant dismissed if another report came back from the ship that his attitude was not good. He was not allowed to have a union representative present.

[11] The complainant testified further that he found the advertisement for the position of Chief Cook confusing. It stated under Type of Advertisement: "Indeterminate, Acting, Specified Period". The complainant stated that he was an indeterminate employee who was acting as a Chief Cook or Second Cook for a specified period. He felt as if he was applying for his own position, with no apparent benefit.

[12] Mr. Llewellyn testified on behalf of the respondent. He stated that he was responsible for the vessels and crew in the Newfoundland and Labrador Region. This included such matters as leave for employees, HR issues, running appointment processes, training of staff, standards on vessels and safety concerns. He has worked in CCG since 1984 and has been the Marine Superintendent for four years. About three years ago, the respondent undertook to staff all CCG positions on an indeterminate basis. This process was held to staff existing vacancies and to create a pool of qualified Chief Cooks from which appointments could be made for the following five years.

[13] As the delegated manager, Mr. Llewellyn developed the Statement of Merit Criteria (SMC) and job advertisement with Mr. Hayden, Logistics Officer and subject matter expert for this process. They received advice and guidance from the Human Resources Advisor.

[14] Mr. Llewellyn stated that the Chief Cook position is a vital one on a vessel. The crew is away from home, working for 28 days, often in heavy weather. The Chief Cook must be able to provide food in any conditions, as well as have good supervisory skills and good interpersonal skills. The cook can influence morale through the provision of good food. The Chief Cook has to ensure that the food is safe and not contaminated, as the vessels are audited by Health Canada.

[15] Mr. Llewellyn stated that he and Mr. Stagg met once with the complainant in January or February 2005 to discuss concerns about his attitude. He testified that he did not make any statement about speaking to the union to have Mr. Wall dismissed. First, Mr. Llewellyn had the authority to dismiss employees himself, and second, Mr. Wall had great potential as a cook.

[16] Mr. Stagg testified on behalf of the respondent. As Acting Supervisor, Fleet Services, CCG, Newfoundland Region, he is the manager of crew, personnel and training for the Region, which consists of about 700 employees. He was a Logistics Officer with the CCG for a number of years.

[17] Mr. Stagg stated that CCG has a number of vacancies and is constantly trying to recruit new employees, as there is a shortage of sea-going personnel. In the past three years, he ran a number of appointment processes for various positions such as Chief Engineer, Logistics Officer, Chief Cooks and Second Cooks.

[18] His main involvement in this appointment process was as a member of the selection board, to select employees from the qualified pool. Because of his background in logistics, he did provide some advice to Mr. Llewellyn as to the essential qualifications for Chief Cook.

[19] The selection board established the criteria for selection for appointment after the position was advertised, while the board was awaiting receipt of applications. The criteria for selection would be used once the assessment of the candidates was completed, to determine who should be appointed from among the qualified candidates. Criteria for selection were one of the asset qualifications listed on the SMC (experience in the duties and responsibilities of Chief Cook onboard a ship or commercial kitchen) and information received from referees on the following three abilities:

- Ability to carry out the day-to-day functions of a galley onboard a ship or commercial kitchen;
- Ability to supervise;
- Ability to comply with and apply the personal hygiene and safety standards.

[20] The selection board considered the asset qualification first. It was decided that to be appointed, candidates should have a minimum of two years' experience in the duties and responsibilities of Chief Cook. The qualified candidates that met this selection criterion would then be selected on the basis of information received from referees on these three abilities.

[21] Mr. Llewellyn stated that the BBA was chosen as the assessment method for abilities and personal suitability qualifications, as it allowed candidates two to three weeks to reflect on their qualifications and write out examples of how they demonstrated each qualification. This eliminated the concern that an assessment, such as an interview, is one single snapshot of performance and a candidate may have a bad day. Mr. Llewellyn stated that he liked this assessment method as past performance is a good predictor of future performance. Mr. Hayden developed the BBA in conjunction with the Human Resources Advisor.

[22] In terms of the concern that a candidate could be helped or someone else could write the BBA, Mr. Llewellyn noted that the board was interested in the example presented by the candidate and not how well he wrote. In addition, the board asked for a referee who could discuss the example given for each ability, and a verifier for each personal suitability qualification.

[23] Candidates were asked to provide a referee for each ability example and a verifier for each personal suitability qualification. Candidates were informed that a referee would be asked a series of questions about the ability, while a verifier would simply be asked to verify that the example provided was accurate. Mr. Stagg was not part of the assessment board, but had conducted 80 of the 90 references, as Mr. Hayden had returned to sea, and Mr. Boland was very busy. The references were contacted to assess the three abilities. Verifiers were not contacted.

[24] The complainant provided the name of Mr. Greening as the referee for each ability example and thus, Mr. Stagg had only to contact one referee for Mr. Wall. Other candidates provided a different referee for each ability. No one was contacted to verify the personal suitability qualifications. Thus, Mr. Stagg did not contact Mr. Walters, the

second name provided by the complainant. Mr. Stagg completed the reference checks and took down *verbatim* all information given. The evaluation of the reference checks was done by the assessment board.

[25] The assessment board evaluated the BBA and reference check information on a pass/fail basis. Twenty-nine candidates, including the complainant, were found to be qualified for appointment.

[26] The selection board applied the selection criteria to the 29 candidates that were found to be qualified. The selection board began with the asset qualification and found that 14 candidates met this experience. The complainant did not.

[27] When the selection board assessed the complainant against the asset qualification, it concluded he had six months experience as a Chief Cook. In fact, the complainant testified that he had worked 202 days as Chief Cook aboard CCG vessels. He explained that the board had not taken into account time allotted for days off, nor the lay-day factor. The lay-day factor takes into account that when at sea, the crew works additional time each day and the lay-day factor means they receive additional time off or compensation. Using this factor and applying the criterion the respondent outlined means that the complainant had 436 days of Chief Cook experience. In addition, the complainant had been injured on duty while he was acting as Chief Cook. He contends that the 128 days he was on injury on duty leave should count towards his experience as Chief Cook. If injury on duty time was taken into account, he would have almost two years experience. He also had transferable skills and experience as a Second Cook.

[28] The complainant stated that the board had not taken into account his past experience. As set out in his résumé, he was a proprietor of a business refurbishing offices and hotels from 1986 to 1995. He had also worked at many CP Hotels. He was employed by a local school board from 1997 to 1999 working with children with challenging needs. This work required very high communication skills.

[29] The complainant stated that Mr. Stagg had only contacted one referee, Mr. Greening. The complainant had also given the name of Mr. Walters, who had not

been contacted. As well, the notes from the reference check conducted did not cover all of the criteria on the BBA, as it was supposed to.

#### ARGUMENTS OF THE PARTIES

##### A) COMPLAINANT'S ARGUMENTS

[30] The complainant argues that the respondent abused its authority in a number of ways during this appointment process. First, the wording on the advertisement was ambiguous concerning the types of positions (indeterminate, acting, specified period) that would be staffed.

[31] The BBA, used to assess abilities and personal suitability, was not a fair and unbiased tool. It was open to abuse as candidates completed it at home and could have another person complete it. The board only verified the information given in the three abilities areas, not all information the candidate had provided. The respondent should have a standardized assessment tool to be used across the country for similar positions, and one that could be monitored.

[32] The complainant alleged that the reference checks should have been completed by one of the members of the assessment board. Instead, Mr. Stagg completed most of the references. Given the unpleasant meetings he had with the complainant, one could not be assured that the reference check was properly completed, both in terms of how the questions were asked and how the responses were written down. In addition, Mr. Stagg only contacted one person that the complainant suggested as a reference. The complainant had suggested two references, but his second reference, Mr. Walters, was not contacted.

[33] The assessment board developed the selection criteria after the advertisement went out. The criteria should be set before the advertisement is issued. They relied heavily on experience as a Chief Cook, without following up with candidates to clarify or elaborate on the information supplied. The board had not read all the complainant's information, or chose to ignore the fact that he had worked with special education and



developmentally delayed children and adults, which demonstrated his dependability, effective interpersonal relationships and leadership.

[34] The selection board assessed his experience as Chief Cook as six months. The complainant submits he had far more experience than that. Because the crew on CCG ships worked 12-hour shifts, the work day had to be calculated using the lay-day factor, which would increase the complainant's experience to 436.32 days.

[35] In addition, the time that the complainant was off work on injury on duty leave (199 days) should have counted as experience as Chief Cook, as he had been acting as Chief Cook when his injury occurred. The board was looking for two years experience (including on/off cycle), and his injury on duty leave was part of the off cycle.

#### B) RESPONDENT'S ARGUMENTS

[36] First, the respondent noted that the complainant was assessed as having all the essential qualifications for the position of Chief Cook. He completed the BBA, his reference was checked and he was one of the 29 qualified individuals. Thus, the complainant could not complain that he was not appointed by reason of the BBA, as he was found qualified on the basis of the BBA. In terms of the concern that a candidate might cheat, Mr. Llewellyn testified that the example the candidate gave was what was important, not the grammar or writing style. Furthermore, there was no evidence that any candidate had employed someone else to complete the BBA.

[37] The complainant alleged there should have been a national standardized assessment tool. The *PSEA* affords managers flexibility and broad discretion to choose its assessment methods.

[38] Turning to the reference checks, Mr. Stagg testified that he took *verbatim* notes and had asked all referees the same questions. Mr. Stagg did not assess the candidates, but merely passed his notes on to the assessment board to evaluate. In any event, the complainant qualified on this aspect. The references were also used to select candidates, but only after they met the asset qualification of two years' experience as a Chief Cook.

[39] The respondent submits it had no obligation to contact the candidates to obtain further information. Candidates had an obligation to demonstrate how they met all the qualifications on their application. The fact that the board decided to make the asset qualification of experience as a Chief Cook more precise by setting two years as the cut-off point did not change the qualification. In *Lavigne v. Deputy Minister of Justice et al.*, [2008] PSST 0013, the Tribunal held that while it is preferable to include definitions in the advertisement, this did not constitute an abuse of authority.

[40] The respondent stated that the complainant did have 202 days working as Chief Cook. When the on/off cycle was considered, this experience added up to 404 days, still falling short of the two years' experience required. Injury on duty leave should not count as experience as Chief Cook, as this was not a period of time when he was acquiring experience as a cook.

[41] The complainant's experience working with developmentally challenged individuals was not taken into account, as this was not one of the selection criteria. The board decided that experience working as a Chief Cook was an asset, and that is what was assessed for selection.

[42] With regard to the unpleasant dealings between the complainant and Mr. Llewellyn and Mr. Stagg, the respondent stated that the Tribunal is faced with contradictory evidence. The respondent's two witnesses provided clear, honest answers as to what transpired at the meeting where Mr. Wall's performance was discussed. Following the discussion in February 2005, the complainant continued to receive acting appointments as Second Cook or Chief Cook and his term position became permanent in 2006.

[43] The complainant stated he was confused by the advertisement for indeterminate, acting and specified period positions. This was a common way to advertise on *Publiservice*. It was to inform candidates that appointments might be made to indeterminate positions, or acting appointments or specified period appointments might be made, depending on the vacancies.

[44] The complainant has not demonstrated that there was any error in this process that affected him directly. To find abuse of authority, the Tribunal must find a serious error, which affected the results of the appointment process. In this case, there was no such evidence.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[45] The Public Service Commission (PSC) provided general written submissions on the concept of abuse of authority and how the PSC suggests the Tribunal focus its approach to abuse of authority. The PSC submits that, to make a finding of abuse of authority in an appointment process, the Tribunal must make a finding of improper intention on the part of the respondent. Errors or omissions do not constitute an abuse of authority, unless a party has shown "serious carelessness or recklessness" such that bad faith may be presumed.

[46] In this case, the complainant was in the qualified pool. The matters complained of have to affect the complainant himself. Since he was found qualified, matters relating to the BBA assessment were not relevant. He was not selected for appointment as he did not have two years' experience as Chief Cook. That qualification was applied equally to all candidates and was not used to intentionally eliminate the complainant.

ANALYSIS

[47] The complainant alleges that the respondent abused its authority in assessing his merit in this process by failing to take into account all information he submitted and by improperly assessing his experience as Chief Cook. The complainant also speculates that the unpleasant dealings he had with two board members could have resulted in an unfair assessment of him. He raises a concern over the wording of the original advertisement for the position as well as the lack of a standardized appointment process.

[48] Two sections of the *PSEA* are pertinent to this complaint. They read as follows:

**30.** (1) Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.

(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.

36. In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).

[49] Section 30 highlights the role of the PSC (or its delegate) in assessing essential and asset qualifications and in making appointments, as well as the role of the deputy head in establishing essential and asset qualifications. Section 36 provides guidance on assessment methods. It gives authority to the PSC (or its delegate) to use **any** assessment method to determine whether a person meets the qualifications for the position.

[50] In *Visca v. Deputy Minister of Justice et al.*, [2007] PSST 0024, the Tribunal stated:

[42] Broad discretion is given to managers under subsection 30(2) of the *PSEA* to establish the necessary qualifications for the position they want to staff and to choose the person who not only meets the essential qualifications, but is the right fit. Similar discretion is provided under section 36 of the *PSEA* for those with staffing authority to choose and use assessment methods to determine if the person meets the established qualifications. The Tribunal has discussed the discretion provided by section 36 with respect to the choice of assessment method in *Jolin v. Deputy Head of Service Canada et al.* [2007] PSST 0011, at paragraphs 26 to 28.

[43] Weighting the merit criteria and using cut-off scores based on the performance of the candidates are methods that fall within the broad discretion given to managers under the *PSEA*. There is flexibility for managers to determine which criteria are more important than others for a position at the time of the selection process. Mr. Wilson made this determination and chose an assessment method that put more emphasis on two criteria, namely, extensive and recent experience, and judgment.

[51] Thus the starting point for the analysis of the issues brought forward by the complainant is that the delegated manager (in this case, Mr. Llewellyn) has broad discretion to establish qualifications and to assess those qualifications. Only if the

manager has improperly exercised his discretion so that it constitutes abuse of authority, can the complainant succeed.

[52] Mr. Llewellyn established essential and asset qualifications for the position. He then decided to assess the abilities and personal suitability qualifications through a BBA, a take-home assessment tool, which required candidates to demonstrate their qualifications by giving one specific example of how they had demonstrated the particular qualification. For each ability example, a reference had to be provided, and the name of a verifier was to be provided concerning each personal suitability example.

[53] The complainant has not brought forward any evidence to demonstrate that the manager abused his authority in using the BBA. There is no evidence that candidates did not complete the BBA information themselves. While the complainant seems to be of the opinion that having a standardized process across Canada with a monitored examination would have been preferable, that is not what the manager chose to do. The complainant has failed to demonstrate that Mr. Llewellyn abused his authority in the choice of the BBA.

[54] The complainant also contended that it was improper for Mr. Stagg to conduct reference checks as he was not a member of the assessment board. The complainant did not provide any policy or guideline to support his position.

[55] The PSC document entitled *Checking References – a Window into the Past*, points out some advantages of conducting reference checks in person or by phone:

**Do your reference checks in person or by phone.**

Although it is possible to check references in writing, this is not recommended for a number of reasons. Written reference checks do not permit one to catch the hesitations, the inconsistencies, or the off-the-cuff remarks that can be most telling. It is also not possible to ask follow-up questions on the basis of answers to previous questions.

[56] Based on the testimony of Mr. Stagg, the Tribunal finds that he conducted the reference checks by contacting referees, taking down *verbatim* responses and forwarding that information to the assessment board for it to evaluate. While it may be

preferable for an assessment board member to collect the information for the reasons set out in the PSC document above, there is no requirement to do so.

[57] The Tribunal further finds that Mr. Stagg acted in accordance with the assessment board's instructions by contacting only one reference for the complainant. Mr. Greening had been listed as the referee who could provide further information about each example for each of three abilities.

[58] The complainant alleges that his unpleasant dealings with Mr. Llewellyn and Mr. Stagg may have resulted in an unfair assessment. However, he failed to provide any evidence in support of his contention. The complainant was found to be qualified for the position based on the assessment in which Mr. Llewellyn participated and on the basis of reference checks conducted by Mr. Stagg. The complainant was not selected for appointment as he did not have two years' experience performing the duties of Chief Cook. The allegation that his meeting with Mr. Llewellyn and Mr. Stagg in February 2005 affected their assessment of him is without merit.

[59] Turning to the selection criteria, the complainant claims it was improper for the respondent to decide on the selection criteria after the position was advertised. Mr. Llewellyn's testimony was that, while the board was waiting to receive applications from candidates, it took this time to decide what criteria should be used to select among qualified candidates. He stated that he wanted to get on with the appointment process by advertising, and knew there would be about a month to consider selection criteria while waiting for applications. Mr. Llewellyn intended to use the pool of qualified candidates to fill vacancies for the next five years. Selection criteria might change over time and he did not believe it was necessary to advertise the selection criteria.

[60] The Tribunal finds that the respondent did not act improperly in determining the selection criteria after the advertisement was issued. It is preferable to give candidates as much information as possible about the process, in order that those that have a qualification can demonstrate it, and to avoid an allegation that the criteria were established in order to eliminate or to favour a particular candidate. However, in this

case, candidates were in no way prejudiced by the board's actions. The complainant has not shown any wrong-doing in this regard.

[61] The complainant contends that the respondent was obliged to go back to candidates to inform them of the selection criteria and to give them an opportunity to elaborate on their qualifications. The Tribunal is satisfied there is no such requirement in this case. The advertisement clearly set out the essential and asset qualifications and informed candidates:

**Intent / Result of this process:** If you are interested in this position, clearly demonstrate in your application/resume, how you meet each of the essential screening criteria (education, language and experience requirements) of this position. Applicants will not be contacted for additional information. •**If there are any Asset Qualifications identified on the Statement of Merit Criteria relating to education or experience statements and you meet these Asset Qualifications, clearly demonstrate how you meet these Asset Qualifications in your application/resume.** •Candidates must meet each and every Essential Qualification to be appointed to a position. **However, meeting the Asset Qualifications, Operational Requirements, or Organizational Needs (if identified on the Statement of Merit Criteria), may be desirable and could be a deciding factor in choosing the person to be appointed,** depending on the specific position being staffed.

(Emphasis added)

[62] The selection criteria used were one asset qualification and the assessment of three essential abilities, all listed in the SMC. Candidates applying for positions in the public service are required to demonstrate their qualifications and, in this case, were clearly advised to outline their education, language and experience requirements, as well as outlining how they met the asset qualifications. While the complainant mentioned that he had acted as Chief Cook on most CCG vessels, he provided no details as to the length of his experience.

[63] The Tribunal finds that the selection board did not err in how they applied the selection criteria. At the hearing, the respondent conceded that Mr. Wall had 202 work days as Chief Cook, which would mean 404 days' experience, taking into account the on/off cycle. This does not meet the cut-off point of two years' experience, which the board required for selection. The board assessed experience on the basis of a 12-hour day for all candidates. Thus the lay-day factor is not relevant in these circumstances. The board acted reasonably in excluding the time the complainant was off work on injury on duty leave, as this cannot be considered as experience in the duties of Chief

Cook. While the complainant may have other valuable experience, the selection board sought experience in the duties of Chief Cook.

[64] Finally, the complainant raised a concern at the hearing that the job advertisement was ambiguous. It listed under the category of "Type of Appointment": Indeterminate, Acting, Specified Period. This clearly refers to the types of appointments contemplated when the advertisement was published, and indicates that the delegated manager might make indeterminate, acting or specified period appointments, depending on the needs of the organization. The Tribunal finds that the notice was not ambiguous.

#### DECISION

[65] For the above reasons, the complaint is dismissed.

Helen Barkley  
Member

#### PARTIES OF RECORD

Tribunal File:	2008-0225
Style of Cause:	<i>Steve Wall and the Deputy Minister of Fisheries and Oceans et al.</i>
Hearing:	November 18-19, 2008 St. John's (NL)
Date of Reasons:	February 2, 2009
APPEARANCES:	
Larry Teslyk	For the complainant
Martin Desmeules	For the respondent
Marc Séguin	For the Public Service Commission