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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

JOHN WILKINSON

Complainant

and

DEPUTY MINISTER OF NATIONAL DEFENCE

Respondent

Indexed as
Wilkinson v. Deputy Minister of National Defence

In the matter of complaints of abuse of authority pursuant to 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: Louis Bisson, Union of National Defence Employees

For the Respondent: Cristina St-Amand Roy, counsel

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

Heard at Regina, Saskatchewan,
April 18 and 19, 2017.

I. Introduction

[1] John Wilkinson, the complainant, filed two complaints of abuse of authority concerning the proposed appointment of Timothy Yates and the appointment of Sarah Lacombe to the position of support services manager, classified AS-05 ("the AS-05 position"), with the Department of National Defence (DND) in Moose Jaw, Saskatchewan.

[2] The complainant's view is that the Deputy Minister of National Defence ("the respondent") abused its authority in the selection process at issue. He alleges that there was abuse of authority in the assessment of the merit criteria and that the process used to determine the right fit was seriously flawed and was not properly documented. He also claims that the respondent breached an internal direction to hire internal candidates first.

[3] The complainant originally alleged as well that Mr. Yates was favoured in this appointment process but withdrew this allegation at the hearing. Similarly, he initially alleged that the respondent had omitted obtaining prior authorization to hire the proposed appointee and the eventual appointee, but he also withdrew this allegation at the hearing.

[4] The respondent denies that an abuse of authority occurred. It states that the proposed appointee, Mr. Yates, and the actual appointee, Ms. Lacombe, were fully assessed and were found to meet the qualifications for the position and the right-fit criteria. The respondent also states that the complainant was properly assessed and that it did not breach any direction.

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

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

[7] For the reasons that follow, the complaints are dismissed. It was not established that the respondent abused its authority in the appointment process at issue.

II. Background

[8] On July 22, 2011, the respondent launched an advertised internal appointment process with the objective of creating a pool of qualified candidates to staff current and future vacancies for support services manager positions classified at the AS-05 group and level. Three candidates, including the complainant, were found qualified and were placed in the pool.

[9] On January 19, 2015, the "Notification of Appointment or Proposal of Appointment" for Mr. Yates was posted on the public service jobs website. On January 21, 2015, the complainant filed the first complaint of abuse of authority (PSLREB File No. EMP-2015-9512) with the Public Service Labour Relations and Employment Board ("the former Board") under s. 77 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*).

[10] On January 22, 2015, Mr. Yates declined his proposed appointment to the position. Thus, on February 23, 2015, another Notification of Appointment or Proposal of Appointment, this one for Ms. Lacombe, was posted on the public service jobs website. On February 26, 2015, the complainant filed the second complaint of abuse of authority (PSLREB File No. EMP-2015-9632) with the Board under s. 77 of the *PSEA*.

III. Preliminary matters

[11] At the hearing, the respondent submitted that since Mr. Yates was never appointed to the AS-05 position, as he declined the appointment offer, the Board does not have jurisdiction to deal with the complaint filed pursuant to his proposed appointment as none was made. The Board's jurisdiction requires that the complaint meet the conditions of s. 77 of the *PSEA*. According to the respondent, the complaint in file EMP-2015-9512 does not meet the conditions.

[12] The complainant, on the other hand, submitted that the Board does have jurisdiction to deal with a complaint filed when a proposed appointment has been made, given the specific wording of s. 77 of the *PSEA*. If the complaint is upheld, the corrective action pursuant to s. 81(1) could be for the Board to order the deputy head not to make the appointment or to make a declaration that there was an abuse

of authority.

[13] A person's right to file a complaint concerning an internal appointment process is governed as follows by s. 77(1) of the *PSEA*:

> ***77 (1)*** *When the Commission has made* ***or proposed an appointment in an internal appointment process****, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Board's regulations — make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of*
>
> ***(a)*** *an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);*
>
> ***(b)*** *an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; or*
>
> ***(c)*** *the failure of the Commission to assess the complainant in the official language of his or her choice as required by subsection 37(1).*
>
> [Emphasis added]

[14] Subsection 15(1) of the *PSEA* provides for the PSC to delegate appointment authority to deputy heads. The appointment authority in this case has been delegated to the Deputy Minister of National Defence.

[15] I find that the statutory language is clear. The Board does have jurisdiction to deal with a complaint filed when an appointment has been proposed and the complainant, who is in the area of recourse, was not appointed or proposed for appointment.

[16] In particular, since the complaint in file EMP-2015-9512 was filed pursuant to a proposed appointment and the complainant, who is in the area of recourse, was not appointed or proposed for appointment, I have jurisdiction to deal with it.

IV. Issues

[17] I must determine the following two issues:

> **Issue 1:** Was there abuse of authority in the assessment of the merit criteria and the process used to determine the right fit?

Issue 2: Was there abuse of authority by reason of a breach by the respondent of an internal direction to hire internal candidates first?

V. Relevant facts

[18] The assessment board members were Julia Roy, who at the time the assessment was made was the lieutenant-commander and commanding officer of 23 CF Health Services Centre (she retired from the Canadian Armed Forces in February of 2013), and Captain (Lieutenant) and Support Services Manager Melissa McGregor. They evaluated the candidates and found that three, including the complainant, met all essential qualifications. All three also met some of the asset qualifications, while not meeting others. The three were put in a pool of qualified candidates for the position.

[19] The complainant explained that at the time he applied for the position, he was a petty officer 1st class (PO1) with the Royal Canadian Navy. He had 34 years of service in the military. Once the evaluations were completed, he was informed that he was found qualified for the position. The complainant testified that Ms. Roy contacted him to offer him the position and to ask him if he was available to go on training for it. After he emailed her on March 27, 2012, stating, "Request approval to attn the J8 conference", he received the following response from Ms. Roy:

…

> *Per our telecon today, you are authorized to attend the subject forum in Edmonton using the fin code noted in the admin instruction. Please note that this authority is based on anticipatory staffing of the AS 05 position in Moose Jaw. Please book your travel and accn [sic] per admin instruction and cc Lt McGregor. Thank you.*

…

[20] On April 13, 2012, the complainant emailed her again, stating as follows:

…

> *Just touching base to keep you in the loop as yet I have not received a letter of offer did you still want me to attend the up coming training session in Edmonton I have made all the bookings and I will be driving. If anything else occurs I will let you know. Have a great day.*
>
> [*Sic* throughout]

[21] The same day, Ms. Roy replied, stating the following: "Yes, please attend. We are also waiting on the letter of offer. You will get a chance to meet Lt Melissa McGregor as she is also attending."

[22] The complainant specified that at that time, he was waiting for a letter of offer from DND Headquarters in Ottawa, Ontario. He also asked whether he could present his release letter to the Canadian Armed Forces. He was advised to wait until he received a letter of offer. He understood that he needed to start his new job before being released for his pay in the AS-05 position to be at the higher end of the range.

[23] The complainant attended the training in Edmonton, Alberta, on April 17 and 18, 2012. He said he was introduced to support services managers from other regions as the incoming support services manager in Moose Jaw.

[24] Five months later, the complainant had not yet received a letter of offer. On September 14, 2012, he emailed Ms. Roy, stating the following: "Again just a follow up and wondering if there is anything that I can do or anyone I can contact. Thanks for your assistance."

[25] On September 20, 2012, Ms. Roy replied, stating the following:

> *We are caught up in a government-wide hiring freeze now – there are some exceptions, however, the position you competed for is not one of them. I can only offer my understanding of your frustration with this process and encourage you to hang in there until the new fiscal year. You will be informed of a decision as soon as we have something from Ottawa.*

[26] However, the complainant never received a letter of offer for the position. He said that periodically, he made calls or sent emails to inquire about the letter of offer and to express his interest in the position. He added that he still hoped to receive a letter of offer three years later when Mr. Yates and Ms. Lacombe were proposed for appointment in 2015. The complainant explained that he was working in Regina, Saskatchewan, but that his family was in Moose Jaw.

[27] While being cross-examined, the complainant was asked if he was promised a letter of offer for the position, to which he replied, "No."

[28] The complainant also testified that in 2013, someone else was appointed into the position for four months less one day. After that, he was asked if he would be interested in a one-year appointment. He replied that he was interested. However, later on, he was informed that he could not be offered the position since although he was in the military, he was not a public servant employed by DND, and thus, he was not considered internal to DND. The Job Opportunity Advertisement (JOA) specifically contained the following words, as in July 2011, the respondent's intention was to reduce the number of persons it hired from outside DND:

> *As per DM/CDS/VCDS direction; to implement current DND/CF Workforce Planning and Management, and to prevent further growth that would adversely affect fiscal budgets: -Employees internal to DND may be screened, assessed and appointed before other applicants.*

[29] In addition, in 2013, when Mr. Yates, a public servant, was seconded to the position for one year, the complainant filed a complaint with the Board with respect to this one-year secondment; however, the complainant later withdrew it.

[30] The complainant became a public servant in March of 2014. He now holds the position of assistant to the wing commander, classified SCI-03, with DND.

[31] The AS-05 position was not always filled, but when in the fall of 2014 the complainant heard that it would be filled on an indeterminate basis, he asked to meet with the Lieutenant-Commander and the Major responsible for filling it. During a discussion he had with them in October of 2014, he was asked if he was still interested in it. He replied that he was. He also informed them that he never received a letter of offer for the position in 2012.

[32] On January 19, 2015, the notice proposing the appointment of Mr. Yates was posted on the public service jobs website. However, he declined the offer. The notice of consideration of Ms. Lacombe was then posted on it on February 16, 2015. The notice of her appointment was posted on February 23, 2015. She accepted the job offer. When she did so, she was a public servant, but not a DND employee.

[33] The manager who had initiated the hiring process, Ms. Roy, explained that she was the lieutenant commander and commanding officer at the 23 CF Health Services Centre from July 2009 to July 2012. She initiated the selection process in July of 2011. She explained that the JOA contained the statement that employees internal to DND

"… may be screened, assessed and appointed before other applicants" because human resources (HR) specialists had recommended that it be added as it was part of the policy and practice context at the time. The word "may" was used to mean that it was discretionary.

[34] Ms. Roy also explained that she established the essential and asset qualifications for the position and that she determined the assessment methods. The essential qualifications were those necessary for the work to be performed; a candidate had to meet them to be appointed. The asset qualifications were not essential to perform the work, but they could help the selection board identify the right fit for the position. Nine essential and 14 asset qualifications were assessed. Ms. Roy added that the position was in the field of managing HR, information management and technology (IM/IT), and financial resources.

[35] The candidates for the position were assessed through preliminary screening, a written test, an interview, and a reference and validation check.

[36] After each candidate was evaluated, Ms. Roy and Captain McGregor separately completed an evaluation guide for each candidate, which contained the marks awarded to them for each of the 23 qualifications assessed. The notes taken during the interviews were transcribed into the evaluation guides.

[37] The HR representative assisting Ms. Roy then prepared a table that showed that three candidates met all the essential qualifications, five candidates did not meet them all, and two had withdrawn from the process. The three successful candidates were placed in the pool of qualified candidates.

[38] Ms. Roy explained that after the reference checks were completed, she was informed of the hiring freeze. Thus, no appointment was made to the position at that time. When asked if she informed the complainant in 2012 that he was the successful candidate, she replied that she made no offer to anyone at the time and that she hoped that she did not imply to him that he had been selected. While she informed the three candidates that they were qualified and were placed in the pool, because of the hiring freeze, she never received authorization to staff the position. Thus, no one was selected for the position, and no criteria or rationale were prepared to identify the right fit for the position.

[39] Ms. Roy mentioned that she occasionally received phone calls and emails from the complainant, as he wanted feedback on his interview, and that they discussed the opportunity for him to receive training for the position. She explained that she could authorize the training for him as he was in the military. However, she could not do the same for the other two qualified candidates because they were neither with DND nor in the military (they were public servants external to DND); thus, paying their travel costs and expenses was not possible. She believed the complainant could benefit from the annual forum held in Edmonton that addressed the principles of sound financial management, given that he was a qualified candidate in the pool. Nevertheless, she testified that she did not tell him he had been selected for the position. An authorization to staff the position needed to be obtained from DND Headquarters in Ottawa before the position could be staffed.

[40] Ms. Roy acknowledged that in an email dated March 27, 2012, in which she authorized the complainant to attend the Edmonton forum, she wrote that the authorization was based on "… anticipatory staffing of the AS 05 position in Moose Jaw". However, she specified that no final decision had yet been made as to which of the three qualified candidates would be selected for the position.

[41] Again, on April 13, 2012, when Ms. Roy replied as follows to the complainant, "Yes, please attend. We are also waiting on the letter of offer," she specified that she meant that DND Headquarters in Ottawa had not yet given her permission to issue a letter of offer. The hiring freeze had not been rescinded. Thus, no decision had been made with respect to the candidate selected for the position.

[42] On September 20, 2012, when Ms. Roy answered the complainant's email, she had already left her position at 23 CF Health Services Centre in Winnipeg, Manitoba, and had started in a new position in Edmonton. To be helpful, she got back to the complainant to confirm that the hiring freeze was still on and that with respect to the selection process, he would be informed "… of a decision as soon as we have something from Ottawa."

[43] Major Guy Langevin, who from July 2014 to January 2016 was the clinic manager and deputy commanding officer for the 23 CF Health Services Centre, was not involved in the selection process before he started in that position. He also replaced Ms. Roy in January 2016 as commanding officer there.

[44] Major Langevin explained that the AS-05 position needed to be staffed because of the very important work that needed to be accomplished in the Moose Jaw clinic. He became involved in the selection process when approval to staff the position was granted in the fall of 2014. He then contacted HR to see if the pool of candidates for the position was still valid. He learned that it was and that it contained three qualified candidates.

[45] On October 21, 2014, Major Langevin prepared a table to measure how the three qualified candidates had performed. He calculated their overall scores by adding all their marks for both the essential and asset qualifications, and he added one point to the total score for each qualification that had been met but for which no mark was given. It may be noted that each of the three candidates had a passing score for all the essential qualifications. Mr. Yates came first with a total of 103, Ms. Lacombe second with a total of 102, and the complainant third with a total of 82.

[46] On the same date, Major Langevin prepared a "Right Fit Statement", which stated that after reviewing the testing and interview results and the reference checks, the results showed that Mr. Yates's "strongest strengths" were (1) experience developing business plans; (2) ability to research, monitor, and analyze data for use in decision making; and (3) being customer service oriented. The statement also specified that these skills were priorities for the 23 CF Health Services Centre, and as such, Mr. Yates met the criteria of the "best fit candidate" for the position.

[47] Then, Major Langevin learned that a person with priority status was available. That person was assessed, was deemed qualified, and was offered the position over Mr. Yates. However, that person held the position only for one month.

[48] On January 6, 2015, Major Langevin asked the following of HR: "Please contact Mr. Yates to see if he is still interested and if so send him a letter of offer." However, Mr. Yates declined the job offer on January 22, 2015.

[49] Major Langevin testified that given that Ms. Lacombe had obtained the second-highest score, she was then determined to be the right fit for being appointed to the position. He did not prepare another Right Fit Statement for her. On the basis that her overall score in the selection process was 102, the second highest, Major Langevin considered that she was the next-best right fit for the position. In the circumstances, he simply wrote the following to HR:

> *It looks like Mr. Yates has declined the offer for the Support Service Mgr position in Moose Jaw. We then have to go back to our second candidate for the position, can you contact Sarah Lacombe if she is still interested.*

[50] Ms. Lacombe was contacted, and she accepted the job offer.

VI. Analysis

[51] 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."

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

A. Issue 1: Was there abuse of authority in the assessment of the merit criteria and the process used to determine the right fit?

1. Merit

[53] The complainant alleges that there was abuse of authority in the assessment of the merit criteria.

[54] Section 30 of the *PSEA* sets merit as the cornerstone of public service staffing and reads in part as follows:

> ***30 (1)*** *Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.*
>
> ***(2)*** *An appointment is made on the basis of merit when*
>
> > ***(a)*** *the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and*
> >
> > ***(b)*** *the Commission has regard to*
> >
> > > ***(i)*** *any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the*

> *future,*
>
> ***(ii)*** *any current or future operational requirements of the organization that may be identified by the deputy head, and*
>
> ***(iii)*** *any current or future needs of the organization that may be identified by the deputy head.*
>
> …

[55] Section 36 of the *PSEA* provides that a deputy head may use the following:

> *… 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).*

[56] The respondent has broad discretion to determine the assessment methods to be used.

[57] The complainant agrees that a delegated manager may choose to exercise his or her discretion by using any combination of essential and asset qualifications to assess candidates on the basis of merit. But he alleges that once a delegated manager has identified asset qualifications and has assessed the candidates against them, the candidates that do not meet them cannot be appointed on the basis of merit because they do not meet the qualifications referred to in ss. 30(2)(a) and (b)(i) of the *PSEA*. In his view, successful applicants must meet the essential qualifications and any asset qualifications that were identified and used.

[58] In particular, the complainant submits that since the assessment board established the requirement for the candidates to meet 14 asset qualifications, it could not subsequently override this requirement if the candidates did not meet all of them. In this case, as all three candidates failed at least one of the asset qualifications, the complainant submits that none of them could be appointed on the basis of merit.

[59] In addition, the complainant points out that Major Langevin used both the essential and asset qualifications to make the appointment decision. According to the complainant, there was a requirement that the selected candidate meet both the essential and asset qualifications to be appointed since these qualifications were used in making the appointment decision. The overall score was calculated from the marks

obtained for all qualifications.

[60] The complainant relies on *Haarsma v. the Deputy Minister of National Defence*, 2013 PSST 5, in support of his position. In that case, the complainant was screened out of an internal appointment process for an AS-06 position because he did not possess the necessary education qualification. The asset qualification of graduation with a degree from a recognized university was used to screen candidates. The complainant in that case alleged that the respondent abused its authority by improperly assessing his education. The respondent submitted that the complainant was eliminated from the appointment process since he did not meet the asset qualification that was used in screening.

[61] The Public Service Staffing Tribunal ("the former Tribunal") found that the complainant in that case had not proven abuse of authority in the establishment of the education qualification. The evidence supported a finding that the manager established the requirement for a candidate to possess a university degree based on the work to be performed. The former Tribunal also stated that nothing in the governing legislation precluded a manager from using an asset qualification at the initial screening stage of an appointment process.

[62] The complainant submits that that decision supports his view that once a delegated manager establishes the requirement for a candidate to possess an asset qualification based on the work to be performed, like a university degree, then if a candidate does not meet that qualification, the person cannot be appointed on the basis of merit.

[63] The complainant also refers me to a number of paragraphs in the PSC's written submission to substantiate his position. The relevant extracts are as follows:

> *45. The PSC* Assessment Policy *states that … the assessment processes and methods effectively assess the essential qualifications* ***and other merit criteria identified*** *and are administered fairly.*
>
> *46. The objective of the PSC Assessment Policy is to ensure that the assessment processes and methods result in the identification of the person(s) who meet the qualifications* ***and other merit criteria used in making the appointment decision****, and provide a sound basis for making appointments according to merit.*

> PSC Assessment Policy, *PSC Book of Authorities and Documents, Tab 24.*
>
> *47. The PSC* Guide to Implementing the Assessment Policy *specifies that* ***prior to a specific appointment being made, all identified essential qualifications must have been assessed and any identified asset qualifications****, organizational needs and operational requirements.*
>
> …
>
> *49. Pursuant to section 30 of the* PSEA*, all appointments to or from within the public service* ***must be based on merit*** *with the exception of acting appointments of less than four months (*PSER *ss. 14(1)) and casual appointments (*PSEA *s. 50).*
>
> *Sections 30 and 50,* PSEA
>
> *Subsection 14(1),* PSER
>
> *50. Furthermore, the PSC* Selection and Appointment Policy *states that appointments are based on merit … The policy requires that persons who are proposed for appointment or appointed* ***must meet each essential qualification and also any asset qualifications, operational requirements and organizational needs that were used to make the appointment decision.***
>
> [Emphasis added]

[64] On the other hand, the respondent submits that the essential qualifications are those that the candidate must meet to be appointed as they are necessary for the work to be performed. The asset qualifications are not essential to perform the work but can help the selection board identify the right fit for the position. Ms. Roy also explained that she viewed the essential qualifications as those necessary for the work to be performed; they had to be met for a person to be appointed. The asset qualifications were not essential to perform the work.

[65] The respondent refers me to the former Tribunal's decision in *Jalal v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 38 at para. 95, which reads as follows:

> *It is clear from the wording of s. 30(2) that, to be appointed, a person must meet the essential qualifications, but not necessarily the asset qualifications. The delegated manager can take into consideration whether the candidate possesses the asset qualification in deciding whether to appoint that person, but he or she can appoint a person who does not*

> *possess them. See, for example,* Steeves and Sveinson v. Deputy Minister of National Defence, *2011 PSST 0009, at para. 57.*

[66] I agree with this line of reasoning. It is clear from the wording of s. 30(2) of the *PSEA* that to be appointed, a person must meet the essential qualifications but not necessarily the asset qualifications. Paragraph 30(2)(a) specifically provides that the delegated manager "is satisfied" that the person to be appointed meets the essential qualifications for the work to be performed. Subparagraph 30(2)(b)(i), on the other hand, provides that the delegated manager "has regard to" any additional qualifications that he or she may consider an asset for the work to be performed.

[67] Given the clear wording of s. 30(2)(a) of the *PSEA*, I am satisfied that the three candidates in the pool were qualified for the position as they had demonstrated that they possessed all essential qualifications necessary to perform the work. Pursuant to s. 30(2)(b)(i), Major Langevin could then "have regard to" the asset qualifications. He did so by calculating the candidates' overall scores by adding their marks obtained for both the essential and asset qualifications, which was not a contravention of s. 30(2)(b)(i).

[68] The complainant also believes that his answer to interview question 15, which assessed leadership, deserved a higher mark. Ms. Roy testified that while he provided a good answer to that question, it did not meet the "excellent" criterion according to the grid used, which is why he obtained 8/10 and not 9/10 or 10/10. The score on the interview question could potentially impact the second stage of this appointment process, as the scores obtained at the interviews were tabulated and used in the process of choosing a candidate from the pool. However, I note that in the best-case scenario, the complainant would have obtained two additional points, which would not have made any difference on the candidates' ranking, given the significant differences in their overall scores.

[69] The respondent submits that since the complainant qualified for the position, it is pointless to address his concern that he was not properly assessed in the appointment process.

[70] The parties often disagree about assessment boards' answer ratings. However, in this case, it was a judgment call by the assessment board, which was in the best position to determine the degree to which the complainant was successful.

As mentioned in *Drozdowski v. Deputy Head (Department of Public Works and Government Services)*, 2016 PSLREB 33 at para. 36: "The assessment board must have some leeway in determining what constitutes satisfactory answers and to what extent the answers reflect the qualities sought …". In this case, points were attributed according to the rating scale's description of the types of answers provided. I am satisfied that the complainant's answer was properly assessed.

[71] Therefore, I conclude that the complainant has not shown abuse of authority in the assessment of the merit criteria.

2. <u>Right fit</u>

[72] The complainant believes that the process used to determine the right fit was seriously flawed and that it was not properly documented. In addition, he submits that his experience working in a healthcare setting should have prevailed over other considerations. In his view, the other qualified candidates did not have that experience.

[73] In support of his position, the complainant refers me to two paragraphs from the PSC's written submission, which read as follows:

> ***51.*** *The PSC* Selection and Appointment Policy *also requires that the reasons for the appointment decision be documented. This helps to ensure that the selection for appointment is fair and transparent.*
>
> Selection and Appointment Policy, *PSC Book of Authorities and Documents, Tab 27.*
>
> ***52.*** *The PSC* Guidance Series : Assessment, Selection and Appointment *specifies in section 2.1 that there are several selection options a manager may use in selecting the person suited for the job (often referred to as the "right fit") and choosing from among persons who have been found qualified during the assessment process. In addition to assessing the essential qualifications, other merit criteria, such as asset qualifications, organizational needs or operational requirements that were identified at the beginning of the appointment process, may also be applied in making a selection decision. This section also specifies that managers can compare and rank persons where it makes sense to use the ranking of persons in accordance with the qualifications. However, neither the PSEA nor the PSC* Appointment Policy *includes any such requirement in making selection decisions. Managers may use their judgment by taking into account the guiding values and practical management considerations. Managers are expected to be able to explain appointment*

> *decisions. Selection must be based on the merit criteria and the person selected must be qualified.*
>
> Guidance Series - Assessment, Selection and Appointment, *PSC Book of Authorities and Documents, Tab 26.*

[74] When Major Langevin, the hiring manager, was informed that the qualified pool of candidates for the position was valid, he decided that he would select, as the right fit for the position, the candidate who had obtained the highest overall score. Thus, he added the candidates' marks for each essential and asset qualification to see who had obtained the highest overall score. The table that he prepared to calculate the scores was filed into evidence. It shows that Mr. Yates had the highest overall score, 103, and that Ms. Lacombe was next with an overall score of 102. The complainant's overall score was 82.

[75] The respondent submits that broad discretion is given to managers to establish the qualifications for the positions they want to staff. Accordingly, Major Langevin had the discretion to choose from the qualified candidates the person who, in his opinion, was the right fit for the position.

[76] The former Tribunal described "right fit" as follows in *Marcil v. Deputy Minister of Transport, Infrastructure and Communities*, 2011 PSST 31 at para. 48:

> *The term "right fit" is not a term found in the* PSEA. *It is a term used in the human resources community to describe the basis for deciding who will be appointed from among qualified candidates in an appointment process. The merit and other criteria used to select someone for appointment are recorded in a written right fit rationale. The Tribunal has also used this term to illustrate the manager's discretion to choose among qualified candidates the person who, in his or her opinion, is the right fit….*

[77] Furthermore, as noted in *Stamp v. Commissioner of the Correctional Service of Canada*, 2014 PSST 4 at para. 30, a delegated manager may choose to exercise his or her discretion by using any combination of essential and asset qualifications for the determination of the right fit criteria.

[78] I recognize that the facts that surround the discussions that Ms. Roy and the complainant had in 2012 about the results of the process are ambiguous. Indeed, there was confusion, and there might have been a misunderstanding as to whether the

complainant was the right fit for the position and would get the job. However, according to the evidence, it is clear that he never received a letter of offer for the position. He understood that he would receive one. However, for several reasons, including the hiring freeze, he never did.

[79] I am also satisfied that Ms. Roy never selected anyone for the position. She confirmed that while she was the commanding officer, no criteria or rationale were prepared to identify the right fit for the position. In addition, the respondent established that no letter of offer was prepared because Ms. Roy was not given authorization to fill the position. The emails that the complainant submitted into evidence confirm that the training he received was in anticipation of the future staffing of the position and the prospect that he might be the successful candidate. However, the position could not be filled because the authorization to fill it was not provided to Ms. Roy. She confirmed to the complainant in September 2012 that he would be informed "… of a decision as soon as we have something from Ottawa", which confirms that no authorization had been provided to fill the position at that time.

[80] When Major Langevin received approval to staff the position two years later, he chose to use the highest overall score to select the right person for the position. He explained that he considered that the candidates' overall scores in the process were good indicators of their abilities to fill the position.

[81] I see no problem with this approach. The fact that the complainant disagrees with the selection method used does not mean it was an abuse of authority.

[82] In addition, I find that the right-fit method selected by Major Langevin was properly documented in the Right Fit Statement prepared for Mr. Yates. While Major Langevin did not prepare a new Right Fit Statement for Ms. Lacombe after Mr. Yates declined the job offer, Major Langevin affirmed that his method to select the right fit for the position had not changed. While he did not identify any specific criteria for selecting Ms. Lacombe, she was chosen because she was the candidate with the second-highest score, which the table he prepared clearly shows.

[83] Certainly, it would have been preferable had Major Langevin prepared a Right Fit Statement for Ms. Lacombe, as he did for Mr. Yates. It would have clarified the record for anyone consulting it. However, failing to do it did not constitute serious misconduct equivalent to an abuse of authority since the table he prepared provides an

explanation of his decision.

[84] For those reasons, I am satisfied that Major Langevin properly exercised his authority to choose the right-fit criteria for this appointment and that he was able to explain his appointment decisions. Therefore, I conclude that the complainant has not shown that the process used to determine the right fit was seriously flawed and that it was not properly documented.

B. Issue 2: Was there abuse of authority by reason of a breach by the respondent of an internal direction to hire internal candidates first?

[85] The complainant is of the view that the respondent abused its authority by breaching an internal DND direction. The JOA specified that employees internal to DND "… may be screened, assessed and appointed before other applicants." He believes that he should have been appointed to the position in 2012 because of that internal direction. In his view, despite the fact that he was not a public servant in 2012, he should have been appointed because he worked for the Canadian Armed Forces.

[86] The complainant specifically submits that pursuant to ss. 35.1(1) and (2) of the *PSEA*, he was deemed a person employed in the public service for the purpose of the advertised internal appointment process. Those sections read as follows:

> ***Mobility — member of Canadian Forces***
>
> ***35.1 (1)*** *A member of the Canadian Forces who has accumulated at least three years of service and is not employed in the public service for an indeterminate period*
>
> ***(a)*** *may participate in an advertised internal appointment process; and*
>
> ***(b)*** *has the right to make a complaint under section 77.*
>
> …
>
> ***Deemed employment in public service***
>
> ***(2)*** *A member who participates in a process referred to in subsection (1) is, for the purpose of the process, deemed to be a person employed in the public service.*

[87] The complainant explained that in 2012, he was in the military, and transferring from it to the public service would have been a good job transition. He is adamant that

in 2012, he should have been considered an employee internal to DND and that he should have been given priority over others who were not internal to DND.

[88] The respondent submits that the word "may" in the JOA was used precisely because the department could, on a discretionary basis, screen, assess, and appoint employees internal to DND before other applicants. Yet, it was not obliged to. Ms. Roy confirmed that this statement was added to the JOA because HR specialists had recommended doing so as it was part of the policy and practice context at the time.

[89] The respondent submits, in addition, that in 2012, the complainant was not a public servant working for DND. Ms. Roy confirmed that had the complainant been a public servant working for DND, he would have been considered before the other candidates in 2012. However, HR representatives explained to her at the time that no Canadian Forces (CF) member was considered internal to the federal public service, thus internal to DND.

[90] First, the terms used in the JOA stated as follows: "… employees internal to DND may be screened, assessed and appointed before other applicants." While the complainant believes that he should have been appointed to the position in 2012 because of that statement, the word "may" indicated that the respondent had discretionary power to screen, assess, and appoint employees internal to DND but that it was not an obligation. Such an interpretation would render null and void the use of the term "may" or at least would limit the discretion conferred to the respondent. Thus, the direction in the JOA to appoint from within DND was discretionary; there was no requirement to appoint an employee internal to DND.

[91] Second, with respect to s. 35 of the *PSEA*, in my view, it does not imply that CF members are generally to be treated as employees internal to the public service. It states that a CF member may apply to an advertised internal process and that the member will be recognized as a valid candidate for the purposes of internally advertised positions. It does not deem that the member be treated as an internal employee of any particular department.

[92] Finally, I note that in 2015, although the complainant was at that time an employee employed by DND and thus an employee internal to DND, the respondent was not obligated to select him for the position. Major Langevin, who was given the responsibility to hire a person for the position, had the discretion to decide how he

would select that person.

[93] Therefore, I find that it has not been established that the respondent abused its authority by breaching an internal DND direction.

[94] I therefore conclude that an abuse of authority has not been established in these complaints.

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

(The Order appears on the next page)

VII. Order

[96] The complaints are dismissed.

June 20, 2017.

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