



Files: 2009-0047, 0048, 0049 and 0266
Issued at: Ottawa, September 9, 2011

BAKHTIAR ANWAR

Complainant

AND

**THE CHIEF PUBLIC HEALTH OFFICER
OF THE PUBLIC HEALTH AGENCY OF CANADA**

Respondent

AND

OTHER PARTIES

Matter	Complaints of abuse of authority pursuant to s. 77(1) (a) and a complaint of unreasonable revocation pursuant to s. 74 of the <i>Public Service Employment Act</i>
Decision	The complaints are dismissed.
Decision rendered by	Maurice Gohier, Member
Language of Decision	English
Indexed	<i>Anwar v. Chief Public Health Officer of the Public Health Agency of Canada</i>
Neutral Citation	2011 PSST 0024

Reasons for Decision

Introduction

1 The complainant, Bakhtiar Anwar, applied in an internal advertised appointment process conducted to fill several Policy Analyst positions, at the ES-04 group and level, with the Public Health Agency of Canada (PHAC). The complainant alleges that the respondent, the Chief Public Health Officer, PHAC, abused its authority in this appointment process in a number of ways. First, the complainant believes that he should have been found fully qualified rather than being placed in a partially assessed pool of candidates. He argues that the respondent misled him into believing that he was fully qualified. Secondly, the complainant takes issue with the respondent's top-down assessment approach. Thirdly, he argues that a manager who was interested in hiring him in a different position should have completed his assessment. Finally, the complainant argues that he received a verbal offer of employment from this same manager that was then unreasonably revoked.

2 The respondent contends that the complainant was not in a fully assessed pool of candidates at the time of the appointments. According to the respondent, no revocation of appointment took place in this instance because no appointment was made. In addition, the respondent submits that the complainant has failed to prove any abuse of authority in this appointment process.

Background

3 The complainant, whose substantive classification was at the ES-03 group and level, submitted his application in response to the ES-04 *Job Opportunity Advertisement* that was posted on *Publiservice*. Under a heading entitled "Essential Qualifications," the advertisement contained only the merit criteria that would be used for screening purposes, namely the education and experience qualifications. However, the advertisement did include the usual link that invited candidates to view the complete

Statement of Merit Criteria & Conditions of Employment (SMC), which contained the following complete list of essential qualifications, under the heading “Essential Qualifications”:

Graduation with a degree from a recognized university with an acceptable specialization in economics, sociology or statistics. NOTE: The courses of the specialization in economics, sociology or statistics do not necessarily have to be part of a degree program in the required specialization. The specialization can be obtained through an acceptable combination of education, training and/or experience.

Experience developing policy initiatives.
Experience developing briefing materials, such as briefing notes, Question Period notes, and analytical reports.
Experience providing advice to management.
Experience participating in inter- and/or intra-governmental working groups.
Experience working collaboratively with a range of external stakeholders.

Knowledge of the federal policy cycle, including the role of decision makers.
Knowledge of emerging issues and trends in health promotion and public health.

Ability to synthesize information.
Ability to develop sound policy analyses and policy options.
Ability to provide advice to senior management.
Ability to represent the division and Agency at various meetings and working groups.
Ability to communicate effectively in writing and orally.

Effective interpersonal relationships
Thoroughness
Initiative
Dependability
Judgment

Official Language Proficiency : Various Language Requirements

Other Official Language Information :
Bilingual Imperative BBB/BBB and English Essential

4 Twenty-eight candidates met the screening criteria and were invited to write the Written Communication Test - 345 (the WCT-345), a Public Service Commission (PSC) standardized test, which assessed the candidates’ *Ability to communicate effectively in writing*. The assessment board decided that it would invite only the 15 candidates with the top marks on the WCT-345 to participate in the assessment of the remaining essential qualifications.

5 Candidates who successfully completed the WCT-345, but whose marks were not amongst the top 15, were placed in a partially assessed pool of candidates. The

assessment board also decided that it would complete the assessment of these candidates only if needed.

6 On October 1, 2008, the complainant was advised by letter that he had been placed in the **partially** assessed pool of candidates (the October 1, 2008 letter). That letter read as follows:

Dear Mr. Anwar:

This is further to your assessment in the above-mentioned selection process.

Following your written examination, I am pleased to inform you that the assessment board has placed you in a **partially assessed pool of candidates**.

When the assessment process is completed and an appointment will be made, you will be notified of the results through a notice on Publiservice. The notice will specify the period of time within which you may discuss with the Manager any issues related to the appointment process.

Thank you for your interest and participation in this internal advertised appointment process. Should you wish to obtain further information, please do not hesitate to contact me at [phone number].

Yours sincerely,

(emphasis added)

7 The assessment board proceeded to assess the 15 candidates with the top marks for the WCT-345 by means of a written exam, an interview, and reference checks. The assessment board established a pool of fully qualified candidates. The respondent then made several appointments from this pool following the issuance of the appropriate *Notifications of Consideration* and *Notifications of Appointment or Proposal for Appointment*.

8 On January 28, 2009, the complainant filed three complaints to the Public Service Staffing Tribunal (the Tribunal), followed by a fourth complaint on April 27, 2009. Three of the complaints were filed pursuant to s. 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (*PSEA*) and allege that he was not appointed as a result of an abuse of authority. In his fourth complaint, filed under s. 74 of the *PSEA*, the complainant alleges that he was given a verbal offer of

employment that was subsequently revoked. The Tribunal consolidated all four complaints for the purposes of this hearing.

Issues

9 The Tribunal must determine the following issues:

- (i) Did the respondent appoint the complainant and subsequently revoke his appointment?
- (ii) Did the respondent abuse its authority in the manner in which it assessed the complainant?

Summary of relevant evidence

10 The complainant called a Human Resources (HR) representative shortly after receiving the October 1, 2008 letter to enquire about its meaning and that is when a misunderstanding apparently began. It is unnecessary to delve into the various conversations that took place between the complainant and others in an attempt to untangle the confusion since nothing turns on how the misunderstanding occurred.

11 The complainant testified that, following his discussion with H  l  ne Gauthier, the HR representative, he thought he was in a pool of fully qualified candidates. Ms. Gauthier testified that she explained to the complainant that when individuals are in a pool of fully qualified candidates for a given group and level (in this case an ES-04), they may then market themselves to other managers looking to fill vacancies at the same group and level. A manager who was not involved in the original appointment process may use a pool of fully qualified candidates to fill a different position at the same group and level. However, such an appointment would be subject to further assessment of any other essential qualifications required by that different position.

12 Alan Diener is Manager of Population Health Economics with the Knowledge, Information and Data Systems Division of PHAC. He was not a member of the assessment board and, therefore, was not involved in any way in the appointment

process conducted to fill the ES-04 Policy Analyst positions. Towards the end of October 2008, Mr. Diener wanted to fill a position classified at the EC-05 group and level when he became interested in the complainant. The EC group is a new classification group which consolidated the Economics, Sociology and Statistics (ES) group and the Social Science Support (SI) group into the Economics and Social Science Services (EC) group. The EC-05 level is the classification equivalent of the former ES-04 level. For the sake of simplicity, both positions will hereafter be referred to as being at the ES-04/EC-05 group and level. In the weeks that followed, the complainant forwarded a number of documents to Mr. Diener, such as the Job Opportunity Advertisement, his résumé, various writing samples, and the names of individuals who could act as his references. However, the complainant did not provide Mr. Diener with a copy of the October 1, 2008 letter indicating that he was in a pool of partially assessed candidates. As a result of their numerous exchanges, Mr. Diener was left with the incorrect impression that the complainant was in a pool of candidates who were fully qualified at the ES-04/EC-05 group and level.

13 Mr. Diener testified that he is not delegated by PHAC to authorize an appointment. Although he may initiate the preparation of the required documentation, a Staffing Action Request (SAR), Mr. Diener must submit the matter to a higher level for authorization. In mid-December 2008, Mr. Diener began assembling the necessary paperwork to complete a SAR and his discussions with the complainant evolved to include a potential reporting date of late January to mid-February 2009. When the SAR was sent to PHAC HR for its review, the fact that the complainant was not in a pool of fully qualified candidates came to light.

14 On January 22, 2009, Mr. Diener sent an email to the complainant explaining that he was in a partially assessed pool and could not be offered a position until he had completed the assessment for the ES-04/EC-05 Policy Analyst appointment process.

15 Several months later, once the original pool of fully qualified candidates was exhausted, the assessment board completed the assessment of the candidates remaining in the partially assessed pool. On November 5, 2009, the complainant was

advised by email that the assessment board had found him to meet all of the essential qualifications for the position of Policy Analyst and that his name had been placed in a pool of **fully** qualified candidates.

Arguments of the parties

A) Complainant's arguments

16 The complainant argues that he should have been found fully qualified for appointment since he met the education and experience criteria listed in the essential qualifications shown in the Job Opportunity Advertisement. In his view, any remaining qualifications could have been assessed through an examination of his résumé. Alternatively, he argues that he was misled by the respondent into believing that he was part of a pool of fully qualified candidates. The complainant also argues that it was an abuse of authority for the respondent to use a top-down approach and invite only the 15 candidates with the top marks for the WCT-345 for further assessment. The complainant believes that the appointment process should have been conducted differently by the respondent.

17 The complainant also submits that it was an abuse of authority for HR not to have advised Mr. Diener that he could complete the assessment for the Policy Analyst position. The complainant believes that his discussions with Mr. Diener constituted a verbal offer of employment and that it was an abuse of authority for this offer to have been subsequently revoked.

B) Respondent's arguments

18 The respondent submits that the evidence demonstrates that no offer of employment was made to the complainant and, therefore, no revocation had taken place. Consequently, the Tribunal has no jurisdiction with respect to the s. 74 revocation complaint presented by the complainant.

19 The respondent argues that the appointment process in this instance was conducted openly and fairly. Based on the results of a PSC standardized test, the

assessment board decided to use a top-down approach for the assessment of candidates, a decision that was within their discretion to make. Under s. 30(2) of the *PSEA*, a candidate must meet all of the essential qualifications of a position in order to be appointed. The complainant could not be appointed since he had not been assessed against all of the essential qualifications. According to the respondent, there was no evidence of any abuse of authority in the appointments that are the subject of the three s. 77 complaints before the Tribunal.

C) Public Service Commission's arguments

20 The PSC notes that, although the *PSEA* does not define what constitutes an appointment, s. 56(1) of the *PSEA* specifies that it "takes effect on the date agreed to in writing by that person and the deputy head, regardless of the date of their agreement." There is no evidence in this case that an agreement was ever reached between the complainant and a duly authorized representative of the deputy head. Furthermore, for the Tribunal to have jurisdiction in the matter of a revocation, such revocation must have been made either by the PSC in accordance with s. 67(1) or by the deputy head under ss. 15(3) or 67(2) of the *PSEA*. Since neither has occurred, the complaint concerning the revocation should be dismissed for lack of jurisdiction.

21 While the PSC recognizes that the use of partially assessed pools is acceptable, it emphasizes that a candidate may not be appointed unless fully assessed against all of the essential qualifications of a position. The PSC also submits that the complainant presented no evidence to demonstrate that any of the appointments he is contesting were made in contravention of s. 30(2) of the *PSEA*.

Analysis

Issue I: Did the respondent appoint the complainant and subsequently revoke his appointment?

22 For the Tribunal to have jurisdiction in the matter of a revocation, an appointment must have been made and subsequently revoked either by the PSC in accordance

with s. 67(1), or by the deputy head under ss. 15(3) or 67(2) of the *PSEA*. (See *Pugh v. Deputy Head of Environment Canada*, 2007 PSST 0003, at para. 17).

23 At the core of the complainant's argument is his belief that Mr. Diener made him a verbal offer of employment that was subsequently revoked.

24 For the reasons that follow, the Tribunal finds that no offer of employment was made to the complainant and that no appointment was made; it therefore follows that no revocation of an appointment has taken place.

25 When individuals are in a pool of fully qualified candidates for a given group and level, they may market themselves to other managers looking to fill vacancies at the same group and level. From the documentary and testimonial evidence presented by both parties, it is clear that Mr. Diener was interested in possibly hiring the complainant to fill a vacant ES-04/EC-05 position within his organization. The numerous discussions they had and the exchange of emails between them confirm this mutual interest. However, the evidence also demonstrates that Mr. Diener was operating on the mistaken belief that the complainant was part of a fully qualified pool of candidates at the ES-04/EC-05 group and level.

26 The Tribunal notes that a manager who is not involved in the original appointment process may use a pool of fully qualified candidates to fill a different position; whether such an appointment will be the result of an advertised appointment or a non-advertised appointment process will depend on what was indicated in the notice for appointments to the pool of candidates. However, such an appointment would be subject to further assessment of any other qualifications required by that different position. The evidence presented demonstrates that the discussions between the complainant and Mr. Diener were based on the presumption that the complainant was in a pool of fully qualified candidates for the ES-04/EC-05 Policy Analyst position. Unfortunately, the complainant was not part of such a pool during the time that he and Mr. Diener were discussing the vacant ES-04/EC-05 position.

27 Furthermore, it is uncontested that Mr. Diener did not possess the authority to make an appointment. This authority is delegated from the PSC to a deputy head pursuant to s. 15 of the *PSEA*, and then sub-delegated from the deputy head to specific managers within his or her organization in accordance with s. 24 of the *PSEA*. Although Mr. Diener could initiate the preparation of the SAR, he had to submit the matter to a higher level for authorization. In mid-December 2008, Mr. Diener began assembling the necessary paperwork and his discussions with the complainant evolved to include a potential reporting date of late January to mid-February, 2009. When the SAR was sent to PHAC HR for its review, as part of the approval process, the fact that the complainant was not in a pool of fully qualified candidates came to light. As a result, the ongoing approval process was never completed, no offer of employment was ever made, and no appointment took place.

28 The PSC correctly points out that, under s. 56(1) of the *PSEA*, an internal appointment takes effect on the date agreed to in writing between the person and the deputy head's delegate. As demonstrated by the evidence, there was no such agreement.

29 Since there was no appointment to be revoked, there was no basis for a complaint under s. 74 of the *PSEA*.

Issue II: Did the respondent abuse its authority in the manner in which it assessed the complainant?

30 The complainant has the burden to prove, on a balance of probabilities, that there was abuse of authority in the appointment process (see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008, at para. 49).

31 The complainant raised numerous arguments concerning his view that it was an abuse of authority for the respondent not to have appointed him. First, he noted that he met all of the essential qualifications listed on the *Job Opportunity Advertisement*. He also alleges that he was misled by the respondent into believing that he was part of the pool of fully qualified candidates. He expressed his view that it was an abuse of authority for the respondent to have used a top-down approach based on the results of

the WCT-345. Lastly, he considered that it was an abuse of authority for: (i) Mr. Diener not to have completed the assessment begun by the assessment board, and (ii) for PHAC HR not to have recommended to Mr. Diener that he complete the assessment.

32 The complainant argues that since he met all of the essential qualifications listed on the *Job Opportunity Advertisement*, he should have been deemed qualified for an appointment. Under a heading entitled “Essential Qualifications,” the *Job Opportunity Advertisement* contained only those qualifications that are typically used for screening purposes (education and experience qualifications), and Official Language Proficiency. The Tribunal notes that the *Job Opportunity Advertisement* also included the usual link inviting candidates to “(v)iew the complete *Statement of Merit Criteria & Conditions of Employment*,” which is a separate document that contains the complete list of essential qualifications candidates were required to meet in order to qualify for appointment. This included the above qualifications in addition to those related to knowledge, abilities, and personal suitability.

33 Pursuant to s. 30(2) of the *PSEA*, for an appointment to be made on the basis of merit, the person appointed must meet the essential qualifications established for a position. If a candidate does not meet the essential qualifications, then such an appointment would not be one that was based on merit. (See *Rinn v. Deputy Minister of Transport, Infrastructure, and Communities*, 2007 PSST 0044, at para. 38).

34 The definitive document describing the essential qualifications to be met is the SMC. It was somewhat confusing for the *Job Opportunity Advertisement*, under the heading of “Essential Qualifications”, to show only those qualifications that would be used for screening purposes, namely, the education and experience qualifications. An inexperienced candidate could conclude, as appears to have happened in this case, that since his education and experience are set out in his application, it would be the only tool utilised to assess the essential qualifications. The fact is, however, that the essential qualifications included those described in the complete SMC. The Tribunal finds that the potential confusion between the *Job Opportunity Advertisement* and the SMC does not amount to an abuse of authority, particularly since candidates were

specifically directed by the Job Opportunity Advertisement to view the complete SMC. As a result, the Tribunal finds that the complainant's argument that he had met all of the essential qualifications and therefore qualified for an appointment is not substantiated.

35 The complainant also alleges that the respondent abused its authority by using a "top-down" assessment process, and not fully assessing all candidates at the same time.

36 To analyze this allegation, the Tribunal will consider s. 48 of the *PSEA*. Section 48 of the *PSEA* reads as follows:

- (1) After the assessment of candidates is completed in an internal appointment process, the Commission shall, in any manner that it determines, inform the following persons of the name of the person being considered for each appointment:
 - (a) In the case of an advertised internal appointment process, the person in the area of selection determined under section 34 who participated in that process; and
 - (b) In the case of a non-advertised internal appointment process, the persons in the area of selection determined under section 34.
- (2) For the purposes of internal appointment processes, the Commission shall fix a period, beginning when the persons are informed under subsection (1), during which appointments or proposals for appointment may not be made.
- (3) Following the period referred to in subsection (2), the Commission may appoint a person or propose a person for appointment, whether or not that person is the one previously considered, and the Commission shall so inform the persons who were advised under subsection (1).

37 Since the parties did not make submissions on the application of s. 48 of the *PSEA* at the hearing, the Tribunal requested that the parties provide further written submissions following the oral hearing. The parties complied with this request.

38 In his written submissions, the complainant reiterates his belief that he had been assessed against all of the advertised qualifications, that he had been appointed, and that his appointment had been unreasonably revoked. He also argues that all candidates should be assessed contemporaneously and not in separate stages.

39 For its part, the respondent submits that the Tribunal had already decided in *King v. Deputy Head of Service Canada*, 2008 PSST 0006, that the use of a top-down method of assessment did not constitute an abuse of authority. It is used to manage volume by giving delegated managers greater flexibility, efficiency and responsiveness in staffing, which are all objectives of the *PSEA*.

40 The PSC states that the respondent exercised its managerial flexibility to use a top-down method of assessment to determine those candidates who would end up in a partially assessed pool, and those candidates who would be included in a fully qualified pool. The PSC submits that its *Notification Policy* and its related *Guidelines* are clear on the meaning and interpretation of the expression “the assessment of candidates” in the context of s. 48 of the *PSEA*. This expression, according to the PSC, refers to the assessment of each candidate being considered for appointment, not all candidates who are participating in the process who might be partially assessed at the time of the proposed appointment.

41 Early in its jurisprudence, the Tribunal emphasized that one of the key legislative purposes of the new *PSEA* is to provide managers with considerable discretion in staffing matters. As the Tribunal explained in *Tibbs*:

62 An examination of the preamble of the *PSEA* helps to reveal its legislative purpose. (...) The following section is of particular note: “delegation of staffing authority (...) should afford public service managers the flexibility necessary to staff, to manage and to lead their personnel to achieve results for Canadians.”

63 This section of the preamble reinforces one of the key legislative purposes of the *PSEA*, namely, that managers should have considerable discretion when it comes to staffing matters. To ensure the necessary flexibility, Parliament has chosen to move away from the previous staffing regime with its rules-based focus under the former *PSEA*. The old system of relative merit no longer exists. The definition of merit found in subsection 30(2) of the *PSEA* provides managers with considerable discretion to choose the person who not only meets the essential qualifications, but is the right fit because of additional asset qualifications, current or future needs, and/or operational requirements.

42 The Tribunal has found that s. 36 of the *PSEA* provides the deputy head with wide discretion to use any assessment method that he or she considers appropriate in an internal appointment process. (See *Jolin v. Deputy Head of Service Canada*, 2007 PSST 0011, at para. 77). The Tribunal has also previously addressed the use of a

top - down assessment method in an appointment process. In *King*, the department had decided that it would interview only those candidates who had achieved the top 15 scores in a PSC standardized test—a number deemed sufficient to meet its then current and anticipatory needs. The Tribunal found the use of a top-down assessment method of candidates in the circumstances of that case did not constitute an improper exercise of discretion and, therefore, there was no abuse in using this approach. At para. 56 of *King*, the Tribunal stated: “The use of cut-off scores based on the performance of the candidates such as in the top down method are methods that fall within the broad discretion given to managers under the *PSEA*.”

43 The respondent concedes that, depending on the circumstances, the use of a top-down assessment method could lead to a finding of abuse of authority by the Tribunal. However, the respondent contends that s. 48 should not be interpreted to mean that every candidate must be assessed against every essential qualification before an appointment can be made and should not be interpreted to preclude the use of a top-down assessment method. The Tribunal concurs.

44 The Tribunal emphasized in *King* that the complainant did not provide any evidence that the top-down method led to the elimination of specific candidates once their results were known, nor did she raise any allegation of personal favouritism or bias concerning the appointments. Similarly, in this case, as the respondent points out, the complainant has not taken any issue with or adduced any evidence to demonstrate that the appointments were not meritorious.

45 In the circumstances of this case, where there are no allegations of abuse concerning the persons appointed and the assessment board did complete the complainant’s assessment and found him qualified, the Tribunal concludes that s. 48 of the *PSEA* did not preclude the respondent from using a top-down assessment method to determine which candidates would proceed to the next step in the assessment process. Accordingly, the Tribunal finds that the complainant’s allegations that the respondent abused its authority by using a top-down assessment method and in not fully assessing all candidates at the same time are not substantiated.

46 When he filed his complaints in January and April 2009, the complainant was in a partially assessed pool of candidates. The October 1, 2008 letter advising the complainant that the assessment board had placed him in a partially assessed pool of candidates and the November, 2009 email confirming that he had then, a year later, been placed in a pool of fully qualified candidates provide sufficient documentary evidence to support this fact. He could not be appointed in accordance with merit to an ES-04/EC-05 Policy Analyst position at the time he filed his complaints since he had not been assessed against, nor found to meet, the essential qualifications for the position at that time. It was only when the original pool of qualified candidates was exhausted that the assessment board completed the assessment of those candidates in the partially assessed pool. Prior to November 2009, notwithstanding his misunderstanding about his status as a candidate, the complainant could not be appointed since he had not been assessed against all of the criteria listed in the SMC. In fact, it would have been an abuse of authority for him to be appointed in such circumstances.

47 It is important to point out that the subject of these three complaints is the process that led to the three persons being appointed in this appointment process, not the creation of the pool from which the appointments were made. Section 77(1) of the *PSEA* provides that when the Commission “has made or proposed an appointment (...) a person (...) may (...) make a complaint to the Tribunal (...)”. The complaints therefore concern those appointments. Other appointments that have resulted or could have resulted from the appointment process are not relevant to these three complaints. If or when those other appointments do occur, they would be subject to distinct complaint rights under s. 77 of the *PSEA*.

48 The complainant also argues that it was an abuse of authority for Mr. Diener not to complete the assessment that had already been started by the assessment board assigned to conduct the process to staff the ES-04 Policy Analyst positions. The Tribunal disagrees. Mr. Diener was not a member of the assessment board assigned by PHAC to assess the candidates in that appointment process. Simply stated, the manager was seeking to rely on the candidate evaluation performed by that assessment board, thereby avoiding the need to conduct an entire appointment process of

his own – a reasonable and efficient approach. The Tribunal finds that Mr. Diener had no authority to intervene in and complete an assessment process begun by others, nor did he have any obligation to do so. In the circumstances, there was nothing inappropriate in either Mr. Diener's actions or those of PHAC HR.

49 The Tribunal concludes that the complainant has not proven, on a balance of probabilities, that the respondent abused its authority in the manner in which it assessed the complainant.

Decision

50 For all the above reasons, these complaints are dismissed.

Maurice Gohier
Member

Parties of Record

Tribunal Files	2009-0047, 0048, 0049 and 0266
Style of Cause	<i>Bakhtiar Anwar and the Chief Public Health Officer of the Public Health Agency of Canada</i>
Hearing	May 10-11, 2010 Ottawa, Ontario (final date for receipt of written submissions was March 24, 2011)
Date of Reasons	September 9, 2011
APPEARANCES:	
For the complainant	Bakhtiar Anwar
For the respondent	Martin Desmeules
For the Public Service Commission	Lili Ste-Marie