



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

Files: 2009-0596/0597/0613
Issued at: Ottawa, December 22, 2010

LIVIA STEINDL

Complainant

AND

THE DEPUTY MINISTER OF HEALTH CANADA

Respondent

AND

OTHER PARTIES

Matter	Complaint of abuse of authority pursuant to section 77(1)(a) of the <i>Public Service Employment Act</i>
Decision	Complaint is dismissed
Decision rendered by	Joanne B. Archibald, Member
Language of Decision	English
Indexed	<i>Steindl v. Deputy Minister of Health Canada</i>
Neutral Citation	2010 PSST 0024

Reasons for Decision

Introduction

1 Livia Steindl, the complainant, applied in an internal advertised appointment process for the position of Senior Evaluation Officer, a position at the ES-05 group and level. The complainant was eliminated from the appointment process as she failed the written examination. The complainant brought a complaint of abuse of authority, alleging that the Deputy Minister, Health Canada (the respondent), abused its authority by using a flawed assessment tool.

2 The respondent acknowledged that there were some errors in the examination. However, it said that the influence was minor and there was no significant or adverse impact from them.

3 The Public Service Commission expressed the view that in order for the Public Service Staffing Tribunal (the Tribunal) to find abuse of authority, it will have to be shown that flaws in the examination led to the complainant being found not qualified.

Background

4 In April 2009, Health Canada advertised an internal appointment process for the Senior Evaluation Officer position. The complainant was among the applicants who responded. She was screened into the process and received an email inviting her to write an online examination on May 20, 2009. The examination was distributed at 9:00 a.m. and was due by midnight.

5 The instructions for the examination included a list of the merit criteria to be assessed and stated that a candidate would have to pass each one in order to be given further consideration. Before each question, the merit criteria being assessed were specifically set out.

6 The complainant wrote the examination and submitted it. On June 16, 2009, she was advised that she did not obtain the pass mark and her candidacy would not be given further consideration.

7 On September 1, 4, and 17, 2009, Health Canada posted *Notifications of Appointment or Proposal of Appointment*. The complainant filed three complaints with the Tribunal, alleging abuse of authority in the application of merit, pursuant to section 77(1)(a) of the *Public Service Employment Act* (the *PSEA*). These complaints were consolidated by the Tribunal.

8 The complainant alleges that there were errors in two questions of the assessment that constitute an abuse of authority. The first question at issue was question 2A(C). The second question at issue was numbered as question “6 and 7” in the examination due to a typographical error. This question will be referred to as question 6 throughout this decision. The complainant contends that errors in these questions caused her to fail the examination.

Issue

9 The Tribunal must determine whether errors in question 2A(C) and question 6 influenced the assessment of merit and constitute an abuse of authority.

Analysis

10 Under section 88(2) of the *PSEA*, the Tribunal’s mandate with respect to internal appointment processes is to consider and dispose of complaints made under section 77 of the *PSEA*. Section 77 of the *PSEA* provides that an employee may bring a complaint to the Tribunal that he or she was not appointed because of abuse of authority.

11 The burden of proof in a complaint before the Tribunal rests with the complainant. (See *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008.) The Tribunal has consistently ruled that a finding of abuse of authority does not require intent, and that an interpretation requiring proof of intent would run contrary to Parliament’s intention in enacting the *PSEA*. (See for example, *Tibbs*, at para. 72, and *Rinn v. Deputy Minister of Transport, Infrastructure and Communities*, 2007 PSST 0044, at para. 36.)

12 At the same time, the preamble and the whole scheme of the *PSEA* make it clear that Parliament intended that much more is required than mere errors and omissions to

constitute abuse of authority. (See *Tibbs* at para. 65. See also *Neil v. Deputy Minister of Environment Canada*, 2008 PSST 0004, at paras. 50 and 51.)

13 While both questions in the written assessment contained errors, the Tribunal cannot find any evidence that demonstrates how these errors, whether viewed separately or as a whole, demonstrate abuse of authority.

14 Question 2A(C) asked candidates to name six evaluation standards. The question was based on information found in the Government of Canada *Policy on Evaluation* (the Policy). However, the Policy was replaced April 1, 2009, approximately seven weeks before the examination, with a new Policy containing one standard and four requirements.

15 Brigitte Lucke, the Director of the Office of Accountability and Planning, was the chairperson of the assessment board. She testified that the assessment board adapted an examination that was used in a different process. She stated that the assessment board recognized the problem with question 2A(C) as soon as it received the examinations for marking. It decided to accept answers that relied on either the old or new Policy, and thereby avoid penalizing any candidate.

16 Ms. Lucke stated that no candidate was eliminated based on their answer to this question and she noted that the complainant received full marks for her answer to question 2A(C). She added that the complainant's work station is immediately outside her office and the complainant did not approach her to express concern or ask for clarification concerning this or any question on the examination. While not specifically addressed by the evidence, it was inferred that the complainant indeed wrote her examination from her work station.

17 Question 6 asked candidates to prepare a memorandum, describing options and a recommendation based on a fictitious scenario. Question 6 was used to assess the ability to provide strategic advice and recommendations (A2), and the ability to communicate in writing (A3). The marking scheme for question 6 provided for a global score to be awarded for the rated abilities.

18 Cesare Spadaccini was a member of the assessment board. He testified that he adapted the scenario from another process. He was also the member of the assessment board who was assigned to mark question 6 on all of the examinations.

19 In error, the text of question 6 referred to the Minister of Homes and Communities when it should have referred to the Minister of Industry. Mr. Spadaccini testified that he became aware of this oversight when he first saw the completed examinations. He brought it to the attention of the other assessment board members. It was determined that it had no bearing on the answer and could be disregarded. In addition, as he marked the examinations, there was no indication that candidates were confused or misled by this erroneous reference.

20 Mr. Spadaccini testified concerning the assessment of the complainant's response to question 6. He noted that candidates were instructed to prepare a "concise and well-crafted" answer, not to exceed three pages. The complainant's response was one page in length. Roughly two-thirds of it was cut and pasted from the scenario.

21 In Mr. Spadaccini's view, the complainant's response to question 6, largely copied from the scenario, was not her work. In two places she mentioned the Minister of Homes and Communities, but this had no influence on marking her answer. The answer was weak as it had little or no analysis. It required significantly more analysis and thorough consideration of the options than was shown in the response. The complainant was awarded five marks of ten for each of A2 and A3 and did not attain passing marks for these merit criteria.

22 The complainant did not contest this evidence. She argues, however, that the mistakes on the examination jeopardized her chance for success, and the errors were serious enough to constitute an abuse of authority. She submits that this is serious negligence.

23 The Tribunal finds that errors did occur, but that the complainant has not shown how these errors adversely impacted either her candidacy or the process in general. The complainant received full marks for question 2A(C). With regard to question 6, the respondent's uncontradicted evidence is that the complainant's score is attributable to a

lack of content in her response. Abuse of authority is more than simple errors or omissions. (See *Tibbs*, at para. 65.) The Tribunal finds that these errors are not serious enough to constitute an abuse of authority.

24 There is no evidence that the complainant was confused by the questions as a whole or individually. In addition, there is no evidence that she raised these concerns at the time of the examination and no evidence to relate her concerns to her ability to answer the questions. The complainant has not established that the errors in questions 2A(C) and 6 otherwise affected her ability to answer the other questions on the exam or otherwise led to an improper result. The complainant may be dissatisfied with the outcome of the appointment process, but she has not demonstrated that the respondent abused its authority.

25 While the errors on the face of the examination are unfortunate, they are not so serious by themselves as to constitute an abuse of authority. The complainant did not demonstrate that they affected her performance or her assessment to a point that would constitute an abuse of authority. It is not sufficient for her to point to the errors without establishing how the errors had a negative impact on her performance.

26 In these circumstances, the Tribunal finds that the complainant has not established an abuse of authority within the meaning of section 77(1)(a) of the *PSEA*.

Decision

27 For these reasons, the complaint is dismissed.

Joanne B. Archibald
Member

Parties of Record

Tribunal Files	2009-0596/0597/0613
Style of Cause	<i>Livia Steindl and the Deputy Minister of Health Canada</i>
Hearing	December 6, 2010 Ottawa, Ontario
Date of Reasons	December 22, 2010
APPEARANCES:	
For the complainant	Livia Steindl
For the respondent	Josh Alcock and Alison Sephton