



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

Files: 2010-0299 and 0300
Issued at: Ottawa, November 3, 2011

MILES DENNY

Complainant

AND

THE DEPUTY MINISTER OF NATIONAL DEFENCE

Respondent

AND

OTHER PARTIES

Matter Complaints of abuse of authority pursuant to sections 77(1)(a) and (b) of the *Public Service Employment Act*

Decision The complaints are dismissed

Decision rendered by Merri Beattie, Member

Language of Decision English

Indexed *Denny v. Deputy Minister of National Defence*

Neutral Citation 2011 PSST 0033

Reasons for Decision

Introduction

1 Miles Denny, the complainant, alleges that the Deputy Minister of National Defence, the respondent, abused its authority by refusing him access to two non-advertised acting appointments. He also alleges that the appointments that were made were not based on merit.

2 The respondent asserts that its decision to restrict access to these appointments was appropriate in the circumstances, and that both appointees were assessed and found qualified for appointment. The respondent denies any abuse of authority in these processes.

Background

3 On May 20, 2010, the respondent issued a notice of *Information Regarding Acting Appointment (Notice)* announcing the acting appointment of David MacKeigan to the position of Transit Supervisor. A *Notice* announcing the acting appointment of Paul Varner to the position of Salvage/Warehouse Supervisor was issued the same day. Both positions are in the Canadian Forces Ammunition Depot (CFAD), Bedford, NS, and both appointments are at the GT-04 group and level.

4 The complainant filed a complaint of abuse of authority in response to each *Notice*, under s. 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the PSEA). The two complaints were consolidated for a hearing before the Public Service Staffing Tribunal (the Tribunal), in accordance with s. 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6.

5 The complainant initially made an allegation regarding the essential qualifications that were established for these appointments. In closing arguments he withdrew the allegation. Accordingly, the Tribunal will not address that matter in these reasons.

Issues

6 The Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority by restricting access to these acting appointments?
- (ii) Did the respondent make appointments that were based on merit?

Analysis

Issue I: Did the respondent abuse its authority by restricting access to these acting appointments?

7 The evidence demonstrates that access to these GT-04 acting appointments was unavailable to GT-02 employees. According to the written rationales for the non - advertised appointments, GT-02s were, at the time, limited to acting appointments at the GT-03 level for safety reasons.

8 The complainant, who is a GT-02, submits that there is no evidence that GT-02s pose a greater safety risk than GT-03s. He argues that this one-level acting rule creates an unfair barrier.

9 The respondent called Sophie Prevost as a witness. Ms. Prevost is the Material Control Officer at the CFAD, Bedford, and the delegated manager for the appointments at issue. She explained that the CFAD handles ammunition. Upon receipt, ammunition is inspected to ensure that it is safe and suitable. It is then safely stored and maintained until it is issued. The CFAD also repairs and stores unused ammunition that is returned after a deployment. Given the nature of the work, safety is a priority.

10 Ms. Prevost also explained that, at the time of these appointments, the ongoing safety training for GTs was in transition to the new Civilian Ammunition Technical (CAT) training and certification. Ms. Prevost testified that, prior to her joining CFAD Bedford in August 2009, the decision had been made that GT-02s could only act at the GT-03 level until their CAT certifications could be confirmed. Modules from the old training had to be compared with the new CAT courses and then the training history of each

employee had to be reviewed so the employee could be certified at one of the four CAT levels. This exercise had not been completed when these appointment processes were undertaken. The complainant confirmed in his testimony that he received his CAT certification in April 2011.

11 Ms. Prevost stated that, for her, safety concerns are not merely a function of CAT certification. She explained generally that GT-02s move and haul ammunition, and GT - 03s perform an oversight function, checking ammunition against the inspection notes. She described GT-04s as managers of the ammunition process, with long-term business and strategic planning duties and responsibility for the daily work plan of the depot. They are also required to resolve crises.

12 Ms. Prevost stated that, as an immediate subordinate, a GT-03 would know the work and the basic procedural rules for safety compliance to perform at the GT-04 level. The complainant acknowledged that he does not know the daily responsibilities of GT - 04s because he rarely sees them during the workday.

13 Ms. Prevost testified that there was a sufficient number of GT-03s who were interested in acting at the GT-04 level to address her needs. Also, Ms. Prevost had concerns about placing a GT-02 in an acting GT-04 situation, supervising his or her GT - 03 supervisor for a period of time, and then returning to the subordinate GT-02 position. None of this evidence was contested.

14 The Tribunal addressed access to appointment opportunities in some detail in *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 0006. In *Jarvo*, the Tribunal determined that the PSEA does not guarantee access to every appointment and, in fact, permits limiting access in several ways. Nevertheless, it is possible that rules such as this one restricting GT-02s to one-level acting appointments could fetter a delegate's discretion.

15 The Tribunal finds that the respondent did not conclude that all GT-02s were, in fact, a safety risk. However, until safety certification according to the new CAT standard could be confirmed, the respondent was not satisfied that safety would be assured if

GT-02s were performing duties more than one level higher. Given the nature of the work in the CFAD, safety is paramount.

16 The Tribunal is satisfied that the decision to impose a temporary rule restricting access to acting appointments was prudent and based on real operational considerations. In addition, the Tribunal is satisfied with the respondent's explanation of its other reasons for choosing from among the GT-03s for these acting GT-04 appointments.

17 The Tribunal concludes that the respondent did not act arbitrarily when it decided not to consider GT-02s for these non-advertised GT-04 acting appointments. The evidence does not support a finding that the respondent abused its authority in this respect.

Additional Matter: The Choice of Process

18 Section 77(1)(b) of the PSEA provides that a complaint may be made to the Tribunal that a respondent abused its authority by choosing between an advertised and a non-advertised appointment process. The complainant included this ground in his complaint and in his arguments during the hearing. However, his submissions are not related to the choice of process *per se*, but rather relate to the one-level rule restricting access to these acting appointments. The complainant did not provide any evidence to support his allegation that the choice of non-advertised appointments was an abuse of authority.

19 Ms. Prevost testified that, shortly after her arrival at CFAD Bedford, an advertised process was initiated to fill the GT-04 Warehouse Foreman position. Candidates had been screened and a written test had been administered when, in April 2010, Headquarters cancelled the process. Ms. Prevost's understanding is that the cancellation was due to the unresolved CAT certifications.

20 Ms. Prevost testified that most of the CFAD's supervisory positions are filled by military personnel and many of them were vacant temporarily, but for significant periods, due to deployments to Afghanistan. She stated that she could not leave the two GT-04s

vacant because they are important to the CFAD's operation. In addition, the one other officer at her level was absent from November 2009 to February 2010 and again in April and May 2010. Ms. Prevost needed managers in place to assist her during his absences.

21 The Tribunal finds that the complainant has failed to prove that the respondent abused its authority by choosing non-advertised processes to make these appointments.

Issue II: Did the respondent make appointments that were based on merit?

22 The complainant asserts that Mr. Varner could not meet the ability to manage and lead or the requirement to demonstrate dependability. He relies on the Tribunal's finding of abuse of authority in another complaint involving himself and the respondent. See *Denny v. Deputy Minister of National Defence*, 2009 PSST 0029.

23 Ms. Prevost testified that she had directly supervised both appointees. She assessed Mr. Varner's ability to manage and lead, and his dependability based on her personal knowledge of his work performance and his performance reviews. Ms. Prevost stated that Mr. Varner had managed a fleet of vehicles as well as employees' work and leave during various assignments. In her view, Mr. Varner fully met her criteria for managing and leading. Ms. Prevost also testified that Mr. Varner planned his absences, always notified management when he had to be absent from work and had no record of abusing his leave. She was satisfied that Mr. Varner met her criteria for dependability. This testimony was uncontested.

24 Mr. Varner was an assessment board member in the appointment process that was the subject of the *Denny* decision. The Tribunal finds that his involvement in that process has no bearing on his candidacy in this appointment process. Candidates have an opportunity for a fresh assessment when they are considered for an appointment.

25 The complainant did not establish that Ms. Prevost failed to assess Mr. Varner's ability to lead and manage and his dependability according to the criteria she established, and found that he met the qualifications.

26 The complainant also submits that the documentation in these two appointment files does not specify that Mr. Varner and Mr. MacKeigan met the essential education and personal suitability qualifications. He argues that, without evidence that the appointees met these qualifications, it cannot be certain that the appointments were based on merit as required under s. 30(2) of the PSEA. The complainant relies on the Tribunal's decision in *Patton v. Deputy Minister of National Defence*, 2011 PSST 0008, in support of his position.

27 In *Patton*, the Tribunal found that none of the documentary or oral evidence demonstrated that the essential knowledge qualification could have been assessed and, therefore, the appointment constituted an abuse of authority. The Tribunal determined that there was no evidence to support the respondent's argument that an essential knowledge qualification was linked to and could be subsumed in the assessment of an essential experience qualification. The complainant argues that the respondent has taken the same approach here by assessing education through the assessment of training.

28 In this case, the education requirement was a secondary school diploma or acceptable experience and/or training in a relevant field. Ms. Prevost's testimony concerning the appointees' training is relevant to her assessment of the essential education qualification. Ms. Prevost testified that she relied, in part, on the appointees' résumés, which confirm that they both met the education requirement.

29 The respondent produced assessments written by Ms. Prevost for each of these appointments. They are very brief and do not address education or personal suitability. Ms. Prevost testified that she assessed the two appointees based on their résumés and their performance reviews, which were submitted into evidence. She also based her assessments on the appointees' training records and her personal knowledge of their work, having directly supervised them. Written rationales demonstrating that the appointees were the right fit for the appointments were also produced. Each rationale includes a statement that the appointee met all the merit criteria required for the respective appointment, which Ms. Prevost confirmed in her testimony.

30 The Tribunal is satisfied that Ms. Prevost had sufficient personal knowledge of the appointees, as well as other tools, to assess their personal suitability qualifications. The Tribunal is further satisfied that Ms. Prevost did assess the essential personal suitability qualifications, as she testified.

31 The Tribunal finds, however, that the written assessments of both Mr. Varner and Mr. MacKeigan are deficient. Assessments should be well documented and, if these ones had been more comprehensive, the complainant's concerns may well have been addressed without a hearing before the Tribunal. Nevertheless, as the Tribunal has held in many decisions commencing with *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008, mere errors or omissions do not rise to the level of abuse of authority. The errors or omissions must be serious. The Tribunal is not satisfied that the omissions in this case warrant a finding of abuse of authority.

32 Section 30(2) of the PSEA requires that a person must meet all the essential qualifications to be appointed. Based on all the evidence before it, the Tribunal is satisfied that Ms. Prevost assessed the essential qualifications of both appointees and found that they met the requirements of s. 30(2) for their respective appointments. The Tribunal finds that the complainant has not met his burden of demonstrating that these appointments were not based on merit.

Decision

33 For all these reasons, the complaints are dismissed.

Merri Beattie
Member

Parties of Record

Tribunal Files	2010-0299 and 0300
Style of Cause	<i>Miles Denny and the Deputy Minister of National Defence</i>
Hearing	May 31 and June 1, 2011 Halifax, Nova Scotia
Date of Reasons	November 3, 2011
APPEARANCES:	
For the complainant	Louis Bisson
For the respondent	Josh Alcock
For the Public Service Commission	John Unrau (written submissions)