



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2013-0178

Issued at: Ottawa, May 22, 2014

COLLEEN RYAN

Complainant

And

THE DEPUTY MINISTER OF NATIONAL DEFENCE

Respondent

AND

OTHER PARTIES

Matter	Complaint of abuse of authority under s. 77(1)(a) of the <i>Public Service Employment Act</i>
Decision	The complaint is substantiated
Decision rendered by	John Mooney, Vice-Chairperson
Language of Decision	English
Indexed	<i>Ryan v. Deputy Minister of National Defence</i>
Neutral Citation	2014 PSST 9

Reasons for Decision

Introduction

1 Colleen Ryan, the complainant, participated in an internal advertised appointment process to staff a Production Supervisor position at the SR-MGT-01 group and level with the Department of National Defence (DND) in Victoria, British Columbia. The complainant contends that she was not appointed because the Deputy Minister of National Defence, the respondent, abused its authority in the application of merit. More specifically, she alleges that the assessment board was not properly constituted, the appointee was not qualified for the position, a member of the assessment board was biased against her and that the managerial and peer review used to determine the right fit candidate was not conducted properly. The respondent denies all these allegations.

2 The Public Service Commission (PSC) did not attend the hearing, but submitted written submissions in which it provided its interpretation of abuse of authority and described the policies and guides that are relevant to this appointment process. The PSC did not take a position regarding the merits of the complaint.

3 For the reasons set out below, the Tribunal concludes that the complainant has proven that the respondent abused its authority in the appointment process. There is sufficient evidence for the Tribunal to find bias against the complainant in this appointment process.

Background

4 On March 19, 2012, the respondent posted a *Job Opportunity Advertisement* (JOA) on the federal government's *Publiservice* Web site to fill the position described above for an indeterminate or specified period, or on an acting basis. There was one anticipated vacancy, but the process would be used to create a pool of candidates to make acting appointments or to staff similar positions on a term or indeterminate basis.

5 The assessment methods consisted of a review of applications, a written examination and an interview. The complainant was screened into the appointment process, completed the written examination and the interview successfully, and her

name was placed in a pool of qualified candidates along with the names of four other candidates. One qualified candidate later decided to withdraw his name from the pool.

6 To determine which candidate was the right fit for appointment, the respondent conducted a managerial and peer review of the remaining four candidates in the pool. The reviewers rated each of these candidates on three of the essential qualifications (leadership, effective interpersonal skills, and communication). The leadership qualification was given a weight of 60% in the final score, with 20% of the weight being assigned to each of the other two qualifications.

7 On May 1, 2013, the respondent posted a *Notice of Appointment or Proposal for Appointment* (NAPA) regarding the appointment of Glenn Maglio (the appointee).

8 On May 6, 2013, the complainant brought a complaint of abuse of authority to the Public Service Staffing Tribunal (the Tribunal) pursuant to s. 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (PSEA).

Issues

9 The Tribunal must determine whether the respondent abused its authority in the application of merit in the appointment process. In doing so, the Tribunal must answer the following questions:

- (i) Was the assessment board improperly constituted?
- (ii) Was the appointee unqualified for the position?
- (iii) Was there bias against the complainant in this appointment process?
- (iv) Was the process used to determine the right fit candidate seriously flawed?

Analysis

10 Section 77(1) of the PSEA provides that a person in the area of recourse may make a complaint to the Tribunal that he or she was not appointed or proposed for appointment because the PSC or the deputy head abused its authority in the appointment process. Abuse of authority is not defined in the PSEA. However, s. 2(4)

offers the following guidance: “For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.”

11 As has been established in the Tribunal’s jurisprudence, the wording of s. 2(4) indicates that abuse of authority must be interpreted broadly and is not limited to bad faith and personal favouritism. In *Kane v. Canada (Attorney General)*, 2011 FCA 19, at para. 64, the Federal Court of Appeal upheld the Tribunal’s interpretation by ruling that an error can also constitute an abuse of authority. (The Court of Appeal’s decision was set aside on a different ground by the Supreme Court of Canada in *Canada (Attorney General) v. Kane*, 2012 SCC 64). Whether an error constitutes an abuse of authority will depend on its nature and seriousness.

12 Abuse of authority can also include improper conduct and omissions. The nature and seriousness of the improper conduct or omission will determine whether or not it constitutes abuse of authority. See *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008.

13 The Tribunal’s jurisprudence has also established that the complainant has the burden to prove, on a balance of probabilities, that there was abuse of authority in the appointment process (see *Tibbs*, at para. 49).

Issue I: Was the assessment board improperly constituted?

14 The complainant alleges that the assessment board was not properly constituted because the delegated manager did not choose its members.

15 Kevin Whitney is the Group Manager responsible for the group in which the position to be staffed is situated. He explained that this was a collective staffing process to establish a pool of candidates that would be used to staff positions in different groups in the respondent’s Fleet Maintenance Facility. The collective process involved seven managers. Mr. Whitney did not have the delegation to choose the members of the assessment boards for this collective process. He did, however, have the delegation to appoint persons in his group. Mr. Whitney exercised his authority as the delegated manager to appoint Mr. Maglio to the position.

16 The Tribunal finds that the complainant has not established that Mr. Whitney contravened his staffing delegation by not choosing the members of the assessment board. There is no evidence that his delegation, which was not submitted in evidence, required him to choose any or all of the members of the assessment boards of this collective staffing process.

Issue II: Was the appointee unqualified for the position?

17 The complainant alleges that the appointee was not qualified for the position. More specifically, she contends that the appointee's answers to the interview questions were not properly assessed.

18 Al Hall is a Work Centre Manager in the group where the position to be staffed is situated. He explained that he and a colleague, Dave Lowdon, conducted the interviews. They each wrote down the candidates' answers and then discussed them in order to reach a consensus on the marks to be awarded. The candidates' answers were assessed in relation to criteria identified in the rating guide.

19 The Tribunal has held in numerous decisions that its role is to determine whether there has been an abuse of authority, not to reassess candidates. See *Elazzouzi v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 0011, as upheld in *Canada (Attorney General) v. Lahlali*, 2012 FC 601 at paras. 42-46.

20 Thus, after examining the marking of all the appointee's answers that the complainant brought to its attention, the Tribunal finds that there was no abuse of authority in that assessment. For example, the complainant contends that the appointee should have failed the second question of the interview which assessed effective interpersonal skills, because he did not really answer that question. Candidates were asked to identify a situation where they were required to take an unpopular decision. Although the situation described in board members' notes is not as clear as it could be, they indicate that the unpopular decision involved choosing the right person to do a job. Both sets of notes describe how the appointee would deal with that decision. Mr. Hall's notes indicate that the appointee answered that he would explain his choice to the remainder of the crew, ask for feedback and explain the workers' view of the situation.

Those behaviors corresponded to some of the criteria set out in the rating guide, such as listening to others. According to Mr. Hall, what was important was whether the behaviours described in the appointee's answer provided the board with enough information to assess the candidate's answer. In his view, they had sufficient information to accomplish that task.

21 The Tribunal finds that Mr. Hall gave a reasonable explanation for the marks awarded to the appointee's answer to that question as well as the other interview questions the complainant brought to its attention.

22 The Tribunal therefore concludes that the complainant did not establish that the appointee was unqualified for the position.

Issue III: Was there bias against the complainant in this appointment process?

23 The complainant alleges that there is a reasonable apprehension that Mr. Hall would be biased against her. He was part of the assessment board for the written examination and the interview, and was also a member of the managerial and peer review team who participated in the determination of the right fit candidate. She contends that she had a history of conflict with Mr. Hall.

24 The respondent argues that there is no evidence that Mr. Hall was biased against the complainant. He found her qualified in the written examination and the interview, and the scores that he gave her as a member of the managerial and peer review team were in keeping with those given by the other reviewers.

25 To establish bias, it is not necessary that actual bias is found. A reasonable apprehension of bias may constitute abuse of authority. See *Denny v. Deputy Minister of National Defence*, 2009 PSST 0029 at para. 125, referring to *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at p. 394.

26 The Tribunal determined in *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 0010, that persons assigned to assess candidates in an appointment process have the duty to conduct an unbiased assessment that does not give rise to a reasonable apprehension of bias. At para, 74 in *Gignac* the Tribunal

adapted the test set out in *Committee for Justice and Liberty* to fit the context of bias in an appointment process, as follows:

Where bias is alleged, the following test can be used to analyze this allegation, while taking into account the circumstances surrounding it: *If a reasonably well informed bystander can reasonably perceive bias on the part of one or more persons responsible for assessment, the Tribunal can conclude that abuse of authority exists.*

The evidence regarding bias

27 The complainant is an electrical technician at the SR-EEW 11 group and level. She started working for the respondent in 1980 as an electrical apprentice. She was the first woman to be hired in that trade group. She is the only female electrician in the Fleet Maintenance Service in Victoria, British Columbia. She is also the only woman amongst the five candidates who qualified for the position.

28 The complainant testified that there is a long history of uneven distribution of acting appointments. She was the only women among five persons in a pool of qualified candidates established in 2008 for Production Supervisor SR-MGT-01 positions. Although the complainant did not present an allegation of discrimination based on sex, she pointed out that the four men were given either permanent positions or long-term acting opportunities. A male colleague who had applied in that process, but did not qualify, was nevertheless given more acting appointments than her. She complained of the situation to her manager, Mr. Hall, and he answered that he would give her more acting appointments. However, according to the complainant, he did not provide her with these opportunities. At the end of 2009, she complained again about the situation and Mr. Hall told her that he would manage the pool of candidates as he saw fit. She then approached Human Resources (HR), and was offered a six-month acting appointment in that position.

29 The complainant stated that the pool was terminated after that acting appointment in July 2010. From that point on, acting appointments were offered on a rotational basis to persons who had expressed an interest in acting in the position. Although she had expressed her interest and had qualified for the pool that had been terminated, she was never offered an acting opportunity. Conversely, everyone else who had expressed an interest was appointed to the position on an acting basis.

30 The complainant brought her concerns regarding the acting appointments and sexual discrimination to the Canadian Human Rights Commission (CHRC) in April 2011. The CHRC exercised its discretion to require the complainant to first address the matter through the internal DND grievance process, which she did. Her grievance was denied at the third level because it was presented out of time. A manager, however, wanted to look further into those matters and ordered an external investigation.

31 The report of the external investigation was issued on December 24, 2012, and covered the previous five years. It dealt mainly with allegations of discrimination based on sex in relation to acting appointments and training opportunities. The complaint was directed at the respondent as a whole, not against any particular individual, but Mr. Hall was a witness in the investigation. The report contains negative comments made by Mr. Hall against the complainant regarding acting appointments, upon which further comments will be made later in these reasons.

32 The complainant testified that when she learned that Mr. Hall would be a member of the assessment board for the interview, she felt she would not be successful because of her previous conflict with him regarding her grievance and complaint to the CHRC. At the time of the interview, however, she did not raise her concerns regarding Mr. Hall's participation.

33 The complainant stated that the pool of qualified candidates for this appointment process was created in July 2012, as indicated in the Board Report signed by Mr. Hall on July 19, 2012. She was told that candidates placed in the pool following the assessment process would be offered acting appointments until the position was filled on a permanent basis. This was confirmed in an email of October 25, 2012, from Mr. Hall to the persons in the pool. All the other candidates in the pool were offered such short term acting appointments, but not her. The complainant's testimony was not challenged by the respondent. In late 2012, she complained to her union after consultation with HR and was finally offered an acting appointment.

34 The complainant testified that in late 2012, she discussed the appointment process with Mr. Hall. He referred to the successful candidate as “he”. The complainant told Mr. Hall that she understood by that comment that she was not the chosen candidate. He answered “the only way I would give you this job is if I am ordered to.” This testimony was not challenged on cross-examination and not refuted by Mr. Hall when he testified.

35 Mr. Hall described to the Tribunal his participation in the appointment process. He assessed the complainant’s written examination, but because the examinations did not indicate the candidate’s name, he was not aware which examination was hers. The complainant passed that part of the assessment process.

36 Mr. Hall, along with Mr. Lowdon, was a member of the assessment board for the complainant’s interview, which was conducted in June 2012. The complainant also passed this phase of the assessment process.

37 Mr. Hall testified that he was also part of the five member managerial and peer review team that was used in the selection of the right fit candidate. Reviewers were asked to score candidates for three personal suitability qualifications on a scale of one to five, according to established criteria. Mr. Hall testified that he believes the managerial and peer review was conducted half-way between the time the pool of qualified candidates was established and the time Mr. Maglio was appointed to the position.

38 Mr. Hall stated that the fact that the scores that he gave the complainant in his review were consistent with those given by the other reviewers who participated in that exercise indicates that he was not biased against the complainant. Mr. Hall gave the complainant one point for leadership, two points for effective interpersonal skills, and one point for communications. All the other reviewers, with the exception of Mr. Whitney who gave three points for communications, gave one or two points for each of those qualifications.

39 To further prove that he was not biased against the complainant, Mr. Hall gave the Tribunal a detailed explanation of the marks he attributed to the complainant in his managerial review. He only gave her one point for leadership because when he

supervised her for almost two years while in the position to be staffed, he observed that she lacked leading by example. She did not take on extra duties, had no initiative, did not listen to constructive criticism and refused any feedback on her performance. She declined to look at evaluation reports and she showed no interest in performance management.

40 Mr. Hall gave the complainant two points for effective interpersonal skills because she was lacking in that area also. Two of his employees who worked for the complainant when she was acting in the position, sent him an email in which they stated that they did not want to work with her anymore. Another employee told Mr. Hall that he did not want to work for or with the complainant.

41 Mr. Hall explained that he gave the complainant one point for communications because there were issues with regard to that qualification. For example, the complainant did not always relay relevant information through the chain of command. He would often be informed of significant information from a second-hand source. She also had limited lateral communications. The shop works as a group, but she preferred to work in isolation.

The Tribunal's findings

42 It is rare that evidence will be presented that leads to a finding of actual bias on the part of one of the assessment board members. However, this is one such case. The statement made by Mr. Hall to the complainant during the appointment process is sufficient evidence for the Tribunal to find that he was biased against the complainant. The complainant testified that in late 2012, Mr. Hall told her that "the only way I would give you this job is if I am ordered to." As indicated above, the complainant was not cross-examined on this statement, nor during his testimony did Mr. Hall deny that he made this statement. The evidence does not indicate clearly whether this statement was made before or after the managerial and peer review exercise was conducted. The managerial and peer review report is undated. Mr. Hall testified that he believes the review was conducted half way between the time the pool of qualified candidates was established (July 19, 2012) and the appointment of Mr. Maglio (May 1, 2013). The Tribunal finds that whether the statement was made before or after the managerial and

peer review is not determinative of the issue of bias. The statement was made by Mr. Hall while the appointment process was ongoing, and indicates an adverse disposition towards the complainant.

43 There are also other elements that support a conclusion that Mr. Hall was biased against the complainant. The complainant testified that she had complained to Mr. Hall on several occasions about acting opportunities. While Mr. Hall first told her that he would provide her with more acting opportunities, when she complained again in 2009, he told her that he would manage the pool of qualified candidates as he saw fit. According to the complainant, she had to approach HR to obtain a six-month acting appointment. The complainant's testimony was not refuted by Mr. Hall.

44 The investigation into the complainant's allegations of discrimination based on sex in relation to acting appointments and training opportunities is also revealing in relation to acting appointments. While it is true that Mr. Hall was not named as a respondent in the complainant's grievance, he was a material witness in the investigation. At p. 14 of the investigation report, the Tribunal notes the following with respect to the events of 2009 described in the previous paragraph:

HR advised that the complainant had complained about the related acting opportunities and **HR told Witness Hall** and management that they had to put the complainant in the acting position for six months. The concern raised by HR was the breakdown of time that others in the existing pool were getting. [Another employee] was removed and the complainant was put in the position.

(emphasis added)

45 The complainant testified that from July 2010, although she expressed interest, she was never offered an acting opportunity. Conversely, everyone else who expressed an interest was appointed to the position on an acting basis. In late 2012, she complained to her union and was finally offered an acting appointment.

46 Based on the evidence, the Tribunal finds that, unlike others in the pool of qualified candidates and despite her repeated requests, the complainant was denied opportunities to act in the position from the summer of 2010 until late 2012, and then only when Mr. Hall was directed by HR that he must put her in the position on an acting basis.

47 Taking into account all the circumstances set out above, the Tribunal finds evidence of actual bias, and further, an informed bystander would reasonably perceive bias on the part of Mr. Hall in both his assessment of the complainant during the interview, and during the managerial and peer review that followed. The extent to which this bias influenced the assessment is impalpable. However, Mr. Hall's bias and participation in the assessment could well have influenced the level of the complainant's passing score for the interview as well as her low scores in the managerial and peer review. In the circumstances demonstrated in this case, it is sufficient that his bias could have influenced the outcome of the appointment process.

48 Thus, the Tribunal concludes that the respondent abused its authority in this appointment process.

Issue III: Was the process used to determine the right fit seriously flawed?

49 Since the Tribunal has already concluded that there was an abuse of authority in this appointment process because Mr. Hall was biased against the complainant, there is no need to address the complainant's allegation that the process used to determine the right fit was seriously flawed.

Decision

50 For these reasons, the complaint is substantiated.

Corrective Action

51 The Tribunal orders the respondent to revoke the appointment of Glenn Maglio to the position of Production Supervisor at the SR-MGT-01 group and level with the Department of National Defence (DND) in Victoria, British Columbia within 60 days of this decision.

John Mooney
Vice-Chairperson

Parties of Record

Tribunal File	2013-0178
Style of Cause	<i>Colleen Ryan and the Deputy Minister of National Defence</i>
Hearing	February 4 and 5, 2014 Victoria, British Columbia
Date of Reasons	May 22, 2014
APPEARANCES:	
For the complainant	Robin J. Gage, Counsel
For the respondent	Zorica Guzina, Counsel
For the Public Service Commission	Luc Savard (written submissions)