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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

**MIHAELA MARIN-LAZARESCU**

Complainant

and

**PRESIDENT OF SHARED SERVICES CANADA**

Respondent

and

**OTHER PARTIES**

Indexed as

*Marin-Lazarescu v. President of Shared Services Canada*

In the matter of a complaint of abuse of authority - ss. 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:** Bruce Roy, Public Service Alliance of Canada

**For the Respondent:** Spencer Shaw, counsel

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

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Heard at Ottawa, Ontario,  
December 19 and 20, 2019.

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## REASONS FOR DECISION

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### I. Introduction

[1] Mihaela Marin-Lazarescu (“the complainant”) filed a complaint of abuse of authority about the appointment of a person (“the appointee”) to the position of manager, Branch Business Planning (BBP), Service Delivery and Management Branch, classified AS-05, with Shared Services Canada (SSC) in Ottawa, Ontario.

[2] The complainant’s view is that the SCC’s president (“the respondent”) abused its authority firstly, in the choice of a non-advertised appointment process for the appointment; secondly, in the application of merit as the appointee was not qualified; and thirdly, because personal favouritism and nepotism were factors in the respondent’s decision to appoint the appointee.

[3] The respondent denied that an abuse of authority occurred. It submitted that a non-advertised appointment process was chosen and that it was appropriate, given SSC’s operational needs at the time the appointment was made. It stated that the appointee was fully assessed and was found to meet the qualifications for the position. There was no personal favouritism or nepotism.

[4] The Public Service Commission (PSC) did not appear at the hearing. It 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 dismissed. It was not established that the respondent abused its authority in this appointment process.

### II. Background

[6] The complainant occupies a position with SSC in Ottawa.

[7] The “Notification of Appointment or Proposal of Appointment” (NAPA) for the appointee was posted on the federal government’s job site from May 30 to June 14, 2017.

[8] The complainant made her complaint under s. 77 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) with the Public Service Labour Relations and Employment Board (PSLREB) on May 30, 2017, in response to the NAPA.

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

### **III. Issues**

[10] The Board must determine the following issues:

- 1) Did the respondent abuse its authority by choosing a non-advertised process for this appointment, and, in particular, did bias influence the decision to use such a process?
- 2) Did the respondent abuse its authority by appointing a person who was not qualified?
- 3) Did the respondent abuse its authority by showing personal favouritism in its decision to appoint the appointee?

### **IV. The facts**

[11] The complainant testified at the hearing on her own behalf. The respondent called Chris Szwarc, who, for the appointment process at issue, was Director of Branch Business Planning, Service Delivery and Management Branch, SSC.

[12] After the new federal department, SSC, was created in 2011, the complainant’s position was transferred by Order-in-Council to SSC. At the time of her complaint, her substantive position was with the Corporate Branch, classified at the AS-04 group and level.

[13] On February 26, 2016, the complainant saw an advertisement for an AS-05 position with the Data Centre Services Branch (“the Data Centre”). She applied, and after the interview and her references were checked, she was found to be the successful candidate.

[14] On March 29, 2016, she was offered an appointment on an acting basis to the AS-05 position by the then-director of the Data Centre’s BBP. The position number was 110290 (“the first AS-05 manager position”). The appointment was for 4 months less a day but it was extended, and the complainant remained in the position until November 29, 2016.

[15] The complainant explained that in June 2016, the Data Centre was divided in two. Half of the employees were moved to the new Service Delivery and Management Branch (“Service Delivery”). Her position was moved there. She supervised a team of 3 employees. She explained that in Service Delivery, she and her team supported 4 sectors with more than 19 cost centres and sub-cost centres. Among others, she mentioned the following: (1) the Service Delivery and Management Branch Senior Assistant Deputy Minister office, (2) the Service Delivery and Management Team 1, (3) the Service Delivery and Management Team 2, (4) Service Management Operations, and (5) Service Management Transformation. She explained that her group monitored an approximate annual budget of \$260 million.

[16] On September 6, 2016, Mr. Szwarc was appointed as the director of the new BBP in Service Delivery. The complainant reported to him.

[17] Mr. Szwarc appointed the complainant on an acting basis to a different AS-05 position, numbered 111215 (“the second AS-05 manager position”), as of November 29, 2016. The acting appointment was until March 31, 2017. She explained that she was put into this position because she did not meet the language requirements for the first AS-05 manager position as at that time, she had not completed the oral exam part of her second-language evaluation, which had been postponed twice.

[18] The person substantively holding the second AS-05 manager position was on sick leave and then retired early in 2017.

[19] The complainant highlighted that when she was assessed for the second AS-05 manager position, Mr. Szwarc indicated the following in the document entitled, “Rationale for Non-Advertised Appointment Process”: “A key element of this skillset is [sic] the financial, acquisition and process elements.” She recognized that in the new position, she continued the same work she had carried out in the first AS-05 manager position, even though the position number was different.

[20] The rationale that Mr. Szwarc prepared for the complainant’s appointment on an acting basis in the second AS-05 manager position stated the following:

*I am the executive leading a newly created Business Planning unit within a recently created Branch of SSC.*

*I am putting forward an acting assignment for Mihaela. She has been acting in this position for a bit less than eight months. The*

*reason for this action is due to the immediate need of this organization. This is especially important for the organization given that we are nearing end of Fiscal Year. Further, this individual has the knowledge given that she has already been in the role.*

*The other manager role is currently vacant. That individual is absent from the office on sick leave and has already confirmed she will be soon retiring from the public service (by January 2017). There is no other employee within my current unit that could fulfill this role, including meeting the language requirement. Within the team, the other team members are at lower levels and are, themselves, currently participating within the AS-02 pool. Results of that process are not yet revealed. An advertised staffing process would take time and we are currently under duress. Further, the organization is continuing to experience significant change, and it is preferred that we try to maintain consistency at this point in time.*

*A key element of the skillset is the financial, acquisition and process elements. The department currently has an AS-05 pool that was established for the issues manager functions, which did not focus on the above noted elements. Appreciating that the SSC's currently developing a classified organizational structure, our BBP vision is to align ourselves with that proposal structure and to support competitive staffing processes going forward. The proposed draft organizational structure is currently indicating this role to be set at the AS-05 level.*

*I recommend that the SDM team continue to keep Miheala in the acting role and that the paperwork be processed quickly. I will communicate accordingly with my staff, which could include informal discussion if that would be the case.*

*[Sic throughout]*

[21] Before appointing the complainant to the position on an acting basis, Mr. Szwarc had approached the Human Resources (HR) section to fill the second AS-05 manager position permanently as the person substantively holding this position was on sick leave and had advised that she would retire in January 2017. However, he had discovered that it would take some time before he would be authorized to permanently appoint a person to the position.

[22] Mr. Szwarc wished to permanently appoint the appointee to the second AS-05 manager position. He had worked with her in the past at Natural Resources Canada. He had noted that she had highly developed skills in the financial, acquisition, and process areas. He knew that she would be able to resolve the many difficulties and discrepancies he continuously found in the monthly data reporting in his section.

[23] Mr. Szwarc communicated to his finance team his intention to bring the appointee in as a manager. He explained that as a manager, she would help the team with its extensive workload. He did not specify to his team the mechanism of the appointment that would be chosen.

[24] Due to a position reclassification exercise conducted in SSC and the fact that a job description was not available for the position to be staffed, it took several months for the respondent to permanently staff the second AS-05 manager position.

[25] Therefore, the complainant's appointment on an acting basis in the second AS-05 manager position was extended from April 3 to July 28, 2017. On April 27, she was notified that her appointment would not be extended once it ended and that she would have to return to her substantive position.

[26] On May 30, 2017, the NAPA was posted. The appointee was appointed on an indeterminate basis to the second AS-05 manager position on the Service Delivery's BBP team. The complainant filed her complaint that same day.

[27] The appointee started into her new position on June 19, 2017.

[28] The complainant's last day in the second AS-05 manager position was June 7, 2017, even though her appointment on an acting basis was to be until July 28. She filed a grievance to challenge the early termination of her appointment. Ultimately, the parties reached an agreement on that grievance.

## **V. Analysis**

[29] 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 the PSC or the deputy head abused its authority in the appointment process.

[30] Pursuant to s. 77(1)(a), the complainant alleged that the respondent abused its authority in the application of merit. She also claimed under s. 77(1)(b) that it abused its authority by choosing a non-advertised appointment process.

[31] The 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. The issues****1. Issue I: Did the respondent abuse its authority by choosing a non-advertised process for this appointment, and, in particular, did bias influence the decision to use such a process?**

[32] Section 77(1)(b) provides a right of recourse as follows when the choice of appointment process is at issue:

*77 (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Board's regulations — make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of*

...

*(b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process ....*

[33] Section 33 of the *PSEA* provides that “[i]n making an appointment, the Commission may use an advertised or non-advertised appointment process.”

[34] The complainant testified that during team meetings, Mr. Szwarc mentioned that he considered it essential to bring the appointee to SSC into an AS-05 position. But, according to the complainant, he did not specify that the appointee would eventually be appointed and promoted through a non-advertised process.

[35] The complainant explained that at one team meeting, she asked him how he would proceed to bring in the appointee. He answered that it would be done by deployment. The complainant said that at a team meeting, she asked him for the appointee’s classification and level but that he did not answer her.

[36] The complainant explained that as of September 2016, in all planning, staffing, and salary-forecasting documents presented monthly for the financial periods of the fiscal year, the appointee’s name was added as a new, deployed employee to forecast the salary of the second AS-05 manager position.

[37] The evidence showed that the appointee was not deployed to the second AS-05 manager position but was eventually appointed to it. This was done because originally, she was classified at the FI-01 group and level at Natural Resources Canada. She was at the top of the pay scale. When Mr. Szwarc considered deploying her from the FI

category to the AS category, for the envisaged transition, she had to be transferred to the AS-04 level, for which the top of the pay scale was \$3500 less than her salary. That meant that she would have had to accept a pay reduction of approximately that amount. To avoid it, Mr. Szwarc decided that it would be more reasonable to offer to appoint her at the AS-05 level. The complainant did not agree with that since it was a promotion.

[38] The evidence showed that initially, on December 9, 2016, Mr. Szwarc emailed a team leader/HR management advisor. His email had the subject “rationale-non-advertised-nomination-[the appointee]” and stated the following: “Please find attached my draft proposal for the staffing of [the appointee]. The proposal is for her to come over from her FI-01 to my AS-05 position.”

[39] The same day, the advisor responded as follows:

*Just a few things I would address:*

*Current capacity within the directorate, are there others who would be affected by this decision? Why are they not being considered?*

*How will or has the decision been communicated to staff? If it hasn't been, when will it be?*

*Why is this strategy being used at this time instead of another staffing mechanism such as a temporary action (such as secondment, assignment, acting) or a selection process? What would be the impact of going with the advertised route?*

*The box to select would be other, since none of the other criteria apply to your situation. A shortage group is defined as a group which lacks a large number of programs to train these individuals. These are extremely rare occurrences, our only area maybe [sic] CITS.*

*Let me know if you have any questions or concerns.*

[40] SSC was conducting a position reclassification exercise at the time, and a new organization chart for the BBP was being created. Therefore, Mr. Szwarc was in contact with the Classification section. At the time, the respondent had not excluded the option of deploying the appointee to SSC, as is shown as follows in an email dated December 15, 2016, which the Manager, HR Operations, Organizational Design and Classification, Human Resources and Workplace, sent to Mr. Szwarc:

*Further to our discussion yesterday regarding a proposed new AS-05 position, I think that a couple of options are possible. However, it will depend on what the proposed functions of the position*



*are/will be. We may be able to clone an existing AS-05 OIC position that will be regulated after the implementation of the BBP structural model. The functions to be assigned to the position will help us determine what the options are.*

*Please could you send us ...:*

- A list of functions (primary responsibilities/accountabilities) for the proposed AS-05;*
- A signed CAR;*
- A signed (proposed) Organizational Chart.*

*When submitting the request to HR ... please remember to mention that you have not submitted a signed work description given that Complex Classification will determine which work description best matches the functions; otherwise, you will receive a note asking for the signed work description to complete the request. Once I have located an appropriate work description, I may, of course, send it to you for your signature OR we may wait until the position is regulated in order for you to sign a new generic work description. **A caveat will need to be put into the letter of offer to the person who will be deployed into the position letting them know that the job description is under review.** The functions you provide could give more clarity to the incumbent as to the duties of the position.*

...

[Emphasis in the original]

[Underline emphasis added]

[41] On January 5, 2017, Mr. Szwarc asked the complainant for a job description for her current role in the second AS-05 manager position. That same day, she sent him a list of the key responsibilities given that SSC did not yet have a job description for that position.

[42] On January 9, 2017, Mr. Szwarc completed the Rationale for Non-Advertised Appointment Process for the appointee. Among other things, he specified that "... the staffing action in this particular case was initiated given the immediate need of this organization. This is a great opportunity for SSC to secure an experienced and talented individual with a proven track record."

[43] On February 2, 2017, Mr. Szwarc submitted a staffing action request for the appointment of the appointee into the second AS-05 manager position. He checked the box adjacent to the text specifying a non-advertised appointment as the method chosen for the appointment. The work description was still being prepared.

[44] On March 3, 2017, the complainant sent the BBP's salary forecast to Mr. Szwarc. In the salary forecast, a mention of the appointee's arrival in the AS-05 position was included with the following note: "[the appointee] HR documents in process deploy". She explained that the Salary Forecasting Tool (SFT) is used to plan and manage salary costs. She explained that it is a key financial module that managers use to record their human resources costs and their salary forecasts, based on their human resources plans.

[45] The complainant also explained that when she sent Mr. Szwarc the salary forecast for fiscal years 2016-2017 and 2017-2018 to allocate the annual salary amount, next to the second AS-05 manager position, she noted that the appointee would be deployed to SSC.

[46] The complainant said that during a discussion with Mr. Szwarc's assistant in March of 2017, she learned that the appointee was classified at the FI-01 group and level. Not long after, she discovered that the appointee would not be deployed to the position but appointed to it pursuant to a non-advertised process.

[47] The complainant explained that she was interested in being appointed permanently into the AS-05 position because she had performed its duties since March 2016.

[48] During her cross-examination, the complainant added that Mr. Szwarc brought in two people from his former department. One was brought in as an AS-06 through a deployment. The other, the appointee, was brought in to the second AS-05 manager position through an appointment, which the complainant emphasized constituted a promotion.

[49] For his part, Mr. Szwarc explained that before he was appointed the director of BBP, Service Delivery, he held several positions at Natural Resources Canada, including as a director of finance.

[50] Once he started in his BBP director position, Mr. Szwarc noticed that there was an urgent need to find very competent people to solve significant problems. He provided background on SSC's recent creation in 2011 and the challenges encountered.

[51] SSC was created pursuant to the amalgamation of the information technology (IT) personnel of 43 federal government departments. Its mandate is to manage shareable software, hardware, and telecommunications equipment held in common.

[52] Mr. Szwarc explained that following SSC's creation, a new procedure required that all departments and agencies invest specific funds for the IT services they needed. However, SSC was understaffed and had inherited very old IT equipment. Departments and agencies expected improved services right away. Often, problems arose, and they asked why software, hardware, or telecommunications equipment was not working. The media also reported on the problems departments and agencies encountered from the creation of SSC. So there was an urgent need to address all the issues.

[53] To solve the many problems, a new branch was created; Service Delivery. It received the mandate to serve as an interface with the 43 departments and agencies with which SSC did business.

[54] Therefore, the Data Centre was split in two in the fall of 2016. Part of it kept the Data Centre name, and the other part was named Service Delivery. Mr. Szwarc explained that two-thirds of the Data Centre's BBP employees remained at the Data Centre. A senior official was appointed to head Service Delivery, which housed the remaining third of the Data Centre's employees. That person appointed Mr. Szwarc to head the Service Delivery's BBP.

[55] Mr. Szwarc specified that each SSC branch has a BBP section. The BBPs serve the units within the branches. They provide operational, strategic, and planning functions to support branches in areas such as finance, human resources, training, and accommodation.

[56] He explained that there was a lot of pressure on Service Delivery then. Every month, it had to report on the customer satisfaction level.

[57] Mr. Szwarc explained in more detail some of the reasons behind the disarray in the new branch. At that time, Service Delivery had approximately 550 employees, and the BBP serving it had approximately 22 employees responsible for providing the following areas of expertise: (1) strategic planning, (2) auditing, (3) finance; (4) workforce management (or human resources), and (5) accommodations.

[58] Mr. Szwarc insisted that in Service Delivery in 2016, management did not yet have a complete picture of the total number of employees and their locations. As SSC had been newly created, it had not yet defined all the duties in the Order-in-Council with respect to IT personnel that had been transferred from other departments and organizations.

[59] Mr. Szwarc explained that no organizational charts existed and that many employees were appointed to positions on an acting basis because new positions needed creating. As some positions had no work descriptions, it was difficult to permanently appoint employees to positions. A large number of positions were vacant. Concrete procedures were required.

[60] He added that due to the urgency of the circumstances, many employees were being hired, and finding them workstations and even chairs was difficult. There was considerable pressure on the BBP. He mentioned that about 100 employees were hired in Service Delivery in just 1 year.

[61] Mr. Szwarc continued describing the magnitude of the difficulties encountered at that time. Many urgent tasks needed accomplishing, and many problems needed solving. Each file the BBP dealt with, whether it involved human resources, auditing, strategic planning, etc., required significant work. Everything had to be done from scratch.

[62] As the new organization chart for Service Delivery's BBP had not yet been created, the direction was to renew appointments on an acting basis until it was created, which is why he renewed the complainant's last such appointment.

[63] However, Mr. Szwarc was aware that the person substantively holding the second AS-05 manager position was about to retire. He felt that it became necessary to take measures to staff the position indeterminately. His team had a hard time completing certain tasks. Among other things, the headcount management and the financial forecasting exercises were not done well.

[64] More precisely, M. Szwarc noticed that significant discrepancies were found in the branch's financial forecasting. In view of the constraints and challenges that the BBP and the branch faced, he felt that the appointee, with her expertise, could create a system that could ensure the uniformity of processing rules and financial forecasts. He

knew her from Natural Resources Canada, and he knew that she could fix the sources of the problems.

[65] He explained that his team originally included two positions classified at the AS-05 group and level. However, given the evolution of the functions and the classification exercise, and upon the further analysis of the unit's requirements, he had ascertained the need for one AS-05 position, which was operationally focused, and one AS-06 position, which emphasized strategic finance.

[66] Mr. Szwarc explained that he then had several conversations with HR about his intention to bring the appointee to his team. SSC had an AS-05 pool that had been established for issues-manager functions but was not suitable. He explained that he needed a financial team and that the process had focused on senior administrative functions, not financial functions. Thus, an appointment was necessary. A deployment was not considered for the reasons he mentioned in his prepared rationale.

[67] In that rationale, Mr. Szwarc alluded to the fact that the BBP was experiencing many problems and that it was in desperate need of a very capable AS-05 manager to carry out the financial functions of the position. In the rationale, he explained in detail why he wished to appoint the appointee to the AS-05 position. The rationale, which was finalized in January of 2017, read as follows:

*I am the executive leading a newly created Business Planning unit within a recently created Branch at SSC.*

*I am pursuing this staffing action in this particular case given the immediate need of this organization. This is a great opportunity for SSC to secure an experienced and talented individual with a proven track record.*

*This candidate is already an indeterminate public servant at the FI-01 level. She is fluently bilingual candidate processing language skills above the position's required CBC level. In addition, this candidate has previously performed the tasks required of this position.*

*There is a current need for an AS-05 within the BBP given that the person currently occupying the AS-05 position is absent from the office on sick leave and has already confirmed she will be soon retiring from the public service (by January 2017).). There is no other employee within my current team that could fulfill this role, including meeting the language requirement. An advertised staffing process would take time and we are currently under duress.*

*A key element of this skillset is the financial, acquisition and process element. The Department currently has an AS-05 pool that was established for the Issues Manager function, which did not focus on the above-noted elements. This candidate demonstrates that she possesses the qualifications noted above and would be a great fit for the AS-05 role.*

*Appreciating that the SSC's currently developing a classified organizational structure, our BBP vision is to align ourselves with that proposed structure and to support competitive staffing processes going forward. The proposed draft organizational structure is currently indicating this role to be set at AS-05 level.*

*As noted above, given the current need, coupled with organizational need and identification of a talented individual, SSC is presented with a great opportunity for the Department to attract a valuable resource through a non-advertised staffing process.*

*This individual has received outstanding performance reviews and is respected by her peers. [The appointee's] current management team will not allow her to leave on an assignment basis.*

*[The appointee] is currently an FI-01 (the top of the FI-01 pay scale is \$72,282). When a transition from the FI category to the AS category is considered, she would be transferred over to the AS-04 level (top of AS-04 pay scale is \$68,793); however, that would result in her having to accept a pay reduction of approximately \$3,500. It is more reasonable in this case for the AS-05 level to be offered given that [the appointee] would not accept a pay reduction.*

*I recommend that the SDM team hire [the appointee] as an AS-05 and that we endeavor to bring her on board quickly. I will communicate accordingly with my staff, which could include informal discussion if that would be the case.*

*[Sic throughout]*

[68] As mentioned, at that time, the Classification section was involved in a job-classification process and was resetting position numbers. Eventually, only one AS-05 position was maintained; the other one was reclassified AS-06. On April 3, 2017, the new, generic work description for the second AS-05 manager position was completed.

[69] The appointee was appointed into that position effective June 19, 2017.

[70] During Mr. Szwarc's cross-examination, the complainant brought to his attention the rationale he prepared when she was appointed on an acting basis to the second AS-05 manager position from November 29, 2016, to March 31, 2017. Some of the wording is the same as the wording he used to appoint the appointee, including the fact that "we are currently under duress." He responded that at the time of her appointment, the unit was still waiting for the new model. Because the Classification

section was reviewing the positions, the rule was to continue appointments on an acting basis, including that of the complainant.

[71] When the “Notice of Consideration” was posted for the appointee’s appointment, the complainant announced that she had concerns. So she had a conversation with Mr. Szwarc. On one hand, she disagreed with the fact that her appointment on an acting basis would end before July 28. On the other hand, she did not agree with the appointee’s appointment to the second AS-05 manager position as it was a promotion.

[72] Subsequently, a staffing process was run to fill the AS-06 position in Mr. Szwarc’s team. The complainant applied but did not qualify.

[73] The complainant submitted that Mr. Szwarc acted in bad faith and that he never told his staff, including her and three other employees in the BBP Finance and Acquisition team, that the appointee would be promoted into the AS-05 position.

[74] The complainant presented the following definitions of “deployment” and “promotion” that she found on the Treasury Board’s website:

*A deployment is the move of an employee from one position to another within the same occupational group.*

*Promotion means the assignment to an employee of the duties of a position for which the maximum rate of pay is more than the maximum rate applicable to the employee’s substantive level.*

[75] The complainant submitted that the second AS-05 manager position should have been offered to current SSC staff first. She had been appointed on an acting basis to the first AS-05 manager position in March 2016 and was interested in obtaining a permanent appointment to the second AS-05 manager position.

[76] The complainant added that the explanation in the rationale that “[a]n advertised staffing process would take time and we are currently under duress” did not make sense. This explanation was used for both her appointment on an acting basis to the second AS-05 manager position and the appointee’s permanent appointment to it. Yet, as the complainant was performing the job when the appointee was appointed, Mr. Szwarc had no basis for saying “we are currently under duress”; the job was being carried out.

[77] The complainant relied on the guide applicable to appointments resulting from non-advertised processes in 2016, which was the time of the staffing process. The guide is entitled, “Guiding Questions for the Development of a Non-Advertised Appointment Rationale” (“the Guiding Questions”). She brought the following parts of it to my attention:

...

***Fairness*** means that decisions are made objectively, free from political influence or personal favoritism [sic]; policies and practices reflect the just treatment of employees and applicants.

- ▶ How was this candidacy brought to your attention?
- ▶ Does the appointee have a history of past employment within the department? i.e. casual employment, contract or temporary help services?
- ▶ Why was this person chosen (availability, education, experience, etc.)?
- ▶ Is the appointee related to you or to a member of your team?
- ▶ Is there a pool of potential candidates available at this time? If so, why is the pool not being utilized?
- ▶ Can you explain the staffing decision to your staff? How will this appointment be perceived by the other employees?

***Transparency*** means that information about decisions, policies and practices is communicated in an open and timely manner.

- ▶ Has the department prepared a resourcing plan for the position being filled and for other similar positions and communicated the plan to employees and/or applicants?
- ▶ Considering the environment of the organization, how was this situation initiated? If acting / term, will it be renewed?
- ▶ Considering the environment of the organization, how is the decision going to be communicated to your staff?

...

[Emphasis in the original]

[78] The complainant submitted that the respondent did not abide with the guiding questions. Mr. Szwarc did not explain the staffing decision to his staff, did not tell them that the appointee would be appointed via a non-advertised process, and let them believe that she would be deployed. In addition, in the rationale, he stated that he would communicate the decision to his staff, but in her view, in the end, he did not.

[79] The complainant submitted that her testimony clearly established that Mr. Szwarc did not specify the mechanism of the appointment to her. In her capacity as a



manager, she supported staffing actions, but she was told that the appointee would be deployed. Never did Mr. Szwarc tell her that the appointee would be promoted to the second AS-05 manager position from her FI-01 position.

[80] She submitted that it is apparent from his exchanges with the HR representative in December 2016 that Mr. Szwarc discussed a deployment with HR. The following was specified in the email sent to him and dated December 15, 2016: “A caveat will need to be put into the letter of offer to the person who will be deployed into the position letting them know that the job description is under review.”

[81] In the forecasting process in March of 2017, the complainant had also added the following note beside the appointee’s salary: “[The appointee] HR documents in process deploy”. Clearly, she understood that the appointee would be deployed into the second AS-05 manager position.

[82] Yet, documentation she obtained in response to an access-to-information request indicated that a non-advertised process was considered for the appointment but was not communicated to the staff. She submitted that therefore, Mr. Szwarc acted inequitably or in bad faith. She submitted that he also offered no alternative plan for dealing with the promotion within the rationale and justification that was submitted to senior management as the basis for the appointment.

[83] The complainant submitted that while ss. 30(4) and 33 of the *PSEA* mention that managers have the discretion to choose between an advertised and a non-advertised process, the discretion is not absolute. It must be exercised in accordance with fair, transparent employment practices. She adds that this is required by the *PSEA*, the Public Service Staffing Tribunal’s regulations, the *Public Service Employment Regulations* (SOR/2005-334), and the PSC’s Appointment Policy.

[84] The complainant also submitted that bias influenced the decision to use a non-advertised process for the appointment at issue. She submitted that such a process was chosen specifically to bring the appointee to SSC. According to her, it demonstrated that Mr. Szwarc showed bias in favour of hiring the appointee.

[85] In support of her allegation, she referred me to the following three cases, which deal with bias: *Amirault v. Deputy Minister of National Defence*, 2012 PSST 6 at paras.

56 and 57, *Denny v. Deputy Minister of National Defence*, 2009 PSST 29 at para. 124, and *Hunter v. Deputy Minister of Industry*, 2019 FPSLREB 83 at paras. 91 to 93.

[86] Paragraphs 56 and 57 of *Amirault* read as follows:

*56 These policies [the PSC's policies] create expectations on the part of candidates that those responsible for assessment act fairly and are not in conflict of interest. The Tribunal therefore concluded in Gignac that those responsible for assessment in appointment processes have a duty to carry out assessments that are unbiased and that do not generate a reasonable apprehension of bias (see also Bain v. Deputy Minister of Natural Resources Canada, 2011 PSST 0028 at paras. 133-139).*

*57 Accordingly, the Tribunal finds in the present case that reasonable apprehension of bias is the appropriate test for determining whether the assessment board acted fairly and without bias in this appointment process. The test provides that where an informed person, viewing a matter realistically and practically - and having thought the matter through - would reasonably perceive bias (whether conscious or unconscious) on the part of one or more persons responsible for the assessment, the Tribunal can conclude that there was abuse of authority (see Gignac, at paras. 72-74; and Committee for Justice and Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369, at 394). It is not necessary for the complainant to prove that the board members had an actual bias against him. As the courts have noted in elaborating this test, actual bias need not be established since it is usually impossible to determine whether the decision-maker [sic] approached the matter with a truly biased state of mind (see Newfoundland Telephone at 636; R. v. S. (R.D.), [1997] 3 SCR 484 at para. 109).*

[87] Paragraph 124 of *Denny* reads as follows:

*[124] The test for reasonable apprehension of bias is well established. Suspicions, speculations or possibilities of bias are not enough and bias must be real, probable or reasonably obvious. See Robert W. Macauley & James L.H. Sprague, Practice and Procedure before Administrative Tribunals, vol. 4 (Toronto: Thomson Carswell, 2004), at 39.4.*

[88] The complainant maintained that a reasonable person would detect bias in favour of the appointee for the following reasons: (1) Mr. Szwarc appointed the appointee to the second AS-05 manager position only because he knew her from Natural Resources Canada, where he had been a director before being deployed to SSC; (2) the appointee did not meet the essential qualifications for the position; in particular, she did not have experience supervising staff; and (3) the appointee did not

have knowledge and experience in the use of SSC's systems, such as the "Applications and Solutions" application.

[89] The complainant submitted that an informed person, viewing the matter realistically and practically and having thought the matter through would reasonably perceive bias (whether conscious or unconscious) on the part of Mr. Szwarc. He appointed the appointee because they had worked together in the past. In addition, he did not specify the appointment mechanism to his staff. He targeted the appointee and used a tunnel-vision approach to appoint her, which was not fair to the other employees. As a result, management appointed the desired person but not necessarily the best person for the position.

[90] She submitted that the easiest way to fill a position is not an acceptable reason for choosing a non-advertised process. Paragraphs 91 to 93 of *Hunter* read as follows:

*[91] I am left to conclude that what really drove the decision making in this case was the hiring manager's initial assertion, on June 14, 2016, that the non-advertised appointment process was simply "the easiest way to fill the position" and that rather than helping him really understand the appointment process, the respondent's HR advisor used the increased policy flexibility offered through the New Directions in Staffing framework to offer the manager justification for use [sic] of a non-advertised appointment process, in spite of the series of errors and omissions. This might have met the goal of "efficiency" incorporated into ISSED's Staffing Management Policy, but it is harder to see how it reconciles with the goal of "staffing integrity" in that policy or the principles of fairness and transparency in the PSEA.*

*[92] Such a position effectively renders meaningless s. 77(1)(b) of the PSEA, which allows for complaints to be made about the choice between an advertised and a non-advertised appointment process.*

*[93] Ultimately, the respondent's actions fall short of the requirement to properly document and retain information about an appointment process, as required in the PSC's Appointment Policy, and fall short of the provisions of its Staffing Management Policy, which requires articulating selection process decisions in writing. I agree with the decision maker in Beyak — this requirement is not merely to produce a written rationale but to produce one that makes sense.*

[91] She added that the principles of fairness and transparency in the *PSEA* were not respected in this case. The value of transparency set out in the *PSEA*'s preamble was not respected because Mr. Szwarc failed to communicate his decision to his team accurately, openly, and in a timely manner. The appointment was communicated as

being an at-level deployment and not a non-advertised appointment, which showed bad faith.

[92] The respondent submitted that s. 33 of the *PSEA* clearly states that as the PSC's delegate, the deputy head has the discretion to choose between advertised and non-advertised processes. The *PSEA* gives no preference to advertised over non-advertised processes. Nevertheless, in s. 77(1)(b), it provides for a direct challenge of that discretionary choice on the ground of abuse of authority.

[93] The respondent submitted that in many decisions, the Public Service Staffing Tribunal ("the Tribunal") established that merely choosing to conduct a non-advertised process is not an abuse of authority. According to *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 6, for a complaint under s. 77(1)(b) of the *PSEA* to succeed, the complainant must establish that on a balance of probabilities, the choice to use a non-advertised process was an abuse of authority. As identified in *Bérubé-Savoie v. the Deputy Minister of Human Resources and Skills Development Canada*, 2013 PSST 2, the mere fact that a respondent chose to conduct non-advertised appointment processes to staff positions is not an abuse of authority.

[94] The respondent submitted that when the AS-05 position was staffed, Mr. Szwarc reviewed established pools and ongoing processes within the department and determined that they did not have enough of an emphasis on finance to be used to staff the position in question. Moreover, Mr. Szwarc stated that other AS-06 manager positions in the BBP were staffed using an advertised process. As a result, Mr. Szwarc demonstrated a balanced approach to staffing his organization using a multitude of staffing mechanisms to meet operational requirements while providing advertised promotional opportunities for employees.

[95] The respondent highlighted that with the change to the BBP's organizational structure came a need to appoint the appointee, who is an experienced and a talented person who possessed the key financial background needed to support the functions of the positions and the branch. It did not use "... a tunnel-vision approach which led to not appointing the best person for the job", as the complainant alleged. On the contrary, the evidence showed that the respondent found the person who was the best fit for the position.

[96] The respondent submitted that the onus was on the complainant to demonstrate abuse of authority in the decision to select a non-advertised process. Moreover, s. 30(4) of the *PSEA* is clear that considering only one person is expressly authorized.

[97] In response to the complainant's allegation that the manager did not provide timely and open communication with respect to the appointment, the respondent submitted that Mr. Szwarc openly communicated his intention to bring in the appointee as an additional resource for the BBP. The complainant recognized that Mr. Szwarc had communicated his intention of bringing the appointee to the organization. Several times, she identified in the SFT the salary for the appointee in the second AS-05 manager position.

[98] The respondent added that while the complainant alleged that Mr. Szwarc had identified within the SFT that it would be a deployment, it is important to note that the SFT is a financial salary-forecasting tool. Its purpose is to secure and forecast the salary associated with a full-time-equivalent position, not to communicate a staffing mechanism.

[99] The respondent submitted that non-advertised appointments are permitted under s. 33 of the *PSEA* and therefore do not fail to meet the values of fairness, access, and transparency. Mr. Szwarc respected the value of transparency given that the Notification of Consideration and the NAPA were posted in accordance with s. 48 of the *PSEA*, properly creating a right to recourse.

[100] The respondent added that the Guiding Questions prepared by SSC, which include guidance questions for developing a non-advertised appointment rationale, are not the same as a regulation or a law and are not binding on managers. Rather, they are intended to guide managers when choosing an appointment process.

[101] The respondent added that although on December 9, the HR representative had asked Mr. Szwarc, "Why is this strategy being used at this time instead of another staffing mechanism such as a temporary action (such as secondment, assignment, acting) or a selection process?", the complainant did not directly question Mr. Szwarc on it. It argued that therefore, I should give less weight to her point of view on it since I did not have the benefit of hearing Mr. Szwarc's answer.

[102] The respondent also differentiated this case from the three cases that the complainant cited. It stated that the scenario in *Denny* was very different and that it does not apply in this case. A significant conflict existed in *Denny* but not in this case.

[103] It added that in *Hunter*, several significant errors occurred in the staffing process at issue. For that reason, the addition of the errors led to a finding of abuse of authority. That is not so in this case; all the steps in the process were documented, and no errors were made.

[104] And in *Amirault*, the facts were very different. The allegation in that case was that the involvement of two assessment board members gave rise to a reasonable apprehension of bias due to previous conflicts with the complainant in that case. There was no conflict between Mr. Szwarc and the complainant in this case.

[105] The respondent submitted that while the complainant may not agree with the choice of appointment process, as indicated, there is no preference in the *PSEA* between advertised and non-advertised processes. As such, the respondent maintained that the appointment did not constitute an abuse of authority.

[106] I find that the complainant did not establish an abuse of authority in the choice to use a non-advertised appointment process in the circumstances presented in this case. Section 33 of the *PSEA* provides that "... the Commission may use an advertised or non-advertised appointment process." The *PSEA* uses permissive language that does not establish a preference in the choice of process. In *Jarvo*, at para. 7, the Tribunal held as follows:

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

[Emphasis in the original]

[107] I am satisfied that Mr. Szwarc's evidence supported the decision to use a non-advertised appointment process. His testimony reflected a reasoned decision that recognized the importance of correcting a problematic situation that had persisted

since his arrival. The rationale relied principally on the opportunity to secure an experienced and talented person with a proven track record to take care of the problems encountered in forecasting exercises, among others. He specified that no other employee in his then-current team could have fulfilled the role. Because of the BBP's difficult situation, as he witnessed problems on a daily basis, he decided that there was no time to initiate an advertised staffing process.

[108] I note that conflicting evidence was presented at the hearing as to whether the non-advertised process was chosen to address an urgent situation. The written rationale specified that "we are currently under duress." The complainant feels that she was doing a good job and that there was no need to permanently fill the second AS-05 manager position with the appointee. In essence, the complainant feels that others should have had access to the opportunity to be permanently appointed in the position.

[109] The evidence demonstrated that Mr. Szwarc did not consider the complainant or anyone other than the appointee for the permanent appointment. Mr. Szwarc knew that the incumbent of the position would not return from her sick leave and that she was about to retire. He felt that there was an urgent need to staff the position with the person best suited to deal with the repeated discrepancies found in the financial numbers, which resulted in very large differences, and complications for his team.

[110] In accordance with the provisions of s. 30(4) of the *PSEA*, he was not required to consider more than one person for the appointment to be made on the basis of merit. Although the complainant occupied the position on an acting basis while the substantive position holder was on sick leave, I agree with the respondent that management is not obligated to appoint an employee appointed on an acting basis to a vacant position indeterminately.

[111] The PSC's *Appointment Policy* identifies fairness, transparency, access, and representativeness as guiding values for managers delegated to make appointment decisions. Yet, I note that as the Tribunal held in *Jarvo*, at para. 32, "Neither the *PSEA* nor the PSC's *Appointment Policy* guarantees an employee a right of access to every appointment opportunity." By their nature, non-advertised appointment processes are not advertised to employees before the decision to appoint is made. Therefore, they do not present an opportunity for employees to apply for them.

[112] The complainant is also preoccupied by the fact that Ms. Szwarc did not specify the mechanism of the appointment to his team. The written rationale specified the following: “I recommend that the SDM team hire [the appointee] as an AS-05 and that we endeavor [*sic*] to bring her on board quickly. I will communicate accordingly with my staff, which could include informal discussion if that would [*sic*] be the case.”

[113] The evidence showed that Mr. Szwarc communicated to his team his intention to bring in the appointee as a manager with the BBP. When he communicated it, he believed that he could deploy her from her position classified at the FI-01 group and level to the second AS-05 manager position, classified at the AS-05 group and level. The correspondence with HR also demonstrates that initially, he operated on the assumption that a deployment would be the method used to staff the position. However, he realized that to avoid a reduction in salary for her, he would have to appoint her to the position through a non-advertised process. He found that doing so was reasonable in the circumstances and provided reasons for his decision.

[114] The complainant acknowledged that Mr. Szwarc communicated his intention to his team, but she highlighted that he failed to specify that a non-advertised process would be used as a staffing tool. She had repeatedly indicated in the SFT the salary for the person and position, with the expectation that the person would be deployed to the team. However, the appointee was appointed, not deployed, into the position.

[115] Having considered all the circumstances, I do not believe that the change from a deployment to a non-advertised appointment process constituted an abuse of authority. The evidence shows that the people in the unit were aware that the managerial position would be staffed. They were told that it would be done by a deployment, not by a non-advertised process.

[116] I note that the complainant said that at a team meeting, she asked her manager for the appointee’s classification and level, and he did not answer her, which is the only information I have on this. I do not know when the meeting took place, the specific question she asked, or the response she received, other than that Mr. Szwarc did not provide her with the appointee’s classification and level.

[117] Specifically, I do not know if that meeting took place around September 2016, which is when Mr. Szwarc arrived and announced his intention to staff the position in question with someone who had the particular expertise he was looking for, or if it



took place later, once he had become familiar with the staffing process and had discovered that a deployment was not the solution he was looking for. It is difficult, given the circumstances, for me to decide whether in reality Mr. Szwarc refused to answer the question. However, I note that the complainant has the burden of proof.

[118] In sum, there is no evidence that Mr. Szwarc's omission with respect to answering the grievor's question about the appointee's classification and level was an attempt to mislead her. Therefore, considering all the facts before me, I conclude that it has not been shown that Mr. Szwarc attempted to mislead anyone.

[119] In addition, I do not believe that the omission with respect to specifying the chosen means of staffing was detrimental to the complainant or to anyone else. Nevertheless, to avoid any possible misunderstanding, Mr. Szwarc should have informed his staff of the ultimate chosen means of staffing; it would have been more transparent. Indeed, transparency is a key value in staffing situations.

[120] I also find that on a balance of probabilities, the complainant did not establish that bias influenced the decision to use a non-advertised process for the appointment. The allegation that Mr. Szwarc was biased is essentially one of bad faith in his exercise of discretionary authority.

[121] In the rationale and his testimony, Mr. Szwarc provided a reasonable explanation of why he chose a non-advertised process and appointed the appointee to the position. As mentioned, he considered that the department had the opportunity to secure an experienced and talented individual with a proven track record to take care of the problems that had been encountered. He also explained in detail at the hearing the extent of those problems. He needed someone who was good at resolving financial data discrepancies, who was experienced, who had a proven track record, and who could be responsible for analyzing and reporting financial information and monitoring financial activities.

[122] Considering all this, I do not believe that an informed person, viewing the matter realistically and practically and having thought the matter through, would reasonably perceive bias on the part of Mr. Szwarc.

[123] For all these reasons, I conclude that the complainant did not establish that the respondent abused its authority by choosing a non-advertised process for this appointment and in particular that bias influenced the decision to use such a process.

**2. Issue II: Did the respondent abuse its authority by appointing a person who was not qualified?**

[124] Section 30(2)(a) of the *PSEA* provides that an appointment is made on the basis of merit when the PSC or a delegated manager is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency.

[125] Section 36 of the *PSEA* also provides that a deputy head may use the following:

*36 ... 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).*

[126] On April 3, 2017, Mr. Szwarc finalized and authorized the work description for the second AS-05 manager position with the reference “NEW – OIC 00111215”. The complainant highlighted that one of the activities included in it is the following: “Supervises a team of 4 to 10 or more employees directly or through subordinates engaged in providing a range of administrative services to the Branch Service Line clients.” Even though that activity is listed as a key activity in the work description, the complainant stated that in the “Assessment against the Statement of Merit Criteria” that Mr. Szwarc prepared for the appointee, he did not assess it.

[127] The complainant said that she reviewed the appointee’s résumé and that she found no supervisory experience.

[128] The complainant also believes that the appointee needed coaching to understand managing and controlling the financial “Workbook” used in forecasting, budgeting, and expense tracking for the Transformation Program/Project, ITSM Roadmap, Program Integrity Project.

[129] Therefore, the complainant considers that Mr. Szwarc appointed an unqualified person. Her view is that she possessed all the experience, knowledge, and abilities required to perform in the second AS-05 manager position without additional training and coaching.

[130] Mr. Szwarc explained that he assessed the following qualifications in the Assessment against the Statement of Merit Criteria that he prepared for the appointee: (1) education, (2) language requirements, (3) experience, (4) knowledge, and (5) abilities. Specifically, he determined the experience qualifications required for the position and assessed those qualifications in the following manner:

*Explain how he/she meets each criteria / Expliquez comment il/elle rencontre chaque critère.*

***Experience with financial forecasting, analysis and reporting***

*[The appointee] has approximately 3 years of experience in financial forecasting, analysis and reporting. While working as a Junior Financial Planning Analyst for NRCan, [the appointee] was responsible for the analysis and reporting of financial information regarding Transfer Payments in relation to Public Accounts. When she was a Grants and Contributions Advisor, she was responsible for analysis and reporting on Grants and Contributions. With respect to financial forecasting, [she] has over 8 years of experience (April 2005-July 2009 and July 2000 to March 2005) in the analysis of financial trends and comparing spending patterns from previous years in order to estimate and allocate funds and prepare forecasts.*

***Experience in monitoring financial activities***

*[The appointee] has approximately 3 years of experience in monitoring financial activities. Her current role includes quarterly monitoring of financial agreements and transfer payments for grants and contributions that must be disclosed during quarterly Proactive Disclosure exercises. As an administrative officer, [the appointee] maintained a commitment and charging authority log in order to track and monitor budget expenses and report on them on a monthly basis.*

***Experience in resolving financial data discrepancies***

*[The appointee] is an effective problem solver and she has demonstrated this in her work as a Junior Financial Planning Analyst. She regularly works with others to resolve discrepancies in data prior to her reports on Proactive Disclosure. [The appointee] is adept at analyzing and identifying the issue, identifying the person/group that can help resolve the problem and liaising effectively with them to resolve the issue.*

***Experience in using a financial information system example (ex. SAP)***

*[The appointee] has experience using SAP during her tenure with Natural Resources Canada.*

*[Emphasis in the original]*

[131] He explained that to assess the appointee, he considered her résumé and the fact that he had seen her performing her work. She produced error-free work. He explained that he constantly found significant discrepancies in the data provided to him at SSC. He needed to be able to depend on someone. He had seen the appointee work, and she had dealt with similar problems in her previous position.

[132] More precisely, Mr. Szwarc explained that while the appointee was in a junior financial officer position at Natural Resources Canada, she was involved in the control of transfer payments. Large amounts per year, billions, were made in grants. He had noticed that before she arrived in that position, everything had been in disarray, and significant discrepancies were found in the reporting. When she took over the job, she was very solid, and she solved all the problems. When she finished the job, the reporting was accurate. He had noted that she was excellent and was the go-to person in her area of expertise.

[133] Mr. Szwarc also explained that the work description that was finalized and authorized on April 3, 2017, for the second AS-05 manager position was of a general nature. He said that such descriptions were encouraged as the department could not write unique work descriptions for each position. He explained that he exercised his discretion to establish the necessary qualifications for the second AS-05 manager position. He specified that some of the generic activities included in the work description were not applicable. The necessary qualifications he identified were activities related to the financial responsibilities of the position.

[134] In response to the complainant's allegation that the appointee had no experience managing employees, Mr. Szwarc replied that that was not correct. He added that he considered all the appointee's work experience mentioned in her résumé, including her employee-management experience from 1989 to 1991. However, he added that management experience was not a criterion he had identified to meet the operational needs of his unit. Critical was the person's financial expertise, to ensure that the person placed in the position would have the capacity to analyze, forecast, and report; monitor financial activities; resolve financial data discrepancies; and use a financial information system.

[135] Finally, Mr. Szwarc added that after the appointee's arrival into the position, senior management perceived great improvements in the data reporting. She had solved the recurring problems.

[136] The complainant submitted that based on the BBP organizational chart, the person in the second AS-05 manager position should manage a team of four AS-02 administration and planning officers. Thus, Mr. Szwarc should have assessed the appointee's experience in supervising and managing a work team, such as assigning work, monitoring performance, and dealing with performance issues, which was not done.

[137] The complainant submitted that the appointee needed training and coaching on all SSC financial and procurement systems that she did not use as a Natural Resources Canada employee, such as the following: SIGMA (five modules; i.e., salary, procurement, purchase orders, accounts receivable, and accounts payable), Procurement to Pay (P2P), the Business Information Technology System (BITS), the Delegation of Authority System, Requests for Assets (GCSX), GCDocs, EPS System-PRAs, and PeopleSoft. On the other hand, the complainant stated that she had been trained on all of them.

[138] Therefore, the complainant submitted that there is no evidence that the appointee was qualified for the position or that she was more qualified than the complainant.

[139] The respondent submitted that the appointee satisfied all the qualifications required for the position. It added that managers are given broad discretion under s. 30(2) of the *PSEA* to establish the necessary qualifications for any position they wish to staff and to choose the person who not only meets the essential qualifications but also is the right fit.

[140] It added that similar discretion is provided under s. 36 of the *PSEA* for those with staffing authority to use the assessment methods of their choice to determine if a person meets the established qualifications. It referred me to *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11 at paras. 26 to 28.

[141] The respondent submitted that the appointee's appointment was based on merit and that it balanced the guiding appointment values and the flexibilities provided by the *PSEA* with efficient hiring practices to meet business needs.

[142] The respondent submitted that the appointee had experience supervising staff, but as that criterion was not identified as a necessary qualification for the position, it was not assessed. The financial responsibility duties of the position were identified as the critical qualifications. Furthermore, the respondent added that if experience in management were always a mandatory criterion, everyone who has not already been a supervisor could never become one, which would be illogical.

[143] The respondent also submitted that onboarding an employee into a new department does require some level of training to address departmental-specific approaches and procedures. The expectation is that the employee has the knowledge, experience, abilities, and personal suitability necessary to complete the functions.

[144] The respondent submitted that employees in the area of selection were provided with the opportunity to informally discuss the decision and to formally complain to the Board. Although the complainant is of the opinion that other employees in the work unit did not agree with the selection decision and could have met the established merit criteria, no other employee complained to the Board about the appointment. The respondent further submitted that the first and second notifications were posted in a timely fashion, in accordance with the appropriate authorities.

[145] I find that the complainant did not demonstrate that the respondent abused its authority by appointing an unqualified person.

[146] In *Visca v. Deputy Minister of Justice*, 2007 PSST 24, the Tribunal found that s. 30(2) of the *PSEA* gives broad discretion to managers to establish the necessary qualifications for a position and to choose the person who not only meets the essential qualifications but also is the right fit.

[147] In accordance with that provision, managers have the discretion to determine the essential qualifications of positions to be staffed. A complainant may disagree with the choice of qualifications, but it does not mean that they are unacceptable. The

manager is responsible for deciding on the essential qualifications of the position to be filled.

[148] The complainant insisted that the position does require supervising employees and that this was deliberately not listed as an essential qualification. Mr. Szwarc, for his part, explained why he did not include this activity, which is one of the generic activities of the work description, as an essential qualification.

[149] My role is to determine whether there was an abuse of authority in the application of merit. In doing so, I can examine whether there was an abuse of authority in how the essential qualifications were set. For example, they must relate to the work to be performed. However, if the ones chosen were not related to the work to be performed but rather were set in such a way as to ensure the appointment of a particular person, it would amount to an abuse of authority.

[150] Thus, in the matter before me, the complainant questioned the fact that Mr. Szwarc did not identify supervisory experience as an essential qualification.

[151] In my view, not identifying supervisory experience as an essential qualification was not an abuse of authority in this case. Mr. Szwarc clarified that the necessary qualifications he identified for the job to be performed were the financial responsibility duties of the position. In my opinion, given the problems that the BBP encountered and the fact that there was a desperate need to appoint someone to the position who would be well equipped to take over the financial functions and resolve the data discrepancies, it is comprehensible that he did not identify supervisory experience as an essential qualification.

[152] In addition to having broad discretion to determine the essential qualifications of a position to be filled, a manager has broad discretion to determine the assessment methods. No evidence was adduced to indicate that the tools Mr. Szwarc used were inadequate for a thorough assessment of the appointee's qualifications.

[153] Mr. Szwarc thoroughly explained his assessment of the appointee against the statement of merit criteria and confirmed that she met the required merit criteria to be appointed to the position. The tools he used to assess her were his assessment of her in the workplace and her résumé.

[154] In *Visca*, the Tribunal confirmed that an assessor's personal knowledge of a candidate is an accepted assessment method. Mr. Szwarc stated that when he worked with the appointee, he had regular contact with her at Natural Resources Canada. He had observed that she was doing an excellent job. She was the go-to person in her area of expertise.

[155] Since Mr. Szwarc had personal knowledge of the duties and qualifications required for the position, his personal knowledge of the appointee and of her qualifications was valuable and was an appropriate assessment method, as in *Morris v. Commissioner of Correctional Service of Canada*, 2009 PSST 9.

[156] Mr. Szwarc concluded that the appointee met all the qualifications of the position. He recorded the results of his assessment in the rationale that listed the merit criteria and how the appointee met them, which he signed on January 9, 2017, and presented with the Rationale for Non-advertised Appointment Process.

[157] Considering all the above, I conclude that the complainant did not prove that on a balance of probabilities, the respondent abused its authority in appointing a person who was not qualified for the second AS-05 manager position.

**3. Issue III: Did the respondent abuse its authority by showing personal favouritism in its decision to appoint the appointee?**

[158] In s. 2(4), the *PSEA* provides, "For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism."

[159] The complainant alleged that Mr. Szwarc's actions in this appointment process demonstrated personal favouritism towards the appointee. According to her, it was a factor in his decision to appoint the appointee. In her complaint, she also alleged that the appointment was based on nepotism.

[160] The complainant submitted that the appointee would not have been appointed with a promotion had she not known Mr. Szwarc so well. She added that their personal relationship gave the appointee an unfair advantage.

[161] She added that the circumstantial evidence establishes that the appointee was appointed on the basis of personal favouritism. According to her, the appointment simply could not have been made on the basis of the delegated director's knowledge of the appointee because the appointee did not possess all the experience, knowledge,



and abilities required to perform the position without additional training or coaching. In addition, the complainant considers that the appointee's qualifications were not properly assessed.

[162] At the hearing, Mr. Szwarc was asked whether he personally knew the appointee. He replied that he did not. Their relationship was only of a professional nature. He described his strictly professional interactions with her.

[163] The respondent submitted that as identified in the exchange of information on June 21, 2017, Mr. Szwarc attested that he and the appointee have no personal relationship, that they maintain a strictly professional association, and that consequently, their affiliation would not constitute the definition of nepotism. The respondent added that the decision to choice of appointee was made in good faith and without personal favouritism.

[164] The respondent submitted that the complainant bore the burden of proof, which required her to present sufficient evidence for the Board to determine that on a balance of probabilities, a finding of abuse of authority is warranted.

[165] The respondent submitted that while in her allegations, the complainant stated that she possessed circumstantial evidence relating to a personal relationship between the appointee and Mr. Szwarc, she presented no evidence to support it. It added that having worked together is not evidence of a personal relationship. In accordance with *Carlson-Needham v. Deputy Minister of National Defence*, 2007 PSST 38, the complainant must have convincing evidence demonstrating personal favouritism and cannot make allegations based on perception and irrelevant facts. As identified in Mr. Szwarc's Assessment against the Statement of Merit Criteria, the appointee did in fact meet the essential merit criteria of the position.

[166] The respondent submitted that as in *Hunter*, Mr. Szwarc had no personal relationship with the appointee. Their relationship was purely professional. It brought to my attention to paragraph 106 of *Hunter*, which reads as follows:

*[106] In his testimony, the hiring manager stated that he had no personal relationship with the appointee. They had a purely professional working relationship solely from the time they worked together at ISED, which did not extend outside the workplace. While his testimony had many discrepancies with respect to the events surrounding the decision to use a non-advertised appointment*

*process, in this area he was clear and unequivocal. The complainant proffered no direct evidence to counter that testimony.*

[167] The respondent submitted that therefore, the appointee's appointment respected staffing values and was based on merit. It added that the complainant provided no evidence that the decision was motivated by bad faith or personal favouritism.

[168] I find that the complainant did not establish that the respondent abused its authority by showing personal favouritism or nepotism in its decision to appoint the appointee.

[169] In *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7, the Tribunal held that evidence of personal favouritism can be direct or circumstantial.

[170] In *Glasgow*, the Tribunal further developed the concept of personal favouritism. It explained as follows at paragraph 41:

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

[171] The evidence before me did not establish that the appointee was appointed for reasons of personal favouritism or nepotism. More precisely, the complainant did not provide any evidence, either direct or circumstantial, to support a claim of personal favouritism or nepotism.

[172] Conversely, Mr. Szwarc described his limited, professional interaction with the appointee before her appointment and the circumstances under which he decided to appoint her using a non-advertised appointment process. He testified clearly and straightforwardly. Moreover, his testimony as to the extent of his relationship with the appointee was not challenged in any material way.

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

*(The Order appears on the next page)*

**VI. Order**

[174] The complaint is dismissed.

May 14, 2020.

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