



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**Files:** 2008-0580 and 2008-0584  
**Issued at:** Ottawa, February 21, 2011

**JOHN STEEVES AND KYLA SVEINSON**

Complainants

AND

**THE DEPUTY MINISTER OF NATIONAL DEFENCE**

Respondent

AND

**OTHER PARTIES**

<b>Matter</b>	Complaint of abuse of authority pursuant to section 77(1)(a) of the <i>Public Service Employment Act</i>
<b>Decision</b>	Complaints are dismissed
<b>Decision rendered by</b>	Merri Beattie, Member
<b>Language of Decision</b>	English
<b>Indexed</b>	<i>Steeves and Sveinson v. Deputy Minister of National Defence</i>
<b>Neutral Citation</b>	2011 PSST 0009

# Reasons for Decision

## Introduction

1 John Steeves and Kyla Sveinson, the complainants, participated in an internal advertised appointment process to staff an Officer position in the Resources Analysis and Compliance Services (RACS), 14 Wing, Department of National Defence, in Greenwood, Nova Scotia. The complainants allege that the hiring manager, Major Marcy Spiers, was biased. They assert that their assessments were unfair because Major Spiers provided their references although she was not familiar with their past experience. This led to an improper selection for appointment. The complainants also allege that the selection for appointment was not based on the merit criteria established for the appointment process.

2 The respondent, the Deputy Minister of National Defence, denies any abuse of authority in this appointment process. It asserts that Major Spiers was not biased and that, as the complainants' supervisor, she was an appropriate reference. The respondent also states that the process and criteria used for the selection of right fit for appointment were proper.

## Background

3 On May 12, 2008, an internal appointment process to staff the position of RACS Officer at the AS-05 group and level was advertised. The process was open to employees of the federal public service occupying positions across Canada and members of the Canadian Forces.

4 The *Job Opportunity Advertisement (Advertisement)* listed three essential experience qualifications. Applicants had to clearly demonstrate in their applications that they met those criteria, or risk being eliminated from the appointment process. Three candidates were screened in, including the complainants.

5 To assess the screened-in candidates, the respondent used a written exam, the Public Service Commission's standardized Middle Managers In-Basket 820 test (PSC 820), an interview, a practical exercise and references. All three candidates were

found to meet all the essential qualifications and Adam Hamilton was selected for appointment.

**6** Major Spiers was the hiring manager and chair of the assessment and selection boards.

**7** The complainants filed complaints of abuse of authority with the Public Service Staffing Tribunal (the Tribunal) pursuant to s. 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss.12, 13 (the PSEA). The Tribunal consolidated the files pursuant to section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-06.

**8** At the request of the complainants, and in accordance with s. 99(3) of the PSEA, the Tribunal decided these complaints based on the parties' written submissions and the documents on file, without holding an oral hearing.

## **Issues**

**9** The Tribunal must determine the following issues:

- (i) Was the appointment process tainted by bias?
- (ii) Did the respondent abuse its authority in its choice or use of references in this appointment process?
- (iii) Was the selection for appointment properly conducted?

**10** There is no allegation before the Tribunal that Mr. Hamilton does not meet the essential qualifications for the RACS Officer position.

## **Analysis**

**Issue I:** Was the appointment process tainted by bias?

**11** The complainants allege that Major Spiers had no intention of appointing either of them to the AS-05 position. They submit that Major Spiers demonstrated her bias in several ways prior to and during this appointment process.

**12** In Ms. Sveinson's submission, she uses the heading "Bias/Favouritism", but there is no other reference to favouritism in her submission and none in Mr. Steeves' submission. Section 2(4) of the PSEA refers specifically to personal favouritism constituting abuse of authority and the Tribunal explained the essence of personal favouritism in *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 0007, at para. 41:

(...) Undue personal interests, such a personal relationship between the person selecting and the appointee should never be the reason for appointing a person. Similarly, the selection of a person as a personal favour, or to gain personal favour with someone else, would be another example of personal favouritism.

**13** The complainants have not provided any evidence whatsoever that Mr. Hamilton was selected on the basis of personal favouritism.

**14** As for the allegation of bias, the courts have acknowledged that direct evidence of actual bias is difficult to establish and have found that the duty of fairness requires that there be no reasonable apprehension of bias. The Supreme Court of Canada articulated the test for reasonable apprehension of bias in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 and *Newfoundland Telephone Company v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623.

**15** The Tribunal has adapted the test for the context of staffing complaints under the PSEA: Would a reasonably informed bystander looking at the appointment process reasonably perceive bias on the part of one or more of the persons involved in the appointment decisions?

**16** The person who is alleging bias or a reasonable apprehension of bias has the burden of demonstrating its existence. Bias or the apprehension of bias must be real, probable or reasonably obvious and mere suspicions, speculations or possibilities of bias are not sufficient. See Robert W. Macaulay & James L.H. Sprague, *Practice and Procedure before Administrative Tribunals*, vol. 4 (Toronto: Thompson Carswell, 2004), at 39.4.

**17** The complainants argue that the broad area of selection for this appointment process, which was open to employees of the federal public service across Canada and members of the Canadian Forces, is evidence that Major Spiers did not want to consider either local candidate. The respondent explained that it decided to open this process broadly to ensure a sufficient pool of qualified candidates. A previous process had resulted in a very small pool which was rapidly exhausted. The PSC's view is that the respondent complied with the PSC's *Policy on Area of Selection* by providing broad access to this process.

**18** The Tribunal finds that the respondent's explanation that its decision regarding area of selection was based on previous experience and future planning is reasonable. Choosing a broad area of selection is consistent with the PSC's *Area of Selection* policy to give reasonable access to appointments so that a reasonable pool of potential candidates can apply.

**19** The complainants also point out that Major Spiers chose not to appoint Ms. Sveinson to the AS-05 position although she could have, since employment equity was identified in the Statement of Merit Criteria (SMC) as an organizational need. The evidence of the respondent however, that there were no identified gaps in the organization, was uncontested. The Tribunal accepts the respondent's argument that, in light of this, it did not have a need to appoint Ms. Sveinson based on employment equity.

**20** The complainants also submit that Mr. Hamilton, who was not an employee of 14 Wing, was selected for appointment before the results of the PSC 820 were received. They provided a memorandum dated July 17, 2008, from Major Spiers to the Civilian Human Resources Officer, which contains the rationale for selecting Mr. Hamilton for appointment to the RACS Officer position. They also state that the *Notification of Consideration for Appointment* of Mr. Hamilton was issued on July 18, 2008; however, the complainants did not receive their PSC 820 results until July 29, 2008.

**21** The respondent acknowledges that the written results of the PSC 820 were received by candidates after the board's decision to appoint Mr. Hamilton was made. However, the PSC had verbally informed the assessment board of the PSC 820 results prior to the selection of Mr. Hamilton. If the respondent had waited for candidates to receive their PSC 820 results before issuing the appointment process results, it could have avoided the perception that the selection for appointment preceded finalization of the assessments. Nevertheless, the respondent's statement that the PSC had already verbally given the test results to the board is uncontested. The Tribunal concludes that the evidence does not support a finding that the decision to appoint Mr. Hamilton was premature.

**22** The complainants submit that Major Spiers knew that they wanted to advance in their careers. Mr. Steeves provided his Civilian Performance Review Report for the 2007-2008 fiscal year, which includes a statement under employee career interests – "Advancement in Public Service". Ms. Sveinson provided an email she sent to Major Spiers on November 6, 2007, in which she states her intent to apply to the appointment process at issue in this complaint. Despite Major Spiers' knowledge of the complainants' career aspirations, neither of them was offered an acting appointment to the AS-05 position, although it was vacant from October 2007 until it was staffed through this process. The evidence confirms that Major Spiers intended to begin the process early in 2008 and did not offer an acting appointment to anyone. In the end, the process was advertised in May 2008 and completed in August 2008. The Tribunal finds that this does not demonstrate a reasonable apprehension of bias

**23** The complainants also raise the fact that on June 5, 2008, Major Spiers sent an email to the RACS Officer in Comox, B.C., in which she states that the AS-05 position would be filled by August 1, 2008 and she requests that three places be reserved for employees of 14 Wing for the RACS professional development event to be held that fall. Since the complainants were the only two employees in RACS, 14 Wing, they submit that the email is further evidence that Major Spiers did not intend to appoint either of them to the AS-05 position.

**24** The Tribunal finds that this evidence does not establish on the balance of probabilities that Major Spiers knew who would be appointed. The closing date for applications to this appointment process was May 12, 2008. Twelve people applied. When Major Spiers sent the June 5 email, she would have known that there were candidates from outside the RACS, 14 Wing. More likely than not, this evidence points to the fact that Major Spiers knew that it was possible that the RACS would have a new employee by the fall.

**25** The complainants also provided an email from Major Spiers to the Civilian Human Resources Officer, Atlantic. The email is dated July 18, 2008 and concerns the Human Resources Plan (HR plan) for the 2009-2010 fiscal year. In the email, Major Spiers states that the AS-04 and the AS-03 positions “have the potential to become vacant” in 2009-2010. The complainants identified the AS-04 and AS-03 positions as their substantive positions.

**26** On July 18, 2008, in the context of human resources planning for 2009-2010, Major Spiers projected that the complainants’ positions could become vacant that year. The Tribunal finds, however, that this does not establish an apprehension of bias. According to the complainants, Major Spiers knew that they wanted to advance their careers. Since the rationale for selecting Mr. Hamilton was dated July 17, 2008, she also knew that neither of them would be appointed to the AS-05 position. This evidence shows that, for planning purposes, Major Spiers considered the possibility that the complainants might seek to advance their careers outside the RACS. In fact, by March 2009, Mr. Steeves had moved to Nunavut and Ms. Sveinson had moved to the Ottawa area.

**27** The person who is alleging bias or a reasonable apprehension of bias has the burden of demonstrating its existence. The Tribunal finds that a reasonably informed bystander would not perceive bias, based on these submissions.

**28** An objective person – a bystander – would consider the following facts: Major Spiers sought applicants from a broad area to fill a vacant AS-05 position. She did not offer a temporary acting appointment to anyone while the position was

vacant and although there were delays, the process to staff permanently was initiated within seven months and completed three months after that. She made arrangements for a future learning event based on the knowledge that candidates from outside the RACS had applied to the appointment process. There was no identified need to make an employment equity appointment. And, knowing the appointment decision, Major Spiers anticipated that the complainants, who wanted to advance, might leave the RACS when they learned that someone else would be appointed to the AS-05 position.

**29** Based on these facts, the bystander would not conclude or reasonably perceive that Major Spiers was biased.

**Issue II:** Did the respondent abuse its authority in its choice or use of references in this appointment process?

**30** There are two matters to consider with regard to references. First whether Major Spiers should have been a reference for the complainants and, secondly, whether the assessment board ought to have contacted other references for the complainants.

**31** Major Spiers was the supervisor of both complainants; however, neither complainant named Major Spiers as a reference for this appointment process. They argue that Major Spiers was unable to verify or elaborate on their experience prior to October 2007. They submit that the assessment board relied on inadequate information by using the single reference provided by Major Spiers.

**32** The complainants acknowledge that it is an acceptable practice to obtain a reference from a current supervisor. However, they argue that Mr. Hamilton was selected for appointment based on the depth and breadth of his experience. They submit that the depth and breadth of their experience would have been evident had the board contacted other references. Ms. Sveinson states that she provided references, but they were not contacted by the assessment board. In contrast, the assessment board obtained information from references named by Mr. Hamilton.

**33** The respondent submits that the purpose of the references was for assessment of the personal suitability qualifications identified in the SMC. It asserts that the



assessment board had no obligation to contact other references, as it had sufficient information from Major Spiers to make an informed assessment of the complainants' personal suitability qualifications. According to the respondent, 14 Wing Greenwood is a small organization and Major Spiers knew the complainants' work. The respondent also explains that the board had no choice but to contact the reference provided by Mr. Hamilton because it had no direct knowledge of his personal suitability qualifications.

**34** The Tribunal has addressed the choice of references in several decisions. In *Dionne v. Deputy Minister of National Defence et al.*, 2008 PSST 0011, the matters of a candidate's consent and a referee's qualifications are explained as follows:

55 [...] While it may be preferable to have a candidate's consent, there is no legal requirement to do so, and the PSC guidelines on conducting references do not require consent where the referee is from a federal institution. What is important is that the referee is familiar with the work of the candidate, and can provide sufficient information to allow the board to conduct an adequate assessment of a candidate's qualification.

**35** Since Mr. Hamilton was not an employee of 14 Wing, the Tribunal accepts the respondent's position that it had no knowledge of Mr. Hamilton's work and, therefore, no choice but to obtain a reference from the person he named.

**36** The Tribunal finds that, from a general perspective, Major Spiers was an appropriate reference for the complainants. The *Reference Check Guide* (the *Guide*) used in the appointment process states that the referee should have been in a close working relationship with the candidate for at least one year. Prior to reporting directly to Major Spiers in October 2007, the complainants reported to a supervisor who reported directly to Major Spiers. The respondent's submission that 14 Wing, Greenwood is a small organization is uncontested. The Tribunal is satisfied that Major Spiers had a sufficiently close work relationship with the complainants that covered approximately two years as their direct and indirect supervisor.

**37** The Tribunal also finds that Major Spiers was an appropriate reference in the context of this assessment, based on the evidence of how references were used.

**38** The complainants argue that references were used to assess experience. They submit that Major Spiers had no knowledge of their prior experience and assert that, if other references had been contacted, the breadth and depth of their experience would have been evident. They also submit that breadth and depth of experience was the basis for their elimination from consideration and the selection of Mr. Hamilton for appointment.

**39** The Tribunal does not accept the complainants' argument on this issue for three reasons. First, a review of the evidence demonstrates that candidates' experience was assessed using the information they provided in their applications.

**40** The *Advertisement* states that applicants had to clearly demonstrate on their application that they met the following essential experience criteria:

- Recent experience planning and conducting comprehensive resource analysis, compliance verifications and management reviews
- Recent experience managing, supervising or facilitating a team
- Experience in writing, reviewing, editing and presenting correspondence, reports and/or presentations to senior management

**41** Candidates were also required to demonstrate on their application that they had the following asset experience qualifications:

- Recent experience conducting management studies in one or more of the following areas...
- Experience working with the Department of National Defence
- Experience applying Treasury Board policies and regulations

**42** The Tribunal finds that the information candidates provided in their applications was the basis for assessing all essential and asset experience qualifications. It also finds that the *Guide* did address personal suitability qualifications, as the respondent argues that it did. The *Guide* also contains two questions that inquire about a candidate's experience. However, the *Guide* demonstrates that the board simply sought confirmation of two of the six experience qualifications through reference questions 2 and 3.

**43** Question 2 in the *Guide* is: “To your knowledge, has [candidate] ever undertaken compliance activities? This could include compliance inspections, validations, quality assurance, analytical work, etc.” The note under this question is: “Reference should indicate candidate has extensive experience conducting compliance and evaluation assignments.”

**44** The Tribunal finds that this reference question was used to confirm the first essential experience qualification.

**45** Question 3 in the *Guide* is:

To your knowledge, has [candidate] ever conducted any types of management studies? For example, an organizational study? A business case analysis? Done policy research of any kind? Conducted cost-benefit analyses or non-public fund studies?

The note under that question reads as follows: “If candidate conducted such studies, reference should indicate whether candidate handled them with ease, or whether difficulties were experienced and what kind.”

**46** The note for this question indicates that it was used to assess how the candidate conducted the studies, which relates to the personal suitability type of qualifications the respondent submits were being assessed. However, the question directly asks whether the candidate conducted studies, which is the first asset experience qualification. The Tribunal finds that this reference question was used, in part, to confirm that a candidate had that experience qualification.

**47** Secondly, although both complainants state that the breadth and depth of their experience would have been evident had other references been obtained, neither complainant provided evidence that they had included experience in their applications that preceded Major Spiers knowledge of their work and, therefore, may have required validation from another reference. Furthermore, both experience qualifications that were confirmed by references required recent experience. The complainants have failed to demonstrate that Major Spiers, who had personal knowledge of the complainants’ work for approximately two years, would have been unable to provide information to confirm their recent experience.

**48** Thirdly, the Tribunal finds that neither experience qualification that was confirmed through references is linked to the selection board's reasons for its decision to appoint Mr. Hamilton.

**49** A memorandum dated July 17, 2008 and signed by Major Spiers (the rationale), explains the selection board's reasons for choosing Mr. Hamilton for appointment. According to the rationale, three broad factors influenced the selection decision: breadth of experience, in-depth knowledge and personal suitability.

**50** After a close examination of the rationale, the Tribunal finds several references to experience qualifications that, according to the evidence before the Tribunal, were assessed based solely on candidates' applications and were not confirmed through reference checks.

**51** Neither of the two experience qualifications that were confirmed through references is mentioned in the document. There is no evidence that the two experience qualifications that were confirmed through references had any bearing on the selection board's decision to appoint Mr. Hamilton.

**52** The complainants have failed to demonstrate that the respondent abused its authority in choosing or using references in this appointment process.

**Issue III:** Was the selection for appointment properly conducted?

**53** The complainants submit that the selection board did not base its selection for appointment on the merit criteria identified for this appointment process. They argue that selection for appointment requires the application of asset qualifications, organizational needs and/or operational requirements.

**54** Merit under the PSEA is individual merit. 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. Section 30 of the PSEA reads:

30. (1) Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.

(2) An appointment is made on the basis of 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 official language proficiency; and

(b) the Commission has regard to

i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,

ii) any current or future operational requirements of the organization that may be identified by the deputy head, and

iii) any current or future needs of the organization that may be identified by the deputy head.

**55** Parliament's choice of different clauses for ss. (a) and (b) is important and meaningful. It indicates that Parliament gave a distinct meaning to each section. Section 30(2)(a) specifies a mandatory requirement that the person to be appointed must meet all the essential qualifications. Otherwise the appointment is not made on the basis of merit.

**56** This obligation is missing from s. 30(2)(b), in which Parliament used the words "has regard to" any identified asset qualifications, operational requirements and organizational needs. Both the English version of s. 30(2)(b) –"has regard to" - and the French version - "prend en compte" lack the obligation found in 30(2)(a). The expression "has regard to" means "to consider, to pay attention to: take into consideration or account" (*Black's Law Dictionary*, 10<sup>th</sup> edition, under "has regard to").

**57** Therefore, the words "has regard to" in s. 30(2)(b) indicate that the criteria established under this section must be considered; attention must be paid to them, but it is not necessary to assess or use them. If it were necessary to assess and use the asset qualifications, operational requirements and organizational needs, there would be no distinction made between these criteria and the essential qualifications.

**58** The delegated manager, therefore, has discretion in determining who among the qualified candidates is the right fit for the position. The manager must consider whether

or not to do so based on criteria established under s. 30(2)(b). Accordingly, the manager has no obligation to make a selection for appointment based on asset qualifications, operational requirements and/or organizational needs. When two or more candidates meet the essential qualifications, the manager has considerable discretion to choose who to appoint. The manager must not abuse that authority.

**59** In this case, the respondent established three asset experience criteria, five operational requirements and one organizational need. The rationale dated July 17, 2008 explains the selection board's reasons for choosing Mr. Hamilton. A close examination of the rationale reveals that several of the essential qualifications and the third asset experience qualification were used in determining that Mr. Hamilton was the right fit for appointment.

**60** The complainants made submissions concerning one specific criterion, namely the organizational need employment equity. They specifically argue that Ms. Sveinson could have been appointed under this criterion.

**61** Earlier in these reasons, the Tribunal found that the respondent's decision not to use that criterion was not attributable to bias or a reasonable apprehension of bias. Under the PSEA, the respondent was not required to appoint Ms. Sveinson based on employment equity. The *Advertisement* and the SMC state that consideration would be given to candidates belonging to one of the employment equity groups, one of which is women. This statement provides discretion and the respondent's submission that there were no gaps to address in the organization is uncontested.

**62** The complainants argue that additional references, that, according to them, would have established the depth and breadth of their experience, would have had an effect on the selection for appointment. As the Tribunal has already addressed in its reasons above, it cannot agree. The evidence shows that the third asset experience qualification, which was used for selection, was not discussed with references; it was assessed based solely on the candidates' applications. According to the rationale, neither of the experience qualifications that were confirmed through reference questions 2 and 3 had any bearing on the board's decision to appoint Mr. Hamilton.

**63** The complainants' submissions attempt to demonstrate that they were equally or better qualified than Mr. Hamilton. This indicates a belief that ranking and relative merit apply to this appointment process, specifically to the selection for appointment. In *Visca v. Deputy Minister of Justice*, 2007 PSST 0024, at para. 44, the Tribunal established that ranking is not required under the PSEA and a manager has considerable discretion pursuant to s. 30(2) of the PSEA to choose among candidates who meet the essential qualifications, the person who is the right fit for the position according to the manager's judgement.

**64** Having determined that three candidates met the essential qualifications, the selection board used its judgement to decide who was the right fit for the position. The written rationale for the decision to appoint Mr. Hamilton, which Major Spiers signed on July 17, 2008, does not contain any comparison to the other candidates and, there is no expectation that such a comparison be provided. The rationale simply describes the qualifications Mr. Hamilton possessed which, in the board's judgement, made him the right fit for the RACS Officer position. In this case there is no evidence of ranking of candidates to determine selection, which is consistent with the provisions of the PSEA.

**65** The complainants also argue that there was no explanation in the rationale as to why one of them was not chosen.

**66** The PSC's *Selection and Appointment* policy requires that "the reasons for the appointment decision" be documented. Decisions throughout an appointment process may have the effect of eliminating one or more candidates. However, those decisions are made for the purpose of finding a qualified candidate. At the appointment stage, the PSC's delegate is not deciding who to eliminate or not appoint, but rather, who to appoint. There is no requirement in the PSEA or in PSC policy to document the reasons for not selecting candidates.

**67** In its submission, the PSC suggests that an error may have been made by the hiring manager in completing the written rationale recommending Mr. Hamilton for appointment. The Tribunal does not agree.

**68** At the appointment stage, assessments have already been completed and documented. The purpose of a rationale at the appointment stage is not to restate or explain the assessments. As stated earlier in these reasons, there is no allegation or evidence before the Tribunal that Mr. Hamilton failed to meet the essential qualifications necessary for this appointment. The purpose of the appointment rationale is to explain the reason for selecting a candidate for appointment. This rationale does that.

**69** The Tribunal concludes that the complainants have failed to establish any abuse of authority in the selection of the appointee.

### **Decision**

**70** For all these reasons, the complaints are dismissed.

Merri Beattie  
Member

### **Parties of Record**

<b>Tribunal Files</b>	2008-0580 and 2008-0584
<b>Style of Cause</b>	<i>John Steeves and Kyla Sveinson and the Deputy Minister of National Defence</i>
<b>Hearing</b>	Paper hearing
<b>Date of Reasons</b>	February 21, 2011
<b>Representatives:</b>	
<b>For the complainants</b>	John Steeves and Kyla Sveinson
<b>For the respondent</b>	Neil McGraw
<b>For the Public Service Commission</b>	John Unrau