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*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

JOHN SETO

Complainant

and

DEPUTY MINISTER OF TRANSPORT, INFRASTRUCTURE AND COMMUNITIES

Respondent

Indexed as

Seto v. Deputy Minister of Transport, Infrastructure and Communities

In the matter of complaints of abuse of authority pursuant to paragraph 77(1)(a) of the
Public Service Employment Act

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

For the Complainant: Larry Teslyk

For the Respondent: Richard Fader, counsel

For the Public Service Commission: Claude Zaor

Heard at Toronto, Ontario,
November 17 and 18, 2016.

REASONS FOR DECISION

I. Introduction

[1] The complainant, John Seto, was an unsuccessful candidate in the internal advertised process 14-MOT-IA-HRS-81307 for an indeterminate appointment to an operational program planning and quality assurance analyst position at the AS-03 group and level in the Department of Transport based in Toronto, Ontario.

[2] The complainant alleged that the Deputy Minister of Transport, Infrastructure and Communities (“the respondent”) erred when assessing his interview questions, which caused him to be given a failing grade on one of the mandatory qualification questions, thus eliminating him from the appointment process. The respondent denied the allegation and maintained that the assessment board acted appropriately.

[3] The Public Service Commission did not attend the hearing. It made written submissions that discuss the regulatory and policy framework that underpins appointment processes in the federal public service. It took no position on the merits of the complaints.

[4] For the reasons that follow, I find that the complainant has not established that the respondent abused its authority; therefore, I dismiss the complaints.

II. Background

[5] The complainant has 10 years of service with Transport Canada, and before that, he worked with the Immigration and Refugee Board of Canada. He applied to the AS-03 appointment process, which was open to employees of the Civil Aviation Directorate of Transport Canada within the geographic area of selection and was screened in.

[6] The complainant was eliminated from the appointment process following the interview for failing to meet the essential qualification of values and ethics.

[7] On March 24, 2015, he filed two complaints of abuse of authority with the Public Service Labour Relations and Employment Board (“the Board”) pursuant to section 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c.22, ss. 12 and 13 (“the Act”). The complaints were consolidated in April 2015.

III. Request for Sealing Order

[8] The respondent requested that the standardized interview questions, expected answers, scoring criteria and matrix be sealed. The complainant opposed this request but gave no reasons. I ordered that the documents be sealed since they contain confidential materials developed by the respondent for use across their national operations for assessment of candidates seeking appointment to positions. Disclosure of these documents would add little to the understanding of the complaint in this case, but would cause significant prejudice to the respondent's human resources operations as future appointment processes would most likely be biased due to candidates being able to access questions and expected answers in advance of their assessment. The respondent would then be required to develop new assessment tools at some considerable time and expense.

IV. Issues

[9] The complainant made the following five allegations, which arose from his assessment in the appointment process:

- 1) Did the respondent use incorrect information to give the complainant a failing grade on question 3?
- 2) Did the respondent penalize the complainant for his choice of example in question 3?
- 3) Did the respondent fail to consider one of the complainant's responses in full?
- 4) Did the respondent improperly compare the complainant's response to one question with another candidate's response?
- 5) Did the respondent inconsistently assess the complainant?

V. Analysis

[10] 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 stating that he or she was not appointed or proposed for appointment because of an abuse of authority.

[11] “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.” It also includes improper conduct and omissions, depending on their nature and severity; see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at para. 66.

A. Did the respondent commit errors or omissions that amount to an abuse of authority?

[12] The complainant was screened in and was invited to participate in an interview. He received a failing grade on question 3, entitled “Values and Ethics”. The respondent did not conduct any further assessment or reference checks. The complainant alleged that five different errors were made in assessing his qualifications. The grounds for the five allegations arose from the informal meeting he requested, which was held with management representatives of the respondent.

[13] The respondent submitted that only the failing grade given to the complainant’s answer to the third question should be examined as that effectively halted assessing him, which therefore renders the other questions and assessments irrelevant. The respondent explained that the assessment of the values and ethics question was only assessed by means of an interview. The other qualifications referred to by the complainant were assessed by means of interview and reference checks. However, when it was determined that the complainant failed the values and ethics questions, reference checks were not sought for the other qualifications, which left those qualifications partially assessed.

[14] While the complainant did not argue it in so many words, I infer from his submissions that he sees the series of alleged errors or omissions as evidence of an abuse of authority. I chose to hear the evidence on all five allegations, to make an informed judgement on them as a whole.

Issue 1: Did the respondent use incorrect information to give the complainant a failing grade on question 3?

[15] This question addressed values and ethics and asked the candidates to describe a conflict that occurred between a colleague’s actions and the candidate’s values and ethics or those of the Department.

[16] The complainant testified that he described an incident at a public restaurant, where a co-worker spoke ill of their employer. He described how he cautioned the co-worker to be careful with what was said in public and on social media. He did not testify as to exactly what the co-worker said, but when I asked him to clarify his evidence, he admitted that the co-worker made a negative statement about their department.

[17] This was also confirmed by the handwritten assessment notes of Robbi Jordan, who was on the assessment board. She is the acting manager of analysis and occurrence, planning and reporting, for the Civil Aviation Directorate. I find her notes consistent with the complainant's testimony as he described his recollection of his answer to this question.

[18] The complainant testified that during the informal discussion, Ms. Jordan stated that he had "bad-mouthed" his employer. He further pointed out that in her written assessment, she wrote, "No problem with negative talk, just about being overheard".

[19] Ms. Jordan was adamant in her testimony that neither she nor the other two panel members ever said or were of the opinion that the complainant had ever spoken negatively of his department. She repeated her vigorous assertion again in cross-examination.

[20] When describing the assessment of the complainant on question 3, Ms. Jordan noted that he was in fact given 6 out of a possible 10. Due to the importance of values and ethics and in light of the relatively senior level of the position, a passing grade of 7 out 10 was established in advance. She further described that the complainant's response was fine but that he could have also discussed in more detail concerns with the co-worker and not just voicing negative beliefs in public.

[21] Given that question 3 asks candidates to describe the actions of a colleague, I find it more probable than not that, in fact, the complainant did describe a negative comment of a co-worker and not of himself. As such, I prefer Ms. Jordan's evidence, which clearly establishes that the panel did not misunderstand the complainant's answer and did not erroneously ascribe to him comments reflecting badly upon the employer.

[22] I expect that if, as the complainant argued, the assessment board had misunderstood him and had erroneously ascribed negative comments about the department to him, he would not have received such a generous grade of 6 out of 10.

[23] As I find that the evidence before me at the hearing clearly established that there was no misunderstanding, I find that the complainant has not established that the respondent abused its authority in the assessment of this question. As such, the first allegation is not founded in fact.

Issue 2: Did the respondent penalize the complainant for his choice of example in question 3?

[24] The complainant testified that during the informal discussion, one of the assessment board members (who was not called to give evidence at the hearing) stated that the complainant had not demonstrated any personal values.

[25] Without the person alleged to have made this comment testifying, I could not explore its accuracy or context any further. The complainant also noted that the handwritten assessment notes from one of the assessors stated that he did not mention discussing the issue with a supervisor.

[26] The complainant stated that the exam question did not require him to have discussed the issue with management and that he was unfairly penalized for not having done so.

[27] Ms. Jordan was asked about the assessment board's views on the complainant's reply to question 3. She explained that the department saw the position being filled as senior and as potentially requiring a security clearance for handling secret information. Given those heightened responsibilities, she indicated the panel expected a somewhat heightened level of values and ethics to be demonstrated in the complainant's interview.

[28] When asked to describe how the complainant's answer was assessed, Ms. Jordan stated that the panel did not find that his reply met the required threshold. She stated it was too short and was not fully developed. It was found to be less about the department's values and ethics and more about his concern that a co-worker not be overheard in public using the department's name. She further explained that his answer could have included some mention of personal or departmental values and that

it could have referred to the potential risk to client relationships.

[29] Consistent with my findings about the first allegation, I do not have evidence before me, with respect to the second allegation, to find that the respondent penalized the complainant in any way for choosing that particular example to respond to question 3 or the elements of his response. His allegation, which is that he was told he did not demonstrate personal values or ethics and did not raise the matter with management, contains examples of what more he could have added to his reply to obtain a better grade.

Issues 3 to 5: Did the respondent fail to consider one of the complainant's responses in full; did it improperly compare his response to one question with another candidate's response; and did it inconsistently assess him?

[30] The remaining three allegations all relate to questions other than question 3, which was the one part of the interview the complainant failed when he was assessed for essential qualifications.

[31] The respondent objected to me hearing these three allegations and argued that only question 3 was relevant given that it was the sole question that caused the complainant to be eliminated from the appointment process.

[32] Ms. Jordan stated that the review of the complainant's interview answers ceased once he failed to receive a passing grade on question 3. She further testified that in an effort to help him with potential future appointment processes, the panel agreed to an informal discussion at which all his interview responses were discussed.

[33] Ms. Jordan testified on this same point and explained that the examples of other answers were in no way used to decide the complainant's grades but rather were used in an attempt to help him understand how he might be able to more fully answer questions in a future appointment process. I accept her evidence on this point as it was logically consistent for the respondent to wish to use concrete examples of responses to help the complainant learn from his experience.

[34] Based on the complainant's testimony and the documents from the assessment board, he alleged that he should have received a grade of better than 5 out of 10 for question 5, which dealt with engagement and asked about a difficult situation experienced while working with a group. He testified that during the informal

discussion, he was told that he had “failed” other questions in addition to question 3. Ms. Jordan’s testimony and the documentary evidence suggest otherwise.

[35] The complainant stated that he was told that he did not provide an outcome for the example he used to answer question 5. My examination of the assessment board’s notes appears consistent enough with the complainant’s testimony for me to conclude that no error or omission occurred on this point.

[36] The complainant also alleged that an error or omission occurred in the scoring of his answer to question 1 for which he received 6 out of 10 for his reply. The question asked him to provide an example from his past in which he was required to go beyond the call of duty to help a client. He testified about, and the assessment documents accurately depict it, helping an elderly patron of an Eaton’s cafeteria at which he used to work as she could not reach her lunch. The complainant described how he walked around the serving counter to move the elderly person’s lunch closer to her.

[37] The complainant stated he should have received a grade of more than 6 out of 10 for this response. The assessment board’s notes state that he gave “too simplistic” a response. He freely chose to use the cafeteria example to answer question 1 but testified that in his informal discussion, he asked the respondent to consider his answer for question 6 as also answering question 1. He was told that doing so was not possible.

[38] The complainant sought to enter into evidence the assessment notes and scores of the two people who were successfully appointed through this same process. I declined to accept this documentary evidence based upon my view of it not being relevant. The complainant testified that in his informal meeting, the panel used as examples some details of the other participants’ answers.

[39] And finally, the complainant alleged that an error or omission occurred with the assessment of his reply to question 2, which asked for an example of when a heavy workload and multiple priorities required that the work be reorganized to ensure that tasks were completed.

[40] The complainant relied upon a Treasury Board guideline that states that managers are responsible for the workload in their units and for negotiating deadlines.

He explained that his reply to the panel effectively detailed that he took work projects and deadlines to his manager for direction on priority.

[41] As I previously stated, given the relatively senior level of the position, I accept the assessment board's explanation, as stated by Ms. Jordan, which was that more was expected from the complainant's answers.

[42] The complainant did not cite the *Act*; nor did he rely upon any cases to support his allegations of errors and omissions.

[43] In *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11, the former Tribunal found that assessments of candidates under section 36 of the *PSEA* can be done in several stages (see also *King v. Deputy Head of Service Canada*, 2008 PSST 6):

[88] The respondent may conduct an assessment in several stages. Requiring successful completion of a particular step in the assessment process does not necessarily imply abuse of authority. In the present case, there is nothing improper about this approach.

[44] In the case at hand, the respondent chose to assess the candidates in stages which required a passing mark of the interview questions before moving to the next step, which was the verification of the references. This approach is not, in and of itself, an abuse of authority. Given that the complainant did not pass question 3, the respondent did not continue with the assessment of the other qualifications rendering them partially assessed. No evidence was provided by the complainant to prove that there was any abuse of authority in how this approach was used.

[45] In its reply to the allegations, the respondent cited *Portree v. Deputy Head of Service Canada*, 2006 PSST 0014, as authority for the proposition that an abuse of authority allegation must demonstrate more than a mere error or omission. The allegation on its own or disagreeing with the result of an appointment process does not constitute evidence of wrongdoing.

[46] The complainant wished that I would reconsider the grades assigned in his interview assessment. It is clearly established that my role is not to reconsider assessment grades. The Federal Court of Canada in *Lavigne v. Canada* (Justice), 2009 FC 684, upheld the former Public Service Staffing Tribunal's decision in *Lavigne*

v. *Deputy Minister of Justice*, 2008 PSST 13, and stated that it was not for the Tribunal to substitute its assessment of candidates' qualifications for that of an assessment board.

VI. Conclusion

[47] Based on the evidence before me, I find that the complainant did not establish that the respondent made any errors or omissions that would support a finding that the respondent abused its authority in its assessment of his interview. Consequently, there has been no abuse of authority.

[48] In this case, the respondent engaged in good faith with the complainant in an informal meeting to answer questions and give detailed feedback in an effort to help him better perform in future interviews.

[49] I can most generously describe the complainant's allegations as misunderstandings that arose from his informal discussion.

[50] For all of the above reasons, I make the following order.

(The Order appears on the next page)

VII. Order

[51] The complaints are dismissed.

February 6, 2017.

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