



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2009-0019
Issued at: Ottawa, December 9, 2009

JOHN COSTELLO

Complainant

AND

THE DEPUTY MINISTER OF FISHERIES AND OCEANS 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>Costello v. Deputy Minister of Fisheries and Oceans Canada et al.</i>
Neutral Citation	2009 PSST 0032

Reasons for Decision

Introduction

1 The complainant, John Costello, alleges that the respondent abused its authority when it invited him to an interview without identifying two of the essential qualifications that would be assessed. The complainant also alleges that there is no clear link between these two qualifications and the assessment tool. Furthermore, the complainant alleges that the references obtained on these two qualifications were not properly assessed.

2 The respondent, the Deputy Minister of Fisheries and Oceans, argues that the delegated managers have broad discretion to select assessment methods, conduct assessments and determine whether candidates meet the essential qualifications for a position. According to the respondent, the assessment board had a good understanding of the work to be performed, developed and used a rating guide that clearly outlined the criteria to be assessed, and had the necessary competencies to ensure a thorough assessment of the candidates' qualifications. The respondent submits that the complainant's qualifications were properly assessed, and he was eliminated from the appointment process because he did not meet all of the essential qualifications.

Background

3 In January 2008, the Department of Fisheries and Oceans initiated an internal advertised appointment process for an Area Manager, Small Craft Harbours, at the PM-05 group and level. The intent was to establish a pool of candidates for anticipated vacancies in Area Manager positions.

4 The complainant was a candidate in this appointment process. He was assessed but not found qualified because he failed to meet two essential qualifications, namely judgment and reliability, which were assessed through an interview.

5 On January 15, 2009, a Notification of Appointment or Proposed Appointment of Sharon Branton was posted on *Publiservice*.

6 The complainant filed his complaint with the Public Service Staffing Tribunal (the Tribunal) on January 15, 2009 pursuant to paragraph 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*).

Issues

7 The Tribunal must determine the following issues:

(i) Did the assessment tool assess the qualification it purported to assess? If not, did the respondent abuse its authority by using that tool?

(ii) Did the respondent abuse its authority by issuing an interview invitation to the complainant that failed to identify all of the qualifications to be assessed at the interview?

(iii) Did the respondent abuse its authority by not properly assessing the complainant's references?

Summary of Relevant Evidence

8 The complainant testified on his own behalf. Mr. John Loubar and Mr. William Golding, testified on behalf of the respondent.

9 Mr. Loubar is the Area Director, Western Newfoundland and Southern Labrador. He has been in this position for the last four and three-quarters of his 21 years in the public service. He is at the EX-01 group and level.

10 Mr. Loubar testified that this appointment process was initiated because of the anticipated retirement of three Area Managers. The plan was to establish a pool of candidates to replace them. He chaired the assessment board, which also included Jane Kelsey and William Golding. Mr. Loubar drafted the Statement of Merit Criteria (SMC) after studying other SMCs for similar positions. The SMC was finalized in consultation with Human Resources and Mr. Golding.

11 According to Mr. Loubar, the Area Manager, Small Craft Harbours, is a highly sensitive and complex position in which the incumbent works with limited supervision.

The job involves 107 harbours along 1000 kilometres of coastline. Some of the harbours are managed directly by the Department of Fisheries and Oceans and another 55 are managed by community organizations called harbour authorities. The Area Manager is responsible for construction and maintenance projects in these harbours, and deals with government agencies, harbour authorities, and persons in the fishing industry. He testified that federal and provincial members of parliament are interested in the work of this position because of the large amount of money involved and the impact on their constituents. The Area Manager has a staff of three.

12 Mr. Loubar said that the judgment qualification was included in the SMC because the Area Manager works with considerable autonomy in assessing and prioritizing projects while dealing with a limited budget. He must deal with complaints and enquiries from interested stakeholders, including members of Parliament.

13 Mr. Loubar testified that Mr. Golding developed the question to assess judgment. The question involved a realistic scenario that an Area Manager might face on the job. He said the assessment board considered all of the rating criteria for this qualification. It was looking for a manager-level answer that considered all the options. The complainant's answer was good, but simplistic and short. It did not cover many of the criteria they were looking for. A score of "very good" was necessary to pass. The complainant's score was "good."

14 The reliability qualification was included because of the high level of sensitivity and the political and socio-economic impact of the position. According to Mr. Loubar, "[w]e depend on the Area Manager and his group to get the work done in an appropriate manner." He said that Mr. Golding suggested a question about the application of public service ethics and values because they "wanted more than does the person show up on time." He testified that this was a big issue since the report of the Gomery Commission. The successful candidate must assess needs objectively, avoid making promises outside their authority, recognize the role of politicians and deal carefully with other stakeholders. The assessment board wanted to know if the candidate could apply the values and ethics personally, and get his or her staff to do so.

15 According to Mr. Loubar, the complainant basically responded that he would apply the public service values and ethics by leading by example. The board was looking for more. He said that other candidates described the kinds of behaviours that they would demonstrate to accomplish this.

16 Mr. Loubar testified that the assessment board asked the same questions to all candidates.

17 According to Mr. Loubar, the *Job Opportunity Advertisement* stated that reference checks “may” be sought because the assessment board wanted to maintain its flexibility. He said the assessment board decided to use the reference checks to validate the interview findings. They were not scored as part of the assessment, but used to ensure there were no negative surprises. With one exception, all of the candidates got positive references. The references had no impact on who qualified for the position.

18 Mr. Golding has been the Regional Director, EX-01, Small Craft Harbours, Newfoundland and Labrador for the last 14 years.

19 Mr. Golding’s testimony was similar to Mr. Loubar’s. For the question on the judgment qualification, he testified that he wanted a real life example. He said that it is possible for a member of the public or a harbour authority to ask for favours, and he wanted to know how the candidates would deal with such a request. He said the complainant’s answer was a very matter of fact type of response. It was a rules-based approach in which he basically said “don’t bring this to me,” while implying that the individual could take his request to a higher level. This was not what the assessment board was seeking. He testified that some of the other candidates met the criteria, demonstrating that they understood the impact of their response on the larger organization, while the complainant failed to demonstrate that dimension.

20 With respect to the reliability qualification, Mr. Golding testified that he drafted the definition and the question. He said that this was a high profile position and the successful candidate would have to demonstrate reliability to clients, staff and supervisors. For a senior position, he said: “the application of values and ethics is a key

aspect of reliability.” According to Mr. Golding, the complainant’s answer was very general and failed to demonstrate the behaviours associated with values and ethics in the Public Service.

21 The complainant is a Case Manager and Employee Assistance Advisor at the AS-04 group and level. He testified that he received an email on July 10, 2008, inviting him to an interview and listing the qualifications to be assessed. Judgment and reliability were not on the list. The interview took place 11 days later and during that period, the email was not updated to advise him that these qualifications would be included in the interview.

22 He believes his response to the judgment question was in keeping with the definition of the qualification. He said that the client in the scenario asked him to behave in an unethical manner by requesting funding for a project outside of a meeting of the Regional Harbour Authority Advisory Committee (the Committee). In his answer, he said he would acknowledge the client’s concerns but would not entertain his request to fund the project. He said it was inappropriate for the client to make his request outside of the Committee meeting. He feels his response was appropriate and demonstrated good judgment.

23 With respect to reliability, the complainant testified that the question he was asked was about values and ethics and not reliability. Nevertheless, he believes that his answer to lead by example and address and deal with his staff, if they were not respecting appropriate behaviours, was an appropriate answer.

24 The complainant testified that the assessment board had references from a director, a manager and a client stating that his judgment and reliability were above average.

25 On cross-examination, the complainant testified that he has no difficulty with the qualifications of the appointee and is not seeking revocation of her appointment; nor is he suggesting bad faith or personal favouritism in her appointment. He also admitted that he was familiar with the term “essential qualifications” and that he knew judgment

and reliability were on the SMC for the position. He also agreed that the assessment board's interview notes were a good summation of his responses.

26 The complainant stated that he worked on a project involving navigational aids and harbour boards in 1998 and 1999 and dealt with search and rescue operations from June 1988 to February 1995 and again from April 1997 to March 1998. However, he conceded that he has only been on the periphery of the small craft harbour function for the last 10 years. He stated that he has no direct reports or financial signing authority in his current position.

Arguments of the Parties

A) Complainant's Arguments

27 The complainant argues that the respondent unintentionally abused its authority through the use of inadequate assessment tools and by failing to properly assess his references.

28 While the complainant agrees that judgment and reliability are essential qualifications for the PM-05 position, he argues that the questions used to assess these qualifications were flawed and did not assess the qualifications properly.

29 He argues that the assessment criteria for the judgment qualification are unreasonable and the majority of them cannot be related to the scenario he was given.

30 Regarding the reliability qualification, the complainant presented a definition of reliability from an unidentified dictionary that reads as follows: "Consistently performs in a competent manner to the point where actions are predictable." He argues that the respondent's definition: "Applies public service values and ethics; works with integrity and respect," is not a definition of reliability.

31 The complainant argues that the respondent has failed to meet the public service staffing value of fairness in this appointment process. He states that the Public Service Commission's (PSC) *Assessment Policy* provides that the assessment processes and methods must effectively assess the essential qualifications and other merit criteria and

be administered fairly. Furthermore, he argues that the processes and tools must be directly linked to the identified merit criteria and be able to accurately measure them, that candidates have an opportunity to demonstrate their merit for the position and that managers have a sound rationale for their decisions.

32 The complainant argues that the respondent abused its authority by using unreasonable assessment methods or assessment methods that do not allow the qualifications stipulated in the SMC to be assessed. In support of this, he refers to the Federal Court decision in *Madracki v. Canada*, (1987) 72 N.R. 257, [1986] F.C.J. No. 727 (QL) (F.C.A.); and *Jolin v. Deputy Head of Service Canada et al.*, [2007] PSST 0011, at paragraph 77.

33 He further argues that the *Assessment Policy* provides that persons to be assessed be informed in a timely manner of the assessment methods to be used. He states that this was not done. The email dated July 10, 2008, inviting him to the interview, did not mention that judgment and reliability were to be assessed during the interview.

34 He cites section 36 of the *PSEA* to argue that references are a valid means to assess past performance and accomplishments. He says that his three references show that, based on past performance, his reliability and judgment are excellent, but this information was not used and, therefore, did not allow the merit criteria to be properly assessed.

35 The complainant also cites *Finney v. Barreau du Québec*, [2004] S.C.R. 17; [2004] S.C.J. No. 31 (QL), to support his contention that the Tribunal may find bad faith in this case based on the respondent's serious recklessness or carelessness in using inadequate assessment tools and by not properly weighing the reference checks. Furthermore, he argues that four of the five categories of abuse of authority identified by David Phillip Jones & Anne S. de Villars, *Principles of Administrative Law* (Toronto: Thomson Carswell, 2004), apply in this case.

36 The complainant stated that he was not seeking revocation of the appointee's appointment. He is seeking a fair reassessment so that he can be included in the pool

for other Area Manager positions. He asks that the Tribunal order the respondent to correct the deficiencies in the assessment process and reassess him using appropriate questions and giving proper weight to the references.

B) Respondent's Arguments

37 The respondent argues that under subsection 30(2) and section 36 of the *PSEA*, it is up to the delegated manager to establish the essential qualifications for a position and to determine how they will be assessed. The respondent cited *Visca v. Deputy Minister of Justice et al.*, [2007] PSST 0024, in particular paragraph 51, concerning the broad discretion available to managers under section 36.

38 According to the respondent, the evidence of the two senior managers must be given significant weight. They demonstrated that they are familiar with the duties and responsibilities of the job to be performed. The complainant, on the other hand, never worked in the small craft harbour program and it has been ten years since he has had exposure to the program. He is not in a managerial position and has no responsibility for direct reports or budgets.

39 The respondent believes that the evidence shows a clear link between the work to be performed, the qualifications that were assessed, and the interview questions that were asked. The respondent is not required to prove that the assessment methods, processes and tools are directly linked to the merit criteria. The complainant must prove that they are not. Furthermore, there is no evidence that the assessment tool is flawed.

40 According to the respondent, the complainant failed the reliability qualification because he did not demonstrate the behaviours expected of a senior manager in this highly sensitive position. The evidence shows that reliability means more than just showing up. Application of public service values and ethics are key to the position, and the managers were looking for the candidates to demonstrate relevant behaviours. The definition of reliability has to be established with reference to the work to be performed. The complainant cannot substitute his dictionary definition for the definition used by the assessment board.

41 The judgment question was based on a real life scenario. Mr. Golding explained the origins of the scenario and its link to the work to be performed. The complainant gave a good answer to the question, but it lacked the depth and breadth expected at the level of the Area Manager.

42 The respondent acknowledged that the email inviting the complainant to his interview did not list judgment and reliability as qualifications to be assessed. The respondent has no information to explain their absence. However, the *Job Opportunity Advertisement* stated that candidates must meet the essential qualifications of the position in order to be appointed and the SMC clearly indicated judgment and reliability are essential qualifications. The complainant should not have been surprised that he was assessed against these qualifications and he had almost seven months from the time of his application until his interview to prepare for the assessment.

43 The respondent contends that its failure to list the two qualifications in the invitation to the interview was a mere oversight and does not constitute abuse of authority. It cited *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008, paragraph 65; *Visca*, paragraph 48; and *Oddie v. Deputy Minister of National Defence et al.*, [2007] PSST 0030, paragraph 80, in support of its position.

44 The respondent argues that the references were only used as a validation tool. Since they were not marked or weighted, the respondent cannot accept the complainant's assertion that they were excellent. As the complainant had not been in a managerial role with direct reports and signing authority since 2002, the referees would not be able to assess how he would perform in the Area Manager role. The assessment board used a real life scenario to assess judgment and it could not ask the referees, who worked in different areas, how the candidate would perform as an Area Manager in that situation.

45 Citing *Lavigne v. Deputy Minister of Justice*, [2009] C.F. 684, paragraphs 70 and 71; [2009] A.C.F. no 827 (QL); *Portree v. Deputy Head of Service Canada et al.*, [2006] PSST 0014, paragraphs 47, 54, 56; *Oddie*, paragraph 66; and *Jolin*, paragraphs 26 to 32, the respondent submitted that it is not the complainant's opinion that matters. He

cannot simply disagree with the assessment, but must provide convincing evidence of abuse of authority to prove his allegations.

C) Public Service Commission's Arguments

46 The PSC noted that under section 16 of the *PSEA*, deputy heads are subject to the *Public Service Commission Appointment Policy, Assessment Policy, and Selection and Appointment Policy*. The PSC has also developed a series of guides to help explain how the policies should be implemented.

47 The PSC stated that it had no serious issues with the definition of judgment developed by the respondent. From a policy perspective, it did have issues with the definition of reliability and the list of criteria to assess it.

48 The PSC said that Mr. Loubar testified that he wanted a broader, detailed sense to reliability. Mr. Golding testified that the assessment board wanted more than just good attendance. The PSC argues that the SMC does not reflect this broader sense. It just states that reliability is an essential qualification.

49 According to the PSC's *Guidance Series – Assessment, Selection and Appointment*, section 1.3, when establishing essential qualifications, “[t]he manager should clearly identify what he or she is looking for. If necessary, he or she should further detail an essential qualification, so that persons can fully understand the manager's expectations.”

50 The PSC agrees that values and ethics are important, but argues that the SMC should at least have identified values and ethics to provide a fairer and transparent assessment process.

51 The PSC contends that failure to follow a PSC policy is not automatically an abuse of authority. It argues a finding of abuse of authority must be based on improper intention, bad faith, personal favouritism, or such serious recklessness that bad faith can be presumed.

52 The PSC provided additional authorities in support of its submissions on abuse of authority.

D) Respondent's Reply to the Public Service Commission's Arguments

53 The respondent submits that its understanding of the evidence differs from that of the PSC. It is satisfied that the definition of reliability used for the assessment process is appropriate for the Area Manager position. It argues that one cannot go from the definition to the assessment criteria without considering the question that was asked. The criteria reflect what the assessment board was looking for in response to the question. They were not asking the candidates to define values and ethics, but to demonstrate expected behaviours.

54 The respondent submits that while the PSC would have preferred a more elaborate definition of reliability in the SMC, the SMC is already a lengthy document. Furthermore, everyone entering the public service signs an undertaking to be bound by its values and ethics. "It is a given." It would set a dangerous path to require the inclusion of values and ethics in every SMC. The respondent asked rhetorically what would happen if, for example, someone forgot to include it.

55 It also argues that the PSC's *Guidance Series – Assessment, Selection and Appointment* is not policy and managers are encouraged to follow its advice but it is not mandatory to do so. Furthermore, Mr. Loubar's name and telephone number were included on the *Job Opportunity Advertisement* for candidates who needed more information on the assessment process. The complainant's invitation to his interview also provided a contact if he had any questions regarding the interview. There was ample opportunity for candidates to obtain additional information if they required it.

Relevant Legislation

56 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);

[...]

57 Section 16 and subsection 29(3) of the *PSEA* provide that deputy heads are subject to PSC policies:

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).

29. [...]

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

58 Subsection 30(2) of the *PSEA* reads as follows:

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

(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.

59 Section 36 of the *PSEA* reads as follows:

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).

Analysis

Issue I: Did the assessment tool assess the qualification it purported to assess? If not, did the respondent abuse its authority by using that tool?

60 Under subsections 30(1) and (2) of the *PSEA*, a person may be appointed to a position if he or she meets the essential qualifications, as established by the deputy head, for the work to be performed. It would be a serious and fundamental error to appoint someone who has not demonstrated that he or she meets the essential qualifications for the position. As the Tribunal found in *Rinn v. Deputy Minister of Transport, Infrastructure and Communities et al.*, [2007] PSST 0044, at paragraph 35:

[35] Merit now relates to individual merit where the person to be appointed must meet the essential qualifications for the work to be performed. There is considerable flexibility in selecting the person to be appointed; however, the fundamental requirement in appointing a person on the basis of merit is that the person must be qualified for the position.

61 There is no dispute that the SMC for the Area Manager, Small Craft Harbours, identifies *judgment* and *reliability* as essential qualifications. These qualifications are listed but not defined in the SMC.

62 The assessment board used the following definition, question and assessment criteria to assess *judgment*:

PS2: Judgment

Definition: Forms an appropriate and relevant decision, opinion or evaluation by discerning and comparing objective data and subjective factors and relating these to a general conclusion.

Q2: In your role as Area Manager, Small Craft Harbours, you will be expected to maintain a good working relationship with the elected members of the harbour authorities in your area which would also include the representatives from your area who serve on the Regional Harbour Authority Advisory Committee. Following one of the regular meetings of this committee, you are approached by one of the members from your Area with whom you have developed a good working relationship over the years and who has always been cooperative of DFO initiatives. He asks you in private, in recognition of your good relationship, to give priority to the inclusion of a major infrastructure project at his harbour in the program expenditure plan for the upcoming year which is currently being prepared. How would you handle this situation?

Assessment Criteria:

- Recognizes relevant information, identifies and evaluates options and chooses the best response.

- Uses the information one obtains to develop alternate courses of action and makes decisions which reflect factual information and are based on logical assumption and take into account organizational resources.
- Reaches sound decisions and appropriate courses of action with regard to situations, persons and issues such that organizational objectives are effectively achieved.
- Perceives possible options clearly, readily identifies the pros and cons of various options basing decisions on objective information and logical argument.
- Considers all available options, ensuring that no salient points are overlooked and displays sufficient concern for detail.
- Assess the impact of decisions and actions through the feasibility of solutions.
- Demonstrates a concern for efficiency, effectiveness and concreteness.
- Demonstrates foresight in preventing future problems and a concern for the good of the organization.
- Practically applies policies, principles, processes to given situations.
- Makes decisions and pursues courses of action.
- Identifies weaknesses in analysis and evaluation and offers solutions, recommendations, and alternative to correct the problems.
- Foresees the impact of one's judgments on the objectives and on the organization.

63 In his testimony, the complainant acknowledged that judgment was an essential qualification for the Area Manager position, but he contends that the assessment criteria for the judgment qualification are unreasonable and the majority cannot be related to the scenario he was given. The complainant provided no explanation beyond his allegation as to why this is the case.

64 The complainant also testified that although the assessment board did not give him a passing mark on the question, he believes that his answer was satisfactory. The Tribunal notes that this allegation is against the assessment rather than the assessment tool.

65 Mr. Golding testified that he wanted to use a real life example to test judgment. He explained why the chosen scenario was relevant to the Area Manager position. No

evidence to refute the relevance of the example was presented. Mr. Loubar's evidence supported that of Mr. Golding. Both of the respondent's witnesses testified that the complainant's response to the scenario fell short of what they expected at the manager level.

66 Section 36 of the *PSEA* gives deputy heads broad discretion in the selection and use of assessment methods. There is nothing wrong with the use of a scenario to assess judgment, provided the scenario does assess that qualification. No evidence has been presented to show that the assessment criteria are not related to judgment and cannot be demonstrated through a candidate's response to the scenario.

67 In *Tibbs*, at paragraph 55, the Tribunal found that "...complainants have the burden of proof with respect to complaints of abuse of authority before the Tribunal." The complainant has not met this burden, as there is nothing in the evidence that leads the Tribunal to conclude that the respondent abused its authority in assessing the judgment qualification, in its choice of assessment criteria, or in its use of the scenario to assess candidates against those criteria.

68 Despite his position that the assessment tool did not effectively assess the judgment qualification, the complainant believes that his answer to the question demonstrated good judgment. The assessment board rated his answer "good," but this was not a high enough rating for him to pass. According to Mr. Loubar and Mr. Golding, the assessment board expected a more in-depth answer for this senior PM-05 position.

69 The Tribunal has found in a number of decisions that its role is to examine the process used by a deputy head to ensure that there is no abuse of authority. The Tribunal will not redo an appointment process or assess whether answers were correctly evaluated, unless there is evidence of wrongdoing in the evaluation process. (See, for example, *Oddie*, at paragraph 66.) In this case, the complainant disagrees with the assessment board's methods and conclusions, but he has failed to establish any evidence of wrongdoing, intentional or unintentional, on the part of the assessment board in its assessment of the judgment qualification.

70 The assessment board used the following definition, question and assessment criteria to assess reliability:

PS4: Reliability

Definition: Applies public service values and ethics; works with integrity and respect.

Q4: How would you ensure the application of public service values and ethics to the activities of your work unit?

Assessment Criteria:

- Demonstrates Values and Ethics, including the Code, in personal behaviour
- Integrates Values and Ethics, including the Code, into unit practices
- Reflects a commitment to citizens and clients in own and unit activities
- Fosters a climate of transparency, trust and respect within the unit and in partnerships
- Incorporates equitable practices into HR planning
- Supports opportunities for and encourages bilingualism and diversity in the unit, based on OL and EE policies
- Builds and promotes a safe and healthy, respectful unit, free of harassment and discrimination
- Acts with transparency and fairness in all transactions, including staffing, contracting, and day-to-day activities

71 The complainant contends that the above definition has nothing to do with *reliability*. He relies on the following definition of reliability from an unnamed dictionary: “Consistently performs in a competent manner to the point where actions are predictable.”

72 The respondent established reliability as an essential qualification but failed to define reliability in the SMC.

73 The issue the Tribunal must address is whether the respondent assessed reliability or another qualification. Under subsection 30(2)(a) of the *PSEA*, a person may only be appointed to a position if they meet all of the essential qualifications. In order to accomplish this, he or she must be assessed against all of the essential qualifications.

74 The evidence from the respondent's witnesses is that in assessing this qualification, the assessment board expected more of the Area Manager than simply a demonstration of good attendance. The position has a high level of sensitivity. The incumbent must work under limited supervision and interact with the fishing industry, harbour authorities and members of the provincial and federal parliaments. The Area Manager is also responsible for three staff. Mr. Loubar testified that the Department depended on the Area Manager to act in an appropriate manner. According to Mr. Golding, the application of values and ethics is a key aspect of reliability for this position.

75 The *Merriam-Webster Online Dictionary*, online: <<http://www.merriam-webster.com/>>, defines *reliable* as: "suitable or fit to be relied on: dependable." The *Oxford Dictionary of Current English*, second edition, s.v. "reliable", defines *reliable* as: "of consistently good character or quality; dependable."

76 The *Cambridge Dictionaries Online*, online: <<http://dictionary.cambridge.org/>>, defines "reliable" as: "Something or someone that is reliable can be trusted or believed because they work or behave well in the way you expect."

77 In this case, the Tribunal finds that the respondent's decision to use values and ethics to assess reliability at a high level is consistent with the definition of reliability found in generally available dictionaries. Ethics and values, as defined for the purpose of this assessment process, were used to determine whether a person is of "consistently good character or quality" or is "suitable or fit to be relied on" or "capable of being depended on." This is consistent with what the assessment board was looking for in a candidate.

78 The respondent was not simply expecting candidates to demonstrate reliability at a low level. Due to the senior nature of the position, it was expecting candidates to demonstrate a high level of reliability by demonstrating that they can apply public service values and ethics and work with integrity and respect. It would have been helpful to candidates if they knew the level of reliability that was being sought. While failing to provide more detail on the essential qualification being assessed does not

constitute abuse of authority in the circumstances of this complaint, it would have provided for a more clear and transparent appointment process.

79 In *Neil v. Deputy Minister of Environment Canada et al.*, [2008] PSST 0004, the Tribunal made the following comments on providing details to candidates, at paragraphs 50 and 51:

[50] The Tribunal wishes to emphasize that, while it is not mandatory to inform candidates of complete details of how a particular qualification will be assessed, it is in everyone's interest to be as clear and transparent as possible in an appointment process. This will ensure that all those who do, in fact, meet a qualification can demonstrate this and proceed to the next step of the process. Therefore, it would have been preferable for the respondent to provide candidates with greater details on the Statement of Merit Criteria concerning how "significant experience" was to be assessed by the board. This approach is recommended in the Public Service Commission's Guidance Series – Assessment, Selection and Appointment as follows:

[...]

[51] However, failure to inform candidates of a specific definition related to a merit criterion does not, in and of itself, amount to abuse of authority. The qualification established by the managers and against which candidates would be assessed was set out in the Statement of Merit Criteria. The Tribunal finds that the qualification itself was sufficiently detailed so that candidates knew what they had to demonstrate.

80 The Tribunal made similar comments in *Bell v. Deputy Head of Service Canada et al.*, [2008] PSST 0033 and in *Richard v. Deputy Minister of Canadian Heritage et al.*, [2009] PSST 0012. Nevertheless, as in these other cases, the Tribunal finds that the failure to inform candidates of the definitions of the merit criteria is not, in and of itself, sufficient to substantiate a claim of abuse of authority.

81 From the evidence of Mr. Loubar and Mr. Golding, the Tribunal is satisfied that the assessment board used a definition which was consistent with common definitions of the word "reliable", and the assessment criteria used were relevant to the definition.

82 In conclusion, the Tribunal finds that the complainant has failed to establish that the assessment tools used to assess judgment and reliability were not linked to the qualifications being assessed.

Issue II: Did the respondent abuse its authority by issuing an interview invitation to the complainant that failed to identify all of the qualifications to be assessed at the interview?

83 The respondent concedes that the email it sent to the complainant inviting him to his interview did not indicate that he would be assessed against the judgment and reliability qualifications. The respondent could offer no explanation for this omission and characterizes it as an oversight but not an abuse of authority.

84 The complainant acknowledged that he knew judgment and reliability were in the SMC as qualifications for the position but he did not expect them to be assessed at the interview. In the view of the Tribunal, there is little doubt that it would have been helpful to the complainant, in preparing for the interview, if he knew that he was going to be assessed against these qualifications.

85 In *Tibbs*, the Tribunal found the following:

[66] [...] [A]buse of authority will always include improper conduct, but the degree to which the conduct is improper may determine whether or not it constitutes abuse of authority.

[...]

[73] While abuse of authority is more than simply errors and omissions, acting on inadequate material and actions which are, for example, unreasonable or discriminatory may constitute such serious errors and/or important omissions to amount to abuse of authority even if unintentional.

86 The failure of the respondent to notify the complainant of all the qualifications that were to be assessed in the interview constitutes an error in the administration of the assessment process. However, this error, in the circumstances, is not sufficient to substantiate a finding of abuse of authority. There is no evidence that this was done in bad faith or that it is more than a clerical error. No evidence was adduced showing that the complainant was treated differently than other candidates in their interview invitations, or that a candidate was given more information than what was given to the complainant. The playing field was not perfect, but there is no evidence that it was not a level playing field for all candidates.

87 The Tribunal finds that the respondent's failure to notify the complainant that he would be assessed in the interview against the judgment and reliability qualifications does not constitute abuse of authority as contemplated by the *PSEA*.

Issue III: Did the respondent abuse its authority by not properly assessing the complainant's references?

88 The complainant argues that he had excellent references regarding the reliability and judgment qualifications and the respondent's failure to use these references in assessing these qualifications means that the assessment was flawed.

89 However, as indicated in the testimony of Mr. Loubar, the *Job Opportunity Advertisement* for the position states that references "may" be sought. Under section 36 of the *PSEA*, deputy heads may use references as an assessment method, but they are under no obligation to do so (See *Charest v. Deputy Minister of Human Resources and Social Development et al.*, [2008] PSST 0019, at paragraph 69).

90 The assessment board decided to use the references only to validate the assessment results and to ensure that there would be no "negative surprises." The evidence shows that the judgment qualification was assessed during the interview by using a real-life scenario based on the position being staffed. The reliability qualification was assessed through a question where candidates were asked to describe how they would ensure the application of public service values and ethics to the activities of the work unit. In the case of both qualifications, the focus of the assessment board was on how candidates would perform in the position being staffed. How candidates performed on these qualifications in their current or former positions was only of interest insofar as the references provided information that was inconsistent with what was learned during the interviews. According to Mr. Loubar, the references for all candidates, except one, were positive, and they had no impact on the outcome of the appointment process.

91 Since the references were not rated, the complainant's contention that his were excellent cannot be confirmed. Furthermore, given the respondent's approach on the use of references, they would only be relevant if they were found to be inconsistent with the results of the interview and had a negative impact on the complainant's assessment.

The evidence indicates that the references did not have a negative impact on the complainant's assessment.

92 The Tribunal finds that the respondent was under no obligation to rate the references obtained for the complainant in assessing the judgment and reliability qualifications for the position. As such, the respondent did not abuse its authority by not rating the references and by not including them in the complainant's assessment.

93 In conclusion, the Tribunal finds that the administration of the appointment process was not perfect, but the flaws were not of a sufficiently egregious nature to warrant a finding of abuse of authority.

Decision

94 For all these reasons, the complaint is dismissed.

Kenneth J. Gibson
Member

Parties of Record

Tribunal File	2009-0019
Style of Cause	<i>John Costello and Deputy Minister of Fisheries and Oceans et al.</i>
Hearing	September 1 and 2, 2009 St. John's, NL
Date of Reasons	December 9, 2009
APPEARANCES:	
For the complainant	John Costello
For the respondent	Karen L. Clifford
For the Public Service Commission	Marc Séguin