

**Date:** 20220912

**File:** EMP-2018-11675

**Citation:** 2022 FPSLREB 77

*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

**MARIO GHAFARI**

Complainant

and

**DEPUTY HEAD  
(Statistics Canada)**

Respondent

and

**OTHER PARTIES**

Indexed as

*Ghafari v. Deputy Head (Statistics Canada)*

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

**Before:** Ian R. Mackenzie, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Complainant:** Himself

**For the Respondent:** Liliia Vorontsova, student-at-law

**For the Public Service Commission:** Alain Jutras, senior analyst

---

Heard at Ottawa, Ontario,  
February 16 and 17 and March 4 and 8, 2022.  
(Post-hearing written submissions filed March 10, 11, 15, and 28, 2022.)

---

**REASONS FOR DECISION**

---

**I. Application before the Board**

[1] The complainant, Mario Ghafari, made a complaint under s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “PSEA”), alleging abuse of authority by the respondent, the Chief Statistician of Canada, in an internal advertised appointment process for senior methodologist positions at Statistics Canada in 2017.

[2] The complainant argued that the director involved in the appointment process was biased against him. He also alleged that a performance evaluation used to assess him was inaccurate, leading to a disadvantage in the appointment process. He alleged that the director did not consult his supervisors. He also alleged that the assessment was inaccurate. The respondent denied abusing its authority in the appointment process.

[3] The Public Service Commission (PSC) did not attend the hearing but provided written submissions addressing the policies and guidelines that applied to the disputed appointment process. It did not take a position on the merits of the complaint.

[4] For the following reasons, the complaint is dismissed. The complainant did not demonstrate on a balance of probabilities that the respondent abused its authority in the appointment process.

**A. Procedural issues**

[5] The complainant provided a list of eight witnesses in addition to unnamed witnesses that he was intending to call. The deputy head objected to some of the witnesses, and I issued a ruling before the hearing on the witnesses that the complainant could call.

[6] A panel of the Federal Public Sector Labour Relations and Employment Board (“the Board”) has the power to control who can testify before it. The relevance of the testimony is the paramount consideration in determining if there is a need to call a witness to testify. In addition, the panel has the authority to limit repetitive testimony that will not help it determine a complaint.

[7] I did not allow the complainant to call human resources advisors for the respondent as witnesses. The complaint relates to allegations of abuse of authority by the decision maker. The complainant did not establish that evidence of advice that might or might not have been provided was relevant to a determination on the issue of abuse of authority.

[8] I limited the number of selection board members that the complainant could call. I determined that one witness was sufficient to testify about the selection board's role. I reserved on the relevance of this testimony and invited the parties to make submissions on relevance at the hearing.

[9] I also allowed the complainant to call a witness, Wesley Yung, to testify about similar appointment processes. I also reserved on the relevance of this testimony, since on its face, it was beyond the scope of the appointment process that is the subject of this complaint.

[10] At the commencement of the hearing, the complainant sought to introduce new and amended allegations. The respondent objected. I denied the complainant's request to file new allegations, as there was no new information that would justify accepting new allegations. I also determined that it was not in the interests of fairness to amend the allegations so late in the proceedings. To the extent that the proposed amended allegations clarified existing allegations, I told the complainant that he could restate his existing allegations in his submissions.

[11] During the hearing, the complainant sought to introduce evidence related to a subsequent MA-04 appointment process. I did not allow this evidence, as the complaint relates solely to the 2017 appointment process. After the conclusion of the hearing, the complainant asked that this ruling be reconsidered. Rulings on admissibility of evidence during a hearing are final. Reconsidering such rulings during a proceeding is appropriate only if there is new evidence that warrants such a reconsideration. In this case, there was no additional testimony during the hearing that would warrant revisiting this ruling on admissibility.

[12] After the conclusion of the hearing, the complainant sought to introduce additional evidence: the MA-04 job description, as well as a document that provided a scale for assessing competencies. The respondent objected to the introduction of this evidence.

[13] Both parties relied on the three-part test for accepting post-hearing testimony summarized in *Whyte v. Canadian National Railway*, 2010 CHRT 6 (affirmed in *Murray v. Canada (Attorney General)*, 2013 FC 49) as follows:

- 1) Could the evidence have been obtained with reasonable diligence before the hearing?
- 2) Does the evidence "... probably have an important influence on the result of the case ..."?
- 3) Is the evidence "apparently credible"?

[14] I denied the request to admit new evidence. I ruled that both documents that the complainant sought to introduce were readily available before the hearing. In addition, the testimony that prompted his request to admit additional documents was heard on March 4, 2022, and there was a subsequent hearing day for oral submissions on March 8, 2022. He did not raise his request until two days later, on March 10, 2022.

## **B. The allegations**

[15] The complainant made the following four allegations in his complaint:

- A performance-assessment evaluation that was used as a screening tool was not accurate, which disadvantaged him.
- The director who assessed his application was biased and therefore not able to provide a fair assessment.
- The director consulted with section chiefs rather than the immediate supervisor, as was stipulated in the selection process poster.
- The assessment of the core and functional competencies, part of the essential qualifications, was not accurate, and there were inconsistencies between the assessments of the director and a reassessment done during the informal discussion period.

## **II. Summary of the evidence**

[16] The complainant was a candidate in an MA-04 internal advertised appointment process launched in May of 2017 to staff senior methodologist positions at Statistics Canada. He had been working as a methodologist in the Social Surveys Methods Division at Statistics Canada since 2008.

[17] The identified assessment tools for the appointment process were as follows:

- Public Service Performance Agreement (PSPA) year-end results for 2015-2016 and 2016-2017;
- the completion of a "Track Record"; and
- a written exam.

[18] For the PSPA results, only those who had obtained an achievement level of “succeeded” or higher for both the core competencies and the work objectives were to be considered for the appointment process.

[19] The job poster contained the following question and answer related to the use of PSPAs:

...

*... Can performance agreements be used as an assessment tool in a selection process?*

*Yes. Hiring managers have always been able to use performance agreements for staffing purposes. The authority to select and apply relevant and valid assessment tools rests with individual departments.*

...

[20] At the time of the appointment process, the complainant’s PSPA from 2016-2017 was rated at “succeeded minus”, and therefore, he was screened out of the appointment process. He filed a grievance against this PSPA, and it was eventually amended to “succeeded”. He was then screened in, and his track record was validated by the director (David Dolson) in October 2017. The other candidates’ track records were evaluated in June and July of 2017.

[21] The PSPA was used as a screening tool and was not shared with the directors who validated the track record. Steve Matthews was the head of the selection committee. He testified that the selection committee reviewed the PSPAs of each candidate only to determine if each one had a rating of “succeeded” or higher. Mr. Dolson testified that he did not review the complainant’s PSPA when completing the track-record validation.

[22] The job poster identified the following essential qualifications: education, experience, and competencies. The complainant met the education qualification. He also met the following experience qualifications:

...

*EXP1: Recent experience\* with, and responsibility for, various aspects of survey methodology or research in related areas.*

...

---

*EXP2: Experience presenting methodological issues orally and in writing to peers or client groups or at conferences.*

...

[23] Candidates were required to meet all six required “core competencies” and “functional competencies”, as follows:

...

*CORE COMPETENCIES:*

*C1 - Demonstrating integrity and respect*

*C2 - Thinking things through*

*C3 - Working effectively with others*

*C4 - Showing initiative and being action-oriented*

*FUNCTIONAL COMPETENCIES:*

*C5 - Planning and organizing for results (Level 2)*

*C6 - Innovative Thinking (Level 2)*

...

[24] The track record was described in the job poster as follows:

...

*A track record is an assessment instrument that asks you to describe your work-related accomplishments in terms of observable behaviours exhibited on the job. The instrument consists of a structured template for you to record descriptions of situations where you demonstrated behaviours associated with each qualification.*

...

[25] Candidates were required to “clearly demonstrate” how they met each of the following essential qualifications, including the core and functional competencies. Candidates were asked to provide, for each qualification, “... one or more examples from your own experience that you feel demonstrates your proficiency in the evaluated qualification.” Candidates were required to provide sufficient details in the track record to demonstrate the following:

...

*1) that they possess the essential qualification (e.g. possess the experience or meet the competency); AND*

*2) that the quality of their work demonstrates sufficient mastery of that essential qualification to suggest readiness for the position to be staffed.*

...

[26] Candidates had 500-word limits for the first 4 competencies and 750-word limits for the functional competencies. The job poster provided the following suggestions on how to prepare the track record:

...

- *Ensure your response addresses the qualification being assessed.*
- *Provide concrete, specific examples of behaviours that illustrate the required qualification.*
- *Choose examples with sufficient complexity, impact, and degree of difficulty to allow you to illustrate the extent to which you demonstrated the qualification.*
- *Focus on what you did, and make clear what your role was....*
- *Describe the example in the past tense. This will ensure that you are providing concrete examples, rather than general statements.*

...

[27] For the core and functional competencies, the track record started with the same phrase, “Taking into consideration that you are applying for a MA-04 position, please provide at least one example of your ongoing typical work behavior [sic] that demonstrates the competency of [the required competency] ...”.

[28] A “track record validation” document was prepared to assist in the assessment of the candidates. Each qualification, including the core and functional competencies, had a rating, as follows:

- “MA-04 (Consistently & Sufficiently)” - if the candidate has demonstrated consistent and sufficient mastery of the qualification to suggest readiness for the MA-04 position;
- “Above MA-04 (On occasion)” - if the candidate has demonstrated consistent and sufficient mastery of the qualification to suggest readiness for the MA-04 position and demonstrated readiness at the MA-05 level or above on occasion; and
- “Below MA-04”.

[29] The essential qualifications were then to be assessed, considering the track-record document as well as an assessment by the candidate’s director. Mr. Dolson was the complainant’s director (the “home Director”). The job poster stated the following:

---

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

...

*Your home Director will be asked to validate the provided information for accuracy and confirm your readiness for the position to be staffed.*

*The Director may contact your supervisor or clients to obtain the necessary information to validate your examples.*

...

[30] The job poster contained the following question and answer:

...

*... My Director is not aware of my day-to-day work. How can he/she validate my example?*

*The Director may contact your immediate supervisor or clients to obtain the necessary information to validate your example. However, your Director is ultimately responsible for validating your track record.*

...

[31] Mr. Dolson consulted Patrice Mathieu and Edward Chen separately in assessing the complainant. Mr. Mathieu and Mr. Chen were chiefs of sections where the complainant had worked or was working. His immediate supervisor reported to the chief. Mr. Mathieu had been the complainant's immediate supervisor for varying periods when the complainant's substantive supervisor had been away on leave. However, Mr. Dolson testified that he consulted Mr. Mathieu based on his knowledge of the complainant from his role as a section chief.

[32] Mr. Dolson testified that he consulted only the chiefs for all seven candidates that he assessed. He testified that he thought that the chiefs would have a good idea of what the candidates were achieving and good knowledge of what was expected at the MA-04 level.

[33] Mr. Matthews testified that there was no requirement for the directors to consult with supervisors, although they were free to.

[34] Mr. Dolson evaluated the complainant as not meeting all six core and functional competencies. In the "Final Comments" section of the evaluation, Mr. Dolson concluded the following:



---

*This is a selection process for a senior Methodology position. Much too much of the evidence provided in this application does not pertain to methodology work itself and this has a lot to do with why I concluded “below MA4”. Even where methodology examples are provided - with the notable exception of the work for Communications Division - they do not meet the requirement of “consistent and sufficient” for MA4.*

[35] Mr. Matthews testified that all the directors met for a consistency review of the assessments of all the candidates. Mr. Dolson had no recollection of attending this meeting, but he believed that he did attend. The complainant’s assessment was not changed as a result of the consistency review. I heard no evidence on changes to the assessments of other candidates as a result of this consistency review.

[36] Mr. Matthews provided feedback to the complainant at an informal discussion in December 2017. The complainant raised two main concerns at that discussion: the requirement of core competency examples related to methodology work, and the subjectivity of the assessment.

[37] In preparation for the informal discussion, Mr. Matthews asked Normand Laniel, an assistant director familiar with the complainant’s work, to review the complainant’s track record.

[38] Mr. Laniel determined that the complainant did not meet the following essential qualifications: C1 - Demonstrating integrity and respect; C2 - Thinking things through; C4 - Showing initiative and being action-oriented; and C5 - Planning and organizing for results. The complainant’s assessment was not changed after this review.

[39] The first competency (C1) in the track record was “Demonstrating Integrity and Respect”. The complainant provided examples of activities at work, but Mr. Dolson made the following comment on the track record about this competency: “The information provided is accurate but nothing is said regarding ‘conduct their work activities in a manner that reflects a commitment to client service excellence’. This omission is important.”

[40] In its reply to an order for production, the respondent stated that just over 75% of successful candidates made some reference to client service. Mr. Dolson testified that of the answers he was shown at the hearing, all the candidates he assessed referred in some way to client service.

[41] In his review, Mr. Laniel rated the complainant as not meeting this competency. He noted that there were some inaccuracies in the answer. He mentioned that the complainant's phone conversations bothered his neighbours and that a supervisor had some concern about the complainant not "doing all his hours".

[42] The second competency (C2) was "Thinking Things Through". The complainant provided examples related to address matching, constructing a main file from multiple large files, making large files smaller, and a recommendation to test programs using fake data.

[43] Mr. Dolson provided the following comments on the track record:

...

*Four items are provided. The first relating to address matching does refer to thinking things through in a survey methods topic but regarding a rather routine issue - some analysis was needed to determine that a wrong file was being used. The next two items both refer to information technology topics the resolution of which was useful ... but it's not methodology or statistics thinking things through. The fourth item is recommending to do some testing using synthetic data; a good idea but not one requiring challenging thinking things through.*

...

[44] Mr. Laniel noted that the examples provided were at the MA-02 level and that the level of complexity and amount of thinking required was low.

[45] The third competency (C3) was "Working Effectively with Others". The complainant provided examples of sharing information with his colleagues about a computer program used for statistics. He also stated that during meetings, he always listened carefully, asked questions for clarification, and provided recommendations and ideas when possible.

[46] Mr. Dolson provided the following comments on the track record:

...

*Several of the examples provided are accurate and are indicative of working well with others. The candidate is very motivated in the dimensions of fairness and respect and this contributes to working well with others but although he would frequently share information proactively there were also occasions when he would refuse to do so. As well, both section chiefs confirm to me that*

*much too often the employee did not pay adequate attention at meetings and missed important information and would not adequately follow up to obtain such information. This impaired his ability to keep up with and work well with his colleagues.*

...

[47] Mr. Laniel found that the complainant met this competency and did not provide any comments.

[48] The fourth competency (C4) was “Showing Initiative and Being Action-Oriented”. The complainant provided an answer that Mr. Dolson did not consider an example of methodology. Mr. Laniel noted that one example provided was not accurate, another example was not clear, and the other examples were not sufficient.

[49] The fifth competency (C5) was “Planning and Organizing for Results (Level 2)”. The complainant provided examples in his answer, including designing and formatting spreadsheets and organizing electronic files in folders. Mr. Dolson noted that the examples were organizing the results, not organizing “for results”. Mr. Laniel stated that none of the examples had anything do with the competency.

[50] The sixth competency (C6) was “Innovative Thinking (Level 2)”. The job poster contained the following definition: “... Implies the identification, creation and implementation of new or alternative viable solutions to problems, situations, or work processes across the organization”. The complainant provided an example of his work with the communications team on the 2016 census, for which he and the team received an innovation award from the Chief Statistician. He also provided an example of an idea about using voice over internet protocol.

[51] Mr. Dolson stated that some innovative thinking was demonstrated in the first item, but “... there [was] no evidence of innovative thinking on a consistent and sufficient basis.” Mr. Dolson testified that he did not believe that receiving an innovation award as part of a team project was sufficient. He also questioned the level of contribution that the complainant made to the project. Mr. Dolson testified that this rating could have gone either way and that it was “borderline”. Mr. Laniel assessed the complainant as passing this competency and stated, “Got an innovation award!”

[52] Mr. Dolson’s overall conclusion (“Final Comments”) on the track record was as follows:

---

*This is a selection process for a senior Methodology position. Much too much of the evidence provided in this application does not pertain to methodology work itself and this has a lot to do with why I concluded "below MA4". Even where methodology examples are provided - with the notable exception of the work for Communications Division - they do not meet the requirement of "consistent and sufficient" for MA4.*

[53] Mr. Laniel provided no final comments.

[54] Mr. Laniel testified that in validating the track record, he did not consult the complainant's PSPA. He also testified that he did not discuss the track record with Mr. Dolson.

[55] The complainant alleged bias on the part of Mr. Dolson in his evaluation of the track record. The complainant testified about three instances of issues with Mr. Dolson.

[56] The first instance relates to a request the complainant made to meet with Mr. Dolson in 2014. The complainant had concerns about the assignment of work and personal favouritism. He requested a meeting with Mr. Dolson, the section chief and his supervisor. Mr. Dolson refused to meet with him and testified that this was an issue that should first have been addressed at the supervisor or section-chief level. If it was not resolved, the matter could have been addressed by the assistant director. Only if it was not resolved at that level would he have intervened, Mr. Dolson testified.

[57] The complainant testified that he had made a disability-related accommodation request to Mr. Dolson. I have determined that the details of the accommodation request are not relevant to the allegation. Mr. Dolson initially refused to accommodate the complainant, who then raised it with the Chief Statistician. After that, it was granted. Mr. Dolson testified that it was likely that the accommodation request would have been granted without the Chief Statistician's involvement.

[58] The complainant testified that Mr. Dolson was the first-level grievance officer for his grievance against his PSPA of 2016-2017. The PSPA was prepared by the complainant's supervisor. After the grievance hearing, Mr. Dolson made the decision to change the rating to "succeeded" (which allowed the complainant to be screened into the appointment process). The complainant testified that there were no interventions from Mr. Dolson at the grievance hearing and that he believed that changes were made

to the PSPA only on the initiative of Human Resources. Mr. Dolson testified that he came to this decision after hearing from the bargaining agent representative and after discussions with the supervisor and a human resources representative. The complainant also testified that he had asked in his grievance to be removed from Mr. Dolson's supervision.

### **III. Reasons**

[59] For the reasons set out in this section, I have found that the complainant has not proven an abuse of authority in the appointment process. Accordingly, his complaint is dismissed.

#### **A. Introduction**

[60] The complainant and the respondent made oral submissions after the conclusion of the evidence portion of the hearing. The PSC provided submissions in writing before the start of the hearing.

[61] Section 79(1) of the *PSEA* provides a right to be heard to the PSC. I have reviewed the PSC's submissions, but other than a generic statement of the law under the *PSEA*, I did not find those submissions particularly relevant to the complaint. Accordingly, I have not summarized them in this decision and have given them no weight.

[62] The complainant and the respondent provided submissions on the assessment of each of the competencies. The Board's role is not to reassess candidates but to determine whether there was an abuse of authority in the appointment process; see *Vaudrin v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 19, and *Broughton v. Deputy Minister of Public Works and Government Services*, 2007 PSST 20. Therefore, I have summarized only the parts of their submissions that relate to the alleged bias of Mr. Dolson or that are alleged to demonstrate an abuse of authority in the assessment.

[63] Section 77(1)(a) of the *PSEA* provides that an unsuccessful candidate in the area of selection for an internal appointment process may make a complaint to the Board that he or she was not appointed to or proposed for appointment because of an abuse of authority in the application of merit.

[64] The complainant has the burden of proving that on a balance of probabilities, the respondent abused its authority (see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at paras. 49 and 55).

[65] Section 30(1) of the *PSEA* states that appointments must be made on the basis of merit, and s. 30(2)(a) states that an appointment is made on the basis of merit when the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head.

[66] “Abuse of authority” is not defined in the *PSEA*; however, s. 2(4) offers the following guidance: “For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.” Section 2(4) must be interpreted broadly, which means that “abuse of authority” must not be limited to bad faith and personal favouritism (see *Ross v. Commissioner of the Correctional Service of Canada*, 2017 PSLREB 48 at para. 14). In *Canada (Attorney General) v. Lahlali*, 2012 FC 601 at paras. 21 and 38, the Federal Court confirmed that the definition of “abuse of authority” in s. 2(4) is not exhaustive and that it can include other forms of inappropriate behaviour.

[67] An abuse of authority may involve an act, omission, or error that Parliament cannot have envisaged as part of the discretion given to those with delegated staffing authority (see, for example, *Tibbs*, at paras. 66 and 71, and *Agnew v. Deputy Minister of Fisheries and Oceans*, 2018 FPSLREB 2 at para. 95). Abuse of authority is a matter of degree. For such a finding to be made, an error or omission must be of such an egregious nature that it cannot be part of the delegated manager’s discretion.

[68] The respondent submitted that an allegation of abuse of authority is a very serious matter and must not be made lightly (see *Portree v. Deputy Head of Service Canada*, 2006 PSST 14). The respondent also submitted that the complainant’s allegations were frivolous and unfounded as they were based on no documentary evidence. Although I have found that the complainant has not met the high burden of proving an abuse of authority, I do not agree that his allegations were frivolous.

[69] The complainant made four allegations in his complaint that I have set out in the allegations section of this decision. For ease of analysis, I will address these four allegations under the following headings: 1) the use of the PSPA (of 2016-2017), 2) allegation of bias (of Mr. Dolson), 3) the consultation process (relied upon by Mr.

Dolson in his assessment of the complainant), and 4) the assessment of the competencies.

### **1. The use of the PSPA**

[70] The complainant made general allegations about the use of the PSPAs in the appointment process and specific allegations related to the 2016-2017 PSPA. I will first address the general allegations.

[71] The complainant submitted that the job poster clearly indicated that the PSPA could be used in assessing candidates and that its limited use as a screening tool was clarified only after the appointment process was completed. He also submitted that the only source of information for the candidates' competencies for the track record was the PSPA, and therefore, it was normal for a candidate to use the PSPA content as "one of the inputs" in filling out the track record. The respondent submitted that it was clear from the job poster that the PSPA was to be used solely as a screening tool, and the evidence of Mr. Dolson supported that it was not used when validating the track record. The respondent stated that therefore, there was no basis for the complainant's allegation that he was disadvantaged by the PSPA results.

[72] The evidence of Mr. Matthews was that the PSPA was not used when assessing candidates. It was used only as a screening tool. Mr. Dolson testified that he did not review any candidate's PSPA when validating the track record. The evidence demonstrated that the PSPA's contents were not considered in the assessment but in the selection of the appointees. This is consistent with s. 36 of the *PSEA* where the respondent has considerable discretion to assess and select candidates.

[73] There was no requirement in the job poster that the candidates could rely only on examples from their PSPAs to support the competencies. I find that the complainant's perception that he was limited to these examples is not supported by the job poster. Accordingly, this also cannot amount to an abuse of authority.

[74] The complainant has also alleged that the initial version of the 2016-2017 PSPA (which was used to screen him out of the appointment process) put him at a disadvantage. Part of his allegation relates to his reliance on this PSPA when completing his track record. I have already determined that the candidates were not limited to the PSPA when completing the track record. He also submitted that the delay

revising his 2016-2017 PSPA meant that he was assessed only later in the process and not at the same time as the other candidates.

[75] The PSPA process is outside the appointment process. Accordingly, any failures in the PSPA process (in this case, the delay in the change to “succeeded”) cannot constitute an abuse of authority in the appointment process.

## 2. Allegation of bias

[76] The complainant has argued that Mr. Dolson was biased against him. The burden of proving bias rests with the complainant (see *Denny v. Deputy Minister of National Defence*, 2009 PSST 29).

[77] The respondent submitted that unlike in *Amirault v. Deputy Minister of National Defence*, 2012 PSST 6, Mr. Dolson and the complainant did not have any serious conflicts in the workplace. The respondent submitted that although the complainant did have issues with his supervisor and section chiefs, Mr. Dolson was not directly involved with these issues. The respondent submitted that the issues raised by the complainant about Mr. Dolson were part of the regular business relations and work processes in the office. The respondent also noted that Mr. Dolson testified that he attended a training session on the validation process and had discussions about consistency, which addressed any possible bias in the appointment process.

[78] The respondent submitted that Mr. Dolson’s allowance of the grievance against the PSPA of 2016-2017 was evidence of an absence of bias; see *Smith v. Deputy Minister of National Defence*, 2018 FPSLRB 19 at para. 42.

[79] The test for bias is the reasonable perception of a “reasonably informed bystander” (see *Denny*, at para. 126). Bias, or the apprehension of bias, must be real, probable, or reasonably obvious; mere suspicion, speculation, or the possibility of bias is not sufficient (see *Bizimana v. Deputy Minister of Public Works and Government Services*, 2014 PSST 3 at para. 96).

[80] The alleged bias of Mr. Dolson rests on three main interactions: a refusal to meet with the complainant, an accommodation request, and participation in the PSPA grievance process. Interactions with managers that are not always positive are part of any workplace. Managers not only manage workplace issues but also have a role to play in appointment processes. The issue of bias in an appointment process arises only



when the nature or tenor of the interaction between a complainant and an assessor could be seen by a reasonable bystander as exhibiting bias. The complainant's perception is not a factor that is considered in this assessment.

[81] In *Denny*, the PSST found that there was a reasonable apprehension of bias based on a history of animosity between the selection board member and the complainant. In that case, the assessment itself was seriously flawed, and the fact that the practical test was administered by the board member who was allegedly biased reinforced the impression of an unfair, biased, and very deficient assessment.

[82] In *Amirault*, the complainant had made a complaint against one of the selection board members before the former Public Service Staffing Tribunal and in the past had serious conflicts with the other assessment board members.

[83] The first incident relied on by the complainant was Mr. Dolson's refusal to meet about work-assignment issues with a supervisor. There were two layers of management between Mr. Dolson and the complainant — the section chief and the assistant director. Therefore, it was within Mr. Dolson's authority to have the issue addressed at lower levels of management. There was no evidence that Mr. Dolson treated the complainant any differently than he did other employees at a similar level.

[84] The second incident relates to a human-rights accommodation request made by the complainant and Mr. Dolson's initial response to it. I have determined that the nature of that accommodation request is not relevant to the merits of this complaint. Initially, Mr. Dolson denied it. After the complainant raised it with the Chief Statistician, it was granted.

[85] Although Mr. Dolson testified that the accommodation eventually would have been allowed, even without the Chief Statistician's involvement, I agree with the complainant that it was granted only after that intervention. However, the accommodation issue was eventually resolved to the complainant's satisfaction and was not an issue of direct conflict between him and Mr. Dolson. The accommodation issue related to an office practice that Mr. Dolson had not established. His actions in addressing the accommodation request fell under his normal management duties. I find that a reasonable person would not consider that Mr. Dolson was biased against the complainant for raising this issue.

[86] The third incident related to the grievance against the PSPA of 2016-2017. The initial PSPA was prepared by the complainant's supervisor. Mr. Dolson was the first-level grievance officer and heard the grievance. After the hearing, and in consultation with a departmental labour relations officer, he allowed the grievance in part by changing the rating and removing some of the narrative.

[87] In *Smith*, the Board noted that an indicator of an absence of bias was the fact that the person alleged to be biased screened the complainant back into the appointment process. This is a similar situation. But for Mr. Dolson's action of changing the PSPA rating, the complainant would have been screened out of the appointment process, without an opportunity to be assessed based on his track record.

[88] A reasonable person would not consider allowing a grievance as an indication of bias on the part of Mr. Dolson, especially when doing so allowed the complainant to be considered in the appointment process.

[89] The complainant also noted that Mr. Dolson initially approved the PSPA that the supervisor had prepared. He suggested that Mr. Dolson could have raised concerns about the PSPA when he first reviewed it. Mr. Dolson allowed the grievance after hearing from the complainant's representative at the grievance hearing. When he initially reviewed the PSPA, he did not have the benefit of any submissions other than that provided by the supervisor. I find that this does not demonstrate bias on the part of Mr. Dolson.

[90] The complainant also raised some additional alleged indicators of bias on the part of Mr. Dolson during the appointment process.

[91] The complainant stated that Mr. Dolson failed him under the competency of "Demonstrating integrity and respect" for failing to mention client-service excellence when there was evidence that other candidates did not mention it. Mr. Dolson acknowledged in his testimony that his assessment of this competency was a "tough call". He disagreed that the other candidates he assessed did not demonstrate client-service excellence.

[92] I have addressed the assessment of the competencies later in this decision. However, a reasonable person would not regard Mr. Dolson's assessment of this competency as bias. A disagreement on how to assess a competency is not an

indication of bias. I also find that the complainant has not established that other candidates assessed by Mr. Dolson did not include in their answers examples that in Mr. Dolson's opinion demonstrated client service.

[93] The complainant submitted that Mr. Dolson's failure to recognize innovation when the complainant received an innovation award from the Chief Statistician was a further example of bias. He also stated that Mr. Dolson's testimony questioning the complainant's role in the project leading to the award demonstrated bias. Mr. Dolson recognized that he had a high threshold for demonstrating innovation and even suggested that the complainant's answer "was on the borderline". I find that a disagreement on the appropriate definition of "innovation" does not amount to bias. A reasonable person would see that there was disagreement on the appropriate level of innovation but that this does not amount to bias on the part of Mr. Dolson.

[94] The complainant noted that Mr. Dolson failed him in six competencies and that Mr. Laniel failed him in four competencies. He submitted that the discrepancy of 33% between the raters was "huge" and that it demonstrated bias on the part of Mr. Dolson. I find that a disagreement in evaluating a candidate does not constitute bias. Reasonable people can disagree on rating competencies.

[95] For these reasons, after reviewing each allegation separately, I took into account all the facts submitted by the complainant as a whole and I have determined that there is no evidence of bias by Mr. Dolson, and the allegation of abuse of authority based on bias is dismissed.

### **3. The consultation process**

[96] The complainant submitted that Mr. Dolson should have consulted his immediate supervisors and not section chiefs and that consulting section chiefs was an abuse of authority. He referred to the job poster's reference to consulting immediate supervisors for information on the candidates' day-to-day work. He also submitted that Mr. Mathieu, a section chief, admitted in his testimony that he would not have knowledge of the complainant's day-to-day work.

[97] The respondent submitted that under this appointment process, the director was ultimately responsible for validating the track record and was granted considerable latitude and flexibility in choosing the individuals to consult who had the

best knowledge of a candidate's work. The respondent noted that Mr. Dolson testified that the section chiefs had a good idea of employees' work and an understanding of what was required at the MA-04 level. The respondent submitted that Mr. Dolson was consistent in consulting only section chiefs for all candidates. The respondent stated that Mr. Dolson was in the best position to assess whether he had sufficient information about the complainant (see *Portree*, at para. 59).

[98] There was no requirement in the appointment process to consult with immediate supervisors. When making appointments, s. 36 of the *PSEA* allows the PSC or its delegate (the respondent) to use the assessment methods "... that it considers appropriate to determine whether a person meets the qualifications ...". Unless the assessment method amounts to an abuse of authority, there is no role for the Board in evaluating the assessment method used.

[99] It was clear from the job poster that it was not a requirement that the director consult a candidate's supervisor. The evidence showed that Mr. Dolson did not consult any immediate supervisors of any candidate. Therefore, failing to consult with immediate supervisors was not arbitrary and is not an abuse of authority. There was nothing improper about consulting section chiefs who would have had some knowledge of the candidates' work.

[100] The complainant also submitted that negative aspects of a candidate's performance are given more weight at higher levels of management than would be given at the immediate supervisor level. He submitted that the fact that Mr. Dolson consulted section chiefs amplified the weight of any alleged negative issue against the many positives of his candidacy. He submitted that consulting the immediate supervisor would have resulted in more positive comments that could have outweighed the negative factors.

[101] Again, the choice of assessment methods is left to the PSC's delegate, i.e. the respondent. The Board has no role in assessing whether the assessment could have been more comprehensive.

#### **4. The assessment of the essential qualifications' core and functional competencies**

[102] As already noted, s. 36 of the *PSEA* allows the PSC or its delegate (the respondent) to use the assessment methods "... that it considers appropriate to

determine whether a person meets the qualifications ...”. The Board’s role is not to reassess candidates in an appointment process but to examine how the assessment has been done and determine whether there has been an abuse of authority; see *Abi-Mansour v. Chief Executive Officer of Passport Canada*, 2014 PSST 12 at para. 29.

[103] It is the candidates’ responsibility to clearly demonstrate in their applications that they meet all the essential qualifications; see *Walker-McTaggart v. Chief Executive Officer of Passport Canada*, 2011 PSST 39 at para. 21. In this case, the complainant failed to demonstrate to Mr. Dolson that he met all six competencies, part of the essential qualifications. Even if I were to accept that Mr. Laniel’s assessment was more accurate, the complainant still did not meet the threshold of passing four of the six competencies.

[104] The complainant made submissions on Mr. Dolson’s assessments of all six competencies. I have not summarized those submissions, as they would involve the Board reassessing the complainant’s track record. I have addressed his concerns about some of Mr. Dolson’s assessment in the section of this decision on alleged bias.

[105] The complainant submitted that Mr. Dolson and Mr. Laniel relied on incorrect information about him in coming to their assessments of the core and functional competencies. This submission also relates to the candidate’s assessment — and to review the information available to the assessors would lead to the Board reassessing his application.

[106] The complainant relied on alleged errors in the assessment of some of the competencies, focusing on “Demonstrating integrity and respect” and “Innovative thinking”. The complainant did not agree with Mr. Dolson’s opinions on his performance of these competencies. The respondent submitted that a minor error that does not affect the outcome of a process cannot be considered an abuse of authority; see *Smith*, at para. 58. I agree that if there were errors in Mr. Dolson’s assessment of two of the competencies, the outcome would not be affected — the requirement for the appointment process was to pass all of the competencies.

[107] The complainant argued that “complexity” was not part of the criteria for assessing the core and functional competencies. He based this submission on the fact that complexity was mentioned specifically in the “assets experience” section of the job poster but not in the “core and functional competencies” section. The job poster

did not refer to complexity in the list of core competencies. However, the following question and answer is included in the job poster:

*Q2. Are there any guidelines that could help me prepare my track record?*

*There are no guidelines, however here are some suggestions that might help you:*

...

- *Provide concrete, specific examples of behaviours that illustrate the required qualification.*

- *Choose examples with sufficient **complexity**, impact, and degree of difficulty to allow you to illustrate the extent to which you demonstrated the qualification.*

[Emphasis added]

[108] Mr. Dolson did not mention “complexity” in his assessment. Mr. Laniel referred to complexity in his assessment of “Thinking Things Through” (C2) only. The reference in the question and answer to “complexity” refers to the examples that demonstrate the qualification or competency, not the competency itself. Mr. Laniel was commenting on the complexity of the example provided by the complainant. I find that there is no abuse of authority, as the complainant has not established that complexity was part of the criteria used in assessing the core and functional competencies. In addition, I find that the competencies were not assessed based on complexity, as the job poster only referred to the necessity to provide examples with sufficient complexity.

[109] The complainant argued that the instructions for the six competencies were ambiguous and that there was no requirement that they be assessed at the MA-04 level. He also submitted that examples of methodology and statistics work were not required in the examples to be provided for these competencies.

[110] I do not agree. The instructions clearly stated that the competencies were to be described, considering “... that you are applying for an MA-4 position ...”. It was open to the director to assess those competencies considering the core work functions of the MA-04 level (statistics and methodology). In addition, the assessment methods chosen by the respondent are not subject to review by the Board.

[111] The complainant submitted that there was no clear answer key to assist the directors in assessing the appropriate level of the examples of the six competencies.

He stated that therefore, the director was required to use his experience and judgment, which was arbitrary. Assessing competencies is an inherently subjective exercise, requiring the use of an assessor's experience and judgment.

[112] The complainant submitted that there was no evidence that the coherence analysis of his track record was done alongside the other candidates, since his application was assessed later in the process. His track record was not assessed at the same time as those of the other candidates because he was assessed later in the appointment process. Mr. Matthews testified that the complainant's track record was subject to a coherence analysis. There was no evidence presented on the coherence analysis of the other candidates. I find that there is no evidence of an abuse of authority in the coherence analysis. The complainant did not establish that there was a lack of coherence with the assessments of the other candidates.

[113] The complainant referred me to the decision of *Clark v. Deputy Minister of National Defence*, 2019 FPSLREB 8. In that decision, the Board stated that if the tool used to assess a qualification is flawed, the outcome cannot be considered fair or reasonable (also see *Chiasson v. Deputy Minister of Canadian Heritage*, 2008 PSST 27 at para. 50). In *Clark*, the Board found that a screening question was flawed "... in that it did not clearly state what was required of the candidates." The question was also assessed incorrectly, the Board determined. In this case, the question was worded clearly enough for candidates to know that the examples to be provided related to the duties of an MA-04 position. In *Clark*, the question was also clearly assessed incorrectly. In the case before me, the six competencies that were assessed required the assessor's judgment (Mr. Dolson). There is no evidence of a clearly incorrect assessment by Mr. Dolson as there was in *Clark*.

[114] The complainant also referred me to *Goncalves v. Commissioner of the Royal Canadian Mounted Police*, 2017 FPSLREB 2. In that case, the Board determined that the appointee clearly did not meet all the established essential qualifications. There is no evidence before me that the appointees did not meet the essential qualifications.

[115] The complainant also referred me to *Hunter v. Deputy Minister of Industry*, 2019 FPSLREB 83, to support his position that there should be documentation to support a selection decision. *Hunter* involved a non-advertised appointment process and the

issue of documentation related to the decision to use a non-advertised process. In this case, the selection process was advertised, and I find that *Hunter* is not relevant.

#### **IV. Conclusion**

[116] The complainant feels that he was not fairly assessed in the appointment process. However, he did not meet his burden of demonstrating an abuse of authority in the appointment process.

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

*(The Order appears on the next page)*



**V. Order**

[118] The complaint is dismissed.

September 12, 2022.

**Ian R. Mackenzie,  
a panel of the Federal Public Sector  
Labour Relations and Employment Board**