



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2008-0697
Issued at: Ottawa, April 6, 2010

DEB CHASE

Complainant

AND

THE COMMISSIONER OF CORRECTIONAL SERVICE OF CANADA

Respondent

AND

OTHER PARTIES

| | |
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| 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 | John Mooney, Vice-Chairperson |
| Language of Decision | English |
| Indexed | <i>Chase v. Commissioner of Correctional Service of Canada et al.</i> |
| Neutral Citation | 2010 PSST 0002 |

Reasons for Decision

Introduction

1 Deb Chase, the complainant, was an Area Director with Correctional Service Canada (CSC) when she participated in an internal advertised appointment process to staff Associate District Director and Area Director positions with CSC in Ontario. She filed a complaint that she was not appointed by reason of abuse of authority, alleging that the appointment process was structured in such a way that it prevented her from participating in a fair manner. She claims that the assessment board members were biased against her, or that there is a reasonable apprehension that they were biased against her. As well, she asserts that the assessment board intended to use an inappropriate reference to assess her qualifications.

2 The respondent, the Commissioner of CSC, denies that there was any abuse of authority in the appointment process. It asserts that the complainant was not appointed to the position because she refused to be interviewed by the assessment board. In its view, the assessment board members were neither biased against the complainant nor did they use an inappropriate reference to assess her qualifications since they never had the opportunity to decide who to contact as a reference.

Background

3 On July 20, 2007, the respondent posted a *Job Opportunity Advertisement* on *Publiservice* to fill Associate District Director and Area Director (WP-06) positions in Ontario (appointment process 07-PEN-IA-ONT-211). The complainant, who occupied a position at the WP-05 group and level at the time, was screened into the process on October 15, 2007. However, on May 18, 2008, she informed the Staffing Officer that she refused to attend the interview with the assessment board. She did not participate further in the appointment process.

4 On October 16, 2008, the respondent issued two *Notifications of Appointment or Proposals for Appointment* on *Publiservice*, one for an appointment to the Kingston Area Parole Office, and the other for the Greater Ontario and Nunavut District Office. On October 20, 2008, the complainant brought a complaint of abuse of authority to the

Public Service Staffing Tribunal (the Tribunal) under paragraph 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22 ss. 12,13 (the *PSEA*).

Issues

5 The Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority in the manner it dealt with reference checks to assess the complainant's qualifications?
- (ii) Were any of the assessment board members biased against the complainant?

Summary of Relevant Evidence

6 The complainant testified that she began working for CSC in 1990 as a Parole Officer at the Collins Bay Institution. In 1997, she became a Unit Manager at the Warkworth Institution. In November 2001, she took an assignment as the Area Director (WP-05) in the Peterborough Area Parole Office. Her assignment, which started on November 19, 2001, was to end on March 31, 2002; however, it was extended several times. She was finally deployed to that position on October 1, 2004. Her supervisor at that time was Monty Bourke, District Director, Eastern and Northern District.

7 The complainant was responsible for the parole offices in Peterborough, Barrie, and Belleville. There were serious staff problems in the Peterborough office, including a lack of respect among staff. During her first year as the Area Director, she improved respect among employees and greatly improved the work performance of the staff. The complainant's performance was excellent, as indicated in her Performance Evaluation Reports from October 1, 2001 to September 30, 2004. In 2004, Mr. Bourke gave the Peterborough office an award of excellence.

8 Between 2001 and 2005, the respondent undertook a reorganization of the parole offices in Ontario. The reorganization was to result in fewer Area Directors. The Area Director position in Peterborough, which the complainant occupied, was to be eliminated.

The complainant's interactions with Mr. Orr

9 According to the complainant, the situation deteriorated when the respondent appointed Derek Orr as the District Director of the Greater Ontario and Nunavut District in the spring of 2006. Mr. Orr became her supervisor. The complainant described several incidents involving Mr. Orr which she found disturbing.

10 In the summer of 2006, Mr. Orr initiated an investigation regarding the complainant's failure to cooperate in an Ontario Provincial Police (OPP) investigation concerning impaired driving charges that had been laid against an acquaintance of hers. She had done so on the advice of the driver's lawyer. The investigators concluded that the complainant's refusal to cooperate with the OPP was "unbecoming of her position." In May 2007, Mr. Orr wrote a letter of reprimand. The complainant grieved the letter of reprimand and her grievance was upheld by Nancy Stableforth, the Deputy Commissioner of the Ontario Region, in September 2007.

11 In March 2007, the complainant learned from Alec Brown, a union representative for the Public Service Alliance of Canada, that Mr. Orr had, during a meeting with the Peterborough staff in August 2006, directed Mr. Brown to have the staff file complaints against her. Some employees did file harassment complaints against her. The investigator, who according to the complainant is a close friend of Mr. Orr, concluded that three of several accusations laid against her were founded. The respondent imposed a fine equivalent to three days work. The respondent later reduced the discipline to a letter of reprimand after the complainant grieved the disciplinary measure. The complainant referred her grievance to adjudication before the Public Service Labour Relations Board, which has not yet heard the matter.

12 In April 2007, Mr. Orr assigned the complainant to the Warkworth Institution. The complainant refused to report to that institution because it entailed traveling long distances and she could not do so because of health reasons. Mr. Orr asked the complainant to submit a sick leave request and threatened to cut off her benefits if she did not do so. The complainant explained her situation to Paul Snyder, the Assistant

Deputy Commissioner, and he assured her that her pay and benefits would not be cut off.

13 The complainant testified that Mr. Orr left on sick leave in August 2007.

14 Another incident that left the complainant distraught occurred in 2007. Mr. Orr initiated another investigation into her work behaviour. The investigator concluded in August 2007 that the complainant had shown improper behaviour at work. The complainant filed a grievance in September 2007 and, in January 2008, Ms. Stableforth informed her that she would destroy the investigation report.

15 In October 2007, the complainant discovered, through an access to information request, an undated Performance Evaluation Report (PER) that provided a negative assessment of her work. Mr. Orr's name appears on it, but he never signed it. On January 9, 2008, Ms. Stableforth informed the complainant that she had ordered that all copies of the PER be destroyed. Ms. Stableforth explained to the complainant that the PER was not an official document; it was a draft that was never placed on the complainant's file.

The appointment process

16 David Mohan testified for the respondent. He is now a Labour Relations Advisor at the Pittsburgh Institution in Kingston. From August 2007 to May 2008, he was the Staffing Officer for the appointment process related to this complaint. His role was to provide advice to management and candidates on the appointment process. The assessment board made all decisions regarding the process.

17 Mr. Mohan testified that he did not know Mr. Orr, that he had no contact with him during the appointment process and that Mr. Orr was not involved in any phase of the process.

18 Craig Townson, Associate District Director, Central Ontario District, also testified for the respondent. He was a member of the assessment board. Originally, the assessment board was also composed of Dave Pisapio and Peter White, the Warden of the Warkworth Institution. Mr. White retired, so he was replaced by Theresa Westfall.

19 Mr. Townson knew the complainant as a colleague. He had met her a few times at office meetings.

20 Between 1994 and 2004 or 2005, Mr. Townson was the District Director of the Central Ontario District, while Mr. Orr was the Associate District Director, and later the Director of the Hamilton Niagara District. There were five districts at that time, and the District Directors met every second month. They collaborated on common matters such as finances and resources. Mr. Townson had no social interactions with Mr. Orr, other than collegial activities after business meetings. Mr. Orr never talked to him about the complainant or the Peterborough office. Mr. Orr was an extremely discreet person.

21 Mr. Townson explained that Mr. Orr was the manager for the positions to be staffed through the appointment process, but he left on leave in the summer of 2007. June Blackburn, who was acting in Mr. Orr's position, was later appointed to the position.

22 Mr. Pisapio, District Director, Central Ontario District, also testified for the respondent. He chaired the assessment board. Mr. Pisapio knew of the complainant, but he had never worked with her or had any social interactions with her.

23 Mr. Pisapio worked for nine years with Mr. Orr and reported to him during that period. Mr. Orr was then the District Director of the Central Ontario District, and Mr. Pisapio was the District's Associate District Director. At the time of the assessment process, however, he did not report to Mr. Orr since the latter had left the District Director position. When Mr. Pisapio worked with Mr. Orr, he did not interact socially with him, other than to have dinner or a drink with him in a work context.

24 Mr. Pisapio testified that Mr. Orr had no involvement in the appointment process, and he had no contact with him during the process.

25 The complainant described her participation in the appointment process. She did not understand why she had to apply for the Associate District Director and Area Director positions since her position was already that of Area Director. On cross-examination, the complainant acknowledged that three other persons who held

positions at the WP-05 group and level also had to apply in advertised processes for the Associate District Director and Area Director positions at the WP-06 group and level.

26 Nonetheless, the complainant did apply. She was screened into the process on October 15, 2007. The next phase of the appointment process would have been the interview. She phoned David Mohan to obtain information about the appointment process. He told her that her personal suitability qualifications would be assessed through a reference check, and that her "current supervisor, Mr Orr" would be the person contacted. She did not suggest other references because she did not think that it was possible to do so. On cross-examination, the complainant testified that Mr. Bourke, with whom she had good relations, would have given her a good reference if the assessment board had contacted him. She did not suggest to Mr. Mohan, however, that he could contact Mr. Bourke.

27 During that telephone conversation, the complainant also asked Mr. Mohan for the names of the assessment board members. He told her that the board would be comprised of Mr. Pisapio, Mr. Townson and Ms. Westfall. The complainant explained to the Tribunal at the hearing that she was concerned about the composition of the assessment board because Mr. Pisapio and Mr. Townson were long-time colleagues of Mr. Orr, although she did not know whether they were friends with him. She feared that Mr. Orr might influence them. The complainant did not indicate in her testimony whether she had communicated those concerns to Mr. Mohan during the telephone conversation. As for Ms. Westfall, the complainant testified that she had no concerns about her participation in the assessment board.

28 Mr. Mohan also gave testimony regarding that telephone conversation. He stated that the complainant asked him questions regarding the appointment process. He did not recall the complainant asking him specifically about reference checks, but "typically" the employee's immediate supervisor is contacted as a reference, so that might have been his answer. Mr. Mohan explained that candidates are asked for references at the interview phase of the appointment process. Mr. Mohan added that since the complainant was working from home, he told her that she could email him if she needed more information.

29 Mr. Townson testified that candidates who passed the interview were further assessed with respect to personal suitability through reference checks. The reference checks were conducted with the candidate's current and previous supervisors. Using those persons as references was not a rigid or inflexible rule. Each case is decided on its merits. If a candidate asks that a person not be used as a reference, the assessment board usually tries to get as much context as possible to determine the merits of the request. A possible option in such a case is to use another supervisor as a reference. In this case, if the complainant had raised issues about Mr. Orr, the assessment board would have discussed the matter with her. The assessment board might have used a third or fourth reference. This obviously did not happen since the complainant never presented herself at the interview and never explained her concerns.

30 Mr. Pisapio also testified that if the assessment board had known that the complainant had issues with Mr. Orr, it would have taken that into consideration.

31 In a December 13, 2007 email to Mr. Mohan, the complainant explained that she would not be able to perform well at that time because she had health issues and several outstanding grievances. Mr. Mohan answered by email that the respondent could accommodate the complainant's health problems. He suggested that the complainant contact the Personnel Psychology Centre (PPC) of the Public Service Commission (PSC) which has expertise on accommodations for assessments. The PPC subsequently made several recommendations to accommodate the complainant's health issues, which the respondent accepted but were not implemented because the interview did not take place.

32 On December 17, 2007, the complainant sent Mr. Mohan another email in which she explained that it was not only her health issues that had to be resolved. She informed him that she was not ready to participate in the appointment process until ". . . the matters that remain outstanding at the regional and national level regarding me . . ." are resolved. She referred Mr. Mohan to Ms. Stableforth and Mr. Snyder whom she said were well aware of the situation. Mr. Mohan answered by email the next day that he had sent the Accommodation Request to the PSC. Mr. Mohan did not mention the complainant's outstanding grievances.

33 Mr. Mohan testified that he did not want to approach Ms. Stableforth or Mr. Snyder to inquire about the complainant's labour relations issues as the complainant had suggested because, according to him, it would infringe privacy legislation to reveal who had applied in the appointment process.

34 Mr. Townson testified that when he saw the complainant's email of December 13, 2007 in which she refers to outstanding grievances, he did not know to what she was referring. He did not ask Mr. Mohan to make further inquiries with the complainant. Mr. Townson believes that it is not the role of the assessment board to resolve workplace conflicts. Those conflicts can take years to resolve. The assessment board could not wait that long because the respondent had to fill vacancies.

35 Mr. Pisapio testified that the complainant never raised her concerns about Mr. Orr with the assessment board members during the appointment process. In the complainant's email of December 13, 2007, the complainant refers to outstanding grievances, but Mr. Pisapio did not know what those grievances were about or who they involved. Her grievances were part of a separate process. Grievances were not his responsibility, so he did not ask Mr. Mohan to inquire about them.

36 Mr. Pisapio stated that Mr. Orr had told him at one time that he had gone to Peterborough because there were issues between the complainant and the Peterborough office staff. But Mr. Pisapio did not know what those issues were since Mr. Orr did not provide further specifics.

37 Mr. Mohan stated that the complainant called him on January 5, 2008 to tell him that she would not attend the interview. She referred to personal labour relations issues she had with management. He told her that it was not his role to get involved in labour relations issues. The complainant added that she was not withdrawing from the process, and remained an interested participant.

38 On May 5, 2008, Mr. Mohan sent an email to the complainant offering her a choice among six dates between May 13 and May 23, 2008 to attend the interview. He also confirmed the names of the members of the assessment board.

39 On May 18, 2008, the complainant sent Mr. Mohan an email in which she stated that she refused to appear before the persons who were members of the assessment board. Mr. Mohan did not know why the complainant refused to appear before those persons. He informed the assessment board members of the matter by email and discussed the matter with Mr. Pisapio and Mr. Townson.

40 Mr. Pisapio testified that the assessment board members were puzzled when they learned in May 2008 that the complainant refused to meet them. Neither Mr. Pisapio nor Mr. Townson had had any negative interaction with the complainant. They asked Mr. Mohan if he had more information regarding the complainant's concerns, but he did not have more information. They did not ask Mr. Mohan to seek more details on the matter from the complainant. At that time, all the other candidates had already been assessed.

41 Mr. Townson testified that he also saw the complainant's email of May 18, 2008. He did not know what concerns the complainant had about the assessment board members. The complainant did not inform Mr. Mohan of the nature of the problem. If there had been a problem with the composition of the assessment board, the assessment board members would have considered the matter. Changing a member of the assessment board can create difficulties since it entails extra costs and time, but the assessment board could have considered that option if a candidate had concerns regarding a member.

42 Mr. Pisapio also testified that the assessment board considered changing the composition of the assessment board, but they decided not to pursue that option. Since the respondent was undergoing a reorganisation and there were positions to fill, the assessment board decided to go ahead with the appointment process. The assessment board considered that the complainant had withdrawn her candidacy.

43 Mr. Mohan also testified that the assessment board members considered the possibility of changing the composition of the assessment board, but decided against it because it is difficult to find assessment board members. The assessment board also wanted to keep Mr. Pisapio as a member to ensure consistency among the appointment

processes since Mr. Pisapio had been involved in an appointment processes in another region. Mr. Pisapio had also been involved in the development of the assessment tools.

44 On May 21, 2008, Mr. Mohan wrote to the complainant that, since she refused to select a date for the interview, the assessment board had no alternative but to consider that she had withdrawn from the appointment process.

45 The complainant testified that she believes she would have been disadvantaged in the appointment process because, being absent from work for 15 months, she had no interaction with her colleagues. She lost the day-to-day experience of interpreting and applying the respondent's policies, legislation and regulations. She did not have access to CSC's Intranet.

Arguments of the Parties

A) Complainant's Arguments

46 The complainant contends that the assessment board was biased against her. Mr. Townson had work meetings with Mr. Orr during a period of ten years. During those years, they met for dinners and drinks, albeit in a group setting. Consequently, the complainant finds it difficult to believe that Mr. Orr never spoke to him about the complainant.

47 Mr. Pisapio, for his part, reported to Mr. Orr for nine years. Although he testified that he did not have a social relationship with Mr. Orr, he did say that he joined Mr. Orr occasionally after work for a drink. Mr. Pisapio was aware that Mr. Orr had "dealings" with the complainant since Mr. Orr had told him that he had gone to Peterborough to deal with staff problems involving the complainant. This raises the spectre of bias, or, minimally, the apprehension of bias. Mr. Pisapio was primed to be negatively influenced in his assessment of the complainant.

48 Ms. Westfall is married to Mr. Snyder, a person with whom the complainant had communicated during her ordeal with Mr. Orr. The complainant contacted Mr. Snyder when Mr. Orr threatened to cut off her pay and benefits when she refused to report to the Warkworth Institution. The complainant's concern is that Mr. Snyder would have

communicated information to Ms. Westfall about her interactions with Mr. Orr. That type of information could have biased her assessment of the complainant.

49 The complainant referred the Tribunal to *Denny v. Deputy Minister of National Defence et al.*, [2009] PSST 0029, at paragraphs 126 and 133, where the Tribunal held that assessment board members have a duty to act fairly, which includes a bias-free assessment, and that bias can operate on an unconscious level.

50 The assessment board should not have proposed to use Mr. Orr for a reference. The negative history between the complainant and Mr. Orr shows that he held great animosity towards the complainant. A reference given by Mr. Orr would have been fatal to her application. In *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008, the Tribunal stated that acting on inadequate material can constitute abuse of authority. In this complaint, by relying on a reference provided by Mr. Orr, the respondent would have relied on inadequate material to assess the complainant's personal suitability.

51 The complainant submits that the assessment board should have investigated her concerns. She told Mr. Mohan, and by extension the assessment board, that it was impossible for her to participate fairly in the appointment process while her grievances were ongoing. She specifically asked Mr. Mohan to contact Mr. Snyder and Ms. Stableforth for a briefing regarding her outstanding issues and grievances.

52 The complainant wanted the appointment process delayed and the workplace conflicts resolved before being assessed. Mr. Mohan and the assessment board chose to ignore her concerns.

53 The complainant asks that the appointments resulting from the appointment process be revoked. She also asks that, in any future appointment process to staff the position, the assessment board be comprised only of persons that have no direct knowledge about the workplace disputes involving the complainant and Mr. Orr, and that candidates be allowed to choose the person who will provide a reference for them.

B) Respondent's Arguments

54 The respondent submits that it did not abuse its authority in the appointment process. The complainant's concerns regarding the assessment board members are merely speculations. She did not demonstrate that the assessment board members were biased since she refused to be assessed by them.

55 Mr. Pisapio and Mr. Townson made it clear in their testimonies that, while they had had a work relationship with Mr. Orr, they were not close to him; their relationships were strictly professional. They were not aware of, or involved in any way in, the disputes between the complainant and Mr. Orr. The mere fact that Mr. Orr knew the assessment board members cannot suffice to demonstrate either actual or reasonable apprehension of bias.

56 As to Ms. Westfall, the complainant argues, on the one hand, that she was concerned that Mr. Snyder, Ms. Westfall's husband, might have conveyed to his wife detrimental information regarding the complainant's disputes with Mr. Orr. On the other hand, the complainant reproaches Mr. Mohan and the assessment board members for not contacting Mr. Snyder to investigate her labour relations issues when she invited them to do so in her December 17, 2007 email. The respondent contends that the complainant's arguments are contradictory.

57 The assessment board did not intend to use an improper reference in the appointment process. Mr. Mohan testified that he never told the complainant that Mr. Orr would be used as her reference. He simply stated that the most recent supervisor could be contacted because that is usually the case. The complainant never mentioned to Mr. Mohan that she feared that a reference from Mr. Orr would be fatal to her assessment.

58 The respondent submits that the assessment board did not act improperly with regard to the complainant's work issues. It was not Mr. Mohan's role, nor the role of the assessment board members, to investigate labour relations matters.

59 The respondent denies that the complainant was disadvantaged in the appointment process because, being on leave, she was not involved in the day-to-day operations of CSC and did not have access to CSC's Intranet. The complainant did not demonstrate that those factors disadvantaged her.

C) Public Service Commission's Arguments

60 The PSC emphasizes that bad faith and personal favouritism involve the deliberate misuse of statutory powers for an improper purpose. According to the PSC, abuse of authority means that the power to exercise the authority was intentionally improperly used.

61 Subsection 29(3) of the *PSEA* gives the PSC the authority to make policies regarding the manner of making appointments. The PSC has developed a policy framework comprised of a number of policies. Section 16 of the *PSEA* provides that deputy heads must follow PSC policies when they make appointment decisions. The PSC submits that when a PSC policy is not followed, it is problematic, but it does not automatically mean that there is an abuse of authority. The PSC argues that whether or not there is a breach of policy is one factor among others for the Tribunal to consider in determining whether there is an abuse of authority. The PSC has also developed a series of guides to help understand the PSC policies. According to the PSC, deputy heads are not bound by these guides.

62 In this case, the PSC submits that the respondent breached the values of fairness and transparency set out in the *PSC Appointment Policy*, the *PSC Assessment Policy*, the *PSC Guide to Implementing the Assessment Policy*, and the *PSC Guidance Series – Assessment, Selection and Appointment*. The complainant was concerned that the assessment board members were biased against her and that, if Mr. Orr was used as a reference, he would be biased against her. The complainant brought these concerns to the attention of the Staffing Officer and the assessment board members. According to the PSC, the respondent's lack of action in taking the steps required to follow-up and understand the complainant's concerns, and its failure to consider using

different assessment board members to assess the complainant, constitute a failure to comply with the values of fairness and transparency.

63 The PSC does not take a position on whether there was any bias or appearance of bias on the part of Mr. Orr, or any of the assessment board members in this complaint. The PSC submits that if the Tribunal finds that there was bias or a reasonable apprehension of bias, this would constitute the bad faith necessary for a finding of abuse of authority.

64 On the matter of corrective action, the PSC argues that the Tribunal does not have jurisdiction to make any orders regarding future appointment processes.

D) Respondent's Reply

65 The respondent submits that it did not breach the values of transparency and fairness in the establishment of the assessment board. The link between the assessment board members and Mr. Orr is tenuous at best. The fact that two of the assessment board members knew Mr. Orr does not equate to actual bias or establish a reasonable apprehension that the assessment board members were biased.

E) Complainant's Reply

66 The complainant felt that, because of Mr. Orr's ongoing harassment, she would not have been fairly assessed if Mr. Orr was used as a reference. He would have destroyed her credibility as a valid candidate.

67 The complainant argues that it could not have been Parliament's intention that a candidate be forced to proceed in an appointment process in which his or her concerns about the fairness of the process have never been addressed.

Analysis

68 The complainant brought a complaint under paragraph 77(1)(a) of the *PSEA*, which provides that a person in the area of recourse may make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of abuse of authority by the PSC or the deputy head in the exercise of their authority.

69 The expression “abuse of authority” is not defined in the *PSEA*; however, subsection 2(4) stipulates that it includes “bad faith”. In *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17, [2004] S.C.J. No. 31 (QL), the Supreme Court described the concept of “bad faith” as follows at paragraph 39:

These difficulties nevertheless show that the concept of bad faith can and must be given a broader meaning that encompasses serious carelessness or recklessness. Bad faith certainly includes intentional fault, a classic example of which is found in the conduct of the Attorney General of Quebec that was examined in *Roncarelli v. Duplessis*, [1959] S.C.R. 121. Such conduct is an abuse of power for which the State, or sometimes a public servant, may be held liable. However, 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, having regard to the purposes for which it is meant to be exercised (Dussault and Borgeat, *supra*, vol. 4, at p. 343). [...]

70 In *Tibbs*, the Tribunal held that the scheme of the *PSEA* indicates that abuse of authority is more than simple errors and omissions:

65. It is clear from the preamble and the whole scheme of the *PSEA* that Parliament intended that much more is required than mere errors and omissions to constitute abuse of authority. For example, under section 67 of the *PSEA*, the grounds for revocation of an appointment by a deputy head after an investigation are error, omission and improper conduct. These grounds for revocation are clearly less than those required for a finding of abuse of authority. Parliament's choice of different words is significant: Sullivan & Driedger, *supra* at 164. Abuse of authority is more than simply errors and omissions.

71 As the Tribunal's jurisprudence has established, the complainant has the burden to prove, on a balance of probabilities, that there was abuse of authority in the appointment process (see, for example, *Tibbs*, at paragraph 49).

72 The Tribunal notes that all of the complainant's disputes centre on Mr. Orr. The Tribunal wishes to emphasize at the outset that it recognises that the complainant had a difficult relationship with him and understands that her disputes with him distressed her. The Tribunal also notes, however, that that relationship had no impact on the appointment process because Mr. Orr was not involved in any way in that process. The complainant did not want the assessment board to use Mr. Orr as a reference because she feared he would provide a negative reference. She also feared Mr. Orr would influence the assessment board members negatively towards her. For those reasons, she refused to attend the interview. The evidence, however, establishes that her fears

were merely speculative. She relied on assumptions and presumptions that were never tested. The assessment board did not make a decision as to whether it would use Mr. Orr as a reference. The identification of references was to be made at her interview. The assessment board was never given the opportunity to decide who would be used as a reference for the complainant since she refused to attend the interview. The evidence also establishes that Mr. Orr exerted no influence whatsoever over the appointment process. The complainant's fear of bias was unfounded. What follows is a more detailed analysis of those issues.

Issue I: Did the respondent abuse its authority in the manner it dealt with reference checks to assess the complainant's qualifications?

73 The complainant argues that the respondent abused its authority in the manner it intended to use reference checks to assess her qualifications. More specifically, the complainant maintains that the respondent should not have intended to use Mr. Orr, the complainant's most recent supervisor, as a reference since, in her view, he would have given her a negative reference because of his animosity towards her. The complainant argues that by relying on a reference provided by Mr. Orr, the respondent would have relied on inadequate material to assess her personal suitability.

74 The Tribunal finds that this allegation is not substantiated. The assessment board never decided who would be used as a reference for the complainant. Mr. Townson and Mr. Pisapio testified that the usual practice was to ask candidates for references during the interview phase of the appointment process. Although the assessment board decided, as a general rule, to contact the candidates' current and previous supervisors as references, if a candidate had legitimate concerns about the person to be used as a reference, the assessment board would consider other options such as contacting previous supervisors. Therefore, had the complainant gone to the interview and discussed her concerns about Mr. Orr with the assessment board members, they would have had the opportunity to determine whether Mr. Orr was a proper reference. The assessment board members were never given that opportunity because the complainant refused to attend the interview.

75 The complainant argues that Mr. Mohan misled her on the use of reference checks. The complainant testified that Mr. Mohan told her that her “current supervisor, Mr. Orr” would be used as a reference when she talked to him in October 2007. Mr. Mohan testified that he recalled that the complainant asked him questions regarding the appointment process, but he did not remember referring specifically to Mr. Orr. Since “typically” the current supervisor is contacted as a reference that might have been his answer. The Tribunal does not accept the complainant’s contention that Mr. Mohan misled the complainant. The Tribunal notes that Mr. Mohan had no reason to mention Mr. Orr by name outright since he did not know either Mr. Orr or the complainant. He had no reason to know that Mr. Orr was the complainant’s supervisor. What most likely happened is that Mr. Mohan described the usual practice, which is to use the candidate’s current supervisor. He may have mentioned Mr. Orr by name if the complainant mentioned that her current supervisor was Mr. Orr. Mr. Mohan therefore correctly described the usual practice regarding references. In fact, Mr. Mohan could not do more than describe what is usually done since he did not have the authority to decide who will be contacted as a reference. The assessment board had that authority.

76 The Tribunal finds, therefore, that the complainant has failed to prove that the respondent relied on inadequate material. The complainant has not proven that the assessment board would have used Mr. Orr as a reference.

77 In her email of December 13, 2007, the complainant mentions that she had “. . . a number of issues and grievances outstanding at the regional and national level” She makes the same assertion in her email of December 17, 2007. It seems that those issues and grievances centre on Mr. Orr, although she does not specifically mention him in those emails. Mr. Mohan did not ask the complainant what those issues were about. He did bring the matter to the attention of the assessment board members, but they had no knowledge of the issues the complainant referred to and felt that grievances were not their responsibility. At that point, the assessment board members had no reason to connect the complainant’s outstanding issues to Mr. Orr.

78 The complainant and the PSC argue that Mr. Mohan or the assessment board members should have asked the complainant what those outstanding issues and

grievances were about in order to determine whether they had an impact on the appointment process.

79 The Tribunal is of the view that both parties should have acted differently. The complainant, who is an experienced manager, should have gone to the interview and described to the assessment board members her outstanding grievances and issues, namely her concerns regarding Mr. Orr, so they could decide whether Mr. Orr was a proper reference for the complainant. Similarly, it would have been preferable if, once her emails had been received, Mr. Mohan and the assessment board members had asked the complainant why she thought the issues related to her grievances could have an impact on the appointment process. In the Tribunal's view, however, this omission is not serious enough to constitute "serious carelessness" or "recklessness" as the Supreme Court described above in *Finney*. Had Mr. Mohan asked the complainant about these issues at the beginning of the appointment process, he would have learned that the complainant had issues with Mr. Orr and that she did not want him as a reference. He would have conveyed that information to the assessment board members. Had the assessment board members followed their usual practice, they would have waited for the interview to discuss with the complainant whether Mr. Orr was a proper reference. The complainant, however, as mentioned above, refused to attend the interview. Thus, there is no evidence that this omission affected the outcome of the appointment process.

80 The complainant also submits that Mr. Mohan should have contacted Mr. Snyder and Ms. Stableforth regarding her outstanding issues and grievances as she had requested in her email of December 17, 2007. Mr. Mohan stated that privacy concerns prevented him from approaching them. The Tribunal does not accept either of these propositions. There were no privacy concerns in approaching those persons given the complainant's consent. However, while it would have been preferable that Mr. Mohan or the assessment board members ask the complainant about her outstanding issues, it was not their responsibility to make inquiries before other persons. It was the complainant's responsibility to go to the interview and explain to the assessment board members how, according to her, those issues could influence her participation in the appointment process. The Tribunal also notes that the complainant's arguments

regarding that matter are somewhat contradictory. On one hand, the complainant argues that Mr. Mohan should have contacted Mr. Snyder regarding her outstanding grievances and relay that information to the assessment board members; on the other hand, she argues that information Mr. Snyder may have relayed to Ms. Westfall, an assessment board member, regarding her interactions with Mr. Orr may have rendered that member biased against her.

81 The PSC's view is that the respondent's failure to take the steps to follow-up and understand the complainant's concerns regarding her outstanding grievances constitutes a failure to comply with the values of transparency and fairness set out in its policies. The Tribunal does not agree that this omission resulted in a contravention of the appointment values of transparency or fairness. The respondent did not, for example, hide or conceal anything from the complainant, nor did it treat the complainant differently from other candidates in the appointment process.

82 The complainant also argues that the respondent should have waited until her outstanding grievances were resolved before assessing her. The Tribunal does not agree. A grievance under the *Public Service Labour Relations Act*, S.C. 2003, c. 22, and a complaint under the *PSEA* are different. It would be unreasonable to require that an assessment board wait months, if not years, until grievances are resolved before completing the appointment process. It is telling, for example, that the complainant's grievance against the sanctions imposed on her following the harassment report was still before the Public Service Labour Relations Board at the time this complaint was heard. Requiring an assessment board to wait until grievances are resolved before completing an appointment process would go against the intent and spirit of the *PSEA* which states in its preamble that managers should have the ". . . flexibility necessary to staff . . ."

Issue II: Were any of the assessment board members biased against the complainant?

83 In *Denny*, at paragraph 125, the Tribunal referred to *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, [1976] S.C.J. No. 118

(QL), which sets out the test for reasonable apprehension of bias as follows at 394 (S.C.R.):

[T]he apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information....[T]hat test is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.

84 The complainant submits that one or more of the assessment board members were biased against her, or that their actions gave rise to a reasonable apprehension of bias. The Tribunal does not agree.

85 Mr. Townson and Mr. Pisapio have established that their respective relationships with Mr. Orr were strictly professional. Mr. Townson and Mr. Orr were both district directors and they had work meetings every second month with other district directors to discuss matters that were common to districts in Ontario. Mr. Pisapio, for his part, held a position that reported to Mr. Orr for nine years. However, he no longer reported to Mr. Orr at the time of the appointment process. Both Mr. Townson and Mr. Pisapio testified that neither of them were friends of Mr. Orr and that they had no social interactions with him other than the odd meal or drink in a work context.

86 The testimony of Mr. Townson and Mr. Pisapio also establishes that they had no contact with Mr. Orr during the appointment process and that Mr. Orr was not involved in the process in any way. Although Mr. Orr was the Director of the unit which was being staffed, he had left on sick leave in the summer of 2007. When the complainant decided not to be assessed by the assessment board on May 18, 2008, Mr. Orr had been gone for nearly nine months.

87 There is no evidence that Mr. Townson and Mr. Pisapio knew the nature of the disputes the complainant had with Mr. Orr. Mr. Orr was not called as a witness at the hearing. Mr. Pisapio felt that there may have been issues since Mr. Orr had told him at one time that he had gone to Peterborough to address issues between the complainant and the Peterborough office staff. However, he testified that Mr. Orr did not specify what those issues were. The complainant has provided no evidence to refute

Mr. Pisapio's testimony on this point. As for Mr. Townson, there is no evidence that he knew anything about the disputes between the complainant and Mr. Orr.

88 The Tribunal finds that the complainant's allegations of bias against Mr. Townson and Mr. Pisapio are mere suspicions and speculations. In *Denny*, at paragraph 124, the Tribunal held that, in cases where reasonable apprehension of bias has been alleged, "[s]uspicious, speculations or possibilities of bias are not enough and bias must be real, probable or reasonably obvious."

89 As for Ms. Westfall, the complainant testified that she had no concerns about her participation on the assessment board. Notwithstanding this, the complainant's representative still alleged that Ms. Westfall was biased. The complainant had informed Mr. Snyder of her interactions with Mr. Orr. Mr. Snyder was Ms. Westfall's spouse. The complainant's representative argues that, since Mr. Snyder may have informed his spouse about the complainant's interactions with Mr. Orr, this could have influenced Ms. Westfall negatively with respect to the complainant. Neither Ms. Westfall nor Mr. Snyder testified at the hearing.

90 The Tribunal finds that there is no evidence that Mr. Snyder discussed the complainant's interactions with Mr. Orr with his spouse. Even if there had been such evidence, it would not necessarily constitute proof of bias. It is not uncommon for assessment board members to have heard of candidates in an appointment process. At times, assessment board members have significant knowledge about candidates since employees who report to them may have applied in the appointment process. The mere fact that assessment board members may have heard about a candidate in an appointment process, even in a negative fashion, does not in and of itself render the assessment board member biased. It all depends on the context and what was said. For example, the Tribunal could decide that a selection board member was biased if there was evidence that what the member heard, or knew, of a candidate in an appointment process, or an issue involving a candidate, rendered the member incapable of assessing the candidate fairly and with an open mind. In this case, as stated above, there is no evidence that Mr. Snyder even spoke to Ms. Westfall about the complainant or any issues involving the complainant.

91 The Tribunal finds that the complainant has failed to prove, on a balance of probabilities, bias or reasonable apprehension that any of the assessment board members were biased. Applying the test set out in *Committee for Justice and Liberty* to the facts of this complaint, the Tribunal finds that an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that it was more likely than not that the assessment board members would assess the complainant fairly.

92 The complainant argues that when she informed Mr. Mohan on May 18, 2008 that she refused to appear before the assessment board because of its composition, Mr. Mohan or the assessment board members should have inquired as to the nature of the complainant's concerns. The complainant did not at any time explain to either Mr. Mohan or the assessment board why she refused to appear before this particular board. While it was the complainant's responsibility to explain her concerns to Mr. Mohan, including any concerns about bias on the part of the assessment board members, the assessment board members should have inquired as to why the complainant did not want to appear before them. In the Tribunal's view, however, while this failure constitutes an omission as referred to in *Tibbs*, it is not serious enough to constitute "serious carelessness" or "recklessness" as the Supreme Court described above in *Finney*. There was no "fundamental breakdown of the orderly use of authority". In any event, the complainant did not establish at the hearing that the assessment board members were biased against her or that there was a reasonable apprehension that they were biased.

93 The complainant and the PSC submit that the assessment board members should have considered changing the composition of the assessment board. In the Tribunal's view, the assessment board was not obligated to change its composition merely because the complainant stated that she refused to appear before them. However, despite the fact that they were not obligated to do so, and despite the fact that they did not know why the complainant did not want to appear before them, they did in fact consider that option. Mr. Mohan and Mr. Pisapio testified that the assessment board considered changing its composition, but decided not to because of the difficulties involved in finding new members. The assessment board had already had to change

one member: it had replaced Mr. White, who retired, by Ms. Westfall. As for Mr. Pisapio, his presence assured consistency in assessing candidates since he had participated in an appointment process in another region. The Tribunal finds that there was nothing improper in deciding not to change the composition of the assessment board.

Other Issues

94 The Tribunal wishes to address the complainant's assertion that she should not have had to apply for the Associate District Director and Area Director position since it was her own position. The Tribunal does not share that view. To gain incumbency in a position under the *PSEA*, a person must be appointed or deployed to the position. The complainant was deployed to an Area Director position at the WP-05 group and level on October 1, 2004, as indicated in the letter of offer of September 8, 2004. She was never appointed or deployed to the Associate District Director and Area Director position, which is a position at the WP-06 group and level. She was not the only Area Director at the WP-05 group and level who had to apply in the advertised appointment process for the WP-06 position following CSC's reorganization. According to her own testimony, three other Area Directors also had to apply in the advertised appointment process for that position.

95 In her testimony, the complainant emphasized that she would have been disadvantaged vis-à-vis other candidates in the appointment process had she been assessed further because she had been away from work on leave for more than a year. The complainant's representative, however, did not raise this allegation in his argument. Nonetheless, the Tribunal will comment on it. The Tribunal finds that that allegation is not substantiated since the complainant did not submit any evidence to support it. The complainant did not demonstrate how she would have been disadvantaged in comparison to other candidates had she decided to be assessed further in the process. There was no evidence, for example, regarding how the assessment methods used to assess the candidates would favour candidates who were present at work over employees who were away from work on leave.

Decision

96 For all of these reasons, the complaint is dismissed.

John Mooney
Vice-Chairperson

Parties of Record

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| Tribunal File | 2008-0697 |
| Style of Cause | <i>Deb Chase and the Commissioner of Correctional Service of Canada et al.</i> |
| Hearing | October 15 and 16, 2009 Kingston, Ontario (Subsequent written arguments provided) |
| Date of Reasons | April 6, 2010 |
| APPEARANCES: | |
| For the complainant | David Capra |
| For the respondent | Pierre Marc Champagne |
| For the Public Service Commission | John Unrau |