



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**File:** 2013-0210  
**Issued at:** Ottawa, June 2, 2014

**COREY NASH**

Complainant

AND

**THE COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA**

Respondent

AND

**OTHER PARTIES**

<b>Matter</b>	Complaint of abuse of authority pursuant to s.77(1)(a) of the <i>Public Service Employment Act</i>
<b>Decision</b>	Complaint is dismissed
<b>Decision rendered by</b>	Joanne B. Archibald, Member
<b>Language of Decision</b>	English
<b>Indexed</b>	<i>Nash v. Commissioner of the Correctional Service of Canada</i>
<b>Neutral Citation</b>	2014 PSST 10

## Reasons for Decision

### Introduction

1 Corey Nash, the complainant, filed a complaint of abuse of authority with the Public Service Staffing Tribunal (the Tribunal) under s. 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12,13 (PSEA). The complaint concerns his elimination from an internal advertised appointment process for the position of Executive Director at three healing lodges with the Correctional Service of Canada (CSC). Specifically, his complaint is related to the appointment to the Executive Director position at the Willow Cree Healing Lodge at Duck Lake, Saskatchewan (Willow Cree). It is the complainant's view that his qualifications were not properly considered. As well, he alleges that there was bias against him, discrimination on the basis of race, and personal favouritism toward the selected candidate.

2 The Commissioner of the Correctional Service of Canada, the respondent, denies that an abuse of authority occurred. It states that the complainant failed to show that he met two essential experience qualifications established for the Executive Director position. As a result, he was properly screened out of consideration for the position.

3 The Public Service Commission (PSC) did not appear at the hearing, but did present a written submission in which it reviewed relevant PSC policies and guidelines. It took no position on the merits of the complaint.

4 Prior to the hearing, the complainant provided notice to the Canadian Human Rights Commission (CHRC) in accordance with s. 78 of the PSEA to indicate that he intended to raise an issue involving the interpretation or application of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA). The CHRC advised that it did not intend to make submissions in this matter.

5 For the reasons that follow, the Tribunal has determined that the evidence does not establish abuse of authority. It shows that the complainant was eliminated from the assessment process as he did not demonstrate that he possessed two essential

experience qualifications. Furthermore, the evidence does not support the allegations of improper assessment, bias, personal favouritism, or discrimination on the basis of race.

## **Background**

6 The respondent advertised the appointment process for the Executive Director position and received 15 applications prior to the closing date of December 10, 2012. Brenda LePage, then Regional Deputy Commissioner, Prairie Region, CSC, conducted the screening of applications to determine whether each candidate met the education and experience qualifications for the position. She determined that five candidates met the screening requirements and would be further assessed. The complainant was screened out as she determined that he did not meet two of the experience qualifications.

## **Issues**

7 The Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority in the assessment of the complainant's experience?
- (ii) Did the respondent abuse its authority by showing bias against the complainant?
- (iii) Did the respondent abuse its authority by showing personal favouritism toward the appointee?
- (iv) Did the respondent abuse its authority by discriminating against the complainant on the basis of race?

## **Analysis**

8 Section 77(1) of the PSEA provides that a person in the area of recourse may file a complaint with the Tribunal on the basis that he or she was not appointed or proposed for appointment because of an abuse of authority. The complainant has the burden to prove, on a balance of probabilities, that there was an abuse of authority.

**9** 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.” Abuse of authority also includes 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 at para. 66.

**Issue I: Did the respondent abuse its authority in the assessment of the complainant’s experience?**

**10** The complainant was screened out of the appointment process on the basis of Ms. LePage’s determination that he failed to meet two experience qualifications. They are reproduced below together with applicable definitions that appeared on the Statement of Merit Criteria (SMC):

- Significant\* experience in managing\*\* operations, programs or services within a correctional institution or community and to this effect, in setting and implementing operational policy and procedures. (Experience 1)
- Significant\* experience in the management\*\* of human resources and financial resources. (Experience 2)

\*Significant is defined as more than four (4) years (full and continuous business cycles) in an institution, the community or project activity area.

\*\*Managing in this context means having direct delegated authority and accountability for human and financial resources through at least two (2) complete budgetary cycles.

**11** The complainant testified that he has worked as a Parole Officer since 2004. He applied for the Executive Director position with the encouragement of a mentor. In deciding to apply, he felt that he met all of the qualifications for the position.

**12** Prior to submitting his application, he emailed Louise Berthiaume, Manager, Executive Resourcing, CSC, to ask whether post-secondary education could be considered in the assessment of “significant” experience. In response, Ms. Berthiaume replied that education and experience would be assessed separately. She added, “We will be assessing the experience criteria based on a candidate’s experience ‘in the management of correctional operations and/or interventions in a correctional institution

or correctional community setting' and will not be giving weight to a degree for the experience requirement."

**13** The complainant noted that the phrase "correctional community" used by Ms. Berthiaume was not stated on the SMC, which referred only to "community." He felt that his accumulated experience, while not completely in a correctional setting, met the experience requirements as well as the definitions of "significant" and "managing."

**14** The complainant's application addressed the experience qualifications by describing three types of work he had done. From 2008 onward, he held a co-chairman's role with Aboriginal Employee Network (AEN), a federal, interdepartmental Aboriginal community of practice operating in conjunction with the former Alberta Federal Council. While the AEN had no employees or human resources responsibilities, it received project funding from time to time, contracted for services, and regularly delivered projects under budget. From October 1, 2009, through September 30, 2010, he worked as an acting Parole Officer Supervisor, with responsibility for recruiting, training, and providing functional supervision to Parole Officers. He noted that from March 26 to June 30, 2012, working with external agencies and partners, he implemented a scaffolding training program for offenders.

**15** Ms. LePage developed the SMC for the Executive Director position. She described the position as equivalent to a Warden at a minimum security institution. Willow Cree is operated from a cultural and traditional perspective. It is important that the Executive Director is culturally competent and of Aboriginal ancestry in order to be able to lead, understand and develop relationships with the First Nations offenders and staff at the institution.

**16** The Executive Director is a member of the regional management committee and is a senior executive to whom junior managers report. Willow Cree houses 40 offenders. Ms. LePage testified that the duties of the Executive Director include bureaucratic responsibility and leadership for budget management, human resources, human and physical assets, as well as rehabilitation and reintegration of offenders. Budget management includes planning, cash forecasting, managing, preparing financial reports

and exercising the delegated financial authorities under the *Financial Administration Act*, R.S.C., 1985, c. F-11, particularly ss. 32 and 34. Human resources includes managing employees, staffing, discipline, labour relations, harassment prevention, and professional development.

**17** Ms. LePage stated that to meet Experience 1, a candidate would have extensive correctional managerial experience in an institution or community setting such as a parole office. The experience could be at the AS-08 level of the Executive Director position or at a junior level in a position that reported to a similar level. Such positions would include program, security, or parole managers. The requirement for managerial experience in a correctional environment was applied to all candidates.

**18** Ms. LePage also addressed Experience 2. To meet Experience 2, a candidate would demonstrate experience managing a budget through two full cycles: planning, cash forecasting, managing, balancing and reporting. With respect to human resources, the candidate would demonstrate managing a group of employees, staffing, labour relations, harassment prevention and professional development.

**19** Ms. LePage considered that both of these experience qualifications were set at a level commensurate with the senior management level of the AS-08 Executive Director position. This was not an entry level position.

**20** Ms. LePage testified concerning her assessment of the information provided in the complainant's application.

**21** With respect to Experience 1, the stated requirement was managing for more than four years of full and continuous business cycles. Ms. LePage considered that the complainant's year spent as an acting Parole Supervisor, where he had trained, recruited, and functionally supervised parole officers could be considered to address some aspects of Experience 1. However, the range of experience was narrow and failed to demonstrate the broad range of experience managing, developing policy or setting a vision, for example. His example of implementing the scaffolding training program demonstrated experience and competence building partnerships and working across levels of government. However, it entailed a period of only three months. The

cumulative duration of these experiences, even if they met the range of experience detailed in Experience 1, was insufficient to meet the requirement of four years.

**22** Ms. LePage testified that she assessed the complainant's AEN activities to determine whether they met Experience 1 or 2. She stated that she was familiar with the work of AEN. She knew it as a community of practice that was funded and supported through the Alberta Federal Council. It was a valuable organization, but it did not provide the complainant with the level of management experience required to meet Experience 1. Ms. LePage quoted from the complainant's application where he summarized his AEN experience by stating, "As cited above, as the Lead of this Aboriginal community our team has been providing services in this project activity area for four full Federal Government budget cycles." Ms. LePage stated that this sentence reflected precisely her own knowledge and understanding of the role and function of the AEN. It undertakes short term, funded projects. Further, with respect to Experience 2, the work of the AEN did not provide the complainant with financial and human resources management over two complete budgetary cycles. The project funding to which the complainant referred did not provide the required complexity to satisfy the requirements of Experience 2. Moreover, there were no employees reporting to the AEN, and therefore, no staffing, labour relations, supervision, performance review or direction given to staff members.

**23** For Experience 2, Ms. LePage also took into account the complainant's experience as an acting Parole Supervisor although it was not clear to her whether the duties were sufficiently broad to satisfy the requirements. Further, she considered the complainant's experience with the scaffolding project, but found that there was no evidence of budgetary control or staff reporting to the complainant. In any event, the cumulative duration of the acting appointment and the experience with the scaffolding project was insufficient to meet the definition of "significant."

**24** After the complainant was eliminated from the appointment process for failing to meet Experience 1 and 2, he contacted Ms. LePage to inquire further about the screening process. Ms. LePage replied by email on April 15, 2013. In her reply, she

added the words “work standards and objectives” when citing the first experience criterion.

**25** Ms. LePage acknowledged that neither her email nor the one sent by Ms. Berthiaume on December 10, 2012, accurately quoted the experience criteria as they were stated on the SMC. She stated that with the additional words, she was trying to clarify for the complainant the depth and level of experience that was sought and she thought that perhaps Ms. Berthiaume was trying to do the same. She added, however, that when she screened candidates she had before her a copy of the SMC and the correct wording and it was what she used to screen candidates.

**26** 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 or redo the appointment process. See, for example, *Broughton v. Deputy Minister of Public Works and Government Services*, 2007 PSST 0020. Rather than reassess, the Tribunal examines the assessment that was done to determine whether there is an impropriety that constitutes abuse of authority. See *Stamp v. The Commissioner of the Correctional Service of Canada*, 2014 PSST 4 at para. 42.

**27** The Tribunal finds that Ms. LePage’s testimony demonstrates that she considered fully the information before her in the complainant’s application documents. The Tribunal is satisfied that Ms. LePage properly applied Experience 1 and 2 in the form in which they appeared on the SMC. In evidence, she provided a coherent explanation of her assessment of Experience 1 and 2 and the reasons for finding the complainant not qualified. In neither case had the complainant accumulated the required experience in terms of length or depth. While the complainant may disagree with the assessment, he has not presented evidence to show that it was inappropriate or unreasonable.

**28** Accordingly, the Tribunal does not find an abuse of authority in the assessment of the complainant’s experience.



**Issue II: Did the respondent abuse its authority by showing bias against the complainant?**

**29** The complainant feels that Ms. LePage had earlier shown disdain for him. Therefore, she was biased against him and she could not properly assess his application. As examples, the complainant referred to an email message sent to Don Head, Commissioner of the CSC, in 2009 and her intervention when he was appointed to a Board of Inquiry (BOI) at Stony Mountain Institution in 2011.

**30** Ms. LePage testified that as the Deputy Commissioner, she was responsible for the 3500 staff members of the Prairie Region. Ms. LePage considered that she did not have a direct personal or professional relationship with the complainant, although she recalled meeting him at an Aboriginal staff function.

**31** In her position as Deputy Commissioner, Ms. LePage was briefed by the complainant's manager that he had ongoing workplace concerns. Indeed, on one occasion he initiated a harassment complaint. Although the complaint was held to be unfounded, Ms. LePage took the step of asking for a review of his personnel file so that she could assess whether he was being treated fairly, particularly with regard to developmental assignments. The file review satisfied her that he was being given those opportunities.

**32** On June 18, 2009, Ms. LePage received a copy of an email sent by Mr. Head to the complainant. The text of the email indicated that Mr. Head was responding to the complainant after receiving concerns from him. Ms. LePage replied to Mr. Head indicating her assessment of the situation and the efforts she had made to address it. She wrote:

Corey's focus right now (at least with local and regional managers) appears to be that we are mistreating him by not promoting him directly from his current WP-4 position right to the RMC or EXCOM table. He truly believes he is a high flying staff member who has not been promoted due to reprisals or retribution following his settlement with CSC. I can find no evidence of that. In order to start some developmental work and to address gaps in his leadership competencies Jan has offered him some at level assignments and has even gone so far as to work with partners (Stan Daniels and other gov't depts.) to try and gain him an assignment outside CSC hoping maybe a change of environment would provide a fresh start etc. (he has rejected those offers indicating that he is beyond that).

**33** With respect to the settlement referred to in this email, Ms. LePage stated that resolving employee complaints through a settlement agreement is a common practice at the CSC. She was aware that an agreement existed between the complainant and the CSC. However, she was not aware of the details as she was not involved in it.

**34** With respect to the 2011 BOI at Stony Mountain Institution, Ms. LePage testified that she was aware beforehand that the complainant wanted to participate on a BOI. She became concerned when she found out that he was being considered for this particular BOI because she knew the complainant had worked there earlier. In addition, she knew that the settlement agreement between the complainant and the respondent was based on events that happened during that time. She felt that it would not be positive for him to return to the site of a stressful experience. Further, she was concerned about the potential for a claim of bias or perception of conflict of interest that might be made against the CSC based on his participation on a BOI at Stony Mountain Institution. She felt that it would be in everyone's best interest to assign him to a different investigation. As BOIs did not fall under her authority, she contacted the Incident Investigation Branch to share her concern.

**35** The Tribunal finds that the evidence does not establish actual bias on the part of Ms. LePage. Therefore, it must determine whether the evidence is sufficient to support an allegation of reasonable apprehension of bias.

**36** In *Denny v. Deputy Minister of National Defence*, 2009 PSST 0029 at para. 125, the Tribunal referred to *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, which sets out the test for reasonable apprehension of bias at p. 394:

[T]he apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information....[T]hat test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.

**37** The Tribunal in *Denny* also referred to the more recent expression of the test as set out in *Newfoundland Telephone Company v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, [1992] S.C.J. No. 21 (QL) at

para. 22 (QL), and applied it to the circumstances of that complaint. Based on the jurisprudence, the test for reasonable apprehension of bias in a staffing complaint can be formulated as follows: *Would a reasonably informed bystander looking at the process reasonably perceive bias on the part of Ms. LePage?* See *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 0010.

**38** The complainant relies on two incidents to demonstrate that Ms. LePage is biased against him: her email to Mr. Head in 2009 and her intervention in the complainant's selection to the BOI in 2011. In the first incident, it is evident that Ms. LePage is briefing her superior regarding her dealings with the complainant based on her knowledge and assessment, as well as information from his managers. This briefing follows earlier contact between her superior and the complainant. The complainant does not dispute the content of Ms. LePage's email. In the second incident, where the complainant was being considered for a BOI at Stony Mountain Institution, Ms. LePage explained her concern and why it led her to act and that she wanted to ensure a sound experience for the complainant as well as an investigation free from reproach. She did not have authority to select or remove investigators from the BOI. However, she felt a responsibility to convey relevant information to those in charge.

**39** In both incidents, Ms. LePage was acting within the scope of her responsibilities as a Deputy Commissioner. She explained the actions she took and the Tribunal is not persuaded that she acted unreasonably or that there was a reasonable apprehension of bias against the complainant arising from those occurrences. Furthermore, no evidence has been presented to establish a link between the two incidents and the assessment of the complainant's experience in this appointment process. See *Praught and Pellicore v. President of Canada Border Services Agency*, 2009 PSST 0001 at para. 66.

**40** Applying the test as stated in *Gignac* to the facts of this complaint, the Tribunal finds that a reasonably informed person, viewing the matter reasonably, would conclude that it was more likely than not that Ms. LePage would assess the complainant fairly.

**41** The Tribunal therefore finds that the complainant has failed to prove on a balance of probabilities either actual bias or a reasonable apprehension of bias on the part of Ms. LePage.

**Issue III: Did the respondent abuse its authority by showing personal favouritism toward the appointee?**

**42** As noted above, abuse of authority is not defined in the PSEA, except to the extent that s. 2(4) states that it includes personal favouritism and bad faith. For example, in *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 0007 at para. 41, the Tribunal stated that personal favouritism may include the selection of a person solely based on a personal relationship, as a personal favour, or to gain personal favour with someone else.

**43** The complainant alleges that the respondent had shown personal favouritism in choosing the appointee for appointment to the Executive Director position as his father was a previous Director and he is a member of the Beardsley's and Okemasis First Nation (the First Nation) on whose land Willow Cree is located.

**44** Ms. LePage stated that the CSC has an agreement with the First Nation that permits Willow Cree to be located on its land and sets objectives for hiring members of First Nations. However, the First Nation has no authority over staffing decisions and there is no agreement with the CSC to hire its members specifically.

**45** Ms. LePage testified that the appointee applied for the Executive Director position and he was assessed and found to meet the established qualifications. He is a CSC employee who worked through progressively more senior roles before applying for this position. The appointee self-identifies as Aboriginal and he is a member of the First Nation. His father was the first director of Willow Cree. She denied that either of these facts influenced the selection in this appointment process. She added that since the first director was appointed, subsequent directors have either been Métis or members of other First Nations.

**46** The Tribunal finds that the evidence does not establish personal favouritism in the decision to appoint the selected candidate to the Executive Director position. The challenge appears to be limited to the appointee's membership in the First Nation and the fact that his father was a previous Executive Director. The complainant has not disputed the appointee's qualifications. The Tribunal concludes that there is insufficient evidence to establish that the appointment was influenced by personal favouritism or any consideration other than merit.

**Issue IV: Did the respondent abuse its authority by discriminating against the complainant on the basis of race?**

**47** Section 80 of the PSEA provides that in considering whether a complaint is substantiated under s. 77, the Tribunal may interpret and apply the CHRA.

**48** Section 7 of the CHRA provides that it is a discriminatory practice to directly or indirectly refuse to employ or continue to employ any individual, or, in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination which, according to s. 3(1) of the CHRA, includes race.

**49** In order to establish that the respondent engaged in a discriminatory practice, the complainant must first establish a *prima facie* case of discrimination as set out by the Supreme Court of Canada in *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 ("O'Malley").

**50** A *prima facie* case is one that covers the allegations made and which, if the allegations are believed, would be complete and sufficient to justify a finding in the complainant's favour, in the absence of an answer from the respondent. Once a *prima facie* case is made, the onus then shifts to the respondent to disprove the allegations or provide some other reasonable explanation. The Tribunal cannot take into consideration the respondent's answer before determining whether a *prima facie* case of discrimination has been established. See: *Lincoln v. Bay Ferries Ltd.*, [2004] F.C.A. 204 at para. 22.

**51** It is not necessary that discriminatory considerations be the sole reason for the actions at issue in order for the complaint to be substantiated. The complainant need only show that discrimination is one of the factors in the respondent's decision. See *Holden v. Canadian National Railway Company* (1991), 14 C.H.R.R. D/12, (F.C.A.) at para 7.

**52** The area of selection for the Executive Director position was defined as:

Employees of the Correctional Service of Canada, Parole Board of Canada and the office of the Correctional Investigator across Canada, who self-identify when applying as an Aboriginal person, in conformity with the definition outlined in the Employment Equity Act.

**53** The complainant self-identified as Aboriginal in his application document. The screening board report completed by Ms. LePage records that the complainant was considered to be within this area of selection. No evidence was presented to suggest that the complainant was screened out on the basis of race.

**54** Although the Tribunal can accord weight to the complainant's belief, it must consist of more than just a "bare possibility", as the Canadian Human Rights Tribunal has stated that "an abstract belief that a person is discriminated against, without some fact to confirm that belief, is not enough." See *Filgueira v. Garfield Container Transport Inc.*, 2005 CHRT 32, at para. 41; aff'd: 2006 FC 785.

**55** In the present case, no evidence other than the complainant's own assertion was led to support his allegation that his race was a factor in the treatment of his candidacy or the decision to screen him out of the appointment process. Accordingly, the Tribunal finds that the complainant has not established a *prima facie* case of discrimination based on race.

**56** Consequently, the Tribunal concludes that there is no evidence to establish that the respondent discriminated against the complainant in this appointment process.

## Decision

57 The complaint is dismissed.

Joanne B. Archibald  
Member

## Parties of Record

<b>Tribunal File</b>	2013-0210
<b>Style of Cause</b>	<i>Corey Nash and the Commissioner of the Correctional Service of Canada</i>
<b>Hearing</b>	April 15-16, 2014 Edmonton, Alberta
<b>Date of Reasons</b>	June 2, 2014
<b>APPEARANCES:</b>	
<b>For the complainant</b>	Satinder Bains
<b>For the respondent</b>	Joshua Alcock
<b>For the Public Service Commission</b>	Luc Savard