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*Federal Public Sector
Labour Relations and
Employment Board Act and
Public Service Employment Act*



Before a panel of the
Federal Public Sector
Labour Relations and
Employment Board

BETWEEN

STEVEN HARRINGTON

Complainant

and

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

and

OTHER PARTIES

Indexed as

Harrington 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: Himself

For the Respondent: Marie-France Boyer, counsel

For the Public Service Commission: Claude Zaor, senior analyst

Heard at Ottawa, Ontario,
March 11 to 13, 2020.

REASONS FOR DECISION

I. Introduction

[1] The complainant, Steven Harrington, applied as a candidate to an internal advertised appointment process conducted to staff several EX-01 positions with the Canada Border Services Agency (CBSA). He was not appointed, and he then filed a complaint of abuse of authority. He alleged that the respondent, the President of the CBSA, abused its authority pursuant to s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12 and 13; “the *PSEA*”).

[2] The complainant’s view is that the respondent abused its authority by using the references it received from the two referees who provided information about him in this appointment process. In particular, the assessment board erred by requiring that one of his referees be his immediate supervisor, by relying on information from that supervisor that on its face was unreliable because it showed that his supervisor was biased against him, by refusing to set that reference aside and substitute another one, by accepting a reference from a second referee who was influenced by the immediate supervisor, and by failing to diligently pursue a reference from a third referee.

[3] The respondent denied that the alleged abuse of authority occurred. It stated that the complainant provided three referees. Two of them provided information about him. The third was contacted but did not respond to the invitation to provide a reference. The respondent asserted that it did not err by refusing to set one reference aside and substitute another one. It had enough information to assess the complainant’s qualifications for the position.

[4] The Public Service Commission (PSC) was not present at the hearing, but it made written submissions. It noted the importance of complying with legislation and policy when assessing candidates.

[5] After hearing and considering the evidence, which is set out later in this decision, I find that the respondent did not abuse its authority as alleged. The assessment board contacted two referees, both named by the complainant, and obtained references from them. The effort made to contact the third referee was adequate, and in any event, there was no need for the third reference. Finally, it was

not demonstrated that the assessment board acted improperly when it refused to set a reference aside and substitute another one for it.

II. Background

[6] On March 5, 2015, the respondent launched an internal advertised appointment process (which was numbered 14-BSF-IA-HQ-CAB-NAT-EX-338) for several EX-01 positions at the CBSA.

[7] The complainant was a candidate. After being screened against the essential qualifications of education and experience, he was interviewed. He passed the interview and was then asked to complete the “Key Leadership Competencies” (KLC) self-assessment tool, which was sent to him on June 22, 2015.

[8] On July 10, 2015, the complainant submitted that tool. He was asked to provide the contact information of his immediate supervisor as well as that of another peer or subordinate, to validate the information he provided in it. When the respondent received it, it was sent to his validators (or referees) for their review.

[9] Candidates were required to achieve a pass mark of 3 out of 5 for each of the knowledge qualifications and the KLCs. Once all the information was received from his validators, the assessment board determined that the complainant did not meet any of the KLCs; therefore, he was eliminated from the process.

[10] On February 24, 2017, a notice of appointment or proposed appointment for the successful candidate’s appointment was posted on the Government of Canada’s jobs website. The complainant filed his complaint with the Federal Public Sector Labour Relations and Employment Board (“the Board”) on March 13, 2017.

III. Issues

[11] The Board must determine whether the respondent abused its authority by using the references it received from the two referees who provided information about the complainant.

IV. Relevant evidence and analysis

[12] The complainant testified at the hearing on his own behalf. The respondent called Sylvie Munyanganizi, who, for the appointment process at issue, was Senior EX Resourcing Advisor, CBSA.

[13] The complainant filed his resume in evidence. He primarily held a strategic planning analyst (SG-SRE-04) position at Health Canada from 2008 to 2014.

[14] He explained that in 2013, the person who had supervised him since 2007 died suddenly. Another supervisor, Rick O'Leary, was then appointed to the supervisor position. On Mr. O'Leary's arrival, the complainant felt that it was important to inform Mr. O'Leary of his health problem. So he emailed Mr. O'Leary on February 3, 2014, to inform him of that condition (or functional limitation). He explained that it was a huge challenge for him but that he was overcoming it, gradually. He estimated that most of his limitation had been eliminated by then, February 2014. He wanted his new supervisor to be aware of it. I note that since the complainant's email contained sensitive personal information about him, and since the parties and I became aware of it at the hearing, by mutual agreement, it was agreed that it was not necessary to enter it as an exhibit on the record since the respondent did not dispute that the complainant suffered from the medical condition he described in his email.

[15] In March of 2015, the complainant applied for the EX-01 position at the CBSA. He was screened against the essential qualifications of education and experience.

[16] On June 10, 2015, he was interviewed. He stated that his interview went very well and that during it, the assessment board mentioned that he would have to submit the contact information of his immediate supervisor as well as that of another peer or subordinate so that the assessment board could validate the information he would provide in the KLC self-assessment tool. He told the assessment board of the particular challenge he would face because he had lost his most recent, long-term supervisor to a terminal illness.

[17] On June 15, 2015, the complainant sent what he called a "thank-you email" to the assessment board, in which he reminded it that the reference would be particularly challenging for him, as his long-term supervisor had died suddenly. He wrote the following:

One thing I feel I must mention is that my best reference (most recent long-term Director, whom I directly reported to) passed away early and unexpectedly in 2013. That said, I have excellent references [he clarified he then hoped to provide the DG of the Food Directorate as a reference but he later learned that that individual was outside the country]. They are very good people

and will be happy to hear from you. Please let me know should you want their contact information.

[18] The complainant also provided additional information to Ms. Munyanganizi, who was a member of the assessment board and the human resources (HR) representative who ran the process. He told her that his most recent long-term supervisor of seven years had unexpectedly died and that his second referee, his former director general, had just left the public service and was unreachable for the foreseeable future as he was abroad.

[19] On June 22, 2015, the complainant was sent the KLC self-assessment tool. Part of the email sending it read as follows:

...

This will be your opportunity to highlight your successes, capabilities, lessons learned, and most importantly, why you are deemed to qualify for an Executive Position. To validate your examples, the Board has request you to that [sic] your current supervisor AND a peer or subordinate for all examples you provide within each of the KLC's. Given this tool will serve as your references, their role will be to corroborate the examples provided and validate that they display the behaviours of the KLC. As such, we will then contact the validators to further discuss and to inquire accordingly as to any questions the board may have. Therefore, please ensure your validators are advised that they will be contacted. Also, please note that should we not obtain sufficient information from this tool, we reserve the right to seek additional information from the referees you provided or other sources.

...

[20] To that, the complainant replied with the following:

...

As previously communicated to Sylvie Munyanganizi, Tammy Branch, and Robert Mundie [the three Board members], my best reference (most recent long-term Director, whom I directly reported to for 6 years) passed away early and unexpectedly in 2013. As a result, I have only reported to my current supervisor since May 2014. This makes this exercise a little more challenging for me.

...

[21] On June 24, 2015, Ms. Munyanganizi's response to the complainant included the following: "I completely understand but, we are looking for the current supervisor reference input."

[22] The complainant noted that the instructions provided to candidates specified only that they had to inform the validators of their approach. No instructions were provided about the length of expected responses.

[23] In addition, the complainant added that every candidate was to name his or her current supervisor as a validator, but no instructions were provided if the validators did not have direct knowledge of the facts described in the examples. In his case, the director who had witnessed the facts set out in his examples was deceased, and his new supervisor was not aware of them. Nevertheless, the complainant had been told that it was imperative that he provide the name of his new supervisor, who had been supervising him for just under a year. He later added that Ms. Munyanganizi eventually told him that more weight was given to the supervisor's comments, but that had not been indicated beforehand or at any other time.

[24] In particular, the complainant expressed to Ms. Munyanganizi his reluctance to use his current supervisor, who had not supervised him for very long. At the hearing, he explained that he had had concerns about some of that supervisor's views and ability to provide a fair assessment of his history and competencies. Specifically, the new supervisor was not aware of the work he had done with senior management on some files and of his management experience when he had been in positions on an acting basis.

[25] He recalled that Ms. Munyanganizi told him not to worry, since the sole purpose of the validation exercise was to ensure that there were no red flags following the assessment board's conclusion that he met the KLC requirements at the interview. Note that she did not remember telling him this. Note also that during the exchange of information, another HR representative wrote the following to the complainant about the rating guide and the validations: "... candidates were asked to complete a Key Leadership assessment form which references then validated. Should no discrepancies be found, previous results were maintained and candidates moved to the next phase of assessment, second language requirement CBC/CBC."

[26] At the hearing, the complainant testified that he was also unsure about what his new supervisor would say about him with respect to his reliability, given that in the past, he had informed his supervisor of his functional limitation, which could be seen as affecting his reliability. In particular, he explained that at one point, his new

supervisor had questioned him about the negative sick leave balance on his file. The complainant had stated that his former supervisor had advanced him three weeks of sick leave when he had realized the severity of his medical condition. When he discussed the matter with his new supervisor, he had only one week of sick leave left to repay. His medical condition was under control. However, when his new supervisor questioned his negative sick-leave balance, the complainant had felt that he was being judged negatively.

[27] For that reason, and because he was a candidate in the appointment process at issue, he and his new supervisor had discussed the reliability criterion in advance. In fact, the complainant had suggested answers for Mr. O'Leary to use when questioned on this subject as his referee. The complainant's view was that his medical condition should not have had a negative impact on his reliability as he was reliable and met all his deadlines.

[28] The complainant brought to my attention the instructions given to candidates in the KLC self-assessment form. They included, in part, the following:

Through self-reported examples of current, past performance and work-related achievements, you must demonstrate that you meet the behaviours associated with all the Key Leadership Competencies (KLC). Please consult the following link ...

In assisting you in providing concrete examples, each of the competencies have questions to steer you in the right directions [sic]. However, in drafting your responses to ensure they accurately reflect the competency definition, please:

- 1. Provide concrete, specific examples of behaviours that directly address to behavioural indicator statements.*
- 2. Avoid slang terms, acronyms and abbreviations.*
- 3. Describe examples in sufficient detail to clearly illustrate to what extent and depth you have shown the behaviours for each competency.*
- 4. Focus almost exclusively on what you did in the situation you are describing. When referring to an experience you had as part of a team, you should make clear what your role was apart from the role(s) of others. For example avoid phrases such as "we decided to...", "we organized a ...", "we felt that ..." or "it was decided to ...", "it was felt that...". When discussing what others did, you should do so only as part of the context in which they took their actions.*
- 5. Describe achievements in the past tense since your validators will need to clearly understand your role in the events. Using*

the past tense helps ensure that you are providing concrete examples rather than making general statements (e.g. " [sic] I work well with teams.")

[29] Under each competency criterion, such as "Management Excellence - People Management", additional information was included, such as the following:

VALIDATION INFORMATION

For each examples [sic] provided, please provide the period/timeframe, name, relationship and contact information of the referees you have chosen to validate your example.

[30] The complainant explained that he made a very significant effort to complete his KLC self-assessment tool. He provided many examples with considerable detail. He explained that since there were no limitations on the length of the candidates' responses, he felt that including considerable detail in his examples was preferable.

[31] On July 10, 2015, the complainant returned his completed KLC self-assessment tool.

[32] On July 13, 2015, the complainant emailed his colleague, Harvey MacLean, and informed him that he had provided Mr. MacLean's name as a referee and as a validator for some of his examples. He also informed Mr. O'Leary and Laurene Bakouche, a colleague, that he had provided their names as referees.

[33] The KLC self-assessment tool was then sent to the complainant's validators for review. The assessment board obtained references for the complainant from Mr. O'Leary and Ms. Bakouche.

[34] The complainant insisted that the validators were not given any instructions on how to validate the candidates' examples. As a demonstration, he filed in evidence the email that had been sent to one of his validators. The only information provided to the validators was the following:

*In the context of the selection process for the position of Director (various positions) at the Canada Border Services Agency (CBSA), you have been identified as a colleague of **Mr. Steven Harrington**. We would appreciate your validating the information in the attached document (Key Leadership Competency Self-Assessment).*

We appreciate the time you will allocate to this request and thank you in advance for your collaboration.

[Emphasis in the original]

[35] The complainant identified Mr. O’Leary as his current supervisor and identified him as the validator for these 16 of his examples: 1, 7, 9, 10, 11, 14, 15, 16, 17, 19, 20, 22, 24, 25, 26, and 27. He identified Mr. MacLean as a colleague and as the validator for these 8 of his examples: 2, 6, 8, 12, 13, 18, 21, and 23. Finally, he identified Ms. Bakouche as a subordinate and as a validator for these 3 of his examples: 3, 4, and 5.

[36] Mr. O’Leary made a significant number of comments. He commented on all the complainant’s examples, not just the 16 for which he was the identified validator.

[37] The complainant showed me the information he provided in his examples. For example, the first criterion was “Management Excellence - People Management”, and the candidates were asked to answer the following questions in their examples:

- *How well do you recruit, retain, and develop staff in order to meet current and future needs?*
- *How do you deal with ineffective performance?*
- *Do you address work-life balance issues?*
- *How frequently and effectively do you provide coaching and feedback to staff?*
- *What career growth, challenges and opportunities do you provide?*

[38] The complainant provided five examples for this criterion, the first being the following:

I noticed ineffective performance with an employee in my bureau in 2015. Standard Operating Procedures weren’t being followed, and work wasn’t being completed on-time. I addressed the ineffective performance promptly so as to minimize its impact. Knowing that these types of issues often (but not always) relate back to training, rather than lack of skill, ability, or intentional breach; the first think I did was to meet with her to ensure she had the information and training she needed in order to perform well. I made sure that it was clear that I wanted to help. First I went through the resources that were available to her so she knew where to find information about our processes, procedures and expected turn-around times. I identified who; in addition to myself; she could turn to for guidance on specific categories of issues, then

asked her if we could go over the two procedures that I had noticed that weren't being followed correctly, or on time. During that time, I made sure (in a polite, respectful way) she was aware of my performance expectations and when things must be completed by. I also spoke at length about the importance of the work and the problems that occur when things aren't performed in a timely fashion and according to the SOP (inaccurate reporting that leads to problematic meetings and a loss of trust in our reports and case management business system). I later found that the same problems were occurring, so I investigated and analyzed the situation to gain understanding. I first set out to determine if this could be an employee in duress (knowing the performance issue would be temporary & to know if compassion might be appropriate), or if it was culpable (deliberate & within her control, requiring discipline) or non-culpable (outside of her control - requiring training) behavior. After determining that it was non-culpable behavior as it seemed related to a lack of skill/ability that might be overcome by increasing training, I took a more hands-on approach to her training, and increased the specificity in which instructions were provided, and demonstrated patience. I also ensured SOP's were created, even for processes where SOP's weren't required (for others) in the past. She has since improved to an acceptable level, and I have treated this as a performance issue rather than something that would require discipline. I was not the only one who helped with the increased training of this employee. I then monitored the situation in case a change in management approach was required.

[Sic throughout]

[39] Mr. O'Leary later commented on this example as follows:

My reading of this example is that there was a supervisor/employee relationship in place: Steven indicates that the employee "was aware of [his] performance expectations and when things must be completed by". It needs to be clarified that Steven does not have any direct reports and was not in a position to establish either performance expectations or timelines for this employee. The employee who is the subject of this example is a colleague of Steven's and Steven was asked to support the employee's training. In the example, Steven contends [sic] that he investigated the situation to gain an understanding of the problems that the employee was encountering and addressed the situation accordingly. I cannot validate whether this investigation and analysis took place, but I recall a conversation with Steven where he indicated that this employee was not a team player, had poor interpersonal skills and lacked sufficient competencies for the job. Steven asked if there was any way [sic] was any way I could dismiss the employee; improving performance was never discussed. As stated above, I can only validate that Steven was asked to participate in the mentoring/training of a new colleague during the on-boarding process.

[40] Note that with respect to examples 2, 6, 8, 12, 13, 18, 21, and 23, for which Mr. McLean was the validator, Mr. O'Leary saw the need to clarify the following:

I would like to clarify that Harvey McLean joined the Food Directorate in July 2013 and remained there until his retirement in June 2015. Harvey McLean's role in the Food Directorate was Senior Advisor, Learning and Development; he would have been a colleague of Steven's from approximately February 2014 until June 2015.

[41] With respect to examples 3, 4, and 5, for which Ms. Bakouche was the validator, Mr. O'Leary added the additional clarifying information:

I would like to clarify that Laurene Bakouche reported to me from the time that she joined the Food Directorate's Bureau of Business Systems and Operations in June 2014 until July 2015. While I'm not certain what "Subordinate" means in the context of this Assessment, it should be noted that Laurene has never reported to Steven. Similar to Example #1, Steven was asked to participate in mentoring/training of [sic] Laurene during the on-boarding process.

[42] The next criterion assessed was "Management Excellence - Financial Management". For this criterion, the candidates had to consider the following questions:

- *How do you allocate and manage division resources transparently?*
- *Have you implemented strategies to achieve operational efficiencies and value for money?*
- *How do you manage audit, evaluation, and other objective division performance information?*

[43] The complainant brought to my attention one of his four examples for this criterion. It reads as follows:

Operational Efficiencies - In 2015, I noticed that our horizontal group in which I am a part, and specific managers from each of our science bureaus spent a significant amount of time and effort to produce a Directorate report that had to be recreated every 2 weeks. This involved Program Officers compiling information on a spreadsheet, and then sending the information to section heads from each Science bureau, who would then solicit their evaluators to validate and update the information. A Regulatory Project Officer would then compile the information and create a report in excel. I realized that our new Business Case Management system

called RADAR combined with our Business Intelligence Reporting Software called Cognos could be used to fully automate the creation of this report and free up peoples time, thereby achieving operational efficiencies in addition to value for money on our investment by leveraging the capabilities of our new business system. First I told my supervisor that I planned to completely automate the process within a month (2 report cycles), and therefore would lead the creation of the reports over the next few rounds. I then determined what change was needed in the way we capture information in our database to accomplish my goal, obtained the human support I needed to make data-entry changes, and the instructions on how to make the changes. I then designated a report I felt was a large improvement over what was previously being created. I sought feedback on the report layout and contents and incorporated suggestions, and had the report created so that with one click of a button our Business Intelligence software would provide the report. This saved people a significant amount of time, in addition to increasing utilization of our new business systems thereby providing value for our investment. The report will likely continue to be used for as long as our Directorate Manages Submissions. Program Officers, Regulatory affairs Officers, Units Heads, and Evaluators from 3 different Science Bureaus no longer needed to work on this report, and the report was of much higher quality than it was before I automated it.

[Sic throughout]

[44] The complainant insisted that everything stated in his example was true. He said that however, in his comments, Mr. O'Leary denigrated the complainant's work and did not acknowledge everything he had done.

[45] Mr. O'Leary's comments on this example were as follows:

I can validate that Steven led the development of a revised reporting structure using data captured in the RADAR database; the development of the report was linked to additional database features that were made available with an upgrade of the RADAR database. I can validate that Steven proposed options to change the way information was captured in RADAR but as manager, I selected the chosen option following a discussion with 5 other team members, including Steven. I should also clarify that I was responsible for assigning human resources to the project since Steven has no direct reports. I cannot validate that Steven designated the report; I'm not certain what specific tasks are captured by the term "design". I can clarify that the hands-on task of creating reports using Cognos Business Intelligence software is the responsibility of another project member who is one of Steven's colleagues. Similarly, I cannot validate that Steven made changes to the report since this was the responsibility of one of Steven's colleagues. Steven [sic] role in the design/development/creation of

these BI reports is to work with the employee responsible for these development tasks by providing advice and conceptual input on to [sic] the development of reports.

[46] On July 28, 2015, Ms. Bakouche sent the following comments for the three situations described in examples 3, 4, and 5:

[Translation]

I would like to mention the fact that according to the Word document, I am considered a “subordinate”, but I am not one. My supervisor is another person I report to.

As for Steven Harrington, I have always been a co-worker, and I work on projects in collaboration with him.

And example number 5:

“She later told me that my praise to her manager made an impact on Performance Management review.” I cannot confirm this statement, but I was hoping for an impact all the same.

[47] The complainant showed me that after the HR representative received this information, the representative thanked Ms. Bakouche by email and wrote the following: “We appreciate the time and thought that you brought to the validation of Mr. Steven Harrington's self-assessment.”

[48] The complainant explained that he disagreed with Ms. Bakouche’s assertion that she did not have a subordinate relationship with him. He brought to my attention a definition of “subordinate” from an Oxford-Dictionary-related website, which reads as follows: “adjective; lower in rank or position” and “noun; a person under the authority or control of another within an organization”.

[49] He insisted that although he is not Ms. Bakouche’s supervisor, she occupies a position several levels lower than he does, and they worked together in a context in which he trained and mentored her. He told me that he regretted defining his relationship with her as one of mentor and subordinate, but his understanding was that since he was in a position several levels above her (he was classified SG-04; she was SG-01 or 02) and he guided her, she met the subordinate criteria.

[50] On July 28, 2015, an HR representative emailed Mr. MacLean, informing him that he had been identified as a colleague of the complainant. She wrote that the respondent would appreciate him validating the information in the complainant's KLC self-assessment tool.

[51] When she testified, Ms. Munyanganizi explained that Mr. MacLean did not respond to the email. The complainant clarified that Mr. MacLean was absent from the office at that time and that later, he retired.

[52] In the process, candidate supervisors were also invited to answer a few additional general questions. Thus, on August 25, 2015, Mr. O'Leary provided answers to additional questions he was asked about the complainant. In particular, the complainant brought to my attention Mr. O'Leary's answers to questions 1 and 7, which are as follows:

1. Is the candidate dependable? Can you rely on the candidate to be punctual, present and respectful of their work schedule?

YES ___ NO ___

If your answer is NO, please provide details.

Steven is dependable. He maintains regular work hours, can nearly always be found at his workstation and respects hi [sic] work schedule. In recent months there have been some ad hoc requests to telework which does not necessarily impact his dependability. However, on occasion, the requests were made at the last minute, which did have some impacts on scheduling etc.... We corrected this problem in successfully implemented [sic] a policy whereby telework requests are made in advance. There have been occasions when Steven makes last minute leave requests to attend to family/family matters.

...

7. In sum, would you recommend this candidate for appointment to this position?

YES ___ NO _x_ Perhaps ___

If you wish to add anything to explain your response, please use the space below.

I don't feel that Steven has sufficient management experience to recommend him for this position; to the best of my knowledge, Steven has never had direct reports in his tenure as a public servant. Steven needs more experience in developing effective interpersonal relations and providing leadership that inspires employees to excel. I think that the leap from officer to executive level without middle management experience would be a difficult

adjustment for Steven as well as the organisation, with more costs than benefits to both.

[53] Once all the information was received from his validators, the assessment board determined that the complainant did not meet any of the KLCs. Therefore, he was eliminated from the process. On August 27, 2015, he received an email informing him of his elimination.

[54] On August 28, 2015, he had a telephone conversation with Ms. Munyanganizi, which was their first informal discussion. The complainant explained that he learned that the reference validation had not gone well but that he had no indication as to why. He also learned that one of his referees, Mr. MacLean, did not respond.

[55] The complainant added that when he discussed his elimination from the process with Ms. Munyanganizi, he was completely flabbergasted when she told him that he had received negative comments from his validators. She told him that his references were negative. He could not understand why. He felt that that was not possible, given that his supervisor had just provided him with a very positive assessment as part of his job performance evaluation. He could not see why negative comments could have been made about him, other than about the functional limitation he had disclosed to his new supervisor.

[56] He specifically remembered that during this discussion, without showing him his validator's comments, Ms. Munyanganizi told him that he certainly must have had some idea as to why his validators' comments were not entirely positive. He insisted that he had no idea. He had gone to great lengths to provide a very detailed KLC self-assessment form. He reiterated that the director who had supervised him since 2007 had suddenly passed away and that as a result, his new supervisor was unaware of his accomplishments. He explained that he got along fine professionally with his new supervisor and that he had received good performance evaluation for his work. However, he felt that his supervisor found his employees not suitable for higher positions, which caused the complainant to not want to name his supervisor, out of a concern of bias.

[57] The complainant explained that he suspected that something was wrong once he learned that the assessment board had concluded that he had received a failing grade for each qualification, which seemed to indicate that his validators had rejected

outright his 27 accomplishments described in his 27 examples. That seemed surprising to him. He shared his views with a bargaining agent representative in October 2016, as follows:

...

One thing that was very interesting is that they marked me obtaining a fail on every single section of the reference check (which keep in mind was simply a validation of work examples), which tells me something was wrong with the way they did it as it's just not possible (unfortunately it was only pass/fail so I can't see if I received any points at all). One theory I have is that since they couldn't get in touch with my most important reference; whom I used for 60% of the examples, that even if I had a perfect score I would only be able to get a maximum of 40%, which still would have failed me, but still can't imagine not getting a single pass.

...

[58] At that point, the complainant also believed that his current supervisor had called his subordinate, Ms. Bakouche, into his office, so that they could complete their references together. The complainant considered that they should never have known about the fact that they were both his referees. Clearly, it was a violation for them to do it together as it meant that his current supervisor, whom he did not particularly get along with, had undue influence on the other referee.

[59] On August 31, 2015, the complainant had another telephone conversation with Ms. Munyanganizi. This was their second informal discussion. He informed her why Mr. MacLean did not respond. According to the complainant, Mr. MacLean had a medical condition that had forced his immediate retirement. The complainant also informed Ms. Munyanganizi that his current supervisor had undue influence over Ms. Bakouche's responses because she was a subordinate, and they should not have completed their references together. He testified that he specifically asked to be allowed to provide a replacement referee or to provide Mr. MacLean's home phone number.

[60] On September 1, 2015, the complainant emailed the following to Ms. Munyanganizi:

*Something seems really out of place with the way this KLC assessment went. I am willing to take the unusual step of sending you all of the comments from my current supervisor (Rick O'Leary), **100% unedited** - his own words - for both my 2015-16*

mid-year review (just completed) and my more detailed Year End Assessment from 2014-15. Perhaps you could tell me if this sounds like we're talking about the same candidate (me!) assessed in the KLC. Also, I have since found out why one of my key references wasn't able to respond. They had to suddenly retire due to health reasons. Has [sic] they were used for my KLC in many of the areas that would have made a difference (People Management for example + many others), in addition to me letting you know in advance about the loss of my best reference (most recent long-term supervisor) due to an untimely death, perhaps the board could reconsider, perhaps after validating the authenticity of the Performance Reviews below? If necessary, I could provide a new candidate to validate the examples already provided (or I could attempt to get the at-home contact info for the reference I already provided)?

Reading such an assessment takes time, and I want you to know that I appreciate yours Sylvie.

[Emphasis in the original]

[61] With this email, the complainant sent Ms. Munyanganizi his unedited performance reviews for 2015-2016 and 2014-2015. He testified that he received no response from anyone in HR.

[62] On September 2, 2016, a year later, the complainant emailed his bargaining agent representative. He wrote that he had learned from Ms. Munyanganizi the year before that the assessment board members did not expect to lose any candidates during that KLC validation exercise and that it had been sad to lose him at that stage. However, Ms. Munyanganizi later testified that she does not recall ever saying that. The complainant also believes that she told him that he had no grounds to make a complaint.

[63] The complainant also submitted an access-to-information and privacy request to understand what had happened. He was told that he could review the redacted material in person if he agreed not to take notes. He requested a meeting on September 26, 2016.

[64] On that date, he left Ms. Munyanganizi a voicemail. She responded on September 27 with the following: "Thank you for your call. My schedule il [sic] quiet [sic] busy but I will try to find a time for us to meet." He then responded that he would like to meet as soon as she was able. But he received no response to his request.

[65] He again requested a meeting, on September 29, 2016. HR did not respond.

[66] He then made his complaint with the Board. He explained that he felt the need to express, through this complaint, his incomprehension of the treatment he received from the respondent's representative in the staffing process. He explained that participating in the staffing process required significant work, study, and effort, and that he was completely confused by Ms. Munyanganizi's dismissive treatment of him. In his view, her closed-minded attitude was not correct. So, he used the recourse available to him to challenge that behaviour.

[67] The complainant also filed a document in evidence to show that he had replaced the director on an interim basis for a period of two weeks. In addition, he filed in evidence a certificate showing that he had completed a course entitled, "IBM Cognos Report Studio: Author Professional Reports Advanced (v. 10.2)". He showed that he subsequently trained a section of his department on that software. He filed in evidence the invitation he extended to employees on June 11, 2015, for the training. He explained that he was the lead for the training and that other people also instructed the attendees, but on different subjects.

[68] As for Ms. Munyanganizi, she testified at the hearing that she started in the public service in 2006 and that she has worked in staffing since then. Her title since 2015 has been senior executive HR advisor. Her role is to advise and guide senior management on how to staff EX-01 to EX-05 positions.

[69] On the staffing process in question, she described the process conducted in 2015 to staff EX-01-level director positions at the CBSA. The steps included advertising the positions to be filled, screening the candidates, conducting interviews, checking references, and conducting official-language assessments. She explained the essential qualifications that were assessed and the rating guides that were used.

[70] The essential qualifications included these three knowledge criteria: K1 - knowledge of the CBSA's mandate and priorities and its contribution to the broader Government of Canada agenda; K2 - knowledge of the management principles and practices related to change management; and K3 - knowledge of the principles and practices related to sound management and stewardship.

[71] The essential qualifications also included four KLCs. Ms. Munyanganizi explained that the KLCs define the behaviours expected of leaders in the public service. The goal is for executives to possess or develop these competencies. As well,

they serve as a fundamental basis for the selection, learning and development, and performance and talent management of executives. The four KLCs assessed were the following: 1) “Values and Ethics”, 2) “Strategic Thinking (Analysis and Ideas)”, 3) “Engagement (People, Organizations and Partners)”, and 4) “Management Excellence (Action Management, People Management and Financial Management)”.

[72] Ms. Munyanganizi explained that the rating guide had been prepared in advance. It prescribed that the 3 knowledge questions were assessed only at the interview. However, the KLCs were assessed first during the interviews. Then, the referees were asked to validate the information provided by the candidates. For the 3 knowledge questions and the KLCs, the required pass mark was 3 out of 5.

[73] The rating guide contained the correct answers for the competencies being assessed. Ms. Munyanganizi explained that these prepared answers were used to evaluate the candidates’ examples. For example, for the “Values and Ethics” criterion, the response components included the following: “Demonstrates Values and Ethics, including the Code, in personal behaviour”, and “Integrates Values and Ethics, including the Code, into division practices”. When it considered the correct answer components, the assessment board evaluated each example that the candidates provided in their KLCs.

[74] Ms. Munyanganizi also explained that the CBSA’s EX Evaluation Scale was used in the process, during the interviews. She explained that following the interviews, the assessment board members agreed on the scores to assign to the candidates for each assessed competency. The assessment grid had scores from 1 (clearly below the level required, or unsatisfactory) to 5 (greatly exceeds expectations, or excellent).

[75] Ms. Munyanganizi explained that when it reviewed the comments in the references, the assessment board used a rating scale before assigning scores for each competency. A candidate received a “Meets expectations” rating when the assessment board judged that the following criterion was met: “Demonstrated good evidence of all or most behaviours with consistency”. On the other hand, the candidate received a “Clearly below the level required – Does not meet” rating when the assessment board judged that the candidate demonstrated few or no evidence of most behaviours. Thus, a score was given for each competency following the interview, and then a pass or fail

indication was made for the references. Hence, the score for the KLCs was a combination of a number and a pass or fail annotation.

[76] Ms. Munyanganizi clarified that the interview allowed the assessment board to verify what each candidate would do in the hypothetical situations outlined and that the references were used to establish what each candidate had done to date. In addition, she explained that the use of the KLC self-assessment tool allowed the assessment board to obtain more accurate information than is usually obtained via phoning a referee. She insisted that for the assessment board, the references were a very important part of the assessment as they were its way of determining if a candidate was capable of “delivering the goods”.

[77] Ms. Munyanganizi explained that once the referees’ responses were received, the assessment board compiled the results for each candidate. She explained that it was expected that each referee, as a witness to the situations that a given candidate described, would clarify whether the situations were accurate and whether they reflected the extent of the candidate’s role in the example. She added that KLC self-assessment tool stated the following for that purpose:

...

Describe achievements in the past tense since your validators will need to clearly understand your role in the events. Using the past tense helps ensure that you are providing concrete examples rather than making general statements (e.g. “ [sic] I work well with teams.”)

[78] Ms. Munyanganizi explained that for all the candidates who made it to the reference stage, the assessment board asked their supervisors to provide additional references, following the validation exercise. The assessment board wanted additional information to learn about the main strengths and weaknesses of each candidate and whether they were ready to enter the EX group.

[79] Finally, Ms. Munyanganizi clarified that in cases in which a supervisor had not supervised a candidate for a period long enough to adequately assess his or her competencies, the assessment board requested that the candidate submit the name of a second supervisor who had done so.

[80] Ms. Munyanganizi presented the following evidence about the complainant's assessment.

[81] In July of 2015, an HR adviser who worked with Ms. Munyanganizi asked the complainant's three referees to validate his examples. For example, she showed that on July 28, 2015, Mr. MacLean was contacted by email. He was asked to validate the information in the complainant's KLC self-assessment tool. He did not respond. However, the complainant's two other referees did provide comments in the following days.

[82] Ms. Munyanganizi confirmed that Ms. Bakouche provided comments as a referee. Specifically, she commented on the examples for which she was the identified referee. Ms. Munyanganizi confirmed that the assessment board found that in her examples, Ms. Bakouche did not validate the complainant's information. In particular, she did not validate that she was his subordinate. The assessment board was of the opinion that a subordinate is a person placed under the authority of another and in a situation of hierarchical dependence.

[83] Ms. Munyanganizi also noted that Mr. O'Leary confirmed that Ms. Bakouche reported to him and not to the complainant. This information was important to the assessment board, according to Ms. Munyanganizi, as it compromised the information the complainant provided in his example. For this reason, since there was no reporting relationship between Ms. Bakouche and the complainant, and the two referees had not validated his example, he received a mark of "fail" for the competency being evaluated. The assessment board reviewed all his examples and the applicable comments in the references.

[84] As to whether the assessment board had informed the candidates that a subordinate meant an individual who reported to them, Ms. Munyanganizi replied that she did not recall that taking place. Thus, the term "subordinate" was not defined for the candidates. However, she did point out that in public service staffing processes, this terminology is common. For example, the Treasury Board Secretariat has created assessment tools that define what it means to be a leader in the public service. For example, the 360-degree assessment tool assesses key leadership abilities and defines "subordinate".

[85] According to Ms. Munyanganizi, the assessment board did not give weight to comments from referees about examples for which they were not identified as the person to validate them. Specifically, sometimes, Mr. O'Leary added comments to examples for which he had not been identified as a validator, so the assessment board ignored them.

[86] For instance, the complainant's example 2 covered 2008 to 2010. He provided the name of his colleague, Mr. McLean, to validate the example, since Mr. O'Leary had not been his supervisor at that time. His supervisor from that time was deceased. Yet, Mr. O'Leary specified the following:

I would like to clarify that Harvey McLean joined the Food Directorate in July 2013 and remained there until his retirement in June 2015. Harvey McLean's role in the Food Directorate was Senior Advisor, Learning and Development; he would have been a colleague of Steven's from approximately February 2014 until June 2015.

[87] On August 18, 2015, Mr. O'Leary was asked to provide additional references for the complainant. The request was worded as follows: "... as a supervisor identified by the candidate, I would ask you to complete the second (supplemental) part of the Key Leadership Competency Self-Assessment. Please provide as much detail as possible." He submitted his comments on August 25, 2015.

[88] Ms. Munyanganizi confirmed that Mr. O'Leary's response to question 7, which was whether the supervisor would recommend the candidate for appointment to an EX position, reinforced the assessment board's decision not to appoint the complainant to one. She explained that the assessment board gave a great deal of weight to the supervisors' comments, since they regularly evaluate the work of their subordinates.

[89] Thus, when it considered the applicable comments from the complainant's references, for each example, the assessment board had to assign him a mark of "pass" or "fail" for the matching competencies. Ms. Munyanganizi explained that generally, in cases in which referees validated or confirmed the information that the candidate offered, the candidate received "pass" for the competency being assessed, which was combined with his or her interview results. However, for the complainant, since his referees often indicated that they were unable to confirm the information he had presented, or they qualified it negatively, the assessment board considered his

examples of no value in those cases, and he did not receive a “pass” for the matching competencies. His scores in the results table were as follows (note that “*” means the interview, and “**” means the references):

K1	K2	K3	C1	C2A	C2B	C3	C4A	C4B	C4C	Status
4	4	4	3 *	3 *	3 *	3 *	3 *	3 *	3 *	
			Fail**	Fail**	Fail**	Fail**	Fail**	Fail**	Fail**	FAIL

[90] On August 27, 2015, the complainant was informed that he had been excluded from the process because he did not meet the essential qualifications for the position.

[91] During the first informal discussion between the complainant and Ms. Munyanganizi, she explained that she informed him that his references were not positive. According to her, at first, he was surprised, but he then told her that he had concerns about his manager’s comments. She recalled that she told him that she could not help him with that and that the best solution might be for him to consult with the Labour Relations section of his department.

[92] She added that the complainant told her again that his best referee, his former supervisor, had passed away. However, according to Ms. Munyanganizi, the assessment board was satisfied that his current supervisor had supervised him for a one-year cycle. In the circumstances, the assessment board considered that it had sufficient information to properly assess his candidacy.

[93] Ms. Munyanganizi could not recall whether the complainant had requested then that the assessment board consult his third referee.

[94] Ms. Munyanganizi said that the complainant specifically asked that the assessment board consider the assessment in his annual performance appraisal to decide whether the information submitted by his supervisor in his reference was credible. Mr. O’Leary had given him a positive assessment in his annual performance review but had given him a rather negative assessment in this process. However, Ms. Munyanganizi did not consider that possible. The annual performance appraisals were not used to assess the candidates.

[95] Ms. Munyanganizi could not recall whether she informed the assessment board that the complainant had requested that it assess the credibility of his supervisor's comments. She thought that she had done so but was not sure. However, she indicated that if she did advise the assessment board of the issue, it was only to advise it of his concerns. In her view, the assessment board had sufficient and credible information to justify its decision that he had not qualified in the process. Therefore, she would not have asked it to use his annual performance appraisal to assess the credibility of Mr. O'Leary's comments or to reassess the complainant. Doing so would not have been fair to the other candidates.

[96] Ms. Munyanganizi stated that she could not confirm the complainant's allegation that Mr. O'Leary might have consulted Ms. Bakouche when he prepared his comments as a referee for the complainant. She did not know whether it was so. Nor did she recall telling him that he had no grounds for recourse. Rather, she believes that she told him that he could make a complaint when the notice of appointment or proposed appointment was posted.

[97] According to Ms. Munyanganizi, the assessment board had no reason to doubt the validity of the information provided by the complainant's referees. On its face, it was credible, detailed, and comprehensive. His supervisor, in particular, had benefitted from a one-year period to observe the complainant's work. Therefore, he had a good understanding of the complainant's skills. Although the complainant advised Ms. Munyanganizi that he questioned the validity of this reference after he received the rather negative references, she did not see what the assessment board could do about it.

[98] Ms. Munyanganizi explained that the complainant contacted her one year later, on September 27, 2016, to request a meeting. The same day, she wrote to him and stated that she would try to find a time to meet with him. On September 29, he asked her if she had found a time. However, she did not respond because she changed jobs in October of 2016. She then left her CBSA position, which is why she never met with him. In addition, she mentioned that another HR representative involved in the matter passed away in November of 2016. Ultimately, no one contacted him.

[99] The complainant suggested to Ms. Munyanganizi that an assessment of seven failing grades following the references and for each competency was suspect. She did not agree and stated that it happens.

[100] The complainant submitted that the decision *Laviolette v. Commissioner of the Correctional Service of Canada*, 2015 PSLREB 6, applies to this case. He submitted that the assessment board had an obligation to consider anything that would call into question the reliability of the referees' information. Thus, it failed to take reasonable steps to ensure that his supervisor's reference was reliable. The complainant insisted that all the examples in his KLC self-assessment tool were true and that his supervisor's failure to confirm them resulted from his supervisor's bias against him. This was evident from the supervisor's remarks, according to the complainant, as he even commented negatively on the examples for which he was not the identified referee. In addition, his supervisor had just given him a completely positive assessment as part of his job performance evaluation. The complainant provided all those details to the assessment board, but it did nothing with them.

[101] The complainant also submitted that the decision in *Raymond v. Chief Statistician of Canada*, 2013 PSST 25, applies to this case. He submitted that as in *Raymond*, the respondent in this case relied on insufficient and inaccurate information to assess him. It was a serious error that constitutes an abuse of authority.

[102] The complainant submitted that the assessment board did not assess many of his examples, like in *Raymond*, given that his referees did not validate them. He insisted that the instructions to the validators were not clear enough. In his view, since no clear instructions were given to the referees, then they, including the immediate supervisor, could influence the process in different ways. In the event of bad faith on the part of a referee, the candidate would have no recourse. However, had the respondent agreed to consult the additional referee that the complainant proposed, it might have received different information about him and might have perceived that the immediate supervisor seemed to have a grudge against him.

[103] The complainant insisted that he advised the assessment board that the information it relied on to disqualify him from the process was not reliable.

[104] He told Ms. Munyanganizi about the inconsistencies in the information and about the fact that he did not agree with his supervisor's comments. At the hearing, he

said that he and his supervisor had a conflict but provided no details about it. He insisted that Ms. Munyanganizi advised him to contact his department's labour relations branch, if necessary. As in the *Laviolette* case, this was not enough. He believes that the assessment board should have done more.

[105] About the inconsistencies he alleged in the references, he reiterated that they are apparent on the face of the file. For example, Mr. O'Leary's comments, which he made when answering the additional questions, suggest a discriminatory attitude towards him. In particular, in question 1, the supervisor refused to check "Yes" to the question of whether the candidate was dependable, although he did write, "Steven is dependable." The supervisor then made negative comments to indicate that his answer to the question instead was that the complainant was not dependable. According to the complainant, for these reasons, which are evident on the face of the comments, the assessment board should not have been satisfied with Mr. O'Leary's comments.

[106] In addition, the complainant strongly believes that Mr. O'Leary suggested in response to question 7 that it would be costly for the respondent to hire the complainant because of his health problem. In his view, this was a comment directly related to his medical condition.

[107] As well, the complainant added that Mr. O'Leary had known him for only one year, so it was unfair for Mr. O'Leary to discredit him in his response to question 7, on the grounds that he lacked experience in specific areas. He had acquired the experience in question in previous years, when Mr. O'Leary had not been his supervisor. Mr. O'Leary simply had no knowledge of that experience. Therefore, the assessment board should have agreed to an additional reference, to address these issues. Specifically, before his death, the supervisor who had supervised him for many years had chosen the complainant to work with him on two directorate-wide projects. One involved charging user fees, and the other involved modernizing and handling submissions. His then-supervisor saw that the complainant was a system administrator of a database and perceived that he would be able to modernize a process. On the other hand, Mr. O'Leary did not know that the complainant had been the lead on that project.

[108] The complainant submitted that another indication on the face of the record that something was wrong was that Mr. O'Leary added comments for all the examples

he presented in the KLC, even those for which he was not the validator. Thus, he seemed very keen to influence the process.

[109] The complainant also pointed out that in another staffing process conducted in 2018 and not related to this process, the job advertisement included the following definition: “Managing means having direct authority for people reporting to you and directing an overall team of more than three (3) people, and having direct responsibility for budgets through at least one budgetary cycle ...”. Yet, no definition of “subordinate” was provided.

[110] The complainant also brought to my attention *Morgenstern v. Commissioner of the Correctional Service of Canada*, 2010 PSST 18. He submitted that in that case, references were the only tool used to assess personal suitability and that the respondent acknowledged that it had relied on insufficient information to assess the candidacy of the complainant in that case. The Public Service Staffing Tribunal (“the Tribunal”) found that the assessment board did not take reasonable steps to determine whether all the necessary information could be obtained, such as asking the referees for more detail.

[111] The complainant submitted that according to Ms. Munyanganizi’s testimony, since the assessment board considered that the referees did not validate his examples, this nullified his examples, so he was not assessed. That was unfair. Thus, as in *Morgenstern*, the assessment board did not take reasonable steps to determine whether all the necessary information could be obtained, such as asking the third referee for comments.

[112] The complainant also brought to my attention the case of *Jean Pierre v. President of the Canada Border Services Agency*, 2013 PSST 28, in which the complaint was dismissed. He distinguished that case from this one because the respondent in that case had no reason to doubt the reliability of the referee’s observations.

[113] The complainant brought to my attention *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, which describes what may constitute “abuse of authority”. He stated that the Tribunal listed five categories of abuse of authority in that case, including the following: “When a delegate exercises his/her/its discretion with an improper intention in mind (including acting for an unauthorized purpose, in bad faith, or on irrelevant considerations).” He said that it was not reasonable for the

assessment board to conclude its assessment of his candidacy without taking further action, given that he had warned it of the unreliability of his supervisor's information. Therefore, the assessment board used unreliable information to decide that he did not qualify in the process, which was an erroneous exercise of its discretion.

[114] To further support his position, the complainant also brought to my attention the case of *Gabon v. Deputy Minister of Environment Canada*, 2012 PSST 29. In that decision, the Tribunal found that the appointment process was flawed in several ways. For example, the combined effect of the inordinate weight that the assessment board gave to one director's remarks — despite the fact that she had never directly supervised the complainant — and the lack of weight it gave to the comments from the complainant's three referees was an error. In reviewing the complaint on the basis of all the errors, the Tribunal found that on a balance of probabilities, the complainant in that case had established evidence of abuse of authority by the respondent in the assessment process at issue.

[115] To further support his position, the complainant also brought to my attention the case *Healey v. Chairperson of the Parole Board of Canada*, 2014 PSST 14. In that case, the Tribunal found that the complainants were assessed based on insufficient or incomplete information. Therefore, the decision with respect to their merit was not based on a reliable source.

[116] Finally, the complainant relied on *Ostermann v. Deputy Minister of Human Resources and Skills Development Canada*, 2012 PSST 28, to further support his position. The complaint in that case was substantiated for several reasons, including the fact that the assessment board used a referee who had supervised the complainant for only a short time. It then gave the same weight to that person's extremely negative reference as it did to those of the other two referees who had supervised the complainant for a much longer time.

[117] The complainant submitted that as a result of all of this, an abuse of authority occurred in the application of merit when it came to his references. It is a well-established principle that abuse of authority encompasses serious errors and omissions and that it is not necessary to establish that a respondent intended to abuse its authority. He submitted that he does not believe that the assessment board intended to abuse its authority, but it did happen.

[118] The respondent maintained that no abuse of authority occurred. It submitted that an assessment board may choose its assessment tools, as set out in the *PSEA*. Specifically, s. 36 of the *PSEA* provides those with staffing authority the broad discretion to choose and use assessment methods to determine if a person meets the established qualifications. The respondent was entitled to use references and to identify the required referees.

[119] The respondent submitted that in correspondence dated June 22, 2015, the complainant advised the assessment board that his best referee had passed away unexpectedly in early 2013 and that he had been reporting to his new supervisor only since May 2014, which made supplying a reference a challenge for him. The assessment board representative responded that the assessment board was looking for the current supervisor's input, and the complainant voluntarily provided it. The respondent insisted that the complainant did not voice any objections to using the referee beyond what he perceived as a short time in which his current supervisor had been responsible for overseeing his work.

[120] On July 10, 2015, the complainant submitted his completed KLC self-assessment tool. After it was received, it was sent to his referees for their review.

[121] The respondent submitted that clear instructions were given to the referees on validating the information. Ms. Munyanganizi confirmed that all referees who provided responses either added information or contradicted the information provided by the candidates. They all understood what "validating" means.

[122] Once all the information was received, the assessment board determined that the complainant did not meet any of the KLCs; therefore, he was eliminated from the process.

[123] The respondent added that asking for a reference from the current supervisor is very common and is not an abuse of authority.

[124] The respondent added as well that the assessment board was not aware of the complainant's disability. Therefore, it could not have had an effect on its assessment of him.

[125] In support of its position, the respondent brought a number of cases to my attention. It submitted that in *Jean Pierre*, at para. 41, the Tribunal noted that someone *Federal Public Sector Labour Relations and Employment Board Act and Public Service Employment Act*

can be a referee if he or she has sufficient knowledge of a candidate's work performance. It added that in this case, the assessment board determined that the supervisor was sufficiently familiar with the complainant's work to provide meaningful feedback on his performance.

[126] The respondent submitted that it did not have to consider the complainant's annual performance appraisal since the criteria assessed in it were not the same as those which were assessed for positions in the EX management group. The annual performance appraisals were not considered for any candidates.

[127] In addition, the respondent referred me to the case of *Pellicore v. President of the Canada Border Services Agency*, 2010 PSST 23, which addresses an employer's use of references. In that case, the complainant had been screened out of an appointment process for failing to meet two essential qualifications, "team spirit" and "values and ethics". The assessment board found Mr. Pellicore's first reference, from his immediate supervisor, unsatisfactory. At the informal meeting following Mr. Pellicore's notification that he had been eliminated, he was able to convince the assessment board that it should contact two other referees, whose names he provided. They responded to the reference questionnaire and essentially confirmed the first referee's answers.

[128] The respondent highlighted that the Tribunal concluded that the assessment board gave Mr. Pellicore a fair opportunity with respect to his references. The fact that they had been negative about the two essential qualifications did not demonstrate bias. In addition, the Tribunal found that there was no abuse of authority by the assessment board relying on references to assess the two qualifications and choosing to ignore other information sources, such as performance appraisals. The Tribunal concluded that there was no abuse of authority. It specifically noted the following at paragraph 62:

62 The complainant argues that it was an abuse of authority for the assessment board not to further examine and reconcile the differences that existed between the verbal responses provided by the references and his written performance appraisals. The assessment board had decided, however, not to use performance appraisals in its assessment of candidates. Since the performance appraisals were not considered by the assessment board in their evaluation of any of the candidates, there was no discrepancy before them to resolve.

[129] The respondent submitted that as noted in *Ben Jab v. Commissioner of the Correctional Service of Canada*, 2013 PSST 22, at para. 41, “[t]he purpose of reference checks is to obtain information that the Board will use to assess a candidate’s qualifications. Referees must provide a frank appraisal, which may or may not show the candidate in a positive light.” The respondent added that there is no evidence that Mr. O’Leary’s information was unreliable, and the assessment board had no reason to question the validity of his comments. Specifically, Ms. Munyanganizi testified that the complainant did not provide clear reasons for alleging that Mr. O’Leary’s comments were unreliable. According to her, the assessment board had no reason to doubt the validity of the information that he and the other referee provided. On its face, the information was credible, detailed, and comprehensive.

[130] The respondent added this, from *Dionne v. Deputy Minister of National Defence*, 2008 PSST 11, at para. 55: “What is important is that the referee is familiar with the work of the candidate, and can provide sufficient information to allow the board to conduct an adequate assessment of a candidate’s qualifications.” And as mentioned as follows in *Gilbert v. Commissioner of the Royal Canadian Mounted Police*, 2007 PSST 40, at para. 79: “An assessment board has the discretion to decide whether it has enough information to make an informed choice regarding an appointment.” In the present case, the assessment board felt and decided that it had enough information to complete the complainant’s assessment.

[131] The respondent noted that in his complaint, the complainant alleged that bias arose in the reference process from the current supervisor. The respondent responded that a referee’s alleged bias does not necessarily demonstrate that the assessment board abused its authority. It brought to my attention paragraphs 49 and 50 of *Pellicore*, which read as follows:

49 However, in any event, a reference’s alleged bias does not necessarily demonstrate that the assessment board abused its authority. The purpose of a reference check is to convey information that is used by the board in its assessment of a candidate’s qualifications. References do not exercise any decision-making authority in the affairs of an assessment board and are therefore not expected to act without any bias, as is required of decision-makers [sic]. In fact, when candidates select someone to act as a reference on his or her [sic] behalf, they typically seek to identify persons whom they believe hold a favourable opinion of their abilities; in other words, persons who may be biased in their favour. The role of references, however, is to give candid

assessments, and these ultimately may or may not be favourable to the candidate, as demonstrated in the present case.

50 This is not to say that an assessment board should ignore any evidence that may call into question the reliability of the information provided by a reference. However, the fact that a candidate merely disagrees with the references' accounts of incidents involving him (as the complainant does in the present instance) does not necessarily establish that the reference is not reliable. In the complainant's case, the Tribunal finds that there is no evidence demonstrating that the information given by the complainant's references was not reliable. The board had no reason to discount the validity of their comments and opinions.

[132] The respondent also submitted that in *Ben Jab*, a similar allegation had been made, and that the Tribunal found that there was no indication that the information provided by the referee was unreliable. In *Ben Jab*, the Tribunal found that the assessment board had no reason to doubt the validity of the referee's comments. Specifically, Mr. Ben Jab participated in an internal advertised appointment process. It was determined that he did not meet two of the essential qualifications, which were assessed in part through references. Mr. Ben Jab alleged that the respondent abused its authority by relying on biased references that did not cover a reasonable period. He also stated that the references provided discriminated against him. The respondent highlighted that Mr. Ben Jab had provided the assessment board with the name of the referee in question, who had been his supervisor for one year. It submitted that the Tribunal found that the evidence did not establish that the referee was biased against the complainant or that the complainant's race or national or ethnic origin was a factor in him not being appointed.

[133] With respect to the complainant's informal discussion with Ms. Munyanganizi, the respondent submitted that she confirmed that she spoke with him at least twice. She testified that she probably reported his comments to the assessment board but that the assessment board had no reason to reconsider its decision that he had not qualified in the process, based on his rather negative references. The respondent added that its obligation is described in *Rozka v. Deputy Minister of Citizenship and Immigration Canada*, 2007 PSST 46, at para. 76, which reads as follows:

[76] Informal discussion is intended primarily to be a means of communication for a candidate to discuss the reasons for elimination from a process. If it is discovered an error has been made, for example, if the assessment board did not consider some information listed on a candidate's application, this provides the

opportunity for the manager to correct that mistake. However, informal discussion is not an opportunity to request that the assessment board reassess a candidate's qualifications.

[134] With respect to the complainant's allegation that his supervisor might have discussed his reference with Ms. Bakouche and therefore could have influenced hers, Ms. Munyanganizi testified that she had no knowledge of it. While the complainant showed that he wrote in an email to Ms. Bakouche in February 2020 that she had mentioned in 2015 that Mr. O'Leary had called her into his office to complete the reference, in her response, she did not confirm it. The respondent submitted that the complainant did not provide sufficient proof that in reality, it occurred. Furthermore, the assessment board had no specific information that would have allowed it to consider that Mr. O'Leary negatively influenced Ms. Bakouche.

[135] The respondent added that it showed that attempts were made to contact a third referee. However, the assessment board was satisfied that the information provided by the two references was sufficient to determine whether the complainant met the qualifications of the position. Consequently, when the third reference proved unavailable, it did not believe that it needed to seek another reference from him. The respondent submitted that the assessment role falls to the assessment board, which must determine whether it has sufficient information to make an informed assessment of a candidate (see *Dionne*). It is not the assessment board's role to be "shopping" for favourable or unfavourable references for any candidates (see *Portree v. Deputy Head of Service Canada*, 2006 PSST 14).

[136] Finally, the respondent pointed out that in *Gilbert*, the Tribunal explained that an assessment board has the obligation to consider all comments from referees, both positive and negative.

[137] The PSC, for its part, referred me to its *Guide to Implementing the Assessment Policy*. It submitted that Section IV of the guide indicates that a fair administration of the assessment means that the candidates had an opportunity to demonstrate their merit for the position and that the managers have a sound rationale for the decisions made.

[138] It added the following in its written submissions:

...

48. Section 4 of the PSC document *Structured Reference Checking - A User's Guide to Best Practices* states that while using references, the assessor should try not to place undue weight on isolated incidents. Rather, the assessor should look for overall patterns in the evidence.

49. This guide provides guidance on how to handle situations where the reference check yields information that is inconsistent with that obtained from other sources. In such situations, organizations are advised to understand this discrepancy, perhaps via further reference checks or a discussion with the applicant.

50. This guide also advises organizations that if negative information is uncovered through the reference checks, they should consider its source and verify its accuracy with other sources of information before using it to make a decision about the applicant. Organizations are also encouraged, when faced with conflicting information, to continue checking until they are satisfied that a pattern is evident.

51. In the PSC document called *Assessing for Competence Series - Checking References - a window into the past*, organizations are warned not to take all reference check information at face value. They are also advised not to give undue weight to isolated incidents, but instead to look for the pattern of the evidence. They are also encouraged to consider the possibility that the candidate's performance may depend on the situation.

...

V. Analysis

[139] 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. "Abuse of authority" is not defined in the *PSEA*. However, s. 2(4) states, "For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism."

[140] The Tribunal and the Board have found that under the *PSEA*, a broad interpretation of what constitutes abuse of authority is required. Abuse of authority includes serious errors, even if there is no bad faith or intent. See *Tibbs*, at paras. 56 to 74.

[141] The complainant bears the burden of proof in a complaint of abuse of authority. See *Tibbs*, at paras. 48 to 55.

[142] My role is to determine whether there was an abuse of authority in this appointment process, not to reassess the complainant. See *Broughton v. Deputy Minister of Public Works and Government Services*, 2007 PSST 20.

[143] The complainant initially raised a discrimination issue in his allegations, which he believed played a role in the application of merit. However, at the hearing, he specified that he did not allege that the assessment board discriminated against him. He recognized that it was not aware of his disability. Thus, his disability could not have had an effect on his assessment. Rather, he believes that the reference process was biased with respect to his current supervisor. For this reason, he believes that the assessment board should have taken additional steps to ensure that the reference was reliable. In particular, he alleged that the assessment board did not make a reasonable effort to ensure that Mr. O'Leary's comments were reliable.

[144] Were Mr. O'Leary's and Ms. Bakouche's comments reliable? If not, the assessment board had a duty to take additional steps to obtain reliable information. If so, it had a duty to consider them in its assessment of the complainant.

[145] As the Tribunal noted in *Pellicore*, at paras. 49 and 50, a referee's alleged bias does not necessarily mean that the assessment board abused its authority. Referees do not exercise any decision-making authority in the affairs of an assessment board and are therefore not expected to act without any bias, as is required of decision-makers. But, an assessment board should take into account anything that would call into question the reliability of a referee's information.

[146] Therefore, the question is whether the complainant demonstrated that the assessment board had reason to question the validity of his referees' comments.

[147] In *Laviolette*, the complainant alleged that the respondent abused its authority when it assessed his personal suitability. He was required to complete a form entitled, "Verification of Personal Suitability". The examples he provided were to be validated by his manager, who was to provide an assessment that reflected his overall performance on each personal suitability item. Candidates could not choose their referees in this

process; the directors of the institutions in which the candidates worked selected them.

[148] Mr. Laviolette argued that the reference provided by his manager was unreliable because she did not follow the instructions given to the referees by failing to validate his examples, that she was not impartial towards him, and that her observations were based on unjustified data since they were in conflict. The complainant had informed the assessment board of this conflict in his informal discussion. The assessment board had advised him to contact his referee to ask her to reconsider her reference. He did so, but she did not change it.

[149] I rendered the decision in *Laviolette*. With respect to the referee's alleged negative bias, I indicated that the assessment board could not leave it to the complainant to correct this situation on his own. The assessment board had an obligation to consider anything that would call into question the reliability of the referee's information. Therefore, it should have taken reasonable steps to ensure that her reference was reliable.

[150] In *Laviolette*, the evidence showed that the complainant alerted the assessment board to the existence of a conflict between him and his manager. He explained to the assessment board that he and his manager had not spoken since their heated discussion about his performance appraisal. According to him, his rating of 2 out of 5 for the "Respect" qualification was not justified since his referee blamed him, because of the conflict, for mistakes he had not made. He then proved that he did not commit the mistake or misconduct alleged by his referee. Thus, he demonstrated a valid reason that the assessment board should have questioned the validity of the referee's observations.

[151] In my view, the complainant in this case did not demonstrate that the assessment board had a valid reason to question the validity of Mr. O'Leary's comments. Of course, candidates do not always agree with their supervisors' comments and may challenge them. The mere fact that a candidate challenges a referee's comments is not in itself sufficient reason to cast doubt on the validity of the comments of a supervisor who also acted as a referee.

[152] In this case, the complainant did not voice any objections to using Mr. O'Leary's reference beyond what he perceived was a short time in which Mr. O'Leary had been

responsible for overseeing his work. In addition, he never suggested that he and Mr. O'Leary had a real conflict. He said that he suspected that Mr. O'Leary was biased since he had assessed the complainant positively in the context of his annual performance appraisal but had not validated all the complainant's examples in the appointment process. Instead, in the process, Mr. O'Leary clarified the facts surrounding the situations that the complainant described in his document.

[153] In essence, the complainant wrote expansively and subjectively about his accomplishments in the KLC self-assessment tool. Mr. O'Leary validated what he could. He also questioned some of the information. For example, he wrote, "I can validate that Steven led the development of a revised reporting structure using data captured in the RADAR database ...". He also wrote, "I can validate that Steven proposed options to change the way information was captured in RADAR ...". But then, he clarified the context of the situation as follows: "... but as manager, I selected the chosen option following a discussion with 5 other team members, including Steven. I should also clarify that I was responsible for assigning human resources to the project since Steven has no direct reports."

[154] Thus, Mr. O'Leary made a distinction between the parts in the examples he could validate and those he could not validate. It was his duty. It is not bias to specify, for example, one's employees' roles and responsibilities.

[155] I understand that the complainant finds it implausible that his supervisor gave him a positive assessment in the context of his performance appraisal and a sometimes-negative assessment in the staffing process. In my view, the reason is that in several of his examples, the complainant did not credibly describe his role. His supervisor provided an overview of each person's roles and responsibilities, to clarify the facts. For instance, a problem is visible in his first example. Mr. O'Leary explained that the complainant's role in this situation was to train an employee. Mr. O'Leary's comments included the following: "... I can only validate that Steven was asked to participate in the mentoring/training of a new colleague during the on-boarding process."

[156] However, the complainant described his role sometimes inaccurately. Specifically, his example includes the following statements:

- He noticed ineffective performance with the employee;

- He addressed the ineffective performance promptly;
- He met with the employee to ensure she had the information and training she needed in order to perform well;
- He trained her (he went through the resources that were available to her so she knew where to find information about our processes, procedures and expected turn-around times).
- He identified who, in addition to him, she could turn to for guidance;
- He “made sure” she was aware of his performance expectations and of timelines;
- When he identified a problem, he investigated and analyzed the situation;
- He determined “that it was non-culpable behavior [sic] as it seemed related to a lack of skill/ability that might be overcome by increasing training”;
- He “took a more hands-on approach to her training, and increased the specificity in which instructions were provided, and demonstrated patience.”
- He was not the only one who helped with the increased training of this employee.
- He then “monitored the situation in case a change in management approach was required”.

[157] In essence, the complainant described his accomplishments in a very pointed and subjective manner. Unfortunately, Mr. O’Leary was unable to validate the significant number of subjective facts that the complainant presented.

[158] The complainant also submitted that Mr. O’Leary’s comments had many inconsistencies that are apparent on their face. For example, in question 1, the supervisor did not check “Yes” in answer to the question of whether the candidate was dependable, although he did write “Steven is dependable.” Subsequently, he raised a few small reliability issues that had to be addressed but that have been resolved. According to the complainant, these comments cast doubt on the good faith of the author and on their value. In his view, this shows that his supervisor was not forthright but wanted to influence negatively the process.

[159] I do not agree that these types of comments show bad faith. The supervisor provided detailed and comprehensive comments. He had had one year to observe the complainant’s work. Therefore, he had a good understanding of the complainant’s skills and aptitudes. He provided a frank reference.

[160] The complainant submitted that another indication on the face of the record that something was wrong is that Mr. O'Leary added comments for all the examples the complainant presented in the KLC self-assessment tool, even those for which Mr. O'Leary was not the validator. According to the complainant, Mr. O'Leary seemed very keen to influence the process. In my view, Mr. O'Leary simply attempted to provide a more complete overview of the situations that the complainant had described.

[161] The complainant did tell the assessment board that his best referee of seven years had passed away. He alleged that as a result, his current supervisor at that time was not aware of all his accomplishments, given that the supervisor had been supervising him for only one year. I note that the fact that a supervisor has been supervising an employee for only one year is not unusual or out of the ordinary. It happens. It would have been advantageous for the complainant had he informed his supervisor in advance of his accomplishments since as part of the appointment process, he asked his supervisor to validate them. It appears that he did not make his supervisor aware of them. In the future, he may wish to consider doing so.

[162] Thus, while the assessment board had an obligation to consider anything that would call into question the reliability of the information provided by the referees, it found that Mr. O'Leary's information was credible and reliable. Therefore, it was not required to take additional steps to ensure that the referees were reliable.

[163] In other words, because the assessment board found the referees' comments reliable, it was under no obligation to obtain a reference from Mr. MacLean. The respondent showed that it attempted to contact him. However, he did not respond. In any event, the assessment board decided that the two referees' information was sufficient to determine if the complainant met the qualifications of the position.

[164] The complainant also submitted that Mr. O'Leary called his subordinate, Ms. Bakouche, into his office so that they could complete their references together. The complainant considered that they should never have even known about the fact that they were both his referees. Clearly, it was a violation for them to complete their references together. In his view, it meant that his supervisor, whom he did not particularly get along with, might have had undue influence on Ms. Bakouche.

[165] In my view, the complainant did not demonstrate that the assessment board had reason to question Ms. Bakouche's or Mr. O'Leary's comments for that reason. Ms. Munyanganizi testified that she did not know about it. In my view, the assessment board did not have enough information to question the reliability of the information that Ms. Bakouche and Mr. O'Leary provided for that reason. In particular, I consider that it did not have enough information to question the reliability of Ms. Bakouche's information because Mr. O'Leary, her supervisor, might have influenced her negatively.

[166] The complainant also submitted that the fact that the word "subordinate" was not defined for candidates in the process amounts to an abuse of authority. I find that given the potential for confusion, it would have been better had the term been defined in advance. However, in this case, despite the possible confusion, I find that the assessment board had enough information on hand to conclude that the referees did not validate the complainant's accomplishments as a whole. As mentioned, the complainant described his accomplishments in a very pointed and subjective manner. Unfortunately, his referees were unable to validate the significant amount of subjective facts he presented. Thus, in my view, the fact that "subordinate" was not defined in the process did not have a significant and material impact on the complainant's assessment results. Therefore, it does not amount to an abuse of authority.

[167] In addition, the complainant strongly believes that in response to question 7, Mr. O'Leary suggested that it would be costly for the respondent to hire him because of his health problem. In his view, this comment was directly related to his medical condition. Apart from this allegation, however, there is no evidence to that effect. I therefore consider this allegation to be unproven.

[168] Ultimately, for each assessed competency, the assessment board considered the examples that the complainant presented and the examples that the references validated. The overall information was evaluated according to established expected behaviours. Since the referees did not validate many of his examples, he did not obtain a pass mark for the KLCs.

[169] I note that this case is akin to the situation in *Ben Jab*, in which the complainant provided the assessment board the name of a referee who was his supervisor for the previous year. The Tribunal found that there was no evidence that the referee's information was unreliable and that there was no reason for the assessment board to

question the validity of the referee's comments. The fact that the candidate disagreed with the referee's information did not make the reference unreliable.

[170] For the benefit of the parties, I will also explain why I find that the other cases cited by the complainant are distinguishable from the present situation.

[171] In *Raymond*, the respondent had selected the complainant for layoff. I rendered the decision in *Raymond*. I found that the evidence demonstrated that unreliable and erroneous validation comments were used to assess the complainant. The complainant had failed two qualifications — “reliability” and “thoroughness”. With respect to his reliability example, the supervisor admitted that he had not bothered to refresh his memory with respect to it. For the example of thoroughness, the supervisor had written in his comment that the example provided had been exaggerated. The supervisor admitted that he had not bothered to verify whether the complainant had done the task indicated in his example. Therefore, he conceded that he had made a mistake.

[172] The facts in *Morgenstern*, *Gabon*, *Healey* and *Ostermann* are also different from those in the present case.

[173] In the *Morgenstern* case, the Tribunal found that the errors and omissions resulted from a serious recklessness amounting to bad faith. In particular, the Tribunal found that the assessment board erred when it considered that management experience and leadership experience were interchangeable. According to the *PSEA*, appointments must be based on merit. Thus, changing the essential experience qualifications and then appointing a person who did not have the necessary management experience resulted in an inequitable result. In addition, references were the only tool used to assess personal suitability, and the respondent acknowledged that it had relied on insufficient information to assess the complainant's candidacy. However, it was not so in this case.

[174] *Gabon* can also be distinguished from the present case. First, there was a lack of clarity in the instructions provided to candidates with respect to identifying referees. Second, despite the fact that the candidates were permitted to provide the names of colleagues or members of a professional organization, the reference guide was directed at supervisors and managers. Third, the assessment board took into account verbal opinions by a former supervisor, without taking the necessary precautions.

Fourth, the assessment board relied on the oral comments of two of the complainant's supervisors, while all the other candidates were assessed by means of a written questionnaire completed by the referees. The combination of all these errors led to a finding of abuse of authority. Such errors did not occur in this case.

[175] *Healey* can also be distinguished from the present case. In that case, the Tribunal found that several errors and omissions constituted an abuse of authority. Errors included the fact that referees were given very short notice before their interviews, along with inconsistent or no instructions as to the information required, which might have prevented them from providing more informed responses. The respondent also failed to identify the qualifications being assessed or the behavioural indicators against which the referees' responses were to be assessed. In addition, some of the information was obtained from an individual who had been supervising one of the complainants for only six weeks, which was also a problem.

[176] In *Ostermann*, the Tribunal found that several errors made in assessing the complainant's "Judgment" qualification were serious enough to constitute an abuse of authority. They were the following. First, a typographical error in the referee's reference showed that the assessment board had relied on inaccurate information; second, the assessment board had used a referee who had supervised the complainant for only a short period and then gave the same weight to that person's extremely negative reference as to those of the other two referees who had supervised the complainant for a much longer period; and finally, the assessment board acted in a simplistic and arbitrary manner, thus fettering its discretion. It had adopted a simple mathematical approach by assigning equal weight to the references provided by each of the three referees, despite a considerable discrepancy between the references. Again, the combination of all these errors led to a finding of abuse of authority. The present situation has not revealed such errors.

[177] For these reasons, I find that the complainant did not establish that the respondent abused its authority by using the references received from the two referees, who provided information about him.

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

(The Order appears on the next page)

VI. Order

[179] The complaint is dismissed.

December 14, 2020.

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