



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**File:** 2009-0461  
**Issued at:** Ottawa, January 20, 2011

**ALAIN POIRIER**

Complainant

AND

**THE DEPUTY MINISTER OF VETERANS AFFAIRS**

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>	Complaint is substantiated
<b>Decision rendered by</b>	Kenneth J. Gibson, Member
<b>Language of Decision</b>	English
<b>Indexed</b>	<i>Poirier v. Deputy Minister of Veterans Affairs</i>
<b>Neutral Citation</b>	2011 PSST 0003

## **Reasons for Decision**

### **Introduction**

**1** The complainant, Alain Poirier, contends that the respondent abused its authority when it improperly screened him out of an appointment process for failing to show that he met the essential experience qualifications for a Statistics Reporting Project Leader (SI-05) position. He alleges that the instructions for the *Job Opportunity Advertisement* were ambiguous and subject to different interpretations and that this led to his elimination from the process. He also alleges that when he met the respondent's representatives for an informal discussion, their minds were closed and they were not prepared to correct their initial decision to screen him out.

**2** The respondent, the Deputy Minister of Veterans Affairs, states that there was no abuse of authority and that the complainant was screened out of the appointment process because he failed to demonstrate that he met the experience qualifications for the position. The respondent also states that there was nothing improper in the informal discussion.

### **Issue**

**3** The Tribunal must determine whether the respondent abused its authority when it screened the complainant out of the appointment process.

### **Summary of Relevant Evidence**

**4** A number of relevant documents were submitted by consent of the parties.

**5** The *Job Opportunity Advertisement* for the SI-05 position was posted on December 4, 2008. The purpose of the advertisement was to create a pool of qualified candidates for indeterminate, acting, and specified period appointments, and for deployment, to SI-05 positions. The closing date for applications was December 18, 2008.

**6** The wording that led to the complainant being screened out of the appointment process is in the second sentence of the instructions below:

Candidates must clearly demonstrate IN THEIR COVER LETTER how they meet the education and experience factors listed in the essential qualifications. Candidates must use the experience factors as a header and then write one or two paragraphs demonstrating how they meet the experience required. Résumés may be used as a secondary source to validate the experience described in the cover letter. Failure to provide this information in the requested format will result in your application being rejected.

(Emphasis in the original)

**7** In their cover letter, candidates were required to demonstrate that they met six essential experience qualifications from the Statement of Merit Criteria (SMC), which are as follows:

E1: Experience in the use of spreadsheet software such as Lotus or Excel.

E2: Experience in the use of office suite software such as Corel Suite or Microsoft Office Suite.

E3: Experience in creating and presenting statistical reports and/or tables.

E4: Experience in the use of data query and retrieval tools such as Cognos and Crystal Reporting.

E5: Experience in defending statistical reports.

E6: Experience in retrieving, analysing and manipulating data from a database.

**8** On December 18, 2008, the complainant submitted an application for the position. He understood the instructions in the job advertisement to mean that he was to describe how he met all of the experience qualifications in one or two paragraphs. In his application, he described his experience in one paragraph.

**9** On January 26, 2009, the complainant received an email from Human Resources Assistant, Margaret Fitzgerald, informing him that he had been eliminated from the appointment process because he failed to meet any of the six experience qualifications.

**10** The complainant met with two of the assessment board members for an informal discussion. During the meeting he discovered that he had been expected to write one or two paragraphs on each experience qualification. He explained his interpretation of the

job advertisement, but he says the board members told him that there was nothing they could do and that the board was not allowed to accept new information. He had a subsequent meeting with his union representative and the three board members. The complainant testified that at the second meeting, the board members were not open to discussing his concerns. They told him that even if the format of his application was not an issue, his application was weak.

**11** The complainant testified that since his complaint, the respondent has changed the wording on new job advertisements to make it clear that candidates must write one or two paragraphs under each experience factor. They have also changed the wording to state that failure to provide information in the requested format “may” result in the application being rejected. In the advertisement for the process at issue, it was stated that failure to follow the requested format “will” result in the application being rejected.

**12** The complainant acknowledged that the assessment board needed to assess whether he met the experience qualifications for the position and that he was expected to clearly demonstrate in his cover letter how he met those qualifications.

**13** The complainant also acknowledged that the email sent to him on January 26, 2009, did not mention that he had been screened out for failing to submit his application in the required format. However, he noted that the *Screening Report Comments* document regarding his application states that he: “Did not submit in proper format. Covering letter does not include experience factors with headers and explanation of each.”

**14** A separate *Screening Report* document shows the complainant as failing all six experience qualifications. However, the complainant contends that he presented enough information in his covering letter to show that he met the experience qualifications.

**15** Kathie Gallant was the chair of the assessment board. She testified that she had significant involvement in developing the *Job Opportunity Advertisement*, the SMC and other tools used in the assessment process. She testified that it was not enough for

candidates to simply state that they had the required experience. Candidates were asked to clearly demonstrate how they met each experience factor.

**16** Ms. Gallant went through the relevant paragraph in the complainant's covering letter and pointed out where he failed to demonstrate sufficient experience to meet each factor. Generally, she testified that the complainant's letter lacked detail and examples for each qualification. She stated that while the complainant did not use the requested format, he was screened out primarily because he did not demonstrate the required experience.

**17** She testified that the board accepted other applications that were not in the requested format. For example, while some candidates did not have a header for each experience factor they did demonstrate how each experience factor was met.

**18** Ms. Gallant acknowledged that for E1 and E2 it was not necessary for applicants to provide examples or demonstrate how Lotus, Excel and office suite software were used, provided they stated it was part of their current duties. She testified that these were standard government software applications so the board would accept that candidates had experience with them. According to Ms. Gallant, the complainant did not say he used the software and it was hard for the board to determine exactly what he did. She said that if he had met all of the other experience factors, then it would have been accepted that he met E1 and E2.

**19** Ms. Gallant testified that the purpose of the informal discussion meetings was to go over the covering letter and application to make sure the board did not misinterpret what was given to them. She did not see the informal discussion as an opportunity for the complainant to submit a new application or résumé. She said that human resources staff had informed her that the board could not accept any new information at the informal discussion.

## **Arguments of the parties**

### **A) Complainant's arguments**

**20** The complainant argues that the *Job Opportunity Advertisement* and the SMC for the position were ambiguous. His interpretation of the documents was that he was to demonstrate how he met all of the essential experience factors in one or two paragraphs. He says the respondent screened him out because it wanted one or two paragraphs on each qualification.

**21** The complainant argues that the *Screening Report Comments* document clearly states that he was screened out of the appointment process because he did not submit his application in the proper format. He argues this was improper given the ambiguity in the instructions. In support of his allegation, he notes the respondent's action to clarify the instructions in subsequent appointment processes.

**22** The complainant disagrees with the respondent's email stating that he was eliminated from the appointment process for failing to meet all six of the essential experience qualifications. He submits that the assessment criteria for E1 and E2 state that it is sufficient for candidates to state that Lotus, Excel or office suite software is part of their current or recent job experience, without providing examples or demonstrating how the applications were used. This is because they are standard software applications within government.

**23** He notes that the job advertisement clearly stated that applicants who failed to provide the information in the requested format would be rejected. He refers to Ms. Gallant's testimony that some candidates whose applications were not in the desired format were nevertheless screened in. However, if the assessment board was intent on adhering to its instructions, as it did in his case, then it should have rejected all applications that were not in the desired format.

**24** The complainant stated that according to a Public Service Commission (PSC) document entitled *Appointment Policy Questions and Answers*, managers have the

flexibility to correct errors or omissions in the appointment process that they discover during informal discussions.

**25** According to the complainant, the respondent fettered its authority to consider his situation with an open mind when it refused to exercise its discretion to correct his situation during the informal discussion. In support of his position, he cites the five categories of abuse of authority described in *Bowman v Deputy Minister of Citizenship and Immigration Canada*, 2008 PSST 0012, para. 81, which refers to the framework provided in *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008 (*Tibbs*). In particular, he cited category five, which refers to situations where a delegate refuses to exercise his/her/its discretion by adopting a policy which fetters the ability to consider individual cases with an open mind.

**26** As corrective action, the complainant requests the opportunity to resubmit his application, providing one or two paragraphs on each essential experience qualification.

## **B) Respondent's arguments**

**27** The respondent argues that a finding of abuse of authority requires evidence of serious wrongdoing. Furthermore, an error, omission or improper conduct does not by itself constitute abuse of authority. Although bad faith can constitute abuse of authority, the respondent argues that bad faith requires an element of intent. The respondent submits that the complainant has not met his burden to prove, on a balance of probabilities, that the respondent abused its authority.

**28** The respondent contends that the screening was fair. All candidates received consistent treatment. No one was screened in unless they demonstrated that they met the essential experience qualifications. While the complainant argues that he was screened out because he failed to follow the requested format, the evidence shows that he was screened out because he failed to meet the essential qualifications for the position. The respondent submits that the advertisement and the SMC were clear; and the burden was on the candidates to demonstrate that they met these qualifications. It was not sufficient to list the qualifications; candidates had to demonstrate how they met

them. The complainant failed to do this. For example, for E6, the complainant's application is silent on experience in analysis.

**29** The respondent submits that the Tribunal has ruled in a number of cases that candidates are responsible for ensuring that they demonstrate clearly in their application that they possess all of the essential qualifications necessary for the position. The Tribunal has also ruled that its role is not to reassess candidates.

**30** The respondent argues that the purpose of informal discussion is not to reassess a candidate's qualifications. While the respondent acknowledges that informal discussion can serve to correct an error, it does not agree that an error was made. In this case, the complainant had an obligation to demonstrate that he met the essential experience qualifications and he failed to do so.

**31** With regard to E1 and E2 of the SMC, the respondent states that the board was prepared to interpret these qualifications generously if a candidate stated they were part of his/her present duties.

**32** The respondent argues that the fact that subsequent advertisements for other appointment processes are worded differently than the advertisement for this appointment process is not relevant. The writing of advertisements is an evolving process and the fact that they change does not mean there was abuse of authority in this case.

### **C) Public Service Commission's arguments**

**33** The PSC did not attend the hearing but made written submissions. Its submissions offer an analysis of some relevant PSC policies and guidelines that may be useful to the Public Service Staffing Tribunal (the Tribunal) in arriving at its decision.

**34** Referring to *Ammirante v. Deputy Minister of Citizenship and Immigration*, 2010 PSST 0003, the PSC submits that under its *Appointment Policy (General)*, appointment decisions must be based on merit and non-partisanship and are guided by the values of fairness, transparency, representativeness and access. Values-based



decisions are highly dependent on the judgment and responsibility of individuals who are accountable for their decisions. In a delegated values-based merit system, it is the sub-delegated manager's application of the values that renders any given choice appropriate.

**35** The PSC *Assessment Policy* indicates that an assessment should be designed and implemented without bias, political influence or personal favouritism and that the assessment processes and methods effectively assess the essential qualifications and other merit criteria identified and are administered fairly. The policy objective indicates that assessment methods and processes identify persons who meet the qualifications used in the appointment decision and provide a sound basis for making appointments according to merit.

**36** From a values perspective, the PSC submits that transparency is supported if the complainant understands the basis for his elimination from the process: because he did not follow the requested format or because he did not demonstrate in his application all of the experience qualifications necessary.

**37** The PSC described the requirements of its *Policy on Informal Discussion*. It appears to the PSC that the informal discussion took place within a reasonable timeframe. Once the department became aware of the complainant's concerns, it was up to the sub-delegated manager to determine what, if anything, should be done. It appears to the PSC that the sub-delegated manager determined that no further action needed to be taken.

## **Analysis**

### *Overview*

**38** Section 77 of the *Public Service Employment Act* (the *PSEA*) provides that an employee may bring a complaint to the Tribunal that he or she was not appointed because of abuse of authority. It is well established that the complainant has the burden of proof, on the balance of probabilities, in these complaints. (See for example, *Tibbs* at para. 50, 53 and 55.)

**39** In addition, in *Tibbs* and other decisions, the Tribunal has consistently ruled that a finding of abuse of authority does not require intent, and that an interpretation requiring proof of intent would run contrary to Parliament's intention in enacting the *PSEA*. (See for example, *Tibbs*, at para. 72, and *Rinn v Deputy Minister of Transport, Infrastructure and Communities* 2007 PSST 0044, at para. 36.)

**40** For the reasons provided below, the Tribunal finds that the respondent abused its authority in this case.

*The error in the instructions for the cover letter to the application*

**41** The issue in this case relates to the wording of the instructions in the *Job Opportunity Advertisement* and the SMC.

**42** The instructions indicated that candidates had to clearly demonstrate in their cover letter how they met the education and experience factors listed in the essential qualifications. Furthermore, the instructions clearly stated that failure to comply with the instructions, as they were set out in the job opportunity advertisement, would lead to elimination from the appointment process. Elimination from the process was possible based both on the form of the letter and its content.

**43** While the respondent wanted candidates to include one or two paragraphs for each qualification in their cover letter, the wording of the instructions can lead to different interpretations. The complainant's interpretation of the instructions was that the candidate was to provide one or two paragraphs for all of the qualifications. This is an interpretation that is quite different, but reasonable, in light of the wording.

**44** The Tribunal finds that instructions requesting a candidate to provide one or two paragraphs for each qualification are markedly different from instructions requiring a candidate to provide one or two paragraphs for all qualifications. The Tribunal also finds that the wording in the job opportunity advertisement was ambiguous and subject to different interpretations. The wording of the instructions could reasonably lead a candidate to believe that he/she only had a maximum of one or two paragraphs to describe how they met all six experience qualifications.

**45** The problem with these instructions is supported by the fact that instructions in subsequent appointment processes had unambiguous language. It is not clear whether the respondent changed the instructions in subsequent appointment processes as a direct result of this complaint. Although not determinative, the Tribunal finds that these subsequent instructions are relevant. The instructions in the more recent appointment process for a Material Services Agent in the same division of the same department ask candidates to "...use each experience factor as a header and then under each header write one or two paragraphs demonstrating how they meet the experience factor." These instructions are clear and do not leave room for the same kind of misinterpretation as those in the process at issue.

**46** The respondent argued that it is appropriate to differentiate between the content and the format in assessing the complainant's application. According to the respondent, the focus of the instructions was the first sentence that emphasized the need to demonstrate all the qualifications, and not the second sentence, that required a certain format for doing so. The Tribunal disagrees. The words in the instructions must be read in their entirety. The first sentence deals with the content and the second with the format. If the instructions on the format had been clear and unambiguous, then the complainant would have known that he was expected to provide one or two paragraphs on each experience qualification. This in turn would have led to an understanding of the level of detail that was required. The complainant would have known to provide more in-depth information in his cover letter and could have addressed the qualifications without the evident constraints resulting from his interpretation of the instructions.

**47** It was reasonable for the complainant to conclude that the requirement of format had to be met in demonstrating how a candidate met the qualifications. The *Screening Report Comments* document further confirms the link between content and format. It states clearly that the complainant's application was inadequate because he: "Did not submit in proper format. Covering letter does not include experience factors with headers and explanation of each."

**48** If the respondent wanted the former approach, a candidate who followed the latter approach would suffer an extreme disadvantage in the appointment process. The

notion of one or two paragraphs for all the information on all the qualifications conveys a distinctly different set of requirements than the notion of one or two paragraphs for each qualification that is being assessed.

**49** Based on the evidence in this case, the Tribunal finds that the instructions provided to candidates were sufficiently ambiguous as to constitute an error in the assessment process. The respondent did not clearly describe what it wanted from candidates in the job advertisement or the SMC. Although the respondent argues that all candidates were assessed consistently, they could not possibly have been assessed in a consistent way, on the basis of the same information, because of the distinct differences in the way the instructions could be interpreted.

*What impact did the error in the instructions have on the complainant's application?*

**50** Several Tribunal decisions assert that candidates in appointment processes must ensure that they demonstrate in their application that they meet all of the essential qualifications required for the position. However, none of the cases cited by the respondent relate to a situation where there was a flaw in the instructions regarding how to submit the application.

**51** Section 16 of the *PSEA* provides that deputy heads are subject to any policies established by the PSC. The *PSC Appointment Policy* provides that persons must have a reasonable opportunity to apply and to be considered for appointment. The *PSC Assessment Policy* provides that assessment processes and methods are to effectively assess the essential qualifications and other merit criteria and are to be administered fairly.

**52** These policies establish that candidates are entitled to a fair and reasonable opportunity to be considered for positions in the public service. A reasonable opportunity for consideration includes the provision of clear instructions that are consistently applied and appropriate steps to correct errors or other problems that occur during the assessment process.

**53** Ms. Gallant testified that the complainant's description of his experience fell short on each qualification. She stated that the complainant's descriptions lacked detail or examples. The Tribunal finds that this is not surprising given the limited space the complainant understood to be available to provide this information. The Tribunal finds that the poor wording of the instructions led the complainant to believe there was limited space to demonstrate his qualifications for the position. The complainant's interpretation of these instructions did not conform to what the respondent wanted, and although that interpretation was reasonable, it contributed directly to his elimination from the appointment process.

*Does the failure to correct the error in the appointment process amount to abuse of authority?*

**54** The Tribunal finds that when the complainant explained his interpretation of the instructions to the assessment board, the board should not have refused to accept that the instructions were ambiguous or refused to take action to correct its error.

**55** The respondent cited a number of cases where the Tribunal determined that errors, omissions and improper conduct are not by themselves sufficient to establish abuse of authority. However, in determining whether there is abuse of authority in this case, it is important to consider the nature of the error, the consequences to the complainant and how the respondent dealt with this error once it was drawn to its attention.

**56** The complainant argues that when he brought his concerns to the members of the assessment board at two informal discussion meetings, the board should have accepted that its instructions to candidates were ambiguous and given him another opportunity to demonstrate that he possessed the essential experience qualifications for the position. He testified that the respondent was not willing to accept new information from him and told him there was nothing they could do. At the second meeting they told him that even if the format was not an issue, his application was weak.

**57** Ms. Gallant testified that the board did not see the informal discussion as an opportunity for the complainant to submit a new application or résumé. She said that human resources staff had informed her that the board could not accept any new information at the informal discussion.

**58** In *Rozka v. Deputy Minister of Citizenship and Immigration Canada*, 2007 PSST 0046, para. 76, the Tribunal found that informal discussions are primarily intended to provide candidates with an opportunity to discuss the reasons for elimination from a process. If, however, during an informal discussion, it is discovered that an error was made in assessing a candidate, then the manager should take steps to correct the error.

**59** The evidence of Ms. Gallant indicates that some other candidates did not describe their experience in the desired format. Nevertheless, the assessment board accepted their applications because they demonstrated in their cover letter how they met the essential qualifications to the board's satisfaction. However, the instructions in the job advertisement state: "Failure to provide this information in the requested format will result in your application being rejected."

**60** The assessment board exercised its discretion to accept these applications despite the mandatory wording in the job advertisement. This demonstrates that the assessment board was prepared to be flexible in assessing candidates based on their individual circumstances. The Tribunal finds that the assessment board was not consistent in the manner it exercised its discretion to address the flaws in the job opportunity instructions. More flexibility should have been afforded to the complainant in light of the flawed instructions he was given.

**61** In *Chiasson v. Deputy Minister of Canadian Heritage* 2008 PSST 0027, the Tribunal found:

55 As a delegate of the PSC under section 15 of the *PSEA*, the respondent is responsible for ensuring the integrity of the appointment process. It must be able to offer a fair appointment process. When an error occurs in the appointment process, the respondent is required to ensure that the error is rectified as soon as possible and without prejudice to the candidates.

**62** On the basis of the human resources advice it received, the assessment board decided not to accept any new information from the complainant. However, the first issue the board had to consider was whether there was a flaw in the appointment process. Had the assessment board accepted that the wording of the instructions was flawed, it could then have examined how the error could be corrected. As the Tribunal found above, the instructions were flawed.

**63** The Tribunal agrees that an informal discussion is not intended to provide candidates with an opportunity to be reassessed. However, in this case, an error of significant consequence occurred. The respondent's error could only be corrected by accepting new information from the complainant, in the format that the respondent had intended. By refusing to do so, the complainant was unfairly eliminated from the appointment process.

**64** In this case, allowing the complainant to resubmit his experience qualifications would not have provided an advantage to the complainant or a disadvantage to other candidates. Experience is a matter of fact. A candidate either has it or does not have it at the time they submit their candidacy for an appointment process.

**65** In *Tibbs*, para. 70, the Tribunal identified five categories of abuse of authority applicable to discretionary administrative decisions. The following two are relevant to this complaint:

- a) When a delegate refuses to exercise his/her/its discretion by adopting a policy which fetters the ability to consider individual cases with an open mind; and
- b) When a delegate acts on inadequate material (including where there is no evidence, or without considering relevant matters).

**66** In this case, the assessment board fettered its discretion by refusing to accept or consider that its instructions were flawed, and then take measures to alleviate the impact that this error had on the complainant's application. It then proceeded to

eliminate the complainant from the assessment process on the basis of inadequate information regarding his experience qualifications.

**67** The respondent's failure, in this case, to correct a serious error directly led to the elimination of the complainant from the appointment process, denying him reasonable and fair access to an employment opportunity. Thus, the Tribunal finds that by acting with such serious carelessness or negligence, the respondent abused its authority.

**68** The Tribunal has often stated that much more is required than mere errors and omissions to constitute abuse of authority. (See *Tibbs* at para 65. See also *Neil v. Deputy Minister of Environment Canada*. 2008 PSST 0004, paras 50 and 51). In this case however, the lack of clarity in the instructions constituted more than a mere administrative error. The instructions were susceptible to different interpretations and led directly to the complainant's failure to demonstrate that he met the essential experience qualifications. Furthermore, when the respondent was made aware of this serious error and its consequences, it failed to consider ways to correct the situation. As a result, the respondent unfairly and improperly eliminated the complainant from the appointment process on the basis of inadequate information. This amounts to serious carelessness or negligence as the complainant was denied a fair opportunity to be considered for a position.

**69** The Tribunal finds that the respondent abused its authority in this case.

## **Decision**

**70** For all these reasons, the complaint is substantiated.

## **Corrective Action**

**71** The relevant provisions concerning corrective action are found in ss. 81(1) and 82 of the *PSEA*, which read as follows:

81. (1) If the Tribunal finds a complaint under section 77 to be substantiated, the Tribunal may order the Commission or the deputy head to revoke the appointment or not to make the appointment, as the case may be, and to take any corrective action that the Tribunal considers appropriate.



[...]

82. The Tribunal may not order the Commission to make an appointment or to conduct a new appointment process.

**72** The complainant has requested that he be given the opportunity to resubmit his application in the desired format.

**73** The Tribunal notes that this appointment process was initiated to create groups of qualified candidates for similar positions. In the circumstances, it agrees that the corrective action proposed by the complainant is appropriate.

### **Order**

**74** The Tribunal orders that within ten (10) days of this decision, the respondent is to offer the complainant an opportunity to resubmit an application demonstrating how he meets the essential experience qualifications for this appointment process. In this application, the complainant will be entitled to write one or two paragraphs on each essential experience qualification. The complainant is only entitled to refer to experience that he possessed on the date of his original application.

**75** If the complainant makes a submission and is found to meet the essential education and experience qualifications, he is to be afforded an opportunity to proceed through the assessment process as if he had been found to meet these essential qualifications in his original application.

Kenneth J. Gibson  
Member

**Parties of Record**

<b>Tribunal File</b>	2009-0461
<b>Style of Cause</b>	<i>Alain Poirier and the Deputy Minister of Veterans Affairs</i>
<b>Hearing</b>	August 31 and September 1, 2010 Charlottetown, Prince Edward Island
<b>Date of Reasons</b>	January 20, 2011
<b>APPEARANCES:</b>	
<b>For the complainant</b>	Alain Poirier
<b>For the respondent</b>	Karen Clifford