

Date: 20090105

Docket: T-435-08

Citation: 2009 FC 1

Ottawa, Ontario, January 5, 2009

PRESENT: THE CHIEF JUSTICE

BETWEEN:

GLENN C. SMITH

Applicant

and

**PUBLIC SERVICE COMMISSION
MONICA PRELUSKY INVESTIGATOR**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant was the unsuccessful candidate in the practical skills assessment, the final phase of the selection process for the position of photographer and graphic arts technician with National Defence.

[2] He was screened out of the competition after the final phase, apparently for not completing the PowerPoint Photoshop assignment which was part of the practical skills assessment.

[3] The applicant requested a Public Service Commission investigation into the results of the selection process. On February 12, 2008, the investigator determined that the complaint was unfounded. This proceeding is the application for judicial review of that decision.

[4] The first aspect of the applicant's challenge concerns the printing of photographs, one of the tasks in the practical skills assessment. During the test, the applicant noticed that the printer was inadequate. He nonetheless took the additional time required to print the photographs with the faulty printer. This was his deliberate choice because the points assessed for the printing of the photographs were double those to be earned on the PowerPoint test. As a result, in his view, the applicant did not leave himself sufficient time to complete the PowerPoint test.

[5] In assessing the candidates' performances, the selection board had the photographs professionally developed after the test because of the faulty printer. In the applicant's opinion, this provided an advantage to the successful candidate who spent less time on this task without completing the printing of the photographs. Unlike the applicant, the successful candidate finished the PowerPoint test within the allotted time.

[6] The investigator understood the issue. In her report, she noted that: "The selection board acknowledge the faulty printer which resulted in poor quality prints for both candidates and had their submissions professionally developed". She concluded that the selection board was aware of the printing difficulties and "... had the prints for both candidates professionally developed

allowing them to proceed with their assessment". In the investigator's view, the evidence demonstrated no advantage to either candidate.

[7] The investigator also seems to have understood the applicant's explanation for his inability to complete the PowerPoint task:

He said he experienced time delays due to a slow printer, insufficient printer supplies, and faulty or missing equipment. He said he was unable to find assistance easily and believed that the total time lost was approximately one hour. As a result, he said he lacked sufficient time to adequately complete the PowerPoint/Adobe Photoshop task and chose not to do it.

[8] The investigator's analysis of the PowerPoint issue is set out in paragraph 19 of the report where she concludes that the applicant did not request additional time to complete this task:

Both the department and Mr. Smith are in agreement that he did not attempt the PowerPoint/Adobe Photoshop task. The evidence shows that he submitted his final tasks prior to the allotted time and he did not request additional time. Mr. Smith gave the appearance of having completed the practical tasks to his satisfaction and completeness.

[9] The investigator's analysis is supported by the hand-written notes of the departmental assistant in attendance at the testing. The applicant acknowledges he did not explicitly request additional time. His view is that he did so implicitly by explaining to the departmental assistant why he was leaving early without the task having been completed. I cannot agree.

[10] It is understandable that the applicant may have expected more detail in the investigator's report concerning the linkage between the additional time he spent with the faulty printer and his inability to complete the PowerPoint task.

[11] However, this Court must review the investigator's decision against the available record.

The investigator's conclusions are set out in paragraphs 21 and 22 of her report:

... while [the applicant] had an explanation for his actions, the selection board was nonetheless entitled to assess for the qualifications it required for the performance in the position. The Department explained the deficits in Mr. Smith's performance.

... I see clearly demonstrated that Mr. Smith was not satisfied with his assessment and he would have treated his assessment differently. However, it must still be shown that something was amiss to the extent that he can demonstrate that the selection formed an opinion that was not reasonable. Yet the evidence presented to me shows only a divergence of opinion and does not lead me to the conclusion that the selection board acted without reason or that in any real possibility that merit has been compromised.

[Emphasis added]

[12] In her view, the investigator was unable to conclude that the selection board's determination was unreasonable. Similarly, in applying the *Dunsmuir* principles concerning the standard of review, I cannot conclude that the investigator's report discloses any reviewable error. The conclusions of the report cannot be characterized as an outcome which is unreasonable or one which does not fall within a range of acceptable outcomes: *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶ 47.

[13] During his oral submissions, the applicant properly placed less emphasis on the other issues he had raised in his written material. The investigator's statement that the applicant missed two appointments to inspect the facilities prior to the practical skills test appears to be

inconsistent with an exchange of emails. However, any such misstatement of the facts, while frustrating for the applicant, does not rise to the level of a reviewable error.

[14] Another investigator may have reached a different conclusion. However, the record is sufficient to support the report now under review and this Court's intervention is not warranted. Accordingly, this application for judicial review must be dismissed. In the circumstances of this case, I have concluded that there should be no award as to costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed.
2. There will be no order as to costs.

“Allan Lutfy”
Chief Justice

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-435-08

STYLE OF CAUSE: GLENN C. SMITH v. PUBLIC SERVICE
COMMISSION MONICA PRELUSKY
INVESTIGATOR

PLACE OF HEARING: Ottawa, Ontario and Winnipeg, Manitoba
by videoconference

DATE OF HEARING: December 10, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** LUTFY C.J.

DATED: January 5, 2009

APPEARANCES:

Mr. Glenn C. Smith FOR THE APPLICANT

Mr. Jeff Dodgson FOR THE RESPONDENT

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