



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2007-0244

OTTAWA, MARCH 18, 2009

CARALYNN MORRIS

COMPLAINANT

AND

THE COMMISSIONER OF CORRECTIONAL SERVICE OF CANADA

RESPONDENT

AND

OTHER PARTIES

MATTER	Complaint of abuse of authority pursuant to subsection 77(1) of the <i>Public Service Employment Act</i>
DECISION	Complaint is dismissed
DECISION RENDERED BY	Merri Beattie, Member
LANGUAGE OF DECISION	English
INDEXED	<i>Morris v. Commissioner of Correctional Service of Canada et al.</i>
NEUTRAL CITATION	2009 PSST 0009

REASONS FOR DECISION

INTRODUCTION

[1] CaraLynn Morris works as a Correctional Officer (CX-02) at the Mountain Institution, Correctional Service of Canada (CSC), in Agassiz, B.C. In April 2007, Ms. Jean Stephen was appointed on an acting basis to the position of Institutional Preventive Security Officer (IPSO) at the CX-03 group and level at the Mountain Institution. Ms. Morris alleges that the respondent, the Commissioner, Correctional Service of Canada, abused its authority through a series of serious errors and omissions related to the choice and implementation of a non-advertised appointment process. She also claims that there was abuse in the application of merit. Finally, the complainant contends that Ms. Stephen's appointment was based on personal favouritism.

[2] The respondent denies these allegations and states that there was no abuse of authority in this appointment process. The respondent claims that there were valid operational reasons for choosing a non-advertised appointment process. Moreover, the appointment was not motivated by personal favouritism. Finally, the respondent maintains that any errors that may have occurred in the implementation of the appointment are administrative in nature, and not serious enough to amount to abuse of authority.

ISSUES

[3] To resolve this complaint, the Public Service Staffing Tribunal (the Tribunal) must determine the following issues:

- (i) Did the respondent abuse its authority in choosing a non-advertised appointment process?
- (ii) Did the respondent's errors and omissions in this appointment process constitute abuse of authority?
- (iii) Did personal favouritism influence the appointment of Ms. Stephen?

BACKGROUND

[4] On May 29, 2006, correctional staff at the Mountain Institution were invited to apply for a developmental opportunity in the Security Intelligence Office. Ms. Stephen was selected.

[5] On May 16, 2007 a *Notice of Information Regarding Acting Appointment* was posted on *Publiservice* to announce Ms. Stephen's acting appointment to the CX-03 IPSO position from April 30, 2007 to November 2, 2007.

[6] Ms. Morris filed her complaint with the Tribunal on May 28, 2007.

[7] During the hearing, two different titles were used for the position in question, namely IPSO and Security Intelligence Officer. Nothing turns on the different terminology. For the purposes of these reasons for decision, the term IPSO will be used.

SUMMARY OF RELEVANT EVIDENCE

[8] The complainant provided an overview of her work history with CSC from 1994 to the present. She testified that she had acted in the IPSO position on one occasion for three months, and at other times for shorter periods. Her *Personal Development Plans* dating back to 1997, which consistently document her goal of becoming an IPSO, were introduced into evidence. The complainant applied for the developmental opportunity in the Security Intelligence Office, but was not selected.

[9] The complainant testified that, while sorting mail, she saw Ms. Stephen's application for "CGIL" training. She stated that this training is restricted to IPSOs.

[10] Two reports from the Offender Management System (OMS) were introduced into evidence. The complainant testified that she uses the OMS to enter data. She stated that she obtained these two reports, which are inmate case histories, when she was assigned the inmate. She explained that employees using the OMS have their own password-protected accounts, and access is determined by the Warden.

[11] Each of the two reports is for the period from April 27, 2006 to May 29, 2006. One report dated June 25, 2006 shows Ms. Stephen as Acting IPSO. The complainant testified that this shows that Ms. Stephen was acting as an IPSO before the process to fill the developmental position was finished. The second report dated July 5, 2006 has Ms. Stephen's title as Correctional Officer. The complainant stated that this report shows that the OMS was altered to hide the fact that Ms. Stephen was acting as an IPSO.

[12] On cross-examination, the complainant acknowledged that she could "only deduce" that the discrepancy between Ms. Stephen's titles in the two reports meant that the respondent altered the information to hide the pre-selection.

[13] The *Human Resources Plan* for Mountain Institution, 2006/2007 (HR Plan) was also introduced into evidence; the complainant testified that it contains nothing related to staffing or succession planning for IPSOs.

[14] CSC's *Instrument of Delegation of Authorities in the area of Human Resource Management* formed part of the documentary evidence at the hearing. The complainant testified that this document shows that a Deputy Warden has level 4 delegation, and that a level 2 delegate is required to "[m]ake appointments to the public service following a non-advertised appointment process."

[15] Public Service Commission (PSC) policies and guides related to choice of appointment process, advertising appointment processes and notification were introduced into evidence, as well as CSC bulletins on acting appointments and criteria for non-advertised appointment processes. These documents were introduced without objection; the complainant did not testify about the content of any of these documents.

[16] The complainant introduced the *Checklist for Non-Advertised Appointment Process* to show that it stated the following reason for using a non-advertised process to appoint Ms. Stephen: "Appointment within a developmental program." The complainant testified that she was not aware of any approved developmental program for IPSOs.

[17] The *Acting Authorization and Offer Form* was also part of the evidentiary record at the hearing. This form states that Ms. Stephen's acting appointment was from April 30, 2007 to November 2, 2007. The *Assessment of Qualifications* for Ms. Stephen against the merit criteria for the IPSO position, signed by Michael Boileau, Deputy Warden, was introduced into evidence as well. This assessment is dated August 29, 2007 – four months after Ms. Stephen's acting appointment began.

[18] The complainant testified that she had no direct knowledge of a personal relationship between Mr. Boileau and Ms. Stephen.

[19] Mr. Boileau testified on behalf of the respondent. He was Deputy Warden at Mountain Institution in 2006 and 2007. Mr. Boileau testified that he had been an IPSO for over four years, had managed IPSOs in various positions that he occupied since 1998 and, at Mountain Institution, the two IPSOs reported directly to him. He stated that he has conducted four or five appointment processes for IPSO positions.

[20] Mr. Boileau provided testimony about the nature of the work of an IPSO. He explained that IPSOs collect, analyze and disseminate information about activity within the institution. They develop sources among the institution's staff, the inmates and visitors. They liaise with police and conduct criminal and security investigations. They collect evidence, secure crime scenes, and prepare written reports.

[21] Mr. Boileau testified that, in May 2006, he obtained the Warden's approval to establish a position to assist the IPSOs, and to backfill during their absences. The position would provide a developmental opportunity for employees. The duties of the position were to assist the IPSOs day-to-day, to assume certain portfolios, such as investigations, to conduct interviews, and to provide advice to the manager.

[22] An internal memorandum dated May 29, 2006 was introduced into evidence. Mr. Boileau identified it as the notification to the Correctional staff of the Mountain Institution of the developmental opportunity in the Security Intelligence Office. He testified that the applications were reviewed by himself, D. Havlin, Chief, Correctional Operations, and the two IPSOs. The complainant, Ms. Stephen and one other applicant met the criteria outlined in the memorandum. Ms. Stephen was chosen for the first

one-year assignment, beginning June 19, 2006. Ms. Stephen was selected because she had the most experience in security intelligence – an asset criteria for which preference was given.

[23] On cross-examination, Mr. Boileau was asked to explain the apparent contradiction between a developmental assignment and the requirement for experience. He stated that he does not view it as a contradiction. According to him, to best assist the IPSOs, candidates did not need to be fully qualified. They needed a basic understanding of the operation without having to undergo extensive training. In his view, the developmental assignment was an opportunity to develop skills in the investigative process.

[24] Mr. Boileau stated that he had intended to give all three qualified applicants one year assignments in the developmental opportunity position. He also stated that, while he knew some of the 14 or 15 applicants better than others, none had previously reported directly to him, and he had only working relationships with each of them.

[25] On both cross and redirect examination, Mr. Boileau was questioned about the note in his assessment stating that Ms. Stephen attended Intelligence Security Officer training in June 2004. He explained that she was acting as an IPSO at the Mission Institution at that time. Mr. Boileau was not at the Mission Institution during that time period.

[26] Mr. Boileau stated that the date on each of the OMS reports that the complainant testified about is the date each of the reports was printed. He explained that, as he understands it, the OMS self-generates a profile for the employee entering the data, including position title. OMS reports reflect the employee's title on the date of printing, not his or her title at the time the data was entered into the system. He also stated that the OMS would not be capable of generating a profile titled "Assistant IPSO" or "Developmental Opportunity"; it would likely choose Acting IPSO.

[27] A series of daily roster reports for Mountain Institution was tendered into evidence through Mr. Boileau. Mr. Boileau testified that Ms. Stephen was working as a CX-02 from June 1, 2006 to June 18, 2006, prior to starting her developmental

assignment on June 19, 2006. The roster reports for June 19 and 20, 2006 show Ms. Stephen working in the Security Intelligence Office at the CX-02 level.

[28] Mr. Boileau testified that, in early April 2007, he was contacted by the Warden of the Pacific Institution and asked to make Jim Farrell available for a six-month assignment to that institution. Mr. Farrell is one of the two IPSOs at Mountain Institution. Mr. Boileau explained that he agreed to the assignment, and discussed options for filling the temporary vacancy several times with his Warden. He also discussed the situation at a meeting of the Institutional Personnel Committee, which is comprised of Senior Managers, and representatives of Finance and Human Resources. He decided to make a non-advertised acting appointment.

[29] Mr. Boileau testified that he chose a non-advertised appointment process because there was an unforeseen and immediate temporary need. An advertised process had just been initiated for the region, but would take some time and there was no existing list of persons qualified for the IPSO positions. He stated that he was delegated under the former staffing scheme, had been recently trained, has been involved in many staffing processes, and knows the policies.

[30] Mr. Boileau explained that there was nothing in the HR Plan about this non-advertised appointment process because this vacancy was not anticipated; the assignment opportunity for Mr. Farrell was unexpected.

[31] Mr. Boileau stated that he only considered Ms. Stephen for the appointment because she had demonstrated her capability in the developmental assignment, and was involved in ongoing investigations. He explained that, because of the division of work, Mr. Farrell conducted investigations and the other IPSO did not. Ms. Stephen worked on investigations with Mr. Farrell and was familiar with his files. At the time, she was working closely with the Royal Canadian Mounted Police (RCMP) on a sensitive investigation. Mr. Boileau felt that it was essential to the integrity of the investigation that there be continuity; he was not in a position to replace Ms. Stephen in the key role.

[32] Mr. Boileau testified that, in early April, he assessed Ms. Stephen against the merit criteria for the position using his direct personal knowledge; he was aware of her

previous work, had direct knowledge of her experience, and credentials, and had observed her during the nine months she was in the developmental position. On cross-examination, he further explained that he had personal knowledge of Ms. Stephen's training certificates and her curriculum vitae. Mr. Boileau testified that Ms. Stephen met all the merit criteria for the IPSO position.

[33] Mr. Boileau acknowledged that he did not complete a written assessment of Ms. Stephen until sometime in August, 2007, at which time he was told by Human Resources that his assessment had to be in writing, and he was provided with the *Assessment of Qualifications* document to be used.

[34] Mr. Boileau testified that the non-advertised appointment required the approval of the Regional Deputy Commissioner - the level 2 delegate. According to Mr. Boileau, the Warden signed the *Acting Authorization and Offer Form* to indicate his support of the request before it was sent to the Regional Deputy Commissioner in Abbotsford.

[35] Mr. Boileau stated that he did not prepare the *Checklist for Non-Advertised Appointment Process*. He explained that the document is normally prepared by Human Resources personnel or an administrative assistant. He did not know who prepared this checklist and he had not seen it before. It was prepared for the Warden's signature and approval by the Regional Deputy Commissioner. Mr. Boileau testified that he was not aware of any developmental programs. He stated that if he were to have completed this checklist, he would have chosen the option "Other," together with the rationale he used when he prepared the *Acting Authorization and Offer Form*.

[36] Mr. Boileau proceeded with Ms. Stephen's acting appointment on April 30, 2007 although the level 2 delegate had not yet approved the appointment; approval was given on May 9, 2007. He testified that the situation was urgent and, had approval not been granted for the acting appointment over four months, he planned to shorten the appointment to less than four months based on the required level 3 approval of the Warden that he had obtained on April 12, 2007.

[37] Mr. Boileau stated that the *Notice of Information Regarding Acting Appointment* was not posted on *Publiservice* until May 16, 2007 because of the time needed to prepare it.

ARGUMENTS OF THE PARTIES

A) COMPLAINANT'S ARGUMENTS

[38] The complainant argues that, while the *Public Service Employment Act*, S.C. 2003, c. 22, 12, 13 (the *PSEA*), allows the choice of an advertised or a non-advertised process, the values in the preamble of the *PSEA* must be respected. As well, PSC policies and CSC bulletins must be followed.

[39] The complainant filed a written allegation of personal favouritism with respect to the non-advertised appointment of Ms. Stephen. The case the complainant presented to the Tribunal clearly demonstrated her belief that the respondent personally favoured Ms. Stephen, although she did not use those words in her closing arguments. She framed her arguments in terms of lack of transparency.

[40] The complainant argues that there was no transparency in this non-advertised appointment process. She submits that Ms. Stephen had already received development and training opportunities, yet she was selected for the developmental assignment. She also submits that the OMS reports show that Ms. Stephen was in the developmental position before the application period closed. Finally, Ms. Stephen was the only person considered for the non-advertised acting appointment.

[41] The complainant submits that there were several breaches of policy which constitute serious errors and omissions, and amount to abuse of authority. First, the non-advertised appointment was made prior to obtaining the required level of approval. Secondly, two different rationales were given for choosing a non-advertised process; one was based on a developmental program which does not exist, and the other does not meet policy requirements; it does not demonstrate how the non-advertised process meets the appointment values. Third, and most critically, Ms. Stephen was not assessed until four months after her acting appointment began. The complainant argues

that, subsection 30(2) of the *PSEA* states that “the person to be appointed meets the essential qualifications,” which is a clear requirement to conduct an assessment before an appointment is made. Finally, according to the complainant, it is not clear that an appropriate, duly authorized assessment tool was used to conduct the assessment.

[42] The complainant argues that, in accordance with Tribunal’s decision in *Tibbs v Deputy Minister of National Defence et al.*, [2006] PSST 0008, there is no requirement to establish improper intent to prove abuse of authority. She submits that there is no improper intent in this case. However, the mistakes that were made are serious. As a result, according to the complainant, there has been a significant deviation from the nature and purpose of the *PSEA* amounting to abuse of authority.

[43] The complainant submits that revocation is inappropriate in this case since the acting appointment has ended. She is seeking a declaration of abuse of authority.

B) RESPONDENT’S ARGUMENTS

[44] The respondent argues that the *PSEA* provides the discretion to choose between an advertised and a non-advertised appointment process. The respondent submits that the Tribunal’s decisions in *Robbins v. the Deputy Head of Service Canada et al.*, [2006] PSST 0017, and *Chaves v. Commissioner of the Correctional Service of Canada et al.*, [2008] PSST 0003, establish that a complainant must demonstrate, on a balance of probabilities, that there was abuse in making the choice to use a non-advertised process.

[45] The respondent submits that the complainant has not met her burden; there is no evidence that the decision was motivated by bad faith or personal favouritism. There was an urgent, temporary need; a non-advertised appointment process was a valid and reasonable choice, made in good faith, and consistent with the need to protect the integrity of CSC’s operations, specifically the RCMP investigations.

[46] The respondent argues that the preamble must be read in context with the rest of the *PSEA*. Non-advertised appointments are permitted under section 33 of the *PSEA*

and, therefore, do not, in and of themselves, fail to meet the values of fairness, access and transparency in the preamble.

[47] The respondent argues that in *Oddie v. Deputy Minister of National Defence et al.*, [2007] PSST 0030, and *Wylie v. President of the Canada Border Services Agency et al.*, [2006] PSST 0007, the Tribunal has clearly indicated that policies have no legislative authority and are not binding on the Tribunal.

[48] The respondent submits that policy requirements in general and, specifically, those at issue here are not found in the *PSEA* or in the *Public Service Employment Regulations*, SOR/2005-334 (the *PSER*). The respondent further submits that it is not the Tribunal's role to enforce the policies of the PSC or CSC.

[49] The respondent relies on the Tribunal's decisions in *Tibbs* and *Portree v. Deputy Minister of Service Canada et al.*, [2006] PSST 0014, to argue that much more than mere errors or omissions is required to constitute abuse of authority. A complainant must demonstrate a serious wrongdoing or flaw in the appointment process.

[50] The respondent submits that there were no serious errors or omissions in this appointment process.

[51] The respondent agrees that there is nothing in the HR Plan about the IPSO positions or this appointment process; however, the unforeseen departure of Mr. Farrell could not be expected to have been included in any plan.

[52] The respondent acknowledges that Ms. Stephen was appointed before the delegated manager approved the appointment of over four months. However, the required approval had been obtained to proceed with a shorter appointment, which was the alternate plan.

[53] The respondent acknowledges that there was a clerical error on the *Checklist for Non-Advertised Appointment Process*; the wrong reason for using a non-advertised process was noted. Nevertheless, although the *PSEA* does not require it, a written justification for choosing a non-advertised appointment process was included on the *Acting Authorization and Offer Form*.

[54] The respondent submits that Ms. Stephen was assessed before her appointment, albeit not in writing. However, neither the *PSEA* nor the *PSER* requires a written assessment. The respondent also submits that section 36 of the *PSEA* provides flexibility to choose assessment tools, and that the complainant has not provided any evidence to support the allegation that the tools used were unauthorized or inappropriate.

[55] The respondent argues that, although the *Notice of Information Regarding Acting Appointment* was posted sixteen days after the appointment began, there was no impact on the right to file a complaint.

[56] Finally, the respondent submits that there is no evidence of personal favouritism.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

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

[58] With respect to this particular complaint, the PSC expresses concern that some of its policies were not precisely followed which, in its view, appears to have led to a lack of transparency. The respondent's written justification for using a non-advertised appointment process does not, in the opinion of the PSC, appear to be in compliance with the PSC *Policy on Choice of Appointment Process*. As well, the PSC stresses that the notification of this appointment was not posted until more than two weeks after the appointment began. Finally, although Ms. Stephen's assessment shows that she meets all of the essential qualifications, the document is dated almost four months after the appointment began.

[59] The PSC submits that the failure to follow a PSC policy in an appointment process is not enough by itself to establish abuse of authority. For the Tribunal to conclude that there is abuse of authority, according to the PSC, it must find that the appointment process was affected by improper intention such as bad faith or personal

favouritism, or be satisfied that such serious recklessness or carelessness occurred that bad faith can be implied.

RELEVANT LEGAL AND POLICY PROVISIONS

[60] Subsections 30(2) and 30(4), and section 33 of the *PSEA* are relevant:

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

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

[...]

30. (4) The Commission is not required to consider more than one person in order for an appointment to be made on the basis of merit.

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

[61] This complaint is made under subsection 77(1) 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);

(b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; or [...]

[62] Section 13 of the *PSER* pertains to notices related to acting appointments:

13. The Commission shall, at the time that the following acting appointments are made or proposed, as a result of an internal appointment process, inform the persons in the area of recourse, within the meaning of subsection 77(2) of the Act, in writing of the name of the person who is proposed to be, or has been, appointed and of their right and grounds to make a complaint:

(a) an acting appointment of four months or more;

(b) an acting appointment that extends the person's cumulative period in the acting appointment to four months or more.

(emphasis added)

[63] The PSC's power to establish policies, and the deputy heads' obligation to follow them are found respectively in subsection 29(3) and section 16 of the *PSEA*, which read as follows:

29. (3) The Commission may establish policies respecting the manner of making and revoking appointments and taking corrective action.

16. In exercising or performing any of the Commission's powers and functions pursuant to section 15, a deputy head is subject to any policies established by the Commission under subsection 29(3).

[64] Subsection 56(1) of the *PSEA* is relevant. It reads as follows:

56. (1) The appointment of a person from within that part of the public service to which the Commission has exclusive authority to make appointments takes effect on the date agreed to in writing by that person and the deputy head, regardless of the date of their agreement.

[65] The following provisions of the *PSC Policy on Choice of Appointment Process* are relevant:

Policy Statement

The choice of advertised or non-advertised, and internal or external, appointment processes is consistent with the organization's human resources plan and the core and guiding values.

[...]

Policy Requirements

In addition to being accountable for respecting the policy statement, deputy heads must:

[...]

- ensure that a written rationale demonstrates how a non-advertised process meets the established criteria and the appointment values.

[66] CSC has established internal directives which have been issued in Bulletins. The following provisions are relevant:

CSC Bulletin on Acting Appointments (Bulletin #: 2007-24)

Context

There are valid operational requirements that call for the use of acting appointments, such as:

- replacing employees on leave, paid or without pay, absent on language training or other training, or on assignment/secondment, etc;

Requirements

Acting appointment opportunities for periods greater than four (4) months, as a norm, will be the result of an advertised appointment process.

Non-advertised acting appointments greater than four (4) months will be the exception rather than the rule.

Persons in the area of selection must be informed of the name of the person being appointed and of their right to make a complaint to the Public Service Staffing Tribunal:

- immediately, if the initial period of acting exceeds four (4) months; or [...]

File Requirements

- a written rationale demonstrating the decision-making process, including why the choice of rotational assignments or an advertised process was not used and in the case of an advertised appointment process, how the area of selection was established;
- a detailed assessment of applicants against the Statement of Merit Criteria and Conditions of Employment;
- a Signed Statement of Persons Present at Screening Board/Rating Board

CSC Bulletin on Criteria for Non-Advertised Appointment Processes (Bulletin #: 2007-23)

Statement

Correctional Service of Canada will use non-advertised appointment processes to help the organization meet its business and human resources needs in a manner that respects the Public Service appointment values of fairness, access and transparency. All appointments made to and within the public service must be based on merit, free from

political/bureaucratic patronage and nepotism and respect the provisions of the Employment Equity and Official Languages Acts.

Requirements

Prior approval of level 2 as defined in the Instrument of Delegation in the area of Human Resource Management is required before proceeding with an Internal or External Non-Advertised Appointment Process.

A non advertised appointment process must:

- be consistent with CSC's human resources planning, unless the vacancy is due to unforeseen circumstances;
- respect the PSC appointment values of fairness, access and transparency.

In addition to the appointment values managers should take the following considerations into account prior to selecting a non-advertised appointment process:

- flexibility, affordability and efficiency;
- nature of the work, urgency and duration of the appointment;

Criteria

The criteria are not prescriptive or all-inclusive and the potential applicability of a criterion does not mean that a non-advertised process must be used, or that it is necessarily the best staffing option.

Internal or external non-advertised appointment processes could be used in the following circumstances:

- Other reasons that are not listed in the above criteria, but support a non-advertised appointment process as the best option that meets the needs of CSC and respects the Public Service appointment values. The rationale must make reference to past efforts to recruit by advertisement, citing the area of selection used and the results achieved.

Documentation for Staffing File

In accordance with PSC Policy requirements the sub-delegated manager must provide:

- A written rationale demonstrating how their decision meets the established criteria stated in this bulletin. The use of the Checklist for Non-Advertised Appointment Processes ([CSC-1329](#)) is mandatory and must be approved by level 2 and signed by the sub-delegated manager.

- A written assessment of the proposed appointee against the essential qualifications and conditions of employment.

In addition a Signed Statement of Persons Present at Screening Board/Rating Board form must be completed and retained on the staffing file.

ANALYSIS

Issue I: Did the respondent abuse its authority in choosing a non-advertised appointment process?

[67] The Tribunal has determined that, for a complaint under paragraph 77(1)(b) of the *PSEA* to be successful, the complainant must establish, on a balance of probabilities, that the *choice* to use a non-advertised appointment process was an abuse of authority. See, for example, *Rozka et al. v. Deputy Minister of Citizenship and Immigration Canada et al.*, [2007] PSST 0046.

[68] Based on the evidence, the Tribunal finds that Mr. Boileau was faced with an immediate, unforeseen requirement to replace an employee on a temporary basis, and had important operational needs to consider. The criteria established by CSC allow non-advertised appointment processes when they best meet the needs of CSC and respect the appointment values. Mr. Boileau had an employee with the required qualifications, who was already involved in ongoing investigations. He decided to appoint the employee on a non-advertised, acting basis, from April 30, 2007 to November 2, 2007 and he requested approval to do so.

[69] The Tribunal finds that, at the decision stage, measures were taken that promote transparency. Mr. Boileau discussed the options for filling the vacancy with the Warden. He also discussed his proposed approach with his colleagues and advisors on the Institutional Personnel Committee, who would then be able to respond to questions and concerns raised by their employees. Mr. Boileau knew, and informed the Regional Deputy Commissioner, that an advertised process had been initiated which would provide employees with fair access to future temporary and indeterminate vacancies.

[70] There is no evidence of abuse of authority in the *choice* to use a non-advertised appointment process.

Issue II: Did the respondent's errors and omissions in this appointment process constitute abuse of authority?

[71] The complainant alleges that Mr. Boileau failed to assess Ms. Stephen prior to appointing her and that he did not use an authorized assessment tool. She also contends that the rationale for choosing a non-advertised process is insufficient to meet policy requirements and that the appointment was made without the proper delegated approval. The PSC raises concerns about the delay in notifying employees of the non-advertised appointment.

[72] The Tribunal established in *Tibbs*, that abuse of authority is more than errors and omissions and that the degree to which conduct is improper may determine whether or not the conduct constitutes abuse of authority.

[73] In *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17, [2004] S.C.J. no. 31 (QL), the Supreme Court found that bad faith should be interpreted to include serious carelessness or recklessness. The Supreme Court held as follows, at paragraph 39 (QL version):

39. [...] recklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that absence of good faith can be deduced and bad faith presumed. The act, in terms of how it is performed, is then inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power [...]

[74] In *Robert and Sabourin v. Deputy Minister of Citizenship and Immigration et al.*, [2008] PSST 0024, the Tribunal found that the respondent's multiple errors and omissions demonstrated such serious carelessness as to constitute bad faith.

[75] Although the Tribunal finds, in this case, that the respondent made errors and omissions, they do not demonstrate serious carelessness or recklessness and therefore do not amount to abuse of authority.

(i) Assessment

[76] In *Tibbs*, the Tribunal identified a framework to guide the analysis of abuse of authority complaints. An allegation that an appointment was made without any assessment or an assessment based on inadequate tools could be considered under the category of abuse by acting on insufficient material. The Tribunal does not find that to be the case here.

[77] In *Robert and Sabourin*, the Tribunal found that the respondent's failure to assess the appointee in a timely manner was a serious omission. The written assessment in that case, as in this one, was done approximately four months after the appointment was made. However, the evidence before the Tribunal in *Robert and Sabourin* was that no assessment was done before then because there was no Statement of Merit Criteria (SMC).

[78] In this case, based on the evidence presented, the Tribunal finds that Mr. Boileau had a thorough knowledge of the IPSO positions and the qualifications required to do the work. The SMC was available for the assessment of Ms. Stephen and Mr. Boileau assessed her before her appointment. His assessment was based on the merit criteria for the position and his personal knowledge of Ms. Stephen's qualifications. Finally, unlike the case of *Robert and Sabourin*, there is no evidence before the Tribunal that Ms. Stephen does not meet the essential qualifications for the position.

[79] Section 36 of the *PSEA* permits the use of any appropriate assessment method in determining whether a person is qualified. In *Visca v. Deputy Minister of Justice et al.*, [2007] PSST 0024, the Tribunal confirmed that an assessor's personal knowledge of a candidate is an accepted assessment method.

[80] In this case, the Tribunal finds the following pertinent facts: Mr. Boileau possessed a thorough knowledge of the duties and qualifications of the IPSO position; he had ample experience managing IPSOs; and, he had first-hand experience of Ms. Stephen's performance in the developmental assignment. The Tribunal finds that this combination made the use of personal knowledge an entirely appropriate assessment method.

[81] The Tribunal finds that Ms. Stephen's appointment was based on Mr. Boileau's pre-appointment assessment that she met the essential qualifications. The written assessment that he later prepared is uncontested and reflects his earlier assessment. The appointment was not made based on insufficient information.

[82] While the assessment was timely, it was not documented in a timely manner. This is an omission that does not constitute an abuse of authority but, as happened here, can contribute to negative perceptions about the legitimacy of an appointment. Transparency requires that assessments be properly documented contemporaneously with the actual assessment.

(ii) Written Rationale

[83] In a significant departure from the former staffing scheme, there is no preference given to advertised over non-advertised appointment processes in the *PSEA*. The PSC, however, recognizing that the value of transparency is at greater risk with non-advertised processes, has established a policy governing the use of non-advertised processes.

[84] In *Robert and Sabourin*, the Tribunal explained the legislative requirement for compliance with, and the essential role of PSC policy in ensuring transparency in non-advertised appointment processes:

[60] Policies of the PSC also ensure that there are transparent employment practices. The policy on notification requires that persons in the area of recourse are notified of their right to complain. With respect to non-advertised appointment processes, PSC policy requires that deputy heads establish and communicate criteria for the use of non-advertised processes and requires a written rationale. These requirements ensure there is a written record of decisions made.

[...]

[69] [...] Under subsection 29(3) of the *PSEA*, the PSC may establish policies respecting the manner of making appointments. Pursuant to section 16 of the *PSEA*, deputy heads are subject to these policies. Contrary to the respondent's submission, this is not merely a question of policy; there is a clear obligation under the *PSEA* for deputy heads, and their delegates, to comply with PSC policies established under subsection 29(3).

[85] In *Robert and Sabourin*, the Tribunal found extreme carelessness because the respondent failed to write a rationale to justify using a non-advertised appointment

process on any of the three occasions when it was required. In this case, in the *Acting Authorization and Offer Form* submitted for the Regional Deputy Commissioner's approval, Mr. Boileau included a brief explanation of why the acting appointment was needed, and information that an advertised appointment process was underway.

[86] The CSC's *Bulletin on Acting Appointments* requires a written rationale explaining the decision, including why rotational assignments or an advertised process was not used. The PSC's *Policy on Choice of Appointment Process* requires a written rationale demonstrating how the non-advertised criteria, and the appointment values, have been met and the CSC's *Bulletin on Criteria for Non-Advertised Appointment Processes* requires the mandatory use of a departmental form and approval by a level 2 delegate. Clearly, these requirements were not met. There was also an error on the *Checklist for Non-Advertised Appointment Processes*; however, the Tribunal is satisfied on the evidence that this latter was a minor administrative mistake.

[87] A justification for using a non-advertised process serves two important purposes. It must provide sufficient information for the delegated manager to consider a request to approve a non-advertised appointment. In this case, the Regional Deputy Commissioner approved the request. The complainant offered no evidence which could lead the Tribunal to conclude that there was insufficient information for the level 2 delegate to make her decision.

[88] The other purpose served by a comprehensive rationale is to help ensure transparency in non-advertised appointment processes. Based on Mr. Boileau's testimony, there was a rationale for using a non-advertised process for this appointment. PSC policy, however, requires that the rationale be in writing, and that it address specific matters. In this case, a very limited justification was put in writing, but it did not meet the policy requirements. The failure to provide a comprehensive written rationale was an omission which resulted in a significant lack of transparency in this process.

[89] However, as further explained in *Robert and Sabourin*, there are other measures in the legislative scheme that contribute to ensuring the transparency of non-advertised

processes which may, as in this case, mitigate the respondent's failure to provide a written rationale. The *PSEA* requires that persons in the area of recourse are notified of non-advertised appointments and provides an opportunity to examine the process through recourse to the Tribunal. The *Public Service Staffing Tribunal Regulations*, SOR/2006/6, provide for exchange of all relevant information when a complaint is made to the Tribunal.

(iii) Notification

[90] Persons in the area of recourse were notified of the appointment and the grounds for recourse to the Tribunal.

[91] For acting appointments, as is the case here, the *PSC Policy on Notification* does not apply. Notification of an acting appointment is governed by section 13 of the *PSER*.

[92] Section 13 of the *PSER* requires that notice of an acting appointment of four months or more shall be given "at the time" the appointment is made or proposed. CSC requires that the notice be issued "immediately." It is particularly important that notification of acting appointments be timely, given their temporary nature. An untimely notice can give rise to speculation of impropriety. As well, it may deter an employee from exercising his or her right to complain about an appointment that has ended or is about to end.

[93] In *Robert and Sabourin*, the respondent did not notify employees of the appointment until more than three months after it was required to do so, and after the acting appointment had ended. The notice was untimely as a result of other serious problems, namely that there was no SMC for the position and no assessment had been done. In this case, the notice was published 16 days after the appointment was made, and an assessment had been done.

[94] While the notification was not provided at the time of the appointment, and was certainly not immediate, the period of delay in this case did not cause undue prejudice to those who had a right to complain.

[95] The Tribunal finds the following factual chronology of events. In early April 2007, the need to temporarily replace an employee arose. On April 10, 2007 Mr. Boileau requested authorization for an acting appointment beginning April 30, 2007. Financial certification and the Warden's approval were obtained on April 11 and 12, 2007 respectively. The request was then sent to regional headquarters for final approval by the Regional Deputy Commissioner, which was granted on May 9, 2007. The notice was published on May 16, 2007.

[96] The Tribunal finds that the need to act quickly to address an unforeseen need, together with the logistics of obtaining approval from a delegate in another location, contributed to the delay in notifying employees of this appointment. CSC should consider alternative, more expedient means to avoid delays in the future, and to ensure complete compliance with legislative and policy requirements. Having said that, the delay was not exceedingly long and the notice could not have been issued prior to obtaining the Regional Deputy Commissioner's approval to proceed. Transparency was affected by this delay. However, based on the evidence, the Tribunal is satisfied that the delay in notification was not due to serious carelessness or recklessness.

(iv) Delegated Authority

[97] The complainant submits that the respondent proceeded with a non-advertised appointment without proper authority. The fact is that the required approval was granted on May 9, 2007 and the appointment was effective on April 30, 2007. This amounts to a retroactive appointment.

[98] Subsection 56(1) contemplates appointments made both following and before the date of an agreement between a deputy head and the person to be appointed. It reads as follows:

56. (1) The appointment of a person from within that part of the public service to which the Commission has exclusive authority to make appointments takes effect on the date agreed to in writing by that person and the deputy head, regardless of the date of their agreement.

[99] The agreement in this case is the *Acting Authorization and Offer Form*. There is no dispute that the Regional Deputy Commissioner is the deputy head's delegate

authorized to make a non-advertised acting appointment of four months or more. The date of this agreement between the deputy head's delegate and Ms. Stephen is May 9, 2007. When Ms. Stephen and the Regional Deputy Commissioner signed the agreement, they agreed, in writing, to an effective date of April 30, 2007. There is nothing improper in the legally delegated approval of this retroactive appointment.

Summary

[100] The respondent did not comply with PSC policy, resulting in errors and omissions, particularly in documenting the assessment and the justification for this non-advertised appointment process. However the Tribunal finds, based on the evidence, that the respondent's errors and omissions, while careless and deficient in terms of transparency, do not reach the level of serious carelessness or recklessness where bad faith could be imputed.

[101] Having said this, the Tribunal wishes to emphasize that more could have been done to alleviate the legitimate concerns of the complainant that the appointment process was not transparent. Documenting decisions is essential for the proper administration of appointments. Delegated managers should be particularly diligent in this regard given the broad discretion afforded to them under the *PSEA*. Timely completion of comprehensive records of decisions helps to ensure transparent employment practices.

Issue III: Did personal favouritism influence the appointment of Ms. Stephen?

[102] In *Glasgow v. Deputy Minister of Public Works and Government Services Canada et al.*, [2008] PSST 0007, the Tribunal addressed the concept of personal favouritism and the use of circumstantial evidence to support an allegation of personal favouritism:

[41] Undue personal interests, such as a personal relationship between the person selecting and the appointee should never be the reason for appointing a person. Similarly, the selection of a person as a personal favour, or to gain personal favour with someone else, would be another example of personal favouritism.

[...]

[44] Evidence of personal favouritism can be direct, such as facts establishing clearly the close personal relationship between the person selecting and the appointee. However, it will often be a question of circumstantial evidence where some action, comments or events prior to, and during, the appointment process will have to be reviewed. Depending on its source and its particular relation to the issues in a complaint, circumstantial evidence can be as convincing as direct evidence. [...]

[103] The complainant alleges that this non-advertised appointment process was chosen to favour Ms. Stephen. She bases this allegation on the following set of circumstances. First, Ms. Stephen received training which the complainant believes is normally reserved for higher-level employees. Secondly, Ms. Stephen was chosen for the developmental opportunity assignment before the process to fill it ended. Lastly, Ms. Stephen was the only one considered for the non-advertised acting appointment.

[104] The complainant admits that she has no direct knowledge of a personal relationship between Ms. Stephen and Mr. Boileau. Mr. Boileau testified that there was only a working relationship. Therefore, there is no direct evidence before the Tribunal of personal favouritism.

[105] The complainant's evidence is entirely circumstantial. As explained in *Glasgow*, this may be sufficient to lead to a finding of personal favouritism. However, the circumstantial evidence presented here falls far short of what was envisioned in *Glasgow*.

[106] The complainant testified that, while sorting mail, she saw Ms. Stephen's application for "CGIL" training that is restricted to IPSOs. She did not produce the application, or a witness to testify about Ms. Stephen's training. There is no evidence before the Tribunal to identify the training, to establish that only IPSOs can attend the training, or to establish whether or when Ms. Stephen attended the training. There is evidence that Ms. Stephen attended the Security Intelligence Officer course in June 2004. Mr. Boileau testified that Ms. Stephen was acting IPSO at Mission Institution at the time, but that he was not there. According to the complainant's testimony, both she and Ms. Stephen had past acting opportunities.

[107] The only certain facts that the Tribunal can find, based on the evidence, are that Ms. Stephen received training in the past while acting at a higher level, and that this

training did not involve Mr. Boileau. There is nothing in these facts that could give rise to a finding of personal favouritism.

[108] The complainant and Mr. Boileau gave conflicting testimony concerning the OMS reports. Neither the complainant nor Mr. Boileau is an OMS expert. The complainant has drawn her own conclusions about the information in the reports, and Mr. Boileau sought information from someone else. They disagree as to what the report dates represent, and on the significance of the different employee titles. No witness with specialized knowledge of the OMS or the specific reports appeared before the Tribunal. Given all of the above, the Tribunal cannot place any weight on the OMS reports. Accordingly, there is no evidence that Ms. Stephen was pre-selected for the developmental assignment, or that there was an attempt to hide the pre-selection by altering the information in the OMS.

[109] Ms. Stephen was chosen for the developmental opportunity almost one year prior to the non-advertised acting appointment in question. There is no evidence, nor is it reasonable to conclude, that Mr. Boileau could have anticipated Mr. Farrell's temporary absence at that time. On the contrary, Mr. Boileau's uncontested evidence is that he had very little notice of Mr. Farrell's departure.

[110] The complainant asks the Tribunal to conclude, based on her interpretation of a series of circumstances and some limited information, that Ms. Stephen's non-advertised appointment was based on personal favouritism. The Tribunal finds as fact that Ms. Stephen was chosen for a developmental assignment and, a year later, was the only person considered for an acting appointment. It is an undisputed fact that Mr. Boileau considered only Ms. Stephen for this non-advertised acting appointment. Subsection 30(4) of the *PSEA* specifically permits an appointment based on merit after consideration of only one person.

[111] The evidence does not support a finding that personal favouritism influenced the decision to use a non-advertised process for this appointment.

DECISION

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

Merri Beattie

Member

PARTIES OF RECORD

Tribunal File:	2007-0244
Style of Cause:	<i>CaraLynn Morris and Commissioner, Correctional Service of Canada et al.</i>
Hearing:	April 22 and 23, 2008 Abbotsford, BC
Date of Reasons:	March 18, 2009
APPEARANCES:	
Corinne Blanchette	For the complainant
Sean Kelly	For the respondent