



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2009-0442
Issued at: Ottawa, December 13, 2010

NEIL SMITH

Complainant

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

AND

OTHER PARTIES

Matter	Complaint of abuse of authority pursuant to ss. 74 and 77(1)(a) of the <i>Public Service Employment Act</i>
Decision	Complaint is dismissed for want of jurisdiction.
Decision rendered by	Joanne B. Archibald, Member
Language of Decision	English
Indexed	<i>Smith v. President of the Canada Border Services Agency</i>
Neutral Citation	2010 PSST 0022

Reasons for Decision

Introduction

1 Neil Smith, the complainant, performed the duties of a dog handler with the Canada Border Services Agency (CBSA) until May 2009, when he was advised that he would be assigned to other duties as his dog was retiring. The dog handler duties were advertised in June 2009, and Claudette Simoneau was selected to be trained and to assume the dog handler duties previously performed by the complainant.

2 On June 30, 2009, the complainant filed a complaint under ss. 74 and 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12,13 (the *PSEA*). He alleges first that Ms. Simoneau's assignment to dog handling duties constituted an appointment and he complains of an abuse of authority in the application of merit and in the choice of appointment process. Secondly, he alleges that his own appointment has been revoked.

3 The respondent challenges the Tribunal's jurisdiction to accept the complaint. It submits that no appointment or revocation has occurred. Dog handler duties were part of the work description for a Border Services Officer (BSO).

Relevant Information and Evidence

4 The complainant joined the public service in 2003 as a Canine Officer (PM-02) with the Canadian Food Inspection Agency (CFIA).

5 On December 12, 2003, the complainant received a letter from the President of CFIA, advising him of the creation of the CBSA and the transfer of certain CFIA functions to CBSA. Effective December 12, 2003, he was transferred to the position of Canine Officer (PM-02) at CBSA.

6 On February 8, 2005, Michael Hines, Director, Organization and Classification, CBSA, issued a memorandum indicating the establishment of a new national BSO (PM-03) work description. The memorandum confirmed that the Detector Dog Handler position had been eliminated and the duties fully incorporated into the new BSO work description. They would correspondingly be reclassified from a PM-02 to the BSO

classification of PM-03. A one page addendum to the work description listed additional duties and responsibilities of BSOs who were performing detector dog handler duties.

7 In an undated letter, the complainant was offered an indeterminate appointment to a BSO (PM-03) position effective April 1, 2005. The complainant accepted this offer on April 24, 2006, after receiving an email on April 20, 2006, from Philip Crabbe, then Acting Chief, confirming that CBSA did not intend to move him from the agriculture detector dog handler duties after he accepted. The complainant explained that until he received the clarification from Mr. Crabbe, he had been concerned that if he accepted the appointment, he would be relinquishing his dog handler duties.

8 On January 30, 2007, after a classification conversion exercise, CBSA completed a new work description for the position of BSO (FB-03). It incorporated two specific references to dog handling duties under the heading *Skill*:

[...]

It may also require knowledge of the principles, methods and techniques associated with detector dog training and handling to detect contraband or regulated commodities.

[...]

May also be required to interpret the behavioural reaction of a detector dog in order to determine a course of action during examinations.

[...]

9 In October 2006, the complainant left the work place for a period of leave. Another BSO then assumed the dog handler duties with the dog that had been working with the complainant.

10 The complainant returned from leave in January 2007. He then assumed BSO duties at a port of entry. The dog handler duties remained with the other BSO until September 2007 when he chose to give them up. The complainant was then asked to resume dog handler duties. He continued to work with the dog until it retired in April 2009.

11 On May 15, 2009, the complainant received a letter from Darren Frank, Chief of Operations, CBSA. Mr. Frank referred to the conversion of the dog handler position to a BSO. The letter stated that after the conversion, CBSA viewed the dog handler duties as an assignment to duties within the BSO work description. Mr. Frank added that in the

Ottawa district where the complainant worked, the decision had been made to rotate the dog handler duties as appropriate.

12 Within the letter, Mr. Frank explained the management considerations: fair distribution of career opportunities, employees' career objectives, service time as a handler, and the overall experience base within the district. He noted that, at that time, the complainant was the longest serving dog handler.

13 As the dog working with the complainant was retiring and would be replaced with a new dog, Mr. Frank testified that he considered that the time was appropriate to give another BSO the opportunity to perform the dog handler duties. Shortly thereafter, a bulletin entitled "Assignment Opportunity" was posted for a Food, Plant and Animal Detector Dog Handler. It was available only to indeterminate, designated BSOs (FB-03) in the Ottawa district. The bulletin provided details of a two-day detector dog handler pre-selection course that "may be used as an assessment tool," followed by ten weeks of training at the CBSA Rigaud Learning Centre. An attachment to the posting indicated additional conditions of employment, including that the employee must be able to provide care, maintain and lift the dog.

14 The closing date was June 26, 2009. Seven people replied. The complainant, who testified that he did not think he would be considered, did not reply to the posted opportunity.

15 Three people were chosen for the pre-selection training. From among them, Ms. Simoneau attended the training at Rigaud and was assigned to perform the dog handler duties with a new detector dog.

Jurisdictional matters

16 In order to hear the complaint on its merits, the Tribunal must have jurisdiction over the matters raised in the complaint. The complainant is required first to establish that there has been an appointment before the Tribunal will consider his s. 77 complaint. He must also establish that there has been a revocation of his appointment for the Tribunal to have jurisdiction to hear the complaint under s. 74 of the *PSEA*.

Argument of the Complainant

17 With respect to revocation, the complainant argues that the respondent has acted arbitrarily. While it did not explicitly tell him not to apply when it posted the assignment opportunity in 2009, it was implicit in Mr. Frank's letter that someone else would be given the dog handler duties. The complainant was not allowed to continue as a dog handler.

18 In the matter of whether Ms. Simoneau was appointed to a position, the complainant relies on the Supreme Court of Canada decisions in *Canada v. Brault*, [1987] 2 SCR 489 and *Doré v. Canada*, [1987] 2 SCR 503.

19 *Brault* involved the assignment of dog handler duties to a Customs Inspector position and this was determined to be a new appointment. The complainant argues that this is the same case. The addition of dog handler duties is a significant and substantial change. The respondent relied on evaluation and selection to choose Ms. Simoneau. Working with a dog requires special qualifications that are taught and assessed during the ten-week training program at Rigaud.

20 In *Doré*, the Court held that the assignment of a person to an unclassified position for a period of nine months constituted an appointment. Similarly, the complainant argues that given the length of the assignment in the present case, which has been advertised previously for three years with a possibility of extension, it should also be considered an appointment.

Argument of the Respondent

21 The respondent argues that the complainant has no right, in the present case, to complain to the Tribunal.

22 With respect to Mr. Crabbe's email confirming his intention not to move the complainant from his dog handling duties, the respondent notes that the context of this correspondence was the reclassification of the position. Mr. Crabbe's statement did not prevent management from changing the complainant's duties in the future. When the

respondent later decided to reassign the complainant to other duties, Mr. Frank provided him with clear reasons for the decision.

23 Although the bulletin announcing the dog handler assignment for which Ms. Simoneau was later selected was entitled "Assignment Opportunity," and referred to filling "the position" of Food, Plant and Animal Detector Dog Handler," no such position actually existed. This was a description of a function within the BSO duties, as there was no longer a stand-alone dog handler position.

24 The respondent argues that the mere fact that a BSO is required to go through special training and evaluation does not demonstrate that there has been an appointment. There are many tools at the disposal of BSOs and they are trained in the use of these tools. The respondent has a duty to ensure that a BSO is well trained to handle a dog. The thoroughness and length of training and evaluation do not create an appointment.

25 Finally, the respondent submits that the position has evolved. The respondent explicitly determined that the dog handler duties would be incorporated into the BSO work description. This was not done secretly.

26 The respondent seeks to distinguish the *Doré* and *Brault* decisions from the facts of the present case. In *Doré*, a new supervisory position was being created and a person was given those duties on a full-time basis, pending classification. This situation continued for nine months before the appeal was heard. In the respondent's view, the Court wanted to prevent circumvention of appeal rights by a failure of the employer to proceed to classify a position. However, in the present case, there is no new position. There is an existing work description that has been classified. The functions and duties have been set down and where there is disagreement, a grievance is the correct avenue of recourse.

27 In *Brault*, a new canine unit had been established and new functions had been created. The Court found that the new functions required additional and special qualifications. Again, the respondent argues, the Court's main concern was to prevent the circumvention of merit and thereby deprive employees of the right of appeal. This is

different from the present case. The dog handler position has evolved and is now part of the national work description for a BSO. There are no new functions. The BSO who has dog handler duties inspects, examines and verifies, and uses a dog as one of the detection tools in carrying out these duties.

28 The respondent maintains that dog handling duties represent an assignment to functions within the BSO work description and do not constitute an appointment.

Arguments of the Public Service Commission

29 The Public Service Commission (PSC) did not appear, but provided written submissions regarding the complaint.

Issues

30 In the present case, there are two issues arising, namely:

- (i) Whether Ms. Simoneau's assignment constituted an appointment within the meaning of s. 77(1) of the *PSEA*; and,
- (ii) Whether the complainant's appointment has been revoked within the meaning of s. 74 of the *PSEA*.

Analysis

31 The matters over which the Tribunal has authority are set out in s. 88(2) of the *PSEA* which specifically provides that "[t]he mandate of the Tribunal is to consider and dispose of complaints made under subsection 65(1) and sections 74, 77 and 83."

Issue I: Does Ms. Simoneau's assignment constitute an appointment within the meaning of s. 77(1) of the *PSEA*?

32 Both parties referred to the decisions of the Supreme Court of Canada in two cases: *Brault* and *Doré*.

33 In order to gain a proper understanding of the *Brault* decision, it is important to consider its factual context. In 1982, the Department of National Revenue, Customs and

Excise sought dog handlers for a new detector dog unit to be established in the Montréal Region. It restricted applications to qualified Customs Inspectors (PM-01) in the region. Twenty applications were received. The candidates were interviewed for selection for a three month training program. A final selection was made, followed by training and appointments. Appeals were lodged under the former version of the PSEA.

34 Mr. Justice Le Dain framed the issue as follows, at p. 491:

The question raised by this appeal is whether the creation of additional functions or duties in a position in the Public Service of Canada, calling for additional qualifications and the selection of a person possessing such qualifications, amounts to the creation of a new position, although not formally designated as such ...

35 There are thus three aspects to this issue: the creation of additional functions or duties; the requirement for additional qualifications; and, the selection of a person possessing the qualifications.

36 In order to understand the context of the Supreme Court's analysis of the issue, it is necessary to review certain aspects of the lower court decisions. The original PSC Appeal Board decision was extensively quoted by Mr. Justice Pratte in the Federal Court of Appeal judgment, *Canada v. Brault*, [1985] 1 FC 410. An excerpt from the Appeal Board decision, as it was reproduced at p. 415, appears below:

The Department may not have made up special job descriptions for "dog handler" positions, but in my opinion this is wrong. The position description for a Customs Inspector PM-01 (Exhibit M-1) which I was given at the hearing may be accurate for ordinary customs inspector positions, but in my view it in no way reflects the special qualifications, duties and responsibilities expected of a "dog handler" as mentioned on poster 82-44, or as presented at the appeal hearing. As regards the single national statement of qualifications, which the Department said it uses for customs inspector competitions, it is apparent that in circumstances the specifications contained in poster 82-44 added considerable other material.

37 From this excerpt, it is understood that when the appeal was lodged, the work description for a Customs Inspector described the work of an "ordinary customs inspector." It did not contain dog handling functions and the Appeal Board found that an appointment had occurred to the new dog handler position. It went on to consider the question of merit.

38 At the Federal Court of Appeal, the majority held that no appointment had occurred, that the creation of a new position required the “clear and unambiguous indication of intent.” If this was absent, there could be no appointment. In his dissenting decision, Pratte J.A. stated, at pp. 415-416:

As counsel for the applicant emphasized, the *Public Service Employment Act* frequently uses the expression “appointment to positions in the Public Service” but does not define the words “appointment” and “position”. It follows that these words are used in their ordinary sense, according to which a person is appointed to a position when he is designated to perform a job or function. Accordingly, a person who already has a position in the Public Service as was the case with the mis-en-cause Lenoir and Beaupré, is appointed to another position if he is designated to perform a job different from the one already held by him. In my view, for someone who already has a position in the Public Service to be appointed to a new position, it is not necessary for the authorities in question to expressly appoint him to such a position; it will suffice if such authorities, without expressly creating a new position, appoint him to permanently carry out in future a new job which is substantially different from that associated with the position held by him until that time.

The mis-en-cause Lenoir and Beaupré were customs inspectors when they were selected to perform the duties of "dog handler". To decide whether as such they were being appointed to new positions, it must be determined whether their new duties were sufficiently different from those of a customs inspector to constitute a different job. The Board answered this question in the affirmative. **I consider it was correct, as the function of a "dog handler" adds such significant responsibilities and obligations to those of a customs inspector that it seems impossible to accept the applicant's argument that the selection of the mis-en-cause as "dog handlers" was merely an assignment of duties within the ordinary limits of their jobs as customs inspectors.**

(emphasis added)

39 This passage was cited with approval by the Supreme Court of Canada, where Mr. Justice LeDain added, at pp. 501-502:

Obviously the administration must have reasonable flexibility to make minor changes in the functions of an existing position in the Public Service which the occupant of the position may be called on to perform, without thereby creating a new position for which an appointment based on selection according to merit must be made. **Where, however, as in the present case, the change in functions is of such a significant or substantial nature as to call for additional or special qualifications requiring evaluation and therefore what amounts to a new selection for the position, a new position within the meaning of the Act is created.** Quite clearly it was considered necessary, because of the special qualifications required for the function of dog handler, to make an evaluation and selection of candidates for this function. This was a clear indication, in my opinion, that the function of dog handler was a new position although it also required the qualifications for the existing position of customs inspector.

(emphasis added)

40 The Tribunal finds the facts of the present case distinguishable from those in *Brault*.

41 Firstly, the dog handler duties do not constitute the creation of additional functions or duties. The current work description for the BSO defines the duties of the position to include dog handling. The evolution of those duties from a stand-alone dog handler position to their incorporation into the BSO work description is well documented in the evidence. It is a mischaracterization to say that this complaint concerns an appointment to a new position. The work description defines the duties and responsibilities of the position. It provides flexibility in work assignments within the BSO position. The dog handler duties are explicitly set out in the BSO work description.

42 Ms. Simoneau occupied the position of BSO at the time she assumed the dog handler duties. Her assumption of dog handler duties was a shift in her work, reflecting the flexibility and versatility inherent in the current BSO work description.

43 Thus, referring back to the three aspects of the issue, as set out by the Supreme Court in *Brault*, no additional functions or duties were created when Ms. Simoneau was given other existing BSO duties. Addressing the second and third aspects of the test (i.e., a requirement for additional qualifications and the selection of a person possessing these qualifications), the Tribunal finds that, in the circumstances of this case, the training and selection of Ms. Simoneau do not support a finding that an appointment has occurred. Ms. Simoneau was evaluated and trained to prepare her to assume duties found in her work description. The length of the training and the assessments conducted cannot be considered in isolation from the work description.

44 In *Doré*, it was significant to the Court that, although the employee continued to occupy her substantive position, she had ceased to perform the functions of that position in order to assume the duties of a new, unclassified position for a period of “significant and indefinite duration.” In these circumstances, the Supreme Court found that an appointment had occurred.

45 The Tribunal finds that the facts in *Doré* are distinguishable from those of the present case. Ms. Simoneau was not assigned to a new position. She was given an

opportunity to perform duties within the work description of a BSO. This does not constitute an appointment under the *PSEA*, irrespective of the period for which she will perform the dog handler duties.

46 The Tribunal finds that it has no jurisdiction over this matter as it has not been shown that an appointment has occurred.

47 It would appear that some CBSA employees have taken issue with the content of the BSO work description. In the joint submission of counsel, it was indicated that outstanding grievances, including 2,466 classification grievances and 922 job content grievances, have been initiated concerning the current BSO work description. These are, however, not matters for the Tribunal's consideration as they do not fall within its mandate. For the purposes of the complaint before the Tribunal, the current work description is the one that was in place at the time the complaint was made.

Issue II: Has the complainant's appointment been revoked within the meaning of s. 74 of the *PSEA*?

48 Section 74 of the *PSEA* provides the following recourse in the case of revocation:

74. A person whose appointment is revoked by the Commission under subsection 67(1) or by the deputy head under subsection 15(3) or 67(2) may, in the manner and within the period provided by the Tribunal's regulations, make a complaint to the Tribunal that the revocation was unreasonable.

49 Under s. 15(3) and 67(2) of the *PSEA*, a deputy head is permitted to revoke an appointment and take corrective action after an investigation, where it is shown that a selection for appointment was influenced by error, omission, or improper conduct. Similarly, under s. 67(1), if the PSC conducts an investigation of its own accord and finds an appointment or proposed appointment that was not made based on merit, or that was influenced by error, omission or improper conduct, it may revoke the appointment or take necessary corrective action.

50 In these specific situations, the person whose appointment is revoked may make a complaint to the Tribunal that the revocation was unreasonable.

51 However, in the case before the Tribunal there is no evidence that either the deputy head or the PSC revoked the complainant's appointment. On the contrary, the evidence establishes that the complainant accepted an appointment to an indeterminate BSO position in April 2006 and in May 2009 he was moved to new opportunities within the BSO work description. This move was based on a number of considerations including the distribution of career opportunities, employees' career objectives, service time as a handler, and the overall experience base within the district. In these circumstances, giving the complainant other duties within the existing BSO work description does not constitute revocation under the *PSEA*.

52 Accordingly, the Tribunal finds that there has been no revocation of an appointment within the meaning of s. 74. The complainant's concerns do not fall within the Tribunal's mandate.

Decision

53 The Tribunal finds that neither an appointment within the meaning of s. 77(1)(a), nor a revocation under s. 74 has occurred. It has no jurisdiction to consider this complaint.

54 The complaint is therefore dismissed for want of jurisdiction.

Joanne B. Archibald
Member

Parties of Record

Tribunal File	2009-0442
Style of Cause	<i>Neil Smith and the President of the Canada Border Services Agency</i>
Hearing	September 8-9, 2010 Ottawa, Ontario
Date of Reasons	December 13, 2010
APPEARANCES:	
For the complainant	Erik Lupien
For the respondent	Martin Desmeules
For the Public Service Commission	John Unrau