Date: 20211110

File: EMP-2017-11189

Citation: 2021 FPSLREB 123

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

JENNIFER REGIER

Complainant

and

THE DEPUTY HEAD OF THE CORRECTIONAL SERVICE OF CANADA

Respondent

and

OTHER PARTIES

Indexed as
Regier v. Deputy Head of the Correctional Service of Canada

In the matter of a complaint of abuse of authority under sections 77(1)(a) and (b) of the *Public Service Employment Act*

Before: Joanne B. Archibald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Frank Janz, Public Service Alliance of Canada

For the Respondent: Adam Feldman, counsel

For the Public Service Commission: Alain Jutras

Heard via videoconference,
September 14 and 15, 2021.

REASONS FOR DECISION

I. Introduction

[1] The complainant, Jennifer Regier, made a complaint under ss. 77(1)(a) and (b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "*PSEA*") alleging abuse of authority by the respondent, the deputy head of the Correctional Service of Canada. According to the complainant, abuse of authority occurred in the application of merit and in the choice of a non-advertised process to staff the manager, intensive intervention strategy, (MIIS) position at the Correctional Service of Canada's Grand Valley Institution (GVI), which is classified at the WP-05 group and level.

[2] The respondent denied abusing its authority in the appointment process.

[3] The Public Service Commission did not attend the hearing and provided written submissions addressing the applicable policies and guidelines. It did not take a position on the merits of the complaint.

[4] For the following reasons, the complaint is allowed. It was not shown that the appointed candidate met the essential merit criteria for the position. This constitutes abuse of authority in the application of merit.

II. Background

[5] On May 4, 2017, a Notification of Appointment or Proposal of Appointment was issued for the appointment of Sarah Fleras ("the appointee") to the MIIS position.

[6] The complainant made the complaint under s. 77 of the *PSEA* on May 8, 2017.

III. Issues

[7] The issues to be determined are as follows:

1) Was there abuse of authority in the application of merit?
2) Was there abuse of authority in the choice of a non-advertised appointment process?

IV. Summary of the evidence

[8] The complainant testified that she is a behavioural counsellor at GVI. She believes that she has sufficient experience to prove that she is qualified for the MIIS position, which she acted in several times. She feels that because she was not in a

qualified pool of candidates for the WP-05 position of manager, assessment and intervention (MAI), as the appointee was, she was overlooked for the appointment.

[9] The complainant described the differences between the MIIS and MAI positions. She testified that the MIIS mentors and oversees behavioural counsellors and inmate admissions and discharges in a structured living environment. The main treatment is dialectic therapy administered by trained behavioural counsellors in consultation with a psychologist. By contrast, the MAI supervises parole officers.

[10] The complainant feels that the appointee was selected because she was in a qualified pool for the MAI position, but she was not assessed for the MIIS position. According to the complainant, one essential knowledge criterion required of the MIIS was not assessed for the MAI position. It is identified on the statement of merit criteria for the MIIS position as "[k]nowledge of policies, treatment interventions and multi-disciplinary teams specific to the Intensive Intervention Strategy" ("K2").

[11] The complainant acknowledged that the respondent prepared a narrative assessment of the appointee for the MIIS position. Relative to K2, it stated:

> …
>
> *Ms. Fleras has demonstrated knowledge of policies, treatment interventions and multi disciplinary teamwork specific to the IIS* [Intensive Intervention Strategy] *during her employment at GVI. She has worked as part of the team and has provided significant direction and input into IIS decisions as they have related to her positions as Parole Officer and A/MAI.*

[12] According to the complainant, the narrative assessment was very general and did not indicate that the appointee had been assessed for K2. The complainant also questioned how the appointee could be knowledgeable of treatment interventions if she had never worked in a role in which they would be administered.

[13] The complainant referred several times to her participation in the MAI appointment process and to the reasons she withdrew from it. That process is not the subject of this complaint, and its relevance to this matter was not established. Accordingly, it has not been considered in these reasons for decision.

[14] Elizabeth Vitek, formerly GVI's warden and now retired, testified that she was the hiring manager for the MIIS position. She testified that the MIIS position is unique

to women's institutions. The incumbent oversees a multidisciplinary team in a structured living environment. It includes primary workers, psychologists, psychiatrists, and parole officers.

[15] Ms. Vitek testified that the appointee worked in the women's centre at GVI for many years. She holds a bachelor of arts degree with honours in criminology and criminal justice, with a concentration in psychology. Before the MIIS appointment, she had worked as a primary worker and parole officer at GVI, which was cited in her résumé submitted for the MAI position. It was clear to Ms. Vitek that the appointee had a good idea of policies and treatment interventions as part of an intensive strategy. According to Ms. Vitek, the parole officer experience would have given the appointee a strong understanding of human behaviour.

[16] Ms. Vitek testified that the fact the appointee was in the MAI pool was a main factor in choosing her. It demonstrated that she met the criteria for that process. The MAI required knowledge of policies related to correctional interventions. This essential merit criterion was assessed by questions on the MAI appointment process examination, and the appointee achieved a passing score of 28 marks out of 40.

[17] Ms. Vitek acknowledged that K2 is not required of the MAI. However, she felt that the essential merit criteria for the MAI and MIIS positions were close to identical and that the appointee would be an excellent fit for the indeterminate MIIS appointment.

[18] Ms. Vitek stated that she had contact in the workplace with the appointee when she occupied the MAI position on an acting basis. This left her with no question that the appointee had the personality and skill set for the MIIS position.

[19] Ms. Vitek felt that the appointee would have a clear understanding of treatment interventions, as required by K2, from the respondent's deputy head's directives that look broadly at the expectations for managing offenders.

[20] Ms. Vitek spoke of the urgency to staff the MIIS position as a factor in choosing a non-advertised appointment process. She did not want the delay that an advertised appointment process would have brought. She suspected an MIIS process would be national in scope, and months to years could pass before an appointment would occur.

[21] The respondent's written rationale for using a non-advertised process explained that the appointee had acted as a manager at GVI for significant periods. It stated, "She has demonstrated that she meets the one additional merit criteria, which is a knowledge component, identified for the MIIS."

[22] The rationale provided no detail to explain how the K2 criterion was met, but it concluded with the statement that the appointee meets the merit criteria.

V. Summary of the arguments

A. For the complainant

[23] K2 was not properly assessed. The MIIS and MAI are different positions with different requirements. The respondent's explanation was general and did not address specific knowledge of the treatment interventions or therapies that are critical tools for the MIIS position. That knowledge was not tested in the MAI appointment process.

[24] The complainant's closing argument did not address the allegation of abuse of authority in the choice to use a non-advertised appointment process.

B. For the respondent

[25] The respondent argued that K2 was assessed using the MAI assessment materials, the appointee's résumé, and Ms. Vitek's direct observation. There was breadth and thoroughness to the assessment for K2.

[26] Concerning the choice of a non-advertised appointment process, the respondent noted that s. 33 of the *PSEA* provides management with the flexibility to choose between an advertised and a non-advertised process. There is no requirement to consider more than one candidate for an appointment. Ms. Vitek commented on the operational need to quickly fill the position and to avoid the delay of an advertised process.

VI. Analysis

A. Issue 1: Was there abuse of authority in the application of merit?

[27] Section 30(1) of the *PSEA* states that appointments to the public service are to be made on the basis of merit.

[28] Section 30(2)(a) provides that the appointed person must meet the essential qualifications for the position.

[29] In the present case, the complainant alleged that the respondent did not show that the appointee met K2, which was an essential merit criterion, according to the statement of merit criteria for the MIIS position. Therefore, the complainant argued, the appointment was an abuse of authority as set out in s. 77(1)(a) of the *PSEA*.

[30] The complainant's unchallenged evidence is that the MAI's work involves overseeing the work of parole officers and that it is not the same work that the MIIS performs. The evidence before me does not suggest that the MAI's assessment or work addresses K2 or is in any way specific to the Intensive Intervention Strategy, as required.

[31] The evidence shows that the appointee was considered a qualified candidate in the MAI appointment process and that she later occupied an MAI position.

[32] The respondent argued that when considered together, the appointee's success in the separate MAI appointment process, her résumé, and Ms. Vitek's personal knowledge of the appointee's performance while occupying the MAI position on an acting basis confirmed that she met K2.

[33] The appointee's résumé for the MAI appointment process recites her work history and the positions she occupied while employed by the respondent. It has no content that addresses K2 or that would allow assessing it.

[34] As for Ms. Vitek's testimony, in my view, it provided little more than general, impressionistic statements. It lacked a foundation for the conclusion that the appointee met K2.

[35] A review of the narrative assessment of the appointee shows that it is broadly stated and that it does not refer to any training or work experience, for example, to support the conclusion that the appointee met K2.

[36] I find that the evidence presented by the respondent is an unconvincing response to the complainant's case. Reviewing the methods used to assess the appointee for K2 shows them to be inadequate. I am unable to conclude that the appointee's success in the MAI appointment process, the details in her résumé for that

position, or her performance in the MAI position allowed the K2 qualification to be assessed. There is no suggestion that any of this information addressed K2 in a manner that would reasonably lead to a finding that K2 was met.

[37] Section 36 of the *PSEA* provides substantial discretion in the selection of assessment methods. However, it is not unfettered. As the former Public Service Staffing Tribunal found in the case of *Rochon v. Deputy Minister of Fisheries and Oceans*, 2011 PSST 7 at para. 72:

> *[72] While s. 36 of the PSEA provides deputy heads with broad discretion in the selection and use of assessment methods, these methods must effectively assess the qualification, and be used in a fair and reasonable manner. The deputy head may be found to have abused his or her authority where the methods used have no connection to the qualifications or do not allow those qualifications to be assessed, the tool is flawed or the outcome cannot be considered reasonable or fair.…*

[38] The burden of proof in a complaint of abuse of authority rests with the complainant. (See *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at para. 50.) Applying the legal test of the balance of probabilities, I find that the allegation of abuse of authority in the assessment of merit is founded. It has not been shown that the assessment of the appointee for the MIIS position included an assessment of K2. As such, it cannot be said that the appointment conformed to s. 30 of the *PSEA*.

B. Issue 2: Was there abuse of authority in the choice of a non-advertised appointment process?

[39] The complainant asserted that she was a qualified candidate who deserved an opportunity to be considered for the MIIS position and that she was denied that opportunity when the respondent chose to use a non-advertised appointment process.

[40] The respondent's reply was that its need was urgent and that it could not go through the delay of an advertised appointment process. Moreover, it was not obliged to consider more than one candidate when making the appointment.

[41] Section 33 of the *PSEA* allows the choice between an advertised and a non-advertised appointment process. It is settled law that merely choosing a non-advertised appointment process is not an abuse of authority. (See *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 6 at para. 7.)

[42] Further, nothing in the *PSEA* provides employees with a right of access to every appointment opportunity that may arise. (See *Jarvo*, at para. 32.)

[43] There is no evidence to suggest an impropriety or irregularity in the respondent's choice of a non-advertised appointment process. In these circumstances, an abuse of authority cannot be established.

[44] The allegation is dismissed.

VII. Conclusion

[45] Based on the evidence, I conclude that the complainant established that the respondent abused its authority in the application of merit. It was not shown that the appointee met the K2 qualification.

[46] No abuse of authority in the choice of appointment process was established.

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

(The Order appears on the next page)

VIII. Order

[48] In accordance with s. 81(1) of the *PSEA*, the Board orders the deputy head to revoke the appointment of Sarah Fleras to the position of Manager, Intensive Intervention Strategy, in appointment process 2017-PEN-INA-ONT-124359 within 30 days of the date of this order.

November 10, 2021.

Joanne B. Archibald,
a panel of the Federal Public Sector
Labour Relations and Employment Board