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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

JEAN-DANIEL BARRY

Complainant

and

DEPUTY MINISTER OF FOREIGN AFFAIRS

Respondent

and

OTHER PARTIES

Indexed as

Barry v. Deputy Minister of Foreign Affairs

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

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

For the Complainant: Himself

For the Respondent: Cristina St-Amant-Roy

For the Public Service Commission: Louise Bard (written submissions)

Heard at Ottawa, Ontario,
May 31, June 1, and August 9, 2017.

REASONS FOR DECISION

I. Introduction

[1] Jean-Daniel Barry, the complainant, filed an abuse-of-authority complaint after seven candidates were appointed to foreign service information technology professional team leader positions, classified CS-03 (“the CS-03 position”), with the Department of Foreign Affairs, Trade and Development (“the department”).

[2] The complainant alleges that the Deputy Minister of Foreign Affairs (“the respondent”) abused its authority in the assessment of the essential merit criteria in the appointment process at issue. Particularly, he alleges that he was not assessed fairly at the interview stage because an interview question (“the question at issue”) was flawed. In addition, he alleges that the respondent failed to ask him probing questions about the details missing in his response to the question at issue. He also alleges that the assessment board failed to correct the situation when it was told about the flaw. Finally, he alleges that the assessment board should have considered the information in the reference check to assess the competency that he failed at the interview stage.

[3] The respondent denies that an abuse of authority occurred. It states that the appointees were fully assessed and were found to meet the qualifications for the CS-03 position. The respondent also states that the complainant was properly assessed at the interview stage and in the appointment process in general and that there was no error to correct.

[4] 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.

[5] For the reasons that follow, the complaint is dismissed. The complainant has not established that the respondent abused its authority in the appointment process at issue.

II. Background

[6] On April 16, 2014, the respondent launched an advertised internal appointment process to staff the CS-03 position and to create a pool of qualified candidates.

[7] The assessment tools used in the appointment process included two PSC tests, an interview, and a reference check.

[8] The complainant was eliminated from the appointment process at the interview stage when he failed the effective interpersonal skills qualification.

[9] On June 3, 2015, the “Notification of Appointment or Proposal of Appointment” for the appointees was posted on the public service jobs website. On June 16, 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*).

[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. It changed the name of the Public Service Labour Relations and Employment Board to the Federal Public Sector Labour Relations and Employment Board (“the Board”).

III. Issue

[11] I must determine the following issue. Did the respondent abuse its authority in the assessment of the essential merit criteria, particularly at the interview and informal discussion stages?

IV. Relevant facts

A. The appointment process and the alleged flawed question

[12] The complainant testified at the hearing on his behalf.

[13] The respondent called Daniel Lajoie, deputy director, Chancery Electronic Security Systems Unit, and Ellen Ruth Zeisler, director, Human Resources (HR) Renewal Task Force, to testify. The screening board and assessment board for this selection process consisted of Mr. Lajoie, Debbie Whippler, and John Varriano.

[14] The complainant’s substantive position is as a foreign service information technology professional, classified CS-02. Since April of 2016, he has been appointed on an acting basis as an information technology facilities service officer, classified CS-03, which also occurred between October 2013 and September 2014.

[15] The complainant explained that on January 6, 2015, the respondent invited him to an interview, which was held on January 12, 2015. Immediately before it, he received

the questions and was given 30 minutes to prepare. He was also provided with instructions, which included the fact that during the structured interview, he would be presented with five questions. He would have 60 minutes to answer all 5 questions, or about 12 minutes per question. He specified that the five questions did not indicate which qualifications were being assessed. He answered them. At the end, he was given an opportunity to add information to his responses. He did not have anything to add and felt confident that he had replied adequately to each question. The interviewers did not ask him any prompting questions.

[16] On April 7, 2015, the complainant was informed that he had been eliminated from the appointment process at the interview stage as he had been found not qualified on one essential qualification, namely, effective interpersonal skills.

[17] The complainant requested an informal discussion.

[18] On April 22, 2015, Mr. Lajoie, Ms. Whipple, and the complainant had the informal discussion. The complainant discovered that he had not obtained a passing mark for question 3 of the interview, the question at issue, which assessed effective interpersonal skills and read as follows:

In this position, you have to lead teams with diverse backgrounds and varying skill levels which can sometimes lead to conflict in a team environment. Tell me about a time in the past when you experienced such conflict.

- *How did the problem come about?*
- *What impact did it have on the team and the work atmosphere?*
- *What was your role?*
- *How was the problem resolved?*
- *What changes resulted from this experience?*

[19] The three members of the assessment board took notes of the complainant's response. Mr. Lajoie's notes, which are similar to those of the others on that board, read as follows:

[How did the problem come about?] Varying skill levels. Some felt they could not perform tasks expected. [What impact did it have on the team and the work atmosphere?] Resulted in

morale and self-esteem issues. Others had to pick up additional load to compensate and issues of resentment. [What was your role?] My role was to identify solution. [How was the problem resolved?] Promote team work by teaming workers as experience sharing. [What changes resulted from this experience?] Resulted higher morale, knowledge exchange, improved performance. Sort of monitoring. Promote team work. Share experience from veterans with recruits.

[Sic throughout]

[20] During the informal discussion, the complainant was told that he had not answered the first part of the question. In addition, he was told that he had not given any details of his interactions or behaviour in resolving the conflict. He had not specified his dealings with the others. He said he did not know that he needed to provide details of the specific actions he had taken to achieve the solution. He said the question at issue was not clear, and he asked for the notes he had written while preparing for the interview.

[21] At the hearing, the complainant recognized that he did not say how he engaged with people to resolve the problem, but in his view, that is not what the question at issue asked. He testified that since he did not know that it was to assess the effective interpersonal skills qualification, he did not know that he needed to describe his interactions with others. Hence, in his view, the question at issue was flawed, and he misinterpreted it.

[22] During the informal discussion, the complainant specifically referred to the fact that according to him, the question at issue was flawed, and his effective interpersonal skills had not been assessed since he clearly had not provided the assessment board with information on his interactions with others. However, the assessment board did not agree that the question at issue was flawed, mainly because it had been vetted by the HR section, and several candidates had passed it. The complainant disagreed. The assessment board members agreed to consult the HR section for advice.

[23] On April 29, 2015, the complainant emailed the HR section, and he copied the assessment board. The email read as follows:

Following my informal discussion last week with Daniel Lajoie and Debbie Whipple, I was told that my questions would be posed to HR to provide further clarification or

corrective action to my elimination in the process.

As I understand it, my elimination was based on my failure to demonstrate “effective interpersonal skills” in the interview process. As explained to me, this was assessed on the fourth question and, more specifically, sub-question asking “How was the problem resolved?”. This fourth sub-question was a direct question, like the other three previous sub-questions in which I provided a direct answer. My direct answer explained what the resolution to the problem was. I did not provide any details as to the steps involved in developing this solution, but rather focused on the resolution and its result. I did not interpret the question in a way that would have yielded a response targeted to addressing “effective interpersonal skills”.

The structured interview process provides tools to fully understand and assess candidates. One of which is probing questions. As described on the Public Service Commission website, “Applicant’s responses will vary in length and level of detail. This variability is acceptable as long as enough information is obtained to assess each qualification fairly and accurately. However, there may be a need to request additional examples or more specific information to more fully understand the applicant’s answer. Asking probing or follow-up question is **a necessary component of the interview** as doing so helps to ensure that sufficient data is obtained for all qualifications being assessed.” I responded to a direct question, with a direct answer and without being probed further information, I could only deduce that my answer was sufficient and addressed the merit criteria being assessed in this question.

I am seeking more information and reconsideration into this process based on what I think was not a fair opportunity to demonstrate that I have effective interpersonal skills. I believe that if I was not able to speak to this merit criteria, then I could not have been fairly assessed on it. I believe I deserve a fair chance in this competitive process, one that is not limited by a misinterpretation of an ambiguous question.

I urge the process to review this assessment and identify a potential shortcoming or flaw. I understand that this question would have been answered positively by other candidates. Interpretation, interview language or previous experiences could all have played a part in why certain candidates were able to respond correctly. However, looking at this objectively, I don’t think it’s possible to deny that this question could and has been interpreted in different ways by the candidates. Subsequently, the board’s decision not to probe for more information which would allow them to properly assess the qualification has made it impossible for candidates like

myself, who did not interpret the question as it was intended, to be assessed on this merit criteria.

I greatly appreciate the time being taken to properly review this issue and look forward to discussing this further, to ensure that the outcome of this process is fair for all.

[Sic throughout]

[Emphasis in the original]

[24] The next day, April 30, 2015, Mr. Lajoie specified the following to the complainant:

Just to be clear, the interpersonal skills was [sic] evaluated over the whole question #3, not specifically from the sub-question within it. As I explained, the question was the initial part of the text we read to you and the 5 sub-questions as you refer to were pointers to structure the candidates [sic] answer.

[25] Just after that and still on April 30, the HR advisor responded as follows:

Thank you for your comments about the process. Management is delegated to determine the tools that would best assess the merit criteria based on the needs of the organization, both current and future. The assessment tools used for this process were reviewed and discussed with HR. If you did not understand the question or what was being asked, it may have been prudent to ask the board for further clarification. As Daniel Lajoie explains below, the question being asked provides you the context in which to answer the question and the sub-questions were provided to help candidates provide information by acting as a guide to format their answer.

As you have already had your informal discussion, you will be able to file a formal complaint, should you wish to, with

Should you have any additional questions or concerns, please feel free to contact me.

[26] On May 1, 2015, the complainant sent another email to the HR advisor, and he copied the assessment board. The email read as follows:

Thank you for your reply. The problem was not that I did not understand the question but rather misunderstood it. The questions were direct questions and I did not have any issue in understanding them. If I had, I would have obviously asked

the question. As I stated the question (and sub-question) was ambiguous. I do not think it is unreasonable to think that I would have interpreted it in the way that I have. Your response does not address my primary concern which was to see if it could be agreed that the question could have led to my interpretation and thus prevent me to speak to the merit criteria being assessed.

Also, there was no mention at any point prior or during the interview that the sub-questions were only there to act as a guide. There was also no indication as to which criteria was being assessed on the specific questions and therefore I could not steer my answer towards a specific qualification. I prepared for the question in a way that I would respond to each sub-question. There was no reason in my mind why these questions would be asked if they were not to be answered directly.

It is the board's responsibility to ensure that it generates questions and if required probing questions to ensure that they can assess each merit criteria. Managers have the flexibility and ability to correct errors or omissions in the appointment process discovered during the informal discussions. During my informal discussion the managers did not seem to indicate that my interpretation of the question was wrong or impossible, which would indicate a flaw in the question or a flaw in explaining how the question should be answered. Had the question been clear and unambiguous; that I was to mention the process in which the conflict was resolved and not only what the resolution was, my response would have addressed the criteria being assessed. I do not think it is fair that my interpretation of a question leads to my elimination.

Additionally, I wish to understand why the board did not ask any probing questions. As I've quoted in my original email, probing questions are a necessary component of the interview. Their use would have, in all likelihood, avoided this issue. Why would the board prevent themselves from using a tool that enables them to better assess candidates? One of which is deemed by the PSC as necessary.

Finally, I also wish to note that a similar complaint was substantiated by the Public Service Staffing Tribunal in the past. I hope that this error can be corrected before appointments are made to avoid the hardship and grief involved in submitting a formal complaint.

[27] At the hearing, Mr. Lajoie explained that the skill of effective collaboration is indispensable for a team leader at the department and that the question at issue was to assess the candidates' effective interpersonal skills. He added that given the

rotational environment, employees are continually assigned to new positions, and the ability to interact effectively with people from different cultures is very important. Teams vary in size and composition. Although he is a very competent employee, the complainant did not provide a comprehensive response to the question at issue, which is why he was eliminated from the process. The question at issue was not flawed.

[28] The assessment criteria for the question at issue were developed to enhance consistency. They included an array of possible answers and included the following with respect to the candidate:

[1] Is open and listens to others and respects and considers their ideas, opinions, needs and interests;

[2] Readily accepts differences and diversity;

[3] Is empathetic, especially toward people with different values and cultural backgrounds or with special needs;

[4] Seeks solutions that are acceptable to everyone;

[5] Uses tact and maintains composure in difficult situations;

[6] Knows when to speak and when to listen;

[7] Resolves conflicts in an open and constructive fashion;

[8] Puts others at ease;

[9] Consults with individuals before making changes that involve them personally;

[10] Works collaboratively as opposed to competitively;

[11] Gains support from supervisor/s, HR; and

[12] Any additional valid element.

[29] Mr. Lajoie explained that parts of the complainant's response met some of the assessment criteria, namely, elements 2, 3, 4, and 10. However, after the interviewers collectively reviewed all their notes, they concluded that he did not provide enough valid elements to meet the qualification. The definition of "meet" in the rating scale read as follows: "Demonstrates all or most indicators in moderate depth." The definition of "does not meet" read as follows: "Most or all indicators not demonstrated." There was also a definition for "exceeds", which read as follows:

“Demonstrates most or all indicators in considerable depth.”

[30] As for Ms. Zeisler, she explained that her role in the process was to ensure that the staffing action respected the core values of fairness, transparency, accessibility, and representativeness. In addition, she made sure that the process was carried out in compliance with PSC and departmental legislation and policies. She was responsible for training the assessment board members. She highlighted that she made sure that they understood how the department’s staffing processes are conducted.

[31] Ms. Zeisler explained that the question at issue is a behavioural question commensurate with the type asked for a position at the CS-03 group and level. In other words, it was a standard question for such a position. She explained that the department has a global footprint and that conflicts between individuals can occur. She clarified that it is essential for a team leader at the department to have good interpersonal skills because he or she has to lead and manage a team in a diverse environment.

[32] Ms. Zeisler also mentioned the higher level of complexity in the management duties inherent in the position and the need for a certain level of complexity for the interview questions. The assessment board was looking for candidates with the breadth and depth of knowledge needed to fill the CS-03 position, for which their responses to the interview questions were indicators. She maintained that the question at issue, a common behaviour question, was absolutely adequate and perfectly adapted to the target group and level.

[33] At the hearing, Ms. Zeisler recognized that the standard practice at the department is now to include with the interview questions the qualifications that are being assessed. She added that that is a logical way to do things and that it was part of the natural evolution of selection processes. However, in her view, the question at issue was sufficiently clear for candidates to answer it without having the essential qualification being assessed specified. It clearly focused on team conflicts and on persons from diverse backgrounds.

B. The decision not to ask probing questions

[34] The complainant testified that probing questions are a necessary component of an interview. Given that he had misinterpreted the question at issue, their use, in his

case, would have avoided his disqualification. As he wrote to the respondent, “Why would the Board prevent themselves from using a tool that enables them to better assess candidates?” He insisted that the PSC deems probing questions necessary.

[35] Mr. Lajoie specified that the assessment board agreed in advance that no probing questions would be asked because not all candidates require the same degree of such questions. Some candidates require many questions, but others do not, which makes it very difficult for an assessment board to ensure that the same degree of probing questions are posed to all candidates. Thus, to ensure fairness, transparency, and equality to every candidate, the assessment board decided in advance that no probing questions would be asked.

[36] Ms. Zeisler clarified that she instructed the assessment board members not to ask probing questions. She indicated to them that the common practice in the department is to read the questions again to the candidates but not to ask probing questions. It ensures that all candidates are treated fairly. She noted that she was aware of the PSC guide that the complainant had referred to but added that it includes only guidelines. Therefore, it is not mandatory, and adjustments can be made that respect the values of fairness, accessibility, transparency, and representativeness. She emphasized that not asking probing questions is a way of respecting the values of fairness and consistency in how everyone is treated. The assessment board members were also instructed to note the candidates’ responses and to assess those responses against the behaviour indicators.

C. The informal discussion

[37] The complainant testified that once the assessment board was informed that he had misinterpreted the question at issue, it refused to correct the problem. He testified that managers have the ability to correct errors in an appointment process that are discovered during an informal discussion.

[38] On the other hand, Mr. Lajoie stated that the assessment board had enough information to assess the complainant. Thus, it was not necessary at the informal discussion stage of the process to correct any mistake. The complainant’s answer was basically incomplete, as he had not responded to the first part of the question at issue and had very briefly answered the sub-questions. That is why he was eliminated from the process; it was not because the question at issue was flawed. Mr. Lajoie clarified

that it clearly addressed interpersonal conflicts and thus was adequate to assess the candidates' effective interpersonal skills.

[39] With respect to an informal discussion, Ms. Zeisler added that if it is discovered during one that for example, the assessment board made a mistake assessing the candidates' qualifications, it can address that mistake. However, in her view, the assessment board did not make a mistake in this case. The question at issue was not flawed, and there was no error to correct.

D. The reference checks

[40] The complainant produced a chain of emails dated January 13, 2015, between an HR advisor and two members of the assessment board. According to the chain, one suggestion made by one board member, Mr. Varriano, was to carry out reference checks every time a candidate succeeded at the interview. However, another board member, Mr. Lajoie, suggested concurrently making the reference checks because that input would complement the interview questions and thus would be part of the total scoring. On January 15, 2015, Mr. Varriano wrote to the HR advisor, stating: "I believe it was agreed that [the] reference check questionnaire would be sent to Referees following completion of the interview."

[41] However, Mr. Lajoie clarified at the hearing that despite the fact that references were obtained for many of the candidates, the references were not assessed if the candidate had been eliminated from the process after the interview. Mr. Lajoie confirmed that he never saw references for eliminated candidates.

[42] It is not contested that nine days after the interview, on January 21, 2015, the complainant's references received an email asking them to provide a reference for him. They had until January 28, 2015, to provide them.

[43] At the hearing, Mr. Lajoie specified that during the staffing process, Ms. Zeisler had explained that the purpose of the reference checks was to validate the assessment board's assessments and that they were not part of the total scoring. The reference checks were supposed to be made only for the candidates who had been successful at the interview. In this case, given that the complainant did not obtain a passing grade on the interview, his references, although they were obtained, were not assessed.

[44] Ms. Zeisler clarified that the standard practice at the department is to carry out reference checks only if a candidate has been successful at all previous stages of the process. The reference checks obtained in this case for candidates who were eliminated from the process were not considered as they were not necessary.

V. Analysis

A. Was there abuse of authority in the assessment of the merit criteria, particularly at the interview and informal discussion stages?

[45] 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.”

[46] A complainant bears the burden of proof in an abuse-of-authority complaint. See *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, at paras. 48 to 55.

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

[48] The complainant relies on *Tibbs*, at para. 70, in support of his position that the assessment board had acted on inadequate material to assess him and that it had refused to exercise its discretion to correct that. He alleges that he was not assessed fairly because the question at issue was flawed. He insists that the problem was not that he did not understand it but rather that he misunderstood it. He does not think it is fair that that misinterpretation led to his elimination. He relies on an extract from the archived *Guide to Implementing the Assessment Policy* that reads as follows: “‘Fair’ administration of the assessment means that individuals have had an opportunity to demonstrate their merit for the position and that managers have a sound rationale for

the decision(s) that are made.” The complainant states he has the appropriate effective interpersonal skills for the CS-03 position but that he was not given an opportunity to demonstrate them.

[49] The complainant submits that the former Public Service Staffing Tribunal (“the formal Tribunal”) once upheld a similar complaint. In *Poirier v. Deputy Minister of Veterans Affairs*, 2011 PSST 3, the complainant in that case applied for a position advertised in a job opportunity advertisement (JOA). His interpretation of the instructions in the JOA was that each candidate was to provide one or two paragraphs for all the qualifications. The respondent’s intended interpretation of the instructions was that each candidate was to provide one or two paragraphs for each qualification.

[50] The complainant was eliminated from the appointment process based on his cover letter, which adhered to the form and substance of the JOA instructions, as he understood them. He alleged that when he met with the respondent’s representatives for an informal discussion, their minds were closed, and they were not prepared to correct the initial decision to screen him out.

[51] The former Tribunal found that the JOA instructions were flawed and that the complainant ought to have been afforded more flexibility. It found that the poor wording of the instructions directly contributed to his elimination from the appointment process. It thus agreed with him that the wording of the instructions for the JOA was unclear and that it could have led to his interpretation, which was different but reasonable. Had the instructions as to form been clear, he would have known that he was expected to provide one or two paragraphs on each experience qualification.

[52] The complainant also relies on *Ostermann v. Deputy Minister of Human Resources and Skills Development Canada*, 2012 PSST 28, at para. 37, in support of his position that the respondent committed a serious error because the question at issue did not properly assess the qualification being evaluated. He submits that not indicating which essential qualification was assessed for each question was a serious error as it did not allow the candidates to know how the questions should be answered. Specifically, he could not steer his answer towards a specific qualification given that those being evaluated were not specified. Ultimately, his response did not address effective interpersonal skills. Thus, his, which were effective, were not

addressed or assessed.

[53] The complainant also referred me to *Hammond v. Deputy Head of Service Canada*, 2008 PSST 8, at para. 13, which states: “The key principle established in *Madracki* is that an assessment tool must test the qualification; if not, the assessment is unreasonable. Although the *Madracki* decision predates the current legislative framework, the principle remains valid.” In the complainant’s view, his response to the question at issue proves that his interpersonal skills were not assessed. He submits that the respondent, in turn, has not proven that he was assessed for this qualification, which shows that it assessed him on inadequate material.

[54] The complainant also submits that the sub-questions did not appropriately lead him to discuss his interpersonal skills. For example, sub-question 4 asked how the problem was resolved. In his view, it should have been worded as follows: “What steps did you take to resolve the problem?” Then, he states, he would have described his conversations or interactions with his colleagues or subordinates. He would have described his actions rather than the solution.

[55] The complainant also submits that the assessment board, particularly Mr. Lajoie, never denied that he might have misinterpreted the question at issue. Thus, the complainant suggests that this is an admission and that it confirms that the question at issue was flawed. He specifically stated that during the informal discussion, the managers present did not indicate to him that his interpretation of the question at issue was wrong or impossible, which indicates the flaw in it.

[56] On the other hand, Mr. Lajoie testified that the complainant did not directly answer the first part of the question at issue and that he only very briefly answered the sub-questions. That might be why he alleges that he misinterpreted the question at issue. But, according to Mr. Lajoie and Ms. Zeisler, the fact is that he did not provide a comprehensive response and thus did not demonstrate that he is capable of handling conflicts. The respondent submits that the purpose of the question at issue was to assess the candidates’ ability to constructively handle conflicts, thus the interpersonal skills of each candidate had to be detailed. The respondent submits that the question at issue was adequate and clear.

[57] There is no doubt that the complainant is a very competent employee. However, I cannot conclude that he was asked a misleading question and that the assessment board acted on inadequate material to assess him.

[58] I find that this case is distinguishable from *Poirier*. In the present case, it is clear that the complainant did not provide a complete answer to the question at issue. However, the problem is not a lack of clarity in the question but the fact that he did not fully answer it. Unlike the situation in *Poirier*, I cannot conclude that the question at issue was susceptible to different interpretations and that that led directly to the complainant being eliminated from the process. Rather, it is because the complainant did not answer all parts of the question that he was eliminated from the process.

[59] The first part of the question, which the complainant did not answer, read as follows: “In this position, you have to lead teams with diverse backgrounds and varying skill levels which can sometimes lead to conflict in a team environment. Tell me about a time in the past when you experienced such conflict.” Had he answered that part, in addition to the sub-questions, he would likely have provided information from his past that was relevant to the effective interpersonal skills qualification being evaluated. He could have explained what he actually did when, in the past, he had experienced a conflict in a team environment. In addition, had he provided a full answer to the following sub-question: “What was your role [in the conflict]?”, he would likely have described his interactions with others. Instead, he briefly answered that his role had been to identify a solution.

[60] Therefore, I conclude that the complainant has not established that he was asked a misleading or flawed question.

[61] With respect to probing questions, the complainant submits that the assessment board erred by not using a tool that would have enabled it to better assess him. In support of his arguments, he relies on an extract of the *Public Service Commission Structured Interview Guide*. A section of it goes into detail about probing questions. The complainant highlights the following from that document: “The board may need to request additional examples or more specific details to more fully understand the applicant’s answers.” Among other things, the guide also states that asking probing questions can be a necessary component of the interview. He submits that probing questions in his case would have ensured that the assessment board obtained

sufficient data to assess the qualification at issue.

[62] The complainant also relies on *Ostermann*, at para. 38; *Bowman*, at para. 122; and *Poirier*, at paras. 66 to 68, in support of his position that the assessment board refused to exercise its discretion through the strict application of a guideline (to not ask probing questions), which fettered its ability to assess each candidate with an open mind.

[63] On the other hand, the respondent submits that the following sentence is also in the PSC's structured interview guide: "Probing questions should be standardized; otherwise you may inadvertently give an advantage to some applicants, while disadvantaging others." The respondent submits that the evidence is clear. At the start, the assessment board decided not to ask probing questions, to be fair to the candidates.

[64] In addition, the respondent relies on *Akhtar v. Deputy Minister of Transport, Infrastructure and Communities*, 2013 PSST 19, at paras. 82 and 83, which mentions that PSC guides are instructive but that they do not constitute policies within the meaning of s. 29 of the *PSEA*. Therefore, they are not policies that bind a deputy head. They are tools to help conduct appointment processes.

[65] I agree with the former Tribunal's finding in *Akhtar* that when an assessment board decides to use a method or tool that is not directly in line with a PSC recommendation, this does not in itself render the assessment method or tool unfair or otherwise constitute an abuse of authority. In this case, although the decision of the deputy head, who had the decision-making authority, was not directly in line with the PSC recommendation, as probing questions were avoided, the decision does not in itself constitute an abuse of authority. Based on the evidence, the decision respected the key staffing values of fairness and transparency set out in the *PSEA*'s preamble. The preamble recognizes that the principles of fairness, transparency, accessibility, and representativeness are applied with a view to ensuring merit.

[66] In addition, I note that in *Pynn v. Commissioner of the Correctional Service of Canada*, 2014 PSST 15, at para. 50, the former Tribunal held that the assessment board's decision not to prompt the complainant during the interview did not constitute an abuse of authority given that there was no evidence before it that the

complainant was treated differently from any other candidate assessed in the interview. This case is similar in that there is no evidence that the complainant was treated differently from any other candidate assessed in the interview.

[67] Therefore, I conclude that the complainant has not established that the assessment board committed a serious error or an abuse of authority by deciding not to ask probing questions in the appointment process.

[68] The complainant also alleges that the assessment board failed to correct the problem when it was told about the flaw in the question at issue. He relies on the decision in *Payne v. Deputy Minister of National Defence*, 2013 PSST 15, at para. 45, in support of his position that the assessment board was inflexible during the informal discussion.

[69] Relying on *Rozka v. Deputy Minister of Citizenship and Immigration Canada*, 2007 PSST 46, at para. 76, the respondent submits that the purpose of the informal discussion is not to reassess a candidate. However, if it is discovered that an error was made, it provides an opportunity for the manager to correct it. But in this case, there was no error to correct. The question at issue was not misleading.

[70] Given my finding that the question at issue was not misleading or flawed, I agree with the respondent that there was no serious error to correct. Therefore, I cannot conclude that the respondent improperly refused to exercise its discretion to correct the issue.

[71] Finally, the complainant alleges that the assessment board should have considered the information available in the reference check to assess the competency that he failed at the interview stage of the process. He states the emails dated January 13, 2015, prove that the references were supposed to be a complement to the interview questions and thus part of the total scoring. In any case, he submits that it is incorrect to ignore relevant information, whether or not it was collected by mistake. The complainant relies on *Payne*, at para. 44, in support of his position that the assessment board should use all information at its disposal, as long as it is factual. He also relies on a section of the PSC document entitled *Structured Selection Interview*, which focuses on combining information from different methods.

[72] Mr. Lajoie clarified at the hearing that despite the fact that references were obtained for the complainant and other candidates, the references were not assessed if the candidates had been eliminated from the process at the interview stage. Mr. Lajoie confirmed that he never saw the references for the candidates eliminated from the process, including those of the complainant.

[73] Ms. Zeisler confirmed that the information provided by the complainant's references was not considered because he was not successful at the interview stage and was eliminated from the process.

[74] The respondent relies on *Costello v. Deputy Minister of Fisheries and Oceans Canada*, 2009 PSST 32, in support of its position that when a reference check is made for verification purposes, as in *Costello*, then it is used only to ensure that the reference identifies no discrepancies with respect to the other assessment tools, like the interview.

[75] In *Costello*, the plan was that references would be used only as tools to validate the completed assessments. The employer in that case did not mark or weigh the references and did not use them to determine the candidates' scores. The former Tribunal stated that the respondent in that case was under no obligation to rate the references obtained for Mr. Costello when it assessed the qualifications of the position. Thus, it found that the respondent had not abused its authority by not rating the references and by not including them in the complainant's assessment.

[76] The respondent also relies on *Visca v. Deputy Minister of Justice*, 2007 PSST 24, at para. 38, in support of its position that it was not a serious error to obtain the complainant's references even though they were not needed. Such an error is clearly not serious and is not indicative of wrongdoing that could constitute abuse of authority.

[77] I note that the former Tribunal and the Board have often stated that much more is required than mere errors and omissions for something to constitute an abuse of authority (see, for example, *Tibbs*, at para. 65, and *Iwata v. Deputy Minister of Human Resources and Skills Development Canada*, 2012 PSST 19, at para. 12).

[78] The rating guide confirms that the references were not marked for the candidates eliminated from the appointment process. For them, "not applicable" is

indicated under “references”. For the successful candidates, if the references identified no discrepancies that affected the assessments, the candidates received “meets” under “references”. Therefore, I am satisfied that the respondent did not mark or weigh the references for the candidates eliminated from the appointment process and that it did not use them to determine the candidates’ scores. The evidence shows that references were instead used only as tools to validate the completed assessments. I am satisfied that that is a correct practice.

[79] Therefore, I conclude that the complainant has not demonstrated that the respondent abused its authority by not rating his references and by not including them in his assessment.

[80] As a result, the complainant has not demonstrated that the respondent unfairly and improperly eliminated him from the appointment process by using inadequate information or by refusing to exercise its discretion to correct the alleged flawed question or in any other way.

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

(The Order appears on the next page)

VI. Order

[82] The complaint is dismissed.

October 5, 2017.

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