

Date: 20221228

Files: 771-02-39416 and 39460

Citation: 2022 FPSLREB 106

*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

TIMOTHY HAY AND TARA HARRISON

Complainants

and

**DEPUTY HEAD
(Correctional Service of Canada)**

Respondent

and

OTHER PARTIES

Indexed as

Hay and Harrison v. Deputy Head (Correctional Service of Canada)

In the matter of complaints of abuse of authority under paragraph 77(1)(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 Complainants: Frank Janz

For the Respondent: Marie-France Boyer

For the Public Service Commission: Alain Jutras

Heard by videoconference,

August 31 and September 1, 2022.

REASONS FOR DECISION

I. Introduction

[1] The complainants, Timothy Hay and Tara Harrison, made complaints to the Federal Public Sector Labour Relations and Employment Board (“the Board”) under s. 77(1)(b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “PSEA”). They alleged abuse of authority by the respondent, the deputy head of the Correctional Service of Canada (CSC), in the choice of a non-advertised appointment to staff the position of Parole Officer (“PO”), classified WP-04, in Saint John, New Brunswick (“the PO position”). The process number was 2018-PEN-INA-ATL-143756 (“the appointment process”).

[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 to address applicable policies and guidelines. It did not take a position on the merits of the complaints.

[4] For the following reasons, the complaints are dismissed.

II. Summary of the evidence

[5] Documents provided during the hearing show that Nicole Smith, the hiring manager for the respondent’s Saint John parole office (“the hiring manager”), considered Frederic Roy (“the appointee”) for appointment to an English-only PO position in that office in April 2018. At that time, he was working as a bilingual PO at the CSC’s Springhill Institution (“Springhill”) in Springhill, Nova Scotia. He lived in Saint John and preferred to find a position there. The hiring manager’s written comments indicate that she anticipated appointing him to a bilingual position when the current bilingual PO deployed to a position outside the region.

[6] A further document shows the approval on October 15, 2018, for a change to the PO position from English to a bilingual linguistic profile (CCC/CCC). The rationale stated that the linguistic profile change provided “... flexibility when dealing with the preferred language of choice of our clients being supervised at the Saint John Parole Office and the residents at the CCC when bilingual Parole Officer is absent.”

[7] On November 15, 2018, the respondent posted a “Notification of Appointment or Proposal of Appointment” to announce the appointee’s indeterminate appointment to the PO position and provide information concerning the recourse process.

[8] On November 22 and 30, 2018, the complainants submitted their complaints to the Board. They alleged that the language profile of the PO position, formerly English only, was changed to exclude them from consideration. Earlier in the complaint process, the complainants raised many other allegations including bias and improper administration of a priority. However, during the hearing, those allegations were not advanced and the hearing proceeded based solely on the argument concerning the language profile selected for this non-advertised appointment.

[9] The parties agree that both complainants are unilingual English speaking.

[10] Mr. Hay testified that he joined CSC in 2016. In 2017, he accepted an indeterminate appointment in Regina, Saskatchewan. For personal reasons, he elected to return to Saint John in 2018.

[11] Mr. Hay stated that in March 2018, he emailed the hiring manager concerning a position in Saint John when he returned from Regina. He renewed the conversation in September 2018 and learned that there would be a vacancy but that it would be filled locally.

[12] In October 2018, Mr. Hay arrived in Saint John from Regina without a position to assume. He then became a spousal relocation priority as set out in s. 9 of the *Public Service Employment Regulations* (SOR/2005-334).

[13] Mr. Hay recalled that during the period of his priority entitlement, he was contacted about a medical adjudicator position in Prince Edward Island and a PO position at Springhill. While he preferred to work in Saint John, he accepted the position at Springhill and returned to employment in February 2019.

[14] Mr. Hay knew that unilingual English positions did not come up very often and that when they did, they were more likely at Springhill than in Saint John. He testified that he felt that the language profile of the PO position was changed to bilingual to avoid employing him in Saint John. In his view, the requirement for bilingual service did not merit a bilingual PO position.

[15] Mr. Hay testified that he contacted the hiring manager when he learned of the appointee's appointment to the Saint John parole office. She told him that it formed part of a succession plan relative to the respondent's need for bilingual capacity.

[16] Ms. Harrison testified that she commenced employment with the respondent at Springhill in 2007 as a correctional officer. She first acted as a PO in 2011 and continued to accept acting appointments whenever they were offered. She was also in a qualified pool of candidates for a unilingual English PO position.

[17] Ms. Harrison stated that the appointee's indeterminate appointment to a bilingual position upset her. She stated that the PO position was formerly unilingual English and she had occupied it previously on an acting basis. The hiring manager also told her that the appointee preferred to work in Saint John. Ms. Harrison understood that one justification for the change of language profile was an employee's right to be supervised in the language of their choice, but the PO position was not supervisory, so this made no sense to her. Someone told Ms. Harrison that there were only two French-speaking offenders in Saint John.

[18] When Mr. Hay later accepted an indeterminate PO position at Springhill, Ms. Harrison saw her only option as taking an indeterminate position in Kentville, Nova Scotia.

[19] The respondent called no witnesses.

III. Summary of the arguments

A. For the complainants

[20] Mr. Hay argued that the respondent abused its authority in the choice of a non-advertised appointment process by changing the language profile of the PO position several weeks after it knew of his spousal relocation priority. This action eliminated him from consideration due to his official language proficiency of English only. He easily could have filled a unilingual English position but received no consideration at all.

[21] Ms. Harrison submitted that the respondent considered the appointee's work location preference in his selection for the PO position, which was an improper justification for the appointment.

B. For the respondent

[22] The respondent argued that s. 33 of the *PSEA* gave it the sole discretion to choose an advertised or a non-advertised appointment process and that there was no preference for one over the other.

[23] The respondent has broad discretion to establish the necessary qualifications for a position, including the linguistic profile.

[24] Further, the complainants presented no concrete evidence and only their perception of injustice, which did not meet the threshold to prove their case.

IV. Reasons

[25] The complainants were interested in an indeterminate PO position at the Saint John parole office. When notified of the appointee's appointment to the PO position, they were understandably disappointed. They recognized that they did not meet the linguistic profile of the PO position to which he was appointed, and they questioned the appointment. This led them to initiate complaints about the choice of a non-advertised appointment process.

[26] Section 77(1)(b) of the *PSEA* provides 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

...

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

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 :

[...]

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;

[27] The burden of proving abuse of authority rested with the complainants. (See *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8.) At s. 2(4), the *PSEA* provides that abuse of authority includes bad faith and personal favouritism.

[28] The complainants alleged an abuse of authority in the choice of a non-advertised appointment process. Section 33 of the *PSEA* addresses the choice between an advertised and a non-advertised appointment process:

33 In making an appointment, the Commission may use an advertised or non-advertised appointment process.

33 La Commission peut, en vue d'une nomination, avoir recours à un processus de nomination annoncé ou à un processus de nomination non annoncé.

[29] The Board and the predecessor Public Service Staffing Tribunal have been equally clear in stating that there is no preference in law between an advertised and a non-advertised appointment. (See, for example, *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 6 at para. 25.) To succeed with a complaint of abuse of authority in the choice of appointment process, there must be evidence to demonstrate that the actual choice of process was itself an abuse of authority; that is, it was tainted by something improper.

[30] The evidence does not establish that the respondent's action to proceed with a non-advertised appointment approached the threshold of an abuse of authority. Rather, the documents presented show that the appointee was considered for the PO position as early as April 2018, when the hiring manager observed that his bilingual ability would address an anticipated organizational need. The documents also show that she then appointed him to a bilingual PO position when one became available.

[31] As for any question of whether the change to the PO position's linguistic profile constituted an abuse of authority in the choice of process, the documents of April 2018 and October 2018 set out the respondent's focus on strengthening its bilingual capacity for its clients when a bilingual PO was absent or after the anticipated departure of a bilingual PO deployed from the region.

[32] The establishment of the language qualification fell squarely within the respondent's authority to establish qualifications, including official language proficiency, for a position pursuant to s. 30(2) of the *PSEA*. (See *Vani v. Chief Statistician of Canada*, 2008 PSST 29 at para. 51.)

[33] The complainants questioned the need for a bilingual PO and indicated that they had heard that the need was low. However, without more, their impression is not sufficient to persuade me that the change to the PO position's language profile was pretextual or done to exclude them from eligibility for it. Proof would be required to demonstrate that the respondent created a qualification that was not grounded in the needs of its organization.

[34] The complainants also suggested that the choice of a non-advertised process was tainted by the appointee's wish to work in Saint John rather than in Springhill.

[35] While the appointee's preferred work location was mentioned in the rationale for his selection in April 2018, it is one of several comments that the hiring manager made about his suitability for the PO position, including a positive performance appraisal, language ability, and the future needs of the organization.

[36] Viewed in the entire context of all of these considerations, I do not accept that the appointee's declared work location preference unduly influenced the choice of a non-advertised process.

[37] Accordingly, I find that the respondent did not abuse its authority in the choice of a non-advertised appointment process.

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

(The Order appears on the next page)

V. Order

[39] The complaints are dismissed.

December 28, 2022.

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