



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

Files: 2011-0632 and 2011-0643
Issued at: Ottawa, November 21, 2013

ROBERT CHARTRAND AND CLAUDE BOMBARDIER

Complainants

AND

**THE DEPUTY MINISTER OF PUBLIC WORKS AND GOVERNMENT
SERVICES CANADA**

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	Lyette Babin-MacKay, Member
Language of Decision	English
Indexed	<i>Chartrand v. Deputy Minister of Public Works and Government Services Canada</i>
Neutral Citation	2013 PSST 31

Reasons for Decision

Introduction

1 The complainants, Robert Chartrand and Claude Bombardier, are Investigations Managers (AS-06) with the Special Investigations Directorate (SID) of Public Works and Government Services Canada (PWGSC). They claim that the respondent, the Deputy Minister of PWGSC, abused its authority by personally favouring Ron Milito when it appointed him to his reclassified position of Director, Disclosure and Special Reviews by means of a non-advertised appointment process. They further contend that Mr. Milito does not meet some essential experience and knowledge qualifications, that the assessment board members were not qualified to assess him, and that the respondent breached Public Service Commission (PSC) and PWGSC policies and directives.

2 The respondent denies all allegations and asserts that because the complainants have not demonstrated a personal interest in an appointment to this position, they do not have standing to file a complaint pursuant to s. 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the PSEA).

3 The PSC did not attend the hearing but made written submissions. It did not take a position on the merits of these complaints.

4 For the reasons that follow, the Public Service Staffing Tribunal (the Tribunal) finds that the complaints are not substantiated.

Background

5 In June 2008, Mr. Milito accepted a deployment from Agriculture and Agri-Food Canada to the AS-07 position of Manager, Internal Disclosures and Investigations (Manager/ID) at PWGSC. Between the fall of 2009 and the summer of 2010, this position's responsibilities were reviewed and several others were added. As a result, the position was renamed Director, Disclosure and Special Reviews (Director/DSR) and proposed for reclassification from the AS-07 to the EX-01 group and level.

6 On July 20, 2010, a departmental Executive Classification Evaluation Committee approved the reclassification of the position to EX-01 effective July 1, 2010, this being

the date on which the final version of the work description was approved by the responsible manager, Frank Brunetta, then Assistant Deputy Minister, Departmental Oversight Branch (ADM/DOB). This committee determined that the reclassification was the result of an evolution of the position's duties.

7 Michelle Vautour, Senior Human Resources Advisor, Executive Services Directorate, was assigned to advise Mr. Brunetta, as sub-delegated manager, on the staffing of the reclassified position. In consultation with him, she prepared a Statement of Merit Criteria (SMC), which included essential qualifications of education, language, experience, knowledge and key leadership competencies.

8 On October 12, 2010, PWGSC's Executive Resourcing Committee approved the proposal to appoint Mr. Milito to the reclassified EX-01 position, subject to an assessment by means of a structured interview, a SELEX test (an assessment instrument used for entry into the EX group) and reference checks.

9 A non-advertised appointment process was undertaken. Relying on his personal knowledge and on the résumé Mr. Milito had provided, Mr. Brunetta determined that Mr. Milito satisfied the language, education and experience qualifications, which included "experience in leading multiple investigations relating to a wide range of allegations, some of a very sensitive nature, and in providing recommendations on corrective action" (E-1).

10 The essential qualifications of Knowledge and Key Leadership Competencies were assessed by means of a structured interview, held on December 16, 2010. The interview assessment board (the board) was chaired by Mr. Brunetta and included Alex Lakroni, then Assistant Deputy Minister/Chief Financial Officer, Finance Branch, PWGSC, and Greg Strain, then Director General, Agri-Environmental Policies and Programs, Agri-Environmental Services Branch, Agriculture and Agri-Food Canada. Ms. Vautour provided assistance and observed the interview. Mr. Brunetta was appointed Procurement Ombudsman of Canada in January 2011, but he continued in his duties of board member and sub-delegated manager of this appointment process.

11 The board members had decided that Mr. Milito's interview results would be assessed on a "pass/fail" basis. Following the interview, they concluded by consensus that Mr. Milito had demonstrated that he met the qualifications being assessed.

12 The PSC administered the SELEX test and reference checks were conducted.

13 In May 2011, the board members received the assessment documentation (interview results, SELEX results and reference checks), agreed that Mr. Milito had demonstrated that he was qualified for the position and signed an Integration Guide summarizing the results of the assessment.

14 On June 7, 2011, Linda Anglin, then Acting ADM/DOB, signed the Personnel Action Form approving the appointment.

15 On July 20, 2011, the respondent issued a *Notice of Appointment or Proposal of Appointment* (NAPA) for Mr. Milito's non-advertised appointment to this EX-01 position. For the purpose of recourse, the area of selection indicated was "(e)mloyees of the Public Service across Canada".

16 On July 26, 2011, and on August 2, 2011, respectively, Mr. Chartrand and Mr. Bombardier filed complaints of abuse of authority with the Tribunal, pursuant to ss. 77(1)(a) and (b) of the PSEA.

17 Sometime in August 2011, at the request of the corporate staffing unit, Ms. Vautour asked Mr. Milito to provide a covering letter in relation to his qualifications for the position in question, for the résumé he had submitted.

18 On September 1, 2011, Mr. Brunetta signed a document entitled *Rationale supporting non-advertised process* for Mr. Milito's appointment. This rationale indicated "(a)ppointment of an employee to his or her reclassified position" as the reason for using a non-advertised process.

19 On September 2, 2011, Mr. Milito accepted the appointment to the EX-01 position.

Issues

20 The Tribunal must determine the following issues:

- (i) Does each complainant have a right to complain?
- (ii) Did the respondent personally favour Mr. Milito by reclassifying his position to EX-01 and by appointing him by means of a non-advertised process?
- (iii) Does Mr. Milito possess the essential experience qualification E-1?
- (iv) Does Mr. Milito possess the essential knowledge qualification K-2?
- (v) Was the assessment board competent to conduct the assessment?
- (vi) Did the respondent breach PSC policies and guiding values? If so, does this breach constitute an abuse of authority?

Analysis

21 Section 77(1) of the PSEA provides that a person in the area of recourse may make a complaint to the Tribunal 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 exercise of their respective authorities under s. 30(2) of the PSEA.

22 According to s. 30(2) of the PSEA, an appointment is made on the basis of merit when 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.

23 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”.

24 A complainant bears the burden of proving abuse of authority, on a balance of probabilities. See *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008 and

Glasgow v. Deputy Minister of Public Works and Government Services Canada, 2008 PSST 0007.

25 It should be noted that at the complainants' request, Mr. Milito was summoned to testify. However, in a letter decision dated April 18, 2012, the Tribunal granted a request by Mr. Milito to suspend the application of his summons for the reasons set out in the decision. As a result, he did not testify in these proceedings.

Issue I: Does each complainant have a right to complain?

26 At the pre-hearing conference held on February 29, 2012, the respondent asked the complainants whether they were interested in the position. The complainants replied that they were not interested because of the manner in which the whole process had been held. Immediately following the pre-hearing conference, the respondent filed a motion to dismiss these complaints.

27 In its letter decision dated March 23, 2012, the Tribunal ruled that it did not have enough information to grant the respondent's motion and denied it, without prejudice to the respondent's right to raise the matter of the complainants' standing at the hearing.

28 Mr. Chartrand acknowledged in his testimony that he indicated at the pre-hearing conference that he was no longer interested in the position. He elaborated, however, that he made this remark because he had become aware, after filing his complaint, of all the circumstances surrounding this non-advertised appointment process, which in his view demonstrated a lack of transparency. As a result, although his relationship with Mr. Brunetta had previously been very good, Mr. Chartrand by then no longer wanted to work with him. Mr. Chartrand affirmed in his testimony that he would have considered applying for the position if an advertised appointment process had been held to staff it.

29 The hearing was conducted over several days between April 11, 2012, and March 22, 2013. Towards the end of the hearing, Mr. Chartrand indicated that he had recently retired from the public service.

30 Mr. Bombardier was present at the hearing but was not called to testify.

31 In its final arguments, the respondent reiterated its request that the Tribunal dismiss Mr. Chartrand's and Mr. Bombardier's complaints.

32 A complainant must be interested in being appointed to the position at issue in the complaint. In the case of a non-advertised appointment process, it is not possible for an employee to file an application to indicate his or her interest in an appointment to a position, as would be the case in an advertised appointment process. It is by filing a complaint that he or she was not appointed that an employee can express this interest. At the time of the appointment, both complainants were clearly employed in the area of recourse.

33 The Tribunal does not consider remarks made by participants at a pre-hearing conference as constituting evidence that is properly before the Tribunal. Although Mr. Chartrand confirmed in his testimony that he eventually ceased to be interested in the position, the Tribunal is satisfied, based on his additional explanation, that he had an interest in being appointed to it when the appointment took place. Furthermore, given that he was properly employed in the public service for most of the duration of these proceedings, his recent retirement does not negate his right to proceed with his complaint.

34 As for Mr. Bombardier, the respondent did not call him as a witness and did not adduce any evidence to establish the lack of interest. In the absence of any such evidence, the Tribunal is satisfied that in filing his complaint, Mr. Bombardier expressed his personal interest in the position.

35 This matter can be distinguished from *Doraismamy v. Deputy Minister of Transport, Infrastructure and Communities*, 2011 PSST 0035, where the complainant expressly stated, both at the pre-hearing conference and at the hearing, that he had no interest in the position.

36 Accordingly, the Tribunal finds that the complainants had the right to complain, pursuant to s. 77 of the PSEA, that they were not appointed by reason of an abuse of authority.

Issue II: Did the respondent personally favour Mr. Milito by reclassifying his position to EX-01 and by appointing him by means of a non-advertised process?

37 The complainants argue that the respondent reclassified the position not as a result of an evolution of the AS-07 position's duties but rather to personally favour Mr. Milito. They contend that the EX-01 work description does not reflect the work that was actually being performed by Mr. Milito prior to the reclassification. In their view, the respondent created a new EX-01 position, which should have been staffed by means of an advertised appointment process.

Mr. Milito's deployment to PWGSC

38 Mr. Brunetta explained how Mr. Milito came to join PWGSC. Mr. Brunetta was employed at Agriculture and Agri-Food Canada for approximately 29 years, until January 2007. While employed there, he met Mr. Milito in the mid-90s. Later, from approximately 2002 to 2004, Mr. Milito reported to Mr. Brunetta. In January 2008, Mr. Brunetta was appointed Chief Risk Officer at PWGSC, following which, in June 2008, Mr. Milito was deployed to PWGSC, to the position of Manager/ID, which reported directly to Mr. Brunetta.

The reclassification of the position of Manager/ID

39 In his testimony, Mr. Brunetta explained that the responsibilities of the position of Manager/ID changed in the context of a branch-wide organizational transformation. He recalled that prior to the formation of the Departmental Oversight Branch in 2009, allegations of wrongdoing made pursuant to the *Public Servants Disclosure Protection Act* (PSDPA) and other types of complaints were being received by various directorates of the department, including the ID section.

40 After becoming ADM/DOB, Mr. Brunetta spoke to the Deputy Minister about the need, given PWGSC's important public profile, to ensure that any inappropriate behaviours and wrongdoings be dealt with correctly. At PWGSC, the ADM/DOB is designated as the Senior Officer authorized, pursuant to the PSDPA, to receive disclosures of wrongdoing from public servants. It was decided that Mr. Brunetta would heighten the profile of disclosures of wrongdoing and to that end, he needed to have all

investigation requests resulting from PSDPA disclosures channelled, led and coordinated through a single position that would report to him. Mr. Brunetta explained that in discussions with the Human Resources Branch (HR Branch), the notion of expanding the duties of the Manager/ID was developed and Mr. Brunetta was assigned resource persons to review that position's work description. When Mr. Brunetta was satisfied with the work description that was prepared for him, he approved it and the HR Branch activated the necessary processes to adopt it.

41 Mr. Brunetta's recollection of the stages leading up to the revision of the work description was confirmed by several witnesses.

42 Josée Descarreaux, then Manager of Executive Classification, Executive Services Directorate, HR Branch, testified that she asked Jocelyne Proulx, the senior consultant assigned to the writing and validation of EX classification work descriptions of the Departmental Oversight Branch, to work with Mr. Brunetta to rewrite the work description of Manager/ID.

43 Daniel Morin, then Senior Human Resources Advisor, EX Group Organization and Classification, related that Mr. Brunetta advised him that he needed to have an executive level position responsible for special projects and that for that purpose, he wanted Mr. Milito's position to be reclassified to the EX-01 group and level. Mr. Morin recalled that informal evaluations of early versions of the revised work description concluded it still warranted an AS-07 group and level.

44 Ms. Proulx has extensive experience in the field of executive classification and organizational design. She confirmed that in 2009, she was asked to put in place an organizational structure for departmental oversight at PWGSC. She was aware of the context leading to the review of the work description of Manager/ID. Disclosures of wrongdoing and other types of complaints within PWGSC were being received from various sources and the Deputy Minister had asked Mr. Brunetta to assume responsibility of several sensitive files. Mr. Brunetta had in turn decided to delegate this responsibility to Mr. Milito, who was already responsible for matters related to internal disclosures of wrongdoing and their investigations. Mr. Milito would report directly to the ADM/DOB and acquire additional responsibilities.

45 Ms. Proulx explained that in the drafting of the work description, Mr. Milito and Mr. Brunetta provided her with additional information and access to a classified log that Mr. Milito was keeping of sensitive cases that had been received in the Departmental Oversight Branch. Mr. Brunetta approved the final version of the work description at the beginning of July 2010.

46 Along with Ms. Descarreaux, Ms. Proulx was a member of the departmental Executive Classification Evaluation Committee that met to evaluate the final work description on July 20, 2010, and approved the EX-01 classification of the position of Director/DSR. As sponsor for the reclassification, Mr. Brunetta was present and provided background and context for the position. Since other duties had been added to the position, which remained responsible for internal disclosures, the committee concluded that the responsibilities of the position had evolved.

47 Section 88(2) of the PSEA specifies that the Tribunal's mandate is limited to considering and disposing of complaints relating to layoffs (s. 65), revocations of appointments (s. 74), appointments or proposals of appointment (s. 77), and the implementation of corrective action (s. 83). The Tribunal does not have jurisdiction under the PSEA to consider whether a position is properly classified. See *Rinn v. Deputy Minister of Transport, Infrastructure and Communities*, 2007 PSST 0044 at para. 42.

48 However, in determining whether the respondent abused its authority, the Tribunal can examine the complainants' allegations that a work description was modified to personally favour its incumbent and allow him or her to be appointed by means of a non-advertised process.

49 Unlike in *Beyak v. Deputy Minister of Natural Resources*, 2009 PSST 0007, where the work description did not reflect the actual duties of the position, the evidence indicates that the position at issue in this case remained responsible for enquiries and investigations of disclosures of wrongdoing, and assumed responsibility to provide strategic and operational leadership for the review, processing and investigation of other types of complaints and allegations received from different sources. These modifications were done in the context of a reorganization of the Departmental

Oversight Branch and classification specialists concluded that the position of Manager/ID had evolved.

50 While it is true that Mr. Brunetta sought to have the position classified at the EX-01 group and level and that the work description was modified until this was achieved, it was within Mr. Brunetta's authority to make this request. The position reports to an Assistant Deputy Minister and the work description indicates its incumbent must establish close working relationships with Branch Heads and other senior officials.

51 The Tribunal does not agree that Mr. Milito had to have performed all the duties of the revised work description before the position was reclassified. The work description reflects the responsibilities that management requires the incumbent to assume upon appointment. This reclassification took effect on July 1, 2010. Mr. Milito was assessed against the SMC and appointed to the position over a year later, on September 2, 2011.

52 The respondent decided to modify the duties for organizational and operational reasons, and the complainants have not demonstrated otherwise.

The choice of a non-advertised process

53 Section 33 of the *PSEA* provides for both advertised and non-advertised appointment processes and sets no preference in the use of one over the other. The Tribunal has established that the burden lies on a complainant to demonstrate, on a balance of probabilities, that the *choice* to use an advertised or non-advertised process was an abuse of authority.

54 Evidence was presented that the decision to use a non-advertised process was made in accordance with the criteria set in the departmental directive *DP89 Non-Advertised Appointment Processes*, which was in effect when Mr. Milito's assessment commenced in 2010. Directive *DP89* requires that a non-advertised process be used to appoint an employee when his or her position is reclassified. The *PWGSC Directive on Non-Advertised Appointment Processes*, which replaced directive *DP89* on April 18, 2011, also states that these appointments are always non-advertised.

55 The complainants have not led any evidence demonstrating that personal favouritism was a factor in the decision to use a non-advertised appointment process to appoint Mr. Milito to the reclassified position.

Issue III: Does Mr. Milito possess the essential experience qualification E-1?

56 The complainants have extensive investigative experience. They allege that Mr. Milito has never conducted or led investigations, let alone multiple ones, and that he can therefore not be said to possess the essential qualification “experience in leading multiple investigations relating to a wide range of allegations, some of a very sensitive nature, and in providing recommendations on corrective action” (E-1).

The respondent’s basis for finding Mr. Milito qualified

57 Mr. Brunetta testified that he assessed Mr. Milito’s experience based on his personal knowledge as Mr. Milito’s supervisor and on Mr. Milito’s résumé, which he discussed with Ms. Vautour.

58 Ms. Vautour stated that she conducted a preliminary review of the résumé that Mr. Milito submitted. Her handwritten annotations (E-1, E-2 and E-3) on the document reflect her validation work and her discussions with Mr. Brunetta about it.

59 In his testimony, Mr. Brunetta indicated which portions of Mr. Milito’s résumé demonstrate that he meets E-1. He referred to the paragraph titled “Profile” where Mr. Milito states having extensive experience in government relations, audits and communications, and providing strategic advice to senior officials and the Minister’s office on a wide variety of issues. The résumé also states that while employed in Mr. Brunetta’s ADM/DOB office at PWGSC, Mr. Milito dealt with “sensitive, urgent and consequential issues,” which required “liaising and maintaining positive working relationships with various senior officials’ offices”. In reference to his employment at Agriculture and Agri-Food Canada, Mr. Milito states in the résumé that he had co-ordinated and overseen all external audits of departmental programs conducted by the Office of the Auditor General. In Mr. Brunetta’s view, audits are a type of investigation and the term “co-ordinate and oversee” is synonymous with “leading investigations”. To Mr. Brunetta’s recollection from when he worked at Agriculture and

Agri-Food Canada, Mr. Milito may have needed to “get involved” in audits there. Mr. Brunetta also knew that Mr. Milito had assisted in collecting evidence as part of a group that had investigated a case of fraud, which could have given him some investigative experience. Mr. Brunetta does not know if Mr. Milito had dealt with more investigations at Agriculture and Agri-Food Canada.

The meaning of leading investigations

60 Mr. Chartrand pointed out that the E-1 qualification refers to *leading investigations*. He asserts that he has conducted and led investigations and that there is a difference between the two. Conducting an investigation involves going into the field and gathering information, and one needs extensive experience and training to do this. In a team of investigators, the person who leads an investigation is usually the supervisor, who discusses the case with the investigator conducting the investigation, suggests the next best course of action, reviews the investigation report at the end to see if it is complete, and gives instructions to continue the investigation if required.

61 A number of witnesses provided similar testimony about the difference between conducting and leading investigations, and stated that Mr. Milito had never provided them with any advice about the investigations they were conducting. Christine Stolarik, former Chief Risk Officer/Director General, Risk Oversight and Integrity, and Director General responsible for SID from September 2009 to March 2011, testified that Mr. Milito never provided direction or monitored investigations conducted by SID, as this was the role of its Director.

62 When asked, in testimony, how he defined the term “leading investigations” as it is set out in the SMC, Mr. Brunetta cited a professor from Harvard University, Ronald Heifetz, who has said that one leads by mobilizing resources towards common goals. Mr. Brunetta did not describe how this characterization of the term applied specifically to the functions of the Director/DSR position or to the Manager/ID position that Mr. Milito had been occupying prior to his appointment.

63 However, questioned as to how Mr. Milito provided leadership for the review, processing and investigations of PSDPA complaints, Mr. Brunetta explained that in the context of a disclosure on a matter related to conflict of interest, for example, the

HR Branch would bring the issue to the ADM/DOB office and it would be up to Mr. Milito to decide how to deal with it. Mr. Milito would do an initial investigation by interviewing the person making the allegation, obtaining the information at this person's disposal, involving the services of Departmental Security as required, and ascertain with the HR Branch whether a conflict of interest declaration was on file. The decision would be made to issue a mandate letter for an investigation and, depending on the nature and complexity of a case, whether to conduct it within the Internal Disclosure section or transfer it to another group. Mr. Milito would ultimately be accountable for the investigation of a complaint, in accordance with his work description.

64 Roland Boisjoli had occupied the position of Manager/ID on a secondment basis until Mr. Milito's deployment to this position in June 2008, then had returned to his substantive position in SID. He rejoined the Internal Disclosure section in April 2009, where he then worked alongside Mr. Milito. Mr. Boisjoli has continued to work within the Disclosures and Special Reviews Directorate, in a position that is now called Manager, Internal Disclosures.

65 Mr. Boisjoli confirmed Mr. Brunetta's description of Mr. Milito's role in internal disclosures. He stated that Mr. Milito was particularly involved in the reporting stage of investigations, where the Senior Officer prepares a report setting out his analysis of the investigation and whether the findings substantiate a founded allegation, and makes recommendations to the deputy head for corrective action, as required.

66 Mr. Brunetta testified that Mr. Milito prepared, planned and led serious and complicated investigations at PWGSC in the two years leading to the reclassification of his position in 2010. He provided two examples.

67 The first example related to an investigation about the procurement of a vaccine (the vaccine investigation), held following an audit. According to Mr. Brunetta, this case was very sensitive and for this reason, it had been handled by Mr. Milito within Mr. Brunetta's ADM/DOB office. Mr. Milito was responsible for looking into the issue and advising Legal Services, the Privy Council Office and Industry Canada. According to Mr. Brunetta, SID had not been involved. A second example concerned an investigation of questions regarding the ownership of properties on which two government buildings

were being constructed in Gatineau, QC, (the Gatineau office buildings investigation) and potential links of one of the proprietors to someone in the department. The case had been referred by the Deputy Minister's office and Mr. Milito had been required to deal with the external consultants who had looked into this issue. Mr. Brunetta said he was not at liberty to divulge further information on this case.

68 In his testimony, Mr. Chartrand categorically denied that Mr. Milito had investigated the vaccine and Gatineau office buildings cases. Mr. Chartrand stated that he had conducted the Gatineau office buildings investigation himself at SID, from January to September 2010. The matter had been raised through an anonymous letter to the Deputy Minister's office and Mr. Brunetta had directed Mr. Milito to immediately send the file to SID in January 2010. Mr. Milito had told Mr. Chartrand that Mr. Brunetta had instructed him to have Mr. Chartrand investigate the matter, given his investigative background. Mr. Chartrand also testified that Mr. Bombardier was the SID investigator who conducted the vaccine investigation and that Mr. Milito was not involved with it in any way. Mr. Chartrand was aware of this because he had accompanied Mr. Bombardier in the collection of the material to start the investigation. Mr. Chartrand had also been present during the many briefings where Mr. Bombardier had provided status reports to their Director General and their Director.

69 Both Mr. Bombardier and Mr. Chartrand were supervised by Nancy Fahey, Director, SID, who reported to Ms. Stolarik. In their testimony, Ms. Stolarik and Ms. Fahey each confirmed having knowledge of the vaccine investigation and of the Gatineau federal office buildings investigation. The vaccine investigation had been entirely conducted by Mr. Bombardier, not Mr. Milito, and Mr. Chartrand had conducted the Gatineau federal office buildings investigation. Ms. Stolarik briefed Mr. Brunetta and the Deputy Minister regularly on this very sensitive case. Access to the report had to be controlled because of the case's high visibility.

70 Ms. Stolarik explained that information about ongoing investigations was shared and discussed within a departmental committee called the Investigations Management Framework (IMF) Committee, which she had chaired. She acknowledged that she and other committee members would not be cognizant of an issue unless they had a specific

need to be. She also conceded that she was not privy to what was going on in the ADM/DOB's or in Mr. Milito's offices unless it was shared with her.

71 Brent Kereliuk, Departmental Security Officer at PWGSC, also sat on the IMF Committee. He testified that he had many dealings with Mr. Milito and understood that Mr. Milito's role was to review and triage disclosures, determine if they warranted investigation, then assign them to the appropriate investigative body. According to Mr. Kereliuk, Mr. Milito became chair of the IMF Committee after Ms. Stolarik left PWGSC.

72 Mr. Brunetta stated that as Assistant Deputy Minister, he did not have detailed knowledge of all the cases since he had to judiciously select the files in which to take a deeper interest. However, Mr. Milito and the directors that reported to Mr. Brunetta provided him with regular reports outlining ongoing cases and briefed him every two or three weeks. When Mr. Brunetta was ADM/DOB, his office's dealings with SID depended on the issue, and this directorate would only be aware of Mr. Milito's work to the extent it related to its investigations. Many investigations, however, never went beyond his or Mr. Milito's office. Mr. Milito had led other investigations and handled issues flowing from sensitive cases from Mr. Brunetta's office. Mr. Brunetta was not asked to provide examples to illustrate this.

73 Section 30(2)(a) of the PSEA requires that the person to be appointed meet the essential qualifications of a position, as established by the deputy head. Numerous Tribunal decisions have also confirmed the broad discretion given to managers, pursuant to s. 36 of the PSEA, to choose and use assessment methods to determine if a person meets these necessary qualifications. See *Visca v. Deputy Minister of Justice*, 2007 PSST 0024 at para. 42; and *Trachy v. Deputy Minister of Transport, Infrastructure and Communities*, 2008 PSST 0002. However, that discretion is not absolute and must be used in a fair and transparent manner. See, for example, *Jolin v. Deputy Head of Service Canada*, 2007 PSST 0011 at para. 37; and *Denny v. Deputy Minister of National Defence*, 2009 PSST 0029 at para. 144.

74 The respondent did not set out a formal definition for the expression *leading multiple investigations* in a rating guide or other document prepared for this appointment process.

75 In Mr. Brunetta's view, leading is the mobilization of resources towards a common goal. In the context of an internal disclosure, it entails deciding how to deal with an issue and putting things in motion accordingly. Mr. Brunetta and Mr. Boisjoli confirmed that Mr. Milito did do this. According to the complainants, Mr. Milito cannot be deemed qualified because he has not led investigations as they have. They dispute the two examples given by Mr. Brunetta to demonstrate that Mr. Milito has led multiple investigations. Although Mr. Brunetta does not provide very much detail about the extent of Mr. Milito's involvement in these cases, the complainants did not seek to clarify his testimony with him.

76 Mr. Brunetta's testimony is that Mr. Milito had little investigative experience. This was not a concern for him and indeed, the SMC does not include a requirement for experience in investigations. Although it would have been useful that a rating guide define this qualification, the complainants have not demonstrated that Mr. Brunetta's interpretation of the requirement for experience leading investigations is unreasonable. Mr. Brunetta was satisfied that Mr. Milito had the required experience.

77 The complainants have therefore not established that Mr. Milito lacked the essential experience at issue when he was appointed.

The August 31, 2011, letter

78 The complainants contend that the respondent's failure to establish that Mr. Milito was qualified for the position is also demonstrated by a letter dated August 31, 2011, which the respondent asked Mr. Milito to submit after the NAPA had already been posted and these complaints had been filed. They dispute a number of the assertions made by Mr. Milito in this letter, in which Mr. Milito states, for example, that he led "more than 30 cases, ranging from simple complaints to highly sensitive cases" although Mr. Milito made no mention of this experience in his résumé.

79 Presented with the August 31, 2011, letter at the hearing, Mr. Brunetta testified that he had never seen it before. He was therefore not questioned about its content.

80 Ms. Vautour explained that Mr. Milito had not provided a presentation letter with his résumé. Sometime in August 2011, the Corporate Staffing Unit advised that Mr. Milito's experience was to be documented and assessed. Ms. Vautour requested a letter from Mr. Milito for this purpose. She reviewed the letter with the manager of the Corporate Staffing Unit. She believes that she also provided a copy to Mr. Brunetta. She believed Mr. Brunetta had previously confirmed, on the basis of his knowledge of Mr. Milito's work within his Branch, some of the information that the document contained.

81 Ms. Vautour acknowledged that this letter was requested and provided after the NAPA had been issued on July 20, 2011, and after the complainants had filed their complaints on July 26 and August 2, 2011. However, she felt that this did not pose a problem because Mr. Milito's assessment was completed before his acceptance of the appointment on September 2, 2011.

82 Contrary to Ms. Vautour's assertions with respect to the timing of this letter, assessments of candidates are to be completed prior to the publication of the NAPA. However, this letter was not used in the screening of Mr. Milito and Mr. Brunetta indicated he had not seen it and was not questioned about its content. In addition to Mr. Milito's résumé, Mr. Brunetta used his personal knowledge to conclude that Mr. Milito met all the essential experience qualifications.

83 Given that the August 31, 2011, letter was not considered in the assessment of Mr. Milito, it has no impact on the Tribunal's earlier finding that the complainants have not established Mr. Milito lacked the essential experience E-1.

Issue IV: Does Mr. Milito possess the essential knowledge qualification K-2?

Knowledge K-2

84 The complainants allege that Mr. Milito did not demonstrate that he possesses "(k)nowledge of investigative techniques, procedures and processes, and current

redress mechanisms”, which is one of the essential knowledge qualifications (K-2) set out in the SMC:

K-1: Knowledge of legislation governing internal disclosure and investigations in the Federal Public Service, such as Treasury Board’s Code of Conduct, the Public Service Disclosure Protection Act, Access to Information, Privacy Act and the Code on Values and Ethics; and

K-2: Knowledge of investigative techniques, procedures and processes, and current redress mechanisms.

85 The complainants also submit that this essential qualification should have been evaluated by means of a written assessment instead of an interview. This would have required the respondent to explain how it concluded that Mr. Milito possesses this knowledge.

86 Ms. Vautour prepared the interview questions, in consultation with Mr. Brunetta. She stated that for this EX position, the assessment board was not seeking a specialist. It was seeking a manager with general knowledge.

87 Four interview questions assessed the K-1 and K-2 knowledge qualifications. Shortly before the interview, the candidate was given a written scenario involving the receipt of allegations of wrongdoing and presented with four different questions in relation to it. Two questions addressed K-1 and two addressed K-2. Mr. Milito was also asked to prepare a plan of action to address the allegations received in the scenario.

88 Mr. Brunetta reviewed Mr. Milito’s answers in detail and explained how they addressed the questions posed.

89 For K-1, the board was looking for the candidate to provide a broader context without specific detail of the legislation. Mr. Brunetta recalled, however, that Mr. Milito was detailed in his responses though this is not reflected in Mr. Brunetta’s notes from the interview. Mr. Brunetta was impressed by the way Mr. Milito positioned his responses: he gave context and background on the PSDPA, and elaborated on the need for a process to be established.

90 To address the allegations presented in the scenario, the board was looking for Mr. Milito to develop a plan of action, mobilize resources and execute this plan.

According to Mr. Brunetta, M. Milito walked in ready to set out how the allegations would be addressed. In his answer, he outlined the Treasury Board Secretariat's policy on investigations and spoke of its three elements – initiation, investigation, and reporting, and he elaborated on investigative techniques.

91 For his part, Mr. Lakroni testified that he was satisfied that Mr. Milito demonstrated sufficient knowledge of investigative techniques, processes and mechanisms. In his view, Mr. Milito's answers to the four sub-questions in the scenario presented were technically sound. Mr. Milito was above average at the interview and demonstrated that he was ready for an EX-01 position. There was consistency throughout his answers to the questions.

92 Pursuant to s. 36 of the PSEA, Mr. Brunetta had the authority, as sub-delegated manager, to assess the knowledge qualifications by means of an interview. The board members have explained why they concluded that Mr. Milito met this essential qualification. The complainants have not established that the assessment tools used were deficient or inadequate.

93 The Tribunal finds that the complainants have failed to demonstrate that Mr. Milito does not possess the required K-2 knowledge qualification.

Issue V: Was the assessment board competent to conduct the assessment?

94 The complainants contend that the respondent has disregarded the requirements of the *PSC Assessment Policy*, in that board members Lakroni and Strain had no prior experience in investigating complaints and were therefore not qualified to assess the K-2 essential qualification "knowledge of investigative techniques, procedures and processes, and current redress mechanisms".

95 The *PSC Assessment Policy* states that in addition to being accountable for respecting the policy statement, deputy heads must ensure that those responsible for assessment "have the necessary competencies to ensure a fair and complete assessment of the person's qualifications" and that they "are able to carry out their roles, responsibilities and duties in a fair and just manner".

96 Mr. Lakroni testified that he is now the Chief Financial Officer (CFO) of PWGSC, an EX-04 position that he has held since 2007. He joined the public service in 1993. As part of his functions as CFO, he is a member of the audit committee chaired by the Deputy Minister. To prepare for the interview, he reviewed Mr. Milito's résumé, the work description, the SMC, and the questions and answers. Mr. Lakroni was confident that Mr. Milito was qualified.

97 Mr. Lakroni is not a specialist in investigations but he considers himself fairly knowledgeable about what they entail. By profession, he must provide financial oversight, ensure that internal controls are in place, ask questions, find and analyze facts, decide whether those facts lead to findings of wrongdoing, and take corrective action. He gave some examples of how investigations are conducted within his area of responsibility. Mr. Lakroni stated that he is very experienced in hiring executives. He explained that when hiring an executive, he mainly examines the person's capacity to lead. The individual must have a solid knowledge base and be able to wisely use the resources entrusted to him or her.

98 Mr. Strain testified that he has about 28 years of service in the public service and was first appointed to an EX level position in 2005. When the interview was held in December 2010, he was Director General, Agri-Environmental Policy and Programs, Agri-Environmental Services Branch. He prepared for the interview by reviewing the material that he received. Earlier in his career, he was part of a group responsible for compliance audits. Mr. Strain has been a board member for EX-01 positions before. He explained that at the EX-01 level, one is transitioning from being an analyst to becoming a manager. One must be able to contextualize and show how to lead a team of agents. In his view, Mr. Milito did "a very good job" in this appointment process.

99 Mr. Brunetta explained that it is because Mr. Lakroni is a colleague and a fellow ADM that he asked him to be a board member. They have worked together on issues at PWGSC and Mr. Brunetta trusted his judgement and his competence. As for Mr. Strain, he has lengthy experience in policy at Agriculture and Agri-Food Canada and he brought this experience to the board. Mr. Brunetta indicated that the job description addresses policy and procedure development of the PSDPA.

100 The complainants believe that Messrs. Lakroni's and Strain's lack of experience investigating complaints renders them unable to assess knowledge of investigative techniques, procedures and processes.

101 The burden of proving abuse of authority lies with the complainants to demonstrate, as they allege, that the composition of the board could not allow a proper assessment of the qualifications.

102 The PSEA does not require a deputy head to establish an assessment board or that a board have a certain composition. See *Sampert v. Deputy Minister of National Defence*, 2008 PSST 0009. Whether an assessment board is improperly constituted is a question of fact that depends on the specific complaint and the evidence presented at the hearing.

103 Those who conduct the assessment should be familiar with the work required in the position to be staffed. A manager might invite an individual from another department or another area within the department, who has a particular expertise, to participate as a board member.

104 For the purpose of interviewing candidates, Mr. Brunetta, as sub-delegated manager, established an assessment board of himself and two other executives. He explained that he trusted Mr. Lakroni's judgement and competence, and that he chose Mr. Strain because he has lengthy experience in policy. Mr. Lakroni and Mr. Strain both testified as to how they prepared for the assessment and indicated that they have experience assessing candidates for executive positions, where there is less emphasis on the technical aspects of a position and more on the leadership capabilities. The assessment board was not seeking an investigator, but an executive with the necessary knowledge base. Mr. Brunetta was very familiar with the position and Messrs. Lakroni and Strain explained how they prepared for the interview.

105 The complainants have failed to demonstrate that the board members, all executives with prior assessment experience, were not competent to conduct the assessment for this EX-01 position or that they did not properly assess this knowledge qualification. This allegation is not substantiated.

Issue VI: Did the respondent breach PSC policies and guiding values? If so, does this breach constitute an abuse of authority?

The rationale supporting the use of a non-advertised process.

106 The complainants contend that the rationale prepared in support of this non-advertised appointment process was submitted too late and lacks the information required to meet the policy requirements of the PSC *Choice of Appointment Process Policy* and of the PWGSC *Directive on Non-Advertised Processes*.

107 The PSC *Choice of Appointment Process Policy* with which deputy heads must comply (s. 16 of the PSEA), requires that a non-advertised appointment process be consistent with the organization's HR Plans and with the appointment values of fairness, access, transparency and representativeness. It also requires that a written rationale demonstrate how the process meets the established criteria and the values.

108 Section 6-2 of the PWGSC *Directive on Non-Advertised Appointment Processes*, under the heading Responsibilities and Accountabilities, specifies that managers with sub-delegated staffing authority are responsible for:

1. Providing a written rationale demonstrating how a non-advertised process meets the criteria defined in this directive and the appointment values, and indicating the reason(s) why an advertised process was not considered;
2. Providing a detailed written assessment of the candidate demonstrating that the appointment is based on merit.

109 The appointment process was started in 2010 and the complaints were filed in August 2011, yet the written rationale supporting the use of a non-advertised process is dated September 1, 2011.

110 Mr. Brunetta confirmed that he was aware of his responsibility to provide a written rationale for this non-advertised process. It is his understanding that the HR Branch, upon reviewing the file, realized that the rationale was missing. Ms. Vautour therefore wrote the rationale, which he reviewed and signed. Mr. Brunetta did not agree that the PWGSC directive requires that the rationale be prepared at the beginning of the process.

111 Ms. Vautour does not believe that the PSC policy requires that this document be produced at a certain point in the process. She stated that the rationale document is often not produced until the candidate is found qualified.

112 Ms. Vautour acknowledged that the rationale does not mention how the staffing values are met but stated that it is often done this way in the case of a reclassification. She conceded that this should perhaps have been added.

113 Ms. Vautour is of the view that the values of *access* and *transparency* were respected through the notification of appointment issued. A right to complain and informal discussion were available to employees in the area of selection. Access to the manager and to the information related to the decision to choose a non-advertised process was available, and access was also provided to Mr. Milito in terms of developmental opportunities related to the assessment of his duties. She conceded that the rationale could have been more descriptive with regards to the values of *fairness* and *equity* but she did not explain how this could have been done. She noted that the rationale did indicate that Mr. Milito was assessed against the SMC. Ms. Vautour said that in the respondent's view, it is fair and equitable to provide an opportunity to an incumbent to be assessed for his or her own position following reclassification.

114 The Tribunal has reviewed the non-advertised appointment rationale prepared in support of the process. Although it generally addresses the criteria set in the PSC policy and in the PWGSC directive, it does not clearly explain how this appointment meets the appointment values. Ms. Vautour's testimony at the hearing did provide some explanation of how each guiding value is addressed but this approach does not fulfil PSC policy and PWGSC directive. However, this error is not sufficiently serious as to amount to an abuse of authority.

115 In addition, the NAPA was issued on July 20, 2011, and the complaint period closed on August 4, 2011, but the rationale was only signed on September 1, 2011. Although the *PSC Choice of Appointment Process Policy* does not state when the rationale supporting the choice of appointment process must be issued, it would only make sense that it would be finalized before the NAPA is issued. However, the delay in

preparing the rationale in and of itself was not a serious error in the circumstances and does not constitute an abuse of authority.

The written assessment

116 The complainants contend that in addition to the assessment conducted, the respondent was required to provide a detailed *written* assessment demonstrating that the appointment is based on merit, in accordance with the PWGSC *Directive on Non-Advertised Processes* and with the PSC *Choice of Appointment Process Policy*.

117 Ms. Vautour acknowledged that the PSC *Guide to Implementing the Choice of Appointment Process Policy* indicates, at section 4, that the Deputy Head is to ensure that a written rationale demonstrates how the non-advertised process meets the established criteria and the appointment values. She also conceded that the PWGSC *Directive on Non-Advertised Appointment Processes* specifies that managers with sub-delegated staffing authority are responsible for “providing a detailed written assessment of the candidate demonstrating that the appointment is based on merit”.

118 Ms. Vautour confirmed that a written assessment was not done but explained that at PWGSC, a formal assessment is required for entry in the EX group. The manager must conduct a structured interview and reference checks, and administer a SELEX test. This is consistent with the PSC *Choice of Assessment Process Policy*, which requires a structured interview for entry in the EX group. PWGSC considers its assessment process more rigorous than that conducted by a written assessment.

119 While it is true that the PWGSC *Directive on Non-Advertised Appointment Processes* specifies that managers with sub-delegated staffing authority are responsible for “providing a detailed written assessment of the candidate demonstrating that the appointment is based on merit”, this is a departmental directive, and the PSC *Choice of Appointment Process Policy* does not contain a similar requirement.

120 The Tribunal is satisfied with Ms. Vautour’s explanation that the department requires a formal structured assessment (interview, reference checks and SELEX test), not a written assessment, for appointments to EX positions. This was done in the present appointment process.

121 Accordingly, the Tribunal finds that the complainants have not established that the respondent abused its authority in the application of the *PSC Choice of Appointment Process Policy* and of the guiding values of the public service.

Decision

122 For all these reasons, these complaints are dismissed.

Lyette Babin-MacKay
Member

Parties of Record

Tribunal Files	2011-0632 and 2011-0643
Style of Cause	<i>Robert Chartrand and Claude Bombardier and the Deputy Minister of Public Works and Government Services Canada</i>
Hearing	April 11 and 12, 2012, September 25 to 28, 2012, and March 18 to 22, 2013 Ottawa, Ontario
Date of Reasons	November 21, 2013
APPEARANCES:	
For the complainants	Robert Chartrand Claude Bombardier
For the respondent	M ^e Anne-Marie Duquette
For the Public Service Commission	M ^e Marc Séguin Written submissions