



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**FILES: 2007-0207, 2007-0208,  
2007-0209, 2007-0295,  
2007-0305, 2007-0307**

**OTTAWA, JULY 3, 2009**

**SUSAN AYOTTE ET AL.**

**COMPLAINANT**

**AND**

**THE DEPUTY MINISTER OF NATIONAL DEFENCE**

**RESPONDENT**

**AND**

**OTHER PARTIES**

**MATTER** Complaint of abuse of authority pursuant to paragraph 77(1)(a) and (b) of the *Public Service Employment Act*

**DECISION** The complaints are substantiated

**DECISION RENDERED BY** Francine Cabana, Member

**LANGUAGE OF DECISION** English

**INDEXED** *Ayotte et al. v. Deputy Minister of National Defence et al.*

**NEUTRAL CITATION** 2009 PSST 0021

## REASONS FOR DECISION

### INTRODUCTION

[1] The complainants, Susan Ayotte, Helen Pohl and Giovanna Druda, filed two complaints each with the Public Service Staffing Tribunal (the Tribunal). The complainants allege that the respondent, the Deputy Minister of National Defence, abused its authority and acted in bad faith when it chose a non-advertised appointment process and in its application of merit under subsection 30(2) of the *Public Service Employment Act*, S.C. 2003, c.22, ss. 12 and 13 (the *PSEA*). In addition, they believe that the respondent appointed Hope Seidman on the basis of personal favouritism to the position of Chief English Curriculum (ED-EDS-03) at the Canadian Forces Language School (the CFLS) by modifying the merit criteria to suit the appointee.

[2] Pursuant to section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-06 (the *PSST Regulations*), the Tribunal consolidated the six complaints on December 7, 2007.

### BACKGROUND

[3] On February 19, 2007, Bruno Jobin, Deputy Chief of Standards, announced during a team meeting that Ms. Seidman was going to take over the Chief English Curriculum position.

[4] On March 5, 2007, the complainants filed their first complaints with the Tribunal (nos. 2007-0100, 2007-0101 and 2007-0102) challenging the February 2007 appointment of Ms. Seidman, following a non-advertised appointment process. On April 20, 2007, the Tribunal issued a Letter Decision dismissing those complaints on the ground that no appointment or proposed appointment had been made as Ms. Seidman was performing an additional assignment as Chief English Curriculum while she continued to perform her duties as Chief Educational Technology.

[5] On April 17, 2007, Mr. Jobin, forwarded an email from Maj. Bernard Cyr, Chief of Standards, which announced that following the external non-advertised appointment process, Ms. Seidman had been appointed to the Chief English Curriculum position as

an indeterminate employee, which was effective immediately. On May 8, 2007, William-Eric Sinden, Human Resources Officer, offered Ms. Seidman the indeterminate position of Chief English Curriculum, process number 07-DND-**ENA**-MNTRL-059782, effective April 17, 2007 (emphasis added).

[6] On May 2, 2007, the complainants each filed a complaint pursuant to section 77 of the *PSEA* alleging abuse of authority in the choice of process.

[7] On June 11, 2007, a modification was made to the May 8, 2007 offer, changing the appointment process number to 07-DND-**INA**-MNTRL-063671 indicating an internal appointment (emphasis added).

[8] On June 11, 2007, a Notice of Consideration bearing process number 07-DND-INA-MNTRL-063671 (internal non-advertised process) was published on *Publiservice* indicating that Ms. Seidman was being considered for appointment, as well as indicating a change in tenure from term to indeterminate.

[9] On June 26, 2007, a Notice was issued announcing Ms. Seidman's appointment. Following this announcement, the complainants each filed another complaint on June 27, 2007, pursuant to paragraphs 77(1)(a) and (b) of the *PSEA*.

#### ISSUES

[10] The Tribunal must determine the following issues:

(i) Did the respondent conduct an internal or an external appointment process, which led to the appointment of Ms. Seidman on April 17, 2007?

(ii) Did the respondent abuse its authority by relying on insufficient material when it appointed Ms. Seidman?

(iii) Did the respondent abuse its authority by appointing Ms. Seidman based on personal favouritism?

(iv) Did the respondent abuse its authority by acting in bad faith when it chose a non-advertised appointment process?

## SUMMARY OF RELEVANT EVIDENCE

[11] Ms. Pohl has been an English Curriculum and Testing Developer (ED-EDS-02) at the CFLS since January 2000 and became an indeterminate employee in January 2003. She explained that at the end of 2003 she was acting Chief English Curriculum (ED-EDS-03), but did not specify for how long.

[12] While she was acting in the ED-EDS-03 position, she explained that she was responsible for the administrative duties, and she continued to develop the curriculum. She filed a report which was used and is still being used by the Canadian Forces. She testified that she received an excellent performance review which in her view indicated she did a very satisfactory job. Once the Chief returned, she went back to her ED-EDS-02 position.

[13] Ms. Pohl testified that in May 2006, Ms. Middleman, the Chief Educational Technology, initiated an external appointment process to find a replacement for herself because of her upcoming maternity leave. Ms. Middleman prepared the assessment tools and assessed the candidates. As a result of the external appointment process, Ms. Seidman was recruited into the public service around September 2006 for a determinate period while Ms. Middleman was on maternity leave.

[14] Ms. Pohl also testified that Ms. Seidman requested and attended management training in October and November 2006. Ms. Pohl also requested management and project management training in her 2005 Performance Review. Mr. Jobin recommended the training, however it was never provided.

[15] According to Ms. Pohl, Ms. Seidman said that she had been approached in September or October 2006 and asked if she was interested in the Chief English Curriculum position. Ms. Pohl also made reference to the Human Resources Plan sent by Mr. Jobin to all EDS-02 and LAT (Language Training) employees on December 8, 2006. In her opinion, the decision to appoint Ms. Seidman to the position was made on or before December 8, 2006 because the Human Resources Plan stated that "the EDS-03 position (268795) held by Kevin Miller will be subject to a lateral transfer for Hope Seidman (date to be determined)". She believes that Ms. Seidman has

no experience in teaching a second language, nor does she have any experience related to the field of developing curriculum for teaching a second language.

[16] On January 9, 2007, Ms. Pohl sent an email to Mr. Jobin voicing her concern with what she referred to as the deployment of Ms. Seidman from the Chief Educational Technology to Chief English Curriculum. She stated in her correspondence that the two positions “do not share the same essential qualifications and therefore such a deployment would be in contravention to the Public Service’s new definition of merit”. Ms. Pohl explained that Mr. Jobin responded to her email and indicated that since the opportunity to staff the position presented itself, “we considered the available options and chose to select from a pool that exists for staffing similar positions. Strictly speaking, it is therefore not a lateral transfer (or deployment), but an appointment”.

[17] Kevin Miller testified on behalf of the complainants. He indicated that he became the Chief of Curriculum French and English in June 2004. When the Chief Curriculum position was divided into two positions – French and English, he continued to occupy the Chief English Curriculum position. He explained that he previously held various positions including an LAT-1 where he taught French and English. He also held an LAT-02 position and in 1989 he occupied an EDS-03 position. He was supposed to assume the duties of Chief of Tests in the summer of 2006 as the incumbent planned to retire at that time. However, the Chief of Tests postponed her retirement until the summer of 2007. In early 2007, Mr. Miller requested a Special Assignment Pay Plan (SAPP) appointment. He stated that he transferred out of the position when Ms. Seidman’s appointment was announced in February 2007.

[18] Mr. Miller testified that the Chief is the section head and leads the team of curriculum developers. He also indicated that the Chief was expected to supervise and manage the team which included teachers.

[19] Mr. Miller provided a brief history of what had occurred at the CFLS with the curricula. The French and English curricula were not set up the same way and teachers and students complained. The CFLS wanted the English curriculum to be modified to put more emphasis on military content. As a result, the curriculum had to be re-done.

He explained that the differences were not in terms of language, but more so with the vocabulary.

[20] Mr. Miller explained that there is a training curriculum for each of the three language proficiency levels: A, B and C. He explained that Level A had been finalized, but that it became urgent to get on with the development of Level B. He stated that the blueprint for Level B was started around the end of 2007, however he could not provide a date nor could he provide an update as to the status of the project. As far as he knew the development of Level B had not yet started.

[21] When asked if second language teaching experience is important for the position of Chief English Curriculum, Mr. Miller referred the Tribunal to the work description in the document entitled *Position Analysis Schedule (PAS)* and referred specifically to the paragraphs concerning knowledge:

KNOWLEDGE

[...]

The incumbent must have an in-depth knowledge of the Canadian Forces Individual Training and Education System (CFITES) and a general knowledge of the components, classifications and trades within the Canadian Forces.

The job requires an in-depth knowledge of the theories and practices regarding second language teaching, including the application of various practices and methodologies related to adult learning...

[Translation]

[22] Mr. Miller also indicated that the complainants were instrumental in the modifications to the English curriculum.

[23] Mr. Jobin, a witness for the respondent, was Deputy Chief Standards at the CFLS at the time of the appointment process. He explained that he was in charge of staffing the Chief English Curriculum position and was involved in the process from beginning to end.

[24] He referred the Tribunal to an untitled document, introduced on consent of the parties, wherein the first sentence reads: "This report is submitted as an essential source of information for dealing with complaints filed with the Public Service Staffing

Tribunal with respect to this staffing process.” [Translation] This document is not dated nor is it indicated to whom it is addressed. Mr. Jobin stated that it was prepared and sent on June 10, 2007 but did not indicate to whom it was addressed.

[25] Mr. Jobin’s report refers to the fact that it was anticipated that Mr. Miller would leave his Chief English Curriculum position in the summer of 2007. When management announced its *Succession plan for the Standards Unit* [Translation] in December 2006, it was planned that Ms. Seidman would replace Mr. Miller as Chief English Curriculum by way of a lateral transfer. According to Mr. Jobin’s report, management had to revisit its decision of a lateral transfer since Ms. Seidman was employed for a determinate period and could not be deployed to an indeterminate position even if she was qualified.

[26] At the beginning of February 2007, Mr. Miller asked to be relieved of his duties as Chief English Curriculum. Faced with the demands of the priorities in the English section, management asked Ms. Seidman to perform the duties of both the Chief Educational Technology and Chief English Curriculum.

[27] Maj. Cyr, a witness for the respondent, was Chief of Standards at the time of the appointment process. He testified that when Mr. Miller left his position as Chief English Curriculum in February 2007, he asked Ms. Seidman to perform the duties of that position. He testified that management intended to appoint Ms. Seidman to the position because she was qualified. There was also talk of deploying Ms. Seidman to the position. However, he was told by Human Resources that it was not possible to do that in Ms. Seidman’s case.

[28] Maj. Cyr testified that he consulted Human Resources and was advised by Mr. Sinden and Samora Méridier, Civilian Human Resources Advisor, that Ms. Seidman could perform the tasks of both the Chief Educational Technology and the Chief English Curriculum.

[29] On February 19, 2007 during a staff meeting, Mr. Jobin announced that Ms. Seidman, who was a determinate employee since the fall of 2006, would be replacing the Chief English Curriculum effective immediately.

[30] Ms. Pohl testified that after being informed during that staff meeting that Ms. Seidman was appointed to the Chief English Curriculum, she expressed her interest to Mr. Jobin and asked for an opportunity to participate in the appointment process for the position. Ms. Druda testified that she also expressed her interest in the position to Mr. Jobin. She explained her background and indicated that she began working in 1999 as a language teacher (LAT-01). In October 2004, she accepted an indeterminate EDS-02 position in the Curriculum section.

[31] On February 27, 2007, the three complainants, who are Curriculum Developers at the EDS-02 group and level, wrote to Mr. Jobin to express their interest in the position of Chief English Curriculum. The following day Mr. Jobin asked the complainants to provide a text emphasizing their management skills in relation to the position. The deadline to submit their texts was March 7, 2007.

[32] Danielle Moffet, President of Local 10377 of the Agriculture Union of the Public Service Alliance of Canada, explained that in her capacity as Local President, she attended several meetings concerning the staffing of the position of Chief English Curriculum.

[33] On February 22, 2007, Ms. Moffet met with Maj. Cyr to discuss what was happening with the position of Chief English Curriculum. She told Maj. Cyr that she did not understand how Ms. Seidman could be transferred into Mr. Miller's position while he occupied the position. She was surprised that Ms. Seidman was performing the duties of both positions as a term employee. She also asked Maj. Cyr if there had been a request for interest sent to employees. He confirmed that no request for interest had been issued and that no one else was considered.

[34] Ms. Moffet testified that Maj. Cyr confirmed that management intended to appoint Ms. Seidman to an indeterminate position and that it would be done in the spring. According to her, he made reference to the position of Chief English Curriculum. Ms. Moffet also asked Maj. Cyr about the Statement of Merit Criteria (SMC) and explained to him that Ms. Seidman had no experience as a classroom teacher, no experience administering tests, and that she was a term employee. She stated that his



response was that Ms. Seidman “would do as we did, she will learn on the job”.  
[Translation]

[35] Maj. Cyr was asked if he remembered a meeting with Ms. Moffet regarding this selection process. He responded that he seemed to remember one meeting but could not recall what had been discussed.

[36] On February 27, 2007, Ms. Moffet questioned Mr. Jobin about Ms. Seidman’s status. She referred to an email response from Mr. Jobin dated February 28, 2007 in which he confirmed that Ms. Seidman was a term employee occupying the Chief Educational Technology position while also performing the duties of the Chief English Curriculum since February 19, 2007. He further explained that even though Ms. Seidman was the acting Chief English Curriculum, she had not officially been appointed to the position as it officially still belonged to Mr. Miller.

[37] Ms. Moffet described a discussion she had with Mr. Sinden where she discussed the possibility of assigning individuals on a rotating basis for three months each into the Chief English Curriculum position. According to her, that suggestion was refused by Mr. Sinden because if management allowed the three-month rotation for each individual, Ms. Seidman would not have had the chance to participate in that rotation before the end of her term on July 31, 2007. Ms. Moffet testified that Mr. Sinden confirmed that it was management’s intention to appoint Ms. Seidman to an indeterminate position before the end of her term.

[38] Mr. Jobin explained in his report that the issue of modifying the SMC was made subject to a preliminary consultation on February 27, 2007 with the Union National Vice-President for the ED group, Ms. Moffet, Mr. Sinden and other military supervisors of the CFLS. More specifically, Mr. Jobin’s report stated:

On that particular occasion, management explained the key demands of the position in light the English curriculum unit’s important mandate – that is, it was an opportune time to focus on project and resource management, and the next statement of merit criteria would reflect this requirement. The issue of reviewing the language teaching experience criterion was also discussed as was the importance placed upon distance learning by the CFLS; union representatives did not express any concerns regarding these issues.  
[Translation]

[39] On March 5, 2007, the complainants filed their first complaints with the Tribunal challenging the February 2007 appointment of Ms. Seidman, following a non-advertised appointment process.

[40] Mr. Jobin testified that, initially, management was going to proceed with an internal non-advertised appointment process. However, when in March 2007, the complainants manifested their interest in the Chief English Curriculum position, Mr. Sinden recommended that the appointment process be identified as an external non-advertised appointment process since Ms. Seidman had come from an external pool.

[41] On March 8, 2007, Mr. Jobin sent a notice to the three complainants specifying that they were participating in a non-advertised appointment process to fill the position of Chief English Curriculum. The notice included a SMC. A later email was sent indicating that an interview would be conducted.

[42] Mr. Jobin sent an email to the complainants on March 14, 2007 about the interview and the text the complainants had to submit :

1. Further to the enclosed e-mail, the next step of the process consists of an oral interview with the Evaluating Board. Date, place and duration of the interview will be specified later. The purpose of the interview is to evaluate your candidacy in regard to the following essential qualifications mentioned in the Statement of Merit Criteria:
  - a. Ability to manage
  - b. Ability to convince orally
  - c. Judgement
  - d. Effective interpersonal relationships
2. For clarification purposes, be informed that the 500 word text you were asked to provide will not be rated. As explained in my email dated 5 Mar 07 at 14:24, the precise purpose of submitting a text was to support your individual application. A format 'test' is scheduled to evaluate your Ability to convince by writing. This test might take place the same day of your oral interview and the theme will then be specified.
3. Thank you for your participation.

[43] On March 30, 2007, Mr. Sinden informed Ms. Pohl by email that the appointment process number was 07-DND-ENA-MNTRL-059782, indicating that it was an external

non-advertised appointment process. Ms. Pohl testified that she was not aware that she was participating in an external appointment process until she received the email.

[44] Mr. Jobin testified that an external non-advertised process was used because it provided management with the possibility of recruiting individuals outside of the public service. They had four or five individuals in mind from Concordia University and from the previous appointment process in the fall of 2005. He stated that management then decided not to go outside of the public service since there were four candidates from inside the public service. He indicated that the process should have been an internal one.

[45] On April 2, 2007, the day of the interviews, Ms. Druda and Ms. Ayotte withdrew their candidacy from the appointment process. Ms. Druda testified that she felt the process was not real, was unfair and was not transparent. She withdrew from the process before she was interviewed.

[46] Mr. Jobin indicated that Ms. Pohl and Ms. Seidman were interviewed on April 2, 2007. He testified that the interview served to assess both candidates' ability to manage. Mr. Jobin referred to Ms. Seidman's Oral Interview Evaluation Grid and explained that seven questions were asked with respect to the "ability to manage" and that in order to pass a candidate had to provide four good answers out of seven. Ms. Seidman provided five good answers. He testified that the "other skills and qualities" were not assessed as they were deemed not to apply because Ms. Seidman had already been assessed in the appointment process of June 2006 for the Chief Educational Technology position.

[47] On April 3, 2007, Ms. Pohl was informed by Mr. Jobin that she did not meet the essential qualification "ability to manage", which was assessed during the interview. She was therefore eliminated from the appointment process.

[48] On April 3, 2007, the complainants' representative at the time sent an email to Mr. Sinden requesting information in relation to their complaints filed on March 5, 2007 concerning the February 2007 appointment. He was informed by Mr. Sinden that Ms. Seidman had simply assumed the role of Chief English Curriculum on a temporary

basis since February 19, 2007. He indicated that an appointment had not been made and that it was simply an additional assignment.

[49] On April 18, 2007, Mr. Jobin sent Ms. Druda a copy of an organizational chart dated the same day. Ms. Druda pointed out in her testimony that Ms. Seidman's name was included on that chart as Chief English Curriculum.

[50] Ms. Pohl stated that on June 12, 2007 she was made aware by Ms. Mérizier that the appointment process had a new process number: 07-DND-INA-MNTRL-063671, and that it was now an internal non-advertised appointment process. Ms. Mérizier's email is as follows: "As discussed over the phone [a] few minutes ago, because Ms. Seidman was already an internal employee the staffing process has to be an internal not an external has (*sic*) it was used for the appointment".

[51] Ms. Pohl stated that there was no urgency to staff the Chief English Curriculum position as indicated in the rationale for using a non-advertised process. In support of this she mentioned that to this date no work on the curriculum for Level B had begun.

[52] Ms. Druda testified that she believed that Mr. Jobin showed personal favouritism toward Ms. Seidman because he was always mentoring her. She indicated that the respondent provided Ms. Seidman with a two-week long management training course when the training had been denied to her in the past. In her opinion, the merit criteria had been modified to suit Ms. Seidman while the work description remained the same.

[53] Ms. Moffet referred to the 2005 SMC which was used to staff the Chief French Curriculum position, which is the same position as the Chief English Curriculum but for the French component. She also referred to the 2008 SMC which was used to staff the Chief English Curriculum position. She compared both to the 2007 SMC and indicated that the essential qualifications on the 2007 SMC had been modified to favour the appointee. More specifically, the language requirement on the 2005 SMC was BBB/PPP as opposed to BBB/BBB on the 2007 SMC. Furthermore, the teaching experience was considered an essential qualification on the 2005 SMC, whereas it was only considered as an asset on the 2007 SMC.

[54] Ms. Pohl also testified that Ms. Seidman received preferential treatment because she was granted management training while her own requests for training in that area had been denied. In her opinion, Ms. Seidman does not have any experience relating to the duties of the position and the merit criteria were modified to suit Ms. Seidman.

[55] Maj. Cyr testified that Ms. Seidman obtained management training while she occupied the Chief Education Technology position, but that she would have been trained for the Chief English Curriculum position.

[56] Ms. Druda spoke on the confusion surrounding the steps that were taken to appoint Ms. Seidman to the position. She stated that Ms. Seidman was appointed for the second time on June 26, 2007 and that the Notification of Consideration issued on June 11, 2007 had a change in tenure from term to indeterminate.

[57] She further stated that the complainants had asked many questions to which they did not always receive answers. One example which was given by Ms. Druda was when she had asked Ms. Mézizier in an email dated June 20, 2007 why the language profile for the position was different from the BBB/BBB previously required in the SMC sent to her and the other complainants on March 8, 2007. Ms. Mézizier replied to her email on July 12, 2007 stating:

Most of the questions were answered during a conference call with you (*sic*) Union local representative in the presence of Major Cyr in June and also during a meeting with two of (*sic*) colleagues Mrs. Pohl and Ayotte on June 26<sup>th</sup>. Furthermore, you already fill (*sic*) a complaint related to this appointment before the Public Service Staffing Tribunal, I strongly recommend to let the Tribunal takes (*sic*) over this matter.

[58] Ms. Druda indicated that the complainants had also filed grievances with respect to Ms. Seidman's appointment and asked for a fair and transparent process.

[59] Mr. Jobin testified that an error had been made on the 2007 SMC for the external non-advertised appointment process, which required a linguistic profile of BBB/BBB. An amendment was made on April 3, 2007 to reflect the correct linguistic profile of PPP/BBB, which Ms. Seidman possessed in June 2006.

[60] With respect to the SMC for the Chief English Curriculum, Maj. Cyr testified that the situation had changed; a project manager for English curriculum was needed and it

was determined that being a second language teacher was to be an asset as opposed to an essential qualification. He indicated that he had discussed the issue with Lt. Col. Houde. It was decided that they would take a new approach with respect to the English curriculum. He explained that the important abilities necessary for the position of Chief English Curriculum were project management, management skills, and the ability to develop curriculum. Experience teaching a second language was considered to be an asset.

[61] When asked to talk about the appointment process, Maj. Cyr testified that he did not know the details as he was not involved in the process but claimed that Ms. Seidman met the essential qualifications for the position. He confirmed that management wanted her in the position because she was found qualified in another appointment process. According to him, she occupied a similar position at the same group and level (EDS-03). He explained that if she had not met the requirements for that position, they would not have asked her to perform the duties of the Chief English Curriculum.

#### ARGUMENTS OF THE PARTIES

##### A) COMPLAINANTS' ARGUMENTS

[62] The complainants submit that the respondent was not transparent in its process. From February 19, 2007 when the verbal announcement of Ms. Seidman's appointment was made, the information received by the complainants was always provided following questions, either by email or in meetings. They submit that the respondent was never forthcoming with information in relation to the position of Chief English Curriculum. The information from management was very limited and piecemeal, and not provided in a timely manner. They maintain that the respondent was always reacting to actions initiated by the complainants, whether it was grievances, complaints or questions asked at Union Management Committee meetings.

[63] In support of their argument, the complainants refer to the PSC's *Guide to Implementing the Choice of Appointment Process Policy* more specifically to the

paragraph under the heading “Why must the choice of process be consistent with the guiding values?”

... The choice of an appointment process has an impact on access. It is important to ensure that the choice provides a reasonable opportunity to apply and be considered for public service employment. As well, respecting the value of transparency ensures that information about decisions, policies and practices is communicated in an open and timely manner...

[64] They also refer to the *Guidelines Non-advertised Appointment Rationale*, specifically the following points:

- The requirement for a written rationale ensures the manager's choice of a non-advertised process is well documented...
- Fairness means that the choice of process will be made objectively, free from political and personal favouritism... How can management demonstrate that there was no political influence or personal favouritism?
- Transparency means that the information about the appointment process will be communicated in an open and timely manner...
- There must be evidence that its use in the particular circumstance will contribute more effectively or efficiently towards the attainment of an operational requirement recognized in the organisation's HR plan... appointment of a person in an emergency...

[65] The complainants submit that Mr. Jobin's appointment rationale, dated March 2007, mentions that the organization had an urgent need to staff the position. However, the complainants submit that the respondent did not prove that there was any urgency. According to the complainants, the respondent simply identified needs that were to be acted upon. In addition, when questioned, Maj. Cyr talked about a priority or priorities but never mentioned the term emergency or urgency with respect to the Level B project.

[66] In addition, the complainants maintain that Mr. Miller's testimony demonstrated that the project for Level B was still not completed, which was also corroborated by other witnesses and confirmed by Maj. Cyr. Ms. Pohl's testimony also indicated that the project was on hold until the new Chief English Curriculum assumes his or her duties.

[67] The complainants submit that the appointment of Ms. Seidman was predetermined and that the respondent did not demonstrate that the choice to appoint Ms. Seidman was made objectively. They refer to Maj. Cyr's testimony that management wanted Ms. Seidman to occupy the Chief English Curriculum position and if, to make that happen, it was necessary to proceed by way of a non-advertised process, they should do so.

[68] The complainants note that Ms. Moffet testified that several discussions took place between management and the union to try to understand the employer's justification, but the respondent was never able to demonstrate that there was no personal favouritism in its decision to appoint Ms. Seidman.

[69] The complainants distinguish the Tribunal's decision in *Chaves v. Commissioner of the Correctional Service of Canada et al.*, [2008] PSST 0003, with the present case. In the *Chaves* decision, the Tribunal found that the decision to choose a non-advertised appointment process was in fact based on urgent operational and organizational needs and that immediate action was required. However, in the present case, the respondent did not demonstrate that an urgent need existed or that its operational and organizational needs justified the choice of a non-advertised process since the Level B project had still not begun at the time of the hearing.

[70] The complainants argue that the respondent did not make this appointment in accordance with merit because not all merit criteria were assessed in this appointment process.

[71] The respondent introduced the Oral Interview Evaluation Grid for Ms. Seidman. The questions pertained to management and assessed, to a certain degree, her ability to manage. The respondent did not provide any other document, such as a test, relating to the assessment of the selected candidate other than the oral interview. The complainants question whether Ms. Seidman passed the test and ask what the test assessed. The only conclusion they can draw is that Ms. Seidman was not given a test other than the oral interview.



[72] The complainants understand that they have the burden of proof, but they submit that the respondent is responsible for the process. In their view, the respondent has to show that the person to be appointed meets all the essential qualifications.

[73] According to the complainants, the respondent did not show that Ms. Seidman was assessed and that she possessed all the essential qualifications. The respondent did not demonstrate that Ms. Seidman met the PPP/BBB language requirement or even the BBB/BBB requirement. The Tribunal was not provided with any evidence that Ms. Seidman has experience as a designer or a developer in the field of education or training, or has worked as an advisor to management on education or training issues. The complainants state that the respondent did not provide any evidence to demonstrate that Ms. Seidman has knowledge in theories and practices related to adult training.

[74] The complainants argue that the present case is similar to *Cameron and Maheux v. Deputy Head of Service Canada et al.*, [2008] PSST 0016. They submit that the evidence, and to a certain extent the lack of documentation, demonstrates that the respondent abused its authority by relying on insufficient material when making Ms. Seidman's appointment, making it an appointment not based on merit.

[75] The complainants submit that Ms. Seidman was pre-selected for the position and this is supported by the Human Resources Plan of December 2006.

[76] They state that Maj. Cyr's testimony also supports their allegation since he indicated that management considered Ms. Seidman to be qualified to do the work and wanted her in the position of Chief English Curriculum.

[77] The complainants submit that the merit criteria were tailored specifically to allow Ms. Seidman to be appointed to the position. They state that the Statement of Qualifications used for a staffing action, started in 2005 and completed in 2006, required: teaching English as a second language and French as a second language, experience in developing training material, knowledge in training methodology and knowledge of project management. The SMC which was used for the 2008 appointment process indicates that the essential qualifications are basically the same as those in the

2005 appointment process. The complainants believe that Ms. Seidman does not possess those qualifications. As a result, the respondent had to tailor the merit criteria to reflect her knowledge and experience which explains why the 2007 SMC for the Chief English Curriculum position at issue here is different from the previous appointment process and the subsequent appointment process.

[78] The complainants submit that the respondent tried to explain that project management was now “the way to go”, and that it was not something new since it had already been identified in the 2005 appointment process and it was still identified in the 2008 process. The complainants submit that the change in the 2007 appointment process was the sudden elimination of the experience relating to teaching and developing training material and the knowledge in training methodology.

[79] The complainants submit that the respondent tried to explain that there was a change in the way the organization was going. Maj. Cyr testified that the Chief English Curriculum was to become more of a project manager but no documentation was provided by him or by Mr. Jobin to support that contention. They both testified that there were new priorities with respect to the curriculum, but they did not justify such a drastic change in the orientation of the position. The respondent did not provide the Tribunal with a new work description which could have explained the new duties of this position.

[80] The complainants refer the Tribunal to Mr. Miller’s testimony when he explained what was required when he was in the position of Chief English Curriculum. Mr. Miller showed, with supporting documentation, that a Chief English Curriculum is a hands on supervisor that is responsible for developing material and working with the developers. He also confirmed that the work description of 2003 was still in effect when he left in 2007.

[81] As for the issue of personal favouritism, the complainants rely on *Glasgow v. Deputy Minister of Public Works and Government Services Canada et al.*, [2008] PSST 0007, and submit that the present case is based on circumstantial evidence. In their view, it is quite clear that since December 8, 2006 management wanted Ms. Seidman to become the new Chief English Curriculum. They submit that Ms. Seidman was groomed

for the position and was given preferential treatment when she received training which was denied the complainants and other employees on several occasions.

[82] The complainants argue that the appointment process was not well planned because management did not expect to have to initiate an appointment process. This would explain the errors – change in process number, internal and external process. They submit that had they and their union not intervened after the February 19, 2007 announcement, Ms. Seidman would have become an indeterminate employee at that time. Furthermore, they argue that management was so intent on having Ms. Seidman as Chief English Curriculum they rejected the idea of rotational acting appointments because Ms. Seidman's term would have ended before she would have had an opportunity to act in the position and management wanted to appoint her indeterminately before then.

#### B) RESPONDENT'S ARGUMENTS

[83] The respondent submits that the complainants have the burden to convince the Tribunal that the respondent abused its authority in the choice of a non-advertised appointment process. It states that section 33 of the *PSEA* gives the respondent the flexibility to use an advertised or a non-advertised process, and that it does not have to consider more than one person.

[84] The respondent submits that the Tribunal recognised in *Robbins v. the Deputy Head of Service Canada et al.*, [2006] PSST 0017, that the respondent has the discretion to decide which process to use, and that the fact of choosing a non-advertised process alone does not constitute abuse of authority.

[85] The respondent further argues that even though it did not have to consider more than one person, the respondent considered all three complainants in the external non-advertised process.

[86] The respondent submits that the Tribunal heard evidence from Maj. Cyr and Mr. Jobin about what they were dealing with at the time, i.e. an investigation into

problems with the English curriculum, Mr. Miller's early leave for other reasons, the unproductive past appointment processes, and urgency to advance the curriculum.

[87] The respondent states that the complainants have to provide clear and cogent evidence to demonstrate abuse of authority.

[88] In addition, the respondent submits that there is no evidence of personal favouritism. It argues that the allegations are based on rumours, perceptions, and innuendos and not based on facts.

[89] The respondent argues that the Tribunal has heard evidence from Maj. Cyr and Mr. Jobin that Human Resources was consulted at every step. It submits that advice was sought which demonstrates that the advice was followed. The respondent submits it acted in good faith and the appointment was based on merit.

[90] In support of its argument, the respondent refers the Tribunal to the assessment tools filed in evidence, more specifically the Oral Interview Evaluation Grid, which demonstrates that Ms. Seidman was assessed in order to ensure she met the merit criteria.

[91] Furthermore, the respondent submits that the complainants have not provided any evidence to demonstrate that Ms. Seidman was appointed based on factors other than merit. It referred to *Carlson-Needham and Borden v. Deputy Minister of National Defence et al.*, [2007] PSST 0038, in support of its argument. In that case, the Tribunal stated that the complainants must prove that the person was appointed because of personal favouritism based on factors other than merit. They must have convincing evidence demonstrating personal favouritism and cannot make allegations based on perception and irrelevant facts.

[92] The respondent submits that Mr. Jobin did not assess Ms. Seidman with respect to the second box in the Oral Interview Evaluation Grid because she had gone through an appointment process for a similar position (Chief Education Technology) and had been successful. The respondent is of the view that Ms. Seidman met all the essential qualifications of the Chief English Curriculum position. It states that the complainants

have not provided any evidence to demonstrate that the appointee did not meet the qualifications listed in the SMC.

[93] The respondent argues that a change in the SMC alone does not prove personal favouritism. The Tribunal must look at the circumstances presented by Maj. Cyr and Mr. Jobin to explain the reason for the change. It submits that the fact the work description was not changed should not be given much weight because the respondent does not have to use everything found in the work description when preparing the SMC. It submits that there was no need to change the work description as long as the new merit criteria were reflected in the job description.

[94] The respondent argues that errors and omissions are not demonstrative of abuse of authority. In support of its argument, the respondent refers to the Tribunal's decision in *Cannon v. Deputy Minister of Fisheries and Oceans et al.*, [2008] PSST 0021, where the Tribunal concluded that the respondent had made a minor technical error, much like in the present case. The respondent submits that the process number had to be changed but no new process was created.

[95] For all these reasons, the respondent asks the Tribunal to dismiss the complaints.

#### C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[96] The PSC provided written submissions on the concept of abuse of authority. The PSC indicated that it is not its mandate to argue whether there was abuse of authority in individual cases.

[97] It submits that subsection 29(3) of the *PSEA* states that the PSC may establish policies and that those policies must be adhered to pursuant to section 16 of the *PSEA*. However, it argues that guidelines, such as the *Guidance Series – Assessment, Selection and Appointment*, do not have to be complied with, because they are tools to assist departments who can choose to use the information found in the documents. Hence, guidelines do not have the same value or effect as policies.

[98] Finally, the PSC submits that there is more than just the issue of urgency which must be taken into account when choosing the type of process as indicated in the respondent's own *Guidelines Non-advertised Appointment Rationale*.

#### ANALYSIS

**Issue I:** Did the respondent conduct an internal or an external appointment process, which led to the appointment of Ms. Seidman on April 17, 2007?

[99] It is helpful to turn to the definitions in the *PSEA* to determine whether the respondent conducted an internal or an external appointment process. Section 2 of the *PSEA* includes the following definitions:

"external appointment process" means a process for making one or more appointments in which persons may be considered whether or not they are employed in the public service.

"internal appointment process" means a process for making one or more appointments in which only persons employed in the public service may be considered.

[100] Ms. Seidman was recruited into the public service in September 2006 for a determinate period to replace an employee on maternity leave. As a determinate employee, Ms. Seidman was an employee of the federal public service. However, the respondent believed that Ms. Seidman's candidacy could not be considered because she had come from a pool established following an external appointment process. Given the circumstances, Human Resources recommended that an external appointment process be used.

[101] On March 8, 2007 following a show of interest by the complainants, Mr. Jobin sent a notice to the three complainants specifying that they were participating in a non-advertised appointment process to fill the position of Chief English Curriculum.

[102] On April 17, 2007, Ms. Seidman was appointed on an indeterminate basis. However when the respondent concluded in June 2007 that Ms. Seidman was in fact a public service employee hired on a determinate basis, it simply changed the process number to reflect an internal non-advertised appointment process.

[103] As the Tribunal explained in *Richardson et al. v. Deputy Minister of Environment Canada et al.*, [2007] PSST 0007, an external appointment process which only considers persons employed in the public service is considered to be an internal appointment process:

[13] However, a deputy head cannot designate an appointment process as an “external appointment process,” and then consider only one person who is already in the public service, since this would render the distinction between an “external appointment process” and “internal appointment process” meaningless. Moreover, designating an appointment process in such a way could lead to the circumvention of recourse to the Tribunal, which should be available to persons employed in the public service. Clearly, such an interpretation cannot be what Parliament intended when it set out these definitions in the *PSEA*.

[14] The onus rests on the respondent to satisfy the Tribunal that an external appointment process was conducted to staff this position. The respondent has provided no evidence that anyone from outside the public service was in fact considered for this position.

[15] The Tribunal finds that, although the respondent believed it was conducting an external appointment process, by only considering one person who was already employed in the public service, an internal appointment process was conducted.

[104] From March 2007 until the appointment was made in April 2007, the appointment process may have operated as an external appointment process. However, the four employees being considered were all employees of the public service. Therefore, the process was an internal not an external appointment process. By changing the number in June 2007 to an internal process number, this displaced any previous external appointment process that may have been in place. It did not, however, create a new process as alleged by the complainants, but simply corrected an ongoing process.

[105] Accordingly, the Tribunal finds that the respondent conducted an internal appointment process. Consequently, this is an appointment that is subject to the Tribunal’s jurisdiction.

**Issue II:** Did the respondent abuse its authority by relying on insufficient material when it appointed Ms. Seidman?

[106] The complaints were also made under paragraph 77(1)(a) of the *PSEA*, alleging abuse of authority by the respondent in the application of merit. Paragraph 77(1)(a) reads as follows:

77. (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Tribunal’s regulations — make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of

(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);

[107] Subsection 30(2) states:

30. (2) An appointment is made on the basis of merit when

(a) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and

(b) the Commission has regard to

(i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,

(ii) any current or future operational requirements of the organization that may be identified by the deputy head, and

(iii) any current or future needs of the organization that may be identified by the deputy head.

[108] The Tribunal has stated in previous decisions, such as *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008, *Chiasson v. Deputy Minister of Canadian Heritage et al.*, [2008] PSST 0027, and *Cameron and Maheux*, at paragraph 75, that “abuse arises when the delegate acts on inadequate material in making a discretionary decision, including where there is no evidence or without considering relevant matters.”

[109] In addition, the Tribunal has stated in many decisions, that for an appointment to be based on merit, the person appointed must meet the essential qualifications. See for



example *Rinn v. Deputy Minister of Transport, Infrastructure and Communities et al.*, [2007] PSST 0044.

[110] The complainants allege that Ms. Seidman’s appointment was not based on merit because there is no evidence that she meets all the essential qualifications. The respondent argues that Ms. Seidman was the incumbent of a similar position and that is why they gave her the additional duties in February 2007.

[111] The Tribunal does not accept the respondent’s contention that the positions were similar. In comparing the SMC for the position of Chief English Curriculum and the SMC for the position of Chief Educational Technology, there are important differences which cannot support the argument that the two positions are similar. Relevant excerpts of the two SMCs are reproduced below:

CHIEF, CURRICULUM ENGLISH	CHIEF, EDUCATIONAL TECHNOLOGY
<u>Essential Qualifications</u>	<u>Essential Qualifications</u>
<b>Language Proficiency:</b>  Bilingual Imperative BBB/BBB [changed to PPP/BBB on April 3, 2007]	<b>Language Proficiency:</b>  Bilingual Imperative BBB/BBB
<b>Education:</b>  A bachelor degree from a recognized university in education or in a field related to the position	<b>Education:</b>  Master’s degree from a recognized university in educational technology or an acceptable combination of education, training and/or experience.
<b>Experience:</b>  Experience of work as a designer or developer in the field of education or training  Experience of work as an advisor to management on education or training issues	<b>Experience:</b>  Experience in the development of educational software programs  Experience working with learning management systems  Experience in providing guidance to management
<b>Knowledge:</b>  Knowledge of theories and practices related to adult learning	<b>Knowledge:</b>  In-depth knowledge of theories and practices of educational technology  Technical knowledge related to computer-assisted instruction and distance learning  Knowledge of theories and practices related to adult learning

Abilities/Skills: Ability to manage Ability to manage research and development projects in education Ability to convince orally and by writing	Abilities/Skills: Ability to design and implement instructional programs. Ability to convince orally and by writing.
<b>Personal Suitability:</b> Integrity Judgment Initiative Effective interpersonal relationships	<b>Personal Suitability:</b> Initiative Judgment Effective interpersonal relationships

[112] The essential qualifications for the Chief English Curriculum position are fundamentally different from those required for the Chief Educational Technology position. First, the Language Proficiency is different for each position. The position of Chief Curriculum English requires a higher level (PPP/BBB) than the position of Chief Educational Technology which is BBB/BBB.

[113] Secondly, the essential qualifications for the Chief English Curriculum predominantly refer to education and training experience whereas the Chief Educational Technology position relies much more heavily on experience and knowledge of technology issues. The requirement for a B.A. in education for the Chief English Curriculum may not be met if a person has B.A. in another field and a Master's degree in educational technology, or an acceptable combination of education, training and/or experience. Similarly, the requirement for experience in the field of education or training and experience as an advisor to management on education or training issues would have to be assessed as the incumbent of the Chief Educational Technology position may not necessarily meet those requirements by having developed educational software or by having worked with learning management systems.

[114] Furthermore, the Chief English Curriculum position requires that the person possess the ability to manage, an important essential qualification not required for the Chief Educational Technology position. Instead, that position requires the ability to design and implement instructional programs. Lastly, "Integrity" is required for the Chief English Curriculum, but is not required on the SMC for the other position.

[115] The position of Chief English Curriculum requires experience in training, education and management whereas the Chief Educational Technology position requires experience in technology. Clearly the two positions are different; they require different skills and each has a different focus. The respondent's argument is therefore untenable. The Tribunal was not provided the work description for the position of Chief Educational Technology which could have helped it understand the respondent's argument.

[116] The Oral Interview Evaluation Grid for Ms. Seidman was filed into evidence by the respondent on consent of the parties. The document shows that the respondent assessed the ability to manage based on seven questions. Ms. Seidman received a pass mark for five out of seven of the questions. However, the section relating to "other skills and qualities", which refers to the "ability to convince orally (based on all questions)", "judgment (based on all questions and references)" and "effective interpersonal relationships with board members and with others referred to (based on all questions and references)" is crossed out and has a handwritten note beside it stating "not applicable".

[117] The respondent argued that Ms. Seidman's "other skills and qualities" were not assessed during the interview for the Chief English Curriculum position because they had already been assessed for the Chief Educational Technology position. The Tribunal, however, does not have any evidence that those qualifications were in fact assessed. The respondent has not provided Ms. Seidman's record of assessment for the Chief Educational Technology position or any references done for that appointment process. Moreover, there is no evidence that the essential qualifications integrity and the ability to manage research and development projects were assessed, or that the language proficiency PPP/BBB was assessed.

[118] The Tribunal stated in *Tibbs*, that in the absence of evidence to the contrary, the Tribunal may draw reasonable inferences from uncontested facts:

[54] While it is open to the respondent, for its part, to simply deny the assertion, once the complainant has presented some evidence in support of his or her assertion that abuse of authority has occurred, then the respondent will likely wish to raise a positive defense to the assertion. Moreover, it is open to the Tribunal to draw reasonable inferences from

uncontested facts and, thus, if the respondent does not present evidence to explain its reasons for a particular course of action or conduct, it risks being faced with an adverse finding by the Tribunal, namely, a substantiated complaint: Gorsky, Uspich & Brandt, *supra*, at 9-15, 9-16.

[119] Ms. Seidman's *curriculum vitae* was not introduced in evidence. That could have provided some insight as to whether Ms. Seidman had the requisite experience. All the Tribunal has before it is Maj. Cyr's testimony that Ms. Seidman was qualified and that she was hired as a determinate employee in the fall of 2006 through an external process to replace the incumbent of the Chief Educational Technology position. That testimony alone is not sufficient to refute the complainants' allegations. The respondent is responsible for conducting appointment processes. It holds all the information relating to such processes. It is therefore in a position to present evidence that can explain how an appointment process was conducted.

[120] The Tribunal dealt with a similar situation in *Cameron and Maheux*, where the respondent failed to submit the appointee's *curriculum vitae* and assessment report into evidence:

[81] The Tribunal is perplexed by the fact that the *curriculum vitae* and the assessment report on Ms. Bouchard were not submitted by the respondent. It does not believe that the mere statement by Ms. Domingue that Ms. Bouchard met all the qualifications is sufficient, given the evidence offered by the complainants. The respondent holds all the information on the appointment process, and is in a position to submit complete evidence to explain the process if it took place in a manner different from that stated by the complainants. It may be that the respondent elected not to place these documents in evidence because they do not exist, or because their disclosure would cast doubt on Ms. Bouchard's essential qualifications. There may be other reasons, but in the absence of these documents, the Tribunal is rendering a decision based on the evidence tendered at the hearing.

[121] The evidence before the Tribunal leads it to conclude that the respondent abused its authority because it did not ensure that Ms. Seidman met all the essential qualifications before it appointed her. The respondent relied on insufficient material when it appointed Ms. Seidman to the position. Consequently, the Tribunal finds that Ms. Seidman's appointment to the Chief English Curriculum position was not made in accordance with merit because there is no evidence that all the essential qualifications were assessed or that Ms. Seidman met them all.

**Issue III:** Did the respondent abuse its authority by appointing Ms. Seidman based on personal favouritism?

[122] The complainants allege that the respondent showed personal favouritism towards Ms. Seidman. They state that the SMC was specifically tailored to suite Ms. Seidman's qualifications and abilities.

[123] The Tribunal determined in *Glasgow* that personal favouritism in complaints of abuse of authority can be demonstrated by using either direct evidence or circumstantial evidence:

[44] Evidence of personal favouritism can be direct, such as facts establishing clearly the close personal relationship between the person selecting and the appointee. However, it will often be a question of circumstantial evidence where some action, comments or events prior to, and during, the appointment process will have to be reviewed. Depending on its source and its particular relation to the issues in a complaint, circumstantial evidence can be as convincing as direct evidence. As Morley R. Gorsky, S.J. Uspich & Gregory J. Brandt, *Evidence and Procedure in Canadian Labour Arbitration* (Toronto: Thomson Carswell, 1994) state, at page 13-5:

Circumstantial evidence can lead to as thorough a sense of surety as does direct evidence. Indeed, circumstantial evidence can sometimes be more convincing than direct evidence. The convincing power of circumstantial evidence usually lies in the weight of many circumstances added together.

[124] The Tribunal further determined in *Glasgow* that undue personal interests, such as a personal relationship between the person selecting and the appointee should never be the reason for appointing a person. Modifying the essential qualifications of a position to ensure the appointment of an employee without regard to the actual requirements of the position is another example of personal favouritism. Appointing an employee who does not meet the essential qualifications of a position for the purpose of giving the employee indeterminate tenure constitutes personal favouritism.

[125] Ms. Seidman's name appeared in Mr. Jobin's email of December 8, 2006 wherein the ED Human Resources Plan was described: "the EDS-03 position (268795) held by Kevin Miller will be subject to a lateral transfer for Hope Seidman (date to be determined)".

[126] Maj. Cyr testified that management intended to appoint Ms. Seidman to the position in the spring because she was found qualified in another process. Ms. Moffet testified that when she spoke with Maj. Cyr about Ms. Seidman's lack of experience as a teacher, she was told that Ms. Seidman "would do as we did, she will learn on the job". [Translation] This statement was not refuted by the respondent and shows that Maj. Cyr was not concerned whether or not Ms. Seidman possessed any experience teaching a second language.

[127] In addition, when Ms. Moffet suggested to Mr. Sinden that the complainants act in the Chief English Curriculum position on a rotating basis, he refused. He explained to Ms. Moffet that it could not be done because Ms. Seidman's determinate employment would end in July 2007 and management wanted to give her indeterminate tenure before the end of her term. That statement was not contradicted or refuted by the respondent.

[128] Furthermore, there was no urgency as claimed in the rationale for the internal non-advertised appointment process. This is confirmed in Mr. Jobin's email of January 22, 2007:

Meanwhile, as the staffing in the English sector was no longer urgent compared to the one prevailing in the French sector, the process was abandoned. As the opportunity to staff this position recently presented itself once again, we considered the available option and chose to select from a pool that exists for staffing similar positions. Strictly speaking, it is therefore not a lateral transfer (or deployment), but an appointment."

[129] The respondent set out, as early as December 2006, to appoint Ms. Seidman to the Chief English Curriculum position. She was first given the duties of the Chief English Curriculum in addition to her own as Chief Educational Technology in February 2007. Ms. Seidman was then appointed via an external non-advertised process in April 2007 which was subsequently changed to an internal non-advertised appointment process in June 2007. This conduct in itself is a strong indicator that the respondent absolutely wanted Ms. Seidman in that position.

[130] The SMC was modified for Ms. Seidman. According to Mr. Jobin's June 10, 2007 report, the first consultation modifying the SMC was made on February 27, 2007 just days after the complainants and Ms. Moffet asked questions and expressed concerns

about Ms. Seidman being assigned the additional duties of Chief English Curriculum on February 19, 2007. Given all of the above, any reasonable person looking at the circumstances would find this suspicious and not merely coincidental.

[131] The 2005 Statement of Qualifications and the 2008 SMC both have experience in teaching as an essential qualification whereas the 2007 SMC considered teaching to be an asset rather than an essential qualification. Ms. Moffet testified that Ms. Seidman did not have any experience teaching a second language. According to Ms. Moffet, Maj. Cyr told her that Ms. Seidman would learn on the job.

[132] It is clear that the 2007 SMC was modified to accommodate Ms. Seidman because she did not have any experience teaching a second language. In doing so, the respondent personally favoured Ms. Seidman for the Chief English Curriculum position.

[133] The complainants also alleged that preference was given to Ms. Seidman because she received management training and they did not. However, the complainants did not provide any evidence to support this assertion. The mere fact of receiving training is not in and of itself sufficient to prove that this was personal favouritism. There are many other factors that could have come into play and that were not presented to the Tribunal.

[134] Based on the foregoing, the Tribunal finds that the respondent abused its authority and showed personal favouritism when it appointed Ms. Seidman to the Chief English Curriculum position.

**Issue IV:** Did the respondent abuse its authority by acting in bad faith when it chose a non-advertised appointment process?

[135] Section 33 of the *PSEA* provides that the PSC, or its delegate, has the discretion to choose between an advertised or non-advertised appointment process. However, this discretion is not absolute and a complaint may be filed with the Tribunal for abuse of authority with respect to the choice of process under paragraph 77(1)(b) of the *PSEA*. These sections read as follows:

33. In making an appointment, the Commission may use an advertised or non-advertised appointment process.

77. (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may – in the manner and within the period provided by the Tribunal’s regulations – make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of

(...)

(b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process;

[136] Essentially, the complainants are arguing that the discretion to choose a non-advertised process was exercised in bad faith, and not for the purposes for which it was delegated under the *PSEA*.

[137] The *PSEA* does not define “abuse of authority” but subsection 2(4) states: “[f]or greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.”

[138] Bad faith and personal favouritism are among the most serious forms of abuse of authority. Parliament referred to bad faith and personal favouritism in subsection 2(4) of the *PSEA* to make clear that these types of behaviour constitute abuse of authority (see *Glasgow*).

[139] The courts have traditionally found that bad faith in exercising a discretionary power is established when there is an improper intent, a bias, a lack of impartiality or when an irrational procedure leads to the conclusion that it is incompatible with the exercise of the authority’s public duties. As direct evidence of bad faith can often be difficult to establish, the courts have recognized that it can also be established by circumstantial evidence. Bad faith has also been given a broader meaning that does not require improper intent where there is serious carelessness or recklessness. (See René Dussault and Louis Borgeat, *Administrative Law: A treatise*, 2<sup>nd</sup> ed. (Toronto: Carswell, 1990) vol. 1, at page 425 and vol. 4, at page 343 and *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17, [2004] S.C.J. No. 31 (QL)).

[140] In *Cameron and Maheux* at paragraph 56, the Tribunal explained that “bad faith could be established by evidence of acts so exceptional that the Tribunal cannot



conclude that they were carried out in good faith, because they are inexplicable and incomprehensible in light of the *PSEA*". (See also *Burke v. Deputy Minister of Department of National Defence et al.*, [2009] PSST 0003; *Chiasson*; and *Robert and Sabourin v. Deputy Minister of Citizenship and Immigration et al.*, [2008] PSST 0024).

[141] The evidence establishes that as early as December 8, 2006, the respondent intended to appoint Ms. Seidman to the position of Chief Curriculum English. The Human Resources Plan sent by Mr. Jobin on that same date states: "the EDS-03 position (268795) held by Kevin Miller will be subject to a lateral transfer for Hope Seidman (date to be determined)". On February 19, 2007, it was announced that Ms. Seidman would immediately be replacing Mr. Miller as Chief English Curriculum. Furthermore, when Ms. Moffet questioned Ms. Seidman's experience, Maj. Cyr told her that Ms. Seidman's lack of experience was not a problem, as she would learn on the job.

[142] On April 17, 2007, following what was believed to be an external non-advertised appointment process, Ms. Seidman was appointed to the indeterminate position of Chief English Curriculum. In order to support that decision, the respondent prepared a rationale to justify the choice of an external non-advertised appointment process which was signed by Mr. Jobin on March 21, 2007:

Rationale:

This is a non-advertised external process to fill an ED-EDS-03 position (Chief English Curriculum). This process follows two advertised processes (internal and external) held on a national basis in November 2005 to staff the position in question, but had produced no results as of February 2006. For this reason, we had decided to use the solution identified for staffing a similar position (EDS-03/Chief French Curriculum) which was staffed this way after the failure of two advertised processes.

Accessibility, fairness and transparency:

This new process helps to identify qualified candidates who had not necessarily applied at the beginning of the process more easily. The new area of selection – the Standards Unit of the Canadian Forces Language School – is organizational and professional in nature. All the EDS positions at the CFLS are concentrated in that unit. The participation of four (4) EDS incumbents who had indicated their interest in the position has been considered; three of them are in the English Curriculum section. No other candidates with potential interest in the position – which requires specialized knowledge – were identified through internal consultations held within the CFLS. No other candidates indicated an interest.

The method used for staffing purposes is in accordance with the department's criteria. In terms of management principles, it is affordable and efficient because it provides for a quick and effective staffing process. It is also flexible for it is tailored to the pressing needs of the organization. It meets the human resources plan of the CFLS/Standards Unit for 2007-2008.

[143] The PSC's *Choice of Appointment Policy* requires managers to complete a written rationale explaining how the non-advertised appointment process meets the established criteria and the four appointment values of fairness, transparency, access and representativeness. Deputy heads must comply with this policy pursuant to section 16 of the *PSEA*. (See *Robert and Sabourin*)

[144] Mr. Jobin stated in the rationale that the participation of four candidates who demonstrated interest was considered. However, the three complainants' participation in the external non-advertised appointment process was only considered once they informed Mr. Jobin of their interest following the announcement of Ms. Seidman's appointment in February 2007 and after they had filed complaints with the Tribunal. The complainants had to initiate contact with the respondent on a number of occasions in order to obtain information on the appointment process, and at times the respondent was very vague and dismissive when answering their questions.

[145] The rationale indicates that the internal consultation of the CFLS did not identify any other interested candidates and that no other applications were made. This is a contradiction of Ms. Moffet's testimony wherein she stated that Maj. Cyr had told her that there was no request for interest sent out to employees and that no one else was considered. The respondent presented no evidence to support the statement in the rationale that there had been an internal consultation and that there were no other interested candidates.

[146] In *Cameron and Maheux*, the respondent stated that an urgent situation existed in order to use a non-advertised appointment process. However, the Tribunal found that the situation was not urgent at all, since it was foreseeable and it had been known for months. In that case, the Tribunal concluded that the respondent abused its authority as it had acted in bad faith when it extended the appointee's appointment by means of a non-advertised appointment process.

[147] In the present case, the English curriculum was a priority. However, as Mr. Miller and Ms. Pohl explained, the work on the English curriculum had not yet begun when they testified. This evidence was not contradicted by the respondent. The urgency used as justification in the rationale is not supported by the evidence. The work on the Level B project had not been done by Ms. Seidman or anyone else since she took over the Chief English Curriculum duties in February 2007. The rationale signed by Mr. Jobin simply stated that it was urgent to fill the position of Chief English Curriculum. It did not explain why it was urgent. Mr. Miller did not assume the position of Chief of Tests in the summer of 2006 as planned because the incumbent postponed her retirement until the summer of 2007. Mr. Miller did leave unexpectedly in February 2007, however, that has little consequence in the present matter, since the respondent's actions to appoint Ms. Seidman to the position had already begun prior to his departure. The Tribunal therefore finds that there was no urgency, but rather the decision to appoint Ms. Seidman to the position had been predetermined since December 8, 2006.

[148] A number of mistakes were made throughout this appointment process. However, it is not on this basis that the Tribunal finds the respondent abused its authority. The Tribunal considers that the respondent acted in bad faith when it chose a non-advertised process as there was an overall lack of fairness and transparency the purpose of which was to ensure Ms. Seidman's appointment. The respondent wanted Ms. Seidman in the Chief English Curriculum position at any cost right from the moment it included her name in the Human Resources Plan in December 2006 until her appointment on June 26, 2007. Its actions throughout the process constitute an egregious departure from the staffing values of fairness and transparency found in the Preamble to the *PSEA*, the requirements of the *PSEA* and the PSC's *Choice of Appointment Policy* policy.

[149] The respondent's conduct demonstrates that it wanted to hide the fact that it appointed Ms. Seidman without ensuring that she met all of the essential qualifications of the position and on the basis of personal favouritism. The process was not transparent in that information was not forthcoming. The entire process caused a great deal of confusion. The respondent never indicated that Ms. Seidman was assigned the

duties of the Chief at the time of the announcement of February 19, 2007. It took the respondent approximately one month to inform the complainants of that fact.

[150] Based on evidence of the entire sequence of events, the Tribunal finds that the respondent intended to appoint Ms. Seidman from the outset regardless whether she met the essential qualifications for the position, and the actions taken in this process constitute bad faith on the part of the respondent. The respondent therefore abused its authority when it chose a non-advertised appointment process.

#### DECISION

[151] For all these reasons, the complaints are substantiated.

#### ORDER AND CORRECTIVE ACTION

[152] The complainants ask the Tribunal to order the revocation of the appointment of Ms. Seidman to the position of Chief English Curriculum.

[153] The respondent, the PSC and the complainants filed a motion asking the Tribunal to reserve its decision with respect to corrective action in the event the Tribunal found the complaints to be substantiated. They submit that Ms. Seidman is no longer with the department. Consequently, the respondent and the PSC argue that they will need to introduce evidence on the issue of revocation.

[154] The Tribunal therefore reserves its decision on the issue of corrective action as requested by the parties. The Tribunal will therefore contact the parties in order to schedule a hearing to address the issue of corrective action.

Francine Cabana  
Member

PARTIES OF RECORD

Tribunal File:	2007-0207, 2007-0208, 2007-0209 and 2007-0295, 2007-0305, 2007-0307
Style of Cause:	<i>Susan Ayotte et al. and the Deputy Minister of National Defence et al.</i>
Hearing:	November 18, 19 and 20, 2008 Montreal QC
Date of Reasons:	July 3, 2009
APPEARANCES:	
Sylvie Rochon	For the complainants
Stéphane Bertrand	For the respondent
Marie-Josée Montreuil	For the Public Service Commission