



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2013-0110
Issued at: Ottawa, February 21, 2014

GENEVIEVE JOHNSTON

Complainant

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

AND

OTHER PARTIES

Matter	Complaint of abuse of authority under s. 77(1)(a) of the <i>Public Service Employment Act</i>
Decision	Complaint is dismissed
Decision rendered by	Merri Beattie, Member
Language of Decision	English
Indexed	<i>Johnston v. President of the Canada Border Services Agency</i>
Neutral Citation	2014 PSST 1

Reasons for Decision

Introduction

1 Genevieve Johnston, the complainant, was an unsuccessful candidate in an internal advertised appointment process for Senior Program Advisor positions at the FB-06 group and level in the Programs Branch of the Canada Border Services Agency (the CBSA). She alleges that the respondent, the President of the CBSA, abused its authority when it assessed her qualifications and by failing to conduct a fair review of her assessment.

2 The respondent denies the allegations of abuse of authority. It maintains that the complainant was properly assessed based on the qualifications that were established. As well, it asserts that although the complainant disagrees with the outcome, a fair review of her assessment was done.

3 The Public Service Commission (the PSC) did not attend the hearing. It presented a written submission on PSC policies and guidelines relating to the issues. However, it took no position on the merits of the case.

4 The Public Service Staffing Tribunal (the Tribunal) finds that the complainant has not demonstrated that the respondent abused its authority in its assessment of her qualifications, or was unfair in its review of her assessment.

Background

5 The complainant applied to the FB-06 appointment process in October 2011. She met the essential education and experience qualifications, and passed a written communication test and a written knowledge test. On August 14, 2012, she attended an interview to assess consultation skills and team coordination. At the same time, she submitted two self-assessments, called Candidate Self-Assessments (CSAs), which she had prepared prior to the interview. One CSA was used to assess thinking skills and the other to assess judgement.

6 The complainant's interview panel found that she failed to meet the requirements for the team coordination qualification. The assessment board members who evaluated the complainant's CSAs determined that she also failed thinking skills and judgement. The complainant was notified of her elimination from the appointment process and, on November 5, 2012, she requested an informal discussion of her results.

7 One of the two panel members who had interviewed the complainant held an informal discussion with her on December 13, 2012. A report of the informal discussion was sent to the assessment board chair, who notified the complainant on January 25, 2013, that her assessment had been reviewed and her results remained unchanged.

8 Further reviews, discussions and email communications took place involving some of the assessment board members, the board chair and the complainant. However, they did not result in any change to the complainant's assessment results.

9 On March 15, 2013, the complainant filed a complaint of abuse of authority with the Tribunal under s. 77(1) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the PSEA).

Issues

10 The Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority when it assessed the complainant's qualifications?
- (ii) Did the respondent abuse its authority in its use of multiple assessment panels?
- (iii) Did the respondent take appropriate steps to address the complainant's concerns about her assessment?

Analysis

11 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 because of abuse of authority. Whether an error constitutes an abuse of authority depends on the nature and seriousness of the error in question. Similarly, while abuse of authority will always include improper conduct, the degree to which conduct is improper may determine whether it constitutes abuse of authority. (See *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008 at paras. 66 and 73.)

12 In *Tibbs*, the Tribunal also established that the complainant bears the burden of proof (see paras. 49, 50 and 55). In order for the complainant to meet this burden, she must present sufficient evidence for the Tribunal to determine, on a balance of probabilities, that a finding of abuse of authority is warranted.

Issue I: Did the respondent abuse its authority when it assessed the complainant's qualifications?

13 The assessment board determined that the complainant failed three essential qualifications listed in the *Statement of Merit Criteria*, namely, team coordination, thinking skills, and judgement.

14 The complainant alleges that the respondent based its assessment that she failed one qualification (team coordination) on an improper factor, and overlooked information in her responses for all three qualifications that she failed. The Tribunal finds that the evidence does not support these allegations.

(i) *Team Coordination*

15 Team coordination was one of two qualifications assessed during the interview. Prior to starting their interviews, candidates were given twenty minutes to prepare and make notes. They were provided with the definition of team coordination and the interview question, all of which read as follows:

TEAM COORDINATION: Develops and maintains a cohesive team that works to achieve the goals and objectives of the organization in a timely and effective manner.

You have been appointed as an FB6 and are becoming part of an existing team that is experiencing internal conflict. You are responsible for team coordination and support of the FB8 manager.

How do you bring the team together and get them focused on the goals and objectives of the organization?

How do you ensure the team meets their timeframes and deadlines?

How do you ensure your team is effective?

16 The only information given to candidates about the team they were joining is that it was experiencing internal conflict. This was a clear indication that the conflict was an important element and required their attention.

17 Kent Griffiths, Senior Program Advisor, and Valerie Lussier, Manager, Business Systems Support, interviewed the complainant in August 2012. Their respective testimony and interview notes establish that, at the time, they both found that she had not addressed the conflict in the team, and they agreed on a failing grade of 2 on a scale of 1 to 5.

18 The complainant's position with respect to her assessment of this essential qualification is twofold, namely, that resolving conflict should not have been a component of the team coordination qualification and, even if it were, her response addressed how to properly handle the conflict.

The respondent's requirement that candidates respond to the internal conflict as part of their answer to the team coordination interview question

19 The Tribunal has held in many of its decisions that the respondent has a broad discretion to determine the qualifications for a position, and what is required of managers is to establish the qualifications for the work to be performed. (See, for example, *Neil v. Deputy Minister of Environment Canada*, 2008 PSST 0004 at paras. 45 and 46.)

20 The complainant submits that FB-08 managers, not FB-06s, are responsible for human resources matters, including resolving conflict. In her view, the role of an FB-06 Senior Program Advisor is to inform the manager of conflict within the team. She stated her view on this matter during her interview and during her testimony at the hearing. At the time of her interview, the complainant had been acting in an FB-06 position for approximately three years and, as such, she had first-hand knowledge of the role she performed.

21 Mr. Griffiths testified that after his informal discussion with the complainant he became convinced that FB-06s are not responsible for resolving conflict between team members. However, Mr. Griffiths, who is also an FB-06, did not question the requirement to address the conflict when he first saw the *Rating Guide* during a training session for assessors, or at any time throughout the interviews he conducted. Mr. Griffiths stated that after meeting with the complainant he reviewed the FB-06 work description, but it was not tendered as evidence at the hearing.

22 As an assessment board member, Mr. Griffiths' role was to assess candidates against the merit criteria that had been established for the appointment process, not to set or alter the qualifications either during or after the assessments. (See *Bowman v. Deputy Minister of Citizenship and Immigration Canada*, 2008 PSST 0012 at paras 110 and 111.)

23 Christine Maathuis Quinn, who was chair of the assessment board, testified that a group of several directors had agreed on the definitions and required elements of the essential qualifications for this process, including the requirement to deal with conflict in the context of team coordination. Ms. Maathuis Quinn, who is Director, Trusted Travellers Systems and Coordination, Business Systems Support Directorate, also testified that she expects an FB-06 to deal with conflict. As well, Ms. Lussier testified that FB-06s often lead working groups or function as the lead on a file, and are expected to take steps to resolve a conflict before referring the matter to the manager. In her view, addressing the conflict in the team was a key element of the team coordination qualification.

24 The evidence clearly demonstrates that candidates were expected to address the conflict in the team. In the *Rating Guide*, the list of expected answers for this qualification includes “resolves conflict through interaction with others” and “uses available resources to resolve conflict when required.” The expected answers were not available to candidates; however, they had the definition and the question, which are reproduced above.

25 Subsection 30(2) of the PSEA sets out the authority of the deputy head to establish qualifications. The Tribunal finds, based on the evidence presented at the hearing, that the requirement for candidates to address the conflict as part of the assessment of the team coordination qualification was a proper exercise of discretion under s. 30(2) of the PSEA.

26 The Tribunal concludes that the complainant has not shown that the respondent abused its authority by requiring that candidates address a conflict situation in the context of demonstrating that they met the team coordination qualification.

The respondent’s assessment of the complainant’s team coordination response

27 The Tribunal has considered many cases where a complainant challenges the mark or rating they have received. The PSEA does not authorize the Tribunal to assess candidates for appointment. This authority is granted to the PSC under s. 30(2)(a) of the PSEA and may be delegated in accordance with s. 15(1) of the PSEA. Therefore, the Tribunal will not conduct its own assessment; it will determine whether the evidence demonstrates, on a balance of probabilities, that there was an abuse of authority in the assessment that was done. (See, for example, *Zhao v. Deputy Minister of Citizenship and Immigration Canada*, 2008 PSST 0030 at para. 33.)

28 As the complainant points out, candidates were not told the nature of the conflict. The complainant testified that, in her response for team coordination, she indicated that she would foster a healthy work environment, seek guidance, and discuss issues with her manager and make recommendations. She asserts that these actions would address the conflict in the team.

29 The complainant also tendered a document in which she similarly described how she had “generally” addressed the internal conflict during her interview. The document is not dated, but it was sent to Mr. Griffiths on February 5, 2013, and her testimony is that she prepared it after her informal discussion with him on December 13, 2012.

30 The complainant’s testimony and her document show how references to “issues” in her response could be linked to the internal conflict situation in the question, but only with the benefit of additional explanation and by drawing inferences. The preponderance of evidence shows that she did not mention the conflict at any time during her interview.

31 According to Ms. Lussier, managing the workload and maintaining a cohesive team were both required elements of team coordination. Ms. Lussier testified that the complainant did not make any specific link between the actions she said she would take and the internal conflict situation. She stated that the complainant avoided any direct reference to the conflict during her interview. The interview notes of both Ms. Lussier and Mr. Griffiths support Ms. Lussier’s testimony. The complainant’s preparatory notes are also consistent with Ms. Lussier’s testimony, and reinforce the complainant’s testimony that her approach to team coordination was to manage the workload.

32 Ms. Lussier also testified that the complainant covered other required elements for team coordination, but did not address them in sufficient depth. As an example, the complainant said she would ensure effective communication, but did not describe how this would be done. In Ms. Lussier’s view, the complainant only superficially responded to most of the required elements for team coordination.

33 Ms. Lussier’s testimony is consistent with the observations she and Mr. Griffiths noted when they assessed the complainant, and those observations are linked directly to the required elements that were established in the *Rating Guide* to demonstrate team coordination.

34 There is no basis for a finding that the assessors reached an unreasonable conclusion that the complainant’s response for team coordination warranted a mark of 2 – below standard – given the following description from the *Rating Guide*:

2 Below Standard

Some behavioral indicators were met in moderate depth. Some deficiencies exist in the behavior assessed which constitutes a problem.

35 The Tribunal concludes that the complainant's evidence is insufficient to demonstrate that the board members overlooked elements of her response or were unreasonable in any way in their assessment of her for the team coordination qualification.

(ii) Thinking Skills and Judgement

36 The assessment board evaluated candidates' thinking skills and judgement based on their CSAs. The CSA is a structured template in which candidates have to describe one work-related achievement in terms of their own observable behaviours. Candidates were given the CSA templates and an instruction booklet three days prior to their interview, and had to submit their CSAs at the time of their interview.

37 The complainant disputes the board's finding that her CSAs were missing some of the expected behaviours for both thinking skills and judgement. In her view, the board overlooked elements of her responses. During her testimony, the complainant referred to her CSAs as well as to a document in which she had transcribed portions of her CSAs and arranged them to show how they corresponded to segments of the definitions for thinking skills and judgement. The document is undated; however, it was sent by email to Mr. Griffiths on February 3, 2013, following the complainant's informal discussion in December 2012.

38 Mr. Griffiths also testified about the complainant's CSAs. He did not assess the complainant's CSAs during the appointment process; however, he evaluated other candidates' CSAs and he reviewed the complainant's CSAs prior to his informal discussion with her. In his view, the assessors may have overlooked some of the complainant's examples. In his testimony, Mr. Griffiths showed where in the complainant's CSAs he believes she addressed required elements of the qualifications.

39 Mr. Griffiths testified that he disagreed with a number of the assessors' conclusions. For example, he disagrees with the assessors' conclusion that the complainant did not recognize "other potential opportunities or new approaches." In his view, the complainant's entire CSA for thinking skills describes a new approach. Mr. Griffiths did not, however, identify where, in her CSA, the complainant referred to any opportunities or approaches that could potentially arise from the work she did in creating the new approach she described.

40 The Tribunal finds that the preponderance of evidence demonstrates that the assessors did not overlook anything in the complainant's CSAs. Ms. Lussier testified that she and another assessment board member, Ken McNaughton, evaluated the complainant's CSA for thinking skills, and she and board member Melanie Rivet assessed the complainant's CSA for judgement. The signed results page for the complainant's CSAs confirms Ms. Lussier's testimony. It is also Ms. Lussier's uncontested testimony that in each instance, the board members assessed the complainant's CSAs independently of one another.

41 Ms. Lussier explained that she was looking for candidates to demonstrate thinking skills by addressing all the expected behaviours in the context of one decision or event. She found some of the behaviours in the complainant's CSAs; however, they were distributed over several decisions within her example. In her view, the complainant did not demonstrate that she followed a sound thinking process in any one decision, or when her response was examined in its entirety.

42 Ms. Lussier does not agree with Mr. Griffiths that simply stating that there was a risk and that she would mitigate by "ensuring certain information was not shared with Industry members" is sufficient to demonstrate the expected behaviour of "forecasts possible adverse effects and takes steps to minimize them." Ms. Lussier testified that the complainant failed to state what the information was or why it was a risk to share it. She explained that without that kind of detail, she was not able to determine that the complainant had drawn correct conclusions about the risk and determined an appropriate course of action.

43 Similarly, Ms. Lussier testified that the complainant did not explain how the adverse effect of “more information gathering for all” would be mitigated. She does not share Mr. Griffiths’ view that the steps the complainant took to improve the template so the data could be viewed more efficiently would have any mitigating effect on those required to gather the data.

44 According to Ms. Lussier, the complainant did not sufficiently explain her thought processes, and the information she provided was too general to demonstrate the expected behaviours for thinking skills. As another example, Ms. Lussier referred to the complainant’s CSA, where it was written that she “decided” on “the best approach.” According to Ms. Lussier, the complainant did not describe what she considered or what her rationale was for making that decision. Without that information, Ms. Lussier was not able to determine whether the complainant had followed a sound decision process and drawn accurate conclusions.

45 With respect to judgement, Mr. Griffiths acknowledged that the complainant’s response was not strong. Nevertheless, he feels that she should pass the qualification. He stated that the definition of judgement does not go into detail about weighing options and explaining the choice that is made. He also stated that the complainant identified that the status quo would not meet the organization’s needs, and that in any decision one option is to do nothing.

46 There is no evidence in her CSA that the complainant considered more than one course of action, including the option of doing nothing. Nothing in the evidence undermines the assessors’ conclusion that the complainant failed to take options into account or compared and evaluated possible options, which are two of the expected behaviours for judgement.

47 The complainant also pointed out that, in addition to the expected behaviours for thinking skills and judgement, the *Rating Guide* provides for the consideration of other acceptable answers. She submits that the board failed to apply that consideration when assessing her CSAs. Mr. Griffiths stated that he would have accepted parts of her responses for thinking skills and judgement as other acceptable answers for those

qualifications. However, no concrete examples were provided in support of this claim. Ms. Lussier testified that there was nothing in the complainant's CSAs that was sufficiently linked to the assessment criteria to qualify as another acceptable answer.

48 The board members who assessed the complainant's CSAs found that she had failed to demonstrate the qualifications. The complainant disagrees, and she relied heavily on Mr. Griffiths' testimony to support her position. Mr. Griffiths, who was also a board member, believes that the complainant's two CSAs warrant a passing mark.

49 As a result of using CSAs to assess thinking skills and judgement, candidates were free to choose their achievement and present it as they deemed best. Each candidate's CSA would be unique and could not be construed as correct or incorrect. The *Rating Guide* shows that the assessment board was not seeking correct answers. Board members were required to evaluate the CSAs based on the established list of expected behaviours. This approach, which is common in appointment processes, requires the assessors to use their discretion.

50 The Tribunal finds that there is no compelling evidence that supports substituting Mr. Griffiths' opinion for that of the three board members who were charged with assessing the complainant's CSAs. There is no evidence that the assessors failed to fully consider the content of the complainant's CSAs, or reached unreasonable conclusions based on the *Rating Guide*.

51 During the complainant's testimony, the respondent objected on the grounds that her evidence was irrelevant since the Tribunal cannot reassess her. The complainant's response was that she was not seeking a reassessment by the Tribunal, but was providing context for the Tribunal to understand the *Rating Guide* and the factors that the assessment board should have taken into account.

52 The Tribunal sustained the objection because the complainant was elaborating and providing context for a response she gave at the time of her assessment. She was, therefore, adding information to her response that was not available to the assessors. Accordingly, the Tribunal found that the information was not relevant to its examination of the board's assessment of the complainant's qualifications.

53 When the complainant objected on the same grounds to Ms. Lussier's testimony, the Tribunal denied the objection. The Tribunal must determine whether the assessment board members considered the complainant's responses, applied the *Rating Guide*, and acted reasonably in assessing the complainant's qualifications. As such, Ms. Lussier's explanation of her assessment of the complainant is relevant to that determination.

54 The complainant's CSAs were each evaluated by two assessment board members, who independently came to the same conclusion. The complainant's evidence shows that she used key words from the definitions of thinking skills and judgement in her CSAs. However, it does not contradict Ms. Lussier's testimony that the complainant's responses lack the detailed information required to demonstrate the qualifications being assessed. The assessors' comments and Ms. Lussier's testimony are consistent and relate directly to the expected behaviours for thinking skills and judgement that were established in the *Rating Guide*. Despite the differing view held by Mr. Griffiths, the Tribunal finds that the evidence does not establish that there was any abuse of authority in the board's assessment of the complainant.

55 The Tribunal concludes that the evidence does not demonstrate that the respondent abused its authority when it assessed the complainant with respect to the team coordination, thinking skills and judgement qualifications in this appointment process.

Issue II: Did the respondent abuse its authority in its use of multiple assessment panels?

56 It is uncontested that various panels consisting of two assessment board members assessed candidates in this appointment process. The complainant questions the respondent's authority to conduct assessments in this manner. In *Visca v. Deputy Minister of Justice*, 2007 PSST 0024, at para. 60, the Tribunal determined that the use of multiple assessment panels comes under the broad discretion accorded to managers under the PSEA.

57 While there is no requirement that the same board members assess every candidate, the complainant submits that the respondent failed to take adequate measures to ensure consistent, non-arbitrary assessments of candidates. She argues that Mr. Griffiths' testimony about her assessment supports her position.

58 Ms. Lussier and Mr. Griffiths both testified that board members attended a mandatory training session on the content and application of the *Rating Guide*. The *Rating Guide* contains a definition and a list of expected behaviours for each qualification, as well as the five assessment ratings and their definitions.

59 According to Mr. Griffiths, board members did not receive detailed instructions related to the assessment ratings definitions. He testified that there was no specific guidance on deciding whether a candidate had addressed the expected behavioural indicators in "moderate depth" or "great depth". Similarly, he stated that there was no direction as to which "deficiencies" should be viewed as "a concern". Mr. Griffiths also stated that there were no examples of "other acceptable answers" provided to board members.

60 In the Tribunal's view, it is not unreasonable to expect board members to distinguish between moderate and great depth in a candidate's response. The board members had the list of expected behaviours and, according to Ms. Lussier, had been told to look for detailed descriptions of what, how and why in candidates' responses, not simply words that matched the ones in the list. The assessors were expected to identify whether a deficiency was a concern based on the definition and the list of expected behaviours relevant to the qualification being assessed.

61 The board also had discretion to accept an answer that was not specifically reflected in the *Rating Guide*, if appropriate. The assessment method used for the three qualifications at issue in this case required that board members use their judgement when assessing candidates, rather than a numerical point-per-answer approach. As the Tribunal stated in *Visca*, "Parliament has provided those with staffing authority with the means to exercise the discretionary aspects of their authority, according to their judgement." The Tribunal is satisfied that the respondent provided sufficient information

to board members to guide them in exercising their judgement. The complainant has failed to present evidence that those conducting her assessment for the qualifications at issue acted in an arbitrary or unreasonable fashion.

62 Moreover, there is insufficient evidence that the assessments of candidates were conducted in an inconsistent manner. On the contrary, two board members assessed each qualification. If the board members disagreed, they had a discussion and reached consensus. Mr. Griffiths testified that this occurred in the assessments he conducted. According to Ms. Lussier, if the two assessors could not agree, a third board member was consulted. The Tribunal finds that this approach, together with the assessment tools and the training of board members, provided the necessary safeguards to protect against any inconsistent or arbitrary exercise of discretion by board members.

63 The Tribunal concludes that the complainant has failed to demonstrate that the respondent abused its authority by using multiple panels to assess candidates in this appointment process.

Issue III: Did the respondent take appropriate steps to address the complainant's concerns about her assessment?

64 The complainant submits that the respondent failed to respect the principles of procedural fairness in addressing her concerns. She asserts that she had no meaningful opportunity to participate in the review of her assessment, and the review process was tainted by bias. As well, the complainant submits that the respondent failed to comply with CBSA and PSC policy in conducting its review. Finally, she submits that the respondent acted in bad faith by inconsistently deciding whether to change a candidate's mark after informal discussion, and in providing her with misleading information.

65 The Tribunal has explained the purpose of informal discussion on many occasions. In *Rozka v. Deputy Minister of Citizenship and Immigration Canada*, 2007 PSST 0046, for example, the Tribunal held as follows at para. 76:

Informal discussion is intended primarily to be a means of communication for a candidate to discuss the reasons for elimination from a process. If it is discovered that an error has been made, for example, if the assessment board did not consider some information listed on a candidate's application, this provides the opportunity for the manager to correct that mistake. **However, informal discussion is not an opportunity to request that the assessment board reassess a candidate's qualifications.**

(emphasis added)

Key Events Post-Assessment

66 Mr. Griffiths held an informal discussion with the complainant on December 13, 2012. Since Mr. Griffiths had interviewed the complainant, he explained the assessment decision for team coordination. However, Mr. Griffiths had not evaluated the complainant's CSAs and, according to his testimony, he did not fully understand the assessments that had been done. In the Tribunal's view, it was an error for Mr. Griffiths to attempt to explain the complainant's assessments for thinking skills and judgement.

67 The complainant testified that Mr. Griffiths told her he would inform the board chair that all three failed qualifications should be reassessed. Mr. Griffiths prepared an *Informal Discussion Report*, in which he wrote that the complainant had said that "...the question stated that her responsibility was for 'team coordination and support' and passed the HR issue to the manager." He also wrote that "for both self-assessment competencies she showed examples that may have been overlooked by board members." Mr. Griffiths recommended that the complainant's assessments for the three failed qualifications be reviewed.

68 Ms. Maathuis Quinn conducted a review of the complainant's assessments for all three qualifications. She looked at the board's interview notes, the complainant's CSAs, and the *Rating Guide*, to determine whether the assessments were reasonable. She found that they were, and she notified the complainant in writing, on January 25, 2013, that her marks would not change. It was not until after her review that Ms. Maathuis Quinn was informed in an email from Mr. Griffiths that the complainant had raised "many detailed comments" that had not been conveyed to her. In his email, dated January 31, 2013, Mr. Griffiths also indicated that the complainant had raised the possibility that there were flaws in the assessment tools.

69 Ms. Maathuis Quinn received Mr. Griffiths' email on February 1, 2013, and met with him the same day. On February 5, 2013, Mr. Griffiths and Ms. Lussier met and they then had a discussion with Ms. Maathuis Quinn later that day. The testimony of all three witnesses is that they thoroughly discussed the complainant's team coordination assessment, with particular focus on her position that there is no requirement for FB-06s to manage conflict. This was the second review of the complainant's assessment for the team coordination qualification.

70 Mr. Griffiths explained how the complainant believed her answer responded to the conflict and why she thought that the requirement to manage conflict was inappropriate. Based on the complainant's evidence, these are the points she wanted the assessment board to consider. In fact, Mr. Griffiths agreed with the complainant, and argued her position during these meetings.

71 At the end of the discussions on February 5, 2013, Ms. Lussier remained convinced that the complainant's team coordination response merited the mark of 2. According to her, the only way to support a mark of 3 would be to alter the *Rating Guide*. Ms. Maathuis Quinn testified that she was comfortable with Ms. Lussier's application of the *Rating Guide*. In her view, Mr. Griffiths' arguments to change the mark were based on drawing inferences rather than assessing the content of the complainant's response, and on changing the requirements in the *Rating Guide*.

72 At Ms. Maathuis Quinn's request, on February 6, 2013, Ms. Lussier conducted a second review of the complainant's assessments for thinking skills and judgement. Ms. Lussier testified that she considered the complainant's CSAs, which she had in their entirety in writing. She also considered the *Rating Guide*, the information Mr. Griffiths verbally communicated during their meetings on February 5, 2013, and his informal discussion notes.

73 The complainant points out that Ms. Lussier could not recall whether, at the time, she had the complainant's post-informal discussion document referred to earlier in these reasons. The complainant also testified, however, that she had no expectation that the document would be considered by the assessment board.

74 Ms. Lussier reported the result of her review to Ms. Maathuis Quinn, who notified the complainant by email on February 7, 2013, that her original results would not change.

75 Ms. Lussier met with the complainant on February 19, 2013, for an informal discussion of her results for thinking skills and judgement.

(i) Alleged Breaches of Procedural Fairness

76 Two fundamental components of procedural fairness are the right to be heard, and the right to an impartial decision-maker. For the latter, a reasonable apprehension of bias will invalidate a decision.

(a) Right to be Heard

77 The only mechanism contemplated in the PSEA for addressing candidates' concerns prior to the completion of an appointment process is set out in s. 47, namely, informal discussion. The purpose of informal discussion has already been explained. The steps that the delegated manager, Ms. Maathuis Quinn, took in addition to informal discussion to address the complainant's concerns in this case are commendable. There is no requirement in the PSEA or PSC policy to review a completed assessment.

78 The complainant's right to be heard commenced at the point that she filed her complaint to the Tribunal. In *Liang v. the President of the Canada Border Services Agency*, 2007 PSST 33, at para. 40, the Tribunal confirmed that the recourse Parliament established for internal appointments begins with a complaint to the Tribunal under s. 77 of the PSEA and ends with the disposition of the complaint by the Tribunal.

79 The complainant's concerns were dealt with in a way that is not contemplated in the PSEA or in policy. In this context, the complainant had no entitlement to what amounts to a hearing in which she could meet with the board to further explain her responses and debate the content of the *Rating Guide*. However, the complainant could reasonably expect that her concerns would be considered once the delegated manager had decided to initiate a review. Based on the evidence of what her concerns

were, the Tribunal is satisfied that they were brought forward by Mr. Griffiths and fully considered by Ms. Maathuis Quinn.

80 The complainant also argues that all of her original assessors should have participated in the review. She did not tender any evidence or jurisprudence to support this argument. The Tribunal finds that there is no basis for this assertion.

(b) Reasonable Apprehension of Bias

81 The complainant argues that a reasonable apprehension of bias was created since Ms. Lussier did the review of the assessments that she had initially done.

82 The complainant submits that *Fitzgerald c. Université Concordia*, [1995] J.Q. no 3071, J.E. 95-1090 (Qué. S.C.) establishes that, when a matter is being reconsidered, the involvement of the prior decision-maker in the same matter can give rise to a reasonable apprehension of bias.

83 *Fitzgerald* is clearly distinguishable from the present case. *Fitzgerald* dealt with a university's established procedural rules that allowed for a review of the disputed exam mark, followed by a re-evaluation of the exam and, if still not satisfied, recourse to the Appeal Committee. The appellant sought recourse with the Appeal Committee, which ordered a second re-evaluation. He sought recourse with the Appeal Committee a second time and the Appeal Committee ordered another re-evaluation. The Court found that there was a reasonable apprehension of bias in the context of the last re-evaluation, given that the person responsible for it was also the person responsible for the improper second re-evaluation. As previously explained in these reasons, the respondent was not bound, either legally or as a matter of policy, to follow a similar procedure. The Tribunal notes as well that in *Fitzgerald*, Concordia University's procedures required that the first review of a disputed mark was to be done by the marker of first instance.

84 Moreover, the decision-maker in the present case at all material times was Ms. Maathuis Quinn, not Ms. Lussier. Based on Ms. Maathuis Quinn's testimony, on February 5, 2013, she was satisfied that the initial assessment of team coordination was sound. She left open the possibility of further discussion of team coordination, only if the complainant were to pass thinking skills and judgement as a result of those reviews. After the reviews were all completed, Ms. Maathuis Quinn decided that the original assessments would stand. In her view, there was a lack of consensus between Mr. Griffiths and Ms. Lussier on the team coordination qualification. The Tribunal is satisfied that, as the assessment board chair, Ms. Maathuis Quinn had the authority to resolve any question where consensus was not reached, and to decide the matter.

85 Even if one were to determine that Ms. Lussier was the decision-maker in the context of the reviews that took place in this case, there is no evidence on which the Tribunal could make a finding of reasonable apprehension of bias.

86 The test for reasonable apprehension of bias is well established. See *Committee for Justice and Liberty v. Canada (National Energy Board)*, 1978 1 S.C.R. 369, at 394 and *Newfoundland Telephone Company v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 1 S.C.R. 623. The Tribunal has adopted this test to the context of staffing complaints. (See, for example, *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 0010 at paras. 72-74.)

87 In this case, the Tribunal finds that a reasonably informed bystander would not reasonably perceive bias on the part of Ms. Lussier. In the course of an appointment process, it is not unusual for a candidate to disagree with the assessor's conclusion. There was no prior history between the complainant and Ms. Lussier. The mere fact that Ms. Lussier had previously determined that the complainant had failed is not sufficient to establish doubt that she could conduct an unbiased review of her initial assessment.

88 The Tribunal concludes that the complainant has failed to prove that the respondent breached the rules of procedural fairness in the steps that it took to address the complainant's concerns about her assessment.

(ii) *Alleged Breaches of CBSA and PSC Policy*

89 The Tribunal finds that the respondent did not breach its policy or act unreasonably when it denied the complainant's two requests to meet with Brent McRoberts, Director General of Business Systems Support Directorate. The *CBSA Guide on Staffing*, at p. 47, provides that "... if a candidate is not satisfied with the information provided by an Assessment Board member during an informal discussion, the candidate can request another discussion directly with the sub-delegated manager." The *Guide* also states, on the same page: "If the reason for which a person is no longer considered for the appointment is the same, only one informal discussion should be offered."

90 Mr. McRoberts was the champion and one of several directors general who were sub-delegated to make appointments in this appointment process. Ms. Maathuis Quinn was the sub-delegated manager who had oversight of the assessments. The complainant's first request for a meeting was made on February 5, 2013. It was forwarded to Ms. Maathuis Quinn; however, at the time, the review had not been concluded. The second request was made on February 11, 2013. Again, Ms. Maathuis Quinn replied. At that point, the review was complete and the reasons for eliminating the complainant from the process had not changed.

91 In accordance with CBSA policy, Ms. Maathuis Quinn was the appropriate manager to address the complainant's concerns, and she was, in fact, the person who did address them. Under the CBSA policy, an additional informal discussion is discretionary and is indicated when the reasons for eliminating a candidate from a process change after the initial informal discussion. Those circumstances do not apply in this case.

92 In terms of the alleged breach of PSC policy, the PSC's *Informal Discussion Policy* permits the correction of errors and oversights; however, it has not been established that any such correction was appropriate in this case. As the Tribunal has already emphasized, there is no PSC policy that would be applicable to what transpired following informal discussion in this case.

93 The Tribunal concludes that the complainant has failed to prove that the respondent contravened either CBSA or PSC policy in addressing her concerns about her assessment.

(iii) *Alleged Bad Faith*

(a) *Inconsistency in Marking*

94 The evidence does not support the complainant's submission that the respondent was inconsistent in its marking. The mere fact that another candidate's mark was changed after informal discussion, without any evidence about why the mark was changed, is insufficient evidence to prove this allegation. The Tribunal has determined that the respondent acted fairly in reaching its decision not to change the complainant's marks. The complainant led no further evidence to support her allegation.

(b) *Misleading Information*

95 Ms. Maathuis Quinn sent an email to the complainant confirming the original assessment results, on February 7, 2013. Before Ms. Maathuis Quinn's email was sent, Mr. Griffiths told the complainant that he and Ms. Lussier had come to consensus that her mark for team coordination would change from 2 to 3.

96 The complainant's status with respect to the appointment process had not been finalized and it was imprudent of Mr. Griffiths to communicate any detail about the as yet unfinished review to the complainant. Based on the evidence, the Tribunal finds that Mr. Griffiths acted on his own in providing the misleading information to the complainant. There is no evidence before the Tribunal that the delegated manager was aware of Mr. Griffiths' actions in this regard.

97 The Tribunal concludes that the complainant has failed to prove that the respondent acted in bad faith in addressing her concerns about her assessment.

98 In the Tribunal's view, the steps taken by the respondent were more than appropriate to address the complainant's concerns. The Tribunal is satisfied that the respondent reached its final conclusion only after a comprehensive review, with full consideration of those concerns.

Decision

99 For all these reasons, the complaint is dismissed.

Merri Beattie
Member

Parties of Record

Tribunal File	2013-0110
Style of Cause	<i>Genevieve Johnston and the President of the Canada Border Services Agency</i>
Hearing	November 7 and 8, 2013 Ottawa
Date of Reasons	February 21, 2014
APPEARANCES:	
For the complainant	Craig Stehr, Nelligan O'Brien Payne
For the respondent	Josh Alcock, TBS Legal Services
For the Public Service Commission	Claude Zaor, Policy Advisor, by written submissions