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File: EMP-2015-9939

Citation: 2018 FPSLREB 2

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

PATRICIA AGNEW

Complainant

and

DEPUTY MINISTER OF FISHERIES AND OCEANS

Respondent

and

OTHER PARTIES

Indexed as
Agnew v. Deputy Minister of Fisheries and Oceans

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

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Nour Rashid, counsel

For the Public Service Commission: Kimberly Lewis, counsel

Heard at Ottawa, Ontario,
November 14 and 15, 2017.
(Additional written submissions filed November 30, 2017.)

I. Introduction

[1] Patricia Agnew ("the complainant") filed a complaint with the Public Service Labour Relations and Employment Board, now the Federal Public Sector Labour Relations and Employment Board ("the Board"), on September 16, 2015, in relation to the internal advertised process 15-DFO-NCR-IA-CFO-118926 that was held to fill the position of advisor, planning and reporting, classified at the AS-04 level. She filed her complaint under s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*), alleging that the respondent, the deputy minister of Fisheries and Oceans, abused its authority by not properly assessing her qualifications. The respondent denies these allegations.

[2] The respondent and the Public Service Commission (PSC) objected to the Board's jurisdiction to hear this complaint. For the reasons that follow, I find that the Board does have jurisdiction to hear this complaint and that it is substantiated.

II. Objection to jurisdiction

[3] The complainant did not apply for the advertised position within the advertised time frame (March 20 to 30, 2015). Rather, she was referred to the process as a person with priority status on July 24, 2015. She filed her complaint after the publication on the Publiservice website of a "Notice of Appointment or Proposal of Appointment" (NAPA) on September 2, 2015, announcing the name of the appointee to the position.

[4] On September 22, 2015, the respondent filed a motion asking the Board to dismiss the complaint as the complainant "… was not a candidate in selection process 15-DFO-NCR-IA-CFO-118926 …" and therefore was not entitled to recourse before the Board.

[5] According to the respondent, s. 77 of the *PSEA* offers recourse only to persons in the area of recourse, as defined under s. 77(2). Section 77 reads in part as follows:

> ***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) …*
>
> ***(2)*** *For the purposes of subsection (1), a person is in the area of recourse if the person is*
>
> ***(a)*** *an unsuccessful candidate in the area of selection determined under section 34, in the case of an advertised internal appointment process ….*

[6] Section 34 reads as follows:

> ***34 (1)*** *For purposes of eligibility in any appointment process, other than an incumbent-based process, the Commission may determine an area of selection by establishing geographic, organizational or occupational criteria or by establishing, as a criterion, belonging to any of the designated groups within the meaning of section 3 of the* Employment Equity Act*.*
>
> ***(2)*** *The Commission may establish different geographic, organizational or occupational criteria for designated groups within the meaning of section 3 of the* Employment Equity Act *than for other persons.*

[7] The respondent invoked the PSC's *Priority Administration Policy*, according to which a priority person is not a candidate in an appointment process unless he or she applied to it as a candidate. According to the respondent, the complainant did not apply as a candidate but was referred as a priority person long after the application period was closed.

[8] The complainant disagreed with the respondent's position. In her opinion, she was an unsuccessful candidate, since she had been assessed and rejected for not meeting one of the essential qualifications. Moreover, the email in which the respondent rejected her application on August 7, 2015, specifically mentioned the right to make a complaint to the Board.

[9] The PSC supported the respondent's position and reiterated that according to its *Guide on Priority Administration*, a priority person is not a candidate in an appointment process unless he or she applied in the allotted time and was within the area of selection established under s. 34. Because the complainant was not a candidate, she could not be considered "an unsuccessful candidate" with recourse rights under s. 77(1) of the *PSEA*.

[10] The Board rendered a decision dismissing the motion on November 12, 2015.

Its reasons are contained in the following paragraphs:

…

> *The term "unsuccessful candidate" is not defined in the PSEA. The question of whether "unsuccessful candidate" includes priority referrals was addressed by the Federal Court in* Finley v. Canada (Attorney General)*, 2004 FC 1668. Although that case arose in the context of the former legislative regime for staffing, the issue before the Court was similar to the one in this case. A person who had been declared surplus and had priority status was assessed in a closed competition in which she would not have been able to participate but for her priority status. She was found to be unqualified and she attempted to appeal that decision. Just as in the current PSEA, the former version of the PSEA in effect at that time provided recourse rights to "unsuccessful candidates" but contained no provision precluding priority persons from filing appeals to the PSC's Appeal Board. The Court noted, at para. 32:*
>
> > [32] . . . There is no language restricting the scope of [the legislative provision] to a certain type of "unsuccessful candidate", and I find no compelling reason to thus restrict it. Perhaps it was not Parliament's intention to extend appeal rights to surplus employees in any circumstances whatsoever; however, in the absence of clear statutory provisions to that effect, I cannot impute other than what the legislation indicates.
>
> *Similarly, the former Public Service Staffing Tribunal (the Tribunal) found that there is no reason why a priority person who has been considered in an appointment process and assessed against the same merit criteria as those persons who applied when the job opportunity was advertised, should not be considered an unsuccessful candidate with recourse rights, if they are not appointed. The Tribunal found that there is no statutory provision in the PSEA denying them this right. See, for example,* Magee v. Commissioner of the Correctional Service of Canada*, 2011 PSST 12, at paras 20 and 21, and* Maxwell v. Deputy Minister of National Defence*, 2011 PSST 21, at para 21.*
>
> *The respondent has not pointed to any provision in the PSEA specifying that a priority person who is assessed by an assessment board in an appointment process to which she was referred does not have the right to file a complaint, if she is not appointed. Although the complainant did not apply when internal appointment process 15-DFO-NCR-IA-CFO-118926 was advertised, she is in the area of selection specified in the JOA, and she was at least partially assessed*

> *against the statement of merit criteria for that process, having submitted a cover letter and résumé.*
>
> *The Board finds that the respondent treated the complainant as a candidate. Consequently, the Board finds that the complainant is an unsuccessful candidate within the meaning of s. 77(2) of the* PSEA*. She therefore has the right to file a complaint pursuant to s. 77(1). The motion to dismiss is denied.*

…

[11] On January 11, 2016, the PSC filed a motion to dismiss the complaint, again on the basis of the Board's lack of jurisdiction. The PSC's arguments can be summarized as follows.

[12] The PSC argued that because the complainant did not apply to the appointment process when it was advertised, she cannot be an unsuccessful candidate, and consequently, she does not fall within the area of selection for the process.

[13] According to the PSC, the assessment process must be distinguished from the appointment process, as follows:

…

> *… An assessment in the appointment process is a determination of whether a person meets the qualifications in order for the appointment to be based on merit. An assessment can be for other purposes, as for example, in the case of the consideration of a person with a priority entitlement.*

…

[14] The process is clearly different, as there is no deadline for a priority referral, while there is a deadline for persons applying to the process.

[15] The fact that there is no right to make a complaint against the appointment of a person with priority entitlement indicates that the procedure is distinct and separate from the ordinary appointment process.

[16] The complainant replied that she continued to believe that she had a right to make a complaint, since she had been assessed against the merit criteria.

[17] On January 25, 2016, the respondent added its arguments in support of the

motion. Essentially, it argued that because the complainant did not apply to the initial selection process, she could not be considered a candidate.

[18] In a second letter decision, the Board reiterated its first conclusion, applying *Finley v. Canada (Attorney General)*, 2004 FC 1668, to find that the complainant was an "unsuccessful candidate". On May 10, 2017, the respondent filed yet another motion to dismiss, this time based on *Casper v. Deputy Minister of Citizenship and Immigration*, 2016 PSLREB 49, a decision that had been rendered some two months after the second letter decision. The Board dismissed the motion. I will come back to *Casper* in my analysis.

[19] At the hearing, the objection to jurisdiction was again raised. It is one of two issues that will be addressed in this decision.

III. Summary of the evidence

[20] The PSC called as a witness Edward Stack, acting director of its Priority Entitlement Activities division. The complainant testified for herself. The respondent called Kevin Muldoon, the delegated manager for the appointment process and the chair of the selection committee. The evidence is summarized below.

A. Mr. Stack for the PSC on priority entitlement

[21] Mr. Stack testified that he works with departments to administer the priority entitlement program. "Priority entitlement" means that in an appointment process, the person who has priority status will be appointed ahead of any other applicant to the process, provided that person meets the essential qualifications of the position. Priority status arises for various reasons: a person is declared surplus, is laid off, or comes back from extended leave to find that his or her position has been filled. In recent years, Parliament has added persons released from the Canadian Forces for medical reasons, when those medical reasons are attributable to service in the Forces.

[22] In the course of an appointment process, a department must apply to the PSC to obtain priority clearance. If no priority person meets the essential qualifications of the position, the PSC will authorize the department to appoint the person of its choice. This priority clearance is necessary only in the case of appointments; it does not apply to secondments, acting appointments, or deployments.

[23] When a priority person has been assessed and has been found not to meet one or several essential qualifications, then that person may request additional feedback from the department and request that the clearance authorization not be issued. In such cases, the PSC will work with that person and the department to resolve the issue. It may be that indeed the person does not meet the essential qualifications. In other instances, it may be that the assessment was not carried out properly, in which case the PSC may suspend the clearance authorization pending a reassessment.

[24] If a priority person is appointed, there is no recourse against such an appointment (see s. 87 of the *PSEA*). Priority persons may be referred to a department when it asks for a priority clearance or they may self-refer, that is, they may apply to advertised processes and indicate in their applications that they have priority entitlement. Mr. Stack referred to the PSC's *Priority Administration Directive* as the primary guidance for deputy heads in applying the priority system in their appointments.

[25] Finally, Mr. Stack explained that priority persons are registered in a PSC system called the "Priority Information Management System" (PIMS). It administers the files of priority persons and includes information on referrals to appointment processes.

[26] The PIMS generates an automatic email when the organization has assessed a priority person for an appointment process. The beginning and end of the email are generated by the PIMS system. The middle part is filled out by the organization that has assessed the priority person. This email will be referred to in this decision as "the PIMS email".

B. <u>The complainant</u>

[27] The complainant had priority entitlement within the federal public service, as she was returning from leave, and her substantive position had been filled (see s. 41 of the *PSEA*). On July 24, 2015, she received an email from the PSC informing her of a position with the respondent classified at the AS-04 level. The email included the statement of merit criteria (SOMC) for the position, and specified the following: "Because you benefit from a priority entitlement, **you only need to meet the essential qualifications and conditions of employment** outlined in this SOMC …" [emphasis in the original]. She asked the respondent which section the position was in and was told

that it would be in Corporate Planning, Performance and Risk Management, in the Chief Financial Officer sector.

[28] The email indicated that to apply for the position, she would have to provide a cover letter and a résumé. The following was stated regarding those two items:

> …
>
> *2. Provide a **covering letter** demonstrating how you meet the **education** and **experience** factors listed as essential qualifications. **Using each of the experience factors as headers, provide clear and concrete examples and details of where, when and how you obtained the experience.** For example, for each essential experience requirement, you should list where you gained the experience, your title at the time, a description of the tasks you performed relevant to the experience factor, and your accomplishments.*
>
> *3. As a secondary source to validate the experience described in the cover letter, **provide an up-to-date résumé** that clearly outlines your education and experience, as well as any additional information that demonstrates how you meet the requirements of the position….*
>
> …
>
> [Emphasis in the original]

[29] The complainant sent a cover letter and résumé on July 28, 2015. On August 7, 2015, she received two emails, one from the respondent, and the other, received an hour later, an automatically generated PIMS email. Both referred to process 15-DFO-NCR-IA-CFO-118926, with the PIMS email including an additional PSC referral number.

[30] The email received from the respondent indicated that the complainant had not met the following merit criterion: "Experience in utilizing Microsoft Word and Microsoft Excel at an intermediate level." The email also included the following two paragraphs:

> *Should you wish to informally discuss your elimination from this appointment process, please contact* [the name of the direct supervisor for the position, anonymized to "ND" in this decision] *at* [phone number], *or by email at* [email address]. *Please make this request as soon as possible to maximize the opportunity for corrective action.*

> *Once the selection process is finalized, you will be notified of the results and of your right to make a complaint to the Public Service Labour Relations and Employment Board. Please note that notifications related to this appointment process will be posted at: https://psjobs-emploisfp.psc-cfp.gc.ca.*

[31] The email then added the name of the respondent's human resources (HR) advisor, anonymized to "AL" in this decision, and that person's contact information.

[32] The PIMS email contained exactly the same text as the respondent email but started with the PSC referral number E1517R75749, then the following: "The hiring organization has provided the following feedback to communicate the results of your assessment[.] Referral Feedback, exactly as provided in PIMS by the hiring organization."

[33] The PIMS email ended with the following:

> *If you wish to seek additional information regarding the results of this assessment, you should contact one of the persons listed below. (Please also make the Public Service Commission (PSC) aware if you are doing so).*
>
> *Please note, based on the feedback from the hiring organization, the PSC, may provide clearance to proceed with staffing this position after three (3) working days following this e-mail.*
>
> *Hiring Organization Contacts:*
>
> *Name of hiring organization: DFO - Department of Fisheries and Oceans*
> *Name of contact person:* [AL], *Conseillère junior en ressources humaines*
> *Telephone number: …*
> *E-mail address: …*
>
> *Public Service Commission Contacts – Priority Administration Contacts*
> CFP.AP-Info-PA.PSC@cfp-psc.gc.ca
> *Toll-free: 1-855-235-3113*
> *National Capital Region: 819-420-6931*
>
> *Note: Please do not reply to this e-mail account (sender) as it is an automated account.*
>
> *Thank you for your cooperation.*

[34] The complainant testified that she was a little puzzled to receive two emails conveying the same information. She was eager to respond to the respondent, as she thought a mistake had been made in assessing her skill level with Microsoft Excel and Word. She immediately contacted ND on August 7. She received a reply on August 20. She was offered an informal discussion on September 3, which was later changed to September 1.

[35] The complainant disputed her assessment because she believed that she had intermediate skill in both Word and Excel, which she thought she had made clear in both her cover letter and her résumé. In her cover letter, she wrote the following under the heading, "Experience in utilizing Microsoft Word and Microsoft Excel at an intermediate level":

> *I have used Microsoft Word and Excel for over 15 years in my previous employment. I consider myself at an intermediate level in that, I have used the software for more advanced skills such as creating formulas and what-if analyses. I had to use Microsoft Word to create letters, memorandums, briefing notes, university assignments etc.…*

[36] In her résumé, under the heading "WRITING AND RESEARCH", she included the following statements:

> - *Used MS products such as Word, Excel, PowerPoint and Access and various law enforcement programs to compile data and prepare reports and to aid in investigations*
>
> - *Experienced in creating/writing technical publications – safety checklists and technical orders*
>
> …
>
> - *Provided situation reports to update management on various issues*
>
> …
>
> - *Worked on National Defence's Strengthening the Forces Problem Gambling Project – carried out research with numerous stakeholders and wrote articles for their website, as well as, updated their training manual*
>
> …
>
> - *Wrote a plan and proposal to justify to senior management the construction of a new multi-million*

> *dollar ammunition storage facility in Winnipeg and then conducted audits to ensure the facility was built according to the specifications and contract.*
>
> - *Worked as an Executive Committee member for the Air Attaché Ladies' Association – as an editor, I coordinated with members to collate information to meet publishing deadlines for a monthly newsletter*
>
> …

[37] The informal discussion was in fact a brief phone call with Mr. Muldoon and ND. Mr. Muldoon explained that although she seemed to have intermediate skills in Excel, as illustrated by the example given of creating formulas and what-if analyses, she had not demonstrated a similar level for Word in the cover letter. He explained that he was looking for someone who would be able to do headers and footers, tables of content, and so forth, to produce reports. The complainant replied that of course she knew how to do those things, since her résumé indicated that she had produced a number of reports, which would be impossible to develop without such skills. Mr. Muldoon stated that since it did not appear in the cover letter, he could not take it into account. According to the complainant, he appeared irritated and impatient. The call ended quickly.

[38] Only with the disclosure of the evidence for the hearing did the complainant realize that in fact, four informal discussions with four dissatisfied priority persons were held that day, one after the other. Within ten minutes of the last informal discussion, ND had sent a report to HR on the calls. HR issued the NAPA for the appointee the next day.

[39] The complainant saw the NAPA and immediately protested to the respondent. She signalled her intention of making a complaint to the Board, which she filed on September 16. AL informed her on September 10 that the NAPA had been cancelled. Subsequent evidence showed that the appointment process was cancelled in December 2015.

[40] After the NAPA appeared, the complainant attempted throughout the month of September to contact the PSC, using the contacts she had dealt with before. She introduced in evidence several unanswered emails. When the PSC supported the respondent's first motion to dismiss by way of written submissions, on September 28, 2015, the complainant wrote to the PSC analyst who had written the

PSC's submission, asking her for guidance and explaining her complaint. This is the letter she wrote:

> *Dear* [name of PSC analyst],
>
> *Thank you very much for your email* [PSC submission on the respondent's motion to dismiss], *I think I now understand what has happened, please indulge me while I summarize. Earlier this year, I gather it was in March, DFO started a hiring process 15-DFO-NCR-IA-CFO-118926. There were approximately 40 applicants, 20 were eliminated for various reasons (4 were eliminated because they did not meet the intermediate MS Word and Excel requirements), 20 were given a test, 10 proceeded through to the interview stage and one was selected. DFO, I assume, approached HR with the winning candidate and was informed that they had not considered priority referrals in their process and would need to offer the position to that group prior to being able to issue the position to the winning candidate. This is when I assume I received the priority referral E1517R75749 and once I was eliminated DFO could issue the NOC* [notice of consideration] *and NAPA to their preferred candidate. The director involved did this and proceeded with these notices effectively ignoring my cover letter and resume.*
>
> *Here is what I actually know to have occurred. When I received the referral, I looked at this as any of a number of such referrals that I apply to, under the assumption that I have a fair opportunity to be assessed. So from my perspective, I thought that I was part of a competitive process; however DFO reviewed my cover letter and determined that I did not meet the essential merit requirements of undefined intermediate MS Word and Excel skills. I immediately informed DFO that I did not agree and asked for an informal discussion. For their part, DFO started the process to give the winning candidate the position without telling me and scheduled my debrief for the day after the NOC waiting period. After I provided clarity, specifically that I had used headers and footers and table of contents (which I now understand constitutes intermediate skills for DFO) the manager failed to take that clarification into consideration and allow me to be properly assessed for the position. This was an abuse of authority, clearly DFO did not intend to consider me.*
>
> *So an abuse has occurred (not only for me but for other candidates) – I think that is quite clear. How do I (and the others) get a proper redress of this situation? DFO has not exchanged any documentation with me, which is a requirement of this process. I would really appreciate some help here.*

> *Maybe you can explain to me what a priority referral means, my position was back-filled and no one will give me an honest shake at a position. DFO clearly abuses authority and you are telling me that I was not part of a process, well that much is clear, I was not part of a fair process. I would appreciate some guidance on how I can right this wrong for me and the other candidates.*
>
> *Look forward to some sage advice* [name of PSC analyst].
>
> *Kind regards,*
>
> *Pat Agnew*

[41] On October 5, 2015, the complainant wrote a follow-up email to the PSC analyst, asking when she could expect a reply to her September 28 email. This is the response she received:

> *Good afternoon,*
>
> *The Public Service Employment Act (PSEA) establishes the Public Service Commission (PSC) as a party to each PSLREB complaint and provides the PSC with the right to be heard and participate in every staffing complaint process. The September 28th communication was the PSC reply to the motion to dismiss submitted by the Respondent (Department of Fisheries and Oceans). No further communication will be provided by the PSC until the PSLREB renders its decision on the motion….*

[42] No further communication was ever provided, according to the complainant's evidence.

C. Mr. Muldoon

[43] Mr. Muldoon is the director of corporate planning in the Performance and Risk Management directorate under the respondent's chief financial officer. He stated that one of his directorate's main responsibilities is to produce the annual departmental reports on plans and priorities (RPP) and departmental performance (DPR).

[44] He anticipated that he would need someone to assist ND, who was responsible for producing the reports, and accordingly, in March 2015, he asked HR to initiate an internal advertised appointment process (15-DFO-NCR-IA-CFO-118926). Since the position was not to be filled immediately, it was an anticipatory process, designed to create a pool of qualified persons who could be appointed when the need arose.

Because of that anticipatory nature, it was not necessary to first obtain a list of priority referrals from the PSC.

[45] The anticipatory process was carried out. According to Mr. Muldoon, 33 persons applied, and 19 were screened in. Fifteen passed the written exam, nine had an interview, and finally, seven qualified for the pool. By July 2015, Mr. Muldoon was ready to appoint the star candidate, but first, he had to obtain priority clearance from the PSC. It offered the referral to 26 priority persons, but only six, including the complainant, pursued the opportunity. All six were screened out.

[46] Mr. Muldoon explained his decision to screen out the complainant. He stated that he was looking for examples in the cover letter that would show the person was at an intermediate level in using Excel and Word. The complainant had met the requirement for Excel: she had given the examples of what-if analyses and of creating formulas, which are intermediate-level skills, according to Mr. Muldoon. However, she had not given equivalent examples for Word and had not specified what she could do that would show an intermediate level of skills, such as headers, footers, tables of content, and so forth.

[47] In August, the priority persons had been screened out, and Mr. Muldoon was ready to appoint. ND, to whom the appointee was to report, had taken some vacation, which is why ND did not answer the complainant's email immediately and changed the date for the informal discussion. Mr. Muldoon was rather vague on the vacation dates, even in cross-examination, and I had no documentary evidence on them.

[48] Once the informal discussions with the four screened-out priority persons who had requested them were done, the letter of offer to the appointee could be issued. Mr. Muldoon was asked in cross-examination how it could be that the report on the informal discussions was ready ten minutes after the last informal discussion. He answered that ND was a well-organized person who had probably prepared the template ahead of time.

[49] However, within a week, the appointee resigned, having received a better offer elsewhere. On September 10, 2015, Mr. Muldoon met with HR to discuss his options. At that point, it was becoming urgent to fill the position, as the reports were too much for ND to handle alone.

[50] When asked why he did not simply fill the position from the pool, Mr. Muldoon replied that the process had "stalled". When asked to explain, he replied that the complainant had already signalled that she would make a complaint. HR offered him another solution to fill the position quickly with a qualified person, which was to bring someone in on secondment, a mechanism that allows a manager to fill a position without having to consider priorities or even a pool of qualified persons.

[51] This is the solution Mr. Muldoon chose. At the same time, HR pointed out that the screening of persons who had applied, both in the regular process and through priority entitlement, had perhaps not been entirely consistent. HR recommended that it be redone.

[52] Mr. Muldoon hired a consultant, a public service retiree with some 35 years of experience, to redo the assessment. He gave the consultant his own grid but added, "[w]hen uncertain, the candidate should be screened in." The consultant handed in his report on September 23, 2015. Three additional persons had been screened in: the complainant, another priority person, and someone who had applied to the original process.

[53] When asked why he did not at that point give the position to one of the priority persons, Mr. Muldoon repeated that the process was stalled, that it would take time to completely assess a priority person, and that there was urgency to fill the position. The secondment was underway. The secondment agreement was signed on September 23, with a start date of October 12.

[54] In December 2015, the appointment process was cancelled. The seconded person was eventually deployed to the position.

[55] Mr. Muldoon was asked about the fact that the email addressed to the complainant to indicate that she had been screened out provided for recourse to this Board. He stated that that was an administrative mistake and that it should have stated that recourse was to the PSC.

D. <u>Additional evidence pertaining to the PSC</u>

[56] In her evidence and submissions, the complainant stated that the PSC had not helped her at all in her dealings with the respondent after the first assessment. At the start of her submissions at the hearing, counsel for the PSC objected to what

she termed allegations and asked that I disregard them entirely.

[57] I stated that this was the evidence received and that it had not been contradicted. The PSC countered that it had received no notice of such allegations in preparing for the case.

[58] In fairness to the PSC, this complaint is against the respondent, not the PSC. The complainant's written allegations dealt with the respondent's actions.

[59] I allowed the PSC a further 15 days to provide any evidence, whether by affidavit or in writing (correspondence or emails) to show the measures it took to respond to the complainant's calls for help, which she had amply documented.

[60] The PSC provided submissions on November 30, 2017, which included the personal notes of a PSC employee, some exchanges between the respondent and the PSC concerning the process, and a table that purports to show that the complainant had used the generic PSC email in other processes.

[61] I gather from the PSC's submissions that it had some concerns about the process, which were assuaged by the respondent. Throughout the submissions, there is an expectation that the complainant should communicate through the generic email, which is why the letter she addressed to the PSC analyst was answered as it was. The PSC does state in its submissions that perhaps there was some failure of communication and that a new protocol has been in place since June 2017 in an attempt to avoid a recurrence of such miscommunication.

[62] I find that the onus was on the complainant to inform the PSC that she intended to question the result of her assessment. This she did not do. She responded on August 7 to the respondent and did not include the PSC in her email. Not having been informed that the assessment was disputed, the PSC issued the priority clearance a few days later, which was within its rights.

[63] However, once the appointment was made, when the complainant tried to get in touch with the PSC, there was no response (or very little, even if I include an alleged phone call to the complainant by a PSC employee). I have come to the conclusion that in the end, the communications or lack thereof between the PSC and the complainant matter little in this decision. Again, my decision deals with the Board's jurisdiction and the respondent's actions. The complainant perceived a lack of involvement by the PSC

in her case. I do not wish to reopen the hearing to test the allegations. The PSC does seem to admit that there could have been better communication.

[64] In the end, I accept the PSC's submission at the hearing that I should not take the allegations concerning its inaction into account, partly because that evidence has not been properly tested in the hearing room, but mainly because it is not the subject of the complaint. My decision will deal only with the evidence that concerns the respondent and the legal arguments that were raised by the PSC and the respondent.

IV. Issues

[65] There are two issues to be decided in this case. The second issue need be addressed only if the first is answered in the affirmative.

- Issue I: Does the Board have jurisdiction to hear this complaint?
- Issue II: Was there abuse of authority in the application of the merit criteria?

V. Analysis

A. Issue I: Does the Board have jurisdiction to hear this complaint?

[66] The PSC presented oral arguments at the hearing, as opposed to its usual procedure of filing written submissions with the Board. The PSC vigorously challenged the Board's jurisdiction to hear this complaint, because, according to its reasoning, the term "unsuccessful candidate" does not cover the complainant.

[67] In support of its arguments, the PSC cited case law, the legislation, and principles of statutory interpretation. I will review its arguments within my analysis.

[68] The PSC referred to two decisions of the former Public Service Staffing Tribunal (PSST) to make its point that the Board does not have jurisdiction, *Magee v. Commissioner of the Correctional Service of Canada*, 2011 PSST 12, and *Maxwell v. Deputy Minister of National Defence*, 2011 PSST 21.

[69] In *Magee*, the complainant was an employee with a disability. The *PSEA* does not provide for priority status for reasons of disability, but the *Public Service*

Employment Regulations (SOR/2005-334) do, at s. 7. Under the *PSEA Regulations*, as under the *PSEA*, there can be no appointment of a person with priority entitlement if that person does not meet the essential qualifications of the position. *McGee* was decided mainly on the basis that Mr. McGee did not meet the essential qualifications, and consequently, there was no abuse of authority. The PSST member declined to address the priority issue.

[70] In *Maxwell*, the employee had applied to the process, and there was no dispute that she was entitled to make a complaint. She also had a priority entitlement. At the outset, the PSC moved that her priority entitlement not be considered for the purposes of the decision because it was outside the PSST's jurisdiction. The member dismissed the motion in the following terms at paragraph 29: "The Tribunal finds that it can consider the concerns raised by the complainant with respect to her priority entitlement in this internal appointment process. Accordingly, the PSC's preliminary motion is dismissed". In the end, the complaint was dismissed because there was no abuse of authority in determining that the complainant did not meet the essential qualifications.

[71] The PSC also referred to *Renaud v. Deputy Minister of National Defence*, 2013 PSST 26, in which the PSST found that the deputy head had abused its authority because the appointee in that case had not applied for the position. The Department of National Defence held an internal advertised process to fill two positions, one at the EG-06 level, the other at the EG-07 level. Mr. Williams, the appointee, had applied to the position at the EG-06 level, but upon reviewing his application, the employer thought he would be well-suited for the EG-07 position. Long after the selection process had closed, the employer asked Mr. Williams to apply for the EG-07 position, which he eventually obtained.

[72] The PSST found that it had been an abuse of authority to reopen the assessment for a single candidate. The PSC attempts to draw a parallel with this case, and states that similarly, although the complainant was assessed, she cannot be considered a candidate as she did not submit an application during the job advertisement period in March 2015.

[73] The reasoning is that the complainant is not a candidate because she did not apply in the proper period. However, she did apply when given the opportunity, and

she had every right to be assessed, as a person with priority entitlement (contrary to Mr. Williams, who clearly was being favoured with a new assessment, without any statutory justification). If she was assessed, then there was a possibility that she could be appointed. Without a definition of "candidate" in the *PSEA*, its meaning must be its ordinary dictionary meaning: "a person who seeks or is nominated for an office, award, etc.; a person … likely to gain some distinction or position…" (from the *Canadian Oxford Dictionary*).

[74] The *Casper* decision was raised as an illustration of the Board's view that without an application to a process, a person cannot be considered a candidate. I will summarize *Casper* (its fact and reasons), then explain why I believe the case can be distinguished.

[75] Mr. Casper did not have priority status. He had been on leave and was seeking a return to work. For undisclosed reasons, he could not return to his original position or work in his previous location. All parties agreed that he required an accommodation. The employer sought to accommodate him in a position equivalent to the one he had previously held. To accommodate his return to work, his department initiated a referral procedure for him to be considered for positions at his level. For several possible positions, he was told that he did not meet two essential qualifications.

[76] The Board states in *Casper* that in the ordinary course of a selection process, to be a candidate, a person must apply to a specific process within the specified period. Mr. Casper did not do that. Rather, he was referred for consideration to several positions, one of which was the position for which an appointment had been made, which gave rise to his complaint. The evidence showed that he had not been assessed according to the essential qualifications of that position but rather according to different criteria. The Board contrasts as follows Mr. Casper's situation and the situation in *Finley*:

> ***23*** *The complainant argues that the Board should follow the Federal Court's decision in* Finley v. Canada (Attorney General)*, 2004 FC 1668; however, the facts in this case are different. Ms. Finley applied to the process at issue in that case during the application period, and she had a statutory priority for appointment at the time as a surplus employee. In this case, the complainant did not apply when process 13-20 was open to applications, and although the respondent*

> *was considering him for PM-03 positions, he did not have priority status at that time. Contrary to the complainant's submission, he was not an "internal priority". He was on leave, and he required accommodation to return to work; however, his situation did not entitle him to a legislative or regulatory priority. He was not entitled to any exclusion from appointment-related requirements, principles, or practices.*

[77] The complainant in *Casper* was not assessed on the same essential qualifications as those in the process he was complaining about. The department had decided to assess him in a more general way, for a number of positions, and not for a specific position. Therefore, the Board found that the merit criteria used to assess Mr. Casper could not have been used to appoint him to the position at issue, unless allowance were made for accommodation reasons.

[78] The Board concluded in the following way its discussion of whether Mr. Casper was an "unsuccessful candidate" in the process at issue:

> ***33*** *The respondent used an existing resource, the PMU* ["Priority Management Unit", a departmental unit unrelated to the legislative priority system operated by the PSC], *to facilitate a referral process to find the complainant a PM-03 position. The PMU linked at least one referral to appointment process 13-20 because the referral arose when a request was made to appoint from process 13-20. However, the complainant was referred for a position; he was not referred to process 13-20. If the complainant had been qualified, the respondent could have placed him in a PM-03 position rather than make the appointment from process 13-20. The Board finds that the complainant was not a candidate in process 13-20. Accordingly, he is not an unsuccessful candidate in process 13-20.*

[79] By contrast, in this case, the complainant was assessed against the same essential qualifications as were listed in the process at issue. She was referred to the process. She was clearly assessed in the context of the process, albeit not in the same time frame.

[80] In *Casper*, the Board cites *Finley* and states that Ms. Finley was not only a person with priority entitlement but also one who had applied to the process at issue. Actually, Ms. Finley did apply to what was called at the time a "closed competition", which today is termed an "internal appointment process", but she was screened out as she was not in the area of selection. Ms. Finley was an employee of Industry Canada,

and the competition was open to employees of Human Resources Development Canada. However, Ms. Finley was also a person with priority entitlement, as she had been declared surplus in her home department. Consequently, the PSC asked that she be assessed on the basis of her priority status. She failed the assessment and sought recourse before the Public Service Commission Appeal Board ("the Appeal Board"), which has since been replaced, for the purpose of recourse for internal appointment processes, by this Board.

[81] The Appeal Board declined jurisdiction, as it considered that Ms. Finley was not an "unsuccessful candidate" since she was not a person in the area of selection and had not applied within the closed competition but had been referred as a priority person. The Federal Court ruled that this was an error and declared Ms. Finley an unsuccessful candidate entitled to recourse before the Appeal Board, since she had been assessed on the criteria of the competition.

[82] In its arguments in this case, the PSC emphasized the legislation change as being a significant component of the analysis I must carry out to determine whether the complainant in this case is an "unsuccessful candidate".

[83] At the time of *Finley*, the recourse right (for someone participating in a closed competition) was defined as follows at s. 21(1) of the old *Public Service Employment Act* (R.S.C. 1985, c. P-33):

> ***21 (1)*** *Where a person is appointed or is about to be appointed under this Act and the selection of the person for appointment was made by closed competition, every unsuccessful candidate may, within the period provided for by the regulations of the Commission, appeal against the appointment to a board established by the Commission to conduct an inquiry at which the person appealing and the deputy head concerned, or their representatives, shall be given an opportunity to be heard.*

[84] In the new *PSEA*, the right of recourse (for someone participating in an internal appointment process, the equivalent of a closed competition) is provided as follows in s. 77:

> ***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 ….*
>
> ***(2)** For the purposes of subsection (1), a person is in the area of recourse if the person is*
>
> > ***(a)** an unsuccessful candidate in the area of selection determined under section 34, in the case of an advertised internal appointment process ….*

[85] The term "unsuccessful candidate" remains undefined. If the only qualifier is to be in the area of selection, this would include the complainant in this case, as the process was open to persons employed in the public service occupying a position in the National Capital Region.

[86] The PSC argued that allowing such a candidate to bring a complaint would lead to absurd results, contrary to principles of statutory interpretation, since some priority persons may be in the area of selection and others not. Therefore, the Board would have jurisdiction for some, but not all, priority persons. As in *Finley*, it may be that the area of selection would be displaced by the statutory provisions of the priority system. I do not need to decide this and leave the decision to another day, with different facts.

[87] In my view, the change in language does not alter the conclusion I can draw from *Finley* and apply to this case. As in *Finley*, the complainant was assessed for a specific process, with her right to participate being directly linked to her priority status. Without priority status, Ms. Finley would not have been eligible for the closed competition as she was not in the area of selection; without her priority status, the complainant would not have been eligible for the appointment process, as the date to apply had passed. In both cases, Ms. Finley and the complainant were assessed against the essential qualifications. I fail to see how the complainant, like Ms. Finley, cannot be considered an "unsuccessful candidate".

[88] The complainant states that there simply is no case law that directly applies to her case. Her position is simple and straightforward: she was assessed unfairly, and she should be entitled to recourse against an action that she considers constitutes an abuse of authority. Therefore, the issue is whether this Board can offer such recourse by way of a complaint under s. 77 of the *PSEA*.

[89] Mr. Stack testified to the possible intervention of the PSC when the priority process is not respected by a department. This supposes that the PSC is made aware of the problem. In the complainant's case, she waited first for her informal discussion with the respondent to occur. Once that failed, she tried to get in touch with the PSC, to no avail. The standard email she had first received included a do-not-reply notice and provided a generic information email address to the PSC, with no contact person and no indication that recourse was possible with the PSC. Rather, the email indicated that recourse was before this Board.

[90] The PSC and the respondent are adamant that the complainant was not a candidate. I remain unconvinced. She received an invitation to apply as a priority person to a process in which, in theory at least, she would have had the possibility to be appointed if she met all the essential qualifications. In ordinary language, she was a candidate for the position. Nothing in the legislation indicates otherwise.

[91] As in *Finley*, the complainant is an unsuccessful candidate. The language has changed — now, per s. 77 of the *PSEA*, "… a person in the area of recourse …" can bring a complaint. That person is defined as "… unsuccessful candidate in the area of selection …" in the case of an internal advertised process.

[92] How priority persons who are not in the area of selection should be dealt with is not at issue in this decision. It may be that it is of no importance, since they are integrated into the assessment process in any event. The important point is that there should not be abuse of authority in assessing candidates that have a right to be assessed and a possibility of being appointed if they are found to be qualified.

[93] If the purpose of the *PSEA* is to ensure fairness and transparency in staffing matters, as stated in its Preamble, then why would it shield delegated managers from their obligation to respect the statutory priority entitlement system by denying recourse to persons with priority entitlement?

[94] Therefore, I find that this Board has jurisdiction to hear this complaint.

B. Issue II: Was there abuse of authority in the application of merit?

[95] Section 77 of the *PSEA* provides that an unsuccessful candidate in the area of selection for an internal 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. "Abuse of authority" is not defined in the *PSEA*, although it does specify at s. 2(4) that it includes bad faith and personal favouritism. As stated in *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at paras. 66 and 71, an abuse of authority may involve an act, omission, or error that Parliament cannot have envisaged as part of the discretion given to those with delegated staffing authority. Abuse of authority is a matter of degree. For such a finding to be made, an error or omission must be of such an egregious nature that it cannot be part of the delegated manager's discretion. The complainant has the burden of proof (see *Tibbs*, at para. 50).

[96] The following passage from *Tibbs* is relevant to this case:

…

> *[73] While abuse of authority is more than simply errors and omissions, acting on inadequate material and actions which are, for example, unreasonable or discriminatory may constitute such serious errors and/or important omissions to amount to abuse of authority even if unintentional.*
>
> *[74] To require that a finding of abuse of authority be linked to intent would lead to situations that clearly run contrary to the legislative purpose of the PSEA. It could not have been envisioned by Parliament that, for example, when a manager unintentionally makes an appointment that leads to an unreasonable or discriminatory result, there would be no recourse available under the PSEA. When a manager exercises his or her discretion, but unintentionally makes an appointment that is clearly against logic and the available information, it may not constitute bad faith, intentional wrongdoing, or misconduct, but the manager may have abused his or her authority.*

…

[97] In *Portree v. Deputy Head of Service Canada*, 2006 PSST 14, as well, there is a useful definition of what constitutes abuse of authority, as follows:

> *[47] An allegation of abuse of authority is a very serious matter and must not be made lightly. In summary, in order to succeed before the Tribunal, a complaint for abuse of authority must demonstrate on a balance of probabilities a serious wrongdoing or flaw in the process that is more than a mere error, omission or improper conduct that justifies the Tribunal's review and intervention.*

[98] The most relevant precedent for this case is *Poirier v. Deputy Minister of Veterans Affairs*, 2011 PSST 3, where a candidate was screened out because of an ambiguity in the instructions given for the cover letter. The instructions stated that each experience had to be mentioned, with a paragraph or two to explain how the experience had been acquired. The instructions were meant to obtain a paragraph or two about each experience, according to the respondent in that case. Mr. Poirier understood that he was to present his experience (there were six types) in one or two paragraphs. He was screened out because his cover letter did not provide sufficient detail.

[99] The respondent presented a number of cases in which the PSST ruled that it was up to the applicant to demonstrate that he or she possessed the essential qualifications. It was not up to the hiring organization to inquire further. (See, for example, *Edwards v. Deputy Minister of Indian and Northern Affairs Canada*, 2011 PSST 10 at paras. 31 to 38.)

[100] Despite this jurisprudence, *Poirier* stands for the proposition that an applicant should have the opportunity to correct a mistaken impression if it is due to ambiguity in the requirements. In *Poirier*, the delegated manager simply refused to hear Mr. Poirier's explanations at the informal discussion. The following passage from *Poirier* is directly applicable to this case:

> ***65*** *In* Tibbs, *para. 70, the Tribunal identified five categories of abuse of authority applicable to discretionary administrative decisions. The following two are relevant to this complaint:*
>
> > *a) When a delegate refuses to exercise his/her/its discretion by adopting a policy which fetters the ability to consider individual cases with an open mind; and*
> >
> > *b) When a delegate acts on inadequate material (including where there is no evidence, or without considering relevant matters).*
>
> ***66*** *In this case, the assessment board fettered its discretion by refusing to accept or consider that its instructions were flawed, and then take measures to alleviate the impact that this error had on the complainant's application. It then proceeded to eliminate the complainant from the assessment process on the basis of inadequate information regarding his experience qualifications.*

> ***67*** *The respondent's failure, in this case, to correct a serious error directly led to the elimination of the complainant from the appointment process, denying him reasonable and fair access to an employment opportunity. Thus, the Tribunal finds that by acting with such serious carelessness or negligence, the respondent abused its authority.*
>
> ***68*** *The Tribunal has often stated that much more is required than mere errors and omissions to constitute abuse of authority. (See* Tibbs *at para 65. See also* Neil v. Deputy Minister of Environment Canada*, 2008 PSST 0004, paras 50 and 51). In this case however, the lack of clarity in the instructions constituted more than a mere administrative error. The instructions were susceptible to different interpretations and led directly to the complainant's failure to demonstrate that he met the essential experience qualifications. Furthermore, when the respondent was made aware of this serious error and its consequences, it failed to consider ways to correct the situation. As a result, the respondent unfairly and improperly eliminated the complainant from the appointment process on the basis of inadequate information. This amounts to serious carelessness or negligence as the complainant was denied a fair opportunity to be considered for a position.*

[101] In this case, the complainant believed that stating her experience with Word would suffice to establish that she was at an intermediate level. This level was not defined, yet, in Mr. Muldoon's mind, it was very clear that applicants had to give examples such as using headers and footers or structuring a table of content. The instructions did not ask clearly for examples of the skills. Rather, the requirement was worded as follows: "…*provide clear and concrete examples and details of where, when and how you obtained the experience"*. When, in the course of the informal discussion, the complainant attempted to show that she had the intermediate level, since it would have been impossible for her to do her tasks for the last fifteen years without it, Mr. Muldoon simply refused to listen to her arguments.

[102] I find that the assessment of the complainant was done superficially. Mr. Muldoon testified that according to HR, the screening had been inconsistent, which is why he hired a consultant to redo it. Because of that decision, the assessment was redone, and the fact is that the complainant was screened in following the second assessment. However, at the time of the informal discussion, it is clear from her testimony as well as from Mr. Muldoon's that he was not willing to correct the assessment, despite the information in the résumé. The requirement to show

intermediate skills in Word was not clearly stated, in that it was unclear which intermediate skills were sought. Once the complainant stated that she in fact did have intermediate skills, as established by her résumé, the hiring manager had some obligation to verify.

[103] Mr. Muldoon testified that once the process had been done (screening, written test, interviews, and references), the respondent had a "star candidate" who was "head and shoulders" above the rest: this was the appointee. As the complainant demonstrated in her chronology, as set out below, it was clear that any priority person, no matter how qualified, did not stand a chance against the appointee.

[104] The complainant was notified on August 7 that she had failed an essential qualification. She reacted immediately but failed to advise the PSC. There was no contact person indicated for the PSC, only a generic information email address. In addition, although the email did state that the clearance could be issued within three days, it was not clear that only by advising the PSC could this issuance be stopped. Rather, the email emphasized contacting the respondent's contact person and added that in the event of an appointment, recourse would be before this Board. (I note that the same "mistake", as termed by Mr. Muldoon, was made in *Finley* some 12 years before. I do not take an administrative error to give jurisdiction to the Board, but perhaps the mistake should be corrected, if my analysis on the first issue proves wrong.)

[105] The complainant did contact the respondent, but received a response only on August 20, setting an informal discussion for September 3. In the meantime, the PSC had issued the clearance. A notice of consideration was posted in late August, and the informal meeting was advanced to September 1. On September 2, the appointment was announced. The appointee was already in the position, in an acting capacity. The report on the informal discussions, to show that they had been done before the appointment, was sent within 10 minutes of the last discussion. In other words, the document was ready to go before the informal discussions were held, and nothing would have changed the course of the appointment.

[106] There were clearly some misgivings in the way the assessments had been done, and with the second assessment, the complainant and another priority person were found to be qualified. By then, the appointee had resigned for another position.

Mr. Muldoon's explanation as to why he did not give the position to one of the qualified priority persons made no sense. He spoke of a "stalled process"; he spoke of "urgency". The secondment that was used to fill the position was effective October 12. The reassessment was done by September 23. Clearly, there was no intention to use its results. Mr. Muldoon said that it would take time to assess the priority persons, when in fact, since they had met all the essential qualifications, either of them could have been appointed immediately.

[107] When all the actions surrounding the appointment are put together, on the balance of probabilities, I find that there was "… a serious wrongdoing or flaw that is more than a mere error, omission or improper conduct that justifies the [Board's] review and intervention." As in *Poirier*, the respondent abused its authority by failing to assess the complainant properly, and, once alerted to the errors in his assessment, by refusing to consider correcting the error before proceeding with the appointment.

[108] The respondent has argued that the Board has no jurisdiction over secondments or deployments, which was the mechanism that was finally used to permanently fill the position. I agree. The problem I can examine is the initial appointment, which gave rise to the complaint, and the substance of the complaint, which is the failure of the respondent to properly assess the complainant.

[109] I would add, however, that the respondent's further actions serve to confirm its disregard for the complainant's application. The priority exercise appears to have been a simple formality. The only goal was to obtain clearance for the appointment of the chosen candidate. After her resignation, and after the screened-out candidates had been reassessed, the priority persons were never considered to fill the position, in direct contradiction to Mr. Muldoon's assertion that it was urgent to do so.

[110] I find therefore the complaint to be substantiated.

C. <u>Corrective action</u>

[111] The complainant asked for two declarations, which are that the Board has jurisdiction to hear the complaint of someone who participates in an appointment process as a person with priority entitlement and that the respondent abused its authority by not truly considering the qualified priority persons for appointment. I have concluded that the Board can hear the complaint of a person with priority

entitlement. I have also found that there was an abuse of authority in the application of merit.

[112] The Board's remedial powers when a complaint is upheld under section 77 are defined at sections 81 and 82 of the *PSEA*. As stated in *Canada (Attorney General) v. Cameron*, 2009 FC 618, corrective action, if any, must be related to the abuse of authority itself. The Board will therefore make a declaration in regards to the abuse of authority in the application of merit.

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

(The Order appears on the next page)

VI. Order

[114] I declare that the respondent, the deputy head of the Department of Fisheries and Oceans, abused its authority in the application of merit in process 15-DFO-NCR-IA-CFO-118926.

January 5, 2018.

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board