



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**File:** 2010-0644  
**Issued at:** Ottawa, December 13, 2011

**XIANG HE**

Complainant

AND

**THE PRESIDENT OF THE CANADIAN INTERNATIONAL DEVELOPMENT AGENCY**

Respondent

AND

**OTHER PARTIES**

<b>Matter</b>	Complaint of abuse of authority pursuant to section 77(1)(a) of the <i>Public Service Employment Act</i>
<b>Decision</b>	Complaint is dismissed
<b>Decision rendered by</b>	Joanne B. Archibald, Member
<b>Language of Decision</b>	English
<b>Indexed</b>	<i>He v. President of the Canadian International Development Agency</i>
<b>Neutral Citation</b>	2011 PSST 0040

# Reasons for Decision

## Introduction

1 Xiang He, the complainant, was a candidate in an internal, advertised appointment process for the position of Senior Policy Analyst (EC-06) with the Canadian International Development Agency (CIDA). He was eliminated from the process for failing to meet three essential qualifications. When notified, he filed a complaint of abuse of authority under s. 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the PSEA) with the Public Service Staffing Tribunal (the Tribunal). The complainant alleged that the President of CIDA (the respondent), abused its authority by assessing candidates using an examination that was fundamentally flawed and a rating guide that did not allow a proper assessment of responses.

2 The respondent states that it acted within its authority in choosing the assessment methods. Moreover, the assessment board acted reasonably and within its discretion, taking steps to ensure that the examination was properly designed and candidates' responses were appropriately scored.

## Background

3 The Agency posted a *Job Opportunity Advertisement* on the Publiservice website, with a closing date of January 22, 2010. The complainant submitted an application. He was screened into the appointment process and was invited to participate in a written examination (the examination). The examination was used to assess four essential qualifications for the position: knowledge of the trends, theories and principles with regard to international development; knowledge of the Agency's mandate and priorities; the ability to communicate effectively in writing; and the ability to analyze, synthesize and evaluate policies. The candidates' responses were marked by an individual who was contracted to perform this function.

4 The assessment of the complainant's response concluded that he met only the first of the four qualifications. When notified of the result, the complainant sought informal discussion and then attended a meeting with Patricia Peña, Director of Democratic Governance and Human Rights for the Agency. As a result of

their meeting, his examination was resubmitted for marking. While there were some changes in the scores originally awarded, they did not reach the minimum that was required and the complainant remained an unsuccessful candidate.

## **Issues**

**5** The Tribunal must determine whether the respondent abused its authority in the establishment of the examination question or the rating guide used for marking.

## **Relevant Evidence and Analysis**

**6** For the examination, candidates were provided with a document that was described as an extract from a longer briefing paper prepared by the Overseas Development Institute. They were also advised of the four essential qualifications that would be assessed by the examination. The examination was comprised of one question, which follows:

Prepare a 2-3 page briefing note (in standard briefing note format) on the attached policy brief and identify 3 key issues for CIDA's development assistance, with reference to CIDA's mandate and priorities.

**7** The complainant considers that the examination question was flawed because it did not identify the issue to be addressed in the briefing note. In his view, this information would have enabled him to shape the logic and the content of the briefing note. He asserted that the question was very specific and led a candidate to focus on the document that accompanied it, whereas the marking grid, in his opinion, focused on the Agency's priorities. The complainant stated that he believed the issue to discuss in the response was the Agency's position if it was criticized by the public. In his opinion, his response concisely addressed relevant and specific issues to prepare senior management to respond to the public. His impression is that because the assessment board felt that the issue he identified was not valid, they missed the logical connections in his response. The complainant did not refer the Tribunal to his response or the assessment board's marking of it to support his submissions. As he placed no documents before the Tribunal, with the concurrence of the parties, the Tribunal asked the respondent to place documents into evidence to assist the complainant.

This included the examination question, rating guide, and the first and second marking of the complainant's response. Despite the introduction of this documentary evidence, the complainant did not provide any testimony concerning his response, or the rating guide, and did not direct the Tribunal to parts of either of these documents that might have supported his position.

**8** Ms. Peña testified that she oversaw the appointment process as one of six panel members. She stated that, at the time of the appointment process, the Agency anticipated six vacancies at the EC-06 group and level, in a variety of different positions. As the positions shared some characteristics, they were grouped together for the appointment process. The *Statement of Merit Criteria*, examination and rating guide were developed jointly by the assessment board members, with input from other sources as well. The expected answers reflected what would be expected in a candidate's response, and recognized that other acceptable responses might occur.

**9** As a large number of candidates wrote the examination, a consultant was engaged to mark the responses. The rating guide was explained to the consultant and, if questions arose, the consultant could address them to the assessment board. Ms. Peña explained that the assessment board oversaw the consultant's work and remained accountable for the outcome of the marking.

**10** Ms. Peña testified that at the outset of the marking process, in order to ensure the validity of the rating guide, the consultant reviewed approximately 12 candidates' responses. The consultant was given no information to identify any of the individual candidates. Ms. Peña stated that the consultant advised the assessment board that the rating guide worked well, but that the pass mark of 3/5 was higher than it should be and would limit the number of candidates who would pass the examination. The assessment board considered her information and decided to lower the pass mark to 2.5/5. When the marking was entirely completed, the assessment board reviewed the candidates' responses to ensure that the marking was appropriate. Ms. Peña noted that the consultant had added notes to the candidates' responses using a word processing feature that allowed her to insert comments without altering the candidates' work. She was instructed to do this by the assessment board. In Ms. Peña's view,

it allowed the assessment board to have insight into the items the consultant took into consideration.

**11** The complainant met with Ms. Peña for informal discussion after being notified that he was not successful. Ms. Peña testified that she then discussed his assessment with the assessment board and together they decided to resubmit the complainant's response to the consultant for marking. This was done without providing any identifying information to the consultant as the assessment board did not want to introduce any extraneous elements to the marking process. As a result of the remarking, there was some adjustment to the complainant's score, but he remained unsuccessful as he did not attain the required mark for the three essential qualifications. The assessment board reviewed the result and was satisfied that the remarking had been properly carried out. The complainant was advised of the outcome.

**12** Addressing the complainant's contention that there was no issue identified in the examination question, Ms. Peña stated that she did not agree with the complainant's assertion. She testified that the issue was the impact of aid on donors. Candidates were expected to distil the issue from the briefing paper that formed part of the examination. However, even if a candidate wrongly identified the issue, the essential qualifications could still be assessed from the content of the response. Further, she indicated that while the question asked for a briefing note in the standard format, there was no prescribed format. The assessment board recognized that, as they were assessing a range of candidates from a variety of departments, the format would vary. When looking at the responses, the assessment board considered that the format did not impact the content or quality of the responses. Every candidate answered in their own way and 56% of those assessed passed the examination.

**13** The respondent argues that pursuant to s. 36 of the PSEA, the respondent has broad discretion in the selection of assessment methods. The complainant may not have understood what was expected, but the results showed that most candidates who wrote the examination achieved a passing mark. The respondent's position is that there is no evidence that the examination question was improper, that it led to an unfair result or that the method itself was unreasonable.

**14** The respondent argues that the complainant has not shown any flaw or wrongdoing in the marking. Steps were taken, as Ms. Peña testified, to ensure proper application of the rating guide and integrity in the process. In the respondent's view, the complainant did not produce evidence to show any error, omission, improper conduct or serious wrongdoing that would support a finding of abuse of authority.

**15** The Public Service Commission (PSC) did not appear in this matter, but did present a written submission in which it discussed relevant PSC policies and guidelines concerning assessment and selection. It took no position on the merits of the complaint, but noted that assessment methods must be capable of assessing the qualifications for which they are designed.

**16** For the reasons that follow, the Tribunal has determined that the complainant has not established abuse of authority within the meaning of s. 77(1)(a) of the PSEA.

**17** The allegation of abuse of authority is a serious one. The burden of proving an abuse of authority rests with the complainant. (See *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008, at para. 50.) To substantiate a complaint of abuse of authority, it must be shown that more than mere errors and omissions occurred. (See *Tibbs*, at para. 65.) There must be cogent evidence to satisfy the Tribunal on the balance of probabilities that an abuse of authority occurred. The mere suggestion that abuse of authority occurred is insufficient.

**18** Section 36 of the PSEA permits the PSC or its delegate, in this case the respondent, to use "any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications" for the subject position. The Tribunal is not persuaded that an abuse of authority has occurred in using the examination that was set for this assessment process. The evidence establishes that the examination was conducted and the complainant participated. His response was assessed and found not to meet the required score for three of the essential qualifications that were being measured. It is clear from the complainant's argument that if he had been a member of the assessment board, he would have changed

the question and rated it differently. However, this alone does not establish that an abuse of authority occurred.

**19** The complainant repeated a number of times his opinion that the examination question ought to have provided the issue to be discussed in the response. However, he provided no explanation of the basis of this view and presented no evidence to support it. Ms. Peña testified that the assessment board intended that candidates would identify the issue from the briefing paper that accompanied the question. The complainant has not satisfied the Tribunal that this was an unreasonable approach. Neither has the complainant shown that the rating guide itself or its use in assessing his response was flawed.

**20** From the evidence of Ms. Peña, it is equally clear that the assessment process was designed to evaluate the substance in the candidates' responses. It has not been demonstrated that the examination and the rating guide were flawed, either in their structure or application.

**21** The Tribunal finds that the complainant has not met the burden of proving that an abuse of authority occurred either in the use of the examination as an assessment method or the use of the rating guide that accompanied it.

## **Decision**

**22** For the reasons above, the complaint is dismissed.

Joanne B. Archibald  
Member

**Parties of Record**

<b>Tribunal Files</b>	2010-0644
<b>Style of Cause</b>	<i>Xiang He and the President of the Canadian International Development Agency</i>
<b>Hearing</b>	October 24, 2011 Ottawa, Ontario
<b>Date of Reasons</b>	December 13, 2011
<b>APPEARANCES:</b>	
<b>For the complainant</b>	Xiang He
<b>For the respondent</b>	Lesa Brown
<b>For the Public Service Commission</b>	Tricia Heffernan (written submission)