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Citation: 2016 PSLREB 100

*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

BETWEEN

WHITNEY MARTIN AND KYLENE WILLIAMS

Complainants

and

**DEPUTY MINISTER OF THE DEPARTMENT OF INDIAN AFFAIRS
AND NORTHERN DEVELOPMENT**

Respondent

and

OTHER PARTIES

Indexed as

*Martin v. Deputy Minister of the Department of Indian Affairs
and Northern Development*

Complaints of abuse of authority pursuant to paragraph 77(1)(a) of the *Public Service Employment Act*

Before: Marie-Claire Perrault, a panel of the Public Service Labour Relations and Employment Board

For the Complainants: Satinder Bains, Public Service Alliance of Canada

For the Respondent: Nathalie Pruneau, paralegal, Treasury Board Secretariat Legal Services

Decided on the basis of written submissions
filed July 4 and 22 and August 4, 19, and 26, 2016.

REASONS FOR DECISION

I. Introduction

[1] The complainants, Whitney Martin and Kylene Williams, allege that the Deputy Minister of the Department of Indian Affairs and Northern Development (“the respondent”) abused its authority in appointing Dana Piilo (“the appointee”) to a PM-02 Estates and Governance Officer position on an acting basis through a non-advertised process. The appointee had already been appointed twice to act in the position through an advertised process, for a total period of one year immediately prior to this appointment. Both complainants had been found qualified under the advertised process; they submit that they were unfairly denied the opportunity to act in the position. Ultimately, it was staffed on an indeterminate basis, and Ms. Martin was appointed.

[2] The respondent denies that there was any abuse of authority.

[3] The Public Service Commission (PSC) made written submissions on the legal aspects of this case but did not argue the merits.

[4] The complainants each filed a complaint related to the same appointment process with the Public Service Labour Relations and Employment Board (“the Board”) on February 13, 2015. The files were joined for the purposes of the hearing, and this decision applies to both files, numbers EMP-2015-9597 and EMP-2015-9598.

[5] For the reasons that follow, I find that the complaints are not substantiated.

II. Background

[6] The parties filed an agreed statement of facts, reproduced in this paragraph. References to the accompanying supporting documentation have been omitted.

1. *Ms. Dana Piilo was originally appointed in an acting capacity to the PM-02 Estate and Governance Officer Position via an Expression of Interest under process 13-IAN-IA-AO-ON-GIAGR-139439 for the period of January 29, 2014 to July 29, 2014.*
2. *An acting extension was provided to Ms. Dana Piilo in the same PM-02 position via process IAN-IA-AO-ON-GIAGR-153033 from July 30, 2014 to January 28, 2015.*
3. *The complainants, Ms. Martin and Ms. Williams, did not file a complaint against the acting appointment of Ms. Piilo under process numbers 13-IAN-IA-AO-ON-*

GIAGR-139439 and 13-IAN-IA-AO-ON-GIAGR-153033. The initial acting and subsequent acting appointment were as a result of the same process via the Expression of Interest not advertised on Publiservice. The two staffing processes numbers are different because a new job opening request had to be created.

- 4. On February 12, 2015, an Information Regarding Acting Appointment (IRRA) for staffing process 15-IAN-INA-CB-ON-GIAGR-158162 was posted on Publiservice for the PM-02 acting appointment of Ms. Dana Piilo (the appointee) in the position of Estates and Governance Officer in Brantford, Ontario.*
- 5. The appointee was the only candidate considered for this non-advertised acting appointment from January 29, 2015 to March 31, 2015. The following documentation supports the nomination: 1) Statement of Merit Criteria; 2) Signed Statement of Persons Present at Selection Board; 3) the appointee's resume; 4) Justification for Acting Appointment (over 12 months); and 5) Justification of a Non-Advertised Process.*
- 6. Ms. Martin and Ms. Williams each filed a complaint on February 13, 2015, against the 2 months acting appointment of Ms. Dana Piilo under the non-advertised process 15-IAN-INA-CB-ON-GIAGR-158162 for the period of January 29, 2015 to March 31, 2015.*
- 7. The position remained vacant while an internal advertised process # 15-IAN-IA-AO-ON-GIAGR-159715 was launched in March 2015. However, for operational reasons and pending completion of the process another acting appointment of less than 4 months (not subject to recourse) was provided to Dana Piilo from November 12, 2015 to February 20, 2016.*
- 8. On February 23, 2016, a Notification of Appointment or Proposal of Appointment was posted on Publiservice for the promotional appointment of Ms. Whitney Martin, one of the complainants, to the position of Junior Program Officer (PM-02) in Brantford.*
- 9. When the PM generic job descriptions were introduced at INAC the Estate and Governance Officer position became Junior Program Officer, therefore, Ms. Martin occupies the same position that was held by the appointee.*

[7] As the facts were uncontested, the parties consented to a paper hearing.

III. Submissions of the parties

A. Complainants' submissions

[8] The *Information Regarding Acting Appointment* (the "IRAA") published on Publiservice (at the time, the federal government's internal staffing website) indicated that the job was located in Brantford, Ontario. Yet, the appointee was in Thunder Bay, Ontario, whereas both complainants work in the Brantford office.

[9] A pool of qualified candidates was established in the initial process that the respondent advertised by seeking expressions of interest from interested candidates. The complainants allege that they were both admitted into this pool. They were advised that it would expire on December 12, 2014. Yet, the acting appointment at issue occurred after that date. The complainants contend that it is unfair that the pool expired for other qualified candidates but apparently not for the appointee.

[10] The complainants argue that although they were fully qualified, they were never offered an acting opportunity. It seems to them that only the appointee benefitted from being part of the qualified pool. They believe this was an abuse of authority on the part of the respondent.

[11] Therefore, the complainants seek greater transparency in future staffing processes, and equal opportunities. By not being given the opportunity to act in the position, they feel that they were not treated equally. As they stated in their submissions: "We feel a number of things may have factored into this, such as our age and the fact that we are both Aboriginal women."

B. Respondent's submissions

[12] The respondent framed the issue as follows: did it abuse its authority by proceeding via a non-advertised process to extend Ms. Piilo's acting appointment for the period from January 29, 2015, to March 31, 2015?

[13] As a preliminary matter, the respondent requested that the complaints be dismissed for mootness, as one of the complainants has been appointed on an indeterminate basis to the position at issue.

[14] Should the complaints not be dismissed for mootness, the respondent submitted the following arguments.

[15] The respondent maintained that the complainants had not substantiated their allegations and therefore had not met the burden of proof.

[16] The threshold to find abuse of authority is very high and according to the respondent was not met in this case. Abuse of authority must be more than mere errors, omissions, or improper conduct. Serious carelessness or recklessness must be found to make a finding of abuse of authority.

[17] The complainants allege that the use of a non-advertised process was an abuse of authority. Yet, as confirmed by the case law (see *Robbins v. Deputy Head of Service Canada*, 2006 PSST 17), choosing a non-advertised process cannot in itself be considered an abuse of authority, since the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; (*PSEA*)) specifically provides for such a possibility, at s. 33.

[18] The respondent submits that in this case, the non-advertised acting appointment was fully documented to meet all requirements. The appointee met the merit criteria, and the delegated manager signed justifications for both the acting appointment and using a non-advertised process. The IRAA was published on Publiservice to allow proper recourse.

[19] The appointee was fully qualified. Considering only one qualified candidate for a position is not a contravention of the *PSEA* (see *Clout v. Deputy Minister of Public Safety and Emergency Preparedness*, 2008 PSST 22). The appointee was in the area of selection. There is no recourse in the *PSEA* against a decision by management to allow an employee to work from a remote location.

[20] The respondent also maintains that the complainants could not complain of the multiple acting opportunities offered to the same appointee, as any corrective action ordered by the Board can address only the complaint with which it is seized.

[21] The respondent objected to some of the complainants' submissions, which were not part of the original allegations, namely that the appointee was favoured, that the hiring manager was also on the selection committee, and that discrimination based on age and ethnic or racial origin was a factor. The respondent argues that adding to or modifying the allegations requires the Board's permission.

[22] In regard to the remedies requested by the complainants, the respondent stated that none of them is within the Board's jurisdiction as established under ss. 81 and 82 of the *PSEA*.

C. The PSC's submissions

[23] The PSC did not take a position on the merits of the case but provided submissions on its policies, such as its *Assessment Policy* and its *Selection and Appointment Policy*. They provide guidance to delegated managers so that staffing processes are carried out in light of the *PSEA*'s core values of merit, fairness, and transparency.

IV. Analysis

[24] The relevant provisions of the *PSEA* for the purpose of these complaints are the following:

...

77 (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Board's regulations — make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of

(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);

(b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process

...

30 (1) Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.

(2) An appointment is made on the basis of merit when

(a) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency

...

(4) *The Commission is not required to consider more than one person in order for an appointment to be made on the basis of merit.*

...

33 *In making an appointment, the Commission may use an advertised or non-advertised appointment process.*

...

[25] Also relevant for acting appointments is the following provision of the *Public Service Employment Regulations*, SOR/2005-334 (PSER):

14 (1) *An acting appointment of less than four months, provided it does not extend the cumulative period of the acting appointment of a person in a position to four months or more, is excluded from the application of sections 30 and 77 of the Act.*

[26] The complainants submit that they were denied the acting opportunity that was given repeatedly to the appointee, despite the fact that they were qualified. However, the complaint that they filed deals only with the two-month acting appointment that extended the cumulative period of the appointee's acting appointment. The issue can thus be stated as follows: whether the respondent abused its authority by appointing Ms. Piilo in an acting capacity to the PM-02 Estates and Governance Officer position in the Brantford office for the two-month period that constituted an extension to the previous full year of the acting appointment.

[27] Section 77(1) of the *PSEA* states that a person in the area of recourse may make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of an abuse of authority. The *PSEA* does not define abuse of authority, other than indicating in s. 2(4) that it "shall be construed as including bad faith and personal favouritism". As the Federal Court stated in *Canada (Attorney General) v. Lahlali*, 2012 FC 601, at para 34:

Parliament chose to leave it to the Tribunal to interpret this ground of complaint so as to take into account the circumstances of each specific case before it.

[28] As indicated in *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, at para 66, ". . . abuse of authority requires wrongdoing. Accordingly, abuse of authority will always include improper conduct, but the degree to which the conduct is improper

may determine whether or not it constitutes abuse of authority". The complainant bears the burden of proving, on a balance of probabilities, that there has been wrongdoing, that is, that there was improper conduct of such a degree that it amounts to abuse of authority. The Tribunal and the Board have consistently said that mere errors or omissions are not sufficient to conclude that there was an abuse of authority.

A. Respondent's mootness argument

[29] The respondent argues that since one of the complainants has been appointed on an indeterminate basis to the position at issue, the matter is now moot, and cites the following two Tribunal decisions.

[30] In *Dubord v. Commissioner of the Correctional Service of Canada*, 2013 PSST 10, the complainant applied to an advertised internal appointment process. He was initially screened out, but after he filed a complaint with the Tribunal, he was reassessed and finally obtained the position he had applied for.

[31] Similarly, in *Obioha v. Deputy Minister of Employment and Social Development*, 2016 PSLREB 13, the complainant filed a complaint against two acting appointments for a position she was interested in. After her complaint was filed, she was offered an acting opportunity for the same position, and by the time the hearing was scheduled, she was occupying the position on an indeterminate basis.

[32] In both cases, the situation was remedied before the case proceeded. In the first case, the application was reassessed, with the result that the complainant obtained the position. In the second case, the acting opportunity was offered to the complainant, and it ended with a promotion into the position.

[33] This case involves two complainants. One was appointed to the position on an indeterminate basis, but the other received no acting opportunity or indeterminate appointment. Moreover, the gist of the complaints is the missed opportunity because the complainants were not offered the acting appointment. Although Ms. Martin was ultimately appointed to the position on an indeterminate basis, that does not change the fact that she considers that she was unfairly denied the acting appointment. I find therefore that the complaints were not resolved as in the two cases cited and that the complaints cannot be dismissed on the basis of mootness.

B. New allegations

[34] The complainants brought up additional allegations in their submissions that were not in their original allegations, which are that favouritism and discrimination were factors in denying them an acting opportunity. The original allegations simply stated that it was unfair to be denied an acting opportunity when the complainants worked out of the Brantford office (where the position was located) while the appointee worked out of the Thunder Bay office, and when the complainants were fully qualified and thus should have been offered the acting opportunity.

[35] I agree with the respondent that additional allegations cannot be added at the written submissions stage. The matter is covered by s. 23 of the *Public Service Staffing Complaints Regulations*, SOR/2006-6, which provides that the Board will allow allegations to be amended provided a request is made and provided either new information has been obtained or it is in the interest of fairness to amend them. In the present case, procedural fairness dictates that these allegations cannot be considered. The complainants did not request to amend their allegations. The parties agreed that the decision would be made on the factual basis of the agreed statement of facts. No further evidence was to be received.

C. Abuse of authority

[36] Section 33 of the *PSEA* provides that the delegated manager can conduct a non-advertised appointment process. Subsection 30(4) further provides that it is not necessary to consider more than one person for a position, provided that the person meets the essential qualifications. The appointee's qualifications are not in dispute. On its face, then, the acting appointment process is not an abuse of authority. The complainants argue the unfairness of the situation — the fact that they were in the Brantford office and were never offered the acting opportunity, while at the time the complaints were filed, the appointee had held the position on an acting basis for a total of 12 months (two consecutive six-month appointments, from January 29, 2014, to January 28, 2015), the object of the complaint being the additional and consecutive acting appointment, from January 29, 2015, to March 31, 2015.

[37] The respondent is right to state that only the challenged two-month acting

appointment is at issue. The complainants did not file a complaint against the earlier acting appointments. However, a single two-month period could not be the subject of a complaint, as the *PSEER* provides an exclusion to complaints for periods of four months less a day (at s. 14). A complaint may be filed about a two-month acting appointment if the cumulative period of acting appointments is over four months.

[38] The respondent indicated in its justification of the third acting appointment that it considered continuity in the position an important factor for clients. This kind of managerial decision is not reviewable by this Board. The case law in this regard is very clear.

[39] In *Clout*, the complainant argued that there was an abuse of authority in appointing someone in a non-advertised process when other employees were equally qualified for the position. The Tribunal stated that the legislation clearly allowed choosing a non-advertised process and considering a single candidate. Without more, this was not sufficient to find an abuse of authority. In that case, the justification for the appointment was sufficient to counter the allegations of abuse of authority. The appointee met the essential qualifications, and there was no evidence of personal favouritism.

[40] In *Morris v. Commissioner of Correctional Service of Canada*, 2009 PSST 9, the complainant alleged that a non-advertised appointment process for a six-month acting position lacked transparency and was marked by favouritism. The Tribunal found no evidence of personal favouritism, and although notification had been delayed by four months, found that this mistake did not amount to an abuse of authority. There was sufficient justification for the selection of the appointee and no question about her qualifications for the position.

[41] In *Robert*, the Tribunal did conclude that there had been such carelessness on the part of the delegated manager that it amounted to an abuse of authority. In that case, a two-month acting appointment was extended three consecutive times, for a total of six months. Notification was published after the acting appointment was ended and more importantly, the appointee did not meet one of the essential qualifications.

[42] In this case, the respondent followed the requirements for a non-advertised process. It published the notification and provided a rational justification, and the appointee met the essential qualifications. In its justification for the two-month

additional appointment that gave rise to these complaints, the respondent explains that it was awarded to the appointee to ensure continuity for clients of the Estates Office, following the two prior appointments. Moreover, as of December 2014, the Matrimonial Real Property legislation had changed, and the appointee appears to have been the only person who had received training in the new legislation at that point. Finally, the respondent states that the extension was necessary while an ongoing appointment process was underway to staff the position indeterminately.

[43] Given that one of the complainants was finally appointed to the position on an indeterminate basis as a result of the appointment process that was underway, it is difficult to assail the respondent's good faith. I can understand why the complainants would perceive the situation as denying them an opportunity they felt entitled to, since they were in the Brantford office and had the necessary qualifications. However, they did not raise personal favouritism or discrimination in their original allegations, nor did they seek to amend them. I am left with managerial decisions that are within the authority of the delegated manager — to choose someone qualified on a non-advertised basis with a suitable justification of continuity of operations and knowledge of the new legislation.

[44] I find therefore that the complaints are not substantiated.

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

(The Order appears on the next page)

VI. Order

[46] The complaints are dismissed.

September 30, 2016.

**Marie-Claire Perrault,
a panel of the Public Service Labour
Relations and Employment Board**