



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

Files: 2012-0007 and 2012-0924
Issued at: Ottawa, March 21, 2013

BLAIR WINGER

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	Complaints are dismissed
Decision rendered by	Joanne B. Archibald, Member
Language of Decision	English
Indexed	<i>Winger v. the Deputy Minister of National Defence</i>
Neutral Citation	2013 PSST 0009

Reasons for Decision

Introduction

1 Blair Winger, the complainant, filed two complaints of abuse of authority concerning the acting and indeterminate appointments of Darcy Maier to the FR-03 position of Platoon Chief with the Department of National Defence (DND) at Canadian Forces Base Suffield (CFB Suffield) in Alberta.

2 The Deputy Minister, National Defence (the respondent) denies that an abuse of authority occurred in either appointment.

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 complaints.

4 For the reasons that follow, the complaints are dismissed.

Preliminary matter with respect to the complaint regarding the indeterminate appointment

5 With respect to the complaint regarding the indeterminate appointment of Mr. Maier, the respondent made a request at the outset of the hearing for an order dismissing the complaint, on the grounds that it was made outside of the 15-day period allotted for filing a complaint following a notice of appointment, pursuant to s. 10 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6, amended by SOR/2011-116 (PSST Regulations). This request was first received by the Public Service Staffing Tribunal (the Tribunal) on June 21, 2012. On June 29, 2012, the Tribunal issued a letter decision to the parties advising them that the motion was denied, without prejudice to the respondent's right to raise the issue at a later time.

6 On this basis, the respondent renewed its request at the hearing for the dismissal of the complaint concerning the indeterminate appointment.

7 The complainant submitted that if his complaint were found to be late, then the Tribunal should consider extending the time for him to file, due to exceptional circumstances.

8 For the reasons that follow, the Tribunal finds that the complaint was not filed within the prescribed time limits and that an extension to the time to file is not warranted in the circumstances of this case. The complaint regarding the indeterminate appointment is dismissed.

9 In 2010, the complainant and Mr. Maier participated in an internal advertised appointment process for the FR-03 position and were found qualified. The complainant testified that he saw a posted copy of a Notice of Consideration for the indeterminate appointment of Mr. Maier on March 30, 2012. It indicated that Mr. Maier was being appointed from the qualified pool that resulted from the internal advertised appointment process.

10 The complainant testified that on April 11, 2012, he met with Major Sylvain Neveu, who was then the Base Construction Engineering Officer at CFB Suffield, and the hiring manager for the FR-03 position. During the meeting, the complainant expressed a concern about the appointment. The complainant testified that after the meeting, he assumed that Mr. Maier's appointment would proceed.

11 The complainant acknowledged that on April 2, 2012, he received an email addressed to all staff indicating that from that time onward, staffing notices would only be posted on *Publiservice* and would no longer be distributed in paper copy or posted on bulletin boards. *Publiservice* is the federal government online portal providing access to staffing notices.

12 The complainant testified that on April 11, 2012, he enrolled in Career Watch, a service available to federal employees to notify them of staffing notices posted on *Publiservice*. He registered to receive these notices at his personal email address. He noted that the first notice he received from Career Watch was on April 26, 2012, concerning a different position.

13 The complainant was absent from the workplace from April 12 to May 7, 2012. On his return, he examined bulletin boards for a posted Notice of Appointment or Proposal of Appointment (NAPA) for Mr. Maier's appointment and did not find one.

He also asked colleagues whether they had seen a NAPA posted on a bulletin board in the fire hall, and they replied that they had not.

14 The complainant stated that on June 12, 2012, one day before he filed his complaint, he asked Mr. Maier whether he had been appointed indeterminately to the FR-03 position and Mr. Maier confirmed that the appointment had been made several months earlier. On June 13, 2012, the complainant filed his complaint.

15 The complainant testified that he never received notification from Career Watch that a NAPA had been posted for Mr. Maier's indeterminate appointment. The complainant did not, however, affirm that he ever consulted the *Publiservice* website prior to filing his complaint on June 13, 2012, to verify whether a NAPA had been posted.

16 The evidence before the Tribunal includes a printed copy of the NAPA showing that it was posted on *Publiservice* on April 12, 2012, and indicating that the complaint period ended April 27, 2012.

17 Jacqueline White, a Human Resources Assistant at CFB Suffield, testified concerning her experience posting notices on *Publiservice*. She stated that the date of notification, in this case April 12, 2012, indicates the date on which a NAPA is issued. The end of the complaint period, here indicated as April 27, 2012, is automatically inserted by the *Publiservice* system when a NAPA is issued.

18 The complaint is therefore untimely, and the Tribunal finds that the complainant has failed to demonstrate exceptional circumstances that would warrant granting his request to extend time for filing.

19 In *MacDonald v. Deputy Head of Service Canada*, 2006 PSST 0002, the Tribunal held that the time for filing is a strict time limit. However, s. 5 of the PSST Regulations provides that the Tribunal may extend the time for filing a complaint where it is in the interest of fairness to do so.

20 In the present case, the complainant argues that the absence of notification from Career Watch is an exceptional circumstance.

21 The Tribunal has previously considered the use of *Publiservice* as a method of posting staffing documents. Section 10(1)(b) of the PSST Regulations provides that a complaint must be received no later than 15 days after the date specified in the public notice of appointment. In *Tennant v. President of the Canadian International Development Agency*, 2007 PSST 0006, at para. 18, the Tribunal found that a NAPA posted on *Publiservice* constitutes public notice. As such, it is the complainant's responsibility to file a complaint within this 15-day time period.

22 When a complainant requests more time to file his complaint, then the onus lies with the complainant to prove exceptional circumstances that justify the extension of the strict time limit for filing a complaint. See *Casper v. Deputy Minister of Citizenship and Immigration Canada*, 2006 PSST 0010, at para. 22. In the present case, the complainant has not met this burden.

23 In accordance with the uncontradicted evidence of Ms. White concerning the dates found in a NAPA posted on *Publiservice*, the public notice of Mr. Maier's indeterminate appointment was issued on *Publiservice* on April 12, 2012, and the complaint period ended 15 days later, on April 27, 2012.

24 The Tribunal finds that the absence of notification from Career Watch does not constitute an exceptional circumstance that would allow the extension of time to file his complaint. Career Watch is not an alternative or replacement for *Publiservice*. It is, as described by the complainant in his evidence, a service to alert Career Watch registrants that public notice of a staffing matter has been issued on *Publiservice*. The complainant's reliance on Career Watch does not invalidate the effectiveness of a notice issued on *Publiservice*.

25 Therefore, the complaint regarding the indeterminate appointment of Mr. Maier, from the pool of qualified candidates in appointment process 10-DND-IA-SUFLD-345423, is dismissed as it was filed after the complaint period indicated in the NAPA posted on *Publiservice*.

26 The Tribunal notes that the complainant provided notice to the Canadian Human Rights Commission in accordance with s. 78 of the *Public Service Employment Act*,

S.C. 2003, c. 22, ss. 12,13 (PSEA), to indicate that he intended to raise an issue concerning the indeterminate appointment that involved the interpretation of application of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. As the complaint regarding the indeterminate appointment has been dismissed on the basis that it was not filed within the prescribed time period, the issue of discrimination has not been further considered.

Complaint regarding the acting appointment

27 On December 22, 2011, Charles Donnelly, Chief Fire Inspector at CFB Suffield, circulated an email to staff announcing that Mr. Maier would be acting in the position of Platoon Chief for platoon 1 as of January 9, 2012, and that the complainant would be acting in the position of Platoon Chief of platoon 2 as of January 2, 2012. Lance Purcell, Deputy Fire Chief at CFB Suffield, testified that in the period around Christmas 2011, the fire hall was preparing to move to a new system of scheduling firefighters for 24 hour shifts. The email of December 22, 2011, reflected corresponding changes to the scheduling of FR-03s.

28 On January 4, 2012, the complainant filed his complaint concerning the proposed FR-03 acting appointment of Mr. Maier. According to the complainant, Mr. Maier had acted continuously in the same FR-03 position from June 2011 and continued to act in the position at the time of the December 22, 2011, email. The respondent did not contest this statement. The cumulative period of Mr. Maier's acting appointment exceeded four months. As such, it falls within the Tribunal's jurisdiction under s. 14 of the *Public Service Employment Regulations*, SOR/2005-334.

29 The complainant initially alleged an abuse of authority in the application of merit and an abuse of authority in the choice to use a non-advertised appointment process. During the hearing, the complainant's representative advised the Tribunal that the complainant was not challenging the merit of Mr. Maier's appointment. Accordingly the sole issue before the Tribunal is to determine whether the respondent abused its authority by choosing a non-advertised appointment process for the acting appointment.

30 The complainant stated that Mr. Maier's successive acting appointments, including the one announced on December 22, 2011, were generally with the same

platoon, while the complainant acted with different platoons at various times. In his view, Mr. Maier's continued acting appointment in January 2012 was therefore more prestigious than his own and it left the impression that they were not being treated equally.

31 Mr. Purcell recalled that Mr. Winger came to speak with him about his opinion of Mr. Maier's announced appointment. Mr. Purcell then discussed the matter with Human Resources personnel and another FR-03, and the decision was made that continuing the appointment of Mr. Maier had the potential of leaving the impression that he was being favoured. The proposed appointment of Mr. Maier was cancelled and another employee was chosen to act instead.

32 Human resources records confirm that Mr. Maier was not appointed to act as an FR-03 at any time during January 2012.

33 Mr. Purcell also testified that when the acting appointments were announced in December 2011, CFB Suffield was awaiting approval to make indeterminate appointments from the pool of qualified FR-03 candidates in the 2010 internal advertised appointment process. Maj Neveu testified that as the hiring manager he would have preferred to make indeterminate appointments at that time. However, the acting appointments were a necessity that resulted from the delay in obtaining approval for indeterminate staffing, coupled with the on-going operational need to maintain minimum staffing for emergency response.

34 The complainant also argues that the respondent's withdrawal of the acting opportunity from Mr. Maier must be construed as an admission that the respondent abused its authority in the choice of appointment process.

35 The Tribunal finds that the complainant has not established that the respondent abused its authority in the choice of appointment process. The complainant's perception is that his own appointment was less prestigious or that he was treated unequally, but evidence shows that Mr. Maier's appointment did not proceed. The Tribunal observes as well that human resources reports for January 2011 through March 2012 indicate

that in total, the complainant acted in an FR-03 position for 1,410 hours while Mr. Maier accumulated only 1,265 hours.

36 According to s. 2(4) of the PSEA, abuse of authority includes personal favouritism, which is to be distinguished from other types of favouritism. See *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 0007 at para. 39. The complainant has not established that Mr. Maier's acting appointment was more prestigious and, if so, how it would constitute personal favouritism and an abuse of authority in the choice of process. The withdrawal of Mr. Maier's opportunity to act in the FR-03 position in January 2012 may indicate that the respondent took the complainant's concern seriously but, without more, the Tribunal does not find that it can be construed as an admission of abuse of authority.

37 Based on the evidence, the Tribunal finds no abuse of authority in the choice of process in this case.

Decision

38 For these reasons, the complaint is dismissed.

Joanne B. Archibald
Member

Parties of Record

Tribunal Files	2012-0007 and 2012-0924
Style of Cause	<i>Blair Winger and the Deputy Minister of National Defence</i>
Hearing	January 24-25, 2013 Medicine Hat, Alberta
Date of Reasons	March 21, 2013
APPEARANCES:	
For the complainant	Louis Bisson
For the respondent	Martin Desmeules
For the Public Service Commission	Trish Heffernan (Written submission)