Date: 20210511

Files: EMP-2017-11567 and 11568

Citation: **2021 FPSLREB 52**

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

CATHY TURNER

Complainant

and

DEPUTY HEAD
(Royal Canadian Mounted Police)

Respondent

Indexed as
Turner v. Deputy Head (Royal Canadian Mounted Police)

In the matter of complaints of abuse of authority pursuant to sections 77(1)(a) and (b) 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: Frank Janz, representative

For the Respondent: Laetitia Auguste, counsel

For the Public Service Commission: Louise Bard

For the Appointees: Themselves

Heard via videoconference,
April 7, 2021.

REASONS FOR DECISION

I. Summary

[1] Cathy Turner ("the complainant") was denied an opportunity to apply for an appointment due to the deputy head of the Royal Canadian Mounted Police ("the respondent") electing to use a non-advertised process to make two appointments to AS-02 training coordinator positions.

[2] The complainant submitted that she was well qualified for the appointment as having worked for several years in the training unit and for two of those as a training clerk. She was disappointed with being denied an opportunity to apply.

[3] The evidence establishes that the respondent chose to appoint two persons, who had been previously been qualified and placed in a pool for a different AS-02 appointment process, to general office manager positions that were not specifically related to training.

[4] The complainant did not challenge that the two appointees were qualified.

[5] The evidence shows unequivocally that the respondent purposely watered-down the essential qualifications in the statement of merit criteria for the two training positions. In this way, the revised generic qualifications better fit the qualifications established for the other positions for which the two appointees had already been placed in a pool.

[6] The resulting qualifications used for these appointments violated the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *Act*") as they no longer represented the actual work to be performed by the appointees as required in s.30(2)(a).

[7] While Parliament has granted flexibility to allow hiring managers to use discretion to establish merit criteria linked to the duties of a position to be filled, the blatant disregard for the requirements of the *Act* requires my declaration of there having been an abuse of authority in the application of merit.

[8] I decline the complainant's request to order revocation of the appointments.

II. Evidence

[9] None of the following statements were contested during the hearing.

[10] The statements about the contents of the appointment process documents were all confirmed by witnesses referring to the different documents during their examinations-in-chief and cross-examinations.

[11] The Public Service Commission ("the Commission") participated in the pre-hearing case management process and provided written submissions for the hearing but did not take a position on the merits of the complaints.

A. The complainant

[12] The complainant testified that:

- She had enjoyed a long career with the RCMP in various positions that gave her direct experience in matters related to the duties of the training coordinator position that she sought.
- She was well qualified with her education and work experience for the training positions.
- She was disappointed to learn that the positions were filled by a non advertised appointment.
- She pointed to the notice of acting appointment for the training position dated September 25, 2015 (only weeks prior to the two non advertised appointments being made). This was to extend the incumbent who held the position prior to the two appointments at issue in this hearing. She noted that the hearing essential qualifications included the following:
    - *Experience planning formal and/or informal training activities.*
    - *Experience coordinating formal and/or informal training activities.*
    - *Experience following and explaining processes.*
    - *Ability to coordinate training activities.*
- She compared this to the essential qualifications established only weeks later once the acting appointment had ended, in order to make the two appointments subject of this hearing. She noted the new qualifications made no mention of "training" but rather, referenced qualifications like experience in the provision of administrative support services; financial support services; service to the public, etc.

- She said that when she read the new qualifications, she thought that they were missing the references to training and that they looked like a general office AS-02.
- She said the new qualifications were not accurate and were unfair.

B. The respondent

[13] Stephen Sills was the hiring manager for the two positions at issue in this matter. He was the only witness the respondent called to testify. He testified as to what he called a “crisis” situation in the training unit due to the fact that two training positions became vacant just as the busiest time of the year for training was to come.

[14] He stated that the vacancies could not have been predicted in advance to avoid the crisis as one position had only recently been created, and the other had been vacated on short-notice by the person occupying it on an acting basis, who it had been hoped would have occupied it longer.

[15] He also noted that the time pressure to fill the vacancies was compounded by the fact that he had only been assigned oversight of the unit approximately four months before these events related to the appointments began to unfold.

[16] Mr. Sills testified that an ambitious annual training plan was awaiting execution and that it would have been placed entirely in jeopardy without making the prompt appointments to fill the two training vacancies.

[17] Mr. Sills estimated that an advertised process could take at least six months.

[18] He discussed all aspects of the rationale he wrote for the two non-advertised processes to seek their approval and explained how he created a statement of essential qualifications for the two appointments.

[19] Counsel took Mr. Sills through a line by line questioning of the generic qualifications asking him to elucidate upon how each one related to training position duties. These included:

- Successful completion of secondary school…or acceptable combination of education, training and/or experience
- Experience in the provision of

  - administrative support services
  - financial support services
  - service to the public

- Experience in the operation of computers

[20] Other more generalized skills related to effective communication, leadership skills and the ability to organize were also in the generic qualifications.

[21] This rather stilted and uninformative discussion provided answers such as the successful appointee required experience in the operation of computers because the training coordinator would need to use a computer in the course of her work.

[22] I stopped counsel when the next question on the list of generic qualifications was to address the need to have a valid driver's licence. I take notice of the fact that the training coordinator position states that a driver licence is required because the training coordinator needs to operate a motor vehicle.

[23] More revealing to the investigation into the choice of the two appointees was Mr. Sills' explanation of the narrative assessment for appointee L:

> - *Would have contact with the public in dealing with contract issues, issuing of purchase orders and obtaining quotes from vendors (during her time in O Division Training)*
> - *Has demonstrated her ability to organize during her time as a Training Coordinator where she had to organize all the tasks associated with the coordination of a training event.*
> - *She has addressed large groups while in the position of Training Coordinator and effectively relayed important information.*
> - *She demonstrates team leadership when she has been in the role of Training Coordinator.*
> - *As a training coordinator she made judgement decision when it came down to selecting candidates for training keeping in mind the immediate priorities of the unit, division or organization.*

[24] Mr. Sills testified that appointee L had previously performed the duties of the training coordinator under a different supervisor and that her supervisor recommended her as a qualified candidate for this position.

[25] He also testified that appointee M who was given the other position had been identified as the "next most qualified interested candidate" arising from the pool.

[26] While the complainant did not pursue this in his cross-examination of Mr. Sills, it is interesting to note that the respondent's book of documents contained a note to file attached to the rational document signed by the detachment staffing advisor.

[27] The note states, "…*Various staffing options were discussed with the supervisor. The first being to place individuals acting while an advertised process was conducted…I strongly encouraged the supervisor to consider a short-term solution of acting while the advertisement was underway*."

[28] The hearing did not receive a narrative assessment for appointee M as an exhibit, such as was quoted previously for appointee L.

[29] Mr. Sills explained in his examination in chief that his review of the assessment materials for the two appointees that were on record from the other process showed that both of the appointees had strong interpersonal and relationship building skills which he said were critical attributes for the appointments.

[30] Additionally, the Public Service Commission did not participate in the hearing. However, it provided written submissions. It took no position on the merits of the allegation of an abuse of authority occurring.

III. The law

[31] Section 77(1)(a) 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 in the application of merit.

[32] Section 77(1)(b) states that that candidate may also make a complaint that the Commission made an abuse of authority in choosing between an advertised and a non-advertised internal appointment process.

[33] The complainant relied upon both paragraphs of s. 77(1) in her allegations.

[34] 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).

[35] "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."

[36] As then Chairperson Ebbs of the Board noted in *Ross v. Commissioner of the Correctional Service of Canada*, 2017 PSLREB 48 at para. 14, the Board has established that s. 2(4) of the *Act* must be interpreted broadly. That means that the term "abuse of authority" must not be limited to bad faith and personal favouritism.

[37] 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.

[38] As noted in *Tibbs*, at paras. 66 and 71, and as restated more recently in *Agnew v. Deputy Minister of Fisheries and Oceans*, 2018 FPSLREB 2 at para. 95, an abuse of authority may involve an act, omission, or error that Parliament cannot have envisaged as part of the discretion given to those with delegated staffing authority.

IV. Closing submissions

A. The complainant

[39] The complainant's representative argued that the respondent's obvious effort to water-down the essential criteria to better fit the putative appointees violated the *Act*.

[40] He pointed to s. 30(2)(a), which states that an appointment is made on the basis of merit when the person to be appointed meets all the essential qualifications for the work to be performed. Section 30 reads as follows:

> ***30 (1)*** *Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.*
>
> …
>
> ***(2)*** *An appointment is made on the basis of merit when*
>
> ***(a)*** *the Commission is satisfied that the person to be appointed* ***meets the essential qualifications for the work to be***

> ***performed****, as established by the deputy head, including official language proficiency; and…*
>
> …

[emphasis added]

[41] He then pointed to the fact that it was clearly established in evidence that as published by the respondent for the final appointment on an acting basis just weeks before the two appointments at issue were made, several essential qualifications of the training position explicitly noted training duties. Then he noted the new generic qualifications were completely devoid of training.

[42] He then concluded that the essential qualifications for the two appointments at issue did not actually meet "… the essential qualifications for the work to be performed …", as required by s. 30(2)(a) of the *Act*.

[43] In his oral argument, the complainant's representative did not speak to any cases, but he provided a book of authorities to support his presentation.

[44] His book of authorities included another case of the RCMP disregarding well-understood requirements of the *Act*. The Board decision in *Goncalves v. Commissioner of the Royal Canadian Mounted Police*, 2017 FPSLREB 2, included the finding:

> …
>
> *[5] …. For the reasons that follow, I find that the complainant established with clear and cogent evidence that the respondent paid little notice to the appointment formalities set out in the* Public Service Employment Act *(S.C. 2003, c. 22, ss. 12, 13; "the* Act*"); composed a* ***written narrative supporting the appointment that contained a false statement supporting an essential qualification; failed to assess or make a record of the assessment of an essential qualification; and erroneously found that the appointee met all the essential qualifications****.*
>
> *[6] Based upon these* ***many errors, omissions, and disregard for the*** **Act***, I find that an abuse of authority occurred, and I order the respondent to revoke the acting appointment.*
>
> …

[Emphasis added]

[45] Both parties noted *Tibbs* for the flexibility granted by Parliament to deputy heads exercising discretion under the *Act*, along with the limits thereof.

[46] The following relevant paragraphs of *Tibbs* speak directly to the core of the complaints in the case before me as well as to the respondent's reply:

> *[62] An examination of the preamble of the* PSEA *helps to reveal its legislative purpose. The preamble of the* PSEA *is clear and of considerable assistance in interpreting the concept of abuse of authority.* ***The following section is of particular note: "delegation of staffing authority (…) should afford public service managers the flexibility necessary to staff, to manage and to lead their personnel to achieve results for Canadians****."*
>
> *[63] This section of the preamble reinforces one of the key legislative purposes of the* PSEA*, namely, that managers should have considerable discretion when it comes to staffing matters. To ensure the* ***necessary flexibility****, Parliament has chosen to move away from the previous staffing regime with its rules-based focus under the former* PSEA. *The old system of relative merit no longer exists. The definition of merit found in subsection 30(2) of the* **PSEA** ***provides managers with considerable discretion to choose the person who not only meets the essential qualifications, but is the right fit because of additional asset qualifications, current or future needs, and/or operational requirements****.*
>
> *[64] However,* ***this does not mean that the*** **PSEA** ***provides for absolute discretion****. The preamble clarifies the values and ethics that should characterize the exercise of discretion in staffing. It also supports another key legislative purpose of the* PSEA*, establishing new recourse mechanisms on appointment issues before a neutral and independent body, the Tribunal. The relevant section of the preamble reads as follows: "the Government of Canada is committed to a public service that (…) is characterized by fair, transparent employment practices, respect for employees, effective dialogue and recourse aimed at resolving appointment issues."*
>
> *[65] It is clear from the preamble and the whole scheme of the* PSEA *that* ***Parliament intended that much more is required than mere errors and omissions to constitute abuse of authority****. For example, under section 67 of the* PSEA*, the grounds for revocation of an appointment by a deputy head after an investigation are error, omission and improper conduct. These grounds for revocation are clearly less than those required for a finding of abuse of authority. Parliament's choice of different words is significant: Sullivan & Driedger,* supra *at 164. Abuse of authority is more than simply errors and omissions.*
>
> [Emphasis added]

[47] The complainant's submissions concluded with the request that the two appointments at issue in this matter be ordered revoked.

[48] No submissions were provided in rebuttal to the respondent's closing.

B. The respondent

[49] In closing, counsel argued that no errors were made in the staffing processes. But that even if I found an error in how the qualifications were established, it should not be considered so serious as to constitute an abuse of authority as per *Tibbs*.

[50] The documented rationale for the decision notes a significant increase in the training budget but a lack of human resources to fulfil the required activities, which thus caused a crisis in the training unit. It also notes that the training office was experiencing its peak of annual activities, which created an urgent need to fill the vacancies.

[51] Mr. Sills estimated that an advertised hiring process could easily take six months or more to successfully appoint an individual to a position.

[52] Counsel pointed to Mr. Sills' testimony in which he said that the two appointees had just been assessed, were well-suited to the positions, and had very good interpersonal relationship and communication abilities. He also stated that they were the two highest-evaluated candidates assessed in the other AS-02 process that had been qualified and placed in a pool.

[53] Counsel noted the decision of Adjudicator Daigle, which also considered a non-advertised appointment, in *Dhalla v. Commissioner of the Correctional Service of Canada*, 2018 FPSLREB 12. The adjudicator found as follows:

> *[44] Section 33 of the* PSEA *is clear that the PSC or its delegate, in accordance with s. 15(1), may choose an advertised or non-advertised process to make an appointment. It reads as follows: "In making an appointment, the Commission may use an advertised or non-advertised appointment process."*
>
> *[45]* ***In the circumstances, the complainant cannot allege abuse of authority simply because a non-advertised process was chosen.*** *He has to prove that the decision to choose a non-advertised process constituted an abuse of authority.*
>
> *[46] The complainant alleges that the non-advertised process denied him and other visible minorities, like Ms. Sandhu, the opportunity to be considered for the position. On the other hand, the respondent submits that it can justify its decision. It has filed the narrative rationale justifying Ms. Turi's appointment. The "Checklist for Non-Advertised Appointment Process Form" was also submitted, as well as a "Rating Guide" confirming that Ms. Turi was assessed and was found qualified for the position.*

> *[48] I find that the decision to choose a non-advertised process was well explained and documented. Mr. German made it clear that the respondent needed to proceed quickly. It chose to select someone from the pool of qualified candidates that had resulted from the recent EX-02 national process for wardens and to assess that person, Ms. Turi, against the "Statement of Merit Criteria" for the ADCIS position. She was found qualified. Mr. German also considered the fact that her appointment addressed employment equity representation at the most senior levels of the regional management team for the CSC's Pacific Region. The respondent considered this choice of process the most appropriate course of action and prepared adequate documentation to support its decision.*
>
> *[50] Furthermore, s. 30 of the* PSEA *provides as follows that there is no need to go through a selection process and interviews many people to make an appointment:*
>
> > ***30(4) The Commission is not required to consider more than one person in order for an appointment to be made on the basis of merit.***
>
> [Emphasis added]

[54] I concur with the Board's sound reasoning in its *Dhalla* decision.

[55] The facts before me established that important work was waiting to be carried out that along with time pressure justified the choice of a non-advertised appointment.

[56] The law does not require advertising all appointments.

[57] The disappointment of a person who would have wished to apply for an appointment is not on its own a valid basis upon which to allege an abuse of authority based upon the choice of process.

[58] Counsel noted the fact confirmed in testimony by Mr. Sills that the respondent had attempted to fill the AS-02 Training Coordinator position through an advertised process in 2015. However, the rationale for non-advertised staffing action states that it was not successful.

[59] This might have been a useful fact to support the respondent's case had the witnesses been questioned about their circumstances related to this earlier process. Without such questions being asked, I have no idea if this is a relevant fact.

[60] In response to the allegation related to the essential qualifications being watered-down such that they no longer represented the actual work being performed,

Counsel noted the decision in *Visca v. Deputy Minister of Justice*, 2007 PSST 24, which found this:

> *[42] Broad discretion is given to managers under subsection 30(2) of the* PSEA *to establish the necessary qualifications for the position they want to staff and to choose the person who not only meets the essential qualifications, but is the right fit. Similar discretion is provided under section 36 of the* PSEA *for those with staffing authority to choose and use assessment methods to determine if the person meets the established qualifications.…*

[61] Counsel also cited *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 6, which finds as follows:

> *47 This written rationale was not structured in a manner that responds point by point to each of DND's requirements and is, therefore, somewhat deficient in form. The rationale is also missing an explanation of how the appointment was consistent with the organization's HR plan. However, these deficiencies do not rise to the level of abuse of authority. The Tribunal finds that a read of the entire rationale demonstrates that the information it contains responds to the PSC's and DND's objectives related to non-advertised appointments. Moreover, having examined it closely, the Tribunal has no concerns related to the substance of this rationale.*

[62] Counsel noted the recent Board decision in *Beaudoin v. Deputy Minister of Indian and Northern Affairs Canada*, 2018 FPSLREB 41, where Adjudicator Daigle concluded:

> *[93] Although the complainant questioned the tools used, given the new generic job description, the evidence demonstrated that the duties of positions classified PM-05 have remained the same. The respondent simply adopted a generic job description for PM-05 positions to promote a more consistent approach across the country.*

However, that passage must be read in the proper context of this other part of that same decision:

> *[90] The respondent stated that even though a generic job description was adopted on July 28, one day before the exam was administered, the duties of positions classified PM-05 remained the same. The goal was simply to support a more consistent approach across the country. Therefore, adopting a generic job description did not harm or damage the staffing process. All the candidates were assessed in a fair, equitable, and transparent manner, and the assessment tools used were reliable.*

[63] I distinguish those decisions on their facts. The most relevant facts from those cases are found in *Beaudoin*. However, a full reading of that decision clearly establishes that the more generic qualifications at issue in it were part of a national effort to address the position nationally. Nothing of the like is present in the facts before me.

[64] Contrary to *Visca* and *Jarvo*, I find the non-conformance of the redrafted generic essential qualifications to s. 30(2)(a) to be a blatant contravention of the *Act*.

[65] Section. 30(2)(a) of the *Act* sets out that one requirement for finding that an appointment has been made on the basis of merit is established when, "*…the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head…*".

[66] Parliament has granted deputy heads the discretion to establish the essential qualifications for the work to be performed.

[67] At the same time, by virtue of s. 77 (1)(a), Parliament has granted the Board the authority to determine whether there has been an abuse of authority by the deputy head, in exercising that discretion when establishing essential qualifications.

[68] A published essential qualification list for a training position which existed in a previous version only weeks earlier, that now drops all references to training, cannot be said to be the actual or accurate qualifications for the training work to be performed. Given these circumstances, I find that the removal of the references to training from the essential qualifications was a blatant and intentional omission.

[69] The failure to consider training, which is a relevant aspect of the training coordinator duties, in the qualifications for the position, renders the decision arbitrary.

[70] The clear and compelling evidence that this failure was intentional shows the decision was made in bad faith.

[71] Parliament cannot have envisaged that the discretion it granted in staffing appointments would include such actions.

C. The appointees

[72] Both appointees, whose positions are the subject of this hearing, monitored the videoconference, as was their right, as they are parties to these complaints. They spoke at the conclusion of the hearing. They did not address the merits of the complaints but rather voiced their concern with the fact that without intervention of, or order by the Board, the respondent voluntarily produced appointment process documents that included information about the appointees, their evaluations, and supporting documents related to their applications. Fortunately, PRI numbers and other personal identifiers, such as addresses or phone numbers, had been redacted.

[73] Both appointees voiced their displeasure with career-related documents being made public due to the fact that all documents accepted as exhibits in a hearing before the Board become available for anyone to request access.

[74] In the end, most of the information of concern to the appointees was not presented as an exhibit, thus removing the documents from the Board's possession, as they were circulated just before the hearing as potential exhibits but were never accepted as such by the Board.

[75] The Board's Registry informed the appointees of this in writing the morning after the hearing concluded.

V. Conclusion

[76] I accept that the choice of process was based upon *bona fide* reasons related to ensuring the efficacy of the related operations. I conclude that the complainant has failed to establish clear and compelling evidence upon which I can conclude on a balance of probabilities that an abuse of authority occurred in the choice of process in the two appointments.

[77] I do conclude that clear and compelling evidence exists upon which I find, for reasons I have outlined earlier, on a balance of probabilities that an abuse of authority occurred in the application of merit in the two appointments.

[78] My declaring an abuse of authority in these appointments speaks to the neglect of well-established appointment processes and the related statutory requirement. It is not related to the two appointees or their careers.

[79] I decline to exercise my authority to order the two appointments be revoked. Such an order is and should be only exercised under rare circumstances.

[80] Given these conclusions, I declare an abuse of authority in the application of merit in both appointments.

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

(The Order appears on the next page)

VI. Order

[82] The complaint is substantiated in part.

[83] I declare that an abuse of authority occurred in the application of merit in both appointments.

May 11, 2021.

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