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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

GREGORY CHORYHANNA

Complainant

and

**DEPUTY HEAD
(Department of Natural Resources)**

Respondent

and

OTHER PARTIES

Indexed as

Choryhanna v. Deputy Head (Department of Natural Resources)

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

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Monisha Ambwani, counsel

For the Public Service Commission: Louise Bard, senior analyst

Decided on the basis of written submissions,

filed September 24, 2021, February 1 and 15, and July 12, 2024.

REASONS FOR DECISION

I. Complaint before the Board

[1] On June 24, 2021, a notification was posted concerning a non-advertised indeterminate appointment to an EX-01 position, Director of the Explosives Regulatory Division (“ERD”), of Natural Resources Canada (“the respondent”) in appointment process 2020-RSN-INA-PROM-LMS-201418. Gregory Choryhanna (“the complainant”) made a complaint with the Federal Public Sector Labour Relations and Employment Board (“the Board”) under s. 77(1) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “PSEA”) alleging that the deputy head had abused its authority in the choice of process.

[2] The complainant submitted that the position should have been filled by someone with a scientific or engineering degree, with over 10 years experience in the explosives industry, and who could have been appointed under the *Explosives Act* (R.S.C., 1985, c. E-17) by the minister to be the Chief Inspector of Explosives (“CIE”) for Canada, all of which had historically been the case for previous ERD directors. He submitted that the director general (“DG”) acting as the CIE also did not have a scientific or engineering degree or over 10 years of experience in the explosives industry and, being “non-technical”, had not properly assessed the requirements of the director position.

[3] The overriding factor that was ignored was that the ERD’s capability would be significantly weakened by the appointment and that the safety and security of all Canadians would be at greater risk, as a result. In the complainant’s view, neither the DG nor the newly appointed director was qualified to make critical, technical decisions, and there was concern in the industry about the need to put the right person in the position. Having access to advice from technical experts was not sufficient; to make appropriate decisions, one must have greater knowledge and expertise than one’s advisors. In the complainant’s view, the ERD director position requires highly specialized technical skills, as well as leadership competencies, to ensure that safety is not compromised.

[4] Accordingly, the choice of a non-advertised appointment process amounted to an abuse of authority because the hiring manager did not use the most wide-ranging process to find the best person to fill the role at issue. The complainant acknowledged

that the *PSEA* gave the hiring manager much discretion and that a non-advertised appointment process can be appropriate in some circumstances. However, he submitted that the safety and security of Canadians was not considered and that a non-advertised process is not appropriate for a position that requires highly specialized technical skills.

[5] The respondent said that the DG, who was also the hiring manager, determined the merit criteria based on the respondent's current operational needs, which called for less emphasis on technical skills and more emphasis on the key leadership competencies required of a newly appointed executive. It submitted that both the DG and the director had technical experts, scientists, and engineers at their disposal to provide advice, guidance, and recommendations when decisions had to be made in line with the *Explosives Act*. It pointed out that the CIE role is not a requirement of the position.

[6] The statement of merit criteria set out the appropriate qualifications required to perform the current duties of the position, including the Treasury Board Secretariat qualification standards for the Executive ("EX") occupational group. The appointee was fully assessed and met all the essential qualifications established for the position.

[7] A non-advertised appointment process was determined to be the appropriate staffing mechanism due to prior significant labour relations issues. The need for a director with people-management experience and leadership skills was considered paramount. The appointee had been acting in the position since April 2020 and had successfully performed the duties. He had a strong background in program delivery and central-agency experience, as well as solid leadership skills. As well, the choice of a non-advertised appointment process ensured the proper business continuity of the role and its deliverables.

II. Jurisdictional objection - no personal interest in an appointment to the position

[8] At the pre-hearing conference held on December 22, 2023, the complainant confirmed that he would not have applied for the position had it been advertised. He said that he did not meet the language requirements and that he could not have been considered for the position.

[9] He explained that his personal interest was not about the position but rather about the person appointed to it. In his view, the safety and security of Canadians had not been considered, which was the flaw in the appointment process that affected all Canadians on a personal level. He was personally involved as he felt that he had a moral and ethical responsibility to complain on their behalf.

[10] The respondent raised an objection, submitting that s. 77(1) and the jurisprudence are clear that the Board lacks jurisdiction to determine this complaint as the complainant did not have a personal interest in being appointed to the position.

[11] The complainant replied to the jurisdictional objection qualifying his personal interest as “very clear”. Specifically, he states the following:

...

***My personal interest is very clear.** At the time of the complaint, as a public servant and former Inspector of Explosives, my primary duty is to ensure the safety and security of Canadians. If not, I would be breaching the fundamental responsibility of the Government of Canada under the National Security Act, 2017.*

...

[Emphasis in the original]

[12] He reiterates that his interest is premised in the protection of the safety of his co-workers, workers in the private sector, and the Canadian public, claiming that the appointment at issue risks the safety and security of Canadians.

[13] Consequently, this decision deals only with the preliminary objection raised by the respondent.

III. Analysis

[14] Section 77(1) provides that a person **who was not “... appointed or proposed for appointment by reason of ... an abuse of authority ...”** [emphasis added] may seek recourse from the Board. As such, only those with a personal interest in being appointed to a position may make a complaint.

[15] The jurisprudence of the Board and its predecessor, the former Public Service Staffing Tribunal (“the Tribunal”) has repeatedly affirmed this. See, for example, *Lau v. Chief Administrator of the Courts Administration Service*, 2023 FPSLREB 13 at para. 49, *Lafrance v. Deputy Head (Canada Border Services Agency)*, 2022 FPSLREB 36 at para. Federal Public Sector Labour Relations and Employment Board Act and Public Service Employment Act

38, *Doraiswamy v. Deputy Minister of Transport, Infrastructure and Communities*, 2011 PSST 35 at paras. 11 to 16, *Silke v. Deputy Minister of National Defence*, 2010 PSST 9 at para. 68, *Visca v. Deputy Minister of Justice*, 2006 PSST 16 at para. 24, and *Evans v. Deputy Minister of Indian Affairs and Northern Development*, 2007 PSST 4 at paras. 10 to 17.

[16] In *Doraiswamy*, for example, the Tribunal dismissed a complaint in which the complainant alleged that the appointee's qualifications were insufficient and that other candidates should have been considered, but in which the complainant had no interest. The Tribunal stated as follows:

...

8 During the teleconference, the complainant stated that he was not interested in the position or being appointed to it. He indicated that he had filed the complaint because he felt that the qualifications were not appropriate. Since filing, the complainant has retired from a TI-07 position in the public service.

...

16 On the uncontested facts before it, the Tribunal finds that the present complaint lacks any indication of personal interest. The complainant has presented no evidence to contradict the respondent's position and he expressly informed the Tribunal that he has no interest in the position. The complainant is not complaining that he was not appointed. While his complaint document appears to suggest that he would like the acting opportunity to be available to a broader field of candidates, the complaint does not fall within the parameters of s. 77. A claim that other employees could have been interested in the acting appointment does not meet the requirements of s. 77(1) of the PSEA. A person cannot complain that other persons were not appointed or could have been appointed in an appointment process.

...

[17] One of the complainants in *Silke* was found to lack standing to make a complaint as he had no personal interest in the position and had complained on behalf of others. Similar to the complainant in this case, he did not argue that the appointee did not meet the qualifications set out for the position but rather that the appointee did not meet the qualifications that **should** have been required. He was focused on what he saw as the downgrading of the qualifications, as follows:

36 To his knowledge, the appointee does not possess a license in any trade. Her training allows her to meet the needs of the occupants of the housing units but she has no structural training. As a qualified tradesperson, he considers it very important that work be done correctly and completely. In his view, although anyone can perform an inspection, only a qualified tradesperson is able to recognize whether work has been done properly or in accordance to Code. He does not believe that a TSO without a trade license can provide the level of excellence that CFHA expects.

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.

...

[18] At paragraphs 69 to 71, the Tribunal concluded as follows:

69 As discussed in Beyak v. Deputy Minister of Natural Resources Canada, 2009 PSST 0035, 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 a non-advertised appointment process, it is not possible for an employee to indicate his or her interest in an appointment to a position by filing an application, as would be the case in an advertised appointment process. It is by filing a complaint that he or she was not appointed that an employee can express this interest.

70 All complainants are properly in the area of recourse. Faced with the respondent's challenge to their right to bring a complaint, the Tribunal must turn to the evidence and to the parties' arguments.

71 Mr. Johnston has testified that he was not interested in working in Trenton but that others could have been. He is not complaining that he was not appointed, because he would not have applied for this process if he had been given the opportunity. As for his contention that other employees could have been interested in the position, it does not meet the requirements of s. 77(1) of the PSEA: a person cannot complain that other persons were not, or could have been, appointed in an appointment process. Accordingly, the Tribunal concludes that Mr. Johnston has no interest in an appointment to the position of TSO in Trenton and that, in fact, he is complaining on behalf of others. The Tribunal finds that the complainant had no standing and therefore no right to file a complaint to the Tribunal pursuant to s. 77 of the PSEA. The request to dismiss the complaint of Mr. Johnston is granted.

[19] The complainant seeks to raise what he sees as serious concerns regarding the safety of Canadians, however, the issue he raises does not fall within the scope of a staffing complaint under s. 77 of the *PSEA*. The Board cannot assume jurisdiction over matters outside its mandate.

[20] Section 77(1) provides recourse only to those persons who were not appointed, or proposed for an appointment, by reason of abuse of authority. The complainant was such a person; however, he had no personal interest in being appointed to the position. The stated purpose of his complaint was to raise his concerns about the appointment process given his sincere and pressing moral obligation to the Canadian public.

[21] Based on the information before it, the Board finds that the complainant did not have standing to make this complaint, and that the Board does not have jurisdiction to consider and determine it.

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

(The Order appears on the next page)

IV. Order

[23] The motion to dismiss the complaint is granted.

[24] The complaint is dismissed.

August 20, 2024.

**Nancy Rosenberg,
a panel of the Federal Public Sector
Labour Relations and Employment Board**