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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

MICHELLE LAFRANCE

Complainant

and

**DEPUTY HEAD
(Canada Border Services Agency)**

Respondent

and

OTHER PARTIES

Indexed as

Lafrance v. Deputy Head (Canada Border Services Agency)

In the matter of a complaint of abuse of authority - paragraphs 77(1)(a) and (b) of the
Public Service Employment Act

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

For the Complainant: Herself

For the Respondent: Marie-France Boyer, counsel

For the Public Service Commission: Alain Jutras, senior analyst

Preliminary Motion heard by videoconference, March 21, 2022,
Written submissions by Public Service Commission on March 15, 2022.

REASONS FOR DECISION

I. Preliminary issue: standing

[1] Michelle Lafrance (“the complainant”) is at present a senior program analyst with the Canada Border Services Agency (CBSA, “the respondent”).

[2] On November 15, 2017, the complainant received by email a solicitation of interest for temporary acting positions at the superintendent level (FB-05 group and level) that was circulated among staff. The callout letter reads as follows:

To All Officers;

As you are aware, we often need to temporarily backfill superintendent positions. The coverage periods can vary from as little as a few days to a number of months. This email call letter is being sent out to establish a current list of interested officers that we can reference for such future assignments. These assignments may include (but are not limited to) activities such as:

- Managing shift activities and staff on duty;*
- Coordinating operational activities with fellow managers;*
- Handling complaints from clients;*
- Overseeing enforcement activities;*
- Initiating enforcement Blitz activities;*
- Reporting daily activities and critical incidents to fellow Superintendents and the Chiefs;*
- Completing POEMS and BOC notices as required;*
- Providing input and/or suggestions on various POE initiatives;*
- Dealing with facility issues such as alarms, heating or cooling problems, computer, CCTV system failures, etc.*

You will be required to regularly demonstrate competencies such as decisiveness, analytical thinking, dealing with difficult situations and client service at enhanced levels.

If you are interested, please email Supt. Annie Charbonneau with an outline of why you feel you’d be a good candidate for an acting superintendent position. This outline should include an explanation of why you would like an assignment and what you feel can bring to the management team in terms of interests, strengths, skills and enthusiasm. The response should be complete enough to include all of these aspects, but concise enough to fit on one page. In addition, if there is a superintendent position that you are particularly interested in, or not interested in, please also specify.

****If you have previously expressed interest in an acting superintendent position, we ask that you renew your application by responding to this email.*

Expressions of interest to this call letter should be received by Dec. 1, 2017.

Thank you in advance for your interest.

...

[3] The complainant did not express an interest and did not submit her name for consideration.

[4] On February 8, 2018, a Notice of Acting Appointment (NAA) by non-advertised process carrying the number 2018-INA-NOR-OD-MCIA-FB05-494 was published. It stated that N.P. (name anonymized for the purposes of this decision), was appointed to a superintendent position on an acting basis. His appointment is the subject of the complaint.

[5] N.P. had responded to the November 15, 2017, solicitation of interest and submitted his name for consideration.

[6] In the pre-hearing exchange of documents, the respondent indicated to the complainant its position that she lacked the requisite standing to make a complaint. The complainant maintained she had a right to a hearing by the Federal Public Sector Labour Relations and Employment Board ("the Board").

[7] The Public Service Commission (PSC), a party to these proceedings, filed written submissions on March 15, 2022, which did not address or otherwise refer to the specific standing issue that the respondent raised. Therefore, the PSC's submissions, although they are part of the record, will not be referred to in this decision.

[8] When the hearing opened via videoconference on the morning of March 21, 2022, the respondent formally raised a preliminary objection to the Board's authority to hear the complainant, on the basis of the complainant's lack of standing.

II. The respondent's objection

[9] The *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the Act") states, at s. 88, "The Board is to consider and dispose of complaints made under subsection 65(1) and sections 74, 77, and 83."

[10] Section 77(1) of the Act states as follows:

77 (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Board's regulations — make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of:

(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);

(b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; or

(c) the failure of the Commission to assess the complainant in the official language of his or her choice as required by subsection 37(1).

77 (1) Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d'un processus de nomination interne, la personne qui est dans la zone de recours visée au paragraphe (2) peut, selon les modalités et dans le délai fixés par règlement de la Commission des relations de travail et de l'emploi, présenter à celle-ci une plainte selon laquelle elle n'a pas été nommée ou fait l'objet d'une proposition de nomination pour l'une ou l'autre des raisons suivantes :

a) abus de pouvoir de la part de la Commission ou de l'administrateur général dans l'exercice de leurs attributions respectives au titre du paragraphe 30(2);

b) abus de pouvoir de la part de la Commission du fait qu'elle a choisi un processus de nomination interne annoncé ou non annoncé, selon le cas;

c) omission de la part de la Commission d'évaluer le plaignant dans la langue officielle de son choix, en contravention du paragraphe 37(1).

[11] The respondent's objection is that since the complainant did not express an interest in the acting position because she did not supply her name for consideration for it, she lacks the requisite standing to make a complaint with the Board.

[12] The respondent referred the Board to paragraph 18 of *Attorney General of Canada v Cameron*, 2009 FC 618, which reads as follows:

[18] The combined reading of sections 77, 81 and 82 of the Act indicates that any corrective action ordered by the Tribunal must

address only the appointment process that is the subject of the complaints before it. The corrective action must aim at remedying the default identified by the Tribunal in hearing the complaint before it, and cannot address other past or future appointment processes not before the Tribunal further to a complaint made according to the Act.

[13] The respondent also referred as follows to paragraphs 37 and 38 of *Chuey v. Commissioner of the Correctional Service of Canada*, 2021 FPSLREB 58:

[37] I find it material to the choice of a non-advertised process that a 2017 call for expressions of interest from employees classified PE-03, WP-04, AS-05, and CX-02 for an assignment to a DTA/NAMP position in Saskatoon yielded interest, but, according to the respondent, no qualified candidates. The complainant did not put her name forward at that time for what would have been an assignment at her current group and level. Neither can I overlook that she did not apply when the AS-05 appointment process arose. It represented a promotional opportunity and by its terms, it could be used to staff similar positions.

[38] The complainant stated that she did not foresee that this indeterminate AS-05 appointment opportunity would later arise. While she may be disappointed, I am unable to say that she did not have access to be considered by applying to the AS-05 appointment process. Further, the employer was not obliged to seek other interested candidates. It was entitled to consider only one, as it did. [See PSEA, s. 30(4).]

[14] The respondent also referred to *Evans v. Deputy Minister of Indian Affairs and Northern Development*, 2007 PSST 4, in which a complaint was dismissed for a lack of jurisdiction. That decision states as follows at paragraphs 12 and 13:

[12] The Tribunal finds that a complainant's right to file a complaint pursuant to section 77 of the PSEA is subject to the preliminary condition that the complainant must have a personal interest in the appointment.

[13] The complainant has not provided any evidence or submissions to counter the respondent's submissions concerning her lack of personal interest in being appointed to this CR-04 position. As requested by the complainant's representative, the Tribunal has reviewed the complaint and other documentation submitted by the complainant.

[15] The respondent also referred to the matter of *Silke v. Deputy Minister of National Defence*, 2010 PSST 9, which states as follows at paragraphs 37 to 39:

[37] In cross-examination, Mr. Johnston stated that he was not personally interested in the TSO position in Trenton, but that others could have been. He agreed that the requirements of a position can change, but the requirements of a technical position should be upgraded, not downgraded. In his view the standards have been lowered.

[38] Mr. Demont testified that he has been a TSO in Petawawa since April 2007. He has not seen any postings for TSO opportunities in Trenton but has seen the one advertised for all of Canada. He testified that he has family and friends in Trenton and that he probably would have been “a bit interested” in the job if it had been posted.

[39] In cross-examination, Mr. Demont confirmed that he did not apply for the position when it was posted in 2008.

[16] Although the complainant read the November 15, 2017, callout letter, she did not submit her name for consideration. As a result, argued the respondent, this complaint should be dismissed by way of the Board’s lack of jurisdiction to hear it.

[17] Having received the respondent’s arguments, I asked the parties whether it would be fair to ask for written submissions on this objection, because it was of sufficient importance that were it sustained, it would obviate the need for a hearing.

[18] The complainant stated that she was previously aware, in general terms, of the nature of the respondent’s objection. I note that she filed Part 3 of her disclosure on Sunday, March 20, 2022 (the day before the hearing opened), in response to a message from the respondent sent at 3:17 p.m. on Friday, March 18, 2022, indicating that it planned to raise “an objection based on personal interest”.

[19] I then initiated a discussion with the respondent and the complainant regarding their viewpoints on the fairest way to proceed, given all the developments thus far. I repeated my offer to proceed by way of written submissions. The respondent was content to have made an oral argument, and the complainant indicated that she understood all the points that the respondent raised, and was prepared to make oral argument in return. She indicated that she had access to the cases that the respondent referred to because they had already been disclosed to her. She also had her own set of cases ready.

[20] After a brief discussion with me on how her arguments could best be presented, the complainant asked for and was granted a two-hour adjournment to allow her to

review the cases the respondent referred to in its oral argument and to prepare a reply to the objection.

III. The complainant's position

[21] When the callout letter was sent, the complainant had approximately 13 years of experience and had seen many such emails. These solicitations of interest were sent regularly, to temporarily backfill superintendent positions. She read them all. Given that the acting appointments were for very limited durations, she was not interested in them. They were usually for four months less one day, or even shorter periods of time. She referred to one such solicitation sent by Superintendent Annie Charbonneau on April 7, 2017.

[22] The complainant submitted that she had already acted in a superintendent position in February 2009 for one month, from September to December 2009, and from October 2012 to April 2013. She submitted that when the callout letter came out on November 15, 2017, she read it and once again assumed that it was for appointments of limited duration. She therefore did not respond to it.

[23] When the respondent published N.P.'s NAA on February 8, 2018, the complainant made a staffing complaint. She did so because she saw that the appointment was for a longer duration than for four months. Had she known that the acting appointment being contemplated was for this length of time, she stated she would have submitted her name for consideration.

[24] By making the complaint, argued the complainant, she gained the requisite standing to have this matter heard by the Board.

[25] The complainant referred to an explanation she had received from Tammy Kendrew, Chief of Operations, about why N.P. had been appointed, which mentioned a need for consistency in management. The complainant submitted that she had been advised that the November 15, 2017, solicitation of interest had been designed to develop a pool of candidates interested in becoming a superintendent permanently. The complainant pointed out that this was not apparent in the solicitation of interest, which was another reason she did not respond to it.

[26] Had the November 15, 2017, solicitation of interest been sufficiently detailed, argued the complainant, she would have submitted her name for consideration.

[27] The complainant referred as follows to paragraphs 79 and 80 of *Beyak v. Deputy Minister of Natural Resources Canada*, 2009 PSST 35:

[79] A complainant must have a personal interest in the appointment to file a complaint. The wording of subsection 77(1) of the PSEA, namely “a complaint to the Tribunal that he or she was not appointed or proposed for appointment,” makes this clear. a complaint must be personal to the complainant, as a person can only complain that he or she was not appointed, and cannot complain that other persons were not appointed. See: Visca; and Evans v. Deputy Minister of Indian Affairs and Northern Development, [2007] PSST 0004.

[80] In an advertised appointment process, an employee in the area of selection can communicate his or her personal interest by applying for the position. This is not possible when a non-advertised appointment process is chosen. However, by filing a complaint that he or she was not appointed, an employee can also express personal interest. The threshold test for having a personal interest in a position should not be higher for a non-advertised process than an advertised process. In both situations, where there is a challenge to a complainant’s right to bring a complaint, the Tribunal will make its determination based on the evidence and arguments presented by the parties.

[28] Thus, argued the complainant, her complaint is a clear expression of her personal interest in the acting position that is the subject of her complaint.

[29] The complainant distinguished the facts of the *Chuey* decision from the present matter because the complainant in *Chuey* did not apply to a process for the same position after making the complaint. The complainant submitted it is further evidence of her personal interest that she did make such an application later on.

IV. The respondent’s rebuttal

[30] The November 15, 2017, callout letter offered acting positions for “... as little as a few days to a number of months.” A number of months can mean two or more. In its callout letter, management was clearly seeking to create a pool of applicants for a number of different positions, for different durations. Multiple positions had to be backfilled. Had the complainant been at all interested, she could simply have signalled her interest. Once this is done, she could have asked further questions at the appropriate time about the nature of the appointments or their duration. She chose not to do this.

[31] The callout letter clearly indicates, with three asterisks for emphasis, “***If you have previously expressed interest in an acting superintendent position, we ask that you renew your application by responding to this email.” The complainant did not. The author of the callout letter had been in place only since September of 2017 and could not possibly have known of the complainant’s history of acting appointments or career interests (or anyone else’s, for that matter). Thus, the importance of renewing interest by responding to the callout letter was clearly spelled out. Those who failed to respond risked falling off the radar.

[32] In, addition, the respondent pointed out that at several junctures in the complainant’s submissions, she refers to “an eight-month acting position.” In fact, the acting appointment in 2018-INA-NOR-OD-MCIA-FB05-494 was for a duration of six months and three weeks. The respondent questioned how this length of time could be appreciably different from the “four months less one day” term, which was apparently not to the complainant’s liking.

[33] Finally, the *Beyak* decision involves a much different set of facts because a very different staffing process was involved. The callout letter in *Beyak* indicated positions at the AS-02 group and level. However, when the time came to appoint candidates, the positions were found to be at groups and levels other than AS-02. That decision states as follows at paragraphs 61 to 63:

[61] The complainant returned from maternity leave in early January 2007. She was a Contract Coordinator (PC-02) with the Business Affairs Office. She stated that Mr. MacMillan did not share any information willingly with employees. As well, he did not seem to understand the workings of the office. She learned from a colleague that a notice was posted on Publiservice for the acting appointment of Ms. Delorme as a CO-01 in their office. She explained that it was a chance discovery, as employees were not otherwise notified, and it was unusual to look at notices of CO positions since there were previously none in the office.

[62] The complainant explained that she initially dismissed the email notice of a job opportunity in August 2006 as she was not interested in an administrative position. She understood that the position was temporary as the email referred to the wrap-up of the CCP. However, she would have expressed interest in the position if the August 28, 2006 email had reflected the job description of the CO-01 position, or had any sort of technical or scientific aspect to it. She also testified that the difference in salary between her position as a PC-02 and a CO-01 was not significant for her.

[63] The complainant explained that there was a complete disconnect between the job description of the CO-01 position and the functions described in the August 28, 2006 email, as well as the functions performed by Ms. Delorme. She testified that Ms. Delorme was performing duties of an administrative nature in the wrap-up of the CCP and never reported on any business development activities in team meetings. She also explained that Ms. Delorme coordinated administrative duties and the annual report. She prepared monthly estimates, which were previously prepared by a person in an AS-01 position. She also testified that Ms. Delorme did not perform any of the duties in business development found in the job description of the CO-01 position, and that no business development was coming out of the Business Affairs Office. The duties of Ms. Delorme on the CCP closure did not include any business development as the program did not generate revenue, but consisted of controlling expenditures.

[34] The solicitation of interest in *Beyak* was found to have little in common with the resulting appointments. The respondent argued that that is why the complainant in *Beyak* was found to have had a personal interest in the appointment by virtue of her complaint.

[35] Compared to *Beyak*, argued the respondent, the present case is very straightforward. The callout dated November 15, 2017, was for opportunities to act at the FB-05 (superintendent) level, which is exactly what the appointee received. Thus, the circumstances under which the complainant in *Beyak* was deemed to have a personal interest are simply not present in this case.

V. Reasons

[36] According to s. 77(2)(b) of the *Act*, in the case of a non-advertised internal appointment process, a person must be in the area of selection to have a right of recourse with respect to the appointment.

Area of recourse

77(2) For the purposes of subsection (1), a person is in the area of recourse if the person is

(a) an unsuccessful candidate in the area of selection determined under section 34, in the case of an advertised internal appointment process; and

(b) any person in the area of selection determined under section 34, in the case of a non-advertised internal appointment process.

Zone de recours

77(2) Pour l'application du paragraphe (1), une personne est dans la zone de recours si :

a) dans le cas d'un processus de nomination interne annoncé, elle est un candidat non reçu et est dans la zone de sélection définie en vertu de l'article 34;

b) dans le cas d'un processus de nomination interne non annoncé, elle est dans la zone de sélection définie en vertu de l'article 34.

[37] The NAA stated that the area of selection for N.P.'s appointment was the following: "Persons employed in the Canada Border Services Agency within the Northern Ontario Region." The complainant is employed at the CBSA and the respondent has not contested that she was in the area of selection.

[38] However, even if complainants are in the area of selection, they must also satisfy a personal interest requirement in order to have the right to file a complaint under s. 77. The respondent referred to the Public Service Staffing Tribunal (PSST) decision in *Evans*. That case involved a complaint made under s. 77 concerning a non-advertised appointment. The PSST held, at para. 12 of the decision, that a complainant's right to file a complaint pursuant to s. 77 of the *Act* is subject to the preliminary condition that the complainant must have a personal interest in the appointment. The evidence in *Evans* was that the complainant's substantive position was at a level higher than the position at issue in that case and, more importantly, the complainant had clearly made statements in her complaint that she was acting as a spokesperson for other persons who "may have liked the chance to try" for the job. The Tribunal found that the complainant did not have a personal interest in that case and dismissed the complaint.

[39] In contrast, the complainant in the present case held a position at a lower level (FB-03) and she indicated in her submissions that she was very much interested in an acting appointment to the position for an extended period (beyond four months).

[40] As the PSST noted in *Silke* at para. 69, referencing *Beyak*, the threshold test for having a personal interest in a position is not higher for a non-advertised process than an advertised process. In the case of non-advertised appointment processes, it is not possible for employees to indicate their interest in an appointment to a position by filing an application, as would be the case had they viewed a posted job opportunity in an advertised appointment process. It is by filing a complaint that employees who were not appointed can express their interest in a position that is staffed by a non-advertised process.

[41] In *Silke*, the PSST dismissed the complaint of one of the complainants because he had explicitly stated he was not interested in working in the city where the job was located. The complainant in the present case has made no such statement. She states unequivocally that she would have been interested in the appointment that N.P. was given.

[42] The respondent calls into question her interest since she did not respond to the callout letter when it was circulated on November 15, 2017. This fact is irrelevant. The appointment at issue is by non-advertised process. Had the respondent run an advertised process, usually initiated by posting of a formal job opportunity advertisement on the GC Jobs website, and the complainant had not applied, the respondent could of course have argued that she was not in the area of recourse set out in s. 77(2)(a), in that she was not an unsuccessful candidate who had applied.

[43] But the respondent decided to make N.P.'s appointment by non-advertised process. As was noted in both *Silke* and *Beyak*, in the case of non-advertised processes, an employee can express an interest in an appointment simply by filing a complaint. This is precisely what the complainant has asserted in this case. When she made the complaint, she was interested in the appointment. That is the operative date for determining if someone is interested in a non-advertised appointment, not a moment in the past when a letter was circulated by email "soliciting interest."

[44] The respondent tried to argue that *Beyak* does not apply because its facts differed. This is a false distinction. The principle cited by the complainant, which I referenced above, is simple and derived from the plain language of the *Act*. How can someone show an interest in advance of an appointment if the process for the appointment was not advertised in advance? Call-out letters collecting names of

potential appointees do not transform a non-advertised appointment process into an advertised one.

[45] The respondent's reference to an excerpt from the recent *Chuey* decision was also taken out of context. The complainant in that case had alleged an abuse of authority in the choice of a non-advertised process. In its defence, the respondent pointed out that when it had issued a call for expressions the previous year, some employees responded but none were considered qualified. That outcome was one of the reasons it decided not to use an advertised process the following year, and opted to make a non-advertised appointment instead, selecting someone from a pool of qualified candidates created in a pre-existing AS-05 advertised process, to which the complainant had not applied. The Board commented that had the complainant applied to that AS-05 advertised process, she might have been selected for the non-advertised appointment. These circumstances are entirely different from the present case. The issue dealt with in *Chuey* is not relevant to the substance of the respondent's objection about whether the complainant has sufficient interest or standing to file a complaint.

[46] The respondent also claimed that the purpose of the call-out letter was to establish a "pool of applicants" for different positions. While having a list of people who would likely accept an acting appointment is undoubtedly helpful, it does not constitute what is commonly referred to as a pool of qualified candidates that is created after assessing applicants in an advertised appointment process. To create these pools, candidates are first assessed and found to partially or fully meet essential merit criteria. There is no indication that each person who responded to the call-out letter in this case was assessed against any essential qualifications. In fact, the letter did not really list what the qualifications would be for any appointment other than a general statement about the competencies appointees would be required to "regularly demonstrate." This was clearly not an advertised process.

[47] In sum, the objection being raised by the respondent is as to whether the complainant has a right of recourse about N.P.'s appointment. According to s. 77(2)(b) of the *Act*, as someone in the area of selection for a non-advertised process, she is in the area of recourse with an interest in the appointment position when it was made on February 8, 2018. This is sufficient to establish that she is entitled to file the complaint.

[48] For all of the above reasons, I make the following order:

(The Order appears on the next page)

VI. Order

[49] The motion to dismiss this complaint is denied, and the matter will proceed to a hearing on the merits of the complaint.

May 13, 2022.

**James R. Knopp,
a Panel of the Federal Public
Sector Labour Relations and
Employment Board**