



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**File:** 2009-0463  
**Issued at:** Ottawa, February 17, 2011

**TROY PATTON**

Complainant

AND

**THE DEPUTY MINISTER OF NATIONAL DEFENCE**

Respondent

AND

**OTHER PARTIES**

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

**Decision** Complaint is substantiated

**Decision rendered by** Joanne B. Archibald, Member

**Language of Decision** English

**Indexed** *Patton v. Deputy Minister of National Defence*

**Neutral Citation** 2011 PSST 0008

# Reasons for Decision

## Introduction

**1** This complaint concerns an internal, non-advertised appointment process to fill the position of Explosives Safety Officer (ESO) at the GT-05 group and level, with the Department of National Defence at the Canadian Forces Ammunition Depot in Dundurn, Saskatchewan (CFAD Dundurn).

**2** The complainant, Troy Patton, alleges that three flaws occurred in the appointment process and that they constitute an abuse of authority. He first alleges that the choice of an internal non-advertised appointment process was not reasonable and employees were denied access to the staffing opportunity. Secondly, he alleges that the essential training qualification requiring Civilian Ammunition Technician 5 (CAT 5) training was not possible to achieve. Thirdly, he alleges that the resulting appointment of Glenn King was not based on merit.

**3** The Deputy Minister of National Defence (the respondent) denies that it abused its authority in the appointment process. In the respondent's view, the appointment process was comprehensive, transparent and fair.

## Background

**4** The position of ESO was occupied by Bill Hildebrandt from August 1997 until December 2008 when he retired.

**5** The complainant has worked as a civilian at CFAD Dundurn since 2001. Major M.-Sophie Prevost (now retired) was the Commanding Officer at CFAD Dundurn from 2006 to 2009. The ESO reported directly to her and when a process was initiated to replace Mr. Hildebrandt, she was the hiring manager.

## **Issues**

**6** The Public Service Staffing Tribunal (the Tribunal) must determine the following issues:

- (i) Whether there was an abuse of authority in the choice of a non-advertised appointment process;
- (ii) Whether there was an abuse of authority in the training qualification;
- (iii) Whether the appointment was made on the basis of merit.

**7** As explained below, the Tribunal finds that while there was no abuse of authority in the choice of appointment process or in setting the training qualification, an abuse of authority occurred in the assessment of merit, such that it cannot be determined whether the appointment has been made on the basis of merit.

## **Analysis**

### **Issue I: Was there an abuse of authority in the choice of a non-advertised appointment process?**

**8** Major Prevost testified that in her civilian human resources plan for CFAD Dundurn, she indicated that she intended to staff the ESO position through an internal non-advertised appointment process and this is indeed what occurred. An email message from Major Prevost to her branch heads on December 20, 2007 indicated that during 2008 she intended to give acting appointments in the ESO position to allow interested employees to job shadow Mr. Hildebrandt. Major Prevost testified that the acting opportunity was available to all GT-03 and GT-04 employees to permit them to experience the position, and to determine their suitability for appointment to it when Mr. Hildebrandt retired.

**9** Major Prevost testified that expressions of interest were sought from employees. The human resources plan was shared at a “town hall” meeting for all employees. In her view, the employees knew of the plan for hiring an ESO, the availability of an acting

appointment to the ESO position, and that the acting appointment would be a key feature in ultimately selecting an employee to replace Mr. Hildebrandt.

**10** Mr. Hildebrandt testified that it was generally known at CFAD Dundurn that the opportunity to be considered to replace him in the ESO position was “wide open” to anyone who was qualified and interested. He stated that the availability of the acting appointment was repeated regularly to employees. He recalled communication to employees directly from their branch heads and through staff meetings about the availability of the acting appointment in the ESO position. He stated that he made all of his staff aware that acting appointments would be taking place, and that the opportunity was available to them if they wanted it. There was no time limit established for individuals to put their names forward.

**11** At the time that the acting appointments in the ESO position were initiated, the complainant was a GT-02 employee acting in a GT-03 position in Mr. Hildebrandt’s branch. Mr. Hildebrandt recalled speaking specifically with the complainant about the opportunity to act as the ESO. He testified that he directly asked the complainant on several different occasions whether he wanted to put his name forward and the complainant repeatedly told him that he was not interested.

**12** The complainant stated that he became aware that a person would act in the ESO position when, in December 2007, he was told to change offices in order to accommodate it. He recalled no prior emails or inquiries for interested persons to put their names forward. The complainant further stated that when the acting appointments started, he expected he would have been asked whether he was interested. He stated that his career interest was to advance as far as possible. He testified that he always responded to advertised appointment processes and, in the fall of 2007, the complainant told the Commanding Officer, Major Prevost, of his desire to advance. As a result, he expected that he would have been asked whether he wanted this opportunity.

**13** There was no evidence that from December 2007 onward the complainant ever indicated any interest in acting in the ESO position.

**14** Major Prevost testified that all of the branch heads confirmed to her that they had communicated the acting opportunity in the ESO position to their staff. The process was for an interested person to put their name forward to their branch head who would convey the name to Major Prevost. The individual would then be given an opportunity to act in the ESO position.

**15** In the end, four individuals expressed interest and were given opportunities to act as the ESO prior to Mr. Hildebrandt's retirement. Major Prevost did not receive an indication that the complainant was interested in this opportunity. She testified that if additional expressions of interest had been forthcoming from any employees, they would have been given an opportunity.

**16** Major Prevost testified that the assessment of the four individuals who acted as ESO was based on several tools. After their acting appointments they received an evaluation of their performance from Mr. Hildebrandt. This was used in combination with Major Prevost's personal knowledge of the individuals, their performance during weekly management meetings, the quality of their completed reports and submissions, references and feedback from other senior managers. At the conclusion of the assessment, two individuals, including Mr. King, remained interested in the position and were found to meet all of the essential qualifications.

**17** The appointment to the ESO position occurred in mid 2009 by which time the second qualified person had withdrawn his interest. As Mr. King was the only qualified individual who remained interested, he was then appointed.

**18** The rationale for the non-advertised appointment process, written by Major Prevost, was provided to the Tribunal. It detailed the importance of providing an advancement opportunity to employees at CFAD Dundurn and indicated that all GT-03 and GT-04 employees were notified of the opportunity to be considered for the position.

**19** In testimony, Major Prevost stated that she believed CFAD Dundurn had the best resources to fill the highly specialized ESO position. The technical knowledge and qualifications could not be acquired other than at an ammunition depot.

**20** The choice to use a non-advertised process falls within the authority given to the respondent under s. 33 of the PSEA. It is well established that the decision to proceed with a non-advertised process is not, of itself, an abuse of authority (see *Clout v. Deputy Minister of Public Safety and Emergency Preparedness*, 2008 PSST 0022 at paras. 32 and 34). However, the discretion to use a non-advertised appointment process is not absolute and s. 77(1)(b) of the PSEA provides for a direct challenge to it on the ground of abuse of authority (see, for example, *Kane v. Attorney General of Canada and Public Service Commission*, 2011 FCA 19 at para. 3).

**21** The complainant argues that he had a lack of access to the appointment opportunity. His position is unclearly articulated. If the complainant is suggesting that he had a right to be considered with Mr. King, he has not established a foundation for it. The PSEA provides for notice in s. 48 and the right to complain in s. 77. However, there is no provision in the PSEA or the *Public Service Employment Regulations*, SOR/2005-334, to establish a right of access to a position that is the subject of a non-advertised appointment.

**22** If, alternatively, the complainant means that he had no access to the acting opportunity, the evidence does not discharge the complainant's burden of proof. It is clear from the evidence that the respondent actively sought interested persons to act in the ESO position prior to Mr. Hildebrandt's retirement. The complainant acknowledges that he was aware that acting appointments were being made to the ESO position. Mr. Hildebrandt's evidence is that he asked the complainant more than once, but the complainant declined. His evidence was not challenged. The complainant suggests that he ought to have been offered the acting appointment based on the awareness that his career aspirations were high, but there is no evidence that the complainant ever directly expressed his interest in the available acting appointment to the ESO position to Mr. Hildebrandt or anyone else.

**23** The Tribunal finds it unlikely that through the course of town hall meetings, solicitations from Mr. Hildebrandt, and the obvious appointment of individuals to act in Mr. Hildebrandt's position, that the complainant was unaware that acting opportunities were available. It was not reasonable for him to rely on the general indications of his

career aspirations to substitute for actively expressing his interest in this particular opportunity. If he expected to be considered, he had the opportunity to express his interest and be considered with others who took that step. There is, as found above, no evidence that he put himself forward to be considered.

**24** The complainant also argues that he did not have prior knowledge that Mr. King's appointment would occur. In *Clout* at para. 38, the Tribunal held that the fact of not having advance notice of a non-advertised appointment is not an abuse of authority. Knowledge that an appointment has been made is given through a public posting. Further, the Tribunal finds that whether the complainant knew of the opportunity before the appointment was made is not a material aspect of this case. He certainly knew of the appointment once it was made and he was advised of his right to recourse. Accordingly, the Tribunal finds no abuse of authority in the issue of whether the complainant had prior knowledge of the appointment of Mr. King.

**25** Other than these arguments, the complainant did not present any ground on which to base his claim of abuse of authority in the choice of a non-advertised appointment process. In *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008 at para. 55, the Tribunal held that complainants have the burden of proof with respect to complaints of abuse of authority. The Tribunal finds that the complainant has not discharged the burden of demonstrating an abuse of authority in the respondent's choice of an internal non-advertised appointment process.

## **Issue II: Was there an abuse of authority in the training qualification?**

**26** The Statement of Merit Criteria (SMC) contained the following training qualification:

**Training:** formal training in the technical aspects of ammunition and explosives storage, maintenance, transportation, accounting and disposal commensurate with the qualification of Ammunition Technical Officer, Ammunition Technician QL7 and civilian ammunition technician CAT 5 or acceptable alternative.

**27** The complainant is concerned that the training qualification includes CAT 5, an unattainable qualification. It was agreed by the parties that at the time of this appointment process, the CAT qualification was under development. Major Prevost

testified that CAT was included only because she had been told through her chain of command to incorporate it into the SMC. She acknowledged that its inclusion presented a problem because the CAT training program was not finalized and employees had not been formally evaluated to determine their CAT level. However, Major Prevost testified that the training provision in the SMC provided four alternate means of meeting the training qualification: (i) as an Ammunition Technical Officer; (ii) as an Ammunition Technician QL7; (iii) as a civilian ammunition technician CAT 5; or (iv) by presenting an acceptable alternative. An individual had to possess only one of these in order to meet the training qualification. The CAT qualification was not applied to the assessment of Mr. King or any person who was considered.

**28** The Tribunal finds no abuse of authority in the establishment of the training qualification. The inclusion of CAT 5 at a time when it was undefined and unachievable was out of the ordinary. However, there is no evidence that it was used or applied. It was only one of four means of meeting the training qualification and it had no practical application in this appointment process.

**Issue III: Was the appointment made on the basis of merit?**

**29** The complainant noted two errors in the transcription of qualifications from the SMC onto the form used to record Mr. King's assessment. With respect to the education qualification, the SMC indicated "successful completion of secondary school education according to provincial/territorial standards or PSC approved alternatives," while the form provided the alternative of "an acceptable combination of education, training, and/or experience." With respect to the training qualification, the complainant noted that the alternative of Ammunition Technical Officer which appeared on the SMC did not appear on the form.

**30** The complainant did not challenge whether Mr. King met the education and training qualifications as they were stated on the SMC.

**31** The Tribunal finds that, while the content of the form differs from the text of the SMC, there is no evidence that these differences influenced the assessment of merit or led to an improper assessment of Mr. King's qualifications. 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; and *Neil v. Deputy Minister of Environment Canada*, 2008 PSST 0004, at paras. 50 and 51). The Tribunal finds no basis for its intervention in the matter of the transcription of the training and education qualifications.

**32** The complainant also noted that there was no record of assessing Mr. King for the essential qualification of “Knowledge of acts, regulations and orders involved in the storage and handling of radioactive sources” (K7). He asserted that in the absence of evidence that Mr. King met this qualification, he could not be considered qualified for appointment on the basis of merit.

**33** Major Prevost testified that very few items had radioactive sources. She noted that Mr. King had been assessed and found to meet the essential qualification of “Experience in radiation safety” (E5). She suggested that the requisite knowledge for K7 could be assumed if a person met E5.

**34** The Tribunal finds no foundation in the evidence for linking the experience required for E5 to the essential knowledge qualification K7. They were listed as distinct qualifications on the SMC, indicating that they were indeed to be separately considered and assessed. There is no evidence that K7 was considered at any time in the assessment of Mr. King’s qualifications, and no suggestion that his experience was analyzed to determine whether it could apply to the requirements of K7.

**35** An appointment to or from within the public service must be based on merit. This is a fundamental requirement of s. 30 of the PSEA. In *Rinn v. Deputy Minister of Transport, Infrastructure and Communities*, 2007 PSST 0044, the Tribunal held at para. 35:

Merit now relates to individual merit where the person to be appointed must meet the essential qualifications for the work to be performed. There is considerable flexibility in selecting the person to be appointed; however, the fundamental requirement in appointing a person on the basis of merit is that the person must be qualified for the position.

**36** The *PSC Appointment Policy (General)*, created pursuant to s. 29(3) of the PSEA, requires that appointments be based on merit. Pursuant to s. 16 of the PSEA,

the actions of deputy heads and their delegates, are subject to PSC policies (see *Robert and Sabourin v. Deputy Minister of Citizenship and Immigration*, 2008 PSST 0024 at para. 69).

**37** The respondent has failed to demonstrate that K7 was assessed. The Tribunal finds that the failure to assess K7 renders it impossible to ascertain whether Mr. King's appointment conforms to the merit requirements of s. 30 of the PSEA. Appointing someone who does not meet the essential merit criteria constitutes an abuse of authority.

### **Decision**

**38** As Mr. King has not been assessed for the essential requirement K7, his appointment constitutes an abuse of authority. For this reason, the complaint is substantiated.

### **Corrective Action**

**39** Prior to concluding the hearing of this complaint, the complainant and respondent were asked to speak to the issue of appropriate corrective action in the event that this complaint was substantiated. They both expressly addressed the issue of assessment and neither party indicated that they were opposed to taking measures to complete the assessment.

**40** After considering the submissions of the parties on the matter of corrective action, the Tribunal finds that in the circumstances of this case, the abuse of authority can be addressed first by assessing Mr. King for the essential qualification K7, and then by taking further action commensurate with the outcome of the assessment.

### **Order**

**41** The Tribunal orders the respondent, within 30 days of this decision:

(i) To complete the assessment of Mr. King for the essential qualification K7 in order to determine whether he is qualified for appointment to the ESO position.

(ii) If Mr. King is found not to meet the essential qualification K7, his appointment will be revoked.

(iii) The respondent will notify the parties to this complaint of the outcome of the corrective action.

Joanne B. Archibald  
Member

**Parties of Record**

<b>Tribunal File</b>	2009-0463
<b>Style of Cause</b>	<i>Troy Patton and the Deputy Minister of National Defence</i>
<b>Hearing</b>	October 19-20, 2010 Saskatoon, Saskatchewan
<b>Date of Reasons</b>	February 17, 2011
<b>APPEARANCES:</b>	
<b>For the complainant</b>	Louis Bisson
<b>For the respondent</b>	Josh Alcock