



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**Files:** 2012-0793 and 2012- 0809  
**Issued at:** Ottawa, February 4, 2013

**CHRISTINE EWING AND JAMES TRELLER**

Complainants

AND

**THE COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA**

Respondent

AND

**OTHER PARTIES**

<b>Matter</b>	Complaints of abuse of authority pursuant to sections 77(1)(a) and (b) of the <i>Public Service Employment Act</i>
<b>Decision</b>	Complaints are dismissed
<b>Decision rendered by</b>	Joanne B. Archibald, Member
<b>Language of Decision</b>	English
<b>Indexed</b>	<i>Ewing v. the Commissioner of the Correctional Service of Canada</i>
<b>Neutral Citation</b>	2013 PSST 0004

## **Reasons for Decision**

### **Introduction**

**1** Christine Ewing and James Treller, the complainants, filed complaints of abuse of authority concerning the appointment of Mary Hodge to the position of WP-04 Correctional Program Officer (the WP-04 position) with the Correctional Service of Canada (CSC) in Drumheller, Alberta.

**2** It is the complainants' view that the Commissioner of CSC, the respondent, abused its authority, firstly, in the choice of a non-advertised appointment process for this appointment and, secondly, in the application of merit as the appointee was not qualified.

**3** The respondent denies that an abuse of authority occurred. A non-advertised appointment process was chosen to address a situation arising as a result of reorganization within CSC. It states that the appointee was fully assessed and found to meet the qualifications for the position.

**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** For the reasons that follow, the complaints are dismissed. It has not been established that the respondent abused its authority in this appointment process.

### **Background**

**6** The complainants and Ms. Hodge all occupy positions with CSC at the Drumheller Institution (the Institution) in Drumheller, Alberta. In 2011, there was a call for interest in an acting appointment to a WP-04 position at the Institution. Ms. Hodge was one of those who responded and she was appointed. She attended training during August 2011 and, on September 6, 2011, began acting in a WP-04 position. The acting appointment is not the subject of these complaints.

**7** In September 2011, the respondent initiated a national advertised appointment process (the advertised appointment process) for WP-04 positions at various locations

across Canada. Ms. Hodge and the complainants were candidates in the advertised appointment process.

**8** Ms. Hodge remained acting in the WP-04 position until appointed to it indeterminately in March 2012 using a non-advertised appointment process. The appointment occurred following an assessment of Ms. Hodge conducted by Louise Kloot, Manager, Programs, who recommended the appointment to the Warden, Darcy Emann. He in turn recommended the appointment to the Regional Deputy Commissioner who approved it.

**9** The complainants filed their complaints 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 (the PSEA) following the non-advertised, indeterminate appointment of Ms. Hodge to the WP-04 position. Pursuant to s. 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6, as amended by SOR/2011-116, the complaints were consolidated for the purpose of hearing.

## **Issues**

- (i) Did the respondent abuse its authority by choosing a non-advertised appointment process?
- (ii) Did the respondent abuse its authority by appointing a person who was not qualified?

## **Analysis**

**10** 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.

**11** Pursuant to s. 77(1)(a), the complainants allege that the respondent abused its authority in the application of merit. The complainants also claim under s. 77(1)(b) that the respondent abused its authority in choosing a non-advertised appointment process.

**12** The complainants bear the burden of proof in a complaint of abuse of authority. See *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008, at paras. 48-55.

**Issue I: Did the respondent abuse its authority by choosing a non-advertised appointment process?**

**13** Section 33 of the PSEA provides that “the Commission may use an advertised or non-advertised appointment process”. The PSEA uses permissive language and does not indicate a preference in the choice of process. In *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 0006, at para. 7, the Tribunal considered abuse of authority in the context of choice of process and held that:

Section 33 of the PSEA explicitly permits the use of non-advertised appointment processes. Nevertheless, s. 77(1)(b) of the PSEA provides for a direct challenge of the discretionary choice between an advertised and non-advertised process, on the ground of abuse of authority. The Tribunal has established that merely choosing to conduct a non-advertised process is not an abuse of authority in itself. For a complaint under s. 77(1)(b) of the PSEA to be successful, the complainant must establish, on a balance of probabilities, that the **choice** to use a non-advertised process was an abuse of authority.

(emphasis in original)

**14** Ms. Ewing recalled a conversation with Kim Brant, Senior Corporate Staffing Consultant with CSC, in which Ms. Brant spoke of the appointment of Ms. Hodge and purportedly said: “Even managers make mistakes”. Ms. Ewing understood this to mean that the appointment of Ms. Hodge was a mistake.

**15** Louise Kloot began acting as the Manager, Programs in October 2011. She was appointed indeterminately shortly thereafter. Her duties include responsibility for delivery of correctional programming. Ms. Kloot testified that Human Resources told her at the outset of her own appointment that Ms. Hodge’s substantive position was vulnerable and would likely be affected by reorganization within CSC. It would be moved to Saskatoon, Saskatchewan. Ms. Kloot became aware through conversation with Ms. Hodge that she would be unable to follow her substantive position to Saskatoon.

**16** In October 2011, Ms. Kloot also determined that she would be losing at least one indeterminate staff member from Programs. Concerned about the loss of a WP-04 staff member and the consequent reduction in capacity to deliver mandated programming to

inmates, Ms. Kloot considered methods for filling the vacancy. Ms. Kloot testified that she first attempted to appoint from an existing WP-04 pool, but no candidates were available. She was aware of the WP-04 advertised appointment process that had been initiated in September 2011. She had no involvement in it, but felt that her need to fill the position was too urgent to wait for the advertised process to conclude.

**17** Ms. Kloot confirmed that she knew that a non-advertised appointment process could be used to staff a vacant position. She testified that she was aware that she would have to assess Ms. Hodge's qualifications and complete a rationale before a non-advertised appointment could be considered. She provided detail of the steps she took to fill the WP-04 position by way of a non-advertised appointment process.

**18** Ms. Kloot prepared the rationale for Ms. Hodge's appointment and provided it to Mr. Emann for signature. The rationale notes firstly that appointing Ms. Hodge avoided the priority situation that would be created when her substantive position was moved to Saskatoon, Saskatchewan. It also identified that she was an Aboriginal employee, and a member of a designated employment equity group.

**19** Ms. Brant testified concerning her involvement in the appointment of Ms. Hodge. She was aware in the fall of 2011 of the regionalization of Ms. Hodge's work unit. CSC wanted to place its own employees before priority situations arose. Specifically with respect to Ms. Hodge's appointment, Ms. Brant provided advice that it was reasonable to use a non-advertised appointment process to avoid a priority situation, provided that Ms. Hodge met the merit criteria for the WP-04 position.

**20** Mr. Emann stated that, based on reviewing the documentation prepared by Ms. Kloot, he was satisfied that Ms. Hodge was qualified and that the appointment met the requirements for a non-advertised appointment process. He recommended the appointment to the Regional Deputy Commissioner, who approved it. He noted as well that Ms. Hodge's appointment addressed the underrepresentation of Aboriginal employees at the Institution. He added in his testimony that the need to staff the position was urgent. CSC had a statutory obligation under the *Correctional and Conditional Release Act*, S.C. 1992, c. 20, to deliver programming to inmates, and one

vacant WP-04 position translated into 50 inmates per year who would not receive programming. This information was not reflected in the rationale.

**21** Ms. Kloot acknowledged that the Institution's 2011-2012 Human Resource Plan (HRP) showed WP-04 staffing as a low priority and indicated that positions would be staffed from a national external advertised process. She noted that the HRP indicated that objectives for recruiting Aboriginal employees were not being met. Mr. Emann also addressed the HRP, stating that it was a living document. While it was accurate at the time it was prepared, staffing needs changed over time.

**22** In his testimony, Mr. Emann acknowledged that in May 2012, several months after the appointment in issue, he stated during a staff meeting that Prairie Regional Headquarters had conducted an analysis of its capacity to deliver programming to inmates, which indicated that the Institution may be over-resourced. However, in his testimony, he added that, although the Institution was maintaining its program delivery obligations at that time, it was also planning for the addition of 150 inmates for which it would require resources.

**23** Ms. Brant also testified about her conversation with Ms. Ewing. She denied that she made any suggestion of a mistake in the appointment of Ms. Hodge. Rather, as the person at CSC who was responsible for complaints to the Tribunal, she was endeavouring to assure Ms. Ewing that a complaint to the Tribunal was not a contentious issue between an employee and CSC recourse was an employee's right. She told Ms. Ewing that no one was perfect and that if the Tribunal identified mistakes, they would be rectified. Ms. Brant stated that this was advice she commonly gave to employees seeking recourse.

**24** The evidence of Ms. Brant provides a context for her conversation with Ms. Ewing and a credible explanation of the intent of the comment as a general remark rather than a specific observation relative to the appointment of Ms. Hodge. The Tribunal does not find that Ms. Brant was suggesting that a mistake had occurred.

**25** The Tribunal finds that the rationale for choosing a non-advertised appointment process, which was reiterated in the testimony of Ms. Kloot and Ms. Brant, provides a

proper justification for the choice of process. The rationale relies principally on the relocation of Ms. Hodge's substantive position to Saskatoon and her decision not to relocate. This made her continued employment vulnerable and she could have been laid off. Ms. Brant's evidence was that CSC preferred to find placements for its employees in such situations. In other decisions, the Tribunal has viewed such information as a reasonable consideration in the decision to appoint a qualified person using a non-advertised appointment process. (See, for example *Rosenthal v. the President of the Federal Economic Development Agency for Southern Ontario*, 2012 PSST 0022, at para. 36; *Kosowan v. Deputy Minister of Health Canada*, 2009 PSST 0024, at paras. 62-63.)

**26** The Tribunal concludes that the complainants have not proven that there was an abuse of authority by the respondent in the choice of a non-advertised appointment process.

**27** The Tribunal notes that conflicting evidence was presented at the hearing concerning whether a non-advertised process was chosen to address an urgent situation. The written rationale does not contain any such reference. However, both Ms. Kloot and Mr. Emann testified that there was an urgent need to fill the WP-04 position.

**28** The Tribunal has already found that the written rationale provided a reasonable justification for the respondent's choice of process. Nevertheless, if there was an urgent need to staff the position, it should have been reflected in the written rationale as transparency is a key staffing value.

**Issue II: Did the respondent abuse its authority by appointing a person who was not qualified?**

**29** Section 36 of the PSEA provides that a deputy head may use "any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i)." The respondent has broad discretion to determine the assessment methods to be used, and no evidence has been presented to indicate that the tools used by Ms. Kloot were

inadequate for a thorough assessment of Ms. Hodge's qualifications for the WP-04 position.

**30** Ms. Kloot testified that she had daily contact in the workplace with Ms. Hodge. She supervised Ms. Hodge's work in Programs, and observed that she was doing an excellent job. She added that in addition to passing the WP-04 training, Ms. Hodge demonstrated superior organizational skills, enthusiasm about the programs she was delivering, and exceptional rapport with inmates.

**31** The tools she used to assess Ms. Hodge were her own assessment of Ms. Hodge in the workplace, Ms. Hodge's résumé, and information from a previous supervisor. Applying the same Statement of Merit Criteria used in the advertised appointment process, and conducting her assessment using these tools, Ms. Kloot concluded that Ms. Hodge met all of the qualifications for the WP-04 position. The assessment process started in January 2012. Ms. Kloot recorded the results in an assessment document that listed the merit criteria and how Ms. Hodge met them. The assessment document was signed by Ms. Kloot on March 9, 2012, and presented to Mr. Emann with the rationale for using a non-advertised appointment process.

**32** The complainants allege that Ms. Hodge did not meet one essential experience qualification for the WP-04 position. They extensively questioned Ms. Kloot about her assessment of Ms. Hodge's experience interviewing, motivating, and/or counselling persons in individual and/or group settings aimed at changing human behaviour for the required minimum period of one full time year during the past five years. Ms. Kloot testified that her conclusion that Ms. Hodge met this merit criterion was based on her observations of Ms. Hodge in Programs over a four-month period, as well as information she received from Ms. Hodge's past supervisor about her dealings at the Institution with new employees and inmate cleaners, and her supervision and training of other employees over the preceding five years. She explained in detail the work performed by Ms. Hodge that satisfied this requirement. She added that Ms. Hodge had described activities outside the workplace that augmented her experience in this area. In the end, Ms. Kloot was satisfied that Ms. Hodge demonstrated the essential experience qualification.

**33** In addition, the complainants claimed that Ms. Hodge could not be qualified in the non-advertised appointment process for the WP-04 position based on their belief that she was not found qualified in the advertised WP-04 appointment process. While they presented no evidence to show Ms. Hodge's result in the advertised process, Ms. Ewing expressed her opinion that Ms. Hodge completed a written examination administered in December 2011, too quickly to have performed well. Moreover, the complainants stated that they observed that Ms. Hodge was not present at the Institution on dates in March 2012, when interviews were conducted. The complainants believe that she could not have been found qualified in the advertised process, although no evidence was presented to the Tribunal to show the outcome of Ms. Hodge's candidacy in that appointment process.

**34** It is clear that the assessment tools used in the non-advertised process were different from those used in the advertised process. Ms. Ewing referred to a written examination and an interview in the advertised appointment process whereas, in the non-advertised process, Ms. Kloot elected to use her observations, Ms. Hodge's résumé, and a former supervisor's reference. As indicated above, the Tribunal finds no error in the assessment of Ms. Hodge's experience. Further, there was no direct challenge to whether the tools were adequate for the purpose of assessment in the non-advertised appointment process. Moreover, the non-advertised appointment process was completed before the results of the advertised appointment process were known. In these circumstances, the outcome of the advertised appointment process would have no relevance to this proceeding.

**35** The complainants did not allege personal favouritism. However, they claim that Ms. Hodge was improperly groomed for appointment to the WP-04 position or received an unfair advantage. They base their argument on the fact that Ms. Hodge acted in the WP-04 before being indeterminately appointed to it. The Tribunal finds that the complainants have not produced sufficient evidence to support this allegation. The pertinent facts leading to the indeterminate appointment were not contested: Ms. Hodge initially responded to a general call for interest in an acting appointment to a WP-04 position, she was chosen and trained for it, and then she assumed the duties associated with the position. There is no indication of any advantage conferred on

Ms. Hodge and deliberately withheld from others or any error or impropriety that would constitute grooming or an unfair advantage as alleged.

**36** The Tribunal concludes that the complainants have failed to prove on a balance of probabilities that the respondent abused its authority either in the choice of a non-advertised appointment process or in its determination that Ms. Hodge met the merit criteria for the WP-04 position.

### **Decision**

**37** For these reasons, the complaints are dismissed.

Joanne B. Archibald  
Member

### **Parties of Record**

<b>Tribunal Files</b>	2012-0793 and 2012-0809
<b>Style of Cause</b>	<i>Christine Ewing and James Treller and the Commissioner of the Correctional Service of Canada</i>
<b>Hearing</b>	November 27-28, 2012 Calgary, Alberta
<b>Date of Reasons</b>	February 4, 2013
<b>APPEARANCES:</b>	
<b>For the complainants</b>	Robert Couture-Wiens for Christine Ewing Grace Chychul for James Treller
<b>For the respondent</b>	Richard Fader
<b>For the Public Service Commission</b>	Trish Heffernan (written submission)