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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

ANDREW BURT

Complainant

and

DEPUTY MINISTER OF VETERANS AFFAIRS

Respondent

and

OTHER PARTIES

Indexed as

Burt v. Deputy Minister of Veterans Affairs

In the matter of a complaint of abuse of authority - paragraphs 77(1)(a) and (b) of the
Public Service Employment Act

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

For the Complainant: Mathieu Delorme, Association of Canadian Financial Officers

For the Respondent: Andréanne Laurin, counsel

For the Public Service Commission: Claude Zaor, written submissions

Heard at Charlottetown, Prince Edward Island,
September 25 and 26, 2018.

REASONS FOR DECISION

I. Introduction

[1] Andrew Burt, the complainant, filed a complaint of abuse of authority about the appointment on an acting basis of a colleague, Brodie Carter, to a branch financial officer position, classified FI-03 (“the FI-03 position”), with Veterans Affairs Canada (VAC) in Charlottetown, Prince Edward Island, from May 6, 2015, to February 22, 2016.

[2] The complainant alleges that the deputy head of VAC (“the respondent”) abused its authority in the choice of a non-advertised process and in the application of merit for the appointment. He claims that that choice did not respect the key staffing values of fairness, accessibility, and transparency and that the appointee did not meet the position’s language requirements. In addition, he originally alleged that favouritism had been shown towards the appointee. However, he withdrew that allegation at the hearing.

[3] The respondent denies that abuse of authority occurred. It states that the choice of a non-advertised process respected core staffing values, including merit, and that the appointee was fully assessed and was found to meet the qualifications of the position. It states that although the position has a language profile qualification of BBB/BBB, which the appointee did not meet, given that it could not be filled by appointing someone on an acting basis who met that profile, the appointee could have been in the position for up to one year without meeting it.

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

[5] For the reasons that follow, the complaint is allowed. The complainant established that the respondent incorrectly relied on the exemption from meeting the official language proficiency found in s. 15 of the *Public Service Employment Regulations* (SOR/2005-334; *PSER*). That section contains an exemption from official language proficiency for an appointment on an acting basis that cannot be filled with someone who meets the required proficiency. It may continue for a period of no more than 12 months. In this case, the evidence did not support a finding that the position could not have been filled on an acting basis with someone who met the required official language proficiency.

II. Background

[6] On February 5, 2016, an “Information Regarding Acting Appointment” (IRAA) was issued, specifying that Mr. Carter was appointed to the FI-03 position for the period from May 6, 2015, to February 22, 2016.

[7] The complainant filed a complaint of abuse of authority on February 22, 2016, with the Public Service Labour Relations and Employment Board (PSLREB) under s. 77 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*).

[8] 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 to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB 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. Issues

[9] I must determine the following issues:

A. Was there abuse of authority in the application of merit and in the evaluation of Mr. Carter?

B. Was there abuse of authority in the choice of a non-advertised process?

IV. Facts

[10] The complainant testified at the hearing on his own behalf. The respondent called two witnesses to testify, Christina Hutchins who at the time of the non-advertised process was senior director of corporate finance, and Sherry Spence, who at that time was initially director, financial planning and analysis, and then director, financial strategic initiatives.

[11] The complainant explained that he started his career in Ottawa, Ontario, where he worked for Transport Canada until 1999 as an FI-01 and briefly as an FI-02. He then worked for eight years in the field of finance for the P.E.I. provincial government.

[12] He started working at VAC in 2007 in FI-01 and FI-02 positions. He also occupied, on an acting basis, the financial management advisor position, classified FI-03, for four weeks in February of 2016 and for the seven months from April 6 to November 14, 2016.

[13] The complainant's substantive position is classified FI-02 and is with the VAC's Financial Planning and Analysis branch. He occupied it from June 2012 to November 2016 and worked under the supervision of the branch financial officer for those four years. He explained that he is now on assignment in an FI-02 position as a financial analyst in the Chief Financial Officer Branch of Employment and Social Development Canada (ESDC).

[14] The complainant described the tasks he accomplished and the reports he prepared in his many positions over the years. He demonstrated that he has many years of experience in the finance field. He explained that he had six years of experience as an FI-02 in early 2015 when Mr. Carter was appointed on an acting basis to the branch financial officer position.

[15] The complainant explained that approximately 12 employees are part of the FI group in the VAC's Financial Planning section, generally 4 in the Expenditure Management unit and 8 in the Financial Management unit.

[16] The branch financial officer, who occupies the FI-03 position at issue, is in charge of the Expenditure Management System. He or she works closely with three others when all the unit's positions are filled, two classified FI-02, and one classified FI-01. That group of employees supports all aspects of forecasting and expenditure management for VAC. It deals with such issues as allocating resources to programs, providing funding according to the budget, and providing input into cabinet submissions. It is responsible for handling the entire departmental budget.

[17] The complainant explained that immediately before the non-advertised appointment process was conducted, Mr. Carter and he were the two financial analysts (classified FI-02) assisting the branch financial officer (classified FI-03) in the unit. The complainant's substantive position was classified at the FI-02 group and level, while Mr. Carter's substantive position was classified at the FI-01 group and level. However, Mr. Carter was acting as an FI-02 at the time.

[18] On January 5, 2015, the incumbent of the FI-03 position started an assignment

on an acting basis as the director, financial planning and analysis (an FI-04 position), while the incumbent of the FI-04 position, Ms. Spence, went on French language training for an expected four months.

[19] On that same day, after receiving an email about the FI-03's appointment on an acting basis to the FI-04 position, the complainant wrote to Ms. Spence to inquire whether "... plans [would] be communicated regarding backfilling behind Melonie [the incumbent of the FI-03 position]?"

[20] Still on that day, the new Acting Director and Mr. Carter received a BlackBerry. In the Financial Planning unit, none of the FI-02s, except Mr. Carter, received such a device. The complainant was left with the impression that his colleague, Mr. Carter, would be chosen to backfill the FI-03 position. Mr. Carter had already replaced the incumbent of the FI-03 position during her maternity leave in 2014.

[21] On January 7, 2015, Ms. Spence responded as follows to the complainant: "Sorry for not responding sooner. Christine [the senior director of corporate finance] is making the decision on back-filling [sic] behind Melonie and hasn't communicated that plan to me so I'm afraid I can't answer your question."

[22] Again, on October 2, 2015, the complainant emailed the Acting Director. He asked for a frank conversation about any planned staffing decisions for the pending vacancy in the FI-03 position.

[23] On October 13, 2015, the complainant emailed Ms. Spence, on the same subject, as follows:

Sherry,

Melonie was not able to fully respond to my concerns regarding the division of work duties before leaving. The next logical step in my mind is to have a one-on-one with yourself (and possibly Christine), so that this issue can be addressed and resolved.

Thanks

...

[24] The complainant was not informed that Mr. Carter had been chosen to occupy the FI-03 position on an acting basis in February 2015. However, a year later, in February 2016, he saw the advertisement that was issued specifying that Mr. Carter had been appointed to the FI-03 position for the period of May 6, 2015, to February 22, 2016. However, over the year, the complainant had noticed that Mr. Carter accomplished many FI-03 tasks.

[25] In the meantime, in February 2015, a position on an acting basis of less than four months was offered to Mr. Carter for the period from February 23 to May 5, 2015. His FI-02 position was not backfilled. Senior management expected that Ms. Spence would return from her French training and to her position in May 2015 and that the incumbent of the FI-03 position would return to her FI-03 position at the same time.

[26] However, that did not happen. Ms. Spence did not return to her FI-04 position in May of 2015, and the incumbent of the FI-03 position was asked to continue to act in the director position.

[27] So, in May 2015, senior management extended Mr. Carter's appointment on an acting basis in the FI-03 position. However, only in September 2015 was documentation prepared to explain why he had been chosen to act in the branch financial officer position and why he had been appointed through a non-advertised process.

[28] Ms. Hutchins was the senior director of corporate finance when Mr. Carter's appointment was extended. She explained that in May 2015, the fact that Ms. Spence would not return to her position was brought to the attention of the round table that addressed the management of the branch. It was decided that the appointment on an acting basis in the FI-04 position of the incumbent of the FI-03 position had to be extended and that so did Mr. Carter's appointment in the FI-03 position. Ms. Hutchins stated that the branch financial officer, the FI-03, works as the liaison officer with the Treasury Board Secretariat (TBS) analyst responsible for expenditure management. Thus, the FI-03 position needs to be staffed at all times.

[29] Ms. Hutchins explained that the FI-04 director, financial planning and analysis, was the delegated manager for the FI-03 appointment process. As the incumbent, Ms. Spence, was not occupying her position in May 2015, and as her replacement did not have the delegated signing authority to approve the extension of Mr. Carter's appointment through a non-advertised process, it is possible that no written follow-up

took place in May 2015. But, as the delegated manager was absent, a management decision was made to extend Mr. Carter in the FI-03 position.

[30] Ms. Hutchins explained that the position needed to be filled right away and that a non-advertised process was chosen to staff it. She was informed that a pool was in place in the area of selection. It had been created pursuant to process number 2013-DVA-IA-ACIN-CHEOI-351 (“the 2013 process”). It contained a group of qualified candidates for several at-level acting assignments with varying language requirements.

[31] The language requirement for the FI-03 branch financial officer position was bilingual imperative, BBB/BBB. Ms. Hutchins explained that only one qualified candidate was in the bilingual imperative BBB/BBB pool created under the 2013 process. However, that person was already acting in a FI-03 position and was not available.

[32] Seven qualified candidates were in the English essential pool created under the 2013 process, including Mr. Carter. Ms. Hutchins explained that he had already acted in the FI-03 position from December 2, 2013, to November 14, 2014, and that he had seen all the reporting cycles, which is why senior management decided to appoint him. He was the most logical choice because of his experience. He had a very good understanding of the breadth and complexity of the planning and estimates process. Ms. Hutchins believed that he was the only one in the pool who met those requirements.

[33] On May 28, 2015, a Human Resources Generalist Advisor wrote the following to the Acting Director and Ms. Hutchins: “I’m just wondering if I need to prepare any paperwork to extend Brodie?” The Acting Director responded, “Yes, I would like to extend Brodie as I continue to rely on him to completely handle EMS inquiries. This is something that I’ve been meaning to ask.” The same day, Ms. Hutchins also responded, with, “Agree with extension”.

[34] In essence, Ms. Hutchins explained that Mr. Carter was already working in the unit and had been qualified in the FI-03 pool and that based on her personal knowledge of his qualifications, he was the right person for the position in May 2015 when compared to the others in the pool. She recognized that she did not look outside the pool for other candidates.

[35] Thus, in May 2015, Mr. Carter was asked to continue acting in the FI-03 position.

[36] With respect to the BlackBerry provided to Mr. Carter on January 5, 2015, Ms. Hutchins stated that he was often contacted by employees in the department who were in charge of preparing answers to ministerial and media questions. Mr. Carter had access to information they needed. It was necessary for him to have a BlackBerry, regardless of whether he occupied an FI-02 or FI-03 position.

[37] As for Ms. Spence, she explained that from January to April 2015, she was on full-time French language training. From May to the beginning of September 2015, she continued receiving part-time training in the mornings and worked on a special project in the afternoons. On September 28, 2015, she was appointed the director, financial strategic initiatives.

[38] Ms. Spence explained that in September 2015, the Director General of Finance (Maureen Sinnott) asked her to complete the assessment of Mr. Carter in his appointment on an acting basis in the FI-03 position. Ms. Spence clarified that senior management had already decided to extend his appointment. Her role was to assess him.

[39] Once she acquainted herself with the situation, Ms. Spence prepared the required documentation. She filled the “Checklist for Non-advertised Appointment Processes” form. She indicated “please see attached rationale” under both of the headings “explain why a non-advertised appointment process was chosen over an advertised appointment process” and “provide an explanation of how the non-advertised appointment meets the appointment values of fairness, access, transparency and representativeness”. She completed the assessment and the rationale for extending Mr. Carter and signed it on September 17, 2015. The rationale reads as follows:

The incumbent [Mr. Carter] is acting for another employee who currently [is] acting at the director level while the incumbent of that position [Ms. Spence] completes second-language training. The end date of the acting assignment is scheduled to be [in hand writing: February 22, 2016] given that the incumbent [of the FI-03 position] will continue to act in the director position until January 2016 at which time she will begin a period of maternity leave for one year.

The work being performed by Brodie [Mr. Carter] is critical to the operation of the Financial Planning Directorate as it is the key position responsible for ensuring the requirements of the planning and estimates process are met. No other staff

members have sufficient experience to perform the work required at this level although cross-training [sic] has commenced to increase breadth and depth of knowledge of other staff members. Stability and continuity are the current key drivers for this extension.

[40] The form authorizing the request to extend Mr. Carter's assignment on an acting basis that Ms. Spence signed on September 17, 2015, included the following remark: "To extend Brodie Carter's acting assignment as the incumbent is being extended in her acting appointment to January 31, 2017."

[41] Shortly after that, on October 2, 2015, the complainant emailed the Acting Director (the FI-04), asking for a frank conversation about any planned staffing decisions with respect to the pending FI-03 position vacancy. He added, "The main purpose of the discussion is to have the staffing regulations regarding official languages clarified as my interpretation doesn't seem to be accurate."

[42] On November 25, 2015, a Human Resources Generalist Advisor wrote to Ms. Spence to enquire whether the appointment on an acting basis was in fact non-advertised or whether Mr. Carter had been selected using the 2013 process. Part of the email read as follows:

Hi Sherry,

I'm reviewing the paperwork submitted for an acting extension for Brodie Carter from May 6, 2015 until January 31, 2017 in position 7202, Branch Financial Officer and have a few questions/concerns.

The Statement of Merit submitted was for process 2013-DVA-IA-DM-CH-EOI-351 but the acting was submitted as non-advertised (even though Brodie qualified on this process). Can you confirm that this acting is indeed non-advertised or was he selected using the process? If he was selected using the process, the VAC 980 with Right Fit criteria will be required. If it wasn't, you can ignore this.

...

[43] Ms. Spence later responded, stating that Mr. Carter's appointment had been extended via a non-advertised appointment process.

[44] Also on November 25, 2015, the Human Resources Generalist Advisor assisting Ms. Spence with the staffing process informed her that the position had a language profile of BBB/BBB, which Mr. Carter did not meet. Therefore, the Advisor informed

Ms. Spence that Mr. Carter could act in the position without meeting the language requirement for up to one year only if it was not possible to fill the position with someone who met that requirement. The Advisor added that after that year had passed, it had to be filled with someone who met the requirement.

[45] Specifically, part of the November 25, 2015, email from the Human Resources Generalist Advisor read as follows:

...

Further to this, the position has a language profile of BBB/BBB and Mr. Carter does not meet this requirement. With respect to language, the Public Service Employment Regulations (PSER) provides exclusion from the application of merit with respect to official language proficiency for an acting appointment to an encumbered bilingual position that cannot be filled with an acting appointment of a person who meets the required official language proficiency qualification for a total period of no more than 12 months.

As such, you need to demonstrate/determine that there is no one available to fill the acting [sic] who meets the official language proficiency, which is difficult as process 2013-DVA-IA-DM-CH-EOI-351 has a valid bilingual BBB/BBB group with one individual remaining in the group. Perhaps the opportunity was offered to this individual and he declined and if this is the case, this would be included in your rationale for filling the position with someone who does not meet the language profile.

If this is the case, you could have someone act in the position for up to 1 year without meeting the language. After that one year period, anyone in the position must meet the language requirement (so Brodie could act until February 22, 2016 but anyone acting after this point would need to meet the language requirements).

...

[Emphasis in the original]

[46] Ms. Spence agreed with Ms. Hutchins that Mr. Carter was the best person to replace the incumbent of the FI-03 position. She added that the person occupying that position is responsible for ensuring that the requirements of the planning and estimates process are met. Ms. Spence mentioned that Mr. Carter was involved in the estimates and supply process and that he was familiar with the expenditure management system. He had specific experience in the field, which other employees did not have. Therefore, to ensure stability and continuity, he was chosen to occupy

the FI-03 position. She used the assessment done in the 2013 process and her personal knowledge of Mr. Carter's work to assess him.

[47] Ms. Spence explained that in the form with her rationale, she had initially indicated that the extension would be from May 6, 2015, to January 31, 2017 (which was when the incumbent of the FI-03 position would have returned from her maternity leave). However, as she explained, the human resources generalist advisor changed the date of January 31, 2017, to February 22, 2016.

V. Analysis

[48] 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."

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

A. Was there abuse of authority in the application of merit and in the evaluation of Mr. Carter?

[50] The complainant maintains that an abuse of authority occurred in Mr. Carter's evaluation. He alleges that Mr. Carter did not meet the language requirements of the branch financial officer position. It was classified FI-03 and was bilingual imperative BBB/BBB, and Mr. Carter was unilingual.

[51] The complainant submits that under the definition of "merit", everyone who is appointed to the federal public service must meet essential qualifications. To support that assertion, he refers me to several cases, including *Cameron v. Deputy Head of Service Canada*, 2008 PSST 16, and *Rinn v. Deputy Minister of Transport, Infrastructure and Communities*, 2007 PSST 44.

[52] The complainant also brings to my attention the case of *Sachs v. The President of the Public Health Agency of Canada*, 2017 FPSLRB 3. The complainant in that case alleged that the respondent made errors and omissions in assessing the appointee in that case and that it had inappropriately handled extension requests in the appointment process. The Board found that the respondent abused its authority

by wrongly finding that the appointee met all essential qualifications. Paragraph 21 of that decision reads as follows:

[21] It is well established indeed, that the hiring manager has wide latitude to establish essential qualifications and asset qualifications tailored to the specific operational needs of the workplace. The deputy head also has considerable flexibility to determine the right-fit criteria and the candidate that best fits them. However, once the essential qualifications are established, and when called to account, the respondent must be able to show that the essential qualifications have been assessed and that they have been met.

[53] In the present case, the complainant believes that Mr. Carter should not have been appointed to the branch financial officer position as he did not meet its language requirements.

[54] The complainant also brought to my attention the case of *Robert and Sabourin v. Deputy Minister of Citizenship and Immigration*, 2008 PSST 24. In it, the complainants had claimed that the respondent had acted in bad faith by extending an appointment on an acting basis, even though the appointee did not meet one of the essential qualifications. The complainants had submitted that the process lacked transparency since among other things, the notification had been posted three months late.

[55] The Public Service Staffing Tribunal (“the Tribunal”) determined that a number of serious errors and omissions had occurred in that case during the process that when taken as a whole, constituted an abuse of authority. Among other things, the errors included failing to demonstrate that the position could not have been filled with someone who met the language proficiency qualification.

[56] Mr. Carter did not meet the official language proficiency qualification for the branch financial officer position. That is an undisputed fact. However, the respondent relied on the exemption from meeting that qualification in ss. 14 to 16 of the *PSER*.

[57] Under the scheme of the *PSER*, merit and recourse do not apply to appointments on an acting basis of under 4 months. They also do not apply to such appointments made for 4 to 12 months to an encumbered bilingual position, when it cannot be filled with a bilingual employee.

[58] Specifically, section 15 of the *PSER* states as follows:

Exemption from official language proficiency — encumbered position

15 (1) *Subject to subsection (2), an acting appointment of four months or more but not more than twelve months to an encumbered bilingual position that the Commission cannot fill with an acting appointment of a person who meets the language proficiency qualification under paragraph 30(2)(a) of the Act is excluded from the application of that paragraph respecting official language proficiency.*

Exception

(2) *Subsection (1) does not apply to an acting appointment to the same position if the cumulative period of the acting appointments of all persons in that position is more than twelve months.*

[59] In its written submissions, which were sent to the parties and the Board one week before the hearing, the PSC submitted that in the complainant's allegations and the respondent's reply, both referred to the *Public Service Official Languages Exclusion Approval Order* (PSOLEO) as applying to the situation referred to in this complaint. The PSC clarified that the PSOLEO does not apply to this situation and that it appears that instead, the parties meant to refer to s. 15 of the *PSEER*.

[60] At the hearing, both the complainant and respondent agreed that s. 15 applies to this situation, not the PSOLEO.

[61] As noted earlier, the complainant submits that Mr. Carter acted in the FI-03 position for 12 months even though he did not meet the language requirement for the encumbered bilingual position. He adds that the *PSEER* provides an exclusion from the official language proficiency obligation for an appointment on an acting basis to an encumbered bilingual position only if it cannot be filled by appointing someone who meets the required official language proficiency.

[62] The complainant believes that he should have been considered for the appointment on an acting basis. He was qualified and is bilingual. His most recent second language evaluation (SLE) results, from 2015, were E (reading comprehension), C (written comprehension), and B (oral interaction). He recognized that his SLE test results expired at the beginning of 2015, but he explained that he had requested permission to take the SLE tests in 2014. He was allowed to take them in 2015, and his results were the same: ECB.

[63] The complainant submits that the respondent had to ensure that the position could not be filled by a bilingual candidate. According to him, it did not do so. In the circumstances, it did not comply with s. 15 of the *PSEER*, and the appointment of Mr. Carter was not valid.

[64] The complainant also submits that the principles of fairness, transparency, accessibility, and representativeness, which are stated in the *PSEA*, must be applied, with a view to ensuring merit. However, they were not applied in this case.

[65] First, the process was not transparent; the complainant was never informed that Mr. Carter had been chosen to occupy the FI-03 position on an acting basis in February 2015. Second, the notions of accessibility and representativeness were not given much weight. Ms. Hutchins recognized that she did not look outside the pool for other qualified candidates. And third, there was a lack of fairness and transparency in that the respondent did not ensure that no one who met the official language proficiency requirement was available to fill the acting position.

[66] The respondent's position is that senior management was justified in appointing a unilingual employee to a bilingual position. Ms. Hutchins had good knowledge of the Expenditure Management unit, and she concluded that management could not fill the position with someone bilingual. Ms. Spence was later asked to document this decision. She concurred that management could not fill the position with someone bilingual.

[67] Ms. Spence completed the assessment of Mr. Carter in September 2015. She explained that she based her assessment on her knowledge of him and on his CV. She prepared a narrative assessment based on the statement of merit criteria for the position used in process 2013-DVA-IA-DM-CH-EOI-351, after which she concluded that he had all the required qualifications for the position.

[68] The written rationale that was prepared for the non-advertised process stated in essence that the FI-03 position had to be staffed to meet organizational and operational needs and that the objective was to quickly fill that key position. It stated that Mr. Carter's work was critical to the operation of the Financial Planning Directorate as it was the key position responsible for ensuring that the requirements of the planning and estimates process were met. While the rationale did not say exactly how it respected staffing values and principles, it stated that no other staff members had sufficient experience to perform the work required at that level, although cross training had commenced to increase the breadth and depth of knowledge of other staff members. The rationale stated that at that time, stability and continuity were the key drivers for the extension.

[69] In the narrative assessment, under the heading "Assessment against the Statement of Merit", Ms. Spence listed the essential qualifications of the position (the education requirement, three experience requirements, four competencies, and the official languages requirement) and included her assessment for each one. Under "Official Languages - English Essential", she indicated, "Assessment: Brodie is in a unilingual English position." At the hearing, she acknowledged that she made a mistake by writing that the position was English essential. She believed that that might have happened because she used a template created for the 2013 process. But she confirmed that she knew that the FI-03 position was bilingual imperative BBB/BBB and that Mr. Carter was unilingual.

[70] The respondent submits that the only qualified candidate in the bilingual imperative BBB/BBB pool created under the 2013 process was not available. Ms. Hutchins believed that Mr. Carter was the only candidate in the English essential pool created under the 2013 process who met the requirements for the position. She stated that he had specific experience applying financial central agency and departmental policies, guidelines, and procedures and responding to central agency requests for financial information.

[71] She specified that although the complainant had occupied an FI-02 position in the unit for three years as of 2015, he and Mr. Carter had distinct tasks. Therefore, in her view, the complainant did not have the same understanding as Mr. Carter did of the breadth and complexity of the planning and estimates process. She added that he had not experienced the full cycles of expenditure management, which are the budget cycles over 18 months. She also explained that when the complainant was involved

in drafting reports or cabinet submissions later on, it meant more back-and-forth between them. She had to ensure that everything was adequate. In 2015, no cross training was underway in the unit.

[72] Ms. Hutchins said that cross training has now become a priority to ensure the adequate coverage of tasks, despite having few staff, in the event of unanticipated or challenging circumstances.

[73] In addition, the respondent and the PSC submit that when making appointments, s. 36 of the *PSEA* permits the PSC or its delegate, in this case the respondent, to use the assessment methods "... that it considers appropriate to determine whether a person meets the qualifications ...".

[74] Section 36 of the *PSEA* allows discretion in choosing methods to assess candidates for appointment, as follows:

36 In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).

[75] The respondent submits that Mr. Carter was fully assessed and that he was found to meet the qualifications of the position. Although the position had a language profile of BBB/BBB, which he did not meet, given that it could not be filled by appointing someone on an acting basis who met the required official language proficiency qualification, Mr. Carter could remain in the position for up to one year without meeting it.

[76] I agree with the respondent that a manager has the discretion to choose the right person for the job, as long as the successful candidate meets the essential qualifications and the respondent can justify its decision. The question is whether the appointed person met the essential qualifications for the position at issue.

[77] The respondent is under the impression that since a human resources generalist advisor changed the end of the extension from January 31, 2017, to February 22, 2016, to respect s. 15(1) of the *PSEER*, it complied with its obligations. In my view, it was not sufficient for the respondent to change the end date; it also had to ensure that the position could not be filled by appointing someone on an acting basis who met the language proficiency.

[78] In this case, the respondent had to satisfy the Board that on May 6, 2015, senior management, in the form of Ms. Hutchins, was unable to fill the branch financial officer position with someone who met its language proficiency qualification.

[79] While Ms. Hutchins believed that Mr. Carter was the only one in the 2013 pool who met the requirements for the position, the respondent did not appoint him from the pool by way of the 2013 advertised appointment process. He was appointed pursuant to a non-advertised appointment process. No one explained why making an appointment by way of the 2013 advertised appointment process was not considered.

[80] However, it is clear that the round table that addressed the management of the branch did not consider appointing anyone outside the 2013 pool. When asked if the complainant was considered for the FI-03 position, Ms. Hutchins answered that he was not.

[81] At the hearing, Ms. Hutchins was asked why he was not considered. She explained that his name was not on the list of eligible candidates in the 2013 pool. She said that he had not applied for an FI-03 position in 2013. He had not been assessed and was not thus part of the pool of qualified candidates for an FI-03 position.

[82] In addition, she said that he did not have the same experience as Mr. Carter, which is why he was not considered. She added that the complainant was not qualified for the position at the time because of his lack of experience with specific tasks related to the expenditure management system. She gave as an example his lack of experience with the program alignment architecture.

[83] The complainant acknowledged that his duties and those of Mr. Carter were not identical but stated that they overlapped. They shared duties and responsibilities in the unit. Mr. Carter was the liaison with the TBS. They each accomplished different tasks in the unit.

[84] Ms. Hutchins testified that in 2015, no cross training was underway in the unit. She specified that the respondent has since started to increase the breadth and depth of the knowledge of the staff. Ms. Spence also wrote in the rationale for extending Mr. Carter's appointment on an acting basis, which was drafted in September 2015, "... cross-training [*sic*] has commenced to increase breadth and depth of knowledge of

other staff members.”

[85] Thus, the respondent argues that in 2015, only Mr. Carter met the requirements of the position, and that management was unable to fill the position by appointing someone on an acting basis who met the official language proficiency qualification, as set out in s. 30(2)(a) of the *PSEA*.

[86] However, has the respondent demonstrated that it could not fill the appointment on an acting basis with someone who met the language proficiency qualification? That issue begs to be addressed.

[87] For the following reasons, I find that it has not. I find that the respondent has not met its onus of showing that it could not have filled the position with a bilingual employee.

[88] While the respondent established that no bilingual candidate was available in the 2013 pool, it did not appoint Mr. Carter under the advertised 2013 process but under a non-advertised process. And pursuant to s. 15 of the *PSEER*, it had to conduct a proper search for a qualified candidate outside that pool.

[89] Yet, Ms. Hutchins and Ms. Spence were unaware in May and September 2015 of the strict requirements under s. 15 of the *PSEER*. Only on November 25, 2015, did the Human Resources Generalist Advisor assisting Ms. Spence with the staffing action inform her that the position had a BBB/BBB language profile, which Mr. Carter did not meet. Therefore, the Advisor informed Ms. Spence that Mr. Carter could act for up to one year in the position without meeting the language requirement only if it was not possible to fill it via appointing someone who met it.

[90] In the circumstances, I cannot give great weight to the respondent’s claim that Ms. Hutchins and Ms. Spence searched for a bilingual candidate to appoint to the position. Based on the evidence before me, they did not know that doing so was necessary. In fact, Ms. Hutchins recognized that senior management limited its search to the 2013 pool and that it did not consider the complainant because he was not in that pool.

[91] At the hearing, the complainant was asked if in 2015, he had recent and significant experience providing financial advice and support to managers, which was one of the essential qualifications for the position. He answered that he did and described in detail how he had acquired that experience in the unit or elsewhere,

including the time frame and the context. He summarized his tasks and responsibilities and described some of his files. He was also asked if at that time he had recent and significant experience applying financial central agency and departmental policies, guidelines, and procedures and responding to central agency requests for financial information (the position's two other essential qualifications). Again, he answered that he did and described in detail how he had acquired that experience, including the time frame and the context. He again summarized his tasks and responsibilities and described some of his files.

[92] The complainant also described in detail how he met the position's four competencies (oral and written communication, strategic thinking - analysis, values, and ethics, and financial systems).

[93] On the face of things, I find that the complainant was a bilingual candidate who probably qualified for the position in 2015. However, I conclude that it is most likely that he qualified for it for another reason.

[94] In April 2016, when the respondent could no longer possibly keep Mr. Carter in the branch financial officer FI-03 position, the complainant was offered it. He specified that no one acted in it between February 23 and April 6, 2016, when he was asked to. He accepted the offer, and from April 6 to November 14, 2016, he was in the position on an acting basis. He stayed there for almost seven months, until he left for an assignment offered at ESDC.

[95] According to the respondent, during those six to seven months, the complainant met the position's requirements because he had been offered cross training.

[96] However, the complainant stated that he received no cross training before assuming the FI-03 position. At the hearing, Ms. Spence was asked whether he had been provided cross training in 2015 and 2016. She replied that she could not answer since she had left by then. Ms. Hutchins said that she recommended that cross training be offered to increase the breadth and depth of knowledge of the staff. However, she could not confirm that the complainant had received it. Thus, I was provided with no concrete evidence that any was provided.

[97] Having considered all the evidence, I find that it is more likely that the complainant did not receive any additional training before occupying the position in April 2016.

[98] It is important to emphasize that the evidentiary onus under s. 15(1) of the *PSEER* lies with the respondent, not the complainant. In other words, the respondent had to satisfy me that it could not have filled the position in May 2015 with an acting appointment of a person who met the required language proficiency qualification. Having found that it is more likely that the complainant did not receive any additional training before occupying the position in April 2016, I conclude that he thus met the position's qualifications not only in 2016 but also in May 2015.

[99] In addition, the complainant testified that in 2015, he had been interested in the position and would have accepted an appointment on an acting basis. Ms. Hutchins recognized that she did not ask him about the appointment before appointing Mr. Carter to it on May 6, 2015.

[100] In my view, had Ms. Hutchins been aware of the obligations imposed on the respondent by s. 15(1) of the *PSEER*, and had she properly examined the situation, she would have realized that at a minimum, the complainant had been available and interested. Then, she could have assessed him to see if he qualified for the position.

[101] Given the obligations imposed on the respondent by s. 15(1) of the *PSEER*, I find that the respondent did not meet its onus of demonstrating that it could not fill the position with someone who met the language proficiency qualification.

[102] Therefore, I conclude that the exception in s. 15 of the *PSEER* did not apply. As Mr. Carter did not meet the language qualification for the position between May 6, 2015, and February 22, 2016, his appointment was not based on merit. In the circumstances, I find that the respondent abused its authority by appointing him.

B. Was there abuse of authority in the choice of a non-advertised process?

[103] The complainant believes that choosing a non-advertised process was in bad faith and unfair. In his view, Mr. Carter's initial appointment on an acting basis was extended in an improper manner that was also not transparent. The respondent did not ensure adherence to the key staffing values of fairness, accessibility, transparency, and representativeness. A considerable delay occurred in carrying out the assessment and publishing the notice of the appointment on an acting basis.

[104] The complainant filed in evidence VAC's existing policy requirements for conducting non-advertised appointment processes. They are in a document

entitled *Criteria for Non-advertised Appointment Processes*. Part of it provides as follows:

3.1 Criteria for Internal Non-advertised Processes

...

- *Acting appointments to exceed 4 months where a non-advertised process is justified by urgency or specialized requirements, a known candidate pool in the area of selection or a plan for rotational appointments, or for other reasons of consequence described in the narrative rationale.*

...

4. Requirements

Delegated managers must review the Non-Advertised Appointment Criteria with their Human Resources Specialist whenever consideration is being given to this staffing option.

If it is decided to proceed with a non-advertised appointment process, the applicable criteria must be identified in the written rationale provided by the manager, which will be signed by him/her, and added to the staffing file. The written rationale must contain the following:

- *Why a non-advertised appointment process was chosen over an advertised appointment process*
- *The criterion used for the non-advertised appointment in relation to the list of departmental criteria, and*
- *An explanation why the specific criterion is used, and*
- *An explanation of how the non-advertised appointment meets the appointment values of fairness, access, transparency and representativeness.*

...

[105] The complainant agrees that managers have the discretion to choose between an advertised and a non-advertised process under s. 33 of the *PSEA* and that considering only one person is expressly authorized under s. 30(4). However, he submits that that does not mean that the *PSEA* provides absolute discretion. Section 77(1)(b) provides for a direct challenge of the discretionary choice between an advertised and a non-advertised appointment process on the ground of abuse of authority.

[106] Specifically, the complainant submits that the requirement in the first paragraph of section 4 (entitled “Requirements”) of the *Criteria for Non-Advertised Appointment Processes* was not met, which is that the delegated manager review the non-advertised appointment criteria with his or her human resources specialist when considering that option. In addition, he submits that the rationale prepared does not directly address the four requirements of the policy that needed to be addressed.

[107] The complainant also alleges that it was unfair for the respondent to consider just one person for the FI-03 position, especially given that the exemption in s. 15 of the *PSEER* applies only when a position cannot be filled with a bilingual employee. In this case, the non-advertised process denied him the opportunity to be considered for the position.

[108] On the other hand, the respondent submits that it can justify its decisions to use a non-advertised process and to appoint Mr. Carter. It filed the Checklist for Non-advertised Appointment Processes and the narrative rationale justifying Mr. Carter’s appointment, which were prepared in September 2015.

[109] The respondent submits that there was a need to temporarily backfill the FI-03 position in early 2015. Ms. Spence and Ms. Hutchins clearly explained that in January 2015, the incumbent of that position, the branch financial officer, started acting in another position. An FI-03 appointment process had been conducted in 2013, and qualified FI-03 candidates were available. Thus, the opportunity to select someone from that pool was considered.

[110] The respondent reiterates that while the position to be staffed had a BBB/BBB linguistic profile, the only qualified bilingual candidate was not available and could not accept the acting opportunity. Management selected Mr. Carter from the remaining seven unilingual candidates. He was selected for an appointment on an acting basis of less than four months commencing February 23 and ending May 6, 2015. As for the complainant, he had not been a candidate in the 2013 process.

[111] When the round table that addressed the management of the branch learned that Ms. Spence would not return to her FI-04 position in May 2015, it decided to keep the incumbent of the FI-03 position in the FI-04 position. Around the same time, that incumbent also announced that she would go on maternity and parental leave beginning in early 2016. Senior management decided to extend Mr. Carter’s appointment, to ensure continuity of service. Ms. Hutchins and Ms. Spence explained

that filling the FI-03 position was necessary to meet organizational and operational needs.

[112] For administrative reasons, senior management chose to proceed by way of a non-advertised appointment process rather than appointing someone from the pool. In September, Ms. Spence took steps to document the decision to use a non-advertised process and the choice to nominate Mr. Carter.

[113] The respondent maintains that there was no abuse of authority in its decision to choose a non-advertised process. It submits that pursuant to s. 30(4) of the *PSEA*, there is no requirement to consider more than one person for an appointment to be made on the basis of merit. In addition, there is no obligation for managers to make appointments from pools.

[114] It submits that under s. 33 of the *PSEA*, and as demonstrated in *Clout v. Deputy Minister of Public Safety and Emergency Preparedness*, 2008 PSST 22, managers have the discretion to choose between an advertised and a non-advertised process. The respondent submits that although the complainant feels that the use of a non-advertised process was not fair and equitable as it did not give him an opportunity to participate, choosing to use one was well within management's authority.

[115] In its written submissions, the PSC included its *Choice of Appointment Process Policy*. That policy, which was in effect at the time the complaint was made, states that the choice of advertised or non-advertised and internal or external appointment processes is consistent with an organization's human resources plan and its core and guiding values. That policy requires that deputy heads establish and communicate the criteria for using non-advertised processes. It also requires deputy heads to ensure that a written rationale demonstrates how a non-advertised process meets the established criteria and the appointment values.

[116] 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, which, for the following reasons, I find that he has not done.

[117] Section 77(1)(b) of the *PSEA* provides that a complaint may be made that the respondent abused its authority in choosing between an advertised and a non-advertised appointment process. Section 33 is clear that the PSC or its delegate,

in accordance with s. 15(1), may choose an advertised or non-advertised process to make an appointment. It reads as follows: “In making an appointment, the Commission may use an advertised or non-advertised appointment process.”

[118] In the circumstances, the complainant could not allege that an abuse of authority occurred simply because a non-advertised process was chosen. He had to prove that the decision to choose it constituted an abuse of authority.

[119] While the exemption provided in s. 15 of the *PSEER* applies when a certain position cannot be filled with a bilingual employee, s. 30 specifically provides that there is no need to go through a selection process and interview many people to make an appointment, as follows, in section 30(4): “The Commission is not required to consider more than one person in order for an appointment to be made on the basis of merit.”

[120] As long as the successful candidate meets the essential qualifications and the respondent can justify its decision, choosing a non-advertised process is permissible. This is in accordance with s. 36 of the *PSEA* and with the following excerpt from the *PSEA*'s preamble:

...

delegation of staffing authority should be to as low a level as possible within the public service, and should afford public service managers the flexibility necessary to staff, to manage and to lead their personnel to achieve results for Canadians

[Emphasis added]

...

[121] On the evidence, I find that Ms. Hutchins was initially faced with an unforeseen circumstance in that Ms. Spence could not return to her director, financial planning and analysis, position in May 2015. Therefore, the incumbent of the FI-03 position, who had replaced Ms. Spence, could also not return to her position, the one at issue. Consequently, Ms. Hutchins authorized extending Mr. Carter's appointment on an acting basis. Due to the anticipated short duration, she chose to appoint him through a non-advertised appointment process.

[122] While I have serious concerns about the transparency of the process, which will be addressed later, the evidence does not support finding that the respondent abused

its authority in the choice of a non-advertised process. Ms. Hutchins was faced with a temporary and short-term requirement for a branch financial officer. The criteria established by VAC allow non-advertised appointment processes if they are justified by urgency or specialized requirements. In addition, the non-advertised appointment process was for a short-term acting situation.

[123] The decision to choose a non-advertised process was also explained and documented, although late in the process. The respondent considered this choice of process the most appropriate course of action and prepared adequate documentation to support its decision.

[124] The rationale is not perfect. It does not explain why Mr. Carter was appointed through a non-advertised appointment process instead of via the 2013 advertised appointment process. In addition, it does not explicitly provide an explanation of how the non-advertised appointment met the values of fairness, access, transparency, and representativeness in appointments. However, it states that stability and continuity were the key drivers behind the extension.

[125] In *Robert and Sabourin*, the Tribunal also determined that a number of serious errors and omissions had occurred during a process that when taken as a whole, constituted an abuse of authority (including a lack of written rationales, a lack of a Statement of Merit Criteria, a failure to complete a timely assessment of the appointee's qualifications, a failure to demonstrate that the position could not have been filled with someone who met the language proficiency qualification, the appointee's failure to meet essential qualifications, and improper notification). However, the Tribunal concluded that the choice of a non-advertised appointment process had been supported by operational circumstances and therefore had not been an abuse of authority.

[126] Similarly, I conclude that the choice of a non-advertised appointment process was supported in this case by operational circumstances and therefore was not an abuse of authority.

[127] However, I note that the preamble to the *PSEA* sets out its legislative purpose and refers to a public service that embodies "transparent employment practices". PSC policies also ensure transparent employment practices. For example, its *Policy on Notification* requires that persons in the area of recourse be notified of their right to complain.

[128] In September 2015, Ms. Spence documented the decision to extend Mr. Carter's appointment in the FI-03 position. A couple of weeks later, on October 2, 2015, the complainant emailed the Acting Director, asking for a frank conversation about any planned staffing decisions on the pending vacancy in the FI-03 position. He was never told that a decision had been made to extend Mr. Carter's appointment. That lack of transparency is unfortunate. It certainly does not reflect the staffing values set out in the legislation.

[129] In addition, a delay occurred in preparing the paperwork to extend Mr. Carter's appointment beyond four months. At the hearing, Ms. Hutchins could not provide an explanation or justification for this delay except that Ms. Spence prepared the documentation in September 2015 when she returned from her training.

[130] It is a fact that a considerable delay arose in carrying out the assessment and in publishing the notice of the appointment on an acting basis. The assessment was completed on September 17, 2015, and the IRAA of Mr. Carter for May 6, 2015, to February 22, 2016, was posted on February 5, 2016.

[131] 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. In my view, the errors and omissions that arose during the course of the appointment process (the lack of transparency and the delays), while improper, are not serious enough on their own to constitute an abuse of authority. While delays arose in carrying out the assessment and in publishing the notice of the appointment on an acting basis, the assessment was completed on September 17, 2015, and the notice was posted on February 5, 2016.

[132] In addition, I note that management did not consult its human resources specialist before choosing the non-advertised appointment process option. This is another example of not complying with the PSC's or VAC's policies and guidelines. This administrative error resulted in management not taking the necessary steps to comply with s. 15 of the *PSER*. This issue has already been addressed, as have the resulting consequences. Nevertheless, again, by itself, or in conjunction with the errors set out earlier, omitting to consult a human resources specialist was not sufficiently serious to equate to an abuse of authority.

[133] Therefore, I find that the complainant has not proven on a balance of probabilities that the respondent committed an abuse of authority by choosing

a non-advertised process.

VI. Conclusion

[134] Given my finding that the respondent contravened s. 15(1) of the *PSEER* and that the appointee did not meet the language proficiency qualification for the acting appointment, I conclude that the appointment was not made on the basis of merit.

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

(The Order appears on the next page)

VII. Order

[136] I declare that an abuse of authority in the application of merit occurred in the appointment process.

[137] I am aware of the fact that the appointment on an acting basis at issue to the branch financial officer position (classified FI-03) has ended. However, this fact does not make revoking the appointment moot. In light of the finding that the appointee did not meet the language proficiency qualification for the acting appointment, I order the respondent to revoke the appointment.

April 12, 2019.

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