



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2010-0547
Issued at: Ottawa, March 23, 2012

DAVID WHALEN

Complainant

AND

THE DEPUTY MINISTER OF NATURAL RESOURCES CANADA

Respondent

AND

OTHER PARTIES

| | |
|-----------------------------|--|
| Matter | Complaint of abuse of authority pursuant to section 77(1)(a) of the <i>Public Service Employment Act</i> |
| Decision | Complaint is substantiated |
| Decision rendered by | Joanne B. Archibald, Member |
| Language of Decision | English |
| Indexed | <i>Whalen v. Deputy Minister of Natural Resources Canada</i> |
| Neutral Citation | 2012 PSST 0007 |

Reasons for Decision

Introduction

1 David Whalen, the complainant, was an unsuccessful candidate in an internal advertised appointment process for the AS-06 position of Regional Assets Manager, with Natural Resources Canada (NRCan), in Edmonton, Alberta. He alleges that the respondent, the Deputy Minister of Natural Resources Canada, abused its authority by failing to assess all of the essential qualifications for the position and by not verifying the experience of the appointee.

2 The respondent denies that it abused its authority. It submits that it used flexibility and discretion in a responsible manner and conducted a transparent appointment process.

3 The Public Service Commission did not appear at the hearing, but provided written submissions. It noted the importance of complying with legislation and policies in the assessment of candidates.

4 For the reasons below, the complaint is substantiated. The Tribunal finds that the written examination (the examination) administered to assess knowledge failed to properly assess candidates for the knowledge factors identified below as K1 and K2. As such, it has not been shown that the appointment of the appointee has been made in accordance with merit as required by s. 30 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the PSEA).

Background

5 In 2010, NRCan conducted an internal advertised appointment process for this position. Seventeen applications were received and eight were screened out as they did not meet the education and experience requirements. Three candidates withdrew and six wrote an examination to assess the four essential knowledge qualifications. Two candidates attained the required pass mark for the examination. They were interviewed and their references were checked. At the conclusion of the assessment process, both were found to be qualified.

6 The complainant applied and was screened into the appointment process. He wrote the examination and he was found not to meet two of the essential qualifications. On July 13, 2010, he received notice that he had failed to obtain the pass mark for certain qualifications and his candidacy would not be given further consideration. On August 24, 2010, NRCan issued a Notice of Appointment or Proposal of Appointment for the appointee. On September 7, 2010, the complainant filed a complaint of abuse of authority pursuant to s. 77 of the PSEA with the Public Service Staffing Tribunal (the Tribunal).

Issues

7 The Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority by failing to assess all of the essential knowledge qualifications for the position?
- (ii) Did the respondent abuse its authority by failing to verify the experience of the appointee?

Issue I: Did the respondent abuse its authority by failing to assess all of the essential knowledge qualifications for the position?

8 The examination and the Statement of Merit Criteria (SMC) were placed in evidence before the Tribunal. The knowledge qualifications set out in the SMC are:

- Knowledge of the legislation, regulations and policies of the federal government pertaining to real property management including Canada Labour Code, health and safety, and environmental requirements. (K1)
- Knowledge of real property management trends and recent developments. (K2)
- Knowledge (of) real property project management, risk management, and project leadership practices. (K3)
- Knowledge of contract management in the federal government.

9 The complainant alleged that K1, K2, and K3 were not completely assessed. The complainant stated that K1 contains four distinct elements of knowledge: legislation, regulations and policies; Canada Labour Code; health and safety; and environmental

requirements. It is his view that knowledge of legislation, regulations and policies was assessed. However, the other three elements were not addressed by the questions asked on the knowledge examination.

10 The complainant further asserted that K2 contains two elements of knowledge of real property management: trends and recent developments. He believed that while knowledge of trends was tested by the examination, no question addressed recent developments.

11 Lastly with respect to the examination, the complainant maintained that K3 contains three individual knowledge components to be tested: real property project management, risk management, and project leadership practices. He believed that only risk management was tested.

12 In the complainant's submission, the elements of the examination did not match the requirements of the SMC. Therefore, in his opinion, it could not be said that the ensuing appointment was made on the basis of merit.

13 Lorene Gillmore is the Regional Manager, Shared Services for the Prairie and Northern Region. The Regional Assets Manager is a senior position reporting to her. During testimony before the Tribunal, Ms. Gillmore reviewed the SMC for the appointment process and described the steps taken to assess candidates. She explained that after receiving the applications, she screened candidates for education and experience. She stated that she was not comfortable assessing knowledge for this position. At her direction, the examination was created and then marked by retired federal employee Henry Sano. Ms. Gillmore and two others conducted interviews for those candidates who passed the examination. She then collected references and assessed them with other members of the assessment board.

14 Ms. Gillmore testified that she spoke with Mr. Sano several times concerning the creation of the examination, the strategic nature of the position and her preference for examination questions that produced narrative answers. According to Ms. Gillmore, Mr. Sano produced an examination with four questions for each qualification and she believed that all of the factors were assessed. Once Mr. Sano completed the marking

of the examinations, he was not further involved. The complainant was found not to meet K2 or K4 and was eliminated from consideration.

15 Mr. Sano testified concerning his involvement in the appointment process. He acknowledged that he prepared and marked the examination. He recalled that the examination was limited to one hour and that there was a broad area of knowledge to cover. He developed nine examination questions. More than one factor was tested in each question and each factor would be tested in four of the questions.

16 Mr. Sano recalled his discussion with Ms. Gillmore. He explained his understanding of the knowledge qualifications. K1 consisted of mandatory items that a federal employee would be expected to undertake. K2 was broad: it covered the whole enterprise and commerce of real property management, assessing candidates' knowledge of trends and the way the federal government was headed in terms of service. K3 represented leadership and risk management, with a project focus. K4 related to contracting, specifically acquisition, leasing and disposal. Mr. Sano reviewed the questions and his intention for each of them. He testified that he did not look for candidates to mention key words, but he looked broadly for a demonstrated, basic understanding of what was being asked.

17 Questions 1, 2, 3, and 5 were intended to test K1. Mr. Sano testified that he structured the questions to produce an overall, general understanding of legislation, regulations and policies related to real property matters. He stated that the examination did not directly ask questions about the Canada Labour Code, health and safety or the environmental requirements. He considered that there could be interplay among the elements and added that the areas were too detailed to be encapsulated in a single question. He suggested that question 2, which asked candidates to describe the role of Treasury Board and the Secretariat, indirectly had potential to touch on all of the areas expressed in K1. Question 3 allowed candidates to address the government policy of preserving cultural heritage. Question 5, which asked candidates to identify the initiative known as LEED, did not address environmental requirements directly, but had some scope for it.

18 Questions 4, 5, 6, and 8 addressed K2. Mr. Sano maintained that trends such as public-private partnerships, sustainable government operations, risk assessment and management, as well as the area of contracting were available answers to these questions. He considered that questions 4, 6, and 8 evaluated aspects of both elements. Question 5 allowed a discussion of LEED, as noted above, and Mr. Sano considered this as rising in importance in recent years as a strategy for sustainable government operations.

19 Questions 1, 3, 6, and 7 were used to test K3. Mr. Sano testified that question 1 dealt with project work and the reliance of the federal government on local authorities to enforce mandatory items. Question 3 related to the Federal Heritage Buildings Review Office. Mr. Sano testified that once a building is assigned a heritage designation, it affects project managers in terms of the scope of work and how risk is assessed. Question 6 asked for the identification of key components of risk assessment, how they are to be assessed and evaluated. Mr. Sano stated that this addressed risk management as a trend and as part of the skill set of a project manager or project leader. He also considered that question 7 which asked candidates to describe a building management plan, gave them the opportunity to demonstrate knowledge of roads, grounds, administration costs and payment in lieu of taxes. In Mr. Sano's opinion, these questions addressed K3.

20 The Tribunal finds that the respondent abused its authority in the assessment of candidates as the examination failed to adequately test K1 and K2 as they were set out in the SMC for this position. Section 30 of the PSEA requires appointments to be made on the basis of merit. Further, it provides that for an appointment to be based on merit, the appointee must meet the essential qualifications for the work to be performed. As the Tribunal has previously held, failure to fully assess the essential qualifications is an abuse of authority (see for example, *Rochon v. Deputy Minister of Fisheries and Oceans*, 2011 PSST 0007, at para. 81; *Patton v. Deputy Minister of National Defence*, 2011 PSST 0008, at para 37). Both K1 and K2 were essential qualifications set out in the SMC for this appointment process. As they were not fully assessed, it cannot be demonstrated that the appointee meets the essential qualifications for the position.

21 K1 presents a specific, detailed knowledge qualification to be assessed. The language is inclusive. There is no evidence before the Tribunal to suggest that the specific inclusion of the Canada Labour Code, health and safety and environmental requirements in the SMC was an accident or a mere illustration. The Tribunal accepts that they appeared in the SMC for a reason and the evidence shows that they were not addressed by the questions used to assess K1. The plain wording of K1 establishes their contextual significance and the only reasonable explanation for their appearance is that they were essential to the position and the assessment of candidates. To overlook them in the assessment is a serious omission constituting an abuse of authority.

22 With respect to K2, the qualification distinguishes between trends and recent developments within one qualification. In the manner in which the essential qualification is expressed with the use of the conjunction “and”, a plain reading demonstrates that they were two distinct concepts. As such, neither could be overlooked in the assessment. Mr. Sano stated in evidence that knowledge of recent developments was not addressed by the examination. As such, there is no evidence that this aspect of K2 was evaluated and this serious omission constitutes an abuse of authority.

23 As regards K3, Mr. Sano’s testimony that the three aspects of the qualification were assessed was not challenged or contradicted. The Tribunal finds that the complainant has not demonstrated that any aspect of that qualification remained unaddressed by the examination.

Issue II: Did the respondent abuse its authority by failing to verify the experience of the appointee?

24 In the matter of verifying the appointee’s experience, the complainant noted that the assessment board took no steps to validate the experience the appointee claimed in his application, particularly for the experience qualification of managing programs and human and financial resources, as reflected on the SMC. He is of the view that verification must be done to comply with merit.

25 Ms. Gillmore testified that when she screened the appointee’s application for experience, she accepted what he had written in his covering letter and résumé.

All applications were screened in this manner. His description of his work history established that he satisfied the experience requirement. The respondent submitted that Ms. Gillmore was entitled to rely on the experience disclosed by the appointee.

26 The Tribunal finds no abuse of authority in the assessment of the appointee's experience. Section 36 of the PSEA provides that managers may choose any assessment method to determine whether a candidate meets the qualifications for a position and the Tribunal has held that managers have broad discretion in the selection of those assessment methods (see *Visca v. Deputy Minister of Justice*, 2007 PSST 0024, at para. 51). In the present case, the chosen assessment method was the application. There is no evidence to suggest that Ms. Gillmore acted unreasonably in relying on the description of the appointee's experience in his application. It has not been shown to be unreliable or questionable and the complainant has not shown that Ms. Gillmore was under an obligation to seek verification of it.

Decision

27 As the appointee has not been assessed for the complete requirements of K1 and K2, his appointment constitutes an abuse of authority. For this reason, the complaint is substantiated.

Order

28 Pursuant to its authority under s. 81(1) of the PSEA, the Tribunal orders the respondent to revoke the appointment of the appointee to the position of Regional Assets Manager within 60 days of the date of this decision.

Joanne B. Archibald
Member

Parties of Record

| | |
|--|---|
| Tribunal File | 2010-0547 |
| Style of Cause | <i>David Whalen and the Deputy Minister of Natural Resources Canada</i> |
| Hearing | December 6 and 7, 2011 Edmonton, Alberta |
| Date of Reasons | March 23, 2012 |
| APPEARANCES: | |
| For the complainant | David Whalen (self-represented) |
| For the respondent | Pierre Marc Champagne |
| For the Public Service Commission | Marc Séguin (written submissions) |