



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2008-0661

Issued at: Ottawa, May 29, 2013

MYRIAM MONTPETIT

Complainant

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

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	The complaint is dismissed
Decision rendered by	John Mooney, Vice-Chairperson
Language of Decision	French
Indexed	<i>Montpetit v. the President of the Canada Border Services Agency</i>
Neutral Citation	2013 PSST 0017

Reasons for Decision

Introduction

1 Myriam Montpetit, the complainant, participated in an internal advertised appointment process to staff Manager, Regional Programs, positions at the FB-06 group and level at the Canada Border Services Agency (CBSA). She was eliminated from the appointment process because, according to the President of the CBSA, the respondent, she did not meet two of the essential qualifications of the position.

2 The complainant alleges that the respondent abused its authority in the application of merit in this appointment process. More specifically, she alleges that the respondent assessed her qualifications improperly by failing to consider relevant factors, by failing to comply with the Public Service Commission (PSC) policy on reference checks, and by failing to respect the principle of fairness. The respondent denies all these allegations.

3 The PSC submits that there is no evidence that the respondent abused its authority or that it did not comply with PSC policy. The PSC is of the view that the complaint should therefore be dismissed.

4 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 in this appointment process.

Background

5 In October 2007, the respondent posted a *Job Opportunity Advertisement* on *Publiservice*, the federal government website, to staff various positions at the CBSA, including the position at issue, on an indeterminate basis.

6 The respondent screened in candidates on the basis of their education and work experience. The other qualifications were assessed by means of a standardized written exam, a scenario, and a reference check.

7 The complainant failed to meet two essential qualifications: leadership and interpersonal relations.

8 On September 19, 2008, the respondent posted a *Notification of Appointment or Proposal of Appointment* for the appointment of five people to the position at issue.

9 On October 6, 2008, the complainant filed a complaint of abuse of authority with the Tribunal pursuant to s. 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the PSEA).

10 On January 26, 2009, the complainant's representative submitted the complainant's allegations to the Tribunal.

11 On February 10, 2009, the respondent submitted its reply to those allegations.

12 On February 18, 2009, the PSC provided the Tribunal with its preliminary submissions.

13 A pre-hearing conference was scheduled for November 2, 2009, and the complaint was scheduled to be heard on December 8 and 9, 2009, in Montréal. The complainant asked the Tribunal to postpone the pre-hearing conference and the hearing because she was on sick leave. The Tribunal granted that request on October 30, 2009.

14 From the end of 2009 to the end of 2012, the Tribunal asked the complainant's representative to provide updates on the complainant's health. The complainant's representative informed the Tribunal on a number of occasions during that period that the complainant was on sick leave for an indefinite period.

15 Section 98(1) of the PSEA states that the Tribunal shall determine a complaint as expeditiously as possible. In this case, the complaint was filed on October 6, 2008, that is, almost four and a half years ago. The Tribunal determined that it was time to hear the complaint and informed the parties on July 31, 2012, that the hearing would be held on December 11 and 12, 2012.

16 The Tribunal informed all parties on October 22, 2012, that a pre-hearing conference to prepare for the hearing of the complaint would be held on November 20, 2012, by teleconference.

17 On November 20, 2012, the respondent's and the PSC's representatives joined the teleconference, but not the complainant or her representative. The Tribunal therefore ended the conference call without addressing the issues of the complaint.

18 To facilitate the complainant's ability to participate in the hearing of the complaint, the Tribunal decided to proceed via teleconference. The Tribunal informed the parties on November 22, 2012, that the teleconference would be held on December 19, 2012.

19 On November 28, 2012, the complainant's representative sent the Tribunal a medical certificate in which the complainant's physician indicated that the complainant was not able to take part in a hearing. The representative added that she had been unable to obtain more information about the complaint from the complainant.

20 In light of the complainant's health, the Tribunal informed the parties on November 29, 2012, that the December 19, 2012, hearing by conference call was cancelled. The Tribunal then decided to conduct a paper hearing, that is, by means of a review of the written submissions, in accordance with s. 99(3) of the PSEA, which gives the Tribunal the authority to decide a complaint without holding an oral hearing. The Tribunal informed the parties of the deadline for making written submissions.

21 The Tribunal subsequently received written submissions from the respondent and the PSC, but not from the complainant. The complainant did not ask the Tribunal to extend the deadline for making written submissions.

22 Section 29 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6, as amended by SOR/2011-116, states that if a party does not appear at the hearing of a complaint and the Tribunal is satisfied that notice of the hearing was sent to that party, the Tribunal may dispose of the complaint without further notice. The Tribunal is of the view that that provision also applies to paper hearings. Even though the complainant did not provide the requested written submissions, the Tribunal decided to dispose of the

complaint by reviewing the documentation provided by the parties, namely, the complainant's complaint, her allegations, the respondent's reply to the complainant's allegations, and the respondent's and the PSC's written submissions.

Issue

23 The Tribunal must determine whether the respondent abused its authority in its assessment of the complainant's qualifications.

Analysis

24 Section 77(1) of the PSEA states that a person in the area of recourse may make a complaint that he or she was not appointed or proposed for appointment by reason of an abuse of authority by the PSC or the deputy head in the appointment process. Abuse of authority is not defined in the PSEA, but s. 2(4) states that, "[f]or greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism".

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

Issue: Did the respondent abuse its authority in its assessment of the complainant's qualifications?

26 The assessment board determined that the complainant did not meet two of the essential qualifications: leadership and interpersonal relations. Each of those qualifications was assessed by means of a scenario and a reference check. An overall mark based on the results of both assessment methods was awarded for each qualification. The complainant performed well in the scenario, but she failed to meet the two qualifications as a result of the unfavourable references provided by her referees.

27 The Tribunal has held in numerous decisions that its role is to determine whether there was an abuse of authority, and not to reassess the candidates. See, for example, *Broughton v. Deputy Minister of Public Works and Government Services*, 2007 PSST 0020.

28 The complainant submits that the respondent did not comply with the PSC's policy on reference checks. According to the PSC document *Structured Reference Checking: A User's Guide to Best Practices*, to which the PSC referred, candidates should choose referees with whom they have worked for at least six months within the last five years. The Tribunal notes that this document is not a policy, but rather, a practical guide that, as the PSC pointed out, is not binding upon the respondent.

29 The complainant had suggested three referees: her manager and two other people. Those two other individuals refused to act as referees. Therefore, the assessment board contacted two of the complainant's other supervisors, one of whom was an acting manager. The complainant stated that her manager and the acting manager were not sufficiently familiar with her work to act as referees. Her manager was often away from the office, and the acting manager had not supervised her for a sufficient length of time. During the time the acting manager was her supervisor, the complainant had to take leave.

30 The Tribunal finds that the complainant did not establish that the manager and acting manager were not sufficiently familiar with her qualifications to act as referees. The complainant's manager had been supervising her for ten months at the time of the appointment process. Thus, she had ample time to get to know the complainant's work. The complainant herself had suggested the manager as a referee. The Tribunal finds that the complainant failed to establish that her manager's numerous absences prevented her from becoming familiar with the complainant's work.

31 The acting manager had supervised the complainant for over a year, which was ample time for him to make observations about the complainant's qualifications, even if

the complainant had to take leave during that period. Furthermore, the complainant did not indicate the length of her leave.

32 The third referee had supervised the complainant for five months, that is, one month less than the period of time suggested in the above-mentioned PSC guide. Because the complainant made no mention of this referee other than to say that he was retired, the Tribunal will make no findings about his ability to act as a referee.

33 The complainant also alleges that the respondent failed to respect the principle of fairness because the acting manager who acted as a referee was also a candidate in the appointment process to staff the position at issue. The respondent acknowledged that fact in its reply to the complainant's allegations. The Tribunal finds that choosing a candidate to act as a referee is not ideal because it could place the referee in a conflict of interest or give the appearance of a conflict of interest, thus affecting the impartiality of the referee's observations. However, that fact in itself, in the absence of any other evidence, does not establish abuse of authority.

34 The complainant further alleges that the assessment board failed to consider relevant factors in the assessment of the two above-mentioned qualifications. In the complainant's opinion, the assessment board should have considered her performance appraisals. The Tribunal finds that allegation to be unsubstantiated. Section 36 of the PSEA gives delegated managers broad discretion in choosing assessment methods. Delegated managers may use any assessment method that they consider appropriate, provided that it allows for the proper assessment of the qualifications established in the statement of merit criteria. See, for example, *Jolin v. Deputy Head of Service Canada*, 2007 PSST 0011, and *Ouellet v. President of the Canadian International Development Agency*, 2009 PSST 0026. The assessment board was therefore within its rights to decide not to consider the complainant's performance appraisals.

35 The Tribunal thus finds that the complainant did not demonstrate that the respondent abused its authority in the assessment of her qualifications.

Decision

36 For all these reasons, the complaint is dismissed.

John Mooney
Vice-Chairperson

Parties of Record

Tribunal File	2008-0661
Style of Cause	<i>Myriam Montpetit and the President of the Canada Border Services Agency</i>
Hearing	Final written submissions received on February 19, 2013
Date of Reasons	May 29, 2013
APPEARANCES:	
For the complainant	Diane Lacombe (written submissions)
For the respondent	Nathalie Pruneau (written submissions)
For the Public Service Commission	Marc Séguin (written submissions)