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



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

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BETWEEN  
**LEN PARLIAMENT**

Complainant

and

**DEPUTY MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES**

Respondent

and

**OTHER PARTIES**

Indexed as

*Parliament v. Deputy Minister of Public Works and Government Services*

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:** Justine Lacroix and Dejan Tonicic,  
Professional Institute of the Public Service of Canada

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

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

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Heard at Ottawa, Ontario, via videoconference,  
September 15 to 17, 2020.

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**REASONS FOR DECISION**

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**I. Introduction**

[1] Len Parliament (“the complainant”) made a complaint of abuse of authority about the appointment of a person (“the appointee”) to the position of Director, IT Services and Release Management Services (RMS), classified CS-05 (“the position at issue”), with Public Works and Government Services Canada (PWGSC, which is now named Public Services and Procurement Canada (PSPC)) in Ottawa, Ontario.

[2] The complainant’s view is that the deputy minister of PWGSC (“the respondent”) abused its authority firstly in the choice of a non-advertised appointment process for the appointment and secondly in the application of merit as the appointee was not qualified. Initially, in his complaint, the complainant had alleged that the appointment process had been unfairly biased in favour of the appointee, but he did not present any arguments or evidence in this respect at the hearing.

[3] The respondent denied that an abuse of authority occurred. It submitted that a non-advertised appointment process was chosen and that it was appropriate, given PWGSC’s operational needs at the time the appointment was made. It stated that the appointee was fully assessed and was found to meet the qualifications for the position at issue.

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

[5] For the reasons that follow, the complaint is dismissed. It was not established that the respondent abused its authority in this appointment process.

**II. Background**

[6] The complainant occupies a position with PWGSC in Ottawa, Ontario.

[7] The “Notification of Appointment or Proposal of Appointment” (NAPA) for the appointee was posted on the federal government’s job site from June 2 to 19, 2017.

[8] The complainant made his complaint under s. 77 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) with the Public Service Labour

Relations and Employment Board (PSLREB) on June 16, 2017, in response to the NAPA. Due to a technical glitch, the complaint was received only on June 23, 2017.

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

### **A. Issues**

[10] I must determine the following issues:

- 1) Was there abuse of authority in the choice of a non-advertised appointment process?
- 2) Was there abuse of authority in the application of merit?

### **III. Summary of the evidence**

[11] The complainant testified and introduced 35 documents into evidence. At the time of the events at issue, he was Manager, SAP Systems Administration and Infrastructure/BASIS, classified CS-04, with PWGSC.

[12] The respondent called the hiring manager, Mary Flynn-McRae, and introduced eight documents into evidence. At the time of the events at issue, she was the director general of the SAP-ERP Program, SAP-ERP Directorate.

[13] The complainant explained that he graduated from Queens University in 1990 and that he has been working in the computer field since then. He affirmed that in 2012 and 2013, he held a manager-level position on an acting basis, classified CS-05. In this role, he supervised a dozen people. He managed a large budget and performed all the tasks associated with human resources management.

[14] He explained that he was also in the position subject to this complaint on an acting basis for a period of six weeks in the summer of 2010. Since 2010, he has generally been in an application architect role. He has contributed to the development of a new SAP application architecture. SAP is a multinational software corporation that makes enterprise software to manage business operations and customer relations. The company is especially known for its enterprise resource planning (ERP) software. The complainant managed the SAP-ERP Program.

[15] He explained that towards the end of 2015, he underwent emergency surgery. At the time he was diagnosed, he received treatment, but he underwent a second surgery in early 2016. He was out of the office from January to March 2016. By the time he returned, Ms. Flynn-McRae had started in the position of the director general of the SAP-ERP Program. He asked to meet with her.

[16] They met and discussed his accommodation measures. According to the complainant, he also informed Ms. Flynn-McRae that he was looking for a CS-05 position and that he wanted to receive second-language training. He said that he also told her about a project suggestion he had made to an assistant deputy minister. He took the opportunity to share it with her. According to him, they also discussed the SAP-application-components migration project. However, according to him, it was on hold due to a lack of infrastructure from December 2016, and the migration did not take place until June 2018, due to unforeseen delays.

[17] The complainant said that in June of 2016, the previous incumbent of the position at issue indicated in a meeting that he might leave his position in the next few months as he was investigating and evaluating another work opportunity.

[18] The incumbent eventually left on November 30, 2016.

[19] On that date, the complainant received an email from Ms. Flynn-McRae in which she informed her team that the appointee would take up the position at issue on an acting basis as of December 1, 2016.

[20] In January of 2017, in a one-on-one meeting with the hiring manager, the complainant said that he expressed his interest in acting in the position at issue. According to the complainant, during this meeting, Ms. Flynn-McRae indicated that three individuals were considered for this acting opportunity, not including him. In addition, he said that she asked if he was planning to retire soon, to which he responded that he was not. He added that she asked if he would be up to the challenges of the appointment, considering his medical condition. He responded in the affirmative. I note that in his complaint, the complainant did not allege any discrimination on the basis of either age or disability.

[21] In early May 2017, the complainant found the “Notification of Consideration” indicating that the appointee was being considered for a promotional appointment to the position at issue on an indeterminate basis.

[22] On May 5, 2017, the complainant emailed the Human Resources (HR) Advisor identified as the contact person in the Notification of Consideration, requesting an informal discussion, which was then scheduled for May 29, 2017.

[23] On May 26, 2017, the HR Advisor emailed Ms. Flynn-McRae, providing her with the “Summary Basis for decision” document for the appointee’s non-advertised appointment, for her review and approval (“the Summary Basis email”).

[24] The complainant explained that on May 28, 2017, he emailed the HR Advisor, requesting a copy of the Summary Basis for decision in advance of the meeting. According to him, she responded that the document would be discussed verbally the next day during the informal meeting. In another email on the same date, she indicated that the goal of the informal discussion was to meet informally and talk about the staffing decision.

[25] On May 29, 2017, the complainant met with Ms. Flynn-McRae for the informal discussion. During their meeting, he asked her for the reasons behind the choice of a non-advertised staffing process. According to him, she indicated that there was an urgent need, as the appointee had left in November 2016. During the discussion, he felt that the respondent was not interested in conducting an advertised process. He had hoped to apply for the position at issue.

[26] On June 2, 2017, the NAPA was posted.

[27] On June 6, 2017, Ms. Flynn-McRae provided the HR Advisor with her feedback on the draft Summary Basis for decision document that the HR Advisor had emailed to her on May 26, 2017, containing changes embedded in that email.

[28] On June 16, 2017, the complainant sent his complaint to the Board, but it was not received until June 23, 2017. On that date, the complainant provided the Board with a technical explanation for what occurred when he made his complaint by email.

[29] On July 12, 2017, the respondent requested that the complaint be dismissed on the ground that it was made outside the period provided for in s. 10 of the *Public Service Staffing Complaints Regulations* (SOR/2006-6).

[30] On July 27, 2017, the Board issued a letter decision in which it denied the respondent's motion to dismiss the complaint, given the circumstances presented by the complainant, and it extended the deadline to make the complaint to June 23, 2017.

[31] In an email on August 30, 2017, a representative of the respondent emailed the complainant to confirm the information that was shared verbally during a meeting that was held on August 28, 2017, which included the following:

...

- 1) [The appointee's] *acting was for period [sic] of 4 months minus a day and is not considered an appointment. Therefore, no notification needed to be posted. He acted from December 1, 2016 to March 31, 2017. The effective date of his indeterminate appointment is April 1, 2017.*
- 2) *The only HR delegations [sic] of authority is Staffing delegation. This does not form part of the definition of experience in human resources management as included on the Statement of Merit Criteria (please see page 2 of the attached SMC) which includes assigning work, managing performance, developing resourcing plans, determining needs and approving training, etc.*
  - a. *Also, [the appointee] has never had staffing delegation.*
- 3) *To meet the experience criteria of managing financial resources and as explained in the definition on the SMC (also on page 2 of the attached SMC), an individual could have had full or partial delegation of a budget. The definition also includes other things such as forecasting, planning, budget allocation, reporting, etc. In [the appointee's] case, he managed a budget and in this capacity, forecasted, planned, reported and did budget allocation, therefore meeting the definition but did not have financial delegation.*
  - a. *[The appointee] did not have financial delegations of authority before his acting CS-05 or his indeterminate CS-05 appointment [later corrected].*

...

[32] In an email dated August 31, 2017, the respondent's HR representative indicated that its finance team had clarified that the appointee did have financial authorities from December 14, 2015, to March 31, 2016, and reiterated that the respondent was satisfied that he met the definition and the experience criteria.

[33] In an email dated September 7, 2017, a senior HR advisor responded to the complainant's September 6, 2017, email asking for further information. Later, on September 25, 2017, the respondent's advisor also informed him of the following, by email:

...

*... As stated during the EOI meeting, the new departmental approach to non-advertised appointments, which is a result of the New Direction of Staffing from the Public Service Commission, was applied to this appointment. Non-advertised criteria is no longer required. The Summary Basis for decision for the appointment was provided to you during the meeting. The purpose of this document is to describe the choice of appointment process, discuss current [sic] environment, candidate selection etc....*

...

[34] The complainant explained that he completed his efforts to obtain the completed evaluations of the appointee and that on October 31, 2017, in an email from an HR representative, the respondent provided, among other things, a highly redacted copy of the assessment material for the appointee's appointment.

[35] On November 1, 2017, the complainant responded to that email. He requested once more that the respondent provide a complete copy of the Summary Basis for decision document as well as the complete assessment material for the appointee.

[36] On November 8, 2017, in an email from the same HR representative, the respondent indicated to the complainant and the Board that it would send the complainant an electronic copy of the Summary Basis for decision document and that it would resend the complete assessment material for the appointee related to all financial management qualifications as it had been redacted by mistake. In a second email on the same date, the respondent sent a scanned copy of the Summary Basis for decision as well as the amended assessment material for the appointee.

[37] As for Ms. Flynn-McRae, she explained that she arrived as the director general of the SAP-ERP Program in December 2015. To better understand her workforce, she met with her directors and managers to discuss HR planning.

[38] She explained that in November 2016, she was informed that the incumbent of the position at issue was to leave his position on December 1, 2016. She explained that

that position was the information technology (IT) lead for several high-profile business transformation projects.

[39] She explained that she had to find a replacement for the incumbent director. She looked at previously conducted PSPC pools, but they were not specific enough to meet the requirements of the position at issue. She explained that before the incumbent's departure, she had discussed with him possible candidates for the position. She received recommendations from him. She then considered three potential candidates, who were also identified as part of the talent management program, to determine whether there would be any interest in occupying the position on an acting basis. Only the appointee, who was an employee on the team, was interested. He had qualified in two CS-05 pools in which the criteria were very similar to the needs of the CS-05 position to be filled.

[40] Thus, Ms. Flynn-McRae discussed an appointment on an acting basis for the appointee with the Chief Information Officer and the Management Committee in late November 2016. The committee gave its approval.

[41] So, the appointee was offered an appointment on an acting basis of four months less a day from December 1, 2016, to March 31, 2017.

[42] In the meantime, Ms. Flynn-McRae also had to consider how the position at issue would be filled more permanently. In late December 2016, pursuant to discussions with the HR division, she determined that the most efficient staffing option would be to appoint the appointee on an indeterminate basis. The indeterminate appointment was discussed with the Chief Information Officer and the Management Committee. They approved it.

[43] The complainant said that in January 2017, he informed Ms. Flynn-McRae that he was interested in acting in the position at issue, which Ms. Flynn-McRae does not recall.

[44] Ms. Flynn-McRae explained that with the assistance of the HR division, she reviewed the CS-05 statement of merit criteria (SMC) that had been used to fill several CS-05 positions within the Chief Information Officer Branch (CIOB) since 2015. She updated the SMC to accurately reflect the current needs of the position at issue, which had evolved over time.



[45] She explained that even though the narrative assessment against the SMC for the appointee was not finalized until March 2017, she was satisfied that he was fully qualified for the position at issue before he began in it on an acting basis in December 2016. The assessment confirmed that he was the right-fit candidate to occupy the position indeterminately.

[46] On May 4, 2017, the Notification of Consideration for the appointment of the appointee to the position at issue was posted.

[47] The complainant requested an informal discussion and certain documents. On May 28, 2017, the guide for non-advertised appointments was sent to him, and he was advised that the reasons for the choice of process would be shared during the informal discussion, which was scheduled for the next day.

[48] On May 29, 2017, the informal discussion took place. Ms. Flynn-McRae explained that during this meeting, she provided the reasons for the non-advertised appointment from the Summary Basis for decision. By email, HR also confirmed that no notification that the position at issue would be filled on an acting basis (as it was for less than four months) or information about the deadline to submit a complaint had been provided.

[49] On June 2, 2017, the HR Advisor reminded Ms. Flynn-McRae that she was waiting for her review and approval of the Summary Basis for decision for the appointee's non-advertised appointment that she had sent to Ms. Flynn-McRae on May 26. The HR Advisor sent the reminder because she wanted to send Ms. Flynn-McRae the letter of offer and to post the second notification that day. Ms. Flynn-McRae clarified that as part of her ongoing discussions with HR on this matter, she had given verbal approval for that action. Later that day, the NAPA for the appointee to the position at issue was issued, stating that the complaint period was to close on June 19, 2017.

[50] Ms. Flynn-McRae recognized that the final written version of the Summary Basis for decision for the appointee's indeterminate appointment was finalized on June 6, 2017, with an effective date of April 1, 2017. It was finalized that day when she added some information on the Summary Basis for decision and sent it to HR. The Summary Basis for decision documented the appointment decision.

[51] She explained that even though she had received the draft Summary Basis for decision on June 2, she was very busy at that time. She did not become aware of the HR Advisor's June 2 email until the weekend. Only on Tuesday, June 6, was she able to add her written comments to the Summary Basis for decision document. All she did, in essence, was add context to the information already in it. She had had several discussions with the HR Advisor about it. She had authorized the HR Advisor to proceed, since the document was almost finalized. All she wanted to do was add some information here and there, which she did on June 6.

[52] The Summary Basis email, once finalized, read as follows:

...

**Summary of decision - [The appointee]**

*[MB], the incumbent of the position at the present time, has been in the position for several years; however from the beginning was [sic] on assignment to John McKenzie's team. He subsequently accepted a secondment to SSC and has never physically occupied the position on our team. [MB] remains on secondment with SSC and a deployment is planned. The position should become vacant shortly.*

*For the staffing of our CS-05 position, we have decided to proceed with the non-advertised appointment of [the appointee]. The staffing action was approved by the CIOMB. Following the discussion at the senior management table, [the appointee] was offered an assignment [appointment on an acting basis] until the appointment could be finalized.*

**CONTEXT / BACKGROUND**

*In recent years the CIOB has undergone several major organizational changes and combined with the transformation of its service delivery model and modernization of its technology, there has been a distinct lack of continuity and stability. The SAP organization in particular is participating in a number of business transformation projects with most of the branches in PSPC; including the Financial Management Transformation with FAB; the Real Property business transformation and Receiver General accounts receivable transformation. All of which are priorities for the GoC and/or PSPC. It will be critical to ensure the stability of the current SAP solution, while at the same time evolving the solution to support these new initiatives.*

*We have an immediate need for an SAP Technical Director; who possesses SAP experience with a strong background and knowledge of infrastructure, project management, as well as experience dealing with Shared Services Canada. [The appointee] is the most logical and efficient choice within CIOB who meets this criteria. [The appointee] has qualified in the following pools for IT Director*

*positions within the Federal Government: Refs: 2015-FNA-IA-012 (REX-07) Executive IT director at [sic] Financial Consumer Agency of Canada, and 14-CEO-IA-TEC-10920 (CS-05) at Elections Canada: Director, Business Solutions, Director Development & Maintenance, Director, Security, Innovation & Field Technology Services, and IT Infrastructure Director. We have reviewed these pools' criteria and they are very similar to the needs of our CS- 05 position. Unfortunately, it is not possible to appoint [him] directly from one of these pools, which is why we are proceeding with a non-advertised appointment.*

*Previously conducted PSPC pools are not specific enough to meet our requirements, and the limited resources left within in the previous CIOB pool are not a good fit and do not meet our direct and urgent operational needs.*

*It is important to note that [the appointee] has already worked on some of our current and upcoming modernization projects as a manager during the last 2 years and more recently as an interim director since November 2016. He is fully qualified for the «Director, SAP, Technical Support and Operations» position (CS-05). Even though the narrative assessment of [the appointee] was not finalised until March 2017, we were satisfied that he was fully qualified for the position before the beginning of his acting in November 2016.*

*In our present context, going through a full competitive process would not be efficient and would require additional time and resources. We have an important need right now, and we need to stabilise our group and have a strong leader to ensure we can deliver on our mandate and meet our deadlines on our current and upcoming transformation and modernization projects. Not proceeding with this staffing action would compromise several key projects planned and underway and would have an impact on the reputation of the CIOB and the Department.*

*[The appointee] has been performing very well and has obtained a «surpassed» rating in his EPMA for the past several years. He is targeted as part of the Talent Management Program. «Talent Management is the process of putting in place integrated strategies to improve the processes for recruiting, developing and retaining people with the required competencies to meet current and future strategic departmental objectives». In order to manage [the appointee's] talent, we felt the appropriate strategy was to offer him the acting opportunity in the CS-05 position beginning in November 2016. [The appointee] has been very effective in this role to date and is, according to his overall performance, his specific and relevant expertise and knowledge, the right candidate to occupy this position on an indeterminate basis.*

...

[53] The complainant's complaint was accepted by the Board on June 23, 2017.

[54] Ms. Flynn-McRae explained that on August 31, 2017, an HR representative emailed the complainant, clarifying new information about the appointee's financial delegation of authority. The finance team had stated that the appointee did not have financial delegations of authority before occupying the CS-05 position on an acting basis or indeterminately. This was incorrect. In fact, he had financial authorities from December 14, 2015, to March 31, 2016. Ms. Flynn-McRae specified that during that period, and in others when he did not have financial authorities, he managed a budget, and in that capacity, he forecasted, planned, reported, and carried out budget allocation, therefore meeting the definition and the experience criteria.

[55] At the hearing, she also explained why a non-advertised process was chosen to appoint the appointee to the position at issue. First, he had done an excellent job. In addition, he was already working on several major infrastructure projects, including establishing a bigger server and upgrading existing platforms.

[56] Ms. Flynn-McRae also explained why the respondent decided to backdate to April 1, 2017, the appointee's indeterminate appointment to the position at issue. The alternative was to extend the acting appointment by four months less a day from April 1 to the end of July 2017. However, this additional HR action was deemed unnecessary since the appointee's assessment was completed in March 2017 (he had by then been assessed against the essential qualifications for the position). Therefore, the respondent chose not to create several HR actions but rather to permanently appoint him to the position.

[57] According to her, she was transparent with her team; i.e., she kept it informed of developments in this area.

[58] Ms. Flynn-McRae said that she is familiar with the PSC's *Appointment Policy*, which came into effect on April 1, 2016. She has received training on it. She explained that she followed all the steps outlined in it. Senior management agreed to the interim and indeterminate appointments, and she was transparent with her team. There was a consensus that the appointee was the right fit for the position at issue.

[59] She added that a more specific policy for the department was adopted on May 30, 2016, entitled *Policy on Staffing and Recruitment*. Its section 6.1.1 states the following with respect to the use of advertised and non-advertised processes:

“In making an appointment, either an advertised or non-advertised appointment process may be used.”

[60] She explained that section 5.1 of the *Guideline on Staffing and Recruitment* also deals with the choice of appointment process. This section reads as follows:

*Managers may choose between advertised or non-advertised appointment processes. The appointment process should be selected on the basis that there is a reasonable explanation for the decision, founded on the current and/or future organizational context and business needs. The choice of appointment process should balance the need for flexibility and efficiency in staffing and recruitment practices to meet operational requirements with access to employment opportunities to and within the department. In choosing between an advertised and non-advertised appointment, the following factors may be of consideration:*

**(a) Operational factors**

- Duration of the position
  - short or long term needs
- Number of positions to be staffed
- Requirement for a candidate pool
- Current or future needs
- Competencies or skills required
- Specialization of the position
- Availability of potential candidates
- Existing pools or recruitment efforts
- Group and level of the position
  - entry level or senior level

**(b) Organizational factors**

- Risk or impact on the organization or work unit according to the choice of process
- Organizational or business needs
- Departmental priorities or initiatives
- Financial flexibility or constraints
- Efficiency and/or urgency
- Value for money (stewardship)

**(c) Workforce factors**

- Risk or Diversity / Employment Equity
- Linguistic capacity

- *Integrated HR planning*
- *Mobility*
- *Geographic or regional constraints*
- *Talent management*
- *Investment in employees*
- *Public Service Renewal*

*Decisions regarding the choice of appointment process should be proactively and openly communicated to those who would be expected to be impacted by the decision.*

[61] At the hearing, Ms. Flynn-McRae explained how those factors were met. She added that the department had millions of dollars invested in ongoing projects affecting its IT infrastructure. It was essential that the projects run smoothly. Among other things, her team had to deal with a transfer from two data centres to a bigger data centre, yet the project, i.e., the purchase and installation of a large server, was behind schedule due to unforeseen circumstances. In fact, the project continued until 2018. She added that a significant number of other activities were also underway and that her team was working with Shared Services Canada (SSC) daily on them. Her team was very busy as there were many deadlines to meet that were tight and changed regularly. There was pressure to complete these projects quickly.

[62] She also explained how she considered Part 3 of the “Non-advertised Appointment Processes Guide for Managers and Human Resources Professionals” in her decision to appoint the appointee. In particular, Appendices A and C of that guide provide very relevant guidance to managers, such as the potential sources of information that can be used to assess merit and how they may be applied. In this case, she explained that she used the appointee’s résumé, performance appraisals, and career achievements. In addition, the appointee reported directly to her, so she knew the quality of his work. She also considered the recommendations of the other directors general with whom she had discussions at senior management meetings.

[63] She explained how the required criterion of three years of experience managing human and financial resources within the last five years was met in this case. Specifically, she explained how she counted the appointee’s years of experience in managing the areas of human and financial resources; i.e., how she assessed criterion EX3, “Significant\* and recent\*\* experience in managing human resources and

financial resources”. In essence, she listed the different positions he had in recent years and his responsibilities in those positions. This resulted in the following:

*SAP SSC Partnership and SAP Systems Migration, Manager, AND interim SAP Systems Administration and Infrastructure / BASIS, Manager, SAP ERP Directorate - (CS-04) - Public Works and Government Services Canada, Chief Information Officer (CIO) Branch - June 2015 to November 2016.*

*Responsibilities for Migration: Responsibilities as interim BASIS Manager: Lead and manage a multi-disciplinary team of 10 people which includes 6 SAP senior analysts/technical leads, 2 IT application analyst/technician, 4 SAP senior consultants incl. 1 hardware and IBM AIX specialist, incl. assign and review work, manage and assess performance, develop learning plans to meet current requirements and career development objectives and manage and develop staffing plans, complete staffing and acting processes. Manage an operational budget of: 2M\$ for operations + 2M\$ for migration to new SSC data center CDOQ (Centre de données de l'ouest du Québec). Complete process to renew and hire SAP consultants through contracts, negotiate licencing contracts with vendors (incl. Oracle), write justification for sole source procurement of required software. Manage SAP BASIS team incl.: Manage the support, maintenance, design, and upgrade of all SAP systems, and all related third parties' modules and applications for PSPC, SSC, and IFMS (supporting and providing SAP services to other departments and agencies). Report SAP systems issues, and status reports to senior management.*

*- Service Delivery and Integration Manager (CS-04) - Public Works and Government Services Canada, Information Technology Services Branch, Application Management & IT Operating Services: IT Infrastructure Services, Service Request and Integration Management - Feb. 2012 to Sept 2014.*

*Responsibilities: Manage/supervise a team of 10 employees + 1 consultant and complete all related HR activities; incl. assign and review work, manage and assess performance, develop learning plans to meet current requirements and career development objectives and manage and develop staffing plans, staffed 2 positions - including 1 “swap”: of 1 retired resource for 1 priority list resource, deal with difficult employees and labour relations, budget and financial responsibilities including manage an operational budget of \$1M+. Handle the procurement, billing (internal to PWGSC) and recovery of all the costs of all operational service requests (SRs) and major SSC services infrastructure service level agreements (SLAs) for a total of \$2M+/FY for ops requests (SRs) + 20 M\$ for optional major SLAs (such IT security, DR, DCE etc.) and recover the cost for the procurement of non standard hardware requests bought through PWGSC computer National Master Standing Offer (NMSO \*now managed under SSC ITAM).*

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*IT Manager (CS-04) - Public Works and Government Services Canada, Information Technology Services Branch, Application Management & IT Operating Services: Application Engineering Services - July 2009 to Feb. 2012.*

*Responsibilities: Manage/supervise a team of 25+ employees (incl. assign and review work, manage and assess performance, develop learning plans to meet current requirements and career development objectives) and 4+ consultants, plan and manage requirements for HR (develop staffing plans, hire new employees, participate actively to staffing boards to hire CS02s and CS03s) and to contract IT consultants/contractors, manage an operational budget of 2+ million dollars (forecasting budgeting and expenditures) and recover of costs through billing to internal clients, negotiate with external training vendors to lower the cost of training through IT group training courses for our directorate (120 employees).*

*[Sic throughout]*

[64] At the hearing, the complainant indicated to Ms. Flynn-McRae that he did not agree with how she had grouped two of the appointee's positions when describing his responsibilities from June 2015 to November 2016. He insisted that the appointee had only 3.5 months' experience in the SAP Systems Administration and Infrastructure/BASIS, Manager, SAP ERP Directorate, position. During those 3.5 months, from December 2015 to March 2016, the appointee had replaced him when he was away from the office.

[65] Ms. Flynn-McRae recognized that she could have described the appointee's responsibilities in these two different positions separately. But she explained that even with only 3.5 months of valid experience in the areas of managing human and financial resources for the first period (June 2015 to November 2016), she was satisfied that the appointee met the criterion of 3 years of experience within the last 5 years. In particular, by adding the 3.5 months of managing human and financial resources experience to the experience the appointee had gained in the service delivery and integration manager position (which he occupied from February 2012 to September 2014, for a total of 32 months), she counted at least 35.5 months of valid experience under this criterion, excluding the experience he accumulated while in the position at issue on an acting basis. Indeed, her objective was to ensure that he met the criterion of 3 years of experience in this field within the last 5 years. According to her calculations, he met it. Therefore, without even considering his experience in the



next position she described in the justification, she was satisfied that he met all the essential qualifications.

#### IV. Analysis

[66] Section 77 of the *PSEA* provides that an unsuccessful candidate in an advertised internal appointment process may make a complaint with the Board that he or she was not appointed or proposed for appointment because of an abuse of authority.

[67] “Abuse of authority” is not defined in the *PSEA*. However, s. 2(4) provides, “For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.” As per *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, an abuse of authority could also include improper conduct or important omissions. The complainant bears the burden of proof in a complaint of abuse of authority. See *Tibbs*, at paras. 48 to 55.

##### A. Issue 1: Was there abuse of authority in the choice of a non-advertised appointment process?

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

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

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

...

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

[70] The complainant and Ms. Flynn-McRae described the circumstances leading to the appointment.

[71] The complainant’s position was that the decision to use a non-advertised appointment process for this appointment was an abuse of authority. The

non-advertised appointment process did not respect the guiding staffing values of fairness, access, transparency, and representativeness. The choice of the non-advertised appointment process unfairly limited his access and that of others to this opportunity.

[72] The complainant maintained that the respondent chose to secretly proceed by way of a non-advertised appointment process and later to withhold from him information that he had requested. In his view, this clearly demonstrates that the respondent's intent was to obfuscate the reality that this choice was made to unfairly limit his access and that of others to being evaluated alongside the appointee for the position at issue.

[73] The complainant added that the process was not fair and transparent. The NAPA was posted on June 2, 2017, which was a full two months after the retroactive start date of the appointment (April 1, 2017).

[74] The complainant brought to my attention s. 13 of the *Public Service Employment Regulations* (SOR/2005-334; *PSER*), which reads as follows:

*13 The Commission shall, at the time that the following acting appointments are made or proposed, as a result of an internal appointment process, inform the persons in the area of recourse, within the meaning of subsection 77(2) of the Act, in writing of the name of the person who is proposed to be, or has been, appointed and of their right and grounds to make a complaint:*

*(a) an acting appointment of four months or more;*

*(b) an acting appointment that extends the person's cumulative period in the acting appointment to four months or more.*

[75] The complainant submitted that the respondent did not comply with those requirements because the appointee's acting appointment lasted more than four months. The NAPA being posted only on June 2, 2017, means that the appointment on an acting basis extended to six months. Thus, in his view, the respondent circumvented the requirements by making the appointment retroactive to April 1, 2017.

[76] To further support this argument, the complainant also brought to my attention s. 14(1) of the *PSER*, which reads as follows: "An acting appointment of less than four months, provided it does not extend the cumulative period of the acting appointment

of a person in a position to four months or more, is excluded from the application of sections 30 and 77 of the Act.”

[77] In addition, the complainant submitted that the Summary Basis for decision for the non-advertised appointment did not meet the requirements of the *PSEA*, the PSC’s *Appointment Policy*, the department’s *Policy on Staffing and Recruitment*, the department’s *Guideline on Staffing and Recruitment*, and the *Non-advertised Appointment Process Guide for Managers and Human Resources Professionals*.

[78] Essentially, the complainant disagreed with the respondent’s assertion that there were priority initiatives and an operational urgency to fill the position at issue. He submitted that the urgency was not proven. He believes that the hiring manager should have known in June or July 2016 of the intention of the incumbent of the position to leave it.

[79] The complainant also argued that the respondent failed to act properly by failing to provide him with the documents he requested in a timely manner after he made his complaint.

[80] For its part, the respondent submitted that as indicated at the hearing and as explained during the exchange-of-information meeting, the appointee acted in the position at issue for a period of four months less a day, which is not considered an appointment. Therefore, no notification had to be posted. The appointee acted in it from December 1, 2016, to March 31, 2017. The effective date of his indeterminate appointment was April 1, 2017. A notification was posted for his indeterminate appointment on June 2, 2017.

[81] The respondent submitted that the non-advertised appointment was made in accordance with the *PSEA*, the PSC’s *Appointment Policy*, and the departmental policy, guideline, and guide. It also submitted that the appointment was conducted in a fair and transparent manner, respecting the values set out in the *PSEA*’s preamble.

[82] The respondent submitted that the hiring manager completed a narrative assessment confirming that the appointee met the merit criteria and that she prepared a Summary Basis for decision documenting the appointment decision. Two documents were used to articulate the selection decision and to validate the hiring manager’s appointment decision, including information about the context and current

environment. One document is an email chain (containing emails from May 26 to June 6, 2017) called Summary Basis for decision between the HR Advisor and the hiring manager, summarizing their discussions for the non-advertised appointment. The other document is the Assessment against the SMC that explains how the appointee was assessed.

[83] The respondent submitted that s. 33 of the *PSEA* directs the PSC or its delegate to use either an advertised or a non-advertised appointment process. It does not confer a preference on one over the other, either explicitly or implicitly. Additionally, s. 30(4) states that there is no requirement to consider more than one person for an appointment to be made on the basis of merit. In *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 6, the Public Service Staffing Tribunal (“the Tribunal”) addressed access to appointment opportunities and indicated that the *PSEA* does not guarantee access to every appointment and that in fact, it permits limiting access in several ways. For this particular appointment, no other person, including the complainant, was considered for the indeterminate appointment.

[84] The respondent submitted that in June or July 2016, Ms. Flynn-McRae was not aware that the incumbent intended to leave the position at issue. She found out after he had accepted a position in November 2016.

[85] The respondent noted that the complainant argued that this non-advertised appointment also limited access for other people. It responded that in *Evans v. Deputy Minister of Indian Affairs and Northern Development*, 2007 PSST 4, and *Silke v. Deputy Minister of National Defence*, 2010 PSST 9, the Tribunal confirmed that a personal interest must exist for a person to make a complaint of abuse of authority.

[86] With respect to transparency, the respondent submitted that the employees reporting to the position at issue were advised that the appointee would occupy it on an acting basis and that he would be subsequently appointed on an indeterminate basis, as it was discussed several times in management meetings. Additionally, they were informed as it would result in them reporting to the appointee. Additionally, all employees were advised with the posting of the “Notification of Consideration” in early May 2017.

[87] The respondent submitted that as a result of delays finalizing the documentation for the non-advertised indeterminate appointment, it was decided that

it would be more efficient to backdate the appointment to April 1, 2017, rather than complete two separate staffing actions — an extension to the appointee acting in the position at issue beyond four months, and his indeterminate appointment, as there would have been identical documentation, and the appointee had already been assessed and had been found to meet the criteria.

[88] The respondent also pointed out that the fact that the complainant had to make a formal request to the Board for the information disclosure cannot in itself lead to the conclusion that the respondent acted in bad faith and therefore abused its authority. This is noted in *D’Almeida v. Royal Canadian Mounted Police*, 2020 FPSLRB 23 at para. 72.

[89] I find that the complainant did not establish that there was an abuse of authority in the choice to use a non-advertised appointment process in the circumstances presented in this case. Section 33 of the *PSEA* provides that “... the Commission may use an advertised or non-advertised appointment process.” The *PSEA* uses permissive language that does not establish a preference in the choice of process. In *Jarvo*, at para. 7, the Tribunal held as follows: “For a complaint under s. 77(1)(b) of the *PSEA* to be successful, the complainant must establish, on a balance of probabilities, that the **choice** to use a non-advertised process was an abuse of authority” [emphasis in the original].

[90] I am satisfied that Ms. Flynn-McRae’s evidence supported the decision to use a non-advertised appointment process. Her testimony reflected a reasoned decision that recognized the importance of continuing the many ongoing modernization projects, including the SAP-application-components migration project, at the time of the incumbent’s departure from the workplace. The email chain between the HR Advisor and the hiring manager summarizes their discussions for the non-advertised appointment. The assessment document for the appointee also includes similar information within the “Context/Background” section.

[91] The Summary Basis email noted that the appointee’s experience and knowledge were significant considerations in the choice to use a non-advertised appointment process. She wrote that the respondent had an immediate need for a SAP technical director with SAP experience and a strong background in and knowledge of infrastructure and project management, as well as experience dealing with SSC. She

indicated the need to continue the appointment on an acting basis via a non-advertised process to maintain stability and expertise in the position at issue. She specified that doing so was critical to ensuring the stability of the current SAP solution and to support the initiatives. Stability and strong leadership were needed to ensure that the organization would be able to deliver on its mandate and meet its deadlines for current and upcoming projects. The complainant presented no evidence, other than his disagreement with the rationale, to challenge it with respect to the choice of process.

[92] In addition, the Summary Basis email explained that one of the reasons for moving forward with a non-advertised process was that the appointee was identified as being part of a talent management program based on his outstanding performance evaluations over the last several years. The email also mentioned that the non-advertised appointment was the most appropriate and efficient staffing option, given the many business transformation projects the SAP organization was participating in, which were all government-wide or departmental priorities. Additionally, the appointee had also qualified in other CS-05 or equivalent processes for similar positions. As none of those other government departments' processes allowed for the respondent to appoint from their pools, the respondent proceeded with a non-advertised appointment.

[93] I note that the Summary Basis email identified that the appointee assumed the duties of the position at issue in November 2016. It appears from the evidence that this was an administrative error, as he began on December 1, 2016, on an acting basis.

[94] I further note that Ms. Flynn-McRae finalized the written Summary Basis for decision, which explained the reasons for choosing a non-advertised appointment process, only on June 6, 2017. Nonetheless, I am satisfied that before the NAPA was posted on June 2, 2017, she had given her authorization to the HR Advisor to proceed, since the document was almost finalized. And, as can be seen from the documentation, all she did on June 6, 2017, was add some context to the information already in the Summary Basis for decision.

[95] Ms. Flynn-McRae also explained why the respondent decided to backdate to April 1, 2017, the appointee's appointment to the indeterminate position. By late December 2016, she had already started to consider how the position at issue would be filled more permanently. Already in late December 2016, pursuant to discussions

with the HR division, she had determined that the most efficient staffing option would be to appoint the appointee on an indeterminate basis.

[96] The indeterminate appointment was discussed with the Chief Information Officer and the Management Committee. They approved it. The appointee's complete assessment against the essential qualifications was then finalized in March of 2017.

[97] Ms. Flynn-McRae explained that she had many priorities then, that time went by, and that only on June 2, 2017, was it possible that the appointee could be permanently appointed to the position at issue. She explained that at that time, one option was to extend the appointment on an acting basis by four months less a day, from April 1 to the end of July 2017. The other option was to backdate to April 1, 2017, the appointee's indeterminate appointment. The second option was chosen to avoid creating an additional HR action that was deemed unnecessary. I agree that important at that moment was that a NAPA be posted so that the individuals in the area of recourse who disagreed with the appointment would be provided with a right of recourse. That right was provided on June 2, 2017, when the NAPA was posted. The complainant used his right of recourse. Therefore, I am of the opinion that this way of proceeding was not chosen to take away a right of recourse from anyone concerned by the appointment but rather to simplify the appointment process.

[98] I understand that the complainant feels that others should have had access to the opportunity to act in or be appointed to the CS-05 position, and he expressed a concern that neither he nor they were considered before the appointment was made. The evidence demonstrates that Ms. Flynn-McRae did not consider the complainant or anyone other than the three potential candidates, who were also identified as part of the talent management program, to determine whether there would be any interest in occupying this position on an acting basis. In accordance with the provisions of s. 30(4) of the *PSEA*, she was not required to consider more than one person for the appointment to be made on the basis of merit. In addition, I note that the Tribunal uniformly held in several decisions that for a complaint to be made under s. 77 of the *PSEA*, the complainant himself or herself must claim that he or she was not appointed or proposed for appointment because of an abuse of authority. The Board has endorsed this legal requirement in many subsequent decisions.

[99] The preamble to the *PSEA* and the applicable policies and guide identify fairness, transparency, access, and representativeness as guiding values for managers who are delegated to make appointment decisions. As the Tribunal held in *Jarvo*, at para. 32, “Neither the *PSEA* nor *PSC’s Appointment Policy* guarantees an employee a right of access to every appointment opportunity.” By their nature, non-advertised appointment processes are not advertised to employees before the decision to appoint is made. Therefore, they do not present an opportunity for individuals to apply for them (see *Kitsos v. the President of the Canada Border Services Agency*, 2012 PSST 35 at para. 17).

[100] Lastly, the complainant argued that the respondent failed to act properly when it did not provide him with the documents he requested in a timely manner after he made his complaint. Indeed, it took a long time before he could rigorously review certain documents, such as the appointee’s assessment. These documents were either overly redacted or were not shared with him until some time had passed. It would have been preferable had the respondent shared the documents with the complainant more harmoniously. However, the fact that sharing the documents was at times difficult cannot by itself lead me to conclude that the respondent acted in bad faith and therefore that it abused its authority.

[101] In the circumstances, based on the evidence, I conclude that the complainant did not establish that the respondent abused its authority when it chose to proceed with a non-advertised appointment process after considering only one candidate.

**B. Issue 2: Was there abuse of authority in the application of merit?**

[102] The complaint was made under s. 77(1)(a) of the *PSEA*, which refers to s. 30(2). These provisions read as follows:

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

*(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2) ....*

...



**30 (2)** *An appointment is made on the basis of merit when*

*(a) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and*

*(b) the Commission has regard to*

*(i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,*

*(ii) any current or future operational requirements of the organization that may be identified by the deputy head, and*

*(iii) any current or future needs of the organization that may be identified by the deputy head.*

[103] The complainant submitted that there was an abuse of authority in the application of merit, as in the appointee's evaluation, the merit criteria or essential qualifications, were not applied fairly, equally, and transparently. In his view, the assessment was flawed.

[104] The essential qualifications used to assess the appointee's experience were the following:

*Experience:*

*EX1-Significant\* and recent\*\* experience in managing IT projects, or IT service delivery, or a combination of projects and service delivery.*

*EX2 - Significant\* and recent\*\* experience in briefing and providing advice to Senior Management (being defined as directors and director generals at EX-01 level equivalent or above):*

*EX3 - Significant\* and recent\*\* experience in managing human resources and financial resources.*

*Definitions:*

*\*Significant: Significant experience is defined as experience associated with having performed a broad range of related activities which could normally be acquired over a period of approximately (3) three years.*

*\*\*Recent: Recent experience is defined as the experience acquired within the last five (5) years.*

*\*\*\* Human Resources Management: Applicants must clearly demonstrate that they have managed human resources. Some examples of managing human resources may include but not limited to: assigning work, managing performance, developing resourcing plans, determining needs and approving training, etc.*

\*\*\*\* *Financial Management: Some examples of managing financial resources may include but not limited to: full or partial delegation for a budget, forecasting, planning, budget allocation, reporting, etc.*

[Sic throughout]

[105] The complainant brought paragraph 37 of *Patton v. Deputy Minister of National Defence*, 2011 PSST 8, to my attention. In that case, the respondent had failed to demonstrate that one qualification (numbered “K7”) had been assessed. The Tribunal found that the failure to assess it rendered it impossible to ascertain whether the appointment met the merit requirements of s. 30 of the *PSEA*. It noted, “Appointing someone who does not meet the essential merit criteria constitutes an abuse of authority.”

[106] The complainant stated that as in *Patton*, the respondent failed to demonstrate that the experience criterion numbered EX3 was assessed properly or at all. In his view, the failure to assess it or to properly assess it renders it impossible to ascertain whether the appointment met the merit requirements of s. 30 of the *PSEA*.

[107] According to the complainant, the appointee had not had the opportunity to manage finances for a period of 3 years and therefore could not demonstrate that he met the financial management essential qualification. He pointed out that the respondent first indicated that the appointee had never had financial management delegation and then corrected itself by indicating that the appointee had assumed the complainant’s financial delegation of authorities while the complainant was off work for about three months, for medical reasons. In any event, according to the complainant, the appointee did not have sufficient experience in this field to demonstrate that he met that qualification.

[108] Furthermore, in the complainant’s view, the appointee could not have 3 years of experience, acquired within the last 5 years, managing human resources. In his view, Ms. Flynn-McRae should not have counted that the appointee had accumulated, to start, 17 months of experience managing HR from June 2015 to November 2016. He insisted that the appointee had actually accumulated only 3.5 months of human resources management experience during that period. Thus, in his view, despite the fact that the appointee had occupied other positions in the last 5 years, the appointee did not have 3 years of experience in the field, acquired in the last 5 years.

[109] In addition, the complainant submitted that performing human resources and financial management functions — including the following examples — without a signed and dated document of the delegation of financial management authorities is in violation of the *Financial Administration Act* (R.S.C., 1985, c. F-11). He included the following examples:

- 1) approving any overtime expenditures;
- 2) approving work plans that commit to the expenditure of people's time and other budget resources;
- 3) approving the planned expenditure of consulting resources;
- 4) approving invoices from consulting resources;
- 5) approving other expenses, such as the renewal of software or hardware maintenance contracts, intra-area memoranda of understanding, etc.;
- 6) any other HR planning that commits to the expenditure of the resources of the Government of Canada; and
- 7) any other material usage planning that commits to the expenditure of the resources of the Government of Canada.

[110] He added that the essential qualifications were reduced for this non-advertised process, compared to the criteria used to staff the position at issue in the past, which also demonstrates an abuse of authority in the application of merit. For example, he submitted that the criteria used for the position in the past had required seven years of financial management experience.

[111] The complainant then brought to my attention paragraph 82 of *Hunter v. Deputy Minister of Industry*, 2019 FPSLREB 83, which reads as follows: "Do the errors and omissions add up to evidence of carelessness and recklessness amounting to bad faith such that I should find that there was abuse of authority in this case?" According to him, the respondent's course of action amounted to bad faith, which is a form of abuse of authority (see paragraph 95). In support of his point, he brought to my attention paragraphs 90 and 91, which read as follows:

*[90] Furthermore, the errors in this case amount to more than a mere failure to complete the steps required for transparency. In this case, the hiring manager and the HR representatives did not take responsibility for ensuring the quality of documentation. This included the lack of written rationale at the decision stage, the initial refusal to provide one to a potential candidate, the subsequent position that none was required, the use of one that did not make sense given the situation, the fact that the rationale was not signed and dated, and the fact that key documentation was not kept, such as the email to the sector.*

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

*[Sic throughout]*

[112] For its part, the respondent denied that based on previous staffing processes that were run to fill the position at issue, the merit criteria were reduced to favour the appointee. It submitted that the qualifications were established objectively and that they were based on the work description and the nature of the work to be performed. In essence, Ms. Flynn-McRae reviewed the generic CIOB CS-05 SMC that was used to fill several CS-05 positions within the CIOB since 2015 and then removed two essential criteria that referenced work no longer performed. As a result, the 2017 SMC was modified to accurately reflect the current needs of the position that had evolved over time and not to favour the appointee.

[113] The respondent submitted that the appointee was assessed against all the merit criteria of the position at issue and that the hiring manager found him qualified. A narrative assessment, the Assessment against the SMC, was completed demonstrating with concrete examples how the appointee met all the merit criteria.

[114] In response to the complainant's belief that the appointee did not meet the experience criterion of managing HR because he never had staffing subdelegation authority, the respondent submitted that a person does not necessarily need staffing subdelegation to have experience managing HR. Plus, the SMC did not state that subdelegation was required but instead stated the following:

...

*\*\*\*Human Resources Management: Applicants must clearly demonstrate that they have managed human resources. Some examples of managing human resources may include but not [sic] limited to: assigning work, managing performance, developing resourcing plans, determining needs and approving training, etc....*

...

[Emphasis in the original]

[115] The respondent emphasised that Ms. Flynn-McRae assessed the criteria of significant and recent experience managing HR and that she found that the appointee met this qualification. She explained how she counted his months of experience in this field.

[116] In response to the complainant's belief that the appointee did not meet the experience criterion of managing financial resources, the respondent submitted that the appointee had full financial authorities while he replaced the complainant when he was on leave. The finance group confirmed that the appointee was provided financial delegation for that period. The respondent added that to meet the experience criterion of managing financial resources and as explained in the definition in the SMC, an individual could have had full or partial budget delegation. The definition included other things, such as forecasting, planning, budget allocation, reporting, etc. In the appointee's case, he had managed a budget, and in that capacity, he had forecasted, planned, reported, and carried out a budget allocation, therefore meeting the definition. But he did not have financial delegation most of the time.

[117] The respondent confirmed that the hiring manager completed the appointee's assessment in March of 2017. Ms. Flynn-McRae used his résumé, performance appraisals, and career achievements and her personal knowledge of him based on having supervised him. He reported directly to her, so she knew the quality of his work.

[118] The respondent also pointed out that in *Hunter*, several errors were made in the conduct of the process. But that was not so in this case. In essence, at all stages of the process, decisions were documented, and necessary notices were posted.

[119] The Board's role is not to reassess a candidate's qualifications but instead to determine whether there was an abuse of authority in the appointment process, such as in the assessment made by the assessment board.

[120] I note that s. 30(2) of the *PSEA* assigns the authority to establish qualifications to the PSC or the deputy head, as the case may be. Ms. Flynn-McRae, as the hiring manager, testified that with the assistance of the HR division, she reviewed the CS-05

SMC that had been used to fill several CS-05 positions within the CIOB since 2015, and she updated the SMC to accurately reflect the current needs of the position at issue, which had evolved over time. Her explanations were not challenged.

[121] I find that taken as a whole, the evidence does not lead to a finding that the respondent erred in establishing the qualifications. Ms. Flynn-McRae set the experience qualifications to accurately reflect the current needs of the position at issue. Nothing in the evidence shows that it was anything but the reasonable exercise of the authority under s. 30(2) to establish the qualifications for a position. As the Tribunal found in *Visca v. Deputy Minister of Justice*, 2007 PSST 24 at para. 42, the PSEA gives managers broad discretion to establish the necessary qualifications for a position to be staffed.

[122] In addition, Ms. Flynn-McRae explained how she assessed the appointee. She provided satisfactory answers to the issues that the complainant raised. She provided reasonable explanations as to why she concluded that the appointee met the essential qualifications.

[123] In particular, the complainant suggested that the appointee did not meet the experience criterion of managing HR because he never had staffing subdelegation authority. It was confirmed to the complainant that the appointee never had staffing delegation but it was explained that the definition of “experience in human resources management” found in the SMC included assigning work, managing performance, developing resourcing plans, determining needs and approving training, etc. It did not require staffing subdelegation.

[124] I note that as well, “Significant” was defined as follows in the SMC: “Significant experience is defined as experience associated with having performed a broad range of related activities which could normally be acquired over a period of **approximately** (3) three years” [emphasis added]. Ms. Flynn-McRae was satisfied that the appointee met the criterion of significant and recent experience managing HR because she counted at least 35.5 months of valid experience under this criterion, excluding the experience he accumulated in the next position she described in the justification. As she did, I conclude that the appointee met the criterion as he had approximately 3 years of experience for this qualification.

[125] Similarly, it was explained that the definition in the SMC relating to the merit criteria of experience in financial resources included, but was not limited to, full or

partial delegation for a budget, forecasting, planning, budget allocation, reporting, etc. In the appointee's case, he had managed a budget, and in that capacity, he forecasted, planned, and reported and carried out budget allocation, therefore meeting the merit criteria.

[126] In the circumstances, based on the evidence, I conclude that the complainant did not establish that the respondent abused its authority in the application of merit.

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

*(The Order appears on the next page)*

**V. Order**

[128] The complaint is dismissed.

December 21, 2020.

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