



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2010-0061
Issued at: Ottawa, April 13, 2011

KIM MAGEE

Complainant

AND

THE COMMISSIONER OF THE CORRECTIONAL SERVICE OF 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>Magee v. Commissioner of the Correctional Service of Canada</i>
Neutral Citation	2011 PSST 0012

Reasons for Decision

Introduction

1 Kim Magee, the complainant, was a Correctional Officer, CX-02, with the Correctional Service of Canada (the respondent). He was injured on duty and after a period of recovery, he returned to the workplace. He participated in an appointment process for the position of Project Officer, Security (the AS-05 position) and was found not qualified. He submits that the respondent should have accommodated him by appointing him to this position. He alleges that the failure of the respondent to appoint him indeterminately to the AS-05 position was an abuse of authority.

2 The respondent denies that it abused its authority and states that it has accommodated the complainant by appointing him to a suitable position. He was not appointed indeterminately to the AS-05 position because he did not meet the essential qualifications.

Background

3 In August 2003, the complainant was injured while performing the duties of his position as a Correctional Officer. He required an extended period of treatment and rehabilitation. He initially returned to work in 2008 and when he was unable to continue because of his injury, he left the workplace to undergo further treatment. A physical assessment conducted in February 2009 indicated that the complainant could return to the workplace, with the limitation that he could not have inmate contact or return to his Correctional Officer position. It also indicated this limitation would likely be permanent.

4 On May 29, 2009, the complainant returned to work and was given an acting appointment of four months less a day to the AS-05 position. He also submitted an application in the internal advertised appointment process that was being conducted for indeterminate and acting appointments or deployment to the same position.

5 The complainant was screened into the appointment process and wrote an examination on June 9, 2009, to assess the four essential knowledge qualifications for the AS-05 position. He did not pass the examination. As he was found not to meet the

essential knowledge qualifications, he was not further assessed. His acting appointment continued, but came to an end in January 2010. Effective May 13, 2010, on the basis of his disability priority status, he was deployed indeterminately to the position of Victim Services Officer, WP-03, with Correctional Service of Canada.

6 The complainant stated for clarification that he took no issue with the AS-05 assessment process itself or the qualifications of the appointed persons. His concern was limited to the issue of the respondent's failure to accommodate his disability by appointing him to the AS-05 position.

Issues

7 The Tribunal must determine the following issues:

- (i) Was the respondent's failure to appoint the complainant to the AS-05 position indeterminately an abuse of authority?
- (ii) To what extent can the Tribunal intervene in the circumstances of this case to address the complainant's priority entitlement?

Relevant Evidence and Analysis

Issue 1: Was the respondent's failure to appoint the complainant to the AS-05 position an abuse of authority?

8 The parties uniformly agree that the complainant has suffered greatly from his injury and the consequences that have extended to his personal life as well as his work. In the complainant's view, the AS-05 position is well-suited to him and an appointment to it would accommodate the disability that has arisen from his injury. The complainant argues that, irrespective of the outcome of his assessment for the AS-05 position, the respondent ought to have appointed him to it because of his disability.

9 Caleigh Miller was the departmental Return to Work coordinator with whom the complainant dealt when he returned to work in 2009. She worked with the complainant to find the initial acting appointment to the AS-05 position that he assumed on his return. She testified that she continued to work with him afterward as well. She

maintained regular contact with the complainant and his union representatives to look for an indeterminate position. She also discussed with him the availability of registering in the public service priority system based on his disability. This would permit the complainant to be considered for referral and priority appointment to a broader spectrum of positions across the public service.

10 Ms. Miller testified that the complainant initially resisted becoming a priority as he felt it could mean being forced to leave the department or relocate. She stated that in August 2009, the complainant altered this position and agreed to register in the priority system. On September 4, 2009, she sent him a request to provide the information that would permit his registration to proceed. She also provided a website for information. Documents in evidence show that on September 23, 2009, the complainant provided a medical certificate from his physician to indicate that his disability was permanent. The complainant was then registered as a priority based on his disability.

11 Ms. Miller testified that if the complainant had met the essential qualifications when assessed for the AS-05 position, he would have been appointed to it using his priority status. However, when it was determined that he did not meet the essential qualifications, the indeterminate appointment was not further considered.

12 Section 30 of the *Public Service Employment Act*, S.C. 2003, c.22, ss. 12 and 13 (the PSEA) sets merit as the cornerstone of public service staffing. Section 30 of the PSEA reads as follows:

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.

13 In its decision in *Patton v. Deputy Minister of National Defence*, 2011 PSST 0008, the Tribunal reiterated that merit is a basic precept in staffing, and stated:

35 An appointment to or from within the public service must be based on merit. This is a fundamental requirement of section 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).

14 The Tribunal finds no abuse of authority in the respondent's decision not to appoint the complainant from the internal advertised appointment process for the AS-05 position. The Tribunal finds that the complainant failed to meet the essential qualifications for this position. He has not challenged the knowledge examination or his results and takes no issue with the assessment process that found him not qualified. Section 30(2)(a) requires that to be appointed, a person must meet the essential qualifications established for the position. A person who does not meet the essential qualifications cannot be appointed.

15 The complainant argues that the Correctional Service of Canada's *Guidelines 254-2 Return to Work Program* have been contravened but he has not provided any argument concerning how this has occurred and no evidence of how the program was breached. Based on the evidence and argument before it, the Tribunal finds that it has no basis upon which to address this issue.

Issue II: To what extent can the Tribunal intervene in the circumstances of this case to address the complainant's priority entitlement?

16 The complainant argues that he was nonetheless entitled to be appointed to the AS-05 position as a priority. This is based on his contention that he was qualified and the respondent should accommodate the complainant by appointing him to the position. In reply, the respondent argues that once the complainant had failed the written knowledge examination they could not appoint him indeterminately to the AS-05 position.

17 The foundation for the complainant's claim that he is qualified is unclear as he has not argued against the assessment board's finding that he failed the written knowledge examination.

18 If, however, the complainant relies on his initial appointment to the AS-05 position as an indication that he is qualified, it must be remembered that this appointment was for less than four months. Section 14(1) of the *Public Service Employment Regulations*, SOR 2005/344 (the *PSER*) explicitly provides that:

14. (1) An acting appointment of less than four months, provided it does not extend the cumulative period of the acting appointment of a person in a position to four months or more, is excluded from the application of sections 30 and 77 of the Act.

19 As noted above, s. 30 of the PSEA requires appointments to be made on the basis of merit. Section 14 of the *PSER* creates an exception for appointments of less than four months duration. Such appointments are excluded from the merit provisions of s. 30. Accordingly, the Tribunal cannot infer from the acting appointment that the complainant was qualified for the AS-05 position.

20 The PSEA gives the Public Service Commission (PSC) the authority to make regulations to establish and determine the order of priorities (see s. 22(2)(a) and (b)). Section 87 of the PSEA specifies that a complaint cannot be brought under s. 77 in respect of certain types of appointment, including appointments made under regulations established pursuant to s. 22(2)(a). As such, it extends to the disability priority established by s. 7 of the *PSER*. Moreover, the *PSC Guide on Priority Administration*

provides that the PSC is responsible for administration and oversight in matters of priority entitlement.

21 The mandate of the Tribunal in this complaint extends to the question of whether the respondent abused its authority in the exercise of its discretion as regards s. 30(2) of the PSEA and the Tribunal has found no abuse of authority. The complainant has not provided evidence or arguments that the respondent failed to accommodate him in the staffing process. On the facts presented in this complaint, the Tribunal will not intervene in the question of the complainant's priority entitlement.

Decision

22 For the reasons stated above, the complaint is dismissed.

Joanne B. Archibald
Member

Parties of Record

Tribunal Files	2010-0061
Style of Cause	<i>Kim Magee and the Commissioner of the Correctional Service of Canada</i>
Hearing	February 24-25, 2011 Saskatoon, Saskatchewan
Date of Reasons	April 13, 2011
APPEARANCES:	
For the complainant	Frank Janz
For the respondent	Dora Benbaruk