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Citation: 2019 FPSLREB 107

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

KIRK MCINTOSH AND DONNA MYSKIW

Complainants

and

COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA

Respondent

and others

Indexed as
Myskiw v. Commissioner of the Correctional Service of Canada

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

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

For the Complainants: Themselves

For the Respondent: Zorica Guzina, counsel

For the Public Service commission: Claude Zaor, by written submissions

Heard at Winnipeg, Manitoba,
September 5 and 6, 2018.

REASONS FOR DECISION

I. Summary

[1] Kirk McIntosh and Donna Myskiw ("the complainants") are social program officers, classified WP-03, at the Stony Mountain Institution ("the institution") of the Correctional Service of Canada ("the respondent") near Winnipeg, Manitoba. They are both long-serving employees of the respondent and are seeking career advancement opportunities. They alleged that errors occurred in the internal appointment process at issue and that personal favouritism tainted the evaluation of the appointee, who was a friend of a senior manager and member of the evaluation committee, which thus amounted to an abuse of authority. The respondent denied the errors and replied that the appointment was based upon merit.

[2] Given the uncontradicted evidence that the hiring manager and the appointee were personal friends who regularly had lunch together during the workweek and who occasionally spent time together socializing while away from the workplace and while on vacation, I conclude that personal favouritism existed and therefore that the internal appointment process was biased.

[3] Despite the fact that the complainants conceded that the appointee was indeed qualified for the appointment, I find that an abuse of authority occurred and make such a declaration. To do otherwise would allow the spectre of personal favouritism to taint appointments and undermine the confidence of the public and public service employees in internal appointment processes.

[4] The complainants did not request the revocation of the appointment as a remedy. Only for that reason do I demur on exercising my authority to revoke it under these otherwise unacceptable circumstances.

II. Background

[5] According to s. 77 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *Act*"), in the case of an internal -appointment process, any 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 an abuse of authority in the application of merit. The complainant has 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).

[6] Section 30(1) of the *Act* states that appointments to or from within the public service must be made on the basis of merit, and s. 30(2)(a) states that an appointment is made on the basis of merit when the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head.

[7] "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." The former Public Service Staffing Tribunal (the Tribunal) considered that phrase, and in *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7 at paras. 39 and 40, it determined the following, with which I concur:

> *[39] Moreover, the words* "for greater certainty" *found at the beginning of subsection 2(4) are placed there for a purpose. Parliament referred specifically to bad faith and personal favouritism to make certain that there would be no argument that these improper conducts constitute abuse of authority. It is noteworthy that the word* ***personal*** *precedes the word* ***favouritism,*** *emphasizing Parliament's intention that both words be read together, and that it is* ***personal favouritism****, not other types of favouritism, that constitutes abuse of authority.*
>
> *[40] Bad faith and personal favouritism are some of the most serious forms of abuse of authority which the public service as a whole should diligently strive to prevent. When it does occur, all necessary action should be taken to correct the abuse. Clearly, the purpose of subsection 2(4) is to ensure that there is no argument that these improper conducts constitute abuse of authority. See,* e.g., *Ruth Sullivan,* Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002), at 180-182.…*
>
> [Emphasis in the original]

[8] In addition to the relevant testimony (summarized later) the Public Service Commission provided written submissions about the regulatory framework for appointments. It took no position on the merits of this complaint.

III. Facts

[9] This is the second case I have heard from these same complainants challenging the appointment practices of their managers at the institution. In the previous case, I found that an abuse of authority occurred in another WP-05 internal non-advertised

appointment process (see *Myskiw v. Commissioner of the Correctional Service of Canada*, 2018 FPSLREB 70).

[10] In the matter before me now, the respondent issued a job opportunity advertisement (JOA) (2016-PEN-IA-PRA-112403) for a WP-05 position at the institution for an appointment on an acting basis. The area of selection was open to the respondent's employees occupying a position at the institution. Both complainants applied but were unsuccessful. Mr. McIntosh was screened out after he was found not to meet the essential criteria of experience. Ms. Myskiw was screened in but did not receive a passing mark on the written evaluation.

[11] This decision results from the consolidation and hearing of eight complaints related to the many appointment extensions granted to the appointee to the position at issue in this matter.

[12] Sjana Sookermany was a member of the evaluation committee for the internal appointment process. She was a senior manager at the institution. Although she had once supervised the appointee, such was not the case as of the appointment at issue.

[13] The complainants testified that the WP-05 position was highly sought after, that they had expressed their interest to Ms. Sookermany, and that they had asked to be offered an assignment to it on an acting basis to help prepare themselves and to gain experience in the position. The complainants also testified that the appointment on an acting basis was extended several times, eventually to over two years.

[14] In her examination-in-chief, Ms. Sookermany testified that she and the appointee, Terry MacDonald, were indeed friends in a personal manner when away from work. She added that they never discussed the appointment or selection process.

[15] In cross-examination, Ms. Sookermany sought to clarify her friendship with the appointee by adding that it was mainly around work. When she was asked about their activities together away from work, Ms. Sookermany testified that she and the appointee had once spent time together at a cabin at a lake but that they had not socialized for some time. Their last weekend social event was in September 2017. She admitted that they often spoke upon arriving at work in the morning and that they frequently left the workplace to have lunch together. Mr. McIntosh testified that

Ms. Sookermany and the appointee regularly spent long lunch breaks together both at and away from the office.

[16] In their examinations-in-chief, the complainants also mentioned that they were of the view that management had unfairly denied them opportunities on an acting basis in the WP-05 position, that they had been unfairly screened out of the evaluation process, and that the appointee improperly received many extensions to her acting appointment beyond the one year originally advertised in the JOA. They also alleged that the right-fit determination was predetermined to favour the appointee. These matters were presented more as allegations, and there is insufficient evidence about them to merit a specific analysis.

[17] In her examination-in-chief, Ms. Myskiw noted that the evaluation committee had reflected poorly upon her cover letter. It had made notes on it pointing out a spelling error and one passage, which it had found included irrelevant information.

[18] In his testimony on this matter, Matt Gee, the chairperson of the evaluation committee, confirmed that Ms. Myskiw did not pass the criterion of her ability to communicate effectively in writing. Ms. Myskiw did not pursue this matter in her cross-examination of Mr. Gee or the other evaluation committee members.

[19] Mr. Gee testified that he was not concerned about Ms. Sookermany evaluating her friend, who later accepted the appointment, because she is “capable and professional.” Mr. Gee assured the hearing that Ms. Sookermany did not attempt to sway the evaluation process in favour of the eventual appointee.

[20] Mr. Gee added that a blind right-fit exercise was performed to ensure the objectivity of the selections. He explained that in fact, the appointee was not the first choice from the right-fit assessment.

[21] In cross-examination, Mr. Gee admitted that he was aware of Ms. Sookermany’s friendship with the appointee but repeated his assertion that she did not attempt to sway the evaluation committee in favour of her friend. He added that Ms. Sookermany was the most knowledgeable about the work of the position. When he was asked whether he had perceived her friendship as raising the perception of impropriety, Mr. Gee replied that he had been aware of the issue and that he would have acted had it involved a family member or a spouse of a candidate on the evaluation committee.

Mr. Gee also stated that the committee had other members who were not personal friends of the eventual appointee and that the evaluation process relied upon nationally standardized questions and answers.

IV. Issues

A. Did the respondent's use of Ms. Myskiw's cover letter to evaluate her written communications and its failure to disclose that on the JOA constitute an error?

[22] The uncontradicted evidence established that Ms. Myskiw's cover letter was used to assess her ability to communicate effectively in writing. The JOA did not state that the cover letter would be used for that purpose.

[23] The complainants did not rely on jurisprudence but argued that the lack of notice that their cover letters would be used in the assessment was unfair and in error. I disagree.

[24] Applicants to an internal appointment process should be aware that the entirety of their submissions, including cover letters, is being submitted for the sole purpose of considering and assessing them for their suitability for appointment.

[25] This Board has consistently recognized a very broad flexibility for managers to use assessment methods that they deem useful for the purposes of their internal appointment processes. This is mandated as follows by s. 36 of the *Act*:

> ***36*** *In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).*

[26] Parliament has clearly stated the intention to allow managers the ability to craft their assessments of candidates to meet the particular needs of the position being offered for appointment.

[27] As counsel for the respondent submitted, the Tribunal considered s. 36 in *Jolin v. Deputy Minister of Service Canada*, 2007 PSST 11 at para. 77, and found as follows:

> *[77] Section 36 of the* PSEA *provides that the deputy head may use any assessment method that he or she considers appropriate in an internal appointment process. For the Tribunal to find that there was abuse of authority in the selection of the assessment methods,*

> *the complainant must prove that the result is unfair and that the assessment methods are unreasonable, do not allow the qualifications stipulated in the statement of merit criteria to be assessed, have no connection to those criteria, or are discriminatory.*

[28] The use of a cover letter to assess written communication skills is a reasonable and eminently fair aspect of the flexibility granted by Parliament for a deputy head to determine assessment methods. I find that the respondent made no errors by using Ms. Myskiw's cover letter to evaluate her written communications and by not disclosing that on the JOA. The lack of disclosure of it in a JOA is of no consequence as candidates should take care to present themselves as well as possible in all aspects of their candidacies for appointment, including in their cover letters.

B. Did the appointee's personal friendship with an evaluation committee member amount to personal favouritism?

[29] Counsel for the respondent conceded that a friendship existed between the appointee and Ms. Sookermany. As noted in the testimony of the witnesses, I find that the uncontradicted evidence clearly established that the friendship was of a personal nature, with frequent contact in the margins of the workday, plus infrequent socializing outside the workplace.

[30] The complainants did not cite jurisprudence but argued that this obvious personal friendship created a perception of bias in favour of the appointee and tainted the internal appointment process. They argued that it cannot be condoned and that it was an abuse of authority under the *Act*.

[31] Counsel for the respondent noted the testimony of the respondent's witnesses, all of whom clearly stated their belief that the appointee was well qualified for the appointment and that she deserved it, solely based upon merit. Counsel also noted Ms. Sookermany's strong denials that her friendship with the appointee influenced her or the evaluation committee's work.

[32] Counsel for the respondent cited two Tribunal decisions, which addressed personal favouritism, in support of her submission that the facts of this case should not lead me to conclude that personal favouritism influenced the appointment at issue in any way.

[33] *Carlson-Needham v. Deputy Minister of National Defence*, 2007 PSST 38, first determined that the Tribunal had established that a complaint under the *Act* must do more than state a perceived injustice. It determined further at paragraph 54 as follows:

> *[54] … a complainant must prove, on a balance of probabilities, that the person was appointed because of personal favouritism based on factors other than merit. In other words, the complainant has to prove that a respondent's actions lead to the conclusion that the person appointed was appointed for reasons of personal favouritism.*

[34] The PSST's later decision in *Glasgow* considered facts that are similar to those in *Carlson-Needham*. One candidate pointed to office operational decisions that were alleged to have been motivated by personal favouritism and that resulted in the appointee in that case receiving an unfair advantage in the evaluation process. In considering the allegations before it in *Glasgow*, the PSST stated as follows (at paragraph 63):

> *[63] When a complainant alleges that there has been differential treatment, such as personal favouritism or bias, in the marking of the answers to a test or the ranking of candidates, the Tribunal where appropriate, will examine how marks were awarded, or the order of the ranking. The Tribunal will review the evidence to make a determination as to whether the allegation of differential treatment leads to the conclusion of abuse of authority and, thus, a substantiated complaint.*
>
> [Emphasis added]

[35] I distinguish both *Glasgow* and *Carlson-Needham* on their facts as both consider the management of office functions, which gave rise to the complainants alleging personal favouritism, rather than a personal friendship, as in the case before me.

[36] In a more direct response to the complainant's allegation, counsel for the respondent addressed the issue of the apprehension of bias related to the friendship and cited my decision in *Johnston v. Director of Public Prosecutions*, 2018 FPSLREB 65, with specific attention to the following, at paragraphs 33 to 35:

> *[33] The complainant noted in argument on this allegation the fact that this Board has found that it is not necessary that actual bias be found, as a reasonable apprehension of bias may constitute abuse of authority (see* Ryan v. Deputy Minister of National Defence*, 2014 PSST 9 at para. 25, which cites* Denny v. Deputy Minister of National Defence*, 2009 PSST 29 at para. 125, referring to* Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at p. 394).*

> *[34] In its original form, in* Committee for Justice and Liberty*, at 394, the Supreme Court of Canada enunciated the test for the apprehension of bias as follows:*
>
> > … "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."
>
> *[35] In* Ryan*, relying on* Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10, which in turn relied upon* Committee for Justice and Liberty*, the PSST adapted that test, as follows:*
>
> …
>
> > Where bias is alleged, the following test can be used to analyze this allegation, while taking into account the circumstances surrounding it: If a reasonably well informed bystander can reasonably perceive bias on the part of one or more persons responsible for assessment, the Tribunal can conclude that abuse of authority exists.
>
> …
>
> [Emphasis in the original]

[37] I also note *Bain v. Deputy Minister of Natural Resources Canada*, 2011 PSST 28, which examined as follows the issue of a friendship and the finding of a reasonable apprehension of bias:

> …
>
> ***121*** *The complainant contends that Mr. Aubé should have declined to be a board member because he is a friend of the appointee. This personal friendship gives rise to a reasonable apprehension of bias by Mr. Aubé towards the appointee.*
>
> ***122*** *Asked about the nature of his relationship with Mr. Murphy, Mr. Aubé stated that they are good friends. He stated that they first met about 15 years ago when both worked in the same laboratory. Their friendship developed after Mr. Murphy came to work for him around 1997-1998, at the Bells Corners complex. They saw each other socially for about two or three hours every five or six months, with varying frequency. Mr. Aube's subsequent appointment as Executive Director of CANMET Energy Secretariat led him to move to another physical complex in 2002, at which point they saw each other occasionally and had minimal contact outside working hours.*
>
> ***123*** *Mr. Aubé stated that their interaction was more professional when Mr. Murphy acted for him, although they still went out every couple of months or so for a beer. Their relationship remained the same, professionally and socially with varying frequency, during the staffing process. He testified that his friendship with*

Mr. Murphy had no impact on his ability to assess him impartially. He said he was able to put their friendship aside and only assess Mr. Murphy's performance.

…

126 *Mr. Aubé testified that when the board discussed the evaluation of the candidates in the appointment process, he was able to do so objectively and without being affected by his personal relationship with the appointee. He could dissociate his professional and personal relationship with Mr. Murphy when the board discussed him and in those discussions, he limited himself to the answers Mr. Murphy had provided. The board always discussed candidates' answers then reached consensus.*

…

134 *In examining issues of bias and of reasonable apprehension of bias, the courts have acknowledged that it is <u>difficult to establish direct evidence of actual bias</u>. The manner in which the test for bias should be applied was set out in dissenting reasons in* Committee for Justice and Liberty v. Canada (National Energy Board), *[1978] 1 S.C.R. 369 at p. 394.*

> *[T]he apprehension of bias must be a reasonable one held by reasonable and right minded persons applying themselves to the question and obtaining thereon the required information… [T]hat test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [this person],* whether consciously or unconsciously, *would not decide fairly.*
>
> *(emphasis added)*

…

138 *Bias and the reasonable apprehension of bias can be established when there is a sufficiently close personal relationship with someone who has a direct interest in the outcome of the decision. In* Principles of Administrative Law, *(Jones, David Phillip and de Villars, Anne, Thomson Carswell, Toronto: 2009), the authors discuss situations where the decision-maker has a close personal relationship with someone who has a direct interest in the outcome of the decision at issue, and note at pages 408-409 that this could give rise to a reasonable apprehension of bias:*

> *Where a decision-maker has a sufficiently close personal relationship with someone who has a direct interest in the outcome of the decision, that relationship will give rise to a reasonable apprehension of bias and that person is disqualified from taking part in the decision. … The central issue … is typically whether the relationship between the decision-maker and the person involved … is sufficiently*

> *close that a reasonable person would have concerns about the decision-maker's ability to judge that matter impartially.*
>
> ***139*** *Candidates in an assessment process must be able to trust that the process will be run in a fair manner. A reasonable apprehension of bias taints the process and raises doubts about its integrity. Fairness requires that board members be diligent in avoiding situations that could give rise to an apprehension of bias of the decision-maker as an individual.*
>
> *…*
>
> [Emphasis added]
>
> [*Sic* throughout]

V. Conclusion

[38] I prefer the approach of the Tribunal in *Bain*, which addressed the important matter of the apprehension of bias. I come to the same conclusion and find that a reasonably well-informed bystander who was aware of Ms. Sookermany's personal friendship with the appointee, despite knowing of the appointee's qualifications, would reasonably perceive bias on the part of the evaluation committee.

[39] The existence of a personal friendship raises such a strong presumption of there being personal favouritism that it creates an apprehension of bias with regard to the outcome regardless of the fact that the appointee might have been qualified and might otherwise have deserved the appointment on the basis of merit.

[40] Evaluation committee members should recuse themselves from an internal appointment process when they discover that a personal friend has applied. Failing to recuse themselves taints the evaluation process and casts a shadow over what might otherwise be a meritorious appointment.

[41] The complainants specifically did not ask me to order the revocation of the appointment at issue; otherwise, I would have exercised my discretion under the *Act* and would have done so.

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

(The Order appears on the next page)

VI. Order

[43] I declare that the respondent abused its authority in the application of merit in the internal appointment process leading to the appointment.

November 6, 2019.

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