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



Before a panel of the
Federal Public Sector
Labour Relations and
Employment Board

BETWEEN

JAMIE HILL

Complainant

and

DEPUTY MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES

Respondent

and

OTHER PARTIES

Indexed as

Hill v. Deputy Minister of Public Works and Government Services

In the matter of a complaint of abuse of authority - paragraph 77(1)(a) of the *Public Service Employment Act*

Before: Nathalie Daigle, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Louis Bisson, counsel

For the Respondent: Jenna-Dawn Shervill, counsel

For the Public Service Commission: Claude Zaor, senior analyst

Heard at Ottawa, Ontario,
February 15 and 16, 2017.

REASONS FOR DECISION

I. Introduction

[1] Jamie Hill, the complainant, filed a complaint of abuse of authority concerning the appointment of Dianne Pineau to the position of team lead, classified AS-04 (“the AS-04 position”), with the Department of Public Works and Government Services (PWGS) in Miramichi, New Brunswick.

[2] The complainant alleges that the Deputy Minister of PWGS (“the respondent”) abused its authority in the assessment of the essential merit criteria in the appointment process at issue, particularly at the reference check stage. The complainant originally alleged as well that his supervisor’s reference was discriminatory but withdrew it at the hearing.

[3] The respondent denies that an abuse of authority occurred. It states that the appointee was fully assessed and found to meet the qualifications of the AS-04 position. The respondent also states that the complainant was properly assessed.

[4] The Public Service Commission did not appear at the hearing but presented a written submission in which it discussed its relevant policies and guidelines. It took no position on the merits of the complaint.

[5] For the reasons that follow, the complaint is allowed. The complainant established that the respondent abused its authority in the appointment process at issue.

II. Background

[6] On October 2, 2014, the respondent launched an advertised internal appointment process to staff a team leader position and to create a pool of partially assessed candidates to staff future identical or similar positions in Miramichi.

[7] The assessment tools used in the appointment process included a written test, an interview, and a reference check.

[8] The complainant’s application was screened through a written test and interview; however, his candidacy was eliminated from the appointment process at the reference check stage as he was found not qualified on two essential qualifications, namely, adaptability and dependability.

[9] On March 17, 2015, the “Notification of Appointment or Proposal of Appointment” for Ms. Pineau was posted on the public service jobs website. On March 31, 2015, the complainant filed a complaint of abuse of authority with the Public Service Labour Relations and Employment Board under s. 77 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; PSEA).

[10] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board to the Federal Public Sector Labour Relations and Employment Board (“the Board”).

III. Issue

[11] I must determine the following issue:

- Did the respondent abuse its authority in the assessment of the essential merit criteria, particularly at the reference check stage of the process?

IV. Relevant facts

[12] The complainant testified at the hearing on his behalf.

[13] The respondent called Bernadette Mande, Human Resources (HR) assistant, and Etienne Petit, HR advisor, to testify. Mr. Petit was a project advisor at the time of the selection process, helping PWGS managers staff positions in Miramichi. The screening board and assessment board for this selection process consisted of Mr. Petit and Danielle Monette-Latouche, who was his supervisor.

[14] In October 2014, when the appointment process was launched, the complainant was a compensation advisor trainee, classified AS-01, at PWGS in Miramichi. In March of 2015, he was promoted to a compensation advisor position, classified AS-02. He relocated to Ottawa, Ontario, in September 2016 and is now an audit analyst there, classified AS-03.

[15] The complainant explained that he has a disability; he cannot drive because of a medical condition. The respondent’s operations in Miramichi are situated in two separate buildings. The complainant made accommodation requests in 2014 to his

supervisor, Nate Cline, manager, pay operations (acting), including a request for extra time to travel between the buildings to accomplish his work. As he could not drive from one building to another, he had to walk, which took him approximately 40 minutes, instead of the 5 minutes it would have taken by driving. He added that there was no public transit, so he always had to walk between the two buildings.

[16] He testified that in general, Mr. Cline was not receptive to his accommodation requests. Between April and October 2014, he ended up filing three grievances against Mr. Cline related to different matters. The complainant filed another grievance in 2015.

[17] The complainant submitted his candidacy for the AS-04 position in October 2014. On November 6, 2014, he was asked to send the names and contact information of two references (current and previous managers who had supervised him for a minimum of six months) by November 12, 2014. On November 11, 2014, he provided the names of Mr. Cline and Lorilee Carrier. At the time, Mr. Cline was the only person at PWGS who had supervised the complainant for the minimum period of six months. Ms. Carrier was from outside the public service. The complainant was in a development program at that time and was new to the public service.

[18] On November 20, 2015, Mr. Cline provided his reference for the complainant. The reference included many positive comments. However, the first part of his reference, under the heading “Dependability”, read as follows: “I’ve observed that he will at times demonstrate great dependability with respect to being present (usually early, willing to stay late) and then go through some waves where liberties are taken with leave and breaks/meetings without preapproval.” The second part of his reference, under the same heading, read as follows:

In recent months I have had challenges from the employee to follow through, keep commitments and to have him manage his work to meet imposed workload deadlines. At certain times, due to the employee not following through, management have [sic] been forced to take control of workload-cases to have them redistributed.

[19] In the third part of his reference, under the same heading, Mr. Cline wrote that had he given the reference earlier in the year, it would have been positive. However, he wrote the following: “With the varying issues and occurrences since, it would be difficult for me as a supervisor to recommend re-hiring.”

[20] Part of Mr. Cline's reference, under the heading "Adaptability", read as follows:

The Pay Centre is an ever changing environment (in project mode) as it evolves towards a more stable, end-state organisation in the future. From what I have noticed, the employee seems to be challenged when face [sic] with sudden changes and seems to be more comfortable working in a stable environment with limited changes, where he can control different aspects of his work, such as a lower number of cases assigned to his personal workload.

...

[21] The reference provided by Ms. Carrier, dated November 19 2014, was, overall, positive.

[22] In addressing Mr. Cline's reference under "Dependability", the complainant explained at the hearing that the comment stating "... some waves where liberties are taken with leave and breaks/meetings ..." and the one about him not keeping commitments and not meeting imposed workload deadlines refers to the fact that at one point, he had to leave because of a medical emergency. He had left the office urgently and had not sought permission to leave, given the urgency of the situation. In addition, he explained that often, on short notice, he had to walk to the other office building, and he required time to walk there given that there is no public transit. He could not drive there because of his medical condition.

[23] As for Mr. Cline's other comment, under the heading "Dependability", which was that it would be difficult for him as a supervisor to recommend rehiring the complainant, the complainant testified that in the six-to-nine months before Mr. Cline gave this reference, their relationship deteriorated. Mr. Cline's attitude changed toward him because he made accommodation requests. Following them, the complainant filed grievances against Mr. Cline alleging that he was not properly accommodated.

[24] With respect to Mr. Cline's reference under the heading "Adaptability", the complainant took issue with its implication that he did not perform his work well. In fact, the remarks relate to the form of accommodation he required due to his medical condition. He explained that the words used by Mr. Cline were very similar to those in his medical accommodation request and in the medical information that he provided in support of his request.

[25] On December 11, 2014, in response to an email that the complainant had sent him, Mr. Cline informed the complainant that if he had to give him a reference in the future, he would take into account the events that had transpired during the year, including the issues with leave.

[26] The complainant was successful in the written test and was invited for an interview on February 17, 2015. He testified that his interview went well.

[27] On February 18, 2015, Mr. Petit and Ms. Monette-Latouche marked the references they had obtained from the referees in November 2014.

[28] Three days after his interview, on February 20, 2015, at 8:10 a.m., the complainant sent an email (“the first email”) to the HR assistant in charge of the appointment process, Ms. Mande. The email read as follows: “Hi Bernadette could you please remind me what references i submitted with this application as it has been sometime ago and some people i normally use have moved on without forwarding info Thanks [sic throughout].” The complainant was at work, but he used his cell phone to send the email from his personal email account, since Ms. Mande had used that email address to communicate with him before.

[29] The same day, February 20, 2015, at 10:11 a.m., the complainant wrote her a second email (“the second email”). It read as follows: “Hi Bernadette could you please remind me what references i submitted with this application as it has been sometime ago and i don’t remember. I will likely need to change one if Nate Cline is listed. Thanks [sic throughout].” This email was also sent from the complainant’s personal email account, using his phone.

[30] The complainant explained that he sent the second email because he realized after sending the first email that he probably had given Mr. Cline’s name as a reference in the selection process in November 2014. However, on December 11, 2014, Mr. Cline had informed him that if he had to give the complainant a reference, he would take into account the events that had transpired during the year. By that time, the complainant had filed several grievances alleging that Mr. Cline had not accommodated his disabilities. Thus, the complainant sent the second email to Ms. Mande to advise her that he likely would need to change Mr. Cline as his reference if he had given Mr. Cline’s name.

[31] On February 23, 2015, Ms. Mande sent the following in response to the first email: “Hi Jamie, Regarding this process, we received your reference checks on time from your referees. Thank you.” Ms. Mande explained that when she read the first email, she understood it as meaning, “Have you received my references?” Thus, she responded that she had received them. She testified that she has no recollection of receiving the second email from the complainant.

[32] On March 5, 2015, the complainant was informed that the assessment board had reviewed his references and had found that he did not meet two essential qualifications, adaptability and dependability.

[33] On March 10, 2015, the complainant requested an informal discussion and asked why he never received an answer to his inquiry about the names he had provided as references. He also asked for a copy of the references provided.

[34] On March 12, 2015, the recruitment team informed the complainant that he had provided the names of Mr. Cline and Ms. Carrier as references. The complainant was invited to contact them to discuss their references. He was also told that should he wish an informal discussion, one could be arranged.

[35] Mr. Petit and the complainant held their informal discussion by phone on March 19, 2015. The complainant explained that he had wanted to change Mr. Cline as a reference but that he had never received a response to his inquiry about the names he had provided in November 2014. He referred to the second email he sent to Ms. Mande, to which he never received a response. He also explained that Mr. Cline had advised him in December 2014 that he would no longer give him positive references. The complainant also explained to Mr. Petit the unresolved issues between him and Mr. Cline and the tense relationship. He mentioned his accommodation requests and his grievances.

[36] After the informal discussion, Mr. Petit wrote a note confirming the complainant’s statement about the second email he sent to request that Mr. Cline be replaced as a reference due to a grievance the complainant had filed against him. According to the note, Mr. Petit asked the complainant to forward the email in question as well as the name of his alternate reference. Mr. Petit indicated that there was no guarantee that the alternate reference would be contacted; a decision would be made and communicated shortly after. The complainant forwarded to

Mr. Petit the email and his alternate reference later that day.

[37] Mr. Petit then asked Ms. Mande to search the archived emails, to find out if a response had been sent to the complainant's second email.

[38] Ms. Mande explained that at Mr. Petit's request, she searched the archived emails but could not locate the second email. She explained that she had received a large number of emails as part of the selection process, which had been automatically stored or archived in an allocated location on the network. She looked there for the email but could not find it. She said that it is possible that the email was sent but that she did not receive it in her inbox. She added that the email could not have been in a spam folder.

[39] The complainant testified that the two emails were sent to the same email address, Ms. Mande's.

[40] After thoroughly researching the archived emails, Ms. Mande advised Mr. Petit that she could not locate the second email. Mr. Petit then consulted Ms. Monette-Latouche about it. They discussed the possibility of considering the alternate reference provided by the complainant. However, they concluded that as Mr. Cline had provided both positive and negative feedback about the complainant, his reference was credible. In addition, in their view, the alternate reference provided by the complainant had not supervised him long enough, so accepting a reference from this person was not the best option. They therefore recommended to the Director of the Pay Centre, who was the manager delegated to appoint, that Mr. Cline's reference continue to be relied upon to assess the complainant on the two essential qualifications at issue.

[41] On March 25, 2015, the complainant emailed Mr. Petit the following: "Just wondering if there is any word on my request to change references."

[42] On March 30, 2015, Mr. Petit responded with the following:

...

Further to a review of the information provided and consultation with the assessment board members & the delegated manager, this is to confirm that the decision in regards to your status in process /2014-SVC-IA-ATL-20311 remains unchanged.

Therefore, you are eliminated from the selection process, as outlined in the e-mail you received on March 4th, 2015.

Should you wish to consider your options for recourse, I suggest that you read the Notice of Appointment or Proposed Appointment (NAPA) at the following link:

...

[43] At the hearing, Mr. Petit added that the selection board felt that an alternate reference was not needed as, in its view, Mr. Cline's reference was acceptable and adequate.

V. Analysis

A. Did the respondent abuse its authority in the assessment of the essential merit criteria, particularly at the reference check stage of the process?

[44] Subsection 77(1) of the *PSEA* provides 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 because of abuse of authority. Although the term "abuse of authority" is not defined in the *PSEA*, s. 2(4) states as follows: "For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism."

[45] A complainant bears the burden of proof in a complaint of abuse of authority. See *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at paras. 48 to 55.

[46] Section 36 of the *PSEA* grants discretionary power to delegated managers concerning the choice and use of assessment methods. However, it is not an absolute power. Consequently, the Board can conclude that there was abuse of authority if, for example, it is determined that there was a fundamental flaw in the assessment method. The discretionary power granted to the assessment board is not absolute either. In effect, the board must exercise it in accordance with the nature and purpose of the *PSEA*. See *Bowman v. Deputy Minister of Citizenship and Immigration Canada*, 2008 PSST 12 at paras. 121 to 123.

[47] The complainant explained that as his interview had gone well, he undertook after the interview, on February 20, 2015, to verify if he had given the name of Mr. Cline the previous November as his reference. He was not provided with a specific answer to his question but was advised that the recruitment team had

received his references on time from his referees.

[48] The complainant had participated in other selection processes before, and he was used to the reference checks being done after the interviews were completed. He thought that all processes in the public service were similar and that references would be obtained in this selection process as well after the interviews were completed. That is why he sent the second email. As he explained, it was his first attempt to change Mr. Cline as his reference.

[49] However, on March 5, 2015, the complainant was informed that the assessment board had thoroughly reviewed his references and had found that he did not meet two requirements for the AS-04 position, namely, adaptability and dependability.

[50] The complainant then contacted the assessment board, and as he explained, he made his second attempt to change Mr. Cline as his reference.

[51] After discussing the matter, the assessment board decided to retain Mr. Cline's reference because it viewed it as reliable. Thus, it refused to consider an alternate reference.

[52] The complainant submits that he did his best to communicate to the assessment board his apprehension that Mr. Cline's reference would not be reliable and to obtain permission to provide an alternate reference. However, the assessment board was not open to making adjustments to address his concerns. He submits that he was disadvantaged because, while being successful at the written test and interview steps of the process, he was screened out for having failed to meet two essential qualifications in the process, which were assessed during the reference check. In his view, Mr. Cline's comments on the essential qualifications were not fair and reliable. He submits that the assessment board's decision to refuse to allow him to substitute Mr. Cline's name with that of another supervisor amounted to an abuse of authority.

[53] The complainant clarified at the hearing that he was not taking the position that the assessment board discriminated against him based on his disability. However, in his view, Mr. Cline's reference included a number of discriminatory elements and he told Mr. Petit. For that reason, he believes that the assessment board should have considered other ways to assess his dependability and adaptability. I note that the

issue being addressed is not whether Mr. Cline's reference included discriminatory elements or was discriminatory in general, as that is not the subject of the complaint. Rather, the issue is whether the assessment board abused its authority in assessing the complainant, in particular at the reference check stage of the process.

[54] The respondent submits that if the complainant felt uncomfortable giving Mr. Cline's name as a reference, he should have stated it right at the beginning in November 2014. Instead, three months passed before he raised his concerns, in February 2015. In addition, the respondent argued that it never received the second email. It emphasized that Ms. Mande searched for it and found no trace of it. It submits that it is disingenuous for the complainant to claim that he sent it. Furthermore, if he really had sent it, he would have followed up on it.

[55] The respondent brought to my attention a number of cases, including *Jean-Pierre v. President of Canada Border Services Agency*, 2013 PSST 28, and *Saunders v. Deputy Minister of National Defence*, 2014 PSST 13. In *Jean-Pierre*, the former Public Service Staffing Tribunal ("the Tribunal") held that the respondent could conclude that the complainant's allegations of bias against the assessment board members were not convincing and that there was no reason to examine them in more depth. The respondent submits that in the present case, the complainant's allegation of unfairness against Mr. Cline was equally unconvincing and that there was no reason for the selection board to look into it any further.

[56] The respondent also highlighted that in *Saunders*, the Tribunal rejected the complainant's argument that the mere fact that she had presented grievances and complaints against "management" rendered his referees biased because they were part of management.

[57] The complainant filed the second email into evidence. I note that there is nothing patently amiss with it. It shows that it was sent to Ms. Mande's email address on February 20, 2015, at 10:11 a.m. and that it was forwarded to Mr. Petit's email address on March 19, 2015, at 1:45 p.m. While Ms. Mande could not find it in the respondent's archived emails, I am satisfied that the complainant sent it. It is possible that she simply deleted it after replying to his 8:10 a.m. email.

[58] I add that the complainant was a candid and credible witness at the hearing and that I completely disagree with the respondent's statement that it was "disingenuous" for him to claim that he sent the second email.

[59] I agree with the reasoning in *Saunders* that the mere fact that a candidate has presented grievances against "management" does not render his or her referees' references biased against him or her even if the referees are part of management.

[60] However, in *Saunders*, the Tribunal added that the evidence about the complainant's grievances and complaints did not indicate the existence of any poor relationships between the complainant and his referees. In addition, the grievances and complaints were not directed at his referees personally.

[61] But in the present case, according to the complainant's testimony, the grievances were directed against Mr. Cline, and the evidence supports a conclusion of a poor relationship between the two. In particular, the December 11, 2015, email from Mr. Cline to the complainant supports this conclusion. In that email, he informs the complainant that he will no longer give him positive references.

[62] In addition, while in *Jean-Pierre* the Tribunal found that the complainant's allegations of bias were not convincing and thus there was no reason to examine them in more depth, that is not so in this case. In my view, the complainant's allegation of unfairness against Mr. Cline merited further attention.

[63] Thus, the real question is the following: When a candidate communicates to an assessment board an apprehension that the reference provided by his or her direct supervisor, which is often mandatory, may be influenced by a tense relationship that exists between them, based on a series of events, should the assessment board agree to consider an alternate reference?

[64] I note that a similar issue arose in *Laviolette v. Commissioner of the Correctional Service of Canada*, 2015 PSLREB 6. In that case, I found that an assessment board has an obligation to consider any evidence that may call into question the reliability of the information provided by a referee. In *Laviolette*, I concluded that the assessment board should have taken reasonable steps to ensure that the reference provided was reliable.

[65] In the present appointment process, the candidates had no other choice than to provide the names of their current and previous managers. At the time the complainant provided his references, Mr. Cline had been his only direct supervisor in the public service for the required period of six months.

[66] However, after the complainant was interviewed, he realized that if he had given Mr. Cline as a reference, he should attempt to change that. He made some inquiries to find out whom exactly he had provided as references, but he did not receive any specific responses. Then, during the informal discussion, he communicated to Mr. Petit his apprehension that Mr. Cline's reference could be influenced by their tense relationship, which was in part the result of the accommodation requests he had made and the grievances he had filed.

[67] At the hearing, Mr. Petit acknowledged being told about the tense relationship, the accommodations requests, and the grievances, which is why he offered that the assessment board could look into it. However, in his view, and with the approval of the others involved, the conclusion was that the best thing to do was to retain Mr. Cline's reference.

[68] Mr. Petit testified that the assessment board made that conclusion given that it considered Mr. Cline's reference credible and reliable as he had provided both positive and negative feedback on the complainant. On that basis, it viewed him as a proper source of information. It did not see any advantage in consulting an alternate reference. In addition, the alternate reference provided by the complainant had not supervised him long enough in its opinion, so consulting this person was not the proper solution. It did not discuss alternative ways of receiving dependable information.

[69] While I find that the assessment board rightly considered the information provided to it during the informal discussion, which called into question the reliability of Mr. Cline's reference, I am not satisfied that the assessment board took sufficient steps to ensure that the reference was reliable. In my view, the complainant communicated valid concerns about the reliability of Mr. Cline's reference. In particular, he communicated the following to the assessment board during the informal discussion: (i) that he had sent a second email on February 20, 2015, which remained unanswered; and (ii) that he had a tense relationship with Mr. Cline,

which could have been caused by the complainant's accommodation requests and grievances.

[70] Informal discussions are intended to be a means of communication for candidates to discuss the reasons for their elimination from a process. The Tribunal explained the purpose of an informal discussion many times. For example, in *Rozka v. Deputy Minister of Citizenship and Immigration Canada*, 2007 PSST 46 at para. 76, it stated as follows:

76 Informal discussion is intended primarily to be a means of communication for a candidate to discuss the reasons for elimination from a process. If it is discovered an error has been made, for example, if the assessment board did not consider some information listed on a candidate's application, this provides the opportunity for the manager to correct that mistake. However, Informal [sic] discussion is not an opportunity to request that the assessment board reassess a candidate's qualifications.

[Emphasis added]

[71] In this case, given that the complainant had communicated valid concerns about the reliability of Mr. Cline's reference, I find that the assessment board had the obligation to ensure that the information it relied upon to screen him out of the selection process was valid. In my view, finding that a referee provided both positive and negative feedback about a candidate is not an assurance that the information provided is valid and reliable. It does not guarantee that the referee provided an accurate picture of a candidate's qualifications. One way to ensure that the assessment board has a complete and accurate picture is to consider other sources of information.

[72] Thus, the assessment board should have taken additional steps to ensure that the information provided was reliable. One way it could have done so would have been to agree to consider an alternate reference. At the hearing, Mr. Petit recognized that assessment boards have the discretion to consider information from other sources when there is a possibility that a reference provided may not be reliable. In this case, if the alternate reference provided by the complainant did not seem like a good source of information, because that person had not supervised the complainant long enough, the assessment board could have discussed the situation with the complainant and explored other ways of obtaining accurate and reliable information.

[73] In the circumstances, the complainant has established that the assessment board did not take reasonable steps to ensure that the Mr. Cline's reference was reliable. As a result, I find that the assessment board based its decision to eliminate the complainant from this selection process on incomplete and possibly inadequate information.

[74] For all these reasons, I conclude that an abuse of authority has been established in this complaint in the assessment of the merit criteria at the reference check stage of the process at issue.

VI. Corrective action

[75] According to s. 81(1) of the *PSEA*, if the Board finds a complaint substantiated, it can order the respondent to revoke the appointment and to take any corrective action that the Board considers appropriate.

[76] The Tribunal held that when a complaint is substantiated, it may order corrective action even if it does not order the appointment revoked (see *Chiasson v. Deputy Minister of Canadian Heritage*, 2008 PSST 27). In this case, there is no evidence that the appointee was not qualified for appointment to the AS-04 position.

[77] I find that revocation is not justified in this case and that it would be more appropriate that the complainant to be reassessed without relying on Mr. Cline for a reference in relation to the two essential qualifications for which he was eliminated (dependability and adaptability).

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

(The Order appears on the next page)

VII. Order

[79] The complaint is allowed.

[80] Within 90 days of this decision, the respondent shall, without relying on Mr. Cline for a reference, reassess the complainant with respect to the following two essential qualifications: (i) dependability, and (ii) adaptability, under appointment process no. 2014-SVC-IA-ATL-20311. If the complainant is found to meet these essential qualifications, he is to be afforded an opportunity to proceed through the assessment process as if he had been found qualified to meet them from the outset. If he is found qualified, he shall be eligible for appointment under this process for the duration of the pool established as a result, or for a period of two years from the date of this decision, whichever date is later.

August 23, 2017.

**Nathalie Daigle,
a panel of the Federal Public Sector
Labour Relations and Employment Board**