Date: 20061005

Docket: T-1808-05

Citation: 2006 FC 1193

OTTAWA, ONTARIO, October 5, 2006

PRESENT: The Honourable Mr. Justice von Finckenstein

BETWEEN:

DALE MCGREGOR

Applicant

and

ATTORNEY GENERAL OF CANADA,
LYNN LAJOIE, and SUSAN MCKENZIE

Respondents

REASONS FOR ORDER AND ORDER

[1] The Applicant, Dale McGregor, took part in a closed competition for the position of Regional Administrator, Human Resources with Correctional Service Canada ("CSC") for the Pacific and Ontario regions. This competition followed a successful appeal filed by the Applicant with regard to a previous competition to staff the same position in the Pacific Region. A three-person Selection Board ("Selection Board") assessed the candidates based on three criteria: (1) their education and experience, (2) knowledge qualifications, and (3) their abilities and personal suitability. The knowledge component was assessed on the basis of a written test, and the abilities

and personal suitability components were assessed on the basis of simulation exercises and case study questions, an interview, and reference checks. The Applicant did not pass the knowledge exam and as a result, he was no longer considered for the position and did not participate in the case study questions or the simulation exercise.

[2] The Applicant appealed to the Public Service Commission Appeal Board ("Appeal Board") against the selections made for appointments pursuant to s. 21 of the *Public Service Employment Act*, R.S.C. 1985, c. P-33 ("PSEA"). For the appeal, the Applicant divided his arguments into three categories: "screening", "elements of pre-selection", and "inconsistencies in the conduct of the competition". The Applicant argued that the Selection Board did not establish the evidentiary framework necessary to support its conclusions or to demonstrate that the most meritorious candidate was chosen for the position. He took particular exception to the fact that all members did not evaluate all knowledge questions but rather one member evaluated questions 1 and 2, another evaluated questions 3 to 7 and the third evaluated questions 8 and 9. The only member who testified and appeared before the Appeal Board was the third member who had evaluated questions 8 and 9.

[3] The Appeal Board concluded that no intervention was required. The Appeal Board found that the onus was on the candidate to demonstrate with evidence that the merit principle was not adhered to, such as by calling Selection Board Members as witnesses, but the Applicant had failed to do so. The Appeal Board also concluded that it was not inappropriate for individual Selection Board Members to be responsible for marking only a select few questions. The Appeal Board maintained that since each candidate was assessed identically, this method of assessment did not

violate the merit principle. Finally, the Appeal Board held that the Selection Board had established a sufficient evidentiary framework for its decision.

[4] The Applicant is now seeking judicial review of the Appeal Board decision. He raises two questions:

1. Did the Appeal Board err in placing the onus on the Applicant to adduce evidence in support of his allegation?

2. Did the Appeal Board err in finding that the Selection Board had demonstrated an appropriate evidentiary framework?

STATUTORY FRAMEWORK

[5] The relevant provisions of the PSEA and the *Public Service Employment Regulations*, 2000 ("PSER") SOR/2000-80 are set out in the attached Annex A.

STANDARD OF REVIEW

[6] Both sides agree that questions of law involving whether the merit principle has been respected should be reviewed on a standard of correctness (see *Boucher v. Canada* [2000] F.C.J. 86). Questions relating to the selection process involve mixed fact and law and should be reviewed on a reasonableness standard (see *Canada (Attorney General) v. Jeethan*, [2006] F.C.J. No. 152).

ANALYSIS

Issue 1. Did the Appeal Board err in placing the onus on the Applicant to adduce evidence in support of his allegation?

[7] The Applicant argues that in an appeal under the PSEA all he has to do is raise allegations. It would then be up to the Selection Board to rebut these allegations by showing that it had an

evidentiary framework and that the framework was applied in a fair and consistent manner resulting in a decision based on the merits. In this case, the Applicant argues that since the Selection Board never called any witnesses to explain how questions 1 to 7 of the knowledge component were handled, it failed to establish the required evidentiary process. As he states in his Affidavit at paragraphs 6 and 7:

> For example, in question 6, the successful candidates and I were all awarded 4 out of 5 marks for our answers. For this question, the original rating plan D19 stated that the candidates had to provide three stakeholders in order to receive the full five marks. I argued that there was no reason why I received only 4 marks since I correctly provided the required number of stakeholders. On cross-examination, Mr. St. Laurent stated that it was necessary for the Selection Board Member who marked that question to be convinced that the answer deserved a "true 5" in accordance with the "global rating" system used. There was, however, no departmental witness who I could question further on this point.
>
> Similarly, in question 7, the rating plan called for 5 points per key trend and explanation. Yet for both successful candidates, partial points of 3 out of 5 and 4 out of 5 were awarded for one candidate and 3 out of 5 and 3 out of 5 for the other candidate, with no explanation as to the rationale for the variation from the rating plan scoring procedure. In my argument, I challenged both the variation from the rating plan scoring procedure, as well as the fact that there was no explanation or reason to suggest why the response of one of the successful candidates scored higher than the other successful candidate. This supported my argument that the knowledge exam was not marked consistently between candidates. The departmental representative stated that the new adjectival grid (Exhibit D20) had been used in the marking of this question. <u>This was in contrast to his earlier statement that the grid had not been used by the selection board</u>. Again, however, I was not able to put my questions to any Departmental witness, as the Department chose not to call the Selection Board members that marked questions 1 to 7.

[8] In my view this position reveals a misunderstanding of the appeal process. The appeal process is an adversary process (see *Wiebe v. Canada* [1992] 2 F.C. 592 at paragraph 9).

[9] Sections 25 to 27 of the PSER have set out a complete process for adversarial hearings. They provide for full disclosure, access to information, allegations in writing, and a hearing.

[10] Once this process is invoked it is up to the Applicant to establish that there was a real possibility the merit principle was not applied. As Beaudry J.A in *Leckie v. Canada*, [1993] 2 F.C. 473 at paragraph 15 (C.A.) states:

> In order to succeed under section 21 in establishing that the merit principle had been offended, the applicants had to convince the Appeal Board that the method of selection chosen was "such that there could be some doubt as to its fitness to determine the merit of candidates" … i.e. as to its fitness to determine whether "the best persons possible" … were found. An appeal board's main duty being to satisfy itself that the best persons possible were appointed, it goes without saying that an appellant, before even embarking on a challenge to the method of selection chosen, should at least allege (and eventually demonstrate) that there was a real possibility or likelihood that the best persons possible were not appointed.
>
> (notes deleted and underlining added)

[11] The Applicant relies on *Field v. Canada*, [1995] F.C.J. No. 458 and *Jeethan, supra*. Neither of these two cases is of any help to the Applicant. In *Field*, McGillis J. at paragraph 5 held:

> In my opinion, the Appeal Board erred in law in misconstruing the duty of the Selection Board to rate the candidates on all of the qualifications required for the position in a manner which would permit "...an assessment of the candidates' relative merit."
> …
> In the present case, there was an absence of any cogent evidence, either oral or documentary, in the record to establish the manner in which the merit of the candidates was assessed by the Selection Board on the qualification of personal suitability. In the absence of an appropriate evidentiary framework, the Appeal Board could not have properly determined that the merit principle was respected in the assessment of the candidates on personal suitability. Furthermore, the Appeal Board purported to place on the

> applicant the obligation to adduce evidence to establish that her personal qualities "...should have been rated any differently than the personal qualities of the selected candidate." In doing so, the Appeal Board improperly relieved the Selection Board of its onus of establishing that the assessment of the candidates was conducted in accordance with the merit principle.

[12] I read this case as imposing a duty on the Selection Board to establish an evidentiary framework. In so doing, it discharges its onus of establishing that the assessment of the candidates was conducted in accordance with the merit principle. However, this onus only arises once the Applicant has not met his own onus as enunciated in *Leckie* above; namely to "at least allege (and eventually demonstrate) that there was a real possibility or likelihood that the best persons possible were not appointed'. Similarly, *Jeethan, supra*, stands for the proposition that "the selection board must satisfy the Appeal Board that the merit principle has been respected" (at paragraph 18). It does not in any way contradict *Leckie* above.

[13] The Applicant asked the testifying Board Member questions as to how the knowledge component was marked (see quote in paragraph 7 above). Evidently, there was nothing in the disclosed materials that could establish a likelihood or possibility that the merit principle was not followed. An Applicant, of course, can and often does make his case out of the mouth of the Selection Board Member. However, here, the Member questioned turned out to be the one who did not mark questions 1 to 7 and thus, could not answer those questions. At this point the Applicant seemingly gave up, instead of asking for an adjournment and questioning the other Selection Board Members. He thus, failed to meet the onus of establishing a 'real possibility or likelihood' that the merit principle had not been respected as required by *Leckie, supra*.

[14] Accordingly, the Appeal Board did not err when it found at paragraph 45:

> The appellant challenged the marking done by Ms. Marshall, but he did not demonstrate that she reached obviously unreasonable opinions. He asserted that Mr. St-Laurent could not adequately explain the marking during the hearing and therefore the marks could not be justified. However, the onus was on him to demonstrate that the marking was faulty, for example by calling Ms. Marshall as a witness.

Issue 2: Did the Appeal Board err in finding that the Selection Board had demonstrated an appropriate evidentiary framework?

[15] The Applicant submits that the Selection Board must provide cogent evidence, either oral or documentary for its decision (*Field, supra*). In this case, a global assessment system was used for the abilities and personal suitability elements. For these elements, the Selection Board used inputs from three sources: simulation exercises and the related questions, interviews, and reference checks. It was established that the Selection Board had taken careful notes and it had met to discuss and assign scores to each sub-element of the abilities and personal suitability components. Each score was based on the consensus that it arrived at after considering the input from these three sources. The final tabulation reveals which questions (also called memos) were considered for each sub-element.

[16] The only witness called by the Respondent, a Mr. St. Laurent, could only attest that a global assessment was used, not how it worked or how the inputs from the three different sources (simulation exercise and case study questions, interview, and reference checks) were used to score the abilities or personal suitability elements. (Affidavit of Dale McGregor at paragraphs 16 to 19)

[17] The Applicant argues that without any specifics on how the responses were evaluated, it was impossible for him to challenge the consistency or appropriateness of the marks awarded. He submits that it leaves his right to an appeal meaningless.

[18] Given that the Applicant failed the knowledge component, he was not tested regarding the elements of abilities and personal suitability. As I have found that the Appeal Board did not err with regard to its findings on the knowledge element, there is no need for me to consider his allegations regarding the other two elements on which he was not tested.

[19] Accordingly this application cannot succeed.

ORDER

THIS COURT ORDERS that this application be dismissed.

"Konrad W. von Finckenstein"
Judge

ANNEX A

[20] Section 10(1) of the PSEA states as follows:

10. (1) Appointments to or from within the Public Service shall be based on selection according to merit, as determined by the Commission, and shall be made by the Commission, at the request of the deputy head concerned, by competition or by such other process of personnel selection designed to establish the merit of candidates as the Commission considers is in the best interests of the Public Service.	10.(1) Les nominations internes ou externes à des postes de la fonction publique se font sur la base d'une sélection fondée sur le mérite, selon ce que détermine la Commission, et à la demande de l'administrateur général intéressé, soit par concours, soit par tout autre mode de sélection du personnel fondé sur le mérite des candidats que la Commission estime le mieux adapté aux intérêts de la fonction publique.
(2) For the purposes of subsection (1), selection according to merit may, in the circumstances prescribed by the regulations of the Commission, be based on the competence of a person being considered for appointment as measured by such standard of competence as the Commission may establish, rather than as measured against the competence of other persons. Amended 1992, c. 54, s. 10.	(2) Pour l'application du paragraphe (1), la sélection au mérite peut, dans les circonstances déterminées par règlement de la Commission, être fondée sur des normes de compétence fixées par celle-ci plutôt que sur un examen comparatif des candidats. L.R. (1985), ch. P-33, art. 10; 1992, ch. 54, art. 10; 2003, ch. 22, art. 206(A).

[21] Section 21 of the PSEA reads, in part:

21.(1) Where a person is appointed or is about to be appointed under this Act and the selection of the person for appointment was made by closed competition, every unsuccessful candidate may, within the period provided for	21.(1) Dans le cas d'une nomination, effective ou imminente, consécutive à un concours interne, tout candidat non reçu peut, dans le délai fixé par règlement de la Commission, en appeler de la nomination devant un comité

by the regulations of the Commission, appeal against the appointment to a board established by the Commission to conduct an inquiry at which the person appealing and the deputy head concerned, or their representatives, shall be given an opportunity to be heard.	chargé par elle de faire une enquête, au cours de laquelle l'appelant et l'administrateur général en cause, ou leurs représentants, ont l'occasion de se faire entendre.
…	…
(4) Where a person is appointed or is about to be appointed under this Act as a result of measures taken under subsection (3), an appeal may be taken under subsection (1) or (1.1) against that appointment only on the ground that the measures so taken did not result in a selection for appointment according to merit. Amended 1992, c. 54, s. 16.	(4) Une nomination, effective ou imminente, consécutive à une mesure visée au paragraphe (3) ne peut faire l'objet d'un appel conformément aux paragraphes (1) ou (1.1) qu'au motif que la mesure prise est contraire au principe de la sélection au mérite.

[22] Regulations 25 to 27 of the *Public Service Employment Regulations*, 2000 ("PSER") SOR/2000-80 provide:

25.(1) Subject to subsection (4), the registrar of appeals shall send to the deputy head concerned, the successful candidate and the appellant a notice in writing indicating the date, time and place of the hearing at least 14 days before the date of the hearing.	25.(1) Sous réserve du paragraphe (4), le greffier des appels envoie à l'appelant, à l'administrateur général en cause et au candidat reçu un avis indiquant les date, heure et lieu de l'audition de l'appel, au moins quatorze jours avant la date de l'audition.
Notice after full disclosure	Avis après la divulgation complète
(2) Subject to subsections (5) and (7), the notice of hearing	(2) Sous réserve des paragraphes (5) et (7), l'avis

shall only be given after full disclosure is completed.

d'audition ne peut être donné qu'après la divulgation complète.

Full disclosure

Divulgation complète

(3) Subject to subsection (8) and (9), full disclosure shall be completed within 45 days after the date of the letter, referred to in paragraph 23(*b*), that acknowledges receipt of the written document bringing the appeal.

(3) Sous réserve des paragraphes (8) et (9), la divulgation complète doit être réalisée dans les quarante-cinq jours suivant la date de l'accusé de réception du document écrit visé au paragraphe 21(1).

Shorter notice

Délai plus court

(4) If the persons referred to in subsection (1) agree, the notice of hearing may be given less than 14 days before the date of the hearing.

(4) Si les personnes visées au paragraphe (1) y consentent, l'avis de l'audition peut être donné moins de quatorze jours avant la date de l'audition.

Hearing after disclosure period expired

Audition à l'expiration du délai

(5) The notice of hearing may be given after the period referred to in subsection (3) has expired, whether or not full disclosure has been completed.

(5) L'avis d'audition peut être donné après l'expiration du délai visé au paragraphe (3), que la divulgation complète soit réalisée ou non.

Hearing after disclosure completed

Audition après la divulgation complète

(6) The notice of hearing may be given before the expiry of the period referred to in subsection (3) if full disclosure has been completed and confirmed in writing by the persons referred to in subsection (1).

(6) L'avis d'audition peut être donné avant l'expiration du délai visé au paragraphe (3), si la divulgation complète est réalisée et est confirmée par écrit par les personnes visées au paragraphe (1).

Hearing in other circumstances

Audition suite aux autres

circonstances

(7) The notice of hearing may be given before full disclosure is completed if the appeal concerns
(*a*) an acting appointment;
(*b*) an appointment for a specified period;
(*c*) an appointment made as a result of measures taken under subsection 21(3) of the Act; or
(*d*) a jurisdictional issue.

(7) L'avis d'audition peut être donné avant que soit réalisée la divulgation complète si l'appel porte sur, selon le cas :
a) une nomination intérimaire;
b) une nomination pour une période déterminée;
c) une nomination consécutive à une mesure visée au paragraphe 21(3) de la Loi;
d) une question de compétence.

Extensions and other measures

(8) If an appeal board has reasonable grounds to believe that full disclosure cannot be completed within the period referred to in subsection (3), it may within that period, on the request of the appellant or the deputy head concerned, make an order
(*a*) if necessary, extending that period one or more times; or
(*b*) imposing any measure it considers necessary to complete full disclosure.

Prorogation et autres mesures

(8) Si le comité d'appel a des motifs raisonnables de croire que la divulgation complète ne peut être réalisée dans le délai visé au paragraphe (3), il peut, à la demande de l'appelant ou de l'administrateur général en cause, avant l'expiration de ce délai, rendre une ordonnance :
a) prorogeant le délai une ou plusieurs fois, s'il y a lieu;
b) imposant toute mesure qu'il estime nécessaire pour en permettre la réalisation.

Order

(9) An appeal board may, at any time, make an order imposing any measure it considers necessary to complete full disclosure.

Ordonnance

(9) Le comité d'appel peut, à tout moment, rendre une ordonnance imposant toute mesure qu'il estime nécessaire pour permettre la divulgation complète.

Access

26.(1) An appellant shall be provided access, on request, to any information, or any

Accès

26.(1) L'appelant a accès sur demande à l'information, notamment tout document, le

document that contains information, that pertains to the appellant or to the successful candidate and that may be presented before the appeal board.

concernant ou concernant le candidat reçu et qui est susceptible d'être communiquée au comité d'appel.

Copies

(2) The deputy head concerned shall provide the appellant, on request, with a copy of any document referred to in subsection (1).

Copies

(2) L'administrateur général en cause fournit sur demande à l'appelant une copie de tout document visé au paragraphe (1).

Refusal to disclose

(3) Despite subsections (1) and (2), the deputy head concerned or the Commission, as appropriate, may refuse to allow access to information or a document, or to provide a copy of a document, if the disclosure might
(*a*) threaten national security or any person's safety;
(*b*) prejudice the continued use of a standardized test that is owned by the deputy head's department or the Commission or that is commercially available; or
(*c*) affect the results of such a standardized test by giving an unfair advantage to any individual.

Refus de divulguer

(3) Malgré les paragraphes (1) et (2), l'administrateur général en cause ou la Commission peut refuser de donner accès à l'information ou aux documents ou de fournir copie des documents dont l'un ou l'autre dispose, dans le cas où cela risquerait :
a) soit de menacer la sécurité nationale ou la sécurité d'une personne;
b) soit de nuire à l'utilisation continue d'un test standardisé qui appartient au ministère de l'administrateur général en cause ou à la Commission ou qui est offert sur le marché;
c) soit de fausser les résultats d'un tel test en conférant un avantage indu à une personne.

Appeal board

(4) If the deputy head concerned or the Commission refuses to allow access to information or a document under subsection (3), the

Comité d'appel

(4) Si l'administrateur général en cause ou la Commission refuse de donner accès à de l'information ou à des documents aux termes du

appellant may request that the appeal board order such access.

paragraphe (3), l'appelant peut demander au comité d'appel d'en ordonner l'accès.

Conditions

Conditions

(5) If the appeal board orders access to information or a document under subsection (4), that access is subject, before and during the hearing, to any conditions that the appeal board considers necessary to prevent the situations described in paragraphs (3)(*a*) to (*c*) from occurring.

(5) Si le comité d'appel ordonne que l'accès soit donné à de l'information ou à des documents en vertu du paragraphe (4), cet accès est assujetti, avant et pendant l'audition, aux conditions que le comité d'appel estime nécessaires pour prévenir les situations décrites aux alinéas (3)*a*) à *c*).

Use

Utilisation

(6) Any information or document obtained under this section shall be used only for purposes of the appeal.
SOR/2000-129, s. 8(F).

(6) L'information ou les documents obtenus en vertu du présent article ne peuvent être utilisés que pour les besoins de l'appel.
DORS/2000-129, art. 8(F).

Allegations in writing

Allégations par écrit

27.(1) The allegations submitted by the appellant to the deputy head concerned shall be in writing and sufficiently detailed to permit the deputy head to provide a response.

27.(1) Les allégations que l'appelant envoie à l'administrateur général en cause sont remises par écrit et sont suffisamment détaillées pour que celui-ci puisse y répondre.

Oral allegations

Présentation orale

(2) Despite subsection (1), in exceptional circumstances and with the consent of the appeal board, allegations may be submitted orally.

(2) Malgré le paragraphe (1), les allégations peuvent, dans des circonstances exceptionnelles et avec le consentement du comité d'appel, être présentées oralement.

New or amended allegations

(3) An appellant may only amend allegations, or introduce new allegations, at an appeal if the amendments or new allegations result from information obtained after full disclosure has been completed that could not otherwise have reasonably been obtained by the appellant during disclosure.

Request adjournment

(4) The appellant or deputy head concerned may request that the appeal board adjourn the appeal hearing if they have been prejudiced by the submission by the other party of documents, information or allegations that, for reasons beyond the party's control, could not be disclosed within the period referred to in subsection 25(3).

SOR/2000-129, s. 9(F).

Completion of inquiry

Allégations nouvelles ou modifiées

(3) L'appelant ne peut modifier ses allégations ou en déposer de nouvelles que par suite d'une information obtenue après la divulgation complète et à laquelle il ne pouvait raisonnablement avoir accès lors de la divulgation.

Demande d'ajournement

(4) L'appelant ou l'administrateur général en cause peut demander au comité d'appel d'ajourner l'audition s'il a subi un préjudice du fait que l'autre partie a produit des documents, de l'information ou des allégations qu'elle n'a pu divulguer dans le délai visé au paragraphe 25(3) pour des motifs indépendants de sa volonté.

DORS/2000-129, art. 9(F).

Fin de l'enquête

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

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Mr. Alexandre Kaufman	FOR THE RESPONDENT

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