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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

BETWEEN

ROGER ADKIN

Complainant

and

DEPUTY MINISTER OF THE DEPARTMENT OF THE ENVIRONMENT

Respondent

and

OTHER PARTIES

Indexed as
Adkin v. Deputy Minister of the Department of the Environment

In the matter of a complaint of abuse of authority pursuant to paragraph 77(1)(a) of the *Public Service Employment Act*

Before: Chantal Homier-Nehmé, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Himself

For the Respondent: Kétia Calix, legal counsel

Heard at Edmonton, Alberta,
December 15, 16, and 21, 2015.

I. Introduction

[1] The complainant, Roger Adkin, was an unsuccessful candidate in an internal advertised anticipatory appointment process for an operations manager position, classified at the GT-7 group and level, in the Environmental Enforcement Directorate of Environment Canada in Vancouver, British Columbia. He filed a complaint under s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*), in which he alleged that the respondent, the deputy minister of the Department of the Environment ("Environment Canada"), abused its authority by not properly and consistently assessing candidates and by committing serious errors and omissions. He alleged that the respondent was biased in favour of the person proposed for appointment, Colin Fehr ("the appointee"), and that it discriminated against some applicants.

[2] The complainant called four witnesses, including himself; the appointee; Marie-Claude Roberge, advisor, Integrated Staffing Solutions Division; and Vince Haughland, operations manager, Environmental Enforcement Directorate for Environment Canada's Pacific and Yukon Region.

[3] The respondent denied the allegations and maintained that the complainant was eliminated because he failed to meet all essential qualifications. It maintained that the appointment process was conducted in accordance with the *PSEA* and its staffing values.

[4] Three witnesses from its Environmental Enforcement Directorate testified for the respondent: Marko Goluza, regional director for Environment Canada's Pacific and Yukon Region; Michael Bell, regional director for its Prairie and Northern Region; and Rosalie Abrecinos, administrative assistant to the regional director for the Prairie and Northern Region.

[5] The Public Service Commission (PSC) provided only written submissions.

[6] The respondent requested a sealing order for Exhibits C-5 and C-12 which contains applicants' personal information including: their names, group and level of their positions, their email addresses and Personal Record Identifier (PRI). The complainant did not object to the sealing order.

[7] In *Pajic* v. *Statistical Survey Operations*, 2012 PSLRB 70, an adjudicator had to deal with a similar request for sealing exhibits. He summarized the applicable principles as follows at paragraphs 9 and 10:

…

> *In dealing with such a request, I must act within the parameters developed into what is known as the "Dagenais/Mentuck" test. The rule is that Court and quasi-judicial tribunal proceedings are public and documents that are on the record of those proceedings, such as exhibits, are also public. However, a Court or a quasi-judicial tribunal may impose limits on the accessibility to their proceedings or record in certain circumstances, where in its view the principle of open justice should give way to a greater need to protect another important right. In Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41, the Supreme Court of Canada reformulated the Dagenais/Mentuck test as follows:*
>
> *such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and*
>
> *the salutary effects of the … order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.*

…

[8] In *Vancouver Sun (Re)*, 2004 SCC 43, the Supreme Court of Canada decided that the Dagenais/Mentuck test applies to all discretionary decisions that limit the right to information during judicial proceedings. The Supreme Court of Canada reaffirmed at para. 13 in *Canadian Broadcasting Corp.* v. *The Queen*, 2011 SCC 3, that "[t]he analytical approach developed in Dagenais and Mentuck applies to all discretionary decisions that affect the openness of proceedings…" Further, as no arguments were presented to me in support of the public's interest in the openness of these proceedings, I must take account of that interest without the benefit of argument: *R.* v. *Mentuck,* 2001 SCC 76, at para. 38; *Vancouver Sun (Re)*, at para. 48.

[9] Therefore, I find that sealing Exhibit C-5 and C-12 is necessary in order to prevent a serious risk to the privacy interests of the applicants and the salutary effect of the order on the efficacy of the administration of justice outweigh

its deleterious effects on the right to free expression, including the public interest in open and accessible court proceedings. Moreover, not sealing them would be of no benefit to the merits of this decision and could potentially violate the applicants' privacy rights. Accordingly, Exhibits C-5 and C-12 have been sealed.

[10] 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 and the title of the *Public Service Labour Relations and Employment Board Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board") and the *Federal Public Sector Labour Relations and Employment Board Act*.

[11] For the reasons that follow, I find that the complaint is not substantiated. The evidence does not support a finding of abuse of authority or bias in the respondent's assessment of the complainant. Moreover, no serious errors or omissions were committed in the appointment process.

II. Background

[12] The staffing process was anticipatory. It was for a new position created by Environment Canada. The appointee was the only successful candidate who qualified for the pool. A day after the notification of consideration was posted, he declined the offer, for personal reasons.

[13] The position ultimately was not staffed. The salaries envelope shrunk, and Environment Canada did not receive the necessary funding for the "Clean Air Initiative". The new director general for the Environmental Enforcement Directorate at the time was not willing to consider adding a new position. Mr. Goluza stated that he understood and that he respected the decision.

[14] After six months, the pool expired. Although it was possible to extend it for another two years, the respondent did not wish to. The only person in the pool was the appointee. Ultimately, no position was created; nor was a pool of qualified candidates. This decision deals purely with whether there was an abuse of authority in the administration of the process.

III. Issues

[15] The complainant made several allegations about his assessment, which raise the following issues:

1. Was there inconsistency in the application of the screening criteria and consideration of the third experience criterion ("experience three"), recent and significant experience in conducting or supervising investigations leading to Crown reports?

2. Were serious errors and omissions committed in the appointment process?

3. Was the respondent biased towards the appointee?

IV. Analysis

[16] Section 77 of the *PSEA* provides that an unsuccessful candidate in the area of selection for an internal advertised appointment process may file a complaint with the Board that he or she was not appointed or proposed for appointment because of an abuse of authority.

[17] "Abuse of authority" is not defined in the *PSEA*, but 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." Therefore, it is not limited to bad faith and personal favouritism. In many decisions rendered on complaints filed under s. 77, including *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at paras. 56 to 74, the former Public Service Staffing Tribunal ("the former Tribunal") examined what constitutes abuse of authority under the *PSEA* and gave it a broad meaning that includes serious errors even without bad faith or intent.

[18] Errors or omissions can amount to an abuse of authority, even in the absence of serious carelessness or recklessness (see *Canada (Attorney General) v. Lahlali*, 2012 FC 601 at para. 38). However, the seriousness and nature of any errors or omissions, and the degree to which any conduct is improper, will determine whether there was an abuse of authority (see *Tibbs*, at para. 66, and *Song v. Deputy Minister National Defence*, 2016 PSLREB 73 at para. 11). Complainants bear the burden of proof, which requires them to present sufficient evidence for the Board to determine that on a balance of probabilities, a finding of abuse of authority is warranted.

A. The issues

1. Issue 1: Was there inconsistency in the application of the screening criteria and consideration of experience three?

[19] The complainant alleged that there was inconsistency in the application of the screening criteria and in the consideration of experience three.

[20] The respondent maintained that the complainant was screened out because he did not demonstrate that he had significant experience leading or supervising investigations leading to Crown reports.

[21] The complainant called Mr. Haughland to testify about his experience in the appointment process. The respondent objected to his testimony on the grounds of relevance. I allowed the evidence, indicating that his testimony should focus on the appointment process and this complaint. I informed the parties that I would hear their arguments with respect to how much weight I should give his evidence.

[22] Mr. Haughland testified that he also applied to the same appointment process and that he was not screened in, for the same reason as the complainant, which is that he did not demonstrate that he met the essential qualification of experience three.

[23] During their informal discussion, Mr. Goluza, the assessment committee chairperson, told him that he had met all essential qualifications except for experience three and that he did not "articulate" it well enough in his cover letter. He also failed to indicate his experience in enforcement actions, such as preparing reports to Crown counsel. Mr. Haughland did not agree that such a report was an enforcement action. He stated that he thought it was "a typo". His cover letter and résumé clearly showed that he was an operations manager in the Environmental Enforcement Directorate: "reports to crown counsel are an inherent step in the enforcement process". Although Mr. Goluza agreed with him, he was screened out on what he stated he felt was a "technicality".

[24] Mr. Goluza assured Mr. Haughland that both he and Mr. Bell, second assessment committee member, reviewed the applications and that both had screened him out for the same reason.

[25] Mr. Haughland stated that people had been "incredulous" that he had not been screened in. He wanted another informal discussion. He tried contacting Mr. Goluza

again but was unable to reach him.

[26] He decided to call Mr. Bell to discuss things further. Mr. Bell informed him that it was "Marko's process" and that he was not comfortable discussing it with Mr. Haughland. Mr. Bell told him that he should speak with Mr. Goluza directly. Ultimately, Mr. Bell agreed to discuss it with Mr. Haughland because Mr. Goluza was not available. Mr. Bell told him that he and Mr. Goluza had both initially screened candidates, but he could not say why Mr. Haughland had been screened out. Again, he told Mr. Haughland to speak with Mr. Goluza.

[27] During their second informal discussion, Mr. Goluza informed Mr. Haughland that he had been screened out because he had not written down the number of investigations he had done himself, which differed from the reason he had initially been given. He attempted to file a staffing complaint but was unsuccessful due to technical issues with his computer.

[28] The respondent chose not to cross-examine Mr. Haughland.

[29] The complainant called the appointee as a witness. Mr. Fehr joined Environment Canada on September 4, 2011, as an officer in a development program, classified at the GT-3 group and level. He progressed to GT-4 and then reached GT-5 just before the spring of 2013.

[30] He stated that he understood the essential qualification listed in experience three, "Significant experience leading or supervising investigations" and referenced at pages two and three of the job opportunity advertisement (JOA), as including letters of prosecution: "physically taking a case brief and turning it into an enforcement action, such as charges and fines". He worked in this field for about three years while at Environment Canada. As required in the JOA, he indicated his experience in his cover letter and résumé.

[31] In terms of significant and recent experience, he understood it to mean three years in the last five years of doing the work. As indicated in his application, from September 4, 2011, to the date of the appointment process, he had gained 24 months of experience. From 2012 to 2013, he carried out many successful investigations; he detailed his experience planning and conducting inspections under both the *Canadian Environmental Protection Act* (S.C. 1999, c. 33; *CEPA*) and the *Fisheries Act* (R.S.C., 1985,

c. F-14; *FA*), which transformed into multiple investigations and the successful prosecution of four dry cleaners.

[32] In his application, he stated that he was investigating a referral made by the "… Intelligence Department under the Ozone Depleting Substances Regulation [*sic*]". He led 41 on-site and 26 off-site inspections and partnered on 26 additional inspections under the *CEPA* and the *FA*. He indicated that he was familiar with "… the inspection planning and executing … while gathering … evidence and assessing due diligence …". He successfully led nine investigations while partnering in five others under the *CEPA* and the *FA*.

[33] He disagreed that these investigations were meant to progress him from the GT-4 to the GT-5 level and that throughout, he was mentored by his manager. He stated that he disagreed that the majority of the "NEMESIS file" was written by his manager and that his manager had taught him how to conduct investigations.

[34] He planned a one-week trip for the *CEPA* investigation, identified targets, took the basic training, and learned all about writing reports and culminating recommendations based on the evidence he collected during the investigation. He informed his manager, of his work, but all the recommendations were based on his own findings. His manager would review his work and make recommendations. However, all the work was his.

[35] In cross-examination, the appointee testified about his experience in the investigative field. He conducted inspections and investigations under the *CEPA* and the *FA* that led to charges and arrests being made under the *Criminal Code* (R.S.C., 1985, c. C-46). The matters he dealt with ranged from things as simple as someone fishing without a licence to more complicated infractions. He would determine the appropriate enforcement action and proceed with it. As indicated in his application, he had carried out multiple investigations for which he had been the lead conservation officer. He had been responsible for supervising seasonal conservation officers actively in the field, which included teaching and mentoring them.

[36] The appointee stated that he had conducted a compliance field trip for "PERC tetrachloroethylene", which progressed into an inspection of approximately five companies through different kinds of enforcement actions. It led to four successful prosecutions. His work involved obtaining search warrants, gathering evidence from

laboratories, obtaining production orders, and conducting interviews. He would then submit the information in briefs to Crown counsel to support the recommendation of charges along with the relevant collected evidence and witness statements. In total, he led nine investigations and partnered on others. When he applied to the anticipatory position, he had led investigations or was leading them.

[37] The complainant testified that he has worked for the Government of Canada for 26 years, 14 of them with Environment Canada. As of the day of the hearing, he was the intelligence manager for Environment Canada's Prairie and Northern Region and was classified at the PM-5 group and level in the Environmental Enforcement Directorate. He reported directly to Mr. Bell.

[38] Mr. Bell informed the complainant that he was not aware why Mr. Goluza had screened him out. Mr. Bell told him that Mr. Goluza was looking for "… someone who could hit the ground running"; someone with the ability to lead and conduct investigations without further training. At that time, the complainant did not know that Mr. Bell was on the hiring committee, so he agreed that he would ask Mr. Goluza for an informal discussion.

[39] During and after that informal discussion with Mr. Goluza, the complainant took notes. He explained that the discussion took place by phone and stated that it lasted "five minutes and eight seconds". Mr. Goluza told him that he had been screened out because he had failed to indicate the number of investigations he had completed under experience three, and therefore, Mr. Goluza could not determine the number of reports to Crown counsel he had completed. Mr. Goluza told him that it was a requirement for all applicants to list a specific number of investigations. Had the complainant listed the number of investigations he had carried out, he would have been screened in. There were no equivalencies. Mr. Goluza told him, "Either you wrote them or you didn't."

[40] The complainant also discussed his experience acting as the regional director, in which he oversaw all regional investigations and reviewed reports to the Crown for quality assurance. Mr. Goluza responded that acting as a GT-8 was irrelevant, that he was not reviewing résumés, and that all decisions to screen candidates in or out were based only on the information in the cover letters. He asked Mr. Goluza if he could give him the missing information, but Mr. Goluza said, "No; the competition is closed."

[41] He then asked Mr. Goluza if he had applied the same criteria to everyone. The complainant stated that Mr. Goluza went on a tangent, explaining that there was no favouritism, that he believed the right person should get the job, and that if anyone who applied did not provide a specific number of investigations and did not take the time to write down their experience using the proper experience headers followed by concrete examples, they would have been disqualified, no matter what they wrote. He stated that he was looking for someone "who could hit the ground running", who required no mentorship or training, and who could step right in and do the job.

[42] After that discussion, the complainant thought about things and then decided to discuss things further with Mr. Bell. The complainant told Mr. Bell that something was not right with the appointment process and that he would monitor it. He stated that if it was not "on level", he would file a complaint. Mr. Bell informed him that he had been a board member in the appointment process, which shocked the complainant. He asked Mr. Bell if his assessment concurred with that of Mr. Goluza.

[43] He recalled that Mr. Bell then produced documents that he had received by mail and that were related to the exam, along with the complainant's assessment sheet. It listed the essential qualifications and had a comments column for each board member. The assessment sheet revealed that Mr. Goluza indicated that the complainant had met all the essential qualifications except for experience three. Mr. Bell's column was not yet filled out. The assessment sheet, which was filed into evidence, indicates that Mr. Bell wrote "No" as his comment for experience three, and just below that, "'direct engagement'??". Both he and Mr. Goluza put "No" at the bottom of their comment columns, indicating that the complainant had been screened out. Mr. Bell also wrote "#3" after the "No" at the bottom of his column.

[44] Mr. Bell then produced the screening graphic, which indicated that the complainant had been screened out on account of experience three. The complainant recalled discussing whether independent assessments had been made for the candidates. Mr. Bell said that there had been. The complainant became frustrated and left Mr. Bell's office. Around Remembrance Day, he returned to Mr. Bell's office and while talking to him noticed that Mr. Bell was working on the appointment process. He noted a few of the résumés and wrote down the few names he could see.

[45] After Remembrance Day, the complainant observed Mr. Bell with a stack of résumés. He followed Mr. Bell to his administrative assistant's desk. Mr. Bell gave her instructions to mail them back to Mr. Goluza and informed her that nothing had changed in the screening. At that point, the complainant was very upset and wanted to file a complaint.

[46] He requested his staffing file through the exchange of information which takes place prior to the hearing. He also filed an access to information request. He was concerned with the process and wanted to know what the assessment board was looking for. As for the term "leading", an email from Mr. Goluza to Ms. Roberge and dated July 10, 2013, indicated that it meant "… doing the majority of the work and initiating it yourself" and that "supervising" meant the following: "… one of your direct reports did the task and not a co-worker or someone at a different classification you mentor".

[47] In an email to Mr. Goluza on August 2, 2013, Ms. Roberge indicated that with respect to "EXP 3: Significant* experience in leading and/or supervising investigations", he would "… have to consider candidates with an experience of [*sic*] leading and/or supervising any activity that is as complex as a Report to Crown." On the same day, he responded "Fair enough :)", and "Approved!"

[48] The complainant went on to indicate that he spoke to Richard Kott, national coordinator of the Intelligence Renewal Project at Environment Canada. He asked him a number of questions, including: "Please explain the types of investigations in the context of what the division does and what would be considered as reports to the Crown". He named the following six:

> *1. Intelligence Bulletins*
>
> *2. Operational Intelligence Assessments*
>
> *3. Strategic Intelligence Assessments*
>
> *4. Tactical Intelligence Assessments*
>
> *5. Intelligence case files (Intel case files follow the same format as case files produced by enforcement officers …)*
>
> *6. National Project Reports/Assessments …*

[49] Mr. Kott indicated that "[i]ntelligence staff have the same training and the same delegation and designation as enforcement officers and are in fact EO's [*sic*] …".

[50] During his informal discussion with Mr. Goluza in October 2013, the complainant asked if he could provide the missing information for experience three, but Mr. Goluza responded that he could not because the appointment process was closed. However, when he received the information as part of the exchange of information process that took place prior to the hearing, it included an email dated October 31, 2013, from Mr. Goluza to Ms. Roberge, with a copy to Mr. Bell, which was almost entirely redacted but for the following: "I received the following after a discussion with the referenced individual. I have analyzed it below and would like your objective opinion please… at the very least this is actually a lot of 'new information'". The complainant concluded that Mr. Goluza had allowed other participants to provide additional information, to be rescreened.

[51] In cross-examination, the complainant agreed that when he applied for the position, he was aware that he had to demonstrate that he met all the essential criteria through his qualifications on his application, as indicated on the JOA. He also agreed that he did not indicate a number of investigations or of reports to Crown counsel. He stated that perhaps he took the wrong approach; however, reports to Crown counsel are not enforcement actions. Mr. Goluza was aware of the projects referred to in his application, for which there had been a 40% success rate in terms of enforcement actions.

[52] Mr. Bell was also aware of the complainant's qualifications and experience. The complainant felt that he had done a better job than others in detailing his experience in his application.

[53] The complainant disagreed that Mr. Goluza informed him that the assessment board considered both the cover letters and the résumés before screening out applicants. Mr. Goluza had told him that he had considered only the cover letters.

[54] Mr. Goluza testified that he has been the regional director for the Pacific and Yukon Region in the Environmental Enforcement Directorate at Environment Canada since January 2011. The directorate is responsible for enforcing the prohibitions contained in the *CEPA* and the *FA*. The directorate's authority is derived from legislation. He is responsible for directly supervising 10 employees and 40 indirect

reports in the region. For a number of years, he had wanted to staff an additional operational manager position to reduce the team sizes from 10 direct reports to 6 or 7 for each operational manager.

[55] Mr. Goluza was the assessment board's chairperson because the position was to be in his region. The JOA listed the statement of merit criteria (SMC), which specified the required essential and asset qualifications to perform the duties expected of the person appointed to the position. Environment enforcement officers are responsible for enforcing the prohibition provisions in the *CEPA* and the *FA*. They are required to carry restricted weapons and must pass a use-of-force certification. They plan and conduct inspections, intelligence activities, and investigations in environmental and regulatory fields.

[56] He established the essential education and experience qualifications via consulting with his director general and the four other regional directors. The essential qualifications were taken from previous JOAs and are standard in the Enforcement Branch. Operations enforcement managers are responsible for their own geographical areas, so for both experience factors, they would be responsible to assess the regulated environment, develop a plan, and strategically deploy resources to address its needs and issues of non-compliance.

[57] The position required significant experience leading or supervising investigations and experience associated with performing a large number of complex activities resulting in enforcement actions, such as reports to Crown counsel, which normally a person who has worked in the field for about three years would have. "Three years" meant "three years at any time". For this criterion, he was looking for the number of activities that had resulted in enforcement actions.

[58] When there is an alleged violation under the *CEPA* or the *FA*, the enforcement officer will consider several factors before taking an enforcement action during the course of an inspection or an investigation, during which he or she would lawfully collect evidence of a violation and of any impact on the environment. Once the enforcement officer has the full picture, he or she decides on the appropriate course of action, which could include taking no action, for reasons of evidence that exonerates the entity or depending on a number of factors, such as profit impact and the degree of foreseeability of the infraction.

[59] The enforcement officer may recommend or issue an enforcement action, which could include a warning letter, a ticket, or a civil monetary penalty from $200 to $500, depending on the nature of the infraction. In that case, the officer would put together a report to Crown counsel for federal penalties, which requires evidence beyond a reasonable doubt. When penalties are disputed, a representative from the prosecutor's office is assigned, who in turn recommends whether or not to prosecute.

[60] When conducting investigations, enforcement officers collect evidence through a number of activities and outline an objective set of facts informed by scientific expert opinions. In the past five years, that part of the work has grown significantly in the region. Recently, the Associate Deputy Minister or Chief Enforcement Officer and the Chief Federal Prosecutor for the British Columbia region commented on the increased volume and complexity of the files.

[61] For the first asset qualification, the JOA lists the ability to act in accordance with a 'Use of Force' or other similar policy from other organizations. Mr. Goluza did not believe this qualification should be listed as an essential qualification because he did not want to limit the number of applicants. For example, applicants from the Canada Border Services Agency, Transport Canada, Canada Revenue Agency, or Industry Canada, which have public officers as opposed to compliance officers, could still have met the other essential qualifications but not necessarily the asset qualifications.

[62] The second asset qualification, which was "Knowledge of Major Case Management practices", came from the policing enforcement world, which requires more transparency in court files and investigations.

[63] The directorate needed to increase its representation of persons with disabilities and of visible minorities. For operational requirements and conditions of employment, all officers and persons working at that group and level needed an enhanced reliability and secret clearance.

[64] There were 31 applicants in total. The applications were sent to Ms. Roberge in Ottawa, Ontario, who then sent all the hard copies to Mr. Goluza. Before assessing them, he asked his administrative assistant to draw up one assessment sheet for each applicant, which referenced education as well as the four essential qualifications and their definitions. It had one column each for his and Mr. Bell's comments.

[65] The first column listed only the essential qualifications, which were evaluated during the pre-screening. The asset qualifications were assessed during the written examination. During pre-screening, the focus was on the essential qualifications. Definitions were developed with Ms. Roberge's help. All cover letters and résumés were assessed, along with all information that Human Resources had provided.

[66] The complainant's application, cover letter, and résumé were pre-screened using the assessment sheet. Mr. Goluza filled out the column entitled "Marko's comments". For each essential qualification that was met, he indicated "Y" for yes or "N" for no. If one essential qualification was not met, then the applicant was screened out. As indicated in the JOA, the applicants had to meet all essential qualifications to be screened in.

[67] The complainant was screened out because he did not demonstrate that he had significant experience leading or supervising investigations. Mr. Goluza did not recall the exact date on which he assessed the complainant's application, but he did recall it was sometime in September 2013, before Mr. Goluza left for Chilliwack, B.C., in October. When screening both the cover letter and résumé for experience three, Mr. Goluza indicated that he was looking for three years of experience with a large number of complex activities that had resulted in enforcement actions in a field that required doing those tasks, or experience doing them.

[68] The complainant's cover letter and résumé did not indicate any such activities, and no actions were identified. For the first experience criterion, the complainant indicated that he had recent experience planning and conducting inspections, intelligence activities, and investigations in environmental or regulatory fields. Therefore, he was screened in. If applicants indicated that they met the requirement, then they were screened in.

[69] Once all applications were assessed and the assessment sheets were filled out for each applicant, Mr. Goluza put the assessment sheet on top of each application and asked his assistant to send them to Mr. Bell in Edmonton, Alberta, so that he could carry out his assessment. Part way through a training course in Chilliwack, he spoke with Mr. Bell about how they were reviewing the essential qualifications. Mr. Bell wanted to screen out a candidate with a political science education background because the person did not meet the educational requirement listed in the JOA.

Mr. Goluza disagreed and found that public policy was a field relevant to the position. He clearly remembered not discussing the complainant's application with Mr. Bell.

[70] Once Mr. Bell went through the applications and populated the third column of the assessment sheet, he sent them back to Mr. Goluza, who received them from his administrative assistant sometime in mid-October. He then locked them in a cabinet in his office and informed Ms. Roberge of the results. Those screened out received an email from Human Resources informing them of that fact. Many were screened out, and many of them requested an informal discussion.

[71] Mr. Goluza recalled meeting with the complainant for an informal discussion. He had indicated on the assessment sheet "1100 1105", and at the top, "Oct 24, 2013". He prepared for the discussion by taking out the assessment sheet; the complainant's application, cover letter, and résumé; and the SMC. The informal discussion was held by phone. He went through the assessment and identified why the complainant had been screened out. For experience three, Mr. Goluza referred the complainant to his cover letter and explained that nowhere in what was submitted did the complainant detail how he met it. He mentioned to the complainant that he considered him a team player and that he enjoyed working with him but that unfortunately, he had to consider only what was included in the résumé and cover letter.

[72] The complainant then asked if he could provide additional information or clarification. Mr. Goluza responded that he could not accept any new information, which was the guidance he had received from Human Resources. The complainant indicated that that was too bad and that he would be watching the process closely. Mr. Goluza informed him that he had the right to file a complaint at the end of the process. After the informal discussion, both agreed everything was over, and they went on to discuss work, specifically the Heavy Duty Diesel Vehicles and Engines Initiative. It took them about five minutes to go through the application and the assessment sheet.

[73] In his testimony, Mr. Goluza went through the appointee's application, cover letter, and résumé. Mr. Goluza stated that the appointee was screened in because "… he met the time and experience factors for all essential qualifications." The appointee's application clearly indicated that he was leading complex investigations. He detailed a number of complex activities that had led to briefs to

Crown counsel and that had resulted in enforcement actions.

[74] The appointee had been employed as an enforcement officer with Environment Canada since 2011. For four years and roughly five months, he was a lead conservation officer with Alberta Parks. The appointee also outlined in writing some of his roles when he worked in that capacity. The first paragraph is about supervising multiple officers. Then he uses a few bullet points to add a number of additional duties such as regulatory law enforcement. All his experience was considered when his work in the relevant field for about three years was looked for.

[75] Mr. Goluza did not take notes during the informal discussion with the complainant. He simply went through the complainant's assessment with him. In reference to the complainant's notes dated October 24, 2013, he disagreed that he told the complainant that he had been screened out because he had failed to indicate the number of investigations he had completed under experience three and that Mr. Goluza could not determine the number of reports to Crown counsel that the complainant had completed.

[76] He told the complainant that he was looking for a description of complex activities for a period of three years in that field. So if an applicant indicated only that he or she had been part of a number of investigations, then that applicant would not have met the pre-screening criteria for experience three. Mr. Goluza was looking for a description of the activity and the action that took place at the end of it.

[77] Mr. Goluza did not agree with the complainant, who said that Mr. Goluza stated that he would not consider equivalencies to reports to Crown counsel and that because the complainant's experience at the Canada Border Services Agency had occurred too long ago to consider, it would not meet the definition of "recent experience". The pre-screening document used to assess the complainant's application makes no reference to "recent experience". Mr. Goluza considered the whole application, the cover letter, and the résumé.

[78] Mr. Goluza did not agree that he would have told him that acting as a GT-8 was irrelevant, as he was not reviewing résumés, and that all decisions to screen candidates in or out were based only on the material in the cover letters. All applications were reviewed in their entirety during the screening process.

[79] Mr. Goluza agreed that he said that the complainant could not provide new information. He recalled the complainant saying that he would be "watching the process closely", but he did not recall any mention about filing a complaint. The complainant was not allowed to provide additional information, but Mr. Goluza did allow one candidate to provide clarifying information. The candidate mentioned "A-44's" in his application, which is an immigration term. Mr. Goluza wanted to know if they were the same as reports to Crown counsel; if so, they would constitute an enforcement action. The candidate provided the clarification. It was determined that in fact they were different, and the candidate was screened out.

[80] Ms. Roberge testified that candidates in a selection process are normally not allowed to provide additional information. However, if the delegated manager allows it, she advises that it be allowed for all candidates. Otherwise, it would not be fair. She advised Mr. Goluza and Mr. Bell to discuss experience three to ensure that they both had the same understanding of what the criterion meant.

[81] Mr. Goluza recalled that the complainant asked for something in writing to capture the informal discussion. The purpose of an informal discussion is to give effect to an informal process. He did not provide anything in writing. He did not get back to the complainant; nor did the complainant follow up with him.

[82] In cross-examination, the complainant admitted that the notes he took after the informal discussion with Mr. Goluza were initially handwritten. The document introduced into evidence was transcribed approximately two days after the meeting. He did not agree that during the informal discussion, he told Mr. Goluza the following: "Fair enough, but I will be watching the process closely." The complainant indicated that twice, he asked Mr. Goluza if he had notes from the informal discussion, and that both times, Mr. Goluza said that he had none. He wrote down notes so that he would not forget. The complainant did not share this document with Mr. Goluza.

[83] In cross-examination, Mr. Goluza indicated he has run approximately four competitions. He completed training for the delegated authority to run them. The most recent course he took was in 2013 or 2014. He does not remember if it occurred before or after the competition.

[84] He had a discussion with all the regional directors before establishing the essential qualifications for the position. He met with Mr. Bell to establish the SMC

before the JOA was posted, in July 2013. They discussed experience three.

[85] Ms. Roberge testified that delegated managers can establish essential criteria for positions they wish to staff. She stated that she did not have any "pre-set" discussions with Mr. Goluza or Mr. Bell about the meaning of "normally found in" or "about three (3) years" as listed in the essential qualifications in the JOA.

[86] Two or three managers from Environment Canada applied to the competition, but all of them were screened out. Mr. Goluza disagreed that Mr. Haughland had two informal discussions. Mr. Haughland reached out to him twice but had only one informal discussion. The reason he was screened out was not that he did not indicate the number of investigations he worked on but that he did not describe his experience in his application.

[87] In cross-examination, Mr. Goluza stated that based on his training and experience, he considered reports to the Crown an official enforcement action. When he wrote the SMC, he consulted other directors and regional directors, which is why the criterion was written as it was. The requirement was for close to three years of experience conducting complex activities that resulted in enforcement actions. The language in the JOA is passive. It does not state a minimum requirement of three years but instead states, "for about three (3) years". If candidates had two-and-a-half or closer to three years of experience, it was acceptable. He would not have screened out someone with 2 years and 10 months of experience without consulting Human Resources.

[88] Mr. Bell testified that he has been the regional director for Environment Canada's Prairie and Northern region since November 2009. He is responsible for supervising five operations managers and one intelligence manager, who is responsible for enforcing federal environmental legislation. He directly supervises 6 operations managers, 3 administrative staff, and approximately 40 to 50 officers indirectly in Environment Canada's regions.

[89] He assessed the complainant's application and concluded that he met the education requirement and experience one, two, and four, but not three. Experience three required leading complex activities that resulted in enforcement actions. When he read the complainant's application, he saw no reference to specific activities and no reference to outcomes. Mr. Bell acknowledged filling out an assessment sheet

for all candidates sometime at the end of September 2013. He received all the applications from Ms. Abrecinos, who had received them by mail. He reviewed the applications, the cover letters, and the résumés over a couple of days.

[90] Mr. Bell explained that it would be difficult for someone in the complainant's position to meet experience three. In his position, the complainant does not conduct investigations or manage people. In the Investigations and Enforcement Branch, investigations are conducted, and criminal charges may be laid. He does not do this work. The only way he could acquire this experience would be through assignment opportunities.

[91] In cross-examination, Mr. Bell explained that intelligence work is not the same as investigation work. Intelligence work involves looking to where an operation should be going; it looks at the big picture when there is non-compliance and takes that information and deploys officers to gather evidence, which leads to prosecutions. Intelligence gathers information vital to a successful prosecution, but the officers conduct complex activities and investigations which result in prosecutions.

[92] The documentation sent to Mr. Bell included all materials in the candidates' applications, which was all their cover letters and résumés, along with his assessment sheets listing all essential qualifications, with the first column containing his comments. Ms. Abrecinos mailed all the documentation.

[93] The complainant alleged that the candidates who were screened in did not all indicate the specific number of investigations they worked on and did not take the time to write out their experience using the proper headers followed by concrete examples. I disagree. A review of the candidates' applications that were screened in showed that they all indicated the number of investigations they had worked on and described how they met each criterion, using concrete examples. In particular, the appointee's experience is described in great detail.

[94] It is well established that complainants bear the burden of proof with respect to abuse of authority complaints (see *Tibbs*, at paras. 49, 50, and 55). For the complainant to meet that burden, he had to present sufficient evidence for the Board to determine that on a balance of probabilities, a finding of abuse of authority was warranted. Mere assumptions and baseless allegations are not sufficient.

[95] Section 30 of the *PSEA* provides wide discretion in establishing essential and asset qualifications, and it empowers the PSC, or its delegated authority as per s. 15, to assess whether a person to be appointed meets those qualifications, taking into account any operational requirements and current or future organizational needs. Thus, the respondent was empowered to determine the essential and asset qualifications to be met.

[96] The *PSEA* also provides wide discretion as to the assessment tools that can be used to assess candidates. Section 36 states as follows:

> *Assessment methods*
>
> ***36*** *In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).*

[97] That provision provides considerable latitude when determining the assessment methods to be used in an appointment process (see, for example, *Visca v. Deputy Minister of Justice*, 2007 PSST 24 at paras. 51 to 53). However, it is not unfettered. As noted in *Tibbs*, discretion in staffing processes must be exercised in accordance with the nature and purpose of the *PSEA*. It is held in check by the guiding principles of the *PSEA*, which recognize that the Government of Canada is committed to fair and transparent employment practices.

[98] The *PSEA* confers the discretion to choose from available methods for assessing candidates and to proceed with an appointment based on merit under s. 30(2). Complainants often attempt to challenge their assessment results when presenting their complaints before the Board. However, the Board's role is not to reassess candidates. As discussed, that authority is granted to the PSC under s. 30(2)(a) of the *PSEA* and may be delegated to a deputy head in accordance with s. 15(1).

[99] Rather, the Board determines whether the evidence demonstrates that on a balance of probabilities, abuse of authority occurred in the assessment that was done (see, for example, *Lahlali*, at paras. 42 to 46).

[100] Based on the testimony and the evidence adduced at the hearing, I conclude that there was no inconsistency in how the screening criteria were applied. All applicants

were assessed in the same manner. All those screened in described their experience in the execution of complex activities leading to Crown reports. As indicated in the JOA, if applicants had inquiries to make about any of the essential requirements for the position, they could have contacted Ms. Roberge. Although the complainant and Mr. Haughland claimed that the wording used for experience three was confusing, the complainant did not present any evidence that he attempted to obtain clarification on it before submitting his application.

[101] Although one candidate was permitted to provide clarifying information, none was allowed to present new information. In all appointment processes, it is up to the applicants to demonstrate that they meet the essential qualifications. The complainant did not do that and therefore was screened out. For these reasons, I find that the respondent did not abuse its authority in its assessment of experience three.

2. Issue 2: Were serious errors and omissions committed in the appointment process?

[102] The complainant made several allegations on how the appointment process was handled.

[103] He alleged that it was inappropriate that the respondent extended the closing date of the selection process. On August 27, 2013, Mr. Goluza emailed everyone in the region, informing them that the closing date was extended and that the area of selection had been expanded. He asked that it be circulated to anyone interested. The position was open to members of the public service. Because the JOA was posted in August, when many employees were on leave, he decided to extend it four or five additional days, to receive as many applications as possible. In the complainant's view, that was inappropriate.

[104] The complainant felt it was unprofessional of Mr. Bell not to inform him of the fact that he was on the assessment board. He concluded that Mr. Bell had something to hide. The complainant alleged that Mr. Bell just followed all Mr. Goluza's directions. He believed that the only reason Mr. Bell told him that he was on the assessment board was that the complainant had informed him that he was thinking of filing a complaint.

[105] The complainant alleged that the respondent completed the supporting documentation in the appointment process after he was screened out. He accused the respondent of hiding information from him. He did not agree that Mr. Bell reviewed all

applications, résumés, and cover letters. After his informal discussion with Mr. Goluza in October 2013, the complainant wanted to discuss the matter further with Mr. Bell. When he went to Mr. Bell's office, he saw Mr. Bell marking the applications. He saw the assessment document, and it was completed only on one side.

[106] According to the complainant, Mr. Bell indicated to him that the assessment board were doing the pre-screening with three documents. A pile of documents was on his desk, and the complainant's application was on the top. The complainant saw him fill out the assessment form. For this reason, the complainant concluded that the supporting documentation was filled in after he was screened out. He stated the following: "Had there been a paper trail, as recommended by Human Resources, we would not be in this situation."

[107] In cross-examination, Mr. Bell indicated that he did not recall showing the complainant the assessment form filled out with Mr. Goluza's comments. He would not have done that. When he received the applications, he received the assessment form completed only with Mr. Goluza's comments. He had not yet filled out the assessment form. His assessment was independent.

[108] Mr. Bell recalled having two discussions with the complainant, one immediately after finding out he was screened out. He recalled that the complainant came to his office and that he wanted to know more about the process. He wanted to know if Mr. Bell knew why he had been screened out. Mr. Bell's response was not a response. The complainant was told that he was 1 of 31 candidates and that it would not be fair to discuss the process because it was ongoing. Mr. Bell did not disclose to him that he was a board member because he felt it would not be appropriate to disclose that until the informal discussion took place.

[109] The second conversation occurred immediately after the complainant's informal discussion with Mr. Goluza. It was similar to the first, except this time Mr. Goluza informed him that he had been a board member and that he had participated in the assessment. He attempted to explain to the complainant that although he had been screened into a GT-7 process in the past, the criteria for this selection process had been different.

[110] Mr. Bell did not have any discussions with Mr. Goluza specifically about the complainant. Their only discussion had been about the education requirement and

screening-in applicants who had a political science background, to screen in more people.

[111] The complainant did not agree that Mr. Bell did the pre-screening and that he mailed the package to Mr. Goluza before the informal discussion in October 2013. No one could give him an exact time of when the pre-screening was done. The complainant indicated that he took staffing training with the Canada School of Public Service and that he had participated in several appointment processes as a chair and co-chair. He always followed Human Resources' advice. He was shocked as to how the appointment process had been handled.

[112] Kathleen Paish, Mr. Bell's executive assistant, testified that she received the applications from Ms. Abrecinos, Mr. Goluza's assistant, sometime in late September or early October of 2013. Once she received them, she opened the package, photocopied the applications, and separated them into a "yes and a no pile", as reflected in Mr. Goluza's comments.

[113] In cross-examination, she agreed with the complainant that no date was noted as to when the applications were received, but she did recall that she was on leave in August and therefore that the applications would have been received in late September or early October 2013. Once Mr. Bell reviewed them and completed the assessment form, the applications were returned after a week or two.

[114] The complainant alleged the respondent had an obligation to properly document the staffing file. There were no notes from the informal discussions that Mr. Goluza and Mr. Bell held. There was no paper trail demonstrating when or how the screening process took place or when applications were sent from Mr. Goluza to Mr. Bell for his assessment. There were no notes on how the applications were assessed and how they were scored. In cross-examination, Mr. Goluza agreed that "documentation helps every process" but stated that there is a fine line between recording everything and using judgment to record only those things that require documentation.

[115] Mr. Goluza agreed that he did not take notes during his informal discussions with some applicants, other than the email he sent to Ms. Roberge on October 31, 2013. The only notes he took of an informal discussion with the complainant were those on the complainant's assessment form. He recalls the

conversation with the complainant as being straightforward and that the complainant indicated that he would be "watching the process closely". He did not recall which candidate he had discussed the "A44" reports with. Based on his email to Human Resources, he recalled that the individual had well below the three years of experience required in enforcement experience and that he had not referenced material resource management.

[116] In cross-examination, Mr. Bell indicated that he did not recall using a specific guide to score the exams. He recalled that there is a standard human resources guide, which indicates whether a candidate met or exceeded criteria. In assessing candidates during the interview, he explained that he used an abbreviated form of writing. He did not ask the candidates to slow down, to not disturb the flow of the interviews.

[117] As discussed, in many decisions rendered on complaints filed under s. 77, including *Tibbs*, at paras. 56 to 74, the former Tribunal examined what constitutes an abuse of authority under the *PSEA* and gave it a broad meaning that includes serious errors or omissions; bad faith or intent is not a determining factor. Essentially, it would be an action that Parliament did not confer as part of the discretion given to a delegated authority. Abuse of authority will be found when the complainant can establish that the respondent acted in an "outrageous, unreasonable or unacceptable way", per *Tibbs*. As the Tribunal has often stated, abuse of authority is a matter of degree. Not just any omission or error can amount to an abuse of authority; rather, the behaviour must be of such an egregious nature that it cannot be part of the delegated manager's discretion.

[118] As the former Tribunal stated as follows in *Ostermann v. Deputy Minister of Human Resources and Skills Development Canada*, 2012 PSST 28 at para. 14: "Whether an error constitutes an abuse of authority will depend on its nature and seriousness." Therefore, a finding of abuse of authority can be made when a delegate acts on inadequate material or without considering relevant matters, when the result is unfair, or when unreasonable action is taken, which is the proper approach for the Board to take when considering complaints made under s. 77 of the *PSEA*.

[119] The complainant failed to present sufficient evidence for the Board to determine that on a balance of probabilities, a finding of abuse of authority is warranted. In the absence of other supporting evidence, extending the closing date of the selection

process did not amount to an abuse of authority. The respondent explained that it wanted as many candidates as possible to apply to the selection process, which is a valid reason.

[120] Failing to document the staffing file when the applications were received and when they were assessed does not amount to a serious error or omission that could amount to an abuse of authority. Although documenting would be preferable, to ensure transparency, there is nothing nefarious in not doing it. Nor was Mr. Bell's failure to inform the complainant that he was on the assessment board. The respondent has no obligation legislatively or otherwise to inform candidates about who will be on an assessment board.

[121] The complainant's allegation that the supporting documentation in the appointment process was filled out after he was screened out could raise serious doubts about the integrity of the process. However, he failed to demonstrate that it was so. The informal discussion with Mr. Goluza occurred on October 24, 2013, as indicated in the complainant's notes. Ms. Paish testified she was on leave in August and that the applications were received in late September or early October 2013. Once Mr. Bell reviewed the applications and completed the assessment form, the applications were sent back, which took a week or two. Therefore, I find that the respondent did not commit serious errors or omissions in the appointment process that would amount to an abuse of authority.

3. Issue 3: Was the respondent biased towards the appointee?

[122] Throughout the exchange of documents process, the complainant noted irregularities. He alleged that there was no list of factors to assess the candidates' experience and that the asset criteria had been changed part way through the process. He alleged that the respondent was biased towards the appointee and that it ensured that he would be the successful candidate by destroying the original matrix, changing the SMC, and removing written test results. The written exam did not match the matrix, and marks were changed to pass when the appointee failed to give complete answers. He accused the assessment board of writing the answers for the appointee during the interview process.

[123] The questions on the written exam and the references also led the complainant to believe that the board members had abused their authority, to ensure that the

appointee would be the successful candidate. The majority of the candidates passed the essential and asset qualifications and were screened in for the interview. However, the questions on the written exam did not test the essential qualifications. The answers on the scoring matrix were not in line with the questions. Marks were given to the appointee even though he did not correctly answer some questions.

[124] The complainant questioned how the appointee received points for interview questions when the "notes" portions of the interview questionnaire were left empty. He questioned the basis on which the points were allotted for questions if it appeared that no answer had been supplied. There was no competency guide and no scoring matrix. Moreover, the reference documents for the appointee were only partially completed. His reference document was filled out in point form, and there were blank boxes. For the complainant, it was confusing how the reference check documents were used in the appointment process as they did not appear anywhere in the evaluation process.

[125] The respondent denied the allegation. The appointee was the only candidate in the process who succeeded at both the written exam and the interview. He achieved a pass mark in "knowledge, abilities and personal suitability" against the pre-screening, the written exam, the interview, and the reference checks. His scores were all higher than the pass marks, which had been identified at the beginning of the process.

[126] The respondent introduced into evidence a signed document entitled "SIGNED STATEMENT OF PERSONS PRESENT AT SCREENING COMMITTEE", and both Mr. Goluza and Mr. Bell promised that they would faithfully and honestly fulfil the duties devolved upon them in connection with the selection committee and that they would not reveal to any person or persons, except those authorized by the PSC, the committee's deliberations or the nature of its report. They affirmed that they were both not related to any of the candidates and that the nature of their associations with the candidates was such that they could render impartial decisions. The statement was signed on October 15, 2013.

[127] Mr. Goluza stated that when he screened in the appointee, he looked at both his cover letter and résumé. He could not explain why the complainant was provided with only a copy of the appointee's cover letter when he requested all the documentation that had been used to screen in the appointee. The assessment tools used included

the assessment sheet, the written exam, the interview, and the reference checks, which were selected in consultation with Ms. Roberge. Mr. Goluza either drafted them himself or took them from older advertised processes and updated or changed them somewhat. Before having them finalized, he consulted with other board members.

[128] The matrix entered into evidence recorded all applicants' marks, along with the pre-screening criteria, knowledge, abilities, and assets identified in the JOA. Mr. Goluza's administrative assistant filled out the form based on the sheets that both he and Mr. Bell gave her. She would have completed the matrix only after it had been finalized by both assessment board members at every stage. Human Resources provided a document that included a description of the SMC factor, the criteria, the assessment item number, the score, the required passing score, and a column to indicate "pass" or "fail". This document was prepared for all applicants, and the board members filled it in.

[129] There were a manageable number of applicants. The assessment board did not want to restrict the process any further or make the pool smaller. For the asset qualifications, they decided to mark how the applicants did, but they did not make it part of the process. Mr. Goluza consulted with Human Resources, which advised him that doing so was acceptable.

[130] Once the pre-screening was completed, applicants who were screened in wrote the exam. Approximately eight or nine candidates wrote it, but only three passed. Eleven were invited to write it. A red line on the matrix indicates withdrawals, which could happen at any point in the process.

[131] For the qualification in experience four, no timelines were required. Mr. Goluza considered the appointee's cover letter, which indicated that he managed and supervised approximately five or six individuals along with managing financial and material equipment and supplies and consumable goods. He looked at the entire résumé. He agreed that it was easier for him to assess applicants when they wrote directly under a header of each essential qualification in their cover letters but disagreed that doing so was a requirement for being screened in.For experience four, which stated the following: "Experience in managing and supervising human, financial and material resources", the appointee indicated that he supervised three students. In previous summers, he had been responsible for six students at Aspen Beach for the

seasonal conservation program, which involved hiring students and providing spring training for enforcement officers, who were then dispatched for enforcement. He was responsible for the entire process: hiring, training, mentoring, direct supervision, shift schedules, and performance evaluations. He stated that he also had conflict resolution experience, which he gained when he worked in a maintenance program. Although he had no financial authority, he had financial responsibilities for purchase orders and supplies. The appointee understood that he would be assessed on both asset and essential qualifications.

[133] When he assessed the appointee's written exam and the essential qualification "Ability to communicate effectively in writing", Mr. Goluza used an assessment sheet titled "Q.15 Written Communication exercise", which indicated the questions and the expected answers. Although initially he had given the appointee a mark of 5 out of 10, he explained that he scored the written exams using this sheet prior to assessing other applicants. Once all the exams had been corrected, he felt that 6/10 was more appropriate because the appointee's answers were of a better quality than the others' were.

[134] Both he and Mr. Bell documented each candidate's answers to the interview questions. Mr. Goluza explained that during the interviews, the board would ask a question and then take notes on what the candidates answered. The notes taken reflect each candidate's answers. Each question indicated the essential qualification, asset qualification, or personal suitability criterion that was being assessed.

[135] For each assessed item, the assessment board would write down the candidate's answer and go through each criterion one at a time. Candidates received different scores for a given criterion. As an example, question four assessed the asset criterion "A4 - Ability to plan and organize" and the personal suitability criterion "PS1 - Strategic thinking". The appointee received a mark of 7/10 for the first and 6/10 for the second criterion. Each answer was marked twice.

[136] For question four, the appointee received a mark of 6/10 for the personal suitability criterion "strategic thinking" and 7/10 for the personal suitability criterion "judgment". Candidates would sometimes receive different scores for the same essential or personal suitability qualification, depending on the questions and on the answers they supplied. Oral communication was assessed throughout the interview

process, considering all of a candidate's answers and using a rating scale. The appointee received a mark of 8/10. Mr. Goluza did not take notes with respect specifically to oral communication.

[137] In cross-examination, Mr. Goluza agreed with the complainant that although the written exam had 15 questions, the matrix did not. Mr. Goluza testified that both he and Mr. Bell corrected the exams in December 2013. The complainant pointed out that the exam indicated that only those candidates who met the pass marks established for each merit criteria assessed would be considered further in the selection process. The appointee testified that he knew he had to pass to progress in the process.

[138] Mr. Bell reviewed the exam questions before it was administered. He also reviewed the exams once they were completed, and he participated in the scoring. He and Mr. Goluza determined the expected answers. He agreed that the exam indicated that both the essential and asset criteria would be tested.

[139] In cross-examination, he agreed that the appointee did not meet all asset qualifications. He explained that candidates do not have to pass the asset criteria to move forward to the next step. Their purpose is to help select the best fit.

[140] In terms of the asset criteria, Mr. Goluza testified that although they were assessed in the written exam, they were not considered at the pre-screening phase. He acknowledged that a certain number of candidates passed both the essential and asset qualifications but that the appointee did not. Mr. Goluza testified that he did not rely on the asset criteria and stated that had he done so, he would have been obligated to inform the candidates before the assessments were made. In cross-examination, Mr. Goluza testified that the appointee failed the asset criteria. He disagreed that it was favouritism and that it was unfair that the only one candidate to move forward did not meet the asset criteria.

[141] In redirect examination, Mr. Goluza testified that three candidates made it to the interview portion of the selection process and that passing the asset criteria was not essential to make it to the interview stage. He admitted to changing the appointee's mark on question 11 from a fail to a pass. He agreed with the complainant that the reason for making the change could have been better documented. The exam review revealed that the appointee had covered several points in his answer and therefore that he should have received a pass mark, as reflected in the exam answers document

at pages 8, 13, and 14.

[142] In cross-examination, Mr. Bell indicated that he agreed with Mr. Goluza's reassessment of the appointee's mark. In his assessment, he felt that the appointee deserved 6/10. He indicated that he did not reassess any other candidate's exam. All three candidates interviewed had passed all the essential qualifications.

[143] Mr. Goluza testified that he reviewed all the candidates' references and that he ranked them. In cross-examination, he agreed that no marks were given on the reference documents. He explained that he asked the individuals providing the reference checks to complete the forms and to send them back to him.

[144] In the appointee's case, one of the individuals providing a reference did not do that. Mr. Goluza asked Ms. Abrecinos to set up a few different telephone appointments to have it completed. Although the individual had to reschedule a few times, eventually, he was able to connect with her and ask all the questions listed on the reference checks. He wrote down her answers and emailed them to her so that she could confirm that what he had recorded was accurate. She confirmed that it was. The second reference check was filled out and emailed to him.

[145] Another thing that led the complainant to conclude that the respondent was biased towards the appointee was an email sent to Mr. Goluza on February 3, 2014. The appointee sent Mr. Goluza and Mr. Bell an unsolicited email to thank them for the opportunity to be interviewed and to request feedback on his performance throughout the process. He explained that his intention was to learn how he had done in the interview process and to learn how he could improve. Because the process was not yet complete, Mr. Goluza informed him that he would advise him when it would be appropriate for them to discuss those things.

[146] On April 16, 2014, Mr. Goluza emailed him to inform him that he had been found qualified and that he had made it into the pool. He indicated that the "Notice of Consideration" would be posted on the federal government's internal job site at that time, PubliService. He copied Mr. Bell and Ms. Roberge, whom he had consulted before sending the email. He also copied Ms. Abrecinos, his administrative assistant, so that she could set up a meeting to discuss planning and the next few months as well as the details of a start date.

[147] On April 17, 2014, Mr. Goluza had a discussion with the appointee. He wanted to discuss the details of moving and of creating a new district by moving people from the old team to the new team. He stated that he was not sure if the "funding for the clean air initiative" had been approved at that point, but Manon Bombardier, the director general then, was prepared to make the funding available.

[148] The appointee confirmed that his performance was discussed during his interview but that more was said about the expectations of the position and the logistics of his move. At that time, he was very much interested in the position. He was actively looking to find a new home for his family in Vancouver so that when he received the offer, he would be ready to go.

[149] On April 22, 2014, Narendra Mathur, an indeterminate employee working at Transport Canada in Winnipeg, contacted Mr. Goluza. She was an affected employee who benefitted from priority consideration for appointment in the selection process. She self-referred to the position. Mr. Goluza and Mr. Bell assessed the application and found that she did not meet the essential education qualification. Sometimes in priority referrals, the candidate will be contacted for additional information. The process is different for self-referrals. The Human Resources branch provided assistance. Ms. Mathur was the only person who self-referred. Mr. Goluza never received any other follow-up information with respect to the education requirement. Because she did not meet the education requirements, Human Resources did not seek additional information.

[150] On April 25, 2014, Mr. Goluza received an email from Henry Quon, senior science officer, Air Pollutant Emissions Inventory Section at Environment Canada, informing him that he was an affected employee and that he had received an email from the PSC referring him to the anticipated operations manager position for the British Columbia Region. Because he benefitted from a priority entitlement, he had to meet only the essential qualifications and conditions of employment outlined in the SMC. He wanted to know more about the position before self-referring. Mr. Goluza met with him and discussed some of the general functions of the position. Upon learning about the position and the requirement to wear a uniform and the use of compliance tools, Mr. Quon decided not to refer himself to the position.

[151] On June 3, 2014, Mr. Goluza sent an email confirming that a Notice of Consideration had been posted on PubliService and that the appointee was being considered. On June 16, 2014, Mr. Goluza wrote to the appointee to ask him if he was interested in accepting the position and to identify an effective start date so that he could consider it for the letter of offer.

[152] On the morning of June 17, 2014, the appointee declined the position, for personal reasons. In cross-examination, he explained that at that time, his fiancée had received a verbal offer for an environmental protection officer position with the Province of Alberta. She had competed for it sometime in mid-May. He was no longer in a position to move to Vancouver. Had the offer been made to him sooner, he would have accepted it.

[153] The complainant alleged the process was flawed as the appointee proceeded to the interview stage even though he did not meet the asset criteria. Section 30 of the *PSEA* states that an appointment is made on the basis of merit if the candidate meets the essential qualifications. In this case, the assessment board determined the appointee met the essential qualifications. Although candidates may be assessed on the asset criteria, it is for the board to determine whether they must be met. In this appointment process, the JOA indicated that both the essential and asset criteria had to be met. However, it was clear from the exam that only the essential qualifications would be evaluated in order to proceed to the interview.

[154] The complainant alleged that the respondent was biased towards the appointee and that that was the true justification for his proposed appointment. In *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10, the former Tribunal determined that bias by the assessment board could constitute abuse of authority.

[155] In *Drozdowski v. Deputy Head (Department of Public Works and Government Services)*, 2016 PSLREB 33, the Board discussed the history of the terminology used to define "bias" in the context of an administrative decision-making process. Citing *Newfoundland Telephone Company v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, and *Denny v. Deputy Minister of National Defence*, 2009 PSST 29, the Board determined the test could be reworded as follows: "If a reasonably informed bystander could reasonably perceive bias on the part of one or more of the

persons responsible for assessment, the Board can conclude that abuse of authority exists."

[156] The complainant's allegation that the respondent was biased towards the appointee rests on the fact that the appointee's answer to question 11 of the written exam should not have been reassessed. That is not sufficient to establish a reasonable apprehension of bias. Had the complainant established that the respondent did not have a valid justification to review the appointee's answer or demonstrated that the appointee was not qualified for the position, then there may have been some basis upon which to make a bias claim. But that was not the case.

[157] However, the mere fact that the assessment board reviews a question, in the absence of other supporting evidence, does not demonstrate personal favouritism, bias, or generally, abuse of authority (see, for instance, *Jalal* v. *Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 0038 at para. 53). The respondent has provided a reasonable explanation for reviewing the appointee's written exam. The respondent clearly established that the appointee met all the essential qualifications of the position. None of the allegations shows that the respondent was biased towards to appointee. Therefore, I find that the complainant has not established an abuse of authority in the appointment of the appointee.

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

(The Order appears on the next page)

V. Order

[159] Exhibits C-5 and C-12 are to be sealed.

[160] The complaint is dismissed.

November 21, 2017.

Chantal Homier-Nehmé,
a panel of the Federal Public Sector
Labour Relations and Employment Board