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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

BRENDA SACHS

Complainant

and

THE PRESIDENT OF THE PUBLIC HEALTH AGENCY OF CANADA

Respondent

Indexed as

Sachs v. The President of the Public Health Agency of Canada

In the matter of a complaint of abuse of authority - subsection 65(1) of the *Public Service Employment Act*

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

For the Complainant: Sean Kemball, Professional Institute of the Public Service of Canada

For the Respondent: Cristina St-Amant-Roy, counsel

For the Public Service Commission: Louise Bard (written submissions)

Heard at Winnipeg, Manitoba,
January 17 and 18, 2017.

REASONS FOR DECISION

I. Introduction

[1] The complainant, Brenda Sachs, was an unsuccessful candidate in the internal advertised appointment process numbered 13-AHS-WPG-IA-026 for an indeterminate appointment to the position of chief, IT (information technology) operations, classified at the CS-04 group and level, with the Public Health Agency of Canada's (PHAC) national microbiology lab, based in Winnipeg, Manitoba. The amended area of selection for this appointment process was open to employees of the PHAC and Health Canada occupying positions in Winnipeg.

[2] The complainant alleges that the respondent abused its authority in the application of merit by making errors and omissions in how the appointee to the position at issue was deemed to have met the essential qualifications and in how it administered interview dates in the assessment process.

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

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

[5] For the reasons that follow, I find that the complainant has established with clear and cogent evidence that the respondent abused its authority by erroneously finding that the appointee met all essential qualifications and by failing to exercise discretion equitably between candidates in how they disposed of requests for extensions of time to prepare for the written evaluation.

II. Background

[6] The complainant had been working in the public service for over 26 years and since 2010 had been the respondent's manager of client IT services, supervising a staff of 12 direct reports. Her manager was Bob Conarro, who was also the head of the assessment board for the appointment process at issue. The complainant was screened in and was invited to perform the "white paper" written evaluation for which she received a failing grade on the first of three essential knowledge questions, which dealt

with IT guidelines and Government of Canada policies. Therefore, she was eliminated from further participation in the assessment process.

[7] The original appointee from this process enjoyed a brief tenure in the position. After his departure, Curt Smith was given an acting appointment in the same position, effective April 1, 2015. On June 11, 2015, an Information Regarding Acting Appointment was issued extending Mr. Smith's acting appointment from July 1 to September 1, 2015. It is this acting appointment that is challenged. The complaint alleges an abuse of authority occurred due to Mr. Smith not meeting all essential qualifications. Mr. Smith's appointment was extended again to December 31, 2015.

[8] 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 become the Federal Public Service Labour Relations and Employment Board ("the Board").

III. Issues

[9] I must determine the following issues:

- (i) Did the respondent commit an abuse of authority by erroneously finding that the appointee successfully met the required qualification of having recent and significant experience supervising or managing a team of IT professionals in an IT infrastructure support role?
- (ii) Did the respondent commit an abuse of authority by failing to exercise its discretion to grant the complainant an extension of time to prepare for her written assessment exam?
- (iii) If so, do either amount to an abuse of authority?

IV. Analysis

[10] Subsection 77(1) of the *Act* provides that an unsuccessful candidate in the area of selection for an internal appointment process may make a complaint to the Board that he or she was not appointed or proposed for appointment because of an abuse of authority. The complainant had the burden of proving that on a balance of

probabilities, the respondent abused its authority (see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at paras. 49 and 55).

[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.”

[12] As noted by Chairperson Ebbs of the Board in her recent decision, *Ross v. Commissioner of the Correctional Service of Canada*, 2017 PSLREB 48 at para. 14, the Board and the former Public Service Staffing Tribunal (PSST) have established that s. 2(4) of the *Act* must be interpreted broadly.

[13] This means that the term “abuse of authority” must not be limited to bad faith and personal favouritism. In *Canada (Attorney General) v. Lahlali*, 2012 FC 601 at paras. 21 and 38, the Federal Court confirmed that the definition of “abuse of authority” in s. 2(4) of the *Act* is not exhaustive and that it can include other forms of inappropriate behaviour.

[14] The nature and seriousness of the improper conduct or omission will determine whether it constitutes an abuse of authority. See *Tibbs*, at para. 66.

[15] Subsection 30(1) of the *Act* states that appointments from within the public service must be made on the basis of merit. Section 30(2)(a) requires that to be appointed, a person must meet the essential qualifications, established by the deputy head.

A. Did the respondent commit an abuse of authority by erroneously finding that the appointee successfully met the required qualification of having recent and significant experience supervising or managing a team of IT professionals in an IT infrastructure support role?

[16] The job opportunity advertisement (JOA) as published on the jobs.gc.ca website listed the essential qualifications, which included the following:

Applicants must clearly demonstrate on their application that they meet all the following essential criteria and are within the area of selection...

...

Recent and significant** experience in supervising or managing a team of IT professionals in an IT infrastructure*

support role.

** Recent is defined as within the last three (3) years.*

*** Significant is defined as experience gained over a twelve (12) month period with the candidate performing complex activities related to this task in a wide variety of situations.*

...

[17] The former PSST established in a decision rendered by Chairperson Giguère that the appointee “must meet the essential qualifications for the work to be performed.” (see, for example, *Rinn v. Deputy Minister of Transport, Infrastructure and Communities*, 2007 PSST 44 at para. 35).

[18] Chairperson Ebbs confirmed that again recently in *Ross* in which she found that the evidence before her did not establish that the appointees met all the essential qualifications. Therefore, she found that abuse of authority had occurred in the application of merit. (See *Patton v. Deputy Minister of National Defence*, 2011 PSST 8, and *Ayotte v. Deputy Minister of National Defence*, 2009 PSST 21, for similar findings.)

[19] The respondent suggests in reply to the allegation that the delegated manager has the authority to establish essential qualifications for assessing candidates based upon her or his knowledge of the work to be performed and the current and future needs of the workplace. The respondent then notes that it is not the Board’s role to reassess candidates. Both propositions are well established in the Board’s jurisprudence and are not at issue in the facts before me.

[20] The respondent further argues that the manager used a broad definition of “supervising”, which was part of the previously documented experience criterion in the essential qualifications.

[21] It is well established indeed, that the hiring manager has wide latitude to establish essential qualifications and asset qualifications tailored to the specific operational needs of the workplace. The deputy head also has considerable flexibility to determine the right-fit criteria and the candidate that best fits them. However, once the essential qualifications are established, and when called to account, the respondent must be able to show that the essential qualifications have been assessed and that they have been met.

[22] In his examination-in-chief, Mr. Conarroe testified as to the review of the candidates' applications. He stated that the assessment board relied upon the representations made in the applications as to work experience; in the case of Mr. Smith, the application stated as follows:

i) as the desktop services team lead from November 2010 to February 2011 (4 months), he "... was responsible for supervising a team of up to six staff members that provided support for IT infrastructure...";

ii) he was a systems administrator in 2013 and "supervised staff assigned to [him] on a developmental capacity (4 months 2013)" assigned to him to work in a developmental capacity; and

iii) as a systems administrator, he "... supervised and managed activities assigned to a staff member from January to September 2013 (9 months) separately in addition to the scenario described above."

[23] In cross-examining Mr. Conarroe, the complainant scrutinized each of the three positions that Mr. Smith cited in satisfaction of the required management experience. With respect to the first position, Mr. Conarroe confirmed that the application period for the position ended on November 18, 2013, which made the three-year window of opportunity to gain the required experience begin on November 18, 2010. As such, Mr. Smith's relevant experience in his desktop team-lead position began on November 18, 2010.

[24] The complainant called Dennis Savage who testified that he served as Mr. Smith's supervisor. Mr. Savage confirmed that Mr. Smith's assignment as the desktop team lead involved managing four staff and that this assignment ended on January 7 or 8, 2011. Mr. Conarroe confirmed this testimony and agreed that these facts left Mr. Smith with slightly less than eight weeks of experience in the desktop team-lead management position and not the four months stated in his application.

[25] In scrutinizing Mr. Smith's second position, Mr. Conarroe testified as to the importance he attached to the experience Mr. Smith had working on a project called "Sci-Net", which was seen as a priority in the PHAC. Mr. Conarroe stated that working on such a project could be an example of where one employee is a team and a manager of one is still a manager.

[26] In further cross-examination on the Sci-Net project, Mr. Conarroe confirmed that another employee was also assigned to it but that that employee did not report to Mr. Smith. Mr. Conarroe testified that despite the fact that Mr. Smith did not supervise the other employee, he was delegated to supervise some of that employee's day-to-day tasks related to Sci-Net. When describing Mr. Smith's delegated supervision, Mr. Conarroe stated it would have been "cursory".

[27] In the third position cited by Mr. Smith, his application states that he had the responsibility to "... have the staff member learn, understand and become comfortable and confident with performing [his] responsibilities in [his] absence." The complainant suggested to Mr. Conarroe in cross-examination that the third part of Mr. Smith's management experience, as cited in his application, was in fact training another employee who was named, and required preparation to cover for Mr. Smith when he was on vacation leave. Mr. Conarroe acknowledged that this might have been the case and explained that the office was purposely building competency for Sci-Net to avoid single points of failure.

[28] The complainant pointed to an email circulated on May 3, 2013, from Mr. Smith that indicated that the person he had been training to cover for him would provide support for Sci-Net from May 6 to 24 in case anyone needed to contact Mr. Smith for support issues but that he would still be in the office despite his out-of-office notification. The email stated that the person being trained would be Mr. Smith's backup when he was away.

[29] In cross-examination, Mr. Conarroe was asked to explain a comment in the written response the complainant received in the respondent's reply to her allegations, which stated that "the manager had a broad definition of supervising" and then recited the essential qualifications experience criteria. Mr. Conarroe explained that the position might have included a variety of complex activities. He stated that he believed that "some evidence" of supervisory or team-leader duties was sufficient and that in his view, the most important thing was that that candidate had led a team to meet organizational objectives. Mr. Conarroe also confirmed that he believed that good and competent people can obtain experience in different ways, not necessarily just while in positions carrying the formal "management" title.

[30] Based upon the information in his application, Mr. Conarro testified that Mr. Smith was deemed to have met the essential recent and significant experience criteria quoted earlier in this decision.

[31] In reviewing the evidence I have just outlined, it is clear to me that in his testimony, Mr. Conarro clearly recalled his reasons for giving the appointment in question to Mr. Smith. He had seen enough of his technical IT work on important projects, such as Sci-Net, to feel confident that he was the best person for the job. While the evidence before me did not closely examine right-fit criteria, I can assume that Mr. Conarro would have confidently stated that he viewed Mr. Smith as his best right-fit candidate.

[32] However, the evidence is not clear that Mr. Smith satisfied the essential experience criteria as stated in the JOA. Having carefully reviewed all the documentary evidence and oral testimony before me, I can say with a high degree of certainty only that Mr. Smith had 7.5 weeks of qualifying supervisory or management experience that fit the published essential criteria, which was his work as the desktop service team lead. He clearly did not supervise or manage the other employee assigned to work on Sci-Net despite overseeing that person's day-to-day assigned tasks.

[33] And finally, I have sufficient evidence to conclude that the supervision and management, in which Mr. Smith prepared another employee to act in his place when he was away, did not satisfy the published essential experience qualifications.

[34] While Mr. Conarro testified as to how each of the three stated positions of experience satisfied his need for a capable person who could manage the challenges of the office, I do not find that the evidence establishes that the published essential qualifications were satisfied.

[35] The JOA required the appointee to have the following:

Recent and significant** experience in supervising or managing a team of professionals in an IT infrastructure support role.*

**Recent is defined as within the last three (3) years.*

***Significant is defined as experience gained over a twelve (12) month period with the candidate performing complex activities related to this task in a wide variety of situations.*

[Emphasis added]

[36] The complainant drew to my attention the fact that two of the three positions Mr. Smith cited involved working with one other person. Mr. Conarro testified that he believed managing a team of one is still managing a team. I note that the relevant portion of the JOA notes “team of professionals”, in the plural. While I do not consider that this matter amounts to an error that resulted in an abuse of authority, I would hope that in the future, the respondent will pay careful attention to details such as this in its JOAs.

[37] However, I cannot accept the other text which I emphasized above, which refers to “complex activities”, properly encompasses preparing another person to cover a position during someone’s vacation.

[38] As such, I find that the respondent erroneously found that Mr. Smith met the essential qualification of supervisory or management experience. Had this error not been made, Mr. Smith could not have been deemed to have met this criteria and could not have been appointed.

B. Did the respondent commit an abuse of authority by failing to exercise its discretion to grant the complainant an extension of time to prepare for her written assessment exam?

[39] The complainant gave uncontradicted testimony that when she was invited to participate in the written white-paper exercise with an oral presentation as part of the knowledge assessment part of the appointment process, she faced a strict deadline in her office duties that involved completing an internal audit.

[40] She stated that she was notified by email that she had been screened in to the knowledge assessment phase of the appointment process on November 22, 2013, and that she was given a deadline of November 29 to submit her paper. She was scheduled for an interview on Monday, December 2, 2013, at which she was to make an oral presentation of the paper.

[41] She testified that she spoke to her manager, Mr. Conarro, who was also chairing the assessment board, and that she explained to him that she had a significant internal audit project that would occupy all her time leading to the oral presentation scheduled for December 2. She asked for an extension of time. She testified that her request was rejected, that she had very little time outside her office

duties due to working extra hours on her audit project, and that she felt unprepared for her oral presentation.

[42] The respondent called Mr. Conarro to testify. He confirmed that another candidate had submitted a paper application, which had been misplaced. That was discovered only once the process neared the holiday season. The assessment board determined that the application should be accepted, and that candidate was screened into the knowledge-assessment process. She requested an extension of time to prepare for the oral presentation due to being busy with holiday preparations. He confirmed that it was granted, which gave her two more days than the complainant had to prepare.

[43] The respondent did not adduce any further evidence on this point to help explain what if any rationale the assessment board might have prepared in advance to guide its decisions on whether to accept requests for extension of time. Nor was the respondent able to provide any evidence about what factors informed its decision to grant one request for an extension but to decline the complainant's request.

[44] In my recent decision, *Ryan v. Deputy Minister of National Defence*, 2017 PSLREB 54, I cited with approval the case of *Kress v. Deputy Minister of Indian and Northern Affairs Canada*, 2011 PSST 41, for the proposition that extensions of time and the rescheduling of exams should be dealt with consistently and preferably, as in *Ryan*, with pre-established objective criteria that such requests will be considered against.

[45] The need for assessment boards to give candidates in the same process equitable treatment in the exercise of their discretion has been noted in cases such as *Payne v. the Minister of National Defence*, 2013 PSST 15, which in turn relied upon *Poirier v. Deputy Minister of Veteran Affairs*, 2011 PSST 3.

[46] The uncontradicted evidence clearly establishes that the requests from two different candidates for extensions of time to prepare for the oral presentation and interview were given arbitrary and inconsistent responses, which rendered the complainant's rejection and subsequent oral presentation and interview unfair and the assessment board's exercise of its discretion inequitable.

C. Conclusion - abuse of authority

[47] The complainant has established that a mistake occurred in that the appointee, Mr. Smith, did not possess the essential qualification of having 12 months (within the past 3 years) of experience supervising or managing a team of IT professionals in an IT infrastructure support role. As noted previously, the satisfaction of all essential qualifications is mandatory in appointment processes. Therefore I find that screening in Mr. Smith was a significant mistake.

[48] As a secondary and contributing matter, the complainant has also established that the respondent erred in the inequitable exercise of discretion in disposing of extension of time requests by candidates preparing for the oral presentation and interview. The evidence clearly establishes that this had a material impact upon the complainant since she was removed from the process, and as such, I find this is a second error in the appointment process.

[49] Given my findings of the appointee's failure to meet the essential qualifications and the employer's error in how it administered extensions of time, events which altered the outcome appointment process for each of the respective candidates affected, I conclude that the appointment was not made on the basis of merit and declare an abuse of authority occurred.

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

(The Order appears on the next page)

V. Order

[51] I declare that an abuse of authority in the application of merit occurred in the appointment process.

[52] I order the respondent to revoke the acting appointment to the position of Chief, IT Operations (CS-04).

June 26, 2017.

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