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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

AMINAH APPLEBY

Complainant

and

DEPUTY HEAD OF THE ROYAL CANADIAN MOUNTED POLICE

Respondent

and

OTHER PARTIES

Indexed as

Appleby v. Deputy Head of the Royal Canadian Mounted Police

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

Before: Joanne B. Archibald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Julie Jobin and Dominique Vidmar, Canadian Association of Professional Employees

For the Respondent: Laetitia Auguste, counsel

For the Public Service Commission: Louise Bard

Heard via videoconference,
September 27 and 28, 2021.

REASONS FOR DECISION

I. Introduction

[1] The complainant, Aminah Appleby, made a complaint under ss. 77(1)(a) and (b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “PSEA”) alleging abuse of authority by the respondent, the deputy head of the Royal Canadian Mounted Police (“RCMP”). According to the complainant, abuse of authority occurred in the application of merit and in the choice of a non-advertised process to staff the regional manager, north west claims, litigation and advisory services (“CLAS”) position, classified at the EC-05-SPESS-05 group and level (“the regional manager position”) and located in Edmonton, Alberta.

[2] The respondent denied abusing its authority in the appointment process.

[3] The Public Service Commission did not attend the hearing and provided written submissions addressing the applicable policies and guidelines. It did not take a position on the merits of the complaint.

[4] For the following reasons, the complaint is dismissed.

II. Background

[5] On July 11, 2019, a notification of appointment or proposal of appointment (“NAPA”) was issued for the appointment of Sarah Shields (“the appointee”) to the regional manager position.

[6] The complainant made the complaint of abuse of authority under s. 77 of the *PSEA* on July 27, 2019.

III. Summary of the evidence

[7] The complainant testified that she is a senior analyst in CLAS, as was the appointee.

[8] The complainant explained that the former regional manager was temporarily deployed from the position with the expectation that the deployment would become permanent. She understood that to cover the absence of the regional manager, each senior analyst would receive a four-month appointment to act in the position. An

advertised appointment process for the indeterminate regional manager position would follow when the deployment became permanent.

[9] According to the complainant, the appointee received the first appointment to act in the regional manager position. After four months, the appointment was extended to one year. On July 11, 2019, the NAPA was posted for the non-advertised indeterminate appointment of the appointee to the regional manager position, which led to this complaint.

[10] The complainant pointed to an email exchange on February 5, 2019, with Heidi Wild, then Superintendent, Employee and Management Relations, “K” Division, and now retired. In the exchange, the complainant wrote to Ms. Wild to state that she was interested in the opportunity to act when the appointee’s appointment ended in March 2019. She received a response from Ms. Wild to confirm that this was the plan.

[11] Nonetheless, the appointee was extended in the position, and the complainant did not receive the opportunity she expected. She accepted this decision when Ms. Wild told her that the appointment was extended for continuity within CLAS.

[12] Even so, the complainant testified that she continued to believe that she would have an opportunity to apply for the indeterminate appointment to the regional manager position. In her opinion, all the senior analysts were experienced and capable of performing the duties of the position.

[13] However, after the NAPA was posted and the complainant saw the rationale for the non-advertised appointment, she became aware that a narrative assessment had been completed for each of the senior analysts before the earlier extension of the appointee’s appointment to act. Ms. Wild prepared the assessments and concluded that among the senior analysts, only the appointee was qualified for the regional manager position.

[14] The complainant challenged the assessment of her qualifications. The narrative assessment stated that she had been resistant to taking on new advisory files, particularly while the appointee was in the regional manager position. She stated that no one, including Supt. Wild, had spoken to her or coached her about resistance.

[15] With respect to the ability to communicate effectively in writing, the complainant noted the comment that the briefing notes she wrote always had to be

rewritten by a manager. Furthermore, it was noted that she was sent to a writing course because her writing skill was lacking.

[16] The complainant argued that this was a misrepresentation of facts as it was always a manager's prerogative to add to or amend a briefing note. Moreover, past performance appraisals had noted that her files were professional and detailed. As for the writing course, she had asked to take it, and this was the reason she was sent. She was not sent because a manager considered her writing to be deficient.

[17] Concerning the ability to effectively interact and communicate orally, the narrative assessment first referred to an incident that occurred when the appointee contacted the office to indicate that she would be absent, as her daughter was ill. The narrative assessment indicated that the complainant wanted only to know whether the appointee was working from home. She offered no assistance in light of the absence.

[18] The complainant agreed that she did not ask about the appointee's daughter and that she confined herself to asking whether the appointee had a laptop.

[19] The narrative assessment also referred to a specific litigation file. It stated that the complainant was argumentative and that a manager assumed conduct of the file when a superintendent refused to deal any longer with her. The performance appraisal of 2017 noted without greater explanation that managers took over the file at the last minute.

[20] Further, the performance appraisal referred to a miscommunication and an email that the complainant sent to express her concern. It concluded that she learned from the incident "how to temper passion before sending out messages."

[21] The complainant recalled the file and noted the reference to it in her performance appraisal. She testified that she was not argumentative and that no one refused to work with her.

[22] Next, the complainant challenged the assessment of a number of qualifications that, although they were used in the narrative assessment but do not appear on the statement of merit criteria ("SOMC") used for the indeterminate appointment to the regional manager position. These were: the ability to promote innovation and guide change; the ability to manage human resources; the ability to achieve results; adaptability and flexibility; and, partnership, network, and relationship building.

[23] As they are not relevant to the indeterminate appointment to the regional manager position, I have not repeated the complainant's evidence.

[24] In cross-examination, the complainant was directed to her 2018 performance appraisal, which acknowledged her strong principles but cautioned that the articulation of her position could lead the intended audience to misunderstand her or feel overwhelmed.

[25] The complainant stated that the appointee wrote the performance appraisal. The complainant did not agree with the appraisal, but she did not formally contest it.

[26] The 2018 performance appraisal also stated that the complainant was showing development in handling situations in which the direction she received did not align with her position.

[27] The complainant testified that nonetheless, she abided with the direction she was given.

[28] In conclusion, the complainant advised the Federal Public Sector Labour Relations and Employment Board ("the Board") that her complaint was not about the appointee but about how the process was conducted and about the respect, courtesy, and transparency she felt she was not afforded.

[29] Ms. Wild gave evidence. She testified that the regional manager reported directly to her at the time of the events in question. The work of CLAS involved insurance, legal claims, and risk management. Ms. Wild confirmed that when the former regional manager left the position, there were three senior analysts in the unit, including the complainant and the appointee. The original plan was to allow the senior analysts to rotate through three or four month appointments to act in the regional manager position.

[30] Ms. Wild acknowledged that this remained the plan when she received and responded to the complainant's email of February 5, 2019. Shortly after, she held a meeting with the chief superintendent. Together, they decided that it would be better to leave the appointee in the position and to extend the acting appointment. This decision provided continuity to CLAS; it also recognized the complexity of the files assigned to the regional manager and the training that would be required to reassign those files.

[31] Ms. Wild testified that when this decision was made, and at the suggestion of Human Resources, she assessed all three senior analysts to decide who among them to place in the regional manager role for a one year appointment. Using the job description, the SOMC, her personal knowledge, and information from the former regional manager and the appointee, Ms. Wild completed the narrative assessment and determined that the complainant did not meet all the requirements for the position. Ms. Wild did not use performance appraisals. She acknowledged that the narrative assessment differed from the performance appraisals and suggested that it could be hard to put negative details in performance appraisals.

[32] Reviewing the narrative assessment, Ms. Wild testified that the former regional manager advised her that the complainant's written briefing notes regularly had to be rewritten.

[33] Concerning oral communication, Ms. Wild relied firstly on her experience with the complainant when the appointee was absent due to her daughter's illness. Ms. Wild stated that the complainant was dismissive as she focused her concern on knowing when the appointee would return and whether she was working while she was away. The complainant did not ask whether she could help cover the work assignment. Ms. Wild considered this dismissive.

[34] Further, with respect to the specific litigation file named in the narrative assessment, Ms. Wild explained that the complainant had disagreed with the chief superintendent's decision about it. She voiced her opinion several times during a meeting with him.

[35] Later, the chief superintendent told Ms. Wild that he had had enough and that he no longer wanted to deal with the complainant on the matter. Ms. Wild explained that once a case has been presented and the chief superintendent has made a decision, the decision is final.

[36] As to the choice of appointment process, Ms. Wild testified that she made the decision to use a non-advertised one. She stated that the regional manager position is unique to the RCMP. It is high-risk; it deals with serious civil lawsuits and large payouts of taxpayer money. Ms. Wild was scheduled to retire shortly. In discussions with Human Resources and the chief superintendent, the decision was made to appoint a person who knew the job and how to discharge its functions. A search of previously

advertised EC-05 positions was conducted, and no individual with the qualifications to assume the position was identified.

[37] The decision to proceed with a non-advertised appointment process was made in May 2019. The narrative assessments of the senior analysts had been completed by March 2019. Given the short period of elapsed time, a reassessment of all three senior analysts was not considered necessary.

[38] Ms. Wild only completed a further narrative assessment of the appointee, on May 16, 2019, as part of the non-advertised appointment process. Ms. Wild testified that she based it on her experience working with the appointee and conversations with the former regional manager and the chief superintendent. The assessment showed that the appointee met all the merit criteria for the position.

IV. Analysis

[39] Section 77 of the *PSEA* provides that a person in the area of recourse for a non-advertised appointment process may complain to the Board that he or she was not appointed because of an abuse of authority.

[40] The complainant's allegations include (1) abuse of authority in the choice of a non-advertised appointment process and (2) abuse of authority in the application of merit. 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."

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

A. The issues

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

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

[43] The *PSEA* assigns no priority between a non-advertised and an advertised appointment process, and there is considerable discretion in making the choice. (See *Clout v. Deputy Minister of Public Safety and Emergency Preparedness*, 2008 PSST 22.)

[44] I accept Ms. Wild's explanation of the reasons that led her to make a non-advertised appointment. The position was unique, she was soon to retire, and no other qualified person had been identified. These were all relevant considerations in the choice to proceed with a non-advertised appointment process.

[45] The decision contrasted with the complainant's expectation that an advertised appointment process would be forthcoming. While she must have been disappointed, the case law is clear: there is no guaranteed "right of access to every appointment opportunity." (See *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 6 at para. 32; "*Jarvo*.")

[46] The complainant expressed her concern that the process was not transparent or fair. The answer to her concern is that transparency was afforded when the NAPA was issued. It notified employees of the details of the appointment and the right of recourse. (See *Vaudrin v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 19.) It also afforded the complainant the opportunity to participate in an exchange of information relative to the appointment.

[47] Moreover, the mere choice to use a non-advertised appointment process is not an abuse of authority. (See *Jarvo*.) For a complaint against the choice of appointment process to succeed, the evidence must establish on the balance of probabilities that the choice constituted an abuse of authority. (See *Robbins v. Canada (Human Resources and Social Development)*, 2006 PSST 17).

[48] After reviewing the evidence before me, I find on the balance of probabilities that the evidence does not demonstrate an abuse of authority in the choice of a non-advertised appointment process to staff the regional manager position. In the circumstances of this appointment, it was a reasoned choice based on relevant considerations.

2. Was there abuse of authority in the application of merit?

[49] The Board's role is to determine whether there has been an abuse of authority. The Board and the former Public Service Staffing Tribunal ("the Tribunal") have confirmed that this is their role; the role is not to reassess candidates or redo the appointment process. (See, for example, *Broughton v. Deputy Minister of Public Works*

and *Government Services*, 2007 PSST 20, and *Clark v. Deputy Minister of National Defence*, 2019 FPSLRB 8).

[50] The complainant's principal concern is the narrative assessment of February 28, 2019, which found her not qualified to act in the position. The narrative assessment was then relied on to eliminate her from consideration when the appointee was identified for the indeterminate appointment.

[51] As noted above, every qualification assessed in the narrative assessment was not later shown on the SOMC or assessed for the regional manager position. However, there was significant overlap, particularly with respect to communication, reflected in the narrative assessment and on the SOMC as the ability to communicate effectively in writing and the ability to effectively interact and communicate orally. In the narrative assessment, the complainant did not meet the requirements of either of these qualifications.

[52] The complainant alleged that personal favouritism, bad faith, fettered discretion, improper conduct, and bias tainted the application of merit.

[53] The Tribunal considered personal favouritism in *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7. It noted that personal favouritism is proscribed and constitutes an abuse of authority. (See paragraph 39.) To clarify, the Tribunal added, at paragraph 41:

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

[54] No evidence of personal favouritism was forthcoming in the evidence. For example, there was no direct or indirect suggestion of an undue personal interest, friendship that influenced the selection of the appointee, or any other improper benefit that emanated from the appointment.

[55] The Tribunal addressed bad faith in *Cameron v. Deputy Head of Service Canada*, 2008 PSST 16. Bad faith comprises exceptional acts that defy reasonable explanation.

Examining the evidence presented in this case, I do not find that it demonstrated bad faith to any degree.

[56] As to the allegation of fettered discretion or improper conduct, I was referred to the Tribunal's decision in *Hailu v. Deputy Minister of Health Canada*, 2013 PSST 27. *Hailu* involved the rigid application of a rule that prevented a fair assessment of an employee. No comparable circumstance has been demonstrated in the evidence before me, and the facts of *Hailu* have no application to this case.

[57] As to the allegation of bias, the Board and the Tribunal have long relied on the test for a reasonable apprehension of bias as set out in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394:

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

[58] I find that the Board was not presented with evidence of a reasonable apprehension of bias. No reason was given for Ms. Wild to be biased. Furthermore, nowhere in the evidence is there a suggestion of actions, errors, or omissions that a reasonable person, viewing the matter realistically and practically, would conclude exhibit bias, whether in favour of the appointee or against the complainant.

[59] The performance appraisals and the narrative assessment all disclose aspects of the complainant's performance that required attention. She disagreed with the conclusions, but generally, her evidence consisted of a difference of opinion, without evidence to support her view.

[60] A difference of opinion is not evidence of bias. It is possible that the former regional manager could have provided evidence to support the complainant's position concerning the writing course and her demonstrated ability in the workplace. However, she was not called as a witness. As for oral communication, Ms. Wild described events that led her to conclude that the complainant did not meet the requirement. No contradictory evidence was presented.

[61] As such, it has not been demonstrated that an informed person, viewing the matter realistically and practically would conclude that bias influenced the regional manager appointment process.

[62] I will express some concern with the mention in the narrative assessment of the complainant's leave without pay. It was approved before it was taken, according to her evidence, and it is difficult to understand why it would be mentioned or why a negative inference would be drawn from it. However, this alone is insufficient to ground a finding of a reasonable apprehension of bias.

[63] To summarize, Ms. Wild gathered information and applied it, together with her personal knowledge, to prepare the narrative assessment. It was not contradicted or undermined by evidence.

[64] Based on the evidence before me, I conclude that the complainant did not establish on the balance of probabilities that the respondent abused its authority in the application of merit.

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

(The Order appears on the next page)

V. Order

[66] The complaint is dismissed.

December 20, 2021.

**Joanne B. Archibald,
a panel of the Federal Public Sector
Labour Relations and Employment Board**