



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

Files: 2011-0908, 2011-1022,
2012-0839 and 2012-0061
Issued at: Ottawa, May 10, 2013

ANTOINETTE SOCCAR

Complainant

AND

THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Respondent

AND

OTHER PARTIES

Matter	Complaints of abuse of authority pursuant to sections 77(1)(a) and (b) of the <i>Public Service Employment Act</i>
Decision	The complaints are dismissed
Decision rendered by	John Mooney, Vice-Chairperson
Language of Decision	French
Indexed	<i>Soccar v. the Commissioner of the Royal Canadian Mounted Police</i>
Neutral Citation	2013 PSST 0014

Reasons for Decision

Introduction

1 The Commissioner of the Royal Canadian Mounted Police (the respondent) used non-advertised appointment processes to appoint Filomena Silva on an acting basis on four occasions to the position of Team Leader, Curriculum Design, at the ED-EDS-04 group and level (position or above-mentioned position), with the Royal Canadian Mounted Police (RCMP). Antoinette Soccar, the complainant, filed complaints of abuse of authority with the Public Service Staffing Tribunal (the Tribunal) in relation to two of those acting appointments. She alleges that the respondent abused its authority by choosing to use non-advertised appointment processes. She also alleges that the respondent abused its authority in its assessment of the appointee's qualifications.

2 The respondent subsequently offered that same individual an indeterminate appointment to the above-mentioned position using an advertised appointment process. The complainant took part in that process but was eliminated on the ground that she did not meet one of the essential qualifications of the position. The complainant filed a complaint with the Tribunal, alleging that the respondent had abused its authority in its assessment of her qualifications and those of the appointee.

3 The respondent denies having abused its authority in these appointment processes. With regard to the acting appointments, the respondent submits that it had the right to use a non-advertised process to staff the position in the short term. The respondent also submits that the appointee met the qualifications of the position. With regard to the indeterminate appointment, the respondent submits that it properly assessed the complainant's and the appointee's qualifications.

4 The Public Service Commission (PSC) was not represented at the hearing, but it provided the Tribunal with written submissions describing its relevant appointment policies and guides. The PSC did not take a position on the merits of the complaints.

5 For the reasons set out below, the Tribunal finds that the complainant did not establish that the respondent abused its authority in these appointment processes.

Background

The acting appointments

6 The respondent made four consecutive acting appointments using non-advertised appointment processes.

7 On February 16, 2010, the respondent appointed Ms. Silva to the above-mentioned position until June 15, 2010 for a period of four months less a day. The respondent then appointed her to the position for the period from June 16, 2010, to March 31, 2011. No complaints in relation to those two initial acting appointments are before the Tribunal.

8 In August 2011, the complainant learned that Ms. Silva had continued to act in the position after March 31, 2011, but that the respondent had not posted the *Information Regarding Acting Appointment* notice (appointment notice) for that extension. The complainant nevertheless filed a complaint of abuse of authority on August 17, 2011, pursuant to s. 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (PSEA) (file 2011-0908). The Tribunal is authorized to hear that complaint because it is not necessary to wait for an appointment notice to be posted before filing a complaint with the Tribunal. The fact that an appointment was made is sufficient to exercise the right to recourse available under s. 77 of the PSEA. See *Mercier v. Deputy Minister of Public Works and Government Services*, 2011 PSST 0013, at paras. 19-25, and *Sherif v. Deputy Minister of Agriculture and Agri-Food Canada*, 2006 PSST 0003.

9 On September 16, 2011, the respondent posted on *Publiservice*, the federal government's website, an appointment notice indicating that Ms. Silva had been re-appointed to the position for the period from April 1, 2011 to January 31, 2012. On September 30, 2011, the complainant filed a complaint of abuse of authority pursuant to ss. 77(1)(a) and (b) in relation to that acting appointment (file 2011-1022). The complainant thus filed two complaints in relation to the period beginning on April 1, 2011.

10 On February 8, 2012, the respondent posted another appointment notice announcing the acting appointment of Ms. Silva for the period from January 31, 2012 to March 30, 2012 (file 2012-0061). On February 13, 2012, the complainant filed a complaint of abuse of authority pursuant to ss. 77(1)(a) and (b) in relation to that final acting appointment.

11 All of the assessments for these acting appointments were conducted by Superintendent (Supt.) Terry Gibbon, Director of Learning Services (LS) with the RCMP's Canadian Police College (the College).

The indeterminate appointment

12 At the same time, the respondent was conducting an advertised appointment process to staff the position on an indeterminate basis. The respondent posted a *Job Opportunity Advertisement (JOA)* on *Publiservice* on December 29, 2010.

13 The assessment board for that appointment process was made up of Supt. Gibbon; Inspector (Insp.) Raymond Duquette, the officer in charge of the Investigative Training team; and Shauna Murphy, Human Resources (HR) Advisor.

14 The assessment board used the following assessment methods: a review of each candidate's application setting out his or her experience and education, a review of a document written by each candidate, an interview, and a reference check.

15 Over 20 candidates applied for the position—six were interviewed and two were found qualified for the position.

16 The complainant failed the interview question assessing the “ability to manage human and financial resources,” an essential qualification in this appointment process. She was therefore eliminated at this stage of the process.

17 On April 2, 2012, the respondent announced on *Publiservice* Ms. Silva's indeterminate appointment to the above-mentioned position.

18 On April 12, 2012, the complainant filed a complaint of abuse of authority pursuant to ss. 77(1)(a) and (b) in relation to that appointment (file 2012-0839).

19 The four complaints were consolidated for the purposes of these proceedings pursuant to s. 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6, as amended by SOR/2011-116 (Tribunal Regulations).

Issues

20 In order to determine whether the respondent abused its authority in the choice of appointment process and in the application of merit, the Tribunal must decide the following issues:

The acting appointments

- (i) Did the respondent abuse its authority by appointing Ms. Silva to the position using non-advertised appointment processes?
- (ii) Did the respondent abuse its authority in its assessment of the appointee's qualifications?

The indeterminate appointment

- (iii) Did the respondent abuse its authority in its assessment of the complainant's qualifications?
- (iv) Did the respondent abuse its authority in its assessment of the appointee's qualifications?

Analysis

21 Section 77(1) of the PSEA states that a person in the area of recourse may make a complaint that he or she was not appointed or proposed for appointment by reason of an abuse of authority by the PSC or the deputy head in the appointment process. Abuse of authority is not defined in the PSEA, but s. 2(4) states that "for greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism".

22 As has been established in the Tribunal's case law, this wording indicates that abuse of authority must be interpreted broadly and is not limited to bad faith and personal favouritism. In *Kane v. Canada (Attorney General)*, 2011 FCA 19, the Federal Court of Appeal upheld the Tribunal's interpretation that an error can also constitute an abuse of authority (para. 64). Although the Court of Appeal's decision was set aside on a different ground by the Supreme Court of Canada in *Canada (Attorney General) v. Kane*, 2012 SCC 64, the Supreme Court did not address the issue of the definition of abuse of authority and, therefore, the Federal Court of Appeal's comments on that matter remain relevant. In *Canada (Attorney General) v. Lahlali*, 2012 FC 601, the Federal Court confirmed that the PSEA's definition of abuse of authority in s. 2(4) is not exhaustive and that abuse of authority can include other forms of inappropriate behaviour (paras. 21 and 38).

23 However, it is clear from the preamble and the scheme of the PSEA that minor errors or omissions do not generally constitute an abuse of authority. Whether or not an error constitutes an abuse of authority will depend on the nature and seriousness of the error. Abuse of authority can also include an omission or improper conduct. The scope of the omission or the degree to which the conduct is improper will determine whether or not they constitute an abuse of authority. See, for example, *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008.

24 As the Tribunal has established in many decisions, the complainant bears the burden of proving, on a balance of probabilities, that the respondent abused its authority in the appointment process (*Tibbs*, at paras. 49 and 55).

The acting appointments

25 As explained earlier, the respondent appointed Ms. Silva to the position on an acting basis a number of times, but only three complaints, covering the period from April 1, 2011 to March 30, 2012, are before the Tribunal. The allegations are the same in those three complaints. The Tribunal will therefore not deal with the two initial acting appointments. Any mention of those appointments by the Tribunal is simply to ensure a better understanding of the sequence of events.

Issue I: Did the respondent abuse its authority by appointing Ms. Silva to the position using non-advertised appointment processes?

26 The complainant alleges that the respondent abused its authority by appointing Ms. Silva to the position on an acting basis using non-advertised appointment processes. The complainant submits that she was qualified for the position but that the respondent made the choice based on personal favouritism toward Ms. Silva in order to give her an unfair advantage in the indeterminate appointment process being conducted simultaneously. The complainant also submits that the respondent did not offer her the position because it was biased against her. According to the complainant, the acting appointments are inconsistent with the values of fairness and transparency discussed in the Public Service Commission's *Appointment Policy* (PSC's policy).

Why the respondent appointed Ms. Silva to the position using a non-advertised appointment process

27 The complainant submits that the respondent should have offered her an acting appointment to the position because she was fully qualified. She holds a Master's in Education, with a concentration in leadership and organizational studies. She joined the College in February 2009, working in the Curriculum Development Section (CDS) of Learning Services as a training program designer and learning specialist at the ED-EDS-03 group and level. She had indicated her interest in the position in an email to Supt. Gibbon on August 12, 2011. Her interest in an acting appointment to this position was also listed in her 2011-2012 learning plan.

28 Supt. Gibbon conducted the acting appointment processes. More specifically, he was the one who assessed Ms. Silva's qualifications and selected her for the position. That choice was approved by HR, which has delegated staffing authority from the respondent.

29 Supt. Gibbon joined the RCMP in 1980. He has held a number of positions throughout his long career. In 2010, he was appointed to the position of Director of LS at the College, a position he held when the respondent made the appointments at issue in these complaints. The College, whose main campus is located in Ottawa, offers 300 types of training programs relating to law enforcement. The College comprises

seven sections, five of which are made up of police officers who are experts in a policing field, while the CDS is made up of training experts. These training experts work with the experts in police matters to develop courses.

30 Supt. Gibbon chose to staff the position using a non-advertised process because initially the position was going to be vacant for only a short period of time. In December 2009, Joyce Coldrey, the incumbent of the position, requested six months of unpaid leave to work for another government agency. Nadine Lemery replaced Ms. Coldrey, but Ms. Lemery left the College in January 2010. In February 2010, Supt. Gibbon asked Ms. Silva, who had previously worked in the CDS, to act in the position for a period of four months less a day.

31 Ms. Coldrey was to return in June 2010, but she did not come back as expected. She had decided to take a five-year leave from work. Because Ms. Coldrey would be away for such a long period, Supt. Gibbon decided to staff the position indeterminately using an advertised appointment process. In the meantime, someone needed to fill the position on an acting basis.

32 Supt. Gibbon explained that, prior to Ms. Silva's arrival, things were not going well in the CDS. He had learned from Ms. Coldrey and Ms. Lemery that there were conflicts between CDS and the other LS sections. CDS employees felt that their section should be responsible for the development and updating of courses. The employees of the other sections, on the other hand, felt that each section should be responsible for the courses it offered. Those differences of opinion resulted in a difficult and unproductive work environment. The employees in the sections made up of experts in policing fields had trouble working with the CDS. A number of files were at a standstill and there was a lack of thoroughness in curriculum development. Ms. Lemery had told him before her departure that there were also conflicts among CDS employees.

33 Supt. Gibbon stated that, after Ms. Silva's arrival, things improved considerably. As of March or April 2010, he saw significant improvement in the quality of the documents produced by CDS. In light of that success, he decided to renew Ms. Silva's acting appointment. In an email dated July 21, 2010 to Kathy Albert, HR Advisor, he

explained that he had chosen to extend Ms. Silva's appointment instead of appointing the complainant because Ms. Silva had more seniority, held a position at a higher level, and was better qualified. He also wanted to maintain some stability in the section and the complainant had indicated that she was looking for a position elsewhere, which could have hindered the section's operations.

34 The respondent submitted to the Tribunal the non-advertised process rationale, completed by Sharon Woodburn, HR Officer, on November 18, 2010. That document applies to the period from June 16, 2010 to March 31, 2011, and reflects Supt. Gibbon's testimony.

35 Supt. Gibbon stated that Ms. Silva's acting appointment was renewed twice after March 31, 2011, because the indeterminate appointment process being conducted simultaneously was taking longer than expected, and because Ms. Silva was doing a good job.

36 The Tribunal finds that the respondent did not abuse its authority in choosing to staff the position on an acting basis using non-advertised processes or in appointing Ms. Silva to the position. Section 33 of the PSEA clearly states that the PSC (or its delegated manager) may use an advertised or non-advertised process to make an appointment. The Tribunal has already established that merely choosing to conduct a non-advertised process is not an abuse of authority in itself. See, for example, *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 0006, and *Rozka v. Deputy Minister of Citizenship and Immigration Canada*, 2007 PSST 0046.

37 In this case, the uncontested evidence shows that the respondent had valid reasons for choosing non-advertised processes and for appointing Ms. Silva to the position. When Ms. Coldrey decided not to return to the position in June 2010, the respondent decided to staff the position using an advertised process but needed someone in the meantime to perform the duties of the position on an acting basis. The choice of Ms. Silva for the last two acting appointments was reasonable because the respondent wanted to maintain stability in the position and because Ms. Silva had done a good job.

Personal favouritism and unfair advantage

38 The complainant submits that Supt. Gibbon deliberately extended the acting appointments based on personal favouritism toward Ms. Silva in order to give her an unfair advantage in the advertised appointment process that was being conducted simultaneously to staff the position indeterminately.

39 Personal favouritism has been discussed in many Tribunal decisions. In *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 0007, at para. 39, the Tribunal emphasizes the following:

It is noteworthy that the word **personal** precedes the word **favouritism**, emphasizing Parliament's intention that both words be read together, and that it is **personal favouritism**, not other types of favouritism, that constitutes abuse of authority.

(emphasis in original)

40 At para. 41 of *Glasgow*, the Tribunal further explains:

Where there is a choice among qualified candidates, paragraph 30(2)(b) of the PSEA indicates that the selection may be made on the basis of additional asset qualifications, operational requirements and organisational needs. The selection should never be for reasons of personal favouritism. Undue personal interests, such as a personal relationship between the person selecting and the appointee should never be the reason for appointing a person. Similarly, the selection of a person as a personal favour, or to gain personal favour with someone else, would be another example of personal favouritism.

41 In this case, Supt. Gibbon stated that he had no personal relationship with Ms. Silva. The complainant did not establish the existence of such a relationship or of undue personal interests that could have influenced the decision to appoint Ms. Silva to the position.

42 The Tribunal finds that the complainant failed to establish that the respondent extended the acting appointments to give Ms. Silva the opportunity to gain experience that would give her an unfair advantage in the indeterminate appointment process. The Tribunal finds that the respondent provided reasonable explanations for those extensions. Supt. Gibbon explained to the Tribunal that the process to staff the position indeterminately took longer than expected because of various professional commitments and events in his personal life. The respondent had assigned him various

tasks above and beyond his regular duties. For example, in 2010, he was assigned to the Prime Minister's protection detail during the G-20 and G-8 summits. The RCMP also assigned him to security for the Olympic Winter Games in Vancouver in 2010. During the same period, one of his managers passed away suddenly and he had to ensure that that manager's duties were covered. At the same time, he often had to replace the College's director general, who also had taken on extra duties. Supt. Gibbon also wanted to resolve a serious labour relations conflict involving the complainant and Ms. Silva before making an indeterminate appointment to the position. That conflict was not resolved until fall 2011.

43 The Tribunal therefore finds that the respondent provided valid reasons to explain why Ms. Silva's acting appointments needed to be extended on several occasions. It was not to give her an unfair advantage in the indeterminate appointment process. The advertised appointment process took longer than expected.

Bias

44 The complainant also alleges that Supt. Gibbon chose to offer the acting appointments to Ms. Silva because he was biased against the complainant.

45 In *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623; [1992] S.C.J. No. 21 (QL), the Supreme Court described the standard of reasonable apprehension of bias as follows at para. 22 (QL): "The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator." The objective tests set out by the Supreme Court also apply to assessment board members in the context of an appointment made under the PSEA. See, for example, *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 0010, at paras. 64-71.

46 The complainant failed to establish that there was a reasonable apprehension of bias against her on the part of Supt. Gibbon. The complainant referred to a number of incidents between her and Ms. Silva, including a labour relations conflict. The Tribunal notes that there was a conflict between the complainant and Ms. Silva, but that conflict did not involve Supt. Gibbon. Therefore, the Tribunal does not see how that conflict

would have influenced Supt. Gibbon's decision to staff the position using a non-advertised appointment process and to appoint Ms. Silva to the position. That conflict is simply not relevant to this complaint.

47 The complainant also alluded to a complaint that she had filed on September 16, 2011 with the Office of the Commissioner of Official Languages because Ms. Silva was communicating with her in English and was also requiring the complainant to communicate with her in that language. The Commissioner of Official Languages (the Commissioner) found in favour of the complainant. The Tribunal finds that that incident does not demonstrate bias on the part of Supt. Gibbon. That incident involved the complainant and Ms. Silva. Supt. Gibbon was only indirectly involved as Ms. Silva's supervisor. Furthermore, the Commissioner's March 2012 report indicates that as of October 21, 2011, the complainant was no longer reporting to Ms. Silva and was instead reporting directly to Supt. Gibbon. Supt. Gibbon also testified that the RCMP had taken steps to correct the situation. That incident is insufficient to establish an apprehension of bias. A reasonably informed bystander could not reasonably perceive bias on the part of Supt. Gibbon as a result of his role in that complaint. On the contrary, it seems that his role had a positive impact on the complainant because the situation improved when Supt. Gibbon became her supervisor.

The value of fairness

48 The complainant also alleges that, by using a non-advertised process to appoint Ms. Silva, the respondent failed to respect the value of fairness set out in the PSC's policy. The complainant points out that ss. 16 and 29(3) of the PSEA specify that the deputy head is subject to the PSC's policies when making an appointment.

49 In *Jarvo*, the Tribunal refers to the PSC policy that defines that term:

28 The *Appointment Policy* characterizes fair appointment decisions as those that are made objectively and without personal favouritism or political influence. The policy goes on to state that practices must reflect the just treatment of persons.

50 In this case, aside from her own statements, the complainant did not present any evidence in support of her allegation that Ms. Silva's appointment was not made objectively or that it was made in a manner that violated the PSC's policy. As explained earlier, the respondent appointed Ms. Silva to the position because she was already doing a good job in a section with poor productivity prior to her arrival. The respondent's decision was fair and reasonable.

The transparency of the appointment processes

51 The complainant submits that Ms. Silva's acting appointments were not transparent as required by the PSC's policy, which states that a process is transparent when information about decisions is communicated in an open and timely manner. According to the complainant, the rationales for the choice of non-advertised processes and the appointment notices were published well after the appointments were made.

52 First, the Tribunal notes that the rationale for the choice of appointment process is not normally posted publicly, in contrast to the appointment notice prepared in accordance with s. 48(3) of the PSEA and referred to in s. 10(1)(b) of the Tribunal Regulations. The purpose of the rationale for the choice of process is not to announce a decision, but rather, to document the decision so that it can be explained if necessary.

53 The first acting appointment before the Tribunal is the one that began on April 1, 2011. Supt. Gibbon provided the rationale for the choice of a non-advertised appointment process in the September 12, 2011, document entitled *Rationale Non-Advertised Appointments*. In that document, he explains that he made that choice as a temporary measure while awaiting the completion of the advertised appointment process to staff the position indeterminately.

54 Clearly, it would have been preferable for the respondent to have added the rationale to the file prior to the start of that acting appointment, but the Tribunal finds that, in the specific circumstances of this case, that omission is not serious enough to constitute an abuse of authority. The rationale provided is the same as the rationales provided for the acting appointments made prior to April 1, 2011. Supt. Gibbon gave the same explanation in an email dated July 21, 2010 to Ms. Albert, and in an email dated

October 25, 2010 to Julie Roy, Acting Staffing Advisor. Ms. Woodburn, Staffing Advisor, provided the same explanation in a document dated November 18, 2010, entitled *Rationale Non-Advertised Appointments*. Therefore, although the rationale for the April 1, 2011 appointment was added to the file late, that omission is not serious enough to constitute an abuse of authority because it simply repeated the previous rationales. The Tribunal is of the opinion that, under the circumstances, that rationale was reasonable.

55 With regard to the acting appointment for the period from January 31, 2012 to March 30, 2012, the rationale for the choice of appointment process was provided by Supt. Gibbon on March 12, 2012. As explained above, that rationale should have been prepared prior to the start of the extension of the acting appointment, but that omission is not serious enough to constitute an abuse of authority because the rationale repeats the same reasons given numerous times before for the previous acting appointments.

56 The appointment notices were also posted late. The appointment notice for the acting appointment from April 1, 2011 to January 31, 2012 (the first appointment before the Tribunal) was not posted until September 16, 2011. It should have been posted before April 1, 2011, so that the people in the area of recourse could exercise their right to contest the appointment in a timely manner. The Tribunal must point out that it is important that managers rigorously follow the requirements of the *Public Service Employment Regulations, 2000, SOR/2005-334 (PSER)* relating to notification. Employees have the right to be informed of an acting appointment as soon as the appointment is made, and not after the fact. However, in this case, this omission is not serious enough to constitute an abuse of authority. While the Tribunal is not excusing the omission, the complainant suffered no prejudice and was able to exercise her right to make a complaint. As mentioned in *Tibbs*, at para. 65, it is clear from the preamble and the whole scheme of the PSEA that Parliament intended that much more is required than mere errors and omissions to constitute abuse of authority.

57 With regard to the acting appointment from January 31, 2012 to March 31, 2012, the appointment notice was published on February 8, 2012, thus only eight days after

the acting appointment. That delay in posting the appointment notice is not serious enough to constitute an abuse of authority.

58 Therefore, the Tribunal finds that the respondent did not abuse its authority in appointing Ms. Silva to the position on an acting basis using non-advertised appointment processes.

Issue II: Did the respondent abuse its authority in its assessment of the appointee's qualifications?

59 The complainant submits that the respondent did not assess the appointee's qualifications for all the acting appointments. As noted earlier, only the last two acting appointments, beginning on April 1, 2011, are before the Tribunal.

60 The Tribunal notes that there were several acting appointments. The sequence of the appointments is thus important to understanding how the assessments were conducted.

61 The first acting appointment began on February 16, 2010, and lasted for four months less a day. Pursuant to s. 14(1) of the PSER, acting appointments of less than four months are excluded from the application of s. 30 of the PSEA, which states that appointments must be made on the basis of merit. As a result, there was no obligation to conduct an assessment for that acting appointment.

62 The second acting appointment began on June 16, 2010 and ended on March 31, 2011. Although no complaint is before the Tribunal in relation to that acting appointment, it is important to note that the respondent established a Statement of Merit Criteria (SOMC) for that appointment and assessed Ms. Silva against those criteria. That assessment was recorded in writing in a document entitled *Statement of Merit Criteria / Énoncé de critères de mérite Assessment of Filomena Silva Against SOMC*. The bottom of each page of that document is dated August 31, 2010, which seems to be the date the document was printed. The *Signed Statement of Persons Present* that accompanies the document seems to indicate that the assessment was completed on July 20, 2010, by Supt. Gibbon. The assessment in question is a narrative description that indicates that Ms. Silva meets all the qualifications established for the

position. Various documents refer to this assessment: the email dated July 21, 2010, from Supt. Gibbon to Ms. Albert; the email dated October 6, 2010, from Supt. Gibbon to Ms. Roy; and the document dated November 18, 2010, entitled *Rationale Non-Advertised Appointments*.

63 The respondent submits that the assessment completed by Supt. Gibbon on July 20, 2010, was used for the subsequent acting appointment of April 1, 2011, which does in fact seem to be the sequence of events. Supt. Gibbon simply left Ms. Silva in her position after March 31, 2011, because he had already assessed her in July 2010. The Tribunal finds that to be a valid approach since Ms. Silva was assessed prior to the start of the acting appointment of April 1, 2011.

64 The respondent conducted another assessment of Ms. Silva's qualifications in September 2011, as indicated in the *Signed Statement of Persons Present at Screening Board* signed by Supt. Gibbon on September 22, 2011, which refers to the document entitled *Assessment of Filomena Silva Against Statement of Merit Criteria*. According to the testimony of Supt. Gibbon and Ms. Murphy, it seems that that second assessment was not necessary, but they wanted to better document Ms. Silva's appointment. The Tribunal notes that, indeed, the September 2011 assessment contains the same merit criteria from July 2010, and describes in more detail how Ms. Silva meets those criteria.

65 Ms. Murphy stated that the assessment board used the September 2011 assessment for the appointment covering the period from January 31, 2012 to March 31, 2012. The Tribunal finds that the respondent was justified in using that assessment to make this final acting appointment because the assessment preceded the appointment.

66 The Tribunal therefore finds that the respondent assessed Ms. Silva's qualifications before each acting appointment at issue before the Tribunal. Thus, the respondent did not abuse its authority in its assessment of Ms. Silva's qualifications.

The indeterminate appointment

Issue III: Did the respondent abuse its authority in its assessment of the complainant's qualifications?

67 The complainant submits that her qualifications were assessed improperly. She states that her response to the question she failed was correct. In addition, one of the assessment board members took interview notes in English whereas she had chosen to be interviewed in French. The complainant also submits that the assessment board was biased against her because of conflicts of interest.

68 The respondent submits that the complainant failed an interview question that assessed an essential qualification, and denies all allegations of bias.

The assessment of the complainant's response

69 As the Tribunal has established in many decisions, its role is to determine whether there was an abuse of authority and not to re-assess the candidates. See, for example, *Broughton v. Deputy Minister of Public Works and Government Services*, 2007 PSST 0020. Thus, the Tribunal, after having examined the correction of the question that the complainant failed, finds that there was no abuse of authority.

70 On the interview question that assessed the "ability to manage human and financial resources," candidates were asked to explain the steps they would take as CDS team leader to manage and optimize their human and financial resources. The assessment board members discussed the complainant's response and concluded that her answer did not match the expected answers. In the board's view, the complainant did not answer the question as a manager, but rather, as a colleague. For example, the assessment board expected the complainant to respond that she would work closely with the finance team. The complainant made no reference to such cooperation. The Tribunal finds that the respondent provided a reasonable explanation for the assessment of the complainant's response.

The note-taking in English

71 The complainant submits that the assessment board assessed her qualifications improperly because Supt. Gibbon took notes in English even though the interview was conducted in French. The Tribunal notes that it would have been preferable for Supt. Gibbon to write down the complainant's response in French because it would have better reflected her answer. However, the complainant was unable to identify the elements of her response that Supt. Gibbon allegedly omitted in his notes. The complainant also failed to establish that the other two assessment board members who wrote down her answer omitted elements of her response.

Bias and conflict of interest

72 According to the complainant, the respondent improperly assessed her response to the question that she failed because Supt. Gibbon was biased against her as a result of her labour relations conflict with Ms. Silva and her complaint to the Office of the Commissioner of Official Languages. The Tribunal has already dealt with these issues in the context of the acting appointments. These allegations are unsubstantiated.

73 The complainant also submits that Supt. Gibbon was biased against her because she had filed a grievance against management for refusing to pay her a day's salary. She explained that she had been on sick leave and was due to return on Monday, January 23, 2012, but Supt. Gibbon told her to come back a day later. The respondent did not pay her for the Monday. The complainant filed a grievance and management paid her for that day.

74 The Tribunal fails to see how that grievance would demonstrate bias against the complainant. On the contrary, Supt. Gibbon acted in the complainant's interest in this incident. He explained in his testimony that he postponed the date of the complainant's return to work at the request of her union representative. According to that union representative, the complainant was not ready to return to work on that date. Supt. Gibbon testified that he told the union representative that the complainant would be paid for the Monday. The complainant even mentioned that in her grievance submitted to the first-level grievance process on April 27, 2012. It is unclear who

decided not to pay the complainant or why, but clearly, Supt. Gibbon acted in the complainant's interest. Therefore, the Tribunal cannot conclude that that grievance demonstrates a bias that would have influenced the correction of the complainant's response. A reasonably well informed observer could not reasonably perceive bias on the part of Supt. Gibbon, given that he acted in the complainant's interest.

Issue IV: Did the respondent abuse its authority in its assessment of the appointee's qualifications?

75 The complainant submits that the respondent abused its authority in its assessment of Ms. Silva's qualifications because she did not meet all the qualifications of the position, because the respondent showed favouritism toward her by giving her acting appointments that gave her an unfair advantage, and because the assessment board members were in a position of conflict of interest in relation to Ms. Silva.

The qualifications of the position

76 According to the complainant, Ms. Silva did not demonstrate that she had the "ability to communicate effectively in writing," an essential qualification for the position. To assess that qualification, the assessment board had asked the candidates to bring to the interview a "Course Development / Curriculum Design document that you have developed and written..." [translation]. Ms. Silva submitted a document entitled *Polygraph Examiner's Course*.

77 The complainant submits that Ms. Silva is not the sole author of that document. Supt. Marc Proulx approved the document on February 27, 2009, but Ms. Silva left the section on January 15, 2009. The complainant alleges that the document could have been modified between those two dates.

78 The evidence clearly shows that Ms. Silva wrote that document. Insp. Duquette stated that the document had been submitted to Supt. Gibbon on January 2, 2009, that is, prior to Ms. Silva's departure, because that is the date that appears at the bottom of each page of the document. He added that the second page of the document indicates that Ms. Silva is the Course Designer. Therefore, she is the one who wrote the

document. Insp. Duquette's testimony is corroborated by that of Supt. Gibbon, who stated that the document in evidence is the document he received from Ms. Silva.

79 The complainant also alleges that Ms. Silva did not meet the essential qualification of "strong interpersonal skills." However, the evidence shows that the assessment board could reasonably conclude that Ms. Silva met that qualification. Insp. Duquette, acting as Ms. Silva's referee, wrote in an email to Supt. Gibbon on February 16, 2012 that she had good interpersonal relationships. In that email, he explained that Ms. Silva had improved the morale and productivity in CDS. He also stated that Ms. Silva is proactive and shares her work with her team members.

80 The complainant submits that her problems with Ms. Silva demonstrate that the latter does not meet that qualification. The complainant referred to, among other things, the labour relations conflict with Ms. Silva and the latter's attempt to force the complainant to communicate with her in English.

81 The Tribunal does not share this point of view. The labour relations conflict does not establish anything because, according to Supt. Gibbon's testimony, the conflict was decided in Ms. Silva's favour.

82 The issue of the language of communication at work between the complainant and Ms. Silva, although serious, does not in itself establish that Ms. Silva does not have good interpersonal skills. As mentioned above, Insp. Duquette's testimony shows that Ms. Silva made a significant contribution to improving the morale in CDS. The complainant failed to demonstrate that Ms. Silva did not have the necessary qualifications.

Personal favouritism and unfair advantage

83 The complainant alleges that the respondent changed the hours of work for the position to be staffed to favour Ms. Silva in the appointment process. An email from Ms. Silva to her staff dated January 5, 2011, indicates that Ms. Silva would be working from 6:30 a.m. to 2:30 p.m. In an email dated July 21, 2010, from Supt. Gibbon to Ms. Albert, Supt. Gibbon notes that the SOMC for the indeterminate appointment

process specified that employees were required to work until 4 p.m. Supt. Gibbon stated that he saw no reason to include that obligation in the SOMC, and the respondent removed it. The Tribunal finds that it cannot infer personal favouritism from the fact that the requirement on hours of work was removed. The Tribunal accepts the respondent's explanation that it was simply a sign of the respondent's flexibility. Moreover, the above-mentioned email from Ms. Silva to her employees states that the complainant would be working until 3:30 p.m. Therefore, the change in working hours also benefited the complainant.

84 According to the complainant, Supt. Gibbon's and Insp. Duquette's relationship with Ms. Silva was not merely a professional one. She bases that allegation on an email to Supt. Gibbon dated February 16, 2012, in which Insp. Duquette refers to Ms. Silva as "Filo". The Tribunal finds that using a shortened form of a person's given name in an email does not necessarily indicate that the two individuals have a personal relationship within the meaning of s. 2(4) of the PSEA.

85 The complainant submits that the fact that Ms. Silva held the position for over two years helped her pass the interview, in particular the question that the complainant failed. Ms. Silva therefore had an unfair advantage. The Tribunal rejects that allegation. The evidence shows that it was not necessary to have held the position to correctly answer that interview question. Supt. Gibbon explained that the expected answer to the question that the complainant failed had been taken from a document from the College's financial resources section, to which all public service employees had access. Furthermore, two other candidates besides Ms. Silva passed the exam, one of whom worked for Correctional Service Canada and had never acted in the position.

Bias as a result of a conflict of interest

86 The complainant submits that the assessment of Ms. Silva's qualifications was biased because of a conflict of interest on the part of Supt. Gibbon. According to the complainant, he should not have interviewed Ms. Silva's referees because he was her supervisor. The Tribunal fails to see how that would place him in a conflict of interest. It is appropriate for the supervisor responsible for a position to be staffed to interview

the candidates, even if he or she is the supervisor of some of those candidates. Supt. Gibbon had no personal interest in having Ms. Silva appointed to the position.

87 The complainant also submits that Insp. Duquette was in a conflict of interest because he was a member of the assessment board and acted as a referee for Ms. Silva. The Tribunal also rejects that allegation. There is nothing to show that performing both functions constitutes a conflict of interest. Insp. Duquette had no personal interest in having Ms. Silva appointed to the position. Furthermore, in *Visca v. Deputy Minister of Justice*, 2007 PSST 0024, the Tribunal noted that an assessment board member could use his or her knowledge of an individual's work to assess that individual, which Insp. Duquette did by acting as Ms. Silva's referee.

Decision

88 For all these reasons, the complaints are dismissed.

John Mooney
Vice-Chairperson

Parties of Record

Tribunal Files	2011-0908, 2011-1022, 2012-0839 and 2012-0061
Style of Cause	<i>Antoinette Soccar and the Commissioner of the Royal Canadian Mounted Police</i>
Hearing	November 26 and 27, 2012, and January 31, 2013 Final written submissions received on February 27, 2013 Ottawa, Ontario
Date of Reasons	May 10, 2013
APPEARANCES:	
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For the respondent	Christine Diguer
For the Public Service Commission	Laurence St. Gelais (written submissions)