

Date: 20220421

File: EMP-2018-11679

Citation: 2022 FPSLREB 31

*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

JACQUES LAPORTE

Complainant

and

DEPUTY HEAD (SHARED SERVICES CANADA)

Respondent

Indexed as

Laporte v. Deputy Head (Shared Services Canada)

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

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Marc Séguin, counsel

For the Public Service Commission: Louise Bard, by written submissions

Heard via videoconference,
February 24, 2022.

REASONS FOR DECISION

I. Application before the Board

[1] The complainant, Jacques Laporte, made a complaint pursuant to s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “the *PSEA*”) with respect to three appointments by internal advertised process (number 17-GSS-QC-IA-SMDC-194102) to the position of director, at the CS-05 group and level within Shared Services Canada (“SSC”). The complainant met the experience qualifications and was screened in but failed the written exam. His candidacy was eliminated from consideration.

[2] The complainant said that the deputy head abused its authority in the application of merit. He said that his requested informal discussion was significantly delayed and therefore could not be used to correct any errors in the process in a timely way. He said that the respondent used a flawed, broadly worded rating guide that allowed for a high degree of subjectivity in the assessments. And he challenged the legitimacy of his second assessment, which was only verbal, with no written record. He alleged that the combination of these issues amounted to bias in the selection process, which is an abuse of authority.

[3] The respondent said that the complainant simply failed to reach the required passing score for the essential criteria that the exam was intended to evaluate. The delay scheduling his informal feedback was not deliberate but simply a human error that did not impact his candidacy. The rating guide was not flawed. There was no evidence of bias. This is simply a case of a perceived injustice and a disagreement with the respondent’s assessment of his exam. There was no abuse of authority.

[4] I find that the deputy head did not abuse its authority with respect to the complainant’s candidacy. Accordingly, I dismiss the complaint.

II. Summary of the evidence

A. The delay providing feedback

[5] The complainant provided detailed oral and documentary evidence relating to the delay receiving his informal discussion. He was advised that he had failed the written exam on October 20, 2017. On the same day, he asked for an informal discussion, and he sent a second request on October 23, 2017. He received an

acknowledgement from Marie-Claude Jacques, Human Resources Advisor, the same day and was told that his request was being sent to the evaluating manager.

[6] On November 15, 2017, having heard nothing, the complainant asked again and received a response on November 16, 2017, from Anise Gallant, Human Resources Assistant, apologizing for the delay and advising that he would be contacted. However, he heard nothing further.

[7] On December 11, 2017, Theresa Osterhout, Senior Director, Project Management Directorate, who had assessed the complainant's exam, advised Human Resources ("HR") that her informal discussions had all been completed. On December 18, 2017, HR followed up on all informal discussion requests that had not yet been completed. Seventy-eight of the 107 candidates who failed the exam had asked for informal discussions.

[8] However, this follow-up did not catch the complainant's outstanding request as HR had listed his request as having been completed, based on Ms. Osterhout's report. HR was unaware that his request had never been sent to Ms. Osterhout because a filter had mistakenly been put on the spreadsheet of candidates such that only requests for informal discussions from SSC employees were sent to her. As the complainant was from the Royal Canadian Mounted Police (RCMP), his request had been filtered out.

[9] On February 8, 2018, the complainant saw the notice of appointment on the "GC Jobs" website and sent an email expressing his frustration with the delay in his informal discussion. Only then did HR realize that his request had never been addressed. Ms. Jacques then informed Ms. Osterhout of the situation.

[10] Ms. Osterhout contacted the complainant the same day. They had a discussion, but he was not satisfied with it as, in his view, it lacked depth and detail. Her recollection of the February 8, 2017, discussion was that he was very frustrated with the SSC and with how his informal discussion had been delayed. There was a good deal more discussion about that than about the content of his exam. The complainant recalled it differently and said that they did discuss Ms. Osterhout's assessment of his exam; however, he acknowledged that he had been very upset about the delay. On February 9, 2017, he requested feedback in writing, which Ms. Osterhout provided on February 12, 2017.

[11] On February 12, 2017, the complainant made his complaint. An exchange-of-information meeting took place on February 21, 2017, at which Ms. Osterhout again provided feedback to him about his exam and about how it was assessed.

[12] In the complainant's view, something was not right about the process. He did not allege that putting the filter on the spreadsheet was anything other than an inadvertent error. However, he believes that when a candidate asks three times for an informal discussion, and no one looks into why it has not been scheduled, the respondent cannot simply continue to rely on the original spreadsheet error as an explanation. This seemed to him like a cover-up of the original mistake. And although the respondent apologized several times, he felt that the apology was worthless if he could not hold the respondent to it. As much as he asked for it, the procedure, in his view, lacked transparency.

[13] The complainant said that he had been certified as a subdelegate for staffing processes at the RCMP and that in his understanding, the informal discussion is an important part of the process as it can provide an opportunity for an assessment board to correct any errors in a timely way, while it can still make a difference.

[14] The complainant also submitted that although he received Ms. Osterhout's feedback in writing when requested, it was almost a cut and paste of the criteria for the position. It was not sufficiently specific and did not explain what were considered to be the specific errors in his exam. In his view, he could not obtain proper details as to why he failed the exam. He submitted that when a decision is important to an individual, the duty of procedural fairness includes providing detailed reasons (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 57).

[15] The complainant acknowledged that not receiving informal feedback in a timely way did not, in itself, amount to an abuse of authority. However, he believes that in combination with the other issues, it became elevated to that degree.

B. The rating guide

[16] The complainant critiqued the rating guide, which sets out the essential criteria being assessed, the question posed to the candidates to assess the criteria, and the expected answers. He highlighted the following footnote to the expected answers:

“*Other answers deemed acceptable by board members are to be considered in assessing the candidate.” He questioned the meaning of this sentence as he felt that it was entirely open-ended, such that a candidate could talk about virtually anything and it could be acceptable.

[17] The complainant submitted that to add fuel to this fire, there was not one assessor but many, as there were over 200 candidates. The respondent must ensure that multiple assessors interpret the assessment tool the same way, which was impossible, given the open language. In his view, it was a serious flaw in the rating guide that led to subjective assessments and, therefore, bias. He felt that no two assessors using this guide would reach the same results.

[18] On cross-examination, Ms. Osterhout was asked whether she agreed that this footnote was so broad as to invite vague and subjective assessments. She explained that it was meant to allow other topics and to make it clear that as long as candidates identified an issue and proposed a strategy, they were not tied down to only the acceptable answers that had been outlined. Right from the development of the poster, through developing the exam and interview questions, the assessors had been very careful about the type of questions and the acceptable answers as they knew that a number of candidates did not come from the SSC and would not have been familiar with its internal details. This footnote allowed those candidates to answer the scenario in a number of different ways, as long as they could meet the key elements required.

[19] The complainant also challenged the point system used for scoring the criterion “Ability to effectively communicate in writing”, which reads as follows:

5 pts: Excellent: No grammar, spelling or punctuation errors; Text is very well structured, very well organized and logical. Clearly and concisely defines messages, important points and issues. Defines complex issues clearly. Distinguishes between essential and non-essential information.

4 pts: Good: One or two grammar, spelling or punctuation errors; Text is very well structured, very well organized and logical. Defines important points and issues very well, almost as clearly and concisely as possible. Defines complex issues with minimal gaps. Few to no issues in distinguishing between essential and non-essential information.

3 pts: Fair: Few grammar, spelling or punctuation errors; Text is well structured, well organized and logical. Defines messages, important points and issues well, but not as clearly and concisely

as possible. Defines complex issues, but with some gaps. A few issues in distinguishing between essential and non-essential information.

2 pts: Poor: A number of grammar, spelling or punctuation errors; Text is sufficiently structured, organized and logical. Only adequately defines messages, important points and issues. Struggles to define complex issues. Struggles to distinguish between essential and non-essential information.

1 pts: Unsatisfactory: Many grammar, spelling or punctuation errors; Text is not sufficiently structured, organized or logical. Defines messages, important points and issues poorly. Unable to define complex issues. Unable to distinguish between essential and non-essential information.

[20] The complainant felt that there was no real distinction between descriptors such as “well structured” and “very well structured” or “well organized” and “very well organized”. He said that if something is done well, it is done well, and that one cannot do better than “good”.

[21] He also submitted that the 5-point “Excellent” designation was the only score that was not subjective because it was based on no errors at all. However, the designations of “Good”, “Fair”, “Poor”, and “Unsatisfactory” were unclear and open to subjective and, therefore, biased scoring. The descriptors for the number of grammar, spelling, or punctuation errors were not precisely quantified but rather used words such as “One or two”, “Few”, “A number of”, or “Many”. As his exam had 4 such errors, it could be scored as Good, Fair, Poor, or Unsatisfactory, depending entirely on the assessor. He suggested that different assessors pick up different things and that not all assessors would note small errors, such as a space before a period or missing capitalization. Nor were they the kinds of errors that Microsoft Word’s spellcheck would have caught.

[22] To the complainant’s point that there was no record to show any questions that might have been raised or feedback that might have been given about the rating guide’s clarity when it was being developed, Ms. Osterhout responded that she could say only that it was very similar to other rating guides she had used, both with respect to its construction and its level of detail. She also noted that the 1-to-5 (unsatisfactory to excellent) point system used to score the ability to effectively communicate in writing is a standard system.

C. Developing the materials and preparing for assessment

[23] Ms. Osterhout testified about her significant involvement with staffing processes over her career, which included everything from student and term positions to acting assignments and indeterminate positions at all levels of the CS and EX-01 classifications. She had been involved in many collective staffing processes like this one, in which the objective was to establish a pool of qualified candidates that could be drawn upon to fill positions with similar roles and responsibilities.

[24] She said that the number of assessors involved in a staffing process depends on the size and scale of the process. At minimum, there are usually 3, but more are required for large initial screenings or multiple exam streams. A process with more than 50 candidates typically requires more assessors. As much of the work is done in addition to regular day-to-day jobs, it is often necessary to bring in extra assessors, to distribute the work. In this case, 12 to 18 assessors were involved. They held EX-02 and EX-03 positions or were HR representatives.

[25] Ms. Osterhout's involvement included reviewing the rating guide and materials and participating in the screening and the formulation of expected responses for the written exam and interview. She explained that to ensure that multiple assessors are on the same page in a selection process, they usually meet several times, to discuss and plan how the assessments will be done. The goal is to ensure a common understanding of what will be required. The next stage involves walk-throughs of screening sample applications and assessing sample exams. Everyone provides input, and there is much discussion and questioning as to what will and will not be acceptable.

[26] This process followed the typical procedure. After the initial meetings, the assessors participated in walk-throughs of sample exams, looking at the criteria that they would evaluate. They considered and discussed in detail the quality of the answers, so that they would be on the same page as much as possible during their assessments.

[27] The process does not require second assessments in every case; if an exam clearly failed, there was no need for a second review. However, if an assessor rated an exam that was questionable, for example, one that was close to a pass, the assessor would ask a second assessor to review it. A second assessment could also be requested

for other reasons. For example, Ms. Osterhout asked for a review of an exam completed in French to ensure that she had not missed any linguistic nuance, as French is not her first language.

[28] In Ms. Osterhout's view, all the assessors evaluated the exams in very much the same way, due to the preparation, the discussions, the walk-throughs, and the process of obtaining a second opinion if an assessor was not completely comfortable with the result for any reason.

D. Assessing the complainant's exam

[29] It was a take-home exam. The candidates had 24 hours to answer a scenario question that involved writing a briefing note to an assistant deputy minister (ADM). The criteria to be assessed were scored on scales of 1 to 5, with 3 being a pass. These were the criteria:

K1 - Knowledge of Government of Canada priorities, policies and initiatives in the fields of IM/IT and the role of SSC, other Departments and central agencies.

Leadership Competencies:

- *Create Vision and Strategy*
- *Collaborate with partners and stakeholders*

A1 - Ability to communicate effectively in writing.

1. K1- Knowledge of Government of Canada priorities, policies, and initiatives in the fields of IM/IT and the roles of SSC, other departments, and central agencies

[30] To assess this criterion, the assessors had to understand where the candidate was positioning the issue and what it meant to the ADM. A director has to identify the context for senior management; for example, how it aligns with the Speech from the Throne, the priorities of the clerk of the Privy Council, mandate letters to presidents and deputy ministers, and, at that time, the priorities set out in Blueprint 2020. Although the issue may be day-to-day for the director, it has to be situated into the big picture for the ADM.

[31] Ms. Osterhout elaborated on her scoring and assessment comments and explained how the scoring was aligned to the rating guide. She said that the complainant's briefing note was written at a very high level that did not provide enough clarity to identify the issues, risks, and options. Nor was there any sense of

timing, costs, or impacts of any of the recommendations put forward. There were many bullets, each lacking depth, and it seemed to her more akin to something from a PowerPoint presentation, in which a speaker would elaborate on each bullet. A briefing note has no speaker to elaborate or clarify it and must contain enough information for the ADM to be able to act on the information immediately.

[32] Ms. Osterhout testified that she looked at it several times, to try and draw the links, but that she could not see where it aligned with the bigger picture for the ADM, for whom it was composed. Although it referred to Blueprint 2020, the bullet points with no connection and no detail were problematic. For example, the RCMP's unique mandate was referenced but there was no explanation as to how that created a problem for moving to a common email system, which was the context of the briefing note.

[33] She noted that the ADM is responsible for 43 organizations and would have a general knowledge of the mandates of each, but could not be expected to understand them all in the kind of detail required by the issue raised in the briefing note. On cross-examination, the complainant suggested to Ms. Osterhout that in his view, an ADM should be familiar with the clients' mandates and should not require an explanation of the RCMP's unique mandate. She explained that it is always best to err on the side of caution and to never make that assumption.

[34] The complainant's exam was scored 0-1 for the K1 essential knowledge criterion.

2. Key leadership competencies: create vision and strategy, and collaborate with partners and stakeholders

[35] The exam was also designed to assess these two leadership competencies, which entail understanding the SSC's goals and objectives and what it wants clients to move towards. The complainant's exam did not clearly show the problem, the options and solutions, or a clear path to reach them. Three options were identified but not the risks of choosing one or the other, how they aligned to the SSC's vision and strategy, or the impacts on all the partners and stakeholders that might be affected. A strategy should have been put forward considering high-level milestones, costs, and next steps — a phased approach indicating what would be done and who should be at the table.

[36] The complainant's score was 2 for the key leadership competency "Create Vision and Strategy", and Ms. Osterhout's summary comment was "Not clearly articulated". For the leadership competency "Collaborate with partners and stakeholders", his score was also 2, and the comment was "No clear references to collaboration".

3. Ability to communicate effectively in writing

[37] For this ability, the assessors looked for a very clear, well-thought-out document written appropriately for the ADM level and providing the kind of information that an ADM would need to be able to act, to call a meeting or provide a response. It required complete sentences with no (or very minimal) grammar, spelling, punctuation, or syntax errors while avoiding acronyms and technical jargon. It required an understanding that writing to senior management is different from writing to staff; there is a shift in the type of communication required. The language used must be clear, concise, and to the point, so that an ADM may quickly and clearly understand exactly what is going on with the issue at hand.

[38] Ms. Osterhout indicated that she struggled with the syntax and grammar of the complainant's exam. Writing destined for senior management must be perfect. Seeing mistakes while reading is a distraction and interferes with efficient comprehension. One loses the sense of what is written. She gave as examples several typos and a long and difficult-to-follow sentence in the complainant's exam. In her view, his briefing note would never have made it to an ADM; it would have been vetted and sent back for corrections. The complainant's score was 2 for the essential ability to communicate effectively in writing.

[39] Asked on cross-examination if she thought that all the assessors felt that small typos were important, Ms. Osterhout responded that all of them felt the same way and that that type of question had come up during one of the walk-throughs. The discussion had centred around the fact that this was specifically a writing exercise and that it was for an ADM. The assessors had all been subject to "the red pen", meaning when written material is screened and sent back for corrections before being given to an ADM. She said that it was ingrained in their minds that small typos are important; they are checked for again and again, and as a result, they jump out.

[40] The complainant suggested to Ms. Osterhout on cross-examination that an exam written under time constraints creates an opportunity for mistakes. She responded that in her view, a 24-hour period provided sufficient time for review and revision.

[41] Finally, the complainant asked Ms. Osterhout approximately how many briefing notes she had written in her career. She said that she had written, contributed to, and reviewed briefing notes throughout almost her whole career, save for the very junior positions. She had also led discussions with her teams as to what was expected in a briefing note. Asked to quantify how many she had written, she said well over 50, likely over 100. She said that she had worked 4 to 5 years for the Treasury Board on a high-profile initiative, with 130 organizations, constantly providing briefing notes and helping other departments prepare briefing notes for their senior management. Her work with briefing notes continued into her later career, and of all those she had written or worked on, about 75% went to the ADM or deputy minister level.

E. The verbal second assessment

[42] The complainant said that in his experience, if someone fails an exam it should go to a second assessor. There should never be only one assessor, because that can lead to bias. In his view, much as we try to avoid bias, it is human nature; therefore, it is important to have two assessors, to avoid any bias or perception of it.

[43] The complainant's exam was not sent for a second assessment. However, after learning that he had failed, he requested one. His exam was sent to Dany Bernier, Senior Director, Project Management Directorate, who reached the same conclusion as had Ms. Osterhout. The complainant alleged that Mr. Bernier had been given Ms. Osterhout's assessment scores and comments rather than just his exam and the rating guide. In his view, Mr. Bernier could not have avoided being influenced by them. The complainant said that a second assessor should never have the first assessor's marks and comments.

[44] Furthermore, when he asked to see Mr. Bernier's assessment, he was told that there was nothing in writing. In his view, looking at the whole of the *PSEA* and what he had learned in subdelegate training, an important objective of the public service selection process is to eliminate any perception of bias. If so, he questions how the respondent could not have anything in writing with respect to the second assessment.

[45] In cross-examination, the complainant asked Ms. Osterhout if Mr. Bernier had been provided with her assessment notes. She responded that Mr. Bernier had been provided a clean copy. The complainant did not indicate why he thought that Mr. Bernier might have had Ms. Osterhout's assessment notes, and there was no evidence presented to suggest that he did. The complainant did suggest by way of a question to Ms. Osterhout that had Mr. Bernier done his own assessment, he would have had his own notes, yet there were none. Ms. Osterhout responded that she had had a discussion with Mr. Bernier, who provided the verbal assessment that it was not an exam that passed, that there was not enough material or points made, and that he could not support passing it.

[46] In the complainant's view, this way of doing things ignored the important principle of transparency. If Mr. Bernier did not put anything in writing, then there was nothing to correlate to show why the two assessments had come out exactly the same, suggesting bias.

III. Summary of the submissions

A. For the complainant

[47] The complainant argued that the failure to provide detailed, timely feedback and the use of a flawed and subjective rating guide raised a reasonable apprehension of bias, which was an abuse of authority. He referred to *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10 at para. 64 and following with respect to the duty to act in an unbiased manner and without reasonable apprehension of bias in appointment processes.

[48] Section 47 of the *PSEA* provides for an informal discussion, which can offer an opportunity for the assessor to correct any issues or errors. This requires timely feedback, so that it can be acknowledged if things were not done right and a decision can be made to cancel and do it over (see *Lirette v. Deputy Minister of National Defence*, 2011 PSST 42 at para. 35).

[49] The risk of inconsistent scoring was high in this process because there were so many assessors and so many ways of interpreting such a broadly worded rating guide. An assessment tool must test what has to be assessed, and if the tool is flawed, the outcome cannot be considered reasonable or fair (see *Chiasson v. Deputy Minister of Canadian Heritage*, 2008 PSST 27 at para. 50).

[50] The complainant submitted that based on the jurisprudence, the *PSEA*, and his gleanings from his sub-delegation training, all candidates are entitled to be assessed uniformly; everyone should be treated the same way (see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8). If the process deviates from that principle by using a flawed assessment tool, the process is tainted with bias. As he put it, “if you have a flawed assessment, it’s not hard to deduct that this was biased.”

[51] The complainant further submitted that he did not have to show actual bias, as long as there was the perception of it. Also, there was simply no transparency in the process, which was highlighted by the second assessor’s failure to provide anything in writing.

B. For the respondent

[52] The respondent noted that the complainant bore the burden of proof in this matter (see *Tibbs*, at para. 55) and that he had not met it. The Board, its predecessors, and the courts have ruled many times on what constitutes abuse of authority (see *Tibbs*, at paras. 56 to 65, and *Lavigne v. Canada (Justice)*, 2009 FC 684). It is clear from the whole scheme of the *PSEA* that more than errors must be shown to substantiate such an allegation.

[53] The complainant alleged that the rating tool was flawed, which led to some form of bias. However, in cross-examination he confirmed that he had never met either Ms. Osterhout or Mr. Bernier and that he had no knowledge of them. He had no history with either assessor that could indicate bias.

[54] The test for bias that the Board normally uses is found in *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC). It is important to remember that test, as expressed as follows in *Gignac*, at para. 72:

72 ... It consists in [sic] determining whether a relatively informed bystander could reasonably perceive bias on the part of an adjudicator. It is not enough to suspect or assume bias; it must be real, likely or reasonably evident....

[55] Nothing in the evidence indicated that the assessment tool was flawed. Ms. Osterhout gave extensive evidence as to what she considered was lacking in the complainant’s exam response and how and why he had failed the knowledge and

ability criteria. Her testimony was comprehensive; she was able to precisely pinpoint the errors and make the links to the rating guide to support the scores given.

[56] An abuse of authority is more than just a perceived injustice (see *Portree v. Deputy Head of Service Canada*, 2006 PSST 14 at para. 50). This case is about a perceived injustice. See also *Portree*, at paras. 54 to 56, to the effect that a complainant's disagreement with an assessor's decision does not mean that it was an abuse of authority. In fact, it is not unusual for a complainant to disagree with such a decision (see *Johnston v. President of the Canada Border Services Agency*, 2014 PSST 1 at para. 87).

[57] The respondent acknowledged that the informal discussion was provided late, but in the end, the complainant received a phone call from Ms. Osterhout and her written feedback, as he requested. She also provided him with feedback at the exchange-of-information meeting. All in all, he had three feedback sessions.

[58] Perhaps some of the perceived injustice resulted from the delay. Ms. Osterhout testified that in their first discussion, the complainant was upset about the delay holding the informal discussion, which he addressed more than the contents of his exam. However, there was no evidence that the delay adversely affected his participation in the selection process. See *Gabon v. Deputy Minister of Environment Canada*, 2012 PSST 29 at para. 72, to the effect that a delay scheduling an informal discussion is not an abuse of authority.

[59] As the former Public Service Staffing Tribunal (PSST) pointed out in *Henry v. Deputy Head of Service Canada*, 2008 PSST 10 at paras. 61 and 62, and *Rozka v. Deputy Minister of Citizenship and Immigration Canada*, 2007 PSST 46 at paras. 74 to 76, informal discussions are not mandatory. They can provide an opportunity to correct errors in the process but are not meant to provide a reassessment opportunity. There was no evidence in this case of an error that needed correcting.

IV. Reasons for decision

A. The feedback was untimely, but it had no impact on the result

[60] Section 47 of the *PSEA* allows for the employer to provide a candidate who is eliminated from consideration for an appointment with an informal discussion about

their candidacy, upon request. It is not mandatory; rather, the respondent “may” provide one. Section 47 reads as follows:

***Informal discussion
with employee***

47 Where a person is informed by the Commission, at any stage of an internal appointment process, that the person has been eliminated from consideration for appointment, the Commission may, at that person’s request, informally discuss its decision with that person.

Discussions informelles

47 À toute étape du processus de nomination interne, la Commission peut, sur demande, discuter de façon informelle de sa décision avec les personnes qui sont informées que leur candidature n’a pas été retenue.

[61] In *Henry*, at paras. 61 and 62, the PSST noted as follows:

61 ... section 47 of the PSEA which deals with informal discussion is not prescriptive...

62 Although the Tribunal strongly encourages departments to conduct informal discussion [sic] with unsuccessful candidates, the PSEA does not make it a mandatory step in a complaint process.

[62] In *Gabon*, the PSST said this:

*72 An allegation that the informal discussion was not done in a timely fashion emerged during the hearing. The complainant testified that she wrote an email to the Board Chair on December 23, 2009 and followed up in June 2010. The Board Chair acknowledged that he had not opened the email in a timely fashion. However, he scheduled a meeting shortly after his oversight was brought to his attention. While it would have been preferable that the Board Chair respond to the meeting request in a more timely fashion, the delay in this case in providing informal discussion does not amount to an abuse of authority under s. 77(1)(a) of the PSEA. See, for example, *Agboton v. President of the Public Service Commission, 2010 PSST 0013*.*

[63] An informal discussion can be very useful. The candidate can learn why their candidacy was not successful which can be useful information when applying for future appointments. And as the complainant argued, it can also provide an opportunity to correct any errors in the process. For this purpose, of course, the timeliness of the discussion is important.

[64] I agree with the complainant that the spreadsheet error, albeit inadvertent, was not investigated and fixed in a timely way. Given that he raised the issue with the respondent, it should have been. There was no evidence to substantiate his suspicion that it was a cover-up of the original mistake. However, there was also no adequate explanation as to why his informal discussion was not scheduled for several months, even after he had raised the issue.

[65] Accordingly, although providing an informal discussion is not mandatory, had there been evidence of a specific error or issue that might have impacted his candidacy and that might have been corrected with a timely informal discussion, his abuse of authority argument about the delay might have had some merit.

[66] However, there was no such evidence. He pointed to no error or issue, such as, for example, missing information in his application or information that had not been considered and that might have been corrected. He argued that the assessment tool and process were flawed which resulted in errors in his exam assessment, as he sees it, but I find that there were none.

[67] In *Henry*, at para. 60, quoting *Rozka*, the PSST noted as follows:

60 While informal discussions are an opportunity for an assessment board to correct errors there is no requirement to reassess a candidate. The Tribunal addressed the issue of informal discussion in Rozka:

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

[Emphasis added]

[68] The untimeliness of the feedback that the complainant received was certainly not a model of best practices and it should not have happened. However, it was moot in this instance, as it had no impact on the outcome of the selection process for him. He simply had an understandable desire for an opportunity to express his disagreement with his exam assessment and to argue for a better one. Essentially, he

hoped to be reassessed, but the purpose of an informal discussion is not to reassess a candidate, particularly in the absence of any error.

[69] The delay in holding the informal discussion did not give rise to, or constitute evidence of, an abuse of authority.

B. No flaws in either the rating guide or the assessment process

[70] The complainant's submission that the rating guide was subjective and flawed because it allowed for the possibility of different kinds of exam responses had no merit. Ms. Osterhout explained that this flexibility was intended to avoid inadvertently eliminating non-SSC candidates. Since he was from outside the SSC, the complainant was the very kind of candidate who might have benefited from this approach.

[71] Of course, there is always the possibility of some variation in the assessments of different assessors. Assessors are human beings, with their own brains and their own ways of seeing the world. No system can guarantee that different assessors will score every aspect of an exam exactly the same way.

[72] However, the assessors' extensive collaboration in developing and reviewing the materials, discussing and debating the details of what would be required, the walk-through assessments of sample exams, and the option of requesting a second assessor when there was any doubt, undoubtedly went a long way towards reaching the goal of consistent assessment. Ms. Osterhout's evidence was detailed, credible, and persuasive. It demonstrated that the respondent did everything possible to ensure that all the assessors were on the same page, that they had a solid and common understanding of what was required, and that they were well equipped to assess the exams as consistently as possible.

[73] The complainant's objection to a standard, straightforward point system to score writing ability similarly had no merit. He submitted that there is no real distinction between writing that is well structured or writing that is very well structured. He said that if something is done well, it is done well; it cannot be done any better than that.

[74] There is simply no merit in that suggestion. There is an obvious difference between writing well and writing very well. There is an obvious difference between

good and excellent. In any event, the complainant was scored 2 out of 5 on writing ability, which is neither good nor excellent.

[75] The complainant also submitted that the rating guide was subjective because it lacked a specific quantification of the number of errors that would be acceptable for each score. His view was that because of this, his four grammar, spelling, and punctuation errors could have been scored as Unsatisfactory, Poor, Fair, or Good, depending entirely on the assessor. He seemed to think that Ms. Osterhout was just a hard marker with an eagle eye for tiny errors that another assessor might have forgiven or not even noticed. And in his view, such a flawed and subjective rating guide allowed for a wide range of opinions on the importance of grammar, spelling, and punctuation.

[76] Ms. Osterhout's testimony was clear that all the assessors were on the same page on this topic, that it had been specifically discussed, and that they were all familiar with "the red pen" - the vetting that occurs before briefing notes are delivered to ADMs. As she put it, the complainant's briefing note would not have made it to an ADM; it would have been sent back, to be corrected.

[77] It is unfortunate that despite the importance the complainant attributes to receiving feedback, he does not appear to receive it with an open mind so as to benefit from it in future selection processes. Ultimately, he received informative and useful feedback three times but appears to have accepted none of it and continues to suggest that spelling, grammar, and syntax errors in a briefing note to an ADM should not be considered so important.

C. No evidence of bias

[78] The PSST considered an allegation of abuse of authority based on bias in *Gignac*. It noted that the Supreme Court of Canada had ruled that the well-established duty to act fairly in matters affecting an individual's rights, privileges, and interests applies to administrative decisions, considering their statutory, institutional, and social contexts (see *Baker*, at para. 28). Staffing decisions in the public sector seriously impact people's career opportunities and earnings and therefore their lives and are clearly the types of administrative decisions that the Court referred to in *Baker*.

[79] As well, the legislative context for a staffing complaint specifically includes a duty of fairness in employment practices. The preamble to the *PSEA* identifies fair and transparent employment practices as key values characterizing staffing in the public service. The Public Service Commission (“PSC”) has developed policies and employment practices that deputy heads must follow, to ensure that assessments are fair and that appointment processes are impartial. The PSC’s *Guide to Implementing the Assessment Policy* sets out the importance of a process being fair and of it being perceived as such and states that assessment board members must minimize any appearance of bias.

[80] The test to determine whether there is a reasonable apprehension of bias in the context of staffing is set out in *Gignac* and is well-expressed in *Drozdowski v. Deputy Head (Department of Public Works and Government Services)*, 2016 PSLREB 33, at para. 26, as follows: If a reasonably informed bystander could reasonably perceive bias on the part of one or more of the persons responsible for assessment, the Board can conclude that abuse of authority exists.

[81] The complainant clarified that he was not alleging bias on the part of Ms. Osterhout, Mr. Bernier, or any other individual. Rather, he said, the whole chain of events, including the lack of timely and appropriate informal feedback, use of a flawed rating guide, and the lack of details and material to substantiate the results of his failed exam, especially the absence of a written second assessment, tainted the entire process.

[82] I find that there was no evidence of bias based on the chain of events, as alleged. The only flaw in the process was the delay in the informal discussion which does not, in these circumstances, substantiate an allegation of bias. There was no flaw in the rating guide or the assessment process that would suggest bias.

[83] Further, there is no merit to the complainant’s suggestion that there must always be a second assessment, although I agree with him that if there is one, it should be documented. Ms. Osterhout testified that the practice was to have written comments from a second assessor only if they disagreed with the first. In my view, best practices would dictate having a written record, but it is not a requirement and the absence of it does not, in and of itself, suggest bias.

[84] In the absence of any evidence to the contrary, I find that Mr. Bernier’s verbal report to Ms. Osterhout was simply an efficient way of reporting. And, given the

respondent's efforts to ensure consistency in assessments, it is not surprising that the second assessment would be similar to the first. If anything, it shows that the rating guide successfully produced two similar assessments of the same exam, the very result that the complainant argued would be impossible due to what was, in his opinion, the rating guide's vague and open-ended language.

[85] While having written documentation of the second assessment would have provided a better record of Mr. Bernier's findings, its absence does not imply bias or constitute a serious error that would amount to an abuse of authority (*Tibbs*, at para. 73).

V. Conclusion

[86] There was no lack of detail to substantiate the results of the complainant's failed exam, as alleged. Ms. Osterhout's written comments were quite informative as to why the complainant did not pass. Her testimony at the hearing was comprehensive and detailed, and it clearly substantiated why his exam was assessed as it was.

[87] The assessment tool was not flawed. It contained all the required elements, and the efficacy of its use was further bolstered by the multiple assessors' collaborative preparation, which was specifically aimed at producing a high degree of consistency in assessments.

[88] There was no evidence of bias due to flaws in the process. The only flaw in the process was the delayed feedback. This unfortunate error and the respondent's failure to fix it in a timely way should not have happened, but it did not impact the result of the complainant's candidacy. However, it clearly exacerbated his frustration with the process and perhaps caused him to perceive bias and injustice where there was none.

[89] I find that there was no abuse of authority on the part of the respondent.

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

(The Order appears on the next page)

VI. Order

[91] The complaint is dismissed.

April 21, 2022.

**Nancy Rosenberg,
a panel of the Federal Public Sector
Labour Relations and Employment Board**