



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**File:** 2010-0476  
**Issued at:** Ottawa, September 22, 2011

**CARL JACK**

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) (b) of the *Public Service Employment Act*

**Decision** Complaint is dismissed

**Decision rendered by** Joanne B. Archibald, Member

**Language of Decision** English

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

**Neutral Citation** 2011 PSST 0026

# Reasons for Decision

## Introduction

1 Carl Jack, the complainant, alleges that the Commissioner of the Correctional Service of Canada (the respondent), abused its authority in the choice to extend an acting appointment to the position of Program Manager (WP-05) through a non - advertised appointment process. Moreover, it is his view that an existing pool of eligible candidates, of which he is not a member, ought to have been considered before the extension to the appointment was made. The complainant does not take issue with the initial appointment that preceded the extension.

2 The respondent states that the three week extension of the acting appointment was done solely to bridge a gap until a candidate from the existing pool was available and it did not constitute an abuse of authority.

## Background

3 On April 14, 2010, the respondent appointed Tanya Dwyer to act as the Program Manager at the Pittsburgh Institution until August 13, 2010. Ms. Dwyer was appointed to replace the incumbent of the position during a period when she was assigned to duties elsewhere. The parties do not dispute that Ms. Dwyer's initial acting appointment was for a period of less than four months and, as such, it was not subject to recourse before the Public Service Staffing Tribunal (the Tribunal). (See s. 14 of the *Public Service Employment Regulations*, SOR/2005-334).

4 During the period of Ms. Dwyer's initial appointment, the respondent was advised that the incumbent would remain in the other duties until March 31, 2011. As a result, Ms. Dwyer's appointment was then extended for the period of August 14, 2010, through September 3, 2010, pending further action to staff the position for the duration of the incumbent's absence. As the cumulative period of Ms. Dwyer's appointment then exceeded four months, the respondent posted a notice entitled *Information Regarding Acting Appointment*, which indicated that persons in the area of selection had a right to complain against the appointment.

**5** On August 19, 2010, the complainant filed a complaint with the Tribunal under s. 77(1)(b) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12,13 (the PSEA), alleging an abuse of authority in the choice of a non-advertised appointment process.

### **Issues**

**6** The Tribunal must determine whether the respondent abused its authority in choosing a non-advertised appointment process for this appointment.

### **Relevant Evidence and Analysis**

**7** The complainant, a Correctional Officer (CX-02) at the Pittsburgh Institution, testified that he felt that he met the essential qualifications for the Program Manager position and believed that he and others would have been interested in the opportunity if it had been offered. When he completed his Personal Development Plan (PDP) in September 2009, he indicated that he would be interested in a Program Manager position. He agreed, however, that when advertised appointment processes were conducted in 2007 and 2010 for the position, he did not participate in either of them and he was not in a qualified pool for the Program Manager position. Nonetheless, he believed that “best practices” would have suggested either advertising the vacancy or asking for expressions of interest from other employees before extending Ms. Dwyer’s appointment particularly as the respondent appeared to have known in June 2010 that the incumbent’s absence would be longer than anticipated.

**8** Crystal Thompson testified that she had acted as the Deputy Warden at the Pittsburgh Institution from May 31 through September 6, 2010. Shortly after arriving, she became aware that the incumbent of the Program Manager position would not return before March 31, 2011. She recognized that this would extend the period of time for keeping an employee acting in the position, and contacted Human Resources (HR) for guidance. Ms. Thompson was aware of an existing pool of qualified candidates and knew that Ms. Dwyer was not in the pool. She wanted to appoint a candidate from the pool rather than extend Ms. Dwyer’s appointment. Ms. Thompson then provided certain

right fit criteria to HR and she was given the names of eight candidates from the pool who might fit those criteria.

**9** Ms. Thompson contacted the candidates and two of them indicated they would be interested in the acting appointment. She chose one of them and when she contacted her, the candidate indicated that she would not be available to start until September 8, 2010. As this date fell three weeks after Ms. Dwyer's appointment was scheduled to end, Ms. Thompson considered the options for staffing the position for this period. In the interest of stability in the work unit, she elected to bridge the gap by continuing the appointment of Ms. Dwyer for three additional weeks. She decided that it was not reasonable or feasible to bring someone new into the position for a brief period. In reaching this decision, she considered principally the need for stability in the work unit as there were significant changes in the program delivered by the unit, and, at the time, both the Assistant Warden Intervention and the Assistant Warden Operations were absent from the institution. Ms. Thompson stated that she consulted with the Warden and he agreed with her decision to extend the appointment.

**10** Ms. Thompson testified that she assessed Ms. Dwyer prior to extending her appointment and found her qualified. She then prepared the Staffing Action Request (SAR) to extend Ms. Dwyer's acting appointment. In the SAR, she recorded the fact that the extension was not contemplated in the HR plan and she set out the rationale for the appointment: the existing acting appointment was being continued until the candidate chosen from the qualified WP-05 pool was available to assume the duties.

**11** Ms. Thompson stated at the hearing that, at the Warden's suggestion, she approached the complainant in July 2010 for an acting appointment as a Parole Officer (WP-04) at Millhaven Institution. The WP-04 position represented a higher rate of pay for the complainant at a different correctional facility. Ms. Thompson testified that the complainant declined the opportunity citing personal reasons. He did not mention an interest in the Program Manager or any other position. Ms. Thompson added that she had not seen the complainant's PDP of 2009 when she contacted him. She first saw employees' PDPs and their Individual Learning Plans in September 2010 when they were submitted for that year.

**12** 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 choice of appointment process, assessment and selection, among others. It took no position on the merits of the complaint.

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

**14** In its decision in *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 0006 at para. 7, the Tribunal held:

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.

**15** The PSEA indicates no preference in choosing either an advertised or a non - advertised appointment process. Section 33 states clearly that “the Commission may use an advertised or non-advertised appointment process.” Section 48 expressly allows that in the case of an appointment from a non-advertised appointment process, proper notice that a position was available will first be given when someone has been assessed and is to be appointed to it. There is no requirement that notice of an impending non-advertised appointment to a position be given prior to the appointment being made.

**16** The complainant takes the position that the respondent abused its authority in choosing a non-advertised appointment process for the three week extension to the Program Manager position because he believes that employees, including him, may have been qualified and interested in the opportunity. He adds that the respondent ought to have used the available qualified pool of candidates for the extension instead of continuing Ms. Dwyer’s appointment. Ms. Thompson explained in evidence the reasons for her decision: the extension was of short duration and it maintained stability in the Program Manager position while accommodating a delay before the individual from the qualified pool was available.

**17** The Tribunal finds no evidence of abuse of authority in the choice to use a non - advertised appointment process. In the circumstances of this case, it reflected a practical approach to filling a short term vacancy. The PSC has issued a *Guide to Implementing the Choice of Appointment Process Policy* which recognizes that “(e)ven with effective HR planning, short-term requirements, unforeseen or urgent circumstances may lead to a decision to staff a position on a temporary basis through mechanisms such as casual, acting or term appointments.” Ms. Thompson’s reasons for the brief extension to Ms. Dwyer’s acting appointment were explained. They included the unforeseen extension to the incumbent’s absence, the decision then to use the existing pool of qualified candidates to fill the longer term vacancy, and the delayed availability of the chosen candidate from the pool. She recorded her rationale in the SAR. Her explanation was not challenged or contradicted.

**18** The complainant has presented no evidence to suggest that the longer duration of the incumbent’s absence was foreseen from the outset of Ms. Dwyer’s initial appointment. Neither has he shown how the timing of the decision to extend Ms. Dwyer’s appointment constituted an abuse of authority. The complainant’s principal concern appears to be denial of access to the opportunity but, as the Tribunal held in *Jarvo* at para. 32, there is no guaranteed right of access to every appointment that may arise. Moreover, the complainant’s assertion that he and others might be qualified does not establish that the respondent abused its authority in this appointment process. (*See Clout v. Deputy Minister of Public Safety and Emergency Preparedness*, 2008 PSST 0022, at para. 31.) The decision to consider only one person, as was done in this case, is expressly permitted under the provisions of s. 30(4) of the PSEA.

**19** For these reasons, the Tribunal finds that the complainant has not established that the respondent abused its authority in choosing to extend Ms. Dwyer’s acting appointment through a non-advertised appointment process.

**Decision**

**20** The complaint is dismissed.

Joanne B. Archibald  
Member

**Parties of Record**

<b>Tribunal Files</b>	2010-0476
<b>Style of Cause</b>	<i>Carl Jack and the Commissioner of the Correctional Service of Canada</i>
<b>Hearing</b>	July 26, 2011 Kingston, Ontario
<b>Date of Reasons</b>	September 22, 2011
<b>APPEARANCES:</b>	
<b>For the complainant</b>	Sheryl Ferguson
<b>For the respondent</b>	Allison Sephton
<b>For the Public Service Commission</b>	John Unrau (written submission)