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



Before a panel of the  
Federal Public Sector  
Labour Relations and  
Employment Board

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BETWEEN

**WENDY KAVANAGH**

Complainant

and

**THE PRESIDENT OF SHARED SERVICES CANADA**

Respondent

and

**OTHER PARTIES**

Indexed as

*Kavanagh v. President of Shared Services Canada*

In the matter of a complaint of abuse of authority - paragraphs 77(1)(a) and (b) of the  
*Public Service Employment Act*

**Before:** Nathalie Daigle, a panel of the Federal Public Sector Labour Relations and  
Employment Board

**For the Complainant:** Erik Gagné, senior union representative

**For the Respondent:** Andréanne Laurin, student-at-law

**For the Public Service Commission:** Claude Zaor

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Heard at Ottawa, Ontario  
June 7 and 8, 2017.

### **I. Introduction**

[1] Wendy Kavanagh, the complainant, filed a complaint of abuse of authority concerning the appointment of Megan Bokovay to the position of departmental audit and evaluation committee coordinator, classified AS-03 (“the AS-03 position”), with Shared Services Canada (SSC) in Ottawa, Ontario.

[2] The complainant’s allegation is that the deputy minister of SSC (“the respondent”) abused its authority in the selection process at issue. She alleges that there was abuse of authority in the assessment of the merit criteria and that the appointee did not possess the essential qualifications and was personally favoured.

[3] The complainant also alleged that an abuse of authority occurred in the choice of process with respect to Ms. Bokovay’s prior acting appointment of four months less one day made pursuant to a non-advertised process, but the complainant withdrew this allegation at the hearing.

[4] The respondent denies that an abuse of authority occurred. It states that the appointee was fully assessed and that she was found to meet the qualifications for the position. The respondent also states that the complainant was properly assessed.

[5] The Public Service Commission (PSC) did not appear at the hearing but presented a written submission in which it discussed its relevant policies and guidelines. It took no position on the merits of the complaint.

[6] For the reasons that follow, the complaint is dismissed. It was not established that the respondent abused its authority in the appointment process at issue.

### **II. Background**

[7] On June 10, 2014, the respondent launched an advertised internal appointment process to staff an AS-03 departmental audit and evaluation committee coordinator position, with the intention of establishing a pool of qualified candidates that could be used to staff similar positions within SSC and other federal organizations. The process was open to SSC employees across Canada, and it specified the possibility of including employees in the federal public service occupying positions in the National Capital Region should an insufficient number of employees be identified. SSC chose to use the expanded area of selection due to a low number of applicants.

[8] The assessment tools used in the appointment process included a PSC standardized test, an interview, and a reference check.

[9] The appointee was the sole candidate found qualified at the end of the process. A total of 15 candidates applied, 10 of whom were SSC employees. Of the 15, 4 were screened in based on the experience and education requirements listed on the job opportunity advertisement: 2 from SSC, including the complainant, and 2 from other government departments, including the appointee. Two candidates, including the complainant, were unsuccessful on the PSC standardized test, and one candidate withdrew. Following a written exam, reference checks, and an interview, the appointee was found qualified and was appointed to the position.

[10] On February 18, 2015, the *Notification of Appointment or Proposal of Appointment* for Ms. Bokovay was posted on the public service jobs website. On February 23, 2015, the complainant filed a complaint of abuse of authority with the Public Service Labour Relations and Employment Board under s. 77 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; PSEA).

[11] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9), received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board to the Federal Public Sector Labour Relations and Employment Board (“the Board”).

### **III. Issues**

[12] I must determine the following two issues:

Issue 1: Was there abuse of authority in the assessment of the merit criteria?

Issue 2: Was there abuse of authority by reason of personal favouritism of the appointee?

### **IV. Relevant facts**

[13] The complainant testified at the hearing on her own behalf.

[14] The respondent called Darren Horne, chief audit executive, and Sylvie Bertrand, manager, Departmental Audit Committee Secretariat, to testify. The screening and assessment boards for this selection process consisted of Ms. Bertrand and Julie Piché.

[15] Mr. Horne, who at the time of the process was the director of internal audit in the Audit and Evaluation Directorate, was the delegated manager for this appointment process. He explained that in a former role at the PSC, he gained many years of experience in staffing processes and that he often gives advice to his staff conducting them. He explained that in the present appointment process, he approved all the tools used, including the job opportunity advertisement and the statement of merit criteria. The appointment process was launched because the AS-03 position was vacant as the incumbent had left on a secondment.

[16] Mr. Horne explained that the incumbent of the AS-03 position is expected to work closely with the members of the departmental audit committee, which consists of SSC's deputy head and three external members who hold senior management positions. To be well equipped for this position, it is essential that an individual be dedicated, hardworking, and well organized. He noted that in the past, complaints had been made, given that some incumbents had had difficulties ensuring that documents were moved, meetings were scheduled, and travel arrangements were planned.

[17] The professional experience required for the AS-03 position was listed as follows:

*Significant\* and recent\*\* experience in providing administrative support services to senior officials (DG and above). This includes at a minimum the arrangement of hospitality, travel, and event logistics, as well as the planning and coordination of senior management meetings (DG and above).*

*Significant\* and recent\* experience in the management of documentation in a tracking system, which includes creating records, tasking, tracking deliverables and due dates.*

*\*Significant experience is defined as the depth and breadth of experience generally acquired in the full-time performance of duties for a minimum period of two (2) years.*

*\*\*Recent is defined as within the last 5 years.*

[18] Both the complainant and appointee submitted their applications on June 25, 2014.

[19] Initially, the complainant was screened out for not meeting the stated qualifications. However, after the existing information in the complainant's application was clarified during an informal discussion, she was screened back in and was invited to write the exam.

[20] On September 25, 2014, the complainant confirmed her attendance for the written exam. She later wrote it.

[21] On October 17, 2014, the complainant was informed that her candidacy could not be given further consideration as she had not obtained a pass mark on the PSC standardized test. She was provided with the results of her test. The document containing her mark was adduced in evidence, and it shows that her mark was below the passing mark.

[22] The complainant affirmed at the hearing that she filed her complaint because the appointee did not have the required experience for the position. She affirmed that the appointee was new to the public service and that she could not have acquired the required two years of experience working for senior officials (directors general and above).

[23] Ms. Bertrand explained that as part of the applications review, she inquired as to whether, given the requirement for experience providing administrative support services to senior officials (directors general and above), in counting the number of years of experience acquired, the assessment board could accept past experience providing administrative support services to senior officials in the private sector. So, on July 14, 2014, she specifically asked a Human Resources Advisor whether, by asking for a minimum of two years of experience in the last five years, these two years had to have been acquired working only for the federal government or if they could have been acquired working in both the private and the federal sectors. The Advisor answered that when experience in a different area is not identified as not applicable in the statement of merit criteria, then it could have been gained in a completely different area.

[24] Ms. Bertrand explained that the appointee's experience both inside and outside government was found to meet the experience qualifications identified in the statement of merit criteria. Her outside experience included working as an administrative coordinator at a private-sector company, where she provided administrative support to the president of that company. Among other things, she organized meeting materials and arranged travel to Africa for the president. The appointee's application described her experience in detail. Ms. Bertrand explained that the assessment board was satisfied that providing administrative support services to a president of a company was equivalent to doing so for a senior official (a director general or above) in government.

[25] At the hearing, Mr. Horne was also asked whether the assessment board could have considered work experience gained outside the public sector as valid in this case. He answered that it could have, as long as the experience was providing administrative support services to senior management positions equivalent to the director general level and above, which would ensure that the individual interacted and provided administrative support services to high-level senior officials.

[26] The appointee passed the PSC standardized test with a score of 70 out of 75. The assessment board then proceeded with an interview and reference checks. She successfully completed each stage.

[27] At the hearing, Mr. Horne also explained that before appointing Ms. Bokovay to the position, the human resources advisor had requested a priority clearance number, issued by the PSC. The name of an employee with a reinstatement priority was provided through the PSC's priority system. An offer was made to that person, who ultimately decided not to accept it. An offer was then made to Ms. Bokovay, who was the only one in the pool, and she accepted it.

## **V. Analysis**

[28] Subsection 77(1) of the PSEA provides 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 because of abuse of authority. Although the term "abuse of authority" is not defined in the PSEA, s. 2(4) states as follows: "For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism."

[29] A complainant bears the burden of proof in a complaint of abuse of authority. See *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008 at paras. 48 to 55.

**A. Issue 1: Was there abuse of authority in the assessment of the merit criteria?**

[30] The process was open to SSC employees across Canada, and it specified the possibility of including employees in the federal public service occupying positions in the National Capital Region should an insufficient number of employees be identified. SSC chose to use the expanded area of selection due to its intention to create a pool of qualified candidates and the limited number of applications it received from SSC employees; it received 10.

[31] Firstly, the complainant submits that the respondent should not have expanded the area of selection to employees in other government departments because she disagrees that 10 applications is an insufficient number in a selection process. She relies on the “Oxford Dictionaries” website, which defines “insufficient” as “[n]ot enough; inadequate”. In her view, the respondent had received enough applications and did not need more.

[32] For its part, the respondent submits that in *Umar-Khitab v. Deputy Head of Service Canada*, 2007 PSST 5, the former Public Service Staffing Tribunal (“the former Tribunal”) held that it was not its role to assess whether the area of selection in an appointment process was reasonable or whether it met the criteria and considerations in the PSC’s “Area of Selection Policy and Operational Guidelines”. The authority to determine the area of selection is found in s. 34 of the *PSEA*. Section 77, which provides for recourse to the Board for appointment processes, does not refer to s. 34. In accordance with s. 88(2), the Board’s mandate is to consider and dispose of complaints made under ss. 65(1), 74, 77, and 83, none of which allows a complaint about an area of selection.

[33] The authority to determine the area of selection belongs to the PSC, and it can be delegated to the deputy head. The PSC can establish the area of selection based on geographic, organizational, or occupational criteria or by establishing as a criterion belonging to any of the designated groups in the *Employment Equity Act* (S.C. 1995, c. 44). To be considered for appointment or to be appointed or proposed for appointment, the person must be in the area of selection established for a particular appointment process.

[34] Even though the Board does not have jurisdiction to hear a complaint about the area of selection in an appointment process, it must consider evidence that is relevant to the complaint made under s. 77 of the *PSEA*.

[35] The complainant is of the view that the respondent should not have expanded the area of selection to employees in other government departments because it already had 10 candidates. The reality is that at each stage of a selection process, the number of qualified candidates decreases, so it is desirable for an organization to obtain a sufficient number of candidates at the beginning, to ensure that the process will succeed. It is not unusual for large organizations to receive hundreds of job applications in response to one job advertisement.

[36] In the present case, according to the evidence, the process would ultimately not have been successful had the respondent not assessed candidates from other government departments. The evidence shows that the appointee, who was from another government department, was the sole candidate found qualified at the end of the process.

[37] But mostly, the job opportunity advertisement specified that the process was open to SSC employees across Canada and that it would include employees in the federal public service occupying positions in the National Capital Region should an insufficient number of SSC employees be identified. As such, interested employees in the federal public service occupying a position in the National Capital Region were encouraged to apply. I am satisfied that 10 is a low number of applicants to a selection process and that choosing to use the expanded area of selection was within the respondent's rights.

[38] Therefore, in this case, the complainant has not demonstrated any inconsistency between the *PSEA* and the area of recourse established by the respondent.

[39] Secondly, the complainant submits that the job opportunity advertisement did not state that experience providing administrative support services to senior officials in the private sector was acceptable. In her view, given that the requirement was for experience providing administrative support services to senior officials (directors general and above), the assessment board could not count as applicable a candidate's experience providing administrative support services to senior officials in the private sector. In support of her position, she relies on *Visca v. Deputy Minister of Justice*, 2007



PSST 24 at para. 51, which reads as follows:

*[51] Managers have broad discretion under section 36 of the PSEA to select and use assessment methods to determine whether a candidate meets the established qualifications for a position. However, as the Tribunal found in Jolin, supra, this discretion is not absolute and a person who was not appointed can complain under paragraph 77(1)(a) of the PSEA that there was an abuse of authority in the selection and use of an assessment method.*

[40] In support of her position that the assessment board's discretion was not absolute, the complainant relies on *National Arts Centre v. P.S.A.C., Loc. 70291*, 1996 CarswellOnt 6076 at para. 42, which mentions that properly exercised discretion is discretion that has been exercised by the proper authority on the particular facts of the case and that is not tainted by capriciousness, bad faith, or discrimination.

[41] The complainant claims that the assessment board did not have the authority to change or discount an essential qualification in the selection process. She argues that no law or policy allows an assessment board to change an essential qualification. To be able to find that the appointee met the qualification, the job opportunity advertisement would have had to say that experience providing administrative support services to senior officials in the private sector was acceptable. As it did not, the complainant claims that the respondent could not find that the appointee met the qualification.

[42] On the other hand, the respondent submits that managers have considerable discretion when it comes to staffing matters. Relying on *Tibbs*, at para. 63, and *Visca*, at para. 34, it submits that Parliament has provided those with staffing authority with the means to exercise the discretionary aspects of their authority, according to their judgment. In this case, the assessment board's decision to accept the appointee's private-sector work experience was entirely within its discretion. No act or policy needed to stipulate exactly that the assessment board could do so. It was a judgment call on its part that respected the principles of fairness, transparency, and accountability.

[43] I note that s. 77(1)(a) of the *PSEA* provides that a complainant may file a complaint if there is abuse of authority by the PSC or the deputy head in the exercise of its or his or her authority under s. 30(2), which reads in part as follows:

**30 (2) *An appointment is made on the basis of merit when***

**(a) *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 ....***

[44] As stated in *Visca*, at para. 36, Parliament clearly intended that it would be an abuse of authority to appoint a person who does not meet the essential qualifications.

[45] Section 36 of the *PSEA* also provides that managers may choose any assessment method to determine whether a candidate meets the qualifications for a position. As stated in *Visca*, at para. 51, managers have broad discretion to select those assessment methods.

[46] In this case, the assessment board used a common assessment method to assess whether the candidates met the essential criteria; that is, it asked them to submit an application demonstrating how they met the criteria. As seen, the job opportunity advertisement listed the requirements for the position, which included having two years of experience providing administrative support services to senior officials (directors general and above). The respondent screened in the candidates who demonstrated in their applications how they met this and the other essential qualifications.

[47] In her application, the appointee described in detail how she met this essential qualification. In addition to having worked in the federal public sector, she wrote of having worked for the president of a private-sector company. She listed in detail the administrative tasks she accomplished in her former role.

[48] I do not find that the respondent erred by accepting this work experience. In doing so, it did not substantially change an essential qualification or create a requirement that differed from those listed in the job opportunity advertisement. In particular, the job opportunity advertisement did not say that the required experience could have been gained only in the federal government. In the circumstances, it was open to the assessment board to consider the appointee's experience providing administrative support services to the president of the private-sector company. I concur with the respondent that a president of a company is a senior official at a level comparable or higher than that of a director general in the federal government.

[49] Thirdly, the complainant submits that the assessment board acted unreasonably when it relied on the description of the appointee's experience in her application to screen her in and then did not verify it. She believes that the respondent should have contacted the president of the private-sector company to verify that information.

[50] The respondent submits that the assessment board did not have reason to question the information provided by the appointee in her application. Mr. Horne explained that for administrative efficiency, the information in a candidate's application is not verified at the screening stage of the process but at the reference stage. Thus, the respondent claims that as it had no reason to question the information submitted, it was under no obligation to vet it at the screening stage.

[51] There is no evidence that the appointee's application contained questionable or unreliable information. While the complainant claims that the respondent should have contacted the president of the private-sector company to verify the information in the appointee's application, the respondent had no reason to. It used a standardized test, an interview, and a reference check to ensure that the appointee met all essential qualifications and that her skills and capabilities were appropriate for the position. It was an appropriate way of managing the process.

[52] I also agree with the reasoning of the Tribunal member in *Charest v. Deputy Minister of Human Resources and Social Development*, 2008 PSST 19 at para. 69, which states that it is within the assessment board's discretion, under s. 36 of the *PSEA*, to determine when there is sufficient information to assess a particular qualification. I am satisfied that in this case, the assessment board could determine that it had sufficient information to assess the requirement of experience providing administrative support services to senior officials (directors general or above). To assess this qualification, it had the application, the interview, and the reference check.

[53] Thus, in light of the evidence submitted, it was open to the respondent to conclude that the appointee demonstrated the qualifications specified in the job advertisement.

[54] Therefore, I find that the complainant has not demonstrated that the assessment board abused its authority when assessing the merit criteria.

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**B. Issue 2: Was there abuse of authority by reason of personal favouritism of the appointee?**

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[55] The complainant raised an allegation that the appointee was personally favoured in this appointment process. She did not present evidence or arguments in support of her allegation.

[56] The respondent submits that *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7 at para. 41, describes personal favouritism as follows:

*[41] ... The selection should never be for reasons of personal favouritism. Undue personal interests, such as a personal relationship between the person selecting and the appointee should never be the reason for appointing a person. Similarly, the selection of a person as a personal favour, or to gain personal favour with someone else, would be another example of personal favouritism.*

[57] Mr. Horne testified at the hearing that before her appointment to the AS-03 position, the appointee had worked for another director in the office. For that reason, he knew her somewhat. However, she had never worked for him, and they had no personal relationship.

[58] In this case, there is no evidence whatsoever that Mr. Horne had anything other than a professional relationship with the appointee. Thus, the evidence failed to establish that the appointee was appointed for personal favouritism reasons.

[59] As a result, I find that it has not been demonstrated that the respondent abused its authority in the assessment of the merit criteria or by reason of personal favouritism.

[60] For all of the above reasons, the Board makes the following order:

*(The Order appears on the next page)*

**VI. Order**

[61] The complaint is dismissed.

November 10, 2017.

**Nathalie Daigle,  
a panel of the Federal Public Sector  
Labour Relations and Employment Board**