



The Commissioner
for Public Appointments
Northern Ireland

Complaint investigation and report on a public appointment process for the
Northern Ireland Fire and Rescue Service

Department of Health

July 2018

Glossary of Terms

- Code of Practice for Ministerial Public Appointments in Northern Ireland - the Code
- Department of Health - the Department
- Northern Ireland Fire and Rescue Service - the NIFRS

INTRODUCTION

1. In October 2017 Mr John O'Neill (the complainant) applied for a non-executive lay member post on the Board of the Northern Ireland Fire and Rescue Service (the NIFRS). The recruitment process was administered by the Department of Health (the Department).
2. The complainant having made his application and having been interviewed by the selection panel was found suitable for appointment to the NIFRS Board. His name was accordingly included on the list of applicants suitable for appointment and submitted to the Permanent Secretary for consideration. The complainant was not selected for appointment.
3. The complainant submitted a complaint to me as Commissioner on 18th May 2018. I agreed to investigate the matter.

NATURE OF COMPLAINT

4. The complaint submitted to me is summarised in two elements below.
 - I. The criteria/considerations upon which the Permanent Secretary made his decision do not relate to the four essential criteria set out in the Information Pack.
 - II. The complainant asserts that the Department has not provided meaningful feedback for the reasons for his non-appointment.

SUMMARY OF FINDINGS AND OBSERVATIONS

5. At this stage I draw attention to my role as Commissioner for Public Appointments for Northern Ireland which is to regulate, monitor, report and advise on the way in which appointments are made to the Boards of public bodies in Northern Ireland. I may also investigate complaints by an applicant dissatisfied with an appointment process. Decision-making on whether there has been unlawful discrimination in this or any other public appointments process lies outside my jurisdiction. My findings in this report do not, therefore, constitute a decision on whether there has or has not been unlawful discrimination at any stage throughout the process under scrutiny.
6. In this public appointment process a number of the reasons recorded by the Permanent Secretary for selecting the appointees were different and unrelated to the published criteria for the appointments. I find that the Permanent Secretary introduced new criteria unrelated to the published criteria in order to make his selection for appointment. When the Permanent Secretary adopted this approach the departmental Public Appointments Unit failed to advise him of the potential adverse consequences. These actions are a clear breach of the Code (and constituted a failure to follow the Department's guidance). I uphold this element of the complaint.
7. I further find that there was no proper rationale or correct justification for the basis on which the Permanent Secretary selected the successful applicants in preference to the complainant.

Consequently the complainant cannot be assured that there were rational and justifiable grounds for his non-appointment.

8. There is a great onus on the Department and the appointing Permanent Secretary to ensure that these appointments are made fully in accordance with the Code in the most transparent and justifiable manner. This is particularly so in the current political circumstances. There were substantive breaches of the Code in this appointment process accompanied by a lack of proper rationale and justifiable grounds for the appointments. This leaves the way open for the fair minded and informed observer to form a perception that some form of bias may have motivated the decision making. The outcome of this appointment process, therefore, created a situation wherein perceptions of unfairness, bias or discrimination could arise. These perceptions are exacerbated when there is existing significant under-representation of any section 75 groups on the public board being recruited to.
9. The purpose of the Code is to instil public confidence in the transparency and fairness of our public appointment system. These breaches and failures adversely affected the complainant. Breaches of the Code in such circumstances have the potential to undermine public confidence in both these particular appointments and the public appointments system more generally.
10. Despite the fact that a skills audit was undertaken at the outset of the process the panel recorded additional candidate attributes as potentially beneficial to the NIFRS Board. Some of these attributes were used as the basis for appointment. This suggests that a more detailed skills audit could have been carried out at the beginning of the recruitment process. A skills audit exercise can be rendered inadequate, however, if a Department has an overly formulaic approach to criteria setting. I recommend that the Department reassesses its approach to the skills audit exercise and criteria setting with a view to ensuring they take full account of the skills and experience required for the Board appointments.
11. The Department in providing feedback to the complainant on his non-appointment reiterated the reasons cited by the Permanent Secretary for appointing the successful candidates. My findings above show that these reasons were lacking in proper and correct rationale and justification and could not, therefore, constitute meaningful feedback to the complainant. I uphold this element of the complaint.
12. I wish to stress that this report does not reflect negatively in any way on those individuals appointed in the competition under scrutiny. All the evidence shows they came to the process in good faith and conducted themselves correctly throughout.

THE APPOINTMENT PROCESS

13. Under the Northern Ireland Fire and Rescue Services (Northern Ireland) Order 2006 the NIFRS Board shall consist of a Chairman and ten other members appointed by the Department.
14. In January 2017 the then Minister of the Department approved the initiation of a recruitment competition to fill four vacant posts on the Board of the NIFRS (one district councillor member, two lay member and one trade union member), the Minister requested that those applicants

found suitable for appointment be presented to her in an unranked list at the end of the process.

15. In March 2017 the office of the Minister of Health was suspended.
16. The Department proceeded with the appointment process and in September 2017 formed a selection panel comprising a Department of Health official, a representative of the NIFRS and an Independent Assessor provided by CPA NI. The vacancies were advertised in October 2017.
17. All applications were assessed against the following four essential criteria.
 - i. **Strategic Thinking** – Drawing on either your working life or personal life provide specific examples that demonstrated an understanding of collective decisions making and good governance practice within an organization within the voluntary, public or private sector. Provide clear evidence of a scrutiny and oversight role of business objectives to achieve successful outcomes.
 - ii. **Corporate Governance and Accountability** - Drawing on either your working life or personal life provide an example that demonstrates a commitment to or understanding of corporate governance and accountability. Provide a clear example to demonstrate your knowledge and understanding of the elements within good corporate governance practice including confidentiality and how you have been involved in ensuring this within an organization in the voluntary, public or private sector.
 - iii. **Stakeholder Engagement** - Drawing on either your working life or personal life provide specific examples of how you have established effective relationships inside and outside organisations or in partnership within different organisations.
 - iv. **Self-Awareness and Personal Contribution** - Drawing on either your working life or personal life provide an example of how you have managed conflict to reach consensus and ensured that your view has been heard. Demonstrate by way of example how you have used right judgment and impartiality to maintain your position on an issue which has divided opinion.
18. The original person specification included Business Sense as one of the essential criteria. Early on in the process this criterion was substituted with Strategic Thinking. Applicants were subsequently assessed using Strategic Thinking as a criterion for appointment. However, when the list of applicants suitable for appointment was presented to the Permanent Secretary as an annex to a submission, the Business Sense criterion was incorrectly included in the body of the submission. This error had no apparent effect on the outcome.
19. The selection panel conducted an initial sift of all applications against the essential criteria for appointment. Those applicants who met the required standard were invited for interview.
20. Thirteen applicants were presented to the DoH Permanent Secretary, in a submission from the Public Appointments Unit dated 21st February 2018, as suitable for appointment to the non-executive lay member positions. The Permanent Secretary selected two of these for appointment as lay members of the NIFRS Board and recorded reasons for the decision. From the same submission an individual was selected from a group of three local council nominees for appointment to the Board (also with recorded reasons). One applicant was found to be suitable as the Trade Union representative and was selected for appointment.

21. The complainant was informed that the Permanent Secretary had made the appointments, that he had not been selected and that his name would be placed on a reserve list. The complainant requested feedback on his performance throughout the process. This was provided by the Department in the form of the selection panel's documentation from his interview which included his scores.
22. On 23rd April 2018 the Department provided the complainant with information regarding the criteria/considerations applied by the Permanent Secretary in making the appointment decision. The response stated that, *'For this public appointment competition I can advise that the decision regarding those appointed to the Lay member position focused on those candidates with a wide range of experience; previous Non Executive roles; corporate governance experience; and a legal background which could be an asset to the NIFRS Board'*.
23. The complainant submitted a formal complaint to the Department on 24th April 2018. The complaint to the Department is summarised by me as follows.
 - i. The apparent reliance of the person/s making the final selections on 'a wide range of experience' in a situation where candidates were not required to detail their experience other than by way of demonstrating certain competencies which does not necessarily involve detailing all such relevant experience.
 - ii. The apparent reliance of the person/s making the final selections on 'previous Non-Executive roles' in a situation where candidates were not required to detail such roles other than by way of demonstrating certain competencies which does not necessarily involve detailing all such previous roles.
 - iii. The apparent reliance of the person/s making the final selections on 'corporate governance experience' in a situation where candidates were not required to detail their experience other than by way of demonstrating certain competencies which does not necessarily involve detailing all such relevant experience.
 - iv. The apparent reliance of the person/s making the final selections on 'a legal background which could be an asset to the NIFRS Board' in a situation where candidates were not required to detail any such background other than by way of demonstrating certain competencies which does not necessarily involve detailing any such background.
 - v. The fact that the four 'criteria' applied as at i. – iv. above were not referred to as criteria, whether essential or desirable, either in the information pack provided or otherwise.
24. The complainant subsequently submitted a further request to the Department. Stating his belief that he had not been provided with clear and cogent reasons as to why he had not been appointed, he requested this specific information preferably by reference to the formal criteria set out in the information pack.

25. The complainant submitted an additional complaint (part vi. of his complaint) on 11th May 2018 to the Department about the failure to provide clear and meaningful feedback about his non-appointment. The Department responded to the complainant on 14th and 15th May 2018.
26. The complainant was dissatisfied with the response and after requesting further information from the Department was informed by them that all relevant and available information had been provided. The complainant then submitted the complaint to the Commissioner.

SCOPE OF THE INVESTIGATION

27. The investigation involved a detailed review of the following documentation.
- The information pack for the competition.
 - The appointment plan for the competition.
 - All documentation relating to the assessment of each applicant who passed the interview stage.
 - All communication with the complainant.
 - The submission requesting the initiation of the competition and the Minister's response.
 - The submission to the Permanent Secretary presenting the applicant summaries of those applicants found suitable for appointment.
 - The record of the Permanent Secretary's decision.
28. As part of the investigation a list of questions was put to the Department of Health Permanent Secretary, the Head of the Public Appointments Unit and each member of the selection panel. The responses to these questions were considered by the Commissioner in determining the investigation findings.

EACH ELEMENT OF THE COMPLAINT IS DEALT WITH BELOW

(Parts i - vi of the complaint to the Department are contained within elements I and II below)

Element I

The criteria/considerations upon which the Permanent Secretary made his decision do not relate to the four essential criteria set out in the Information Pack.

The appointment decisions and related documentation

29. In January 2017 the then Minister of Health requested an unranked list of applicants found suitable for appointment. The Minister was in receipt of the departmental guidance when making this decision. Following the decision by the then Minister to have names presented in an unranked list, the Permanent Secretary proceeded with this approach.
30. The Department provided the Permanent Secretary with an applicant summary for each applicant in an alphabetical list as an annex to the departmental submission of 21st February 2018. In addition in the main body of the submission the scores were provided against the alphabetically listed names. The applicant scores are not provided to Ministers who have requested an unranked list and as such their provision in this submission to the Permanent Secretary is a significant departure from established procedure. The Department has stated

that it considers the information provided to the Permanent Secretary to be an unranked list. I do not accept the Department's contention that a list of applicants with their respective total scores against their names is an unranked list merely because applicants' names are not listed in order of their scores. There were only thirteen applicants on this list and the reader could readily see how they performed relative to each other. In this appointment process the Permanent Secretary was presented with what amounted to a ranked list but he proceeded to appoint without following the selection panel scoring, in other words, as if he had been presented with an unranked list. This departure from previous procedure has served to complicate and make more stark the issues raised in this complaint.

31. The Permanent Secretary was also provided with the departmental guidance on the use of ranked and unranked lists in a public appointment recruitment process. The aim of the guidance is to help Ministers make evidence based appointment decisions which do not take account of new criteria. The departmental submission recommended that the Permanent Secretary make appointments, taking into account this guidance.

32. The guidance emphasises that:

'It is important that the Minister makes his or her decision only on the basis of the criteria agreed and advertised for the competition. It is inappropriate to introduce additional criteria at this stage in the process and to do so could lead to successful challenge.'

The reasons for appointment recorded by the Permanent Secretary

33. The Permanent Secretary selected two applicants for appointment as lay members (and additionally one for the local councillor position and one for the Trade Union representative position). One of the two lay member applicants was appointed on the basis of their *'wide range of experience and previous NED roles'*. The recorded reason for appointing the other applicant was *'corporate governance experience and legal background could be an asset to NIFRS Board'*.

34. Some of these reasons recorded by the Permanent Secretary for selecting the appointees were different and unrelated to the published criteria for the appointments. This action by the Permanent Secretary is a clear breach of the Code and constitutes a failure to follow the departmental guidance. And as the guidance warns such action leaves the way open for *'successful challenge'*.

35. In the submission of 21st February 2018 the Permanent Secretary was presented with an applicant summary for each applicant. The purpose of the applicant summary is to provide the Minister, or as in this case the Permanent Secretary, with an objective analysis of each applicant's skills and experience based on the information provided by each applicant during the appointment round.

36. The Permanent Secretary made the appointment decision based on the information provided by the selection panel to him in the applicant summaries (with one important exception - see paragraph 39 below). The applicant summaries included a paragraph detailing the applicants' background and how they had performed at interview, and also a comment on *'what skills*

and knowledge will the individual bring to the role', all of which was lifted almost verbatim from the selection panel's notes. The summaries contained information (also from the selection panel's notes) which was extraneous to the published criteria about some applicants' skills and experience. In addition, the applicant summaries contained a brief pen picture, a line covering conflicts of interest and time commitment and details of other public appointments held.

37. I make a number of observations below about the reasons upon which the Permanent Secretary based his decision to appoint the two successful lay applicants.

One successful applicant appointed on the basis of a 'wide range of experience and previous NED (non-executive director) roles':

38. There was no evidence presented to suggest that the Permanent Secretary in making his decision evaluated the breadth of the successful applicant's experience against any other applicant and particularly against the complainant's experience. Looking at the information provided in the applicant summaries I find no grounds for concluding that the complainant had less wide experience than the appointed applicant. Even if one assumes that the wide experience of the successful applicant was related to the agreed criteria - and this is not at all clear - the term was too vague to be used as a selection criterion. It was also unjustified to use it as the basis for selecting the successful applicant because, based on the information in the applicant summary, the complainant could also equally be said to have had a wide range of experience. In addition the complainant makes a valid criticism when he states that candidates were not required to detail their experience other than by way of demonstrating certain competencies which does not necessarily involve detailing all such relevant experience.

39. The criterion of 'previous NED roles' as a second basis for selection of this applicant was not only unrelated to the published criteria there was in fact no evidence presented in the applicant summary relating to the successful applicant's previous non-executive director roles. This information was not sought from applicants. In responding to a request for information the Permanent Secretary informed this investigation that he knew the successful applicant professionally although not particularly well. This professional familiarity may explain the introduction by the Permanent Secretary of this new information not provided in the applicant summary. In citing the successful applicant's previous non-executive director roles as the basis for selection the Permanent Secretary introduced a wholly new selection criterion for which there was neither justification nor evidence. Applicants were unaware of it and the skills audit which had been carried out at the outset of the process made no reference to the need for previous non-executive director experience. Indeed the emphasis on previous non-executive Board experience runs counter to the Department's avowed policy of increasing diversity and bringing in new people to serve on our public boards.

One successful applicant selected on the basis that their 'corporate governance experience and legal background could be an asset to NIFRS Board':

40. The applicant summary for the complainant did not contain a reference to his performance against either the corporate governance or the strategic direction criteria. This was despite

the fact that the complainant had been assessed as being clearly acceptable against both criteria. Based on examination of the descriptors used in the applicant summaries of other applicants who had the same score as the complainant for these criteria, the descriptor for the complainant's performance against these two criteria could have read any of the following: clearly acceptable; sound understanding [of criterion]; very good; strong; exceeded requirements. Failure to include a reference to these two published criteria was a significant omission by the selection panel when drawing up the complainant's applicant summary. However, the Permanent Secretary was also provided with the applicants' total scores from which it was manifestly clear that the complainant had performed in the upper range of scores against the published criteria. If the Permanent Secretary wished to focus on the corporate governance criterion as a basis for appointment, the omission of this criterion from the applicant summary of one of the top candidates ought to have prompted a review of that summary. A review of the selection panel interview documentation would have shown there was no rationale for preferring the successful applicant over the complainant on the grounds of performance against the corporate governance criterion.

41. The reference to the successful applicant's legal background as a basis for their selection was unrelated to the published criteria. In citing this reason as the basis for his selection decision the Permanent Secretary was introducing a wholly new criterion of which the applicants were unaware. The skills audit which had been carried out at the outset of the process made no reference to the need for legal skills on the NIFRS Board. In addition the complainant, who was in the upper range of scores, had a similarly strong legal background. His applicant summary stated that he *"is a retired solicitor who has worked in private practice, the public sector and voluntary sectors at senior levels"* and that *"his professional legal background would add considerable value to the work of the NIFRS Board"*.

Legitimate Expectations

42. I will now look at the complainant's expectation that the final selection decision would be based solely on the published criteria. Applicants were advised throughout the information pack that the assessment process would relate only to the criteria included in the person specification and that the evidence they provide throughout the appointment process must relate only to these criteria.
- Paragraph 18 states that *'The person specification addresses the qualities, experience, background and competencies sought.'*
 - Paragraph 23 states that *'All applicants must demonstrate clearly and provide the accompanying evidence to support their application that they have the necessary skills, knowledge, experience and qualities required. They will need to show, both on the application form and at interview, how they meet the criteria.'*
 - Paragraph 44 states that *'Competence based interviewing tests candidates against the specific selection criteria for a particular appointment'*.
 - Paragraph 45 states that *'The interview is a crucial part of the appointment process and thorough preparation is essential. You can prepare by: reading and thoroughly understanding the selection criteria.'*
 - Paragraph 52 states that *'At interview, all candidates must satisfy the panel that they adequately meet all of the relevant criteria.'*

43. Applicants would therefore correctly expect that any appointment decision would be based solely on the published criteria, and that as the assessment process had focused solely on these criteria that the information provided to the Permanent Secretary would also be based on the evidence they had provided against these criteria.

Flawed Applicant Summaries

44. There is no doubt that the applicant summaries provided to the Permanent Secretary were flawed in a number of ways. They did not consistently, accurately and fairly portray how each applicant had performed against the published criteria. For some applicants one or more of the criteria were not referred to in the applicant summary. In this competition all criteria were weighted equally and the omission of certain criteria for some applicants could potentially have had a detrimental effect on the final consideration for appointment. In the complainant's case the applicant summary made no mention of his performance against the corporate governance and strategic direction criteria. This might have had a material effect on the complainant in that the omission of the corporate governance criterion in the applicant summary may have contributed to his non-appointment. On balance I tend to the view that the inclusion of this criterion in the complainant's applicant summary would not have altered the final appointment decision.
45. The panel also added information to the applicant summaries that was extraneous and unrelated to the published criteria. It may have been tempting for the panel to add in a reference to attributes of applicants unrelated to the published criteria but since the panel were aware or ought to have been aware, that these extra attributes should not be used for selection purposes their addition merely served to confuse the assessment process.

Ultimate Responsibility for Decision Making

46. The Permanent Secretary used to a large extent the extraneous information set out in the applicant summaries as the basis for his appointment of the two lay members. The Code, case law, and the departmental guidance provided to him, however, are clear and the practice well established that appointment decisions should be made only on the basis of the published criteria. Additionally his use of extraneous information was selective in that he could just as readily have used the extraneous information provided about the complainant. It is more than unfortunate that the departmental Public Appointments Unit failed at the time to advise the Permanent Secretary of the potential adverse consequences of the approach he was proposing to adopt. Similarly the applicant summaries did not serve the Permanent Secretary well. Ultimately, however, it was his responsibility to ensure his decision making was lawful and compliant with the Code (and the departmental guidance).
47. I find that the Permanent Secretary introduced new selection criteria into the appointments process and in doing so materially breached the Code. I therefore uphold this element of the complaint.
48. I further find that there was no proper rationale or correct justification for the basis on which the Permanent Secretary selected the successful applicants in preference to the complainant.

Consequently the complainant cannot be assured that there were rational and justifiable grounds for his non-appointment.

49. There is a great onus on the Department and the appointing Permanent Secretary to ensure that these appointments are made fully in accordance with the Code in the most transparent and justifiable manner. This is particularly so in the current political circumstances. There were substantive breaches of the Code in this appointment process accompanied by a lack of proper rationale and justifiable grounds for the appointments. This leaves the way open for the fair minded and informed observer to form a perception that some form of bias may have motivated the decision making. The outcome of this appointment process, therefore, created a situation wherein perceptions of unfairness, bias or discrimination could arise. These perceptions are exacerbated when there is existing significant under-representation of any section 75 group on the public board being recruited to (the Chair of the NIFRS had quite properly drawn to the attention of the Permanent Secretary at the outset that women and Catholics were significantly under-represented on the Board of NIFRS).
50. The purpose of the Code is to instil public confidence in the transparency and fairness of our public appointments system. These breaches and failures adversely affected the complainant. Breaches of the Code in such circumstances have the potential to undermine public confidence in both these particular appointments and the public appointments system more generally.

Skills audit

51. Despite the fact that a skills audit was undertaken at the outset of the process the panel recorded additional candidate attributes as potentially beneficial to the NIFRS Board. Some of these attributes were used as the basis for appointment. This suggests that a more detailed skills audit could have been carried out at the beginning of the recruitment process. A skills audit exercise can be rendered inadequate, however, if a Department has an overly formulaic approach to criteria setting. I recommend that the Department reassesses its approach to the skills audit exercise and criteria setting with a view to ensuring they take full account of the skills and experience required for the Board appointments.

Element II

The complainant asserts that the Department did not provide meaningful feedback for the reasons for his non-appointment.

52. The Department in providing feedback to the complainant on his non-appointment reiterated the reasons cited by the Permanent Secretary for appointing the successful candidates. My findings above show that these reasons were lacking in proper and correct rationale and justification and could not, therefore, constitute meaningful feedback to the complainant.
53. It follows from these previous findings that I also uphold this element of the complaint.

54. Finally, I wish to stress that this report does not reflect negatively in any way on those individuals appointed in the competition under scrutiny. All the evidence shows they came to the process in good faith and conducted themselves correctly throughout.