



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

Files: 2010-0427, 0428,
0465-0475, 0551-0556,
0632-0639
Issued at: Ottawa, March 30, 2012

OMAR KRAYA

Complainant

AND

**THE DEPUTY MINISTER OF NATIONAL DEFENCE AND
THE DEPUTY MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES
CANADA**

Respondents

AND

OTHER PARTIES

Matter	Complaints of abuse of authority pursuant to section 77(1)(a) of the <i>Public Service Employment Act</i>
Decision	Complaints are dismissed
Decision rendered by	Joanne B. Archibald, Member
Language of Decision	English
Indexed	<i>Kraya v. Deputy Minister of National Defence</i>
Neutral Citation	2012 PSST 0009

Reasons for Decision

1 Omar Kraya, the complainant, has filed twenty-seven complaints of abuse of authority under s. 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the PSEA). The complaints address an internal advertised appointment process for the PG-04 position of Purchasing and Supply Officer with the Department of National Defence (DND) in Ottawa, Ontario, in which the complainant was an unsuccessful candidate. Several appointments were also made under this appointment process to positions at the Department of Public Works and Government Services Canada (PWGSC). Consequently, some of the complaints were filed against the Deputy Minister of PWGSC as well as against the Deputy Minister of DND.

2 On September 10, 2010, the Deputy Minister of DND (who shall be referred to as the respondent, in this decision), obtained approval from the Tribunal to assume carriage of the defence of all the consolidated complaints, including those filed against the Deputy Minister of PWGSC. Accordingly, during the hearing, none of the parties made any distinction between the complaints relating to DND and PWGSC.

3 It is the complainant's view that the assessment board in this appointment process erred in three ways: by failing to diligently pursue a reference from Zamir Qureshi; by using a reference from a person who had no personal knowledge of the complainant; and, by refusing to remove the reference and substitute another one.

4 The respondent, the Deputy Minister of DND, denies that there was an abuse of authority as alleged. The respondent states that the complainant provided three referees and there was no ranking of the three names. Two of the referees were contacted and the respondent asserts that it did not err in refusing to set one reference aside and substitute another reference.

5 The Public Service Commission (PSC) was not present at the hearing, but presented written submissions. It noted the importance of complying with legislation and policy in the assessment of candidates.

6 After hearing and considering the evidence, which is set out below, the Public Service Staffing Tribunal (the Tribunal) finds that the respondent did not abuse its

authority as alleged. Two referees, both of whom were named by the complainant, were contacted by the assessment board and references were obtained from them. The effort applied to contact the third referee was adequate and, in any event, there was no need for the third reference. Finally, it has not been shown that the assessment board acted improperly in refusing to accept the retraction of one of the references.

Background

7 There were several steps in the assessment of candidates in this process: screening of applications, a knowledge examination, an interview, and finally reference checks. The complainant was successful through the first three steps. Prior to attending the interview of November 23, 2009, the complainant received an email asking him to bring the names of two referees to his interview. At the interview, he provided a handwritten list of three names and telephone numbers of referees, Zamir Qureshi, Sean Burke and Jason Choueiri.

8 The references were used to rate the essential qualifications of enthusiasm, judgment, initiative and dependability. The assessment board obtained references for the complainant from Messrs. Burke and Choueiri. The references were then assessed by Lucie Perrier, now retired, formerly the Senior Advisor for the Procurement Group, Community Management Office (CMO) of DND. The CMO worked with Human Resources (HR) to manage appointment processes for procurement and engineering. Ms. Perrier led the PG-04 appointment process. When assessing the references, Ms. Perrier found the reference from Mr. Choueiri to meet the minimum requirements for the position. However, when she assessed Mr. Burke's reference, she found that the complainant did not attain the minimum requirements for judgment, initiative and dependability. On this basis the complainant was eliminated from consideration.

Issue

9 The Tribunal must determine whether the respondent abused its authority by using the reference received from Mr. Burke.

Relevant Evidence and Analysis

10 The complainant described his relationship with Mr. Burke, who was his manager. They did not have a direct reporting relationship and Mr. Burke did not supervise or review his work. On a personal level they had a good relationship.

11 The complainant testified that he asked HR for guidance in selecting his references and did not receive a response. On November 23, 2009, the day of his interview, he was still finalizing his selection of references. He then asked Mr. Burke whether he would be willing to provide a reference for the appointment process and Mr. Burke expressed no hesitation and agreed. When the complainant provided his list of three names to the assessment board, he did not suggest a preferred order or ranking. He testified that he selected Mr. Burke as a referee in case a reference from DND might be required. The complainant was aware that Mr. Burke provided references for at least two other candidates in the appointment process.

12 Mr. Burke testified that he relied on his personal knowledge of the complainant, work examples provided to him by the complainant, and information he obtained from the complainant's supervisor Lynn Lafontaine, the complainant's co-workers and a client, to prepare the reference. Mr. Burke stated that he agreed to provide a reference for the complainant because the complainant said that he would be disqualified without a reference from Mr. Burke. He said that he asked the complainant to find another reference and even provided him with names of potential referees, but the complainant reiterated that he would be eliminated without Mr. Burke's reference. Mr. Burke felt he had no choice but to provide one.

13 Addressing his personal knowledge of the complainant, Mr. Burke stated that his daily routine was to go to the groups in his chain of command and touch base with the supervisors and employees, including the complainant, to discuss what was at hand on that day. Several witnesses testified concerning a meeting held on January 6, 2010, attended by Mr. Burke, Ms. Lafontaine and the complainant. Mr. Burke testified that he convened the meeting to discuss the complainant's performance issues of which he had personal knowledge as well as information received from others. Ms. Lafontaine

also gave evidence about the meeting. She confirmed that it was held to present the complainant with a work plan to address tasks that he had failed to complete. The complainant testified that he recalled a meeting on January 6, 2010, but stated that he still did not understand why his attendance was required at the meeting.

14 Kathy McKeedie, a DND employee, testified that she was assigned to CMO to help with this appointment process. She explained that candidates were asked to bring names of two referees to their interviews. After the interview, 245 candidates remained in consideration, and one of her tasks was to contact their referees and obtain a response to the reference questionnaire. If a candidate did not supply an email address for a referee, Ms. McKeedie attempted to obtain it by consulting federal government directories or telephoning the referee. She sent reference questionnaires to the referees for all candidates on January 5, 2010, and they were due on January 15, 2010.

15 Using the information provided by the complainant at the time of his interview, Ms. McKeedie succeeded in retrieving Mr. Burke's email address from an internal directory and obtaining Mr. Choueiri's email address by telephoning him. After the assessment of candidates was complete, she became aware that the complainant had provided HR with email addresses for his referees on December 3, 2009, but she did not have this information prior to sending the reference questionnaires.

16 Ms. McKeedie identified notes she had made adjacent to Mr. Qureshi's name on the complainant's handwritten reference list. The notes indicated that she tried twice and could not contact Mr. Qureshi. Ms. McKeedie testified that when she first telephoned the number given for Mr. Qureshi, she left a message for him to return the call. When there was no response to the message, she telephoned a second time and left another message to indicate that she was seeking his email address. An individual identifying himself as Mr. Qureshi then telephoned her. According to Ms. McKeedie, Mr. Qureshi indicated that he knew why she was calling and suggested that she actually wanted to speak with his son, and he would ask him to return the call to her. Ms. McKeedie testified that by the time of this telephone call, she had already sent reference questionnaires to Messrs. Burke and Choueiri. She had no subsequent

telephone call from any individual identifying himself as Zamir Qureshi. As only two references were required, she did no further follow-up to contact Mr. Qureshi.

17 Mr. Qureshi appeared as a witness and identified himself as the individual whose name was given as a reference for the complainant. He stated that he was a retired government employee. Although he had never supervised the complainant, he knew his family and had worked at Service Canada in 2006 when the complainant was also employed there. He confirmed that the telephone number supplied by the complainant to the assessment board was indeed his own. He did not recall being contacted by DND concerning a reference for the complainant.

18 Ms. Perrier testified that she assessed the complainant's references and found, after considering the reference of Mr. Burke, that the complainant did not meet the requirements for appointment to the position. She explained that there was a process of review used in this appointment process when a candidate was found not to meet an essential qualification. In the complainant's case, two other assessors independently assessed the reference without access to Ms. Perrier's original assessment. Their assessments were the same as Ms. Perrier's. Ms. Perrier identified the record of the reference check results that bore her signatures as well as the signatures of the other two assessors.

19 When the complainant was notified of the results of the assessment process, he asked for informal discussion. The complainant testified that he had never considered, before or after January 6, 2010, that Mr. Burke looked at him in a disfavoured light. Indeed, he testified that when he learned that he was unsuccessful, it was Mr. Burke who encouraged him to have informal discussion with the assessment board. During informal discussion, the complainant discovered that he was eliminated from further consideration based on the assessment of the reference from Mr. Burke. The complainant testified that he then approached Mr. Burke who offered to retract his reference. The complainant stated that he also followed up with the assessment board to ask them to act on the retraction but they declined.

20 Mr. Burke testified that after the results of the appointment process were known, the complainant told him that he felt unfairly treated. Mr. Burke explained that he understood from the complainant that he would be pursuing a grievance or legal action. Mr. Burke stated in evidence that because he viewed this as a threat, he then contacted CMO to retract his reference. He testified that he was told that they would not comply with his request.

21 Ms. Perrier recalled attending informal discussion with the complainant on two occasions. She testified that the complainant wanted to provide an additional reference. In her opinion, the assessment board had sufficient information to make an assessment and from an ethical perspective, to do what the complainant asked would have provided him with an unfair advantage. Ms. Perrier also stated that Mr. Burke contacted CMO to ask whether he could retract his reference for the complainant and the assessment board refused. Ms. Perrier testified that Mr. Burke did not provide a reason for wanting to withdraw his reference or suggest that his reference was inaccurate or untrue. In her opinion, he made the request because he did not like to see the complainant fail.

22 The complainant argued that Mr. Burke's reference, as shown by his consultation with others, was a collage of the opinions of many and Mr. Burke did not possess adequate personal knowledge of the complainant to provide a reference. Mr. Burke ought to have made his discomfort with providing a reference known to the assessment board. Further, as Mr. Burke provided references for several candidates, he had an inherent conflict of interest. The complainant argued further that when Mr. Burke wanted to retract the reference, the assessment board ought to have honoured his request. In effect, Mr. Burke disavowed the reference and no longer stood by it. The failure to allow the retraction amounted to serious wrongdoing. Moreover, it was the complainant's view that insufficient effort was applied to obtaining a reference from Mr. Qureshi. If the email addresses provided to HR on December 3, 2009 had been forwarded to Ms. McKeedie, then she would have had proper contact information for Mr. Qureshi and a reference could have been obtained.

23 The respondent argued that there was no evidence to suggest an abuse of authority in the acceptance or retention of the reference provided by Mr. Burke.

Mr. Burke, as the complainant's manager, was an appropriate referee. Mr. Burke met daily with staff including the complainant and he was directly engaged in managing the complainant, as evidenced by the meeting of January 6, 2010, which was convened to manage the complainant's performance issues. Mr. Burke agreed to provide a reference at the complainant's insistence and it was the complainant who supplied his name to the assessment board. There was no abuse of authority in failing to remove his reference or substitute another one. As to Mr. Qureshi, the notes made by Ms. McKeedie reflected reasonable diligence in endeavouring to contact him. There was in any event no obligation to contact Mr. Qureshi as two other referees provided sufficient information for the assessment. In any event, the assessment board only required two references and it received them.

24 The Tribunal finds that the respondent did not abuse its authority by using the reference supplied by Mr. Burke in the assessment of the complainant. Section 36 of the PSEA confers authority for the establishment of assessment methods on the PSC, or the respondent as its delegate. In this case, references were the chosen tool to assess certain essential qualifications. The complainant supplied three names and, as he noted, he did not prioritize the names to indicate a preference among them. The assessment board established contact with two of the referees and obtained the required references. The Tribunal finds that although effective contact was never made with Mr. Qureshi, the effort applied to locating him was sufficient. For unknown reasons, the referees' email addresses that were provided by the complainant did not reach the assessment board. The Tribunal concludes that the manner in which referees were contacted and the information was gathered does not amount to an abuse of authority.

25 The Tribunal finds that the reliance on Mr. Burke's reference, in spite of his request to retract it, did not constitute an abuse of authority. As the Tribunal has previously held, what is important is that a referee is sufficiently familiar with the work of a candidate to provide adequate information. See *Dionne v. Deputy Minister of National Defence*, 2008 PSST 0011, at para. 55. A referee is not an assessor. The role of assessment falls to the assessment board which must determine whether it has sufficient information to make an informed assessment of the candidate. See

Portree v. Deputy Head of Service Canada, 2006 PSST 0014, at para. 61. The discretion to accept the retraction rested with the assessment board. When they were given no reason for the request, they denied it.

26 The evidence shows that Mr. Burke was the complainant's manager and, although he did not provide direct supervision, Mr. Burke and the complainant talked about work on a daily basis and Mr. Burke participated directly in managing the complainant's performance. While the complainant criticized Mr. Burke for gathering information from others, including the complainant himself, the evidence did not show that the reference itself was unreliable, unrepresentative or misleading. It must be remembered that Mr. Burke was a referee chosen by the complainant. If the complainant had reservations about giving Mr. Burke as a reference, he should not have provided his name to the assessment board.

27 For these reasons, the Tribunal finds that the complainant has not established that the respondent abused its authority in using the reference provided by Mr. Burke.

Decision

28 The complaints are dismissed.

Joanne B. Archibald
Member

Parties of Record

Tribunal Files	2010-0427, 0428, 0465-0475, 0551-0556, 0632-0639
Style of Cause	<i>Omar Kraya and the Deputy Minister of National Defence and the Deputy Minister of Public Works and Government Services Canada</i>
Hearing	March 5 and 6, 2012 Ottawa, Ontario
Date of Reasons	March 30, 2012
APPEARANCES:	
For the complainant	Michel W. Drapeau and Joshua Juneau
For the respondent	Christine Diguer
For the Public Service Commission	Marc Séguin (written submissions)