



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**FILE: 2008-0390**

**OTTAWA, OCTOBER 15, 2009**

**MILES DENNY**

**COMPLAINANT**

**AND**

**THE DEPUTY MINISTER OF NATIONAL DEFENCE**

**RESPONDENT**

**AND**

**OTHER PARTIES**

<b>MATTER</b>	Complaint of abuse of authority pursuant to paragraph 77(1)(a) of the <i>Public Service Employment Act</i>
<b>DECISION</b>	Complaint is substantiated
<b>DECISION RENDERED BY</b>	Kenneth J. Gibson, Member
<b>LANGUAGE OF DECISION</b>	English
<b>INDEXED</b>	<i>Denny v. Deputy Minister of National Defence et al.</i>
<b>NEUTRAL CITATION</b>	2009 PSST 0029

## **REASONS FOR DECISION**

### **INTRODUCTION**

[1] The complainant, Miles Denny, alleges that he had prior conflict with a member of the board that assessed him in a practical test and that the resulting assessment was biased against him. He further alleges that the practical test was administered in an unprofessional manner and was not a fair test of his abilities. As a result of this alleged abuse of authority, he was found not qualified for the position of Civilian Ammunition Technical Supervisor.

[2] The respondent, the Deputy Minister of National Defence, submits that all candidates, including the complainant, were assessed in the same manner. It further submits that an impartial witness observed the practical test to ensure fairness and transparency. According to the respondent, the complainant could not be appointed to the position because he did not meet the ability components of the essential qualifications.

### **BACKGROUND**

[3] In November 2007, the respondent initiated an internal advertised appointment process to fill two Civilian Ammunition Technical Supervisor (GT-03) positions at the Canadian Forces Ammunition Depot at Bedford, Nova Scotia.

[4] The appointment process consisted of an initial screening, followed by a written exam to assess knowledge, and a practical test to assess abilities. Candidates who met the screening criteria and who successfully passed the written exam and the practical test proceeded to an interview.

[5] The complainant met the screening criteria. Initially, he failed the written exam, but his mark was raised to a passing level following a review of the exam. However, he did not receive a passing mark on the practical test, which was intended to measure essential abilities. He did not proceed further in the appointment process.

[6] On April 22, 2008, the complainant received an email indicating that James Brown and David MacKeigan were being considered for appointment to the GT-03 positions.

[7] Following notices of appointment, the complainant filed his complaint with the Public Service Staffing Tribunal (the Tribunal) on May 15, 2008 pursuant to paragraph 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*).

#### ISSUES

(i) Did the respondent abuse its authority by having Mr. Varner administer the practical test?

(ii) Did the respondent abuse its authority in the administration of the practical test?

#### SUMMARY OF RELEVANT EVIDENCE

##### A) EVIDENCE REGARDING THE RATIONALE FOR THE APPOINTMENT PROCESS AND ESTABLISHMENT OF THE ASSESSMENT BOARD

[8] Maj. John McCallum, the Commanding Officer of the Canadian Forces Ammunition Depot, Bedford, testified for the respondent. He has been Commanding Officer since June 19, 2007. His role is to ensure that all regulations are met, processes followed, and that all necessary staff and resources are in place to meet operational requirements. He described his job as managerial rather than technical.

[9] Maj. McCallum stated that he was the manager responsible for the appointment process, but he did not have delegation to sign letters of offer. While he has not had specific training on the *PSEA*, he said that virtually every human resources decision is made in close consultation with his Human Resources Officer (HRO). He characterized this as one-on-one training with the HRO. He acknowledged that he was not familiar with the details of the Department of National Defence (DND) Civilian Staffing Delegated Authority Matrix. Since his arrival at the Bedford Depot, Maj. McCallum has been continually involved in staffing activities.

[10] Maj. McCallum described the structure of the Bedford Ammunition Depot workforce. There are 20 civilian ammunition technicians (GT-02), four supervisors (GT-03), two area supervisors (GT-04), one GT-05 in a primarily technical role reporting to the Major, and one Material Control Officer (GT-06) responsible for warehousing and inventory management. In addition, there are six apprentices/trainees (GT-01).

[11] One of the supervisory positions is at the jetty where ships come into port to remove or load ammunition. Up to 150 people can be involved in this process and, on occasion, staff from other functions are allocated to assist with these operations.

[12] In late 2007, two of the four GT-03 supervisory positions were vacant. The vacant positions had been filled by a series of acting appointments over the preceding two to three years. Maj. McCallum felt that the acting situation had gone on for too long and needed to be addressed.

[13] He thought that it was important to use an advertised process to ensure that staff had an opportunity to apply. He said that staff had experienced "15 years of disappointment" as a result of three staff reductions and years without promotion opportunities.

[14] Maj. McCallum stated that the GT-03 position is generic across Canada and the Statement of Merit Criteria (SMC) was generated from the work description. While there is some discretion to add asset qualifications or terminology like the "jetty", it is essentially "boiler plate". In this case, he said that a Capt. Francis Wight and Mr. Minnikin (GT-04) drafted the SMC with the advice of Human Resources (HR), and he signed off on it. The assessment process consisted of a knowledge exam, a practical scenario/exercise, and interviews.

[15] He explained that the GT-06, who would normally conduct the practical test, had left in August 2007. Gary Edwards, the GT-05, was heavily involved in the assessment of 230 applications for GT-01 positions. One of the GT-04s, Mr. Minnikin, was fully occupied as an acting GT-05, and performing some of the GT-06 duties. The remaining GT-04 had indicated that he planned to retire in the summer of 2008, so they were

reluctant to commit him to additional duties, although he did assess much of the knowledge exam.

[16] Paul Varner and Paul Perrin were the two GT-03 incumbents. He testified that he considered using Mr. Perrin to administer the test, but he thought, at the time, that he might use Mr. Perrin on the GT-02 appointment process. Mr. Varner was chosen to administer the practical test because of his reputation for hard work, getting things done, and meeting deadlines. Furthermore, staff at the GT-03 level also do the work being tested.

[17] Maj. McCallum acknowledged that the administration of the test only required about one day of work. However, he stated there is a tremendous amount of time involved in drafting the assessment tools, getting agreement on them, grading them and obtaining approvals.

[18] Maj. McCallum considered getting help to administer the test from an ammunition depot in British Columbia, which also has a jetty, but he did not realize that there was sufficient animosity within his unit to impact the process. As well, it did not make sense to him to bring in resources from thousands of kilometres away when he had the people who could do it.

#### B) EVIDENCE REGARDING BIAS

[19] Maj. McCallum explained that, to ensure the test was administered in an impartial manner, he assigned responsibility for the test to Capt. Wight, who did not know any of the participants or about any conflicts between them. Maj. McCallum did not want Mr. Varner or Capt. Wight to assess the candidates alone. If any issues arose, he wanted to be sure that someone with “no axe to grind” was present. He testified that Capt. Wight had been the Commander for the Canadian Materials Support Group that included four ammunition depots. He had technical expertise in the field and was available at the time of the test. The Major did not think that it would be sufficient to only have Capt. Wight conduct the practical test, because officers are only infrequently called on to do frontline ammunitions work. He stated that Capt. Wight was not

intimately familiar with the day-to-day functions of the operation, and that it was better to have a supervisor with hands-on experience as the subject-matter expert.

[20] Maj. McCallum testified that he did not recall any specific, ongoing conflict between the complainant and Mr. Varner. He said that he was aware that the complainant “had conflict at various times with virtually every supervisor in the organization.” According to Maj. McCallum, while there is always some conflict in an organization, he did not recall anything “specific or overriding.”

[21] The complainant testified that he has been working for DND as an ammunition worker since 1991. He has acted in supervisory positions for as many as nine of the 18 years that he has been with DND. He has achieved the highest training proficiency level (level 5), has a dangerous goods certification, and has taken numerous safety courses. He has also served on and co-chaired the local DND health and safety committee.

[22] He stated that he “shuddered” when he was told that Mr. Varner would conduct the practical test with Capt. Wight observing. According to the complainant, he had filed grievances and a harassment complaint against Mr. Varner over disciplinary action Mr. Varner had taken against him in 2006. As well, in 2007, the complainant was involved in having Mr. Varner removed as co-chair of the health and safety committee because the other union members on the committee felt he always sided with management. The complainant then became the co-chair of the health and safety committee.

[23] On cross-examination, Maj. McCallum stated that he arrived at the Bedford Depot after the grievances and harassment complaints involving the complainant and Mr. Varner, and no one drew the conflict between them to his attention. He was certain that HR had not done so. He discussed it with Mr. Varner after the test, but he did not specifically recall if they discussed it before the test.

[24] Given their past history, the complainant considered requesting that Mr. Varner not administer the practical test. However, he did not proceed with this request because he thought that Mr. Varner could be professional, fair and equitable in the administration

of the test. He also testified, however, that he thought he “would have to get 100% to pass.”

[25] The complainant was also surprised that Mr. Varner would be conducting the test since Mr. Varner’s supervisor worked for Jim Brown. This meant that Mr. Brown, who was also a candidate in the appointment process, was the reviewing officer on Mr. Varner’s performance appraisal.

[26] Maj. McCallum testified that, for the relevant time period, Mr. Varner did not report to Mr. Brown. Mr. Varner reported to Mr. Minnikin who, in turn, reported to Maj. McCallum. Therefore, Mr. Varner was not in a conflict of interest with respect to candidate Brown.

[27] On cross-examination, the complainant acknowledged that he only raised his concerns regarding Mr. Varner with co-workers. He stated that he did not think that anyone would listen to him if he took his concerns higher.

[28] The complainant acknowledged that he did not raise his concerns about bias during, or immediately after, the test, because he thought he had done well. He raised his concerns at the subsequent informal discussion with Maj. McCallum because by then he had seen his results.

[29] The complainant acknowledged that he did not know of any reason for Capt. Wight to be biased against him, but, if Capt. Wight agreed with Mr. Varner’s scoring on the test, then “he is biased or he didn’t know the whole story.”

[30] On cross-examination, the complainant testified that he withdrew his harassment complaint against Mr. Varner on the advice of his union because his two grievances covered the same matter. He subsequently withdrew the grievances because the letters that led to the grievances were removed from his file. The complainant stated that, following the incident in which he had Mr. Varner removed from the health and safety committee, Mr. Varner did not speak to him. The complainant indicated that his poor relations with Mr. Varner were well known, but he did not know if Maj. McCallum and Capt. Wight were aware of them.

[31] The complainant testified that two other people, Mr. Perrin and Mr. Edwards, were qualified to conduct the test in place of Mr. Varner.

[32] Mr. Varner testified that he has 21 years of service and is a GT-03, Civilian Ammunition Technical Supervisor. He has been working at the GT-03 level since 1992. He has also acted as a GT-04. He stated that he has many years of experience with torpedoes and is the "resident expert".

[33] Mr. Varner gave his explanation of the circumstances around the grievances and harassment complaint involving the complainant. He said that he was Acting Warehouse Supervisor at the time. The incident leading to the disciplinary action was identified by an inspection team from Ottawa. After a series of investigations, a disciplinary letter was issued. He stated that he had no involvement in the disciplinary process. With regard to the harassment complaint, he stated that he was one of four people who received letters alleging harassment. The complaint was withdrawn because it did not conform to harassment complaint guidelines.

[34] On cross-examination, Mr. Varner stated that he did not recall how he felt when the complainant filed his grievances. With regard to the harassment complaint, he acknowledged that he was "a little taken aback, as anyone would be." He testified that he did not avoid speaking to the complainant, and that they "chatted off and on." However, he admitted "I wouldn't invite him out for a beer." He did not believe that his personal feelings inhibited his ability to administer the practical test. According to Mr. Varner, he was not biased against the complainant and conducted the test in the professional manner expected of him.

[35] Mr. Varner testified that he did not recall raising the possible perception of bias with Maj. McCallum. He raised it with Capt. Wight, but assured him that he could conduct an unbiased assessment and Capt. Wight was "okay" with it. Furthermore, Capt. Wight was there to ensure that a proper assessment was carried out. He added that the test was conducted in a manner that "was basically black or white. There was nothing subjective in what I created."



[36] Capt. Wight testified that he has worked with the Canadian Armed Forces for 35 years. At the time of the appointment process, he worked at DND Headquarters, but was tasked to the Bedford Depot to assist with management and staffing processes. He was deployed to the Bedford Depot in May 2008. He has taken courses on the *PSEA* and has staffing experience. He testified that he drafted the SMC for the appointment process and he also created a bank of questions for the knowledge exam, in addition to participating on the assessment board for the practical test.

[37] Capt. Wight explained that Mr. Varner was on the selection board because he is a GT-03; it was an appointment process for a GT-03 position and he is an expert in the area. In addition, he was working on a rewrite of Standard Operating Procedure (SOP) 2-19. Capt. Wight also said that Mr. Perrin would have been in an “obvious” conflict of interest if he had conducted the test because of his reporting relationship to another candidate, Mr. Brown.

[38] Capt. Wight testified that Mr. Varner “may” have mentioned conflicts with the complainant, but he never said he would feel uncomfortable conducting the test. According to Capt. Wight, neither the complainant nor Maj. McCallum mentioned any conflict between the complainant and Mr. Varner.

[39] Capt. Wight said that he saw no evidence that Mr. Varner was biased against the complainant. He also stated that, at the time of the appointment process, he did not “know anyone from the Commanding Officer right down.” One of the reasons that he was chosen to participate in the practical test was because he was a neutral party.

C) EVIDENCE REGARDING THE DEVELOPMENT AND ADMINISTRATION OF THE PRACTICAL TEST

[40] Maj. McCallum stated that the following ability in the SMC was assessed by the practical test:

Ability to perform functions such as disassemble, assemble, repair, modify and refurbish ammunition stores, packaging and associated components; **A1 practical 65% pass required, SOP and expected answers.** (emphasis in text)

[41] According to Maj. McCallum, the purpose of the practical test was to determine if candidates could move beyond the role of an ammunition worker, and do the work from the perspective of a GT-03 supervisor. While workers are concerned with the steps in the process, he expects supervisors to examine tools, certificates, licenses, etc. For example, a specific number of people are allowed in a building when staff are working on ammunition. If the limit is exceeded, the operation must stop until the limit is restored. This is the concern of the supervisor, not the GT-02s.

[42] The Major testified that he did not recall who developed the assessment tool for the practical test, but he knew that Capt. Wight and HR were involved. In response to a question about whether SOP 2-19 is used for inspections, Maj. McCallum replied that it says so in the title, but that he was not the best person to ask. He also stated that no doubt another SOP covers the functions specified in A1 of the SMC, i.e. disassembly, assembly, etc., but he did not know the number of that SOP.

[43] Regarding the complainant's allegation that SOP 2-19 is about inspection, and is not related to the abilities listed in the SMC, Maj. McCallum testified that inspection is the first step in demonstrating the above abilities. He testified that he could not imagine someone disassembling ammunition without first inspecting it.

[44] Capt. Wight testified that he consulted the GT-04 and GT-05 for input on developing the practical test. It was decided to use SOP 2-19 because it is necessary to do an inspection before doing any other work on ammunition. Capt. Wight explained that a SOP is written for any ammunition-related task. It is a tool for supervisors and workers. The SOP covers some elements of repair, which is one of the five abilities specified in A1 of the SMC.

[45] Capt. Wight testified that the marking guide was prepared by Paul Varner and himself. He also testified that he prepared the scenario based on what he was looking for. He said the two principal things he was looking for in a supervisor were:

- Providing a safe work environment; and,
- The ability to use the SOP – understanding and following the SOP and finding mistakes in it.

[46] The complainant described his experience with the practical test. He entered into evidence an email dated March 4, 2008 from Audrey Fraser, Human Resources Officer, stating that the test would assess: "Ability to perform functions, such as disassemble, assemble, repair, modify and refurbish ammunition stores, packaging and associated components (practical using SOP)." Capt. Wight sent him an email on March 6, 2008 at 2:07 p.m. stating that he was scheduled to take the test from 9:30-10:45 a.m. the following morning in building 203. The email also stated that the practical test would be based on SOP 2-19, and related references. The SOP was attached to the email. The complainant testified that the SOP is not something one would normally take home to study. It is a step-by-step procedure, and each step has several "references" which are essentially sub-steps.

[47] On the date of the test, he was escorted into the building by Mr. Varner and Capt. Wight, and taken to an open L-shaped area. He was given a scenario in which he would be the Acting GT-03 Supervisor in the Torpedo Section because the regular supervisor had gone home sick. According to the complainant, the other candidates were given a different scenario in which the regular supervisor had gone home upset and angry.

[48] He was told that, because the test was set up on short notice, some of the tools that he would require were present, but he would have to "pretend" that other tools were available. Tools from other types of work that are performed in the building had been left behind. He was told to pretend that those tools were not there. According to the complainant, only a bench and the tools required for that day's work should have been present.

[49] The complainant testified that he was told by Mr. Varner to pretend that he was the first person entering the work area to check things out before inviting in his staff. He said he asked Mr. Varner for SOP 2-19, and then he pretended to go down the list to make sure everything was in order. Then, he pretended his staff came into the work area. Mr. Varner then asked him to go to specific parts of the SOP and to perform specific functions.

[50] The complainant said that he did not seek clarification during the test regarding when, or when not, to pretend. He stated: "I thought if I wasn't supposed to pretend, they would tell me. At one point they did."

[51] The complainant said that a SOP guides you through a function step by step. He explained that not all functions are covered by the SOP and some are covered by other documents called references.

[52] The complainant went on to explain how he performed various functions for which he received no marks on the score sheet for the test. He stated that he received no marks, although he read the required steps directly from the SOP or reference manual, and he took or pretended to take the required actions.

[53] For example, question 4 b required him to mark an area requiring repair. He said that he pretended his finger was a pencil and circled the spot but was given no points.

[54] He stated that he got marks for 4 d, "Measure area with depth gauge," but he got no marks for 4 f, "Demonstrates knowledge for proper use of depth gauge." The complainant testified that one could not do 4 d without the knowledge demonstrated by 4 f.

[55] As well, he said that question 5 f required him to open a filter pack and insert a nozzle into one filter. When he opened the filter pack, there were no filters, so he used one from the garbage and "pretended" it was useable.

[56] He performed another function that required a specific screwdriver. An unsuitable screwdriver was available and he used it, pretending that it was the right screwdriver. Mr. Varner told him he was using the wrong screwdriver, and pulled the correct one out of a drawer. On cross-examination, the complainant acknowledged that he could have asked for the correct screwdriver, but at the beginning of the test he was told to "pretend" so that is what he did.

[57] He also stated that he got no credit for the proper usage of signage. In one example (6 c), a required symbol was leaning against a wall, and he thought it had been left there from non-related work. He did not know that it was part of the test. In another

example (6 e), the complainant testified that there is usually an informational white board at the entrance to the work area but, for the test, it was a piece of cardboard leaning against a filing cabinet. He missed it because it was not where it was supposed to be.

[58] The complainant got no points for these and other questions. He noted that partial credit was available, as he received partial credit for his answers to two questions.

[59] On March 12, 2008, the complainant was informed that he was not successful in the practical test because he “did not meet one or more of the Essential Qualifications, specifically the ability to perform functions such as disassemble, assemble, repair, modify and refurbish ammunition stores, packaging and associated components (practical using SOP).” According to the complainant, SOP 2-19 is not about the assembly, disassembly, modification or refurbishing of torpedoes. It is about torpedo inspection.

[60] Capt. Wight gave his version of what occurred during the practical test. He testified that he and Mr. Varner met the candidates and gave them the scenario for the test. The candidates were advised to let Capt. Wight know when they were satisfied that everything was in order and the workers could come in. They were told that Mr. Varner would then ask them a series of questions, and ask them to demonstrate a series of actions.

[61] Four elements of safety were assessed: 1) inspection of the work area; 2) ensuring the man limit board was filled out; 3) ensuring the fire symbol was correct; and 4) general safety – fire extinguishers signed off and with the correct certification. Capt. Wight said that the complainant failed on three of the four elements.

[62] Capt. Wight testified that Mr. Varner “asked the questions, observed the candidates, and marked them on the rating guide.” Capt. Wight was a “second set of eyes” to ensure that they saw the same things. Capt. Wight said that marks were changed on two occasions. On the test for Mr. Brown, Capt. Wight did not see something that Mr. Varner saw. On the complainant’s test, Capt. Wight saw something

Mr. Varner did not observe and he raised the complainant's score. Capt. Wight made the final decisions on the scores.

[63] Capt. Wight acknowledged that the test involved some pretending. For example, he testified that a candidate might pretend to attach a grounding cable, or to get someone to help him with a task.

[64] The captain testified that the complainant failed on the safety aspects of the test, and on using the SOP. He said that the SOP is a simple document, and it is hard to go wrong. However, the complainant did not follow the SOP verbatim.

[65] He went through a number of questions on the test where the complainant got no points, and testified that the complainant did not do what was required. He said that if you do not follow the SOP verbatim, you could miss steps. He believed that the complainant's mark of 145 out of 235 or 61.7% accurately reflected the complainant's performance on the test.

[66] Capt. Wight testified that, in contrast, Mr. MacKeigan did very well on the test, obtaining a mark of 96.8%. He only lost points on one question because he did not do exactly what was expected. Mr. Brown obtained 86.3%. He met all safety requirements, and he followed the SOP verbatim.

[67] According to Capt. Wight, if a candidate followed the SOP verbatim, there is no reason he could not pass the test. He described the SOP as a key document for any process. If the SOP is not read verbatim, you may miss an important step and the consequences could be "catastrophic."

[68] On cross-examination, Capt. Wight testified that, after the test, he did not feel confident that the complainant would be a safe supervisor.

[69] He also testified that there were mistakes in SOP 2-19 but he could not recall what they were. However, the mistakes were not incorporated into the test. He also went through the SOP, at the request of the complainant's representative, trying to identify where various components of the test could be found.

[70] Capt. Wight acknowledged that neither he nor Mr. Varner had the SOP in hand during the test. He said that Mr. Varner did not need the SOP. Capt. Wight acknowledged that he did not know it by heart, but he had the scoring sheet which was based on the SOP.

[71] The complainant questioned Capt. Wight on apparent inconsistencies between the practical test scoring sheet and SOP 2-19. For example, Capt. Wight was asked if question 4 c on the test, which refers to a "mini grinder," is a mistake, since the SOP refers to a "die grinder." Capt. Wight replied: "A mini grinder is still a grinder."

[72] Capt. Wight acknowledged that he did not hand the scenario to the candidates because it had the answers on it. He described the scenario verbally and, while he may not have used identical words, the words were essentially the same.

[73] Mr. Varner said that he drew up the practical test, at the request of management, to assess ability A1 in the SMC. He explained that the GT-03 Supervisor is responsible for operational safety within the task area, infrastructure, and the GT-02s. This is the principal difference between the GT-03 Supervisor and the GT-02.

[74] He testified that the test was conducted in a stand-alone building. All the publications and tools were set out. Some tools were out of view. If a candidate read the SOP and noticed a tool was missing, they were expected to ask for it or they would be marked down.

[75] According to Mr. Varner, SOP 2-19 deals with repair, which is one of the abilities listed under A1. Part of the inspection process is to follow the steps in the SOP. The SOP covers inspection and "what ifs" related to repair.

[76] Mr. Varner described the assessment process. After Capt. Wight briefed the candidates on the scenario, a check sheet was used to rate them on their abilities and functions. If a person was having difficulty, clarification was provided. He said that the complainant requested clarification at one point and that Capt. Wight responded. He could not recall the topic. According to Mr. Varner, "Capt. Wight did the scoring and then discussed it with me."

[77] He provided similar testimony to Capt. Wight on the performance of Mr. Brown and Mr. MacKeigan on the test.

[78] With respect to the complainant, he testified that there were times when he did not use the reference material available to him. He went through the SOP without reading it completely. Mr. Varner explained that, by regulation, no task is to be conducted without consulting the SOP. It provides guidelines and warnings on what is expected of supervisors to perform tasks in a safe manner.

[79] Mr. Varner testified that there is no difference between a mini-grinder and a die grinder.

[80] On cross-examination, Mr. Varner was asked what his "exact" role was in the practical test. He replied that he "created the assessment test for scoring purposes and set up the scenario based on the tasks to be performed." He also testified that he was not aware of any mistakes in SOP 2-19. He said that a pneumatic grinder and a mini-grinder are the same, but he acknowledged that a pneumatic grinder works with air and a mini-grinder works with electricity. He also acknowledged that step 4 of the practical test dealt with repair and the rest of the test dealt with inspection.

[81] Mr. Varner did not take any notes during the test; he said there was "just the score sheet." He also stated that at the time of the test, he knew SOP 2-19 by heart.

[82] Mr. Varner acknowledged that the SOP specifies the location of torpedo-related work as building 239. He said that building 203, where the test took place, was set up the same as building 239 in terms of tools and materials.

[83] On redirect, Mr. Varner testified that whether white boards are on the inside or outside of a room depends on the structure and layout of the building. However, the onus is on the supervisor to ensure that they are updated.

[84] The complainant testified that when he saw his test results, he was angry because his mark was 61.7% and the pass mark was 65%. One more 5% question would have passed him. He also believed that the test was "mickey mouse" and "unprofessional", as he had to pretend or guess what the next step would be.



D) EVIDENCE REGARDING THE INFORMAL DISCUSSION

[85] The complainant requested an informal discussion to discuss his results. Maj. McCallum agreed and anticipated that it would be relatively short. However, the Major stated that "it turned into a long and painful argument over when he [the complainant] pretended and didn't pretend. It became quite heated and I left after an hour."

[86] During the informal discussion, Maj. McCallum explained to the complainant that he had failed the knowledge exam, but HR had encouraged Capt. Wight to review it again to make sure they had not been "overly hard" on him. His score was revised to a passing mark and he went on to do the practical test.

[87] The complainant testified that he did not know where his responses were deficient because he did not get answers to his questions at the informal discussion. He stated that he asked the Major questions about the test, but was only given evasive answers. He stated that, during the test, he read his answers right out of the SOP and showed Mr. Varner and Capt. Wight how to do the things he was asked to do.

[88] He testified that he asked Maj. McCallum: "Sir, would I have been a candidate if I had passed?" and the Major replied: "No, because your co-workers don't want to work with you." The complainant testified that he subsequently asked his co-workers if they had a problem working with him, and they indicated that they did not.

[89] The Major testified that he did not want to answer this question, but the complainant "aggressively insisted" that he do so. Maj. McCallum said he told the complainant that, while he was highly skilled on the technical side, "on the personal suitability side there would definitely be some issues." He told the complainant that his colleagues considered him a "shirker" and that some of them would not work with him. Therefore, he did not see him as a "top" candidate. According to Maj. McCallum, the complainant thanked him for this information, said that this was the first time anyone had ever told him the truth, and that he had a lot of performance appraisals that said he was an effective employee.

[90] Maj. McCallum testified that performance appraisals at the Bedford Depot are often not factual. He explained that Master Corporals also do GT-03 work in the organization, and they are often away on other assignments. This creates a lot of civilian acting situations, and there is reluctance on the part of acting GT-03s to write critical performance appraisals.

[91] Maj. McCallum declined to identify at the hearing the persons who expressed concerns about working with the complainant on the grounds that these people would still have to work together after the hearing.

[92] The complainant testified that after he filed his complaint, Maj. McCallum invited him to go for a coffee where he suggested that, given the complaint, the complainant should find himself another job.

[93] Maj. McCallum replied to this statement. He testified that after his arrival in Bedford, he discovered that the complainant had many complaints about the workplace. There were many emails and he thought that the complainant would have come to discuss them with him. He said that he came to understand that the complainant preferred one-on-one discussions, so he invited the complainant to meet with him at a Tim Horton's restaurant. He proposed an off-site meeting to prevent the "chat lines" from starting up. He could not recall if the meeting took place before or after the complaint was filed.

[94] According to the Major, the "goal was to discuss the problems people had with him." Maj. McCallum said they discussed the relatively small staff, and the limited opportunities for advancement. He told the complainant that, if he was interested in a change, he would do what he could to support him. Maj. McCallum said he was fully supportive of career development and training. He gave examples of how he assisted other staff to change jobs. He said the complainant told him that he would resign from the union and the health and safety committee, and would concentrate on becoming the best technician in the organization. According to the Major, the complainant requested a follow-up conversation in one year's time.

[95] Maj. McCallum thought the meeting ended amiably. He gave no indication to the complainant that he would try to force him out of his job. He testified that this is “simply not possible to do in the public service.”

#### ARGUMENTS OF THE PARTIES

##### A) COMPLAINANT’S ARGUMENTS

[96] The complainant submits that there has been an abuse of authority in two key respects, namely: the assessment of the complainant’s abilities; and, the bias exhibited by the person responsible for administering the practical test, Mr. Varner.

[97] The complainant argues that, in assessing whether or not the respondent abused its authority, the Tribunal must consider whether:

- the process was fair and transparent;
- the practical test effectively assessed the complainant’s ability;
- there was bias;
- the complainant was informed in a timely manner of the assessment methods to be used;
- those responsible for the assessment have the necessary competencies to ensure a fair and complete assessment; and,
- those responsible for the assessment are not in a conflict of interest.

[98] According to the complainant, there is no link between the qualifications to be assessed and the practical test itself. The email from the HRO to the complainant on March 4, 2008 stated that the test would assess the ability to assemble, disassemble, repair, modify and refurbish ammunitions. However, the email from Capt. Wight to the complainant on March 6, 2008 indicated that the test would be based on SOP 2-19. The only link between SOP 2-19 and the listed activities is “repair” in section 4 of the SOP. Moreover, Maj. McCallum, Capt. Wight and Mr. Varner testified that the purpose of the practical test was to assess the ability to inspect, not the ability to assemble and disassemble ammunitions.

[99] The complainant disagrees with Capt. Wight's testimony that the purpose of the practical test was to assess supervisory and safety skills. These are not abilities they said were to be assessed. Safety is not mentioned anywhere in ability A1.

[100] The complainant requests that the Tribunal revoke the appointments made in this appointment process and order corrective action as appropriate.

#### B) RESPONDENT'S ARGUMENTS

[101] The respondent submits that, under section 36 of the *PSEA*, deputy heads have broad discretion to determine the tools to be used to assess whether candidates meet the qualifications. The respondent relies on *Jolin v. Deputy Head of Service Canada et al.*, [2007] PSST 0011, paragraph 77, in support of its position.

[102] According to the respondent, Capt. Wight and Mr. Varner developed the practical test to assess the first ability in the SMC, and that it is important to note the words "such as" before the list of functions. Furthermore, they both testified that safety is the first, and foremost, consideration in a supervisor's job. Mr. Varner explained how the responsibility for safety differs in the GT-02 and GT-03 roles.

[103] The practical test was conducted so that the results would be black or white. The candidates performed the functions or they did not. There was nothing subjective in the test. Although the complainant blames Mr. Varner for his failure to pass the test, the evidence indicates that the result is attributable to his failure to understand what was expected.

[104] According to the respondent, it is clear from the evidence that the complainant made false assumptions about the test. He assumed everything he needed was there and he pretended everything was okay. Moreover, on questions where he was expressly asked to explain and demonstrate specific abilities, he simply read aloud from the SOP; while he probably "explained," he did not "demonstrate" specific abilities. The complainant alleges that Mr. Varner should have prompted him, but this indicates a misunderstanding of the practical test. He failed to understand that he was being assessed on the ability to perform certain technical functions.

[105] The respondent argues that the complainant has not proven that the assessment board abused its authority in using the practical test to assess this ability.

[106] The respondent challenges the complainant's allegations with respect to the issue of bias. The complainant could have raised his past conflict with Mr. Varner before the test, but he did not raise his concerns with anyone until he realized that he had failed. Capt. Wight was included in the assessment process to ensure impartiality. The respondent notes that Capt. Wight and Mr. Varner consulted on their observations and adjusted marks as necessary.

[107] Mr. Varner acknowledged his prior conflict with the complainant, but testified that he was able to separate his personal from his professional feelings.

[108] Citing *Sampert et al. v. Deputy Minister of National Defence et al.* [2008] PSST 0009, paragraphs 53 and 54, the respondent argues that Capt. Wight and Mr. Varner were appropriate members of the assessment board as they were familiar with the work of the GT-03 Supervisor position, and neither had any pre-conceived notion regarding who to appoint. Furthermore, it was Maj. McCallum who made the appointment.

[109] In conclusion, the respondent argues that there is no evidence that the respondent abused its authority.

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

[110] The Public Service Commission (PSC) submits that the appearance of bias is a concern in this case. The evidence demonstrates that there was a "tough" history between the complainant and Mr. Varner. Mr. Varner brought this to the attention of Capt. Wight. Maj. McCallum considered using someone from British Columbia with no relationship to the parties to conduct the test. The evidence also shows that, while it may have been difficult to find time in their schedules, there were other people available with the technical knowledge to conduct the test.

[111] The PSC argues that the composition of the assessment board did not follow its policy, and more effort should have been taken to address the apprehension of bias. Somebody other than Mr. Varner should have been used to administer the practical test.

[112] The PSC submits, however, that there is no evidence of actual bad faith in the conduct of the practical test, and it believes that Capt. Wight was a wise choice to participate in the assessment. Nevertheless, the complainant failed by less than four points, and the perception of bias may have been avoided if someone other than Mr. Varner had administered the test.

[113] The PSC explained that it has developed staffing policies and deputy heads must follow them. The PSC referred to the appointment values and to sections of its *Assessment Policy*, its *Guide to Implementing the Assessment Policy*, and its *Guidance Series – Assessment, Selection and Appointment*.

[114] The PSC notes that Capt. Wight did not give identical instructions to the candidates taking the practical test. It argues that it is preferable to read the instructions because, even if the message is essentially identical, not doing so can lead to allegations like those in the present case.

[115] The PSC takes no position on whether there was abuse of authority in this case. According to the PSC, adherence to PSC policy is only one factor in determining whether or not there has been an abuse of authority.

#### RELEVANT LEGISLATION

[116] Abuse of authority is not defined in the *PSEA*; however, subsection 2(4) provides the following: “For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.”

[117] The complaint was filed under paragraph 77(1)(a) of the *PSEA*:

**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);

[118] Section 16 and subsection 29(3) of the *PSEA* provide that deputy heads are subject to PSC policies:

**16.** In exercising or performing any of the Commission's powers and functions pursuant to section 15, a deputy head is subject to any policies established by the Commission under subsection 29(3).

**29. (3)** The Commission may establish policies respecting the manner of making and revoking appointments and taking corrective action.

[119] Subsection 30(2) of the *PSEA* reads as follows:

**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.

[120] Section 36 of the *PSEA* reads as follows:

**36.** In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).

## ANALYSIS

### **Issue I: Did the respondent abuse its authority by having Mr. Varner administer the practical test?**

[121] Subsection 2(4) of the *PSEA* states that “[...] abuse of authority shall be construed as including bad faith and personal favouritism.”

[122] Bad faith traditionally implies that there is an improper intent, a bias, or a lack of impartiality in exercising discretionary authority. Therefore, the allegation that the respondent was biased is essentially one of bad faith in the administration and assessment of the practical test. See: *Beyak v. Deputy Minister of Natural Resources Canada et al.*, [2009] PSST 0007. See also: 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.

[123] The allegation of bias must be analyzed separately as a specific test has been established in jurisprudence where bias is alleged. The courts have acknowledged that direct evidence of actual bias is difficult to establish and have found that fairness requires that there be no reasonable apprehension of bias.

[124] The test for reasonable apprehension of bias is well established. Suspensions, speculations or possibilities of bias are not enough and bias must be real, probable or reasonably obvious. See Robert W. Macauley & James L.H. Sprague, *Practice and Procedure before Administrative Tribunals*, vol. 4 (Toronto: Thomson Carswell, 2004), at 39.4.

[125] In *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at 394, the reasonable apprehension of bias test is set out as follows:

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



[126] In a more recent decision, *Newfoundland Telephone Company v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; [1992] S.C.J. No. 21 (QL), at para. 22 (QL), the Supreme Court articulated the test as follows: “The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.” The objective test articulated by the Supreme Court in *Committee for Justice and Newfoundland Telephone* also applies to the circumstances here; members of the assessment board have a duty to act fairly, which includes a bias-free assessment. If a reasonably informed bystander looking at the process could reasonably perceive bias on the part of one or more of the assessment board members, then the duty to act fairly has not been met. It is also important to emphasize that one of the key values articulated in the preamble of the *PSEA* is fairness.

[127] The Tribunal finds as a fact that the complainant and Mr. Varner were involved in situations of conflict prior to this appointment process. The complainant’s testimony that he played a role in removing Mr. Varner from the local health and safety committee, and he replaced Mr. Varner as its co-chair is not contested. The complainant filed grievances and a harassment complaint against Mr. Varner when he was Acting Warehouse Supervisor. These incidents occurred in 2006 and 2007. According to the complainant, he and Mr. Varner had not been on speaking terms for an extended period. Mr. Varner testified that, while they did “chat off and on,” he “wouldn’t invite him out for a beer.”

[128] Capt. Wight had no reason to be biased against the complainant. However, Mr. Varner, not Capt. Wight, was the technical expert on the subject matter being tested.

[129] The situation here differs markedly from, for example, *Praught and Pellicore v. President of the Canada Border Services Agency et al.*, [2009] PSST 0001, which involved an allegation of bias against the chairperson of the assessment board. In *Praught and Pellicore*, the Tribunal found as a fact that the chairperson had no memory of the incidents that formed the basis of the bias allegation. In contrast, Mr. Varner testified about the circumstances surrounding the complainant’s grievances and

harassment complaint and acknowledged that he was “a little taken aback, as anyone would be” by the harassment complaint.

[130] According to Mr. Varner’s testimony, he contemplated the implications of his past history with the complainant prior to the administration of the practical test. Mr. Varner testified that he explained his relationship with the complainant to Capt. Wight, but assured him that he could perform his duties in a professional manner. He testified that Capt. Wight was “okay” with that.

[131] Capt. Wight’s testimony is somewhat different. He testified that Mr. Varner “may have mentioned” conflict with the complainant, but “never said he would feel uncomfortable” administering the test. Capt. Wight did not bring the matter to the attention of Maj. McCallum.

[132] Mr. Varner’s testimony that the test was “black or white” and that nothing was “subjective” is contradicted by Capt. Wight’s testimony that, on the complainant’s test, he saw something that Mr. Varner did not observe and raised the complainant’s score. He also testified that changes were made to Mr. Brown’s score. Moreover, given the Tribunal’s finding below concerning the lack of clarification to candidates regarding when to pretend, the Tribunal finds that there was opportunity for an assessment board member to, consciously or unconsciously, bias the results of the test.

[133] The Tribunal finds that an informed person viewing the evidence realistically and practically would think that it is more likely than not that Mr. Varner, whether consciously or unconsciously, would not administer the practical test fairly vis-à-vis the complainant. Accordingly, the Tribunal finds that there is an appearance of bias in this appointment process as a result of Mr. Varner’s involvement, and the duty to conduct a fair appointment process has not been fulfilled.

[134] The PSC’s *Assessment Policy* states that assessments are to be designed and implemented without bias. This policy is established under subsection 29(3) of the *PSEA*. As the Tribunal held in *Robert and Sabourin v. Deputy Minister of Citizenship and Immigration et al.*, [2008] PSST 0024, at paragraph 65, there is a clear obligation in

the *PSEA* for deputy heads, and their delegates, to comply with PSC policies established under subsection 29(3).

[135] One of the key policy requirements contained in the *Assessment Policy* is that deputy heads must ensure that those responsible for assessment “are able to carry out their roles, responsibilities and duties in a fair and just manner.” According to the PSC’s *Guide to Implementing the Assessment Policy* (the *Guide*), “free of bias” “refers to taking steps to reduce prejudices and biased attitudes.” The *Guide* further stipulates as follows:

It is important not only that it **be** fair but that it also **be seen** to be fair. For example, assessment board members should make reasonable efforts to minimize the appearance of bias in the process and the assessment board members should not let personal favouritism influence the outcome of the appointment process. (emphasis in text)

[136] For further clarification, the PSC has produced a *Guidance Series – Assessment, Selection and Appointment* (the *Guidance Series*). The salient points of the *Guidance Series* are as follows:

Managers can help ensure that appointment decisions are free from bias [...] by:

- ensuring that assessment boards have been sensitized to bias-free assessment;
- ensuring that the relationships between applicants and assessment board members do not bias the assessment process or appear to do so;
- ensuring, when possible, that assessment board members do not have a personal interest in the outcome of the assessment process; if this is not possible, having several assessment board members, rather than just one person, assess persons so that results of assessments are not biased.

[137] Maj. McCallum was the person responsible for establishing the assessment board. He arrived at the Bedford Depot after the incidents involving the complainant and Mr. Varner, and neither Mr. Varner nor Capt. Wight drew these incidents to his attention prior to the administration of the practical test. By depriving him of this information, Maj. McCallum was unable to fulfill his responsibility under the *Assessment Policy* to ensure that those responsible for conducting the test were able to carry out their roles, responsibilities and duties in a fair and just manner. Maj. McCallum did place Capt. Wight on the assessment board to ensure that someone with “no axe to grind”

was present. Therefore, the Tribunal finds that Maj. McCallum was aware of the importance of taking steps to ensure a fair process; however, he was acting on insufficient information. As Maj. McCallum testified, he had considered using other persons, including persons from another ammunition depot, to administer the test, but did not realize that there was sufficient animosity within his unit to impact the process.

[138] The complainant did not raise his concerns over bias prior to the administration of the practical test. In fact, he testified that he thought Mr. Varner could administer the test in a “professional, fair and equitable” manner. However, he also testified that he “shuddered” when heard that Mr. Varner would be involved in administering the test and he thought he would “have to get 100% to pass.”

[139] The respondent contends that it was incumbent on the complainant to raise his concerns over bias prior to the administration of the test. However, the Tribunal finds that both the *Assessment Policy* and the *Guide and Guidance Series* documents make it clear that the responsibility for ensuring a bias-free assessment lies with the deputy head, delegated manager and assessment board members.

[140] The Tribunal finds that there were other qualified personnel who could have administered the test. The Tribunal accepts that Maj. McCallum could not have used Mr. Perrin since he would have been in a conflict of interest vis-à-vis Mr. Brown. However, Maj. McCallum acknowledged that there was another GT-04 who was available and had already assessed much of the knowledge exam. As well, he could have used another qualified person from another ammunition depot to administer the test.

[141] For all these reasons, the Tribunal concludes that the respondent abused its authority by having Mr. Varner administer the practical test despite a reasonable apprehension that he would be biased against the complainant.

**Issue II: Did the respondent abuse its authority in the administration of the practical test?**

[142] The Tribunal has held in its decisions that bad faith can be established where, for instance, there is direct or circumstantial evidence of improper intent, bias, lack of impartiality or when an irrational procedure leads to a finding that it is incompatible with the exercise of the delegated manager's staffing authority. Bad faith has also been given a broad meaning that does not require improper intent where there is serious carelessness or recklessness (See, for example: *Cameron and Maheux v. Deputy Head of Service Canada et al.*, [2008] PSST 0016; *Chiasson v. Deputy Minister of Canadian Heritage et al.*, [2008] PSST 0027; *Burke v. Deputy Minister of Department of National Defence et al.*, [2009] PSST 0003; and, *Robert and Sabourin*).

[143] The Tribunal will analyze the errors and omissions made in this appointment process.

#### ERRORS AND OMISSIONS IN THE APPOINTMENT PROCESS

##### A) THE MATTER OF PRETENDING

[144] Section 36 of the *PSEA* provides deputy heads with broad discretion in the selection and use of assessment methods, but these methods must effectively assess the qualification, and be used in a fair and reasonable manner or a deputy head may be found to have abused his or her authority.

[145] In *Chiasson*, the Tribunal held as follows:

[44] Under section 36 of the *PSEA*, the deputy head enjoys broad discretion in choosing the method it considers appropriate for assessing a candidate's qualifications. However, **the choice and use of the assessment method is subject to the recourse set out in section 77 of the *PSEA*. Abuse of authority may exist in the choice or the use of an assessment method [...]**

[50] [...] It is therefore important to determine **whether the tool in question, such as the exam, truly assessed what had to be assessed**, i.e. knowledge and abilities. That being said, if the tool is flawed, the outcome cannot be considered reasonable or fair.

(emphasis added)

[146] SOP 2-19 states that the inspection of torpedoes takes place in building 239. The practical test was conducted in building 203. The complainant testified that, when he entered the room where the test was to take place, he was told that the room was set

up on short notice and that some of the tools he would require were present; he would have to “pretend” that other tools were available. He was also told that he should pretend that other tools, that were not a part of the test, were not present. The complainant testified that, as he went through the test, if the tools that he required were not present, he pretended that they were. He believed that if he was not supposed to pretend, Mr. Varner or Capt. Wight would tell him so. When the complainant saw his test results, he was upset to discover that he was given no points for certain tasks where he pretended. In his view, this was unfair, as he understood that it was appropriate to pretend in those circumstances.

[147] The respondent argues that the complainant’s belief that Mr. Varner should have prompted him indicates a misunderstanding of the practical test. Yet, Mr. Varner testified that, if a person was having difficulty, clarification was provided. There is no evidence that any clarification was provided to the complainant on this point. The Tribunal finds that the respondent contributed to the complainant’s misunderstanding by not providing clear guidance on when he was or was not to pretend.

[148] In his testimony, Capt. Wight acknowledged that the test involved some pretending. Very little evidence was presented regarding the circumstances under which candidates were to pretend or not to pretend. Capt. Wight testified that, for example, a candidate might pretend to attach a ground cable or get someone to help with a task. Mr. Varner presented no evidence on this key aspect of the case. Similarly, none of the respondent’s witnesses provided any evidence as to whether the other candidates were given the same or different instructions regarding pretending, or any instructions at all on the subject.

[149] In *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008, the Tribunal explained the consequences of not providing evidence to refute evidence presented to support a complaint:

[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 [...]

[150] The Tribunal finds as a fact that the practical test involved some elements of pretending. The Tribunal further finds that, at least in the case of the complainant, the respondent did not provide sufficient clarification to the complainant as to when he was, or was not, required to pretend. This constitutes a serious flaw in the administration of the practical test.

[151] The Tribunal considers that failing to provide sufficient clarification when the complainant was to pretend or not to pretend constitutes serious negligence in the administration of the test tantamount to bad faith. The practical test became, in part, a test of the complainant's **ability to guess** what he was supposed to do, rather than a test of his **ability to perform** the tasks requested of him. For example, the complainant testified that, in response to question 4 b, he used his finger to circle the area requiring repair, pretending it was a pencil, but he was given no points for marking the area.

[152] The Tribunal is not satisfied that the administration of the test provided a reasonable or fair assessment of the complainant's abilities as the test was seriously flawed. The respondent was, therefore, unable to truly assess the complainant's abilities. The Tribunal finds that the respondent relied on inadequate material to assess the complainant.

## B) THE USE OF SOP 2-19

[153] The complainant, in both his written allegations and his testimony, stated that he read directly from the SOP and reference manuals during the practical test and then performed or pretended to perform the required tasks.

[154] Both Capt. Wight and Mr. Varner testified concerning the importance of following the SOP "verbatim." According to Capt. Wight, if you do not follow the SOP verbatim, you could miss steps and the consequences could be "catastrophic." Capt. Wight stated that the SOP is a simple document, and it is hard to go wrong. He also stated that, if a candidate followed the SOP verbatim, there would be no reason that he could not pass the test. However, he testified that the complainant did not follow the SOP verbatim.

Mr. Varner testified that there were times when the complainant went through the SOP without reading it completely.

[155] According to the evidence presented, there was only one copy of SOP 2-19 available during the test, and it was in the hands of the complainant. Mr. Varner testified that, at the time of the test, he knew SOP 2-19 by heart. The Tribunal notes that the SOP is 24 pages of text, lists and charts. Capt. Wight testified that he did not know the SOP by heart, but he had the scoring sheet, which was based on the SOP. However, evidence was presented, which was not refuted, that there were differences between the scoring sheet and the wording in the SOP itself. For example, testimony shows that the test refers to a “mini grinder” while the SOP refers to a “pneumatic die grinder.” Capt. Wight testified that the distinction is unimportant as a “grinder is a grinder.” Mr. Varner initially testified that a mini grinder and a pneumatic grinder are the same, but subsequently testified that a pneumatic grinder works with air and a mini grinder works with electricity.

[156] While the distinction between various types of grinders may seem trite, it is the respondent’s witnesses who stressed the importance of following the SOP “verbatim.” According to the Concise Oxford Dictionary, verbatim means “word for word.” To read something verbatim means to read it exactly as it appears in the subject document. The complainant testified that, when required, he read directly from the SOP. Capt. Wight confirmed that, if a candidate followed the SOP verbatim, there would be no reason that the candidate could not pass. The Tribunal has difficulty accepting the respondent’s claim that it knew the complainant did not follow the SOP “verbatim” when only the complainant had the SOP during the test.

[157] The Tribunal also notes a number of other apparent inconsistencies in the testimony of Mr. Varner and Capt. Wight. Mr. Varner testified that he created the test for scoring purposes and set up the scenario based on the task to be performed. Capt. Wight testified that the preparation of the marking guide for the test was a joint effort with Mr. Varner. He also testified that he prepared the scenario. Mr. Varner testified that Capt. Wight did the scoring during the test and discussed it with him. Capt. Wight testified that Mr. Varner “asked the questions, observed the candidates,



and marked them on the rating guide.” Capt. Wight also testified that, in the scenario, he was looking for evidence that the candidates could identify errors in the SOP, but in cross-examination, he testified that while there were errors in the SOP, they were not incorporated into the test. Furthermore, Mr. Varner, the resident expert on SOP 2-19 testified that, to his knowledge, there were no errors in the SOP. It is, therefore, difficult to understand why Capt. Wight would be looking for the candidates to identify them. Moreover, no notes were taken by either assessment board member.

[158] The Tribunal is satisfied from the complainant’s background and testimony that he understood the purpose of the SOP and was both capable and motivated to read directly from it given his belief that he “would have to get 100% to pass.” By the same token, the Tribunal is not satisfied that the assessment board was in a position to determine if the complainant met the critical requirement to follow the SOP verbatim as the complainant was the only person in possession of the SOP during the test. Given the Tribunal’s finding regarding bias, and the lack of consistency in the testimony of the two members of the assessment board, the Tribunal finds, on the balance of probabilities, that the assessment board was not in a position to effectively assess the complainant’s use of the SOP.

#### C) THE SCENARIO GIVEN TO CANDIDATES AT THE BEGINNING OF THE TEST

[159] In his testimony, Capt. Wight conceded that the words used to set out the test scenario for the complainant may not have been identical to the words used for the other candidates. Consistency is a component of a fair assessment process, and it was an error to provide a different test scenario to the complainant. Nevertheless, on the evidence, the Tribunal finds that this error, by itself, was not serious enough to have affected the outcome of the test.

#### D) OTHER ALLEGATIONS

[160] The Tribunal considered a number of other allegations raised by the complainant, but finds that they are either unsubstantiated, or do not amount to serious errors to support a finding of abuse of authority. The Tribunal is satisfied that Mr. Varner did not have a reporting relationship to candidate James Brown during the relevant time period

and was, therefore, not in a conflict of interest with respect to Mr. Brown. Maj. McCallum's personal comments at the informal discussion regarding the complainant's personal suitability for the GT-03 position were made after the administration of the test and are, therefore, not relevant to the complaint. According to the rating guide used for the assessment process, all personal suitability qualifications were to be assessed by interview questions. As the complainant did not pass the practical test, he did not proceed to an interview.

[161] While the Tribunal is not satisfied with the manner in which the practical test was administered, it does not find significant flaws in the content of the practical test. The test was intended to assess the "[a]bility to perform functions **such as** disassemble, assemble, repair..." (emphasis added). "Repair" was one of the functions assessed. It is also axiomatic, given the nature of the tasks, that safety is a necessary consideration in the conduct of the functions being assessed. The Tribunal is satisfied, based on the evidence, that "inspection" is a necessary first step in conducting the above functions and the complainant knew that the assessment would be based on SOP 2-19, which deals with "inspection." There is no convincing evidence that successful completion of the test would not provide the assessment board with sufficient information to determine that a candidate met the essential qualification being assessed. (See: *Jacobsen v. Deputy Minister of Environment Canada et al.*, [2009] PSST 0008, paragraph 42).

[162] The complainant also alleged that he did not have sufficient notice to prepare for the test. However, there is no evidence that the other candidates received more time to prepare than the complainant. Furthermore, the complainant testified that the SOP "is not something one would normally take home to study."

[163] In conclusion, the Tribunal finds that the administration of the practical test was seriously flawed. The instructions on the test were not clear, and did not provide the complainant with a fair and reasonable opportunity to demonstrate the abilities being tested. It was incumbent on the assessment board to provide clear instructions as to when to, or not to, pretend. Furthermore, neither member of the assessment board had the SOP during the test, and was, therefore, not in a position to determine whether or not the SOP was followed verbatim.

[164] The complainant has satisfied the Tribunal, based on a balance of probabilities, that the respondent's errors and omissions in the administration of the practical test were of such a serious nature as to constitute bad faith. Accordingly, the Tribunal concludes that the respondent abused its authority in the administration of the practical test.

#### DECISION

[165] For all these reasons, the complaint is substantiated.

#### CORRECTIVE ACTION

[166] The Tribunal's remedial powers are found in subsection 81(1) of the *PSEA*, which reads as follows:

**81.(1)** If the Tribunal finds a complaint under section 77 to be substantiated, the Tribunal may order the Commission or the deputy head to revoke the appointment or not make the appointment, as the case may be, and to take any corrective action that the Tribunal considers appropriate.

[167] The complainant has requested that the Tribunal revoke the appointments resulting from this appointment process.

[168] Revocation is the only remedy that will make the complainant whole in this case. There is no point in ordering a reassessment of the complainant by a different assessment board using a more objective assessment process, as the two successful candidates filled both of the available positions. According to the respondent's witnesses, the successful candidates were assessed in the same manner as the complainant. However, the Tribunal has found that the administration of the practical test was so badly flawed that it cannot be relied upon to provide a valid assessment of a candidate's abilities.

[169] The Tribunal orders the deputy head to revoke the appointments resulting from this appointment process.

[170] Furthermore, in view of the Tribunal's findings with respect to bias, it is recommended that Maj. McCallum, Capt. Wight and Mr. Varner undertake training on bias-free staffing.

Kenneth J. Gibson  
Member

PARTIES OF RECORD

Tribunal File:	2008-0390
Style of Cause:	<i>Miles Denny and the Deputy Minister of National Defence et al.</i>
Hearing:	April 28 and 29, 2009 Halifax, NS
Date of Reasons:	October 15, 2009
APPEARANCES:	
Louis Bisson	For the complainant
Lesa Brown	For the respondent
John Unrau	For the Public Service Commission