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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

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BETWEEN

**TRAVIS PALMQUIST**

Complainant

and

**PRESIDENT OF CANADA BORDER SERVICES AGENCY**

Respondent

and

**OTHER PARTIES**

Indexed as

*Palmquist v. President of the Canada Border Services Agency*

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

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

**For the Complainant:** Travis and Randy Palmquist

**For the Respondent:** Holly Hargreaves, counsel

**For the Public Service Commission:** Claude Zaor, senior analyst

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Heard at Winnipeg, Manitoba,  
August 14 and 15, 2019.

## REASONS FOR DECISION

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### **I. Introduction**

[1] Travis Palmquist, the complainant, filed an abuse-of-authority complaint after seven candidates were appointed to superintendent positions, classified FB-05 (“the FB-05 positions”), with the Canada Border Services Agency (“the CBSA”).

[2] The complainant alleged that the CBSA’s president (“the respondent”) abused its authority when the essential merit criteria in the appointment process at issue were assessed. Particularly, he alleged that he was not assessed fairly and transparently at the interview stage for the “Values and Ethics” competency. In addition, he alleged that the assessment board members were biased against him because they were made aware of a negative incident in the past involving him while assessments were ongoing.

[3] The respondent denied that an abuse of authority occurred. It stated that the complainant was properly assessed at the interview stage and in the appointment process in general and that there was no bias against him.

[4] The Public Service Commission did not appear at the hearing but presented written submissions 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 dismissed. The complainant did not establish that the respondent abused its authority in the appointment process at issue.

### **II. Background**

[6] In May 2016, the respondent launched an internal advertised appointment process (numbered 16-IA-PRA-CAD-FB05-75) to staff the FB-05 positions on acting and indeterminate bases. The intent was to create a pool of qualified candidates for positions in its Prairie Region.

[7] The assessment methods used in the appointment process consisted of screening the applications to validate education and experience, followed by a take-home written exam, an interview, and reference checks.

[8] On June 27, 2016, the complainant was informed by email that he had been eliminated from further consideration following his participation at the interview stage as he did not obtain the pass mark established for the Values and Ethics competency. The pass mark was 6/10, and his mark was 4/10.

[9] On August 24, 2016, the “Notification of Appointment or Proposal of Appointment” for the indeterminate appointments of the appointees was posted on the federal government’s job site, providing a right to recourse between August 24 and September 8, 2016. The complainant filed a complaint against the appointment of all the appointees within the specified time frames.

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

### III. Issues

[11] I must determine the following two issues:

1. Did the respondent abuse its authority in the assessment of the essential merit criteria, particularly at the interview stage for the Values and Ethics competency?
2. Did the respondent abuse its authority by acting in a biased fashion because it was made aware of a negative incident in the past involving the complainant while assessments were ongoing?

### IV. Analysis

[12] Section 77(1) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *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 an 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.”

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

**A. Did the respondent abuse its authority in the assessment of the essential merit criteria, particularly at the interview stage for the Values and Ethics competency?**

[14] The complainant testified at the hearing on his own behalf.

[15] The respondent called Greg Valentine, who, as of the appointment process at issue, was the chief of operations in the CBSA's Central Alberta District (Edmonton International Airport), and Benjamin Tame, who at that time was the chief of operations, Emerson Traffic (Manitoba). The screening and assessment boards for the appointment process consisted of Mr. Valentine, Mr. Tame, Ana Maria Coutu (Chief of Operations, Calgary, Alberta), and Nina Patel (Director, Central Alberta District).

[16] The complainant explained that he has been working for the respondent since 2006. In 2016, he was a border services officer (BSO) posted to the Calgary International Airport. He added that as of the appointment process, he often acted as a mentor and team lead. He also carried out a wide variety of work. He applied for a superintendent position in May 2016 but was informed shortly after that he had been eliminated from the process because he did not obtain the pass mark established for the Values and Ethics competency. He then filed this complaint. His substantive position since January 2018 has been as a BSO at the Boissevain port of entry in Manitoba.

[17] The complainant explained that on June 27, 2016, he received an email from a human resources advisor advising him that he had not obtained a pass mark for question 5 of the interview and that he had the option of requesting an informal discussion about his elimination from the process.

[18] Question 5 of the interview, the question at issue, which assessed "Values and ethics - *Serving through integrity and Respect*", read as follows:

*Question 5*

*Please describe a recent situation when you found yourself in a difficult ethical challenge in the workplace. Tell us:*

*i) What made it an ethical challenge?*

*ii) What issues did you face and how did you handle the situation, including the outcome?*

*iii) How would your colleagues and supervisor describe your values as a CBSA employee?*

*iv) Please describe how your personal / professional values and ethics have prepared you to assume the position of a [sic] manager of a team in the CBSA.*

[19] At the hearing, the complainant gave an overview of his response to this question during the interview. His difficult ethical challenge or dilemma was whether to release or refer his friend to secondary inspection. He explained that he was a BSO at the Winnipeg, Manitoba, airport at the “primary inspection” stage when a client presented at the customs counter. The complainant had grown up with him, and they were friends. He knew his friend’s background and that he was dealing drugs. His friend was happy to see him. He decided to send his friend to the “secondary inspection” stage. While his friend waited for his luggage, the complainant informed his superintendent that his friend was “using cocaine and deals it”. So, he referred him to secondary inspection for the purpose of “getting intelligence or finding drugs”. The Superintendent thanked the complainant.

[20] The complainant explained that at the interview, he felt that Ms. Patel seemed frustrated with his answer. She stopped writing and asked him to explain the dilemma.

[21] The complainant explained that his dilemma was whether to release his friend, who might have been hiding something. The other option was to refer him for an inspection. He explained that following the CBSA’s instructions was important to him. Therefore, he decided to refer his friend.

[22] The complainant continued the interview and answered subquestions iii) and iv). Subquestion iv) reads, “Please describe how your personal / professional values and ethics have prepared you to assume the position of a [sic] manager of a team in the CBSA?” To describe his personal and professional values and ethics, he spoke of his background and the fact that he and his family own rental buildings. He stated that he does not make extra claims to inflate the amount of his operating expenses. He stated that he remembered that after he gave that answer, one board member (Ms. Coutu) laughed. He asked her why she laughed. She told him to just keep going. He continued to explain why he considered himself prepared to assume a team manager position at the CBSA. At the end of the interview, the assessment board thanked him.

[23] The complainant filed in evidence the assessment board's notes of his response to question 5. One member noted that he had not let a traveller through because of a personal friendship. The dilemma set down in the notes was, "Do I let him [the traveller] through because of personal friendship or refer based on personal knowledge of the person". Another member noted that his example was about a friendship, while the two other members noted that he had referred to an acquaintance.

[24] After being informed that his candidacy had been eliminated from the process on June 27, 2016, the complainant asked for feedback.

[25] Mr. Tame provided the complainant with feedback in a phone conversation. According to the complainant, Mr. Tame informed him that the only reason his application was rejected was that the assessment board had not considered his example an ethical dilemma. Still according to him, Mr. Tame said that his application was rejected for no other reason. He stated that during the conversation, Mr. Tame acknowledged that had the assessment board considered his example an ethical dilemma, he would have been considered qualified for the process at issue.

[26] The complainant filed in evidence the written notes that Mr. Tame made after their July 5, 2016, discussion. In a note to the file, Mr. Tame summarized their conversation as follows:

*FB-05 Feedback for Travis Palmquist*

*1537 on July 5, 2016*

*I provided feedback to BSO Travis Palmquist by telephone on July 5, 2016 from 1537 to approximately 1610.*

*I explained to BSO Palmquist that overall he did quite well in his interview. I provided some general feedback and also walked through each question with him. I identified areas in which he excelled and also outlined areas that could be strengthened in the future.*

*In discussing question number five I identified that the example he provided did not have sufficient depth and complexity. More significant is that he failed to clarify for the board the ethical challenge he was facing in the given situation. He did not identify the competing values and how they intersected with the CBSA values. In addition, he failed to provide a sufficient response to parts iii and iv of the question. Therefore, he did not earn the required marks to pass the values and ethics component of the assessment.*

*BSO Palmquist indicated that after the interview he thought to himself that he may [sic] have been unsuccessful on question five. I stated that I was glad that our assessment rang true to him.*

*The feedback was well received [sic] by BSO Palmquist. He thanked me for my time and we went on to discuss deployment options to the Southern Manitoba District.*

[27] The complainant believes that the assessment board did not recognize the extent of the dilemma that he had experienced and that he had explained to the board.

[28] On July 14, 2016, the complainant had a discussion with Ms. Coutu, along with his bargaining agent representative. According to the complainant, Ms. Coutu confirmed that the information he had received from Mr. Tame at his first feedback session was an accurate representation of why he had failed question 5 of the interview — the assessment board had determined that his example was not considered an ethical dilemma. The complainant disagreed. He requested clarification as his view was that it was impossible that a personal example of an ethical dilemma could be interpreted as not being one. If he felt that he had been in a real dilemma at that time, no third party could determine otherwise.

[29] According to the complainant, at that time, Ms. Coutu added another reason that he had failed question 5, which, in his view, was a change relative to the first feedback session. According to him, she indicated that he had not provided detail on his dilemma and implications sufficient to obtain a passing grade on this question. In a note to the file, she had summarized their July 14, 2016, conversation as follows:

*Information Discussion Notes*

*BSO Travis Palmquist*

*Union Representative Russel Hay*

...

*We spoke about his answer. In particular, I explained that he failed to give us enough information about his scenario to clearly articulate what the conflict was and what made it an ethical challenge. He said that he believed it was an ethical dilemma and did not understand how the board could tell him that it was not since an ethical dilemma is how an individual feels about the situation. And that he felt it was an ethical dilemma for him.*

*We went through his example and I stated that may have been an ethical dilemma for him but that he failed to articulate the challenge to the board with enough depth for us to be able assess it favorably.*

*We went through some of the things that were missing from his articulation through different examples of how to clearly demonstrate what that challenge was, what he did and what the outcome was. Elaborating on the relationship with the individual and why the decision to refer that person was ethically challenging for him.*

*At the end of the conversation he stated he understood but that he would still look to appeal the process.*

*Informal conversation ended.*

...

[Sic throughout]

[30] On August 17, 2016, the “Notice of Consideration” (NOC) was posted. It included the names of persons being considered for the FB-05 positions.

[31] On August 18, the complainant contacted Ms. Patel to advise her that he would file a complaint. He felt that an informal discussion should take place since the NOC had been posted. He emailed the following to Ms. Patel:

...

*Please accept this as my formal appeal for the above notice of consideration.*

*As you are aware I requested a feedback session on this process. In this session I was advised that the only reason for not being successful was that my example on Values & Ethics was not considered an ethical dilemma. Furthermore the reviewer confirmed that had the example been considered as an ethical dilemma, I would have qualified for this process.*

*Subsequently, myself and my representative met with a Chief of Operations in Calgary who was also a board member. In this meeting she initially confirmed the information received from the reviewer. She ultimately acknowledged and confirmed that my example was in fact an ethical dilemma and “it was a good example of an ethical dilemma”. She then defended her position by providing a different explanation for why I was not successful.*

*Given these conflicting and changing responses I can only conclude that I have not been treated fairly and ethically in this process to date.*

...

[32] Ms. Patel replied that he had already had an informal discussion, with Ms. Coutu.

[33] The complainant also testified that his answer to question 5 was better than that of another candidate. He provided me with the assessment board’s notes of the



other candidate's answer, which state that he had to report a team member to his supervisor because he had observed the team member commit possible misconduct. The candidate's mark was 6/10. According to the complainant, his answer, but not that of other candidate, met all the elements included in the answer grid, so his mark should have been 10/10.

[34] The complainant added that he requested an additional informal discussion, since the NOC stated that someone in the area of selection could request one. However, Ms. Patel replied that he had already received one.

[35] Mr. Valentine testified that he had been an assessment board member and that he had conducted the interviews, along with the other members. He explained that an assessment guide had been prepared in advance. It had guidance for the answers sought and a rating scale. One of the essential qualifications was Values and Ethics. It was the subject of an interview question, the maximum mark for which was 10, and the pass mark was 6. According to the rating scale, the mark was 10 for an exceptional answer, 9 for a superior answer, 8 for a very good answer, 7 for a good answer, 6 for a fair answer, 5 for a standard or below answer, 3 or 4 for a weak answer, and 1 or 2 for a poor answer. Each category is described in the rating scale.

[36] He explained that the following were the criteria in the guide for evaluating question 5:

***Values and ethics - Serving through integrity and respect***

- *Demonstrates Values and Ethics, including the Code, in personal behaviour*
- *Integrates Values and Ethics, including the Code, into staff work practices*
- *Reflects a commitment to citizens and clients in own and staff activities*
- *Fosters a climate of transparency, trust, and respect among staff and in partnerships*
- *Incorporates equitable practices into HR management*
- *Encourages bilingualism and diversity, based on OL [official languages] & EE [employment equity] policies*
- *Builds and promotes a safe and healthy, respectful workplace*
- *Is alert to and deals quickly with harassment and discrimination*

- *Manages work activities and transactions with transparency and fairness*

[37] Mr. Valentine explained that the candidates were given 30 minutes to review the questions and 60 minutes for the interview.

[38] Mr. Valentine explained that the complainant was marked at 4/10 for his response to question 5, which was a consensus among the assessment board members. Mr. Valentine referred to the notes he took during the complainant's interview. He explained that they were not verbatim. They read as follows:

*Q5 Traveller @ PIL [primary inspection line] I knew. they deal cocaine. friendship. Refer Spoke w/ Secondary officer. spoke to Supt. Clear me of bias. Stayed away from exam.*

*Colleagues thanked me Supt was made aware*

*Uphold V&E. Respectful workplace/people/culture support colleagues.*

*Rental properties, report all my income. Personal life.*

*Knew them and it was*

*Uphold values and ethics Support people/be better at their jobs*

*[Sic throughout]*

[39] Mr. Valentine explained that after the interviewers collectively reviewed their notes, they concluded that the complainant did not provide enough valid information to meet the qualification. To obtain a pass mark of 6/10, the board had to conclude that the response met the following criteria, which is the definition of "fair" in the rating scale: "A satisfactory proportion of criteria or expected answers were addressed. A satisfactory proportion of the answers provided were appropriate. Some deficiencies exist in the competencies or behavior [sic] assessed, but none are of major concern."

[40] The complainant was marked at 4/10 because his answer was considered weak. The definition of "weak" (3 to 4/10) in the rating scale read as follows: "Few criteria or expected answers were addressed. Few of the answers provided were appropriate. Deficiencies exist in the competencies or behavior [sic] assessed and there appears to be a problem."

[41] Mr. Valentine also provided more context about the complainant's work environment and the situation he described in his response to question 5. Mr. Valentine explained that travellers arriving in Canada pass through a primary inspection line. In the complainant's example, he had been friends with the traveller.

He decided to refer the traveller for a second examination, in which more detailed questions are asked of a traveller, and the BSO may examine the traveller's baggage. His intention was to avoid any appearance of bias. He did not participate in the second examination.

[42] However, Mr. Valentine explained that when a BSO knows a traveller, the BSO must notify his or her supervisor, who will refer the traveller to another BSO or to second examination. Otherwise, there would be an appearance of a conflict of interest.

[43] Mr. Valentine explained that the complainant did not receive a pass mark on that question because he simply summarized the process to follow, while the assessment board was looking for a difficult choice between two important and competing values. In his response, the complainant did not mention such a choice. He summarized the procedure to follow when a BSO knows a person at customs. Therefore, he did not describe a recent situation in which he found himself "... in a difficult ethical challenge in the workplace."

[44] In his cross-examination, Mr. Valentine also stated that in his responses to subquestions 5i) and ii), the complainant did not demonstrate in sufficient detail the extent of the dilemma he had experienced. He had to answer each subquestion. His answers to the other ones could have been adequate, but those to 5i) and ii) were not sufficient. With respect to subquestion iv), Mr. Valentine later added that his opinion was that the complainant had not provided sufficient information. Stating that he reported his business income was not sufficient information to properly answer the question. It required that the candidate describe how his or her personal and professional values and ethics had prepared him or her to assume a team manager position at the CBSA.

[45] Mr. Valentine added that the mark of 4/10 for question 5 was an overall mark for the responses to the 4 subquestions. He clarified that it was clear that on the whole, those 4 responses were considered insufficient. According to the marking scale, it meant that his mark would be 3 to 4 since, as noted in the scale, "Few criteria or expected answers were addressed."

[46] Mr. Tame also explained why the complainant was marked at 4/10 for his response to question 5. Mr. Tame was shown the notes he took during the

complainant's interview, which are not a verbatim compilation of the complainant's response. They read as follows:

- @ Primary
- Knew client - ACQUAINTENCE
  - Knew he deals cocaine
- Referred individual
  - Spoke w/ secondary to let them know
  - Spoke w/ supt as well - I know the indiv.
- No part of exam
- iii) - Uphold V+E
  - safe, respectful workplace is a big priority for me.
- Support diversity
  - religion, culture, background
- Support colleagues - mentor, coach
- iv) - Report additional income @ tax time - rental props.
- V+E in personal life.

[47] Mr. Tame explained that the complainant received 4/10 for his response to question 5 because it lacked depth and complexity — the scenario was very black-and-white in that the right thing to do was relatively obvious. The two competing values presented little tension. In other words, in his response, he did not include enough depth to show that he had used values and ethics in a very challenging situation.

[48] Mr. Tame also confirmed at the hearing that the terms “informal discussion” and “feedback session” were used interchangeably. For the respondent, they are equivalent and refer to an “informal discussion”.

[49] The complainant submitted that the assessment board did not treat him fairly and transparently and that it abused its authority in the application of merit for the following reasons.

[50] First, he submitted that question 5 includes four subquestions. He stated that in their testimonies and in their views, the respondent's two witnesses confirmed that the assessment board reached the consensus that his response did not raise any ethical issues, which had already been communicated to him during the feedback sessions. Given the consensus, which he stated was based on an erroneous evaluation, the

assessment of the four subquestions was tainted. The information he provided in subquestions ii) to iv) was not assessed properly.

[51] To be more precise, he submitted that according to the evaluation method used, the board was to assign an overall mark for question 5 after taking into account the answers to the four subquestions. He believes that it penalized him by not assessing him on the subquestions because it concluded that the ethical challenge presented for subquestions i) and ii) was unsatisfactory. Therefore, he was under-assessed. The board was concerned that his response was not very detailed, but that was not the essence of the question. He considers that his final assessment was tainted because by deciding that he had not described an ethical dilemma, the board assessed only two parts of the question and marked him at 4/10.

[52] Second, the complainant submitted that the correction grid prepared in advance did not include a definition of “ethical challenge”. Yet, it was not up to the board to interpret that term narrowly. If a candidate claims that a situation was an ethical challenge for him or her, the assessment board cannot dismiss it and give it no weight. The candidate experienced that situation, and only he or she knows the emotions that were involved. He added that later, Ms. Coutu recognized that the situation that he described could have been an ethical dilemma for him.

[53] He insisted that question 5 did not ask the candidates to identify two competing values. Instead, it asked them to describe an ethical challenge that they found difficult, which is what he did. The board could not penalize him for answering the question as it was worded.

[54] The complainant added that he did provide an example of what was for him an ethical challenge, based on his experience and values. He believes that Mr. Valentine recognized that ethical challenges are life lessons and that they are not the same for everyone. Thus, the complainant submitted that the board incorrectly placed itself in his shoes when it concluded that his responses to parts i) and ii) of question 5 did not describe an ethical challenge but just him doing his job.

[55] The complainant also submitted that eventually, Ms. Coutu changed her explanation as to why he did not pass question 5. He submitted that this lack of transparency and change of position was a direct abuse of authority. At the first feedback session, he was informed that he had failed question 5 because he did not

describe a real ethical dilemma. Subsequently, Ms. Coutu told him that his response did not contain enough depth and complexity to allow the board to conclude that he met the Values and Ethics criterion. In his view, these rationales are irreconcilable and demonstrate an abuse of authority. In essence, he was misled. The lack of transparency in the assessment board's reason for failing him on question 5 also undermines the board's credibility.

[56] Thirdly, the complainant argued that since his answer was more complete than that of the other candidate, which was reviewed at the hearing, the respondent abused its authority by marking him at 4/10 for his answer while marking the other candidate at 6/10.

[57] Finally, the complainant alleged that after the NOC was posted, he was entitled to an informal discussion, as was indicated in the NOC, but Ms. Patel denied it. His view is that he was entitled to one because the NOC specified as follows: "You may request an informal discussion if you are within the following area of selection and participated in the advertised process".

[58] He submitted that Ms. Patel's refusal to provide him an informal discussion showed a lack of commitment to address his concerns with the appointment process. Otherwise, it would have allowed the board and him to address those outstanding concerns. This was another error by the board, in addition to the errors listed earlier, which leads to the conclusion that overall, an abuse of authority was committed in the staffing process.

[59] For all those reasons, the complainant claimed that the assessment board did not treat him fairly and transparently and that it abused its authority in the application of merit.

[60] For its part, the respondent submitted that Mr. Valentine and Mr. Tame confirmed that they had received appropriate training before carrying out the staffing process. The board members who testified confirmed that the evaluation tools were prepared in advance. The board assessed the complainant's responses shortly after his interview and concluded that he did not pass question 5 because he did not demonstrate in his answer how he applies values and ethics. He was asked to describe a work situation in which he found himself in a difficult ethical challenge. The situation he described was not sufficient to allow the board to assess how he

approaches values and ethics. In addition, he did not provide sufficient information in response to subquestions ii) to iv) of question 5.

[61] The respondent added that Mr. Tame attended a feedback session with the complainant. He explained that the complainant had received 4/10 for question 5 because his answer lacked depth and complexity. Mr. Tame added that the complainant had welcomed the feedback.

[62] The respondent submitted that the complainant did not pass question 5 as he did not provide sufficient information in his answer. In *Broughton v. Deputy Minister of Public Works and Government Services*, 2007 PSST 20, the Public Service Staffing Tribunal (“the Tribunal”) held that its role was to determine if an abuse of authority had occurred in the appointment process at issue and not to redo that process by reviewing the complainant’s qualifications and second-guessing if the selection board had assessed them correctly.

[63] The respondent also submitted that informal discussions are held so that unsuccessful candidates have an opportunity to learn why they were not qualified. It submitted that the complainant was provided with that opportunity twice, the first time on July 5, 2016, with Mr. Tame, and the second time on July 14, 2016, with Ms. Coutu. Both had been selection board members and had assessed his interview.

[64] The respondent submitted that during the first meeting, Mr. Tame explained to the complainant that the example he had provided to demonstrate his values and ethics did not have sufficient depth and complexity and that he had failed to clarify for the board the ethical challenge he had faced in that situation. In addition, he had failed to provide sufficient responses to parts iii) and iv) of question 5, and as a result, he could not be assigned enough of a mark to pass this essential qualification.

[65] The respondent clarified that at the second meeting, Ms. Coutu stated that the complainant did not provide sufficient information at the interview to clearly demonstrate how his example was in fact an ethical dilemma. Consequently, the board members judged that his response did not meet the standard required to pass.

[66] The respondent submitted that s. 36 of the *PSEA* provides subdelegated managers with the discretion to choose the assessment tools they consider appropriate

for determining whether a person meets the essential qualifications (see *Visca v. Deputy Minister of Justice*, 2007 PSST 24 at para. 51).

[67] It submitted that in *Portree v. Deputy Head of Service Canada*, 2006 PSST 14, the Tribunal stated that the assessment board is in the best position to assess whether it has sufficient information about a candidate to accurately assess the qualifications. The Tribunal also stated that “[s]imply disagreeing with the final result does not constitute evidence of wrongdoing on the part of the assessment board,” and that its role was not to reassess a complainant. Thus, the Tribunal stated that unless it is “... of a serious nature, wrongdoing in the form of an error, omission or improper conduct will not be sufficient to constitute abuse of authority.”

[68] The respondent also submitted that the complainant received appropriate and consistent feedback to help him understand why he failed question 5. Relying on *Rozka v. Deputy Minister of Citizenship and Immigration Canada*, 2007 PSST 46 at para. 76, it submitted that an informal discussion is not held to reassess a candidate. However, if an error is discovered, it provides an opportunity for the manager to correct it. But in this case, there was no error to correct.

[69] I find that the complainant did not demonstrate that the respondent abused its authority in its assessment of his answer to question 5, which evaluated the Values and Ethics competency. There is no doubt that he is a very competent employee. However, I cannot conclude that the assessment board erred in assessing his response.

[70] I note that when reviewing a complaint that a qualification was not assessed properly, I must not substitute my assessment of a candidate’s qualifications for that of a manager or a board (see *Edwards v. Deputy Minister of Indian and Northern Affairs Canada*, 2011 PSST 10 at para. 34). My role is to examine the process used by the respondent to ensure that there was no abuse of authority.

[71] The assessment board had the task of assessing the quality of his response in light of the answer guide, which stated that a correct answer to question 5 would show a number of the following characteristics about the candidate:

1. demonstrated values and ethics and respected the CBSA’s code in his or her personal behaviour;
2. integrated values and ethics into work practices;



3. reflected a commitment to citizens and clients in his or her own and in the staff's activities;
4. fostered a climate of transparency, trust, and respect among staff and in partnerships;
5. integrated fair practices in human resources management;
6. encouraged bilingualism and diversity, based on official languages and employment equity policies;
7. built and promoted a safe, healthy, and respectful workplace;
8. was alert to and dealt with harassment and discrimination quickly; and
9. managed work activities and transactions with transparency and equity.

[72] In the situation he described in the interview, the complainant stated that he had chosen to refer his friend to the secondary inspection stage, which turned out to be an established work practice, rather than giving his friend a free pass. The board assessed his response and concluded that his situation had not really raised an ethical dilemma since he had not been forced to choose between two opposing or contradictory proposals, both of which were usually unsatisfactory but between which he was forced to choose. Following the established procedure was not really an unsatisfactory proposal. Thus, considering this answer and the additional information he provided in response to subquestions iii) and iv), the board concluded that he had not demonstrated that he was able to display the values and ethics in his personal behaviour or work practices. It marked his answer at 4/10.

[73] I find that there is no evidence of a serious error or omission in how the complainant was assessed. Therefore, I conclude that he did not prove that the respondent abused its authority in its assessment of his candidacy.

[74] I also consider that the complainant did not demonstrate that Ms. Coutu changed the explanation as to why he did not pass question 5. In his view, the respondent provided two rationales to explain why he did not pass that question: (1) he did not describe a real ethical dilemma, and (2) his response did not contain enough depth and complexity to allow the board to conclude that he met the Values and Ethics criterion. I do not consider those explanations irreconcilable. On the contrary, I find

that they complement each other and that they are consistent with the characteristics set out in the response guide.

[75] I also find that the complainant was provided with two opportunities to discuss why he was eliminated, which were at informal discussions on July 5, 2016, with Mr. Tame and on July 14, 2016, with Ms. Coutu. Therefore, I conclude that he did not demonstrate that the respondent abused its authority by not offering him an informal discussion after the NOC was posted.

[76] For all these reasons, I conclude that it has not been established that the respondent abused its authority in the application of merit.

**B. Did the respondent abuse its authority by acting in a biased fashion because it was made aware of a negative incident in the past involving the complainant while assessments were ongoing?**

[77] A reasonable apprehension of bias can constitute an abuse of authority. (See *Denny v. Deputy Minister of National Defence*, 2009 PSST 29 at para. 125, referring to *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at 394.) In *Denny*, the Tribunal stated as follows at paragraph 124: “Suspicious, speculations or possibilities of bias are not enough and bias must be real, probable or reasonably obvious.”

[78] Still in *Denny*, the Tribunal also referred to the Supreme Court of Canada’s decision in *Newfoundland Telephone Company v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] S.C.J. No. 21 (QL) at para. 22, which articulated the test for the reasonable apprehension of bias as follows: “The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.” This test also applies to assessment board members, since they have a duty to act fairly.

[79] The complainant stated that the assessment board changed its behaviour when he answered question 5. He stated that its members stopped writing. He felt that they had already formed an opinion that his response was not sufficient for him to pass this question.

[80] He found out later that another BSO, a candidate in the staffing process, had used a situation involving the complainant to answer question 5. That candidate had described a dilemma of hesitating to report a co-worker (the complainant) for an

alleged error he had made in the past. The complainant believes that this impacted his results in that he failed the interview question.

[81] The complainant explained that after the interview, the respondent launched an investigation into the alleged error, which Mr. Valentine was mandated to conduct.

[82] The complainant explained that after the staffing interview on June 17, 2016, he went on paternity leave for six months. When he returned in 2017, Mr. Valentine contacted him to tell him that he was investigating the error. The complainant and his supervisor were interviewed.

[83] The complainant added that when Mr. Valentine called him to a first meeting, he was instructed not to wear his tool equipment, which he found strange. He was confused because he did not know the purpose of the meeting. Once it was underway, he discovered that the investigation involved him and a past incident.

[84] During the meeting, Mr. Valentine asked him if he had stolen money from a traveller in the past. The complainant was confused; he did not know why he was asked that question. At the end of the meeting, he understood that another candidate in the staffing process, Mr. H (his name is anonymized in this decision), had provided as an example of an ethical dilemma that he had experienced the difficult decision of whether or not to report suspicious behaviour by a member of his team. I note that according to the assessment board members' notes made during the interviews, Mr. H did not name the team member. The complainant later deduced that it was him.

[85] The complainant filed in evidence the assessment board members' notes for question 5 of Mr. H's interview. One member noted that Mr. H had explained that he had witnessed misconduct by a member of his team who was also his friend. He knew that denouncing his friend could result in disciplinary action, such as suspension. He believed that his friend had taken money from a traveller. He set aside his friendship to denounce his friend's action; according to him, he would have been culpable had he not disclosed it, so he reported it to the superintendent. As for the outcome, he was not entirely sure. Another assessment board member took similar notes but remarked that the allegation was that Mr. H's friend had accidentally taken money from a traveller.

[86] According to the complainant, what happened in 2014, which was being investigated, was that a traveller failed to report outbound currency in excess of \$10 000 under the applicable legislation. Therefore, he was liable to receive a penalty or to seizure. The complainant discovered that in fact, the traveller was carrying \$15 000 in cash. He asked the traveller why he had claimed to be carrying less than \$10 000 in cash. According to the procedure, he then counted the money in front of the traveller and presented him with the fine, which was \$250 at that time. The procedure required the complainant to place the \$250 in the cash register and to give a receipt to the traveller. However, since the traveller wanted to be released so he could catch his plane, the complainant offered to accept an address so that he could mail the traveller a receipt. But the traveller said that he had no address. In the end, he provided a post-office-box address in Thailand.

[87] So the traveller left and caught his plane. Later on, the complainant went to the cash desk. At that point, he and the cashier noticed that an additional \$50 or \$100 bill had been taken in error. The complainant discussed it with his co-workers, including Mr. H and his superintendent. He remembered that it was agreed that the money would be sent to the traveller, along with the receipt. However, he realized that he could not send money in an envelope to the supplied address, along with the receipt.

[88] The complainant recalled that he, his co-worker, and the superintendent discussed it. It was decided that the receipt for the fine would be placed in an envelope with the additional money and that the envelope would be sealed and placed in a locked desk drawer. Thus, if the traveller made a complaint or requested a refund, a reimbursement could be made.

[89] The complainant was absent on paternity leave for the last six months of 2016. When he returned, he had forgotten about the envelope, which at that point had been in the locked drawer, he believed, for two years; that is, since 2014.

[90] During the investigation, the complainant went to the commercial office where he had left the envelope two years earlier, but it was gone. He had no idea what had happened to it, but he said that he did not take the money from it. At the end of the investigation, it was concluded that there was no trace of the money and that the complainant had not followed the recommended procedure.

[91] The complainant explained that once the investigation was completed, he reviewed the investigation report and the investigator's notes. He understood that while he was away on leave, Mr. H found the key to the drawer in which the envelope was located, took the money, and returned it to their supervisor. The complainant was offended because he received disciplinary action — a two-day suspension — for this incident even though he did not take the money and someone else admitted to giving it to the supervisor.

[92] As he explained, this significantly hurt his career. Since then, he has no longer had the opportunity to act as a supervisor or to be assigned to interesting projects, such as being a dog handler, for example. He was also excluded from the enforcement team. He submitted that the bias against him that began during the appointment process continued after it.

[93] Mr. Valentine explained that he did not know the complainant well as of the staffing process because they had never worked in the same city. He also did not know Mr. H well, for the same reason.

[94] At the hearing, the complainant brought to Mr. Valentine's attention the notes he made when Mr. H answered question 5 of the interview, which read as follows:

*Q5 Misconduct Friendship/Discipline. Aware of conduct believe coworker and reported. Wasn't done. Put friendship aside. Involved and culpable. Don't know outcome. Discussed outcome not shared. Money accidentally taken from traveller R [Respect] I [Integrity] P [Professionalism] R [Respect] for legislation values owned up to mistakes Mutual respect [for colleague]. Thanked for disclosing information. Friendship suffered*

[95] Mr. Valentine explained that Mr. H's ethical dilemma was that he had been forced to choose between two opposing options, which were whether or not to report the apparent improper act by a member of his team of taking money from a traveller. He had chosen loyalty to his employer because he felt that he would be held culpable if he did not report it, at the expense of his friendship with the team member. Mr. H did not disclose the team member's identity in the interview. He reported that his friendship with his co-worker had suffered.

[96] The staffing interview was conducted on June 17, 2016. Mr. Valentine explained that the evaluation of the responses from it was completed immediately afterwards or within the following hours. He confirmed that the board assessed the complainant's

responses, including to question 5, without knowing the identity of the person whom Mr. H had referred to. Mr. Valentine insisted that in no way could the board have linked Mr. H's team member to the complainant because Mr. H did not name the person or the team.

[97] Mr. Valentine explained that later, the director of the Central Alberta District mandated him and someone else not involved in the staffing process to conduct what he called fact-finding interviews with the complainant and others. The purpose was to collect facts to see if evidence supported Mr. H's allegation.

[98] Mr. Valentine was asked when he was instructed to conduct the interviews. He responded that it was shortly before July 15, 2016, which was the date of the complainant's fact-finding interview and was approximately one month after the staffing-process interviews. Mr. Valentine mentioned that he also interviewed the other members of the Calgary Airport enforcement team, Mr. H and Mr. M (name anonymized for the purposes of this decision).

[99] Mr. Tame also testified on the allegation of bias. At the hearing, the complainant brought to his attention the following notes, which he made when Mr. H answered question 5 in his interview:

*Q5 - Witness misconduct of team member - friend, could lead to discipline if I disclose to supervisor.*

*- put friendship aside to do this; I was culpable if I did not disclose*

*- I did report to supt. - \$ taken from traveller*

*- Outcome*

*- not totally sure*

*iii) - Integrity, professionalism + respect for legislation we enforce.*

*iv) - Demonstrate values, own up to mistakes + willing to show.*

[100] Mr. Tame confirmed that the team member's identity was not communicated to the assessment board.

[101] At the hearing, another assessment board member's notes were presented to Mr. Tame. He reviewed them and confirmed that they summarized the situation Mr. H described involving a team member, whose identity was not disclosed.

[102] In response to a question from the complainant, Mr. Tame said that Mr. H's answer to this question was acceptable since it described a difficult choice of whether or not to denounce a friend and team member, who had possibly committed misconduct, knowing that the misconduct was possibly contrary to the respondent's code of ethics.

[103] Mr. Tame was asked whether at the interview, he knew who was on the enforcement team of which Mr. H was a member. He answered that he did not since he did not work in Calgary. In addition, it could have been a member of any team, such as someone on a team that rotates work schedules.

[104] The complainant submitted that Mr. H's interview in the internal advertised appointment process took place one day before his and that it is likely that the assessment board linked the team member that Mr. H mentioned to him, although Mr. H did not name the team member that he denounced. Two assessment board members, Ms. Patel and Ms. Coutu, could have reasonably established a relationship between the complainant and the team member who had committed the possible misconduct. They had worked in the same location as the complainant. They knew the composition of the enforcement team of which Mr. H was part; it had only three members.

[105] The complainant submitted that both Mr. Valentine and Mr. Tame confirmed that they considered significant the misconduct that Mr. H described and denounced and that had they known the team member's identity, a possibility of bias could have been raised.

[106] The complainant claimed that given that the assessment board gave him different rationales to justify his failure of question 5, it is likely that he was not properly assessed because the board was biased against him. The fact that the respondent refused a third feedback session to help him understand why he failed also shows its bias.

[107] To conclude, the complainant specified that he seeks support to achieve a positive resolution to the concerns he raised in his complaint. He asked that measures deemed appropriate be taken.

[108] On the other hand, the respondent submitted that Mr. Valentine confirmed that he had neither worked nor had any contact with the complainant before the interview. In addition, Mr. Valentine was not aware of any conflict between the complainant and any board members. Moreover, he confirmed that Mr. H did not mention the complainant's name during his interview. Finally, none of the members' notes made during Mr. H's interview contains his name.

[109] The respondent submitted that Mr. Tame also confirmed that Mr. H did not mention the complainant's name in his interview and that no assessment board members' notes contain his name. He also added that he had never had any conflict with the complainant. Moreover, he was not aware of any conflict between the complainant and the assessment board members.

[110] The respondent submitted that the complainant did not demonstrate that the assessment board members were biased because they were made aware of a negative incident involving him while the assessments were ongoing.

[111] In the interviews, the candidates were asked to provide examples to demonstrate how they met each criterion. In fact, one candidate, Mr. H, mentioned a situation involving a colleague. However, based on the notes made during that interview and on the information provided by Mr. Valentine and Mr. Tame, no evidence indicates that Mr. H disclosed the complainant's name in his example.

[112] Therefore, the board members did not know that Mr. H referred to the complainant. Mr. Valentine confirmed that it had been impossible for him and the other members to associate Mr. H's reference to the complainant because Mr. H did not name the team. The use of his example could not have impacted the complainant's assessment. As such, the respondent submitted that the complainant did not establish that he was assessed unfairly.

[113] I find that there is insufficient evidence to support a finding of a reasonable apprehension of bias. While the complainant might have perceived that the assessment board was biased against him, I do not find that a reasonably informed bystander would reasonably perceive bias in these circumstances.

[114] According to the evidence, Mr. H did not disclose the identity of his colleague or name the team. Nor do I have any evidence that two assessment board members



associated that colleague with the complainant. His assumption that those two members could have made that association was not supported by independent evidence.

[115] In addition, Mr. Valentine's investigation into the complainant's possible misconduct took place nearly a month after he was interviewed and assessed in the appointment process. The evidence indicates that he was assessed based on the answer he provided and the rating guide that was used to evaluate all the candidates.

[116] Therefore, I find that the complainant did not prove that there was a reasonable apprehension of bias on the part of the assessment board with respect to its decision to mark him at 4/10 on question 5.

[117] For all these reasons, I conclude that it has not been established that the respondent abused its authority by acting in a biased fashion.

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

*(The Order appears on the next page)*

**V. Order**

[119] The complaint is dismissed.

January 22, 2020.

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