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**File:** 2014-9381

**Citation:** 2016 PSLREB 115

*Public Service Labour Relations  
and Employment Board Act and  
Public Service Employment Act*



Before a panel of the  
Public Service Labour Relations  
and Employment Board

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BETWEEN

**KIRK PHELAN**

Complainant

and

**DEPUTY MINISTER OF THE DEPARTMENT OF FISHERIES AND OCEANS**

Respondent

and

**OTHER PARTIES**

Indexed as

*Phelan v. Deputy Minister of the Department of Fisheries and Oceans*

In the matter of a complaint of abuse of authority under section 77 of the *Public Service Employment Act*

**Before:** Bryan R. Gray, a panel of the Public Service Labour Relations and Employment Board

**For the Complainant:** Himself

**For the Respondent:** Caroline Engmann, Counsel

**For the Public Service Commission:** Louise Bard

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Heard at Halifax, Nova Scotia,  
June 8 and 9, 2016.

## REASONS FOR DECISION

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### I. Summary

[1] The complainant, Kirk Phelan, was an unsuccessful candidate in the internal advertised process numbered 13-DFO-MAR-IA-EOS-87123 for an indeterminate appointment to the Project Leader position in the Program Coordination and Support Division, Stream 1, Electronic Research and Development, classified at the EL-6 group and level, in the Department of Fisheries and Oceans (DFO) and based in Dartmouth, Nova Scotia. In this appointment process, there were three separate “streams” established to appoint new supervisors: Stream 1 – Project Leader, Electronic Research and Development (EL-06), Stream 2 – Senior Oceanographic Technician (EG-06) and Stream 3 – Head, Instrument Development/Machine shop (EG-06).

[2] The complainant alleges that the respondent, the Deputy Minister of DFO, abused its authority in the application of merit by establishing the same essential qualifications, including additional knowledge criteria, for Streams 1 and 2 despite the fact that these streams perform different functions. He also alleges that the respondent improperly offered the successful candidate his choice of supervisor positions in two streams despite not assessing him for Stream 1. The successful candidate was appointed to the position of Project Leader, Stream 1, Electronic Research and Development, EL-06.

[3] The respondent denies the allegations. It maintains that the assessment board acted appropriately and that the successful candidate met all the essential qualifications.

[4] The Public Service Commission (PSC) did not attend the hearing. It did make lengthy written submissions that discuss the regulatory and policy framework that underpin appointment processes in the federal public service. I note that the PSC took no position on the merits of the complaint in this hearing.

[5] For the reasons that follow, I find that the complainant has not established that the respondent abused its authority, and I therefore dismiss the complaint.

### II. Facts

[6] The office where the complainant works was reorganized in 2012, before the events leading to this complaint occurred. The Ocean Physics section of the DFO had previously been managed by the same person for many years. During his long tenure,

the section had been organized into separate groups to deal with design, construction and field operations.

[7] The complainant was in the design group and was responsible for designing custom oceanographic monitoring equipment based upon specifications created to meet the needs of departmental scientists and their research projects. The operations group would deploy and maintain the equipment; most often moored on the ocean floor, and would retrieve the equipment when an experiment ended. The operations group was also responsible for the proper functioning of the data collection and retrieval work. A mechanical shop was responsible for the welding and machine work needed to construct the various apparatus, which included ocean current, salinity, and temperature monitoring scientific devices with different sampling and camera capabilities, among others.

[8] Upon the previously mentioned section head's retirement, management chose to reorganize the three sections and to instead create task groups that were focused upon project management and that included some officials from the former sections, in an effort to increase collaboration and efficiency. The complainant testified that this reorganization was communicated to all staff. He also stated that he opposed it and that "heated discussions" took place about the changes.

[9] Thomas Sephton, who was the division manager of the Ocean Physics section before his retirement and who oversaw the reorganization, testified that the former sections were not working well together. He said "tough love" was required to improve the organization, and that "feathers were ruffled" among the staff by the decision to reorganize the working groups.

[10] Mr. Sephton explained that to establish essential qualifications including additional knowledge criteria for the positions in Streams 1 and 2, the priority for the new organization was to improve its handling of scientific data. To explain the connection between the establishment of essential qualifications and the duties of the former operations group, Mr. Sephton stated that this group was at the forefront of data creation and collection through its work deploying, maintaining, transmitting to, and retrieving from the different means of doing that data creation and collection.

[11] As a preliminary matter, the complainant sought to enter two affidavits into evidence. The respondent objected because they contained statements of opinion and

stated further that it would wish to cross-examine each deponent. In order to enable the complainant to call this evidence at the hearing, I offered the complainant during a pre-hearing conference held on May 13, 2016, the opportunity to have these witnesses testify by telephone at a time of their convenience during the hearing. He responded that this would not be possible.

[12] Upon my review of the two proposed affidavits, I found several statements of opinion and ruled that such statements were not admissible as the deponents had not been qualified as experts. I then ruled that the remainder of the proposed affidavits were not relevant. The affidavits were therefore not entered into evidence.

[13] Following the hearing, the complainant and respondent raised a concern regarding Exhibit E-8 remaining on the public record at the Board. They both requested that the assessment scores for all candidates be redacted from E-8, except for the complainant and successful candidate's scores. I granted this request as I find the other candidate scores to be irrelevant and unnecessary to the determination of the matters before me.

[14] The complaint was filed with the former Public Service Staffing Tribunal ("the Tribunal") on October 30, 2014. On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014 84), creating the Public Service Labour Relations and Employment Board ("the Board") to replace the former Tribunal and the Public Service Labour Relations Board. The Board is now responsible for handling complaints filed under the *Public Service Employment Act* (S.C. 2003, C. 22, SS. 12, 13; "the Act").

### **III. Issues**

[15] I must determine the following issues:

- a. Did the respondent abuse its authority by establishing essential qualifications (including additional knowledge criteria) that focused on the skills and work of one former group for use in Streams 1 and 2 in the new organizational model?
- b. Did the respondent abuse its authority by offering the successful candidate his choice of a supervisory position in Streams 1 and 2?

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#### IV. Reasons

[16] Section 77 of the *Act* provides that an unsuccessful candidate in the area of selection for an internal advertised appointment process may file a complaint with the Board that he or she was not appointed because of an abuse of authority.

[17] Abuse of authority is not defined in the *Act*. 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, in some cases, can also include improper conduct and omissions. The degree of the improper conduct may determine whether or not it constitutes abuse of authority. See *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at para. 66.

**A. Did the respondent abuse its authority by establishing essential qualifications (including additional knowledge criteria) focused on the skills and work of one former group for use in Streams 1 and 2 in the new organizational model?**

[18] At the heart of the complainant’s problem with the appointment process is the fact that the respondent established the same essential qualifications, including additional knowledge criteria for both Stream 1 (EL-6) and Stream 2 (EG-6) positions. These qualifications were oriented towards the competencies of the former operations group in which the successful candidate had worked. The complainant alleges that his former design group qualifications were not reflected in either of the two new groups’ supervisory position appointment processes. The complainant noted this was despite the fact that the unit leader EL-06 position description stated, “This position is key to deliver the core unit electronic research and development projects for the Ocean Physics Section.”

[19] The complainant alleges that the respondent erred and showed bias, which amounted to an abuse of authority, by establishing one set of essential qualifications oriented toward the skills of the former operations group for use in both supervisory positions, and ignoring the electronic research and development aspect of the duties.

[20] The complainant cites *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10, for the proposition that bias exhibited during an appointment process can be found to be an abuse of authority under the *Act*. *Gignac* cites jurisprudence that considers bad faith and bias as elements of abuse of authority.

In that case, the former Tribunal notes that improper intent is not required to be shown when the facts reveal “serious carelessness or recklessness” (at paragraph 61). And finally, the Tribunal cites as follows the widely accepted test for bias elaborated by the Supreme Court of Canada in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; 1976 CanLII 2:

...

*... the 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... that test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude....”*

...

[21] Applying that test to the facts, the Tribunal in *Gignac* found that objectionable comments and events involving the Director overseeing the appointment process did show bias and were found to be an abuse of authority. Among other things, the Director told the complainant not to bother applying for the position in question. There is no evidence in the matter before me suggesting bias or an apprehension of bias involving the respondent’s representatives.

[22] The complainant also cites *Ryan v. Deputy Minister of National Defence*, 2014 PSST 9, which is another case in which bias was upheld in a finding of abuse of authority. In *Ryan*, the deputy head was quoted as telling the complainant, “the only way I would give you this job is if I am ordered to” at para. 34. The complainant in *Ryan* then showed in evidence that the deputy head was not fair when it allowed staff access to temporary acting assignments before the appointment process was launched. Again, no evidence demonstrating bias, apprehension of bias or of such objectionable conduct exists in the matter before me.

[23] The complainant also relies upon *Renaud v. Deputy Minister of National Defence*, 2013 PSST 26, as an authority for upholding an abuse of authority allegation when a serious error was made in an appointment process. In *Renaud*, the Tribunal found that the deputy head made an error in the sentence structure of its appointment bulletin that resulted in an unintended and unfair outcome. The Tribunal found that the appointee had not applied for the position he was assigned to. Both errors, neither of which exists in the matter before me, were found to result in an abuse of authority. As

I have no evidence of errors before me, I find *Renaud* is not relevant.

[24] The respondent replies by citing ss. 30 and 31 of the *Act*, which give the deputy head the flexibility to establish essential qualifications. These sections state that appointments shall be made on the basis of merit. Merit requires that the person selected meet the essential qualifications as established by the deputy head of the department. Additional qualifications may be included that the deputy head considers are assets for the work to be performed currently or in the future. Merit also includes considering organizational needs and operational requirements, current or future. Section 30(3) of the *Act* specifically states that the organization's current or future needs are as identified and deemed relevant by the deputy head.

[25] The respondent cites *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11 at para. 77, where the Tribunal notes that section 36 of the *Act* provides that the deputy head may use any assessment method he or she considers appropriate in an internal appointment process.

[26] The respondent also submits that, in *Richard v. Deputy Minister of National Defence*, 2013 PSST 24, at paras. 46 and 47, the Tribunal found that the respondent could reasonably establish general qualifications provided they were related to the position.

[27] To find an abuse of authority in the choice of assessment methods, a complainant would need to prove that the result is unfair and that the assessment methods are unreasonable, do not allow the merit criteria to be assessed, have no connection to the criteria, or are discriminatory. The evidence of Mr. Sephton explaining the purpose of the re-organization and related position descriptions to achieve more effective project management and better data handling satisfies me of their being reasonably linked to the position qualifications and essential knowledge criteria and questions.

**B. Did the respondent abuse its authority by offering the successful candidate his choice of a supervisory position in one of two streams?**

[28] The complainant confirmed that the job advertisement clearly indicated that applicants could apply for multiple streams but that he chose to apply for only

Stream 1. He also acknowledged that the successful applicant in Stream 1 did apply for multiple streams.

[29] Broad discretion is given to managers under s. 30(2) of the *Act* to choose the person who meets the essential qualifications (see *Visca v. Deputy Minister of Justice*, 2007 PSST 0024). Furthermore, as has been often noted in other staffing decisions, my role as a panel of the Board is not to reassess candidates' qualifications. My role is to determine whether there was an abuse of authority in the appointment process (see, for instance, *Boutzouvis v. the Director of Public Prosecution Service of Canada*, 2012 PSST 25 at para. 27; and *Stamp v. Commissioner of the Correctional Service of Canada*, 2014 PSST 4 at para. 42).

[30] While the complainant led evidence with respect to how the candidates in the appointment process were assessed, I do not find it has any probative value related to the previously noted allegations before me.

#### **V. Conclusion**

[31] There is no evidence of serious errors or bias in the conduct of the appointment process.

[32] I find that the complainant has not established that the respondent abused its authority.

[33] For all of the above reasons, the Board makes the following order:

*(The Order appears on the next page)*



**VI. Order**

[34] The complaint is dismissed.

December 5, 2016.

**Bryan R. Gray,  
a panel of the Public Service Labour  
Relations and Employment Board**