



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2012-0953

Issued at: Ottawa, August 22, 2013

ESHETE HAILU

Complainant

AND

THE DEPUTY MINISTER OF HEALTH CANADA

Respondent

AND

OTHER PARTIES

Matter	Complaint of abuse of authority pursuant to section 65(1) of the <i>Public Service Employment Act</i>
Decision	Complaint is substantiated
Decision rendered by	Joanne B. Archibald, Member
Language of Decision	English
Indexed	<i>Hailu v. Deputy Minister of Health Canada</i>
Neutral Citation	2013 PSST 27

Reasons for Decision

Introduction

1 The complainant, Eshete Hailu, occupies the position of Evaluation Manager, an EC-07 position with Health Canada. He believes that the respondent, the Deputy Minister of Health Canada, abused its authority when it selected him for lay-off. In his view, the evaluation of his qualifications in a selection for retention and lay-off process (SERLO process) was flawed and constituted an abuse of authority.

2 The respondent denies that an abuse of authority occurred. It states that it identified a need to eliminate EC-07 Team Leader positions in the First Nations and Inuit Health Branch (FNIHB) of Health Canada. The complainant's position fell into this part of the organization. The respondent conducted a SERLO process and the complainant was selected to be laid off.

3 The Public Service Commission (PSC) participated in this hearing through a written submission addressing its policies and guidelines concerning the selection of employees for retention and lay-off.

4 For the reasons that follow, the Tribunal has determined that the complaint is substantiated. The imposition of a rule that prohibited the exercise of any discretion to take reasonable steps to ask questions or clarify information relied on in the SERLO process fettered the ability to properly evaluate the complainant.

Background

5 On May 8, 2012, the complainant received written notice to participate in the SERLO process for EC-07 Team Leaders to determine who among four affected employees would be retained or laid off.

6 Four merit criteria were evaluated in the SERLO process. They were information gathering and processing, business perspective, networking, and team leadership. Information gathering and processing and team leadership were identified as right fit criteria that would be used to distinguish the evaluations of the employees who would be retained or laid off. (See for example *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008 at para. 63.)

7 The notice of May 8, 2012, advised the employees that they would have to prepare and submit a Selection for Retention Form (SR Form) to the Selection for Retention and Assessment Board (SRAB), giving two examples of situations to show how they met each of the four merit criteria. It stated that the SR Form was a “critical evaluation tool” and “an opportunity to clearly, concisely and accurately demonstrate how [they] have demonstrated the retention criteria requirements.” In addition, the employees supplied the names of referees to validate each of their examples. The referees received a copy of the employees’ examples. They then replied to the SRAB indicating whether the employee had accurately assessed himself or herself in the example and they were asked to provide details to explain. Referees were also asked to provide additional comments addressing each merit criterion and general comments.

8 The SRAB members were Monique Stewart, acting Executive Director, FNIHB, Planning, Information and Performance Measurement, and Cindy Moriarty, Director, Program Management Division and Official Languages. They evaluated the SR Form and the references and produced recommendations to retain or lay-off the employees. Ms. Stewart then presented the SRAB’s recommendations to the Branch Retention Board (BRB) for endorsement. The recommendations were then submitted to the Assistant Deputy Minister for a final decision on retention and lay-off of the employees.

9 On June 20, 2012, the complainant was informed that based on the results of the SERLO process, he would be laid off. On July 5, 2012, the complainant filed a complaint with the Public Service Staffing Tribunal (the Tribunal) under s. 65(1) of the *Public Service Employment Act*, S.C. 2003, c.22, ss. 12,13 (PSEA) on the basis that his selection for lay-off constituted an abuse of authority.

Issue

10 The Tribunal must determine whether the respondent abused its authority in the selection of the complainant for lay-off.

Legal framework

11 Section 64 of the PSEA governs the process to be followed to identify employees for lay-off. It states that:

64. (1) Where the services of an employee are no longer required by reason of lack of work, the discontinuance of a function or the transfer of work or a function outside those portions of the federal public administration named in Schedule I, IV or V to the *Financial Administration Act*, the deputy head may, in accordance with the regulations of the Commission, lay off the employee, in which case the deputy head shall so advise the employee.

(2) Where the deputy head determines under subsection (1) that some but not all of the employees in any part of the deputy head's organization will be laid off, the employees to be laid off shall be selected in accordance with the regulations of the Commission.

(3) Subsection (1) does not apply where employment is terminated in the circumstances referred to in paragraph 12(1)(f) of the *Financial Administration Act*.

(4) An employee ceases to be an employee when the employee is laid off.

12 Section 21 of the *Public Service Employment Regulations*, SOR/2005-334 (PSER) provides for the conduct of a SERLO process in circumstances where a lay-off is to be made from among employees employed in similar positions or performing similar duties in the same occupational group and level. Specifically, it provides that:

21. (1) If the services of one or more employees of a part of an organization are no longer required in accordance with section 64 of the Act, the deputy head shall assess the merit of the employees employed in similar positions or performing similar duties in the same occupational group and level within that part of the organization, and identify, in accordance with merit, the employees who are to be retained having regard to the continuing functions of that part of the organization and the remaining employees who are to be advised that their services are no longer required and are to be laid off.

13 Section 65(1) of the PSEA provides for recourse in lay-off situations:

65. (1) Where some but not all of the employees in a part of an organization are informed by the deputy head that they will be laid off, any employee selected for lay-off may make a complaint to the Tribunal, in the manner and within the time fixed by the Tribunal's regulations, that his or her selection constituted an abuse of authority.

14 Abuse of authority is not defined in the PSEA. However, s. 2(4) states that it includes bad faith and personal favouritism. Abuse of authority requires more than mere error. Whether an error constitutes an abuse of authority will depend on the nature and seriousness of the error in question. Abuse of authority can also include improper

conduct and omissions. The degree to which the conduct or omission is improper will determine whether or not it constitutes abuse of authority. (See *Tibbs* at para. 66).

15 Abuse of authority is broad in scope and does not require an element of intentional conduct. (See *Kane v. Canada (Attorney General)*, 2011 FCA 19 at paras. 57-67, rev'd on other grounds, *Canada (Attorney General) v. Kane*, 2012 SCC 64; and, *Canada (Attorney General) v. Lahlali*, 2012 FC 601 at paras. 31-40.) As the Tribunal held in *Tibbs*, at para. 74:

When a manager exercises his or her discretion, but unintentionally makes an appointment that is clearly against logic and the available information, it may not constitute bad faith, intentional wrongdoing, or misconduct, but the manager may have abused his or her authority.

16 The complaints in *Kane*, *Lahlali*, and *Tibbs* were made under s. 77 of the PSEA in respect of appointments from internal appointment processes. In *Maclean v. Secretary of the Treasury Board of Canada Secretariat*, 2012 PSST 0021 at para. 93, the Tribunal held that abuse of authority has the same meaning in relation to lay-off complaints made under s. 65(1) of the PSEA as it has for complaints made under s. 77.

Analysis

17 In the present case, the complainant alleges that an abuse of authority occurred in his selection for lay-off. It is his view that the SERLO evaluation process was flawed, that his references were not used properly, and that the review of the SRAB's recommendations by the BRB was not meaningful.

18 Ms. Stewart testified concerning the evaluation process conducted by the SRAB. She testified that the FNIHB management team had told her that the SRAB was prohibited from asking questions or seeking clarification from employees or their referees. The evaluation was to be based solely on the SR Form and the references as presented.

19 Ms. Stewart stated that she and Ms. Moriarty started the evaluation process by individually evaluating the employees on the basis of the SR Form and references. They then met together for each of them to explain their respective evaluations and the

scores they had assigned. If their scores for the merit criteria were the same, they accepted this as a consensus evaluation of the employee. If they were different, then they discussed their evaluations further. After they reached consensus, they looked at the references to validate the score.

20 Ms. Stewart testified concerning her evaluation of the complainant. She stated that she found that the complainant's SR Form lacked specific, detailed information as compared with other employees. The SR Forms of the other employees were not presented for comparison. However, to illustrate what was lacking in the complainant's SR Form, Ms. Stewart used the example provided by the complainant to demonstrate the networking merit criterion. He described his actions in creating and coordinating a working group and an advisory committee. She felt that the complainant failed to describe how he chaired meetings, managed working groups, recruited group members, made decisions, or dealt with conflict. These aspects were not addressed by the referee either. One referee's comments were not specific to the behavioural indicators and had no impact on the evaluation. The second referee did not provide any specific detail.

21 For the information gathering and analysis merit criterion, Ms. Stewart felt that the complainant's example of conducting a mental health and addictions data gap analysis lacked detail that would have allowed her to evaluate what he did. For example, he stated that he performed a gap analysis, but she did not know what process he used, what data were missing, or how he analyzed them. She felt unable to evaluate his level of competence. The referees validated the example, but added no information to assist the SRAB in evaluating the complainant.

22 Ms. Stewart added that if this had been a "regular staffing process" rather than a SERLO process, she would have sought answers or clarification where she had questions of either the employee or the referee.

23 Once the SRAB completed its evaluation, Ms. Stewart presented their recommendations for retention or lay-off to the BRB. Ms. Stewart described the BRB's role as a challenge function for the recommendations. The members of the BRB received the SRAB's score sheet and evaluations. They did not review the

employees' SR Forms or references. Ms. Stewart recalled that the members of the BRB asked no questions.

24 Ms. Stewart testified that the BRB endorsed the SRAB's recommendations and it was sent to the Assistant Deputy Minister for a final decision and the complainant was subsequently notified that he had been selected for lay-off.

25 Ms. Moriarty testified concerning her role as a member of the SRAB in the SERLO process. She confirmed that she received the SR Forms and references and prepared her own preliminary assessment before meeting with Ms. Stewart to discuss the evaluations and reach a consensus.

26 Ms. Moriarty stated that the references were used to validate the examples. The SRAB members examined them for information bearing on the merit criteria. According to Ms. Moriarty, no weight was assigned to the references and they were not assessed except in the complainant's case where the team leadership score was reduced based on the reference, as discussed below.

27 Ms. Moriarty explained the complainant's evaluation, relying on examples from his SR Form and references. The complainant used an example of performing a data gap analysis to demonstrate the information gathering and processing merit criterion. Ms. Moriarty testified that he described activities and actions at a senior level and she had "no doubt" that the complainant knew what he was doing. While the complainant listed the steps he took to perform the data gap analysis, for evaluation purposes Ms. Moriarty wanted him to give more detail of his precise activities and to identify the actual data gap that he was addressing. Ms. Moriarty stated that, while she did not doubt that these activities were undertaken, it was simply not clear to her where the project started, where it proceeded, and what the complainant did to make it happen. The referee for this example stated that the complainant's assessment of himself was accurate but, in Ms. Moriarty's view, the referee failed to provide any significant elaboration. She noted that the referee indicated that he was involved at the initial planning stage and that he understood that the project did not proceed to completion.

For Ms. Moriarty, this raised a question about whether the referee could genuinely speak to the example. No steps were taken to clarify this impression.

28 Ms. Moriarty testified concerning the complainant's example of his work as a senior evaluator for the Native Aboriginal Youth Suicide Prevention Strategy to demonstrate the information gathering and processing merit criterion. She found an absence of a specific, detailed account in the complainant's example. While the referee verified the accuracy of the example, and added that the complainant made significant progress through his role as an evaluator, Ms. Moriarty stated that the SRAB was seeking something concrete rather than broad, general statements of this type. She felt that it was unfortunate that more detail had not been provided by the complainant and his referee.

29 The complainant's example for the business perspective merit criterion described his role in starting to lead an evaluation planning process and the steps he took. Ms. Moriarty testified that she had an awareness of the project and this allowed her some insight into the complainant's description, but she excluded this from her evaluation. To evaluate the complainant, she wanted verification of whether there were outcomes for FNIHB from his work, but this was not provided in the example. She considered that she was unable to award a high rating on the basis that the complainant did not fully describe his work in the example. The referee's general statement that the example was accurate provided no assistance in the evaluation.

30 As to the examples for networking, Ms. Moriarty felt that they were too general. There was nothing wrong, but there was an absence of detail and the complainant could have provided more depth in his response. One reference was very positive, but she found it difficult to tie the referee's comments to the evaluation criteria. The other reference, which also failed to address the evaluation criteria, was somewhat critical of the complainant.

31 For team leadership, Ms. Moriarty found good statements of intent in the example, but she had questions about context, challenges, how meetings were chaired, and how the strengths of team members were developed. To evaluate it thoroughly, she

would have required that the example be more detailed. She noted that the complainant referred to privacy requirements in his example, but she did not know what that meant. The referee provided statements criticizing the complainant's ability but provided no examples. The SRAB reduced the complainant's score for this merit criterion on the basis of the critical comments. However, this did not influence his ranking in the SERLO process.

32 Ms. Moriarty testified that the SRAB did not follow up when it had questions concerning the material before it. The material was taken at face value as she understood that the recommendations were to be based solely on what was provided in writing.

33 In *Tibbs*, at para. 70, the Tribunal set out some examples of abuse of authority that include the adoption of a policy that improperly fetters the ability to consider individual cases with an open mind and acting on inadequate material. The evidence demonstrates that both of these elements were present in the SERLO process and, as such, indicate that an abuse of authority occurred.

34 The purpose of a SERLO process is to select on the basis of merit those employees who are to be retained to carry on the continuing work of an affected part of an organization and those employees who are to be laid off. In the present case, both SRAB members testified that they had questions concerning the examples used by the complainant and the responses given by referees. In both cases, they found specific detail to be lacking. The complainant and the referees may have had nothing more to say or they may have failed to appreciate the level of detail that would be required to demonstrate his qualifications. In either case, asking questions and seeking those answers would have allowed the SRAB to more thoroughly address the complainant's merit as it related to the four merit criteria evaluated in the SERLO process. However, as Ms. Stewart testified, the SRAB was instructed not to inquire into or clarify information provided by the employees or their referees.

35 The instructions from the FNIHB prevented the SRAB from exercising any discretion to ask questions or clarify the information before them. Although the purpose

of the SERLO process was to select employees based on their merit for the continuing work in the affected part of the organization, the rigid application of the rule not to seek additional information resulted in a failure to consider the complainant's qualifications with an open mind. There are many examples in the respective evidence of the SRAB members where the application of the rule led them to close their minds to the possibility that the complainant indeed possessed competency beyond what was demonstrated on paper. As merely one illustration, Ms. Moriarty, when referring to the data gap example, stated that she had no doubt of the complainant's ability. However, because he had not gone into sufficient detail in the SR Form, she was limited in her deliberations and had no means to obtain the details that she felt were missing.

36 In *Bowman v. Deputy Minister of Citizenship and Immigration Canada*, 2008 PSST 0012 at paras. 122-123, the Tribunal held that:

122 [...] It is well established law that policies or guidelines cannot be adopted so as to fetter the decision-maker's discretion. In the exercise of discretionary authority, discretion must be brought to bear on every case; each case must be considered on its own merits. (See, for example: *Maple Lodge Farms v. Canada*, [1982] 2 S.C.R. 2 and *Dorothea Knitting Mills Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [2005] F.C.J. No. 394, 295 F.T.R. 314 (F.C.T.D.)).

123 Thus, where a delegate is granted discretionary authority, as is the case here, and, instead of exercising this discretion, relies solely on the application of a guideline to assess a particular essential qualification, this may constitute an abuse of authority. It may be determined that a strict application of the guideline fetters the ability of the delegate to consider individual cases with an open mind.

37 The imposition of the rule that prevented the SRAB from seeking information improperly fettered its ability to evaluate the complainant with an open mind. As Ms. Stewart herself pointed out, if this had been a "normal" appointment process, she would certainly have sought the answers to her questions. There are many instances where asking for information or seeking clarification is permitted in the context of an assessment, provided that it is conducted with care and does not, for example, constitute preferential treatment or bias. (See *Morgenstern v. Commissioner of the Correctional Service of Canada*, 2010 PSST 0018). If it would be appropriate to ask questions or seek clarification when choosing employees for appointment, it should be equally appropriate when deciding whom to retain in the context of a SERLO process.

38 The outcome was that the SRAB failed to take steps to ascertain whether complete and reliable information was reasonably available for the evaluation of the complainant. The failure to take these steps resulted in the complainant being evaluated based on inadequate information. In turn, this created an unreliable foundation for a decision about the complainant's merit. These are serious errors that constitute an abuse of authority. (See *Poirier v. Deputy Minister of Veterans Affairs*, 2011 PSST 0003 at paras. 65-67.)

39 The complainant had raised an additional argument concerning the role of the BRB and whether it could actually serve the "challenge function" to the SRAB's findings that Ms. Stewart described in her evidence. Although the complaint has been substantiated on other grounds, the Tribunal observes, nonetheless, that it is doubtful whether the BRB could meaningfully challenge the SRAB recommendations without having been provided access to the documents underpinning it, such as the SR Forms and the references. The BRB would inevitably have ended up relying exclusively on the SRAB recommendations.

Decision

40 For all the above reasons, the complaint is substantiated.

Order

41 The Tribunal orders that the respondent's decision to lay off the complainant be set aside immediately.

Joanne B. Archibald
Member

Parties of Record

Tribunal File	2012-0953
Style of Cause	<i>Eshete Hailu and the Deputy Minister of Health Canada</i>
Hearing	May 7-8, 2013 Ottawa, ON
Date of Reasons	August 22, 2013
APPEARANCES:	
For the complainant	Karen Brook
For the respondent	Allison Sephton
For the Public Service Commission	Claude Zaor (written submission)