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*Public Service Labour Relations
and Employment Board Act
and Public Service
Employment Act*



Before a panel of the
Public Service Labour
Relations and
Employment Board

BETWEEN

TED LAVIOLETTE

Complainant

and

THE COMMISSIONER OF THE CORRECTIONAL OF SERVICE CANADA

Respondent

and

OTHER PARTIES

Indexed as

Lavolette v. Commissioner of the Correctional Service of Canada

Complaint of abuse of authority under section 77(1)(a) of the *Public Service Employment Act*

REASONS FOR DECISION

Decision: The complaint is substantiated

Before: Nathalie Daigle, Member

For the Complainant: Serge Dubord

For the Respondent: Magdalena Persoiu

For the Public Service Commission: Luc Savard (written representations)

Heard at Montréal, Quebec
September 24 and 25, 2014.

Reasons for Decision

Introduction

1 Ted Laviolette, the complainant, applied for a position as a correctional officer at the CX-02 group and level with Correctional Service Canada (CSC). His application was rejected at the personal qualifications assessment stage. The complainant argues that the Commissioner of the CSC, the respondent, abused its authority by not correctly assessing him and by rejecting his application.

2 The respondent denies having abused its authority in the conduct of the appointment process and in the assessment of the complainant's qualifications.

3 The Public Service Commission (the PSC) was not present at the hearing, but made written representations concerning its applicable policies and guidelines. It took no position on the merits of the complaint.

4 This complaint was heard by the Public Service Staffing Tribunal (the Tribunal) on September 24 and 25, 2014. On November 1, 2014, the *Public Service Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s. 365, came into effect and created the Public Service Labour Relations and Employment Board (the Board). This new Board replaces the Tribunal and the Public Service Labour Relations Board and is responsible for dealing with complaints filed under the *Public Service Employment Act*, S.C. 2003, c. 22, s. 12 and 13 (the PSEA). Consequently, this decision is rendered by the Board.

5 For the following reasons, the complaint is substantiated. The Board finds that the evidence establishes that the respondent abused its authority in assessing the complainant's personal qualifications in this process.

Background

6 In November 2012, the respondent began an internal advertised appointment process to staff various Correctional Officer II positions (CX-02) for institutions in the Quebec Region.

7 The complainant applied in the advertised process.

8 The assessment board was made up of Micheline Beaubien, Assistant Warden, Interventions at the Federal Training Centre in Laval, and Claude Bérard, whose title was not indicated.

9 Ms. Beaubien stated that 455 candidates applied for the Correctional Officer II positions in the Quebec Region. Of those 455 candidates, 425 passed the pre-selection stage. Approximately 350 candidates then attended the knowledge examination. Of those 350 candidates, approximately 200 passed that exam and were invited to write the skills examination. Approximately 150 candidates passed the skills examination. Each candidate's personal qualifications were then assessed. The form entitled "Assessment of Personal Qualifications" was then completed by each applicant and his or her manager.

10 The assessment board found that the complainant did not possess one of the essential personal qualifications required for the position, namely respect. His application was therefore eliminated from the process.

11 Qualified candidates from the selection process were added to pools from which indeterminate and acting appointments were made.

12 On December 23, 2013, the complainant filed a complaint of abuse of authority with the Tribunal under section 77(1)(a) of the PSEA.

Issue

Did the respondent abuse its authority when assessing the complainant's personal qualifications?

Abuse of authority and the burden of proof

13 Section 77(1) of the PSEA states that a person in the area of recourse may make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of an abuse of authority. As indicated in *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, at para 66, ". . . abuse of authority requires wrongdoing.

Accordingly, abuse of authority will always include improper conduct, but the degree to which the conduct is improper may determine whether or not it constitutes abuse of authority". The complainant bears the burden of proving, on a balance of probabilities, that there has been abuse of authority.

Evidence

14 The complainant has been a Correctional Officer I, at the CX-01 group and level, since 2005. When this staffing process was started, he applied for a Correctional Officer II position. He successfully completed the first three stages of the process, but his application was rejected at the final stage, during the reference check. Sylvie Robitaille, Correctional Manager, was his referee. Candidates could not choose their referee in this process, as they were selected by the wardens of the institutions where the candidates worked.

15 The complainant submits that the reference provided by his manager, Ms. Robitaille, was not reliable for various reasons. He indicates that Ms. Robitaille did not follow the instructions given to referees by failing to assess his examples, that she was not impartial toward him and that her observations were based on unreliable information.

16 The complainant argues that the assessment board had reason to doubt the validity of his referee's observations because: (1) his referee did not follow the instructions given to referees, as she failed to assess the six examples that he gave; and (2) he advised the board members that his referee was not impartial toward him and that her observations were based on unreliable information.

17 The following facts provide an overview of the situation.

(1) Did the referee follow the instructions given to referees?

18 To assess the personal qualifications of the candidates, the assessment board asked candidates to complete a personal qualifications assessment form. Specific instructions were given to the candidates. They were to provide concrete examples of situations in which they had demonstrated that they met the following qualifications:

(1) respect; (2) desire to learn and change; (3) integrity; (4) concern for results; (5) team spirit; and (6) sensitivity to diversity. The form advised candidates of the following: “it is imperative that your responses be supported by concrete examples of facts and incidents that you have personally experienced in your work and that can be corroborated by a manager [translation]”. Once the form was completed, candidates were to submit it to their manager.

19 The managers were then to present their own assessment of the candidates’ personal qualifications as follows: (1) by confirming or refuting the information provided by the candidate; and (2) by presenting an assessment that reflects the candidate’s overall performance related to each of the personal qualifications assessed. The instructions on the reference form read as follows:

A section is provided after each of the candidate’s responses to allow you to provide your assessment. In addition to confirming or refuting the information provided by the candidate, you must provide an assessment that reflects his or her overall performance for each of the personal qualifications being assessed.

If you are unable to validate certain examples provided by the candidate, but if one of your colleagues can do so because he or she was a witness, that person should be asked to provide comments on the form, clearly identifying himself or herself and signing the completed section. If that person is unable to do so within the required time, you may enter that manager’s name on the assessment form, with the date when he or she confirmed the example in question, along with his or her comments. This will allow the board to fairly assess the examples provided by the candidate.

[Translation, emphasis in original]

20 The complainant in this case completed the form and provided the requested examples. The question asked to assess whether candidates had the respect qualification was as follows: “Using concrete examples, describe how you interact with offenders, your colleagues and your supervisors [translation].” To answer this question, the complainant described a situation when the meals were being delivered, where an inmate demanded a halal meal because he had been authorized to receive such meals rather than traditional meals. In his example, the complainant explained that he asked the inmate to give him about 20 minutes to inquire about the matter. After looking in the inmate’s file and contacting his manager and the kitchen, the complainant found that the inmate was in fact entitled to a halal menu, but that the authorization had been mistakenly sent to another detention unit. The complainant then had the inmate’s

authorization for a halal diet transferred and the problem was resolved. A bit later, the complainant brought the halal meal to the inmate and explained to him the reason for the mistake.

21 When the complainant's referee completed her part of the form, she did not confirm or refute the information that he provided. Concerning the respect qualification, for example, she instead gave her own examples of "adjustments [translation]" that she had to make with him. Her comment was as follows:

Mr. Laviolette is a respectful and polite officer. He was able to demonstrate some of his abilities in holding the position at the main door, where he was the first person who greeted visitors and staff members. He applied the security rules at the entrance, but some adjustment meetings were held to clarify with the employee what was expected from an officer at the main entrance. The following are some examples of adjustments with the employee: wearing his uniform appropriately, not eating his breakfast at his workstation when large numbers of staff were arriving, and paying personal bills during working hours is not appropriate. On the other hand, the employee having a positive attitude or even just a smile at the entrance would have been appreciated, but that was not always the case.

[Translation]

22 She also wrote the following about the complainant's work as a mentor:

As well, Mr. Laviolette was a mentor for new officers arriving at the staff college and for officers transferred to our institution. He did this work correctly most of the time. It was brought to my attention that Mr. Laviolette left the officer in training with another staff member for short periods, without advising the manager in advance. As well, on another day, when he should have been mentoring a new officer, he failed to advise the manager that he would be an hour late arriving at the institution and the officer was alone in the employee room, as there was no other mentor at the institution to assume responsibility for the officer.

[Translation]

23 At the hearing, Ms. Robitaille acknowledged that she had neither confirmed nor refuted the examples provided by the complainant of facts or incidents that he experienced in his work and that demonstrated, in his opinion, that he had the required personal qualifications for the position. She stated that she thought she had, but that she forgot to do so. However, Ms. Robitaille stated that she confirmed or refuted the examples provided by the other candidates for whom she was a referee. In the complainant's case, it was an oversight on her part that she stated she could not otherwise explain.

24 The complainant also argues that Ms. Robitaille did not submit an assessment that reflected his overall performance, as requested on the form. In his opinion, she instead unjustly accused him of inappropriate behaviour.

25 Concerning the complainant's overall performance, Ms. Robitaille stated that he did not have any performance problems, as he carried out all his duties, but that there was an "alignment [translation]" problem and that is why her reference focused on difficulties that he needed to correct.

(2) Were the members of the board aware that, according to the complainant, his referee was not impartial toward him and that her observations were based on unreliable information?

26 When Ms. Beaubien and Mr. Bérard reviewed the complainant's form, they found that the referee, Ms. Robitaille, had neither confirmed nor refuted the examples that he provided. Ms. Beaubien stated that it was common for supervisors to fail to confirm or refute information provided by the candidates. Those supervisors instead offered their own examples of behaviour adopted by the candidates for each of the qualifications being assessed. The board questioned the best approach to adopt given the situation and consulted the human resources section on the matter. After that consultation, it was agreed that the assessment board would assess all information provided by the candidates and the managers, regardless of whether or not the referees had confirmed or refuted the information provided by the candidates.

27 Ms. Beaubien explained that the board assessed the complainant's form and gave him a mark of 2 out of 5 for the respect qualification, while the passing mark was 3 out of 5. Mr. Bérard made the following note on the complainant's assessment form to justify that mark:

The correctional manager comments that the candidate is a "respectful and polite officer". However, the examples that she provides demonstrate the contrary and significant shortcomings in this area.

[Translation]

28 Since the complainant did not obtain the passing mark for that qualification, the assessment board did not feel there was a need to give him a mark for the five remaining personal qualifications (desire to learn and change, integrity, concern for results, team spirit and sensitivity to diversity).

29 For the respect qualification, a review of the complainant's form shows that the comments provided by the referee were marked. A member of the assessment board found one of the four desired sub-criteria in those comments. The desired sub-criteria for the respect qualification were: (1) Seeks to understand the point of view of others before making a judgement; (2) Interacts in a polite, courteous and appropriate manner; (3) Complies with the rules, standards and limitations set by the organization; and (4) Has a positive and constructive attitude toward the organization [translation].

30 Ms. Beaubien stated that the board also looked for the desired sub-criteria for each qualification in the examples provided by the candidates. The sub-criteria that were met were also to be noted in the margin next to the candidates' examples. However, nothing was noted next to the complainant's example for the respect qualification. Ms. Beaubien was unable to explain why. She stated that it was probably an oversight on the board's part. Ms. Beaubien pointed out at the hearing that although the board did not assess the complainant's examples, it did not matter because the information provided by Ms. Robitaille was sufficient for the board to be able to conclude that certain significant problems had been identified, and that therefore few of the sub-criteria had been met.

31 The complainant pointed out that he informed the members of the board that his referee was not impartial toward him and that her observations were not reliable. He explained to the board that Ms. Robitaille likely made negative comments about him because they were in a conflictual relationship.

32 He explained at the hearing that their relationship deteriorated following a heated discussion that he had with her a few weeks before she acted as his referee. That heated discussion occurred when he challenged his performance evaluation report. According to him, when he went to see her to discuss his performance evaluation, she

replied that she did not have the time to meet with him and that, if he disagreed with his evaluation, he could file a grievance. Voices were raised during that discussion and a third person came to see if everything was alright. The complainant stated that he was surprised by his manager's rigid attitude during that meeting. She had been his manager for two years and his other performance evaluation was positive. She even helped him to become a crisis negotiator. That heated discussion, however, dramatically changed their good relationship and they didn't speak to each other after the incident. The complainant also filed a grievance concerning his performance evaluation report. The grievance was partly allowed. The warden of the institution asked Ms. Robitaille to be a referee for the complainant a few weeks after he filed his grievance.

33 Ms. Robitaille confirmed that the complainant didn't speak to her after the heated discussion and that he filed a grievance concerning his performance evaluation. Since the grievance was partly allowed, she explained that she had to provide further clarification in the complainant's performance evaluation.

34 The complainant only advised the assessment board of the conflict between him and his manager after being informed that he had failed to satisfy the personal qualification of respect. He explained that when he provided his examples to be used to assess his personal qualifications, he was aware that Ms. Robitaille would be his referee. However, he felt that she would provide a neutral and fair reference based on his overall performance, despite their quarrel, given their history of working together. He therefore did not object at that time to her being his referee.

35 It was as part of the informal discussion that the complainant advised the assessment board of the conflict between him and his referee. The board members then suggested that he contact her as soon as possible to ask that she reconsider her reference. At that time, the assessment period was not yet closed.

36 Ms. Beaubien confirmed that she and Mr. Bérard met with the complainant, at his request, for the informal discussion. Ms. Beaubien explained that the complainant then learned of the negative comments made by his referee. According to her, he was visibly

surprised by the comments by his manager. He then advised the board of the conflict between him and his manager and insisted that the information she provided was inaccurate. Ms. Beaubien explained to the complainant that the board was bound by that information and that if the mark of 2 out of 5 that he received for the respect qualification was not justified, he needed to speak to his manager. According to Ms. Beaubien, the board could probably have reconsidered its decision to give him a 2 out of 5 if Ms. Robitaille had changed her comments.

37 Once the complainant advised Ms. Robitaille that he wished to meet with her, she asked an advisor from the human resources section if she could do so. The advisor answered yes, and informed her that she could reconsider her observations, but that it was up to the assessment board to decide whether it would take that new information into consideration.

38 As the complainant was on extended leave, Ms. Robitaille agreed to meet with him outside the institution. They therefore met at a restaurant on July 8, 2013. The complainant then asked her to reconsider her comments. He understood during that meeting that she would do so and would correct the deficiencies he identified. He thus hoped that she would set the record straight and would not unfairly criticize his behaviour.

39 On July 24, 2013, as the complainant had not received any word from his manager, he took the initiative to write to her to ask if she had reviewed her comments. Later the same day, he received a notice from the human resources section advising him that the evaluation stages of the process were now closed and that no new information could be accepted by the assessment board.

40 Two days later, on July 26, 2013, Ms. Robitaille sent an email to the complainant to advise him that she had taken the time to reread her comments about him, but that she did not wish to change them. Her email reads as follows:

Following our discussion, I took the time, with a clear head, to reread the evaluation that I provided as part of the CO-II process. Unfortunately, I am convinced that my assessment was very clear and that no other information could be added to clarify it.

[Translation]

41 The complainant noted at the hearing that Ms. Robitaille's reference was not reliable because her criticisms were, in large part, based on facts that were inaccurate. The actions about which the referee reproached the complainant are summarized in the following paragraphs.

(a) Meeting to "redirect [translation]" the complainant

42 Ms. Robitaille wrote in her comments that the complainant applied the security rules at the entrance, but some adjustment meetings were needed to "redirect him concerning what was expected from an officer at the main entrance [translation]."

43 The complainant argued that his manager never met with him to "redirect him concerning what was expected from an officer at the main entrance [translation]". He also stated that he was never advised that his method of controlling the entry and exit of people and vehicles from the institution was problematic. As evidence, he filed several policies that set the standards to be followed for the control of entry and exit from institutions. He submitted that he strictly applies those policies and carries out his work adequately.

44 Ms. Robitaille stated at the hearing that the complainant in fact carries out all his duties correctly, but that adjustments have sometimes been needed in the past. Ms. Robitaille was unable, however, to clarify the reasons for those adjustments, when they were made or the number of times that they were made.

(b) Wearing the uniform

45 The complainant explained that his usual work is to conduct security searches of people and vehicles during the arrival of large numbers of staff. According to him, he wears his uniform appropriately at work. He wears his rank of CX-01 as required. He stated, however, that when he replaces the incumbent in the CX-02 position, he removes his CX-01 rank, which is pinned to his shoulder, as ranks identify the duties that officers must carry out. In other words, he explained that he wears his CX-01 rank when conducting security searches, but removes it when he must register visitors while replacing the incumbent in the CX-02 position.

46 When Ms. Robitaille explained why she wrote this comment concerning how the complainant wears his uniform, she mentioned that she had seen him at work on one occasion with his shirt outside his pants. She also stated that, on one occasion, he was not wearing his boots, as he should have been. The complainant stated that he never wore his shirt in that way and did not remember failing to wear his boots while on duty. He maintained that he never looked untidy at work. He stated that, if his shirt was out of his pants, it may be because he had just left the restroom and did not notice. When Ms. Robitaille was questioned about whether this was possible, she acknowledged that it was in fact possible. She also acknowledged that it was possible that the complainant was not wearing his boots at a given time because he had just arrived at work.

(c) Breakfast

47 The complainant indicated that he never ate his breakfast at his workstation while large numbers of staff were arriving. He submitted that it would be impossible because, during the mass influx of staff, between 7:00 and 9:00 a.m., a large number of people enter the institution. He must therefore conduct security searches of these persons, like employees and contractors, as well as of vehicles outside. He explained that he does not have a moment of rest and that he occasionally is even provided with assistance when he is not able to keep up.

48 However, Ms. Robitaille stated that she saw him eating toast on several occasions. She stated, however, that she was not certain whether that occurred while he was conducting security searches as a CX-01 or while he was registering visitors as a CX-02 because he sometimes did not wear his CX-01 rank on his shoulder.

(d) Paying personal bills

49 The complainant stated that he quite simply never paid his personal bills during work hours.

50 Ms. Robitaille acknowledged that she had never seen the complainant paying his personal bills during work hours. However, she stated that the Assistant Warden of the institution sent her an email in the past to advise her that she had seen the complainant

paying his personal bills during work hours. Ms. Robitaille acknowledged that she did not indicate on the form that this comment was not from her, but from a third party.

51 There were instructions on the form for referees who were unable to validate certain examples provided by the candidates. Another manager could provide comments on the form, clearly identifying himself or herself. According to the complainant, in this case, the referee could have, in such a manner, stated that this information was reported to her, but her comment made no mention of this. According to him, the referee could have, at least, acknowledged that this did not reflect his overall performance, as he insisted that he never paid personal bills during work hours.

(e) Not smiling

52 The complainant explained that he is a jovial person, but that when conducting security searches of people and vehicles, he is somewhat more reserved and does not smile. However, he says that he acts in a respectful, polite and professional manner and that he was never advised that his attitude was not appropriate. As evidence, he filed a policy concerning the need for greater security at the main entrance, also known as the postern. He stated that he conscientiously applies that policy.

53 At the hearing, the complainant asked Ms. Robitaille why she wrote that a positive attitude from him or even just a smile at the main entrance would have been appreciated. She did not answer the question directly. She stated that she had done her best in the past to encourage him in his work, but that his general behaviour did not improve over time. The complainant then asked her why she had helped him become qualified as a crisis negotiator if his behaviour was inappropriate, given that only the best officers can become crisis negotiators. Ms. Robitaille replied that she was aware that the complainant had received training to become a crisis negotiator, but did not know if he had achieved this status. The complainant was surprised by that statement, as he had stated in his testimony that he had been a crisis negotiator for two years.

54 The Board notes that Ms. Robitaille herself wrote under the qualification “desire to learn and change” that the complainant has been a crisis negotiator for two years. Ms. Robitaille wrote the following in that space:

As well, Mr. Laviolette has been a crisis negotiator for two years. During his last recertification, the instructors also acknowledged that he had good self-control during a simulated emergency. These [sic] characteristic was also revealed in an emergency at the institution.

[Translation]

(f) Mentoring

55 The complainant explained that he acted as a mentor about ten times. He denied that he only did so correctly “most of the time [translation]”. In particular, Ms. Robitaille accused him of having, in the past, allowed interns whom he was training to exchange and work with other officers on duty. The complainant maintained, however, that this is a common practice and that it benefits interns because they can thus obtain an overall vision of the role of an officer in an institution. He also explained that, contrary to what Ms. Robitaille wrote, he never “failed to advise the manager that he would be an hour late arriving at the institution [translation]” one morning, thus leaving an officer in training alone in a room because no other mentor could assume responsibility for him. He stated that Ms. Robitaille assumed that he was an hour late that morning, but the situation was actually quite different. That day, he explained, it was agreed that he and his intern would begin an hour later so his intern could take part in a security round of the fences that was being conducted in the afternoon. According to the complainant, his intern arrived at the usual time for personal reasons, but it was understood that he would not start work until an hour later.

56 Ms. Robitaille acknowledged that she did not know all these facts, but stated that she regardless had to stop assigning the role of mentor to the complainant because he did not provide interns with adequate training. Yet, according to the reference that she gave the complainant for the “team spirit” qualification, it was he who decided to stop being a mentor, not she who stopped assigning that role to him. Ms. Robitaille wrote the following for that qualification:

Mr. Laviolette adapts well to wherever he is assigned and to the people with whom he is asked to work. On the mentor team, which he decided to leave last September, he demonstrated some of his teamwork skills.

[Translation, emphasis added]

Analysis

57 The Board notes that its role is not to reassess the complainant, but to determine whether there was abuse of power in the appointment process. See, for example, *Broughton v. Deputy Minister of Public Works and Government Services*, 2007 PSST 20.

58 Section 36 of the PSEA grants discretionary power to delegated managers concerning the choice and use of assessment methods. However, this is not an absolute power. Consequently, the Board can conclude that there was abuse of authority if, for example, it is determined that there was a fundamental flaw in the assessment method. The discretionary power granted to the assessment board is not absolute either. In effect, the board must exercise it in accordance with the nature and purpose of the PSEA. See *Bowman v. Deputy Minister of Citizenship and Immigration Canada*, 2008 PSST 12 at para 121 to 123.

(a) Missing information

59 The complainant alleges, firstly, that the board failed to take reasonable steps to obtain all the required information from his referee.

60 In *Raymond v. Chief Statistician of Canada*, 2013 PSST 25, the former Tribunal found that the assessment board had failed to take reasonable steps to obtain all the information needed to assess the complainant's work and that this was a major flaw. The assessment board in *Raymond* relied on validation comments that were not reliable and were incorrect from a manager who provided information in a process in the same way as a referee would.

61 The questions that the candidates were to answer on the form were aimed at assessing whether they had the personal qualifications needed for the position of Correction Officer II. The form stated that the candidates were to provide detailed and complete responses directly related to the questions asked. In this case, the complainant completed the form, answering the six questions and providing examples

of facts or incidents that he experienced in his work and that demonstrated, in his opinion, that he had the required personal qualifications for the position. His referee, however, did not take the trouble to validate or refute that information. She instead presented an assessment that included numerous examples of behaviour that needed to be corrected.

62 The assessment board found that several referees, including Ms. Robitaille, did not take the trouble to validate or refute the examples provided by the candidates. Despite those omissions by certain referees, the assessment board chose to continue the assessment of the candidates, based on all the information received.

63 In light of the evidence available, the Board finds that the assessment board failed to appropriately exercise its discretionary authority by not taking additional steps to obtain the required information from Ms. Robitaille. The reference check form was the only tool used to assess the candidates' personal qualifications. In this case, since Ms. Robitaille had failed to confirm or refute the examples provided by the complainant, the assessment board should have asked her to provide the missing information, as it lacked some of the information needed to assess him.

64 For his part, the complainant followed the instructions given on the form and made a significant effort to provide detailed and complete responses directly related to the questions asked. He, in turn, had a legitimate expectation that Ms. Robitaille would do the same. She did not do so, however.

65 When the time came for the board to assess the complainant's personal qualifications, it found that information was missing on the form. Yet, it decided to continue its assessment based on incomplete information.

66 That failure by the assessment board to take reasonable steps to obtain all the information needed to assess the complainant had negative consequences for him. Given that the board did not have any information to confirm or refute his examples, it simply ignored them and did not give them any weight. It therefore acted as though the referee had refuted his examples. However, the board did not have any information that would lead it to conclude that the referee questioned the validity of his examples.

67 For the personal qualification of respect, for example, the assessment board did not give the complainant any marks for his example describing his actions when faced with an inmate demanding a halal meal. However, the assessment board had no information that would lead it to conclude that the referee questioned the complainant's actions in that incident. By choosing to ignore that example, the board thus took away any chance for the complainant to show that he met some of the desired sub-criteria, even though his actions described in his example could have matched some of the sub-criteria, such as "Seeks to understand the point of view of others before making a judgment" and "Interacts in a polite, courteous and appropriate manner [translation]".

68 The Board therefore considers that the assessment board failed to take reasonable steps to obtain all the information needed from Ms. Robitaille to assess the complainant and that this is a major flaw in the assessment method.

(b) *The referee's alleged negative bias*

69 Secondly, the complainant alleges that the board did not make a reasonable effort to ensure that Ms. Robitaille's reference was reliable.

70 As the former Tribunal noted in *Pellicore v. The President of the Canada Border Services Agency*, 2010 PSST 23 at paras. 49-50, a referee's alleged bias does not necessarily demonstrate that the assessment board abused its authority, as it was not to the referee that the PSC delegated its appointment authority. Following is an excerpt from *Pellicore*:

However, in any event, a reference's alleged bias does not necessarily demonstrate that the assessment board abused its authority. The purpose of a reference check is to convey information that is used by the board in its assessment of a candidate's qualifications. References do not exercise any decision-making authority in the affairs of an assessment board and are therefore not expected to act without any bias, as is required of decision-makers. . . .

This is not to say that an assessment board should ignore any evidence that may call into question the reliability of the information provided by a reference.

[Emphasis added]

71 According to *Pellicore*, an assessment board should therefore consider any evidence that may call into question the reliability of the information provided by a referee. As such, the Board finds that to determine that the assessment board abused its authority, the complainant must demonstrate that the assessment board had reason to question the reliability of the referee's observations.

72 It therefore remains to be determined, in this case, whether the complainant has demonstrated that the assessment board had reason to question the reliability of the referee's observations.

73 The simple fact that a candidate does not agree with the observations of a referee does not necessarily prove that the reference was not reliable. In this case, however, the evidence shows that the complainant advised the assessment board of the existence of the conflict between him and his manager. He explained to the assessment board that he and his manager had not spoken since their heated discussion concerning his performance evaluation. The complainant insisted that his mark of 2 out of 5 for the respect qualification was not justified, in his opinion, because his referee criticized his behaviour due to the conflict. The assessment board recommended that the complainant question his manager about the bad reference and see if she would agree to change it.

74 In the Board's opinion, that approach was not appropriate, given that the assessment board was informed of the conflict between the complainant and his referee. The assessment board could not leave it up to the complainant to correct this situation himself. The board had an obligation to consider any evidence that may call into question the reliability of the information provided by Ms. Robitaille. It should therefore have taken reasonable steps to ensure that the reference was reliable.

75 It goes without saying that employees do not always agree with their supervisor's evaluation of their performance and that they can challenge that evaluation. That is part of the normal scheme of labour relations. Thus, the simple fact that a candidate has challenged his or her performance evaluation may not be sufficient reason to question the validity of the observations by his or her supervisor who also acted as referee.

76 However, in this case, the complainant did not simply advise the assessment board that he had challenged his evaluation report. As mentioned before, he advised the board of the existence of a conflict between him and his manager and explained that they had not spoken since their heated discussion several weeks earlier. He also pointed out to the board that she inappropriately criticised his behaviour and that her comments were not credible. He noted, as well, that she had not followed the instructions by failing to take the trouble to validate his examples.

77 Under the circumstances, the assessment board should have contacted Ms. Robitaille to better understand the scope of the conflict between the complainant and her. If it had done so, it would have found that the conflict between them was real. The assessment board would also have found that the referee had evaluated the complainant differently from the other candidates for whom she had been referee, as she had not validated any of his six examples, while she had done so for the other candidates for whom she was a referee.

78 In talking with the referee, the board would also have found that certain errors about which she reproached the complainant were, despite everything, isolated incidents that did not reflect his overall performance. For example, if the board had questioned the referee concerning her comment that the complainant did not wear his uniform correctly, the board could have found that Ms. Robitaille was referring to an isolated incident. In fact, at the hearing, the referee acknowledged that the complainant may have been coming from the restroom when she saw him with his shirt partly out of his pants and that he was likely unaware of this.

79 If the board had taken reasonable steps to ensure that Ms. Robitaille's reference was reliable, it may also have found that the referee was accusing the complainant of paying his personal bills during work hours when she had never seen him do so. A third party reported this fact to her, which, after all, probably did not affect his overall performance.

80 As noted by the PSC, the document entitled *Structured Reference Checking – A User's Guide to Best Practices* offers several tips for people assessing candidates. That

document states, among other things, that undue weight must not be placed on isolated incidents. The document also recommends that the quality of the information provided be considered, especially if there is reason to suspect that the referee is not being entirely frank or if there is inconsistent information.

81 In this case, as the assessment board was aware that there was a conflict between the complainant and his referee and that the complainant maintained that he was unfairly accused of inappropriate behaviour, it should have contacted the referee to discuss these issues and the complainant's qualifications. That communication would have allowed it to assess the quality of the information provided and to differentiate between the referee's comments on the complainant's overall performance from her comments with respect to isolated incidents. The assessment board could then have recorded the information from that verification in writing.

82 However, the evidence shows that the assessment board failed to take such steps to ensure that Ms. Robitaille's reference was reliable. Finally, the Board considers that, if the assessment board had taken such steps to ensure that Ms. Robitaille's reference was reliable, it would have had reason to question it.

83 For these reasons, the Board finds that the assessment board did not make a reasonable effort to ensure that Ms. Robitaille's reference was reliable. This is another major flaw in the assessment method.

(c) The board's failure to assess the complainant's examples

84 Finally, the Board notes that Ms. Beaubien stated that, following a consultation with the human resources section, the assessment board decided to rely on the information available on the candidates' forms to assess their personal qualifications, even though some referees had not validated the examples provided by the candidates. It was agreed, however, that the assessment board would not only consider the information provided by the referees, but also the information provided by the candidates. In the complainant's case, however, the evidence indicates that the assessment board only assessed the information provided by the referee and did not assess the information provided by the complainant. Ms. Beaubien stated that it was

probably an oversight on the board's part. The result is that no one looked into whether the complainant's example of respect met certain desired sub-criteria.

85 The Board considers that this failure by the assessment board means that the complainant was not assessed on the same basis as the other candidates, as he is the only one who provided examples that were not assessed. This is a third major flaw in the assessment method.

86 In the Board's opinion, the three flaws noted in this assessment process are serious and culminate in an abuse of authority.

87 For the reasons given above, the Board finds that the complainant has shown that the respondent abused its authority in evaluating his personal qualifications in this process.

Decision

88 For the above reasons, the complaint is substantiated.

Order

89 The Board orders that the respondent reassess the following essential personal qualifications of the complainant: (1) respect; (2) desire to learn and change; (3) integrity; (4) concern for results; (5) team spirit; and (6) sensitivity to diversity, within sixty (60) days of the date of this decision. If the complainant is deemed to be qualified in light of that reassessment, he shall be added to the pool created by the appointment process, if it still exists.

90 The Board also orders that a person other than Ms. Robitaille act as referee for the complainant. However, that person must be familiar with the complainant's work and must be able to provide enough information to allow the assessment board to adequately assess the complainant's qualifications.

91 The complainant is not seeking the revocation of the appointment made following this appointment process. The Board has no other evidence to indicate that any of the people appointed were not qualified. Revocation is therefore not appropriate in this case.

Nathalie Daigle
Member

Parties of Record

Board File	2013-2789
Style of cause	<i>Ted Laviolette and the Commissioner of the Correctional Service of Canada</i>
Hearing	September 24 and 25, 2014 Montréal, QC
Date of reasons	January 12, 2015
APPEARANCES:	
For the complainant:	Serge Dubord
For the respondent:	Magdalena Persoiu
For the Public Service Commission:	Luc Savard, written representations