



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2008-0750, 0750A, 0750B,
& 0750C
Issued at: Ottawa, August 3, 2010

RAYMOND SILKE ET AL.

Complainants

AND

THE DEPUTY MINISTER OF NATIONAL DEFENCE

Respondent

AND

OTHER PARTIES

Matter Complaint of abuse of authority pursuant to ss. 77(1)(a) and 77(1)(b) of the *Public Service Employment Act*

Decision Complaint is dismissed

Decision rendered by Lyette Babin-MacKay, Member

Language of Decision English

Indexed *Silke et al. v. Deputy Minister of National Defence*

Neutral Citation 2010 PSST 0009

Reasons for Decision

Introduction

1 Raymond Silke, Don Demont, Peter Eder and Rick Johnston allege that the respondent abused its authority when it used an internal non-advertised employment equity (EE) process to staff the position of Technical Services Officer (TSO) (EG-03), at Canadian Forces Housing Agency (CFHA) in Trenton, Ontario. They also allege that the respondent failed to properly assess whether the appointee meets the essential qualifications of the position.

2 The respondent, the Deputy Minister of National Defence (DND), denies that there has been any abuse of authority. It asserts that it used this appointment process to appoint Guy-Anne Guilbeault to a position in the Engineering and Support (EG) group, which the CFHA Human Resources (HR) Plan has identified as an EE shortage group. Managers have been asked to consider members of EE target groups, such as women, when staffing positions in identified EE shortage groups.

Background

3 On November 12, 2008, the respondent posted a *Notification of Appointment or Proposal for Appointment on Publiservice*, for the appointment of Ms. Guilbeault to a TSO position at CFHA – Trenton.

4 On November 21, 2008, the complainants brought complaints of abuse of authority to the Tribunal pursuant to ss. 77(1)(a) and 77(1)(b) of the *Public Service Employment Act* (the *PSEA*).

Issues

5 The Tribunal must determine the following issues:

- (i) Does each complainant have a right to complain?
- (ii) Did the respondent breach the *PSC Policy on Choice of Appointment Process* and the Public Service Commission (PSC) guiding values when it chose to staff

this position through a non-advertised process? If so, does this breach constitute an abuse of authority?

(iii) Does the appointee meet the essential qualifications of this position? Did the respondent breach the *PSC Policy on Assessment*? If so, does this breach constitute an abuse of authority?

Summary of Relevant Evidence

6 Manon Pelletier is an HR Team Leader at CFHA – Trenton. She oversaw this appointment process from beginning to end, and advised management on staffing options. She confirmed that the established staffing process was properly followed and that the required authorizations and approvals were obtained. She reviewed the file before signature of the letter of offer by the delegated authority in Ottawa.

7 Ms. Pelletier confirmed that staffing in the public service is subject to PSC policies and guidelines, and to the staffing values of fairness, access, transparency and representativeness. The public service must be non-partisan and staffing must be based on merit.

8 Ms. Pelletier explained that CFHA has 26 operational sites across the country. For years, it has been difficult to staff technical and TSO positions and appointment processes held in the past five years have been mostly unproductive. There was no EG pre-qualified pool in DND when this process was held.

9 The decision to hold a non-advertised EE process was linked to CFHA HR Plans. The *CFHA Integrated HR Plan 08-09* (the *Integrated HR Plan*) and the *CFHA Housing Operations (H Ops) HR Planning Workbook for FY 2008-2009* (the *H Ops HR Planning Workbook*) were entered in evidence.

10 Ms. Pelletier explained that in providing advice to management, she consulted the *Integrated HR Plan, Section 5 – Employment Equity/Planning*, which states:

“Overall CFHA’s representation for all the designated EE group is greater than labour market availability. However **there are some minor gaps in Women and visible minority representation** that will be addressed by the Agency by maximizing the

flexibility inherent with the *PSEA* for ensuring adequate representation of all designated groups.”

(emphasis added)

11 As for the *H Ops HR Planning Workbook*, it states:

“H Ops will work with HR to attempt to reduce the EE gaps. The EG group has been identified as an Employment Equity Group and individual **managers are trying to fill EG positions with EE target groups such as women as they are able** [...]”

(emphasis added)

12 Ms. Pelletier could not recall the extent of the gap in underrepresentation of women in 2008. Asked to explain the “minor gaps” to which the *Integrated HR Plan* refers, she stated that the gaps are minor when compared to the overall representation in all groups at CFHA.

13 The generic Statement of Merit Criteria and Conditions of Employment (SMC) used in this process was entered into evidence. It is also used for all CFHA TSO appointment processes across the country, and is linked to the TSO position description.

14 This SMC meets the minimum education requirements for the EG group and sets as an occupational requirement: “possession of a valid journeyman’s certificate or an equivalent combination of education and experience”. It does not specifically refer to “women” but it outlines the need to increase employment equity representation.

15 Ms. Guilbeault was the only employee considered for this process.

16 The *Notification of Consideration* for appointment and the *Notification of Appointment or Proposal of Appointment* were entered into evidence. Ms. Pelletier explained that as a practice and for reasons of transparency, CFHA normally uses a national area of selection for its appointment processes and the area of selection for this process was not restricted to members of EE groups: “Employees of the Department of National Defence working for the Canadian Forces Housing Agency across Canada.”

17 Ms. Pelletier explained the requirements of the DND *Guidelines – Non-advertised Appointment Rationale*. They require that managers complete a rationale to clearly

demonstrate how a non-advertised appointment process meets the criterion set for non-advertised appointments. She emphasized that the *Rationale* for this process made reference to the various processes held in previous years, all of which did not yield qualified females. She explained that the rationale was linked to the HR Plans in terms of staffing strategies: it addressed the underrepresentation of women in the EG group and made reference to past unsuccessful processes. She explained further that this process best met the needs of the department because it allowed it to meet EE needs with a fully qualified woman.

18 In cross-examination by the PSC, Ms Pelletier explained how this process met the public service values of fairness, access, and transparency: representativeness was included in the access criterion; the fairness value was met because the process was free of personal favouritism and the employee was qualified for the position; and the access value was met because the department has and continues to hold advertised internal and external appointment processes for its different occupational groups. As for the transparency value, it was met by communicating all staffing decisions in an open manner on the intranet, in HR plans, and by posting the staffing strategy on the departmental web site.

19 Derek Fulford testified for the respondent. He has been the Housing Centre Manager at CFHA in Trenton since 2000. Prior to this appointment, he worked as an inspector on a contract basis from approximately 1984 to 1989 in Downsview, Ontario. He left to work in the private sector as a general contractor building homes. In 1997, he joined CFHA – Trenton as a Housing Inspector (now called TSO), which he did until his appointment as Housing Centre Manager in 2000.

20 He holds a Red Seal certificate in general carpentry and in woodworking, has completed various employer-provided training in management and in human resources and has received training on the new *PSEA*. He has been involved in several appointment processes and is cognizant of the differences between the old and the new *PSEA*.

21 He explained that the key responsibilities of the CFHA – Trenton unit are to rent, maintain and update DND housing units. CFHA units vary across Canada and the Trenton office is small, with approximately ten employees, including one unit supervisor (EG-04) directly responsible for two TSOs (EG-03) and for the other employees. TSOs respond to maintenance complaints received from housing occupants, troubleshoot problems, assess requirements and generate work orders for licensed contractors who perform the work on site. They are also responsible for the quality assurance component of all maintenance work and of some minor improvements.

22 Mr. Fulford explained that this TSO position was staffed to replace an employee who vacated his position unexpectedly in May 2008. He staffed the position on an indeterminate basis to address the period of instability which preceded the prior incumbent's departure, causing some disarray and affecting morale.

23 Mr. Fulford stated that the word "painful" came to mind when looking back on previous attempts to staff TSO positions in Trenton and across the country over the past five years.

24 He was aware of the EE gaps in the target groups (including women) for the EG group and knew that he had a competent female employee, Ms. Guilbeault, already working in his unit at CFHA. She had expressed an interest in this type of work and had acted in the TSO position for a four-month period in the previous year. Although the appointment did not exceed four months, he had ensured that Ms. Guilbeault met the essential qualifications. He had verified that no other employee in the unit had the necessary qualifications. No other employee had shown an interest in this position. Mr. Fulford sought advice from HR who confirmed that he could make an EE appointment to this TSO position.

25 He then prepared a *Rationale* outlining the reasons why a non-appointment process was chosen: lack of success in recruiting to TSO positions in the past, availability of a female employee who met the essential qualifications, and positive input from the unit supervisor and colleagues about Ms. Guilbeault's performance when she

acted in the TSO position. The *Rationale* also listed the benefits to the organization in using this process.

26 In cross-examination, Mr. Fulford explained that the *Rationale* states that the shift from her current position of CR-05 to the TSO would be “expeditious” because the appointment process could be put in place quickly and be completed faster than an advertised one, and the process was “cost-effective” because it avoided holding a long appointment process. Ms. Guilbeault was already working in the organization, had the required qualifications, and was almost at the same pay scale as an EG-03. The “positive effect on the team morale” had been assessed through a dialogue with co-workers, colleagues and with the unit supervisor.

27 Mr. Fulford did not have an explanation for not referring to Ms. Guilbeault’s portfolio in the *Rationale*.

28 Asked where the *Rationale* addressed the PSC values, he stated that fairness was met because the employee had been assessed with the same SMC as had been used in previous TSO appointment processes. The access value was addressed through the HR Plan, which identified a gap in access from the women target group.

29 Mr. Fulford stated that for as long as he could remember, the generic SMC had included the same occupational certification and that it had always been paired with a requirement for experience in residential housing. A journeyperson’s certificate is not sufficient for a TSO and must be accompanied with residential experience. In previous appointment processes, candidates had been found to have the requisite occupational certification but no residential experience.

30 Mr. Fulford commented on the *Applicant’s evaluation against criteria* (the *Applicant’s Evaluation*) which he prepared. He explained that he assessed Ms. Guilbeault by reviewing and researching the course curriculum of the Advanced Interior Design course she had completed. He was satisfied that this course involved a structural component and that portions of the course curriculum covered application of the Building Code, structural design and detail of walls, ceilings, roofs, floors, and the preparation of contract documents. He reviewed Ms. Guilbeault’s portfolio and the

drawings she submitted while at school; these drawings indicated that she knew how structures were put together.

31 In addition, he noted that Ms. Guilbeault had three years of experience with Public Works and Government Services Canada (PWGSC), which had exposed her to Project Management. Finally, when she acted in the TSO position, she was closely monitored by the unit supervisor, who confirmed that she was competent and functioning fully in the position.

32 In cross-examination, in answer to a question about her months of residential construction experience, Mr. Fulford referred to her personal experience and to her experience in the organization and in project management at PWGSC. Mr. Fulford explained that Ms. Guilbeault gained a significant amount of experience in residential construction while working with CFHA during the active posting season (APS) (normally from April to September/October each year). During APS, she dealt with half of the 200 march-outs (residents moving out of their housing unit) and this allowed her to assess housing damages, etc. In addition, she was the Officer of Primary Importance (OPI) for the sidewalk and steps replacement project, a complicated project which she handled very well.

33 Mr. Johnston testified that he has been an employee of CFHA in Petawawa, Ontario since 1981 and a TSO since 2003. He is a licensed carpenter, which means that he has completed a formal apprenticeship and 1,800 hours at a trade school. He has taken various courses to upgrade and add to his qualifications and keep up with the changes to the trade's code. When he was hired in Petawawa, the TSO position required a journeyperson's certificate with a Red Seal endorsement in one of the trades.

34 Mr. Johnston explained that the main responsibility of a TSO is the inspection of contract work on the base to ensure the work has been done satisfactorily. Construction work must be inspected to ensure that it has been done in accordance to the various codes (building, plumbing, carpentry, electrical) and in a timely manner, and that inappropriate shortcuts have not been taken, which create a risk of damage to building, and injury and loss of life to occupants and contractors.

35 He first saw the *Notification of Consideration for Appointment* in the fall of 2008. It caused some concern as it appeared that an employee at the CR-05 group and level was being appointed to a position at the EG-03 group and level.

36 To his knowledge, the appointee does not possess a license in any trade. Her training allows her to meet the needs of the occupants of the housing units but she has no structural training. As a qualified tradesperson, he considers it very important that work be done correctly and completely. In his view, although anyone can perform an inspection, only a qualified tradesperson is able to recognize whether work has been done properly or in accordance to Code. He does not believe that a TSO without a trade license can provide the level of excellence that CFHA expects.

37 In cross-examination, Mr. Johnston stated that he was not personally interested in the TSO position in Trenton, but that others could have been. He agreed that the requirements of a position can change, but the requirements of a technical position should be upgraded, not downgraded. In his view the standards have been lowered.

38 Mr. Demont testified that he has been a TSO in Petawawa since April 2007. He has not seen any postings for TSO opportunities in Trenton but has seen the one advertised for all of Canada. He testified that he has family and friends in Trenton and that he probably would have been “a bit interested” in the job if it had been posted.

39 In cross-examination, Mr. Demont confirmed that he did not apply for the position when it was posted in 2008.

40 Mr. Silke and Mr. Eder were not present at the hearing.

Arguments of the parties

A) Complainants' arguments

41 The complainants argue that they have standing and the right to file a complaint to the Public Service Staffing Tribunal. The complainants submit that they are properly in the area of selection set for this non-advertised process and are therefore in the area of recourse. Because they have the right to file a complaint, they do not need to

demonstrate a vested interest in the position. They contend that their being TSOs (EG-03) already or their interest in moving to Trenton is not relevant in this complaint.

42 The complainants argue that the respondent breached PSC policies, specifically the *PSC Policy - Choice of Appointment Process* when it chose to staff this position through a non-advertised process, and the *PSC Policy – Assessment* and when it found the appointee qualified for the position.

43 They contend that a breach of PSC policies is an abuse of authority. They submit that the wording of s. 2(4) of the *PSEA* is clear that abuse of authority is not limited to bad faith and personal favouritism and that pursuant to s. 16 of the *PSEA*, the deputy head is subject to any policies established by the PSC and ultimately accountable for his or her decisions. As PSC policies are legally binding, a breach of PSC policies is sufficient to demonstrate an abuse of authority.

44 The *PSC Policy – Choice of Appointment Process* requires that the appointment process be chosen in a manner that is consistent with the organization's human resources plan and with the core and guiding values. The complainants submit that this *Policy* was breached because the *Rationale* for this process fails to explain why a non-advertised process was deemed to be the best staffing method in the circumstances. They also contend that the *Rationale* should have addressed departmental requirements in a more detailed manner and provided detailed information, facts and statistics to support them.

45 The complainants argue that in deciding whether the *Rationale* meets the requirements of the *PSC Policy – Choice of Appointment Process* or of *DND's Guidelines – Non-advertised Appointment Rationale*, the Tribunal should only consider the *Rationale* entered into evidence. Written evidence should carry more weight than oral testimony.

46 The *PSC Policy – Assessment* requires that assessment processes and methods effectively assess the essential qualifications and provide a sound basis for making appointments according to merit. The complainants contend that this policy was breached because the appointee does not have the required training to effectively and

competently perform the duties of the position. They submit that the Tribunal must decide if the respondent's interpretation of a "combination of education and experience" meets the requirements of s. 30(2)(a) of the *PSEA*, and whether the *Applicant's Evaluation* effectively assesses what it purports to assess and is a sound basis for an appointment.

47 Finally, the complainants argue that the respondent has breached the PSC staffing values of fairness and access, outlined in the *PSC Appointment Policy – General* and that the *Rationale* does not address these values. Fairness was breached because decisions were not made objectively when the respondent set the area of selection to the whole of CFHA across Canada but considered only one employee. Access was breached because employees from across the country did not have a reasonable opportunity to apply for the process. Finally, as required in departmental guidelines, the *Rationale* did not address how the process was consistent with the HR Plan, the Business Plan and the EE Plan.

48 The complainants leave the determination of the appropriate corrective action to the Tribunal's discretion.

B) Respondent's arguments

49 The respondent argues that the complainants have not demonstrated an interest in this EG-03 position and therefore do not have a standing to file a complaint pursuant to s. 77 of the *PSEA* (*Evans v. Deputy Minister of Indian Affairs and Northern Development*, 2007 PSST 0004, at para. 12). Mr. Johnston has stated that he has no interest in this position. As for Mr. Demont, he has no personal interest in this position as demonstrated by his statement that he did not apply on the advertised process held six months before because he is already an EG-03. Mr. Silke and Mr. Eder did not attend the hearing of their own complaint and it is thus reasonable to conclude that they have no personal interest in this position.

50 The respondent contends that a breach of PSC policy has not been established and that the complainants' assertions that a breach should lead to a finding of abuse of

authority run contrary to principles established (see *Morris v. Commissioner of Correctional Service of Canada*, 2009 PSST 0009, at para. 100).

51 The respondent argues that the Tribunal has confirmed the deputy head's discretion in establishing essential qualifications (see *Visca v. Deputy Minister of Justice*, 2007 PSST 0024, at para. 42). The Tribunal's role is to determine whether there was an abuse of authority in the way in which the assessment board assessed the application (see *Lavigne v. Deputy Minister of Justice and Public Service Commission*, 2009 FC 684, at para. 2).

52 Section 31(2) of the *PSEA* requires that the essential qualifications meet or exceed the applicable qualification standards. The respondent submits that the education requirements in the SMC meet the EG qualifications standards. Management has determined that the occupational certification requirement in the generic SMC was appropriate for use in the process in question, in light of the organization's current needs and of the nature of the work performed.

53 The respondent contends that although the *Applicant's evaluation against criteria* does not expressly mention all the tools that the delegated manager used to assess the appointee's qualifications against the SMC, his unrefuted testimony was that he reviewed the appointee's résumé, researched the background of her training certification and her portfolio, and considered feedback received on her performance as well as his own personal knowledge of her performance. The respondent argues there is no reason why the Tribunal should disregard oral testimony given at the hearing and consider only the written evidence presented.

54 The respondent submits that s. 36 of the *PSEA* gives the deputy head broad discretion to determine the tools necessary to assess whether a candidate meets the qualifications for a position. This section permits the use of any appropriate assessment method, including personal knowledge, in determining whether a person is qualified (*Jolin v. Deputy Head of Service Canada*, 2007 PSST 0011, at para.77; and *Visca*, at para. 55-57; and *Morris*, at para. 80).

55 Finally, the respondent argues that the choice of a non-advertised process was not an abuse of authority, but was reasonable and appropriate, and met the requirements of DND's *Guidelines* and the staffing values. The evidence has demonstrated that the delegated manager needed to staff a vacant position, that HR plans identified an EE gap as it relates to women, that a qualified female employee was available, and that an EE appointment is a valid criterion for a non-advertised appointment.

56 Finally, the respondent submits that the *Non-advertised Appointment Rationale* addresses the values of fairness and access and that the explanation provided for the use of a non-advertised process meets the criteria for these values in DND's *Guidelines – Non-advertised Appointment Rationale*.

57 In the event that the Tribunal finds that there was abuse of authority, the respondent contends that any corrective action must be directly limited to the appointment process in question.

C) Complainants' reply to the respondent

58 The complainants submit that this case must be distinguished from *Evans*, where the complainant was at a higher group and level and filing a complaint for someone else. All complainants are at the same level as the position which was staffed. The complainants contend that their facts qualify as personal interest. Mr. Demont testified that he was potentially interested in moving to Trenton where he has friends and family. Mr. Johnston expressed concern about the perception that the trade standards would be lowered. The complainants caution that the fact that two complainants could not attend the hearing must not be interpreted as indication that they have no personal interest in their complaint. The *PSEA* does not require a complainant to attend a hearing.

59 Finally, the complainants submit that additional information entered into evidence orally at the hearing amounts to a second assessment and would be an improper application of s. 36 of the *PSEA*.

D) Public Service Commission's arguments

60 The PSC noted that a broad policy framework has been developed pursuant to s. 29(3) of the *PSEA* and that pursuant to s. 16, deputy heads and their delegates are subject to these policies. It submits that for a breach of policy to constitute an abuse of authority, it must have been the result of improper intention, bad faith or personal favouritism, or such serious carelessness or recklessness that bad faith can be presumed.

61 The PSC found the *Applicant's evaluation against criteria* somewhat vague, but considered that the testimony of the respondent's witness clarified how the appointee met the essential qualifications.

62 Similarly, the PSC also considered the *Non-advertised Appointment Rationale* somewhat vague but found reasonable the respondent's explanation as to how the values were met, and the EE links addressing the under-representation of women.

Relevant Legislation and Policies

63 The following provisions of the *PSEA* are relevant to this complaint:

2. (4) For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.

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.

30. (2) an appointment is based on 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 the official language proficiency; and

[...]

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

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

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

36. In making a 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).

77. (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may – in the manner and within the period provided by the Tribunal’s regulations – make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of

(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);

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

[...]

(2) For the purposes of subsection (1), a person is in the area of recourse if the person is

[...]

(b) any person in the area of selection determined under section 34, in the case of a non-advertised internal appointment process.

64 The following sections of PSC policies and of DND guidelines are relevant:

PSC Policy – Choice of Appointment Process

Policy Statement

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

[...]

Policy Requirements

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

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

PSC Policy – Assessment

Policy Statement

The assessment is designed and implemented without bias, political influence or personal favouritism and does not create systemic barriers.

The assessment processes and methods effectively assess the essential qualifications and other merit criteria identified and are administered fairly.

The identification of persons who meet the operational requirements and organizational needs is carried out objectively.

DND Guidelines – Non-advertised Appointment Rationale

Departmental criteria

A non-advertised appointment rationale may be used when it is the best staffing method to meet the needs of the DND/CF in the situation and the use is consistent with the appointment **values of fairness, access and transparency**.

[...]

Fairness means that the choice of process will be made objectively, free from political or personal favouritism. How does this appointment meet the definition? Is the person qualified against the Statement of Merit Criteria? How was the person selected? How can management demonstrate that there was no political influence or personal favouritism?

Access means that the organization will continue to provide reasonable opportunities to apply and be considered for Public Service employment. (...) Is this appointment part of an initiative to increase the representation of Employment Equity group members?

Transparency means that information about the appointment process will be communicated in an open and timely manner. How was this appointment process transparent? (...).

There must be evidence that information about the appointment process will contribute more effectively or efficiently towards the attainment of an operational requirement recognized in the organization's HR Plan or the Business Plan or the Employment Equity Plan (e.g. increasing employment equity representation, (...), etc).

DND - Non-advertised Appointment Rationale

Narrative Rationale

Managers must address the following information in their justification:

1. Describe how the non-advertised appointment process meets the Department's criteria.
 - a. Address why the non-advertised appointment process is the best staffing method to meet the needs of the Department/Canadian Forces in the situation.
 - b. Address each of the Public Service appointment values of fairness, access and transparency.

- c. Indicate how the process is consistent with the organization's Human Resources Plan, Business Plan, Employment Equity Plan and/or Official Languages Plan. If not consistent, with one or more of the plans, please explain why.
2. If only one person considered for this appointment process, please explain why. If more than one were considered, describe the context in which others were considered.
3. Describe the possible and potential impact on others in the work unit.

Analysis

Issue I: Does each complainant (Rick Johnston, Don Demont, Raymond Silke and Peter Eder) have a right to complain?

65 In the case at hand, the respondent has challenged the complainants' right to file a complaint, arguing that they have not demonstrated a personal interest and as a result they do not have a standing in this complaint.

66 The complainants' representative argues that the complainants' right to file a complaint flows from their being in the area of recourse and that they need not demonstrate a personal interest in their complaint.

67 A person's right to file a complaint concerning an internal appointment process is governed by s. 77(1) of the *PSEA* which states 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** [...]" (emphasis added). Three conditions therefore apply when filing a complaint: a person must be in the area of recourse, there must have been an appointment or proposed appointment, and the complaint can only be that the complainant was not appointed or proposed to be appointed.

68 The words "a complaint to the Tribunal that he or she was not appointed or proposed for appointment" clearly stipulate that a complaint must be personal to the complainant. The complaint cannot be filed on another person's behalf and cannot be about how other unsuccessful candidates were treated. Therefore the complainant must have a personal interest in an appointment to the position (see *Evans*; *Visca v. Deputy*

Minister of Justice, 2006 PSST 0016, at para. 24; and *Czarnecki v. Deputy Head of Service Canada*, 2007 PSST 0001).

69 As discussed in *Beyak v. Deputy Minister of Natural Resources Canada*, 2009 PSST 0035, the threshold test for having a personal interest in a position is not higher for a non-advertised process than an advertised process. In the case of a non-advertised appointment process, it is not possible for an employee to indicate his or her interest in an appointment to a position by filing an application, as would be the case in an advertised appointment process. It is by filing a complaint that he or she was not appointed that an employee can express this interest.

70 All complainants are properly in the area of recourse. Faced with the respondent's challenge to their right to bring a complaint, the Tribunal must turn to the evidence and to the parties' arguments.

71 Mr. Johnston has testified that he was not interested in working in Trenton but that others could have been. He is not complaining that he was not appointed, because he would not have applied for this process if he had been given the opportunity. As for his contention that other employees could have been interested in the position, it does not meet the requirements of s. 77(1) of the *PSEA*: a person cannot complain that other persons were not, or could have been, appointed in an appointment process. Accordingly, the Tribunal concludes that Mr. Johnston has no interest in an appointment to the position of TSO in Trenton and that, in fact, he is complaining on behalf of others. The Tribunal finds that the complainant had no standing and therefore no right to file a complaint to the Tribunal pursuant to s. 77 of the *PSEA*. The request to dismiss the complaint of Mr. Johnston is granted.

72 Mr. Demont, for his part, has testified that he had not seen any job posting for Trenton, only one for the whole of Canada. He has also testified that he has family and friends in Trenton and that he would have probably been "a bit interested" if a job opportunity had been posted for Trenton. The threshold test for having a personal interest in a position is not higher for a non-advertised process than an advertised process. This was a non-advertised appointment process and by filing a complaint that

he was not appointed, Mr. Demont expressed personal interest in an appointment in this position. No conclusive evidence has been presented that the complainant would not have applied for this process if it had been advertised. Accordingly, the Tribunal finds that the complainant has the right to file a complaint that he was not appointed by reason of an abuse of authority.

73 Mr. Silke and Mr. Eder were not present at the hearing but were represented. The Tribunal does not accept the respondent's argument that their absence demonstrates their lack of a personal interest in the position. Here again, by filing a complaint that they were not appointed in this non-advertised appointment process, Mr. Silke and Mr. Eder expressed their personal interest in an appointment in this position. Accordingly, in the absence of evidence to the contrary, the Tribunal finds that the complainants have the right to file a complaint that they were not appointed by reason of an abuse of authority.

Issue II: Did the respondent breach the *PSC Policy on Choice of Appointment Process* and the PSC guiding values when it chose to staff this position through a non-advertised process? If so, does this breach constitute an abuse of authority?

74 The complainants contend that the respondent breached the *PSC Policy – Choice of Appointment Process*. They argue that the *Rationale* prepared in support of the process fails to address why a non-advertised process was the best staffing method in the circumstances and how it was consistent with HR Plans. In addition, they contend that the *Rationale* does not address how the process met the guiding values of access and fairness. They argue that this is a breach of policy that amounts to an abuse of authority.

75 The respondent submits there was no abuse of authority, and that it did not breach the *PSC Policy* or any guiding values.

76 Section 33 of the *PSEA* allows a manager to choose between an advertised and a non-advertised process when staffing positions. Pursuant to s. 29(4), the manager is not required to consider more than one person in order for the appointment to be based on merit.

77 The *PSC Policy on Choice of Process*, to which deputy heads are legally required to conform, requires that a non-advertised appointment process be consistent with the organization's HR Plans and with the appointment values of fairness, access, transparency and representativeness. It also requires that a written rationale demonstrate how the process meets the established criteria and the values.

78 The Tribunal has reviewed the non-advertised appointment *Rationale* prepared in support of the process and finds that it generally addresses the criteria set in the PSC policy and in the DND guidelines. Although it does not specifically state why the process was deemed the best staffing method to meet departmental needs in the circumstances, it does mention difficulties encountered staffing technical positions, lack of interest from qualified females, availability of a qualified bilingual employee, employee familiarity with the organization and expeditiousness and cost-effectiveness of the process. These reasons are also offered to explain why only one person was considered. The impact on other employees in the work unit (positive effect on employee morale) is also mentioned. Finally, the reference to gaps in women representation in occupational groups such as the EG group makes a link to the organization's HR plans.

79 The *Rationale* fails to meet requirements in that it does not explain how this appointment meets the appointment values. Although Ms Pelletier's testimony at the hearing provided some explanation of how each guiding value is addressed, the Tribunal does not consider that this approach meets PSC policy and DND guidelines. In fact, with regard to guiding values, departmental guidelines specifically list the factors to be considered in determining how the process is consistent with the values.

80 However, while the *Rationale* should have been more detailed and fails to specifically address the guiding values, the Tribunal does not conclude that these errors and omissions demonstrate such serious carelessness or recklessness as to constitute bad faith (see *Turner v. Deputy Minister of Citizenship and Immigration Canada*, 2009 PSST 0022).

81 Accordingly, the Tribunal finds that the complainants have not established that the respondent abused its authority in the application of the *PSC Policy on Choice of Appointment Process* and of the guiding values of the public service when it chose a non-advertised EE internal appointment process to staff this position.

Issue III: Does the appointee meet the essential qualifications of this position? Did the respondent breach the *PSC Policy on Assessment*? If so, does this breach constitute an abuse of authority?

82 The complainants argue that the appointee does not have the required training to perform the duties of the position effectively and competently. They contend that the *PSC Policy on Assessment* was breached because the respondent's assessment of an "equivalent combination of education and experience", as recorded on the *Applicant's Evaluation against Criteria*, does not provide a sound basis for an appointment according to merit. The complainants ask the Tribunal to decide if the assessment of this essential qualification meets the requirements of s. 30(2)(a) of the PSEA.

83 The respondent contends that testimony and evidence entered at the hearing support the manager's conclusion that the appointee meets the qualification of the position.

84 The complainants essentially argue that a valid journeyperson's certificate and hands-on knowledge and experience of the different trades' codes are required to perform the work of a TSO. They contend that the appointee does not hold the appropriate qualifications to perform the duties of the position in a competent manner.

85 Section 30(2)(a) of the *PSEA* requires that the person to be appointed meet the essential qualifications of a position, as established by the deputy head. As for s. 31(2), it requires that these essential qualifications meet or exceed the employer's qualification standards.

86 The evidence demonstrates that generic SMC established for this position meets the minimum qualification standard of the EG Group and that it is the same as the ones used in other TSO appointment processes.

87 Section 36 of the *PSEA* provides deputy heads with a considerable discretion in the choice and use of assessment methods. Mr. Fulford testified that he assessed Ms. Guilbeault's education and experience through a review of her résumé, the course curriculum of the Advanced Interior Design course, her course portfolio and her prior work experience. He testified that her college training included a structural component. He also consulted her unit supervisor. Satisfied that Ms. Guilbeault met the essential qualifications, he proceeded with a non-advertised EE appointment.

88 Mr. Fulford recorded his assessment on the *Applicant's Evaluation against Criteria*, entered into evidence. The Tribunal has reviewed this *Applicant's Evaluation* and has found no indication that Mr. Fulford has abused his authority in finding that Ms. Guilbeault meets the essential qualifications of this position. The Tribunal does not accept the complainants' argument that oral testimony given at the hearing should be disregarded in favour of the written evidence contained in the *Applicant's Evaluation against Criteria*.

89 Having reviewed all the evidence, the Tribunal concludes that the complainants have failed to demonstrate that the respondent abused its authority in finding that the appointee meets the essential qualifications of the position.

90 Similarly, the Tribunal finds no evidence that the respondent breached the *PSC Policy on Assessment*.

Decision

91 For all these reasons, the complaint is dismissed.

Lurette Babin-MacKay
Member

Parties of Record

Tribunal File	2008-0750, 0750A, 0750B, & 0750C
Style of Cause	<i>Raymond Silke et al. and the Deputy Minister of National Defence</i>
Hearing	January 18 and 19, 2010 Ottawa, Ontario
Date of Reasons	August 3, 2010
APPEARANCES:	
For the complainants	Louis Bisson
For the respondent	Lesa Brown
For the Public Service Commission	Trish Heffernan