

Court File No.: T-1110-23

FEDERAL COURT

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| F I L E D | FEDERAL COURT COUR FÉDÉRALE | D É P O S É |
| | May 26 2023 | |
| Wayne Sawtell | | |
| Ottawa, ONT | | 1 |

BETWEEN**ALAIN MUSENDE****APPLICANT****- and -****THE PUBLIC SERVICE COMMISSION OF CANADA AND THE
ATTORNEY GENERAL OF CANADA****RESPONDENTS**

**APPLICATION UNDER ss. 18 and 18.1 of the Federal Courts Act, RSC 1985, c F-7
and Rules 300(a) and 317 of the Federal Courts Rules, SOR/98-106.**

Notice of Application for Judicial Review

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Applicant. The relief claimed by the Applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Ottawa.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

May 26, 2023

Issued by:

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Application

Overview

1. This is an application, made pursuant to sections 18(1) and 18.1 of the Federal Courts Act, R.S.C. 1985, c. F-7, for judicial review in respect of a decision of the Public Service Commission of Canada (“**PSC**”) made under section 114 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (“**PSEA**”). The decision (“**Decision**”), made on April 27, 2023, granted the Applicant Alain Musende (“**Applicant**”) permission to seek nomination as a candidate before and during the next Federal election and to be a candidate before the election period subject to strict and onerous conditions.
2. The Decision is unreasonable, and was the product of an unfair procedure. In particular,
 - a. the Decision is confusing and is not supported by cogent reasons, and employs vague generalizations instead of detailed explanation and justification;
 - b. the Decision is inexplicably inconsistent with a prior section 114 request made by the Applicant that was granted in 2019 (“**2019 Decision**”);
 - c. the Decision is inexplicably inconsistent with the appraisals provided on the PSC’s own “Request for permission and Leave of absence without pay” form by the Applicant’s Deputy Minister, as well as by the Acting Director of the Applicant’s Department;
 - d. the Decision imposes conditions and a duration of leave without pay that are unreasonable and are unsupported; and

- e. the Decision was the product of an opaque and unduly irregular and informal process that: failed to provide the Applicant with appropriate opportunity to be heard by key decision-makers on critical matters; that raises doubts about who made the decision; and that gives rise to a reasonable apprehension of bias.

Relief Sought

- 3. The Applicant makes application for:
 - a. An order of certiorari quashing and setting aside the Decision on the basis of unreasonableness and a lack of procedural fairness;
 - b. A declaration that the current procedures used by the PSC to make the Decision are inappropriately informal and opaque and undermine the delicate balancing sought by Parliament in enacting section 114 of the *PSEA*;
 - c. An order directing the PSC to reconsider the Applicant's section 114 request on an expedited basis, and in light of the declaration requested above at subparagraph b;
 - d. The costs of this application; and
 - e. Such further and other relief as counsel may request and this Honourable Court may permit.

The Grounds for the Application

Background to the Decision

4. The Applicant is a Section Manager for Transparency and Advertising Regulatory Surveillance in the Health Products and Foods Branch of Health Canada. He has been working at this same position since 2011.

5. His duties consist primarily in helping stakeholders understand policies and provisions of the *Food and Drugs Act* and the *Controlled Drugs and Substances Act* and their regulations in relation to drug advertising. He interacts with present and prospective advertisers, providing information on relevant policies and regulatory provisions, all of which are readily accessible to the public. He also speaks at drug related conferences on aspects of drug advertising. Additionally, he contributes to advertising policy development, which must be approved, revised, paused, or rejected by his director and senior management. He does not have the authority to implement any drug advertising program or policy without the clear and explicit approval of senior management.

6. The Applicant's team also works to compare the accuracy of the claims in drug advertising with the claims authorized by Health Canada for the product involved. Non-compliance with the authorized claims is deemed a contravention, and once a contravention is established, the Applicant's team requests compliance from the advertiser involved, by asking them to cease the advertisement and take corrective measures. The staff working on the file makes the determination on contraventions. If they find it challenging, they consult their supervisor. It's only on rare cases where the supervisor needs the Applicant's involvement, in which case the file is discussed with the Applicant. In case of wilful non-compliance by the advertiser, the Applicant's staff refers the case to the Regulatory Operations and Enforcement Branch (ROEB), a Health Canada branch responsible for enforcement actions. At that point, the file would be considered as closed in the

Applicant's Section. It remains up to ROEB to verify the contravention and determine whether the advertiser is still engaging in non-compliance, in which case ROEB would take enforcement actions at their discretion. Neither the Applicant nor his team suggests or recommends enforcement actions to be taken by ROEB.

7. In 2019, the Applicant submitted a "Request for permission and Leave of absence without pay" form to the PSC, in compliance with section 114 of the *PSEA*, for permission to seek nomination as a candidate and be a candidate for the 2019 Federal election. On July 12, 2019, the PSC granted the requested permission, enabling the Applicant to engage in political activities to support his candidacy, while continuing to perform his work duties, subject to three conditions:
 - Not to be involved in files involving persons, businesses etc... that are residents of the riding.
 - Not to be involved in files involving persons, businesses etc... whose political affiliation is known.
 - Not be involved in speaking engagements as a Health Canada representative.
8. The Applicant subsequently stood as a candidate in the 2019 election and took a leave without pay from work (as required under section 114 of the *PSEA*) during the actual election period. He returned to work after the election as he was unsuccessful in his bid.
9. On July 19, 2022, the Applicant served his immediate supervisor, Director Hamida Rahim, with an extensive Grievance alleging sustained and systemic racial discrimination. The Applicant is the only manager or supervisor of the black race in his bureau. The Grievance is currently awaiting a decision from the Assistant Deputy Minister of the branch.

10. On March 14, 2023, the Applicant submitted another “Request for permission and Leave of absence without pay” form (“**Request Form**”) to the PSC in order to stand for nomination and run as a candidate in the next Federal election. On April 27, 2023, the PSC sent the Decision to the Applicant.

The Decision

11. The Decision departs markedly from the 2019 Decision by imposing much stricter conditions on the granting of permission to engage in political activities. In particular, the Decision provides that if the Applicant was to be nominated as the candidate for his party, he would be placed on leave of absence without pay (LWOP) starting on the day the nomination became public or the day that he undertook activities in support of his candidacy. In addition, the leave without pay period would continue until six months following either the date of the election, in the event he was unsuccessful, or any decision to withdraw as a candidate.

12. The Decision itself provides no detailed explanation or justification for its strict conditions beyond the following vague generalities:

The analysis of your request is based on your current circumstances and has identified a risk that could impair your ability to perform your duties in a politically impartial manner, or be perceived as such.

Extensive efforts were made by the PSC to explore whether permission could be granted in this case by imposing conditions to address risk factors identified (e.g., role in policy and program development, non-compliance files, interactions with external stakeholders, representing Health Canada at external events) and to avoid undue infringement on your right to seek nomination as, or to be, a candidate in a federal election. However, they would not have permitted you to continue in your current position.

.....

As a result, in order to safeguard political impartiality, this permission is subject to the following conditions, which you must accept for permission to be granted.

If you are nominated as the candidate for your political party in the electoral district of Ottawa West–Nepean, Ontario, you will be on leave of absence without pay (LWOP) starting on the day your nomination is made public or that you undertake activities in support of your candidacy.

13. Notably absent from the Decision is any explanation of how the Applicant's very limited decision-making authority could be reconciled with the PSC's conclusion that his candidacy would impair either his ability to perform his duties in an impartial manner or lead to the perception of such an impairment. Likewise lacking in the Decision is any explanation of how the 2023 Decision could be reconciled with the permission granted to the Applicant in 2019.
14. The 2019 Decision required only that the Applicant curtail certain very understandable activities in the course of his candidacy. By contrast, the Decision imposed a condition that, for practical purposes, rendered his candidacy impossible. Given the relevant timelines of a 2023 nomination and an election that might not be called until 2025, combined with the 6 months post-election period, the Applicant would be required to take up to a three-year leave without pay. This would be an unbearable cost for most public servants and most working Canadians.
15. Between the date that the Applicant filed his Request and the date of the Decision, the Applicant had extensive interactions, by phone and email, with a frontline policy analyst at the PSC, Gilles St-Amour ("**Mr. St-Amour**"), and the Applicant became

aware of irregularities in the PSC decision-making process and a general lack of a coherent or formal procedure for evaluating his request.

16. For example, on April 13, 2023, Mr. St-Amour sent the Applicant an email that indicated that the PSC had “identified a risk to political impartiality, that he may be unable able to perform his public service duties in a politically impartial manner, or be perceived as such.” The email proceeded to detail an extensive list of 8 conditions that would be placed on the Applicant during the entire period of his candidacy and for 6 months following the termination of that candidacy (either by defeat or withdrawal). No explanation was given for the addition of conditions that were not imposed in 2019, including blanket prohibitions on being involved with policy or program development, representing Health Canada at external events (e.g., conferences, speaking engagements, workshops), and dealing with external parties to Health Canada (e.g., regulatory affairs professionals from pharmaceutical companies or their legal counsel).

17. In the interests of expediting the decision-making process, the Applicant indicated that he was able to accept all but two of the posed conditions – not being involved with policy or program development and not dealing with external parties to Health Canada. In subsequent communications with Mr. St-Amour’s superior, Michelle Cornell, the prohibition on dealing with external parties was amended to “external to the federal public service”.

18. However, inexplicably, the stricter conditions put forward in the April 13 email were soon removed, and it was decided, in meetings between the Applicant’s managers and the PSC, that only a leave without pay option would be offered to the Applicant. The Applicant was not included in these meetings and had no opportunity to respond to the positions advanced at these meetings. In particular, the Applicant had no opportunity to respond to the position allegedly taken by his own managers, that the conditions outlined in the April 13 email could not be accommodated within the duties of the Applicant.

19. No detailed explanation or justification for the change to a blanket leave without pay condition was offered to the Applicant beyond the vaguely worded paragraph from the Decision reproduced above:

Extensive efforts were made by the PSC to explore whether permission could be granted in this case by imposing conditions to address risk factors identified (e.g., role in policy and program development, non-compliance files, interactions with external stakeholders, representing Health Canada at external events) and to avoid undue infringement on your right to seek nomination as, or to be, a candidate in a federal election. However, they would not have permitted you to continue in your current position.

20. The Decision is silent and confusing with respect to conditions and engagement in political activities prior to the nomination process. The PSC provided the conditions for this critical step of the electoral process by phone, only when the applicant sought clarification in early May of 2023. The PSC then indicated that the applicant would be on leave without pay starting on the day that he undertook any political activities in support of his nomination.

21. In the Request submitted by the Applicant on March 14, the Applicant's direct supervisor took the position that the Applicant's proposed political activities posed no risk of perceived political partiality "before the election period" and the Applicant's Deputy Minister took the position that "any perceptions of conflict of interest" could be avoided through a "reintegration plan" after the election.

22. Following the Decision, the Applicant spent several weeks trying to clarify the scope of the conditions imposed – specifically what type of public notice of his nomination would be required to trigger the leave without pay period and what type of political activities he could engage in without triggering the leave without pay period. After eventually determining that the conditions left him no alternative to

taking a leave without pay as soon as he became nominated, he refused the conditions imposed by the Decision on May 10, 2023, and decided to commence this judicial review.

The Statutory Scheme

23. Part 7 of the *PSEA* regulates “political activities” of public servants and provides a carefully considered attempt by Parliament to balance “the right of employees to engage in political activities while maintaining the principle of political impartiality in the public service” (section 112).
24. Subsection 114(1) provides that an employee must seek permission from the PSC to seek nomination as a candidate in an election, and subsection 114(2) provides that permission is also required for an employee to be a candidate in the period before an election. Significantly, subsection 114(3) puts in place a much more stringent requirement for an employee to be a candidate during an election period. Here the employee must obtain a leave of absence without pay from the PSC.
25. The careful balancing at work in the *PSEA* is clearly evident in the distinction between subsections (1) and (2), on the one hand, and subsection (3), on the other hand. A leave without pay is quite an onerous requirement for most Canadians, and in order for a balancing of the democratic right to stand for office set out in section 112 to have any viability, the leave without pay requirement must remain minimally intrusive. An election period is generally around 5 weeks, and thus a public servant can expect to be without pay for only a short period of time in most situations.
26. Subsections 114(4) and (5) both clarify that the relevant test for PSC decisions under subsection (1), (2), and (3) is the maintenance of political impartiality. There can be no real or perceived impairment of political impartiality in order for the PSC to grant the requisite permission.

27. Subsection 114(6) lists various factors that the PSC can take into account in making its decision, factors including “the nature of the election, the nature of the employee’s duties and the level and visibility of the employee’s position.”
28. Subsection 114(7) is critical to the present Application, for it gives the PSC the authority to impose a leave without pay requirement “for the period or any part of the period in which [an employee] seeks nomination as a candidate, or for the period or any part of the period in which he or she is a candidate before the election period.”
29. As discussed above, the leave without pay requirement is reserved for candidates during the election period under the scheme set out in subsections (1), (2), and (3), and this distinction is important to achieving a meaningful balance between the important right of democratic participation and the need for impartiality in the public service.
30. Subsection (7) breaks down this distinction, with the result that an employee could be left without pay for a period much longer than the typical 5-week election period.
31. It is no exaggeration to say that subsection (7) is the most draconian provision in the Part 7 “political activities” regime. This is not to say that the imposition of a leave without pay for an extended period of time could never be justified; rather, it is to say that the implications of a subsection (7) decision are very far reaching, and thus resort to this provision must be measured and carefully justified.
32. The Decision activates subsection (7) by rendering the entire period of the Applicant’s candidacy, from the moment that his nomination is made public to a date 6 months after the election, subject to a leave without pay. As discussed above, with the political timelines applicable in 2023, a period of up to three years

leave without pay could result from the PSC's exercise of subsection (7) discretion in the Decision.

The Legal Defects of the Decision

33. The Decision is defective because it is unreasonable and procedurally unfair.
34. The Decision fails to provide any meaningful justification and instead relies on vague generalities.
35. Furthermore, given that the rights of democratic participation are enshrined in section 3 of the *Canadian Charter of Rights and Freedoms*, and are expressly invoked in section 112 of the *PSEA* as a principle governing the exercise of PSC discretion under section 114, the importance of the rights in question to the Applicant cannot be overstated. Detailed justification must be provided to justify the exercise of statutory power in the Decision.
36. Under the scheme of section 114, the PSC was required to articulate and justify the exact manner in which the Applicant's political impartiality in performing his actual duties could either be impaired or perceived to be impaired. The requisite articulation and justification was not provided.
37. The need for detailed justification, so clearly missing from the Decision, is further heightened by the recognition of the unique place of subsection 114(7) in the statutory scheme: any exercise of this most draconian provision requires a heightened level of justification.
38. Further, the gross discrepancy between the 2019 Decision and the Decision, unaddressed and unjustified, renders the reasonableness of the latter decision highly suspect. Additionally, the fact that the Applicant's superiors endorsed his

bid on the Request Form as posing no significant and irremediable risk renders the PSC's final determination suspect.

39. The procedures followed by the PSC in reaching the Decision were unfair. The Applicant was given an opportunity to address concerns to the frontline analyst Mr. St-Amour, but did not address the actual decision-makers higher in the PSC organization. Indeed, the Applicant was never certain who made the decision.
40. Furthermore, and more troubling, there were meetings between the Applicant's supervisors and members of the PSC that the Applicant was not party to, and during which matters were addressed that he was given no opportunity to respond to. Critically, it was during these meetings that the PSC's original view that conditions could remediate any risk posed by the Applicant's proposed activities was replaced by the blanket imposition of a leave without pay for the entire period post nomination.
41. In other words, the draconian subsection (7) option was activated by the PSC based on discussions with the Applicant's managers behind closed doors, and the Applicant had no opportunity to be heard on the reasoning for the invocation of this option (and indeed, still has no knowledge of the precise reasoning behind the choice due to the lack of reasoned justification).
42. The entire procedure followed by the PSC in reaching the decision was chaotic, informal, and *ad hoc*. Such a process is inappropriate where critical individual rights are in play.
43. The PSC was tasked with reaching a decision by Parliament. Measured and transparent consultations with the Applicant and the Applicant's Department were appropriate, but such consultations needed to be formalized and regularized to preserve the fundamentals of procedural fairness and also to avoid creating a situation where a reasonable apprehension of bias could be formed. The uncertain

and opaque involvement of the Applicant's Department in the process creates such an apprehension, and also raises uncertainty as to who made the actual decision affecting the Applicant's future.

44. The *PSEA* expressly gives the Commission the power to make regulations governing procedures for Part 7 (sections 22(1) and 22(2)(h)), but to date no regulations appear to have been enacted.

Supporting Materials

45. The application will be supported by the following materials:

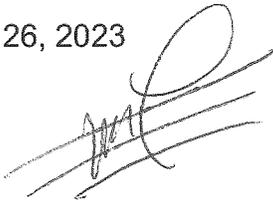
- a. The Decision under review;
- b. The 2019 Decision;
- c. The Request Form used by the Applicant to initiate the PSC decision-making process in 2023;
- d. Email correspondence between the Applicant and staff at the PSC before and after the Decision was rendered;
- e. Affidavit of the Applicant; and
- f. Such further and other evidence as this Honourable Court may permit.

Request for Material from the PSC

46. Pursuant to Rule 317 of the *Federal Courts Rules*, the Applicant requests that the PSC send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the PSC to the Applicant and to the Registry:

- a. All internal PSC notes, memorandums, opinions, emails, letters, transcripts relevant to this Application; and
- b. All notes, memorandums, opinions, emails, letters, transcripts sent to or received from Health Canada staff relevant to this Application.

May 26, 2023



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