



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

FILE: 2008-0228

OTTAWA, APRIL 16, 2009

**KELLY GRAY**

**COMPLAINANT**

**AND**

**THE DEPUTY HEAD OF SERVICE CANADA, AS PART OF THE DEPARTMENT OF HUMAN  
RESOURCES AND SOCIAL DEVELOPMENT**

**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>Gray v. Deputy Head of Service Canada et al.</i>
<b>NEUTRAL CITATION</b>	2009 PSST 0015

## REASONS FOR DECISION

### INTRODUCTION

[1] Kelly Gray, the complainant, is a long time employee of the respondent, the Deputy Head of Service Canada. She has performed the duties of Universal Agent (PM-02) on numerous occasions. Her complaint concerns the respondent's decision to eliminate her from an appointment process for the position of Universal Agent in Scarborough, Ontario on the basis that she did not have the required education.

### BACKGROUND

[2] On April 26, 2007 the respondent advertised an appointment process for the position of Universal Agent (PM-02) in a number of locations in Ontario. One of the essential qualifications for the position reads as follows:

#### Education:

Graduation with a degree from a recognized university or successful completion of a two year post-secondary program (i.e. community college or CEGEP) from a recognized academic institution or an acceptable combination of education and experience.

Note: Acceptable combination of education and experience is defined as a combination of successful completion of secondary school in addition to twelve (12) months experience delivering services to the general public, involving obtaining and providing information requiring explanation and/or clarification.

[3] The complainant does not have a degree from a recognized university, or successful completion of a two-year post-secondary program and she did not complete secondary school. She contends that the respondent should have accepted her results on two Public Service Commission (PSC) tests, the General Intelligence Test 310 (GIT 310) as equivalent to university graduation, and the General Intelligence Test 320 (GIT 320) as equivalent to secondary school graduation.

[4] She filed her complaint with the Public Service Staffing Tribunal (the Tribunal) on April 10, 2008 pursuant to paragraph 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*).

## ISSUE

[5] The Tribunal must determine whether the respondent abused its authority by refusing to accept the complainant's score on the GIT 310 as equivalent to graduation from a recognized university or the GIT 320 as equivalent to graduation from secondary school.

## SUMMARY OF RELEVANT EVIDENCE

[6] The complainant testified that she began working for the respondent in May 1985 at the age of 18. She became a Payment Service Agent (PM-01) in 1987, the level of her current substantive position. In November 1996, she had her first acting appointment in the Universal Agent position at the PM-02 level. Since that time she has performed the duties of Universal Agent on an acting basis approximately half of her working time.

[7] The complainant stated that she applied in this appointment process, indicating she had equivalent education to what was required, that is, successful results on the GIT 320. She contacted several departmental officials, including Colleen Stewart, Director, People and Culture Branch, of the Ontario Region. On May 1, 2007 Ms. Stewart wrote that she would look into the alternatives to the education question. On May 11, 2007 Ms. Stewart wrote that Service Canada was discussing the issue with the Canada Public Service Agency (CPSA). Since management could not clarify the issue immediately, the complainant was asked to go ahead and write a test for the appointment process. She was informed by Ms. Stewart's office on May 24 2007 that, where a qualification is raised beyond the minimum, a manager may accept a pass mark on the GIT 310 as an alternative to university graduation, but it is at the manager's discretion.

[8] The complainant had also made inquiries with Melida Sheppard, who was in charge of all Universal Agent appointment processes being conducted in the Ontario Region. According to the complainant, Ms. Sheppard said that if the complainant got something in writing stating that the PSC tests were acceptable, then she would accept them. Ms. Gray had also contacted her manager, Steve Halfyard, and her Director,

Dave Elliot, to raise the issue of whether her satisfactory scores on the PSC tests would allow her to meet the education qualification. Both Mr. Halfyard and Mr. Elliot thought that the PSC tests would be accepted.

[9] Ms. Gray testified that she went through the written assessment and passed, only to be eliminated on the basis of not having the education requirement. She was notified of her elimination on July 19, 2007. Finally, on July 25, 2007, Ms. Stewart's office informed her that since the education qualification was raised above the minimum standard for the PM group, the manager's decision was not to use the PSC approved alternative.

[10] Ms. Gray stated that, shortly after this appointment process was underway, she was asked to perform the duties of Universal Agent on an acting basis. She performed all the duties of Universal Agent from May 2007 to March 2008 and again from May or June 2008 until January 30, 2009, when her acting appointment was to end.

[11] The complainant stated that she had the impression from her conversations with Ms. Sheppard that she wanted to accept the PSC tests as an alternative to the education requirement. Ms. Sheppard told her if she could do it over again she would change the alternative, but it was too much work to start the process over again.

[12] Ms. Sheppard gave evidence on behalf of the respondent. She testified that she is a Service Delivery Manager, Appeals Centre of Excellence, Ontario Region. At the time of the appointment process, she had been a Senior Project Manager; one of her projects had been to carry out the Universal Agent appointment processes. Universal Agents work in the employment insurance area, calculating employment insurance benefits, assisting with cases going to adjudication, and working with investigation and control units, as well as preparing appeal submissions to the Referee.

[13] In March 2007, the Ontario Region of Service Canada decided to conduct appointment processes for PM-02 and PM-03 positions in accordance with the Human Resources Plan (HR Plan). Management wanted to professionalize the public service in accordance with changes that had been made to positions. The respondent set

standards for the PM positions which required the education qualification listed at paragraph 2 of this decision.

[14] Ms. Sheppard referred to a document issued by Service Canada in 2007, *Directive on the use of the National Statement of Merit Criteria for Service Agents positions – PM-01*, which was introduced into evidence. This document states that the education qualification for PM-01 positions, graduation with a university degree or completion of a two-year post-secondary program, is mandatory for all PM-01 Citizen Service Agent and Payment Service Agent positions. Consistent with the trend towards greater professionalization, Service Canada senior management in Ontario decided that the Universal Agent (PM-02) education requirement could not be less than that required for the PM-01 position.

[15] Ms. Sheppard explained that her involvement in the appointment process began on April 1, 2007. She received drafts of the advertisement for the position as well as the Statement of Merit Criteria (SMC). The SMC was approved by senior management in the Ontario Region, which included the Directors and Director General of Employment Insurance for Ontario, Kathy Garvie. The qualifications and area of selection were approved by this regional management team. Ms. Sheppard was the project leader for 17 appointment processes which took place in different locations in Ontario.

[16] There were three assessment teams for three different areas of the Ontario Region. In Toronto, candidates were screened for education and experience by Cindy Doucet. Ms. Sheppard fielded a number of inquiries about the area of selection, priorities and specific qualifications. The first call she received on the education requirement was from the complainant. Both Mr. Elliot, Director in the complainant's section, and Mr. Halfyard, her supervisor, expressed concerns that some employees might not meet the education qualification. Mr. Elliot further stated that, if Service Canada was proceeding with professionalizing its staff, it would need to support its employees with learning plans. The only person who asked Ms. Sheppard to reconsider the decision not to accept a satisfactory score on the PSC approved test was the complainant.

[17] Ms. Sheppard had a number of conversations with the complainant about the education requirement. Ms. Gray was of the view that the PSC tests were equivalent to university graduation and secondary school. Ms. Sheppard referred the complainant to her Human Resources representative to find out if the PSC test was equivalent to university or high school graduation. While Ms. Gray's application indicated she had Grade 12 graduation, she had informed Ms. Sheppard that she did not. The screening board had asked for proof of her Grade 12 graduation, which Ms. Gray did not provide.

[18] While inquiries into the PSC test were on-going, Ms. Gray continued in the process and was successful on the written portion. In July, Ms. Sheppard received a directive that the PSC approved alternatives to education (i.e. GIT) were not accepted in this appointment process. Thus the complainant was eliminated from further consideration at the end of July 2007.

[19] Ms. Sheppard testified that the approval of the SMC, and the decision not to accept the PSC test alternative, were made by Ms. Garvie and the senior management team. Ms. Stewart, Director, People and Culture Branch wrote to Ms. Gray on July 25, 2007 stating that the decision to raise the education requirement above the minimum was in the interest of professionalizing service delivery. She also indicated that when the education qualification is raised above the minimum for the group and level, the manager has the authority to determine if the PSC approved test will be accepted as an alternative to the higher level of education. Managers may accept the GIT 310 as an alternative but, in this case, the manager's decision was not to use the PSC approved alternative.

[20] Gail Ellingwood, Manager, Qualification Standards, CPSA, gave evidence on behalf of the respondent. The respondent sought to have her qualified as an expert in the field of qualification standards; Ms. Ellingwood's curriculum vitae was introduced into evidence. The complainant's representative did not raise any objections concerning Ms. Ellingwood's qualifications. The Tribunal qualified her as an expert witness on qualification standards.

[21] Ms. Ellingwood had prepared the Qualification Standards document which came into force with the *PSEA*. For the PM group, the minimum education qualification standard is a secondary school diploma, or employer approved alternatives. Employer approved alternatives to education provide management with flexibility in the form of options that they can accept in lieu of the education requirement for the position. Generally, alternatives to education are a satisfactory score on a PSC approved test or an acceptable combination of education, training and/or experience.

[22] Ms. Ellingwood testified that there is confusion surrounding the difference between alternatives to education and equivalencies. PSC tests, which measure cognitive ability and reasoning skills, are alternatives to education. Equivalencies granted by Canadian provincial and territorial authorities, such as the General Education Development (GED), which is a secondary school equivalent, must always be accepted. An equivalency is deemed to be the same as having the qualification. In contrast, an alternative is “in lieu of” or in place of the qualification.

[23] In this appointment process, the education requirement was graduation with a degree from a university, or completion of a two-year post-secondary program. This was above the minimum requirement for the PM group. The manager had also provided an alternative to education, which was a combination of education and experience. For the alternative, the education required was successful completion of secondary school and, in addition, the candidate had to have 12 months’ experience in providing service to the public. Ms. Ellingwood testified that managers have the authority to determine the alternatives to education and, in this case, the alternative did not include a satisfactory score on a PSC approved test. Ms. Ellingwood emphasized, as noted in the Qualifications Standards document, when an alternative is used, it has to be specified on the SMC.

[24] Ms. Ellingwood explained that when the minimum requirement for a group is established as the education requirement, the PSC alternative has to be accepted. Once a manager establishes a requirement above the minimum for the group, the PSC test does not have to be accepted.

[25] In Ms. Ellingwood's opinion, the education qualification established in this case was consistent with the qualification standard for the PM group.

[26] On cross-examination, Ms. Ellingwood agreed that the manager in this case could have accepted the GIT 310 as an alternative to university graduation. However, according to Ms. Ellingwood, it had to be specified as an alternative to education on the SMC.

#### ARGUMENTS OF THE PARTIES

##### A) COMPLAINANT'S ARGUMENTS

[27] The complainant contends that her situation falls squarely within the third category of abuse of authority outlined in *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008, namely when there is an improper and unreasonable result.

[28] During the same period of time in which the respondent was trying to answer the question of whether they would accept her satisfactory score on the GIT 310, the complainant was involved in another appointment process for a PM-02 position, and was found qualified. She performed the duties of the position for a period of about ten months while the process was on-going. The complainant submits that the evidence establishes that the complainant is a highly competent employee who has performed the duties of Universal Agent frequently. As such, according to the complainant, it is an unreasonable result to find that she is not qualified for the position.

##### B) RESPONDENT'S ARGUMENTS

[29] The respondent provided written arguments on the meaning of abuse of authority and the burden of proof in complaints before the Tribunal.

[30] The respondent submits that the issue to be addressed is whether the complainant meets the essential education qualification established by the deputy head. The education qualification consisted of three options: graduation with a university degree; successful completion of a two-year post-secondary program; or, an acceptable combination of education and experience. The respondent submits that, on the



complainant's own evidence, she admitted that she did not meet any of the three options.

[31] The respondent acknowledged that the complainant had performed the duties of Universal Agent both before and after this appointment process. However this does not establish that she has the education required in this appointment process.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[32] The PSC did not appear at the hearing. As it has done in previous complaints, it provided written submissions on the concept of abuse of authority, and how the Tribunal should focus its approach in this area.

[33] The PSC submits that, by virtue of section 30 of the *PSEA*, the establishment of merit criteria is an authority given directly to deputy heads. In this case, it was up to the deputy head to determine, at the outset of the staffing process, whether or not the PSC GIT 320 could be accepted as equivalent to the successful completion of secondary school for the purposes of staffing this particular position in its organization.

ANALYSIS

[34] The issue to be decided in this case is whether the respondent was obliged to accept, as an alternative to a university degree, a satisfactory score on a PSC approved test (GIT 310) or, as an alternative to secondary school graduation, a satisfactory score on a PSC approved test (GIT 320).

[35] The legislative authority for establishing qualifications and qualification standards is set out in sections 30 and 31 of the *PSEA*, which 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.

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

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

(Emphasis added)

[36] Subsection 30(2)(a) sets out the authority of the deputy head to establish essential qualifications. As the Tribunal explained in *Neil v. Deputy Minister of Environment Canada et al.*, [2008] PSST 0004, at paragraph 46: “What is required of managers is to *establish the qualifications for the work to be performed.*”

[37] In *Visca v. Deputy Minister of Justice et al.*, [2007] PSST 0024, the Tribunal confirmed the discretion of the deputy head in establishing essential qualifications as follows, at paragraph 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. [...]

[38] Thus, management has broad discretion to determine the qualifications for a position. In this case, Ms. Garvie, the delegated manager, in consultation with her senior management team, determined that the education qualification for the Universal Agent position would be a degree from a recognized university or completion of a two-year post-secondary program. An alternative to this education qualification was also listed on the advertisement and SMC, namely an acceptable combination of education

and experience. The acceptable combination was successful completion of secondary school, and 12 months experience delivering service to the general public.

[39] The complainant argues that to find her unqualified for the Universal Agent position in this process was an unreasonable result and, therefore, an abuse of authority. In support of her position, Ms. Gray emphasizes that she has been found qualified in other processes, and has performed the duties of Universal Agent many times over the last number of years.

[40] It is uncontested that the complainant does not have a university degree, successful completion of a two-year post-secondary program, or successful completion of secondary school. She does have the experience which formed part of the alternative. Her contention is that the deputy head was obliged to accept her satisfactory scores on one of the PSC approved alternatives – the GIT 310 as an alternative to university graduation or the GIT 320 as an alternative to secondary school graduation.

[41] Section 31 of the *PSEA* provides that qualifications established by the deputy head must meet or exceed any qualification standards established by the employer. In *Rinn v. Deputy Minister of Transport, Infrastructure and Communities et al.*, [2007] PSST 0044, at paragraph 41, the Tribunal explained as follows:

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

[42] The following excerpts from the Qualification Standards developed and maintained by the CPSA, on behalf of the employer, and pursuant to subsection 31(1) of the *PSEA*, are relevant to this decision:

**Program administration (PM) qualification standard**

**Education**

The minimum standard is:

- a secondary school diploma or employer-approved alternatives (see [Section 2, Part 1, Education](#)).

## Conditions applicable to the occupational group qualification standards

### Education

1. While the employer (CPSA on behalf of the Treasury Board) is responsible for establishing and maintaining the qualification standards, the Public Service Commission is responsible for assessment and, in this capacity, prescribes or approves tests that are referred to in the Occupational Group Qualification Standards.

2. The term "**acceptable**" refers to acceptability for a position as determined by the manager unless otherwise regulated by the employer (CPSA on behalf of the Treasury Board).

[...]

5. The other levels of education mentioned in this document refer to the education levels established by Canadian provincial and territorial authorities. Equivalencies granted by provincial and territorial authorities, (e.g., General Education Development (GED) which is a secondary school equivalent), must always be accepted as equivalent to the respective education level.

### Alternatives to education

**Alternatives to education may be used at the manager's** discretion except for certain occupational groups as prescribed below.

**When used, the alternative(s) must be specified on the Statement of Merit Criteria.**

### Employer-approved alternatives to a secondary school diploma

1. a satisfactory score on the PSC test approved as an alternative to a secondary school diploma; or
2. an acceptable combination of education, training and/or experience.

### Application specific to the following groups:

[...]

Program and Administrative Services Group (i.e., AS, PM, WP & OM positions)

[...]

a. **Whenever a position in one of the groups listed above requires a secondary school diploma [...] candidates who meet the following criteria must always be accepted as meeting the prescribed secondary school diploma requirement:**

- o a satisfactory score on the PSC test approved as an alternative to a secondary school diploma; and,
- o [...]

b. The opportunity to be assessed by at least one of the two employer-approved alternatives to a secondary school diploma (1 and/or 2) listed

above **must be offered** to candidates who have not previously met the secondary school diploma requirement.

[...]

#### **Employer-approved alternative to post-secondary training**

The employer-approved alternative to post-secondary training (i.e., community college, CEGEP, or university education) is:

- an acceptable combination of education, training and/or experience. (Not applicable to the Financial Management Group Level 1 positions.)

[...]

#### **Employer-approved alternatives to university graduation**

[...]

For those occupational groups that do allow an alternative to university graduation, the employer-approved alternatives are:

1. a satisfactory score on the PSC test approved as an alternative to university graduation (not applicable to TR and PA Groups [i.e., IS]Group), or
2. an acceptable combination of education, training and/or experience.

(emphasis added)

[43] Based on the oral evidence presented at the hearing, and the above-quoted Qualification Standards, the Tribunal finds that the respondent appropriately applied the qualification standards in this case. The education required was completion of a university degree, or a two-year post-secondary program. This requirement clearly exceeds the minimum standard for the PM group, which is a secondary school diploma. The manager has the discretion to accept alternatives to education, but they must be specified in the SMC. The alternative, in this case, which was listed in the SMC, was a combination of successful completion of secondary school and experience.

[44] There is no obligation specified in these standards for the respondent to accept the GIT 310 as an alternative to university graduation. While a manager may accept it, in this case, she did not use it as one of the alternatives to university graduation.

[45] There is an obligation for the manager to accept the GIT 320 as an alternative to a secondary school diploma for positions in the PM group, whenever a secondary school diploma is the education qualification. However, that is not the case here. The

education qualification was university graduation, or completion of a two-year post-secondary program.

[46] The complainant conceded at the hearing that she did not have a university degree or completion of a two-year post-secondary program. She did not meet the alternative specified, as she does not have a secondary school diploma. The Tribunal concludes that the screening board did not abuse its authority in eliminating the complainant on the basis that she did not meet the education qualification for the position.

[47] The complainant relies on the third category of abuse of authority, as set out in the *Tibbs* decision, namely “when there is an improper result (including unreasonable, discriminatory, or retroactive administrative actions).” The complainant contends that the result of this appointment process – that she was found to be unqualified – was unreasonable because she has performed the duties of Universal Agent a number of times, and was appointed on an acting basis during this appointment process.

[48] A complainant must prove, on a balance of probabilities, that the respondent’s actions constituted abuse of authority. On the basis of the evidence presented, the complainant has not proven that there was an improper result in this case. The deputy head established the education qualification with a view towards increasing the professionalism of the Service Canada staff. An alternative was offered to candidates who did not have a university degree or completion of a two-year post-secondary program. Ms. Gray did not have this qualification. The qualifications established for positions may vary depending on the circumstances which exist at the time of the process, including the organization’s current and future needs. Section 31 of the *PSEA* requires that deputy heads meet or exceed the qualification standards established by the employer. On the evidence presented, the Tribunal finds that the respondent met this obligation in this case. The complainant has not established that the respondent’s actions amount to abuse of authority.

DECISION

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

Helen Barkley  
Member

PARTIES OF RECORD

Tribunal File:	2008-0228
Style of Cause:	<i>Kelly Gray and the Deputy Head of Service Canada, as part of the Department of Human Resources and Social Development et al.</i>
Hearing:	October 23-24, 2008 Toronto, ON
Date of Reasons:	April 16, 2009
APPEARANCES:	
Trinette deWijk	For the complainant
Caroline Engmann	For the respondent