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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

SHERRY GREEN

Complainant

and

DEPUTY MINISTER OF NATIONAL DEFENCE

Respondent

and

OTHER PARTIES

Indexed as

Green v. Deputy Minister of National Defence

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

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

For the Complainant: Louis Bisson, counsel

For the Respondent: Karl Chemsy, counsel

For the Public Service Commission: Luc Savard, written submissions

Heard at Victoria, British Columbia,
April 10 and 11, 2018.

REASONS FOR DECISION

I. Introduction

[1] Sherry Green, the complainant, applied to an internal advertised appointment process to fill a civilian ammunition technician supervisor (GT-03) position with the Department of National Defence (DND) in Victoria, British Columbia. She was found not qualified for the position. She alleges that the respondent, the Deputy Minister of the DND, did not assess her fairly and did not ensure that her assessment was free from bias. In her view, there was a reasonable apprehension of bias in the assessment process, which gave rise to an abuse of authority.

[2] The respondent denies that there was any abuse of authority.

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

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

II. Background

[5] A Job Opportunity Advertisement (JOA) for the civilian ammunition technician supervisor position was posted on the public service jobs website with a closing date of July 24, 2015. The complainant applied and was screened into the process. She passed the exam and was called for an interview.

[6] During the interview, the candidates were assessed against the five experience criteria, four personal suitability criteria, and two abilities criteria identified on the JOA. The complainant was found not to meet three of the experience criteria and two of the personal suitability criteria. Her candidacy was not considered further.

[7] On December 1, 2015, a Notification of Appointment or Proposal of Appointment (NAPA) was posted for the two selected candidates.

[8] On December 16, 2015, the complainant filed a complaint of abuse of authority with the Public Service Labour Relations and Employment Board under s. 77 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*).

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

III. Issue

[10] I must determine the following issue: Did the respondent abuse its authority in the application of merit by reason of a reasonable apprehension of bias?

IV. Summary of the evidence

A. The complainant

[11] The complainant testified at the hearing. She explained that she has been with the DND since 2009. She is presently a civilian ammunition technician (classified GT-02) and works at the Canadian Forces Ammunition Depot (“the Depot”) in Rocky Point, B.C.

[12] She affirmed that two months after she started working for the DND in 2009, she was injured at work, on the dock. She submitted a provincial worker’s compensation board (WCB) claim. In its decision, the WCB recognized her illness as being work related.

[13] As a result of her accident, she used all her sick leave through 2012. She explained that the respondent requested that she undergo a Health Canada assessment in 2013, which showed that she was not fit to return to work. Since then, she has been on extended sick leave. She has tried to return to work twice since 2013 but has not been successful.

[14] The complainant explained that over the years, she submitted several complaints and grievances against two supervisors she worked under at the Depot. At least two of the grievances were sent to adjudication. The two supervisors retired in 2013 and were not involved in the staffing process at issue.

[15] The complainant successfully completed the Civilian Ammunition Technician Level 3 (CAT 3) training before she applied to the GT-03 staffing process.

[16] The board that assessed the complainant consisted of Sandra Nelson, Michel Gingras, and David Ramalho. At the time of the staffing process at issue, all three worked at the Depot; Ms. Nelson and Mr. Gingras were in acting positions, she as an explosive safety officer and he as a material processing officer (and he was also the return to work program advisor). Mr. Ramalho was a material control officer.

[17] The complainant originally alleged in her complaint and allegations that the respondent created a reasonable apprehension of bias when it allowed a board member to take part in her assessment who had been subject to or involved in previous discrimination complaints and grievances that the complainant had filed. She also initially alleged that that board member had been in a conflict of interest during the staffing process because of her complaints and grievances and therefore did not properly assess her.

[18] At the hearing, the complainant's representative clarified what the complainant had meant when she made these allegations. While none of the board members had been targeted by her complaints and grievances, they were aware that she had filed many complaints and grievances against management. Two members were also involved to some extent in her complaints or grievances. She believes that the assessment board did not ensure that her assessment was free from bias.

[19] The complainant said that before the interviews, once she learned of the composition of the interview panel, she communicated her concerns that it could be biased against her, to her union representative and to a human resources advisor. When questioned about this at the hearing, she corrected herself and said that she had voiced her concerns about that composition only after her interview. She explained that both her union representative and the human resources advisor told her that her only recourse was to file a complaint within 15 days of the NAPA being issued.

[20] The complainant also testified that during her interview, one panel member asked her an improper question. She could not remember who it was; she noted that it might have been Ms. Nelson or Mr. Gingras. According to the complainant, someone asked her whether she would be able to integrate herself successfully into the workplace given that she had been away from work for several years. She did not know

what to say in reply.

[21] At the hearing, the complainant explained in more detail why she felt that each member of the assessment board might have been biased against her.

[22] With respect to Mr. Ramalho, she explained that before he was appointed as a material control officer, he had been the union local's president responsible for the Depot. In that role, he had ensured her representation in several of the proceedings she had commenced against her two supervisors, which included a harassment complaint and a grievance that dealt with earning and granting sick leave and a failure to accommodate her disability. In another grievance, she alleged that she had been subjected to discrimination, bullying, and harassment.

[23] The complainant filed two of those grievances in evidence (numbered 5475 and 5591). On each one, Mr. Ramalho's signature appears under the following: "Approval for presentation of grievance relating to a collective agreement or an arbitral award, and agreement to represent employee are hereby given". Each grievance was partially allowed at the final level of the grievance process.

[24] The complainant explained that since Mr. Ramalho had represented her in the past but was now "teaming up" with management, it was a kind of treason. Her opinion was that it was unlikely that he would have been able to evaluate her impartially. However, she acknowledged that none of her complaints and grievances was against him.

[25] In support of her submission, the complainant also filed in evidence an email she received from Mr. Ramalho on June 28, 2015, which demonstrated that at that time, he shared her opinion about questionable conduct by a former member of management.

[26] With respect to Mr. Gingras, the complainant explained that he was the Depot's return to work program advisor. In that role, he was responsible for taking care of employees' return to work after a period of absence. Since she has been absent from work for years and has attempted to return at times, she has dealt with him.

[27] In particular, the complainant noted that after her accident and after she made her WCB claim, she discovered that Mr. Gingras had said something negative about her to the WCB. More precisely, before the WCB approved her claim, Mr. Gingras had

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contacted it at the request of one of the two supervisors targeted by her complaints and grievances. She said that he had made that contact to convey management's opinion that she was not credible and that she was seeking monetary compensation to cover her Christmas leave at the time.

[28] In support of her claim, the complainant relied on grievance number 5591, which she filed on July 10, 2013. In it, she presented a lengthy history of the facts that had led to her grievance. She included the following, which she placed beside the date of November 29, 2012: "Mike Gringas [*sic*] phoned WCB inquiring about claim status of reopening. Said that the employer thought I was only trying to get these sick hours covered by WCB so I could have paid leave at Christmas!"

[29] The complainant's opinion is that since Mr. Gringras made that call to the WCB and a statement about it later on, he was unlikely to evaluate her impartially. However, she acknowledged that these are the only actions she blames Mr. Gringras for and that none of her complaints and grievances was against him.

[30] With respect to Ms. Nelson, the complainant stated that there was no conflict between her and Ms. Nelson. She also acknowledged that none of her complaints and grievances was against Ms. Nelson.

[31] For the reasons I have noted, the complainant believes that she was not fairly considered for the position. Her opinion is that as part of the staffing process, the respondent should have ensured that none of the members of the assessment board had any negative impressions of her. If it were necessary, the respondent could have asked other employees in the GT classification from a different ammunition depot to evaluate her. She stated that there are three other depots in Canada.

B. The assessment board members

[32] The three assessment board members testified at the hearing. They explained that before interviewing the complainant, they introduced themselves and explained how the interview would take place. They then asked her whether she had any questions about the interview process. She responded that she had none, so they carried out the interview.

[33] The three members each explained that they wrote down the complainant's responses during the interview. They then individually rated her responses, and after the interview, they reached consensus on the rating for each question. Ms. Nelson explained that their ratings were similar and that it had been easy to reach a consensus.

[34] The complainant was found not to meet three experience criteria and two personal suitability criteria for the position. Her marks for experience criteria 1, 2, and 5 were, respectively, 8 out of 20 (the pass mark was 12), 17 out of 32 (the pass mark was 19), and 15 out of 30 (the pass mark was 18). She obtained marks higher than the pass marks for experiences 3 and 4. Her marks for personal suitability criteria 3 and 4 were for each 10 out of 20 (the pass mark was 12). She obtained passing marks for personal suitability criteria 1 and 2 and for abilities 1 and 2. Given that she was found not to meet some of the essential qualifications, her candidacy was not considered further.

[35] On September 15, 2015, the complainant was informed that the assessment board had determined that she did not meet the following five essential qualifications: (1) experience in performing the mechanical breakdown repairs, modifications, and maintenance, testing of ammunition, explosives, missiles and related items; (2) experience in issuing, receiving, warehousing and inspecting ammunition, explosives, missiles and related items; (3) experience in supervision; (4) judgment; and (5) initiative.

1. Ms. Nelson

[36] Ms. Nelson, who was the assessment board chairperson and who has 20 years of experience in the GT classification, explained why the board had considered some of the complainant's responses weak. An answer guide had been prepared, so the board members assessed the candidates' answers by comparing them to the suggested answers. Some of the complainant's responses were not consistent with the guide.

[37] In particular, Ms. Nelson explained that for the first two ammunition experiences, the complainant's responses were considered weak because in explaining how she would perform certain manoeuvres, she described ways of executing activities that were unsafe or unsound. Referring to her notes, Ms. Nelson gave several examples, such as one of the complainant's responses, in which she mentioned that she would

remove her gloves to handle a special socket. Ms. Nelson specified that doing so would be dangerous. She added that the complainant's responses indicated that she failed to fully understand the potential consequences of the risks she would be taking in performing these tasks or activities.

[38] Ms. Nelson also explained why the complainant did not meet the supervisory experience qualification. One question asked to assess this experience was the following: "You have two GT2 ammunition technicians working with you in your department. Both have approached you at different times in the last two days indicating they each have a conflict with one another. As a supervisor what is your responsibility?"

[39] The answer grid suggested as possible responses (i) conducting a meeting with each employee, individually, to identify the issues; (2) asking the employees if they are willing to attend a meeting; (iii) if so, conducting the meeting; (iv) advising the senior supervisor of the meeting's outcome; and (v) following up to ensure that the conflict has been resolved.

[40] Ms. Nelson explained that the complainant's response to this question was considered weak because it included elements that were not consistent with the responses sought. For example, she mentioned that she would consider disciplining and moving the employees if necessary. Ms. Nelson explained that a first-level supervisor cannot take those actions. The complainant's response did include a few of the elements in the grid, so the assessment board awarded her 5 out of 10 for her response.

[41] Ms. Nelson explained that as the assessment board's chair, she had selected the other members. She explained that they had to be in the GT classification above the GT-03 level to be able to properly evaluate the responses of the candidates for the GT-03 position. Mr. Gingras and Mr. Ramalho satisfied the requirements. She also needed someone who could speak French, and Mr. Gingras was a French-speaking manager. Both Mr. Gingras and Mr. Ramalho had experience with staffing appointment processes and extensive technical knowledge of the nature of ammunition and associated hazards.

[42] Finally, Ms. Nelson affirmed that the only questions posed to the complainant were those that appeared in the questions and answers guide. She was not asked about her state of health or whether she would be able to integrate herself successfully into the workplace given that she had been away from work for several years.

2. Mr. Gingras

[43] Mr. Gingras explained that he joined the military in 1974. He left 29 years later and is now part of the civilian personnel. He has worked in the ammunition sector for 37 years.

[44] Mr. Gingras has been the return to work program advisor at the Depot since 2010. In this role, he helps supervisors identify and provide modified work when they receive accommodation requests. The objective is to enable an injured or ill employee to remain at work or to return to work performing appropriate duties while considering his or her functional capacities. Mr. Gingras is also responsible for answering questions about managing an illness, injury, or other medical condition or impairment in the workplace.

[45] Mr. Gingras affirmed that he has never had a conflict with the complainant and that she has never filed a grievance or complaint against him. He testified that he has no memory of any problem in past dealings with her. As for an accommodation request that she submitted in the past, Mr. Gingras explained that she had asked to work only half-days and three days per week. He explained that the employer had granted her request and had found her work. However, after one week of work, she had chosen not to continue.

[46] Mr. Gingras also explained why he called the WCB at management's request on November 29, 2012. Since the complainant had used all her sick leave credits in 2010 and 2011, management advanced her a significant number of sick leave credits in 2012. In November of 2012, management had to decide whether it could advance her additional sick leave credits while respecting the collective agreement and practice.

[47] Thus, the manager responsible for making this decision asked Mr. Gingras to inquire with the WCB as to whether the complainant's claim would be accepted. If so, management would have exercised its discretion to advance her supplementary sick leave credits, which would have been possible since all the sick leave credits she

had used in the past years would have been returned to her, which would have helped her.

[48] However, Mr. Gingras was informed that no decision had yet been made on the claim. He asked whether the WCB could expedite processing the complainant's file. In the end, management did not exercise its discretion to advance her more sick leave credits.

[49] One or two years later, probably when the complainant grieved against a member of management, Mr. Gingras was asked about his past call to the WCB. He wrote a statement that he handed over to Human Resources. He did not do anything else or hear about it again after that.

[50] As for the questions the complainant was asked during the interview, Mr. Gingras said that no questions about her state of health were put to her. He affirmed that the only questions she was posed were those in the question and answer guide.

3. Mr. Ramalho

[51] Mr. Ramalho explained that he was in the Royal Canadian Navy from 1975 to 1996. After that, he worked for himself for a few years. He started in the GT classification with the department in 2001. In July of 2015, he became the material control officer at the Depot (a GT-05 position). He explained that he has been working in the ammunition field since 1991.

[52] Mr. Ramalho noted that from 2006 to 2014, he was also the local president of the Union of National Defence Employees, which is a component of the Public Service Alliance of Canada that represents the civilian staff that supports the DND. In that role, he represented the complainant in presenting her grievances. When questioned about them, he mentioned that she has filed probably a dozen grievances. He said that he represented many grievors over the years and that his objective had been to help them find a middle ground so that they could move forward together with their employer. He never refused to represent a union member.

[53] Mr. Ramalho mentioned that he was happy that the complainant was a candidate for a GT-03 position. He had no issues with her performance and had been happy with her work.

[54] He explained that during the complainant's interview, some of her answers to the questions were very good, but on the other hand, others were incorrect. Like the other board members, he took notes of her answers. The board members each individually rated her responses after comparing them to those in the answer guide. After the interview, they awarded her a joint mark that had been reached by consensus. There was no issue with their consensus marks.

[55] Mr. Ramalho also affirmed that the only questions posed to the complainant were those appearing in the question and answer guide, along with general questions, such as: "Do you want to add anything else to your response?" That was all.

V. Positions of the parties

[56] Section 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."

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

A. For the complainant

[58] The complainant submitted that there are two reasons behind the respondent abusing its authority in the application of merit by reason of a reasonable apprehension of bias. Firstly, the assessment board was composed of persons who were not impartial towards her. Secondly, they did not evaluate her answers objectively.

[59] In support of her first allegation, the complainant submitted that she experienced real problems at work, which led to her complaints and grievances. To prove that the difficulties she encountered at work were important, she filed into evidence the response she received at the final level of the grievance process for grievance number 5591. In that letter, the Director General, Workplace Management, partially allowed her grievance. He found that she had been subjected to inappropriate comments and behaviours from her supervisor on the following two occasions: (1) on

November 22, 2012, when her supervisor inappropriately questioned her request for family-related leave; and (2) on March 11, 2013, when her supervisor inappropriately discussed the appropriateness of donating blood and of participating in a workplace activity (a softball tournament).

[60] The complainant submitted that because of her complaints and grievances, it is possible that the assessment board members had a negative opinion of her. They were aware that she had filed many complaints and grievances against management.

[61] The complainant referred me to the Public Service Staffing Tribunal's (PSST) decision in *Denny v. Deputy Minister of National Defence*, 2009 PSST 29 at paras. 133 through 140, in which the PSST held that for bias to be found, it is not necessary to find direct evidence; a reasonable apprehension of bias is sufficient. She pointed out that she did not have to raise her bias concerns before the interview was held. She relied on paragraph 139 of *Denny*, where the PSST found that the *Assessment Policy*, the *Guide to Implementing the Assessment Policy*, and the *Guidance Series - Assessment, Selection and Appointment* documents produced by the PSC made it clear that the responsibility for ensuring a bias-free assessment lies with the deputy head, delegated manager, and assessment board members.

[62] The complainant emphasized that in *Denny*, the complainant in that case alleged that he had had a prior conflict with a member of the board who assessed him in a practical test and that the resulting assessment was biased against him. The PSST found as a fact that the complainant and assessor had been involved in conflicts before the appointment process. The PSST also found that an informed person viewing the evidence realistically and practically would think that it was more likely than not that the assessor, whether consciously or unconsciously, would not have administered the practical test fairly, vis-à-vis the complainant. The PSST also found that other qualified personnel could have administered the test.

[63] The complainant submitted that other qualified personnel could have conducted her interview. The respondent could have found them at another ammunition depot. According to her, had her interview been conducted by different GT employees from another depot in Canada, the apprehension of bias would be reduced.

[64] The complainant added that in *Tibbs*, at para. 70, the PSST set out some examples of abuse of authority that include an improper result (including unreasonable, discriminatory, or retroactive administrative actions). In this case, she submitted that the question about her health that she was asked during her interview was discriminatory and inappropriate. It suggested that the person thought that her condition was problematic and that it would not allow her to perform the duties of the position.

[65] She added that although she did not allege in her complaint and allegations that the respondent had discriminated against her, she did allege that there was an abuse of authority, which includes an improper discriminatory action.

[66] The complainant also referred me to the PSST's decision in *Amirault v. Deputy Minister of National Defence*, 2012 PSST 6 at paras. 55, 57, and 58. In that case, it was alleged that the involvement of two assessment board members gave rise to a reasonable apprehension of bias due to previous conflicts with the complainant. The PSST held that a reasonable apprehension of bias was established based on the existence of those conflicts. The complainant highlighted that at paragraph 55 in this case, the PSST noted as follows: "The PSC *Assessment Policy* provides that persons responsible for assessment must not be in conflict of interest and must be able to carry out their roles, responsibilities and duties in a fair and just manner."

[67] The complainant argued that an informed person would consider the following evidence before making a determination on bias: (i) the fact that she had filed many complaints and grievances against management and that the assessment board members knew about it; (ii) the fact that a board member, perhaps Mr. Gingras or Ms. Nelson, asked her a discriminatory question; and (iii) the fact that Mr. Gingras had called the WCB to say something negative about her and that he had subsequently made a statement about it, which he shared with Human Resources. In her view, an informed person viewing this evidence realistically and practically would think that it is more likely than not that, whether consciously or unconsciously, the assessment board did not fairly assess her during her interview.

[68] The complainant added that since Mr. Ramalho had represented her in the past, there was also an appearance of positive bias that tainted her evaluation.

She submitted that bias is usually negative but that it can also be positive. Accordingly, she submitted that there is an appearance of bias in the appointment process and that the duty to conduct a fair appointment process was not fulfilled.

[69] The complainant argued that the respondent abused its authority in the application of merit by reason of bias for a second reason. In her view, the assessment board members did not correct her answers objectively but did so according to subjective standards. She added that subjective scoring always reduces reliability and therefore diminishes the ultimate validity of the interpretations and conclusions. In particular, she noted that the board members discussed her final mark for each question. They consulted each other before reaching a consensus on the marks to assign to her answers. For example, for question 2, Ms. Nelson and Mr. Gingras gave her 4, but Mr. Ramalho gave her 5. However, after a discussion, there was consensus that her mark would be 4.

[70] The complainant viewed this subjective scoring of her answers as problematic. In her view, a reasonably informed bystander looking at all of this would reasonably perceive bias on the part of one or more of the persons involved in her assessment.

[71] Lastly, the complainant specified that she is not challenging the board's assessment of the appointees.

B. For the respondent

[72] The respondent denied that it abused its authority in this process. It noted that none of the complainant's complaints and grievances had been filed against any of the assessment board members but instead against supervisors uninvolved in the staffing process.

[73] It submitted that the appointment process was structured. The complainant's candidacy was not considered further because she did not obtain the pass mark for some interview questions.

[74] In addition, before or during the interview, the complainant did not raise any concerns about the assessment board's composition. The board gave her the opportunity to ask questions; she had none.

[75] The respondent noted that the complainant testified that she had no issue with Ms. Nelson. She said only that Ms. Nelson might have been the one who had asked the improper question but that she was not sure.

[76] The respondent also noted that the complainant confirmed that none of her grievances and complaints had been filed against Mr. Gingras. He was not her supervisor. She testified that because he was the Depot's return to work program advisor, he should not have evaluated her. However, he carried out only the normal administrative work of such an advisor, nothing more.

[77] More precisely, Mr. Gingras was doing his job when he called the WCB at management's request. At some point, he was asked to prepare a statement of his conversation with the WCB agent, which he then shared with Human Resources. He did his work and was transparent about it. This does not demonstrate that he had a conflict with the complainant; he did not have a difficult relationship with her.

[78] The respondent also noted that Mr. Ramalho had not had a difficult relationship with the complainant. Mr. Ramalho even helped her and supported her over the years. She had no issue with him.

[79] The respondent added that the complainant testified that the board members asked her an inappropriate question. However, she does not remember who asked it, and she did not tell anyone about it after the interview. According to the respondent, there is no concrete evidence that such a question was asked. In addition, the three members said that they did not ask it. They explained that in accordance with the instructions, they asked predetermined questions and that the process was fair and impartial. Furthermore, the respondent submitted that the complainant attempted to make a new allegation by arguing that the question was discriminatory. In any event, there is no evidence that a discriminatory question was asked during her interview.

[80] In response to the complainant's argument that Mr. Ramalho might have had a positive bias towards her, the respondent replied that bias is usually negative, and although it can be positive, it is not evidence of bad faith or of an abuse of authority.

[81] Relying on *Bizimana v. Deputy Minister of Public Works and Government Services*, 2014 PSST 3 at para. 76, the respondent argued that the question to be asked

is the following:

[76] ... the Tribunal must ask whether a reasonably informed bystander looking at this appointment process would think that it is more likely than not that the board members who interviewed the complainant, whether consciously or unconsciously, could not assess her fairly.

[82] The respondent also relied on *Saunders v. Deputy Minister of National Defence*, 2014 PSST 13, in support of its position that the fact that the complainant presented grievances and complaints against “management” is not sufficient in itself to give rise to a reasonable apprehension of bias. It brought to my attention paragraphs 39 and 40 of that decision, which read as follows:

[39] The complainant argues that the mere knowledge of the fact that the complainant presented grievances and complaints against “management” rendered LCol Ross and Ms. Williams biased against her because they are part of management. The Tribunal does not agree with that proposition. The fact of presenting a grievance or complaint is insufficient in itself to give rise to a reasonable apprehension of bias on the part of a member of the management team.

[40] The evidence regarding the complainant’s grievances and complaints only refers to the allegation of delays in updating the VRT and, in one instance, of harassment. The evidence does not indicate the existence of any poor relationships between the complainant and LCol Ross or Ms. Williams. As indicated above, the grievances and complaints were not directed at LCol Ross or Ms. Williams personally. The evidence before the Tribunal is therefore insufficient to establish that those grievances and complaints affected LCol Ross’ and Ms. Williams’ assessment of the complainant’s qualifications.

[83] The respondent also brought to my attention *Jean Pierre v. President of the Canada Border Services Agency*, 2013 PSST 28 at para. 45, where the PSST noted that employees do not always agree with their supervisors but that dealing with such disputes is part of a supervisor’s regular duty. The PSST noted the following:

[45] The complainant submits that Ms. Giroux was biased against him because he disputed two of his performance evaluation reports. The Tribunal notes that the complainant did not inform the assessment board during his interview, which took place before the reference check, that he objected to having Ms. Giroux as a referee. He made his concerns

known to the assessment board only after Ms. Giroux gave an unfavourable reference. That being said, it goes without saying that employees do not always agree with the evaluation of their performance conducted by their supervisor. Sometimes an employee disputes that evaluation. This is part of the normal labour relations model, and dealing with such a dispute is part of a supervisor's regular duties. The complainant failed to establish that his dispute had affected Ms. Giroux's impartiality toward him.

[84] For all these reasons, the respondent submitted that a reasonably informed bystander looking at this appointment process would not think that it is more likely than not that the board members who interviewed the complainant assessed her unfairly, whether consciously or unconsciously.

C. The PSC's written submissions

[85] The PSC submitted that while they have broad discretion to choose assessment tools, deputy heads must respect its *Assessment Policy*, which provides that assessments are to be designed and implemented without bias, political influence, or personal favouritism and that they must not create systemic barriers. It also indicates that assessment processes and methods must effectively assess essential qualifications and other merit criteria and must be administered fairly.

[86] The PSC also produced a document entitled, "Guidance Series - Assessment, Selection and Appointment". The PSC highlighted that the guide provides guidance to help managers make appointment-related decisions that are free from bias and do not cause systemic barriers. For example, managers can do the following:

...

- [ensure] *that assessment boards have been sensitized to bias-free assessment;*

...

- [ensure] *that the relationships between applicants and assessment board members do not bias the assessment process or appear to do so;*

...

- [ensure] *that assessment board members understand the nature of the position and the merit criteria to conduct an accurate assessment; and*

· [ensure] that assessment board members have the necessary qualifications or competencies, including the language proficiency required to permit effective communication, to ensure a fair and complete assessment....

...

VI. Analysis

[87] Having considered the testimony and documents submitted by the parties, I find no evidence of actual bias on the part of the assessment board. Therefore, I must determine whether the evidence is sufficient to support the complainant's allegation of a reasonable apprehension of bias.

[88] In *Denny*, the PSST referred to *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, which sets out the test for a reasonable apprehension of bias as follows at page 394:

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

[89] The PSST in *Denny* applied the test for a reasonable apprehension of bias in a staffing complaint. In the staffing context, it noted that the test could be formulated as follows: Would a reasonably informed bystander looking at the process reasonably perceive bias on the part of one or more of the persons involved in the assessment of the complainant?

[90] Likewise, in *Drozdowski v. Deputy Head (Department of Public Works and Government Services)*, 2016 PSLREB 33, the test was stated as follows:

...

Given the history of the terminology, I think the test can be reworded as follows: If a reasonably informed bystander could reasonably perceive bias on the part of one or more of the persons responsible for assessment, the Board can conclude that abuse of authority exists.

...

[91] Applying the test to the circumstances of this case, I find that a reasonably informed bystander would not reasonably perceive bias on the part of the assessment board members who assessed the complainant.

[92] To start, I note that a past or ongoing conflict between individuals can be an important indicator when determining an apprehension of bias. In this respect, the complainant has acknowledged that none of the assessment board members was the subject of any of her complaints or grievances. It is also clear that there was no apparent conflict between her and any of the board members.

[93] In the same vein, I recognize that the PSST held in *Denny* that "...the responsibility for ensuring a bias-free assessment lies with the deputy head, delegated manager and assessment board members". However, in cases such as this one, in which there is no apparent conflict between the candidate and the assessment board members, I believe the timing of when the candidate raises the issue of bias should be considered. In this case, if the complainant believed that the board members responsible for conducting her interview hindered her opportunity to be properly assessed, she could have raised the issue in a timely way; that is, when she first learned of their names or before her interview. She recognized that she did not raise it at those times. She waited until after the interview, and only then did she object to the presence of the board members on the basis that they knew about her past complaints and grievances.

[94] The complainant also alleges that during the interview, an assessment board member asked her an improper question about her health. She has only a vague recollection of being asked such a question, and she does not remember which board member asked it. I also note that she never mentioned this allegation in her complaint or allegations. It was raised for the first time only at the hearing.

[95] On the other hand, all three board members testified that they did not ask her a question about her health. Their testimony was consistent, and they were each able to provide a detailed description of the course of their decision-making process. I was given no reason to doubt the credibility of their testimony, whether on the issue of the questions put to the complainant or as a whole. As such, I find that there is insufficient evidence to support the complainant's allegation that a board member asked her a question about her health during the interview.

[96] On an individual basis, I find that a reasonably informed bystander would not reasonably perceive bias on the part of Mr. Gingras because, in his role as the return to work program advisor, he phoned the WCB to facilitate management's decision on advancing the complainant some leave. It was part of his work. Later, he was asked to prepare a statement in which he explained why he made the call. On this last point, I note that apart from the complainant's comment, no explanation or evidence was given to support her allegation that Mr. Gingras made negative remarks about her. In my view, there is insufficient evidence to establish that he could not have assessed the complainant fairly, whether consciously or unconsciously.

[97] Similarly, I consider that a reasonably informed bystander would not reasonably perceive bias on the part of Mr. Ramalho because he had represented the complainant in the past with her grievances. While Mr. Ramalho might have represented the complainant in the past and, as with the other board members, was aware of her many complaints and grievances, I agree with the reasoning in *Saunders* that these facts alone are insufficient to give rise to a reasonable apprehension of bias. Relatedly, claiming that this created a positive bias would be inconsistent with the nature of this complaint and the results of the complainant's assessment.

[98] Finally, the complainant alleges a reasonable apprehension of bias because subjective standards were used to assess her. In view of the evidence, I consider that the method of evaluating the complainant's answers to the interview questions was objective and that the interview process was fair. An answer grid was used to assess her responses. The members first assessed her answers individually and assigned initial marks. They then consulted each other to assign final marks to her answers. As such, I am satisfied that in assessing her answers, they did so objectively by taking into account the possible responses in the answer grid and then comparing answers to ensure consistency.

[99] Overall, the evidence indicates that the complainant's candidacy was not considered further because she did not obtain the pass mark for some of the interview questions. For example, the evidence established that in describing her experience using specialized tools or testing equipment as an ammunition technician, she listed unsafe or unsound activities that were not part of the standard operating procedures.

[100] Therefore, I conclude that it has not been established that the respondent abused its authority in the application of merit by reason of a reasonable apprehension of bias.

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

(The Order appears on the next page)

VII. Order

[102] The complaint is dismissed.

August 21, 2018.

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