Public Service Staffing Tribunal | Tribunal de la dotation de la fonction publique

File: 2010-0603
Issued at: Ottawa, March 22, 2012

NORMAN AMIRAULT

Complainant

AND

THE DEPUTY MINISTER OF NATIONAL DEFENCE

Respondent

AND

OTHER PARTIES

Matter	Complaint of abuse of authority pursuant to section 77(1) (*a*) of the *Public Service Employment Act*
Decision	Complaint is substantiated
Decision rendered by	Kenneth J. Gibson, Member
Language of Decision	English
Indexed	*Amirault v. Deputy Minister of National Defence*
Neutral Citation	2012 PSST 0006

Reasons for Decision

Introduction

1 The complainant, Norman Amirault, is alleging that the respondent, the Deputy Minister of National Defence, abused its authority in an appointment process to staff Deputy Platoon Chief positions at the FR-03 group and level in Victoria, British Columbia. More specifically, he alleges that the Deputy Minister abused its authority by commencing this appointment process despite the existence of an FR-03 pool of qualified candidates. He further alleges that the respondent demonstrated a reasonable apprehension of bias against him, and in favour of one of the successful candidates.

2 The respondent denies the complainant's allegations. It responds that the complainant was eliminated from the appointment process because he failed to meet three essential qualifications for the Deputy Platoon Chief position.

3 For the reasons that follow, the Public Service Staffing Tribunal (the Tribunal) finds that the complaint is substantiated on the basis of a reasonable apprehension of bias against the complainant and in favour of one of the successful candidates.

Background

4 In May 2010, the respondent initiated an internal advertised appointment process to establish a pool of qualified candidates for Deputy Platoon Chief, FR-03 positions.

5 Twelve persons, including the complainant, submitted applications. The complainant and eight other candidates were screened into the appointment process and invited to write a test.

6 The complainant failed two essential knowledge qualifications and one essential ability qualification on the test and was informed on August 25, 2010, that he had been eliminated from the appointment process.

7 At the end of the appointment process, four candidates were found qualified. A *Notification of Appointment or Proposal of Appointment*, listing the four qualified candidates was posted on September 21, 2010.

8 The complainant filed a complaint under s. 77(1)(*a*) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12,13 (the PSEA) on September 28, 2010.

9 At the commencement of the hearing, the complainant's representative stated that he would not be pursuing allegations regarding abuse of authority in the choice of process and in the establishment of the Trade Qualification (NFPA 1021/TQ6A).

Issues

10 The Tribunal must determine the following issues:

(i) Did the respondent abuse its authority by commencing a new appointment process?

(ii) Was there a reasonable apprehension of bias in the assessment process, giving rise to an abuse of authority?

Analysis

Issue I: Did the respondent abuse its authority by commencing a new appointment process?

11 The complainant, who is an FR-02, testified that he was in a qualified pool of candidates that had resulted from an FR-03 appointment process in 2007. Two candidates were appointed immediately following the completion of that process. The complainant stated that the first appointee was a unanimous choice of the assessment board. The second appointee was selected by a vote of the assessment board. The complainant testified that he placed third and was told that he would be appointed to the next available position.

12 Gino Chicorelli, an FR-04, Platoon Chief, testified that he was the chair of the 2007 assessment board. He confirmed that the assessment board had determined that the complainant should be appointed to the next available FR-03 position.

13 Randy Morton is also an FR-04. He testified that he participated as a board member in the vote for the second appointee in 2007. According to Mr. Morton, there

was no ranking of candidates and the board did not agree that the complainant would receive the next available appointment. He stated that if a vacancy became available, the board would have reconvened to make a selection from the remaining pool members.

14 Following the 2007 appointments, the complainant acted from time to time in FR-03 positions. However, the respondent did not make any further indeterminate FR-03 appointments before terminating the pool in 2010.

15 In February 2010, Canadian Forces Base Esquimalt (CFB) obtained approval to staff four FR-03 positions on an indeterminate basis. Steve Mullen, the base Fire Chief, testified that after discussion with the Commanding Officer of Port Operations and Emergency Services, Allan James, it was decided not to make an appointment from the 2007 pool but to start a new appointment process. The rationale for this decision was that the 2007 pool was 2½ years old and during that period other staff had acquired the qualifications to be considered for FR-03 positions. According to Chief Mullen, he and Commander James met with local union representatives who endorsed their decision to close the existing pool in order to conduct a new process thereby providing an advancement opportunity to additional staff. Chief Mullen stated that because the respondent conducted a new process, seven persons who were not eligible to apply in 2007 applied in the 2010 process.

16 An email from Commander James explaining the decision to close the 2007 pool states that an agreement was reached with the union that future pools would have a validity period of two years.

17 As the Tribunal found in *Hughes v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 0016, at para. 102, s. 77(1)(*a*) of the PSEA is concerned with the appointment of persons to positions under s. 30(2), not the inclusion of persons in pools. Inclusion in a pool only signifies that a candidate is qualified for a position. It does not entitle a person to be appointed to a position. In any event, the 2007 pool had no specific termination date and no evidence was presented to show that the respondent could not close the pool and commence another appointment process.

The evidence from Chief Mullen and Commander James provides a reasonable explanation for their decision to do so.

18 The complainant alleges that at the time he was included in the 2007 pool, he was informed that he would be appointed to the next available FR-03 position. However, the testimony of two of the persons who participated in that alleged decision is contradictory. Furthermore, 2½ years had passed since that decision was allegedly made and additional employees had become eligible to apply. No evidence was tendered that even if the complainant's expectations were accurate, the respondent was prohibited from changing its mind and pursuing a different course after this length of time.

19 The Tribunal finds that the complainant has not established that the respondent abused its authority when it closed the 2007 pool and commenced a new appointment process.

Issue II: Was there a reasonable apprehension of bias in the assessment process, giving rise to an abuse of authority?

(A) Was there a reasonable apprehension of bias in the assessment of the complainant?

20 On August 25, 2010, the complainant was informed by email that he had not met three essential qualifications for the FR-03 position and that he would receive no further consideration in the appointment process. The three qualifications were:

- A4 - Ability to effectively deal with conflict.
- K3 - Knowledge of hazardous materials and emergency response procedures.
- K5 - Knowledge of relevant publications that provide policy and direction for a DND fire department including but not limited to: FR collective agreement, Fire department OG's (Operational Guidelines), CANUTEC, (Canadian Transport Emergency Centre), RAM (Realty Asset Manual) Chap. 10, NFPAs (National Fire Protection Associations), and DAODs (Defence Administrative Orders and Directives).

21 The complainant alleged that there was a reasonable apprehension of bias on the part of the assessment board against him. He presented evidence of bias regarding

the two assessment board members, Mr. Morton and Mike Gains, and regarding Chief Mullen who testified that he was responsible for overseeing the appointment process.

Respondent objection to evidence of bias regarding Chief Mullen

22 The respondent raised an objection when the complainant started to adduce evidence that Chief Mullen was biased against him. It submitted that the complainant had made no allegation of bias against him. The respondent argued that under s. 23 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-06, as amended by SOR/2011-116 (the *Regulations*), the Tribunal may only allow the complainant to amend or provide a new allegation if the amendment or new allegation results from information that could not reasonably have been obtained before the complainant submitted his original allegations (s. 23(1)(*a*)) or if it is otherwise in the interest of fairness to do so (s. 23(1)(*b*)).

23 The complainant argued that the evidence relates to one of the allegations in the list of allegations that he filed on November 4, 2010. He submitted that the allegation in question is broad, applying to all members of the assessment board, including Chief Mullen, who was the responsible manager with staffing authority in the case of this appointment process.

24 The Tribunal reserved its decision on the objection and permitted the complainant to proceed with his evidence.

25 Having heard the evidence, the Tribunal finds that the allegation in question does not relate to Chief Mullen and that the evidence regarding his alleged bias pertains to events that allegedly occurred in February 2009, long before the complainant submitted his allegations on November 4, 2010. Since the complainant did not present any evidence showing that he could not reasonably have obtained this information before filing his allegations, he is not entitled to make an amendment to his allegations under s. 23(1)(*a*) of the *Regulations*. Furthermore, he did not identify any factors to justify adding the allegations on the basis of fairness, pursuant to s. 23(1)(*b*) of the *Regulations*. For these reasons, the respondent's objection is sustained. The Tribunal

will not take into account the evidence advanced by the complainant in support of his allegation of bias on the part of Chief Mullen.

Evidence of bias regarding Mr. Morton and Mr. Gains

26 The complainant testified that he was the secretary-treasurer of his local chapter of the Public Service Alliance of Canada (PSAC) from 2000 to 2010. He stated that following the 2007 appointment process, he was involved in many serious union/management issues with Mr. Morton. On one occasion, while the complainant was still serving on the local union executive, a dispute developed between Mr. Morton, a union member, and the union.

27 According to the complainant, Mr. Morton raised the issue with Commander James. However, Commander James considered this to be an internal union issue and refused to intervene. Mr. Morton then filed a complaint against the bargaining agent with the Public Service Labour Relations Board (PSLRB). The complaint was ongoing at the time of the hearing.

28 The complainant noted that this dispute took place just prior to the posting of the Job Opportunity Advertisement (JOA) for the FR-03 appointment process in May 2010. He testified that given the ongoing conflict with Mr. Morton, he was concerned whether he would get a fair assessment during the appointment process.

29 Mr. Morton testified that he holds no animosity towards the complainant and that they work well together. He said that when the appointments were made from the previous pool in 2007, he voted that the complainant be one of the two persons appointed, but he was out-voted. He noted that he was the only board member present when the complainant wrote his test in the more recent appointment process and that the complainant did not object to his involvement at that time.

30 Mr. Morton acknowledged that he had filed a complaint with the PSLRB alleging unfair representation. He testified that his complaint was against the union generally, but that an associate had advised him that he should specify the names of the three union executive members, including the complainant, in the complaint.

31 With respect to Mr. Gains, the complainant testified that in 2006 he was involved in a serious labour relations conflict with Mr. Gains that was resolved in 2007. For reasons of privacy, the Tribunal will not relate the details of this dispute.

32 Mr. Gains' testimony on this issue was consistent with that of the complainant. He testified that at the time of this appointment process, he made human resources staff aware of his past conflict with the complainant. He said that Chief Mullen was already aware of the conflict. Human resources staff and Chief Mullen informed him that the past conflict was not relevant to the appointment process.

33 The complainant acknowledged that he has not been involved in any further conflicts or disputes with Mr. Gains since that time.

34 The complainant submits that at the time of the appointment process, there was another FR-04 employee, Rick Lequesne, who could have served on the assessment board. The Fire Inspector and several FR-03s were also available. In addition, he submits that the respondent could have used qualified employees from locations other than Esquimalt.

35 Mr. Lequesne testified that he did not recall being approached to be a member of the assessment board for the test. He expected to be involved at the selection stage once the assessments were completed.

36 Mr. Morton was asked if other FR-03s, 04s or 05s could have participated in the assessment process. He replied that they "never ran into that situation".

37 Mr. Gains testified that at a senior officers meeting, he and Mr. Morton volunteered to participate on the FR-03 appointment process. Two other FR-04s and an FR-05 were present, but did not volunteer.

38 Chief Mullen confirmed that only Mr. Morton and Mr. Gains volunteered to participate on the assessment board. He believed the other FR-04s felt they were too busy to participate. He further testified that he knew about the complainant's concerns, but he had confidence in Mr. Morton and Mr. Gains who had conducted many appointment processes. He noted that Commander James had informed the

complainant by email that, if required, they could compose a board of persons other than Mr. Morton and Mr. Gains to conduct his interview.

39 According to Chief Mullen, Commander James had suggested to him that he, the Chief and the Deputy Chief could conduct the complainant's interview instead of Mr. Morton and Mr. Gains, but the complainant failed the test and never reached the interview stage.

40 Ron McClintock is a human resources manager with the respondent. He was involved in the 2010 appointment process as a human resources officer. He testified that it was his understanding that Mr. Morton and Mr. Gains assessed the tests separately and then met to seek a consensus. He said that some of the answers were "clear cut".

41 Mr. Gains confirmed that he and Mr. Morton prepared the written test and that it had been reviewed by Chief Mullen and Mr. McClintock before the candidates wrote it.

42 Mr. Gains and Mr. Morton explained why they believed the complainant did poorly on the three qualifications that he failed on the test.

43 In Mr. Morton's view, the test answers were not subjective because the board had reference material. He said that the test answers were mainly "black or white". However, Mr. Morton acknowledged that the board did not expect the candidates to know the exact words in the expected answers. He said that if answers were incomplete, the board tried to "read between the lines" and granted as much "leniency" as possible.

44 Mr. McClintock testified that shortly after the exams were written, he reviewed the exams of all of the candidates who failed, to ensure that everything was in order and that the marks added up to the total score. He added that he did not have the authority to change any of the marks awarded by Mr. Morton and Mr. Gains. Mr. McClintock noted that failure on one essential qualification was sufficient for the complainant to be eliminated from the appointment process.

45 Chief Mullen testified that he was responsible for the appointment process. He stated that he reviewed the exam prior to the test to ensure that the exam questions matched the essential qualifications in the JOA for the position. He also reviewed all of the exams of the candidates who failed, including the complainant's exam.

46 The complainant points out that the Public Service Commission's (PSC) *Assessment Policy*, provides that deputy heads must ensure that those responsible for assessment are not in a conflict of interest. He believes that Mr. Morton was in a conflict of interest due to the PSLRB complaint. With regard to Mr. Gains, he submits that although the conflict between them may have occurred well before this appointment process, the conflict was serious and would not be forgotten by those who were involved.

47 The complainant notes that both Mr. Morton and Mr. Gains signed the Board Report declaring that the nature of their relationship with the candidates is such that they can render an impartial decision. He commends Mr. Gains for raising his conflict with the complainant with human resources staff and Chief Mullen, but notes that they considered the conflict to be irrelevant to the appointment process.

48 The complainant further submits that Commander James' email to the complainant on July 30, 2010, stating that the written exam is not open to subjective interpretation, is not consistent with the facts. He notes that he was awarded partial marks for some questions demonstrating that the assessment was subjective rather than objective.

49 The complainant cited the Tribunal's decision in *Denny v. Deputy Minister of National Defence*, 2009 PSST 0029, paras. 121-141, in arguing that the Tribunal should make a similar finding of abuse of authority in this case based on a finding of a reasonable apprehension of bias.

Determination of the appropriate test

50 The respondent submits that the reasonable apprehension of bias test should not be applied in the present case, arguing that an administrative decision made under

s. 36 of the PSEA should only be held to the lower standard of examining whether the persons involved had acted with “closed minds”. The respondent referred to the judgment in *Pelletier v. Canada (Attorney General)*, 2008 FCA 1, in which the Federal Court of Appeal applied the closed mind test to determine whether the duty of procedural fairness was respected when the federal Cabinet terminated a Crown corporation’s board chairperson from his position, by Order in Council.

51 The Tribunal is not persuaded by the respondent’s argument. To begin with, s. 36 of the PSEA relates to the deputy head’s choice of assessment method in an appointment process. The complainant has not made the choice of assessment method an issue in the present case.

52 More significantly, however, the nature of the decision in *Pelletier* is clearly distinguishable from the present case. As the Court noted at paras. 53 and 59, the circumstances of that case were unique. The Court determined, at para. 49, that the lower closed mind standard applies to decisions of administrative decision-makers such as ministers or officials who perform policy-making discretionary functions. The Court found that the case before it, involving the termination of a person appointed by Cabinet during pleasure, fell within this category. Under the PSEA, the nature of decisions taken by those responsible for assessment in appointment processes are not policy-making discretionary functions.

53 In *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (*Newfoundland Telephone Co*.), cited in *Pelletier*, the court stated at para. 29 that: “…the courts must take a flexible approach to the problem so that the standard which is applied varies with the role and function of the Board which is being considered…”

54 As noted in *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 0010 at paras. 64-71, the factors used to determine the extent of the duty of fairness in administrative decision-making include not only the nature of the decision, but also the legislative context and the effect on the individual. The legislative context for a staffing complaint is one where Parliament has specifically

indicated in the Preamble to the PSEA, a duty of fairness in employment practices, which encompasses a binding obligation on the part of deputy heads to adhere to PSC policies that explicitly require assessment board members to make reasonable efforts to minimize any appearance of bias.

55 The PSC *Appointment Policy* provides that fair decisions are those that are made objectively and are free from political influence or personal favouritism, and are based on policies and practices that reflect the just treatment of persons. The PSC *Assessment Policy* provides that persons responsible for assessment must not be in conflict of interest and must be able to carry out their roles, responsibilities and duties in a fair and just manner.

56 These policies create expectations on the part of candidates that those responsible for assessment act fairly and are not in conflict of interest. The Tribunal therefore concluded in *Gignac* that those responsible for assessment in appointment processes have a duty to carry out assessments that are unbiased and that do not generate a reasonable apprehension of bias (see also *Bain v. Deputy Minister of Natural Resources Canada*, 2011 PSST 0028 at paras. 133-139).

57 Accordingly, the Tribunal finds in the present case that reasonable apprehension of bias is the appropriate test for determining whether the assessment board acted fairly and without bias in this appointment process. The test provides that where an informed person, viewing a matter realistically and practically – and having thought the matter through – would reasonably perceive bias (whether conscious or unconscious) on the part of one or more persons responsible for the assessment, the Tribunal can conclude that there was abuse of authority (see *Gignac*, at paras. 72-74; and *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at 394). It is not necessary for the complainant to prove that the board members had an actual bias against him. As the courts have noted in elaborating this test, actual bias need not be established since it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind (see *Newfoundland Telephone* at 636; *R. v. S. (R.D.)*, [1997] 3 SCR 484 at para. 109).

Was there a reasonable apprehension of bias regarding Mr. Morton and Mr. Gains?

58 The Tribunal finds that an informed person, within the meaning of this test, would reasonably perceive bias on the part of both assessment board members.

59 The complainant has presented evidence of conflict with both assessment board members. The principal evidence related to Mr. Morton concerns the complaint he filed with the PSLRB naming, amongst others, the complainant. The Tribunal does not find it significant that Mr. Morton may have voted to appoint the complainant to a Deputy Platoon Chief position during the 2007 appointment process. Relationships can change over time and the events involving Mr. Morton's conflict with the union occurred after the 2007 process. In fact, he was pursuing his PSLRB complaint at the same time he was serving on the assessment board that assessed the complainant's test. Nor is the Tribunal persuaded by the respondent's argument that Mr. Morton's PSLRB complaint was really against the union and not the individuals named in the complaint. The union's dispute with Mr. Morton came about due to decisions taken by individuals, not merely by an organization functioning without human intervention. In naming the complainant in his PSLRB complaint, Mr. Morton was signalling that he believes the complainant was at least partly responsible for the union's decisions, which he was contesting in his complaint.

60 The evidence regarding Mr. Gains relates to events that occurred about four years before the appointment process at issue. There was no evidence of subsequent conflict between Mr. Gains and the complainant. This evidence does not, however, erase the fact that a serious conflict between him and the complainant did in fact take place.

61 Indeed, Mr. Gains himself was sufficiently concerned about how his role on the assessment board would be perceived, given his previous conflict with the complainant, that he raised the point with human resources staff and Chief Mullen, but they dismissed his concerns.

62 Given the history between the complainant and the two assessment board members, it is not surprising that he was concerned about having his opportunity

for career advancement placed in the hands of Mr. Morton and Mr. Gains. The Tribunal notes that other persons were available who could have assessed the complainant's test. The Tribunal is not persuaded by the respondent's argument that no one else volunteered or that maybe the others felt they were too busy. Where participation in appointment processes is part of an employee's duties, and the evidence indicates this is routinely the case for Platoon Chiefs, the respondent can assign this responsibility. The respondent is not restricted to the use of volunteers in order to conduct appointment processes.

63 Chief Mullen admitted that he knew about the conflict between the assessment board members and the complainant. Despite this he determined that he had confidence in Mr. Morton and Mr. Gains to conduct a fair assessment because they had significant experience in assessment processes. The Tribunal finds Chief Mullen's analysis to be incomplete. The PSC *Guide to Implementing the Assessment Policy*, in section VI, advises managers as follows:

> Since the integrity of the assessment process could be the subject of review, 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 any appearance of bias in the process…
>
> (emphasis in text)

64 Chief Mullen's analysis only considers the first part of this advice – that the process be *fair*. In order for the process *to be seen to be fair*, it is necessary to look at it from the perspective of others. As the Tribunal pointed out in *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 0006, at para. 28.

> …in the context of staffing in the public service, one cannot consider fairness through the narrow lens of one individual's perception or perspective. To make objective appointment decisions, delegated managers must consider several perspectives and seek to balance often competing interests when they consider the options available to them to staff a position. It could be said that a manager needs to consider fairness from several perspectives, knowing that the decision is unlikely to be perceived as fair by everyone.

65 The evidence here is that Chief Mullen made his determination on the basis of his perspective alone. In so doing, he failed to consider whether the appointment process would be seen to be fair by others.

66 Based on the evidence regarding the prior differences between the complainant, Mr. Morton and Mr. Gains, the Tribunal finds that an informed person, viewing the matter realistically and practically – and having thought the matter through – would reasonably perceive bias, whether conscious or unconscious, on the part of these assessment board members.

67 The respondent argues, however, that even if a reasonable apprehension of bias did exist, given the test's objectivity, there was little the assessment board members could have done to influence the outcome even if one or both of them were biased against the complainant. It was noted for example, that question No. 1 on the test was a multiple choice question.

68 Yet Mr. Morton testified that some of the questions required knowledge of lists of information and that the assessment board did not expect candidates to have memorized all of this information. He said the board "read between the lines" to determine if sufficient information was presented by a candidate and that the board was, where possible, "lenient" in marking the complainant's answers.

69 The Tribunal has determined in numerous cases that it is not its role to reassess a candidate in an appointment process. Its role is to examine the appointment process to determine if there has been an abuse of authority. See, for example, *Oddie v. Deputy Minister of National Defence*, 2007 PSST 0030, at para. 92.

70 The Tribunal reviewed the complainant's test regarding the three qualifications that he failed - A4, K3 and K5.

71 Qualification A4 concerns the ability to effectively deal with conflict. The relevant question (Q18) was an open ended question and there was no expected answer set out in the rating material that was prepared before the test was administered. There is no explanation as to why the complainant's response to the question was valued at 10 points, as opposed to some higher or lower number. The Tribunal finds that the assessment of this question was subjective with considerable discretion vested in the assessment board to determine a candidate's score.

72 Qualification K3 concerns knowledge of hazardous material emergency response procedures. It was assessed by questions Q9 and Q10. The complainant was awarded partial marks on both questions at the discretion of the assessment board.

73 Qualification K5 concerns knowledge of relevant publications that provide policy and/or direction for a Department of National Defence (DND) fire department. This qualification was assessed by eight questions. The complainant was awarded full marks on five questions. He was awarded partial marks, at the discretion of the assessment board, on two of the three remaining questions. Only Q21 appears to have been marked in an entirely objective manner in accordance with the rating guide, but Q21 was only worth 25 points of the total of 165 points available for K5.

74 Based on this analysis, the Tribunal finds that the assessment of all three qualifications that the complainant failed had a subjective component whereby the complainant's score resulted from the exercise of discretion on the part of the assessment board.

75 The Tribunal therefore finds that the test did, in fact, provide ample opportunity for the assessment board to award partial marks and influence the results, such that the existence of a reasonable apprehension of bias may have affected the complainant's assessment. Furthermore, other persons were available who could have administered the test in place of Mr. Gains and Mr. Morton. Chief Mullen's decision that Mr. Morton and Mr. Gains could conduct a fair assessment of the complainant did not take into consideration the need for the process to be seen to be fair and unbiased.

76 The complainant presented additional evidence in support of his allegation that his test was assessed unfairly. However, given the Tribunal's finding regarding his allegations of bias, these additional issues need not be addressed.

77 For all these reasons, the Tribunal concludes that the allegation of reasonable apprehension of bias on the part of the assessment board against the complainant has been substantiated. As was noted in *Gignac* at para. 74, a reasonable apprehension of

bias in a staffing decision demonstrates bad faith, which constitutes an abuse of authority.

(B) Was there a reasonable apprehension of bias in the assessment of one of the successful candidates?

78 The complainant alleges that there was a relationship between Mr. Morton and one of the successful candidates, Ray Halsall, which gives rise to a reasonable apprehension that Mr. Morton was biased in this candidate's favour.

79 Mr. Morton acknowledged that he had been engaged in an outside business with Mr. Halsall, an FR-02, since approximately 1995. The business involves firefighting training for marine shipboard staff with commercial shipping companies. Mr. Halsall is the president of the business and Mr. Morton is the vice-president.

80 Mr. Morton testified that there is little significance to the titles. He said they are equal business partners and the only two persons engaged in the business. According to Mr. Morton, Mr. Halsall became president because the business was his idea. Mr. Morton said that their relationship is a business relationship only. They do not have a social relationship.

81 At the beginning of the assessment process, the complainant raised concerns with Mr. McClintock and Commander James over Mr. Morton's participation in the assessment of Mr. Halsall. He believed that there was a conflict of interest due to their business relationship. Mr. McClintock sent an email to the complainant on July 30, 2010, stating:

> Just to confirm our conversation this afternoon, I am aware of the perceived conflict of interest with respect to a member of the board on the current FR-03 process. At this time the decision has been made to carry on with the process as planned and my advice is that you should write the exam on Monday as currently scheduled.

82 Mr. McClintock testified that, based on his personal knowledge over 15 years with the fire service, he knew that most FRs have an outside business interest. Mr. McClintock said that Commander James was aware of the business relationship between Mr. Morton and Mr. Halsall. He also said that DND headquarters staff had

previously investigated the business and had determined that there was no conflict of interest between the duties Mr. Morton and Mr. Halsall performed for DND and the work of their company. He testified that Commander James had decided to proceed because he had determined that Mr. Morton would not be involved in any part of Mr. Halsall's assessment. Mr. McClintock also testified that he was sure that Commander James would have considered whether Mr. Morton could be trusted not to share the written exam with Mr. Halsall in advance.

83 On July 30, 2010, the complainant spoke directly to Commander James and followed up with an email expressing his concern about the "validity and security" of the exam if Mr. Morton were on the assessment board with Mr. Halsall as a candidate. Commander James replied by email later that day stating the following:

> Thank you for your phone call and email. I have looked at this issue and I agree that we must recognize that the business relationship between Mr. Morton and Mr. Halsall must be considered. That said I am confident that we can continue to run the competition as planned in a fair and open fashion. As much of the process (screening, written exam) are not open to subjective interpretation I see no potential for a conflict. In other areas where there is the potential that a conflict could be perceived (the interview) I am confident that we can put suitable mitigation measures in place to guarantee a fair and transparent outcome.

84 Mr. Morton testified that in order to be fair and transparent, it was agreed that Mr. Gains would mark Mr. Halsall's exam and conduct his practical test. Mr. Morton acknowledged that he was present during Mr. Halsall's oral interview but Mr. Gains asked all of the questions. He said that he concurred with Mr. Gains' rating of Mr. Halsall on the interview.

85 Mr. Gains testified that Mr. Halsall was assessed "largely" by himself. At the request of human resources staff he prepared a note dated September 15, 2010, addressed "To Whom it may concern" which reads as follows:

> Due to the ongoing conflict between the CFB Esquimalt Fire Dept Local 1009 Union Executive and FR 04, Platoon Chief Randy Morton we felt in concert with CHRSC that it would be in the best interests of all concerned for me to be the lead assessor for candidate Raymond Halsall during the FR03 Deputy Platoon Chief competition. During the Knowledge written exam I answered any and all concerns of candidate Ray Halsall. During the practical or abilities portion of the assessment, I rode in the Fire Truck with Mr. Halsall and performed the role of lead assessor for his evaluation. During the interview or (sic) personal suitability for Mr. Halsall I asked the questions and was again the lead assessor for this portion of the process. We felt that this was the most vigilant way of

> ensuring that the process was transparent as there seemed to be ongoing concerns raised by a participant in the competition who is also a Union Executive member of Fire Dept Local 1009.

86 The Tribunal finds that the fact that DND found no conflict between the outside business of Mr. Morton and Mr. Halsall and their work within DND is not determinative of the question in this case. The issue here is not whether there is a conflict of interest with respect to Mr. Halsall's and Mr. Morton's work as public servants and their capacity as co-owners of a firefighting training business. Rather, the issue is whether Mr. Morton could fairly assess Mr. Halsall given their business relationship.

87 The fact that it is commonplace for DND firefighters to be engaged in outside business activities is only relevant to the extent that it requires the respondent to be particularly vigilant in avoiding conflicts of interest when establishing assessment boards.

88 In this case, the Tribunal finds that Mr. Morton was in a conflict of interest when he participated in the assessment of Mr. Halsall due to the business relationship between them. The evidence demonstrates that the respondent was fully aware of this conflict and that Commander James recognized the need to take steps to mitigate the conflict at the interview stage of the assessment process. However, the Tribunal is not satisfied that the actions of the respondent were sufficient to eliminate the perception of bias at the interview stage.

89 In order to conduct an assessment process that would not only be fair but also be seen to be fair, the respondent should have removed Mr. Morton from the entire assessment process for Mr. Halsall.

90 Although Mr. Gains asked the questions during the interview, Mr. Morton was present and he testified that he concurred with Mr. Gains' assessment. By concurring in the assessment, Mr. Morton participated in the assessment of Mr. Halsall's interview. If it was intended that Mr. Morton was not to participate in the assessment of Mr. Halsall's interview then he should not have played a role in determining the result of the interview.

91 The perception of bias in this case creates the concern that Mr. Morton might, consciously or unconsciously, assess Mr. Halsall more leniently in order to maintain harmony in their business relationship. If Mr. Morton was on an assessment board that found Mr. Halsall not qualified for a FR-03 position, this could cause strains in their business relationship. Mr. Morton would have an interest in avoiding such an outcome. This interest conflicts with his duty to conduct a fair and impartial assessment of Mr. Halsall. The respondent should have ensured that Mr. Morton not be associated in any way with the assessment of Mr. Halsall. By permitting Mr. Morton to participate in the assessment of Mr. Halsall's interview, the respondent ignored this appearance of potential bias. Applying the reasonable apprehension of bias test, the Tribunal finds that an informed person, viewing the matter realistically and practically – and having thought the matter through – would reasonably perceive bias, either consciously or unconsciously, on the part of Mr. Morton, and that as a result the respondent abused its authority.

Decision

92 For all these reasons, the complaint is substantiated.

Corrective Action

93 The Tribunal's remedial powers are found in s. 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.

94 The complainant requested that in the event that his complaint was substantiated, that the Tribunal revoke all four appointments made under this appointment process or, at the least, the appointment of Mr. Halsall. He did not ask to be reassessed under this appointment process.

95 The Tribunal notes that there is no evidence that the appointments made under this appointment process, with the exception of the appointment of Mr. Halsall, were flawed.

96 In the circumstances of this case, the Tribunal finds that the appropriate corrective action is to revoke the appointment of Mr. Halsall. Therefore, the Tribunal orders the deputy head to revoke the appointment of Mr. Halsall within 60 days of the date of this decision.

97 The Tribunal also recommends that all of the persons who participated in, or were involved in the establishment of, this assessment board, take training on bias and conflict free assessment processes.

Kenneth J. Gibson
Member

Parties of Record

Tribunal File	2010-0603
Style of Cause	*Norman Amirault and the Deputy Minister of National Defence*
Hearing	October 6 and 7, 2011 Victoria, British Columbia
Date of Reasons	March 22, 2012
APPEARANCES:	
For the complainant	Louis Bisson
For the respondent	Christine Langill
For the Public Service Commission	Kimberley J. Lewis (written submissions)