



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2007-0316

OTTAWA, FEBRUARY 17, 2009

YSABEL BLANCO

COMPLAINANT

AND

**THE PRESIDENT OF THE CANADIAN INTERNATIONAL
DEVELOPMENT AGENCY**

RESPONDENT

AND

OTHER PARTIES

MATTER	Complaint of abuse of authority pursuant to paragraph 77(1)(a) of the <i>Public Service Employment Act</i>
DECISION	The complaint is dismissed
DECISION RENDERED BY	Francine Cabana, Member
LANGUAGE OF DECISION	English
INDEXED	<i>Blanco v. President of the Canadian International Development Agency et al.</i>
NEUTRAL CITATION	2009 PSST 0004

REASONS FOR DECISION

INTRODUCTION

[1] Ysabel Blanco, along with six other complainants, filed a complaint with the Public Service Staffing Tribunal (the Tribunal) alleging that the respondent, the President of the Canadian International Development Agency (CIDA), abused its authority by acting in bad faith when it modified its *Guidelines on the Management of Pools* and applied them retroactively. Essentially, the respondent decided that successful candidates who are on field posting assignment cannot be appointed during the period of their field posting assignment abroad. The employees abroad would remain in the pool for the duration of their posting and, upon their return from assignment, would be eligible for appointment for the next six months, therefore establishing a pool specifically for CIDA employees on field posting assignment.

[2] Two days prior to the hearing, six out of the seven complainants withdrew their complaints. This decision therefore only concerns Ms. Blanco's complaint.

[3] A hearing was held on September 22, 2008 in Ottawa, Ontario.

BACKGROUND

[4] In July 2006, the complainant participated in an internal advertised appointment process for the positions of Senior Development Officer (PM-05) at CIDA with respect to the Americas Branch, the Africa Branch, the Asia Branch and the Europe, Middle East and Maghreb Branch. The positions are located in Gatineau, Québec. The Job Opportunity Advertisement also indicated that a pool of candidates would be established to fill future vacant positions.

[5] In November 2006, the complainant was posted to New York, USA, for a period of four years. On March 2, 2007, the complainant was informed that she had been found qualified for the positions. Further to her questions, she was informed on March 13, 2007 that CIDA could not promote employees while they were on field posting assignment.

[6] The complainant was informed by amended letter dated April 17, 2007 of the 17 individuals considered for appointment. She was also informed that she was qualified and had been placed in a pool of qualified candidates. The letter further explained that the pool would be valid for three years for individuals already on assignment abroad. It also advised the complainant that the issue of appointing candidates abroad was still under review and that a message to that effect would be sent to the affected candidates individually.

[7] CIDA's *Guidelines on the Management of Pools* (the *Guidelines*) came into effect on December 31, 2005 given the coming into force of the *Public Service Employment Act*, S.C. 2003, c.22, ss. 12 and 13 (the *PSEA*). Generally, the *Guidelines* established that a pool would be created for candidates who met the essential qualifications in an appointment process. Candidates would be listed in alphabetical order with no ranking and the validity of the pool would be 12 months with a possibility of extension to 18 months.

[8] On June 21, 2007, an amendment to the *Guidelines* was made, creating a pool specifically for CIDA employees on field posting assignment. The amendment concerning the pool for qualified candidates on field posting assignment does not have a validity period and the employee remains eligible in the pool for the duration of his or her assignment and for an additional period of six months following his or her return from the field posting assignment.

[9] The Notification of Appointment for this advertised process was issued on June 27, 2007. The complainant had already begun her assignment in New York.

[10] The complainant alleges that the respondent acted in bad faith by amending the *Guidelines* with respect to the eligibility for appointment offers and applying them retroactively without first having advised the candidates. According to the complainant, this amounts to abuse of authority on the part of the respondent.

[11] The complaint was filed on June 29, 2007 pursuant to paragraph 77(1)(a) of the *PSEA*.

ISSUE

[12] The Tribunal must determine the following issue:

Did the respondent abuse its authority when it did not appoint the complainant after amending the *Guidelines* and making them retroactive to December 31, 2005 without first advising the candidates?

EVIDENCE AND ARGUMENTS OF THE PARTIES

A) COMPLAINANT'S EVIDENCE AND ARGUMENTS

[13] The complainant was not present at the hearing; however her representative assured the Tribunal that she was authorized to proceed in her absence and that it would not prejudice the complainant's case.

[14] Her representative also indicated that the complainant's case would not be prejudiced because the witness initially identified during the pre-hearing conference would no longer be testifying at the hearing.

[15] The complainant submits that when she applied for the positions in July 2006, she was not informed that if she were found to be qualified, she would not be appointed, contrary to past practice. In the complainant's view, by amending the *Guidelines* in 2007 and making them retroactive to December 31, 2005 after the appointment process was completed, the respondent acted in bad faith thereby abusing its authority. She contends that the respondent exercised its discretion with an improper intention in mind as described in *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008.

[16] The complainant's Posting Confirmation was entered into evidence on consent. The document indicates that the complainant's assignment to New York began in November 2006 for a period of four years. The complainant maintains that it is not indicated anywhere on the document that the *Guidelines* were amended and that she would not be promoted while on assignment.

[17] In preparation for this hearing, the complainant's representative wrote to the Corporate Human Resources Advisor to ask why the complainant was not appointed. The e-mail response was received on October 15, 2007 and it was entered into evidence on consent. It states:

The reason for not appointing the candidates who submitted complaints is as follows:

The position to be filled is in Gatineau. We need the positions staffed immediately to be able to fulfill our statutory obligations. Anyone who is out of the country falls under the Foreign Service Directive which stipulates that foreign assignments cannot be terminated, except in the following circumstances: security or health reasons, or death. In such circumstances, expenses should be reimbursed.

We cannot appoint anyone to a higher level position if they do not perform the functions of the higher level position nor can we terminate the assignment agreement. The candidates who are outside the country are therefore not available at this time. As a result, they have not been considered. However, they will be considered as soon as they return and for an additional period of six months after their return to the NCR.
[Translation]

[18] In her pleadings, the complainant submits that the paragraph in the amended *Guidelines* which refers to the pool for employees on field posting assignment does not mention that a candidate cannot be appointed while on field posting assignment.

[19] The complainant's representative submitted that the complainant did not sign any document advising her of the amendments to the *Guidelines* or of their impact. As such, she notes that the complainant had accepted the field posting assignment in New York in good faith without having been made aware that she would not be promoted until she returned to Canada.

[20] The complainant's representative also submits that the complainant informed her that she does not wish to terminate her field posting assignment in New York in order to be appointed to a PM-05 position in Gatineau. She also indicated that had the complainant been advised of the amended *Guidelines*, as well as the fact that she would not be appointed while on field posting assignment, she would not have accepted the field posting assignment in New York.

[21] The complainant requests that the amended *Guidelines* not be applied to this appointment process. She also requests that the 17 appointments made in the

appointment process be revoked because, in her view, the respondent could not retroactively apply the amended *Guidelines*. The complainant wants to be appointed while she is on field posting assignment without returning to Gatineau.

B) RESPONDENT'S EVIDENCE AND ARGUMENTS

[22] Ms. Danica Shimbashi, Director General, Human Resources, testified on behalf of the respondent. She stated that she is responsible for the delivery of the Human Resources Program which includes corporate services, policies, development program, staffing, labour relations, and others. She explained that there are 1877 employees at CIDA, of which approximately 132 to 138 are posted out of the country. Most positions are in Gatineau and approximately eight positions are in the regional offices across Canada.

[23] Ms. Shimbashi testified that field postings are assignments as opposed to appointments because they are not classified positions. She explained that all field posting assignments are at the employee's substantive group and level. Upon their return, employees are placed in a position at their group and level. In addition, field postings are voluntary. Ms. Shimbashi testified that when employees accept a field posting assignment, they must honour the commitment for the duration of the posting which varies from one field posting to another.

[24] The witness stated that employees must remain in a field posting assignment until the end of the period unless they request a cross-posting. Section 15.35 - *Termination of Assignment Outside Canada* of the *Foreign Service Directives* sets out the conditions under which someone can return from a field posting earlier. Those reasons are retirement, workforce adjustment situation, employee's death, resignation or dismissal, and extended periods of leave without pay. It is very costly for both the employee and CIDA to terminate such an assignment before the end of the designated period.

[25] Every year, CIDA advertises field postings opportunities. As such, Ms. Shimbashi indicated that the turn-over for out-of-country assignments is 30 to 40 positions in a cycle every year.

[26] Ms. Shimbashi explained that under the former *PSEA*, qualified candidates were placed on eligibility lists in order of merit. When it was time to appoint a person in Gatineau, CIDA would follow the order of merit. If the first person on the list was not immediately available to perform the functions of the position because he or she was on a field posting assignment, CIDA would still appoint that person to the higher level even though the person was not performing the duties of the position. CIDA would continue to move down the list promoting individuals until a person was immediately available to fill the position in Gatineau.

[27] The witness testified that with the coming into force of the *PSEA* in December 2005, CIDA had to review its policies and guidelines and was required to develop policies and guidelines on the management of pools of qualified persons and the area of selection.

[28] She testified that the respondent was not prepared to appoint candidates to a higher level unless they would be performing the duties at that level. The complainant holds a PM-04 position and is not available to perform the duties of a PM-05 position in Gatineau because she is still away on a field posting assignment outside of Canada.

[29] To conform to the requirements in the *PSEA*, Ms. Shimbashi testified that the *Guidelines* were developed and became effective on December 31, 2005. The relevant sections relating to the creation of a pool are the following:

A pool of candidates consists of qualified candidate(s) in an advertised appointment process. The responsible manager has the authority to determine the need for a pool and the number of qualified candidates to be included in the pool [...]

Only qualified candidate(s) who meet the **essential qualification** (e.g. education, knowledge, abilities, personal suitability, language proficiency) for the work to be performed can be placed in a pool **in alphabetical order** with **no ranking** [...]

The validity period of a pool is **12 months**. However, it may be extended up to a maximum of **18 months** with the approval of the Senior Review Committee.

[30] Ms. Shimbashi explained that under those *Guidelines*, a person would be placed in a pool of qualified persons for a period of up to 18 months. According to her, this did not benefit individuals away on field posting assignments for periods exceeding the 18-month validity period since the pool would expire while they were still on field posting assignment making them ineligible for appointment upon their return.

[31] Ms. Shimbashi stated that in May 2007, the respondent concluded that the *Guidelines* needed to be revised as they did not benefit the employees on field posting assignments. The respondent amended the *Guidelines* in June 2007 in order to establish a pool specifically for employees on field posting assignment. The amended *Guidelines* were effective retroactively to December 31, 2005. The relevant amendment reads as follows:

Pools specifically established for CIDA employees on field posting assignment:

- The pool of qualified candidates established for employees on field posting assignment does not have a validity period per se, but rather employees on field posting assignment remain eligible in the pool for the duration of a single assignment and for an additional period of six months after their return from the field posting assignment.

[32] Ms. Shimbashi explained that the amended *Guidelines* provide for two pools: one for qualified candidates who are available immediately to perform the duties of the position in Gatineau and a second one for qualified candidates on field posting assignment. She testified that had the *Guidelines* not been amended, qualified candidates on field posting assignments for periods extending beyond the expiry date would never have the opportunity to be eligible for appointment at a higher group and level because the pool would no longer be valid upon their return to Canada.

[33] Ms. Shimbashi testified that the President and senior executives of CIDA decided to implement the amended *Guidelines* retroactively in order for them to apply to this appointment process which was the first one conducted under the *PSEA*. This would allow qualified candidates to benefit from the amended *Guidelines* as they would be in a pool for a longer period of time.

[34] Ms. Shimbashi stated that 44 candidates were found qualified as a result of this advertised appointment process, including the complainant. Thirty-eight of them were

appointed. Six candidates have not yet been appointed, although three of those candidates have pending appointments since they are waiting for their second language evaluation results. Three candidates remain in the pool because they are still away on a field posting assignment, including the complainant. According to Ms. Shimbashi, candidates in the field have benefited from the amended *Guidelines* since the pool of qualified candidates not on field posting assignment expired on September 8, 2008. Under the amended *Guidelines*, the pool is still valid for the candidates that are away on field posting assignments or have recently returned from field posting assignments.

[35] The respondent contends that the complainant was under the impression that if she were found to be qualified, she would be promoted. It was the usual practice under the former *PSEA* where candidates were appointed even if they were away on field posting assignment because they were placed on an eligibility list in order of merit.

[36] The respondent submits that, pursuant to the *PSEA*, candidates on field posting assignments cannot be appointed to a higher group and level because they would not be performing the tasks of that position. The respondent refers to *Tibbs*, where the Tribunal stated that the old system of relative merit under the former *PSEA* no longer exists and that managers now have a broad discretion pursuant to subsection 30(2) of the *PSEA* to choose the person who is the right fit for the position.

[37] The *Guidelines* were therefore amended to ensure that candidates on field posting assignments, such as the complainant, remain in the pool for the duration of their field posting assignment and an additional six months thereafter, making them eligible for appointment upon their return to Canada.

[38] Furthermore, the respondent submits that applying the amended *Guidelines* retroactively to December 31, 2005 ensures that candidates who participated in this appointment process and who are on field posting assignments are not prejudiced. According to the respondent, this evidence is uncontradicted. In fact, the respondent argues that the amended *Guidelines* provide the candidates on field posting assignments with a possibility of appointment that they would not have had if the *Guidelines* had not been amended and applied retroactively.

[39] The complainant has requested that she be promoted to a PM-05 position in Gatineau. The respondent submits that the Tribunal does not have jurisdiction to appoint the complainant.

[40] The respondent submits that the complainant did not prove on a balance of probabilities that it acted in bad faith or abused its authority.

[41] The respondent therefore requests that the complaint be dismissed.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[42] The Public Service Commission (the PSC) was not present at the hearing but provided written submissions on the concept of abuse of authority and how the Tribunal should focus its approach in this area.

ANALYSIS

ISSUE: Did the respondent abuse its authority when it did not appoint the complainant after amending the *Guidelines* and making them retroactive to December 31, 2005 without first advising the candidates?

[43] The complaint was filed pursuant to paragraph 77(1)(a) of the *PSEA*:

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);

[...]

[44] Subsection 30(2) of the *PSEA* reads 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.

[45] The complainant argues that the respondent acted in bad faith by amending the *Guidelines* and making them retroactive, thereby subjecting the appointment process to those *Guidelines*. The complainant submits that this falls under the first of the the five categories of abuse of authority established in *Tibbs*, namely “when a delegate exercises his/her/its discretion with improper intention in mind (including acting for an unauthorized purpose, in bad faith, or on irrelevant consideration).”

[46] The Tribunal has determined in past decisions such as *Tibbs* and *Jolin v. Deputy Head of Service Canada et al.*, [2007] PSST 0011, that the party alleging abuse of authority must assume the burden of proof. As a result, the complainant must provide convincing evidence and prove on a balance of probabilities that the respondent abused its authority by acting in bad faith.

[47] The evidence shows that with the coming into force of the new *PSEA* in December 2005, the respondent reviewed its policies and guidelines and developed policies and guidelines on the management of pools of qualified persons and the area of selection.

[48] The *Guidelines* were developed in accordance with the intent and spirit of the *PSEA*. However, it was not until the spring of 2007 that the respondent realized that the *Guidelines* would prejudice candidates that were away on field posting assignment because the pool would expire prior to their return to Canada, making them ineligible for appointment. In order to remedy this oversight, the respondent amended the *Guidelines* to allow for the creation of a specific pool for employees on field posting assignments.

This permitted them to remain in a pool for the duration of their field posting assignment, as well as for an additional six months after their return to Canada.

[49] Once the *Guidelines* were amended in June 2007, the respondent made them retroactive to December 31, 2005, in order to ensure that candidates in this appointment process who were on field posting assignment could benefit from the amendments. A communiqué entitled *Management of Promotional Opportunities for Employees While on Field Posting Assignment* was posted on June 22, 2007 on CIDA's Intranet website called *Entrenous*, which explained the reason why the *Guidelines* were amended. Links to the amended *Guidelines*, as well as to "Questions and Answers" were also provided.

[50] The complainant's representative argued that the complainant was not informed of the amended *Guidelines* when she applied for the positions and that if she had known beforehand that they were going to be applied retroactively she would not have accepted the field posting assignment in New York. The complainant was not present at the hearing. No affidavit evidence or any other documentary evidence was presented to the Tribunal with respect to these facts. The representative's arguments carry no weight without any evidence to support them.

[51] It should be noted that the evidence shows that the respondent became aware in May 2007 that the *Guidelines* had to be amended almost a year after the complainant had applied for the positions. The respondent could not have forewarned her of the changes to the *Guidelines*.

[52] The complainant challenges the retroactive application of the amended *Guidelines* and argues that nowhere in the *Guidelines* does it state that appointments cannot be made while on assignment. However, the Tribunal finds that the wording of the *Guidelines*, prior to their amendment, and subsequent to their amendment, did not and still do not allow the respondent any latitude to appoint candidates while away on a field posting assignment.

[53] The Tribunal concludes that when the respondent amended the *Guidelines* in June 2007 to include specific provisions for employees on field posting assignment, it

acted in good faith. The amendment serves to protect candidates on field posting assignment by ensuring that they have a possibility of being appointed upon their return.

[54] The Tribunal further finds that the respondent acted in good faith and did not abuse its authority when it made the amended *Guidelines* retroactive to December 31, 2005. Without this retroactive application, the pool of qualified candidates in this appointment process would have expired prior to some of the candidates returning to Canada, including the complainant.

DECISION

[55] Accordingly, the complaint is dismissed.

[56] Given that the complaint has not been substantiated, it is not necessary for the Tribunal to address the issue of corrective action.

Francine Cabana
Member

PARTIES OF RECORD

Tribunal File:	2007-0316
Style of Cause:	<i>Ysabel Blanco v. the President of the Canadian International Development Agency et al.</i>
Hearing:	September 22, 2008 Ottawa, ON
Date of Reasons:	February 17, 2009
APPEARANCES:	
Andrée Lemire	For the complainant
Marie-Josée Bertrand	For the respondent