

Federal Court



Cour fédérale

Date: 20190724

Docket: T-937-18

Citation: 2019 FC 989

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Vancouver, British Columbia, July 24, 2019

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

BRUNO SOUCY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Bruno Soucy, the applicant, is seeking judicial review of a decision of the Public Service Commission [the Commission] dated April 19, 2018, rejecting his request for an investigation under section 66 of the *Public Service Employment Act*, SC 2003, c 22, ss 12 and 13 [the Act].

I. INTRODUCTION

[2] In 2016, Mr. Soucy was included in a pool of qualified candidates in connection with an advertised external appointment process, but he was not appointed to the position sought. On March 2, 2018, given his concerns about the process that had led to the appointment of another person, Mr. Soucy filed a “Request for Investigation into an Appointment Process” with the Commission, as permitted under section 66 of the Act. This section provides that the Commission may investigate any external appointment process and take any corrective action if it is satisfied that, among other things, the appointment was not made or proposed to be made on the basis of merit.

[3] On April 19, 2018, the Commission decided that an investigation was not warranted, given its finding that the information received did not raise any issues related to the application of the Act or the associated regulations and guidelines. It is this decision by the Commission that is the subject of this application for judicial review.

[4] Mr. Soucy maintains that the decision not to conduct an investigation was unreasonable because the information at issue does in fact raise issues related to the application of section 30 of the Act, which most notably provides that appointments shall be based on merit.

[5] The respondent counters that the decision was reasonable and that the information did not raise any issues related to the application of the Act or the associated regulations and guidelines.

[6] For the reasons set out below, the Court finds that the Commission's decision not to conduct an investigation does not fall within the range of possible outcomes which are defensible in respect of the facts and the law, and that the decision was therefore unreasonable. The decision will be set aside, and the matter will be referred back to the Commission for reconsideration.

II. BACKGROUND

[7] In April 2016, Mr. Soucy submitted an application in connection with an advertised external appointment process seeking to fill the position of Fire Chief at group and level FR-6 [the Position] and establish a pool of candidates to fill similar positions within the department at 2nd Canadian Division Support Base Valcartier, in Quebec. When he submitted his application, Mr. Soucy held the position of Chief Fire Inspector for the Department of National Defence [the Department] in Wainwright, Alberta.

[8] The Statement of Merit Criteria and Conditions of Employment advertised in connection with the Position set out the essential qualifications, including the personal suitability criterion of "Working Effectively with Others", the asset qualifications, and the conditions of employment for the Position (certified record at p 138).

[9] In May 2016, Mr. Soucy travelled to Valcartier to take the Second Language Evaluation tests and participate in an interview conducted by members of the Departmental Evaluation Committee [the Committee] responsible for establishing the pool of qualified candidates for the Position.

[10] On May 20, 2016, the Committee forwarded its report to the Department's human resources branch. This report summarized the evaluation of each of the three candidates for the Position and confirmed that the members of the Committee had made a unanimous recommendation regarding the candidate selected for the Position. The Committee's consensus was that Mr. Soucy should be selected for the Position. The Committee gave M. Soucy an overall score of 54.5/60 and gave Mr. Leach, the other qualified candidate, a score of 45/60. A third candidate received a score of 41/60. Under the criterion for "Working With Others – Interpersonal Relationships", Mr. Soucy received a score of 8.5/10, while Mr. Leach received a score of 9/10.

[11] On May 24, 2016, the Committee sent Mr. Soucy an email informing him that he met the essential qualifications for the Position and that his name had been added to the pool of candidates with the essential qualifications for the purposes of making the appointment at a later date.

[12] On June 22, 2016, François Chamberland became the manager responsible for the staffing process for the Position, since he had been appointed Commanding Officer Operations Services, 2nd Canadian Division Support Group.

[13] On July 5, 2016, Mr. Soucy forwarded a copy of his medical examination and security clearance to the Department (certified record at pp 202-203).

[14] On or about July 5, 2016, the staffing process for the Position was suspended so that the Investigations Branch of the Commission could conduct an investigation under section 66 of the Act into the situation relating to the third candidate, who was not selected to be included in the pool of qualified candidates. The file would therefore remain officially suspended until August 1, 2017, the date on which the Commission issued its investigation report concerning that matter, which it concluded was unfounded.

[15] However, during the suspension, the file was not completely inactive. In July 2016, Mr. Soucy and Mr. Chamberland discussed the possibility of appointing Mr. Soucy to the Position on an acting basis (emails exchanged between Mr. Soucy and Mr. Chamberland; certified record at pp 198-200). In an email addressed to Mr. Soucy on July 12, 2016, Mr. Chamberland advised Mr. Soucy that, in order to prepare the letter concerning the acting appointment, the latter's immediate supervisor would have to agree to him leaving his position in Wainwright while maintaining his job security (certified record at p 200).

[16] On October 24, 2016, Mr. Soucy advised the Department's human resources branch, via email, that he had left his job in Wainwright (applicant's email to Ms. Sénéchal dated October 24, 2016; certified record at p 206).

[17] Nothing happened for several months. In July 2017, discussions concerning an acting appointment resumed between Mr. Soucy and the Deputy Commanding Officer Operations Services but did not lead to an appointment.

[18] On August 1, 2017, the Commission sent Mr. Soucy the results of the investigation commenced the previous year and confirmed that there had been no error, omission or improper conduct in the process. Once the investigation had been completed and the suspension on the process lifted, on September 21, 2017, since he had never been consulted or informed about the candidates' files, Mr. Chamberland met with the two qualified candidates in order to get a sense of whom he would like to work with as a manager and who shared his values. Mr. Chamberland also reviewed the results of the evaluations conducted in April 2016, deemed that the most important criterion was the one related to interpersonal relationships, and noted that Mr. Soucy did not obtain the highest score for that criterion.

[19] Finally, on November 10, 2017, Mr. Chamberland sent Mr. Soucy an email informing him that he had not been selected for the Position (certified record at p 256), and on March 2, 2018, Mr. Soucy filed a request for investigation with the Commission, alleging that there had been violations of the appointment process.

[20] On April 19, 2018, the Commission concluded that an investigation was not warranted, because the information received did not raise any issues related to the application of the Act or the associated regulations and guidelines.

[21] The Commission confirms that it reviewed the information received in compliance with the *Policy on Considerations for Investigations Conducted under the new PSEA by the PSC Relating to External Appointments, Non-delegated Internal Appointments and Appointments Involving Political Influence or Fraud* [the Guidelines]. The Commission summarized

Mr. Soucy's concerns and noted that he had been included in a pool of qualified candidates, but that no indeterminate appointment was made because no offer letter was signed. It noted that the Committee had identified him as the candidate to be chosen from the pool of qualified candidates, but that since Mr. Chamberland had not participated in the evaluations with the Committee, he had had discussions with Mr. Soucy as well as with another candidate in order to identify the person who would share his values as a manager and who would be the ideal candidate for the Position. It found that Mr. Chamberland had made his choice after these discussions, and after analyzing the results of the Committee's evaluations, and noted that being qualified for a position does not guarantee appointment and that managers have the discretion to take relevant circumstances into account.

[22] In the report related to the decision, also dated April 19, 2018, the Commission stated, among other things, that the candidate selected for the appointment would be taking the Second Language Evaluation – Test of Oral Proficiency on May 7, 2018, and that he would be appointed to the position if he obtained the level required.

[23] On May 18, 2018, Mr. Soucy filed an application for judicial review of the Commission's decision.

III. POSITIONS OF THE PARTIES

A. *Applicant's position*

[24] Mr. Soucy argues that the Commission erred (1) in recognizing that Mr. Chamberland had the power to select a candidate who shared his values; (2) in affording Mr. Chamberland unlimited discretion; (3) in disregarding the promises disclosed to Mr. Soucy; and (4) in failing to consider Mr. Soucy's vast experience and high scores following the Committee's evaluation.

[25] Mr. Soucy maintains that the applicable standard of review for his first argument is correctness, while the applicable standard of review for his other arguments is reasonableness (*Moglica v Canada (Attorney General)*, 2010 FCA 34 at para 5 [*Moglica*]; *Andonova v Canada (Attorney General)*, 2016 FC 1236 at para 19 [*Andonova*]; *Boucher v Canada (Attorney General)*, 2000 CanLII 14783 (FCA) at para 7; *Fournier v Canada*, 2000 CanLII 16057 (FC) at para 23).

[26] With respect to his first argument, Mr. Soucy contends that the Commission failed to correctly interpret its home statute in allowing Mr. Chamberland to evaluate the candidates based on his "values". According to Mr. Soucy, the merit principle lies at the heart of the appointment process, even if sections 30 and 31 of the Act and their corresponding amendments allow managers to exercise judgement, i.e., give them the power to choose the individual who not only satisfies the essential qualifications for the position, but also meets operational requirements (*Buttar v Canada (Attorney General)*, 2000 CanLII 15234 (FCA) at para 3; *Samatar v Canada (Attorney General)*, 2012 FC 1263 at para 1 [*Samatar*]; *Desaulniers v Deputy Minister of Environment Canada*, 2011 PSST 18 at para 27; *Tibbs v Canada (National Defence)*, 2006 PSST 8 at paras 59, 63 [*Tibbs*]; *Visca v Deputy Minister of Justice et al*, 2007 PSST 24 at paras 34, 44 [*Visca*]; *Canada (Attorney General) v Lahlali*, 2012 FC 601 at para 40 [*Lahlali*]; *Baur v Canada*

(*Attorney General*), 2004 FC 725 at para 41). Mr. Soucy notes the values set out in the preamble of the Act, including impartiality, excellence, fairness and transparency, as well as the Commission's broad supervisory power (*Tibbs* at para 62; *Seck v Canada (Attorney General)*, 2012 FCA 314 at para 24 [*Seck*]; *Samatar* at para 2). He alleges that the word "value", as used by the Commission in its decision, refers to a personal appreciation of an ideal, while the words "judgment" and "judge", referenced by Parliament, refer to the analysis of a case in accordance with established criteria.

[27] With respect to his second argument, Mr. Soucy first argues that Mr. Chamberland does not have absolute discretion to make appointments and that the latter was required to give reasons for his decision (*Tibbs* at paras 59, 63-64, 68-69; *Visca* at paras 34, 44; Patrice Garant, *Droit administratif*, 6th ed, Cowansville, Édition Yvon Blais, 2010 at p 691). Mr. Soucy notes that he reasonably believed that he would be appointed to the Position. Mr. Soucy further argues that the Commission has the authority to review the arbitrary exercise of discretion and that, after he filed his request for investigation, the Commission should have analyzed possible irregularities in the appointment process (*Kane v Canada (Attorney General)*, 2011 FCA 19 at para 77 [*Kane*]; *Tibbs* at paras 62, 64; sections 66-73 of the Act). He also adds that he reasonably expected that the Commission would have noted that there was a problem, owing to the lack of reasons, and that the Commission would have offered answers to these questions. Finally, Mr. Soucy alleges that the Commission allowed Mr. Chamberland to reject his candidacy prematurely, since the selected candidate had not yet satisfied the language and medical requirements for the Position (*Mabrouk v Canada (Public Service Commission)*, 2014 FC 166 at para 50 [*Mabrouk*]).

[28] With respect to his third argument, Mr. Soucy maintains that the promises made to appoint him to the Position on an acting basis are relevant to the analysis of a request for investigation, that the Commission should have taken them into consideration, and that Mr. Soucy did not need to prove improper intent (*Tibbs* at paras 70-74). He alleges that he received proposals to assume the Position on an acting basis on two occasions: following the Commission's announcement that it would be conducting an investigation, and in July 2017.

[29] With respect to his fourth argument, Mr. Soucy claims that the Commission abused its discretion and erred by failing to consider relevant evidence in its analysis, namely, his experience and the favourable recommendation of the Committee (*Tibbs* at paras 70-74).

B. *Respondent's position*

[30] The respondent submits that the applicable standard of review for situations where the Commission decides against conducting an investigation is that of reasonableness (*Moglica* at paras 4-5; *Andonova* at para 19; *Mabrouk* at para 30; *MacAdam v Canada (Attorney General)*, 2014 FC 443 at paras 77-79 [*MacAdam*]; *Baragar v Canada (Attorney General)*, 2008 FC 841 at para 13 [*Baragar*]).

[31] The respondent set out the legislative framework concerning the staffing process. The preamble of the Act states that the public service must be based on non-partisanship and merit, and that the staffing process should be delegated to as low a level as possible, in this case, to Mr. Chamberland (*Seck* at paras 24-25; *Lahlali* at paras 16, 17, 39-40). The current version of the Act, which came into force in 2005, sets out a version of the merit principle which emphasizes

individual merit rather than comparative merit, which gives greater flexibility to managers, who may also make use of any assessment method (sections 30 and 36 of the Act; *Tibbs* at para 63; *Lahlali* at para 18; *Kane* at para 8; *Seck* at para 26). The Commission has jurisdiction to conduct investigations and take corrective measures (section 66 of the Act; *Seck* at para 44). The respondent contends that the Commission has broad discretion to decide whether or not to conduct an investigation and that even if certain elements may justify conducting an investigation, the Commission may still decide, for various reasons, not to conduct an investigation (*Baragar* at para 14-15; *Samatar* at para 2-3). The Guidelines guide the Commission in making its decision.

[32] The respondent maintains that the Commission's decision was reasonable because it considered Mr. Soucy's concerns and reviewed all the information received in order to conclude that the information did not raise any issues related to the application of the Act, the regulations and the Guidelines (*Andonova* at para 28; *MacAdam* at para 79).

[33] In response to Mr. Soucy's first argument, the respondent notes that Mr. Soucy recognized the manager's authority to choose the right person to perform the required tasks or the person who meets operational requirements or the current or future needs of the organization and that, according to the Commission's report, Mr. Chamberland's choice was directly related to the identified needs. The respondent also stresses that Mr. Chamberland's use of the word "value" does not mean that he exercised his discretion in an inappropriate or arbitrary manner. The respondent adds that from the moment a candidate is determined to be qualified, it is the manager's responsibility to select the candidate who best meets the operational needs for the

position, such that the best evaluation results do not guarantee an appointment, which is consistent with the principle of individual merit (*Wilkinson v Deputy Minister of National Defence*, 2017 CanLII 53960 (PSLREB) at para 76 [*Wilkinson*]; *Stamp v Commissioner of the Correctional Service of Canada*, 2015 PSST 4 at paras 30, 35, 38).

[34] In response to Mr. Soucy's second argument, the respondent claims that Mr. Chamberland did not have any obligation to provide detailed reasons for his decision and, in this regard, highlights the difference versus an internal appointment process (section 47 of the Act).

[35] In response to Mr. Soucy's third argument, the respondent argues that discussions concerning a possible appointment on an acting basis were never concluded and that an appointment would only take effect on the date agreed upon in writing (paragraph 56(1) of the Act; *Wilkinson* at para 78).

[36] In response to Mr. Soucy's fourth argument, the respondent claims that the fact a qualified candidate other than Mr. Soucy was appointed does not mean that the merit criterion was not respected, and that even though Mr. Soucy is of the view that he is the most qualified candidate within the pool of qualified candidates, it is Mr. Chamberland's responsibility to choose a candidate (*Mabrouk* at paras 54-55).

IV. Decision

[37] The Court agrees with the respondent's position concerning the standard of review. Therefore, the issue here is to decide whether it was reasonable for the Commission to decide against conducting an investigation on the ground that the information received did not raise any issues related to the application of the Act, or the associated regulations or guidelines. A finding of reasonableness is based on the existence of justification, transparency and intelligibility within the decision-making process and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[38] The Act governs staffing in the federal public service. Its preamble provides that the authority to make appointments to and within the public service is vested in the Commission, and that the staffing authority should be delegated to as low a level as possible within the public service so that managers have the flexibility necessary to staff positions. Any appointment to the public service by the Commission must be based on merit and must be free from political influence. An appointment is based on merit when (1) the person appointed meets the essential qualifications and (2) the Commission takes into account any additional qualifications considered to be an asset for the work to be performed or for the organization, and any current or future operational requirements (section 30 of the Act).

[39] As pointed out by the parties, in short, section 66 of the Act provides that the Commission may conduct an investigation and take corrective action if it is satisfied, for example, that the appointment was not made or proposed to be made on the basis of merit. The Commission enjoys broad discretion in deciding whether to conduct an investigation or not

(*Baragar* at paras 14-15; *Samatar* at paras 2-3). To that end, it considers information obtained through any means (Guidelines).

[40] The Guidelines guide the Commission in making its decision. In order to decide whether to conduct an investigation or not, the Commission must determine, in part, (1) whether the matter raises the possibility of an issue in the application of the Act that affected the selection for appointment or whether the matter raises the possibility of a violation of the Act, the *Public Service Employment Regulations*, SOR/2005-334, the Commission Guidelines or the terms and conditions for delegation; and (2) whether the information obtained suggests the possibility of systemic irregularities in the application of the Act, the Regulations, the Commission Guidelines or the terms and conditions for delegation.

[41] Managers have considerable discretion to choose the person who not only meets the essential qualifications, but is also the right fit because of additional asset qualifications, current or future needs, or operational requirements; all of these factors are set out in section 30 of the Act (*Tibbs* at para 63; *Visca* at paras 34, 44). There is no reference, however, to the possibility of a manager choosing a candidate based on his or her personal values.

[42] The information on record, including the decision under review and the Commission's report, both dated April 19, 2018, indicates that Mr. Chamberland evaluated the candidates based on his values as a manager and that he also analyzed the evaluations of the candidates done in the course of the process. According to the Commission's report, it was while reviewing the results of the evaluations that Mr. Chamberland deemed the most important essential qualification to be

working effectively with others. Consequently, the evaluation based on his “values” arguably constitutes a separate, deeply personal evaluation that was added to the merit-based evaluation, the elements of which are set out in section 30.

[43] In this context, the Court fails to understand how the Commission was able to conclude that the information received did not raise any issues related to the application of the Act, particularly section 30. From this point of view, the decision is unintelligible and unreasonable.

[44] This is enough to refer the matter back to the Commission so that it can reconsider the request for investigation in accordance with section 66 of the Act and provide the necessary clarifications, as appropriate.

JUDGMENT in T-937-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The decision is set aside.
3. The matter is referred back to the Commission for reconsideration.
4. Costs are awarded in favour of the applicant.

“Martine St-Louis”

Judge

Certified true translation
This 1st day of August, 2019.

Michael Palles, Translator

FEDERAL COURT
SOLICITORS OF RECORD

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OF CANADA

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APPEARANCES:

Marie-Michelle Savard

FOR THE APPLICANT

Nadia Hudon

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jean-François Bertrand Avocats
Québec, Québec

FOR THE APPLICANT

Attorney General of Canada
Montréal, Quebec

FOR THE RESPONDENT