Public Service Staffing Tribunal | Tribunal de la dotation de la fonction publique

**File:** 2010-0214
**Issued at:** Ottawa, September 26, 2012

**BILL BOUTZOUVIS**

Complainant

AND

**THE DIRECTOR OF PUBLIC PROSECUTION SERVICE OF CANADA**

Respondent

AND

**OTHER PARTIES**

| | |
|---|---|
| **Matter** | Complaint of abuse of authority under section 77(1)(*a*) and (*b*) of the *Public Service Employment Act* |
| **Decision** | Complaint is dismissed |
| **Decision rendered by** | John Mooney, Vice-Chairperson |
| **Language of Decision** | English |
| **Indexed** | *Boutzouvis v. the Director of Public Prosecution Service of Canada* |
| **Neutral Citation** | 2012 PSST 0025 |

# Reasons for Decision

## Introduction

1 Bill Boutzouvis, the complainant, participated in an internal advertised appointment process to staff three Senior Counsel positions at the LA-2B group and level at the Public Prosecution Service of Canada (PPSC). He alleges that the Director of the PPSC, the respondent, abused its authority in the application of merit. More specifically, he alleges that the respondent did not assess his qualifications properly and that there was a lack of transparency in one of the appointments. The respondent denies those allegations.

2 The Public Service Commission (PSC) did not attend the hearing but submitted written arguments in which it sets out its interpretation of abuse of authority and describes the relevant policies and guides that apply to this appointment process. Its *Assessment Policy*, for example, provides that assessment methods and tools should be able to effectively assess the candidate's qualifications and provide a sound basis for making appointments according to merit. The PSC did not take a position regarding the merits of the complaint.

3 For the reasons set out below, the Public Service Staffing Tribunal (the Tribunal) finds that the complainant failed to establish that the respondent abused its authority in this appointment process.

## Background

4 On June 9, 2008, the respondent posted a *Job Opportunity Advertisement* (JOA) on *Publiservice* to fill one bilingual and two English Senior Counsel positions at the LA-2B group and level with the PPSC in the National Capital Region (NCR) on an indeterminate basis.

5 The assessment board was comprised of Tom Raganold, Chief Federal Prosecutor for the NCR, who was the delegated manager and chair of the assessment board, Cyril McIntyre, Manager and Senior Counsel, Simon William, Senior Counsel, and Andrew Ross, Human Resources Consultant.

6 The respondent screened candidates on education, experience and occupational certification. The candidates who were screened into the process were invited to an interview and asked to provide a sample of a legal paper they had written. Reference checks were also carried out.

7 Eleven candidates applied and seven candidates, including the complainant, met the essential qualifications and were placed in a pool of qualified candidates.

8 On March 31, 2010, the respondent posted *a Notice of Appointment or Proposal for Appointment* (NAPA) regarding the appointments of Marc Marcotte, Vern Brewer and Allyson Ratsoy.

9 On April 15, 2010, the complainant brought a complaint of abuse of authority pursuant to s. 77(1)(*a*) and (*b*) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (PSEA) to the Tribunal.

**Preliminary matter**

10 As indicated above, the complainant indicated in his complaint form that he was presenting his complaint under s. 77(1)(*a*) and (*b*) of the PSEA. The first provision deals with abuse of authority in the application of merit, the latter deals with abuse of authority in the choice between an advertised and a non-advertised appointment process. At the hearing, the complainant did not present any evidence or make any arguments regarding the choice of appointment process. The Tribunal therefore finds that the complainant has not proven his allegation under s. 77(1)(*b*).

**Issues**

11 The Tribunal must decide the following issues:

(i) Did the respondent fail to properly assess the complainant's qualifications?

(ii) Was there a lack of transparency in one of the appointments?

## Analysis

12 Section 77(1) of the PSEA provides that a person in the area of recourse may make a complaint to the Tribunal that he or she was not appointed or proposed for appointment because the PSC or the deputy head abused its authority in the appointment process. Abuse of authority is not defined in the PSEA; however, s. 2(4) 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."

13 As the Tribunal's jurisprudence has established, the use of such inclusive language indicates that abuse of authority includes, but is not limited to, bad faith and personal favouritism.

14 In *Kane v. Attorney General of Canada and Public Service Commission,* 2011 FCA 19, at para. 64, the Federal Court of Appeal held that abuse of authority can also include errors. Whether an error constitutes an abuse of authority will depend on the nature and seriousness of the error in question.

15 Abuse of authority can also include improper conduct and omissions. The degree to which the conduct or omission is improper will determine whether or not it constitutes abuse of authority. See, for example, *Tibbs v. Deputy Minister of National Defence,* 2006 PSST 0008.

### Issue I: Did the respondent fail to properly assess the complainant's qualifications?

16 The complainant contends that the respondent did not properly assess his qualifications because it did not take into consideration his experience and past performance in counterterrorism, it did not use the asset qualifications properly, the assessment board members were not qualified to assess his qualifications, and the appointment process took too long to complete.

*The complainant's experience and past performance*

17 The complainant alleges that the respondent did not properly consider the importance of his experience and past performance by failing to use the

*Performance and Employee Appraisal Reports* (PEAR) for the previous years. His performance appraisals show that he is a superior counsel and that he should have been promoted because of his experience working on complex prosecution files. According to the complainant, failure to use the PEARs was an error of such magnitude as to constitute an abuse of authority.

18 To support his allegation, the complainant submitted several of his PEARs. For example, the PEAR for the period of March 31, 2005, to April 1, 2006, was very positive. It stated that the complainant anticipated challenges before they arose and that he dealt with them in an innovative manner. It also stated that it would not have been possible to successfully prosecute a certain high profile case without his participation. The complainant's work performance was rated as "outstanding" and he exceeded the objectives set out for him. For the period of March 31, 2006, to April 1, 2007, the complainant had exceeded expectations and had sustained outstanding performance throughout the year. The PEAR for the period of March 31, 2007, to April 1, 2008, indicated that the complainant had been working since 2004 on the first prosecution of offences under the antiterrorism provisions of the *Criminal Code*, R.S.C., 1985, c. C-46. The extremely high volume and complexity of the work associated with that case required an exceptional level of dedication, time and creativity. For a third consecutive year, the complainant "sustained outstanding performance throughout the year and exceeded his objectives".

19 David McKercher testified at the hearing. Mr. McKercher has worked as a federal prosecutor for 27 years. He has been General Counsel at the LA-3A group and level since April 2010. Before that, he was Senior Legal Counsel at the LA-2B group and level for ten years. Prior to working on a high profile counterterrorism prosecution case, he worked mainly on prosecutions involving drug trafficking and *Income Tax Act,* R.S.C., 1985, c. 1 (5th Supp.) offences.

20 Mr. McKercher praised the complainant's work. For example, the complainant worked on an international drug prosecution involving persons from Canada, the United States and Vietnam. In that case, the complainant wrote an affidavit on very

short notice to obtain wiretap authorization and did research on complex legal issues. He knew how to identify issues and protect the public interest.

21 Mr. McKercher also described the complainant's work on a high profile counterterrorism case in 2005. The complainant put together a statement of facts that was very useful in the prosecution of that case, which involved co-conspirators in several countries. Mr. McKercher delegated work to the complainant and depended on him because he knew that the complainant's work was of a high calibre and met high standards. The complainant was performing above his level.

22 Mr. McKercher went over the *Statement of Merit Criteria* (SMC) for the Senior Counsel positions and showed how, in his view, the complainant met the listed merit criteria.

23 In the summer of 2007, Kelly Gorman became the Director and Chief Federal Prosecutor at the PPSC in the NCR. The complainant entered into evidence an email Ms. Gorman sent on May 17, 2007 to George Dolhai, acting Deputy Director, and Chantal Proulx, also acting Deputy Director, asking them to consider appointing the complainant to a position at the LA-2B group and level, at least on an acting basis.

24 During his testimony, Mr.Raganold explained that although PEARs can be used in the assessment of a candidate's qualifications, their primary use is to provide feedback to employees regarding their work performance in order to identify areas of improvement, to set objectives, and for performance pay purposes.

25 The Tribunal notes that the respondent has recognized the complainant's excellent work history. The Tribunal cannot, however, accept the complainant's argument that the respondent's failure to use the PEARs in the assessment of candidates constitutes an abuse of authority. Section 36 of the PSEA gives the delegated manager a broad discretion in the choice of assessment methods.

26 Deputy heads may use any assessment method that they consider appropriate, as long as they properly assess the qualifications that are established in the SMC. See, for example, *Jolin v. Deputy Head of Service Canada*, 2007 PSST

0011, *Ouellet v. President of the Canadian International Development Agency*, 2009 PSST 0026. The complainant did not present any evidence to support his allegation that the respondent's assessment methods were unreasonable or deficient in any way.

27 Mr. McKercher praised the complainant's work and Ms. Gorman recommended that he be promoted. However, neither of these individuals was a member of the assessment board. It is not the Tribunal's role to reassess a candidate's qualifications. Its role is to determine whether there was an abuse of authority in the appointment process, such as in the assessment made by the assessment board.

28 The complainant, Mr. McKercher and Ms. Gorman stated that the complainant was performing duties above the level of his position, implying that he should be appointed to a senior counsel position at the LA-2B group and level.

29 The complainant asked that the Tribunal appoint him to a Senior Counsel position because his past performance warranted such promotion and he was performing work at that level. The scheme of the PSEA, as set out in ss. 29 and 77(1), is that when there is a vacancy and the organization decides to fill that vacancy, a person may make a complaint that that person was not chosen because of an abuse of authority. If the complaint is substantiated, s. 81(1) provides that the Tribunal may order the deputy head or the Commission to revoke the appointment, or take any corrective action it considers appropriate, but it cannot appoint a person to a position. Section 29(1) of the PSEA provides that the PSC or its delegate have the exclusive authority to make an appointment. The Tribunal therefore does not have the authority to appoint the complainant to a position or to order the deputy head to make an appointment.

*The use of the asset qualifications*

30 The asset qualifications for the appointment process were as follows:

> Experience in providing advice in relation to and prosecuting regulatory offences.
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> Experience in providing advice in relation to and prosecuting offences under the Income Tax Act.

> Experience in providing advice in relation to and prosecuting wiretap cases, National Security matters; proceeds of Crime and offence-related property.
>
> Superior writing skills.

31 The respondent did not use the national security experience asset qualification. The complainant contends that the respondent should have used that asset, and, if it had, he would have been the “right fit” candidate. The complainant also argues that the respondent was not transparent and that the right fit principle leaves too much discretion to the delegated manager.

32 The complainant stated that Mr. Raganold did not understand the importance of counterterrorism. Counterterrorism investigations and prosecutions are of vital importance to Canada and its allies, especially the United States and the United Kingdom. Mr. McKercher testified that there was a need for a permanent unit for counterterrorism in each regional office, except possibly the Northern office.

33 The Tribunal finds that the respondent did not abuse its authority when it chose not to use national security as an asset qualification. Section 30(2) of the PSEA makes it clear that while the delegated manager must assess all of the essential qualifications in an appointment process it has discretion with respect to asset qualifications. Section 30(2) of the PSEA reads as follows:

> **30.** (1) Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.
>
> (2) **An appointment is made on the basis of merit when**
>
> (*a*) the **Commission is satisfied** that the person to be appointed **meets the essential qualifications** for the work to be performed, as established by the deputy head, including official language proficiency; and
>
> (*b*) the Commission **has regard to**
>
> (i) **any additional qualifications** that the deputy head may consider to be **an asset** for the work to be performed, or for the organization, currently or in the future,
>
> […]
>
> (emphasis added)

34 In *Steeves v. Deputy Minister of National Defence*, 2011 PSST 0009, at para. 57, the Tribunal explained the distinction between s. 30(2)(*a*) and (*b*) as follows:

> Therefore, the words “has regard to” in s. 30(2)(*b*) indicate that the criteria established under this section must be considered; attention must be paid to them, but it is not necessary to assess or use them. If it were necessary to assess and use the asset qualifications, operational requirements and organizational needs, there would be no distinction made between these criteria and the essential qualifications.

35 The respondent therefore had a broad discretion in choosing the asset qualifications that it would assess and use for appointments made from the appointment process. There is no evidence that the respondent abused its discretion. Mr. Raganold provided valid reasons for using some asset qualifications and not others, and he described how the persons appointed met those asset qualifications.

36 Mr. Raganold explained that because the process would be used to create a pool of qualified candidates for similar positions, he included a variety of asset qualifications that could be used as required for appointments to various positions. The NCR Office, which is a regional office, conducts work in three areas: drug crimes, regulatory offences including offences under the *Income Tax Act* and national security. For the appointments to the Senior Counsel positions at issue, he chose not to use the national security asset qualification because he had a greater need for employees who possessed the other asset qualifications.

37 Mr. Raganold testified that he used the asset experience qualification included in the SMC related to wiretap, proceeds of crime and offence-related property assets because the majority of the cases in the NCR relate to drug prosecutions. There are thousands of drug files. Currently, between 25 and 30 of the 40 lawyers working in the NCR work exclusively on drug cases. Drug prosecution cases often involve matters of proceeds of crime and weapons, as well as the use of wiretapping to infiltrate organized crime. Currently, 12 to 15 of the lawyers are designated agents for the purpose of making applications to a judge for wiretapping authorization.

38 The respondent also used the superior writing skills asset qualification because applications for wiretap authorizations must be well written. If not, they could be rejected.

39 Mr. Raganold stated that he applied the experience qualification related to regulatory offences and offences under the *Income Tax Act* because this is an important part of the work in the NCR. The NCR Office has one team leader and five lawyers dealing with those prosecutions. Regulatory offences include offences under customs, fisheries and excise tax legislation.

40 Mr. Raganold further testified that he did not use the national security asset qualification because there was insufficient work in that area at the time to require it. The NCR Office had only one national security prosecution which was winding down. There was the possibility of a forthcoming counterterrorism file, but it was not known at that time whether charges would be laid in that case. There was, therefore, no need for national security work at the time the appointments at issue were made.

41 The complainant did not challenge the relevance of those asset qualifications to the work of the positions to be staffed in this appointment process. He agreed that the majority of the work in the NCR involves drug prosecution and that wiretapping is an important component of drug prosecutions. Moreover, the complainant did not challenge the qualifications of the three persons chosen for appointment.

42 Mr. Raganold also explained how the chosen asset qualifications were assessed in each of the appointments. He set out the rationale for each appointment in the *Appointment from a Pool of Qualified Candidates* form, which he completed on March 18, 2010. In the case of the appointment of Ms. Ratsoy, Mr. Raganold wrote that he selected her because she had been working extensively in the prosecution of wiretap cases that deal with highly sensitive issues and she was the only candidate that exceeded the respondent's expectations in the assessment of her written communication skills. Mr. Marcotte was chosen because he had the most direct experience in relation to prosecuting wiretap cases with significant proceeds of crime and offence-related property. Mr. Brewer was chosen because he had prosecuted many cases related to regulatory offences and offences under the *Income Tax Act* and had the most experience in those areas.

43 The Tribunal finds that the respondent was transparent in its use of asset qualifications. They were listed in the SMC and the respondent has explained the rationale for choosing and applying the asset qualifications that were used. Equally, it has provided a reasoned explanation for not using the national security asset qualification. The Tribunal finds no abuse of authority in this regard.

*The assessment board members' qualifications*

44 The complainant contends that the assessment board members did not possess the qualifications required to assess his experience and past performance. The complainant adds that he would have been the right fit had the assessment board properly understood his work in counterterrorism. The Tribunal notes that since experience in counterterrorism was not used in the appointment process, any lack of knowledge in that area is not relevant to this complaint.

45 As the Tribunal has explained in previous decisions, those who conduct the assessment should be familiar with the work required in the position to be staffed and, in the case of an advertised appointment process, should not have any preconceived notions as to who should be appointed. See, for example, *Sampert v. Deputy Minister of National Defence*, 2008 PSST 0009, at para. 54. The Tribunal finds that the assessment board members were familiar with the work required, and there was no evidence that any of the board members had preconceived notions as to who should be appointed.

46 Mr. Raganold has significant experience in the practice of law, including prosecuting offences and managing lawyers. He testified that he has been the Chief Federal Prosecutor at the NCR Office, a position at the LA-3A group and level, since February 2007. He is the manager of the office and the chief legal advisor. From 2002 to 2007, he supervised the work of lawyers in the private sector who worked on contract with the Department of Justice in the regions. He joined the federal public service in 1996, as Counsel for the Department of Justice, to conduct a major drug prosecution project. Before that, he worked as a defence lawyer in private practice. He also worked for one year as a Crown Attorney in Cornwall, Ontario and Perth, Ontario. The Tribunal therefore finds that he was amply competent to assess the complainant's qualifications.

47 The complainant also argues that Mr. McIntyre and Mr. William were not qualified to assess his experience since they did not work in the same office. The Tribunal finds that the complainant has not established that it was necessary to have worked in the same office as the complainant to assess his qualifications. In any case, the Tribunal finds that both Mr. McIntyre and Mr. William were aware of the work done in PPSC. They both worked for PPSC and liaised with the NCR Office. According to Mr. Raganold's testimony, Mr. McIntyre is a Manager and Senior Counsel in charge of ministerial and cabinet affairs in the Minister's Office at headquarters. He occupies a position classified at the LA-2B group and level. He was in charge of liaising with PPSC. Mr. William is Senior Counsel at the LA-2B group and level at headquarters and was aware of the work done in the PPSC NCR. He works on drug prosecutions and has worked for the Department of Justice for many years.

48 The complainant also argued that Mr. McIntyre and Mr. William were not qualified to assess him because they had little or no experience in litigation. The evidence shows that Mr. Raganold and Mr. William had sufficient litigation experience and, as a result, the Tribunal finds that as a whole the assessment board possessed the appropriate experience.

49 The complainant did not challenge Mr. Ross' role on the assessment board. According to Mr. Raganold's testimony, Mr. Ross was on the board to provide advice on human resources, not legal matters.

*Time taken to complete the appointment process*

50 The complainant argues that the appointment process took too long. The JOA was posted in June 2008, the interviews only took place in December 2009, and the NAPA was posted in March 2010.

51 The respondent explained that the delays were due to the fact that PPSC was a newly created agency, formerly part of the Department of Justice, and that it had to be built from the ground up. Since it did not have sufficient staff and time to dedicate to the appointment process, it decided to hire a consultant in the spring of 2009. The work of

that consultant was unsatisfactory, and so it decided to change consultants in the midst of the process.

52 The Tribunal finds that the complainant has not proven this allegation. There are no timelines in the PSEA or in the regulations made under the Act for the completion of an appointment process. The process was lengthy. However, the respondent provided a reasonable explanation for the time it took and the complainant did not demonstrate that the length of the process was due to, or caused anything that would amount to, an abuse of authority.

**Issue II: Was there a lack of transparency in one of the appointments?**

53 The complainant contends that there was a lack of transparency in the appointment process because it was used to "convert" Mr. Brewer's acting appointment in a Senior Legal Counsel position at the LA-2B group and level to an indeterminate appointment in the same position. At the time, Mr. Brewer had been acting in that position for three years.

54 The Tribunal finds that the complainant has failed to prove this allegation. Notice of both Mr. Brewer's acting appointment and his appointment from this appointment process were posted on *Publiservice*. With respect to his acting appointment, Mr. Raganold explained that it was extended because it took longer than expected to complete this appointment process. The extension of his acting appointment was posted and no complaint was filed. Mr. Raganold's testimony on that matter was not contradicted.

55 As for this appointment, a JOA was posted on *Publiservice* in June 2008. Mr. Brewer applied in the process, was assessed and found fully qualified. His appointment was made public through the NAPA. The Tribunal therefore finds that there is no evidence of any lack of transparency in his appointment.

**Decision**

56 For all of the above reasons, the complaint is dismissed.

John Mooney
Vice Chairperson

**Parties of Record**

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| **Tribunal File** | 2010-0214 |
| **Style of Cause** | *Bill Boutzouvis and the Director of Public Prosecution Service of Canada* |
| **Hearing** | June 16 and 17, 2011<br>Ottawa, ON |
| **Date of Reasons** | September 26, 2012 |
| **APPEARANCES:** | |
| **For the complainant** | Bill Boutzouvis |
| **For the respondent** | Karen L. Clifford |
| **For the Public Service Commission** | John Unrau<br>(written submissions) |