



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2013-0097
Issued at: Ottawa, March 13, 2014

JO-ANN STAMP

Complainant

AND

THE COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA

Respondent

AND

OTHER PARTIES

Matter Complaint of abuse of authority under s. 77(1)(a) of the
Public Service Employment Act

Decision Complaint is dismissed

Decision rendered by Eugene F. Williams, Member

Language of Decision English

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

Neutral Citation 2014 PSST 4

Reasons for Decision

Introduction

1 Jo-Ann Stamp, the complainant, applied in an internal advertised appointment process for Site Coordinator, Quality Improvement and Accreditation positions at the AS-03 group and level. The complainant was found qualified and placed in a pool of qualified candidates. However, she was not selected for appointment.

2 The complainant alleges that the respondent, the Commissioner of the Correctional Service of Canada (CSC), abused its authority in its assessment of her candidacy, and by adopting improper right fit criteria, which, among other things, fettered the ability of the Human Resources (HR) Branch to consider her for the position.

3 The respondent denies the allegations of abuse of authority. It asserts that the complainant was not appointed to the position because she was not the right fit. It also states that it chose and used appropriate selection tools. Therefore, the respondent submits that it properly assessed all candidates, and the selection of the appointee was based on merit.

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.

5 For the reasons set out below, the complaint is dismissed. The Public Service Staffing Tribunal (the Tribunal) finds that the complainant has presented no evidence to prove that the respondent abused its authority in either the appointment process generally, or in the selection of the appointee to the position.

Background

6 On February 7, 2011, the respondent posted a Job Opportunity Advertisement (JOA) on *Publiservice* to fill 11 Site Coordinator, Quality Improvement and Accreditation positions at the AS-03 group and level at four Ontario locations (Kingston, Gravenhurst,

Kitchener and Campbellford) on either an indeterminate or acting basis (the positions). The closing date for applications was February 14, 2011. The complainant applied.

7 The appointment process involved several stages. Candidates had to meet the essential qualifications, and those who did were further assessed by submitting a letter describing, with examples, how they possessed the following asset qualifications: knowledge of quality improvement methods and tools; knowledge of the Accreditation process in health services; and, the ability to facilitate meetings.

8 After the first two stages of the appointment process, only 50 of the 180 candidates who applied were invited to an exam, which was written in October 2011. Candidates who passed the exam were then interviewed in December 2011 by a three-member board, either in person or by videoconference. The candidates who passed the interview were then asked to provide references. Their referees were asked to complete a written questionnaire. After the reference questions were marked, the candidates who met all of the qualifications were placed in a pool of qualified candidates.

9 Appointments to the positions were made from this pool of candidates using the right fit criteria. The respondent determined that the right fit criteria would be based on three personal suitability qualifications listed on the Statement of Merit Criteria (SMC), namely, interpersonal skills, initiative, and teamwork. Candidates from the pool were appointed on the basis of their personal suitability scores obtained during their interview and reference checks. Candidates from the pool who possessed the highest scores in the right fit criteria were the first to be appointed.

10 Although the complainant passed all stages of assessment, and was placed in the pool, she was not appointed to the position at the Fenbrook Institution in Gravenhurst despite the fact that she had been acting in that position for several years. Another candidate obtained higher marks in the board's assessment of the right fit criteria and was appointed to the Fenbrook position. Similarly, other candidates were appointed to the positions in the other locations based on the fact that they obtained higher right fit marks than the complainant.

11 On March 11, 2013, the complainant filed a complaint with the Tribunal under s. 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the PSEA).

12 At the hearing, the complainant abandoned her allegation of personal favouritism, and there was no evidence led to support that claim. In addition, the complainant did not allege, nor did she lead any evidence, to suggest that the appointee did not meet the essential or personal suitability qualifications.

Issues

13 The Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority by failing to adequately assess candidates in accordance with the SMC?
- (ii) Did the respondent abuse its authority by adopting right fit criteria that fettered its ability to select the complainant in this appointment process?
- (iii) Did the respondent abuse its authority in its assessment of the complainant?

Analysis

14 Section 77(1) of the 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. Errors and omissions in the appointment process may constitute an abuse of authority. Whether an error or omission constitutes an abuse of authority depends on its nature and seriousness. 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.”

15 The complainant has the burden to prove, on a balance of probabilities, that there was an abuse of authority in relation to a complaint under s. 77 of the PSEA. See, for example, *Tibbs* at paras. 49 to 55.

Issue I: Did the respondent abuse its authority by failing to adequately assess candidates in accordance with the SMC?

16 The complainant alleges that the respondent's choice of the right fit criteria failed to reflect the essential qualifications listed in the SMC. The complainant also states that the respondent's choice of the right fit criteria does not accord with the responsibilities and needs of the position.

17 Section 36 of the PSEA confers discretionary authority to delegated managers in the selection and use of assessment methods. However, 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, for example, *Ouellet v. President of the Canadian International Development Agency*, 2009 PSST 0026.

Allegation that the right fit criteria did not reflect the essential qualifications of the SMC

18 The complainant testified that she took an acting assignment at the Fenbrook Institution in Gravenhurst in 2008 as the Quality Improvement Co-ordinator. This function was viewed as a developmental opportunity. The duties evolved and the position was later classified in 2011 as Site Coordinator at the AS-03 group and level. The complainant received acting AS-03 pay from October 2011 to 2013, while working under the supervision of Chief of Health Services, Sue Groody.

19 The complainant asserts that the right fit criteria used by the respondent did not accord with certain right fit requirements identified by Ms. Groody. Ms. Groody had been asked to recommend right fit criteria to the board and she included the following in her recommendations: experience in quality improvement methods and tools; experience of the Accreditation process in health services; and experience in facilitating meetings. Ms. Groody also recommended "Experience in setting up requirements for necessary programs for example Maintenance of medical equipment; Nursing education and training; and compiling data collection for improvement of delivery of service."

20 Lori Francis, CSC Regional Manager, Policy Planning, Ontario Region, was the delegated manager and board chair for this appointment process. Ms. Francis testified that she is responsible for overseeing the accreditation process and pharmacy operations at CSC institutions in Ontario. Ms. Francis created a developmental program that led to the development and classification of the Site Coordinator position across the CSC. According to Ms. Francis, National Headquarters (NHQ) developed an SMC and the assessment tools to be used in all regions in this appointment process.

21 Ms. Francis stated that all candidates were assessed using the same assessment methods to assess the essential qualifications and asset qualifications listed in the SMC. Following the first two assessment stages, the remaining candidates were asked to write an exam, which included a computer exercise. Those candidates who passed the exam were interviewed, and the successful interviewees were asked to provide references. The referees supplied by the candidates were each asked to complete a written questionnaire, the answers to which were graded and combined with the candidate's interview marks on personal suitability to comprise the final grade for these asset qualifications.

22 Ms. Francis explained that there was a delay in appointing people to the positions because of the need to assess priority employees who were affected by the Deficit Reduction Action Plan. Ms. Francis and fellow board members consulted with the Chiefs of Health Services at the institutions about the right fit criteria, and then determined that the components of personal suitability, namely, interpersonal skills, initiative and teamwork in the delivery of the service, would be the right fit criteria to be used for selecting appointees from the pool.

23 Ms. Francis explained that the board did not follow Ms. Groody's recommendation to include experience of quality improvement methods and tools, experience of the Accreditation process in health services, experience in facilitating meetings, and experience in setting up requirements for necessary programs, for example, maintenance of medical equipment, nursing education and training, and compiling data collection for improvement of delivery of service, because those

qualifications were not part of the SMC. She maintained that the right fit criteria had to comply with the SMC.

24 An email exchange between Ms. Francis and assessment board member Adele Anderson, Human Resources, CSC, Ontario, on September 18, 2012, was entered into evidence at the hearing. In this email exchange, Ms. Francis informed Ms. Anderson that “[o]n review of the SOMC we have chosen the right fit to be the highest score in personal suitability for all three sites.” In response to Ms. Anderson’s request for a rationale for this right fit criterion, Ms. Francis stated that interpersonal skills, initiative and teamwork in the delivery of the service were important in ensuring that the accreditation requirements and standards of these AS-03 positions were effectively met.

25 The complainant submits that this approach fails to take into account an assessment of the candidates’ score on the essential and asset qualifications listed in the SMC. By failing to include elements of these qualifications, for example, the results of her written exam and experience in quality improvement methods and tools, experience with the Accreditation process and her experience in facilitating meetings, as part of the right fit assessment, the complainant states that the respondent dismissed her work experience and earlier asset qualification results as not being relevant to the assessment process. By adopting this approach, she contends that the respondent did not adequately assess the candidates. In addition, the complainant asserts that this failure may have an effect on later appointments from this pool.

26 The complainant also submits that since Ms. Groody had described the right fit criteria for the Fenbrook/Beaver Creek institutions in her January 27, 2012 email to the HR section, that recommendation should have been followed by the board. The complainant contends that the right fit applied to the Fenbrook Institution was wrong because it prevented the Chief of Health Services at that institution from obtaining a candidate with experience in two areas she required to address her organizational needs.

27 The complainant further submits that the recommendations of Ms. Groody complied with the SMC because Ms. Groody's request for experience was really a request for knowledge. In other words, the complainant's submission is that the right fit criteria recommended by Ms. Groody complied with the SMC and reflected the specific needs of the institution for which the appointment was made.

28 Appointing someone who does not meet the essential qualifications for the position would be an abuse of authority since the appointment would not be based on merit. See, for example, *Rinn v. Deputy Minister of Transport, Infrastructure, and Communities*, 2007 PSST 0044 at paras. 36 to 38.

29 Subsection 30(2) of the PSEA authorizes the deputy head to establish qualifications. In *Visca v. Deputy Minister of Justice*, 2007 PSST 0024 at para. 42, the Tribunal determined the following concerning the discretion given to delegates of the PSC and deputy heads:

Broad discretion is given to managers under subsection 30(2) of the PSEA to establish the necessary qualifications for the position they want to staff and to choose the person who not only meets the essential qualifications, but is the right fit.

30 A delegated manager may choose to exercise his or her discretion by using any combination of essential and asset qualifications for the determination of the right fit criteria. As the Tribunal explained in *Marcil v. Deputy Minister of Transport, Infrastructure, and Communities*, 2011 PSST 0031, at para. 48:

The term "right fit" is not a term found in the PSEA. It is a term used in the human resources community to describe the basis for deciding who will be appointed from among qualified candidates in an appointment process. The merit and other criteria used to select someone for appointment are recorded in a written right fit rationale. The Tribunal has also used this term to illustrate the manager's discretion to choose among qualified candidates the person who, in his or her opinion, is the right fit.

31 The Tribunal finds, based on the evidence presented at the hearing, that the right fit criterion adopted by the assessment board was based on the merit criteria identified in the SMC. The candidates who were placed in the pool had demonstrated that they possessed all of the essential and asset qualifications for the position. Thus, there is no factual basis to support the complainant's submission that the respondent's approach failed to consider the candidate's scores on the essential qualifications for the position.

The complainant and the other members of the pool had previously demonstrated that they met the essential and asset qualifications. Furthermore, the JOA and the essential qualifications were common to several positions at the four sites. Accordingly, it was open to the respondent to select the same qualifications to be assessed for all the positions.

32 The right fit criterion selected by the board was determined following consultation with the line managers responsible for the program, was properly documented, and was in accordance with the SMC. The criteria that the complainant sought to apply were the right fit criteria recommended by Ms. Groody. The assessment board did not follow that recommendation because it contained qualifications that were not listed in the SMC. Therefore, the Tribunal concludes that the complainant has not established that the candidates were not assessed in accordance with the SMC.

33 The complainant also expressed concern that she was placed at a disadvantage during the interview portion of the assessment process because a printer malfunction limited her ability to polish one of the computer exercises. The Tribunal finds that the computer result did not adversely affect the complainant. She passed that qualification notwithstanding the difficulties with the printer. The complainant successfully qualified for the position, but was not appointed because other candidates scored higher than she did on the right fit criterion. The complainant's score in the computer exercise was not a component of the right fit score. Furthermore, the complainant will not be unfairly prejudiced in future appointments from this pool because of the printer malfunction. Based on the evidence, future appointments will also be made in accordance with the right fit criteria.

Issue 2: Did the respondent abuse its authority by adopting right fit criteria that fettered its ability to select the complainant in this appointment process?

34 The complainant submits that the assessment board's decision to restrict the right fit criteria to the candidates' scores under the personal suitability section fettered its ability to consider the complainant in this assessment process.

35 In *Bowman v. Deputy Minister of Citizenship and Immigration Canada*, 2008 PSST 0012, the Tribunal discussed the meaning of fettering of discretion in the context of an appointment process as follows:

121 ... The concept of discretion refers to decisions where the law does not dictate a specific outcome. Administrative discretion involves an authority to choose from among more than one possible course of action. The discretion afforded to the assessment board was not, of course, absolute. As the Tribunal has held in *Tibbs*, at paragraph 68: "Discretion in staffing processes must be exercised in accordance with the nature and purpose of the *PSEA*." This approach has been endorsed by the Tribunal in subsequent decisions.

122 Equally important, discretion provided to delegated decision-makers must be exercised in accordance with administrative law principles. It is well established law that policies or guidelines cannot be adopted so as to fetter the decision-maker's discretion. In the exercise of discretionary authority, discretion must be brought to bear on every case; each case must be considered on its own merits. (See, for example: *Maple Lodge Farms v. Canada*, [1982] 2 S.C.R. 2 and *Dorothea Knitting Mills Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [2005] F.C.J. No. 394, 295 F.T.R. 314 (F.C.T.D.)).

123 ... [W]here a delegate is granted discretionary authority, as is the case here, and, instead of exercising this discretion, relies solely on the application of a guideline to assess a particular essential qualification, this may constitute an abuse of authority. It may be determined that a strict application of the guideline fetters the ability of the delegate to consider individual cases with an open mind.

36 The complainant contends that the right fit criteria chosen did not permit the assessors to consider the years of experience she had devoted to performing the duties of the position.

37 Apart from the complainant's allegation that the board fettered its ability to consider her in this assessment process, there was no evidence presented at the hearing to support that contention. In fact, the evidence was to the contrary. Ms. Francis testified that she consulted with the Chiefs of Health Services, the managers directly responsible for the supervision of the positions, to obtain their views. She testified that the board considered those views, reviewed the SMC and developed the right fit criteria for all the positions.

38 The right fit criteria selected were objective and they were based on the marks from the candidates' interviews and reference scores. As determined previously, broad discretion is given to managers to establish the qualifications for the position they want to staff. This principle also applies when choosing right fit criteria. In this particular case, the respondent chose to use three personal suitability qualifications as right fit

criteria and not experience. Ms. Francis explained that those criteria were chosen because they were important in ensuring that the accreditation requirements and standards of the AS-03 positions were effectively met. The respondent did consider the complainant's experience in its assessment of her candidacy since she was found qualified, however it did not form part of the chosen criteria for the right fit. The fact that the complainant disagrees with the board's choice of right fit criteria does not amount to abuse of authority. The Tribunal therefore concludes that the complainant has not shown that the respondent fettered its discretion in this appointment process by not considering her years of experience as part of the right fit criteria.

Issue 3: Did the respondent abuse its authority in its assessment of the complainant?

39 The complainant alleges that the respondent abused its authority in assessing her candidacy by assigning scores that were too low for questions relating to personal suitability. In particular, the complainant states that her answers to questions on the "initiative" portion of the interview related to her job functions. She argues that because of the job-imposed limits, the assessment board failed to take into account the institutional restrictions placed upon her ability to initiate actions independent of her supervisors. The complainant contends that the assessment board adopted too strict an application of the initiative guideline by failing to appreciate that her job required her to collaborate with her chief. Consequently, the board's failure to judge initiative with those constraints in mind resulted in a lower mark in this section.

40 During the initiative portion of the interview, the complainant was asked to provide examples of "projects/tasks you started on your own." The complainant described the "walk fit program" that she managed at the Fenbrook Institution. Both interviewers recorded her answer and assigned a passing mark (not full marks) to the answer. Ms. Francis was aware of the scope of the complainant's authority in relation to her duties. Overall, the complainant was awarded passing marks for the personal suitability portion of the interview.

41 Ms. Francis testified that, during the interview, the complainant did not state that the “walk fit program” was a project that she had started on her own. While acknowledging that the complainant fully described the “walk fit program,” Ms. Francis stated that the complainant did not provide information from which the interviewers could determine that Ms. Stamp had started that project. Although she obtained a passing mark, the mark she obtained reflected that omission.

42 The Tribunal has considered many cases where a complainant challenges the mark or rating they have received. The Tribunal’s role is not to reassess the complainant but rather to examine whether or not there was any impropriety in the assessment process. It may find abuse of authority where the complainant establishes that the assessment method is irrelevant to the qualifications of the position, where the methods are unreasonable, discriminatory or that the process is flawed. If the process is flawed, the outcome cannot be considered reasonable or fair. See, for example, *Bowman v. Deputy Minister of Citizenship and Immigration Canada*, 2008 PSST 0012; *Jacobsen v. Deputy Minister of Environment Canada*, 2009 PSST 0008.

43 Based on the evidence at the hearing, the Tribunal finds that the complainant has not proven an abuse of authority either in choosing initiative as an essential qualification for the position, or in the manner in which it was assessed. As the Tribunal has explained on many occasions, what is required of managers is to establish the qualifications for the work to be performed. See, for example, *Neil v. Deputy Minister of Environment Canada*, 2008 PSST 0004 at para. 46. The evidence presented at this hearing leads the Tribunal to find that Ms. Francis was familiar with the work of the position to be staffed because she was the manager responsible for its development and its classification.

44 The complainant was responsible for providing examples of initiative that would allow the assessors to understand how that example showed initiative. In this case, the complainant did not provide evidence that the board failed to properly assess the answer or marked improperly the complainant’s response.

45 The Tribunal finds that there was no evidence to indicate that the mark was unreasonable or unfair having regard to the board's knowledge of the position, of the institutional restrictions, and the complainant's response to the question.

46 The Tribunal concludes that the complainant has failed to prove that the respondent abused its authority in its assessment of her candidacy.

Decision

47 For all these reasons, the complaint is dismissed.

Eugene Williams
Member

Parties of Record

Tribunal File	File 2013-0097
Style of Cause	<i>Jo-Ann Stamp v. Commissioner of the Correctional Service of Canada</i>
Hearing	November 19 and 20, 2013
Date of Reasons	March 13, 2014
APPEARANCES:	
For the complainant	Eric Stamp
For the respondent	Christine Diguier
For the Public Service Commission	Claude Zaor, by written submissions