

Date: 20240326

File: 771-02-41776

Citation: 2024 FPSLREB 42

*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

ANTHONY BLAIR

Complainant

and

DEPUTY HEAD

(Department of Public Works and Government Services)

Respondent

and

OTHER PARTIES

Indexed as

Blair v. Deputy Head (Department of Public Works and Government Services)

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

Before: Guy Grégoire, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Marie-France Boyer, counsel

For the Public Service Commission: Louise Bard, senior analyst

Heard via videoconference,
August 28, 2023.

REASONS FOR DECISION

I. Introduction

[1] In October 2019, Corporate Services, Strategic Management and Communication, within the Department of Public Works and Government Services (“the respondent”), posted a job opportunity advertisement, appointment process 2019-SVC-ONT-IA-355666, to staff a regional chief, accommodation and material, position classified at the AS-04 group and level, in North York, Ontario, for several tenures (“the appointment process”). The job opportunity advertisement had a closing date of October 29, 2019.

[2] In June of 2020, the respondent posted a “Notice of Acting Appointment” indicating the appointment of the appointee from June 15 to October 30, 2020.

[3] Anthony Blair (“the complainant”) applied for the position but was screened out of the appointment process at the initial stage of the assessment. The selection board found that he did not meet two of the three essential experience qualifications.

[4] On May 24, 2020, he filed a complaint with the Federal Public Sector Labour Relations and Employment Board (“the Board”) under s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “PSEA”), alleging abuse of authority in the application of merit. He also alleged that the respondent was biased.

[5] The Public Service Commission (PSC) did not appear at the hearing but instead provided written submissions addressing its relevant policies and guidelines. It took no position on the merits of the complaint.

[6] For the reasons that follow, I conclude that on a balance of probabilities, the complainant did not demonstrate that the respondent abused its authority or demonstrated bias. Therefore, the complaint is dismissed.

II. Summary of the evidence

A. The complainant

[7] In his opening statement, the complainant stated that as of October 2023, he will have worked for the federal government for 25 years. He began his career in a position classified at the AS-01 group and level and eventually progressed to the AS-04

position that he occupies today. He claimed that he feels excluded from any available position, even at-level, for a deployment, such as the one in this case.

[8] He also stated that the appointee was not the best fit for the position and he asked why he was not chosen as he already was at level?

[9] The complainant testified that he applied to the appointment process but that his application was screened out for failing to meet two of the three experience qualifications. He testified that an informal discussion was not held but that on September 11, 2020, he did meet with the staffing manager.

[10] He claimed that the selection board did not look at his résumé and that they should have looked at it and they would have concluded that he met the experience requirements. He testified that his résumé shows that he met all of the experience qualifications. He claimed that it was unfair not to look at his résumé.

[11] He further testified that Campbell Halliday, a selection board member, knew him and that he should have used this personal knowledge to confirm that he met the experience qualifications.

[12] He testified that on the screening report he met experience 2 but in a subsequent e-mail, it is stated that he failed experience 2 and 3.

[13] He claimed that the appointee was already a member of the department and that he should have received the appointment since he already was at level.

[14] He testified that the screening report was not signed by all board members and that it should have been.

[15] He claimed that an e-mail dated May 7, 2020, discussing the possibility of appointing someone from a different department that concluded with the appointment of someone from within, demonstrated bias. He stated that the respondent concluded that the former proposed appointment would have entailed a more complex administrative process, i.e. putting that person through a security clearance procedure so that they preferred appointing from within the department hence a bias in favour of the appointee.

[16] These are the experience qualifications identified in the Statement of merit criteria:

...

Experience:

- 1. Experience providing *strategic advice and guidance to various stakeholders in administration of Procurement, Accommodations/Tenant Services or Material management.*
- 2. Experience in proving [sic] *strategic advice and guidance in financial administration such as: planning and monitoring, budget forecasts and expenditures.*
- 3. Experience in supervising staff in the federal public service.*

Note: Strategic advice relates to the identification of future objectives and the means for achieving them.*

...

B. The respondent

[17] The respondent called upon Mr. Halliday, who is a Senior Occupational Health and Safety Officer within the department and was a selection board member. He testified that the applicants were asked to provide a résumé and a covering letter. The covering letter had to contain a maximum of 2000 words explaining how they met the “Values and Ethics” competency. They were also informed that there would be a self-assessment.

[18] The witness testified that the self-assessment was in the form of questions that the candidates had to answer and that addressed the essential qualifications. Of interest in this case are the questions about the essential experience qualifications. In his answers, the selection board members found that the complainant failed to demonstrate that he met those qualifications. The first two questions were about the first two experience qualifications. The form had an error in that those two questions were identical and obviously required the same answer. The selection board corrected the error and emailed all the applicants to inform them of the error. The selection board corrected the second question to reflect the second essential experience qualification. The candidates then had to answer as stated originally with 400 words or less.

[19] He stated that the selection board screened the candidates' applications in or out based on the essential qualifications. Candidates had to demonstrate, in 400 words, that they possessed the essential experience qualifications.

[20] The witness testified that the selection board did not have a rating guide to assess those qualifications. He claimed that the selection board assessed the candidates' answer and determine that the candidate would either "meet" or "not meet" the experience qualifications; it was a pass-or-fail assessment. The candidates had to clearly demonstrate that they met the criteria by providing examples and specifying the when, how, and where. This, he stated, was the basis for the assessment.

[21] He indicated that the candidates had to apply, and their applications were screened against the essential qualifications. The candidates who had passed the initial screening then took a PSC standardized test and were interviewed. The cover letter was subsequently used to assess the candidates' values and ethics competencies. He testified that the letter was not used to assess the experience qualifications. A pool of qualified candidates was created, and the right-fit candidate was appointed (the appointee).

[22] Mr. Halliday testified that for the screening phase, the selection board members reviewed each candidate's answers and reached a consensus as to whether the candidate would be screened in.

[23] He testified that he knew the complainant only with respect to where he worked but that he knew nothing of the complainant's qualifications or competencies. He claimed that the complainant's answers did not contain sufficient concrete details to clearly establish that the complainant met the experience qualifications. The selection board looked for concrete details such as how, what, and when the experience was acquired. He confirmed that the selection board did not look at the complainant's résumé or covering letter for the screening phase of the assessment. The selection board considered only the answers provided in the self-assessment with respect to the essential qualifications for that particular phase of the assessment, for all candidates.

III. Summary of the arguments

[24] The complainant argued that he answered the questions as they were worded but that the selection board did not take all the information that he provided in his

application beyond the questionnaire. It excluded the information in his résumé and covering letter.

[25] He argued that the selection board did not have a rating guide or criteria to rate the three essential experience qualifications and that the absence of that criteria led to bias and meant that he was not assessed fairly.

[26] The complainant relied on the decision in *Snelgrove v. Deputy Minister of Fisheries and Oceans*, 2013 PSST 35, arguing that all selection board members must be independent of each other. In this case, he claimed, the selection board members came to a consensus; therefore, they were not independent, which led to bias by the selection board.

[27] He argued that Mr. Halliday being unable to recall when the amended second question was assessed, he claimed that the selection board tried to backtrack its original decision, to make the second assessment coherent with the first one.

[28] He then relied on *Brookfield v. Deputy Minister of Foreign Affairs and International Trade*, 2011 PSST 25 at para. 37, which stated that "... the respondent abused its authority when it failed to assess all of the material Mr. Brookfield provided in his application to this process." He also quoted a passage from one of the complainants in *Brookfield* that stated, in agreement with his argument: "Mr. Moore submits that the respondent should have provided the marking scheme and the PSC in its submission submits that providing the pass mark for each test question allows candidates to manage their time and improves transparency" (at para. 53). He argued that the selection board should have considered the whole of his application and that by failing to, it did not fully consider his application and hence abused its authority. Also, he argued that the selection board should have had a marking scheme but did not, which caused the assessment process to lose all transparency. Ultimately, he claimed that he was assessed too harshly.

[29] He then relied on *Payne v. the Deputy Minister of National Defence*, 2013 PSST 15, in which the Public Service Staffing Tribunal (PSST) concluded that the selection board abused its authority when it did not consider the "absolute knowledge" that one of the selection board members had of the complainant's qualifications. The complainant argued that that applies in this case as Mr. Halliday knew him and could have used this knowledge to assess the complainant's application. He argued that his

application should have received leeway and that the selection board should have considered his application in its entirety and concluded that he met the experience requirements. He added that his covering letter was not even considered, although it was required, according to the poster. He emphasized that everything should have been considered.

[30] He further argued that he was screened out of another selection process in which Mr. Halliday was a selection board member; therefore, Mr. Halliday should have known him. He argued that by selecting a person who was already part of the relevant department, the selection board demonstrated bias in favour of that person, hence abusing its authority. He argued that the selection board was also biased against him because he was already at-level and that thus, should have been chosen for the position.

[31] Counsel for the respondent argued that the onus was on the complainant to provide clear and cogent information to demonstrate that he met the essential experience qualifications. She argued that in many appointment processes, selection board members and applicants know each other, and that no inference should be drawn from that. She submitted *Portree v. Deputy Head of Service Canada*, 2006 PSST 14, to support her argument that I may not substitute my opinion for the selection board's evaluation. She claimed that that case further states that the selection board was not required to search beyond the answers that the complainant provided in his self-assessment.

[32] She further argued Mr. Halliday's testimony established that the competencies were assessed by different means and that the cover letter was used later in the selection process to assess the "Values and Ethics" competency and not at the screening phase.

[33] Citing *Visca v. Deputy Minister of Justice*, 2007 PSST 24, she also argued that the complainant adduced no evidence to establish that the appointee lacked qualifications.

[34] She cited *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10, quoting the test for a reasonable apprehension of bias, and argued that there is no such apprehension of bias in this matter.

IV. Reasons

[35] The complaint was made under s. 77(1)(a) of the *PSEA*, which reads 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);

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);

[36] This case has two issues: Did the complainant establish on a balance of probabilities that the respondent abused its authority when it screened the complainant out of the appointment process and, was there a reasonable apprehension of bias by the selection board in making its appointment?

[37] Section 30(2)(a) of the *PSEA* provides that an appointment is made on the basis of merit. It reads as follows:

Meaning of merit

30 (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

Définition du mérite

30 (2) Une nomination est fondée sur le mérite lorsque les conditions suivantes sont réunies :

a) selon la Commission, la personne à nommer possède les qualifications essentielles — notamment la compétence dans les langues officielles — établies par l'administrateur général pour le travail à accomplir;

A. The assessment of the essential qualifications

[38] The complainant did not argue the validity of the essential qualifications but rather his assessment against them. He claimed that he met them and argued before me that the answers he provided along with his résumé, demonstrated that he met them. My role is not to substitute my assessment of a complainant's application for that of a selection board. However, the complainant did not explain at the hearing how his answers provided the "when, where and how" the selection board was seeking. The onus is on the complainant to establish on a balance of probabilities that the respondent abused its authority when it assessed his application and when it concluded that he did not meet two essential experience qualifications.

[39] I find that the evidence submitted did not demonstrate any abuse of authority by the respondent. Quite the contrary; the evidence was that the selection board convened, reviewed the application, and then by consensus concluded that the complainant failed to meet two of the three essential experience qualifications.

[40] The complainant argued that there was no rating guide to assess the experience qualifications, which, as such, constituted an abuse of authority. He also argued that by proceeding by consensus, the selection board members abdicated their authority to assess the candidates' qualifications independently. He relied on *Snelgrove* to support this argument. I find that the facts in that case differ significantly from the case at hand since in that case, a selection board member testified to being intimidated by another selection board member, which rendered the selection process flawed and led to a conclusion of abuse of authority. Nothing of the sort occurred in the present case. Mr. Halliday testified that the selection board members reviewed the applications and reached a consensus. There was no evidence adduced to support this allegation and I find that at no time was there any hint of impropriety by which a board member exercised undue pressure to influence another one. In any case, the complainant did not convince me in any way that by reaching a consensus, the selection board abused its authority.

[41] An assessment by consensus is not a barrier to the independent evaluation by each individual selection board member. It is a manner by which the members may discuss their individual assessment with their colleagues and come to a cohesive

decision about a candidate's evaluation. In *Akhtar v. Deputy Minister of Transport, Infrastructure and Communities*, 2013 PSST 19 a similar conclusion was reached:

...

83 Thus, the decision of the assessment board to use a consensus-based marking approach for candidates, rather than follow the PSC recommendation, does not itself render the assessment tools unfair or otherwise constitute an abuse of authority. (See, for example, *Sproule v. Deputy Minister of Transport, Infrastructure and Communities*, 2011 PSST 0034, at para. 33.) Moreover, the IR confirms that consensus was reached on the assessment of the candidates. Accordingly, in the circumstances of this case, the evidence does not establish an abuse of authority in the assessment board's use of consensus as a method to assess candidates.

...

[42] When managing an appointment process, s. 36(1) of the *PSEA* allows a hiring manager to use the assessment method that she or he considers appropriate to determine that a person meets the required qualifications. It reads as follows:

36 (1) In making an appointment, the Commission may ... use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).

36 (1) [...] la Commission peut avoir recours à toute méthode d'évaluation — notamment la prise en compte des réalisations et du rendement antérieur, examens ou entrevues — qu'elle estime indiquée pour décider si une personne possède les qualifications visées à l'alinéa 30(2)a) et au sous-alinéa 30(2)b)(i).

[43] The complainant argued that the selection board should have considered all the information before it, including the résumé, the covering letter, and the answers to the self-assessment questions. He relied on *Brookfield*. In that case, the complainant had attached a separate document to his application, but the selection board had failed to incorporate it in its assessment of him, and it screened his application out on the basis that his litigation experience had not been established. Those are not the facts in the case at hand. Although a cover letter was requested in the present case, the selection board used it to assess the "Values and Ethics" competency, as indicated on the job opportunity advertisement. Although the advertisement requested a résumé be submitted, the selection board did not use it in the assessment of the candidates with respect to the essential qualifications. Mr. Halliday's testimony, which is supported by

the documentary evidence indicated the questions, assessing the qualifications, specifically asked the candidates to provide "... clear and concrete EXAMPLES and DETAILS, including WHEN, WHERE and HOW you obtained the experience."

[44] Furthermore, in *Brookfield*, a co-complainant stated that a marking scheme was required as it would have improved transparency (at paragraph 53), with which the complainant concurred. The PSST concluded however that there was no obligation for the selection board to have such a marking scheme. I agree with its conclusion. Section 36 of the *PSEA* states the respondent may use any assessment method when assessing applicants. In this case, for the screening portion of the assessment, the selection board attributed a pass-or-fail mark based on consensus and the marks were based on the answers provided by the candidates. Mr. Halliday testified that concrete examples were required, rather than general statements like the complainant provided. I find, as such, there was nothing wrong with using the pass failed assessment method.

[45] The complainant, based on *Payne*, argued that Mr. Halliday knew him and his qualifications and that as such, Mr. Halliday should have used that knowledge when assessing his application. Again, the circumstances of *Payne* differ from those in this case. Although the complainant testified that Mr. Halliday knew him and should have used his "absolute" knowledge, I also heard that he knew the complainant only superficially and not to the extent understood in *Payne*. Therefore, there is no evidence to indicate that Mr. Halliday had any personal knowledge of the complainant's experience. It is a candidate's responsibility to clearly demonstrate that they meet the essential qualifications.

[46] Lastly, the complainant alleged that because Mr. Halliday could not remember when the second assessment was done, further to the email correcting the mistake, this was indicative that the selection board tried to backtrack its original decision, to make the second assessment coherent with its first one. Mr. Halliday testified that he could not recall when the second assessment was done but stated that the selection board reconvened to assess all the applications and that it reached a consensus. In my view, this establishes that the selection board did in fact meet and assess the applications. Ultimately, the candidates had to meet all three experience essential qualifications to proceed in the appointment process, and the complainant failed to demonstrate that he met two of the three.

[47] Consequently, I find that the complainant has not demonstrated, on a balance of probabilities, that the respondent abused its authority when it screened him out of the appointment process.

[48] The complainant raised allegations of bias against the respondent in four instances.

[49] The applicable test to determine whether there is a reasonable apprehension of bias in staffing matters is the following, which is an adaptation of the test set out in *Committee for Justice and Liberty v. National Energy Board*, [1978], 1 S.C.R. 369, at p. 394: “If a relatively informed bystander can reasonably perceive bias on the part of one or more persons responsible for assessment, the Tribunal can conclude that abuse of authority exists” (see *Gignac and Denny v. Deputy Minister of National Defence*, 2009 PSST 29).

[50] Furthermore, the Tribunal in *Gignac* at para. 72 stated that “[i]t is not enough to suspect or assume bias; it must be real, likely or reasonably evident.”

[51] The complainant argued that the discussion determining that someone from within the department would be a better fit was a demonstration of bias against him and in favour of the appointee. The complainant offered no evidence to support his claim. I am of the view that a relatively informed bystander would not perceive bias but rather a sound discussion of relevant consideration to determine which of the qualified candidates would be the best fit for the position.

[52] He also argued that the lack of a rating guide led to bias against him. I discussed above the validity of the absence of a rating guide as it pertains to the present matter and concluded that there was nothing wrong with this assessment method. Equally, I am of the view that given my conclusion, a relatively informed bystander would not regard the absence of a rating guide as leading to a reasonable apprehension of bias.

[53] The complainant further argued that the selection board members were not independent in reaching their evaluation decision as they reached a consensus. The argument against the use of consensus is also discussed above and rejected. Here too, I am of the view that given my conclusion, that a relatively informed bystander would not regard the complainant’s assessment based on a consensus by the selection board members to constitute a reasonable apprehension of bias.

[54] Lastly, the complainant argued that Mr. Halliday demonstrated bias against him by refusing to use his personal knowledge to assess him and that the selection board refused to appoint him on the basis that he already was at level.

[55] I have addressed these issues above. The evidence established that Mr. Halliday had no direct personal knowledge of the complainant as suggested by the complainant. The complainant adduced no evidence whatsoever to support his allegation that the selection board members refused to appoint him to the position on the basis that he was already at level. The evidence shows that he did not demonstrate that he possessed the experience qualifications in the self-assessment questionnaire. Here too, I am satisfied that a relatively informed bystander would not conclude to a reasonable apprehension of bias.

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

(The Order appears on the next page)

V. Order

[57] The complaint is dismissed.

March 26, 2024.

**Guy Grégoire,
a panel of the Federal Public Sector
Labour Relations and Employment Board**