



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2008-0649
Issued at: Ottawa, February 4, 2011

YVES DENIS

Complainant

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

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	The complaint is dismissed
Decision rendered by	Maurice Gohier, Member
Language of decision	French
Indexed	<i>Denis v. President of the Canada Border Services Agency</i>
Neutral citation	2011 PSST 0004

Reasons for Decision

Introduction

1 In July 2007, the President of the Canada Border Services Agency (CBSA) held an internal, advertised appointment process to staff investigator positions at the FB-05 group and level in Montréal, Sherbrooke and Québec.

2 Yves Denis, the complainant, applied for this process. He did not obtain the passing mark of 70% for one of the essential qualifications for the position, the “analytical thinking and decisiveness” ability.

3 On September 30, 2008, the complainant filed a complaint with the Public Service Staffing Tribunal (the Tribunal) alleging that the CBSA (the respondent) had abused its authority in its evaluation of his answers in the written examination used to assess this ability. More specifically, the complainant alleges that the examination did not adequately assess the analytical thinking and decisiveness ability. He adds that the respondent abused its authority in determining that he failed to satisfy this criterion.

Summary of relevant evidence

4 The complainant has been an acting CBSA investigator since April 2006. Before that, he worked as a customs inspector for nearly ten years, from 1997 to 2006. During those years, he took several training courses in various investigation-related fields, such as forensic interviews and interrogations, senior investigator, prohibited weapons and immigration (offences and procedures).

5 Robert Langlois is the director of the regional criminal investigations programs for the entire province of Quebec. Around sixty employees report to him through five managers. Investigators play an important role in enforcing several pieces of legislation on, among other matters, immigration, the import and export of goods, and plant and animal protection. Their role is to deter activities that pose a health and safety risk to the public or that are likely to harm the Canadian economy. Their work requires them to demonstrate their analytical thinking and decisiveness ability. Mr. Langlois established the essential criteria for this selection process and set the passing mark for “analytical thinking and decisiveness” at 70%.

6 Mr. Langlois chose Claude Harvey as the assessment board chair for this process. Mr. Harvey has been a regional program manager since 1994 and has over 30 years of experience in the federal public service. He heads a team of 14 investigators for the Sherbrooke/Québec region.

7 The assessment board (the board) for this process was also composed of two other members, Patrick Scott and Élisabeth Quanwu.

8 The board had decided that the essential qualifications set out in the Statement of Merit Criteria would be assessed through an initial written examination on knowledge, a second written examination on two abilities (analytical thinking and decisiveness, and written communications), an interview and a reference check.

9 Candidates who had passed the knowledge examination were invited to the second written examination, in which “analytical thinking and decisiveness” was defined as follows:

Analytical thinking and decisiveness signify understanding a situation by breaking it into smaller pieces, or by tracing its implications, issues, or problems in a step-by-step way, the ability to make an appropriate decision and demonstrate commitment when the situation requires.

10 The portion of the written examination that assessed this ability consisted of 10 simulation exercises. The instructions page reiterated the definition of “analytical thinking and decisiveness” and explained that, for each question, candidates were to make a decision and explain their reasons for having made that decision.

11 The board assessed the candidates’ answers on the basis of pre-established criteria in the rating guide. Each question was worth 10 points, broken down according to the following grading scheme:

Makes the appropriate decision:	5
Gets to the point quickly:	1
Identifies determining information:	1
Proposes different alternatives:	1
Demonstrates a structured and coherent approach:	1
Defines the nature and scope of the problem:	1
[translation]	

12 During an exchange of information meeting held on October 23, 2008, the assessment board gave the complainant an addendum regarding the first indicator. This addendum specified the following information:

The appropriate decision is defined as follows:

The decision sought is worth 5 points;
An acceptable decision is worth 3 points;
A bad decision is worth 0 points; and
Not making a decision is worth 0 points.

The other indicators are based on a binary system: when candidates meet the indicator, they get one point; otherwise, they get no points.

[translation]

13 In a letter dated February 8, 2008, the complainant learned that he had not obtained the required passing mark for analytical thinking and decisiveness. This letter also informed him that he had been eliminated from the process.

14 On September 30, 2008, the complainant filed a complaint with the Tribunal. He asked that the appointments be revoked and that the Tribunal take any other action that it considered appropriate.

Issues

15 The Tribunal must determine the following issues:

- (i) Did the examination adequately assess the analytical thinking and decisiveness ability?
- (ii) Did the respondent abuse its authority in determining that the complainant did not have the analytical thinking and decisiveness ability?

Analysis

16 Section 36 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the PSEA), gives the deputy head broad discretion in the choice and use of tools that the deputy head considers to be appropriate to determine whether candidates meet the qualifications referred to in s. 30(2) of the PSEA. However, this discretion is not

absolute, and the Tribunal may find that there has been an abuse of authority if the complainant proves that the method used to assess his or her qualifications was unreasonable or that it did not assess the qualifications stipulated in the Statement of Merit Criteria. An assessment tool must adequately assess the qualification sought; if the tool is flawed, the outcome is unreliable (see *Jogarajah v. Chief Public Health Officer of the Public Health Agency of Canada*, 2008 PSST 0015, and *Chiasson v. Deputy Minister of Canadian Heritage*, 2008 PSST 0027, at para. 50).

Question I: Did the examination adequately assess the analytical thinking and decisiveness ability?

17 The complainant alleges that the respondent abused its authority in using an examination that did not adequately assess the ability sought. In the complainant's opinion, the written examination contained errors in its method of assessing analytical thinking and decisiveness. Furthermore, the complainant alleges that the respondent also abused its authority in refusing to correct these errors after they were brought to its attention.

18 The Public Service Commission (the PSC) did not appear at the hearing. However, it provided written submissions in which it notes that, according to the PSC's *Assessment Policy*, assessment processes and methods must effectively assess merit criteria. To ensure an effective assessment, it is important that the assessment methods and tools be clearly linked to the identified merit criteria and that they be able to accurately measure the criteria. According to the PSC, the examination clearly identified and defined the essential qualification being assessed — analytical thinking and decisiveness.

19 During his testimony, the complainant referred to several incongruities and inconsistencies in the text of the examination and the answer key. Among other points, the complainant noted the following:

- The questions were worded differently. For example, for the situations described in questions 1 to 3, the question was “Que devriez-vous faire et pourquoi?” [What should you do and why?], whereas, in questions 4 to 10, the question was “Que feriez-vous et pourquoi?” [What would you do and why?]. The complainant noted

that, in comparison, the questions in the English version of the examination were all the same: “What should you do and why?”.

- The examination answer key emphasized “the” appropriate decision rather than “a” decision. In some cases, the answer key stated that there was only one solution, but the same answer key awarded one additional point for proposing alternatives. The complainant submits that the answer key is flawed, since there are situations where this additional point can never be obtained.
- Question 3 was not worded in the same way in the examination as in the answer key. The examination states, “Vous pensez que c’est injuste” [You think that it is unfair], whereas the answer key states, “Vous pensez que la situation est injuste” [You think that the situation is unfair].
- The person concerned in Question 9 was a woman in the situation, whereas it was a man in the answer key.
- Since the answers in the answer key for Question 10 begin with “yes” or “no”, the original question may have been “Devez-vous en faire rapport?” [Should you report it?] rather than “Que devriez-vous faire et pourquoi?” [What should you do and why?].

20 Mr. Harvey explained that the assessment board drew on the *Values and Ethics Code for the Public Service* and the *CBSA Code of Conduct* to develop the situations and that the purpose of the written examination was to assess “analytical thinking and decisiveness”. In his opinion, the few minor variations raised by the complainant do not change the fact that the examination assessed candidates’ reactions in specific situations.

21 As for the complainant’s argument that the wording of certain questions was different on the examination compared with the answer key, the Tribunal finds that the minor variation in the formulation of these questions in no way changes either the context of the situation or the expected answer. Moreover, the Tribunal notes that, during the examination, candidates were not aware of the differences in the answer key; these differences therefore did not affect how they would analyze or react to a situation.

22 The concept of a decision sought versus an acceptable decision, in the answer key, shows that the assessment board was open to the possibility that there might be more than one answer in certain situations. It would be unreasonable to require an examination answer key to foresee all possible answers, especially unexpected ones.

23 The Tribunal finds that the complainant's arguments regarding questions 9 and 10 are immaterial. That the answer key for Question 9 refers to a person of the opposite sex is of no importance, either in the context or in the analysis of the situation. The same goes without saying for the reasoning of the answer key for Question 10.

24 The complainant failed to show that such mere errors are an abuse of authority by the respondent. As the Tribunal stated in *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008, at para. 65, "[i]t is clear from the preamble and the whole scheme of the *PSEA* that Parliament intended that much more is required than mere errors and omissions to constitute abuse of authority".

25 The examination consisted of 10 situations and required candidates to analyze each situation and explain how they would react in each case. The structure of the examination enabled the respondent to examine candidates' reasoning underlying their decisions. Based on the evidence, the Tribunal is satisfied that the examination adequately assessed the qualification sought, namely, "analytical thinking and decisiveness".

Question II: Did the respondent abuse its authority in determining that the complainant did not have the analytical thinking and decisiveness ability?

26 During his testimony, the complainant reviewed each of the 10 questions used to assess the "analytical thinking and decisiveness" ability, as well as his answers, in order to show what he perceives to be the illogical nature of the expected answers in the examination answer key. He also alleges that some of his answers were found not to be appropriate, even though they were consistent with the *CBSA Code of Conduct* or the *Values and Ethics Code for the Public Service*.

27 The assessment board corrected the complainant's answers following the examination and gave him a mark of 53%; he therefore did not obtain the passing mark of 70%. In four of the situations (1, 4, 9 and 10), the complainant received a mark of 9/10. In two situations (3 and 8), he was given a mark of 7/10 and 6/10, respectively. For the remaining situations (2, 5, 6 and 7), he received a mark of 1/10.

28 The Tribunal's role is to examine the appointment process to ensure that there is no abuse of authority. Its role is not to reassess a complainant's marks on the answers or to review responses but, rather, to consider whether the marking of the answers shows an abuse of authority (see *Costello v. Deputy Minister of Fisheries and Oceans Canada*, 2009 PSST 0032, at para. 69, and *Oddie v. Deputy Minister of National Defence*, 2007 PSST 0030, at para. 66).

29 In *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 0007, where there was an allegation of personal favouritism reflected in the correction, the Tribunal reviewed the answers of the complainant and of the person appointed.

30 The Tribunal finds that the complainant failed to show abuse of authority in the marking of his answers. Both the expected answers and the marking of his answers were reasonable.

31 For example, in Question 2, the candidate is placed in a situation where he encounters a colleague in the parking lot of a shopping centre. He notices that the colleague is using a CBSA vehicle for personal purposes. The complainant answered that he would speak directly with the employee in question but say nothing to the manager in charge. The expected answer for this question in the answer key indicates that the manager must be informed of the situation. During his testimony at the hearing, the complainant added several other considerations that were not part of the scenario described and that were not needed to be able to answer the question. According to Mr. Harvey's testimony, the assessment board determined that, by failing to inform the manager in charge, the complainant left everything up to the employee who had committed the offence, which was an unacceptable choice. The use of a vehicle for personal purposes constitutes serious misconduct and a safety risk to both the employee and to the public.

32 Questions 5 and 7 are other examples where the expected answers were based on the *CBSA Code of Conduct* and the *Values and Ethics Code for the Public Service*. Candidates were placed in two situations where they were offered, in the course of their

duties, an attendance prize and a thank-you gift, both of considerable value. In both cases, the complainant answered that he would accept the gifts and would make a report to either his manager or the manager responsible for making decisions on conflicts of interest, whereas the expected answer in the answer key was that the gifts should be politely refused. The complainant alleges that the expected answers were based on the assessment board's personal preferences rather than the applicable policies on the matter. During a meeting, one of the assessment board members had allegedly told him, "We knew what kind of person we wanted" [translation]. In the complainant's opinion, the comment showed that the board was choosing a type of person rather than assessing the candidates' abilities. He also claims that the board found his answers not to be appropriate even though they were consistent with the *CBSA Code of Conduct* or the *Values and Ethics Code for the Public Service*.

33 The *Values and Ethics Code for the Public Service* gives as an example a similar situation and suggests the following approach:

In the situation where you win an attendance prize, the following options can be considered. Depending on the context, it might be possible to politely and diplomatically decline the prize and ask that another name be drawn. Since an attendance prize is not directly related to your government position, there is less risk that this situation would be seen as a conflict of interest.

If you buy a ticket with your own money, the appearance of a conflict of interest may be reduced since the win depended solely on your purchase and is not a direct result of your official duties. However, it could be alleged that the only reason you were able to buy a ticket was that the federal government had paid for you to attend the conference, hence a potential conflict of interest situation.

Here again, if you are in doubt, refuse the prize, and if you do accept, make an immediate report to your supervisor or to the designated official when you return to your office.

(Emphasis added)

34 The *CBSA Code of Conduct* provides as follows regarding the acceptance of gifts, hospitality and other benefits:

Acceptance of gifts, hospitality and other benefits is permissible if they:

- are infrequent and of minimal value such as low-cost promotional objects, simple meals or souvenirs with no cash value;
- arise out of activities or events related to official duties of the public servant concerned;

- are within the normal standards of courtesy, hospitality or protocol; and
- do not compromise or appear to compromise your integrity or that of the CBSA in any way.

In case of doubt, you should decline the gift, hospitality or other benefits.

Where it is **impossible to decline** gifts, hospitality and other benefits that do not meet the principles set out above, or where it is believed that there is sufficient benefit to the CBSA to warrant acceptance of a certain type of hospitality, you must discuss it with your manager, who will seek **written direction from the manager delegated to make decisions on conflict of interest**. You will then be notified in writing whether the gift, hospitality or other benefit is to be declined or retained by the CBSA, donated to charity, disposed of or retained by you.

(Bold in original; underlining added)

35 The *Values and Ethics Code for the Public Service* states that the preferred option is to politely and diplomatically decline the prize. The conditions described in the second paragraph do not apply in these circumstances, and, according to the third paragraph, “if you are in doubt, refuse the prize”. In the *CBSA Code of Conduct*, the first condition to be met is that the prize/gift be of minimal value.

36 The attendance prize in Question 5, two round-trip airline tickets to any destination in Canada, is not of minimal value. In his answer, the complainant did not consider the possibility of declining the gift at all. The expected answer in the answer key was not based on the assessment board’s personal preferences, as alleged by the complainant, but instead was consistent with the *Values and Ethics Code for the Public Service* and the *CBSA Code of Conduct*.

37 In Question 7, an expensive disc player was being offered by the representative of a computer servicing company as a token of appreciation. The complainant answered that he would accept the gift and would make a report to the manager responsible for making decisions on conflict of interest. In the answer key, the expected answer was to tell the representative, in front of the manager, that accepting gifts contravenes departmental policy and politely decline the offer. The same provisions in the *Values and Ethics Code for the Public Service* and the *CBSA Code of Conduct* apply. The thank-you gift was “expensive” [translation], which fails to meet the very first condition in the *CBSA Code of Conduct* that the gift be “of minimal value”. The complainant did not

consider the possibility of declining the gift. The expected answer was consistent with the various codes.

38 As a final example, the purpose of Question 6 was to gauge candidates' reactions to an inappropriate comment regarding an absent colleague made by a manager in a meeting. In the answer key, the best answer is not to confront the manager but rather to inform the colleague of the situation and let him deal with it as he sees fit. During his testimony, the complainant complained that, when the situation involved someone in a position of authority, all steps to verify the situation had to be taken but that, when it came to a colleague, as is the case in Question 2, action was required. He pointed out that the purpose of the answer key with regard to Question 6 was apparently to avoid embarrassing the manager during the meeting.

39 Mr. Harvey noted that the complainant's reasoning was incomplete and flawed. It is not enough to stop the analysis at not wanting to embarrass the manager; the reason for proceeding should be considered. Apparently, the purpose of the expected answer in the answer key is to turn everything over to those with an interest in the matter or who are directly involved in the situation, namely, the manager and the colleague. Meeting with the manager alone, in private, would have been an acceptable answer but requires a great deal of tact, as it "could lead to an explosive situation" [translation], according to Mr. Harvey. Taking the measure proposed by the complainant and confronting the manager during the meeting would very likely create added conflict between the manager, the person taking the action and the other team members, without resolving the problem between the manager and the colleague. The assessment board found that the option chosen by the complainant would make matters worse and was therefore not an acceptable approach. The complainant failed to show that such a conclusion amounts to an abuse of authority by the assessment board.

40 For all of these reasons, the Tribunal finds that the complainant failed to show that the respondent abused its authority in determining that he did not have the analytical thinking and decisiveness ability.

Decision

41 For all these reasons, the complaint is dismissed.

Maurice Gohier
Member

Parties of Record

Tribunal File	2008-0649
Style of Cause	<i>Yves Denis and the President of the Canada Border Services Agency</i>
Hearing	April 27, 28 and 29, 2010 Montréal, Quebec
Date of Reasons	February 4, 2011
APPEARANCES:	
For the complainant	Érik Lupien
For the respondent	Martin Desmeules
For the Public Service Commission	Marie-Josée Montreuil (written submissions)