

CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE  
LA PERSONNE

**LEVAN TURNER**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**- and -**

**CANADA BORDER SERVICES AGENCY**

**Complainant**

**Commission**

**Respondent**

**DECISION**

MEMBER: J. Grant Sinclair 2010 CHRT 15  
2010/06/10

**I. INTRODUCTION**

**A. Mr. Turner's Pre-Customs Inspector Experience**

**B. Mr. Turner's Custom Inspector Experience**

**(i) May 1998 to October 1998**

**(ii) December 1998 to October 1999**

**C. Mr. Turner's December, 1998 to October, 1999 Performance Review**

**(i) May 2000 to October 2000**

**(ii) May 2001 to September 2001**

**(iii) October 2001 to October 2002**

**(iv) May 2003 to September 2003**

**D. Previous Competitions**

**E. Vancouver Competition 1002**

**F. Shalivi Sharma**

**G. The Student Bridging Program**

**H. Supt. Ron Tarnawski**

**I. How was the Eligibility Restriction Applied?**

**J. Victoria 7003**

## II. Decision

### A. Qualifications and experience as Customs Inspector.

### B. The Klassen emails

### C. Victoria 7003

### D. Vancouver 1002

## **I. INTRODUCTION**

[1] Mr. Levan Turner is the complainant in this matter. He describes himself as a black male, who was 37 years at the time of his complaint. He is currently employed by the federal government as a PM-2 with Service Canada. He has been in that position since June 2008.

[2] In 2005, Mr. Turner filed a complaint with the Canadian Human Rights Commission. His complaint, dated February 8, 2005 is against the Canada Border Services Agency ("CBSA"). CBSA came into existence on December 12, 2003. It is the successor agency to the Canada Customs Revenue Agency ("CCRA"). CBSA is responsible for the enforcement of customs and immigration laws at Canada's borders. Following the creation of the CBSA, the position of Customs Inspector ("CI") became Border Services Officer.

[3] Mr. Turner's complaint arises out of two competitions for the position of Customs Inspector with CCRA. He applied in both competitions. At the time he applied, he was working as a seasonal CI for the summer season in the port of Victoria. He had worked as a seasonal CI in Victoria from 1998 to 2003.

[4] The first competition he applied for was posted by CCRA on June 9, 2003 for a CI position in Vancouver, B.C. ("Vancouver 1002"). The second competition was posted by CCRA on October 11, 2003 for a CI in Victoria, B.C. ("Victoria 7003"). Mr. Turner did not obtain either position. In both cases, the Selection Boards for these two competitions did not consider him qualified to be a CI.

[5] Mr. Turner claims that the decisions of the Selection Boards were tainted by discriminatory considerations, namely considerations of his race, national or ethnic origin and age, contrary to s. 7 of the *Canadian Human Rights Act*.

### **A. Mr. Turner's Pre-Customs Inspector Experience**

[6] Mr. Turner's résumé indicates that he worked in various jobs in Toronto between 1985 and 1995. He was also enrolled in a four year geography program at the University of Toronto, but did not complete it.

[7] His résumé also indicates that, between 1991 and 1995, he was a member of the Metropolitan Toronto Police Auxiliary. This is a voluntary activity which involved community policing, traffic control for special events and community public relations.

[8] As a volunteer, he would do ride-alongs with a regular police officer and assist in policing duties. He was trained in defensive tactics, tactical takedowns and handcuffing. Mr. Turner estimated that, as an auxiliary, he gained more than 2,000 hours of policing and enforcement experience.

### **B. Mr. Turner's Custom Inspector Experience**

#### **(i) May 1998 to October 1998**

[9] In 1995, Mr. Turner moved to Victoria. He first worked as a seasonal CI with the Marine Team, Revenue Canada, Customs & Excise, (the predecessor to CCRA) in Victoria, from May 1998 to October 1998. Marine is responsible for the outside processing of cruise ships, ferries, aircraft, pleasure craft and float planes. As to the ferries arriving in the Port of Victoria, marine dealt mainly with the *Coho* and the *Clipper*. The *Coho* is a car ferry that runs between Victoria and Port Angeles, and the *Clipper* is a passenger ferry that runs between Seattle and Victoria.

[10] The duties of a CI include control of goods and people coming across the international border, interviewing and assessing their admissibility to Canada.

[11] Marine involves primary inspection and secondary inspection. Primary inspection would be the first contact with a CI that persons would have coming off a ferry or cruise ship. That is when they would present their customs declaration and would be questioned by a CI.

[12] At that point, the CI would determine whether they would be admitted to Canada or be sent to secondary for further examination. To make that determination, a CI is trained to ask standard questions and look for indicators, for e.g., whether they believe the traveler, how they answer questions, whether they are evasive, and then decide whether to send them to a secondary examination or admit them to Canada.

[13] If they are referred to secondary, the primary CI would complete a referral sheet to be given to secondary. The secondary CI, who works in another area, would review the referral sheet, verify what was said at the primary inspection and take whatever action is required. This could be collecting custom duties and taxes, referring them to immigration if necessary or admitting them to Canada. Secondary inspection also has an important enforcement aspect. This involves searching, apprehending or arresting individuals seeking admission to Canada, who are uncooperative, belligerent or who become unmanageable when being questioned by a CI.

#### **(ii) December 1998 to October 1999**

[14] Mr. Turner returned to work as a seasonal CI in Victoria from December 1998 until October 1999. He said that he took this position because he wanted to become a full time CI. This is because he loves the interaction with the public and because of his auxiliary policing background he had become very interested in law enforcement. CI work gave him the best of both worlds.

[15] When he came back in December 1998, he was assigned to the Telephone Reporting Centre ("TRC") and worked there from December 1998 to October 1999. The TRC is a static location. A CI assigned to the TRC works for the whole shift, and would not as a general rule, do any outside processing.

[16] The function of the TRC is to clear private vessels and aircraft coming into Victoria from outside Canada. The masters of the vessels or the pilots of the aircraft would phone the TRC to obtain telephone clearance into Canada.

[17] The CI would conduct the same interview, would ask the same questions that would be asked of a person coming across the border on land or by ferry. If they were admitted to Canada, they would receive a clearance number, which is proof that they had called in and were cleared by a CI.

[18] If the CI determined that further information or examination was required, they would be referred for a secondary examination to another CI outside the TRC.

### **C. Mr. Turner's December, 1998 to October, 1999 Performance Review**

[19] At the end of the season, Mr. Turner received a written performance review for December 1998 to October 1999 from Supt. Perry, his supervisor at the TRC.

[20] In the review, Supt. Perry wrote that Mr. Turner had become knowledgeable with the legislation and regulations related to the duties performed by a customs inspector and TRC operations. His appearance was always professional and in accordance with Department guidelines. He said that Mr. Turner worked well with the rest of the team members and assisted with the training and guidance to new staff that came into the TRC. Supt. Perry did note in the review that TRC staff only make referrals and rarely help with primary or secondary referrals. He recommended Mr. Turner for re-employment as a CI for the next season.

[21] Mr. Turner said that the TRC was the part of the CI job where he felt most at home and it was in the TRC where he spent most of his time. But he said that during that season, from time to time, he would help with outside processing doing secondary examinations. He did agree, however, that there was no mention in his review of doing any secondary enforcement duties.

#### **(i) May 2000 to October 2000**

[22] Mr. Turner returned as a CI in the TRC and worked there from May, 2000 to October 2000. His performance review again was done by Supt. Perry. He noted that Mr. Turner demonstrated the ability to make decisions with limited information and exercised good common sense and sound judgment. Team work was a very strong point of his and he was of great assistance in training new staff. He was always looking for ways to improve the operation and share this with the rest of the staff. He demonstrated an in-depth knowledge of the different systems used in the TRC. Again there is no mention of Mr. Turner helping out with the marine team. Supt. Perry recommended Mr. Turner for recall the next season.

#### **(ii) May 2001 to September 2001**

[23] Mr. Turner worked as a CI in Victoria with the marine section from May 2001 to September 2001. His performance review was prepared by Supt. Kathryn Pringle. She commented that Mr. Turner conducted himself in a polite and professional manner. He communicated effectively both orally and in writing. He worked well with his co-workers and was always willing to assist with extra tasks without complaint. She noted that he had become the resident computer expert in the TRC and was able to resolve problems when there was no IT support, especially on the weekends.

#### **(iii) October 2001 to October 2002**

[24] In October 2001, operating under a state of alert because of 9/11, CCRA decided to hire seasonal CIs beyond the summer season. Mr. Turner was extended from October 2001 to December 2001 and then to October 2002 when he worked outside in marine.

[25] For this period, he received two performance reviews, a mid-summer review and an end of season review. In his August 2002 mid-summer review of Mr. Turner, his supervisor, Supt. Baird, reported that Mr. Turner had a very good understanding of the primary process and was able to make quality referrals while facilitating low-risk travelers. He was able to make appropriate decisions when doing secondary exams and was professional, even in difficult circumstances.

[26] Mr. Turner was a team player, communicated well with both the public and his co-workers and had the potential to be a very effective communicator. Supt. Baird lauded him

for the effort he had made to bring forward issues in a constructive manner after pointing out that this was something Mr. Turner had failed to do in the past. He concluded by encouraging Mr. Turner to gain more experience in enforcement through secondary examinations.

[27] In his October 14, 2002 end of season performance assessment, Supt. Baird wrote that Mr. Turner had an excellent understanding of primary and secondary procedures. He demonstrated an effective ability to deal with difficult or hostile situations and good judgment when dealing with secondary examination and enforcement activity.

[28] He noted that Mr. Turner had successfully completed the Officers Powers and Use of Force training at the beginning of the summer and that he had been involved in secondary examinations during the summer and had worked on gaining enforcement experience. As with his other performance reviews, Mr. Turner was praised for interacting well with the public and his co-workers and for his willingness to take on extra work when asked.

[29] In his evidence, Supt. Baird commented on the two reviews that he prepared for Mr. Turner in 2002. There are things that he liked about Mr. Turner as an employee and work that he did well. But he would not characterize Mr. Turner as fully developing into all of the roles expected of a CI. Mr. Turner was very comfortable doing that part of the job that was more service-oriented, like working in the TRC.

[30] As to those of the job that required being more proactive in terms of enforcement and identifying non-compliance amongst travelers or doing secondary examinations and seeing them through to enforcement, such as seizures, that was not Mr. Turner's strong suit.

[31] As to Mr. Turner's 2002 mid-summer review, Supt. Baird explained that employees were given their goals and objectives at the beginning of the season, what was expected of them and how they would be assessed in terms of performance. The mid-season assessment was to let them know if they're on track, or if there were performance issues.

[32] Supt. Baird said that his consistent view of Mr. Turner was that he was always polite and courteous when dealing with the public and fellow officers and always presented himself in a professional manner even in difficult circumstances.

[33] As to his comment about bringing work-related concerns forward in a constructive manner, he said this was added specifically to address a performance issue that Mr. Turner was having in the workplace. His observation was that at times, that he had a tendency to bring issues forward in a manner that Supt. Baird characterized as complaining. He identified this as an issue for Mr. Turner and acknowledged that Mr. Turner had positively responded and had made efforts to be more constructive.

[34] Supt. Baird said that when he wrote in the review that Mr. Turner had the potential to be a very effective interviewer, he was underscoring that Mr. Turner had the fundamentals to develop good interviewing skills. But he was not saying that Mr. Turner was then a good interviewer. He had to work at it.

[35] Good interviewing techniques are developed through practice. The more secondary examinations and focusing attention to that skill set, the better opportunity there is to develop and become more skilled. He observed that this was an area where Mr. Turner was weak and did not put enough effort into developing these skills.

[36] Supt. Baird, said with respect to enforcement experience, that TRC offers very limited enforcement experience because the job involves answering telephones and making referrals to the field. Only rarely would TRC staff help with the secondary examination.

**(iv) May 2003 to September 2003**

[37] Mr. Turner was last employed as a seasonal CI from May 2003 to September 2003 and worked outside in marine. His performance review was prepared by his manager, Supt. Terry Klassen. In his performance review, Supt. Klassen indicated that Mr. Turner provided quality service to the public and to his peers. At times, he had taken on a leadership role when the Supt. was not on site.

[38] He noted that Mr. Turner had a good understanding of customs enforcement and provided fair, responsible and effective enforcement of the programs. He said that the seizure documents for that summer showed that Mr. Turner was involved in six different enforcement actions. In three of them, he was the lead officer, one for seizure and two for officer powers incidents, all dealing with narcotics.

[39] But Supt. Klassen said this was average enforcement experience for that summer and would not necessarily provide a CI with a broad understanding or a good foundation for customs enforcement. Customs enforcement just doesn't deal with narcotic offences. It also involves seizures of other prohibited material such as pornography, alcohol, tobacco, clothing, souvenirs or jewellery that travelers do not report. There are a lot of areas of customs enforcement that were not covered under these six enforcement events.

[40] He concluded that Mr. Turner had met the majority of the performance expectations and recommended him for re-hire.

[41] After they met on September 26, 2003 to discuss and sign off on the review, they had an informal discussion in which Supt. Klassen brought up some concerns that he had not mentioned in the performance review.

[42] Mr. Klassen told Mr. Turner there was a perception among some Supts. that he tended to avoid the harder tasks and sloughed off work. Mr. Turner said this was very surprising to him considering his performance review. He was shocked that Supt. Klassen didn't bring this to his attention sooner so he could respond.

[43] Supt. Klassen also told Mr. Turner that there were also complaints from other custom inspectors that he did not do the cash-out at the end of his shift. A cash-out involves taking the monies collected from duties and taxes at the end of the shift, leaving enough for a cash float for the next shift, and taking the balance to the main office. At the main office, it is put in the safe for the day clerk to take to the bank the next morning. Again Mr. Turner said he was very surprised to hear this because nobody had ever raised this with him before.

[44] David Cormie, who was a CI for 32 years, worked with Mr. Turner in marine. Mr. Cormie, would rate Mr. Turner at the top of the CIs he worked with. He would never describe Mr. Turner as lazy or that he ever was shirking his duties.

[45] Mr. Cormie said that he worked shifts following Mr. Turner but did not recall any complaints about Mr. Turner not doing the cash-out. Mr. Cormie said it was always a judgment call whether to cash out a small amount such as \$50 or leave it for the next shift.

[46] After his informal discussion with Mr. Turner, Mr. Klassen sent an email dated October 4, 2003 to other Supts., Rick Peninger, Mara Gibbons, Kathryn Pringle, Trevor Baird

and Diane Kavelaars. In his email, Mr. Klassen wrote: "I then went to the point and started talking about how he is perceived, i.e., how he sometimes shies away from the harder tasks, or knows the right procedure, but asks to Superintendent for advice, hoping the Superintendent will use their discretion and go the easier way. It was also pointed out how other inspectors had complained that he had left cash outs for others to do instead of doing them on his shift."

[47] The last three sentences in this email read: "I asked him to take a close look at himself next year to ensure he is not dodging harder tasks of seeking the easy path. In turn he asked that we give him ongoing feedback on how he is doing in our eyes. The conversation went very well and without conflict."

[48] On October 12, 2003, he sent another email to the Supts. entitled "Talk with Levan, part two". He wrote "that he had forgotten an important part of the conversation. It was regarding his attendance."

[49] Mr. Turner recalled talking about attendance in this session. Mr. Klassen was concerned that either Mr. Turner's health was an issue or he was abusing his sick leave. He said that Mr. Turner's Leave Summary reports showed a steady increased use of sick leave and family related leave over his years of employment. Mr. Turner said this issue had never been raised with him before.

[50] As to the family leave, Mr. Turner explained that Mr. Turner's girlfriend was on disability and had some medical issues. But she would be back at work and the family related leave would be lower.

[51] Supt. Klassen's email concluded with the comment: "We closed up the one and a half hour discussion with me emphasizing that he needs to be cognizant of the image he is presenting as one of jumping in with both feet and not looking for an easy solution. He also asked that I impart to the other Superintendents that they should feel free and easy to come and discuss with him when something is not sitting right as he does not see this sloughing off as part of his work ethic or nature."

[52] Supt. Klassen did not record these concerns in Mr. Turner's performance review because he had not been given an opportunity to respond.

[53] He also indicated that he had this discussion so that when Mr. Turner came back for the 2004 summer season, which Mr. Klassen recommended, his next supervisor would see these comments and work with Mr. Turner so that these concerns were addressed the next year.

[54] Mr. Klassen agreed that he did not send similar emails concerning his end-of-season meetings with other seasonal employees to the other Supts.

[55] Mr. Turner was not hired for the 2004 summer season. He was told this because CBSA had changed its hiring practices.

#### **D. Previous Competitions**

[56] Although Mr. Turner received very favorable job performance reviews as a five year seasonal term employee, he did not do well in prior competitions for an indeterminate CI position.

[57] Mr. Turner applied for a CI position in competition Victoria 2009. He was interviewed on April 2, 2002 but failed to pass the interview, having scored a failing grade of 60 on the

enforcement orientation. In their interview notes, the Board comprised of Supts. Kathryn Pringle and Dave Denis, indicated that Mr. Turner did not demonstrate the capacity to exercise balanced judgment. The reason was that, in answer to a question, he said that he would only collect duties and taxes if the traveler wanted to pay.

[58] The Board also noted that one of his examples on which he was interviewed related to an incident from four years earlier. This indicated to the Board that he lacked current enforcement experience although he had worked several years experience as a CI.

[59] In May 2002, shortly after his interview, Supt. Pringle called Mr. Turner and explained to him that his lack of enforcement experience had adversely affected his performance in the interview. She encouraged him to work outside in marine during the coming summer rather than in the TRC so he would gain more enforcement experience. She also encouraged him to apply in upcoming competitions if he wanted an indeterminate position once he had acquired that experience.

[60] Initially he resisted this advice, telling Supt. Pringle that because he had not qualified in this competition, he would prefer to work in the TRC where he believed his talents could be better used. He did however work in marine the next season.

[61] In 2002, Mr. Turner again competed for a CI position in Victoria 7012. He was interviewed on February 13, 2003 and again failed to qualify.

[62] In his interview, Mr. Turner received a failing grade on both enforcement orientation and service orientation. A differently constituted Board, Supts. Tarnawski, Northcote and Pringle had similar concerns about his enforcement approach. The Board noted that Mr. Turner did not get all the information before making decisions. He made numerous assumptions regarding who he was dealing with and how he should deal with them. This was after his 2002 mid-season and end of summer performance reviews where Supt. Baird emphasized that Mr. Turner needed to get more enforcement experience.

### **E. Vancouver Competition 1002**

[63] The Vancouver competition, 2003-1727-PAC-3391-1002 was dated June 9, 2003. It was for a CI position for Vancouver International Airport District, Metro Vancouver District and Pacific Highway District. The competition was open to persons residing or working west of the Canadian Rocky Mountains.

[64] In addition to the criteria to be satisfied to be screened into this competition, there was also an eligibility restriction, which provided, "Applicants who have been *interviewed* for this position since January 1, 2002 will not be eligible for this position."

[65] This competition was open both to those working in the public service and to external applicants. Applications were submitted online to the human resources section, who would compile a master list of the names and addresses of those who had applied and the date of their application. The applications were then given to the Selection Board appointed for the particular competition, who would decide who would be screened in.

[66] Once a candidate was screened in, they would be invited to take the Customs Inspector Test ("CIT"). Those who had written and passed this test did not have to do so again. The pass mark was 585/900.

[67] Those candidates who passed the CIT were sent a Portfolio of Competencies package ("POC") to be completed and returned. For Vancouver 1002, there were eight competencies



listed: adaptability, initiative, client service orientation, dealing with difficult situations, decisiveness, self-confidence, teamwork and cooperation, and effective interactive communication.

[68] Applicants were asked to describe a particular event, ideally two-three years old, and focus on what they did, felt and thought, using a different event for each competency.

[69] The Selection Board would initially do a paper review of the POC package submitted by each candidate and determine whether there was sufficient information to demonstrate they had an understanding of the competencies. If so, they would be invited to an interview.

[70] At the interview, the Board would question the candidate on some of the competencies. This was a much more intensive exercise by the Board and would also give the candidate the opportunity to expand on their written answers.

[71] Mr. Turner read the Vancouver 1002 poster as being for a position in the Vancouver International Airport, Metro Vancouver District and Pacific Highway District. Because he had not interviewed for a CI position in Vancouver since January 1, 2002, he considered that he was eligible for this process.

[72] The Vancouver 1002 competition involved two interviews. Mr. Turner satisfied the preliminary stages and was invited to the first interview on April 26, 2004. The members of the Selection Board were Supts. Ron Tarnawski, Mark Northcott and Karen Morin.

[73] In the informal discussion prior to the formal interview, Mr. Turner mentioned to Mr. Tarnawski that he had met him before. He said Mr. Tarnawski's response was yes, he remembered Mr. Turner's voice and his presence. As noted earlier, Mr. Tarnawski was a member of the Selection Board who had interviewed him in February, 2003 for Victoria 7012.

[74] Early in the interview, the Board asked him if he had applied for this position within the eligibility period set out in the job posting. Mr. Turner said no, his understanding and interpretation being that the position was for Vancouver.

[75] The Board indicated to him that, in the event that CBSA's records indicate that he did in fact apply for the position since January 1, 2002, he would no longer be eligible for the process.

[76] After the interview, the Board researched its files and found that Mr. Turner had in fact interviewed for two CI competitions since January 1, 2002, namely, Victoria 7009 on April 2, 2002 and Victoria 7012 on February 13, 2003.

[77] Although Mr. Turner was successful at that interview, he was disqualified from proceeding to the second interview because he came within the eligibility restriction.

[78] The interview notes from Mr. Turner's Vancouver interview, April 26, 2004 at shows a passing score of 70 and then the notation, "not qualified to interview. NQ'd inside of restriction on poster".

[79] Mr. Turner challenged this, saying that there were other people that had interviewed previously in Victoria. He believed them to be Trent Van Helvoirt, Heath Lariviere, Mike Curtis and Chris Hughes. It appears, however, from the evidence that these four persons had interviewed previously for Victoria and were successful.

[80] Shortly after his interview, Mr. Tarnawski called him and explained that because Mr. Turner was unsuccessful in a prior Victoria competition within the time restriction, he was screened out of the Vancouver process. He also told Mr. Turner that the restriction did not apply to candidates who had been interviewed and were successful in prior Victoria competitions.

[81] Mr. Tarnawski followed with a letter dated June 1, 2004, which Mr. Turner received on June 7, 2004. The letter referenced Vancouver 1002 and stated that "due to a restriction on the Customs Inspector Job Poster, applicants who have been interviewed for the above-mentioned position since January 1, 2002, will not be eligible for this process. As it has been determined, you were interviewed after that date you are not eligible for this process. If you require any further information you are to submit a request in writing by June 9, 2004".

[82] Mr. Turner sent a reply letter dated June 7, 2004. The CBSA date stamp indicated that it was received on June 11, 2004). In his letter, Mr. Turner requested further information. He noted that in their earlier conversation, Mr. Tarnawski told him that he was disqualified because he was not successful in the earlier Victoria competitions. But according to Mr. Tarnawski's June 1, 2004 letter, any candidate who was interviewed, successful or not, would be disqualified.

[83] Mr. Turner did not receive any reply to his letter from CBSA. According to Mr. Tarnawski, this was because Mr. Turner's request letter was received after the date specified for requests for information. He said that CBSA was trying to make sure that people who asked for feedback were actually serious about getting feedback.

[84] He conceded that Mr. Turner had raised serious concerns, but said "if it's late it's late". However, his June 1, 2004 letter did not state that the request for information had to be received by June 9, 2004, only that it had to be submitted by that date.

#### **F. Shalivi Sharma**

[85] Shalivi Sharma gave evidence on behalf of CBSA. At the time, Vancouver 1002 was advertised, she was a CBSA Resourcing Advisor whose clients included mainland customs hiring managers for the Pacific Highway District, Vancouver International Airport, and Metro Marine District. She assisted them with the Selection Boards as well as with any training that Selection Board members needed and provided them with general staffing advice.

[86] Ms. Sharma was involved in the drafting of the Vancouver 1002 competition poster. When she first met with the recruitment unit, which at that time consisted of Ron Tarnawski and Mark Northcott, they indicated that they were interviewing the same candidates over and over again who were not being qualified for the position.

[87] At that time they were running multiple processes in order to deal with the shortage of customs inspectors and the high turnover rate. So they decided that anybody who was found not qualified, since January 1, 2002, not just for Vancouver, but also for Victoria, would not be considered for this process as not enough time would have lapsed for them to upgrade their skills.

[88] Ms. Sharma agreed that the poster should have read candidates who had interviewed since January 1, 2002 and who were "unsuccessful" were not eligible for this competition. The failure to make this intent clear was an error on her part.

[89] Ms. Sharma was asked whether a Selection Board should consider the past experience and performance reviews of an employee who has already been in the position, she said that it is not something she would advise the Board to do. Because this was also an external process, it would not be appropriate to consider the performance of an internal candidate. An external candidate would not have this advantage. All candidates should be assessed according to the same criteria.

### **G. The Student Bridging Program**

[90] Ms. Sharma testified about the Student Bridging Program. It is for students who have worked with CBSA while they completed their studies and have graduated. They are then eligible to be bridged without competition into an indeterminate BSO position.

[91] The process involves an assessment against a statement of merit criteria. The hiring manager determines whether they meet each of the qualifications that have been outlined. The program is administered by the Public Service Commission.

[92] There's no minimum in the bridging program in terms of how many years they have worked. In the Student Bridging Program, the students would be hired seasonally, but some students do stay on during the fall and winter semesters but only work part time.

[93] Between 2000 and 2005, there were less than 10 students who were bridged. Since 2005, the total has increased to about 20 or 30 a year in the Pacific Region.

[94] Ms. Sharma did not consider the Bridging Program to be preferential treatment for persons under the age of 35, but agreed that the majority of students in that program would be under the age of 35.

[95] Ross Fairweather also gave evidence for CBSA on the issue of age discrimination. He is the Acting Senior Policy Advisor for the Arming Division of CBSA and has been employed by that Agency and its predecessor organizations for approximately 30 years.

[96] In 2004, he was an acting chief at the Vancouver International Airport, the traffic side of the International Airport. In that year he was invited to Victoria to speak to some of the CIs and it is alleged that at that time he said "if you are under 35 and wanted to pursue a career in Customs come to Vancouver". He said that is not something he would have said. Nor is he aware of any under 35 hiring policy within CBSA or its predecessor organizations.

[97] In fact, Mr. Fairweather said it is the opposite. It's always been his belief and several of his colleagues that some world experience is good for people in this job. They need to have maturity and ability to bring the real world to bear on the decisions they are making about people who travel from other places in the world.

[98] Mr. Fairweather said he thinks it takes a blend. He said CBSA has officers who come in under the bridging program and he has also hired officers who were mature persons who have spent years in other professions. To his knowledge, bridging was not a great source for recruiting officers.

### **H. Supt. Ron Tarnawski**

[99] Mr. Tarnawski is a Supt. at the Pacific Highway Truck Crossing located in the Pacific District. He has worked with CCRA/CBSA for about 19 years.

[100] Mr. Tarnawski said that, in the past, each district within the Pacific Region was responsible for its own recruitment and running its own selection and assessment process.

There were inconsistencies in the way the processes were being run and there was no experience being transferred from one process to another.

[101] Also they were highly competitive and it was not uncommon for districts to offer positions to employees that the other district had run a selection process for and qualified. They would wait for a pool to be created and then raid the pool.

[102] So it was decided to establish one recruiting unit that would do all the selection processes for the entire Pacific Region. This has evolved into a National Recruiting Centre and a national recruiting process with regional offices throughout the country. As part of this process, recruiting units were set up and a standardized interview process was designed where a candidate would apply online, the application would be screened by people that had experience in screening.

[103] Mr. Tarnawski spoke to the eligibility restriction for Vancouver 1002. He said it was put in because they were seeing the same candidates in selection process after selection process. An overwhelming majority would be found not qualified, only to be back for another interview a short time later in the next selection process. Candidates were not taking the opportunity nor did they have the time to develop the required skills. It was becoming a very difficult issue to manage.

[104] Mr. Tarnawski agreed that the wording of the eligibility restriction was lacking. It should have said candidates who interviewed for the position and were unsuccessful were not eligible for this competition.

[105] Mr. Tarnawski first met Mr. Turner when he was one of four candidates he interviewed for Victoria 7012 on February 13, 2003. The reason for his involvement in the interviews was that Victoria was running this competition and needed guidance from the recruiting unit on how to implement the new national process.

[106] As to applying the eligibility restriction and making sure that candidates were not slipping through the net, Mr. Tarnawski said that it was necessary to physically go through the databases from previous selection processes and compare them against the Vancouver 1002 database. Ms. Sharma and her staff did this and highlighted those persons who had applied to previous competitions within the eligibility period.

[107] Mr. Tarnawski said that as the database was being developed, those comparisons were taking place. Sometimes the comparison may not have been done until sometime into the selection process, depending on when the information was available. Unless a candidate was screened out prior to the interview, eligibility was determined at the interview stage.

[108] Mr. Tarnawski said that this wasn't perfect. The lists of candidates were in the hundreds and the Unit had limited resources to deal with the large volume of candidates.

[109] Mr. Tarnawski said that he did recognize Mr. Turner at the Vancouver 1002 interview as having participated in an earlier competition, but did not specifically recall which one. But he strongly denied the suggestion that he recognized Mr. Turner because he is a black man and because of his size.

[110] Rather, he recalled him as a person with a very outgoing, positive personality and for that reason it was easy to remember him as one of the four persons that he interviewed on February 13, 2003. That is why after his interview, the Board decided to follow up on

Mr. Turner's eligibility. Mr. Tarnawski did not recall whether the Board followed up on any other candidate to determine whether they fell within the restriction.

### **I. How was the Eligibility Restriction Applied?**

[111] To determine if the eligibility restriction was applied to all candidates for Vancouver 1002, Ms. Sharma was asked to provide a master list of all candidates who had applied for Vancouver 1002 and who had previously been interviewed in other competitions since January 1, 2002. She produced four lists, Vancouver 1002; Victoria 7003; Victoria 7012; and Victoria 1020.

[112] The master lists purported to list all of the applications received for each of these competitions that were prepared at the closing date of the poster when all the applications were received and reflected all of the candidates who applied for the competition. The master list was updated as the recruitment unit went through the process of screening people in, inviting them for testing, interviews, and so on.

[113] The evidence does not disclose the posting and closing dates for Victoria 1020 and whether it was within the restriction. In any case, it does not matter as the data indicates that all of the candidates who applied for Victoria 1020 and Vancouver 1002 failed the CIT and thus would not have been interviewed.

[114] For the other competitions, the master lists indicated as follows. There were 21 candidates who applied for Vancouver 1002. Of these, some also applied for Victoria 7012 or Victoria 7003 or both. Mr. Turner applied in all three.

[115] Of these 21, only two, Laura Keble and Blaine Wiggins initially raised questions about the equal application of the restriction. On review, however, the evidence shows that Ms. Keble applied for Victoria 7012 but was found not qualified on her POC. This did not disqualify her for Vancouver 1002 because she did not proceed to interview. She did qualify for Vancouver 1002.

[116] Blaine Wiggins' status is more problematic. He did not qualify at the interview for Victoria 7012, yet he did proceed to the second interview for Vancouver 1002 but did not qualify at that stage.

[117] There are two possibilities here. Either Mr. Wiggins fell within the restriction and should not have proceeded to interview in Vancouver 1002. The other possibility is that the master list for Mr. Wiggins shows him listed at two different addresses for the two competitions.

[118] The conclusion from this data is that no candidate who was unsuccessful after interview in Victoria 1020, 7012 or 7003 competitions succeeded in Vancouver 1002, except perhaps Mr. Wiggins and the evidence is inconclusive that he was the same candidate in both competitions.

### **J. Victoria 7003**

[119] This was a competition for a CI position in Victoria. It was posted on October 11, 2003 and was open to those persons resident or employed in the Greater Victoria area.

[120] Mr. Turner said that he applied for this position because it was the end of his seasonal term and he was trying to get into a pre-qualified pool to ensure he could come back for the following summer. Or if they were going to offer any permanent positions, he wanted to make sure he was ready to go.

[121] The process was the same as for Vancouver 1002. Mr. Turner was invited to interview for Victoria 7003, which took place on December 13, 2003. He was found not qualified at the interview.

[122] The Selection Board consisted of Supts. Baird and Supt. Kathryn Pringle. At the interview, the Board addressed Mr. Turner's submissions on two competencies, Effective Interactive Communication and Teamwork and Cooperation. He scored 60 for Effective Interactive Communication and 40 for Teamwork and Cooperation. A pass mark of 70 was required for each competency.

[123] Supt. Baird testified at the hearing with respect to Mr. Turner's interview and the Board's interview notes.

[124] Under Effective Interactive Communication, the Board's notes record "embellished facts, was a police officer when actually an auxiliary volunteer. Written material paints other negatively". In his evidence, Supt. Baird explained that at his interview, Mr. Turner seemed at first to indicate that he was a police officer with the Metropolitan Toronto Police. Later in the interview, he clarified that he was an auxiliary volunteer.

[125] The Board considered this to be an example where he was not clear in his communication, whereas the Board was looking for a very clear, concise, and accurate communication.

[126] The Board also referred in its notes to a few examples that Mr. Turner provided under Teamwork and Cooperation. One example involved an IT problem that came up during his shift in TRC. Apparently none of the IT experts in Victoria or Ottawa were able to solve the problem. Nor was an experienced TRC officer who, according to Mr. Turner's example, became frustrated and gave up.

[127] Then Mr. Turner wrote that he got involved when it became obvious that the problem needed to be fixed. So he phoned Ottawa, spoke to an IT person who became frustrated. Mr. Turner told him that he would deal with the problem and ultimately it was resolved.

[128] Another example that Mr. Turner offered for Teamwork and Cooperation (Dealing with Difficult Situations) involved a black male entering Canada in the afternoon on the *Coho* ferry. He became agitated at some of the CI's questions and as Mr. Turner described it in his example: "I noticed Nina [Patel] trying to talk to him and calm him down but he did not like her at all...I came in and took over, and she stood back and kept others away while I dealt with it..."

[129] Mr. Turner went on to say that "Inspector Ken Moore had the dog Lego go over the car, and the traveler took issue with that. At this point he started putting back all his items that were on the ground being inspected, back into the vehicle. Ken got really upset and grabbed a corner of the tool bag he was trying to put back into the vehicle. Ken looked him straight in the eye and said in an aggressive tone. I'm finished when I say I'm finished."

[130] Mr. Turner described how he jumped in between the two of them and separated them and took the traveler to the front of the vehicle. It was his observation that it looked like it was going to escalate into a fistfight.

[131] Mr. Turner went on to note that he went to Immigration and found out exactly what papers were needed. They weren't too helpful but he was able to get the necessary papers.

[132] The Board's comments were that Mr. Turner came across as being very negative towards his co-workers and supervisors in this example. He tended to embellish the facts and overstate his role at the expense of others involved. He diminished their involvement in that it appeared that only Mr. Turner was able to resolve the situation.

[133] There is also a reference in the Board's notes that Mr. Turner did not agree with a Chief Supt's decision on charging *Coho* for overtime. Mr. Turner said that the Chief was going to charge the *Coho* as a cost recovery for coming in late. The officers were scheduled to be there at a certain time but because it was late, they had to work overtime.

[134] Mr. Turner said that he did not agree with the decision and told them at the interview the reason why. His answer led to the Board recording: "Did not agree with Chief's decision on charge, on charging *Coho* for overtime. Made a conclusion without all the facts, quick to blame, and jumps to conclusions."

[135] In his POC, Mr. Turner had referenced Nina Patel and Ken Moore as validators for his T&C example. Ms. Patel was the Acting Supt. when this situation occurred. He said that he was fully aware that following an interview these references may be called to substantiate the accurateness of the circumstances described.

[136] Supt. Baird testified that his knowledge of Ms. Patel was that she is an officer with a lot of experience dealing with hostile and aggressive travelers in highly charged situations. It would be out of character for her to stand back and let Mr. Turner deal with the problem. As for Ken Moore, Supt. Baird said that he is an experienced dog handler who has dealt with many hostile travelers. Mr. Turner's description of Mr. Moore's actions was not consistent with his observations of Ken Moore in the workplace.

[137] Supt. Baird did indeed contact Ms. Patel about a month later in January 2004 to validate the example which Mr. Turner had provided. He felt compelled to do so because it was so out of character from what he had observed in the workplace.

[138] His recollection is that he phoned Ms. Patel who was in Quebec at the CBSA training facility. He did not provide her with a copy of the POC. He read the example to her over the phone and she provided her comments.

[139] Supt. Baird took notes of this conversation and Ms. Patel's comments. His notes indicate that Mr. Turner did talk to this traveler and was good with him but his involvement was not instrumental. She said that he made others look worse to make himself look better. She considered that she maintained control of the situation and the traveler.

[140] When asked why he chose to validate this information a month after Mr. Turner had been disqualified, Supt. Baird agreed that there was no need to do so. But Mr. Turner did offer Ms. Patel and Mr. Moore as validators.

[141] Supt. Baird did agree that, in his mid-summer 2002 assessment of Mr. Turner, he was quite satisfied with Mr. Turner's effective interactive communication skills. And at no time as Mr. Turner's supervisor did he have any concerns with his truthfulness.

[142] He also agreed that Mr. Turner does have those skills in terms of effectively communicating with the public, asking questions, listening to responses, and with the proper application and effort in secondary, the potential to develop those added skill sets to make him an effective interviewer. But he was not yet there.

## II. DECISION

[143] To succeed in his complaint, Mr. Turner must first show a *prima facie* case of discrimination based on the prohibited grounds of age and national or ethnic origin as he has alleged in his complaint.

[144] On the question of age discrimination, the evidence does not support a *prima facie* case. There was some statistical evidence comparing the age demographics in CCRA/CBSA to the Public Service as a whole and the labor force in general. These statistics were inconclusive. More to the point, neither counsel referred to them in their final argument.

[145] The other evidence offered by Mr. Turner was a comment supposedly made by Mr. Fairweather that if you are under 35 and want a career in customs come to Vancouver. He denied making this comment and said that he was not aware of any policy that preferred candidates under age 35. In fact, his view was that CIs should be a mix of all ages and experience.

[146] Nor does the Student Bridging Program support an allegation of age discrimination. Though it results in younger candidates being hired as CIs, the evidence is that it has not been a major source for recruiting CIs. Between 2000 and 2005, less than 10 CIs were hired through this program and post 2005, 20-30 CIs were hired in the Pacific region.

[147] As to race and national and ethnic origin, apart from of a raft of scattered, confusing and inconclusive statistical evidence (which was entered into evidence by Mr. Turner, but which neither party argued) there was no evidence of direct discrimination.

[148] In order to make a *prima facie* case, Mr. Turner has to rely on circumstantial evidence and inferences as to discrimination. CBSA agrees that in cases like this, which involve circumstantial evidence, the appropriate test to apply is as follows: an inference of discrimination may be drawn where the evidence offered in support of it renders such inference more probable than the other possible inferences or hypotheses.

[149] Mr. Turner identified these aspects of the evidence that he says support an inference of discrimination:

### **A. Qualifications and experience as Customs Inspector.**

[150] Mr. Turner worked as a seasonal CI from 1998 to 2003, a total of six seasons. His performance reviews were always positive especially for effective interactive communication and teamwork and cooperation. Every review recommended that he be rehired for the next season.

[151] He was extended from October 2001 to October 2002 having satisfied the criteria of TRC experience, reliability and teamwork and cooperation. Yet, he never qualified for a permanent CI position, with all of his experience and his consistently positive performance reviews.

### **B. The Klassen emails**

[152] This refers to the post performance review discussion that he had with Supt. Klassen when he told Mr. Turner of some Supts' perception that he was lazy and sloughed off work and was dishonest. Mr. Turner asserts that this is the stereotypical, negative perception of black men.



[153] Following this discussion, Mr. Klassen sent an email to the Supts. setting out in detail the subject matter of their conversation. He followed with a second email detailing other subjects that were not covered in his first email.

[154] Mr. Klassen's explanation for sending these emails was to provide information to be used by Mr. Turner's next season's manager to develop his priorities and objectives. Mr. Klassen had never spoken to Mr. Turner about these concerns previously. Nor did he send similar emails for any other seasonal employee.

### **C. Victoria 7003**

[155] Mr. Turner did not qualify because he did not get the required score of 70 on the effective interactive communication and teamwork and cooperation competencies. This was so although two of the Board members, Supts. Baird and Pringle, had given him very good performance reviews on these two areas.

[156] Further, the Board believed that he had embellished or was untruthful about his previous policing experience when it was clear from his résumé that he had worked only as an auxiliary.

[157] Supts. Pringle and Baird also felt that Mr. Turner lacked sufficient enforcement experience. Mr. Turner responded by making specific efforts to work outside of the TRC in marine to compensate for this deficit. He was commended by Supt. Baird in his performance review for pursuing this.

[158] In January 2004, Mr. Baird contacted Ms. Patel as Mr. Turner's POC validator. This was about a month after he was disqualified and as Supt. Baird agreed there was no purpose in doing this. He did not follow up with any other candidate's validator.

### **D. Vancouver 1002**

[159] At the interview, when Mr. Turner mentioned that he had met Mr. Tarnawski before, his reply was yes, he remembered Mr. Turner's voice and presence.

[160] Both Mr. Tarnawski and Ms. Sharma conceded that they applied the restriction according to their intent and not according to its wording.

[161] Although there were many hundreds of applicants for Vancouver 1002, Mr. Tarnawski conceded that it was quite likely that only Mr. Turner was the only applicant screened out by the restriction. He was also the only one for whom the Board followed up on to see if he met the restriction.

[162] Finally, there was Mr. Tarnawski's insistence on maintaining the date fixed to reply and refusing to answer Mr. Turner's June 7, 2004 letter request for further information. Especially when Mr. Turner had raised the inconsistencies in Mr. Tarnawski's explanation regarding the restriction and which Mr. Tarnawski agreed was a serious and legitimate request.

[163] For the purposes of this decision, I will assume that Mr. Turner has shown a *prima facie* case of discrimination. I will now consider whether CBSA has provided an explanation for not offering Mr. Turner an indeterminate CI position and whether this explanation is reasonable and not pretextual.

[164] CBSA argues that Mr. Turner's position amounts to the assertion that his seasonal employment together with his positive performance reviews is evidence that he was qualified

for the CI position. The only possible inference from the fact that he was unsuccessful in competition for this position is because of his race, national or ethnic origin.

[165] CBSA agrees that Mr. Turner's job performance reviews were positive. But these related to his performance as a seasonal term employee. The evidence is however, that indeterminate CI positions are staffed through a competitive selection process (except for student bridging). For Mr. Turner to attain his goal, he must demonstrate in a competitive selection process that he was qualified for this position.

[166] This explains why Mr. Turner did not obtain a CI position solely on the basis of his previous experience and commendations. It is not enough that he started as a seasonal term CI in 1998 and was hired back for a total of six seasons and received, for the most part, favorable job performance reviews.

[167] In Vancouver 1002, Mr. Turner failed to proceed to the second interview for Vancouver 1002 because CBSA considered that he was within the eligibility restriction. There is no question that this restriction was poorly drafted and did not on its face exclude only unsuccessful candidates who had interviewed in earlier competitions. Mr. Tarnawski and Ms. Sharma, both of whom were involved in originating this restriction, conceded this.

[168] Mr. Tarnawski explained that the reason for excluding unsuccessful candidates was that selection boards were interviewing the same candidates in successive competitions and an overwhelming majority was found to be unqualified. The purpose of the two year waiting period was to avoid interviewing the same candidates and to give them more time to develop the necessary skills for a CI.

[169] It may well be that Mr. Turner was the only candidate that the Board followed up on after his interview. And he may well have been the only candidate who was caught by the eligibility restriction.

[170] But, according to the master lists prepared by Ms. Sharma for the earlier competitions (apart from the questionable status of Mr. Wiggins), Mr. Turner was the only candidate who should have been ineligible.

[171] Further, it is not logical that the eligibility restriction was meant to apply only to Vancouver positions as Mr. Turner believed, but was expanded to cover all previous competitions only to screen out Mr. Turner. If CBSA did not want to hire Mr. Turner for discriminatory reasons, it would have been much easier to do so by assigning him a failing mark for his first interview.

[172] Nor in my opinion does the fact that Mr. Tarnawski recognized Mr. Turner from an earlier competition interview support a conclusion of discrimination. I accept his evidence that he had only interviewed four persons on that day, February 13, 2003 and remembered Mr. Turner about a year later as a very positive person with a very outgoing personality.

[173] Finally, in my view, the fact that Mr. Tarnawski did not respond to Mr. Turner's June 7, 2004 letter request for more information on the application of the eligibility restriction represents an excessive bureaucratic attempt to control his workload. It should not be construed as a discriminatory act.

[174] Dealing now with Victoria 7003, Supt. Pringle was a member of this Board. She also was a member of the Victoria 7009 Board who interviewed him. After that interview, she made a point of calling Mr. Turner to explain the reason he had not performed well in his

interview. She told him that he lacked enforcement experience and she encouraged him to gain that experience before he applied to another competition.

[175] Supt. Baird, a member of this Board, also had identified concerns about Mr. Turner's lack of enforcement experience. Like Supt. Pringle, he encouraged Mr. Turner to work outside to become a better interviewer and better his enforcement skills

[176] These are hardly the actions of an employer who was discriminating against Mr. Turner. On the contrary, they show that both Supt. Pringle and Supt. Baird were supportive, encouraging and seeking to help him to advance his career with CBSA.

[177] As Supt. Klassen noted in his 2003 review, Mr. Turner was involved in six enforcement actions. But as he pointed out, this was average experience for the summer and would not provide a broad understanding or a good foundation for customs enforcement.

[178] This lack of enforcement experience was certainly a negative factor in Mr. Turner's inability to qualify for a CI position in previous competitions. He did not perform well in interviews.

[179] The Board's notes for his Victoria interview record that in his examples of events relating to Teamwork & Cooperation, Mr. Turner came across as being negative towards his co-workers. He overstated his role at the expense of others involved. He diminished their involvement in that it appeared that only he could was able to resolve a difficult situation.

[180] As to Effective Interactive Communication, the Board felt at first that he had embellished his experience with the Metropolitan Toronto Police, which he later clarified. This led the Board to mark him down because his communication was not clear or accurate.

[181] I have reviewed these examples that Mr. Turner offered in the context of the competition and the required competencies. In my opinion, the Board's assessment and interview marks were reasonable.

[182] I can see nothing in the Board's notes that could lead to the inference that Mr. Turner failed to qualify for the CI position because of discriminatory considerations. Nor is there anything see nothing ominous in Supt. Baird calling Ms. Patel after the fact. Her name was supplied by Mr. Turner as one of his validators. For Supt. Baird, Mr. Turner's description of her actions in the example he provided seemed so inconsistent. His attempt to obtain her version of the events does not to have any taint of discrimination.

[183] I have concluded that CBSA has provided a reasonable explanation as to why Mr. Turner did not qualify for a CI position in either the Vancouver 1002 competition or the Victoria 7003 competition. I have also concluded that there is nothing in the evidence or in CBSA's explanation that can be considered pretextual.

[184] For these reasons, I have concluded that Mr. Turner has not substantiated his complaint. Accordingly, it is dismissed.

*"Signed by"*

J. Grant Sinclair

OTTAWA, Ontario  
June 10, 2010

PARTIES OF RECORD

TRIBUNAL FILE:	Levan Turner v. Canada Border Services Agency
STYLE OF CAUSE:	T1248/6007
DATE AND PLACE OF HEARING:	November 17 to 21, 2008 January 19 to 22, 2009  Victoria, British Columbia  March 17, 2009 (Videoconference)  Ottawa-Vancouver
DECISION OF THE TRIBUNAL DATED:	June 10, 2010
APPEARANCES:	
David Yazbeck / Paul Champ	For complainant
(No one appearing)	For the Canadian Human Rights Commission
Graham Stark	For the Respondent