

Federal Court



Cour fédérale

Date: 20111123

Docket: T-463-11

Citation: 2011 FC 1348

Ottawa, Ontario, November 23, 2011

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

SERGEANT BRIAN REHILL

Applicant

and

**THE ATTORNEY GENERAL OF CANADA
AND THE QUEEN IN RIGHT OF CANADA AS
REPRESENTED BY THE HONORABLE
MINISTER OF PUBLIC SAFETY CANADA
(ROYAL CANADIAN MOUNTED POLICE)**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Sergeant Brian Rehill, joined the Royal Canadian Mounted Police (RCMP) in November 1990 and served in a variety of increasingly senior positions. In February 2009, he applied for the position of District Commander, Staff Sergeant in the Antigonish detachment of the RCMP. Superintendent Ted Upshaw acted as the Selecting Line Officer (SLO) for the competition process. Three candidates, including the applicant, applied for the position.

[2] On May 15, 2009, another candidate, Sergeant Anthony Arthur Perry ("Sgt. Perry" or "the successful candidate"), was chosen as the successful candidate. The SLO's recommendation reads as follows:

After carefully and thoroughly reviewing all information contained in the Applications, Cover Letters and Competency Resumes of all candidates for the position of District Commander for Antigonish I made my recommendation based on the fact that the successful candidate has demonstrated the experience, skills and knowledge that makes him the right person for the advertised position.

In his examples, the recommended candidate has demonstrated that his roles have allowed him to provide stronger examples of skills and abilities which outline his strengths in the many competencies. The examples, along with the supporting documentation has in my opinion shown that he is the best fit to fill the Detachment Commander for the Antigonish Position at this time.

[3] On June 15, 2009, the applicant contested the SLO's decision by filing a Request for Intervention (RFI), which was part of the RCMP's internal dispute resolution process at the relevant time.

[4] On February 4, 2011, the RFI adjudicator (the adjudicator) dismissed the applicant's RFI. It is this decision that is being challenged in this judicial review proceeding.

I. Decision under review

[5] The applicant challenged the SLO's decision on several grounds. The adjudicator examined each one of them. However, it will be sufficient, for the purpose of this proceeding, to discuss the SLO's findings that are relevant to the issues raised in this application.

[6] The applicant took issue with the fact that the SLO failed to sign the Confidentiality Agreement (Form 5182), which is an attestation that he will perform his role in an impartial manner. The adjudicator agreed with the applicant in saying that there was no excuse for neglecting to sign this form. However, he found that there was also no evidence to show that the SLO failed to act fairly. Further, there was no policy in place at the time the promotion was given requiring the SLO to sign the form.

[7] The applicant took issue with the fact that the successful candidate did not provide the names of references who could attest to the information provided in his covering letter, as was required in the job advertisement and in the Career Management Manual, Bulletin No CMM-783 (CMM). The adjudicator attached significant weight to this argument. However, he pointed out that neither the applicant nor the respondent presented any evidence to suggest that the information and the examples included in Sgt. Perry's covering letter were inaccurate, false or misleading. The successful candidate's supervisor signed the covering letter and, in so doing, attested that the information contained in the letter was verified and accurate. Hence, the supervisor's signature cured the absence of references.

[8] The applicant took issue with a letter submitted by the Town Council of Antigonish in support of Sgt. Perry's candidacy. He contended that this letter caused the SLO to be biased and that he should have either convened an interview panel or withdrawn from the selection process. The adjudicator found that there was nothing untoward in the letter or the SLO's response. He was of the view that Sgt. Perry did not solicit support from the Town Council by announcing his intention to

apply for the Staff Sergeant position and that the SLO's response to the Town Council's letter did not reveal any bias. Further, the adjudicator found that the applicant's own words spoke to the contrary. The applicant was offered the opportunity to object to the choice of the SLO but did not, even though he knew about the letter.

[9] The applicant took issue with the fact that the SLO did not make any notes or produce "working papers" during his deliberation. The adjudicator noted that there was no duty to produce this type of document. Further, there is no evidence that the absence of "working papers" prejudiced the applicant.

[10] The applicant took issue with the time that it took the SLO to make his decision. The adjudicator found that it was reasonable to believe that the candidates' packages were carefully and thoroughly reviewed, and a decision was made over the three-day period, which was in accordance with the RCMP policy: a decision has to be made within seven days.

II. Issues

[11] This application raises the following two issues:

- A. Did the adjudicator err in finding that the appointment of the successful candidate was valid despite the fact that his application package was incomplete?
- B. Did the adjudicator err by failing to find an apprehension of bias on the part of the SLO?

III. Standard of review

[12] The applicant contended that the first issue should be reviewed under the standard of correctness. He argued that the issue raises a question of law and he distinguished this case from *Dunsmuir v Canada*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], where the Supreme Court ruled that decisions made by labour arbitrators are entitled to a high degree of deference. In support of his position, he invoked the lack of expertise of the adjudicator. The adjudicator's usual duties relate to his responsibilities as a police Superintendent and not as a labour relations adjudicator. He added that it is unlikely that the adjudicator possessed the necessary experience or background in dealing with promotion processes or in sitting on labour boards or tribunals.

[13] The respondent argued that the adjudicator's decision raises questions of fact and questions of mixed fact and law. Accordingly, the first issue should attract a standard of reasonableness. The respondent underscored the fact that this Court has previously determined that the adjudicator's decisions are entitled to a high degree of deference (*Schamborzki v Canada (Royal Canadian Mounted Police)*, 2010 FC 586, 269 FTR 261 [*Schamborzki*]; *Smith v Canada (Attorney General)*, 2004 FC 320 at paras. 12-13, 129 ACWS (3d) 1020 [*Smith*]; *Iwanowich v Royal Canadian Mounted Police*, 2007 FC 254 at paras 23 and 30, 310 FTR 91).

[14] In addition, the respondent argued that there are other indicators calling for a high degree of deference to RFI decisions: There is a strong privative clause at Section 25 of the *Commissioner's Standing Orders (Dispute Resolution Process for Promotions and Job Requirements, SOR/2000-141 [CSO]*; the RFI disputes involve technical provisions regarding the RCMP promotions process; the relevant documents are, by and large, administrative in nature and not legal instruments; RCMP

adjudicators are senior officers or managers who have guidance on how to use their discretion and a relative expertise of internal administration and adjudication. In addition, the respondent added that the purpose of the RFI process is to provide a fair, inexpensive and expeditious disposition of conflicts (*Canada (Attorney General) v Gillis*, 2007 FCA 112, 156 ACWS (3d) 229).

[15] According to *Dunsmuir*, above, at para 62, it is not necessary to undertake a standard of review analysis if the case law is settled as to the appropriate standard.

[16] This Court has, on several occasions, ruled that the appropriate standard of judicial review for decisions by RCMP adjudicators is that of reasonableness (*Schamborzki*, above, at para 50, *Smith*, above, at para 7). I am in agreement with the authorities cited by the respondent and, therefore, the first issue will be reviewed under that standard.

[17] Both parties submitted that the second question attracts the correctness standard: whether there was a reasonable apprehension of bias is, according to them, an issue of procedural fairness. With respect, I am rather of the view that the applicable standard of review is that of reasonableness. In this case, the procedural fairness that is at issue concerns an alleged apprehension of bias on the part of the SLO, not the procedural fairness of the RFI process. The adjudicator's mandate was to determine if, in the light of the evidence, there were sufficient grounds to conclude that there was a reasonable apprehension of bias on the part of the SLO. This determination involved a question of mixed fact and law which attracts the reasonableness standard of review (*Cheney v Canada (Attorney General)*, 2005 FC 1590 at paras 14-15, 144 ACWS (3d) 193).

[18] Therefore, both issues will be reviewed under the reasonableness standard. The Court's role is explained in *Dunsmuir*, above, at para 47:

. . . A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But 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 law.

IV. Discussion

A. Did the adjudicator err in finding that the appointment of the successful candidate was valid despite the fact that his application package was incomplete?

[19] It is useful to outline the administrative framework of the promotion process which was governed by the CMM, issued on June 16, 2006.

[20] Subsection 2.4 of the CMM sets out the five stages of a promotion process:

- 2.4.1 qualifying list based on the Job Simulation Exercises (JSE),
- 2.4.2 supervisor/line officer support,
- 2.4.3 advertisement,
- 2.4.4 competency validation, and
- 2.4.5 selection.

[21] Under subsection 2.5 it is only if a candidate meets all the requirements of the first four stages that it may be proceeded to stage 5.

[22] A member must have his/her supervisor's support before responding to a job advertisement (Subsection 10.0).

[23] Candidates must submit a competency resume and a covering letter. Subsection 11.9 of the CMM provides that "An incomplete application package will not be considered."

[24] The purpose of the covering letter is set forth in subsections 1.1 and 1.2 of the Appendix "C" "Covering Letter for the NOC Promotion Process":

1.1 The purpose of the covering letter (form 5147) is to provide a candidate with an opportunity to provide recent information about the competency requirements, desirables, information about why he/she feels to be the best candidate for the position, and other information for consideration by the line officer/delegate at the selection stage.

1.2 The information contained in the covering letter is very important and will be considered by the line officer/delegate at the selection stage.

[25] Section 2 of Appendix "C" provides instructions to the member in preparing his or her covering letter. It provides as follows:

2.1. You are responsible for the completion of the covering letter. Use of, or assistance from, any outside agencies to complete promotion process documents is not permitted, and will be deemed as cheating.

2.2. Enter the information in the space provided. Do not use type-font characters less than 10 pt. size.

CAUTION: Any alterations to the font size or the number of lines will result in disqualification.

2.3. Attachments will not be considered.

2.4. Include information that can be verified, and provide the name of references.

2.5. You and your supervisor must both sign the covering letter. Your signature will be your verification that the examples provided are true and accurately describe your behaviour.

[26] Section 3 of Appendix “C” provides directions to the supervisors who must verify and certify the information provided by the candidates in their covering letter:

3.1. Read these instructions, the instructions on the covering letter, and all other information provided to you.

3.2. Verify, based on your knowledge or by contacting the references, the behavioural examples provided by the candidate.

3.3. If you are unable to verify an example or if the accuracy of the description is in question, meet with the candidate and attempt to resolve any concerns and disagreements. An example that cannot be verified cannot be used.

[27] The selection (step 5 of the promotion process) is made by an SLO. The name of the SLO is provided to the candidates in advance (subsection 13.6). Paragraph 13.6.1 of the CMM provides that the candidates are afforded an opportunity to object to the participation of the identified SLO, in which case they must submit, in writing, the reasons for their opposition (paragraph 13.6.1); the ultimate decision is made by a Human Resources Officer (paragraph 13.6.2).

[28] The SLO selects the recommended candidate on the basis of the factor set forth in subsection 13.8:

The line officer will identify the recommended candidate whom he/she has determined as being the right person after considering all

of the information, including any operational needs that may exist within the team where the position is located.

[Emphasis added]

[29] Subsection 13.5 specifies that the SLO will consider the information contained in the candidates' application, their competency resume, their covering letter and any other relevant information.

[30] Subsection 13.9 provides that the SLO will normally make his or her recommendation within seven days of receiving the selection package.

[31] The RCMP posted the Job Opportunity Bulletin AR-141 (the JOB) for the position of District Commander, Staff Sergeant of the Antigonish detachment of the RCMP on January 21, 2009.

[32] The JOB contained, in part, the following information and instructions to potential candidates:

Members must submit a complete application package before the closing date of the 28 day JOB which includes:

an Application (Form 5145)

...

a Competency Resume (Form 5144)

...

a Covering Letter (Form 5147)

...

and any additional information as required (CMM 783...)

...

You are required to submit a CR [Competency Resume] Form 5144 (ICS) The CR is pre-formatted. Do not change this setting.

In your CR you are to provide two verifiable examples illustrating how you have best demonstrated each competency required by the competency profile for the position as outlined below (also refer to Chapter 12 of the Career Management Manual). You must provide the name and telephone number of a reference who can confirm the information, and your CR must be verified and signed by your immediate supervisor.

The information you provide on this form is not intended to summarize your entire career. Rather, it is intended to draw attention to specific examples which you believe best show how you have demonstrated each competency in carrying out your duties. There is no time limit on your examples; however, recency of examples can be weighted when each component of the competencies are evaluated by the selecting manager during the selection stage.

You are required to submit a Cover Letter (CL) Form 5147 (ICS). The Cover Letter is pre-formatted. Do not change this setting.

The CL is an opportunity for you to provide updated information about; how you meet the requirements for this position; additional competency information; information concerning any priorities identified by the selecting manager; essentially why you feel you are the best person for this position; or any other relevant information you would like to have considered during the selection process. You must provide the name and telephone number of a reference who can confirm the information, and your CL must be verified and signed by your immediate supervisor.

[33] The pre-formatted covering letter contained instructions, including the following: “The information must be verifiable, references are required.” The covering letter that the member signs includes the following statement:

I certify that the information provided herein is accurate and true to the best of my knowledge. I understand that misrepresentation of information provided may disqualify me from the promotion process. I also understand that the Covering Letter must only be developed,

prepared, written and completed by me and that proof to the contrary will be deemed as cheating.

[34] The space for the supervisor's signature is preceded by the following certification: "I certify that I have taken the necessary steps to establish the accuracy of the information by the above mentioned member and that the information provided by the candidate is accurate and true to the best of my knowledge."

[35] The applicant alleged that the successful candidate did not comply with the CMM and the JOB in that he failed to provide references in his covering letter to confirm the information contained in it.

[36] The adjudicator's mandate is defined at paragraph 22(1)(b) of the CSO, which provides that the adjudicator shall order appropriate corrective action if he determines that a decision, act or omission has prejudiced the complainant.

[37] The adjudicator acknowledged that Sgt. Perry's covering letter did not comply with the requirements, but he found that this irregularity was not fatal and that the applicant had failed to show in what manner he had been prejudiced:

The Complainant has made his case in that the names of references did not appear on the Covering Letter however he has not shown any prejudice that might have resulted in the presentation of unverifiable/unverified information that could be false or misleading. The Respondent has argued that the examples are verifiable and were verified for had they not been verifiable/verified S/Sgt Shermerhorn either would have not permitted their inclusion in the Covering Letter and/or would not have signed the document. While I find there is no excuse for failing to identify references and contact information within the Covering Letter I do find there is a remedy in policy

which addresses that shortcoming and the Respondent has clearly articulated that. The presence of S/Sgt Shermerhorn's signature on the Covering Letter attests to the fact that the examples tendered were verified. In the absence of any real evidence the Complainant has not demonstrated how he was prejudiced.

[38] The applicant contended that the adjudicator erred by not concluding that Sgt. Perry's application should have been rejected at the outset of the process.

[39] First, he contended that there was no doubt that, by failing to provide references, Sgt. Perry's covering letter did not satisfy the CMM and the JOB requirements. He pointed to the following instruction to candidates set forth in the JOB and emphasized the words "must" and "and": "You must provide the name and telephone number of a reference who can confirm the information, and your CL must be verified and signed by your immediate supervisor." He argued that, in view of those clear words, both requirements were mandatory. He insisted that if the RCMP had intended that a candidate be given the choice of providing one or the other, they would have used the expression "and/or" instead of the word "and"; both elements were required.

[40] Second, the applicant contended that, according to the plain language of the instructions set out by the CMM and the JOB, if a requirement of the JOB that "must" be included in the application is missing, the application is incomplete. The applicant added that this omission was fatal and cited subsection 11.9 of the CMM, which provides that "[a]n incomplete application package will not be considered." He insisted on the fact that the requirements with respect to the application package are very technical and detailed. He referenced, as an example, subsection 2.2 of Appendix "C" of the CMM, which provides that using the wrong type-font characters in the covering letter will result in disqualification. If using the wrong font disqualifies a candidate, then a

failure to provide references, which is a more serious flaw, should *a fortiori* result in automatic disqualification.

[41] Third, the applicant argued that the adjudicator erred by finding that he was not prejudiced by the RCMP's failure to reject Sgt. Perry's application. He contended that, as a result of that error, he had to compete with two other candidates instead of just one. He added that all candidates were prejudiced by the fact that the candidate whose application should have been rejected became the successful candidate. If Sgt. Perry's application had been rejected, the outcome of the competition would have been different. The applicant argued that when an erroneous decision in a recruitment competition prejudices the other candidates, the outcome must be nullified. In support of his position, he cited *Stout v Canada (Public Service Commission)* (1983), 24 ACWS (2d) 74, 51 NR 68 (FCA) [*Stout*] and *Mackintosh v Canada (Public Service Commission Appeal Board)*, [1990] FCJ No. 834 (QL) [*Mackintosh*].

[42] The respondent contended that the RFI adjudicator's findings were reasonable.

[43] First, the respondent argued that Sgt. Perry's package was not "incomplete." Subsection 11.7 of the CMM provides that, to be complete, an application must include: an application (Form 5145), a competency resume (Form 5144), and a covering letter (Form 5147). Sgt. Perry did provide those documents and, therefore, he did submit a complete application package.

[44] Second, the respondent contended that, assuming that Sgt. Perry's application was incomplete, the omission to provide references in the covering letter was immaterial since his

superior attested to the accuracy of the information provided in the covering letter and therefore his application ought not to have been rejected. The respondent argued that the purpose of the requirements relating to the references and to the signature of the candidate's supervisor is to ensure that the information provided by the candidate in his covering letter is accurate. The CMM requires that the candidates provide only verifiable examples. Each candidate attests to the accuracy of the information that he has provided when he signs his covering letter. The candidate's supervisor is asked to verify the accuracy of the information provided in the covering letter. To do this, the superior can rely on his personal knowledge of the information presented or on information provided by the persons identified as references. There is no requirement that the supervisor contact each of the references. In this case, one can only infer that Sgt. Perry's supervisor was able to verify the accuracy of the information contained in the covering letter on the basis of his personal knowledge. The respondent submitted that the supervisor's signature constitutes another safeguard, in addition to the signature of the candidate. The SLO may assume that, as long as the supervisor has signed the covering letter, the examples have been verified.

[45] The respondent further submitted that prejudice cannot result from the omission to provide references since there was no evidence that the information provided by Sgt. Perry in his covering letter was inaccurate, false or misleading or that his supervisor was unable to verify the information.

[46] The respondent distinguished this case from *Stout* and *Mackintosh* on the basis that the absence of references had no impact on the assessment of the relative merits of the successful candidate: the outcome would have been the same if the references had been included.

[47] I am of view that the RFI adjudicator's decision was reasonable and is not to be disturbed.

[48] There is no doubt that Sgt. Perry's covering letter did not meet the requirements set forth in the CMM and the JOB. However, I consider that it was reasonable for the adjudicator to conclude that this omission was not fatal and that the applicant failed to show that he was prejudiced by it.

[49] I am of the view that not any and all omissions in a candidate's application package should automatically render the application incomplete within the meaning of subsection 11.9 of the CMM. The seriousness of an omission and its impact on the integrity and the fairness of the promotion process must be assessed in the light of the circumstances of each individual case.

[50] In this case, the failure to provide references in the covering letter must be examined in the context of the goals of the promotion process guidelines and requirements. The CMM provides guidelines that are aimed at ensuring a rigorous and fair competition process. I agree with the applicant that the requirements are very technical and detailed; that being said, their main purposes are to ensure that the process is fair, that no candidate is favoured at the expense of others, that candidates provide complete and accurate information, and that the SLO makes a decision on the basis of relevant, complete and accurate information.

[51] In order to achieve these objectives, the process comprises different steps and requires that the candidates provide different documents. The competency resume and the covering letter are important because they enable the candidates to describe their profile, their experience and to provide information as to why they should be selected. The competency resume is much more

detailed than the covering letter which constitutes a complement to the competency resume. It is worth noting that Sgt. Perry's competency resume did contain references for all of the examples that he submitted.

[52] There is no doubt that the CMM and the JOB required the candidates to provide references both in their competency resume and their covering letter; that being said, I agree with the respondent that the references are requested for verification purposes. The CMM requests that both the competency resume and the covering letter contain information that is verifiable. The accuracy of the information provided by the candidates is essential to the integrity and the fairness of the competition process. In order to ensure the accuracy of the information provided by the candidates, the CMM has established the following safeguards: first, the applicant must attest that the information he provides is complete and accurate; second, the candidate's supervisor must verify the information and certify its accuracy. In order to do this, the supervisor can rely on his personal knowledge of the information presented or, in the absence of such knowledge, on the knowledge of the individual whose names have been provided as references. The references are a tool that the supervisor can use to verify the accuracy of the information provided by the candidate when he or she cannot rely on his or her personal knowledge to certify its accuracy.

[53] I am of the view that, in this case, the failure to provide references did not impact the supervisor's ability to certify the accuracy of the information provided in the covering letter; hence, that failure is not fatal. Therefore, Sgt. Perry's application cannot be said to have been incomplete within the meaning of subsection 11.9 of the CMM. If the irregularity in Sgt Perry's application package had left his supervisor in a position where he could not have verified the information

contained in the covering letter, I would then have concluded that the application was incomplete and ought to have been rejected under subsection 11.9 of the CMM. Such is not the situation in this case. Consequently, I find that it was reasonable for the adjudicator to conclude that the omission to provide references was cured by Sgt. Perry's signature.

[54] In addition, I am of the view that the adjudicator's finding that the applicant was not prejudiced was also reasonable. The adjudicator examined the issue of prejudice in relation to the integrity of the process. He found that there was no prejudice stemming from Sgt. Perry's failure to provide references because his supervisor was able to verify the accuracy of the information contained in the covering letter and because there was no evidence that the information provided in the covering letter was inaccurate, false or misleading. The adjudicator was satisfied that the integrity of the process had not been jeopardized by the absence of references. I conclude that the RFI adjudicator adopted the correct test and that his assessment of the evidence was reasonable.

[55] The applicant argued that the prejudice should be assessed from a different perspective. He contended that Sgt. Perry's application should have been rejected; since Sgt. Perry was the successful candidate, the promotion process was tainted and all the other candidates were prejudiced. In my view, the applicant's argument would have been persuasive if the omission in Sgt. Perry's application and the failure to reject it had had an impact on the integrity and the fairness of the process. For example, I am of the view that a covering letter containing unverifiable or unverified information should be considered incomplete and should be rejected under subsection 11.9 of the CMM. In such a case, the failure to reject the candidate's application would have an

impact on the integrity and fairness of the process and would possibly prejudice the other candidates.

[56] I wish to add that this case is distinguishable from *Stout* and *Mackintosh*.

[57] In *Stout*, the job competition at issue was flawed because no statement of qualifications was prepared before the job competition began, in violation of the Public Service Regulations in force at the time. This went to the very integrity of the process. The selection board simply inferred qualifications from the job description. In that case, the Federal Court of Appeal unambiguously ruled that irregularities vitiate the results of a job competition when they directly affect its outcome (*Stout*, above, at para 3).

[58] In *Mackintosh*, the manager in charge of the recruitment process disqualified questions from a test after it was held, thereby allowing three candidates to pass rather than just one. As those questions were directly relevant to the merits of the candidates, there was a direct impact on the outcome of the competition.

[59] In this case, because the information provided in Sgt. Perry's covering letter was verified and accurate, his failure to provide references had no impact on the outcome of the competition. For all of these reasons, I conclude that it was reasonable for the adjudicator to find that the applicant had not shown "any prejudice that might have resulted in the presentation of unverifiable/unverified information that could be false or misleading."

B. Did the adjudicator err by failing to find an apprehension of bias on the part of the SLO?

[60] The applicant contended that the adjudicator erred in finding that there was no reasonable apprehension of bias. The applicant argued that the adjudicator erred in assessing in isolation the elements that he raised and that the following four elements, taken together, should have led him to conclude that there was a reasonable apprehension of bias:

- a. The letter sent by the Town Council recommending Sgt. Perry's promotion;
- b. The SLO's failure to sign the Confidentiality Agreement;
- c. The speed at which the SLO made his recommendation;
- d. The omission from the SLO to create "working papers" during his deliberations.

[61] I will commence with the letter sent by the Town Council.

[62] Prior to winning the competition for the position of Staff Commander, Sgt. Perry occupied the position of Operational NCO in Antigonish. As part of his duties, he sat on the Antigonish Town Police & Licensing Committee. At the February 5, 2009 meeting of the Committee, Sgt. Perry announced his intention to apply for the Staff Sergeant position. He also informed the Committee that he would apply for another position as well. After he announced his intentions, the Committee moved to write a letter in support of Sgt. Perry's promotion within the Antigonish Detachment.

[63] On February 16, 2009, a motion was passed at a Town Meeting stating that the Chief Administrative Officer of the Town of Antigonish would write a letter to Superintendent Upshaw,

the SLO for the job competition, in support of Sgt. Perry's promotion. That letter, which is dated February 24, 2009, reads as follows:

Dear Superintendent Upshaw,

I am writing on behalf of the Town of Antigonish. At their duly called February meeting, Council made a motion to forward this letter in support of Sgt. T. Perry being promoted from within the Antigonish RCMP Detachment to the position of Staff Sergeant. Council feels that Sgt. Perry would bring a wealth of knowledge to the position and be able to draw upon his experience in the Antigonish area (both Town and County) and be able to continue initiatives and work that he currently involved in. . . .

[64] The SLO responded to that letter on March 3, 2009:

Thank you for your letter dated 2009-02-24. I also want to thank you for taking the time to acknowledge the great work Sgt. Perry has been doing for the Town and County of Antigonish. I would suggest that when it becomes time to fill the Commander's position in Antigonish there will be many who show interest. Sgt. Perry will be given due consideration.

[65] On May 4, 2009, the name of the SLO was communicated to the candidates. At this point, all of the candidates were given the opportunity to object to the choice of the SLO. No objections were raised. At that time, the applicant was aware of the letter that had been sent to the SLO.

[66] The applicant argued that the successful candidate caused a letter on his own behalf to be sent directly to the SLO from the Town Council of Antigonish and that the SLO's response to the letter shows that he was aware of the Town's preference for the position. The applicant contended that the Town Council hold a significant degree of influence over RCMP matters in Antigonish because they are free to opt for the RCMP or their own municipal police force (*Municipal*

Government Act, SNS 1988, c 18, s 54). In this regard, the Town Council are the RCMP's main customer in Antigonish and the surrounding area. The applicant submitted that the letter, in conjunction with the other elements, pointed to a reasonable apprehension of bias.

[67] The applicant contended that the SLO's failure to sign the Confidentiality Agreement (Form 5182), a declaration that he would make his decision in an impartial manner, constitutes additional evidence of partiality on his part. As the SLO was directly in charge of both the applicant and the successful candidate, it was vital for him to sign the form.

[68] The applicant also alleged that the decision to promote the successful candidate rather than the applicant was made in haste as it took the SLO only two and a half working days to make his decision, whereas, according to subsection 13.9 of the CMM, the SLO is only required to make his or her recommendation within seven days. Further, the appointment of a Staff Sergeant within the RCMP is taken very seriously. As a decision of this type can take up to seven days, the applicant alleged that the fact that this decision was made in haste further substantiates that there was a bias on the SLO's part.

[69] Finally, the applicant disagrees with the adjudicator's findings that it was not necessary for the SLO to create any "working papers", or notes during his deliberations. He submitted that some notes would have been required to sort through all the details in the candidates' packages. He contended that, from the absence of notes, it may be inferred that the applications merely received a cursory inspection. On the basis of that factor, taken in conjunction with the other indications of bias, the applicant submitted that the duty of fairness owed to him was violated.

[70] The respondent argued that there was no evidence that the SLO was biased or in any way partial. The respondent further contended that the applicant neglected to object to the appointment of the SLO when presented with the opportunity to do so.

[71] The respondent alleged that the applicant relied on opinion and speculation to ground his claim of apprehension of bias.

[72] Regarding the letter sent by the Town Council of Antigonish to the SLO, the respondent contended that Sgt. Perry did not cause the letter to be written on his behalf and that the SLO's response to the letter did not indicate partiality.

[73] The respondent alleged that the signing of the Confidentiality Agreement was not mandatory. Moreover, the respondent argues that there is no evidence that, by failing to swear that he was impartial, the SLO was, in fact, partial.

[74] Regarding the applicant's argument that the decision was made in haste, the respondent cited *Smiley v The Royal Canadian Mounted Police*, 2007 FC 29, 155 ACWS (3d) 202 [*Smiley*]. In that case, the promotion decision was made in twelve minutes. Yet, Justice Pinard decided that it was not unreasonable to conclude that the committee members came to the meeting well prepared, having read all the materials in advance. In this case, the SLO took much longer than twelve minutes and his decision was made according to the CMM guidelines, which limited deliberation to

seven days. Further, the respondent argued that there was no evidence showing that the SLO did not take all the time necessary to make an appropriate decision.

[75] Finally, the respondent contended that it was unreasonable to infer from the SLO's omission to prepare working papers that his examination of documents was merely cursory, that his decision had been already made or that he was biased.

[76] There is no doubt, and this is not disputed by the respondent, that a duty of procedural fairness and impartiality was owed to the candidates in the promotion process.

[77] As to bias, the applicable test is propounded in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at 394 (available on CanLII) (SCC):

...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [The] test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly.

[78] In *R v R.D.S.*, [1997] 3 SCR 484, 151 DLR (4th) 193, the Supreme Court reiterated the test and made the following comment, at paragraph 36, with respect to the objective aspect of the test:

The presence or absence of an apprehension of bias is evaluated through the eyes of the reasonable, informed, practical and realistic person who considers the matter in some detail (*Committee for Justice and Liberty*, supra.) The person postulated is not a "very sensitive or scrupulous" person, but rather a right-minded person familiar with the circumstances of the case.

[79] While actual bias need not be proven (*Cheney*, above, at para 18), the test is an objective one and, as stated by the Court in *Armstrong v Canada (Attorney General)*, 2006 FC 505 at para 75, 291 FTR 49, “the threshold for establishing a claim is high and substantial grounds are necessary to support a claim.”

[80] In this case, I consider that the RFI adjudicator’s decision was reasonable.

[81] First, I am of the view that it was inappropriate for the Town of Antigonish to interfere in the promotion process. However, the evidence does not support the proposition that Sgt. Perry initiated the sending of the supporting letter. Furthermore, the SLO had nothing to do with the sending of this letter. When he received it, he acted appropriately, stating that he expected that many members would show interest and that Sgt. Perry would be given due consideration. I fail to see any indicia of partiality in his response. Moreover, the applicant failed to oppose to Superintendent Upshaw being the SLO when offered the opportunity to do so, despite the fact that he knew about the letter from the Town Council. One can only conclude that the situation did not raise an apprehension of bias in the applicant’s mind.

[82] With respect to the time that the SLO took to reach his decision, I fail to understand how taking two and a half days to assess the candidates’ applications can ground a claim of reasonable apprehension of bias. I find this allegation to be highly speculative.

[83] Furthermore, I consider that the failure of the SLO to sign the Confidentiality Agreement and his failure to create working papers do raise concerns as to his rigour. However, I find that these elements are too speculative to create a reasonable apprehension of bias on his part.

[84] The process was not perfect. It would have been preferable if the Town of Antigonish had not sent a letter in support of Sgt. Perry's application. It would also have been preferable if the SLO had signed the Confidentiality Agreement and if he had created working papers.

[85] However, in the light of the evidence viewed as a whole, these elements were not sufficient to support a conclusion of a reasonable apprehension of bias. The evidence cannot reasonably lead to a conclusion that the "right-minded person familiar with the circumstances of the case" test is met. Therefore, I find that it was not unreasonable for the adjudicator to conclude that there was no bias.

[86] For all of the above mentioned reasons and despite the able submissions of counsel for the applicant, this application for judicial review is dismissed. The respondent did not ask for costs and no costs will be awarded.

JUDGMENT

The application for judicial review is dismissed, without costs.

“Marie-Josée Bédard”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-463-11

STYLE OF CAUSE: **SERGEANT BRIAN REHILL v THE ATTORNEY
GENERAL OF CANADA**

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: October 12, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** BÉDARD J.

DATED: November 23, 2011

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