Federal Court		Cour fédérale

Date: 20090608

Docket: T-962-07

Citation: 2009 FC 572

Ottawa, Ontario, June 8, 2009

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

CHRIS HUGHES

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

[1] Mr. Hughes, the applicant, was an unsuccessful candidate in an open selection process for the position of Border Services Officer - Customs (PM-03) with the Canada Border Services Agency (CBSA) at various locations in British Columbia and the Yukon. As a result, Mr. Hughes filed a complaint under the former *Public Service Employment Act*, R.S.C. 1985, c. P-33[1] (Act). Mr. Hughes alleged that the merit principle was not upheld in the selection process. Specifically, he alleged that the selection board's marking was unreasonable and inconsistent in the evaluation of one ability factor: effective interactive communication (EIC). He also alleged that the selection

board erred by failing to take into consideration a number of Mr. Hughes' past employment performance reviews that he gave to the selection board at the conclusion of his interview.

[2] In response to Mr. Hughes' complaint, an investigation was conducted pursuant to section 7.1 of the Act. The investigator concluded that Mr. Hughes' complaint was unfounded.

[3] On this application for judicial review of that decision, Mr. Hughes alleges that:

1. The investigator erred in law by failing to order the CBSA to disclose unredacted interview notes prepared by members of the selection board in respect of the assessment of those successful candidates who were sampled in the investigation.
2. The investigator erred by failing to find that the selection board that interviewed him was biased against him.
3. The investigator was biased against him, as evidenced by her hostility towards Mr. Hughes.
4. The investigator erred by failing to find that the selection board's assessment of him was unreasonable.

[4] The application for judicial review is dismissed because Mr. Hughes has failed to establish any breach of procedural fairness or bias on the part of the investigator, and failed to establish any reviewable error on the part of the investigator.

Background Facts

[5] The relevant selection process was 2005-BSF-OC-PAC-1001. Candidates who met the basic screening requirements were invited to write the Customs Inspector test. Mr. Hughes successfully wrote this examination. He and the other 707 successful candidates were then invited to oral interviews.

[6] The oral interviews were held for the purpose of assessing three ability factors. They were EIC, Enforcement Orientation, and Professionalism. In order to be considered further a candidate had to achieve a minimum score of 70 marks for each of these ability factors. The interviewees started with 70 marks and then were deducted marks or had marks added depending upon their answers to questions put to them.

[7] Mr. Hughes was interviewed on April 21, 2005. The two members of the selection board that assessed him were Catherine Black and Steve Cronin. Mr. Hughes achieved the required minimum score of 70 marks in respect of both Enforcement Orientation and Professionalism. However, he received only 55 marks in respect of EIC. In the result, Mr. Hughes failed to achieve the required minimum score in order to be eligible for the position.

[8] During the course of the investigation of his complaint Mr. Hughes received documents related to his assessment by the selection board.

[9] The CBSA agreed to provide Mr. Hughes with the following documents relating to the selection process:

a. the eligibility list;

b. the EIC assessment made in respect of 10 of the successful candidates; and

c. the marking key for the EIC assessment.

[10] In a subsequent e-mail the investigator confirmed the disclosure requirements and noted that "all disclosure must conform to privacy requirements and the protection of personal information must be a paramount consideration."

[11] Mr. Hughes confirmed receipt of the disclosure from the CBSA in an e-mail dated August 10, 2006 sent to the investigator. Mr. Hughes noted that the sample EIC assessments were "completely useless." He complained that the EIC assessment was a global assessment so that the CBSA could not arbitrarily sever from the interview notes information which it thought was not responsive to a question about EIC. He requested that the investigator order the CBSA to resubmit the whole of the selected interview notes in an unredacted form. He concluded by stating that "[i]f this is not done I will move for a new investigator due to bias against me and favourtism [*sic*] being shown to the Department."

[12] The investigation was conducted through a fact-finding meeting that commenced on August 29, 2006 and continued on November 2, 2006 and February 8, 2007. At such meeting the investigator heard the evidence of Mr. Hughes, Catherine Black and Steve Cronin, as well as the

evidence of Mark Northcote (the chair of the selection board) and Nuvin Runghen (a member of the selection board who interviewed a number of the successful candidates).

The Decision of the Investigator

[13] By decision dated April 20, 2007, the investigator found the complaint to be unfounded.

[14] After setting out the allegation, the procedure followed, and a summary of the evidence presented at the fact-finding meeting, the investigator set out her analysis. She started by citing *Blagdon v. Public Service Commission et al.*, [1976] 1 F.C. 615 at page 623 (C.A.) for the proposition that the only general rule applying to selection boards is that selection is to be based on merit, and merit cannot be reduced to a mathematical equation. Merit is often a matter of opinion.

[15] The investigator then quoted Justice Rothstein in *Scarizzi v. Marinaki* (1994), 87 F.T.R. 66, at paragraph 6, to the effect that when reviewing the decision of a selection board, "[o]nly if a Selection Board forms an opinion that no reasonable person could form, may an Appeal Board interfere with the decision of the Selection Board." As such, the investigator's analysis focused on "an examination of the decisions reached by the selection board to determine whether they are tainted for example by unreasonableness, incoherence or illogic."

[16] The investigator determined there was no evidence to support Mr. Hughes' allegation that he was assessed differently from other candidates. She also found no error in the selection board's method of assessment of starting each candidate with 70 points and then adding or subtracting

points depending on the candidate's performance. The documentation and evidence of the selection board members supported the final assessment of the candidates.

[17] The investigator found there was no evidence to suggest that the selection board knew of Mr. Hughes' pre-existing legal issues with the department or that the chair of the selection board had told the selection board of the legal issues as Mr. Hughes alleged.

[18] The investigator held the selection board explained the deficits in Mr. Hughes' performance during the interview and the mark he was awarded was reasonable given his performance on the day of the interview.

[19] The investigator disagreed with Mr. Hughes' assertion that the selection board was obliged to use his past performance reviews with the department as indicators that he was qualified for the position. The investigator reasoned that it was not for her to consider what tools she would have used if entrusted with the task of assessment, rather, the investigator's objective was to consider whether the actions and conclusions of the selection board were sustainable from the standpoint of reasonableness: *Ratelle v. Canada (Public Service Commission, Appeals Branch)* (1975), 12 N.R. 85 (F.C.A.). She distinguished the decision of this Court in *Canada (Attorney General) v. Bates*, [1997] 3 F.C. 132 relied upon by Mr. Hughes. The investigator found that there was nothing outwardly unreasonable in the selection board's decision to assess EIC through a question and answer interview. Further, if the selection board had allowed Mr. Hughes to introduce his past

performance appraisals into his assessment, the investigator found that it would have risked conferring an unfair advantage upon Mr. Hughes.

[20] In conclusion, the investigator found that the evidence did not demonstrate that Mr. Hughes was unreasonably assessed, differently treated, or that the selection board ought to have done more in his assessment.

The Issues

[21] I have set out at paragraph 3 above the issues articulated by Mr. Hughes. To insure that all of the matters raised by Mr. Hughes are properly considered, I frame the issues as follows:

1. What is the applicable standard of review?
2. Did the investigator breach the rules of natural justice and procedural fairness by refusing to order the CBSA to disclose unredacted board notes concerning the assessment of the successful candidates that were sampled?
3. Was there a reasonable apprehension of bias on the part of the investigator against Mr. Hughes?
4. Did the investigator err in finding there was no bias on the part of the selection board towards Mr. Hughes?
5. Did the investigator err in finding the selection board was not obliged to consider Mr. Hughes' past performance reviews?
6. Did the investigator err in finding Mr. Hughes' mark on EIC was reasonable?

The Standard of Review

[22] Mr. Hughes did not make submissions about the standard of review. Counsel for the Attorney General submitted that the reasonableness standard applied to all issues other than those dealing with procedural fairness and natural justice.

[23] The second and third issues set out above are concerned with natural justice and procedural fairness and so the standard of review analysis does not apply to these issues. See *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at paragraph 100. It is for the Court to determine, without affording deference to the decision-maker, whether the requirements of natural justice and procedural fairness were met.

[24] With respect to the remaining issues, I am required to ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Only if this inquiry is unsuccessful is a standard of review analysis required. See: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 62.

[25] In my view the existing jurisprudence has determined the standard of review in a satisfactory manner notwithstanding that the jurisprudence pre-dates *Dunsmuir*.

[26] In *Moussa v. Canada (Public Service Commission)*, [2007] F.C.J. No. 1148 at paragraph 17 (F.C.), the Court found that where factual findings of an investigator are attacked, a standard

analogous to patent unreasonableness applies. For questions of mixed fact and law, the standard of reasonableness applies.

[27] In *Oriji v. Canada (Attorney General)* (2004), 252 F.T.R. 95 aff'd (2005), 344 N.R. 229 (C.A.), the Court conducted a pragmatic and functional analysis and determined that the standard of reasonableness *simpliciter* applies to questions such as whether an investigator erred in finding: there had been no offer of employment; that a priority appointment had not been made; and that an individual was appropriately appointed on an acting basis. These are all questions of mixed fact and law. Where questions of law could be extricated from the investigator's factual findings, the Court applied the correctness standard. See paragraphs 19 and 21 to 25.

[28] Issues 4, 5, and 6, namely, whether the investigator erred in finding there was no bias on the part of the selection board, whether the selection board was obliged to consider the past performance reviews of the applicant, and whether the applicant's mark on EIC was reasonable, are questions of mixed fact and law or questions of fact. In my opinion, based on the case law mentioned above, these issues are to be reviewed on a standard of reasonableness.

[29] Review on the reasonableness standard requires an inquiry into the qualities that make a decision reasonable. Those qualities include the process of articulating the reasons and the outcome. On judicial review, reasonableness is largely concerned with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with

whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. See: *Dunsmuir*, paragraph 47.

Application of the Standard of Review

Did the investigator breach the rules of natural justice and procedural fairness by refusing to order the CBSA to disclose unredacted board notes concerning the assessment of the successful candidates that were sampled?

[30] Mr. Hughes submits that he was not provided with all of the relevant evidence he required in order to argue and present his case. He specifically complains that the contents of the entire oral interview were relevant to the assessment of an applicant's EIC, however the interview notes provided in respect of the sampled successful candidates were redacted. An example of this is found in Exhibit I to Mr. Hughes' affidavit.

[31] Mr. Hughes' complaint was that his candidacy had been improperly assessed. The investigator confined her investigation to whether Mr. Hughes' EIC ability had been properly assessed by the selection board (see, for example, her e-mail of July 25, 2006 which forms part of Exhibit H to Mr. Hughes' affidavit). Given that Mr. Hughes had passed the two other assessment criteria this was not an unreasonable decision.

[32] Prior to, or during, the fact-finding meeting Mr. Hughes was provided with:

- the marking key for EIC;

- the notes of Mr. Hughes' interview that were prepared by the two members of the selection board that interviewed him; and
- copies of the interview notes prepared by selection boards for a sample of 10 successful candidates, redacted on grounds of relevancy to the EIC assessment, privacy requirements and the protection of personal information.

[33] At the fact-finding meeting, Mr. Hughes was afforded the opportunity to cross-examine the members of his selection board, the chair of the selection board and a member of the selection board who interviewed other candidates. The fact-finding meeting took place over three days.

[34] The content of the duty of fairness is variable. What is required is a fair and open procedure "appropriate to the decision being made and its statutory, institutional and social context." The person affected by the decision must have an opportunity to fully put forward his or her views and evidence, and to have those views and evidence considered by the decision-maker. See: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 22.

[35] Mr. Hughes has failed to establish that he was not provided with a meaningful opportunity to present his case fully and fairly (see *Baker*, at paragraph 30).

[36] The marking key for EIC is clear that the assessment of this ability factor was to be based upon the way or manner in which each candidate communicated. For example, of relevance were grammar, vocabulary, the ability to deliver all of the required points, logic, confidence and authority

of delivery. Ms. Black's notes of Mr. Hughes' interview include the comments "not much enthusiasm in tone/delivery-monotone", "irrelevant info. provided", "difficult to understand" and "comment by candidate - inappropriate." Mr. Cronin's notes include the comments "Long pauses", "very quiet voice", "hard to hear" and "very poor EIC."

[37] Armed with those notes, the marking key for EIC and the opportunity to cross-examine members of the selection board, Mr. Hughes was given a meaningful opportunity to present his case. The redactions from the interview notes of other candidates (on grounds of relevance, privacy and personal information) have not been shown to have precluded a meaningful opportunity to challenge the reasonableness of the selection board's assessment of Mr. Hughes' EIC ability.

Was there a reasonable apprehension of bias on the part of the investigator against Mr. Hughes?

[38] In his affidavit Mr. Hughes swears that the investigator routinely laughed and snorted at him, and that on many occasions she shouted at him. He submits that the investigator also showed bias by refusing to order fuller documentary disclosure, by refusing to allow "certain relevant questioning," by refusing "to expand the allegations to include inconsistent marking and favoritism in the marking of Enforcement Orientation and Professionalism," and by failing to investigate the blacklisting and other allegations he brought forth during the investigation. Mr. Hughes also argues that his allegation of bias has not been refuted by the Attorney General who neither filed an affidavit sworn by the investigator nor tendered the audiotapes made during the fact-finding meeting. Mr. Hughes asks that an adverse inference be drawn from this failure.

[39] The principles to be applied when an allegation of bias is made were recently summarized by this Court in *Detorakis v. Canada (Attorney General)*, [2009] F.C.J. No. 191. At paragraphs 52 through 54, my colleague Justice Mosley wrote:

> 52 The test for disqualifying bias or perceived bias is well established in law. The Supreme Court of Canada has laid out the relevant considerations to take into account when dealing with such allegations in a number of decisions, starting with *Committee for Justice and Liberty et al v. National Energy Board et al.*, [1978] 1 S.C.R. 369, followed by *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193 and *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259. A reasonable apprehension of bias may be raised where an informed person, viewing the matter realistically and practically and having thought the matter through, would think it more likely than not that the decision maker would unconsciously or consciously decide the issue unfairly.
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> 53 Allegations of bias are very serious matters. They call into question the integrity of the decision maker. The burden of demonstrating a reasonable apprehension of bias rests with the party arguing for disqualification. Moreover, the inquiry that must be conducted is very fact-specific and there can be no "shortcuts" in the reasoning that supports the allegation: *Wewaykum*, above at paras. 59 and 77.
>
> 54 The presumption is that a board or tribunal is impartial. The grounds must be substantial. A real likelihood or probability of bias must be demonstrated. Mere suspicion is not enough. It is the informed person's perception that counts, not uniformed speculation. Delay in raising an apprehension of bias can be indicative that the grounds lack substance.

[40] In the present case it is troubling that the first allegation of bias was raised by Mr. Hughes against the investigator after she declined to order the CBSA to provide unredacted interview notes in respect of other candidates (see Mr. Hughes' e-mail of August 10, 2006 which forms part of Exhibit H to his affidavit).

[41] Mr. Hughes' allegations of conduct said to demonstrate bias are largely non-specific in nature. No dates or specific instances are provided in respect of the allegations of inappropriate conduct. Aside from his allegation that he was blacklisted by the CBSA, Mr. Hughes does not state what other allegations he made that the investigator did not pursue, nor does he indicate in any detail what relevant questions were not permitted by the investigator.

[42] In my view, Mr. Hughes has failed to meet the evidentiary burden upon him to demonstrate a reasonable apprehension of bias. It was open to him to request that the tape of the fact-finding meeting be produced but he did not, and he filed no request under Rule 317. This failure means that no burden of persuasion shifted to the Attorney General. Only if Mr. Hughes had produced sufficient evidence to meet his burden of proof would there be a basis in law for the drawing of an adverse inference against the Attorney General. See: *Chippewas of Kettle & Stony Point First Nation v. Shawkence*, [2005] F.C.J. No. 1030 at paragraphs 42-44; aff'd [2006] F.C.J. No. 655.

Did the investigator err in finding there was no bias on the part of the selection board towards Mr. Hughes?

[43] Mr. Hughes submits that:

> 29. Mr. Northcote sabotaged the Applicant's interview when he divulged confidential test results to Mr. Cronin prior to the Applicant interview in April 2005. The prior results were from May 2004 when Mr. Northcote interviewed the Applicant. Not only is this a violation of the Applicant's Privacy it violates Federal Staffing rules that test results are not to be divulged to anyone except those that have a need to know. Mr. Cronin had no administrative reason to know the Applicant's prior test results. The disclosure was made for one purpose, to prejudice the Applicant in the current

> process. Mr. Northcote, the Board Chair, the de-facto boss of Mr. Cronin, was telling Mr. Cronin that he has already deemed the Applicant as unsuccessful. Mr. Cronin admitted the disclosure when questioned by the Applicant. Where actual bias occurs in a Federal Staffing competition the Courts have held the merit principle has been violated and the entire competition must be quashed.

[44] The investigator dealt with Mr. Hughes' allegation of bias in the following manner:

> 33. Mr. Cronin advised in response to a question from Mr. Hughes that Mr. Northcote did not take part in the assessment of Mr. Hughes.
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> […]
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> 41. Mr. Cronin acknowledged that he was aware that Mr. Hughes had been unsuccessful in an earlier selection process. No person said or implied anything to him concerning Mr. Hughes' participation in this process to him.
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> […]
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> 43. In specific response to a series of questions from Mr. Hughes, Mr. Northcote denied having anything to do with his assessment or his interview. He shared no information with the selection board concerning Mr. Hughes' court challenges or other complaints against the agency. He acknowledged that the board was given ice breaker questions, but they were just a guideline to put a candidate at ease. Board members were to take notes during the interview and mark each candidate immediately subsequent to the interview.
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> […]
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> 50. Mr. Hughes suggested during the hearing that the selection board must know of his legal issues with the department or that Mr. Northcote must have told them. There was no evidence to suggest that [t]his occurred or that this influenced his assessment.

[45] In his affidavit Mr. Hughes attests that Mr. Cronin admitted during the fact-finding meeting that Mr. Northcote had told him that Mr. Hughes "had failed a previous CBSA selection process." The investigator acknowledged, at paragraph 41 of her reasons quoted above, that Mr. Cronin had knowledge of the fact that Mr. Hughes had previously been unsuccessful in a selection process. This knowledge by itself neither evidences bias nor establishes that Mr. Northcote told the selection board about Mr. Hughes' legal issues with the CBSA.

[46] On the evidentiary record before me I cannot conclude that the investigator erred by failing to find bias on the part of the selection board against Mr. Hughes.

Did the investigator err in finding the selection board was not obliged to consider Mr. Hughes' past performance reviews?

[47] Mr. Hughes states in his affidavit that at the conclusion of his interview he gave the selection board "numerous performance reviews and reference checks that showed the Applicant was an excellent employee. One of the PR's [*sic*] showed on the job EIC as a Customs Officer over a five month period. The EIC definition was exactly the same as the one used in the current competition."

[48] On this evidence, Mr. Hughes argues that the selection board was obliged to address the apparent contradiction between his proven successful track record and his performance at the interview. Reliance is placed upon the decision of this Court in *Canada (Attorney General) v. Bates*, [1997] 3 F.C. 132 (T.D.).

[49] The investigator concluded that the selection board was not required to consider Mr. Hughes' performance reviews for these reasons:

> 52. Mr. Hughes alleged that the selection board was obliged to use the reviews of his past performance with the department as indicators that he was indeed a person qualified for this position. I am unable to agree with this assertion. In *Re Ratelle,* Mr. Justice Pratte held:
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> > Assessment of the merit of different people is often a matter of opinion and we have no reason to prefer the opinion of the Appeal Board to that of the Selection Board in this matter. … If a Selection Board has performed its duty in accordance with the Act and regulations and has made an honest effort to choose the most deserving candidate, then an Appeal Board would be exceeding its authority if it allowed the appeal from the decision of the Selection Board on the grounds that the letter (sic) had not availed itself of the means considered by the Appeal Board to be most appropriate for the performance of its duty. [footnote omitted]
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> 53. While the *Ratelle* case arose from an appeal taken under section 21 of the *Act*, the principles enunciated in it are nonetheless instructive in the situation of a section 7.1 investigation. It is not for the investigator to consider what tools he or she might have used if entrusted with the task of assessment. Rather, the objective is to consider whether the actions and conclusions of the selection board are sustainable from the standpoint of reasonableness.
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> 54. The selection board chose to assess EIC through a question and answer interview. There is nothing outwardly unreasonable in this decision and it has not been demonstrated otherwise during this investigation.
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> 55. The further suggestion is that Mr. Hughes' past performance ought to have qualified him before the selection board. In making this assertion, he also relies on the *Bates* decision of

the Federal Court, which again was an application for judicial review based on a decision of the Appeal Board. Excerpts from the decision of Campbell J. follow:

> In the context of this case, I find that the purpose of an appeal is to expose and correct errors in the application of standards which have the effect of undermining the principle of selection by merit being that the best qualified and most suitable candidate be appointed. That is, to expose and correct errors is not to attack merit, but rather to protect it as a concept.
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> … the merit principle must be cognizant of, and where necessary responsive to, the critical reality of the history of the case and the life situation of the individuals involved. There is no question that both the Preto and Rosenbaum decisions reflect strong concern for how there can be such a disparity between practical performance and a written examination. It is obvious that the concern in both was not to grant Ms. Bates a benefit, but to have this discrepancy rectified to ensure that she was treated fairly and equally with all other candidates. [footnote omitted]

Mrs. Bates held a substantive position and performed satisfactorily for five years before being found unqualified for the position, a decision the Appeal Board and the Federal Court found untenable. Her circumstance was at significant variance with Mr. Hughes'. He was not an indeterminate employee and had not accumulated the service record of Mrs. Bates. He worked discontinuously as a Customs Inspector from 2001 to 2005 and at the time of the interview was employed by the department.

56. Further, if the selection board allowed Mr. Hughes to introduce his past performance appraisals into his assessment, they would have risked conferring on him an unfair advantage which could not be "overcome by others through the exercise of reasonable diligence." In the end, they elected

> a transparent process in which each candidate in this open selection process was assessed using the same tools. Mr. Hughes' performance appraisals were not included. [footnote omitted]

[50] In my view, for the following reasons, the investigator made no reviewable error in reaching this conclusion.

[51] The Act conferred significant discretion upon the selection board as to how it would proceed. Subsection 16(1) of the Act authorized the selection board, acting on behalf of the Public Service Commission, to select candidates after "conducting such examinations, tests, interviews and investigations as it considers necessary."

[52] The selection board chose to assess EIC in an oral interview. Particularly in light of the extent that an oral interview could expose the effectiveness of interactive communication, this was not an unreasonable decision.

[53] The investigator also noted that in *Ratelle v. Canada (Public Service Commission, Appeals Branch)* (1975), 12 N.R. 85, the Federal Court of Appeal held that it was not for an appeal board to determine the most appropriate means of assessing ability. Rather, the function of an appeal board was to inquire whether the selection board made its choice in a manner that was "selection according to merit." The role of an investigator is analogous. The investigator's task was to determine whether the selection board acted in such a way that its selections were according to merit. See: *Deering v. Canada (Attorney General)* (1997), 136 F.T.R. 248 at paragraph 2 (T.D.).

[54] I have noted Mr. Hughes' reliance upon the *Bates* decision. There, Justice Campbell held that a selection board was required to consider inconsistent information. However, this decision must be read in light of the facts then before the Court.

[55] Ms. Bates had worked for five years as a client service representative for what was then Employment and Immigration Canada. Her work was recognized to be excellent and her performance reviews were "completely favourable". The employer held a closed competition in order to give contract extensions to client service representatives whose contracts were expiring. The position Ms. Bates was applying for was the same one that she had held and been appointed to for several terms. The manager of Ms. Bates' unit was a member of the first selection board that assessed Ms. Bates. Thus, the first appeal board found it to be untenable that this manager could in effect tell Ms. Bates that she was doing a fine job, and yet on the basis of an examination conclude that Ms. Bates was not qualified for appointment to the position. The second appeal decision found that the second selection board had been remiss in not contacting the manager to obtain information about Ms. Bates' knowledge.

[56] The investigator found the *Bates* decision to be distinguishable because Mr. Hughes had not amassed the same sort of employment history. I find the *Bates* decision to be distinguishable because there the appeal board had actual knowledge of Ms. Bates' ability and because there the competition was a closed competition between client service representatives who were seeking contract extensions. Thus, one can infer that all of the applicants would have had their performance assessed in the past so that such performance reviews would be available to the selection board.

[57] In the present case, however, there is no evidence that any member of the selection board had actual knowledge that Mr. Hughes' EIC skills were incongruous with his interview results. Further, this was an open competition for an entry-level position. I agree that accepting Mr. Hughes' past performance reviews in order to overcome or supplement his performance at the interview would have risked conferring an unfair advantage upon him. This would have been an advantage that would not have been available to candidates who had not worked for CBSA so as to have their EIC assessed in a performance review.

Did the investigator err in finding Mr. Hughes' mark on EIC was reasonable?

[58] Mr. Hughes argues that "the evidence shows the applicant passed the interview based on the answers given, a comparison of other candidate's marks that showed inconsistent marking, the scoring key, the Internal Affairs issue and the performance reviews submitted." In the alternative, he submits that:

> 79. Even if the board was correct to mark at 55, they and [the investigator] erred in not considering the on the job performance of EIC over a 15 month period to reconcile this with the polar opposite result in the interview. The alleged quiet voice and alleged lack of confidence can be explained by high stress related to the blacklisting by CBSA and the Internal Affairs investigation. The Applicants [*sic*] on the job performance showed very effective EIC and lots of confidence.

[59] In his affidavit, Mr. Hughes swears that:

- He was marked inconsistently because another candidate was given a concession in the "Rolex scenario" that was not given to him.

- He was marked inconsistently because Mr. Runghen stated that he allowed candidates to take time to formulate an answer, yet Mr. Hughes was penalized for long pauses.
- Other panels of the selection board gave written copies of questions to candidates which disadvantaged Mr. Hughes because the panel that interviewed him did not give copies of the questions to the candidates it interviewed.
- On two or three occasions he became stressed when he was talking or thinking about events related to the blacklisting by CRA and CBSA and the current ongoing Internal Affairs investigation. At the end of the interview he told Mr. Cronin about the internal affairs investigation and provided Mr. Cronin with the name and phone number of the Senior Investigator.
- The selection board members knew that stress can affect a person's voice and delivery.

[60] Additionally, Mr. Hughes refers to the assessments of successful candidates in order to point to instances of negative comments made about their performance, instances of what Mr. Hughes submits to be deficient answers, or instances of inconsistent marking. See, for example, paragraphs 46, 47, 61 and 62 of Mr. Hughes' affidavit.

[61] The investigator rejected Mr. Hughes' assertion that he was improperly assessed for the following reasons:

> 46. The duty of a selection board is succinctly set out in the case law. As stated by Pratte J. in the *Blagdon* decision:
>
> > Speaking broadly, the only general rule that governs the activity of a Selection Board is that the selection be made on the basis of

> merit. … It must be realized that the assessment of the merit of various persons, which is the function of the Selection Board, cannot be reduced to a mathematical function: it is, in many instances, a pure matter of opinion. [footnote omitted]

A selection board is convened to assess and form opinions about the candidates in a selection process.

47. What is the standard applied when reviewing the decisions it reaches? In the *Scarizzi* decision, Rothstein J. held:

> Only if a Selection Board forms an opinion that no reasonable person could form, may an Appeal Board interfere with the decision of the Selection Board. [footnote omitted]

Accordingly, in the process of an investigation just as in an appeal, the case is directed toward an examination of the decisions reached by the selection board to determine whether they are tainted for example by unreasonableness, incoherence or illogic. [footnote omitted]

48. Addressing the question of whether Mr. Hughes was assessed differently from other candidates, I find no evidence to support this argument. Mr. Hughes disagrees deeply with the assessment of others. I have included some of them in the synopsis of the facts above. The evidence showed that the selection board started with a score of 70 and moved upward and downward depending on the performance of the candidate. I find no error in this method. It accounts for the performance of the candidate. Moreover, the documentation and memory of the selection board members supported the final assessment of the candidates. As an example, in the matter of question 2, neither the Board nor Mr. Hughes has suggested that he insisted that his wife come to the phone or that the matter had some urgency.

49. This is not a case that falls to the principles of the *Field* decision where the Court found “an absence of any cogent evidence, either oral or documentary, in the record to establish the manner in which the merit of candidates was

> assessed". In the present case, the evidenciary record is manifest and substantial. [footnote omitted]
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> […]
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> 51. Mr. Hughes was assessed based on his performance on the day of his interview. While he has an explanation for his quiet voice and personal performance, the selection board was nonetheless entitled to assess for the qualifications it required for performance in the position. The selection board has explained the deficits in Mr. Hughes' performance on that day. The mark he was awarded was reasonable given his performance during the interview.

[62] I begin by noting that the investigator was not allowed to substitute her opinion for that of the selection board. She correctly recognized that she was permitted to intervene only if the decision of the selection board constituted "an opinion that no reasonable person could form." See: *Scarizzi v. Marinaki* (1994), 87 F.T.R. 66 at paragraph 6. Thus, the investigator was required to determine whether the decision of the selection board was tainted by things such as unreasonableness, incoherence or lack of logic.

[63] The investigator also recognized, correctly, that the selection board's assessment could not "be reduced to a mathematical function: it is, in many instances, a pure matter of opinion." See: *Blagdon v. Canada (Public Service Commission, Appeals Board)*, [1976] 1 F.C. 615 at page 623 (C.A.).

[64] The investigator found no evidence that Mr. Hughes was assessed differently from other candidates. In her view, the documentary evidence and the testimony of the selection board members supported the final assessment.

[65] I have carefully considered Mr. Hughes' submissions but find that they are insufficient to establish that the investigator erred in finding the decision of the selection board to be reasonable and coherent. For example, the fact that Mr. Runghen stated that he allowed candidates time to formulate an answer does not vitiate or make the decision of Mr. Hughes' interviewers unreasonable when they noted and recorded what appear to be frequent pauses of a long duration (for example 3 1/2 and 2 1/2 minutes).

[66] Similarly, the fact that some panels gave candidates the questions in writing while others delivered the questions orally is insufficient to establish unfairness or disadvantage that vitiated the selection process. This is particularly so where the marking key noted that EIC "includes receiving information, understanding, and responding openly and effectively in interactions with others. (Excludes written forms.)" Given that EIC was defined to exclude written communication, it was not unreasonable for a panel of the selection board to deliver the questions orally.

[67] I have also reviewed the interview questions which are found in Exhibit G to the affidavit of Suzanne Charbonneau. In my view, no question was so complex that it could not be readily comprehended if delivered orally. For example, question four was as follows:

> You are working as an SPCA inspector. A woman calls the SPCA office and claims that a dog that lives down the road has attacked her three-year-old son. The woman is very upset and demands that the dog be put down. Your boss tells you to handle the investigation.
>
> What do you do?

[68] The interviewer’s notes document their concerns about Mr. Hughes' EIC ability. Mr. Hughes has confirmed that he became stressed during the interview. As he says, stress may cause a normally well-spoken and confident individual to appear "meek and not confident". This explanation tends to support the decision of the selection board.

[69] On all of the evidence Mr. Hughes has not persuaded me that the decision of the investigator was unreasonable. I find the reasons of the investigator to be justified (in the sense that her findings are supported by the evidence) transparent and intelligible. The result is within a range of outcomes which are defensible in respect of the facts and the law. As such, the investigator’s decision concerning Mr. Hughes' EIC mark is reasonable.

Conclusion

[70] The Court is not unsympathetic to Mr. Hughes' dogged insistence that his EIC skills are such that he ought to have received a passing score, and the fact that he did not evidences bias, retaliation or unreasonableness. However, people have bad days and their performance on a particular day may not be representative of their overall ability. Justice Nadon, while a judge of this Court, expressed this in the following way in *Chappell v. Canada (Attorney General)*, [1997] F.C.J. No. 606 at paragraphs 27 and 28:

> 27 Counsel for the Applicants however states at paragraph 20 of the written submissions:
>
> > The selection board ignored the possibility that the most meritorious candidate may have been ill or unable to perform well for a number of valid reasons...It is extremely possible that the

> results may simply reflect that the most meritorious candidate had a bad day...
>
> 28 I must concur with counsel and say that the scenario described above is possible. However, the same would be true with respect to any test or examination whenever it is administered. People have bad days and some people do not do well on certain tests because of any number of events in their lives. Does this mean that every test should be administered innumerable times simply to ensure the most accurate results possible? This would lead to never-ending testing. The fact that the test results are ten months old is completely unconnected with the fact that the most meritorious candidate may have had a bad day. Finally, there is no obligation on the part of the Selection Board to create a fool-proof system for the selection of absolutely the most meritorious candidate every time. The only requirement is imposed by section 10 and it requires only that selection be based on merit. Perfection on the part of the Selection Board is not required nor is perfection in the candidate selected.

[71] There is simply an insufficient evidentiary basis on which to impugn the decision of the investigator.

[72] The Attorney General seeks costs. Having regard to the non-exhaustive factors enumerated in Rule 400 of the *Federal Courts Rules* and the circumstances of this case, no costs are awarded.

"Eleanor R. Dawson"
Judge

1. While the Act has since been repealed, the parties agree that the provisions of the Act continue to apply to this application. I agree. See: the transitional provisions of the current *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 or Bill C-25, *An Act to modernize employment and labour relations in the public service and to amend the Financial Administration Act and the Canadian Centre for Management Development Act and to make consequential amendments to other Acts*, 2nd Sess., 37th Parl., 2003, cl. 72 (assented to 7 November 2003).

FEDERAL COURT

SOLICITORS OF RECORD

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