



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**Files:** 2008-0490, 0491, 0492,  
0493, 0494 and 0495  
**Issued at:** Ottawa, February 9, 2011

**DIANA JARVO, MICHELE DONALD, KIMBERLY DROVER, LINDA NORTH,  
SHIRLEY MILLER AND JOACHIM DE CANGAS**

Complainants

AND

**THE DEPUTY MINISTER OF NATIONAL DEFENCE**

Respondent

AND

**OTHER PARTIES**

<b>Matter</b>	Complaints of abuse of authority pursuant to sections 77(1)(a) and (b) 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>Jarvo v. Deputy Minister of National Defence</i>
<b>Neutral Citation</b>	2011 PSST 0006

# Reasons for Decision

## Introduction

1 These complaints concern the non-advertised appointment of Sylvia Budd to the AS-04 position of Support Services Manager, Canadian Forces Health Services Centre, Department of National Defence (DND), at the Canadian Forces Base (CFB) Shilo, Manitoba. The complainants, Diana Jarvo, Michele Donald, Kimberly Drover, Linda North, Shirley Miller and Joachim de Cangas, allege that the choice of a non-advertised appointment process was an abuse of authority. They further allege that Ms. Budd does not meet the essential qualifications for the AS-04 position.

2 The respondent, the Deputy Minister of National Defence, denies these allegations. It asserts that pressing operational needs justified the use of a non-advertised process and that Ms. Budd was assessed and met all the essential qualifications for the position.

## Background

3 The Health Services Centre (HSC) provides primary health care to military personnel assigned to CFB Shilo as well as those temporarily there on operations or training. The HSC is comprised of civilian and military positions, headed by the Commanding Officer/Clinic Manager (CO), Major Paul Caines.

4 From December 2007 until April 2008, Ms. Budd was appointed on an acting basis to the Support Services Manager position. On June 9, 2008, Major Caines issued an email notice to HSC staff, announcing that Ms. Budd had been offered the position. A *Notification of Consideration* followed on June 17, 2008. On July 2, 2008, a *Notification of Appointment or Proposal of Appointment* was issued, announcing the non-advertised indeterminate appointment of Ms. Budd to the AS-04 Support Services Manager position. Ms. Budd's appointment was effective July 2, 2008.

5 The complainants filed complaints of abuse of authority with the Public Service Staffing Tribunal (the Tribunal) under s. 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the PSEA). The Tribunal consolidated the complaints in

accordance with section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6.

## Issues

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

- (i) Did the respondent abuse its authority in choosing a non-advertised appointment process?
- (ii) Did the respondent make errors in this appointment process that constitute an abuse of authority?
- (iii) Did the respondent abuse its authority by appointing an unqualified person?

## Analysis

**Issue I:** Did the respondent abuse its authority in choosing a non-advertised appointment process?

**7** Section 33 of the PSEA explicitly permits the use of non-advertised appointment processes. Nevertheless, s. 77(1)(b) of the PSEA provides for a direct challenge of the discretionary choice between an advertised and non-advertised process, on the ground of abuse of authority. The Tribunal has established that merely choosing to conduct a non-advertised process is not an abuse of authority in itself. For a complaint under s. 77(1)(b) of the PSEA to be successful, the complainant must establish, on a balance of probabilities, that the **choice** to use a non-advertised process was an abuse of authority. See for example, *Rozka v. Deputy Minister of Citizenship and Immigration Canada*, 2007 PSST 0046.

**8** Major Caines testified that, when he joined the HSC in January 2008, two of the five positions reporting to him were vacant; the Clinical Services Manager and the Chief Clerk. The Support Services Manager, Lorraine Lockhart, was acting as Clinical Services Manager and Ms. Budd was acting as Support Services Manager. Ms. Lockhart was subsequently appointed as Clinical Services Manager and the

Support Services Manager position was left vacant when Ms. Budd's acting appointment ended in April 2008.

**9** Major Caines explained that the Support Services Manager provides human resources advice to the CO and is responsible for business planning, budget planning and oversight, and infrastructure coordination. According to Major Caines, this position is critical to the HSC's business planning as it provides information and analysis of the overall human resources situation.

**10** On June 11, 2008, Major Caines prepared and signed a written rationale explaining his choice to use a non-advertised process to fill the Support Services Manager position. In the written rationale and in his testimony Major Caines explained that the vacancies and temporary acting situations at the management level had placed a strain on the management team. At the end of Ms. Budd's acting appointment the duties of the vacant Support Service Manager were distributed among the other managers, which increased the strain. He further elaborated in his testimony, stating that the management team was working long hours to try to maintain services but the situation was not sustainable. According to Major Caines, services were deteriorating. For example, human resources approvals from Headquarters were not being tracked and initiatives, such as staffing key clinical positions, were stalled.

**11** Major Caines testified that he anticipated that the existing situation would worsen because, at the time, the HSC was preparing for business planning and for the return of 800 soldiers from Afghanistan in August and September 2008. He decided to use a non-advertised appointment process to staff quickly, to reduce management team fatigue and increase productivity to meet operational needs.

**12** The complainants challenge this justification. Specifically, they question whether, in fact, there was stress or fatigue among employees. They submit that, if there was a strain on the staff, the appointment of an existing employee would do nothing to provide relief. They called Amy Kipfer as a witness. Ms. Kipfer is a Human Resources Officer at CFB Shilo. She testified that she was not aware of any complaints or absences due to stress or fatigue.

**13** The Tribunal is not persuaded by the complainants' submissions on this matter. Major Caines' testimony at the hearing was consistent with the rationale he wrote at the time of the appointment. The Tribunal finds that Major Caines' observations and explanation of the impact of the circumstances on the managers, who report directly to him, is more reliable evidence of the situation than Ms. Kipfer's testimony. Also, while this appointment did not increase the number of employees in the HSC, it did increase the number of managers and, therefore, addressed Major Caines' stated concern. Furthermore, Major Caines' testimony that the managers' capacity would be further strained by the anticipated return of troops and the business planning exercise was uncontested.

**14** The Tribunal is satisfied that the decision to use a non-advertised appointment process was made to address current and future pressing operational needs. In addition, the Tribunal finds that the respondent has complied with the Public Service Commission's (PSC) *Policy on Choice of Appointment Process*. In accordance with that policy, DND has established criteria for the use of non-advertised appointment processes. In addition to specific situational criteria, DND has specified that a non-advertised process can be chosen in "other" circumstances, when a non-advertised process best meets DND's needs. The written rationale and Major Caines' testimony show that Major Caines' reasons fall within this latter criterion.

**15** The evidence before the Tribunal does not support a finding that Major Caines' decision to use a non-advertised appointment process constitutes an abuse of authority.

**Issue II:** Did the respondent make errors in this appointment process that constitute an abuse of authority?

**16** In a number of decisions, the Tribunal has found that although a respondent did not abuse its authority in choosing a non-advertised process, one or more serious errors or omissions in the appointment process may result in a finding of abuse of authority. See for example *Robert and Sabourin v. Deputy Minister of Citizenship and Immigration*, 2008 PSST 0024.

**17** The Tribunal has also found that errors and omissions may not be serious or significant enough to constitute abuse of authority. See *Morris v. Commissioner of Correctional Service of Canada*, 2009 PSST 0009 (*Morris*). In this case, the Tribunal finds that there are deficiencies in the process documentation; however, they are minor and do not amount to abuse of authority.

**18** According to the PSC's *Policy on Choice of Appointment Process*, Major Caines was required to complete a written rationale demonstrating how the non-advertised process met DND's criteria and the staffing values. DND has created a *Non-Advertised Appointment Rationale* form (Rationale) for that purpose.

**19** An older version of the Rationale form was used in this case but the Tribunal does not place great significance on this. The use of the older form did not have an effect on the substance of the rationale. This written rationale adequately responds to DND's requirement to explain why the non-advertised process was the best means to meet the needs of the HSC at the time. Since DND has selected "other" as one of its criteria for using a non-advertised process, the rationale is compliant with the requirement to demonstrate that the choice of process respects the departmental criteria.

**20** The complainants argue that there was an impropriety in providing a written justification of the non-advertised process only after the decision was made.

**21** The Tribunal finds that Major Caines complied with DND's requirement and that the decision to use a non-advertised process was documented in a timely manner. According to the Rationale, DND requires that "[a]fter review and discussion [...], if a manager decides to proceed with a non-advertised appointment process, a written rationale must be prepared and signed ..." The evidence shows that Major Caines sent a *Staffing Request* to Ms. Kipfer on May 27, 2008. He wanted to fill the Support Services Manager position, but had not decided on the appointment process he would use. Major Caines testified that his preference would have been to conduct an external advertised process; however, at the time, his overriding concern was to staff the Support Services Manager quickly. After discussing the situation with the Base Surgeon

and consulting Ms. Kipfer, Major Caines decided, in early June, to use a non-advertised process. The completed Rationale is dated June 11, 2008, which is before the formal notices regarding the appointment were issued, and before the appointment was made.

**22** The complainants also submit that the written rationale does not comply with the requirement to address the staffing values. To address this allegation, the Tribunal will examine the values.

**23** The preamble to the PSEA identifies two core values, namely merit and non-partisanship. Section 30 of the PSEA ensures that appointments respect the two core values. The preamble also describes a public service whose members come from across Canada. Managers have considerable discretion in staffing matters, but the preamble calls for the exercise of that discretion in a manner that is fair, transparent and respectful of employees. Concerns about appointments are to be resolved through effective dialogue and recourse.

**24** In accordance with s. 29 of the PSEA, the PSC has established policies governing how appointments are made. The PSC's policies provide guidance to those with delegated authority in applying the PSEA. The Tribunal acknowledges the value of such guidance, as well as its application to deputy heads. However, these policies are not binding on the Tribunal, and the Tribunal must interpret policy in a way that is consistent and coherent with the legislative framework. It is a basic principle of law that an Act of Parliament must prevail over inconsistent or conflicting subordinate instruments. Accordingly, the Tribunal must examine PSC policy in light of the entire context of the PSEA, in the grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the legislation and the intention of Parliament. See Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4<sup>th</sup> ed. (Markham: Butterworths, 2002) 1, 259, 272.

**25** Section 33 of the PSEA provides the explicit authority to conduct a non-advertised appointment process. There is no preference given to advertised over non-advertised processes in the PSEA.

**26** In its *Appointment Policy* the PSC has identified fairness, transparency, access and representativeness as guiding values for managers who are delegated to make appointment decisions. The allegations in this case relate to the values of fairness, transparency and access. Accordingly, those are the values that are examined in these reasons.

**27** According to the PSC's *Appointment Policy*, transparency is achieved when information about strategies, policies, practices and decisions is communicated in an open and timely manner. The Tribunal has held that, in the context of a non-advertised appointment process, notification to employees, the opportunity to discuss the reasons for the decision informally, and an examination of the process through recourse to the Tribunal are measures that contribute to transparency. See *Morris* for example.

**28** The *Appointment Policy* characterizes fair appointment decisions as those that are made objectively and without personal favouritism or political influence. The policy goes on to state that practices must reflect the just treatment of persons. This definition underscores that, in the context of staffing in the public service, one cannot consider fairness through the narrow lens of one individual's perception or perspective. To make objective appointment decisions, delegated managers must consider several perspectives and seek to balance often competing interests when they consider the options available to them to staff a position. It could be said that a manager needs to consider fairness from several perspectives, knowing that the decision is unlikely to be perceived as fair by everyone.

**29** With respect to access, the preamble to the PSEA describes a public service whose members are drawn from across the country. The PSEA does not, however, require access each time an appointment is made in the public service. Section 29 permits internal appointment processes, which limit consideration to people already employed in the public service. Section 34 permits further restriction of access to appointment processes based on where a person lives or works, for example.

**30** The PSC's *Appointment Policy* states that people from across the country should have a reasonable opportunity to apply and be considered for public service



employment. Nevertheless, it is evident that access to a position is effectively eliminated for all but the appointee in the case of a non-advertised process chosen in accordance with s. 33.

**31** In a supporting document – *Appointment Policy Considerations - Choice of Process* – the PSC advises managers that they “may want to consider ... access to employment or developmental opportunities” when deciding what appointment process they will choose.

**32** Neither the PSEA nor PSC’s *Appointment Policy* guarantees an employee a right of access to every appointment opportunity. The PSC expressly promotes the application of reason and discretion with respect to the value of access and appointment decisions.

**33** The PSC’s policy on *Choice of Appointment Process* states that managers must ensure that the written rationale for a non-advertised process demonstrates how the process meets the guiding values. Managers must weigh all the implications of choosing a non-advertised process; however, access cannot be demonstrated in every individual non-advertised appointment process. Access is a value that is demonstrated when appointments in the public service are viewed collectively rather than individually.

**34** The written rationale in this case deals directly with transparency, stating that informal and formal notifications to employees would ensure transparency in this process. It also addresses fairness, stating that the value of fairness would be met through the opportunity to informally discuss Major Caines’ decision with him. More importantly, Major Caines acted on these commitments and notified employees in a timely manner. He told employees about the appointment in an email before the first formal notification was issued and he extended the normal time allowed for informal discussion after that notice. In total he gave employees more than 20 days to informally discuss his decision with him, before the appointment was made. The PSC requires that a minimum of five days be given. Informal discussion was offered for those interested in obtaining information about the appointment decision and information was provided about making a complaint to the Tribunal. It is also important to note that Major Caines

was transparent about his reasons for this appointment decision from the beginning. There is no evidence that he did not openly explain his reasons to employees who sought informal discussion.

**35** In addition to arguing that the written rationale failed to address fairness, two of the complainants testified at the hearing that this process was unfair, essentially because they did not have the opportunity to apply for the position. In light of the previously mentioned legislative context, this subjective view of fairness is not sustainable. Under the PSEA, non-advertised appointment processes are not unfair merely because they eliminate the opportunity for employees to apply; that is the essence of their nature. Given the very nature of a non-advertised appointment process, the lack of opportunity to apply cannot reasonably be the basis for determining an absence of fairness.

**36** The evidence demonstrates that Major Caines considered the managers who were struggling because of additional workload due to vacancies. He also considered the military personnel who receive services from the HSC, and the organization's ability to meet their demands. Accordingly, Major Caines made the decision that he believed was appropriate in the circumstances. However, he also considered the fact that some employees would view his decision negatively, and he communicated with employees and made himself available for discussion. Nothing in the evidence demonstrates that Major Caines' decision to use a non-advertised appointment process was unfair.

**37** In light of the entire legislative framework, the Tribunal finds that the written rationale sufficiently addresses the guiding values.

**38** The Tribunal agrees with the complainants' submission that the rationale is missing a link to the Human Resources Plan (HR plan). During her testimony, Ms. Kipfer pointed out that page 16 of the HSC HR plan identifies an under-representation of women at the management level, which would be addressed through this appointment. However, the written justification contains only a general statement about employment equity that does not explain a link between this appointment and the HR plan, which is required according to the DND Rationale.

**39** The Tribunal finds that this is an omission in the file documentation required by DND; however, there is no evidence of non-compliance with the PSC's policy. The PSC policy requirement is that the choice of appointment process is consistent with the organization's HR plan. The policy is silent on whether this must be documented. Although the complainants submitted the HR plan into evidence, they have failed to demonstrate that this non-advertised process is inconsistent with its content.

**40** DND also requires managers to describe the possible and potential impact a non-advertised process will have on others in the work unit. This is an important consideration since a non-advertised process inherently prevents access to others who may be interested in the position to be filled. The rationale in this case does not contain a section dedicated to the effect of the appointment on employees in the organization. However, the Tribunal finds evidence in the rationale as a whole that Major Caines considered the impact this non-advertised appointment would have on his employees at all levels.

**41** The written rationale demonstrates that Major Caines' primary consideration at the time was the negative effect of the existing situation on his managers. The rationale explains the problems with the current allocation of tasks and the fact that this was causing "burn out" and was reducing productivity. It also explains the need to fill the Support Services Manager position quickly in order to reduce the fatigue. The rationale then states that an internal employee has been identified who meets the essential qualifications for the position. The positive effect on the managers of proceeding quickly with a non-advertised process is evident. Major Caines also addressed these issues in his testimony, adding that the demands on managers were going to increase due to the return of troops from Afghanistan.

**42** Major Caines also demonstrated that he knew that this decision would likely have a negative effect on other employees. He planned to address this by communicating his decision and providing sufficient time and access to him for informal discussion about his decision. This is described in the written rationale.

**43** In the circumstances, Major Caines chose to alleviate the managers' stress and manage operational demands despite the likely negative impact on other employees. The Tribunal finds that the information in the written rationale is sufficient to establish that Major Caines complied with the requirement to consider the effect of his decision to make a non-advertised appointment.

**44** Finally, the complainants submit that the rationale is missing an explanation of why only one person was considered for appointment.

**45** The Tribunal finds that all the information needed to explain why only one person was considered is contained in the written rationale. Major Caines had determined that Ms. Budd met all the essential qualifications for the Support Services Manager position. This is stated in the written rationale. By proceeding to appoint Ms. Budd, without considering others, Major Caines could act quickly. The need to act quickly to address staff fatigue and reduced productivity is also explained in the written rationale.

**46** The complainants challenge Major Caines' assessment that Ms. Budd met the essential qualifications. That issue is addressed later in these reasons. As for DND's requirement to explain why only one person was considered for appointment, the Tribunal is satisfied that the written rationale does that.

**47** This written rationale was not structured in a manner that responds point by point to each of DND's requirements and is, therefore, somewhat deficient in form. The rationale is also missing an explanation of how the appointment was consistent with the organization's HR plan. However, these deficiencies do not rise to the level of abuse of authority. The Tribunal finds that a read of the entire rationale demonstrates that the information it contains responds to the PSC's and DND's objectives related to non-advertised appointments. Moreover, having examined it closely, the Tribunal has no concerns related to the substance of this rationale.

**48** Based on the evidence, there were no errors or omissions in this non-advertised appointment process or in the documentation that amount to abuse of authority.

**Issue III:** Did the respondent abuse its authority by appointing an unqualified person?

**49** The complainants argue that Ms. Budd's appointment was not based on merit. They submit that there is no evidence that she meets all the essential qualifications.

**50** It is well established that the burden of proof in a complaint before the Tribunal rests with the complainant. See *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008. The Tribunal finds that the complainants have not provided evidence to support their position.

**51** The respondent provided evidence that Ms. Budd was assessed in early June and that the assessment was recorded in writing in mid-June, prior to her appointment on July 2, 2008.

**52** The complainants submit that an assessment of Ms. Budd based on Major Caines' personal knowledge is inadequate, but the Tribunal has determined that the personal knowledge of an assessor is an accepted assessment method. See *Visca v. Deputy Minister of Justice*, 2007 PSST 0024. Major Caines had only worked with Ms. Budd for four months, but she reported directly to him. Moreover, Major Caines testified that his assessment was also based on Ms. Budd's résumé and her Performance Review Reports. There is no evidence to support a finding that this combination of tools was insufficient to conduct a proper assessment.

**53** Major Caines documented his conclusions in a written assessment. The complainants argue that the written assessment does not demonstrate that Ms. Budd meets three of the essential qualifications: proficiency in English; the education qualification; and, experience using Microsoft Office Suite.

**54** The written assessment states that Ms. Budd was using Microsoft Office Suite daily. This clearly demonstrates that she meets the established qualification.

**55** Regarding education, the complainants submit that nothing in the respondent's evidence demonstrates that Ms. Budd meets the qualification established for this appointment or even the minimum education requirement established in the *Qualification Standard* for AS positions.

**56** Section 30(2) of the PSEA requires that the person who is appointed meet the essential qualifications that were established. Under s. 31(2) of the PSEA, qualifications that are established for an appointment process must meet or exceed the *Qualification Standard*.

**57** The *AS Qualification Standard* sets a secondary school diploma or employer-approved alternatives as the minimum education requirement. Employer approved alternatives to meeting this minimum standard include an acceptable combination of education, training and/or experience. For this appointment, Major Caines required a university degree in health care management, business administration or a health care discipline, or an acceptable combination of education, training and/or experience.

**58** For her appointment to be made based on merit, Ms. Budd had to meet the education requirement established for this process, which exceeded the minimum required by the *Standard*.

**59** In their arguments, the complainants stated that two years of post-secondary school was required as part of the acceptable alternative to university graduation in this process. However, they did not provide any evidence that this was the requirement. On the other hand, Major Caines testified that he had defined the acceptable alternative to a degree as two or more years of experience in the health care environment combined with some post-secondary courses and health care-related training. This testimony is consistent with the assessment that was written at the time of the appointment process. The written assessment describes Ms. Budd's experience, post secondary courses and related training. Also, Ms. Budd's résumé was submitted as evidence that she met the established alternative and, therefore, the essential education qualification.

**60** The Tribunal is satisfied that Ms. Budd was assessed against the education qualification as it was established and defined by Major Caines, and was found qualified.

**61** Major Caines did not record his assessment of Ms. Budd's official language proficiency and this is an omission. However, the language qualification for this position

is English essential and the complainants have failed to provide any evidence that Ms. Budd does not meet this qualification.

**62** The complainants point out that the word “meets” does not appear in the written assessment. There is, however, a short narrative related to each qualification explaining Major Caines’ assessment of how Ms. Budd has demonstrated that she meets the qualification. The written assessment is brief; nevertheless, it contains sufficient information to support Major Caines’ conclusion that Ms. Budd is qualified. In the Tribunal’s view this assessment is more comprehensive than one in which a check mark or the word “meets” is the extent of the recorded assessment.

**63** The Tribunal is satisfied that Major Caines properly assessed Ms. Budd and found her to be qualified for appointment to this position.

### **Decision**

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

Merri Beattie  
Member

**Parties of Record**

<b>Tribunal Files</b>	2008-0490, 0491, 0492, 0493, 0494, 0495
<b>Style of Cause</b>	<i>Diana Jarvo and the Deputy Minister of National Defence</i>
<b>Hearing</b>	March 24, 25, 27, 2009 Winnipeg, MB
<b>Date of Reasons</b>	February 9, 2011
<b>APPEARANCES:</b>	
<b>For the complainants</b>	Louis Bisson
<b>For the respondent</b>	Lesa Brown
<b>For the Public Service Commission</b>	John Unrau