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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

MARTIN TANGUAY

Complainant

and

THE COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA

Respondent

and

OTHER PARTIES

Indexed as

Tanguay v. Commissioner of the Correctional Service of Canada

In the matter of a complaint of abuse of authority - section 77 of the
Public Service Employment Act

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

For the Complainant: Valérie Charrette, counsel, Professional Institute of the Public
Service of Canada

For the Respondent: Adam Gilani, counsel

For the Public Service Commission: Louise Bard, written submissions

Heard at Montreal, Quebec,
July 10 and 11, 2018,
(FPSLREB Translation)

I. Introduction

[1] The complainant, Martin Tanguay, filed a complaint with the Federal Public Sector Labour Relations and Employment Board (“the Board”) alleging that the Commissioner of the Correctional Service of Canada (“the respondent”) abused its authority in the interim appointment of Benoît Richer to a chief, facilities management (“CFM position”) position classified at the GL-COI-13 group and level within the Correctional Service of Canada (CSC) in Sainte-Anne-des-Plaines, Quebec.

[2] According to the complainant, the respondent abused its authority by choosing a non-advertised appointment process and in applying the merit criteria since the selected person’s appointment was based on personal favouritism. The complainant also alleges that the respondent committed a serious error by being late posting the appointee’s appointment notice.

[3] The respondent denies abusing its authority. The choice of a non-advertised appointment process was intended to correct an unforeseen situation that arose from the incumbent’s departure on sick leave and then on unpaid leave. The respondent adds that there was no personal favouritism, that the appointee was subjected to a full assessment, and that he possessed all the required qualifications for the position. The respondent acknowledges that the appointment notice was posted later than intended, but it maintains that it was an administrative error and that employees had a right to recourse following the appointment.

[4] The Public Service Commission (PSC) did not appear at the hearing, but it made written submissions describing its relevant guidelines and policies. It did not take a position on the merits of the complaint.

[5] For the reasons set out later, the complaint is dismissed. The complainant did not establish that the respondent abused its authority in the appointment process at issue.

II. Background

[6] A non-advertised appointment process took place to staff a GL-COI-13 CFM position in Sainte-Anne-des-Plaines, Quebec. Originally, it was a temporary need

because the incumbent informed his supervisor on March 6, 2015, that he would be on sick leave for a period of three weeks, from March 9 to 27, 2015.

[7] The incumbent later informed his supervisor that his doctor was extending his sick leave by three weeks, until April 17, 2015.

[8] The respondent had immediate need of someone to perform the duties of the position, given the numerous challenges and projects in progress at Sainte-Anne-des-Plaines Institution and because of an excessive workload in connection with the end of the fiscal year.

[9] The Supervisor asked some employees on-site or who were part of a GL-COI-13 pool of candidates whether they were interested in the position, but no one expressed interest. He then turned to employees who had already held an acting GL-COI-13 CFM position at another institution.

[10] In the past, Mr. Richer had held such an acting position at another institution for just over nine months. He had demonstrated interest in the duties. Therefore, he was selected to fill the temporary need at Sainte-Anne-des-Plaines Institution.

[11] Shortly after that, the incumbent announced to his supervisor that he wished to request 15 months of unpaid leave, which began after his last day of work, May 8, 2015.

[12] The Supervisor then took steps to find a long-term replacement for the position and asked Mr. Richer to stay in it until a long-term replacement was found.

[13] On July 21, 2015, the incumbent informed his manager that he wished to return to work before the end of his 15-month leave.

[14] On August 24, 2015, the incumbent resumed his position at Sainte-Anne-des-Plaines Institution.

[15] Therefore, Mr. Richer held the position in an acting capacity from March 12, 2015, to October 2, 2015. There was a transition period of about a week to ensure the continuation of projects and services.

[16] The appointment notice following the non-advertised process of Mr. Richer's appointment on an acting basis to the CFM position (GL-COI-13) for the period from March 12, 2015, to October 2, 2015, was posted on October 30, 2015.

[17] The complainant filed his complaint when he became aware of the appointment notice. The abuse-of-authority complaint was made to the Board under s. 77 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*).

III. Issues

- (i) Did the respondent abuse its authority by choosing a non-advertised appointment process?
- (ii) Did the respondent abuse its authority by showing personal favouritism towards the appointee?
- (iii) Did the respondent abuse its authority by delaying posting the appointee's appointment notice?

IV. Analysis

[18] Under ss. 77(1) of the *PSEA*, a person in the area of recourse can make a complaint to the Board that he or she was not appointed or proposed for appointment because of an abuse of authority in the appointment process by the PSC or the deputy head.

[19] The complainant relies on s. 77(1)(b) of the *PSEA* to claim that the respondent abused its authority by choosing a non-advertised appointment process. His argument also uses s. 77(1)(a) to claim that the respondent abused its authority in applying the merit criteria.

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

A. Question I: Did the respondent abuse its authority by choosing a non-advertised appointment process?

[21] Section 33 of the *PSEA* stipulates, "In making an appointment, the Commission

[the PSC] may use an advertised or non-advertised appointment process.” It provides some latitude and does not establish a preference for the choice of process. In *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 6 at para. 7, the Public Service Staffing Tribunal (“the Tribunal”) described abuse of authority in the context of the choice of process and found the following:

*Section 33 of the PSEA explicitly permits the use of non-advertised appointment processes. Nevertheless, s. 77(1)(b) of the PSEA provides for a direct challenge of the discretionary choice between an advertised and non-advertised process, on the ground of abuse of authority. The Tribunal has established that merely choosing to conduct a non-advertised process is not an abuse of authority in itself. For a complaint under s. 77(1)(b) of the PSEA to be successful, the complainant must establish, on a balance of probabilities, that the **choice** to use a non-advertised process was an abuse of authority....*

[Emphasis in the original]

[22] The complainant submitted that in light of the following facts, the choice of a non-advertised process was an abuse of authority. In particular, he is of the view that the stated rationale for using a non-advertised process and for selecting the appointee was not objectively valid. He intends to show that other prospective candidates, including him, had the necessary experience and were interested in assuming the duties in question in an acting capacity but that they were not considered.

[23] At the hearing, the complainant adduced his curriculum vitae into evidence, which indicates that he held an acting CFM position classified at the GL-COI-11 group and level at Montée St-François Institution from September 2009 to January 2012.

[24] The complainant explained that in general, positions classified GL-COI-11 are maintenance supervisor positions at the institutions and that the CFM positions are classified GL-COI-13. Nevertheless, he explained that at Montée St-François Institution, the two employees occupying positions classified GL-COI-11 had special status and that they performed CFM duties rather than those of a maintenance supervisor. That is why there was a job description for a CFM classified GL-COI-11 at that institution.

[25] The complainant adduced into evidence the job description of the GL-COI-11

CFM position that he held from 2009 to 2012 at Montée St-François Institution. According to him, the description shows that the incumbent performed duties similar to those of GL-COI-13 CFMs at other institutions. Specifically, the job description states the following:

[Translation]

The incumbent is responsible for the maintenance and construction programs of a CSC institution to which at least two of the following statements apply:

- *The institution has a power plant*
- *The institution has a treatment plant (drinking water or waste water)*
- *The institution's security classification is MEDIUM, MAXIMUM, or MULTI-LEVEL*
- *The institution has a minimum of 225 cells.*

[26] Similarly, the job description for the GL-COI-13 CFM position states that the incumbent is responsible for maintenance and construction programs of a CSC institution to which more than three of those statements apply.

[27] The complainant explained that from 2009 to 2012, the Montée St-François Institution GL-COI-11 CFMs reported to the assistant warden, management services, instead of to a GL-COI-13 CFM, as at other institutions. In addition, that institution had no GL-COI-13 CFMs. And the two GL-COI-11 CFMs there supervised Technical Services assistants, as do the GL-COI-13 CFMs at other institutions.

[28] The complainant explained that he had performed a CFM's duties for two years and seven months at Montée St-François Institution. He submitted that therefore, the respondent erred by not considering him for an appointment on an acting basis as a GL-COI-13 CFM at Sainte-Anne-des-Plaines Institution. He adduced into evidence his performance assessment report covering his time in the GL-COI-11 CFM position at Montée St-François Institution. His assessment was very favourable and stated that he managed financial resources and performed supervisory duties.

[29] At the hearing, the complainant also provided an overview of the positions he

held after January 2012, when he ceased occupying the GL-COI-11 CFM position.

[30] The complainant explained that he first held a liaison officer in charge of construction (AS-05) position at Montée St-François Institution from January 2012 to April 2014. Then, from April 2014 until the hearing, his substantive position was as an engineer/project manager, electrical engineering (EN-ENG-03), in Technical Services. He adduced in evidence the job description for that position to show the tasks he accomplished in that work. Specifically, he outlined his responsibilities to show that he had the necessary qualifications for the GL-COI-13 CFM position. He also showed that he had received a very favourable assessment in 2014-2015 in that position.

[31] The complainant also added that on March 6, 2017, he was informed that he had been deemed qualified and that his name had been placed in a candidate pool for a regional manager, engineering and maintenance, position (EN-ENG-04) and or a regional manager, facilities planning, position (EN-ENG-04). He also was appointed on an acting basis to a position classified at the EN-ENG-04 level as a one-week replacement, from February 22 to 26, 2016.

[32] The complainant adduced into evidence job descriptions for the regional manager, engineering and maintenance (EN-ENG-04), and regional manager, facilities planning (EN-ENG-04), positions to support his argument that he possessed the essential qualifications required for those positions.

[33] The complainant explained that he then applied for a construction project manager (EN-ENG-05) position, for which he received a four-month appointment on an acting basis from February to June 2018. He adduced into evidence that position's job description to show the tasks he completed during that appointment.

[34] Although these developments in the complainant's career occurred after Mr. Richer's appointment on an acting basis to the CFM position (GL-COI-13) in 2015, the complainant submitted that his career path showed that he would have been qualified for the position at issue, since he had qualified for comparable positions, some at a higher level. According to him, the job descriptions for all the positions he held show that he had the relevant expertise, notably in project management, human resources management, and financial management, to occupy a GL-COI-13 CFM

position. According to him, the respondent's argument that no other person was qualified for the position does not hold up.

[35] The complainant also stated that he would have been interested in the GL-COI-13 CFM position but that his candidacy had not been considered. So, he stated that as a former GL-COI-11 CFM at Montée St-François Institution and as a project manager in 2015, he would have been qualified for and interested in the desired position, contrary to the respondent's statement.

[36] The complainant also added that the recourse for non-advertised processes impedes employees' opportunities for advancement, as in one, the respondent does not actively seek candidates.

[37] Finally, the complainant added that the fact that he does not have signing authority under s. 34 of the *Financial Administration Act*, one of the reasons Mr. Richer was selected, was not an issue since his senior manager would have had the authority to approve incurred expenses. At that time, the senior manager of the GL-COI-13 CFM was Martin Gagnon, who was the acting regional administrator, technical services, at the time of the process.

[38] In response to these allegations, the respondent submitted that in the beginning, the replacement need was for a very short duration, a three-week period in March 2015. That leave was then extended by three weeks. After that, the respondent had to find a longer-term replacement for the position, given that on his return to work (progressively, over four weeks), the incumbent informed his manager of his decision to take unpaid leave for up to 15 months, as of May 8, 2015.

[39] Mr. Gagnon was the sub-delegated manager for the appointment process. At the hearing, he provided a detailed description of the steps in the process.

[40] He explained that on Friday, March 6, 2015, the incumbent of the GL-COI-13 CFM position gave him a medical note indicating that he would be off work for three weeks, from March 9 to 27, 2015. Mr. Gagnon explained that when the incumbent informed him of his imminent departure on sick leave, he also mentioned that it would not be easy to find a replacement, since during his previous absences, it had been

difficult to find someone to replace him. The CFM held a key position at Sainte-Anne-des-Plaines Institution. Restructuring was underway at the CSC, and the climate at the institution involved tension and changes in direction.

[41] Concerned about the CFM's departure and the risk that the situation at Sainte-Anne-des-Plaines Institution could worsen, Mr. Gagnon examined several options to staff the vacant position. First, he explained how he temporarily staffed it from March 9 to 27, 2015. In the short term, his objective was to fill the position quickly, given the numerous challenges and projects in progress at the institution and an excessive workload connected to the end of the fiscal year. He testified that the position had to be staffed urgently.

[42] A pool of qualified candidates available for positions classified GL-COI-13 was in place. Mr. Gagnon consulted with the only candidate from it who was available for a temporary replacement. That person was in a GL-COI-11 position and was working at Sainte-Anne-des-Plaines Institution; given the numerous challenges at the institution, that candidate was not interested in assuming the GL-COI-13 CFM position.

[43] Mr. Gagnon then considered appointing a candidate from among the employees classified GL-COI-11 in the local Technical Services Team at Sainte-Anne-des-Plaines Institution. On March 9, 2015, he met with the three employees in question at the institution (the employee in the GL-COI-13 pool was one of them), who informed him that they were not interested in the GL-COI-13 CFM position, given the numerous challenges at the institution. In addition to challenges arising from the CSC restructuring, there were labour relations issues and unresolved or delayed staffing issues. Administrative assistant positions were vacant, and the additional workload for other employees was increasing. The team was at the end of its rope because of all the challenges.

[44] The three employees suggested that Mr. Gagnon ask that an assistant warden, management services, with extensive experience be appointed to the position. According to the employees, such a person would be able to find solutions to the institution's difficulties.

[45] Mr. Gagnon discussed that recommendation with the Regional Deputy

Commissioner, Integrated Services. He asked his superior whether, in the context of the restructuring, an assistant warden, management services, was available to temporarily assume the GL-COI-13 CFM position. That person informed him that none was available. Instead, he suggested that Mr. Gagnon ask the one at Sainte-Anne-des-Plaines Institution to help the person who would be appointed the GL-COI-13 CFM on an acting basis. According to Mr. Gagnon, such a collaboration was desirable, since that assistant warden, management services, knew well the Sainte-Anne-des-Plaines Institution.

[46] Next, Mr. Gagnon set out to find someone to fill the GL-COI-13 CFM position on an acting basis. He turned to employees who had already held such positions on an acting basis at other institutions and in the same area, including Mr. Richer, who had already held a GL-COI-13 CFM position on an acting basis for just over nine months at Cowansville Institution.

[47] In addition, Mr. Richer had completed the G110 training on the delegation of authority for managers and had obtained the required signing authority. Mr. Gagnon specified that given the excessive workload connected to the end of the fiscal year, such a delegation was vital. He explained that he could not approve all the Technical Services invoices at the institution and make the required inspections, since he does not work at that site.

[48] Mr. Gagnon also explained that the CFM (GL-COI-13) manages a large budget at Sainte-Anne-des-Plaines Institution. At the time, several construction projects were underway, and the CFM had to take charge of approving supplier invoices. As a result, the person responsible for invoice approval absolutely had to be in place to address irregularities within a set time.

[49] Mr. Gagnon then asked Mr. Richer if he would agree to assume the position at Sainte-Anne-des-Plaines Institution for a short period of a few weeks. He knew that Mr. Richer had already shown interest in the duties. Mr. Richer agreed to perform them on an acting basis.

[50] On March 11, 2015, Mr. Gagnon sent a memo to staff at Sainte-Anne-des-Plaines Institution, advising them that the incumbent of the CFM position would be away for

three weeks and that Mr. Richer would replace him. Yet shortly after that, the incumbent of the CFM position informed Mr. Gagnon that his absence from work would be extended for another three weeks, until April 17, 2015. Therefore, Mr. Richer was asked to stay in the position.

[51] Following his sick leave and beginning on April 20, the incumbent of the CFM position progressively returned to work. However, on that same day, he informed Mr. Gagnon that he wished to take 15 months of unpaid leave. His request was accepted. His last day of work was May 8, 2015.

[52] Mr. Gagnon explained that at the same time, his workload had increased significantly due to a new governance model put in place at the CSC. In addition, two other CFMs under his authority but performing their duties at other institutions were on sick leave.

[53] On April 30, 2015, Mr. Gagnon filled out a form entitled “[translation] Request for an assignment on an acting basis of less than four months”. In the information about the acting position, Mr. Gagnon indicated March 12, 2015, as the initial start date and that the appointment on an acting basis was from April 25 to July 11, 2015.

[54] On May 8, 2015, Mr. Gagnon emailed the Technical Services team staff, informing them that the incumbent of the CFM position was going on leave for 15 months.

[55] On July 21, 2015, the incumbent of the CFM position wrote to Mr. Gagnon to inform him that he wished to shorten the duration of his unpaid leave and return to work on May 10, 2016, instead of August 10, 2016. On July 27, 2015, he again wrote to Mr. Gagnon to inform him that after all, he wished to return quickly to work and that he would return on August 24, 2015, a year ahead of schedule.

[56] On August 10, 2015, Mr. Richer emailed his team to announce that the incumbent of the CFM position would return on August 24, 2015.

[57] The complainant accuses Mr. Gagnon of not having considered employees who had previously held GL-COI-11 CFM positions at Montée St-François and Joliette Institutions. The complainant is of the view that as a former GL-COI-11 CFM at Montée

St-François Institution, he performed similar duties to those of GL-COI-13 CFMs, and that not considering his candidacy had been an error.

[58] The complainant showed that at Montée St-François and Joliette Institutions, at the time of the process, employees classified GL-COI-11 held CFM positions instead of supervisory positions, as at other institutions. In addition, employees classified GL-COI-11 reported directly to the assistant warden, management services, and not to a CFM classified GL-COI-13, since those institutions had none. It is important to mention that at other institutions, employees classified GL-COI-11 reported to a CFM classified GL-COI-13, who in turn reported to an assistant warden, management services.

[59] Mr. Gagnon acknowledged not having considered people who had already held an acting GL-COI-11 CFM position since a former GL-COI-13 CFM, Mr. Richer, had agreed to perform the duties of the position.

[60] Mr. Gagnon acknowledged that the GL-COI-11 CFMs at Montée St-François and Joliette Institutions performed different tasks than the work/maintenance supervisors classified GL-COI-11 at other institutions. Nevertheless, he clarified that the GL-COI-11 CFMs still did not have the same responsibilities as the GL-COI-13 CFMs at other institutions.

[61] Specifically, he explained that at the smaller Montée St-François and Joliette Institutions, the GL-COI-11 CFMs had less-complex tasks, and the security issues were less significant. Therefore, Mr. Gagnon did not agree with the complainant's statement that the GL-COI-11 CFMs at those institutions performed practically the same tasks as the GL-COI-13 CFMs at other institutions. He also stated that in the smaller institutions, the assistant wardens, management services, were more involved and performed some of the tasks assigned to GL-COI-13 CFMs.

[62] At the hearing, Mr. Gagnon was also invited to compare the job descriptions of GL-COI-11 and GL-COI-13 CFMs. He referred to the first page of the job description for CFMs (GL-COI-11), which states that two out of four criteria must apply to them, while according to the other job description (GL-COI-13), three out of four criteria must apply to them. He explained that the difference showed that the level of complexity of

the work is higher when the incumbent has more responsibilities.

[63] Mr. Gagnon also emphasized other differences between the job descriptions of CFMs classified GL-COI-11 and those classified GL-COI-13. He specifically referred to a section in grey type on page 2 of the job description for the GL-COI-11 CFMs, which indicates that they can be called on to perform several manual labour tasks. Mr. Gagnon clarified that that possibility is considered for GL-COI-11 CFMs because their tasks are less complex and because that way, they have the opportunity to carry out additional manual labour tasks. Finally, Mr. Gagnon noted that the GL-COI-13 CFMs are also responsible for directing their subordinate supervisors, which is not the case for GL-COI-11 CFMs.

[64] Mr. Gagnon explained that the distinctions between the tasks of CFMs classified GL-COI-11 and GL-COI-13 at different CSC institutions were corrected with the establishment of the new governance model in October 2014. After institutions were consolidated, each new one now has a GL-COI-13 CFM. Mr. Gagnon explained that as a result, the title of the GL-COI-11 CFM position at Montée St-François Institution — now called the Federal Training Centre — should be changed to “Supervisor of works and maintenance”.

[65] Mr. Gagnon also clarified that in the medium term, given the incumbent’s unexpected absence for a significant time, he wanted to keep Mr. Richer in the position temporarily, to ensure continuity, which also allowed him to undertake the process of filling the position for the long term.

[66] Mr. Gagnon explained that he had two options for filling the position for the long term: (1) once the new governance model was in effect, he could transfer a surplus GL-COI-13 CFM from another institution to Sainte-Anne-des-Plaines Institution, or (2) if the new governance model were delayed, he could initiate an advertised process to establish a pool of qualified candidates.

[67] Specifically, Mr. Gagnon knew that the CSC restructuring included merging Cowansville and Drummondville Institutions. Thus, there would be a surplus GL-COI-13 CFM who could occupy the vacant position at Sainte-Anne-des-Plaines Institution in September 2015. Mr. Gagnon consulted the Cowansville GL-COI-13 CFM

to gauge his interest in the vacant position, and he stated that he was ready to move to Sainte-Anne-des-Plaines to occupy the position. As for the Drummondville GL-COI-13 CFM, he was prepared to look after the new institution that the merger would create.

[68] The other option was to initiate an advertised appointment process to fill the GL-COI-13 CFM position. According to Mr. Gagnon, had such a process been initiated, it would have been impossible to wait until it ended to find a replacement, since the position had to be staffed at all times. He considered offering the position on a rotational basis to all interested candidates before the process ended. To him, that was another plausible solution in the medium term. Therefore, he formed an assessment committee and began the staffing work. However, he stated that developing the statement of merit criteria was a more arduous task than anticipated, because before the restructuring, the merit criteria used in the different appointment processes for GL-COI-13 CFMs had differed, based on the institution. Yet, the statement of merit criteria had to reflect the needs of the institutions after the restructuring. Mr. Gagnon drafted the new merit criteria in July 2015 and submitted them to Human Resources in early August 2015.

[69] Mr. Gagnon also consulted his supervisor and Human Resources to obtain their support for one of the long-term options described earlier. Human Resources informed him that if the incumbent's unpaid leave was longer than 12 months, the position could be filled. At the end of the day, the option selected would be based on the pace of the new governance model's implementation.

[70] As mentioned, a restructuring of the correctional institutions was in progress at the time of the appointment process. Specifically, a new governance model had been developed in 2014. As part of the restructuring, Montée St-François Institution was combined with the Federal Training Centre, Sainte-Anne-des-Plaines Institution was combined with Archambault Institution, and Cowansville Institution was combined with Drummondville Institution.

[71] Mr. Gagnon stated that in the meantime, the proposed solution was to keep Mr. Richer in the position from May to September 2015.

[72] Still, Mr. Gagnon did not need to institute the long-term options, to either

transfer the surplus GL-COI-13 CFM or proceed with an advertised appointment process, since on July 21, 2015, the CFM position incumbent had announced his early return to work on August 24, 2015. Therefore, his unpaid leave was for less than 3 months instead of 15 months.

[73] Mr. Gagnon finally decided to keep Mr. Richer in the position for an additional brief period, given that it was vacation season and for the sake of efficiency. At that time, Mr. Richer had made several changes to improve the work environment at Sainte-Anne-des-Plaines Institution. In addition, a transition period was necessary between Mr. Richer's appointment and the CFM incumbent's return, to ensure that projects and services continued.

[74] Given that the appointment on an acting basis was extended for more than four months, Mr. Gagnon prepared the necessary documentation to justify choosing a non-advertised appointment process for an appointment of more than four months. In a form entitled, "[translation] Non-advertised appointment process", he indicated March 12, 2015, as the start date of the appointment and September 18, 2015, as the scheduled end date. However, the appointment was extended from September 18 to October 2 to allow for the transition, the financial statement to be completed, and Mr. Richer to take two weeks of vacation.

[75] Mr. Gagnon completed the form entitled "[translation] Non-advertised appointment process checklist". In his rationale, signed on August 11, 2015, he stated the following:

[Translation]

- 1. The local Technical Services team is in the midst of restructuring and is having difficulty implementing the new governance. Last February and March, the last CFM asked whether some employees would be interested in replacing him, but none showed interest. In addition, he left suddenly on sick leave. He has to be replaced quickly by a person with GC110 training and the experience to function immediately. As Mr. Richer had already replaced a CFM for almost a year at Cowansville Institution, he clearly expressed interest in carrying out assignments on an acting basis in CFM positions. Thus, we opted for a non-advertised process, pending the continuation of the*

staffing process with the goal of creating a CFM candidate pool.

- 2. The Technical Services department requires stability to complete its construction and maintenance projects on the institution's many buildings. That said, we believe we have exhausted all other possible options, thus respecting the guiding values of staffing.*
- 3. The incumbent of the substantive position is currently on unpaid leave that began on May 11, and before that, he was on sick leave. So, given the fact that Mr. Richer meets the requirements of the supervisor of facilities management position, that his career goal is to become a CFM, and that at this stage, the regional strategy of relocating affected employees is incomplete, this request to extend the assignment on an acting basis appears justified.*
- 4. Please note that Technical Services is in the process of initiating an advertised process. Despite all this, to our knowledge, Mr. Richer is the only one who has obtained GC110 certification and is available to take the reins for this period.*
- 5. As you can see in the narrative assessment, Mr. Richer fully meets the statement of merit criteria for the CFM position (GL-COI-13).*

[76] In short, Mr. Gagnon acknowledged not considering the complainant's candidacy even though he probably met the merit criteria for the position. Mr. Gagnon added that the complainant had been part of his team in the past and that he had asked him whether he was interested in assuming a position on an acting basis as a chief engineer, maintenance and facilities. The complainant had told him that he was happy in his engineer/project manager, electrical engineering and control, position and that he wished to stay in it. According to Mr. Gagnon, during that discussion, the complainant shared his project management career aspirations. Therefore, Mr. Gagnon instinctively did not think of checking with the complainant to see whether he was interested in the GL-COI-13 CFM position.

[77] Finally, Mr. Gagnon explained that he chose a non-advertised appointment process to prevent the situation from deteriorating. Mr. Richer fully met the merit criteria for the GL-COI-13 CFM position.

[78] In his argument, the complainant presented nine reasons to support his allegation that the respondent had abused its authority by choosing a non-advertised appointment process.

[79] First, he submitted that the respondent's remark about the increased workload due to the end of the fiscal year applied only to the end of the fiscal year. Yet, the appointment on an acting basis was spread out over a longer period, from March 12 to October 2, 2015, long after the end of the fiscal year.

[80] Second, the complainant stressed that the respondent's remark that Mr. Richer was the only qualified employee interested in the position is incorrect. He was qualified and interested in the position. And other former GL-COI-11 CFMs who worked at Montée St-François and Joliette Institutions were almost certainly qualified and could have been interested in the position.

[81] Third, the complainant submitted that the evidence did not clearly show how Mr. Richer communicated his interest in occupying the GL-COI-13 CFM position. In particular, there is no evidence that he communicated his interest in writing.

[82] Fourth, the complainant submitted that the following remark by the respondent: "[translation] [The incumbent] has to be replaced quickly by a person with GC110 training and the experience to be able to function immediately", is not relevant, since certification authority under s. 34 of the *Financial Administration Act* is not an essential qualification for appointment to a GL-COI-13 CFM position. In addition, on January 18, 2016, a CSC representative confirmed to the complainant that when a replacement has not completed G-110 training, "[translation] [t]he senior manager with budgetary authority signs the invoice."

[83] Fifth, the complainant submitted that the respondent had written a bulletin on the criteria for non-advertised appointment processes (Bulletin #2007-23). It lists the rules governing those processes and contains the criteria to justify using one. According to the complainant, the narrative assessment that Mr. Gagnon prepared does not state how the following points in the bulletin apply:

[Translation]

In addition to the appointment values [fairness, access, transparency, and representativeness], managers should consider the following before choosing a non-advertised appointment process:

- *flexibility, affordability, and efficiency;*
- *the nature of the work and the urgency and duration of the appointment;*
- *the merit criteria (essential qualities and qualifications that constitute assets, operational requirements, and organizational needs);*
- *the labour market, including candidate pools and employment equity and official language considerations;*
- *access to professional development opportunities, and employees' career aspirations.*

[84] Sixth, the complainant submitted that Bulletin #2007-23 lists the only situations in which a non-advertised appointment process can be used. When, as in this case, neither of the first two special circumstances listed applies, the bulletin states the following:

[Translation]

...

Internal or external non-advertised appointment processes can be used in the following circumstances.

Other reasons (to be described in the manager's rationale) that do not appear in the above criteria but that justify using a non-advertised process as the best option to meet CSC needs while complying with public service appointment values. The rationale must mention an attempt to recruit via an advertised process and indicate the selection area and the results.

[Emphasis in the original]

[85] According to the complainant, the rationale that Mr. Gagnon prepared did not meet the last criterion and was inadequate. The complainant referred me to paragraph 89 of *Turner v. Deputy Minister of Citizenship and Immigration Canada*, 2009 PSST 22, to support his allegation. In that case, the complainant alleged that the respondent had

abused its authority by choosing a non-advertised process and that it had made the appointment based on personal favouritism. The respondent had replied that its action had been reasonable and appropriate and that the appointment process had been based on operational needs and not personal favouritism. The Tribunal determined that despite the errors and omissions that arose during the course of the appointment process, there was insufficient evidence to find an abuse of authority. Nevertheless, it mentioned the following at paragraph 89:

In addition, the Tribunal finds that the respondent failed to explain how the appointment met the appointment values, which are requirements of both PSC and CIC policy, and the preamble of the PSEA. Furthermore, the respondent did not complete the written rationale until November 27, 2007, almost three months after the appointment commenced.

[86] Seventh, the complainant submitted that the respondent lacked transparency in the process because on May 8, 2015, it did not advise employees that Mr. Richer's appointment on an acting basis would continue through the summer.

[87] Eighth, the complainant submitted that Mr. Gagnon's decision to grant leave of 15 months to the CFM position incumbent was not logical, given that he had stated in his rationale that the local Technical Services team was in the midst of restructuring and was having difficulty implementing the new governance model. According to the complainant, had the respondent really needed stability, he would not have approved the incumbent's leave request.

[88] Ninth, the complainant submitted that the respondent erred by delaying Mr. Richer's assessment to August 2015, which was after the four-months-less-a-day period had elapsed. According to the complainant, the respondent did not explain why the assessment was not completed earlier. On April 21, it already knew that the CFM position incumbent intended to be away for 15 months. The complainant submitted that after the four-month period, an assessment and a notice of appointment or proposal of appointment on an acting basis must be completed. Although it is easier to leave a replacement in place in a difficult situation, rules still require completing a rationale and posting a notice.

[89] The respondent submitted that section 33 of the *PSEA* confers on those

delegated the discretionary authority to choose an advertised or non-advertised process. He claims it was quite reasonable to proceed using a non-advertised process, and he was under no obligation to consider more than one person.

[90] According to the respondent, the choice of a non-advertised process was intended to correct an unforeseen situation arising from the departure of the incumbent on sick leave and then on unpaid leave.

[91] The respondent submitted that Mr. Gagnon had difficulty finding a replacement because the position is demanding. In the past, the incumbent had had difficulty finding someone to replace him during his absences. Mr. Gagnon first offered the appointment on an acting basis to a candidate from the GL-COI-13 pool, a GL-COI-11 employee, who declined the offer.

[92] The respondent stressed that Mr. Gagnon then asked other GL-COI-11 employees from the team if they were interested. All of them declined. However, they suggested to Mr. Gagnon that he ask an assistant warden, management services, at another institution that was being restructured to take the position.

[93] Mr. Gagnon spoke with his superior, but that option was not possible. Nevertheless, it was agreed that an assistant warden, management services, could assist the acting CFM, if necessary. As a result, Mr. Gagnon turned to Mr. Richer, who had already held a CFM position classified at the 13 level. Mr. Richer accepted the appointment on an acting basis.

[94] In addition, the respondent submitted that at one time, the complainant had not shown interest in an appointment on an acting basis, so Mr. Gagnon did not think to ask him whether he was interested in the position.

[95] The respondent referred me to *Clout v. Deputy Minister of Public Safety and Emergency Preparedness*, 2008 PSST 22 at para. 32; and *Kosowan v. Deputy Minister of Health Canada*, 2009 PSST 24 at para. 50. *Kosowan* stated that considering only one candidate, as in this case, is discretionary and is specifically authorized under the terms of s. 30(4) of the *PSEA*.

[96] In its written submissions, the PSC also stated that its *Choice of Appointment*

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Process Policy provided that deputy heads must complete a written rationale demonstrating how a non-advertised process meets established appointment criteria and values.

[97] CSC Bulletin #2007-23 also indicates that a written rationale must be supplied in support of the decision. In addition, it requires that a departmental form (the non-advertised appointment processes checklist) must be completed.

[98] In this case, in accordance with *Robbins v. the Deputy Head of Service Canada*, 2006 PSST 17, the complainant had to establish that the decision to choose a non-advertised process constituted an abuse of authority.

[99] For the following reasons, I find that the complainant has not established that the decision to choose a non-advertised process constituted an abuse of authority.

[100] When the respondent learned that the incumbent had to be away for a few weeks, it envisioned appointing a qualified person to the position from a pool of candidates classified GL-COI-13. Yet, the eligible person from the pool, as well as the other employees asked later on (GL-COI-11 employees from the Technical Services team at Sainte-Anne-des-Plaines Institution), did not agree to replace the absent CFM. Mr. Gagnon then considered Mr. Richer's candidacy; he had already held a GL-COI-13 CFM position at another institution. He agreed to take the position for a short period.

[101] Later, when the incumbent informed the respondent that he would be absent for a long time, Mr. Gagnon decided to keep Mr. Richer in the position long enough to fill the position with a surplus employee or to staff it using an advertised process. However, in the end, the incumbent returned to work almost a year earlier than scheduled. Thus, it was not necessary to resort to the long-term solution.

[102] At the hearing, Mr. Gagnon explained that he had analyzed his needs and had explored a number of potential options for filling the position in the short, medium, and long terms, given the multiple unexpected reversals he had experienced, including the fact that the incumbent's leave was extended several times and then shortened. Mr. Gagnon also stated that he had entertained the possibility that the incumbent of the CFM position might not return to his substantive position.

[103] I am of the view that Mr. Gagnon considered and implemented credible adjustment strategies during that difficult period on the job. I am also of the view that the respondent's written rationale conformed to PSC policy on choosing an appointment process and to the CSC's established guidelines.

[104] Specifically, the rationale for a non-advertised appointment process is based on the following: (1) the Technical Services team was being restructured and encountered difficulties; therefore, the incumbent had to be replaced quickly by a person with training in delegating authority for managers (the G110 course given by the Canada School of Public Service) and the experience to be able to function immediately; (2) the Technical Services department needed stability to complete its projects, and the other options considered in accordance with the guiding values of staffing did not bear fruit; (3) Mr. Richer, in addition to meeting the requirements of the position, showed interest in becoming a CFM; (4) Technical Services was about to initiate an advertised process, but pending this process, the only employee who was available and had obtained the certification and signing authority required for the position was Mr. Richer; and (5) the narrative assessment of Mr. Richer showed that he met the merit criteria of the position.

[105] I note that Bulletin #2007-23 states that the rationale must mention an attempt to recruit using an advertised process and indicate the selection area and the results obtained. Under the circumstances, it would have been preferable had the rationale clarified that one solution considered had been to appoint a qualified and eligible person from the GL-COI-13 pool to the position, but that person had declined the offer. However, the rationale does state the following: "[translation] That said, we believe we have exhausted all other possible options, thus respecting the guiding values of staffing." At the hearing, Mr. Gagnon explained the options that he had considered but that had not worked out.

[106] Ultimately, I am of the view that the written rationale suitably explained the choice of a non-advertised appointment process. The rationale was provided in writing, and clearly, it lists the reasons behind the choice of a non-advertised process. This explicit and detailed rationale reinforces the transparency of the process.

[107] As for the fact that the respondent stated the following in his rationale, “[translation] He has to be replaced quickly with a person with GC110 training and the experience to be able to function immediately”, the complainant submitted that obtaining signing authority is not an essential qualification for the GL-COI-13 CFM position. Although true, I believe that there is still a reasonable basis to that statement.

[108] Mr. Gagnon made that remark due to the CFM’s important workload during the fiscal year-end of March 2015 and right after. He explained that it was vital for the person occupying the position on an acting basis to have the required delegated signing authority to approve all the Technical Services invoices at the institution and to perform the required inspections, since Mr. Gagnon did not work at that site. That rationale was plausible, under the circumstances.

[109] Therefore, I find that despite the sum of his arguments, the complainant has not shown on a balance of probabilities that the respondent abused its authority by choosing a non-advertised appointment process.

B. Question II: Did the respondent abuse its authority by showing personal favouritism towards the appointee?

[110] In *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7, the Tribunal considered the notion of “personal favouritism”, as follows:

...

[41] ... Undue personal interests, such as a personal relationship between the person selecting and the appointee should never be the reason for appointing a person. Similarly, the selection of a person as a personal favour, or to gain personal favour with someone else, would be another example of personal favouritism.

...

[111] The complainant submitted that Mr. Richer was favoured in this process. He stressed that the rationale for selecting Mr. Richer was not objectively valid and that it had not been appropriate to consider only Mr. Richer.

[112] In addition, the complainant added that Mr. Richer benefitted from the support of the Assistant Warden, Management Services, while he was in the position at issue

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and that as a result, he had been shown preferential treatment. He also added that Mr. Gagnon and Mr. Richer had at one point been friends outside the office.

[113] On that subject, Mr. Gagnon explained that he had begun as an intern at the CSC in 2005. He stated that at the time of the non-advertised appointment process, he had held the regional administrator, technical services, position for almost five years, and that Mr. Richer was one of the employees he supervised. He added that before becoming the regional administrator, technical services, in October 2010, he had developed friendships with some of his colleagues, including Mr. Richer. Specifically, he sometimes associated with them outside work, for example, by participating in different outdoor activities. Mr. Gagnon did not know Mr. Richer before he came to the CSC.

[114] Nevertheless, Mr. Gagnon stated that when he became the acting regional administrator, technical services, he distanced himself from his former work team. He gradually ceased associating with his former colleagues. He stated that for five years, his relationship with Mr. Richer and his former colleagues was strictly professional.

[115] The respondent adduced into evidence the form entitled, “[translation] Signed statement of persons present at an assessment board”, which Mr. Gagnon signed on August 6, 2015. The signature on the form states that he knew the candidates’ names, that to his knowledge, he was not related to any of them, and that any interactions he might have had with them would not influence his decision.

[116] Nevertheless, the complainant submitted that the evidence on the circumstances or the context in which the decision to appoint Mr. Richer arose had to be considered. He referred me to the following decisions to support his personal favouritism allegation: *Drozdowski v. Deputy Head (Department of Public Works and Government Services)*, 2016 PSLREB 33 at para. 37; *Turner*, at paras. 94 and 95; and *Glasgow*, at paras. 38 to 41 and 44.

[117] In *Glasgow*, the Tribunal focused on the use of circumstantial evidence in support of a personal favouritism allegation; its paragraph 44 reads as follows:

[44] Evidence of personal favouritism can be direct, such as facts establishing clearly the close personal relationship

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between the person selecting and the appointee. However, it will often be a question of circumstantial evidence where some action, comments or events prior to, and during, the appointment process will have to be reviewed. Depending on its source and its particular relation to the issues in a complaint, circumstantial evidence can be as convincing as direct evidence....

[118] The complainant submitted that it is important to keep the following facts in mind, which show the context in which the decision was made: (1) the certification authority under s. 34 of the *Financial Administration Act* was used as a criterion even though it was not an essential qualification for the position; (2) GL-COI-11 CFMs were not considered for appointment, even though they performed CFM tasks; (3) the extension of the appointment on an acting basis was marked by a lack of transparency; (4) the rationale was produced late; (5) the rationale refers to the end of the fiscal year, even though the appointment covered a longer period; (6) two or three people who endorsed the non-advertised appointment process checklist did not sign the form; only Mr. Gagnon signed it; and (7) the appointment notice was posted well after the end of the four-month appointment period.

[119] The complainant added that that was the context in which Mr. Gagnon appointed Mr. Richer, whom he had already been friends with. In addition, Mr. Gagnon considered no one other than Mr. Richer.

[120] According to the complainant, combining all those things illustrates that there was a series of omissions that if considered together allow for a finding of differential treatment, which constitutes an abuse of authority. He referred to *Glasgow*, at para. 64, which states the following:

[64] ... There might be situations where one serious error in marking or ranking would be conclusive evidence of abuse of authority. There could also be a series of errors, which taken individually would not be conclusive of differential treatment; yet, the weight of all these errors taken together could lead to a finding of differential treatment.

[121] The complainant also referred me to *Robert and Sabourin v. Deputy Minister of Citizenship and Immigration*, 2008 PSST 24 at para. 91, to support his argument that it is not necessary to show intentional fault to establish bad faith, and the facts should

be interpreted more broadly, to include serious carelessness. In this case, he submitted specifically that the respondent showed negligence by appointing Mr. Richer to the position, since the evidence showed that, among other things, Mr. Gagnon and Mr. Richer had already been friends.

[122] Finally, the complainant requested that the Board ask itself whether, as mentioned in *Denny v. Deputy Minister of National Defence*, 2009 PSST 29 at para. 126, an informed observer could reasonably perceive bias (or personal favouritism) on the decision maker's part. According to the complainant, an informed observer could reasonably perceive personal favouritism on Mr. Gagnon's part towards Mr. Richer, given their earlier friendship.

[123] The respondent referred me to paragraphs 52 to 54 of *Carlson-Needham and Borden v. Deputy Minister of National Defence*, 2007 PSST 38, which states the following on the subject of the burden of proof in an allegation of personal favouritism:

[52] In order to be successful in a complaint alleging personal favouritism in an advertised appointment process, a complainant must appear before the Tribunal with convincing evidence demonstrating personal favouritism and not merely make an allegation based on perception and irrelevant facts.

[53] In Black's Law Dictionary, the term "favoritism" is defined as "a preference or selection, usually invidious, based on factors other than merit". Examples mentioned are nepotism, patronage and discrimination.

[54] Thus, a complainant must prove, on a balance of probabilities, that the person was appointed because of personal favouritism based on factors other than merit. In other words, the complainant has to prove that a respondent's actions lead to the conclusion that the appointee was appointed for reasons of personal favouritism.

[124] The respondent submitted that Mr. Richer's appointment was based on merit and not on other factors. It maintained that Mr. Gagnon had explained how he went about finding a replacement for Mr. Richer, who in any case, was not the person he first offered the position to. It also maintained that Mr. Gagnon's relationship with Mr. Richer was strictly professional at the time of nominating Mr. Richer to the

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position, although they had developed a friendship in the past.

[125] The respondent submitted that the complainant had not adduced any evidence demonstrating personal favouritism in the choice of the successful candidate. Mr. Gagnon has no ties, other than professional, to Mr. Richer. He added that benefitting from an opportunity for professional development is not proof of personal favouritism. In fact, the complainant has also benefitted from some professional development opportunities in the past.

[126] Thus, the respondent submitted that it had demonstrated that Mr. Richer's appointment was based on merit. Mr. Gagnon based his assessment of Mr. Richer on his knowledge of Mr. Richer's work and on his curriculum vitae. He prepared a narrative assessment based on the statement of merit criteria for the position, after which he concluded that Mr. Richer had all the required qualifications for the position.

[127] Mr. Gagnon documented the results of his evaluation in the narrative assessment. He assessed each merit criterion. For example, next to the one for recent experience in human resources and financial and project management, he described how Mr. Richer met it, as follows:

[Translation]

Satisfactory. In his substantive position, Mr. Richer worked with several trades and had to coordinate and complete several projects in correctional institutions, which involved multidisciplinary teams of construction workers. In addition, during his assignment of more than nine months in 2012, he effectively performed the duties of the chief of facilities management, in which he oversaw the sound management of the budgets allocated to him and the supervision of a work team composed of employees from more than one construction trade (plumbers, electricians, etc.)

[128] Mr. Gagnon completed and signed the narrative assessment on August 3, 2015.

[129] The complainant also questioned the relevance of the fact that Mr. Richer had completed G110 training on delegation of authority for managers. He claimed that that criterion was not valid and that it constitutes circumstantial evidence of personal favouritism.

[130] The respondent maintained that it was the criterion on experience in human resources and financial and project management that was used in the assessment tool and that it was an appropriate criterion. The note that Mr. Richer had completed G110 training on delegation of authority for managers was added to justify the choice of a non-advertised process. The person selected had to be able to operate immediately, since it was impossible for Mr. Gagnon to approve all the Technical Services invoices at the institution and to conduct the required inspections, because he did not work at that site.

[131] As for the complainant's statement that the extension of the appointment on an acting basis was marked by a lack of transparency, the respondent maintained that that was not so because meetings had been held and emails had been exchanged to inform the Technical Services team about developments with the position. Mr. Gagnon met with the team as soon as the incumbent left the position, and emails were then sent to the team members. For example, on May 8, 2015, Mr. Gagnon emailed Technical Services, advising staff that the incumbent of the CFM position was going on leave for 15 months. On August 6, 2015, he sent another email to announce the return of the CFM position's incumbent on August 24, 2015.

[132] In response, the complainant argued that in any case, the sum of the indirect evidence leads to a finding of personal favouritism, and that if it cannot be established by direct evidence, it can be, by deduction. Mr. Richer was favoured, and he benefitted from an unfair advantage, which was inappropriate.

[133] For the following reasons, I find that the complainant did not establish that the respondent abused its authority by showing personal favouritism towards the appointee.

[134] First, the evidence does not allow a finding that Mr. Gagnon and Mr. Richer had a personal relationship. As a result, I have no direct evidence to indicate the existence of personal favouritism.

[135] Does circumstantial evidence point persuasively to a finding that Mr. Richer was inappropriately favoured or that he benefitted from an unfair advantage?

[136] I do not find that it does. In my view, the evidence, even taken together, is insufficient to show that, on a balance of probabilities, there was personal favouritism. Although, as explained in *Glasgow*, circumstantial evidence sometimes allows for a finding of personal favouritism, circumstantial evidence as defined in *Glasgow* must be of a more convincing nature than what has been submitted in this case.

[137] In my view, the respondent's evidence is credible and meets the requirements of demonstrating how the non-advertised appointment met the organization's urgent operational needs.

[138] In other words, I believe that for operational and efficiency reasons, Mr. Richer was selected to replace the absent CFM. Nothing indicates that he benefitted from an advantage that others were deliberately denied or that an error or irregularity was committed that would have likely created an unfair advantage. He had all the required qualifications for the position.

[139] Finally, although Mr. Gagnon considered only Mr. Richer's candidacy in the non-advertised appointment process, it is not evidence that would allow a finding of personal favouritism. Section 30(4) of the *PSEA* clearly states that it is possible to proceed with an appointment based on merit after considering only a single candidate.

[140] For all these reasons, I find that the complainant has not demonstrated that, on a balance of probabilities, the respondent abused its authority by showing personal favouritism towards the appointee.

C. Question III: Did the respondent abuse its authority by delaying posting the appointee's appointment notice?

[141] The complainant submitted that by posting the appointment notice and recourse once the acting assignment of more than four months had ended, the respondent contravened ss. 13 and 14 of the *Public Service Employment Regulations (PSER)*. Under s. 13 of the *PSER*, the notice of an appointment or proposal of appointment on an acting basis of four months or more must be posted "at the time" the appointment is made or proposed. Section 14 of the *PSER* provides that an appointment on an acting basis of less than four months, provided it does not extend the cumulative period of the appointment of a person in a position to four months or

more, is excluded from the application of ss. 30 and 77 of the *PSEA*.

[142] According to the complainant, the respondent had a duty to post the appointment notice exceeding four months in a timely manner. By not posting it until after the end of the appointment on an acting basis, the respondent knew that any request for recourse would be illusory and void, since the appointment could not be revoked in the event of an irregularity in the appointment process. He claims that that course of action constitutes an abuse of authority on the respondent's part.

[143] He added that in *Robert and Sabourin*, the respondent did not advise employees of the appointment until more than three months after the date on which it should have; the period of the appointment on an acting basis had then ended. The Tribunal deemed that not notifying those in the area of recourse in a timely manner constituted an additional omission in that case. I note that the notice was issued late due to serious reasons, namely, there was no statement of merit criteria for the position, and no assessment had been carried out.

[144] Thus, the complainant accused the respondent of a lack of transparency in the way the process unfolded, a process he considers marked by a series of manifest errors; as a result, there was negligence.

[145] The respondent acknowledged that several administrative delays caused a delay in posting the appointment notice for the acting position. Despite the delay, it was posted; it indicated the expected appointment period and gave employees in the selection area access to the right to complain.

[146] At the hearing, the respondent submitted the basic documentation prepared during the process. First, on August 6, 2015, Mr. Gagnon signed the document entitled "[translation] Signed statement of persons present at an assessment board". Then on August 12, 2015, Mr. Gagnon provided Human Resources with the six required documents supporting the choice of a non-advertised appointment process, which were Mr. Richer's curriculum vitae, proof of academic studies and professional certification, the statement signed by the assessment board (Mr. Gagnon), proof of compliance with security requirements, the narrative assessment (statement of merit criteria), and the non-advertised appointment process checklist.

[147] Mr. Gagnon was not involved in the process after that and did not know why the notice could not have been posted sooner. Nevertheless, he knew that the criteria used for the posting had to be translated. On October 30, 2015, two-and-a-half months later, the notice entitled “Information regarding acting appointment” was posted.

[148] The respondent referred me to paragraph 32 of *Jarvo*, which states that neither the *PSEA* nor the PSC’s *Appointment Policy* guarantees a right of access to every employment opportunity. The PSC’s *Appointment Policy* states the following: “[translation] The PSC expressly promotes that managers apply reason and discretion with respect to access and appointment decisions.”

[149] For the following reasons, I find that the complainant has not established that the respondent abused its authority by delaying posting the appointee’s appointment notice.

[150] It is true that the respondent conceded that an administrative error was committed, since there was a considerable delay in carrying out the assessment and publishing the notice of the appointment on an acting basis. The assessment was completed on August 11, 2015, and the notice was posted on October 30, 2015.

[151] Whether an error constitutes an abuse of authority depends on its nature and seriousness; see *Makoundi v. Deputy Minister of Transport, Infrastructure and Communities*, 2014 PSST 5 at para. 22.

[152] I note that the administrative error had no negative consequences for the employees in the selection area who had the right to complain. Consequently, in my view, the error is not sufficiently serious to equate to an abuse of authority.

[153] In addition, based on the case law of the Tribunal and the Board, a delay in and of itself does not equate to an abuse of authority. For example, in *Merkley v. Deputy Minister of National Defence*, 2017 PSLREB 47, the complainants alleged that PSC policies on appointments on an acting basis were not respected, specifically the requirement that an assessment must be carried out and that an appointment notice must be published, both quickly.

[154] In that case, there was a considerable delay before the assessment was carried

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out and the appointment notice was published. The start date for the extension of the acting assignment was January 31, 2015. The date of the assessment was June 2, 2015, and the date of the notice was June 3, 2015. The respondent explained that the delay had resulted from an administrative error.

[155] In that case, the Board noted that the Tribunal had often dealt with this issue and had deemed that delays do not equate to abuses of authority (see *Soccar v. the Commissioner of the Royal Canadian Mounted Police*, 2013 PSST 14; and *Bérubé-Savoie v. the Deputy Minister of Human Resources and Skills Development Canada*, 2013 PSST 2). The Board added the following at paragraph 33:

33 Although the assessment was not completed on time, the evidence is that the appointee met the essential qualifications at the start of her acting appointment and that she was appointed for that reason. Given the length of the acting appointment, although the lateness of the notice was unfortunate, I do not believe it affected the complainants' right of recourse.

[156] Similarly, I find that in this case, although notice was not provided at the time of the appointment and that it would be difficult to characterize it as immediate, the length of the delay did not unduly prejudice those who had the right to file a complaint.

[157] Nevertheless, I agree that it is essential to provide timely notice of appointments on an acting basis, given their temporary nature. An untimely notice can give rise to speculation of impropriety with respect to the appointment and may deter an employee from exercising his or her right to complain about an appointment that has ended or is about to end (see *Morris v. Commissioner of Correctional Service of Canada*, 2009 PSST 9 at para. 92).

[158] Thus, as mentioned in *Morris*, at para. 96, the CSC should consider alternative and more expedient means to avoid such delays in the future and to ensure complete compliance with applicable legislative and policy requirements. Transparency was affected by the delay.

[159] I find that the complainant has not shown that the respondent abused its authority by delaying posting the appointee's appointment notice.

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

(The Order appears on the next page)

V. Order

[161] The complaint is dismissed.

December 27, 2018.

FPSLREB Translation

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