

FILE: 2007- 0384

OTTAWA, MARCH 2, 2009

DAVID CARNEGIE

COMPLAINANT

AND

THE DEPUTY MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

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	Complaint is dismissed
DECISION RENDERED BY	Kenneth J. Gibson, Member
LANGUAGE OF DECISION	English
INDEXED	<i>Carnegie v. Deputy Minister of Citizenship and Immigration Canada et al.</i>
NEUTRAL CITATION	2009 PSST 0006

REASONS FOR DECISION

INTRODUCTION

[1] The complainant, David Carnegie, believes that there was an abuse of authority in the application of merit concerning an appointment process for a PM-05 Manager position. Specifically, he takes issue with the assessment of his responses to the knowledge test used in this process.

[2] The respondent, the Deputy Minister of Citizenship and Immigration Canada (CIC), disagrees. The respondent submits that the knowledge test was an appropriate assessment tool, and the complainant was fairly assessed by the assessment board.

BACKGROUND

[3] The complainant participated in an internal advertised appointment process conducted to establish a pool of qualified employees to fill immediate and future PM-05 Manager vacancies.

[4] The appointment process consisted of a written knowledge exam, a middle manager simulation exercise, an interview, and reference checks. An assessment board consisting of Cheryl Monroe, Regional Director, Programs, and Audrey Mitchell, Manager, Mississauga Office, assessed the candidates.

[5] The written knowledge exam was administered on three occasions. Departmental human resources staff administered the first session. Ms. Mitchell administered “make-up” sessions for candidates who were not available for the first session. Mr. Carnegie wrote the knowledge test at a make-up session.

[6] The knowledge test was intended to assess five knowledge qualifications, identified on the test as K1 to K5. Candidates were expected to achieve a pass mark on all five knowledge qualifications in order to proceed further in the appointment process. The complainant did not achieve a pass mark on K4 and was eliminated from the appointment process.

[7] On August 7, 2007, the complainant filed a complaint with the Public Service Staffing Tribunal (the Tribunal) under paragraph 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*).

PRELIMINARY MATTER

[8] At the outset of the hearing, the respondent made a motion that the complainant's amended allegations were not properly before the Tribunal.

[9] The Tribunal denied the motion at the hearing. The written reasons are as follows.

[10] On December 17, 2007, the Tribunal granted the complainant's request to amend the allegations prior to hearing pursuant to section 23 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-06 (the *PSST Regulations*). The Tribunal ordered that the amended allegations had to be based on information that could not reasonably be obtained before the complainant submitted his original allegations and the complainant could not use information obtained in mediation.

[11] On January 7, 2008, the complainant filed amended allegations.

[12] The respondent submitted that the amended allegations did not contain any new information, and essentially restated the original allegations. The respondent also submitted that the amended allegations included information obtained during mediation, contrary to the Tribunal's Order of December 17, 2007. The complainant submitted that the amended allegations were in response to information contained in the respondent's reply of November 22, 2007 to the complainant's original allegations, and not information obtained during the subsequent mediation process.

[13] The Public Service Labour Relations Board addressed the issue of the confidentiality of mediation proceedings in *Pepper v. Treasury Board (Department of National Defence)*, [2008] C.P.S.L.R.B. No. 8(Q.L.), 170 L.A.C. (4th) 151. The decision reads in part:

107. One of the elements that contributes to the sense of trust between the parties during mediation is the confidentiality of the process. In fact, most participants take the

confidentiality of the mediation process for granted. Confidentiality is also an express condition of an agreement to mediate. Confidentiality means that only the participants and persons with the authority to resolve the dispute in the final instance will know about the details of the mediation. Confidentiality is important because, from the litigant's perspective, very personal information and career decisions may arise during discussions.

109. As well, parties will hesitate to engage in settlement negotiations if something they say during mediation can later be used against them in another process. With the assurance that their discussions are confidential, parties are more likely to willingly discuss all matters and propose offers of resolution to settle their dispute.

[14] While denying the respondent's motion, the Tribunal ruled that the complainant could not introduce evidence obtained through confidential discussions that took place during mediation.

ISSUE

[15] The Tribunal must determine if the respondent abused its authority in the application of merit, specifically the assessment of the knowledge qualifications.

SUMMARY OF RELEVANT EVIDENCE

[16] Mr. Carnegie testified on his own behalf. He is a PM-04, currently acting as a Security Officer and Facilities Advisor, and he has been with CIC for over 25 years.

[17] Mr. Carnegie testified that, when Ms. Mitchell introduced the knowledge exam, she indicated that candidates needed to pass each knowledge question. He stated that there was no specific discussion of K4 during the introduction to the exam, and at no time was he advised that he had to pass both parts of K4. He testified that during informal discussion with Ms. Mitchell, after he was eliminated from the process, he was told that K4 had a global rating and that his response was not acceptable at the managerial level. He stated that Ms. Mitchell refused go through the exam in detail at that time, and that she made no mention of having to pass both parts of K4. He further stated that he only became aware that he had to pass both parts of K4 when he read it in the respondent's reply to his initial allegations.

[18] The respondent's reply of November 22, 2007 stated, in part:

To be successful a candidate's answer had to demonstrate a good understanding on both parts of the question. The marking scheme was non-compensatory, i.e. candidates had to succeed on both parts of the question to obtain a pass.

[19] The complainant indicated that if he had been aware that he had to pass both parts of K4, he would have allocated more time to the second part of the question.

[20] On cross-examination, the complainant acknowledged that the exam question required him to provide answers for K4 at the level of "Manager." He also indicated that he understood that K4 had two parts and that he had to answer each part. He further acknowledged that Ms. Mitchell told him that his answers to K4 were not satisfactory at the manager level and that K4 was rated on a global rating scale. However, he reiterated that he received no explanation about how the global rating scale was applied.

[21] Cheryl Monroe testified for the respondent. Ms. Monroe was one of two members of the assessment board. Ms. Monroe has over 30 years of experience in the public service, having started in 1975 as a PM-02. She is now retired from her position as Regional Director, Ontario Region. At the time of the staffing process, she was in the position of Director, Greater Toronto East. Ms. Monroe had been involved in many staffing processes during her career, and had received training under the new *PSEA*. She had been responsible for PM-05 manager positions, similar to those being staffed under this staffing process.

[22] Ms. Monroe testified that, following a succession planning review, four directors in the Toronto area, including herself, decided to jointly undertake this staffing process to develop a pool of qualified persons to fill anticipated vacancies at the PM-05 level. They anticipated five vacancies, but were hoping to establish a larger, "robust", pool for future vacancies. They were disappointed when only two candidates were found qualified.

[23] She described the duties of the manager position from the *Job Opportunity Advertisement* and how they related to the essential qualifications set out in the Statement of Merit Criteria (SMC). Knowledge of the *Key Leadership Competencies and Effective Behaviours for the Public Service* was one of the essential qualifications. Question K4 on the knowledge exam was designed to assess the candidates' knowledge of this qualification.

[24] Ms. Monroe noted that websites for CIC and the then Public Service Human Resources Management Agency were listed under the knowledge qualifications in the SMC. It was suggested on the SMC that candidates might wish to visit the websites for reference purposes. She indicated that the then Public Service Human Resources Management Agency website provided information on the key leadership competencies and behaviours.

[25] According to Ms. Monroe, the assessment process consisted of an initial screening, a written knowledge test, a simulation exercise, an interview and reference checks. Mr. Carnegie was screened into the process but, after he failed the knowledge test, was given no further consideration.

[26] Ms. Monroe explained that the knowledge test was designed to assess five "knowledge factors" – K1 through K5. K4 was used to assess knowledge of the key leadership competencies and behaviours. The first page of the test showed the number of points assigned to each factor. For K4, they used a global rating scale with the highest mark being a 7. They rated the entire question as if it were one question with a pass mark of 4 points.

[27] For K4, candidates were asked to do the following:

For the level of "Manager" please describe in detail the competencies under Values and Ethics. In addition, select one other leadership competency for a Manager and describe it in detail.

[28] Ms. Monroe said that all candidates were asked to describe Values and Ethics because it was considered important, but they wanted to give the candidates some choice in selecting the other competency. In assessing the responses, she stated that

the assessment board was not looking for verbatim descriptions of the competencies. The board wanted to be satisfied that the candidates understood what was expected of them at the manager level.

[29] She testified that the assessment board did not look at the K4 question as having two parts, but was rather one question assessing two competencies – one selected by the assessment board and one selected by the candidate. She said that a perfect answer on one competency, but a poor answer on the other competency, would not be sufficient to pass K4. The candidates had to demonstrate an understanding of two competencies at the managerial level.

[30] Ms. Monroe was asked how the assessment board marked the complainant's test. She stated that Ms. Mitchell read the expected answer from the answer key for each question while Ms. Monroe checked off answers on the complainant's test that may or may not have been correct but warranted further discussion. Then, the two assessment board members would discuss the candidate's answers in relation to the expected answers until they came to an agreement on a mark for the question.

[31] On K4, the complainant decided to describe the strategic thinking competency in addition to values and ethics. Ms. Monroe said that the assessment board found his description of strategic thinking to be weak. Using a 7 level Global Rating Scale, set out in the test's answer key, the assessment board gave the complainant a mark of 2 for K4. After further deliberation, they raised the mark from 2 to 3, but it was still not enough for the complainant to pass the K4 question, as the passing mark was 4.

[32] In concluding her testimony, Ms. Monroe stated that she was still satisfied with the way the assessment board marked K4 for the complainant. She was also satisfied that the two candidates who were successful in the staffing process were qualified.

[33] Audrey Mitchell also testified for the respondent. Ms. Mitchell is a PM-05 Manager with CIC, currently in the Mississauga Office. Ms. Mitchell has been with CIC since 1987. During this period, she has been involved in at least seven appointment processes. She has also had training and experience with appointment processes

under the new *PSEA*. She served on the assessment board at the request of her previous director, Ms. Monroe.

[34] Ms. Mitchell stated that she helped to screen candidates, administer make-up sessions for the knowledge test, assess the knowledge test and simulation exercise, and check references.

[35] She said that human resources administered the initial knowledge test, but that she administered make-up tests for candidates who could not attend the initial test. The complainant attended a make-up session.

[36] Ms. Mitchell identified an email that contained the instructions for candidates writing the knowledge test. She stated that she used the same instructions for both make-up tests, and that she read the instructions to the candidates before they wrote the test. Amongst other points, the instructions indicated:

Candidates must pass each Knowledge factor. (K1 – K5)

The pass mark for each factor is 60%.

[37] Ms. Mitchell did not recall any of the candidates, including Mr. Carnegie, asking any questions about the instructions.

[38] Ms. Mitchell repeated much of the same testimony as Ms. Monroe about how the tests were marked, i.e. Ms. Monroe marked the tests while she read from the answer key. She further stated that, in assessing the complainant's answer to K4, she and Ms. Monroe were looking for a response in sufficient detail to reflect what is expected at the level of manager. Their consensus mark was 3 on a scale of 1-7.

[39] Ms. Mitchell testified that she and Ms. Monroe divided the unsuccessful candidates alphabetically for the purposes of informal discussion. Ms. Mitchell took the first half of the alphabet, which included the complainant.

[40] During the informal discussion, Ms. Mitchell said that she went through the questions on the test with the complainant, including the K4 question. Since the complainant did not pass K4, his answer to the K5 question was not assessed. As the

complainant did well on K1 - K3, they spent most of their time on K4. She stated that they looked at his answers to both parts of K4 in relation to the expected answers in the answer key. According to Ms. Mitchell, during the discussion it became apparent that the complainant was not familiar with the global rating scale used for the K4 question. She tried to explain it and how it was used to arrive at his score. She told him that there were two distinct parts to K4 and he appeared to do better on the first part. On the second part, however, his answer was not what was expected at the level of manager. She felt that the complainant was getting frustrated with her explanation and she concluded, during the session, that she would not be able to satisfy him.

[41] On cross-examination, Ms. Mitchell acknowledged that she did not tell the candidates, before they wrote the test, that they had to pass each part of K4 in order to pass the question. She also agreed that she did not tell the complainant during informal discussion that he failed K4 because he had failed a part of K4.

LEGISLATION

[42] The complaint was filed under 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);

[...]

[43] 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.

[...]

[44] Section 36 of the *PSEA* states:

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).

[45] Section 47 of the *PSEA* deals with informal discussions, and reads as follows:

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

ARGUMENTS OF THE PARTIES

A) COMPLAINANT'S ARGUMENTS

[46] The complainant submits that he clearly understood that some questions in the knowledge test had multiple parts and that he was expected to answer each part. However, he also submits that candidates were not told that they had to achieve a passing mark on any particular part of a question and, specifically, they were not told that they had to pass each part of the question for K4. According to the complainant, the assessment board members did not refute this in their testimony.

[47] On his answer sheet concerning "Values and Ethics", he received 3 checkmarks and the comment "acceptable". For his other leadership competency (strategic thinking), he received 1 checkmark, a mark of 1 and the comment of "unsatisfactory". According to the complainant, the assessment board members did not link the notations of "acceptable" and "unsatisfactory" to the overall global assessment.

[48] The complainant asked for, and received, an informal discussion with assessment board member Audrey Mitchell. The complainant submits that, other than being informed that he was assessed globally for K4, he received no other information.

[49] Based on his experience at the informal discussion, the complainant alleges that the respondent's unwillingness and/or inability to provide him with an explanation, other than to tell him that he had been assessed globally and found wanting, constitutes an abuse of authority.

[50] The complainant argues that the respondent's reply to his allegations on November 22, 2007 provides information that conflicts with what he was told at the time he wrote the knowledge test, and at his informal discussion. According to the complainant, the assessment board members advised him that they assessed K4 with one question and came up with a global assessment, whereas the respondent stated in its reply that the reason the complainant was found not qualified was his failure on the second part of the question.

[51] The complainant submits that if the department had wanted a certain level of knowledge about Values and Ethics and one other competency, then they could have asked for that, but they did not. Instead, they said they were seeking an overall competency in each of the knowledge qualifications, including K4. They never said that the two parts of K4 were non-compensatory.

[52] If the complainant had known that he had to pass both parts of the question, rather than the question in its entirety, he would have approached the question differently. Having been told that he must pass the question for K4, he did the reasonable thing, concentrating on the part of the question that was mandatory (Values and Ethics). After having answered that in what was to him a satisfactory manner, he spent less time on the second part, regarding the "optional" portion as being of less importance to the board than the "mandatory" portion.

[53] In *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008, the Tribunal outlined five categories of abuse, including "when the delegate acts on inadequate material (including where there is no evidence, or without considering

relevant matters).” According to the complainant, the selection board acted on inadequate material in that it failed to provide anything approaching a conclusive explanation of its decision.

[54] The complainant also relies on the Tribunal's decision in *Rozka et al. v. Deputy Minister of Citizenship and Immigration Canada et al.*, [2007] PSST 0046, at paragraph 76: “Informal discussion is intended primarily to be a means of communication for a candidate to discuss the reasons for elimination from a process. [...]”

[55] The complainant argues that, at the informal discussion, the assessment board simply told him that they used a global assessment and found him wanting – information he already had – and provided no additional explanation as to how that conclusion was reached in relation to his particular answers.

[56] According to the complainant, the assessment board members testified that the check marks on his answer sheet were “flags” for them to go back and discuss the point more fully to see if such points fit within the expected answers. Whereas the respondent, in response to the allegations, said: “Correct responses were noted by means of a check mark on the answer grid.” So the complainant had four correct answers in his response to the two parts to K4, but received a mark of 3 overall, and was found not qualified because his answer to the second part and, perhaps, the first part as well, were unsatisfactory.

[57] The complainant also relies on *Chiasson v. Deputy Minister of Canadian Heritage et al.*, [2008] PSST 0027, in which the Tribunal held, at paragraph 53: “[...] If the assessment tool contains a fundamental flaw, its consistent application cannot be deemed to be reasonable or fair.”

[58] In that case, the terms of the exam were changed and some or all candidates were not informed of the change. In the present case, the complainant argues that it is not at all clear to candidates how K4 was to be assessed.

[59] The complainant states that he is not requesting the Tribunal to reassess the answers to the question as that is not its job, but rather to recognize that multiple

explanations of the marking from the respondent means that, on the balance of probabilities, one cannot be sure what happened to the complainant with regard to K4.

[60] The complainant also refers to *Oddie v. Deputy Minister of National Defence et al.*, [2007] PSST 0030, in which the Tribunal found that the selection board committed an error in not having reasons for their negative assessment; however, the Tribunal concluded that, because this was not the deciding factor in not appointing the complainant, it was not an abuse of authority. According to the complainant, the implication of this decision is that if the lack of reasons had been the deciding factor, such an error would constitute an abuse of authority.

[61] The complainant submits that he has brought forward an allegation of a serious nature. He is not simply disagreeing with the marks assigned to him by the assessment board, or the marking scheme chosen, or that they are not very good at explaining what they did. Rather, he is alleging that the failure of the respondent to provide a consistent and clear explanation of how he was assessed, and/or providing a number of different explanations of how he was assessed, leads one to question whether or not there is in fact a consistent and clear explanation of what happened to him. This must be regarded as a serious failure that undermines the intent of Parliament that discretion be exercised in a manner that is characterized by fair, transparent employment practices.

[62] The complainant is not seeking the revocation of any appointment made, or proposed to be made, by the respondent from this process. The complainant has not questioned the qualifications of either of the successful candidates.

[63] The complainant seeks an order from the Tribunal that the respondent re-assess him with regard to K4 by a different assessment board, and through a method with clear criteria.

B) RESPONDENT'S ARGUMENTS

[64] According to the respondent, this is a case about an employee who is not satisfied with the information provided about why he was not found qualified.

[65] The respondent relies on *Visca v Deputy Minister of Justice et al.*, [2007] PSST 0024, at paragraph 42, where the Tribunal found that subsection 30(2) of the *PSEA* provides managers with broad discretion to establish the essential qualifications for a position, and to choose the person who is the right fit. According to the respondent, *Visca* also supports the principle that section 36 of the *PSEA* provides staffing authorities with broad discretion to choose and use assessment methods to determine if the person meets the established qualifications.

[66] The respondent submits that there was no ambiguity in the question for K4, or in the way it was assessed. The complainant acknowledged that he had to describe the values and ethics competency and that he had to select and describe one other competency. He understood that there were two parts to K4 and he answered both parts.

[67] The complainant acknowledged that the instructions on how to complete the K4 question were on the exam, that it was one question assessed in two parts, and that it was globally rated as per the points allotted in the right margin on page 1 of the exam.

[68] Initially, the assessment board gave the complainant a mark of 2 on the K4 question but, after further discussion and analysis, they raised the mark to 3. Essentially, the complainant benefited from the thoughtful analysis and discussion of the assessment board.

[69] According to the respondent, the complainant testified that he spent more time on the first part of the question because he thought the “optional” portion was less important. However, he testified that he understood that he had to pass each knowledge question on the exam and he understood that the question for K4 had two parts. This contradicts his testimony that he only obtained this information in the respondent’s reply and at the informal discussion.

[70] The respondent submits that, after 25 years in the public service, it can be assumed that the complainant is familiar with the staffing process and, irrespective of the marking scheme, knows that he must answer questions to the best of his ability. The

marking scheme was provided on the right hand side of page one of the knowledge exam, and to say he didn't know, lacks credibility.

[71] With respect to the issue of informal discussion, the respondent cites *Rozka, Neil v. Deputy Minister of Environment Canada et al.*, [2008] PSST 0004, and *Kitchen v. Deputy Minister Citizenship and Immigration Canada et al.*, [2008] PSST 0028, in support of its position that the informal discussion is primarily for the purpose of communication. While informal discussion can be used to correct errors or mistakes in the assessment process, it is not intended for the purpose of reassessing a candidate. The respondent further argues that informal discussion does not fall within the jurisdiction of the Tribunal unless it points to a decision to unfairly eliminate a candidate from a staffing process.

[72] The respondent submits that Ms. Monroe and Ms. Mitchell provided consistent explanations as to what occurred during the assessment process and at the informal discussion. The respondent argues that the fact that the complainant is not satisfied with these explanations carries no weight in the jurisprudence.

[73] The complainant has the burden of proof. The respondent submits that, in weighing the evidence, even on the complainant's testimony, the requirements for the informal discussion were met. The respondent's witnesses were consistent on what happened, while the complainant was inconsistent.

[74] In the alternative, even if miscommunication did occur during the informal discussion, the respondent argues that these mere errors do not amount to an abuse of authority. The informal discussion that occurred after the complainant was eliminated from the staffing process had no bearing on the actual assessment that took place.

[75] Various individuals responded to the complainant's requests for information, and they all stated the same thing – the candidate had to demonstrate an understanding of the leadership competencies at the manager level. Ms. Monroe's testimony was consistent with the respondent's reply to the amended allegations. The marks and notes she made on the complainant's exam are common practices. Based on the evidence, K4 was assessed the same for all candidates.

[76] The respondent submits that there is no evidence of serious error or omission. Even if there was some miscommunication, it does not constitute abuse of authority. It did not affect the way candidates were assessed on the exam.

[77] The complainant has been unable to refute the respondent's claim that the tools used were effective in assessing the required qualifications. The complainant's submissions fall short of what is necessary to support a case of abuse of authority. The respondent submits that, at all times, the assessment board acted in a fair and transparent manner in its choice of assessment tools.

[78] The respondent submits that the complainant has failed to meet the burden of proof that the respondent abused its authority under section 77 of the *PSEA*.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[79] The Public Service Commission (PSC) made its submissions in writing. The PSC submitted general written observations on the concept of abuse of authority and how the Tribunal should deal with this issue.

[80] The PSC referred to the Tribunal's decisions in *Oddie and Portree v. Deputy Head of Service Canada et al.*, [2006] PSST 0014, where the Tribunal determined that it is not its role to "redo" an appointment process. It also referred to *Visca and Jogarajah v. Chief Public Health Officer of the Public Health Agency of Canada et al.*, [2008] PSST 0015, in which the Tribunal stated that those with staffing authority have broad discretion to choose and use assessment methods.

[81] In the PSC's view, the Tribunal could conclude that there is an abuse of authority on the basis of improper assessment, if the evidence established that the assessment was affected by bad faith or personal favouritism, or if it is satisfied that any error in the assessment process was the result of such serious recklessness or carelessness that bad faith can be implied as the Supreme Court of Canada explained in *Finney v. Barreau du Quebec*, [2004] 2 S.C.R. 17.

D) COMPLAINANT'S REBUTTAL

[82] According to the complainant, the basic issue is that that the complainant did not know, and could not have known, that he had to pass both parts of the question for K4. This information was not available on the website, on the marking scheme, on the exam, or in the instructions given to candidates at the beginning of the exam. He did not learn this from the assessment board or from the informal discussion with Audrey Mitchell, but from the respondent's reply to his allegations.

[83] If the respondent cannot provide a consistent explanation of what it did, then there can be no confidence in the result and this is not a mere error. The respondent has not addressed the issue of why it said, in the informal discussion, that it marked the question globally as one question, while, in the reply to his allegations, the respondent said that the two parts of the question were marked separately and candidates had to pass both parts. That is the heart of the allegation.

ANALYSIS

[84] The complainant alleges that the knowledge exam used in the staffing process was flawed because the respondent did not explain to candidates that the question for K4 had two non-compensatory parts.

[85] Based on the evidence, the Tribunal finds the following relevant facts. The complainant wrote the knowledge exam at a session administered by Audrey Mitchell, a member of the selection board. Before the candidates wrote the exam, Ms. Mitchell read to them instructions provided to her in an email by human resources. The relevant portion of the email is set out below:

Here are a few of the things that we have been telling candidates before the exam:

- 3 hour exam. (9 – 11 am) (*sic*)
- Closed book exam. No study materials are to be used or on the desks.
- Remind candidates that the process is ongoing and they are not to discuss the contents of the exam with anyone.

- Candidates must pass each Knowledge factor. (K1 – K5)
- The pass mark for each factor is 60%.

[86] The parties introduced the Knowledge Test by consent. The first page of the test describes the number of points allocated to each knowledge qualification.

KNOWLEDGE TEST

07-IMC-IA-ONT-RHQ-02

PM05, MANAGER

CITIZENSHIP AND IMMIGRATION CANADA

<u>FACTOR</u>	<u>POINTS</u>
K1	5
K2	9
K3	24 (2+2+5+15)
K4	7
K5	<u>20 (10+10)</u>
	65

[87] The question related to K4, as it appeared on the test, is as follows:

<p>K4. Knowledge of the Key Leadership Competencies and Behaviours for the Public Service</p> <p>The Public Service Human Resources Management Agency of Canada (PSHRMAC) completed a review of the Profile of Leadership Competencies. These leadership competencies have been defined at all levels of the leadership continuum from the Deputy Minister to the Supervisory level. They are grouped as follows:</p> <p>Values and Ethics: <i>Serving Through Integrity and Respect</i></p> <p>Strategic Thinking: <i>Innovation Through Analysis and Ideas</i></p>	<p>Global Rating 1 – 7</p>
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<p>Engagement: <i>Mobilizing People, Organizations and Partners</i></p> <p>Management Excellence: <i>Delivering Through Action</i> <i>Management, People Management, Financial Management</i></p> <p>For the level of “Manager” please describe in detail the competencies under Values and Ethics. In addition, select one other leadership competency for a Manager and describe it in detail.</p>	
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[88] The Tribunal finds that the complainant knew that the K4 question had two parts and that he had to answer both parts. He also knew that K4 would be assessed with a “global rating” of from 1 - 7, as indicated in the upper right corner of the question. The Tribunal also finds that there was no dispute concerning the relevance of K4 to the essential qualifications for the position. The candidates had been advised where they could obtain information on the competencies assessed by the K4 question. The question was one question with two parts and it was marked with a global rating as indicated on the exam. The question was clear and unambiguous. Candidates were asked to describe “in detail” the Values and Ethics competency, and one other leadership competency selected by the candidate.

[89] The Tribunal has no reason to doubt the complainant’s belief that a good answer on one part of K4 could compensate for a poor answer on the other part, or that his strategy was to put most of his time and effort into the first part of the question. However, belief is not proof as the Tribunal succinctly stated in *Robert and Sabourin v. Deputy Minister of Citizenship and Immigration et al.*, [2008] PSST 0024, at paragraph 83.

[90] In examining the documentation related to the question for K4, the Tribunal finds that there is nothing to suggest that one part of the question is more important than the other part; nor is there anything to suggest that a candidate might get a passing mark on the question by providing a good answer on one part of the question without providing an equally good answer on the other part of the question. The question asks candidates to describe the Values and Ethics competency in detail for the level of a manager. They are also asked to select and describe in detail another leadership

competency for a manager. The Tribunal finds, based on the evidence, that the only difference between the two parts of the question is that management has selected one competency, and the candidate selects the other. There is nothing to indicate that, for the purposes of the exam, one competency is more important than the other or warrants a more complete or detailed answer than the other.

[91] Would it have been better if the complainant had been advised in advance that the two parts of K4 were non-compensatory? The complainant believes that if he had had this information, he would have allocated his time differently and devoted more time to describing the second competency. Nevertheless, in the absence of this information, the complainant had to rely on the words in the question. The Tribunal finds that, on a plain reading of the question, a reasonable person would conclude that the assessment board was expecting a similar level of detail for both parts of the question, i.e. a detailed knowledge of two competencies.

[92] Section 36 of the *PSEA* confers broad discretion on managers to choose and use assessment methods to determine if a person meets the established qualifications. However, as the Tribunal established in *Tibbs*, while the authority is discretionary, it is not absolute, and should not be exercised in a capricious or irrelevant manner, even unintentionally.

[93] In *Jolin v. Deputy Head of Service Canada et al.*, [2007] PSST 0011, the Tribunal held:

[77] [...] For the Tribunal to find there was abuse of authority in the selection of the assessment methods, the complainant must prove that the result is unfair and that the assessment methods are unreasonable, do not allow the qualifications stipulated in the statement of merit criteria to be assessed, have no connection to those criteria or are discriminatory.

[94] The complainant does not take issue with the qualifications of the successful candidates. As well, the complainant has not claimed that he was treated differently than other candidates. Given these facts, the Tribunal cannot accept that the K4 question failed to allow the qualifications stipulated in the SMC to be assessed.

[95] For the complainant, the issue is the failure of the respondent to note on the exam, or in some other way to inform the candidates, that they had to pass both parts of K4. While the Tribunal agrees that this information would indeed have been helpful to the complainant, and perhaps to others, the failure to provide this information was not an egregious error or omission amounting to an abuse of authority.

[96] In this case, the question for K4 clearly asked candidates to describe Values and Ethics and one other competency “in detail”. In assessing the answers, the assessment board was looking for candidates to satisfy the board that they had a good knowledge of two, not one, of the leadership competencies. The complainant failed to meet the standard established by the assessment board to demonstrate a good knowledge of two leadership competencies.

[97] The complainant also alleges that if there is no one consistent explanation for what happened to him, then how can he or anyone else have confidence that the staffing process was fair, transparent and resulted in an appropriate outcome?

[98] The Tribunal finds that the K4 question was one question with two parts and that this does not conflict with what was said in the respondent’s reply. The respondent’s reply to the complainant’s initial allegations stated, in part:

The complainant’s knowledge of the key leadership competencies and effective behaviours of the Public Service was assessed using a two-part question, which had a minimum pass mark of four out of seven (4/7). To be successful a candidate’s answer had to demonstrate a good understanding on both parts of the question. The marking scheme was non-compensatory, i.e. candidates had to succeed on both parts of the question to obtain a pass. Correct responses were noted by means of a check mark on the answer grid.

In this case the complainant provided a partially correct response, having covered only some of the elements of the expected answer in the first part of the question, which dealt with “values and ethics.” The complainant failed to also obtain a satisfactory rating on the second part. The complainant chose to describe the leadership competency “strategic thinking” but did not cover both elements, i.e. analysis and ideas. The members of the assessment board determined that his response on the second part of the question was unsatisfactory. Consequently, his overall mark was rated as “3” which was not sufficient for him to succeed on the knowledge qualification being assessed.

[99] The Tribunal finds that the information contained in the respondent’s reply may have been described in a way that was new to the complainant. However, there is a

difference between new information and contradictory information. There is no dispute concerning the fact that the question had two parts. The complainant may have seen the word “non-compensatory” for the first time in the respondent’s reply; however, the Tribunal finds that there is no contradiction between the use of this word and the expectation of the assessment board that candidates demonstrate a good knowledge of two leadership competencies. A good knowledge of only one leadership competency was not sufficient to pass.

[100] The Tribunal finds that the complainant has failed to raise sufficient evidence to support his position that the result was unfair and that the assessment method was unreasonable.

[101] The complainant also alleges that he was not given a satisfactory explanation at the informal discussion for being found not qualified.

[102] In *Kitchen*, the Tribunal noted, at paragraph 78:

[...] [T]he purpose of informal discussions is to provide the unsuccessful candidates the opportunity to understand the reason why they were not qualified. It is therefore a logical part of the process to discuss questions and answers. However, this does not mean that the questions and the assessment tools are inadequate.

[103] In *Rozka*, the Tribunal established the following:

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

(See also: *Neil; Dionne v. Deputy Minister of National Defence et al.*, [2008] PSST 0011; and, *Lavigne v. Deputy Minister of Justice et al.*, [2008] PSST 0013.)

[104] It is evident that the complainant did not get the explanation he was seeking during the informal discussion. Be that as it may, there is no convincing evidence before the Tribunal that the assessment board used the informal discussion to cover up abuses that took place during the assessment process. It is unfortunate that the complainant and Ms. Mitchell could not arrive at a mutual understanding regarding the assessment

of K4. If they had, then it may well have obviated the need for the complaint. However, although informal discussion is part of the assessment process, it is not part of the assessment, and failure to receive an explanation during the informal discussion that satisfies the complainant's concerns is not in itself evidence of abuse of authority.

DECISION

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

Kenneth J. Gibson
Member

PARTIES OF RECORD

Tribunal File:	2007-0384
Style of Cause:	<i>David Carnegie and the Deputy Minister of Citizenship and Immigration Canada et al.</i>
Hearing:	November 18 and 19, 2008 Toronto, Ontario
Date of Reasons:	March 2, 2009
APPEARANCES:	
Alan Lennon	For the complainant
Amita Chandra	For the respondent