



Files: 2011-1209, 2011-1228 and
2011-1229

Issued at: Ottawa, December 10, 2012

NORBERT LUKOWSKI

Complainant

AND

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

Respondent

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>Lukowski v. the Deputy Minister of Transport, Infrastructure and Communities</i>
Neutral Citation	2012 PSST 0034

Reasons for Decision

Introduction

1 Norbert Lukowski, the complainant, filed three complaints of abuse of authority under s. 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12,13 (PSEA) with the Public Service Staffing Tribunal (the Tribunal). The complaints concern four appointments to CS-02 positions with Transport Canada in Ottawa, Ontario, following an internal advertised appointment process.

2 It is the complainant's view that the Deputy Minister of Transport, Infrastructure and Communities, the respondent, abused its authority in the application of merit. In addition, he asserts that the appointments resulted from personal favouritism. He also asserts that the appointees had an unfair advantage in the practical tests (the tests) which were administered.

3 The respondent denies that any abuse of authority occurred. It states that the complainant was screened out solely on the basis that he failed to meet the essential education qualification and there was no bias against him. It maintains that personal favouritism was not a factor in the appointment process and that the appointed persons had no unfair advantage in the tests.

4 The Public Service Commission (PSC) did not appear at the hearing, and presented a written submission in which it discussed relevant PSC policies and guidelines. It took no position on the merits of the complaints.

5 David Alburger and Bryan Wood who qualified and were appointed from this process, attended in the hearing, but made no submissions.

6 For the reasons that follow, the complaints are dismissed. It has not been established that the complainant was improperly assessed or that the respondent was biased against him. There is no evidence of personal favouritism or unfair advantage toward the appointed persons.

Issues

- 7 The Tribunal must determine the following issues:
- (i) Did the respondent abuse its authority in the application of merit by improperly assessing the complainant or by exhibiting bias against him?
 - (ii) Did the respondent abuse its authority in the application of merit through personal favouritism of the appointed persons?
 - (iii) Did the respondent abuse its authority by establishing tests that gave the appointed persons an unfair advantage?

Analysis

Issue I: Did the respondent abuse its authority in the application of merit by improperly assessing the complainant or by exhibiting bias against him?

8 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.

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

10 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. Abuse of authority can include errors. Whether an error constitutes an abuse of authority will depend on its nature and seriousness. See *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008.

11 The role of the Tribunal under s. 77 of the PSEA is to determine whether there has been an abuse of authority. The Tribunal is not to reassess candidates or redo an appointment process. See *Elazzouzi v. Deputy Minister of Human Resources and Skills*

Development Canada, 2011 PSST 0011, confirmed in *Canada (Attorney General) v Lahlali*, 2012 FC 601, at paras. 42- 46. The Tribunal will, therefore, examine an assessment to determine whether there has been an abuse of authority.

12 The *Statement of Merit Criteria* for the CS-02 appointment process provides the following education qualification:

Successful completion of two years of an acceptable post-secondary educational program in computer science, information technology, information management or another specialty relevant to the position, or an acceptable combination of education, training and/or experience.

13 The *Job Opportunity Advertisement* (JOA) stated that applicants must clearly demonstrate on their applications that they met the essential education and experience requirements.

14 Paul Staynor, Chief of Application Development and Technology at Transport Canada, was the hiring manager and the chairperson of the assessment board. Mr. Staynor testified that the CS-02 appointment process was conducted for three different types of CS-02 positions: Informatics Application Specialist (IAS), Document Architect (DA), and Informatics Application Tester (IAT). In total, 40 applicants responded to the JOA. He screened the applications to determine whether the candidates met the screening qualifications including the education qualification.

15 Mr. Staynor stated that he based the screening on the complainant's application, which consisted of a covering letter and a résumé. He determined that the complainant had no formal education in computer science and then evaluated whether the application contained information to satisfy the stated acceptable alternative to formal education. He found no indication of computer science training. Mr. Staynor stated that with no education or training, the complainant's computer science experience would have had to be "massive and pertinent" to meet the education qualification. In Mr. Staynor's opinion it was not. Accordingly, he screened the complainant out on the basis that he did not demonstrate that he met the requirements of the education qualification.

16 The complainant contends that his experience should have been considered sufficient. In testimony, he described tasks that he had completed, including his work with audio and video media, and large document files. He testified that although he was not employed as a Computer Systems (CS) employee, he worked daily with computers in activities that involved information technology. The complainant asserted that although he and Mr. Staynor were employed in different work units, they were employed in the same division and Mr. Staynor should have known the nature of the complainant's work and applied that knowledge in screening for education. Mr. Staynor denied that they had any professional dealings in the workplace.

17 The complainant's current supervisor and three present or former colleagues testified concerning his qualifications for the CS-02 appointment process: Doug Hickey, Joe Dillon, James McAllister, and Roy St. Aubin. None of them were members of the assessment board. While some of them had opinions concerning the complainant's qualifications for the CS-02 positions, none of them believed that Mr. Staynor could have had personal knowledge of the complainant's work as the complainant and Mr. Staynor had not worked directly with one another.

18 The complainant alleges that Mr. Staynor was biased against him as he was instrumental in denying the complainant's request for training in Java technology in 2010. It is the complainant's position that this training would have satisfied the education requirement for the CS-02 position. The complainant produced his Individual Learning Plan (ILP) showing that he requested Java training in 2010 and that his request was deferred to 2011. The document is signed by the complainant, Mr. St. Aubin as his supervisor, and Mr. Hickey as his manager. The complainant testified that Mr. Hickey told him that Mr. Staynor's unit would be asked to provide Java expertise to the complainant's work unit, and if they could not fulfill the requirements, then the complainant's training request would be reconsidered.

19 Mr. Hickey also addressed this matter. He recalled that the discussion of the complainant's ILP coincided with restructuring within the department. He testified that he was told to seek Java support from Mr. Staynor's unit. If it could not be provided,

then the complainant's request for Java training would be reconsidered. He recalled no further discussion of the matter.

20 The Tribunal finds that the complainant has not established that the respondent abused its authority in assessing the complainant's education. Mr. Staynor provided a complete description of the assessment of the complainant's education qualification. The evidence does not show that he overlooked any aspect of education, training or experience described by the complainant in his application documents, and the complainant did not lead evidence to contradict this finding.

21 The complainant suggested that Mr. Staynor ought to have applied his personal knowledge of his work experience. There is no evidence, however, to support the assertion that Mr. Staynor had any personal knowledge of the complainant's work. Mr. Staynor denied it and the complainant's colleagues and supervisors stated their belief that Mr. Staynor could not have had personal knowledge of the complainant's work. Moreover, as the Tribunal has previously held, where, as in this case, the JOA requires a candidate to demonstrate in the application that they meet an essential qualification, it is the candidate's responsibility to ensure that the application clearly does so. See for example, *Edwards v. Deputy Minister of Indian and Northern Affairs Canada*, 2011 PSST 0010; *Walker-McTaggart v. Chief Executive Officer of Passport Canada*, 2011 PSST 0039.

22 The Tribunal finds no evidence of bias against the complainant in this appointment process. As the Tribunal stated in *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 0010, in staffing matters, if an informed bystander can reasonably perceive bias on the part of those persons responsible for assessment, the Tribunal can conclude that abuse of authority exists.

23 The complainant asserted that bias was shown by Mr. Staynor who denied his request for Java training with the intention that the complainant would then not meet the education qualification of this CS-02 process. However, there is no evidence that Mr. Staynor had a role in the decision. He did not supervise or manage the complainant as Mr. Hickey and Mr. St. Aubin did. Indeed, Mr. Staynor is only mentioned because his

work unit might be able to provide Java expertise. There is no evidence that he made a decision concerning the complainant's request. In these circumstances, the Tribunal finds that a reasonably informed bystander would not perceive bias on the part of Mr. Staynor.

Issue II: Did the respondent abuse its authority in the application of merit through personal favouritism of the appointed persons?

24 The complainant's position is that, based on earlier acting appointments when they had a direct reporting relationship to Mr. Staynor, their appointments resulted from personal favouritism. The complainant produced organizational charts showing the structure of the work unit and the reporting relationships.

25 Mr. Staynor acknowledged that the four appointees, David Alburger, Mimi Golding, Jennifer Storey, and Bryan Wood, held long-term, non-advertised acting appointments to CS-02 positions in his work unit prior to and during the subject appointment process. He stated that Transport Canada initiated the present CS-02 appointment process to rectify that situation by conducting an advertised appointment process and replacing them with appointments from the resulting pool of qualified candidates.

26 Mr. Staynor stated that the organizational charts were inaccurate. No CS-02 employee, including the appointees, had ever reported directly to him. He testified that, within his unit, CS-01 and CS-02 employees report to CS-03 employees. In turn, the CS-03s report to him.

27 The Tribunal finds that the evidence does not support a finding of personal favouritism. In *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 0007, the Tribunal found that it was significant that the PSEA refers to **personal** favouritism, giving emphasis to Parliament's intention that the words should be read together, and indicating that it is personal favouritism and not other types of favouritism that constitute abuse of authority. As the Tribunal indicated at para. 41 in *Glasgow*, personal favouritism may include the selection of a person solely based on a personal relationship, as a personal favour, or to gain personal favour with someone else.

28 In the present case, the complainant linked the appointees' previous acting appointments and purported reporting relationship with Mr. Staynor to the allegation of personal favouritism. The only evidence to support his claim originated in the organizational charts indicating that the appointees reported to Mr. Staynor. Aside from the fact that Mr. Staynor denied the accuracy of the charts in his testimony, even if it were accepted that the appointees reported to Mr. Staynor during their held long-term non-advertised acting appointments within his unit, this evidence would be insufficient to establish that personal favouritism was a consideration in their selection for appointment.

29 There was no evidence to support the complainant's allegation that the appointments were attributable to personal favouritism. The Tribunal therefore concludes that the complainant has not established on a balance of probabilities that personal favouritism was a factor in the appointments.

Issue III: Did the respondent abuse its authority by establishing tests that gave the appointed persons an unfair advantage?

30 The tests were among the assessment tools used for the CS-02 process. Mr. Staynor testified that they were used to assess the essential ability qualifications of the three different CS-02 positions. He added that the tests were stored in a restricted area of a computer driver to which only two people, neither of whom was a candidate, had access.

31 The complainant asserted that the test to assess the IAS position unduly favoured Ms. Storey as it required the candidate to work with a real application, which he identified as National Aeronautical Product Approval (NAP Approval). In his opinion, Ms. Storey would have acquired experience with the NAP Approval application when she acted in an IAS position prior to the CS-02 appointment process.

32 Mr. Staynor described the test for the IAS position as a classic test for a programmer. A candidate was presented with an application and asked to add, modify, delete, and search within the application, and then present the results. When asked whether Ms. Storey had worked on the NAP Approval application prior to the test, he stated that he considered it highly unlikely and outside her skill set.

33 The complainant also challenged the test given for the DA, stating that it gave an unfair advantage to Ms. Golding as it was based on the Civil Aviation Medical Examiners (CAME) application. He felt that she would have had exposure to it, as she had worked in a division that was responsible for CAME.

34 The DA test required a candidate to examine the code for a new search application for CAME and write a document to describe the changes to users. Mr. Staynor stated that Ms. Golding had not, to his knowledge, worked on the CAME project prior to writing the DA test.

35 The complainant also challenged the test for the IAT position. He produced a copy of a screen capture from the Transport Canada intranet for the Flight Training and Education (FTAE) database. The complainant expressed his concern that the IAT test might have been stored on this website and consequently have been available to Mr. Alburger and Mr. Wood, both of whom had access to the FTAE database. He stated that he was unable to confirm his suspicion as the site was password protected and he did not have access.

36 Mr. Staynor testified that the FTAE database gives access to an application testing server. It is for users who are testing software before the applications are moved into production. Mr. Staynor stated that the IAT test was never stored on this server. It was kept on a secure server to which only he and one other person, who was not a candidate, had access.

37 The complainant also challenged the marking of the IAT tests of Mr. Alburger and Mr. Wood. He noted that the assessment board added handwritten notes to the rating guide and awarded marks to the candidates based on the content of the notes.

38 Mr. Staynor stated that the IAT test used an application into which a number of errors had intentionally been introduced. A candidate was required to identify the errors. He testified that Mr. Alburger and Mr. Wood correctly identified additional errors as well. The assessment board recorded these responses in the rating guide and, as they were correct, awarded corresponding marks to the candidates.

39 The Tribunal finds that the complainant has not established that the respondent gave an unfair advantage to the appointees. While the complainant suspected that the appointees may have had experience with the applications in issue, he produced no evidence to support this claim. On the other hand, Mr. Staynor testified based on his knowledge of the work in which the appointees were engaged. Further, the Tribunal notes that even if it had been shown that the candidates were familiar with the applications, the tests assessed their ability to produce these results and not simply their knowledge of the applications. There is no evidence suggesting that the appointees had familiarity with the applications that would have unduly influenced their performance.

40 In the matter of marks awarded to Mr. Alburger and Mr. Wood for the IAT test, the assessment board considered the responses to be acceptable and the complainant has not challenged the correctness of the answers themselves. The Tribunal is not satisfied that the assessment board acted improperly in its assessment.

41 With respect to the complainant's suspicion that the test may have been available to some of the candidates in advance, the uncontradicted evidence of Mr. Staynor is that it was kept on a secure server, inaccessible to any candidate. The Tribunal is not persuaded that the test could have been compromised, as alleged. There is no evidence to support the allegation that it was stored in the FTAE database. Accordingly, the Tribunal finds that the complainant has failed to prove, on a balance of probabilities, that the respondent abused its authority by establishing tests that gave the appointed persons an unfair advantage.

Decision

42 For these reasons, the complaints are dismissed.

Joanne B. Archibald
Member

Parties of Record

Tribunal Files	2011-1209, 2011-1228 and 2011-1229
Style of Cause	<i>Norbert Lukowski and the Deputy Minister of Transport, Infrastructure and Communities</i>
Hearing	October 10-11, 2012 Ottawa, Ontario
Date of Reasons	December 10, 2012
APPEARANCES:	
For the complainant	Larry Teslyk
For the respondent	Magdalena Persoiu
For the Public Service Commission	John Unrau (written submission)