



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

Files: 2013-0234 and 0259
Issued at: Ottawa, November 29, 2013

JAMES FIELDHOUSE AND DANIELLE IAFRATE

Complainants

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

AND

OTHER PARTIES

Matter Motion to dismiss the complaint

Decision Complaints are dismissed

Decision rendered by Guy Giguère, Chairperson

Language of Decision English

Indexed *Fieldhouse v. President of the Canada Border Services Agency*

Neutral Citation 2013 PSST 33

Reasons for Decision

Introduction

1 On June 26 and July 5, 2013, respectively, the complainants, James Fieldhouse and Danielle Iafrate, filed complaints with the Public Service Staffing Tribunal (the Tribunal) alleging that the revocations of their acting appointments by the respondent, the President of the Canada Border Services Agency (CBSA), were unreasonable.

2 On November 1, 2013, the respondent brought a motion to dismiss these complaints on the basis that the complainants' appointments have not been revoked and that consequently, the Tribunal lacks jurisdiction to hear the complaints.

Summary of relevant facts

3 Both complainants participated in appointment process 11-BSF-IA-GTA-INTELL-FB-008 (Process No. 1) for the position of Intelligence Officer, at the FB-04 group and level. In October 2011, they were found qualified and placed in a pool of qualified candidates. On December 5, 2011, they were appointed on an acting basis from this pool to Intelligence Officer positions. They were subsequently appointed again as Intelligence Officers and their current acting appointments are scheduled to end on December 5, 2013.

4 During a routine monitoring of staffing processes, irregularities were identified in the staffing file of Process No. 1. The respondent approved an internal investigation, to start on November 1, 2012, into the methods used in Process No. 1 to assess the essential qualifications.

5 While the investigation was still ongoing, the complainants' acting appointments were scheduled to end on December 5, 2012. On December 19, 2012, the complainants were each offered by letters from their regional director "an extension of your full-time acting appointment (...) from December 5, 2012, to December 5, 2013". However, the letters specified that these appointments were being made under non-advertised processes (12-BSF-ACIN-GTA-EIOD-FB-032 and 12-BSF-ACIN-GTA-EIOD-FB-033 (Processes Nos. 2 and 3)).

6 In February 2013, the internal investigation into Process No. 1 was completed and the respondent determined that corrective action was required regarding errors identified in the assessment process. In particular, the written examinations of all qualified candidates had to be re-examined and based on this review, a new list of qualified candidates would be created.

7 On June 21, 2013, the complainants were informed by letter that they were removed from the pool of qualified candidates as they did not obtain the pass mark following a review of the written exam. The complainants were also advised verbally that their acting appointments would end earlier than initially planned. The complainants therefore filed the present complaints under s. 74 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the PSEA), alleging that their appointments had been revoked and that the revocations were unreasonable.

Respondent's Submissions

8 In its motion to dismiss, the respondent claims that when the complaints were filed, it had not yet decided whether the appointments would in fact be revoked. However, upon further consideration, the respondent has decided not to revoke the complainants' appointments. They will therefore continue as planned until December 5, 2013. The respondent indicates that one of the reasons for this decision is because these appointments were made under Processes Nos. 2 and 3.

9 Accordingly, the respondent contends that since the complainants' appointments have not been revoked, the Tribunal has no jurisdiction to hear the complaints under s. 74 of the PSEA.

Complainants' Submissions

10 The complainants maintain that they were told their appointments would be revoked and submit that the respondent is being "unfair" by allowing them to complete their acting appointments because it renders their complaints moot. They argue that the respondent decided not to revoke their appointments in order to thwart their complaints. The complainants also contend that the respondent has abused its authority by finding

them unqualified under Process No. 1. One of the complainants has also referred to s. 83 of the *PSEA* claiming that it affords him the opportunity to “voice his concerns”.

Submissions of the Public Service Commission

11 The Public Service Commission states that it does not have sufficient information to take a position on the motion to dismiss but adds that, if indeed there is no document indicating that the appointments were revoked, then the complainants do not have a right of recourse to the Tribunal under s. 74 of the *PSEA*.

Analysis

12 Section 74 of the *PSEA* provides that a person whose appointment is revoked by a deputy head under s. 15(3) may make a complaint to the Tribunal that the revocation was unreasonable. Section 15(3) authorizes a deputy head to revoke appointments and take corrective action whenever he or she is satisfied, after investigation, that an error, an omission or improper conduct affected the selection of a person for appointment.

13 Thus, in order for the circumstances described in s. 15(3) to arise, the deputy head must have revoked an appointment that was affected by an error, omission or improper conduct. See *Goldsmith v. Deputy Minister of Human Resources and Skills Development*, 2010 PSST 0020; *McMillan v. Deputy Minister of Indian and Northern Affairs Canada*, 2011 PSST 0020.

14 In the present case, the respondent conducted an investigation with respect to Process No. 1 only. The complainants’ current appointments were, however, clearly made pursuant to Processes Nos. 2 and 3, as is evident from their appointment letters. There is no indication that the respondent conducted any investigation with respect to the appointments made in Processes Nos. 2 and 3 or that there was any error, omission or improper conduct associated with them.

15 Furthermore, notwithstanding what the respondent’s original intention may have been following the investigation into Process No. 1, the respondent has now made it clear that the complainants’ current acting appointments are not being revoked. The complainants have not denied that they are in fact still occupying these positions at this

time nor have they provided any information indicating that their appointments are being revoked before their end date of December 5, 2013. The complainants may take issue with the respondent's reasons for deciding not to revoke their appointments but the fact remains that they have not been revoked.

16 The complainants also contend that the respondent abused its authority by deciding to remove them from the pool in Process No. 1. Section 77(1) of the PSEA provides that when an appointment is made or proposed, a person may make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of an abuse of authority. An employee's right to make a complaint under s. 77(1) is therefore conditional on an appointment having been made or proposed. See *Czarnecki v. Deputy Head of Service Canada*, 2007 PSST 0001. The complaint must be filed within 15 days of the notice of the appointment or proposed appointment to which it relates (s. 10(1)(b) of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6, as amended by SOR/2011-116).

17 The complainants have not filed a complaint under s. 77(1) or presented any information showing that appointments were made or proposed in Process No. 1 within the 15-day period preceding the filing of their complaints. The respondent has confirmed in its submissions on the present motion that no appointments have been made within this timeline, which would have entitled the complainants to file a complaint.

18 The Tribunal also notes that one of the complainants relies on s. 83 of the PSEA. Section 83 does not apply to the facts of this case. Complaints may be filed under this section of the PSEA in relation to corrective action ordered by the Tribunal in a previous decision. The corrective action that the respondent took regarding Process No. 1, however, was not made as a result of the implementation of a prior Tribunal order.

19 For all these reasons, the Tribunal finds that the complainants' appointments have not been revoked and that no appointments have been made or proposed under Process No. 1 within the prescribed period prior to the filing of these complaints.

Therefore, the Tribunal does not have jurisdiction to hear these complaints under either s. 74 or s. 77(1) of the PSEA.

Decision

20 The Tribunal grants the respondent's motion to dismiss the complaints. Consequently, the complaints are dismissed.

Guy Giguère
Member

Parties of Record

Tribunal Files	2013-0234 and 0259
Style of Cause	<i>James Fieldhouse and Danielle lafrate and the President of the Canada Border Services Agency</i>
Hearing	Written request, decided without the appearance of parties
Date of Reasons	November 29, 2013