Date: 20240306

Files: 771-02-42935 and 42950

Citation: 2024 FPSLREB 30

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

LES KRAEKER AND MARLENE ST. ONGE

Complainants

and

DEPUTY HEAD
(Canada Border Services Agency)

Respondent

and

OTHER PARTIES

Indexed as
Kraeker v. Deputy Head (Canada Border Services Agency)

In the matter of complaints of abuse of authority under section 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: Marlene St. Onge, for herself

For the Respondent: Alyson Sutton, counsel

For the Public Service Commission: Louise Bard, senior analyst

Heard via videoconference,

December 18, 2023.

REASONS FOR DECISION

I. Summary

[1] Les Kraeker and Marlene St. Onge ("the complainants") filed complaints alleging abuse of authority in the application of merit pursuant to s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *Act*") concerning a non-advertised appointment process. These complaints challenge the interpretation of the word "normally", which was used to qualify an essential qualification that was used to assess a candidate for appointment to a senior FB-07 chief position at the Canada Border Services Agency ("the respondent" or CBSA). A person ("the appointee") received an acting appointment that started on April 1, 2021 (process number 2020-ACIN-PRA-SASSD-FB07-4970).

[2] The complainants alleged that the appointee had only 2 years and 4.5 months of experience in a management role, which should have disqualified her as it did not meet the essential qualification that stated that the appointee had to possess "[r]ecent and significant experience as a supervisor of a CBSA work unit", which was defined as experience "… normally … gained over a continuous period of 3 years within the last 5 years."

[3] The evidence established that the essential qualifications and the impugned word were interpreted and that the appointee was assessed in a *bona fide* manner consistently with the powers delegated under the the *Act*.

[4] While the word "normally" has understandably caused the complainants frustration and disappointment, it is consistent with the flexibility and discretion that Parliament has granted to sub-delegated hiring managers.

[5] The complaints are rejected as Parliament has clearly stated that hiring managers should have as much flexibility as possible to appoint the candidates who they find meet the essential qualifications and are the right fit.

II. The law

[6] Section 77(1) of the *Act* states that when the Public Service Commission (PSC) has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in s. 77(2) may make a complaint to the Federal Public Sector Labour Relations and Employment Board ("the Board") that he or she was not

appointed or proposed for appointment by reason of an abuse of authority by the PSC or the deputy head in the exercise of its or his or her authority under s. 30(2).

[7] Section 30(2) of the *Act* addresses the meaning of merit as follows: "An appointment is made on the basis of merit when … the [PSC] 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 finally, s. 30(4) of the *Act* states that the PSC is not required to consider more than one person for an appointment to be made on the basis of merit.

[8] "Abuse of authority" is not defined in the *Act*. However, s. 2(4) provides, "For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism." *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, held that an abuse of authority could also include improper conduct, serious errors, or omissions. As noted in *Tibbs*, at para. 50, the complainant bears the burden of proof in a complaint of abuse of authority.

[9] 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.

III. Evidence and analysis

[10] Ms. St. Onge was the only complainant that appeared at the hearing and testified that the respondent's use of workplace projects and related experience during the response to the COVID-19 pandemic to justify finding that the appointee had "accelerated" experience, such that the essential criteria were satisfied, was not supported by factual evidence.

[11] Rather, Ms. St. Onge testified that she had extensive knowledge that she had gained through other equally urgent matters, such as the 9/11 terrorist attacks, the SARS outbreak, Ebola, and the H1N1 influenza, which she said had all posed very similar challenges to the CBSA to quickly react to potentially dangerous health risks.

[12] She explained that those events also required working with the Public Health Agency of Canada, providing special treatment arising from special rules and policies to travellers from some countries, and working with quarantine officers. She stated

that the 9/11 terrorist attack response was unprecedented as it closed land borders and airspace. She argued that in that context, COVID-19 was neither unique nor unprecedented. She claimed that this undermined the respondent's claim that the appointee was deemed to have acquired accelerated experience due to working as a chief on an acting basis during the COVID-19 pandemic response.

[13] Benjamin Tame was the respondent's only witness. At the times relevant to the events at issue, he was its regional director and was the sub-delegated hiring authority and decision maker.

[14] He testified to his personal knowledge of the appointee and spoke in very positive and uncontradicted terms of her many on-the-job qualifications and attributes. He gave several specific examples of her successful work on projects that she led. While it was not necessary to answer the allegation, he also explained how the indeterminate chief in the position at issue required leave and then needed to extend it, both in a manner that left the CBSA with a need to run an unadvertised staffing process. That was some of what he believed was part of a compelling case to consider the COVID-19 pandemic as an unprecedented challenge to the CBSA. He gave many examples of how the pandemic created changes to every aspect of the CBSA's land-border-crossing operations.

[15] Ms. St. Onge astutely noted that Mr. Tame attempted to testify about the appointee's assessment against the statement of merit criteria (SOMC) document, even though he had neither authored nor signed it. He attempted to describe how after he returned from leave, he had input into it or oversaw its editing. However, the fact that he acknowledged that it was written in his absence and that it was signed by an acting chief serving in his place rendered the document hearsay to him.

[16] The Board accepted the SOMC as an exhibit but relied upon Mr. Tame's testimony about his firsthand knowledge of the appointee and the related the reasons of why she was deemed the right fit for the position.

[17] The respondent noted the Federal Court's examination in *Lavigne v. Canada (Justice)*, 2009 FC 684, of the preamble to the *Act* and its finding that Parliament intended to delegate staffing authority to as low a level as possible within the public service and that managers should have the flexibility necessary to manage and lead their staff, to achieve results for Canadians. It reads in part as follows:

…

[71] Therefore, this Court is without jurisdiction to answer the question of whether [TRANSLATION] "extensive . . . experience" is properly described by [TRANSLATION] "approximately 10 years of experience" and whether Mr. Lavigne has extensive experience according to the essential qualification.

…

[76] Mr. Lavigne also alleged that the assessment board acted unfairly towards him because it did qualify two candidates who each have eight (8) years of experience in tax litigation of average complexity. According to Mr. Lavigne, eight years is not [TRANSLATION] "10 years" and, therefore, the assessment board acted in a capricious manner.

[77] The French word "environ" (approximately) is important in this context. While we may agree that the word "approximately" lacks a certain precision and may be considered to be vague, this flexibility may well serve the needs of the appointment process.

…

*[86] It must be noted that the new PSEA gave managers more discretion to choose, not only the most qualified person, as did the former PSEA, but the person who is the best fit for the position to be staffed. Under the former PSEA, an appointment process could be challenged if the most qualified person or persons were not chosen. The former system no longer exits [sic]. Parliament has recognized that it is not necessarily the person who meets the requirements for a position who is necessarily the best fit for the position to be staffed, but rather specified, at paragraph 30(2)(*b*) of the PSEA, other bases for assessment, namely additional qualifications considered to be an asset for the work to be performed, that is, the current or future needs and operational requirements. To give effect to this provision, it must be interpreted as giving the manager more latitude to choose the candidate having the best combination of attributes desired for the position to be staffed.*

…

[18] Although Ms. St. Onge did not refer to any jurisprudence, I take note of the following passage of *Tibbs*, which acknowledged that that discretion is not unlimited:

…

***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."*
>
> …

[19] The respondent noted that recently, the Board considered and rejected a very similar argument over the word "normally" as the CBSA used it in another appointment process (see *Warford v. Deputy Head (Canada Border Services Agency)*, 2023 FPSLREB 94). The complainant in that case unsuccessfully challenged the acceptance of the candidate's FB-02 experience as partially fulfilling the essential qualification, which stated that the requisite experience would normally be associated with FB-03- to FB-05-level work. Paragraphs 61 to 63 read as follows:

> *[61] In the present case, the advertisement suggested that the essential qualification of recent and significant experience in the interpretation or enforcement of legislation administered by the Canada Border Services Agency "… would normally be associated with the complexity, depth, and breadth of duties performed at the FB-03, FB-04 and FB-05 levels on a regular basis". It did not suggest that the essential qualification could not be met otherwise.*
>
> *[62] What the respondent actually did in this case shows its careful consideration of the essential qualification in question. In verifying continuity of three years' experience within the past five years, assessors examined each candidate's written responses, checking them against the candidate's resume if necessary. Where reference was made to the Officer Induction Training Program or Officer Induction Development Program, the application was flagged for second review to ensure the experience was sufficient.*
>
> *[63] Thus, I find that the respondent carefully considered the essential qualification in question.* Jolin *and* Tibbs *provide ample authority for managerial discretion in a staffing process. Had the respondent wanted to strictly limit the field of applicants to employees classified FB-03 and higher, it would have been a simple matter to say as much, explicitly, in the advertisement. It chose not to.*

[20] Both parties gave attention to testimony and argument on the matter of whether the CBSA's COVID-19 pandemic response justified the conclusion that the appointee had experience sufficient to meet the essential criteria. Ms. St. Onge took issue with the respondent's claim that the appointee's experience was "accelerated" and argued that no such thing exists.

[21] While Ms. St. Onge is correct in her submission that the phrase "accelerated experience" is not in the *Act*'s staffing authority framework, I need not rule on whether this experience was indeed unprecedented and was a valid justification. Rather, I need conclude only that how the sub-delegated hiring manager considered this matter was not arbitrary or done in bad faith; nor was it a significant error. The evidence clearly shows that it was not.

[22] While undoubtedly, Ms. St. Onge would submit that the required value of transparency in the public service staffing process was put at risk, if not eroded, by the respondent's actions related to qualifying the otherwise-clear essential criteria, I cannot conclude that the use of the word "normally" to give the hiring manager flexibility to assess the essential criteria and hire the person deemed the right fit was inconsistent with the delegated authority under the *Act*.

[23] For the same reasons that the Board enunciated in *Warford*, and to be consistent with the Federal Court's findings in *Lavigne* on the flexibility that Parliament has delegated to managers, I find that Ms. St. Onge failed to adduce clear and compelling evidence to support a conclusion that on a balance of probabilities, an abuse of authority occurred in the application of merit in the appointment process in question. The complaints are dismissed for that reason.

IV. Mr. Kraeker's failure to appear

[24] The Board had ordered these complaints joined as both challenge the same appointment for the same reasons. Mr. Kraeker participated in the Board-chaired pre-hearing case-management conference to prepare for the hearing. However, he wrote to the Board's registry on December 18, 2023, and stated that he would not attend the hearing. He did not request accommodation or a postponement.

[25] The respondent noted the Board's recent decision in *Silva v. Deputy Head (Canada Border Services Agency)*, 2023 FPSLREB 39. In that decision the Board found that Mr. Silva's failure to appear at the hearing left his allegations unsupported by any evidence; thus, he could not meet his burden of proof, and the complaints were dismissed for lack of evidence and for abandonment. Similarly, in the present case, the respondent argued that Mr. Kraeker's complaint should be deemed abandoned.

[26] I distinguish *Silva* on the grounds that it did not consider a joined hearing in which a second complaint proceeded with supporting evidence and arguments on essentially the same matters as those in the complaint for which the party that made it did not appear.

[27] I decline to rule on the respondent's request to deem Mr. Kraeker's complaint abandoned as it is moot given my conclusion that an abuse of authority in the application of merit was not established in this case.

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

(The Order appears on the next page)

V. Order

[29] The complaints are dismissed.

March 6, 2024.

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