



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2011-1155
Issued at: Ottawa, February 4, 2013

MILES DENNY

Complainant

AND

THE DEPUTY MINISTER OF NATIONAL DEFENCE

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 dismissed
Decision rendered by	Joanne B. Archibald, Member
Language of Decision	English
Indexed	<i>Denny v. the Deputy Minister of National Defence</i>
Neutral Citation	2013 PSST 0003

Reasons for Decision

Introduction

1 Miles Denny, the complainant, applied for the GT-04 position of Civilian Ammunition Technician with the Department of National Defence at the Canadian Forces Ammunition Depot in Bedford, Nova Scotia (CFAD Bedford) but was not appointed. The complainant alleges that the Deputy Minister, National Defence, the respondent, abused its authority by appointing a person who does not satisfy the personal suitability qualifications for the GT-04 position.

2 The respondent denies that an abuse of authority occurred. It states that the appointee was fully assessed and found to meet the qualifications for the position.

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

4 For the reasons that follow, the Tribunal finds no abuse of authority in the decision to appoint the appointee. The Tribunal notes that the complainant originally submitted additional allegations of abuse of authority, but withdrew them during the hearing. Accordingly, they have not been addressed in this decision.

Background

5 The complainant and the appointee were two of six candidates in an internal advertised process for the GT-04 position. On September 22, 2011, the assessment board concluded the assessment of candidates. The complainant was notified that he was found not qualified. The assessment board determined that the appointee and one other candidate were qualified for appointment to the GT-04 position.

6 This appointment process was conducted to staff two GT-04 positions at CFAD Bedford. The intention was to make indeterminate appointments at the conclusion of the GT-04 process. Lieutenant-Commander Brian Hammett, the hiring manager for the GT-04 position, is the Commanding Officer of CFAD Bedford. When the results were issued, he had authority to fill only one of the GT-04 positions. He elected to delay an indeterminate appointment while seeking approval to staff both

positions. As an interim measure, he decided to appoint both qualified candidates to act in the GT-04 positions.

7 On November 9, 2011, a Notice of Appointment or Proposal of Appointment was issued and the indeterminate appointments to the GT-04 position were then made.

8 The complainant then filed a complaint of abuse of authority with the Public Service Staffing Tribunal (the Tribunal) under s. 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12,13 (PSEA) concerning the appointment of one of the two qualified candidates to the GT-04 position.

9 The complainant's allegation of abuse of authority is based on an altercation that occurred in the workplace between the appointee and another employee on October 7, 2011 (the incident). By this time, based on the results of the GT-04 appointment process, the appointee was acting in the GT-04 position. Following the incident, Military Police were summoned and they issued an appearance notice to the appointee to appear in the Provincial Court of Nova Scotia. On November 22, 2011, an Information was sworn against him charging him with assault. The Information alleged that the appointee pushed the other employee on the chest. On April 13, 2012, the appointee pleaded guilty and was given an absolute discharge. The effect of an absolute discharge is that he is deemed not to have been convicted of the offence. (See *Criminal Code*, R.S.C. 1985, c. 46, s. 730.)

Issue

10 The Tribunal must determine whether the respondent abused its authority by appointing a person who did not meet the qualifications for the GT-04 position.

Analysis

11 The complainant made this complaint under s. 77(1)(a) of the PSEA. This provision empowers the Tribunal to examine an internal appointment process to determine if the respondent abused its authority to make appointments based on merit. An appointment is merit-based when the deputy head is satisfied that the person to be

appointed meets the essential qualifications for the work to be performed (s. 30(2)(a) of the PSEA).

12 The complainant bears the burden of proving an allegation of abuse of authority in complaints made under s. 77 of the PSEA. See *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008, at paras. 49, 50 and 55. In order for the complainant to meet this burden, it is necessary for him to present sufficient evidence for the Tribunal to determine, on a balance of probabilities, that a finding of abuse of authority is warranted.

13 It is well established that the Tribunal is not to reassess candidates or substitute its judgment for the decision of the assessment board. The Tribunal's role is to determine whether there has been an abuse of authority in the appointment process. See, for example, *Jalal v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 0038, at para.39. However, in considering the question of abuse of authority, the Tribunal may examine the totality of the circumstances leading to an appointment. See *Maxwell v. Deputy Minister of National Defence*, 2011 PSST 0021, at para. 22.

14 In the present case, the Tribunal must determine whether the respondent abused its authority by appointing the appointee. The complainant is not contesting the assessment board's decision in September 2011 to find the appointee qualified. The complainant argues, however, that the incident of October 7, 2011, impacts the assessment board's conclusion to the extent that the appointee should no longer be considered qualified.

15 The complainant alleges that given the appointee's involvement in the incident, it became evident that he did not meet the essential personal suitability qualifications set out in the Statement of Merit Criteria (SMC) for this appointment process and the respondent should therefore not have appointed him. The SMC specified the following essential qualifications under the heading of "Personal Suitability":

Comprehension and Judgement – knowledgeable in all aspects of ammunition. Must make sound decisions in the application of ammunition tasks. Errors in judgement or lack

of comprehension could result in serious injury or death and loss of strategically vital ammunition stocks, equipment and property.

Consequence of Error – must be responsible for ensuring adherence both to general safety and operating procedures in all ammunition tasks, operations and safe ammunition handling procedures and techniques. Individual errors in the handling, maintenance and disposal of ammunition, judgement errors or mistakes in passing of information and orders can result in incidents of serious injury or death and loss of strategically vital ammunition stocks, equipment and property.

Interpersonal relationships – Must be effective in developing and maintaining positive interpersonal relationships.

16 The complainant has no personal knowledge of the incident, but understands that it may have involved a dispute about proper procedures for a vehicle carrying ammunition. He submits that the incident demonstrates that the appointee lacked all three personal suitability qualifications, particularly as the dispute related to the serious matter of munitions handling, to which there is specific reference in the first two personal suitability qualifications. The complainant feels that the respondent ignored the impact of the appointee's involvement in the incident when it proceeded with the appointment.

17 The respondent denies the complainant's allegation, arguing that the circumstances surrounding the incident were taken into account and dealt with before proceeding with the indeterminate appointment. According to the respondent, the facts relating to the incident did not demonstrate that the appointee lacked the personal suitability qualifications for the position.

18 LCdr Hammett testified that when he became aware of the incident, he immediately responded by appointing Sophie Doucette, Material Control Officer (MCO) at CFAD Bedford and supervisor of the GT-04 positions, to conduct a misconduct investigation. He decided that irrespective of when he received approval to staff the GT-04 positions indeterminately, he would delay the appointments until the investigation was complete.

19 Ms. Doucette testified that she has been the MCO and direct supervisor of the appointee since 2009. She was responsible for drafting the SMC for the GT-04 appointment process and stated that she drew the personal suitability

qualifications from a departmental hiring directive. The personal suitability qualifications of comprehension and judgment, and consequence of error were intended to assess the qualities of a knowledgeable employee who would not allow mistakes in terms of health and safety of employees. Interpersonal relationships reflected the team leader requirements of the GT-04 position.

20 She recalled that on October 7, 2011, she was delegated by LCdr Hammett to conduct an investigation into the incident. She began immediately and concluded the investigation on October 22, 2011.

21 LCdr Hammett testified that upon receiving and reviewing Ms. Doucette's investigation report, he formed the opinion that the incident was isolated. In his assessment, it was an unfortunate occurrence and unlikely to be repeated. He considered that both employees played a role in escalating the matter. He added that if, after reviewing the findings of the disciplinary investigation, he had found any indication of gross misconduct or a suggestion that the incident could occur again, he would have reconsidered the decision to appoint the appointee. However, in his opinion, the investigation revealed no valid reason to reverse the assessment board's decision to find the appointee qualified for the position.

22 The complainant's point of view must be weighed against the evidence of LCdr Hammett and Ms. Doucette concerning their actions subsequent to the incident and the appointment decision that was ultimately made. The disciplinary investigation conducted by Ms. Doucette satisfied LCdr Hammett in his roles as both the Commanding Officer of CFAD Bedford and the hiring manager for the GT-04 position that the incident was isolated and unlikely to recur. He determined that the incident did not impact the assessment board's conclusion that the appointee was qualified. On that basis, the respondent proceeded with the appointment.

23 The Tribunal finds that the evidence does not establish that an abuse of authority occurred. It is clear that the respondent did not take the incident lightly. The actions taken subsequent to the incident demonstrate that LCdr Hammett turned his mind to the incident and was satisfied that it did not warrant changing his decision to appoint the

appointee. While the complainant does not agree with this, he has not demonstrated that the respondent abused its authority within the meaning of s. 77(1)(a) of the PSEA.

Decision

24 For these reasons, the complaint is dismissed.

Joanne B. Archibald
Member

Parties of Record

Tribunal File	2011-1155
Style of Cause	<i>Miles Denny and the Deputy Minister of National Defence</i>
Hearing	December 4-5, 2012 Halifax, Nova Scotia
Date of Reasons	February 4, 2013
APPEARANCES:	
For the complainant	Louis Bisson
For the respondent	Pierre-Marc Champagne
For the Public Service Commission	John Unrau (written submission)