



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2010-0356
Issued at: Ottawa, December 1, 2011

DANIEL LAPIERRE

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 *Public Service Employment Act*

Decision The complaint is dismissed

Decision rendered by Lyette Babin-MacKay, Member

Language of Decision French

Indexed *Lapierre v. Commissioner of the Correctional Service of Canada*

Neutral Citation 2011 PSST 0037

Reasons for Decision

Introduction

1 The complainant, Daniel Lapierre, was a candidate in an advertised internal appointment process to fill Assistant Warden, Interventions (AWI) and Assistant Warden, Operations (AWO) positions at the AS-07 group and level at the Correctional Service of Canada (CSC) in the Québec region. His application was rejected following the interview because he did not meet one of the essential qualifications.

2 The complainant alleges that he failed the interview because he was misdirected which resulted in him studying the Key Leadership Competencies (KLCs) to prepare for the process. He alleges that this amounted to bad faith. The complainant also argues that the respondent showed a lack of transparency during the informal discussion and exchange of information by failing to provide the information that he requested.

3 The respondent, the Commissioner of the CSC, denies that there was any abuse of authority or lack of transparency.

Background

4 When the complainant submitted his application, he was the acting AWI at Leclerc Institution in Laval, Québec.

5 The complainant passed the written exam, which assessed knowledge. He was invited to an interview to assess the following abilities and personal suitability criteria:

Ability to manage human resources;
Ability to analyze, identify options and take appropriate action;
Ability to negotiate;
Leadership; and
Results oriented.

6 The interview related to both positions (AWI and AWO), and included four questions, all scenarios. Two questions applied to both positions, two concerned only the AWI position, and two others only the AWO position.

7 The complainant failed the interview because he did not obtain the pass marks for the personal suitability criterion of leadership for the AWI and AWO positions.

8 On June 15, 2010, the respondent posted a *Notification of Appointment or Proposal of Appointment* for Caroline Bouchard's indeterminate appointment to an AWI position in Drummond, Québec.

9 On June 21, 2010, the complainant filed an abuse of authority complaint under s. 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the PSEA).

Issue

10 The Tribunal must decide whether the respondent showed bad faith when assessing the complainant against the essential qualification of leadership.

Analysis

11 The PSEA does not define "abuse of authority," but s. 2(4) specifies that it includes bad faith and personal favouritism.

12 As stated by the Tribunal in a number of decisions, complainants have the burden of proving, on a balance of probabilities, that the appointment process was tainted by an abuse of authority (*Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008, paras. 49 and 55).

13 The complainant argues that when he was preparing for the process, he was poorly advised by his warden and misdirected by the information available on the CSC, Treasury Board Secretariat (TBS) and Public Service Commission (PSC) websites. He asserts that any reasonable person would have concluded that the KLCs had to be studied for the process. He submits that he failed the assessment of the leadership criterion for that reason. He refers the Tribunal to *Poirier v. Deputy Minister of Veterans Affairs*, 2011 PSST 0003, and believes he was treated in a similar fashion.

14 The complainant also alleges that contrary to what is stipulated in the PSEA, the respondent used relative merit in the appointment process and changed his

leadership mark after comparing his answers to the other candidates' answers. After the first correction, his mark was 12 out of 20, high enough to qualify. After the second correction, his mark was lowered to 7 out of 20. After the third correction, his final mark was 10 out of 20.

15 The complainant explains that when preparing for the appointment process, he asked Robert Poirier, his institution's warden, for advice on the material to study. Mr. Poirier advised him to study the KLCs. The complainant adds that his own research also showed that the CSC, TBS and PSC are now placing emphasis on effective behaviours for all levels of management. In support of his argument, he submitted documents from those organizations that discuss KLCs, and some statements of merit criteria (SMC) for CSC positions in which KLCs were identified as essential qualifications. The KLCs are based on the following competencies: values and ethics, strategic thinking, engagement and management excellence.

16 In his testimony, Mr. Poirier explained that he had been the warden of Leclerc Institution at the time of the appointment process. He was not involved in the process. He confirmed that he had recommended that the complainant study the KLCs. Mr. Poirier stated that contrary to the current direction of the public service, the SMC for this process did not refer to the KLCs. This gave him cause for concern, which he expressed to the Regional Management Committee and to Denis Lévesque, a member of the assessment board. He was told that his concerns would be taken into consideration and that changes might be made to the SMC if deemed necessary. Mr. Poirier did not state whether anyone had gotten back to him on the issue. Under cross-examination, he acknowledged that at the CSC, the use of KLCs is mandatory for annual performance assessments but not for appointment processes.

17 The assessment board was composed of Sylvie Brunet-Lusignan, Regional Administrator, Reintegration and Programs, and Mr. Lévesque, a national investigator at the CSC.

18 Mr. Lévesque confirmed that at a meeting, Mr. Poirier had raised concerns about the content of the SMC. Mr. Lévesque stated that he explained to Mr. Poirier that

the people responsible for developing the assessment tools had made the decision and that he had to accept their choice.

19 Mr. Lévesque explained that the assessment tools and the SMC for the AWI and AWO positions were developed by a national committee, of which he was a member, for similar processes held in different regions across the country. The national committee decided how personal suitability would be assessed. Rather than use the KLCs, emphasis was placed on leadership, values and ethics, and results-oriented behaviour. The personal suitability criteria of initiative and values and ethics were assessed through reference checks. Leadership was assessed through responses to a scenario that also evaluated the ability to analyze and identify solutions. Mr. Lévesque stated that while on the committee, he expressed his disagreement with the approach chosen for assessing leadership and asked whether the criterion could instead be evaluated by reviewing all the candidates' answers. Management decided against this because the assessment processes had already started elsewhere in the country and the tools could not be modified along the way.

20 Ms. Brunet-Lusignan described the interview process. The questions, which were all scenarios, were given to the candidates, who had a certain amount of time to prepare their answers. The criteria assessed by each question were indicated on the questionnaire. She and Mr. Lévesque took note of each candidate's answers.

21 In order to assess the answers, a marking scheme showed the elements of the answers sought for each question, and an answer key helped with determining the appropriate mark. Ms. Brunet-Lusignan and Mr. Lévesque each did an initial correction on their own. They did a second correction together and weighed all the candidates to ensure that they had applied the rating criteria consistently for each candidate. A third correction was done for certain candidates. In the complainant's case, the third correction was done because he was just below the pass mark for the personal suitability criterion of leadership. Following the third correction, the committee gave the complainant three extra points for leadership for the AWI position, which was still not enough for a pass mark. His mark for leadership for the AWO position stayed the same. Leadership was the only qualification that the complainant failed to meet.

Ms. Brunet-Lusignan stated that the three corrections explained the changes to the marks in the documents concerning the complainant.

22 Ms. Brunet-Lusignan and Mr. Lévesque stated that during the informal discussion, they explained the results to the complainant, who had prepared on the basis of the KLCs and did not understand why the committee had not used them. According to Mr. Lévesque, the committee took into account the complainant's concerns, and, "to be sure," reviewed his answers after the informal discussion. The committee reached the same conclusion. There were basic elements missing in his answer to the question on leadership for the AWI position and there were clearly many elements missing in his answer to the question on leadership for the AWO position.

23 Section 30(2) of the PSEA gives the deputy head the authority to establish the essential qualifications for the work to be performed. It is then up to each candidate to study the SMC, determine which merit criteria will be assessed and prepare accordingly.

24 It is important here to make the distinction between the complainant's case and the case described in the *Poirier* decision, which the complainant mentioned in his arguments. In *Poirier*, the wording of the *Job Opportunity Advertisement* (JOA) was unclear. The complainant concluded that he had to describe all his experience qualifications in one or two paragraphs, while the respondent instead wanted candidates to prepare one or two paragraphs for each qualification. During the informal discussion, the respondent refused to review its decision despite the complainant's explanation. The Tribunal found that the lack of clarity in the advertisement's instructions directly contributed to the elimination of the complainant from the appointment process. The assessment board fettered its discretion by refusing to accept or consider that the instructions were flawed. It eliminated the complainant from the appointment process on the basis of inadequate information regarding his experience qualifications, which constituted an abuse of authority.

25 Mr. Lapierre's case is different from the case in *Poirier* because in the complainant's case, the SMC was clear. The SMC did not include the KLCs and

leadership was a personal suitability criterion. The complainant stated that if he had known that the KLCs would not be assessed, he could have shown that he met the personal suitability criterion of leadership. However, as part of his preparation, it was the complainant's responsibility to study the SMC in order to identify the qualifications that would be assessed. The SMC clearly did not refer to the KLCs. The respondent did not have to take into account the fact that the complainant prepared for the interview on the basis of different qualifications.

26 Concerning the correction of the complainant's interview results, his final mark was determined by the consensus of the assessment board members. The PSEA no longer requires that the candidates' relative merit be assessed or that they be ranked, although managers are free to use this method. Section 30(2)(a) of the Act requires only that the person appointed be qualified for the position (see *Aucoin v. President of the Canada Border Services Agency*, 2006 PSST 0012).

27 The complainant also argued that the respondent should have used reference checks, together with the chosen assessment tool, to assess the personal suitability criterion of leadership. Under s. 36 of the PSEA, the deputy head with appointment authority may use any assessment method considered appropriate for determining whether a person meets the essential qualifications referred to in s. 30(2) of the PSEA (see *Trachy v. Deputy Minister of Transport, Infrastructure and Communities*, 2008 PSST 0002). In this case, the respondent chose to assess leadership using a scenario during an interview and not through reference checks. The respondent had the discretion to do so under s. 36 of the PSEA.

28 The Tribunal finds that the complainant failed to demonstrate that the respondent showed bad faith in the assessment of the personal suitability criterion of leadership. In this case, the chosen assessment and correction methods were reasonable. The respondent also did not have to take into consideration the fact that the complainant prepared on the basis of qualifications that were not included in the SMC.

Other issue

29 The complainant also states that during the informal discussion and exchange of information, the respondent refused to provide a complete copy of the questions and expected answers, of his annotated marking sheets, and of his results. To obtain these items, he had to make two requests for order for provision of information. He argues that this showed that the respondent lacked transparency.

30 According to the PSC's *Informal Discussion Policy*, deputy heads must ensure that persons eliminated from consideration who request an informal discussion have access to sufficient information concerning themselves to understand and discuss the decision. In this case, the complainant asked for a copy of his results during the informal discussion. The respondent refused and explained that it would not provide a copy of the results because the questions might be used for other processes.

31 One of the objectives of the informal discussion is to ensure transparency and communication during the appointment process. The fact that the respondent refused to provide a copy of its assessment documents could have given the complainant the impression that the respondent lacked transparency. The respondent explained why it was not ready to share information at the informal discussion stage. However, after the complaint was filed and during the exchange of information, it would have been desirable for the respondent to give those documents to the complainant when he requested them. He could have thus prepared his complaint instead of having to make two requests for order for provision of information to obtain those documents.

Decision

32 For all these reasons, the complaint is dismissed.

Lurette Babin-MacKay
Member

Parties of Record

Tribunal File	2010-0356
Style of Cause	<i>Daniel Lapierre and the Commissioner of the Correctional Service of Canada</i>
Hearing	June 2 and 3, 2011 Montreal, Quebec
Date of Reasons	December 1, 2011
APPEARANCES	
For the complainant	Daniel Lapierre
For the respondent	Léa Bou Karam
For the Public Service Commission	Marc Séguin (written submissions)