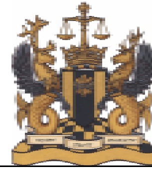
Federal Court		Cour fédérale

Date: 20090608

Docket: T-1167-07

Citation: 2009 FC 573

Ottawa, Ontario, June 8, 2009

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

CHRIS HUGHES

Applicant

and

**ATTORNEY GENERAL OF CANADA and
SCOTT BARKER, ROBERT A. BELL, KIRSTEN CARRIER,
ANGELA CHIN, MASON COOKE, MANDY DHUDWAL, DANIELLE
GETZIE, DANIEL GREENHALGH, ALISON HAYCOCK,
BRIANNA HEWSON, CHRISTINE HOOPER, DAVID JOHNSON,
LAURA KEBLE, LAURA KNIGHT, WILLIAM MACRAE, DAVID ROBERTS,
JESSICA SHUM, TRENT VAN HELVOIRT,
JEFFREY WICHARUK**

Respondents

REASONS FOR JUDGMENT

[1] Mr. Hughes, the applicant, was found not to be qualified for selection into a pre-qualified pool of candidates for appointment to Customs Inspector, PM-02 positions at the Vancouver International Airport, the Metro Vancouver District and the Pacific Highway District (Vancouver pre-qualified pool). As a result, Mr. Hughes filed a complaint under the former *Public Service*

Employment Act, R.S.C. 1985, c. P-33[1] (Act) with the Public Service Commission (Commission) concerning the Vancouver pre-qualified pool. An investigation was then conducted pursuant to section 7.1 of the Act. The investigator concluded that Mr. Hughes' complaint was well-founded for two reasons:

1. The selection process was not conducted in a manner which conformed to the merit principle because two of the qualifications established at the outset by the hiring manager were never assessed.

2. The selection board failed to apply its own instructions to the candidates with respect to verifying whether their written submissions were received on time, leaving open the possibility that candidates who should have been eliminated from the selection process were appointed.

[2] Other aspects of Mr. Hughes' complaint were held to be unfounded.

[3] By virtue of section 7.5 of the Act, the Commission was given discretion based upon this investigation to take "such corrective action as the Commission considers appropriate." The Commission accepted the findings of the investigator and ordered corrective measures. The corrective measures taken by the Commission took into account the fact that during the course of the selection process the position of Customs Inspector, PM-02 was nationally reclassified to the position of Border Services Officer, PM-03. The Commission ordered the following corrective measures be taken:

- that [Canada Border Services Agency] provide to the Commission evidence of the assessment, at the time of the reclassification, of the qualifications of the current employees who were appointed from the pre-qualified pool and whose positions were reclassified from PM-02 Customs Inspector positions to the PM-03 Border Services Officer positions. This evidence must be provided to the Vice-President of the Investigations Branch, Public Service Commission, within thirty (30) days following the date of this Record of Decision;

- should it become necessary, that the appointment of the individuals who fail to be found qualified will be revoked within sixty (60) days following the date of this Record of Decision.

[4] This is an application for judicial review of the Commission's decision.

Background Facts

[5] The selection process was posted in June 2003 and was an open competition. At that time Canada Border Services was part of the Canada Customs and Revenue Agency and the Act did not apply to staffing its positions. On December 12, 2003, the Canada Border Services Agency [CBSA] was established as a department within the Public Service. From that date all appointments were subject to the Act.

[6] Over 2,000 persons applied for selection to the Vancouver pre-qualified pool.

[7] Candidates who met the education and experience requirements were invited to write the Customs Inspector Test, which was designed to assess five separate assessment factors. Those who passed the test were then asked to complete a written exercise entitled Portfolio of Competencies. If

a candidate’s written response met established criteria, the candidate was invited to an interview designed to test the candidate's effective interactive communication. Candidates who met that competency were then invited to a second interview to assess seven competencies.

[8] Mr. Hughes applied for selection into the Vancouver pre-qualified pool. He had previously been successful in selection processes for Customs Inspector positions and had been placed in pre-qualified pools in relation to those competitions. Mr. Hughes had been hired as a Customs Inspector at the Victoria Ferry Port in the summers of 2002, 2003, and 2004.

[9] Mr. Hughes passed the initial stages of the selection process and was invited to a second interview. At that interview he was found to be unqualified in the competencies of "Dealing with Difficult Situations" and "Self-Confidence."

[10] Twenty-two candidates were successful at all stages of the selection process and were placed in the Vancouver pre-qualified pool, which was established on June 22, 2004. Twenty candidates were appointed to indeterminate positions through this process. One candidate declined an offer. One candidate was appointed to a Customs Inspector position in Victoria, British Columbia, through a different selection process. The Vancouver pre-qualified pool was exhausted on January 7, 2005.

[11] As a result of his complaint, Mr. Hughes advanced a number of allegations before the investigator. Two grounds of complaint were held to be well-founded as set out above. The investigator found the remaining allegations to be unfounded. Those allegations were that:

- The selection board was biased against Mr. Hughes.
- Mr. Hughes was improperly disqualified from the "Dealing with Difficult Situations" and "Self-Confidence" competencies.

[12] As noted above, after the selection process was posted, but before the Vancouver pre-qualified pool was established, the position of Customs Inspector, PM-02 was reclassified nationally to the position of Border Services Officer, PM-03. Mr. Hughes says that on February 21, 2007, the position was again changed to an FB-03 classification and group due to a decision of the Public Service Labour Relations Board.

[13] The investigator rendered his decision on May 31, 2006. Mr. Hughes, the CBSA and the individual respondents were given the opportunity to provide submissions to the Commission about appropriate corrective measures.

[14] On June 13, 2007, the Commission issued its Record of Decision which accepted the findings of the investigator and ordered the corrective measures detailed above.

The Decision of the Commission

[15] The reasons of the Commission were brief and were as follows:

> REASONS FOR RECORD OF DECISION 07-06-IB-41
>
> The position of Customs Inspector, PM-02 was nationally reclassified in October 2004 to the position of Border Services Officer, PM-03. The PM-03 standard of competence included the two qualifications initially established by the hiring manager (Enforcement Orientation and Professionalism), as well as the three qualifications not listed in the competition notice (Dealing with Difficult Situations, Decisiveness and Self-Confidence)." At the time of reclassification, the Canada Border Services Agency (CBSA) assessed each of the five (5) qualifications in question in all selection processes. Enforcement Orientation and Professionalism are part of the locally conducted preliminary assessment, while the other three are part of a thirteen week assessment/training phase at the Border Services Learning Centre in Rigaud, Quebec.
>
> The standard of competence for the Border Services Officer position now only exists at the PM-03 level. It is reasonable to conclude that each employee was found to be fully qualified at the time of reclassification. This means merit would have been satisfied. For these reasons, the Commission is seeking verification that the employees appointed from the pre-qualified pool and whose positions were reclassified to the PM-03 positions were assessed at the time of the reclassification. It would be redundant and ineffective at this stage, to require that CBSA reassess qualifications for a position and level (PM-02) that no longer exists.
>
> If the employees affected by this corrective measure on were revoked, the deputy head could reassess and reappoint them using the flexibility of the current *Public Service Employment Act,* R.S.C. 2003, c. 22, ss. 12, 13, as amended, in which the standard is that the person to be appointed meets the essential qualifications. Such a process would not provide meaningful corrective action and would do little more than create an administrative exercise.
>
> With respect to the complainant's own situation, he failed to attain a passing score in two of the assessed qualifications: Dealing with Difficult Situations and Self-Confidence. The investigation found no evidence of bias on the part of the Selection Board. The complainant has since had an opportunity to be assessed for the

> position of PM-03, Border Services Officer and was again found not qualified, therefore no further action is required.
>
> In reaching its decision, the Commission also considered that the high turnover rate of the incumbents for these positions necessitates that the CBSA regularly conduct appointment processes to replenish its staff in several regions throughout Canada. Employment opportunities will continue to exist for individuals who wish to re-apply in the future.
>
> Lastly, on a separate matter, since the results of the investigation make it clear that it is not possible to identify the late submission of any individual Portfolio of Competences by any of the candidates, at least with any degree of certainty, no further action is taken with respect to that particular issue.

The Issues

[16] In his original memorandum of fact and law, Mr. Hughes lists the issues to be:

1. Did the Commission err in law by allowing persons that were hired in violation of the Act and were unqualified for the position to keep their jobs through a separate and unrelated reclassification process for a FB-03 Border Services position instead of a PM-02 Customs Inspector position?

2. Did the Commission commit a reviewable error by ignoring the late written examinations and not setting aside the entire competition?

3. Was the decision of the Commission in keeping with the merit principles, contract law and the Act and Regulations?

4. Did the Commission err in law by not allowing the applicant and the remaining unsuccessful candidates to participate in the reassessment through the transitional provisions of the *Public Service Modernization Act,* S.C. 2003, c. 22*?*

5. Did the Commission fail to take into consideration the ruling made in the Victoria complaint that stated PM-02 Customs Inspector pools could not be used to staff PM-03 Border Services Officer positions for the October 2004 and January 2005 job contracts?
6. Did the Commission ignore the irregularities around the hiring of a specific individual?
7. Did the Commission's delay in investigating and issuing corrective measures, while allowing the individual respondents to keep their jobs while awaiting corrective measures, give the individual respondents an unfair advantage?
8. Should the Commission have ordered the CBSA to exhaust the Victoria pre-qualified pool retroactive to June 2004 and the Vancouver positions in light of the fact that the Vancouver investigation showed none of the candidates were assessed properly and the applicant and 13 others were in a qualified, older pre-qualified pool in Victoria?

[17] In his supplemental memorandum of fact and law, Mr. Hughes lists the issues as:

1. Given the unreasonable delays and mistakes by the Commission from October 2004 through July 2005 and the lengthy delay issuing corrective measures from June 2006 to June 2007 should the corrective measures be struck down?
2. Should the Commission have ignored the investigator's recommendation concerning corrective measures?
3. Does it violate the merit principle to cut out 39 improperly disqualified candidates, but allow 18 improperly hired candidates to have promotions?

4. Was it bias or a merit violation on the part of certain Commission employees to cut out the applicant from corrective measures in February 2006 even though the applicant was included in corrective measures from September 2005 to January 2006?

5. Did the Commission misapply the case law it cited, specifically the *McAuliffe* decision?

6. Did the Commission err by not considering the applicant's pass marks in the Victoria competitions from 2003 and 2004?

7. Did incorrect statements made by the conciliator that the applicant was not in the pre-qualified pool cause the Commission to issue erroneous corrective measures?

8. Given the material non-disclosure around one successful candidate's alleged sexual assault and breach of trust, should the Commission be ordered to review corrective measures around this candidate with knowledge of the incident?

[18] I frame the issues as:

1. What is the applicable standard of review to be applied to the Commission's decision?

2. Should the corrective measures ordered by the Commission be set aside due to undue delay?

3. Were certain employees of the Commission biased against Mr. Hughes?

4. Were the corrective measures ordered by the Commission reasonable?

Standard of Review

[19] The second and third issues 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.

[20] With respect to the remaining issue, the Court is 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.

[21] No jurisprudence was cited that has considered the degree of deference to be afforded to the Commission when exercising its discretion under section 7.5 of the Act. It is, therefore, necessary to analyze the required factors in order to identify the proper standard of review. Those factors include:

1. the presence or absence of a privative clause;
2. the purpose of the Commission as determined by interpreting its enabling legislation;
3. the nature of the question at issue; and

4. the expertise of the Commission.

[22] In many cases it is not necessary to consider all of the factors because some may be determinative. See: *Dunsmuir* at paragraph 64.

[23] In the present case, the determinative factors are the nature of the administrative regime established by the Act and the Commission's recognized expertise.

[24] This Court has acknowledged that the Commission is responsible for the supervision of the public service and the on-going implementation of the Act. See: *Harquail v. Canada (Public Service Commission)* (2004), 264 F.T.R. 181 at paragraph 28. The Act's object is the effective management of the Public Service and the protection of its integrity. See: *Harquail* at paragraph 29.

[25] A key foundation of the Act is the requirement, found in subsection 10(1) of the Act, that "[a]ppointments to or from within the Public Service shall be based on selection according to merit, as determined by the Commission". Section 7.1 of the Act enables the Commission to conduct investigations on any matter within its jurisdiction. Section 7.5 of the Act authorizes the Commission, on the basis of an investigation, to take "such corrective action as the Commission considers appropriate." This discretion is broader than that conferred upon the Commission by subsection 21(3) of the Act which allows the Commission to "take such measures as it considers necessary to remedy the defect" in the selection process.

[26] The scope of discretion given to the Commission, combined with the "discrete and special" nature of the Public Service regime, and the Commission's expertise within that regime signal that deference is due to decisions of the Commission. See: *Dunsmuir* at paragraph 55. Thus, the Commission's decision should be reviewed on the reasonableness standard.

Application of the Standard of Review

Should the corrective measures ordered by the Commission be set aside due to undue delay?

[27] Mr. Hughes submits that the corrective measures should be struck down given "the unreasonable delays and mistakes by the [Commission] from October 2004 through July 2005 and the lengthy delay issuing corrective measures from June 2006 to June 2007."

[28] In support of this submission is Mr. Hughes' evidence that:

- He was assured that corrective measures take a maximum of three months to complete. He became emotionally and financially stressed due to the length of time the Commission took to implement corrective measures.

- In July of 2006, the Commission provided proposed corrective measures to the parties. After receiving submissions from Mr. Hughes and the CBSA, the Commission provided revised proposed corrective measures on September 20, 2006. Thereafter, Mr. Hughes heard nothing for months from the Commission.

- He became very stressed and frustrated with the Commission's delays. He filed a service standard complaint with the President of the Commission.

- The documents Mr. Hughes received from the Commission show that it repeatedly delayed his file through its own mistakes. His file was unnecessarily delayed by nine months in the investigation stage and another nine to ten months in the corrective measures stage.

[29] At the outset, I note that Mr. Hughes complains of significant delay going back to his initial effort to file a complaint, and including delay in the investigative stage. This application for judicial review is concerned only with the Commission's decision of June 13, 2007 relating to corrective measures. Section 7.5 of the Act requires such a decision to be based upon an investigation. Here, the investigation was not concluded until May 31, 2006. Thus, the relevant period for the purpose of considering any delay is that from May 31, 2006 to June 13, 2007. The Commission could not take any step with respect to proposed corrective measures until it received the report of the investigator.

[30] I find the relevant dates and chronology to be as follows:

1. May 31, 2006: The investigator issued his report.

2. June 26, 2006: Mr. Hughes submitted his submissions with respect to corrective measures.

3. July 21, 2006: the CBSA submitted its submissions with respect to corrective measures.

4. July 31, 2006: Mr. Hughes provided his reply to the CBSA's submissions.

5. July 31, 2006: The CBSA provided its final submissions.

6. August 17, 2006: The conciliator prepared proposed corrective measures. Included was the proposal that the candidacy of all successful and unsuccessful candidates be reconsidered to determine whether the failure to assess the two qualifications resulted in their elimination from further consideration.

7. September 20, 2006: The conciliator provided the proposed corrective measures to Mr. Hughes and the CBSA and sought comments thereon. The conciliator also asked the CBSA to notify individuals who might be affected by the proposed corrective measures.

8. October 6, 2006: Mr. Hughes responded to the conciliator that the proposed corrective measures showed bias. More substantial comments were provided on October 10, 2006.

9. December 22, 2006: The Acting Director of the Regional Operations Investigations Branch of the Commission (Acting Director) took carriage of the conciliation phase.

10. February 16, 2007: The Commission notified Mr. Hughes and the CBSA that it was considering different corrective measures from those it had earlier provided to the parties. The Commission provided an opportunity to comment on the new proposed corrective measures. In fact, the draft corrective measures stated "the Commission decides that it will not take any corrective measures in this matter."

11. March 16, 2007: The CBSA stated that it was satisfied with the proposed corrective action.

12. March 30, 2007: Mr. Hughes provided his lengthy response which strongly objected to the new proposed corrective measures. In his response, he advised that he would amend his pending Canadian Human Rights complaint to add the Commission as a party and he was considering adding the Commission as a party to his pending civil suit against the CBSA.

13. May 30, 2007: A briefing note was prepared for the President of the Commission. The briefing note recommended that the Commission order the corrective measures that it ultimately adopted.

14. June 13, 2007: The Commission issued its decision.

[31] As a matter of law, principles of natural justice and the duty of fairness include the right to a fair hearing. Undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied at law. See: *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at paragraph 102.

[32] In the present case, the evidentiary portion of the process ended at the investigative stage. No issue arises that delay impaired Mr. Hughes' ability to present his case because witnesses had died or memories were lost. There is no issue of this type of unfairness arising from delay.

[33] There are, however, other types of prejudice than prejudice that impairs trial fairness. Unacceptable delay may amount to an abuse of process even where the fairness of the hearing has not been compromised. However, such cases are exceptional and few lengthy delays meet this threshold. The delay must be clearly unacceptable and have directly caused a significant prejudice in order to amount to an abuse of process. Put another way, there is no abuse of process by delay *per se*. The party relying upon the delay must demonstrate that the delay was "so oppressive as to taint the proceedings." See *Blencoe* at paragraphs 115 and 121.

[34] Any delay in this case does not rise to this exceptional threshold for reasons that include the following.

[35] First, the Commission was dealing with relatively complex circumstances. The CBSA was re-organized so as to bring its appointments under the provisions of the Act. In October of 2004, the PM-02 positions were reclassified on a national basis to PM-03 positions. The qualifications of the position changed with the reclassification. In the words of the investigator "[r]eassessment of candidates in Vancouver position no longer possible as position reclassified and qual[ifcation]s have changed." The complexity of the circumstances provides some explanation for the time taken by the Commission. This is also reflected in the number of times Mr. Hughes and other parties were afforded the opportunity to respond to proposed corrective measures.

[36] Second, the investigator found Mr. Hughes' allegations of improper disqualification and bias to be unfounded. Subsequently, Mr. Hughes was found not to be qualified for the Border Services Officer PM-03 position (an entry-level position). It is difficult in that circumstance to see how Mr. Hughes was prejudiced by the time taken by the Commission to reach its decision about corrective measures. On the basis of the investigator's report, Mr. Hughes could have hoped, at best, that the Commission order that he be reassessed. However, he had already failed the selection process for the PM-03 position and the PM-02 position no longer existed.

[37] Related to this is the fact that the briefing note prepared for the President of the Commission, and the Commission's reasons, recite that the "high turnover rate of the incumbents for these positions necessitates that the CBSA regularly conduct appointment processes to replenish its staff in several regions throughout Canada. Employment opportunities will continue to exist for

individuals who wish to re-apply in the future." No challenge is made to this finding which is, in essence, a finding of fact. The existence of those potential opportunities negates any finding of prejudice. As such, no abuse of process due to delay is established.

[38] On these facts, Mr. Hughes has not established that the delay was so oppressive as to taint the proceedings.

Were certain employees of the Commission biased against Mr. Hughes?

[39] In his supplementary record, Mr. Hughes raises the issue of bias as quoted above at paragraph 17. Specifically, he puts in issue whether bias motivated Commission employees to remove him from the corrective measures proposed in February of 2006 when he had been included in the initial proposal. In his supporting written submission he states:

> 26. The [Commission] employee who was responsible for most of the delays was [the Acting Director]. Did his unit's mistakes and his mistakes cause him to develop a bias against the applicant? The applicant went to the Federal Court numerous times for delay and made many complaints of delay and incompetence against the [Commission].
>
> 27. Given [the Acting Director]'s history on the file he should not have been involved in the corrective measures stage.

[40] Mr. Hughes adduced no evidence in support of his allegation of bias. He relies on inferences he draws from his interpretation of the documents that are before the Court.

[41] The test for disqualifying bias or apprehended bias is whether 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 not decide a matter fairly (whether consciously or unconsciously). See: *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at paragraph 74. Tribunals are presumed to be impartial. The burden of demonstrating the existence of bias, or apprehension of bias, rests on the person alleging bias. A real likelihood or probability of bias must be demonstrated. A mere suspicion of bias is not sufficient. See: *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at paragraph 112; *Arthur v. Canada (Attorney General)* (2001), 283 N.R. 346 at paragraph 8 (F.C.A.).

[42] I have reviewed the exhibits attached to the affidavits of Mr. Hughes and Ms. Charbonneau. The evidence contained therein falls short of establishing bias, either real or perceived. The fact that the proposed corrective measures were amended to delete the proposal that the candidacy of every person be reconsidered does not by itself establish any perception of bias. The reason for this deletion is explained in a credible fashion in both the briefing note and the Commission's reasons.

[43] As the Federal Court of Appeal noted in *Lo v. Canada (Public Service Commission Appeal Board)* (1997), 222 N.R. 393 at paragraph 16, the appeal process set out in section 21 of the Act is a limited process. It does not give an appellant any right to appointment if his or her appeal is successful. An appellant can only seek the integrity of the application of the merit principle. The Court quoted the following passage with approval:

> Under section 10 of the Public Service Employment Act, "Appointments to ... the Public Service shall be based on selection according to merit ...". The holding of a competition is one means provided by the Act to attain the objective of selection by merit. However, it is important to remember that the purpose of section 21 conferring a right of appeal on candidates who were unsuccessful in a competition is also to ensure that the principle of selection by merit is observed. When an unsuccessful candidate exercises this right, he is not challenging the decision which has found him unqualified, he is, as section 21 indicates, appealing against the appointment which has been, or is about to be, made on the basis of the competition. If a right of appeal is created by section 21, this is not to protect the appellant's rights, it is to prevent an appointment being made contrary to the merit principle, As, in my view, this is what the legislator had in mind in enacting section 21, it seems clear that a Board appointed under this section is not acting in an irregular manner if, having found that a competition was held in circumstances such that there could be some doubt as to its fitness to determine the merit of candidates, it decides that no appointment should be made as a result of that competition. [emphasis added]

[44] These comments have application to a complaint made under section 7.1 of the Act. This means that the making of a complaint did not entitle Mr. Hughes to personal relief. It follows that the absence of personal relief does not by itself establish any apprehension of bias.

Were the corrective measures ordered by the Commission reasonable?

[45] 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.

[46] As discussed above at paragraph 21, there is a lack of jurisprudence that has considered the Commission's powers under section 7.5 of the Act.

[47] The Commission's powers under subsection 21(3) have been the subject of comment by the Court. The subsection has been held to limit the Commission to remedying a defect in the impugned selection process. See: *Lo* at paragraph 14. The Commission's discretion under section 7.5 of the Act is broader in that the Commission may issue the corrective measures it "considers appropriate."

[48] Turning to the reasonableness of the Commission's exercise of that discretion, it is important to understand the nature of the errors found by the investigator.

[49] The first error went to how the qualifications for selection were assessed. Two of the qualifications were "Enforcement Orientation" and "Professionalism". The investigator found that "Enforcement Orientation" was assessed using the new competency "Dealing with Difficult Situations." "Professionalism" was assessed using the new competencies of "Self-Confidence" and "Decisiveness." These three competencies were treated as qualifications in their own right.

However, the new qualifications were different from the qualifications they replaced. Thus, the selection board members, by substituting the new competencies for the original qualifications established by the hiring manager, changed the qualifications for the position. The new competencies did not demonstrate a candidate's "Enforcement Orientation" or "Professionalism" abilities.

[50] The Commission found as a fact that when the position of Customs Inspector PM-02 was reclassified, the PM-03 standard of competencies included "Enforcement Orientation", "Professionalism", "Dealing with Difficult Situations", "Decisiveness" and "Self-Confidence". At the time of reclassification, the CBSA assessed each qualification in the selection process. The Commission went on to find that it was reasonable to conclude that each employee was found to be qualified at the time of reclassification. This satisfied the merit principle. Out of an abundance of caution, the Commission required, as a corrective measure, that the CBSA provide evidence of this within 30 days. The appointment of individuals found not to be qualified would be revoked.

[51] In my view, the conclusion that the merit principle would have been satisfied when the PM-02 position was reclassified, was supported by evidence, is transparent and justified. It is a decision that was reasonably open to the Commission. This is particularly so where, had the appointments been revoked, the incumbents could have been reappointed under section 73 of the current *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 if the Commission was satisfied that they met the essential qualifications for the work to be performed.

[52] The conclusion of the Commission was also reasonable when, as the investigator noted, a reassessment of all candidates was no longer viable because the position had been reclassified with different qualifications. Put simply, there was no point in reassessing qualifications for a PM-02 position that no longer existed.

[53] The Commission then turned its attention to Mr. Hughes' own situation. The investigator had found no bias and nothing that vitiated the selection board's finding that Mr. Hughes was properly disqualified on the basis of the qualifications of "Dealing with Difficult Situations" and "Self-Confidence." Subsequently, in another selection process Mr. Hughes was found to be unqualified for the position of Border Services Officer, PM-03. It was not unreasonable for the Commission to find that no further corrective measures were required with respect to Mr. Hughes.

[54] With respect to Mr. Hughes and all of the other unsuccessful candidates, the Commission noted that there were regular appointment processes to this entry level position so that employment opportunities continued to exist for individuals who wished to re-apply. Given the futility of re-assessing all candidates for a position that no longer existed, this was not an unreasonable conclusion.

[55] The second flaw in the selection process identified by the investigator was that it was possible that candidates who were late in submitting their Portfolio of Competencies, and who should have been eliminated from the selection process on that ground, were appointed.

[56] Candidates were required to have their Portfolio of Competencies received by February 23, 2004. The selection board wrongly accepted portfolios postmarked February 23, 2004 or earlier, even if they were received after February 23, 2004. The investigator found that because envelopes were not kept, there was no way of verifying whether any portfolios arrived after the deadline.

[57] The Commission took no further action on this because it was not possible to determine which portfolios might have been submitted after the deadline. In my view, this was not an unreasonable conclusion.

[58] I acknowledge that it would have been possible for the Commission to revoke all appointments on this ground. Aside from the harshness that would arise from the revocation of the appointment of a candidate whose portfolio was submitted on a timely basis, under the new legislation (which came into force before the investigator rendered his report) individuals whose appointments were revoked could have been reappointed so long as they met the essential qualifications for the work to be performed. Further, the fact that a candidate was not screened out on account of the late filing of his or her portfolio, ought not to significantly prejudice others. This was a selection for a pre-qualified pool for an entry level position and appointment processes were

regularly conducted for this position. This is distinguishable from the situations of assessment of relative merit where one person's incumbency would preclude another from obtaining that position.

[59] I have considered all of the issues raised by Mr. Hughes. In view of the above analysis, I do not consider it necessary to deal with each one. However, I wish to specifically address certain points raised by Mr. Hughes.

[60] First, Mr. Hughes asserts that the successful candidates have benefited because they were allowed to work and also receive reclassifications they were not entitled to. He relies upon *Still v. M.N.R.*, [1998] 1 F.C. 549 (C.A.) to argue that "illegal employment contracts are void ab initio" so that the successful candidates "should not benefit from the illegal contract."

[61] However, *Still* does not stand for that proposition (see paragraphs 41-48 of the decision). Further, in an earlier decision *Murray v. Canada (Public Service Commission)*, [1987] F.C.J. No. 473, the Federal Court of Appeal rejected the proposition that public service appointments made contrary to the merit principle were void *ab initio*. Such appointments are voidable. The Court stated "[u]ntil the appointment is voided, an appointee is legally the occupant of the position and is entitled and required to perform the duties and to be paid the salary attached to it."

[62] Second, Mr. Hughes submits that the Commission should have ordered the CBSA to exhaust another pre-qualified pool, the Victoria pre-qualified pool, because he and 13 other individuals were in a qualified, older pre-qualified pool in Victoria.

[63] However, the Victoria pre-qualified pool was established for the purpose of staffing the older Customs Inspector, PM-02 position. The duties and responsibilities changed when the position was reclassified as Border Services Officer, PM-03. (For example, Border Services Officers conduct secondary examinations at ports of entry and have delegated authority to refuse or allow individuals to enter Canada. Customs Inspectors had no such authority). The CBSA could not use a pre-qualified pool at the PM-02 level to hire at the PM-03 level because members in that pool had not demonstrated that they met the qualifications for the new duties and responsibilities.

[64] Third, Mr. Hughes argues that the CBSA withheld from the Commission knowledge of the fact that allegations of sexual assault and breach of trust had been made against a successful candidate. He says that different corrective measures would have been ordered had this been known.

[65] I disagree. Such allegations were not relevant to the Commission's exercise of discretion. Subsequent misconduct does not detract from an initial assessment of a person’s qualifications.

[66] Fourth, in an internal e-mail dated February 9, 2007, the acting director referred to the decision of this Court in *McAuliffe v. Canada (Attorney General)* (1997), 128 F.T.R. 39. Mr. Hughes argues that the Commission misapplied this decision when it changed the corrective measures.

[67] In *McAuliffe,* Justice Dubé dealt with two issues: procedural fairness and the application of the merit principle. The Commission correctly followed the Court's finding with respect to procedural fairness by advising the parties that it was considering different corrective measures and by affording the parties an opportunity to comment on the new proposed corrective measures. However, Mr. Hughes relies upon the findings of the Court with respect to the merit principle.

[68] In my view, such reliance is misplaced. In *McAuliffe* what was at issue was the creation of eligibility lists. Candidates are placed on eligibility lists in order of merit. See: subsection 17(1) of the Act and *Gariepy v. Canada (Administrator of Federal Court)*, [1989] 2 F.C. 353 (T.D.).

[69] By contrast, a pre-qualified pool is a group of individuals who have been assessed and are deemed to be equally qualified to be hired for similar positions of the same occupational level. See: section 1 of the *Public Service Employment Regulations*, *2000*, SOR/2000-80. This makes the Court's comments with respect to relative merit inapplicable.

[70] Finally, Mr. Hughes argues that the Commission should have followed the recommendation of the investigator with respect to corrective measures.

[71] In my view, section 7.5 of the Act is clear that it is for the Commission to order the corrective action that it views to be appropriate. As such, the Commission is not required to follow the recommendations of the investigator. Support for this view is found in Renée Caron, *Employment in the Federal Public Service*, looseleaf (Aurora, Ont.: Canada Law Book, 2006. There, at paragraph 6:3740, the author writes:

> The investigator's role is essentially one of informal fact-finding and reporting. When the fact-finding phase is complete, the investigator reports to the Commission. In turn, the Commission may take, or order a deputy head to take, such corrective action as the Commission considers appropriate. Notably, the Act does not provide that the Commission must take or order corrective action; rather, it "may" take or order such action. In addition, the corrective action to be taken is that which, in the opinion of the Commission, is appropriate. Thus, the Commission is not strictly bound by the recommendation of its investigator. [emphasis added] [footnotes omitted]

Conclusion

[72] For these reasons, the application for judicial review will be dismissed. In view of the time taken by the Commission to reach its conclusion with respect to corrective measures, I think this is an appropriate case for each party to bear its own costs. 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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APPEARANCES:

Self-represented	FOR THE APPLICANT
Graham Stark	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Self-represented	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENTS