



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**File:** 2008-0788

**Issued at:** Ottawa, December 22, 2010

**SCOTT SHIP**

Complainant

AND

**THE DEPUTY MINISTER OF NATIONAL DEFENCE**

Respondent

AND

**OTHER PARTIES**

<b>Matter</b>	Complaint of abuse of authority under section 77(1)(a) of the <i>Public Service Employment Act</i>
<b>Decision</b>	Complaint is dismissed
<b>Decision rendered by</b>	John Mooney, Vice Chairperson
<b>Language of Decision</b>	English
<b>Indexed</b>	<i>Ship v. Deputy Minister of National Defence</i>
<b>Neutral Citation</b>	2010 PSST 0025

# **Reasons for Decision**

## **Introduction**

1 Scott Ship, the complainant, applied in an internal advertised appointment process to fill Team Leader positions at the AS-07 group and level. The complainant was screened out of the process because he lacked the required experience. The complainant brought a complaint of abuse of authority, alleging that the Deputy Minister of National Defence, the respondent, abused its authority in screening him out of the appointment process. The complainant also alleges that the respondent abused its authority by appointing Collin Pierce to the position since he did not possess the required experience, and by giving him an opportunity to act in the Team Leader AS-07 position prior to this appointment process.

2 The respondent denies that it abused its authority. It asserts that the complainant did not possess the required experience and Mr. Pierce did. It also submits that the Tribunal does not have jurisdiction over Mr. Pierce's acting appointment to the AS-07 position prior to this appointment process since it was a distinct appointment that is not part of this complaint.

3 The position of the Public Service Commission (PSC) is that the screening process was transparent and the screening criteria were applied consistently and fairly to all candidates.

## **Background**

4 In August 2008, the respondent initiated an internal advertised appointment process to fill several Team Leader (Asia/Europe/Americas & Sub-Saharan Africa/Middle East and North Africa/Global Terrorism) AS-07 positions within the Chief of Defence Intelligence, Director General Intelligence Production, in Ottawa (appointment process 08-DND-IA-OTTWA-312409). A pool of fully qualified candidates would also be created for future needs.

5 Thirty-eight people applied for the positions. Nine candidates were screened into the process. Seven candidates were found fully qualified. In November 2008,

six candidates, including Mr. Pierce, were appointed or proposed for appointment to the positions.

6 On December 10, 2008, the complainant brought a complaint of abuse of authority to the Public Service Staffing Tribunal (the Tribunal) under s. 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22 ss. 12 and 13 (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 because the PSC or the deputy head abused its authority in the appointment process.

7 Dr. Linda A. Goldthorp, Director General of Intelligence Production, chaired the assessment board. She described the duties of the Team Leader. Typically, between four and six employees report to the Team Leaders. They manage the daily production of intelligence analysis from various sources, including the four directorates under her responsibility, other parts of the Department of National Defence, other departments or agencies such as the Canadian Security Intelligence Service, the Canadian Forces and Canada's partners and allies. They assign work to the members of their team and review the products of the analysts to ensure analytical rigour. They also manage the finances of the team and assume a training and mentoring role for the intelligence analysts.

### **Preliminary matters regarding allegations of fraud**

8 In addition to filing this complaint, the complainant asked the PSC to investigate Mr. Pierce's appointment under s. 69 of the *PSEA* which gives the PSC authority to investigate an appointment process (external or internal) if it believes that fraud occurred in the process. The complainant submits that nothing prevents him from making a complaint under s. 77 of the *PSEA* on the ground that the appointment of Mr. Pierce constitutes an abuse of authority, and at the same time asking the PSC to conduct an investigation of alleged fraud concerning that appointment under s. 69 of the *PSEA*. The Tribunal agrees. The fact that a person asked the PSC to investigate an appointment does not deprive the Tribunal of its jurisdiction over that same appointment.

9 In his written allegations tendered before the hearing, the complainant stated the following: “The information provided (Acting Team Leader – AS-07) by the appointee on his resume doesn’t reflect the reality (Start date and end date, actual duties performed – Senior Analyst AS-06) and this information was known by the Respondent.”

10 The respondent argues that the above allegation is tantamount to an allegation of fraud. Both the respondent and the PSC argued that the Tribunal could not consider an allegation of fraud because s. 69 of the *PSEA* gives the PSC exclusive authority to investigate matters of fraud in appointment processes. The complainant, however, made it clear at the hearing that he is not alleging fraud in this complaint. The Tribunal therefore does not need to address this objection raised by the respondent and the PSC.

11 On February 3, 2010, the PSC wrote to the complainant informing him that his concerns were not related to fraud and that it would not pursue the matter further.

## **Issues**

12 The Tribunal must decide the following issues:

- (i) Did the respondent abuse its authority when it concluded that the complainant did not possess the experience required for the position?
- (ii) Did the respondent abuse its authority when it concluded that Mr. Pierce possessed the experience required for the position?
- (iii) Did the respondent abuse its authority by giving Mr. Pierce the opportunity to act in the Team Leader AS-07 position prior to this appointment process?

## **Analysis**

13 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 v. Deputy Minister of National Defence*, 2006 PSST 0008 at para. 49).

14 The expression “abuse of authority” is not defined in the *PSEA*, however, s. 2(4) provides that it includes “bad faith” and “personal favouritism”. In matters of assessment of candidates in an appointment process, the Tribunal has held in numerous decisions that its role is to determine whether there has been an abuse of authority, not to reassess candidates (see, for example, *Broughton v. Deputy Minister of Public Works and Government Services*, 2007 PSST 0020).

**Issue 1:** Did the respondent abuse its authority when it concluded that the complainant did not possess the experience required for the position?

15 The screening of candidates was done by Dr. Goldthorp and Greg Steele, her Chief of Staff. Mr. Steele reviewed all the applications and, on his advice, Dr. Goldthorp decided whether a candidate was screened into the process. Dr. Goldthorp testified that prior to and during the screening process, she worked closely with Mr. Steele to ensure that they both had the same understanding of the screening criteria relating to each essential qualification being assessed at this initial stage of the appointment process.

16 The *Job Opportunity Advertisement* stated that applicants had to “... fully demonstrate in writing, at the time of their application, that they possess the above screening qualifications...” The complainant, who was an intelligence analyst at the AS-05 level at the time of his application, was screened out of the process because the respondent determined that he did not meet the following experience qualification: “EX2: Experience in coordinating the production of and conducting all source intelligence analysis” (experience qualification no.2).

17 More specifically, the respondent determined that the complainant did not meet the “coordinating” part of this experience qualification, that is “[e]xperience in coordinating the production of ... all source intelligence analysis.”

18 The relevant part of the complainant’s cover letter reads as follows:

[...]

I have three years of experience coordinating the production of and conducting all source intelligence analysis through my work as an intelligence analyst with the Chief of Defence Intelligence. In this position I was responsible for coordinating and producing all source intelligence analysis. This included simultaneously producing intelligence assessments,

threat assessments, WID and DID articles, and populating the COALA database, using a variety of both classified and open sources of information.

[...]

19 While the complainant stated that he possesses the required experience, the examples he gave do not demonstrate that he “coordinated the production of intelligence analysis.” The Tribunal accepts Dr. Goldthorp’s explanation that “simultaneously producing intelligence assessments” is not the same as “coordinating” the production of those assessments. “Coordinating” implies coordinating the work of other employees or coordinating multiple areas of expertise or multiple departments or agencies to produce an agreed analysis. As Dr. Goldthorp explained, the complainant’s documentation demonstrated that he is individually producing different types of assessments; not coordinating the work of others. In addition, the complainant did not, refute Dr. Goldthorp’s explanation that “... populating the COALA data base ...” does not entail coordinating the work of others, but entails merely the feeding of material into a database.

20 The complainant also stated in his material referenced above that he acquired experience qualification no.2 while he worked as an intelligence analyst in the Chief of Defence Intelligence Directorate. Dr. Goldthorp testified that she was familiar with the complainant’s work in that position since he reported to her through the Team Leader and the Director. She reviewed all intelligence analysts reports in the section since she had to approve them. She therefore reviewed the complainant’s work. According to her, the complainant did not coordinate the production of intelligence analysis; he was a relatively inexperienced intelligence analyst.

21 The testimony of Dr. Goldthorp on this matter was corroborated by Mr. Steele. According to him, the complainant contributed to threat assessments; he did not coordinate them.

22 The Tribunal therefore finds that the complainant has not proven that the respondent abused its authority when it concluded that he did not demonstrate in his application that he coordinated the production of intelligence analysis and, consequently, that he did not possess experience qualification no.2.

23 The complainant also argued that the respondent should have called him to get further information regarding his experience, as it did for two other candidates. Mr. Steele testified that he only called candidates when their résumés were unclear. There was no need to call the complainant since his résumé was unambiguous. In addition, Mr. Steele explained that the complainant also had an opportunity to demonstrate that he possessed that experience during informal discussion, but he did not add anything further that would have led the assessors to screen him back into the process.

24 The Tribunal finds that the complainant has not established that the respondent abused its authority by failing to seek additional information from the complainant regarding his experience. The Tribunal accepts that there was no reason to call him since there was no ambiguity with respect to the description of his experience. Furthermore, the complainant did not establish that the respondent would have learned that he possessed the required experience had it contacted him. The complainant also had an opportunity to provide further information during informal discussion, but failed to provide any clarification of his application material in support of his position that he should not have been screened out of the process. Similarly, the complainant did not present evidence at the hearing that he meets the required coordination aspect of experience qualification no.2. The only evidence in that regard is the complainant's testimony that he kept a weekly and a daily digest in which he "collated and linked" different analyses when he worked as an intelligence analyst from March 2005 to June 2008. This does not constitute evidence that he coordinated the production of intelligence analysis, as Dr. Goldthorp and Mr. Steele established in their evidence, which was not contradicted.

25 The complainant argues that Mr. Steele was not competent to participate in the screening of candidates since he has never performed the duties of an intelligence analyst. At the time of the appointment process, Mr. Steele was Dr. Goldthorp's Chief of Staff. His responsibilities included conducting and coordinating human resources processes and acting as a strategic advisor on general management issues. Mr. Steele's role in the screening process was to assess candidates against the screening criteria and advise Dr. Goldthorp; she made the final screening decisions.

The complainant did not take issue with Dr. Goldthorp's competence to screen candidates.

26 The complainant failed to establish that Mr. Steele must have performed the duties of the position that is being staffed. He did not refer to any provision of the *PSEA* or the *Public Service Employment Regulations*, SOR/2005-334 (*PSER*) or any policy of the PSC that contains such a requirement.

27 The Tribunal finds that Mr. Steele was competent to assess candidates in the screening process and advise Dr. Goldthorp. He was familiar with the work to be performed in the positions. He possesses significant experience in staffing matters. He participated in staffing processes both as an advisor and as a member of assessment boards for AS-02, AS-03, AS-05 to AS-07 and EX-01 positions. He has taken the staffing training module of the mandatory training for managers of the public service. Dr. Goldthorp testified that Mr. Steele knew what was meant by "coordinating" intelligence analysis since he has been in the organization for many years and fully understood the role of a Team Leader and the interdepartmental environment in which the section operates.

**Issue 2:** Did the respondent abuse its authority when it concluded that Mr. Pierce possessed the experience required for the position?

28 The complainant argues that Mr. Pierce did not demonstrate on his application that he possessed three years of experience in relation to experience qualification no.2. According to the complainant, the respondent improperly credited Mr. Pierce for the time he was on language training.

29 In his résumé, Mr. Pierce indicated that he possesses the following experience:

[...]

- Lead a section analyzing international terrorism and security issues, and mentor the development of analysts under my leadership.
- Coordinate, edit, and approve the section's production of a wide range of intelligence reports and documents, such as: Intelligence Assessments, DID's, IOLA's Threats Assessments, presentations, and RFIs.



[...]

- Regularly manage the exchange of information and work collaboratively with foreign intelligence counterparts on security issues, both within the quadripartite community and with other Canadian allies, by receiving foreign delegations and leading Canadian delegations abroad.

[...]

30 The above excerpts establish that Mr. Pierce possesses experience in the production and coordination of intelligence analysis. The first bullet indicates that he led a section that develops intelligence analysis regarding security issues. The second bullet indicates that he was responsible for coordinating the work of a team of intelligence analysts, and it gives examples of the products the team produced. The third bullet indicates that he led delegations abroad. According to Dr. Goldthorp, this last item would entail, at a minimum, coordinating an intelligence conference agenda, and perhaps conference reports.

31 The following excerpts from Mr. Pierce's cover letter also support the respondent's determination that he possesses experience qualification no.2:

[...]I routinely collaborate with counter-parts in the US, UK, and Australia, as well as with other NATO and Mediterranean allies. I have also managed the exchange of information with foreign governments on a number of occasions, including receiving foreign delegations and leading Canadian delegations abroad.

[...]As the Team Leader, I coordinate the production of the section's all source intelligence analysis. I establish the section's priorities, direct production topics and timelines, and edit and approve a wide variety of intelligence products [...]

32 The excerpts referenced above indicate that Mr. Pierce coordinated the work of the section, that he managed the exchange of information with other sources, that he edited and approved products and that he led delegations abroad. In Dr. Goldthorp's view, leading delegations could include coordinating the work of allies. Dr. Goldthorp stated that based on her knowledge of Mr. Pierce's work and her knowledge of the department's operations, Mr. Pierce's description of his experience was accurate. The complainant did not submit evidence to refute that testimony.

33 The complainant argues that Mr. Pierce's experience in relation to experience qualification no.2 does not total three years, as required in the Statement of Merit

Criteria (SMC). The complainant testified that Mr. Pierce had been on language training for what he believed was eight months.

34 In his résumé, Mr. Pierce grouped three positions which spanned the period of September 2002 to August 2008:

A/Team Leader – Terrorism Section . . . January 2006 to August 15, 2008

Counter Terrorism Analyst - March 2004 to January 2006

Middle East Analyst – Arab Peninsula, Israel Palestine, Iran - September 2002 to September 2003

35 Under those three positions, Mr. Pierce described all his relevant experience as they relate to all five experience requirements set out in the SMC. Mr. Steele testified that he concluded that Mr. Pierce acquired experience qualification no.2 during the last two positions he occupied, that is the Team Leader AS-07 position which he occupied on an acting basis, and the Counter Terrorism Analyst position. Mr. Pierce's time in those two positions totalled over four years and five months.

36 Mr. Steele testified that on September 15, 2008, he called Mr. Pierce to obtain more information regarding his language training. Mr. Steele explained that Mr. Pierce had been on language training for eight months. Mr. Steele took notes of that conversation which were entered into evidence. In those notes, Mr. Steele indicates that Mr. Pierce acquired experience qualification no.2 when he occupied an Acting Team Leader – Terrorism Section position from January 2006 to August 15, 2008, when he acted for four months in a higher position, and when he worked as a Counter Terrorism Analyst from March 2004 to January 2006.

37 The respondent concluded from the above documentation that Mr. Pierce had more than three years experience in relation to experience qualification no.2. He acquired that experience in his last two positions which total more than four years and five months. Deducting the eight month period he spent on language training totals over three years. The Tribunal finds that the complainant has failed to demonstrate that the respondent abused its authority in reaching that conclusion.

38 The complainant argues that the Tribunal cannot consider the testimony of Dr. Goldthorp and Mr. Steele regarding their assessment of Mr. Pierce's experience because to do so would constitute a new assessment of that experience. According to the complainant, the respondent cannot provide clarification or new information at the hearing stage of the complaint to better justify its staffing decision. The Tribunal does not agree with the complainant's submission. The respondent did not introduce new evidence regarding the assessment of Mr. Pierce at the hearing. Mr. Steele and Dr. Goldthorp simply explained how they came to the conclusion that Mr. Pierce possessed the required qualification.

39 The complainant also argues that the respondent did not respect the PSC policies regarding appointments in the manner it assessed the complainant and Mr. Pierce. He pointed out that s. 29(3) of the *PSEA* provides that the PSC may establish policies regarding the manner of making appointments, and s. 16 provides that the deputy head's authority to make appointments is subject to PSC policies.

40 The PSC's position is that the respondent complied with its *Appointment Policy* and its *Assessment Policy* and the values set out in those policies in making the appointment. The Tribunal notes that the complainant did not specify how the respondent breached those policies, other than arguing generally that the respondent favoured Mr. Pierce over him in the manner it assessed experience qualification no.2. The Tribunal has already addressed this allegation. The complainant failed to produce any evidence to support his allegation that the respondent did not comply with PSC policies in this appointment process.

41 The complainant argues that the respondent did not respect the values of merit, fairness, access and transparency set out in the *Appointment Delegation and Accountability Instrument* (the delegation agreement) in the assessment of his experience and that of Mr. Pierce. The delegation agreement provides for the delegation of the PSC's appointment authority to the deputy head under certain conditions. Section 15(1) of the *PSEA* provides that the PSC can delegate to the deputy head its appointment authority and set terms and conditions on that delegation.

42 The respondent and the PSC argued that the Tribunal cannot examine the delegation agreement because it does not have jurisdiction over matters of delegation, including the issue of whether the respondent breached the agreement. They referred the Tribunal to *Cameron v. Canada (Department of Human Resources and Social Development)*, 2009 FC 618, where the Federal Court stated:

[30] It is apparent in subsection 24(2) that the PSC has the exclusive authority to make appointments and authorize as well as impose conditions on the sub-delegation of authority to make appointments. The PSC can also remove the delegation just as it can remove the authority to sub-delegate this power. Consequently, it is clearly apparent in the Act that the exercise of the appointment authority, its delegation and their supervision are the responsibility of the PSC and not the Tribunal and that therefore this second action of the order infringes on the exclusive jurisdiction of the PSC to authorize the sub-delegation of the power of appointment and to ensure its supervision.

43 The Tribunal finds that this interpretation of the *Cameron* decision is overreaching. The Tribunal agrees that it is not its role to monitor or enforce the delegation agreement. It cannot revoke that agreement or set conditions if a deputy head does not respect it. However, the Tribunal can examine the delegation agreement to determine whether there was an abuse of authority in making the appointment. A breach of the delegation agreement could constitute one factor among others in deciding whether there was such an abuse. For example, if a delegation agreement provided that the deputy head could not make the appointment, and the deputy head did so, the resulting appointment would have been made without authority. Making an appointment without the legal authority to do so would most likely constitute an abuse of authority within the meaning of s. 77 of the *PSEA*.

44 In this case, the complainant refers to the delegation agreement simply to support his argument that staffing values set out in that agreement were not respected in this appointment process. The Tribunal has already found that the complainant has failed to prove abuse of authority with respect to either his assessment or the assessment of Mr. Pierce. The complainant did not lead any other evidence to support his allegation that the staffing values found in the delegation agreement were contravened in this appointment process. The Tribunal finds that this allegation is also unfounded.

**Issue 3:** Did the respondent abuse its authority by giving Mr. Pierce the opportunity to act in the Team Leader AS-07 position prior to this appointment process?

45 The complainant argues that the respondent provided Mr. Pierce with an unfair advantage in the appointment process by giving him the opportunity to act in the Team Leader AS-07 position through a non-advertised appointment process. It is through that acting appointment that Mr. Pierce acquired in part, experience qualification no.2.

46 The question of whether providing an acting opportunity constitutes an abuse of authority will depend upon the particular facts and circumstances of a given case. In this complaint, the respondent's written rationale for the acting appointments to the Team Leader AS-07 positions indicates that all senior intelligence analysts at the AS-06 level were given acting appointments to that position. Therefore, the respondent did not favour Mr. Pierce over other intelligence analysts.

47 The Tribunal also notes that acting in the Team Leader AS-07 position was not the only way to acquire the necessary experience to meet experience qualification no.2. Dr. Goldthorp testified that very experienced intelligence analysts at the AS-05 and AS-06 level can acquire that experience by coordinating the production of intelligence products with other government organizations or allies. Mr. Steele also testified that there were other ways of acquiring experience qualification no.2. The complainant did not dispute that evidence. It is telling that, as Mr. Steele pointed out in his testimony, one of the appointees was not given that acting opportunity. Nine candidates were screened into the process and six were appointed. There was no evidence presented as to whether the three candidates who were screened into the process, but not appointed, acted in the Team Leader AS-07 position.

48 The Tribunal therefore finds that having provided Mr. Pierce with a prior acting appointment to the Team Leader AS-07 position did not constitute an abuse of authority in this appointment process.

49 The Tribunal is nevertheless concerned by the fact that the respondent generally lacked diligence in giving notice for acting appointments. No notification of Mr. Pierce's acting appointment to the Team Leader AS-07 position was ever posted on *Publiservice*

or otherwise provided to employees in the area of selection in order for them to exercise their right of recourse. The Tribunal is also concerned that the *Information Regarding Acting Appointment* notices for three other appointees to the Acting Team Leader AS-07 position were issued long after their acting appointments had ceased. The same is true for acting appointments to positions at the AS-06 level that were given to several of the appointees in this process. These notices were not provided until long after the appointments had ended.

50 Section 13 of the *PSEER* states that the staffing authority making an acting appointment of four months or more must inform persons in the area of recourse of the name of the person appointed and of their right to make a complaint to the Tribunal regarding the appointment at the time that the appointment is made. By making retroactive appointments and failing to post the *Information Regarding Acting Appointment* notices or posting them long after the acting appointments have ceased, the respondent deprived employees in the area of selection with the opportunity to pursue their recourse rights against those acting appointments in a timely manner. To post notices after the acting appointments have ceased defeats much of the purpose of providing recourse rights for employees.

51 Dr. Goldthorp testified that the delays in posting those acting appointments were due in part to the fact that she had to wait to secure the funds to pay the employees acting at that level. The administrative process was also very long: it included consulting the Chief of Defence Intelligence, the Chief of Staff, the Vice-Chief of Defence Staff, and the Civilian Human Resources division. In the Tribunal's view, the respondent's administrative burdens do not excuse its failure to post notifications concerning the acting appointments. Although the Tribunal finds that these omissions were serious, the Tribunal does not have jurisdiction over those previous acting appointments.

## Decision

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

John Mooney  
Vice Chairperson

## Parties of Record

<b>Tribunal File</b>	2008-0788
<b>Style of Cause</b>	<i>Scott Ship and the Deputy Minister of National Defence</i>
<b>Hearing</b>	January 25 and 26, 2010 Ottawa, Ontario (Last submissions received on March 17, 2010)
<b>Date of Reasons</b>	December 22, 2010
<b>APPEARANCES:</b>	
<b>For the complainant</b>	Louis Bisson
<b>For the respondent</b>	Martin Desmeules
<b>For the Public Service Commission</b>	John Unrau