



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2012-0855

Issued at: Ottawa, March 25, 2013

SERGE DUBORD

Complainant

AND

THE COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA

Respondent

AND

OTHER PARTIES

Matter Complaint of abuse of authority pursuant to section 77(1)(a) of the *Public Service Employment Act*

Decision The complaint is dismissed

Decision rendered by John Mooney, Vice-Chairperson

Language of Decision French

Indexed *Dubord v. the Commissioner of the Correctional Service of Canada*

Neutral Citation: 2013 PSST 0010

Reasons for Decision

Introduction

1 Serge Dubord, the complainant, participated in an internal advertised appointment process to staff Correctional Officer positions at the CX-02 group and level on an acting or indeterminate basis within the Correctional Service of Canada (CSC) at Ste-Anne-des-Plaines Institution. He was initially screened out because he did not meet one of the essential qualifications established for the positions.

2 The complainant alleges that the Commissioner of the CSC, the respondent, abused its authority in this appointment process because it made a number of mistakes. According to the complainant, the respondent improperly assessed his answers to the written exam, refused to correct its mistake during the informal discussion, and refused to grant him a second informal discussion, among other things.

3 The respondent denies that it abused its authority and submits that this complaint is moot. The respondent reassessed the complainant's answers after the complainant filed his complaint with the Public Service Staffing Tribunal (the Tribunal). The respondent determined that the complainant was successful in the appointment process and appointed him to the position.

4 The Public Service Commission (PSC) was not represented at the hearing but sent written submissions to the Tribunal describing its appointment policies and guides that relate to this complaint. The PSC did not take a position on the merits of the complaint.

5 The complaint is dismissed for the reasons set out below. The Tribunal finds that the complaint is moot because there is no longer a dispute between the parties.

Background

6 On April 4, 2011, the respondent posted a *Job Opportunity Advertisement* on *Publiservice*, the federal government Website, to staff the previously mentioned positions.

7 The assessment board was made up of Simon Brunet, Manager of Operations, and Louise Desrosiers, Recruitment Officer. Julie-Anne Cardinal participated in the process as a Human Resources (HR) Advisor. Suzanne Hamon, Senior HR Advisor for the Quebec Region, also participated in the process by giving advice to Ms. Cardinal regarding the complaint process.

8 One hundred and two candidates applied for the positions. Eighteen candidates were screened out. Eighty-four candidates were invited to a written exam that assessed three essential knowledge qualifications, two essential abilities and two asset abilities. Personal suitability was assessed through reference checks. Twenty-five candidates were successful in all steps of the process. Their names were placed in a pool of qualified candidates for the positions to be staffed.

9 On August 25, 2011, the respondent informed the complainant that he had been eliminated from the appointment process because he failed two questions on the written exam that assessed an essential qualification for the position.

10 On April 11, 2012, the respondent posted the *Notification of Appointment or Proposed Appointment* for the appointment of eight people to the positions in question.

11 On April 24, 2012, the complainant filed a complaint of abuse of authority with the Tribunal under s. 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (PSEA).

12 On June 28, 2012, a second assessment board made up of Mr. Brunet and Madeleine Mainville, Recruitment Activity Coordinator, reviewed the answers to the questions that the complainant had not passed. The board determined that the complainant had passed in those questions. The board then assessed the complainant's other qualifications and determined that he met all the requirements of the position. The respondent appointed the complainant to one of the positions on September 25, 2012.

Preliminary Issue

13 At the start of the hearing, the respondent raised the issue of the mootness of the complaint. This matter was debated and judgment reserved. The Tribunal heard the complaint on its merits so that it could rule on the complaint as a whole without having to call back the parties if it decided to rule on the complainant's allegations.

Issue

14 The Tribunal must decide the following issue: Is the complaint moot because the complainant was appointed to the position?

Summary of relevant evidence

Initial assessment of the questions on the written exam

15 The complainant explained to the Tribunal that he wrote his exam on June 10, 2011. In the initial assessment of his answers, the respondent determined that the complainant did not obtain the pass mark for the two questions assessing the essential qualification of "ability to define and analyze problematic situations, identify options and recommend or take appropriate action". The first question described a situation in which a woman was feeling unwell at the grocery store. The other question dealt with a situation in which a prisoner refused to carry out work that had been assigned to him. An overall mark was given for the two answers. The complainant received a mark of 1 out of 5, whereas the pass mark was 3 out of 5. The complainant was therefore screened out. The assessment board did not mark his answers to the other exam questions.

16 The complainant stated at the hearing that he was very surprised to have failed those two questions because he has solid training in first aid and in managing crisis and emergency situations.

17 Mr. Brunet has been working at CSC since 1998. He has held a number of positions within this organization, including Manager of Operations, a position he temporarily left in order to be involved in this appointment process on a full-time basis

as a member of the assessment board. He stated that his role, together with Ms. Desrosiers, was to use the merit criteria to develop assessment tools and criteria, that is, examples of expected answers and the scoring guide. The merit criteria were established by national headquarters in Ottawa.

18 Mr. Brunet explained why the assessment board had initially determined that the complainant's answers to the two above-mentioned questions were worth only 1 out of 5. According to the board, his answers did not correspond to the criteria that the assessment board had established. For example, his answer to the question relating to a person feeling unwell in a grocery store showed that the complainant had knowledge of first aid. However, that question assessed abilities, not knowledge. In addition, the complainant's answers were of an abstract, technical and theoretical nature.

19 Mr. Brunet did not know the complainant and had never met him prior to the informal discussion.

20 Ms. Desrosiers stated that she has been working at CSC since 1980 in various positions, including as a Recruitment Officer, the position that she held at the time of the appointment process. She explained that she and Mr. Brunet had discussed the candidates' answers and awarded points by consensus. She added that she did not know the complainant.

Informal discussion

21 The complainant explained that he had an informal discussion with Mr. Brunet and Ms. Desrosiers on September 21, 2011. This is part of the process that is provided for under s. 47 of the PSEA. During that discussion, the complainant presented them with documents that, according to him, showed that his answers were correct, including a first-aid book from St. John Ambulance and a CSC document on managing emergency situations. According to the complainant, they refused to take into account those documents. In addition, Mr. Brunet was not really able to explain why the two answers were only worth 1 out of 5. According to the complainant, the respondent should have fixed its mistake in assessing his qualifications because that is the purpose of the informal discussion.

22 Mr. Brunet stated that he explained to the complainant at the meeting why the assessment board had awarded him such a low mark. Mr. Brunet gave him the explanations mentioned earlier.

Request for a second informal discussion and review of the complainant's answers

23 On January 18, 2012, the complainant emailed Ms. Cardinal to ask her for a second informal discussion. Ms. Cardinal replied in an email sent to his work address on January 24, 2012, that she would schedule another informal discussion two days later. However, the complainant did not receive that email because he was away from the office for seven days. Ms. Cardinal was not aware of his absence because the complainant had not activated the computer's out-of-office message to inform anyone sending him an email that he was absent.

24 The complainant stated that he exchanged a number of emails with Ms. Cardinal between the end of January 2012 and the end of April 2012 to try to set a date for a second informal discussion. This exchange of emails gave him a clear impression that the respondent would hold a second meeting.

25 Ms. Cardinal stated that she had difficulty reaching Mr. Brunet during this time. He returned to his substantive position as Manager of Operations at Ste-Anne-des-Plaines in February 2012. His availability was limited. In addition, one of his family members was having health problems. The complainant's availability was also limited because he had to be absent from work for three weeks.

26 In the meantime, Mr. Brunet discussed the possibility of a second informal discussion with Céline Laplante, Acting Manager, Recruitment and Staffing. She asked him to review the complainant's answers to the written exam. She told him that if he found that the answers were worth more points, the respondent would act accordingly. If, however, Mr. Brunet decided not to change the mark that was awarded, there would be no reason to have a second informal discussion.

27 A large portion of the complainant's testimony dealt with how Mr. Brunet obtained a copy of his exam in order to carry out the review. Ms. Cardinal had told him that, in the

processing of his complaint, Mr. Brunet had obtained it from the regional administration centre in Laval. Mr. Brunet said the same thing at an exchange of information meeting. However, it seems, according to the testimony of Mr. Brunet and Ms. Cardinal, that Ms. Cardinal gave a copy of the exam to Mr. Brunet's spouse, who worked at CSC as a recruitment officer, so she could give it to him. The complainant stated that he was offended by the fact that he had not been told the truth in this matter. Mr. Brunet and Ms. Cardinal stated that they did not see the relevance of this detail.

28 Mr. Brunet explained that he reviewed the complainant's answers on April 27, 2012, at his office and concluded that there was no reason to change the mark given for his answers. Mr. Brunet informed the complainant by email that same day that he had reviewed his answers in detail and that he was not going to make any changes to the mark. Consequently, Mr. Brunet did not see a reason to have a second informal discussion.

Reassessment of the complainant's qualifications after the complaint was filed

29 The complainant filed his complaint with the Tribunal on April 24, 2012. He subsequently met with Mr. Brunet and Ms. Cardinal in the context of an exchange of information meeting. This is a step in the handling of a complaint that is set out in ss. 16 to 18 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6, as amended by SOR/2011-116.

30 At that meeting, the complainant compared his answers to the answers of some of the candidates who had passed the exam. He argued that his answers were as good as the other candidates' answers. After the meeting, Mr. Brunet discussed the meeting with Ms. Cardinal and they concluded that the complainant had raised interesting points that brought a new perspective to his answers. Mr. Brunet then decided to review the complainant's answers, but he preferred not to do so by himself. He therefore asked HR to suggest a person to help him carry out this task. Since Ms. Desrosiers had retired in November 2011, HR suggested that Ms. Mainville be a member of the new assessment board.

31 Ms. Mainville has worked at CSC since 1983 and was working as a Reintegration Coordinator and Recruitment Activity Coordinator when her manager, Ms. Laplante, asked her to review four candidate assessments, including the complainant's, because Ms. Desrosiers had retired. She and Mr. Brunet therefore reassessed the complainant's answers on June 28, 2012, and found new answer points. They gave him 3 points out of 5, which was the pass mark. They then assessed his other answers to the exam questions and they determined that the complainant had been successful in this step of the process. He was also successful in the reference checks. Mr. Brunet and Ms. Mainville therefore concluded that the complainant was fully qualified.

32 On July 9, 2012, Ms. Cardinal organized a meeting with the complainant; his union representative, Pierre Morin; Mr. Brunet; and Chantal Lanthier, Director of the Regional Reception Centre, to inform the complainant that he had been successful in the appointment process. Mr. Brunet explained to him why the new assessment board considered that his answers were worth more points. Ms. Cardinal then asked him if he would withdraw his complaint before the Tribunal, since the respondent considered him qualified for the position. The complainant answered that he would pursue his complaint.

33 After the meeting, the complainant asked Ms. Lanthier why she had been invited to the meeting. She replied that she attended the meeting because she had been invited. She was not aware of the complaint. According to the complainant, Ms. Lanthier had been invited to the meeting to put pressure on him and to intimidate him so he would withdraw his complaint.

34 Mr. Brunet stated that Ms. Cardinal told him that she had invited Ms. Lanthier because she could let the complainant know what positions were available.

35 The complainant met with Mr. Brunet at his office on July 17, 2012, to check his file. Mr. Brunet then asked him why he was pursuing his complaint before the Tribunal, given that the respondent considered that he was fully qualified for the position. According to Mr. Brunet, the complainant then told him that he would withdraw the complaint if the respondent acknowledged that it had abused its authority and if it met

certain other conditions. Mr. Brunet replied that he was not authorized to make such statements, but that the complainant could send his suggestions to regional headquarters.

36 Richard Marier is the Assistant Warden of Operations of the CSC's Regional Reception Centre in Montreal. He stated that his manager asked him to contact the complainant and three other people who had been placed in the pool of qualified candidates to ask them if they were still interested in the position. Sometimes, candidates in the pool lose their interest in the position for a variety of reasons, such as hours of work. Mr. Marier contacted the complainant in September 2012 to ask him if he was still interested in the position. The complainant replied that he would like to be appointed to the position.

Analysis

37 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.

Is the complaint moot?

38 The complainant submits that the respondent abused its authority in the initial marking of his written exam because it incorrectly assessed his answers. The respondent acknowledges that it incorrectly assessed the complainant's qualifications but submits that the Tribunal should dismiss the complaint without ruling on the complainant's allegations because it became moot when the respondent appointed him to a position after reassessing his qualifications. According to the respondent, there is no longer a dispute between the parties.

39 The complainant submits that the matter should come before the Tribunal so it can find that the respondent abused its authority in the appointment process.

40 In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, the Supreme Court ruled that, pursuant to the doctrine of mootness, a court may refuse to hear a case if it raises merely a hypothetical question. This doctrine may be applied

when the court's decision would not resolve any controversy that affects the rights of the parties (p. 353):

Mootness

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice ...

The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

41 The Federal Court ruled that the doctrine of mootness applied to an application for review of a Tribunal decision in which a complaint was allowed and in which it was noted that the complaint was moot because the person was later appointed. See *Canada (Attorney General) v. Grundison*, 2009 FC 212 (CanLII).

42 This analysis involves two questions:

- (a) Is there still an issue, that is, a tangible and concrete dispute, between the parties?
- (b) If there is no longer a dispute between the parties, should the Tribunal still exercise its discretion to rule on the merits of the complaint?

43 The Tribunal finds that the tangible and concrete dispute between the parties has disappeared. Pursuant to s. 77 of the PSEA, the complaint must deal with the fact that the complainant was not appointed to the position in question because of an abuse of authority. In this case, there was an initial dispute between the parties because the

complainant had not been appointed to the position at the time that the complaint was made to the Tribunal. However, this tangible and concrete dispute disappeared when the respondent appointed him to the position after reassessing his written exam.

44 The Tribunal would like to point out that a complaint does not necessarily become moot merely because a complainant is later appointed to the position at issue. In some cases, there may still be a dispute if there are reasons to take corrective action, even if the person is appointed to the position.

45 In this case, the Tribunal finds that there are no grounds for ordering corrective action as requested by the complainant. The Tribunal notes that the complainant does not challenge the qualifications of the people appointed as a result of this appointment process and that he is not asking for their appointments to be revoked.

46 The complainant is asking that the Tribunal order the respondent to acknowledge that it abused its authority and to issue an apology letter because it took too long to fix its mistake. The Tribunal finds that there are no grounds for ordering these actions. In *Canada (Attorney General) v. Stevenson*, 2003 FCT 341 at paras. 34 and 35 (CanLII), the Federal Court found that it is not appropriate for an administrative tribunal to issue such orders unless the tribunal's enabling legislation provides for it. No such provision is included in the PSEA. In any case, the Tribunal does not believe that the respondent took too long to reassess the complainant's answers to the written exam. The PSEA does not require that an organization reassess a candidate's qualifications. Contrary to the complainant's arguments, the purpose of the informal discussion provided for under s. 47 of the PSEA is not to reassess the qualifications of candidates who were not chosen for the position. Rather, it is to explain to them why they were unsuccessful in the process. See, for example, *Rozka v. Deputy Minister of Citizenship and Immigration Canada*, 2007 PSST 0046, at para. 76. If the assessment board finds, during the informal discussion, that it made a mistake during the process, it should, of course, rectify the mistake. Normally, these are obvious mistakes, such as an error in a calculation. In this case, it was not an obvious mistake, but rather, a difference of opinion on the value of the complainant's answers to certain questions on the written exam.

47 The complainant is also requesting, as a corrective action, that the Tribunal order that Mr. Brunet not take part in an assessment board in the context of an appointment process for a period of two years. The Tribunal finds that there is nothing in Mr. Brunet's behaviour that would warrant such an action. Mr. Brunet did acknowledge in the end that the complainant's answers were worth more points but this was not a significant mistake that would warrant such a corrective action. In any case, the Tribunal cannot give such an order. See *Canada (Attorney General) v. Cameron*, 2009 FC 618, at paras. 18 to 23.

48 In summary, the Tribunal finds that the complaint is moot because there is no longer a dispute between the parties. The Tribunal's decision would not affect the rights of the parties.

49 The second part of the analysis consists in determining whether, in spite of its being moot, the circumstances of the complaint warrant having the Tribunal exercise its discretion to hear the complaint. This could be the case, for example, when a complaint raises important issues that could affect staffing in general or if the respondent's alleged behaviour is a gross violation of the PSEA. In this case, the issues raised by the complainant do not relate to general staffing principles and the allegations are not related to gross violations. This complaint is about a difference of opinion on the value of the complainant's answers to a written exam. The Tribunal therefore finds that this complaint is not one in which it should exercise its discretion to decide on the merits of the complainant's allegations.

50 Since it has been determined that this complaint is moot because the dispute between the parties has disappeared, it is not necessary to address the complainant's allegations. Nevertheless, the Tribunal still wishes to make some comments regarding those allegations.

51 The complainant submits that the respondent should have granted him a second informal discussion. Ms. Cardinal organized a second meeting scheduled for January 26, 2012, but she was not able to reach the complainant because he was absent from work. According to the complainant, she should have taken other measures

to organize another meeting. The Tribunal does not share that opinion. Section 47 of the PSEA states that the PSC or its representative may hold an informal discussion with candidates who are eliminated from an internal appointment process. There is nothing that requires an organization governed by the PSEA to grant more than one informal discussion to a candidate who was unsuccessful on an exam.

52 The complainant focused at length on how Mr. Brunet obtained his file in order to review the answers. Ms. Cardinal had given it to Mr. Brunet's spouse, who is a recruitment officer at CSC, so she could give it to Mr. Brunet. The Tribunal finds that this has no relevance because the fact that he received it from his spouse instead of obtaining it himself from the regional administration centre does not affect this appointment process.

53 The complainant submits that Ms. Lanthier was invited to the meeting of July 9, 2012, in order to pressure him to withdraw his complaint. The Tribunal finds that the complainant has not submitted evidence to support this allegation. The purpose of the meeting was to tell the complainant that he met the requirements of the position as a result of a review of his qualifications. According to Mr. Brunet, Ms. Lanthier's presence at this meeting could have been useful because she knew what positions were vacant.

54 It is not clear why the complainant asked Mr. Marier to testify. Mr. Marier contacted the complainant in September 2012 to ask him if he was still interested in the position. If the complainant is implying that the respondent tried to dissuade him from accepting the position, the Tribunal must reject this interpretation. There is nothing to indicate that this was the respondent's intent. As Mr. Marier explained, candidates whose names have been placed in the pool of qualified candidates may sometimes refuse a position for a variety of reasons, such as hours of work.

Decision

55 The complaint is dismissed. The complaint is moot because there is no longer a dispute between the parties.

John Mooney
Vice-Chairperson

Parties of Record

Tribunal File	2012-0855
Style of Cause	<i>Serge Dubord and the Commissioner of the Correctional Service of Canada</i>
Hearing	December 13 and 14, 2012, and January 25, 2013 Montreal, Quebec
Date of Reasons	March 25, 2013
APPEARANCES:	
For the complainant	Serge Dubord
For the respondent	Christine Diguier
For the Public Service Commission	Marc Séguin (written submissions)