



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**File:** 2010-0341  
**Issued at:** Ottawa, November 24, 2011

**GORDON SPROULE**

Complainant

AND

**THE DEPUTY MINISTER OF TRANSPORT, INFRASTRUCTURE  
AND COMMUNITIES**

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>	Eugene F. Williams, Member
<b>Language of Decision</b>	English
<b>Indexed</b>	<i>Sproule v. Deputy Minister of Transport, Infrastructure and Communities</i>
<b>Neutral Citation</b>	2011 PSST 0034

## Reasons for Decision

### Introduction

1 The complainant, Gordon Sproule, participated in an internal advertised appointment process to staff various positions at the AS-02 level for positions located at various locations in Ontario.

2 The complainant alleges that the respondent, the Deputy Minister, Transport, Infrastructure and Communities, used a false, misleading and inaccurate definition for the assessment of the essential qualification of Engagement. He also alleges that one assessment board member exhibited bias in falsely ascribing and attributing negative remarks to his interview answers. The complainant asserts that it was a conflict of interest for an assessment board member to act as a referee for the appointee. Furthermore, the complainant states that his referees were at a disadvantage because the respondent failed to follow the Public Service Commission (the PSC) guidelines in conducting the reference checks. He is of the view that his elimination from the appointment process consequently excluded him from the pool of successful candidates.

3 The respondent argues that the assessment board properly chose and used a valid definition and assessment criteria for the essential qualification of Engagement. It also asserts that board members did not exhibit bias because the board took a consistent and objective approach in assessing all candidates, and applied the same assessment tools and scales to all candidates. Further, it submits that there was no personal favouritism by the board member who acted as a referee for the appointee. Finally, the respondent asserts that the reference checks were conducted in accordance with standard processes and procedures.

4 The PSC did not attend the hearing but submitted written arguments concerning its *Guidance Series - Assessment, Selection and Appointment Policy* as it relates to the complainant's arguments. The policy requires that persons who are proposed for appointment or appointed must meet each essential qualification and any asset qualification, operational requirement and organizational need that were used to make the appointment decision.

## **Background**

**5** In May 2009, the respondent initiated an appointment process to staff two positions immediately, and to create a pool of AS-02 qualified candidates for various administrative positions. The complainant passed the initial screening and assessment involving a written test. However, he was eliminated from the process because he did not obtain the pass mark for the essential qualification of Engagement which was assessed by an interview on October 21, 2009, and by reference checks conducted in March 2010.

**6** On June 9, 2010, the respondent posted a Notification of Appointment or Proposal of Appointment on *Publiservice* for the position of Assets & Pool Resources Administrator, Corporate Services, Toronto, Ontario. This was the culmination of a process in which 235 persons applied and 60 interviews were held. Twenty-nine people qualified, two were appointed and 27 successful candidates were placed in a pool. The present complaint relates only to the appointment of Lisa Iazzetta.

**7** The complainant filed his complaint with the Public Service Staffing Tribunal (Tribunal) on June 14, 2010, pursuant to s. 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22 ss. 12, 13 (the PSEA).

## **Issues**

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

- (i) Did the respondent abuse its authority in defining the essential qualification of Engagement?
- (ii) Did the respondent abuse its authority in the way it conducted the reference checks?
- (iii) Did the chair of the assessment board abuse her authority by demonstrating personal favouritism towards the appointee?
- (iv) Was one of the assessment board members biased against the complainant?

## **Analysis**

**9** Abuse of authority is not defined in the PSEA. However, s. 2(4) of the PSEA offers the following guidance, “for greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism”.

**10** In *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008, the Tribunal established that abuse of authority will always include improper conduct, but the degree to which the conduct is improper may determine whether or not it constitutes abuse of authority.

**11** Abuse of authority can also include errors (see *Kane v. Attorney General of Canada and Public Service Commission*, 2011 FCA 19 at para. 64). Whether an error constitutes an abuse of authority will depend on the nature and seriousness of the error in question.

### **Issue I: Did the respondent abuse its authority in defining the essential qualification of Engagement?**

**12** The complainant submits that he was unfairly excluded because the respondent used a definition of Engagement that did not mirror the definition in the Treasury Board Secretariat document entitled *Key Leadership Competencies* (the Guidelines). He states that qualities such as Engagement may be demonstrated in an unlimited number of ways. He asserts that the respondent restricted the number of ways in which that criterion could be demonstrated. In addition, the complainant submits that the reference question for Engagement was framed unfairly because it penalized a good employee who did not have any conflicts with others. Thus, his referees did not have any conflicts to report. The complainant argues that “negatively construing the absence of prescribed indicators without asking about them in the interview and reference checks is unfair.”

**13** The assessment board asked the referees the following reference check question relating to engagement:

ENGAGEMENT

Give us an example of a time when the candidate was able to build rapport with someone at work, when the situation was a difficult one.

- What was the situation and what was the candidate's role?
- How did the candidate react/respond?

**14** To illustrate the point, the complainant referred to one of his referees who stated that the complainant interacted well with the group with whom he worked. Another referee described the complainant as professional who had no issues while a third referee indicated that he did not encounter any difficulties with the complainant. Despite these positive statements, the complainant received a failing grade on the question relating to Engagement.

**15** The chair of the assessment board, Natalie Lalonde, described her role. She explained that she interviewed the candidates, conducted reference checks and assigned a tentative mark. When the interviews were completed she met the other three members of the board to review the results of the interviews and the reference checks. The board then assigned final scores to all of the candidates. The Engagement qualification was therefore assessed by the interview and the reference checks.

**16** Ms. Lalonde stated that the board had drawn criteria and questions from a national database that had been developed in Ottawa. She stated that the criteria and the questions used were in line with the Treasury Board's guidelines. She testified that the board's rationale in choosing its criteria was based on the fact that the successful candidates would be required to work well with others.

**17** The complainant testified that the respondent's definition of Engagement failed to correspond with the dictionary definition and did not contain all of the factors set out in the Guidelines. The complainant testified that there were eight factors to be considered in the Guidelines; however, the respondent considered only six of them during the appointment process. He testified that he could only find one word in common between

the dictionary definition and the words used in the appointment process. He also said that there were negative indicators or “red flags” in the respondent’s list that did not resemble those of the Treasury Board’s definitions.

**18** The respondent submits that it consulted with its Human Resources section and made sure that the definition was in line with the Guidelines. As the employer’s delegate, the respondent argues that it has discretion to identify and define essential qualifications, its criteria, and appropriate tools for assessing those qualifications. The respondent concludes that failure to inform candidates of a specific definition related to merit does not amount to an abuse of authority.

**19** In its guidelines, the Treasury Board sets out the different factors to take into consideration regarding Engagement:

**Engagement** – *Working effectively with people, organizations, partners*

- Shares information broadly while observing relevant policies
- Works collaboratively and relates effectively to others by practicing, valuing and embracing diversity of individuals, and fostering respect and equity in the workplace, regardless of differences in values, personalities, cultural or generational backgrounds
- Encourages excellence and recognizes the contribution and success of others
- Consults colleagues, partners, clients, users and stakeholders and acts on others’ concerns
- Elicits trust by modeling effective behaviours such as following through on commitments

**20** In the respondent’s reference checking form entitled *AS-02 Collective Staffing Various Administrative Positions Process #08-MOT-IA-TOR-66952*, there are five criteria listed under Engagement:

- Actively tries to understand the positions of others; encourages others to voice their opinions. Is able to relate to and see issues others’ perspective
- Collaborates to resolve issues, when necessary; compromises in order to reach consensus
- Encourages others to share their perspectives in order to broaden everyone’s understanding of the possibilities for action
- Understands the needs and feelings of others with different values and/or cultural backgrounds; is sympathetic to and tolerant of different needs and viewpoints; shows consideration, concern.
- Other acceptable answers

**21** The Tribunal observes that the Guidelines are much broader than any of the dictionary definitions provided by the complainant.

**22** Pursuant to s. 36 of the PSEA, a deputy head has broad discretion in the selection and use of the assessment methods regarding the assessment of a candidate's qualifications (see *Denny v. Deputy Minister of National Defence*, 2009 PSST 0029). Following its examination of the Guidelines and the respondent's definition of Engagement, the Tribunal finds that the two definitions are similar. Although, the respondent employs different words to convey this meaning, the respondent's qualification relates to actions that are designed to achieve effective working relationships through information sharing, collaboration, and respect for the views of others.

**23** The Tribunal concludes that the complainant did not establish that the respondent abused its authority in defining the essential qualification of Engagement.

**Issue II: Did the respondent abuse its authority in the way it conducted the reference checks?**

**24** The complainant states that the respondent did not follow the steps outlined in the PSC's guide entitled: *Structured Reference Checking - A User's Guide to Best Practices*. Section 2 of this guide invites managers to begin the process by asking the referee to consider the behavioural indicators for a particular competency before asking them to provide examples of how the applicant has demonstrated these behaviours on the job. Neither the Statement of Merit Criteria (SMC) nor the behavioural indicators for Engagement were provided to the referees during this process. Ms. Lalonde, who did the reference checks for the complainant's referees, testified that she used all of the prompts when she contacted the complainant's referees and wrote down the responses during the interviews.

**25** Since the board members' instructions in relation to the conduct of reference checks did not include providing the SMC to referees, the complainant submits that this contravened the PSC's guide. In addition, the complainant points to the absence of values and ethics notes from the reference checks and states that they should have been included in the reference check documents that were sent to the referees.

**26** Ms. Lalonde stated that the referees received the reference questions in advance of the telephone interview. The decision not to provide the SMC or the criteria for Engagement to the referees was made by the board before the reference checks were conducted. The assessment board's rationale in providing the referees with only the questions and prompts was that this information was clear enough to the referees and would provide the assessment board with the information needed to assess the candidates.

**27** The complainant submits that because he had a referee who was not a public service employee, the respondent's failure to follow the PSC's guide unfairly placed his referee at a disadvantage vis-à-vis a public service employee or someone who is familiar with the methodology and the indicators for the criteria for Engagement.

**28** The complainant alleges that the failure to provide the referees with the behavioural indicators and the SMC before conducting the reference checks rendered the process unfair.

**29** Ms. Lalonde interviewed the complainant's referees. She spoke with the first referee on March 1, 2010, and learned that the referee had resumed supervision of the complainant on February 9, 2010. In 2008, the referee had also supervised the complainant for a period estimated to range between four to six months. During these periods the referee did not observe any events in which the complainant's behaviour regarding Engagement could be determined. The referee also advised Ms. Lalonde that the complainant had worked well within the group of employees that she had supervised.

**30** Ms. Lalonde described her telephone interview with the second referee. This referee had supervised the complainant for approximately two months in 2006/2007. In responding to the Engagement question, this referee stated that since the complainant had worked there for such a short period of time, the complainant had not encountered any difficulties nor had the time to build rapport. Based on those responses, Ms. Lalonde concluded that the information provided by the complainant's referees lacked sufficient detail to cover the main points under the Engagement



heading. Consequently, the board sought other references and requested the complainant to provide a third referee.

**31** The third referee informed Ms. Lalonde that the complainant had worked at the University of Toronto for the spring and summer months approximately 12 years earlier. The referee had told her that the complainant worked for a difficult supervisor when he initially started working in the reception area. When asked to provide an example of a time when the complainant was able to build rapport with someone at work, the referee could not provide many details, but observed the complainant to be mild mannered and very professional. Following this telephone conversation, Ms. Lalonde assigned a tentative failing grade to the complainant because there was a lack of information from his references regarding the Engagement criterion.

**32** Thus, when the reference checks were concluded, the assessment board members reviewed the complainant's interview responses as well as the information from the references in relation to their rating guide. The board concluded that the information provided by the complainant's referees, as well as his answers during the interview regarding the Engagement qualification did not meet the pass mark.

**33** Pursuant to s. 16 of the PSEA, deputy heads are required to adhere to policies established by the PSC. However, guidelines, such as the PSC's guide are not policies; they do not have the same value or effect. The guidelines are tools to assist deputy heads in appointment processes. Therefore, the respondent's failure to strictly adhere to the PSC's guide in this case did not necessarily render the reference checking process unfair or otherwise constitute an abuse of authority.

**34** The Tribunal notes that the candidates were required to provide only two references. However, when the board realized that it did not have sufficient information from the complainant's two referees to assess him, it exercised its discretion and asked him to provide a third referee. The deficiency in this case is not with the reference check process, but with the complainant's choice of referees. He did not provide names of people who had worked with him long enough to give him a full and meaningful reference. His last referee had not worked with the complainant for 12 years

and could not provide many details. The respondent was diligent in the way it conducted the reference checks in this case. It should not be obligated to seek numerous referees until it obtains the necessary information to assess a particular qualification.

**35** Providing the referees with the SMC would not have overcome the basic cause for the lack of information about this essential qualification (Engagement) because they had very limited opportunities to observe the complainant's working relationships or too much time had passed in order to provide the necessary details.

**36** The Tribunal therefore finds that the respondent did not abuse its authority in the way it conducted the reference checks. It was reasonable for the assessment board to provide the referees with only the questions and prompts based on the board's rationale that this information would be sufficiently clear to the referees and would provide the assessment board with the information needed to assess the candidates. The respondent also exercised its discretion and asked the complainant for an additional name of a referee when it realized that his other two references were insufficient concerning the Engagement qualification. Furthermore, in this particular case, the Engagement qualification was not solely assessed by the references, but was also assessed during the interview.

**Issue III: Did the chair of the assessment board abuse her authority by demonstrating personal favouritism towards the appointee?**

**37** The complainant alleges that there was personal favouritism because Ms. Lalonde, the chair of the board, was also a referee for one of the appointees, Ms. Iazzetta. The complainant also alleges that Ms. Lalonde was a friend of the appointee because of their prior work relationship and because they both attended an employee's wedding. He is also of the view that the fact that Ms. Lalonde had participated in developing the reference questions and the scoring criteria put the appointee at an advantage because Ms. Lalonde was familiar with the criteria and was therefore able to provide better answers.

**38** In accordance with the instructions provided during the appointment process, the applicants were required to provide the names of two referees – their current supervisor

and someone else. The respondent submits that Ms. Lalonde acted as a referee because she was the appointee's supervisor. Ms. Lalonde was brought into the dual role only after she consulted with Human Resources and received the approval to proceed. In its submissions, the respondent argues that Ms. Lalonde's actions do not establish personal favouritism.

**39** The respondent submits that the complainant and all candidates were assessed in the same manner. It asserts that the complainant has not shown that the appointee did not meet the criteria for appointment to that position. It also submits that the complainant did not provide convincing evidence to allow the Tribunal to conclude that there was personal favouritism.

**40** Ms. Lalonde testified that because of her concerns about performing a dual role of referee and chair of the assessment board, she consulted her Human Resources Advisors before the assessment process began. She was told that she could perform both roles. She was one of four board members who assessed the results, however she did not interview the appointee nor did she compile her interview results, or the results of the reference checks.

**41** Personal favouritism has been the subject of earlier Tribunal decisions. In *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 0007, at para. 39, the Tribunal found:

It is noteworthy that the word **personal** precedes the word **favouritism**, emphasizing Parliament's intention that both words be read together, and that it is **personal favouritism**, not other types of favouritism, that constitutes abuse of authority.  
(emphasis in original)

**42** In para. 41 of *Glasgow*, the Tribunal found:

Where there is a choice among qualified candidates, paragraph 30(2) of the *PSEA* indicates that the selection may be made on the basis of additional asset qualifications, operational requirements and organizational needs. The selection should never be for reasons of personal favouritism. Undue personal interests such as a personal relationship between the person selecting and the appointee should never be the reason for appointing a person. Similarly, the selection of a person as a personal favour, or to gain personal favour with someone else, would be another example of personal favouritism.

**43** The complainant has not provided any evidence to demonstrate that Ms. Lalonde was anything more than the appointee's supervisor. There was no evidence of a social relationship outside of the workplace other than the one occasion where they attended an employee's wedding. This one-time event is not sufficient evidence, in this case, to demonstrate a personal relationship. The evidence shows that candidates had to provide a reference from their current supervisor, which consequently put Ms. Lalonde in a dual role of referee and chair of the assessment board. In this particular case, Ms. Lalonde did not participate in interviewing Ms. Iazzetta or assess the reference check responses for the appointee. The fact alone that Ms. Lalonde was the appointee's supervisor, as well as the chair of the assessment board cannot lead to the immediate conclusion of personal favouritism. Tribunal decisions have held that board members can use their personal knowledge of a candidate in the assessment process (see for example *Visca v. Deputy Minister of Justice* 2007 PSST 0024 at para. 53). As such, Ms. Lalonde answered the reference questions regarding Ms. Iazzetta, but she did not compile the results of the referees. Clay Cervoni, the board member who interviewed and performed the reference checks for Ms. Iazzetta, testified that the chair did not try to influence the other members.

**44** The Tribunal finds that the complainant has not established the existence of personal favouritism in the decision to appoint the appointee.

**Issue IV: Was one of the assessment board members biased against the complainant?**

**45** The question of bias has been considered by the Tribunal in several decisions. In *Denny*, the Tribunal adopted the reasonable apprehension of bias test established by the Supreme Court of Canada in *Newfoundland Telephone Company v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623. Accordingly, in the present case, the question to be asked is: Would a reasonably informed bystander looking at the process reasonably perceive bias on the part of one or more of the persons involved in the assessment of the complainant?

**46** To support the argument of bias, the complainant asserts that Mr. Cervoni, one of the board members who assessed his interview responses, unfairly attributed unwarranted negative connotations to his responses and failed to record his entire answer to the interview questions regarding Engagement.

**47** The complainant testified that the interview notes provided to him revealed that the note taker did not accurately record his answer to the question about a workplace conflict. While the notes quoted him as saying: "I said that he was not a real employee", the complainant states that he had told the interviewers: "I said that he had been contracted by a non-government agency." He indicated that Mr. Cervoni had not written down his entire explanation of his answer. He also stated that Mr. Cervoni had written in his notes that he, the complainant, had to be prompted and asked for clarification. According to him, those remarks were negative connotations.

**48** Mr. Cervoni testified that the complainant had to be prompted and was asked for clarifications during the interview. However, despite prompts from the interviewers, the complainant did not provide much detail during the interview. Mr. Cervoni provided examples in which the complainant's answers to the questions on Engagement did not demonstrate that he possessed the required criteria regarding that essential qualification. Consequently, the information from the referees when combined with the complainant's answers in the interview led the board to conclude that the complainant did not demonstrate that he satisfied the essential qualification of Engagement.

**49** The complainant also alleges that not all the answers provided by the appointee satisfied the qualification of Engagement. The Tribunal notes that the evidence provided by the respondent indicates that a final score was determined by the entire board, after the interview and the reference checks were conducted. On the whole of the evidence, the Tribunal is satisfied that the assessment board had sufficient evidence based on the interview and the reference checks to determine whether the appointee met the qualification.

**50** The Tribunal considered the complainant's concerns about the completeness of Mr. Cervoni's notes in relation to the allegation of bias. There was no requirement for a

verbatim recording of the complainant's answer. The Tribunal heard evidence from Mr. Cervoni, wherein he cited examples that the complainant's responses to the Engagement question did not meet the required pass mark. Furthermore, he wrote down that the complainant had to be prompted. The interviewer took notes as an aide mémoire. That evidence was not challenged by the complainant. Therefore, the Tribunal is satisfied that the notes taken reflected the answers provided by the complainant. The Tribunal therefore finds that a reasonably informed bystander would not perceive bias on the part of Mr. Cervoni as a board member involved in the assessment of the complainant.

**51** Consequently, the complainant has not demonstrated bias on the part of the board member.

**52** An objective assessment of all of the evidence presented in this case leads the Tribunal to conclude that the complainant has not proven on the balance of probabilities that there was an abuse of authority in the application of merit or any proof of personal favouritism or bias in this appointment process.

### **Decision**

**53** For all of these reasons, the complaint is dismissed.

Eugene F. Williams  
Member

**Parties of Record**

<b>Tribunal File</b>	2010 - 0341
<b>Style of Cause</b>	<i>Gordon Sproule and the Deputy Minister of Transport, Infrastructure and Communities</i>
<b>Hearing</b>	June 7, 2011 Toronto, Ontario
<b>Date of Reasons</b>	November 24, 2011
<b>APPEARANCES:</b>	
<b>For the complainant</b>	Larry Teslyk
<b>For the respondent</b>	Pierre Marc Champagne
<b>For the Public Service Commission</b>	John Unrau (written submissions)