



**File:** 2012-1023

**Issued at:** Ottawa, December 12, 2013

**JOHN McCLEAVE**

Complainant

AND

**THE DEPUTY MINISTER OF FISHERIES AND OCEANS**

Respondent

AND

**OTHER PARTIES**

<b>Matter</b>	Complaint of abuse of authority under section 77(1)(a) of the <i>Public Service Employment Act</i>
<b>Decision</b>	Complaint is dismissed
<b>Decision rendered by</b>	Eugene F. Williams, Member
<b>Language of Decision</b>	English
<b>Indexed</b>	<i>McCleave v. Deputy Minister of Fisheries and Oceans</i>
<b>Neutral Citation</b>	2013 PSST 34

## **Reasons for Decision**

### **Introduction**

**1** John McCleave, the complainant, applied in an internal advertised appointment process for the position of Conservation & Protection Supervisor at the PM-05 group and level with the Department of Fisheries and Oceans Canada (DFO). The complainant was screened into the process and evaluated against the essential and asset qualifications identified in the Statement of Merit Criteria (SMC). The complainant was found qualified, but was not selected for the position.

**2** The complainant alleges that the respondent, the Deputy Minister, DFO, abused its authority in his assessment and in the assessment of the appointee. He alleges that the members of the assessment board did not apply the rating guide criteria consistently in assessing the candidates. The complainant also asserts that the successful candidate received preferential treatment because the assessment board awarded the appointee passing marks, which were undeserved, in two essential criteria.

**3** The respondent denies that it abused its authority and states that neither preferential treatment nor bias was present in the appointment process. It asserts that the complainant was eliminated from the appointment process because he was not the right fit for the position. It also states that selection tools were chosen and used appropriately and the selection was based on merit, without any evidence of bad faith.

**4** The Public Service Commission (PSC) did not attend the hearing, but presented a written submission on PSC policies and guidelines relating to the issues in this case. It took no position on the merits of the case.

**5** For the reasons set out below, the complaint is dismissed. The Public Service Staffing Tribunal (the Tribunal) finds that the respondent did not abuse its authority when it decided not to choose the complainant as the right fit for the position and the complainant did not provide evidence that the respondent improperly assessed the appointee.

## **Background**

**6** On May 22, 2012, a Job Opportunity Advertisement (JOA) was posted on the Publiservice website for the position of Conservation & Protection Supervisor at the PM-05 group and level with DFO. The closing date for the process was July 8, 2012.

**7** The complainant was among four applicants who passed the initial screening and were evaluated against the essential and asset qualifications. The evaluation was based on the candidate's application and a self-assessment template to assess all essential and asset qualifications as well as knowledge, abilities and personal suitability (the template). References were used to assess dependability and interpersonal relationships. The assessment board also assessed oral communication by way of a questionnaire.

**8** On July 10, 2012, the assessment board consisting of Jacob MacLeay, Board Chair, Area Chief, Conservation and Protection (ACCP) for Southwest Nova Scotia, Mark Conley, ACCP South Shore and Digby Conservation and Stacey Bieren, Protection Supervisor (CPS), met to review and evaluate the four remaining candidates. The complainant was found qualified, however, he was not chosen for appointment as it was found that he was not the right fit for the position.

**9** The assessment board selected the following criteria to determine which of the four qualified candidates would be a "right fit" for the position:

- Ability to communicate orally (essential qualification)
- Dependability (essential qualification)
- Interpersonal relationships (essential qualification), and
- Experience in dealing with performance management issues (asset qualification)

**10** On August 2, 2012, DFO issued a Notice of Consideration of Dwayne Surette and on August 8, 2012, published a Notification of Appointment or Proposal of Appointment of Mr. Surette which indicated a complaint period ending August 23, 2012. The complainant filed a complaint with the Tribunal on August 21, 2012.

**11** At the argument stage of the hearing the complainant withdrew his allegation of personal favouritism. Therefore, the Tribunal will not address that allegation in these reasons. The complainant submits that the respondent gave preferential treatment to the appointee by being more lenient and by awarding him higher marks than the answers warranted with respect to the essential qualification of “ability to manage”. He believes the appointee’s answers did not deserve a passing mark and that the appointee should have been eliminated from the appointment process at that stage.

### **Issues**

**12** The Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority in its assessment of the complainant?
- (ii) Did the respondent abuse its authority in its assessment of the appointee?

### **Analysis**

**13** Section 77(1) of the Public Service Employment Act (PSEA) provides that a person in the area of recourse may file a complaint with the Tribunal that he or she was not appointed or proposed for appointment because of an abuse of authority. As noted in *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008 at para. 66, “abuse of authority will always include improper conduct, but the degree to which the conduct is improper may determine whether or not it constitutes abuse of authority”. The complainant has the burden to prove, on a balance of probabilities, that there was an abuse of authority.

#### **Issue I: Did the respondent abuse its authority in its assessment of the complainant?**

**14** Section 36 of the PSEA confers discretionary authority to delegated managers in the selection and use of assessment methods. This authority is not absolute. Thus, the Tribunal may find that there is abuse of authority if, for example, it is established that the assessment method has a fundamental flaw. Assessment methods that do not assess qualifications or are unreasonable, discriminatory or produce a result that is unfair can

constitute an abuse of authority. See *Ouellet v. President of the Canadian International Development Agency*, 2009 PSST 0026.

**15** The complainant outlined his background and experience with DFO which included acting as the Field Supervisor at Tusket, NS. He was formerly the chief steward of the Public Service Alliance of Canada. He is also the regional specialist.

**16** The complainant's main allegation is that his template answers were not properly assessed and, therefore, his assessment was not performed in a fair and transparent manner. In his submission and in his testimony the complainant asserted that his scores were lower than what he deserved. The complainant submitted that a comparison of his answers with the rating guide leads to the conclusion that the marks that he was awarded were too low. The complainant asserted that the near absence of assessment board members' notes on his template to justify the lower marks he received was an indication that his scores were too low. He observed that the assessment board made limited notes that were vague. The complainant stated that the paucity of notes to justify his low marks confirm that his scores were too low and signalled that the assessment board failed to conduct a fair, open and transparent appointment process. Thus, there was an abuse of authority in the application of merit.

**17** The complainant focused his testimony on the scores he received on four questions in the template relating to ability to manage (1 out of 4), experience in supervision (1 out of 4), experience in budgeting (2 out of 4) and performance management (2 out of 4). Four was the top score to be awarded in each of those sections. According to the rating guide, which is discussed below, a score of 1 signalled that the candidate met, minimally, the rated requirements of the section and thus could continue in the process.

**18** The complainant highlighted the portions of his template answer in relation to each of the topics where he felt merited a higher score and indicated for each question the score he believed that he deserved.

**19** On July 31, 2012, the complainant was on patrol with Mr. Surette, the appointee, when he received a call from Mr. MacLeay, the Board Chair. The latter asked to speak

with Mr. Surette. Following that conversation, the Board Chair immediately spoke with the complainant to notify him that although he was qualified Mr. Surette would be appointed to the position.

**20** The complainant testified that he had participated in seven appointment processes prior to this one. His experience in those processes led him to conclude that the verbal announcement prior to the written publication of the results in this appointment process was extraordinary.

**21** Mr. MacLeay testified that he had occupied the position of ACCP, Southwest Nova Scotia for four years. He was responsible for enforcement between Windsor to Yarmouth. This area was comprised of three detachments in Tusket, Digby and Meteghan, NS. He noted that each detachment has approximately 10 members under the supervision of a Conservation and Protection Supervisor, a position that is staffed at the PM-05 group and level. These supervisors report to the ACCP and oversee two field supervisors who are each responsible for three or four fishery officers. Mr. MacLeay testified that his duties included human resources, staffing and personnel responsibilities. He had received training in staff delegation, personnel matters and was the hiring manager in this appointment process. He noted that he had conducted two or three appointment processes prior to this one.

**22** Mr. MacLeay testified that the SMC was developed with a human resources advisor (the HR advisor). Although the essential qualifications of the position were set at the national level, he had prepared the asset qualifications. Mr. MacLeay provided a detailed description of the process used to assess candidates.

**23** Candidates were asked to submit a covering letter outlining their qualifications to the HR advisor. In addition each candidate was asked to provide four references: two supervisors and two colleagues. The references were used to assess dependability and interpersonal relationships.

**24** The HR advisor screened the covering letters and sent the template to the candidates who met the screening requirements. He asked them to fill out the template in accordance with his instructions and to return it to him before the closing date. The

HR advisor then retained the original candidate templates, copied them for each assessment board member and provided the templates to Mr. MacLeay for the assessment board meeting.

**25** Mr. MacLeay testified that the HR advisor developed a rating and scoring guide for the assessment board to assess the candidates. The assessment board rated the candidates' template answers against the four rating guide levels: meets minimally, meets, meets plus and exceeds. In addition the board members used their knowledge of the candidates to assess oral communications, dependency and interpersonal relationships.

**26** Mr. MacLeay stated that scores were assigned at an all-day meeting of the assessment board. Board members individually reviewed the candidates' answers. The Board Chair then canvassed fellow board members for their grading of the candidates' responses against the essential qualifications. If they were unanimous in the scores they individually awarded, the score would be accepted and recorded immediately on the scoring sheet. If not, the assessment board discussed the answer until it reached a consensus on the score. Mr. MacLeay stated that every candidate's template was dealt with in that fashion. Although each board member had a copy of the candidate's template, as the board chairperson, he recorded the scores on the master list. He added that the comments were developed as a result of discussion among all of the board members. He indicated that candidates could list any experience to support the criteria for the various competencies that were being measured.

**27** Mr. MacLeay testified that after the assessment board reviewed the candidates' template answers, board members then added the scores that each candidate obtained for the four right fit criteria. The combination of these two scores comprised the final mark for each candidate. Mr. MacLeay stated that while the final decision rested with him, there was consensus among the group that the appointee was the right fit for the position.

**28** Mr. MacLeay reviewed the answers on the complainant's template and explained, by referring to the rating guide, the reasons for the complainant's scores

which were derived from the template answer and from board knowledge. With respect to “oral communications”, Mr. MacLeay observed that at times the complainant is neither clear nor concise but that he still obtained a good score for this category.

**29** In answer to questions about his relationship with the complainant, Mr. MacLeay stated that he had known him for 13 years. They have a good working relationship as the complainant had reported to Mr. MacLeay when the former was in an acting position that reported directly to him. However, they do not socialize outside of work.

**30** Mr. MacLeay did not recall any arguments with the complainant but acknowledged that over a 13-year period there may have been discussions about overtime in which he stated that “we can’t afford that”.

**31** To understand how his template was scored, the complainant requested an informal discussion. The complainant testified that on August 2, 2012, he met with board member Mr. Conley to discuss the results. He also wanted to find out why the assessment board had decided to appoint Mr. Surette. Britton Giffon, a fellow fishery officer, testified that he accompanied the complainant at the meeting.

**32** Over the course of the 50-minute meeting the complainant learned that he had received a passing mark for each question. Although he believed that his answers deserved higher marks he did not provide any reasons to Mr. Conley because he had no basis to compare his responses to the guide and, thus, could not challenge the results during this meeting. At the hearing, the complainant stated that his answers to four questions should have merited a total of seven additional marks.

**33** The complainant also testified that he asked Mr. Conley for clarification of his marks but learned that there were no additional notes recorded by the assessment board during its assessment of him. The complainant felt that Mr. Conley did not provide a satisfactory explanation for the mark and the few marginal notes that the Board Chair had made on the complainant’s template did not shed light on how the board arrived at the mark. In addition, Mr. Conley did not provide him with the rating guide.



**34** Mr. Conley testified about the informal discussion with the complainant. He stated that the complainant had questions about the assessment board's composition, the notes on his template answers and about those answers. Mr. Conley stated that he did not provide the rating guide to the complainant because to do so would have been akin to giving the answers to a test. He discussed a few of the competencies with the complainant, but felt that the complainant was not interested in his response and interrupted his replies.

**35** Mr. Conley denied saying that because there were no notes, he could not answer the complainant's questions during the informal discussion. He added that he never had "any notes other than the rating guide". He pointed out that he started to give the complainant information to enable him to identify where he did well and where he could improve but the complainant cut him off.

**36** Mr. Conley explained how the board arrived at the score for oral communication. He stated that he has known the complainant for many years. During that time, they attended meetings and worked together. He indicated that they have talked hundreds of times at staff meetings, labour management meetings and other gatherings. The board was looking to mark each candidate for clarity, conciseness, logic, vocabulary, usage and grammar. He stated that he and the other board members used their personal knowledge of the complainant in arriving at the complainant's score in this category.

**37** Mr. Conley also noted that the Board used the rating guide in assessing all the candidates but did not take detailed notes for any candidates.

**38** As noted in *Ammirante v. Deputy Minister of Citizenship and Immigration*, 2010 PSST 0003, the Tribunal's role is to examine whether or not there was any impropriety in the assessment process. A review of the relevant evidence in this case leads the Tribunal to conclude that the complainant has not established, on a balance of probabilities, that there was impropriety in the assessment of his candidacy.

**39** It is a good practice for a board member to take notes when assessing a candidate in an interview because it documents the reasons for the mark and provides a transparent basis for the marks candidates receive, especially in processes with

numerous candidates. However, it is not a requirement of the *PSC Assessment Policy* but only a recommendation for behavioural questions found in the *PSC Guidance Series - Assessment, Selection and Appointment*.

**40** Mr. MacLeay provided the marking scheme that was used to assess all the candidates and explained the basis for the marks the complainant received. His responses to questions concerning the marks assigned to the complainant were reasonable having regard to the rating guide.

**41** The Tribunal finds that the Board Chair provided a detailed account of the assessment process. The complainant did not challenge the propriety of the qualifications in the SMC or the assessment tools used in the appointment process. There is no evidence that the methods chosen to assess the candidates were improper or flawed in any way. Moreover, the candidates were all assessed in a similar fashion.

**42** The Tribunal concludes that the complainant has failed to prove that the respondent abused its authority in its assessment of his candidacy in this appointment process.

**Issue II: Did the respondent abuse its authority in its assessment of the appointee?**

**43** The complainant alleges that the respondent was too lenient and gave preferential treatment by selecting the appointee even though the latter failed to meet two essential qualifications: ability to manage and experience in budgetary responsibilities. He asserted that the appointee should have been disqualified because his answer did not meet one of the essential criteria, “ability to manage”. The complainant submitted that Mr. Surette should have been eliminated from the appointment process at that stage of the appointment process because at best, he merely demonstrated the ability to supervise.

**44** The complainant has withdrawn his allegation of personal favouritism but maintains that the respondent’s assessment was too lenient and gave a preferential treatment to the appointee. Therefore, the complainant is arguing essentially that the respondent was biased in favour of the appointee.

**45** In *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 0010, at paras. 60-74, the Tribunal determined that bias, including reasonable apprehension of bias, can constitute abuse of authority in relation to assessment and appointment decisions made under the PSEA. The Tribunal adopted the objective test for reasonable apprehension of bias that was set out in the Supreme Court's decision in *Committee for Justice and Liberty v. Canada (National Energy Board)*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369 at 394.

**46** The test, paraphrased for the purpose of this complaint, is whether a reasonably informed bystander could reasonably perceive bias on the part of one or more members of the assessment board responsible for conducting the assessment.

**47** Mr. MacLeay was questioned closely about the scoring of Mr. Surette's template answers. Mr. MacLeay reviewed Mr. Surette's answers and then explained how, in relation to the rating guide, Mr. Surette met the "ability to manage" criteria. He described how the appointee managed human resources, assigned employees to do different tasks, selected boats and how he played a key role in an operational initiative.

**48** In answer to questions about the assessment of Mr. Surette's experience in budgetary experience Mr. MacLeay stated that Mr. Surette was a member of a committee in South West Nova Scotia that controlled the expenditures of moneys for the entire area.

**49** Mr. MacLeay was also questioned about his relationship with Mr. Surette. He explained that Mr. Surette was a fishery officer who worked in Tusket, a detachment that fell within his responsibility. He also stated that they did not socialize outside of the office.

**50** In view of the evidence tendered in this case, a reasonably informed bystander could not reasonably perceive bias on the part of Mr. MacLeay or the assessment board. In reviewing the evidence the Tribunal finds that the complainant has not proven that Mr. Surette's answers were marked too leniently. Mr. MacLeay explained how the candidates were assessed, including the appointee. He reviewed Mr. Surette's answers, pointed out how his answers conformed to the suggested responses in the rating guide

and described the level of detail that was required to obtain a mark in each section of the rating guide. He also explained that the assessment board achieved a consensus in determining the final mark for each of the answers provided by the candidates and for each of the right fit criteria. This procedure was consistently used to assess each candidate. Mr. MacLeay's responses of the assessment process and the treatment of candidates' answers were reasonable. The allegation that the appointee was assessed more leniently or received preferential treatment in the assessment of his answers is not supported by the evidence.

**51** Thus, the complainant has not provided any evidence of reasonable apprehension of bias in assessing the appointee, nor has he demonstrated that the respondent abused its authority in assessing the appointee in this appointment process.

Decision

**52** For all these reasons, the complaint is dismissed.

Eugene Williams  
Member

#### **Parties of Record**

<b>Tribunal File</b>	2012-1023
<b>Style of Cause</b>	<i>John McCleave v. the Deputy Minister of Fisheries and Oceans</i>
<b>Hearing</b>	August 29-30 2013 Yarmouth, Nova Scotia
<b>Date of Reasons</b>	December 12, 2013
<b>APPEARANCES:</b>	
<b>For the complainant</b>	Thomas Lantz
<b>For the respondent</b>	Allison Sephton
<b>For the Public Service Commission</b>	Claude Zaor (written submissions)