



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2011-0244

Issued at: Ottawa, November 15, 2012

MICHEL COUILLARD

Complainant

AND

THE COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA

Respondent

AND

OTHER PARTIES

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| Matter | Complaint of abuse of authority pursuant to section 77(1)(a) of the <i>Public Service Employment Act</i> |
| Decision | The complaint is dismissed |
| Decision rendered by | Lurette Babin-MacKay, Member |
| Language of Decision | French |
| Indexed | <i>Couillard v. the Commissioner of the Correctional Service of Canada</i> |
| Neutral Citation | 2012 PSST 0032 |

Reasons for Decision

Introduction

1 Michel Couillard, the complainant, participated in an advertised internal appointment process to staff Correctional Manager (CM) positions at the CX-04 group and level at Correctional Service of Canada (CSC) institutions in the Quebec Region. He was eliminated from the process because he did not meet the essential qualification of “strategic thinking.”

2 The complainant submits that the respondent, the Commissioner of the CSC, acted in bad faith and failed to take relevant information into account in its assessment of his qualifications. The complainant also submits that the respondent did not question the contradictory references provided by the complainant’s referees, and that the respondent breached its obligation of procedural fairness when it did not allow him to demonstrate, during the informal discussion, that the negative references provided by one referee were unfounded.

3 The respondent denies any abuse of authority in relation to the complainant and maintains that it fulfilled its obligation of procedural fairness. The respondent submits that the assessment board assessed the complainant on the basis of his interview results and references, which the board validated, and arrived at a consensus. The board was not required to amend its assessment of the complainant following the informal discussion.

4 The Public Service Commission (PSC) was not represented at the hearing, but it provided written submissions in which it addressed the concept of abuse of authority and explained its assessment, selection and appointment policies and its reference checking guides. The PSC did not take a position on the merits of the complaint.

5 For the reasons set out below, the Public Service Staffing Tribunal (the Tribunal) finds that the complainant did not establish that the respondent abused its authority or acted in bad faith in its assessment of the “strategic thinking” competency. In addition, the complainant did not establish that the respondent breached its obligation of procedural fairness.

Background

6 The complainant has worked in corrections since 2001, and has been employed with the CSC since 2007. He has been a Correctional Officer II (CX-02) at Leclerc Institution in Laval, Québec, since 2008.

7 On February 17, 2010, the respondent posted a *Job Opportunity Advertisement* on the federal government's *Publiservice* website to staff the position at issue. The complainant was one of 85 applicants.

8 The essential qualifications listed in the *Job Opportunity Advertisement* and in the *Statement of Merit Criteria* included:

Management Excellence (Action Management, People Management, Financial Management);

Engagement;

Strategic Thinking;

Values and Ethics.

9 The assessment board (the board) was made up of Cynthia Racicot, chairperson of the board and, at the time, Deputy Warden of Archambault Institution in Ste-Anne-des-Plaines, Quebec; Christian Ferguson; and François Luneau.

10 The candidate assessment process involved a number of steps: screening of the applications, a written knowledge exam, an interview, and a check of the candidates' references.

11 According to the complainant, the candidates' referees had to be people who had supervised them within the last year. The complainant's referees were Jean-Pierre Brouillette, a CM; and Rénaud Dubois, the Assistant Warden, Operations. (AWO). Mr. Brouillette supervised the complainant in his position as a Correctional Officer II. Mr. Dubois supervised Mr. Brouillette's CM position, to which the complainant was appointed on an acting basis on May 17, 2010, when Mr. Brouillette was assigned to another position. Mr. Dubois is now retired.

12 The board assessed the competencies of “engagement,” “strategic thinking,” and “values and ethics” by taking into consideration the candidates’ answers to the interview questions and the references provided by the referees, who were given a structured document that defined the three abilities and their related performance indicators. Referees were instructed to “provide examples of behaviours” [translation] that demonstrated the candidates’ work performance. The complainant’s referees provided their references on December 8, 2010.

13 The board awarded marks to the candidates for each competency by consensus, using a marking scale of 1 to 10 points. The pass mark for each competency was 6 out of 10.

14 Fifty-five candidates passed the entire assessment. The complainant did not obtain the pass mark for strategic thinking. He was informed of the results on December 23, 2010.

15 On January 4, 2011, the complainant participated in an informal discussion with one of the board members over the telephone. On February 22, 2011, he participated in a second informal discussion with all the board members. His results did not change.

16 On March 24 and 31, 2011, respectively, the respondent posted a *Notification of Consideration* and a *Notification of Appointment or Proposal of Appointment* for one of the candidates, Christiane Dubord. Other appointments were also made as part of this process.

17 On April 14, 2011, the complainant filed a complaint of abuse of authority pursuant to s. 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the PSEA), in relation to this indeterminate appointment.

Issues

18 The Tribunal must decide the following issues:

- (i) Did the respondent abuse its authority by acting in bad faith in the assessment of the complainant against the “strategic thinking” competency?
- (ii) Did the respondent comply with the PSC’s policies and with the principles of procedural fairness in conducting the informal discussion?

Analysis

19 Abuse of authority is not defined in the PSEA but s. 2(4) states that it includes bad faith and personal favouritism.

20 Pursuant to s. 36 of the PSEA, the deputy head with delegated appointment authority may use any assessment method that he or she considers appropriate to determine whether a person meets the essential qualifications referred to in s. 30(2) of the PSEA: see *Visca v. Deputy Minister of Justice*, 2007 PSST 0024, at para. 42; and *Trachy v. Deputy Minister of Transport, Infrastructure and Communities*, 2008 PSST 0002. However, that discretion is not absolute and must be used in a fair and transparent manner: see, for example, *Jolin v. Deputy Head of Service Canada*, 2007 PSST 0011, at para. 37; and *Denny v. Deputy Minister of National Defence*, 2009 PSST 0029, at para. 144.

21 As the Tribunal has established in numerous decisions, the complainant bears the burden of proving, on a balance of probabilities, that the appointment process was tainted by an abuse of authority (*Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008, at paras. 49 and 55).

Issue I: Did the respondent abuse its authority by acting in bad faith in the assessment of the complainant against the “strategic thinking” competency?

22 The complainant alleges that the board did not question or validate the contradictory references provided by his referees before awarding his mark for strategic thinking. He also submits that the respondent was unable to explain the basis for the negative elements of the references provided by Mr. Dubois.

23 Ms. Racicot, the board chairperson, described how the complainant was assessed. She stated that, in the interview, he did not touch on all the expected elements when he responded to the question assessing strategic thinking. She explained what the board was looking for and what the complainant failed to mention. The board gave him a temporary mark of 6 out of 10 and continued assessing the competency by checking his references.

24 The board noted that the references were contradictory. The references given by Mr. Dubois, who was evaluating the complainant's duties as acting CM, included, in particular, examples of behaviour that did not meet the indicators for strategic thinking. The references given by Mr. Brouillette, who was evaluating the complainant in his duties as a Correctional Officer II, were "positive overall" [translation], with the exception of one comment where the identified behaviour did not meet one of the indicators for strategic thinking. Ms. Racicot briefly described the responsibilities of a CM and of a Correctional Officer II.

25 Ms. Racicot explained that the board attempted to validate the references before completing its assessment. Because Mr. Dubois had retired, the board contacted his supervisor, Marielle Normandin, Deputy Warden of Leclerc Institution. Ms. Racicot read her a portion of the references provided by Mr. Dubois that related to an incident in the administrative segregation unit that resulted in the complainant being removed and replaced by another CM because he was "escalating the situation involving an inmate in crisis" [translation]. According to Ms. Racicot, Ms. Normandin said that she agreed with Mr. Dubois' statements and confirmed that the incident, the date of which was not given in the references, had occurred.

26 Ms. Normandin testified that Ms. Racicot called her in winter 2010-2011. She stated that she did indeed remember the incident in question, which had occurred in administrative segregation on December 1, 2010, and she briefly described what had happened. She explained that Mr. Dubois had told her that he had received a call from a crisis negotiator asking that the complainant be replaced by another CM because an inmate in crisis was not willing to negotiate. Mr. Dubois decided to remove the complainant from the scene. Ms. Normandin added that she had noted

that the complainant was not very skilled in defusing situations and that it was something he needed to work on if he wanted to become an effective CM.

27 Ms. Normandin stated that the board had also contacted her after an informal discussion with the complainant to check whether the Warden would give him a letter of recommendation. She told the board that she would be surprised if the Warden agreed to do so because that would be interfering in the process, which neither he nor she would do.

28 Ms. Racicot was responsible for recording the overall assessment, reached by consensus, for each candidate. She explained the board's findings regarding the complainant. In the interview, he had not answered one part of the question that assessed strategic thinking. Then, in reviewing the references, the board noted concrete examples of instances in which the complainant had not met some of the expected indicators. For example, the complainant did not ask for clarification and direction from management as needed, he did not analyse his shortcomings, he did not always come up with suitable solutions to operational problems, and he did not always take into account the human aspect of issues and decisions. The incident in administrative segregation, for example, demonstrated that he had not chosen the proper solution to the problem and that he had not taken into account the human aspect because he did not exhibit the desired behaviour in front of the employees under his supervision. Ms. Racicot stated that, in such situations, a CM must comply with directives, ensure security, and manage the situation.

29 After the interview, the board awarded the complainant a temporary mark of 6 out of 10 for strategic thinking. However, after also checking his references, the board gave him a final mark of just 5 out of 10, which was below the pass mark.

30 The complainant is of the opinion that the board did not validate the references before deciding on his mark. However, the Tribunal notes that, in his complaint dated April 14, 2011, the complainant indicated that Mr. Ferguson had told him during the informal discussion on January 4, 2011, that the board had contacted Ms. Normandin in an effort to reconcile the contradictory references. Although the exact date when she

was contacted was not clearly established, both Ms. Racicot and Ms. Normandin stated that the latter had been contacted to verify whether the incident in administrative segregation referred to in the references provided by Mr. Dubois had occurred. The evidence also shows that Ms. Normandin was contacted a second time after the informal discussion of January 4, 2011, to check whether the Warden would provide a letter of support for the complainant.

31 Ms. Racicot's testimony indicates that the board primarily wanted to check whether the administrative segregation incident referred to by Mr. Dubois had occurred. Ms. Normandin confirmed that it had. The Tribunal is of the view that the board was not required to validate each of the elements given in Mr. Dubois' references. The board determined that the information in the references was sufficient to allow it to complete the complainant's assessment.

32 For the above reasons, the Tribunal finds that the board validated the references appropriately and that the board determined that it had sufficient information to complete the assessment.

33 The complainant also submits that Mr. Dubois gave him unfavourable references to prevent him from qualifying in the process and to punish him for having applied to a development program called the *Correctional Service of Canada Revised Succession Program – EX minus 1 component* [translation] (*La Relève* program). The exact nature of this program was not explained.

34 In his testimony, the complainant strongly denied the behaviour attributed to him by Mr. Dubois. In his opinion, the many documents that he filed into evidence (Officer Statement and Observation Reports (OSORs) prepared at the time of various incidents, performance reviews, letters of recommendation, excerpts from CSC directives, etc.), along with his own explanations, contradict Mr. Dubois' references and demonstrate that his behaviour was not inappropriate.

35 The complainant described a few instances in which he and Mr. Dubois had differences of opinions on the appropriate measures to take in certain situations. He believes that that could explain in part Mr. Dubois' "hostility" [translation] toward him.

He submits that, on those occasions, his own recommendations were consistent with corporate directives or human resources practices.

36 The complainant also mentioned three meetings and discussions he had with Mr. Dubois in November and December 2010. He believes that they demonstrate Mr. Dubois' attitude toward him.

37 At the first meeting, the date of which was not given by the complainant, he refused Mr. Dubois' request to sanction an employee at a disciplinary hearing for what the complainant considered to be a minor incident. Mr. Dubois said that he was being impertinent. The complainant stated that, afterward, Mr. Brouillette confirmed that his approach had been the right one.

38 Then, on November 23, 2010, Mr. Dubois met with him "to review" [translation] his time as acting CM. Mr. Dubois told him that he had a great deal of potential but that he was too authoritarian with inmates and staff. Mr. Dubois did not explain his comment to the complainant. Mr. Dubois then told him that he would not be sent to the operational desk for training, as expected, and that his appointment as acting CM would be extended by only a week.

39 At a third meeting, in December 2010, Mr. Dubois was very hostile and criticized the complainant for having applied to the *La Relève* program without having spoken to him about it or having obtained the Warden's authorization. When the complainant told him that he had informed Robert Poirier, Mr. Dubois responded by saying that, regardless, he "certainly had not passed the competition" [translation], which surprised the complainant greatly. In her testimony, Chantal Aubertin, who replaced Mr. Dubois as acting AWO in fall 2010, confirmed that Mr. Dubois had told her that the complainant would no longer be an acting CM because he had applied to the *La Relève* program without having informed the Warden. She did not say when Mr. Dubois made that comment.

40 The complainant filed into evidence documents that show that he had informed and asked for the support of Mr. Poirier and Ms. Normandin when he applied to the

La Relève program in October 2010. Ms. Normandin confirmed that the complainant had spoken to her about applying to that program.

41 Lastly, the complainant read and commented on a few of the notations in the board's consensus document, and described in particular the incident that occurred in administrative segregation on December 1, 2010. Ms. Normandin had asked him to intervene, as CM, with an aggressive and agitated inmate. However, the situation deteriorated and crisis negotiators were called in. The negotiators later agreed that another CM should take over. The complainant stated that he voluntarily removed himself "for strategic reasons" [translation] to calm the situation. According to the complainant, contrary to Mr. Dubois' claims in his references, his actions did not "magnify the problem" [translation] or "escalate the situation involving an inmate in crisis" [translation]. His removal was consistent with the corporate directive on the management of security incidents in such circumstances.

42 Julie Lalancette was a parole officer and crisis negotiator in 2010, and was part of the negotiating team called in during the incident. When questioned about the incident, she denied having asked that the complainant be removed because he was aggravating the situation by making inappropriate comments. She stated that she could not recall in detail what the complainant said to the inmate, and she acknowledged that she did not hear all that was said because she was on the other side of the control post for part of the incident.

43 Because Mr. Dubois did not testify, the complainant and Ms. Aubertin's statements could not be presented to him. However, the statements in and of themselves do not establish that Mr. Dubois' references cannot be relied upon. The complainant himself stated that he and Mr. Dubois had differences of opinions and he described incidents in which he refused to carry out Mr. Dubois' instructions. The complainant stated that he did not know why Mr. Dubois had told him in November 2010 that he was too authoritarian, a comment that Mr. Dubois repeated in his references. However, the complainant did not explain why he had not asked Mr. Dubois for an explanation when the comment was made. The Tribunal also notes that, in an email dated November 24, 2010, Mr. Dubois reminded the complainant that,

in their meeting the day before, he had informed him of the areas in which he needed to improve. In his testimony, the complainant did not contradict Mr. Dubois' comment.

44 The Tribunal reviewed the board's consensus document for the three competencies assessed. In that document, the board indicates the shortcomings in the complainant's answers to the interview questions, and gives a detailed explanation of how it came to its conclusions after conducting the reference check. Ms. Racicot also explained those conclusions in her testimony. Mr. Dubois' references addressed the complainant's performance as a CM (CX-04) and Mr. Brouillette's references addressed his performance as a Correctional Officer II (CX-02), although Mr. Brouillette did make the comment that the complainant had potential as a CM. According to Ms. Racicot, the board found Mr. Brouillette's references to be positive, but did note more nuanced comments for one of the behavioural indicators for strategic thinking, namely, according to the consensus document "Analyses shortcomings and seeks honest feedback in order to learn from mistakes." [translation]

45 The Tribunal also reviewed the references provided by Mr. Dubois and Mr. Brouillette. The Tribunal notes that Mr. Dubois' references, which cover a five-month period during which the complainant was an acting CM, contain comments that can be described as positive (e.g., "he is a manager who is focused on results...", "he...knows how to analyse various situations," and "it is important to stress that he follows instructions and takes on requested projects...and is excellent at following up on files" [translation]). Other comments are more critical (e.g., "he has difficulty acknowledging his shortcomings," "he needs to gain more experience," and "his transition from Correctional Officer...to Correctional Manager has not been completely smooth" [translation]). Mr. Brouillette's references, while positive overall, do indicate: "generally, he learns from his mistakes. Pride and his own knowledge may give the impression that he has trouble acknowledging his mistakes but he adjusts...becoming more conciliatory and wise and less authoritarian and vindictive" [translation].

46 The purpose of a reference check is to obtain information that the board can use to assess a candidate's qualifications. The referees' role is to provide an honest

assessment that may or may not be favourable to a candidate. Decisions are made solely by the board, not the referees.

47 In this case, it was the board, and not Mr. Dubois, that decided on the complainant's final mark. After taking into account the complainant's interview results and his references, and after speaking with Ms. Normandin, the board decided that a score of 5 out of 10 was appropriate for the "strategic thinking" competency. Ms. Racicot clearly explained in her testimony the board's reasoning for its decision. As she confirmed, it was the board that determined that the incident in administrative segregation demonstrated that the complainant did not behave appropriately under the circumstances. That incident was only one of the elements in the references provided by the two referees. The board, taking into account the responsibilities and duties of a CM, determined that the references provided enough detail to allow it to complete its assessment.

48 The complainant has failed to establish that the board's assessment was based on inadequate material.

49 The Tribunal finds that the complainant did not demonstrate that the respondent acted in bad faith in its assessment of the "strategic thinking" competency.

Issue II: Did the respondent comply with the PSC's policies and with the principles of procedural fairness in conducting the informal discussion?

50 The complainant submits that the board acted in bad faith and failed to comply with the PSC's *Informal Discussion Policy*, one of the objectives of which is to "correct any errors or oversights" and which requires deputy heads to ensure that "errors or oversights can be corrected where appropriate." The complainant is of the view that, if the board had accepted the documents that he had wanted to present at the informal discussion, the board would have been able to correct its assessment.

51 The complainant also submits that the respondent breached its obligation of procedural fairness because the board did not allow him, at either of the two informal discussions, to present evidence that Mr. Dubois' references were incorrect. He submits

that, as a result, he was unable to demonstrate how those references were false, fully discuss his assessment, or have the assessment reviewed appropriately.

52 Ms. Racicot described what took place at the second informal discussion. She explained to the complainant why he had failed the “strategic thinking” competency. She also explained to him that the board could not ignore Mr. Dubois’ references simply on the basis of what the complainant had told them. She informed him that the board could not accept the documents he wanted to present because they were not part of the assessment tools. The board allowed the complainant to submit a thank-you letter signed by the correctional officers he had supervised.

53 According to Ms. Racicot, the complainant’s arguments failed to convince the board that Mr. Dubois’ references were incorrect or that they were given in bad faith. The references were provided by one of the complainant’s supervisors and seemed, in the board’s view, to be fair. Mr. Dubois also provided references for other candidates. Furthermore, Ms. Normandin confirmed to the board that the incident in administrative segregation had occurred.

54 The evidence shows that the board assessed the complainant on the basis of the interview results and the reference check, and that the board confirmed that the incident in administrative segregation referred to by Mr. Dubois had occurred. The board concluded that the complainant had not demonstrated strategic thinking.

55 The complainant took part in two informal discussions. At the second informal discussion, the board explained its decision to the complainant and explained why he had failed. The complainant wanted to provide documents to the board. The board listened to his arguments but refused to accept his documents.

56 In *Rozka v. Deputy Minister of Citizenship and Immigration Canada*, 2007 PSST 0046, at para. 76, the Tribunal found that informal discussion is a means of communication for a candidate to discuss the reasons for elimination from a process. It also gives the board the opportunity to consider information listed on an application that it may not have considered and to correct mistakes and misunderstandings. However, informal discussion is not an opportunity to request that the assessment

board reassess a candidate's qualifications. In this case, that is what the complainant wanted the board to do.

57 The Tribunal finds that the board was not required to consider the documents that the complainant wanted to submit at the informal discussion. The complainant did not demonstrate that, in refusing to accept those documents, the respondent failed to comply with the PSC's *Informal Discussion Policy* and with the principles of procedural fairness.

Decision

58 For all these reasons, the complaint is dismissed.

Lyette Babin-MacKay
Member

Parties of Record

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| Tribunal File | 2011-0244 |
| Style of Cause | <i>Michel Couillard and the Commissioner of the Correctional Service of Canada</i> |
| Hearing | July 9, 10 and 11, 2012 Montreal, Quebec Final written submissions received on September 25, 2012 |
| Date of Reasons | November 15, 2012 |
| APPEARANCES: | |
| For the complainant | Xavier Mondor |
| For the respondent | Michel Girard |
| For the Public Service Commission | Marc Séguin (written submissions) |