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



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

BETWEEN

DANIAL THOMPSON

Complainant

and

**DEPUTY HEAD
(Department of Employment and Social Development)**

Respondent

and

OTHER PARTIES

Indexed as

Thompson v. Deputy Head (Department of Employment and Social Development)

In the matter of a complaint of abuse of authority under sections 77(1)(a) and (b) of the
Public Service Employment Act

Before: James R. Knopp, a panel of the Federal Public Sector Labour Relations
and Employment Board

For the Complainant: Himself

For the Respondent: Andréanne Laurin, counsel, Treasury Board Legal Services

For the Public Service Commission: Louise Bard and Alain Jutras, senior analysts

Heard by videoconference,

August 17 and 18, 2022.

REASONS FOR DECISION

I. The staffing complaint

[1] Danial Thompson (“the complainant”) was employed with the Department of Employment and Social Development Canada (“ESDC” or “the respondent”) at the AS-04 group and level in Vancouver, British Columbia, in 2018.

[2] Selection process number 2018-CSD-IA-BC-15875, posted in June of 2018, pertained to an advertised process for the position of Senior Manager, Real Property and Asset Management, at the AS-06 group and level, in Vancouver, British Columbia (the “selection process”). The complainant applied for the position and took written and oral exams as part of the staffing process. He was not successful.

[3] On July 27, 2018, a “Notice of Acting Appointment” was posted as a result of this selection process, appointing Brian Chow (the “appointee”).

[4] Section 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, ch. 22, ss 12, 13 (the “PSEA”) provides that a person in the area of recourse may make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of an abuse of authority by the respondent in the exercise of its authority under s. 30(2) of the PSEA, which deals with the assessment of merit. Section 77(1)(b) provides for complaints pertaining to the choice of an advertised versus a non-advertised process.

[5] The complainant made his complaints under both ss. 77(1)(a) and (b) of the PSEA on July 30, 2018. He alleged that he should simply have been appointed by way of a non-advertised process, and that the advertised process was chosen as a means of deliberately eliminating him from the process.

[6] The matter before the Federal Public Sector Labour Relations and Employment Board (“the Board”) was heard by way of the Zoom videoconference platform on Wednesday, August 17, and Thursday, August 18, 2022. The Board was situated in Ottawa, Ontario. Counsel for the respondent was situated in Gatineau, Quebec. The complainant was in Saint John, New Brunswick. Witnesses appeared via teleconference from Mission and Vancouver, British Columbia.

[7] The Public Service Commission (“PSC”) was a party to the proceedings but did not appear at the hearing. It provided written submissions, which are a matter of

record, in which it discussed its relevant policies and legislative guidelines. It took no position on the merits of the complaint.

[8] The complainant provided notice to the Canadian Human Rights Commission that he intended to raise discrimination issues in his complaint. In his notice, when asked to substantiate the precise nature of the prohibited grounds forming the basis of his human rights complaint, the complainant cut and pasted his initial complaint to the Board, which did not illuminate the human rights component of his complaint. When asked at both pre-hearing conferences to further articulate the nature of his human rights complaint by at least stating the prohibited ground of discrimination, the complainant could not. At the hearing, he submitted that his involvement with a national classification grievance led to him being, in his words, “blackballed” and discriminated against in the process at issue and in other processes.

[9] Involvement in union matters is not a prohibited ground of discrimination. The human rights component of this complaint will not be analyzed in this decision.

[10] For the reasons that will follow, this complaint is dismissed.

II. The witnesses’ testimonies, and the documentary evidence

[11] The complainant opened his case with an expression of displeasure about the length of time it took to bring this matter forward. In the four years since he made his complaint, he lost important documents, along with his personal laptop computer. He also stated that some witnesses were no longer available and that memories have faded.

[12] The complaint made with the Board is largely composed of details of the many public service awards the complainant received in the years preceding this complaint, as well as details of acting positions he had successfully filled and the many positive assessments he received. Apparently, he was successfully added to an AS-06 pool of candidates as part of a different process. He testified that he should simply have been appointed to the position through a non-advertised process. The theory of the complainant’s case is the selection process was the “straw that broke the camel’s back”; it was the culmination of years upon years of systemic bias and discrimination in his workplace that led to his decision to leave it, which he did in the spring of 2018.

[13] The complainant took no issue with the appointee and did not seek revocation of the appointment.

[14] It was explained to the complainant at the two pre-hearing conferences and again at the outset of the hearing that the Board's jurisdiction is limited to the one specific selection process named as the subject of his complaint. The respondent was on notice and prepared to respond to this selection process only, not a number of other processes. Therefore, evidence cannot be adduced in support of a wide variety of allegations pertaining to other acting positions and other staffing-related processes. The complainant's continued attempts to do so were met with objections from the respondent. These objections were sustained.

[15] At the time of the events that gave rise to this complaint, Mona Luke was the regional director within ESDC's Chief Financial Officer branch and had been acting in that capacity since 2014. She was the subdelegated authority for the staffing process that is the subject of this complaint. Blair Polychronopoulos was the complainant's manager at the time. Both Ms. Luke and Ms. Polychronopoulos helped ESDC's human resources (HR) branch develop the merit criteria for this advertised process.

[16] Ms. Polychronopoulos was called as a witness by the complainant, and Ms. Luke was called by the respondent. Both testified at this hearing.

[17] The complainant testified to having had discussions at work, with both Ms. Polychronopoulos and Ms. Luke, in which he reminded them that he had already been successfully included in an AS-06 pool of qualified candidates. This was pursuant to an earlier process. He testified to having asked each of them in turn why, given his many awards and his years of stellar performance, he could not simply be appointed to an acting position as part of a non-advertised process.

[18] He repeated these questions to these witnesses when they were on the witness stand.

[19] Ms. Luke and Ms. Polychronopoulos both testified that management's objective, with respect to this selection process, was to be as open and transparent as possible, which was why an advertised process was chosen. Ms. Luke added that the decision to make it an advertised process, even though it was for an acting appointment of only one year, was consistent with senior management's approach to both short-term needs

and long-term succession planning across the ESDC's region. To be consistent with other efforts being made across that and other regions, an advertised process was the clear preference and obvious choice, according to Ms. Luke.

[20] Ms. Luke testified to how the staffing process unfolded. Once applications were received, candidates who met the initial criteria were invited to take written and oral examinations. Reference checks would be conducted for those who passed the examinations.

[21] Ms. Luke testified to management's efforts to ensure that the exam questions and the "Rating Guide" accurately captured the essence of the competencies they were designed to evaluate and that the whole was consistent with the qualifications necessary for the position advertised in the selection process.

[22] The examinations were evaluated by an assessment panel consisting of Ms. Martin as chair, assisted by Ms. Luke and Ms. Polychronopoulos. Of the many applicants, only three were screened-in to write the exam: the complainant, the appointee, and a third individual who ultimately withdrew from the process.

[23] Documents entered as exhibits at the hearing include the following:

- The exam itself, consisting of the questions and instructions to the candidate as to how each of the nine essential competencies would be evaluated.
- The Rating Guide and Rating Scale, which is the exam itself but includes a definition of the competency to be evaluated by any given question. There is also an answer key for each competency and a series of bullet points summarizing key elements of the competency. The purpose of the answer key was to help the assessment panel evaluate the extent to which the candidate addressed the competency in the course of his or her answer.
- The complainant's written work, in essay form, which was used to assess three of the nine essential competencies.
- The notes of Ms. Martin, Ms. Luke, and Ms. Polychronopoulos. Each set of notes consists of a reproduction of the exam template upon which each evaluator placed an "x" or a check mark, the symbol "½", or nothing at all, depending upon how the evaluator felt the complainant addressed each bullet point in the answer key. Each set of notes also includes handwritten comments, made by each individual assessor, about the strengths or weaknesses of any given aspect of the complainant's answer.

[24] Ms. Luke and Ms. Polychronopoulos each testified that the complainant's written and oral exams were evaluated in exactly the same fashion as the exams of the other candidates. Ms. Luke, Ms. Polychronopoulos, and Ms. Martin first completed their evaluations independently. Then, the three of them met as the assessment panel. They

compared notes and discussed the candidate's performance. The panel would then arrive at a consensus as to a candidate's performance, using the bullet points in each answer key as a touchstone. Ms. Luke testified that once the panel reached a consensus, Ms. Martin would record the final mark in her set of notes.

[25] Thus, explained Ms. Luke, Ms. Martin's record of the total check marks and partial marks assigned stands as the final record of the complainant's evaluation. If the answer was found to satisfactorily address the competency described by the bullet point, a check mark would be placed beside it. If the answer partially addressed it, the figure "½" would be written. If the competency described by the bullet point was not addressed by the complainant, an "x" would be placed beside it, it would be crossed out, or it would be left blank.

[26] For each of the 9 essential competencies, the check marks and partial marks were totalled. Each competency had between 5 and 10 bullet points. To pass any given competency, the total had to be 3 or greater. The marks ranged from 0 to 5. The maximum mark for any given competency was 5, which means that even if there were more than 5 check marks, the score would still be 5.

[27] The Rating Guide quantified the number ratings as follows:

- A rating of 1 or 0 was defined as "Unsatisfactory" and is quantified as follows: "Very few or no issues/criteria addressed, many deficiencies, several of major concerns, or inaccuracies or inappropriate comments."
- A rating of 2 was considered "Fair": "Few issues/criteria were addressed, some of major concern. No significant evidence of in depth [sic] knowledge or concepts or abilities in experience demonstrated in answer."
- A rating of 3 was "Good": "Some of the issues/criteria were addressed; some deficiencies exist in the areas assessed, but none of major concern."
- A rating of 4 was "Very Good": "Most of the issues/criteria were addressed; very few [d]eficiencies none of major concern."
- A rating of 5 was "Excellent": "Meets all of the criteria, issues were addressed; answers were appropriate, complete and accurate. No deficiencies in response."

[28] Ms. Luke testified to the difficulty that some candidates have with exams, generally speaking, which is why a post-assessment board review and discussion is offered. At the post-board meeting, testified Ms. Luke, a candidate can review the things that he or she did well, and more to the point, develop strategies to address the things to work on for the next selection process.

[29] The complainant received no Unsatisfactory, Very Good, or Excellent ratings. Over the nine competencies, he received six Good ratings and three Fair ratings. A Fair rating is not a passing grade. The Rating Guide contains the following highlighted text: “Global pass mark of 3 must be achieved in each competency”.

[30] The first essential qualification, A1, is entitled “Communication (Oral)”. The complainant received a grade of 3, which was a passing mark.

[31] With respect to the essential qualification entitled “A2: Communication (Written)”, the complainant also received a passing grade of 3.

[32] Essential qualification A3, entitled “Client Service Excellence”, was similarly graded as a pass at a level of 3.

[33] Essential qualification A4, “Create Vision & Strategy”, was part of the written exam. The exercise in A4 was to create a written briefing note pertaining to a hypothetical situation, namely, the implementation of an activity-based working environment. The complainant’s work was graded 2, which was not a passing grade. The assessment criteria include these eight bullet points:

- There is a check mark beside the bullet point that reads, “Informs analysis with a thorough understanding of the environment”.
- The figure “½” is written beside the bullet point that reads, “Contributes expertise and insight to the development of organizational strategies”.
- There is an “x” beside the bullet point that reads, “Communicates with clarity and conviction”.
- There is an “x” beside the bullet point that reads, “Implements strategies that respond to organizational priorities.”
- There is a check mark beside the bullet point that reads, “Defines nature and scope of the problem or situation”.
- There is an “x” beside each of the three remaining bullet points, which read, in order, “Gathers pertinent information before making decisions on an issue”, “Understands what lies behind a particular situation”, and “Engages others to translate implementation strategies into concrete objectives”.

[34] The complainant cross-examined Ms. Luke on her assessment of this essential qualification. She testified to wanting to see mention made of surveys, focus groups insights, or other sources, to develop a fulsome strategy or plan for all parts of the organization. The complainant did not mention these. Ms. Luke felt that his answer did not demonstrate the required degree of analytical complexity.

[35] The complainant disagreed. He stated that he did bring up a risk-assessment component, but Ms. Luke maintained that overall, his answer lacked the depth and breadth of understanding that they were looking for.

[36] The next essential qualification, A5, is entitled “Mobilize People” and was conducted by way of an interview. The score awarded was 3, which was a passing grade.

[37] The next essential qualification, A6, is entitled “Uphold Integrity and Respect”, and was assessed by way of an interview. The mark awarded to the complainant was 2, which was below the minimum passing grade. He did not meet the criteria on all the bullet points save two, for which he received only half marks, plus one full mark on a different bullet point, for a total of 2.

[38] The complainant took issue with each and every bullet point that did not receive a full mark. Ms. Luke maintained that for this particular competency, it would have been good to see mention made of some form of risk assessment or at least an assessment of staff buy-in. Mention could have been made of an assessment of the “best practices” of other departments or of focus groups or surveys. She testified that he did not provide evidence of in-depth knowledge and an appreciation of the organization’s overall vision.

[39] Essential qualification A7 is entitled “Collaborate with Partners and Stakeholders”, and he received a 3, a passing grade.

[40] Essential qualification A8 is entitled “Promote Innovation and Guide Change”, and he likewise received a passing grade of 3.

[41] Essential qualification A9 is entitled “Achieve Results” and was assessed by way of the written work. The grade received was a 2, a failing mark. The mark “x” is beside the following bullet points:

- *Aligns people, work and systems to achieve program and policy efficiencies and results*
- *Quantifies, monitors and controls resources and costs*
- *Delegates responsibility and accountability to appropriate levels*

...

- *Demonstrates and promotes stewardship of financial and organizational resources*

[42] Ms. Luke testified that the complainant did not demonstrate this competency with his written work, which lacked the level of analytical complexity she would have expected at the AS-06 level. Nor did his work demonstrate an in-depth understanding of how teams need to be motivated. The complainant might have done well, surmised Ms. Luke, had he mentioned certain milestones or timelines or the importance of balancing work priorities.

[43] The complainant received an email dated July 12, 2018, which read, in part:

...

We regret to inform you that your candidacy for the above-noted appointment process will not be given further consideration as you did not meet all the essential qualifications identified for the position.

As such, your candidacy cannot be given further consideration in this appointment process.

...

[44] The complainant testified that he thought he had done well on the written and oral exams pertaining to this process and that he was surprised to see he had not. He requested a post-board interview. Ms. Martin, Ms. Polychronopoulos, and Ms. Luke all participated in his post-board debriefing.

[45] Ms. Polychronopoulos testified generally to the nature of the complainant's answers that received a failing grade. She told him in the post-assessment interview that his answers failed to demonstrate the depth and breadth of understanding and analysis required of the position and that he tended to repeat himself unnecessarily. She repeated these observations in her testimony.

[46] The complainant testified that his intention was to demonstrate a given particular issue by means of different examples and submitted that this perhaps gave the assessment panel the mistaken impression that he repeated himself.

[47] In the post-board review, the complainant expressed a desire for another informal discussion with Ms. Luke, separately. Ms. Luke testified to holding that

meeting with him and to discussing what she felt he had done well and where she felt he could improve.

[48] The complainant testified to receiving an email dated February 22, 2019, and timestamped 9:36 a.m., which reads as follows, in part:

Appointment Process Number 2018-CSD-IA-BC-15875

*Position Title **Senior Manager, Real Property and Asset Management***

...

As your name is still in the pool as a qualified (or partially-assessed) candidate, we are now following up with you to confirm if you would like to remain in this pool and as such, be referred for employment opportunities within our department.

*Please **reply to this email by Friday March 01, 2019** to confirm your interest or if you would like to have your name removed from the pool. If you are still interested in being considered for possible employment opportunities, kindly provide us with your updated information (updated CV, revised personal information, etc.), if applicable.*

...

[Emphasis in the original]

[49] On the same day, February 22, 2019, at 1:32 p.m., the complainant replied, “Yes, I am still very much interested in the AS-06 position of Senior Manager, Real Property and Asset Management and would like to remain in the pool of candidates.”

[50] On March 8, 2019, the complainant received a follow-up email that reads, in part, as follows:

Good day,

Unfortunately the email below regarding Application Process 2018-CSD-IA-BC-15875 was sent to you in error. We want to sincerely apologize for any confusion this may have caused, as you did not meet the Essential Criteria and were not qualified in the Pool.

Again, our sincerest apologies.

...

[51] The complainant was very upset by this turn of events. He brought it to Ms. Polychronopoulos’s attention, who told him that he should never have received the February 22, 2019, email in the first place. Ms. Polychronopoulos said it had obviously

been sent to him in error. Ms. Luke testified to being unaware of the email but stated that it had obviously been sent in error as he had not qualified.

[52] The complainant eventually retired from the public service in May of 2022 and testified to viewing his HR file one week before his retirement and to seeing an indication that he had, in fact, qualified in this process.

[53] The complainant testified to feeling as though he had been blackballed because of his participation in a classification grievance. He said that he had not volunteered to lead it but was basically assigned to lead it, and as a result, he and his Ontario counterpart, both of whom are senior public servants, have never been successful in staffing actions.

[54] Ms. Luke testified to being aware, generally, of the national classification grievance around the time it was filed. She knew that the complainant was involved but testified that his participation played no part whatsoever in his assessment. She added that she did not discuss his participation with anyone and that in fact, she never thought about it again.

[55] The complainant also testified to complaining to Ms. Luke that Ms. Polychronopoulos did not like him and that the friction between them was causing him health problems. The complainant did not elaborate. He testified that this discussion took place before the selection process. Ms. Luke testified that she was not aware that Ms. Polychronopoulos had a negative perception of the complainant, but she was concerned about what the complainant had told her, so she spoke to Ms. Polychronopoulos. Ms. Luke testified to feeling satisfied after her meeting that Ms. Polychronopoulos felt no animosity toward the complainant.

[56] The complainant testified to leaving the department after learning that he was unsuccessful in this process. He felt that this process was the culmination of a prolonged campaign of discrimination and bias against him.

[57] After his departure, he learned from Chris Barthel, a colleague still in the workplace about certain remarks Ms. Polychronopoulos made about the appointee.

[58] Mr. Barthel appeared as a witness for the complainant. He testified that he has known the complainant since 1992. They have worked together on projects over the years and had a very good working relationship throughout.

[59] After the complainant left the department, Mr. Barthel testified to being present at a staff meeting led by Ms. Polychronopoulos, who introduced the appointee as a new manager. Mr. Barthel testified that it appeared to him that Ms. Polychronopoulos appeared to be excited to have the appointee come on board.

[60] Mr. Barthel also testified to a conversation with the appointee. Mr. Barthel testified to what he felt was an off-the-cuff comment made by the appointee about “the real reason why Blair [Ms. Polychronopoulos] had brought him in, which was to fix the problems that had occurred”. Mr. Barthel did not elaborate but testified to his impression that it sounded as though Ms. Polychronopoulos really wanted the appointee in the position.

[61] When the complainant asked Ms. Polychronopoulos about this on the witness stand, she acknowledged that she had a good working relationship with the appointee but had nothing further to add.

[62] The complainant and Ms. Luke both testified to an AS-05 acting position offered to him shortly before he retired in May of 2022. He testified that he declined it because he felt it was a personal insult.

III. Summary of the arguments

A. For the complainant

[63] The complainant was provided with the respondent’s book of authorities before the hearing but did not refer to any cases in his argument, which was exceedingly brief.

[64] He characterized Ms. Polychronopoulos’s testimony as a clear indication of her ongoing animosity and stated that she lied on the witness stand when she testified to how she dealt with a request of his. He had come to her requesting information, and she told him she would need to consult with others before she could consider whether or not she was able to comply with his request. The complainant disagreed with her characterization of the event and was of the opinion that she could have complied immediately.

[65] The complainant submitted that he remains of the opinion that his participation in the national classification grievance was a clear factor in him not being appointed.

[66] He felt that his exam responses were worthy of a passing grade.

[67] The complainant stated that based on his experience, nominations, and awards, he should have simply been appointed to the acting position that is the subject of this complaint.

[68] In summary, the complainant felt that the evidence presented at the hearing pointed to an abuse of authority.

B. For the respondent

[69] The respondent submitted that the complainant did not meet the burden of proof required to establish an abuse of authority. The assessment panel fairly and transparently assessed the written and oral examination responses of all the candidates, including the complainant.

[70] The respondent referred to *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, for the proposition that managers have considerable discretion in staffing matters.

[71] The respondent also referred to *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11, on the matter of deciding which qualifications are essential for any given position.

[72] Furthermore, submitted the respondent, *Jolin* provides that abuse of authority in the assessment of merit requires proof that the result was unfair or that the assessment methods were unreasonable, and it submitted that the complainant failed to produce any such proof. The respondent submitted that the evidence clearly showed that he was fairly evaluated and that he received failing grades for three of the nine competencies.

[73] There is simply no evidence, submitted the respondent, of the choice of an advertised process being inappropriate. It is not enough for the complainant to simply state his preference, per *Gaudreau v. Deputy Minister of Fisheries and Oceans*, 2013 PSST 23.

[74] Also, submitted the respondent, the case of *Chuey v. Commissioner of the Correctional Service of Canada*, 2021 FPSLREB 58, makes it clear that it is not up to the Board to revisit management's choice of a non-advertised versus an advertised process.

[75] The respondent submitted that there is no evidence of animosity toward the complainant. Quite the contrary; he was later offered an acting position, which he declined.

[76] The respondent referred to the email mistakenly sent to the complainant as a mere administrative error, which does not constitute an abuse of authority.

[77] The respondent objected to the complainant expanding the parameters of his complaint by including a personal favouritism allegation, which was not articulated in his initial complaint or his allegations. At the hearing, the complainant was permitted to explore the issue of personal favouritism. In any case, submitted the respondent, Mr. Barthel's testimony did not provide any basis for a finding that the appointee had been appointed by way of an act of personal favouritism.

[78] For the above reasons, submitted the respondent, this complaint should be dismissed.

IV. Decision and reasons

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

[80] "Abuse of authority" is not defined in the *PSEA*. However, s. 2(4) provides as follows: "For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism." As indicated in *Tibbs*, abuse of authority may also include improper conduct or significant omissions. In a complaint of abuse of authority, the burden of proof rests with the complainant (see *Tibbs*, at paras. 48 to 55 and *Davidson v. Canada (Attorney General)*, 2021 FCA 226, at para. 27).

A. Did the respondent abuse its authority in the application of merit?

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

77 (1) When the Commission has made or proposed an appointment in an internal appointment process, a person

77 (1) Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d'un processus de

in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Board's regulations — make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of

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

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

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

(b) the Commission has regard to

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

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

nomination interne, la personne qui est dans la zone de recours visée au paragraphe (2) peut, selon les modalités et dans le délai fixés par règlement de la Commission des relations de travail et de l'emploi, présenter à celle-ci une plainte selon laquelle elle n'a pas été nommée ou fait l'objet d'une proposition de nomination pour l'une ou l'autre des raisons suivantes :

a) abus de pouvoir de la part de la Commission ou de l'administrateur général dans l'exercice de leurs attributions respectives au titre du paragraphe 30(2);

30 (2) *Une nomination est fondée sur le mérite lorsque les conditions suivantes sont réunies :*

a) selon la Commission, la personne à nommer possède les qualifications essentielles — notamment la compétence dans les langues officielles — établies par l'administrateur général pour le travail à accomplir;

b) la Commission prend en compte :

(i) toute qualification supplémentaire que l'administrateur général considère comme un atout pour le travail à accomplir ou pour l'administration, pour le présent ou l'avenir,

(ii) toute exigence opérationnelle actuelle ou future de l'administration précisée par l'administrateur général,

(iii) any current or future needs of the organization that may be identified by the deputy head. **(iii)** tout besoin actuel ou futur de l'administration précisé par l'administrateur général.

[82] As a panel of the Board, my role is not to reassess candidates but rather 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, at para. 65 and *Broughton v. Deputy Minister of Public Works and Government Services*, 2007 PSST 20, at para. 54).

[83] *Tibbs*, at paras. 63 and 64, states as follows:

[63] ... managers should have considerable discretion when it comes to staffing matters. To ensure the necessary flexibility, Parliament has chosen to move away from the previous staffing regime with its rules-based focus under the former PSEA. The old system of relative merit no longer exists. The definition of merit found in subsection 30(2) of the PSEA provides managers with considerable discretion to choose the person who not only meets the essential qualifications, but is the right fit because of additional asset qualifications, current or future needs, and/or operational requirements.

[64] However, this does not mean that the PSEA provides for absolute discretion. The preamble clarifies the values and ethics that should characterize the exercise of discretion

[84] The respondent also correctly cited *Jolin* on the exercise of discretion when setting the necessary qualifications for a given position and the use of an appropriate assessment method. *Jolin* states this at paragraphs 25 to 27:

[25] The PSC is thus empowered, under subsection 30(2) of the PSEA, to assess whether a person to be appointed has the essential qualifications, taking into account any additional qualifications, operational requirements and current or future needs of the organization. Furthermore, the deputy head is specifically empowered to establish essential and additional qualifications and to specify any operational requirements or current or future needs of the organization. In the present case, the PSC delegated the exercise of its powers to the respondent under section 15 of the PSEA. It was thus the respondent, as delegate, who evaluated the person to be appointed.

...

[26] Section 36 of the PSEA sets out the means that the deputy head may employ to assess the essential and additional qualifications of the person to be appointed, as established by the

deputy head pursuant to subsection 30(2). For example, section 36 refers directly to paragraph 30(2)(a) and to subparagraph 30(2)(b)(i). Section 36 reads as follows:

36. In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).

...

[27] the purpose of this section is to confer the discretion to choose among the available methods for assessing candidates, and to proceed with an appointment based on merit under subsection 30(2) of the PSEA. At different steps in the process of selecting the person to be appointed, the deputy head will be called upon to choose and use various assessment methods, including examinations and interviews....

[Emphasis in the original]

[85] Furthermore, paragraph 77 of *Jolin* states:

[77] Section 36 of the PSEA provides that the deputy head may use any assessment method that he or she considers appropriate in an internal appointment process. For the Tribunal to find that there was abuse of authority in the selection of the assessment methods, the complainant must prove that the result is unfair and that the assessment methods are unreasonable, do not allow the qualifications stipulated in the statement of merit criteria to be assessed, have no connection to those criteria, or are discriminatory.

[86] The method of assessment was not challenged, just the results. I found nothing untoward in the methodology described by Ms. Luke and Ms. Polychronopoulos.

[87] I found both Ms. Polychronopoulos and Ms. Luke credible and reliable witnesses on the basis of their testimonies and on the basis of the documentary evidence to which they referred. I find they both assessed the complainant's oral and written exam responses properly, transparently, and fairly.

[88] The complainant was also a credible and reliable witness. He simply did not agree with some of the marks he received. I find nothing to suggest he was assessed any differently than any other candidate. A pass mark of at least 3 was required for each one of the nine essential competencies. The complainant was fairly evaluated and

was graded at less than that for three of the nine competencies. Ms. Luke and Ms. Polychronopoulos justified their evaluations in a satisfactory manner.

[89] *Portree v. Deputy Head of Service Canada*, 2006 PSST 14 at paras. 50 to 52, holds:

[50] An employee must understand that a complaint is more than merely stating a perceived injustice. The complaint must set out the facts upon which the complainant relies in proving his or her case to the Tribunal. A complaint goes beyond merely alleging that the respondent abused his or her authority. The allegations must allege serious facts and a chronology of the events, times, and dates and any witnesses if applicable.

[51] Paragraph 77(1)(a) is not intended to be the “catch all” recourse for complainants who allege abuse of authority whenever they are not satisfied with the results of a selection process. A complainant must not treat the Tribunal as a forum of last resort to appeal a deputy head’s decision on the appointment or proposed appointment simply because he or she was not selected. As stated above, unless of a serious nature, wrongdoing in the form of an error, omission or improper conduct will not be sufficient to constitute abuse of authority.

[52] As explained in Tibbs, supra, the preamble of the PSEA highlights the assessment board’s discretion in making an appointment. Ratings are no longer required or necessary under the PSEA and a candidate that would have fewer points among qualified candidates could be appointed if the selection board determines that he or she is the “right fit”. Therefore, the Tribunal’s role is not to reassess a complainant’s marks on a given answer or review responses given during an interview simply because a complainant does not agree with the decision regarding an interview question....

[90] I conclude that the complainant did not establish on the balance of probabilities that the respondent abused its authority in the application of merit.

B. Did the respondent abuse its authority in the choice of process?

[91] The complaint was also made under s. 77(1)(b) of the PSEA, which provides the following right of recourse when the choice of appointment process is in dispute:

77 (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2)

77 (1) Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d’un processus de nomination interne, la personne qui est dans la zone de recours

may — in the manner and within the period provided by the Board's regulations — make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of

visée au paragraphe (2) peut, selon les modalités et dans le délai fixés par règlement de la Commission des relations de travail et de l'emploi, présenter à celle-ci une plainte selon laquelle elle n'a pas été nommée ou fait l'objet d'une proposition de nomination pour l'une ou l'autre des raisons suivantes :

...

[...]

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

b) abus de pouvoir de la part de la Commission du fait qu'elle a choisi un processus de nomination interne annoncé ou non annoncé [...]

[92] Section 33 of the PSEA states, "In making an appointment, the Commission may use an advertised or non-advertised appointment process."

[93] In *Chuey*, the Board indicated, at paras. 33 and 34:

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

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

[94] For a complaint under s. 77(1)(b) of the PSEA to be successful, the complainant must establish, on a balance of probabilities, that the choice to use an advertised process was an abuse of authority (see. *Robbins v. Deputy Head of Service Canada*, 2006 PSST 17 at para. 36, *Jarvo v Canada (Deputy Minister of National Defence)*, 2011, 2011 PSST 6 at para. 7 and *Hansen v Deputy Head (Department of Justice)*, 2022 FPSLREB 9 at para. 80).

[95] Ms. Polychronopoulos and Ms. Luke provided a satisfactory explanation for the exercise of discretion in the choice of process, saying they felt an advertised process was more open and transparent. Ms. Luke expanded on this, adding that the choice of an advertised process in this case was consistent with the practice and approach being

taken in other departments, and that consistency was an important managerial goal. I therefore find that the choice of an advertised process was not an abuse of authority.

[96] The respondent was also correct in stating that there is no obligation to simply appoint anyone who might have been successful in a different process. This was clearly articulated in *Davidson v. Deputy Minister of Justice*, 2022 FPSLREB 21 at para. 45, as follows:

[45] Moreover, in Abi-Mansour v. President of the Public Service Commission, 2016 PSLREB 53, when faced with a similar allegation, the Board held that "... there is no obligation for the respondent to choose from another pool, in another department, where people were selected with a different set of educational requirements." In that case, the Board went on to state that holding an advertised process so that an appointment opportunity may be offered to more than one candidate is not an abuse of authority.

[97] Similarly, in the present matter, I find that an abuse of authority is not established by the failure to appoint the complainant as part of a non-advertised process simply because he had previously been added to a pool of candidates in a different process.

[98] I conclude that the complainant did not establish on the balance of probabilities that the respondent abused its authority in choosing an advertised selection process.

C. Did the respondent abuse its authority by showing bias against the complainant?

[99] The test for a reasonable apprehension of bias is well established. In the setting of an appointment process, the question to be answered is whether 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 (see *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10; *Drozdowski v. Deputy Head (Department of Public Works and Government Services Canada)*, 2016 PSLREB 33 and *Hansen v Deputy Head (Department of Justice)*, 2022 FPSLREB 9).

[100] I found no evidence of animosity toward the complainant from either Ms. Polychronopoulos or Ms. Luke. If there was such animosity, he would likely never have been offered the acting position, which he ultimately declined. I similarly found

no trace of bias surrounding his participation in a national classification grievance. He is certainly entitled to his opinion about having been “blackballed”, which he expressed on many occasions, but there is no evidence whatsoever that his participation in that grievance had any bearing on the assessment panel’s decisions.

[101] In *Gandhi v. Canada (Canada Border Services Agency)*, 2015 FC 436, confirmed by the Federal Court of Appeal in *Pierre v. Canada (Canada Border Services Agency)*, 2016 FCA 124. At para. 58, the Court wrote,

[58] ... In the first place, in its alternative conclusion on the matter, the Tribunal found that Ms. Clement’s participation in the appointment process leading to the complaint did not prove an appearance of bias. I also share this point of view. Nothing in the documents of Exhibit CF-32 allows one to infer an appearance of bias or a reasonable apprehension of bias against the applicant on the part of Ms. Clement. The very most one can infer is that Ms. Clement was involved in an appointment process in 2009 that led to the filing of a complaint by the applicant, and that this complaint was subsequently settled. This type of situation is common in labour relations, and it cannot be inferred from it that a manager loses his or her impartiality towards an employee because the employee has filed a complaint, a grievance or some other recourse.

[102] In *Hansen v. Deputy Head (Department of Justice)*, 2022 FPSLR 9, the Board applied the reasoning of the decision in *Gandhi*:

...

[61] Concerning the question of whether an earlier grievance predisposed the hiring manager against the complainant, I rely on the Federal Court’s decision in [Gandhi], which was confirmed by the Federal Court of Appeal (2016 FCA 124). The relevant aspect of that case concerns an allegation of bias in the assessment of the complainant because of his earlier complaint to the Tribunal.

[62] At paragraph 58 of Gandhi, the Federal Court held, “this type of situation is common in labour relations, and it cannot be inferred from it that a manager loses his or her impartiality towards an employee because the employee has filed a complaint, a grievance or some other recourse.”

...

[103] On the basis of the reasoning in *Gandhi* and *Hansen*, I find the complainant did not meet his burden of proof regarding his allegation of bias as it pertains to his participation in a national grievance.

[104] The complainant made a bald assertion concerning the veracity of one particular aspect of Ms. Polychronopoulos's testimony that I find was completely unwarranted. The British Columbia Court of Appeal, in *Faryna v. Chorny*, 1951 CanLII 252 (B.C.C.A.), described the test to assess credibility and reliability as follows:

...

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions....

...

[105] Nothing about Ms. Polychronopoulos's testimony was suspect. The complainant's request for information had nothing to do with this staffing process, but I find that she answered his question to the best of her recollection.

D. Did the respondent abuse its authority by showing personal favouritism towards the appointee?

[106] The PSEA explicitly refers to personal favouritism, which is distinct from other types of favouritism. *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7 at para. 39, emphasized the difference as follows:

*[39] ... It is noteworthy that the word **personal** precedes the word **favouritism**, emphasizing Parliament's intention that both words be read together, and that it is **personal favouritism**, not other types of favouritism, that constitutes abuse of authority.*

[Emphasis in the original]

[107] At paragraph 41 of *Glasgow*, the Public Service Staffing Tribunal further explained as follows:

[41] Where there is a choice among qualified candidates, paragraph 30(2)(b) of the PSEA indicates that the selection may be made on the basis of additional asset qualifications, operational requirements and organisational needs. The selection should never be for reasons of personal favouritism. Undue personal interests, such as a personal relationship between the person selecting and

the appointee should never be the reason for appointing a person. Similarly, the selection of a person as a personal favour, or to gain personal favour with someone else, would be another example of personal favouritism.

[108] Ms. Polychronopoulos was candid in her assessment of the complainant's performance on aspects of the exam, and he simply disagreed with her. The idea that she might have inappropriately appointed the appointee on the basis of personal favouritism was never even put to her on the witness stand. If this was a cornerstone of the complainant's case, one might have expected that she would at least have been questioned about it.

[109] I find the evidence of Mr. Barthel to be a reliable indicator of Ms. Polychronopoulos's reaction to the appointee's success in the process. By her own admission, she and the appointee had had a good working relationship in the past. It is common practice for a supervisor, in introducing a new manager to the team, to speak of them in favourable terms. To do otherwise would be highly unusual.

[110] There is nothing in the evidence to suggest that the respondent abused its authority based on personal favouritism.

E. Did the administrative error amount to an abuse of authority?

[111] It is unfortunate that the complainant was mistakenly sent an email that erroneously stated that he was in the pool of qualified candidates pursuant to process number 2018-CSD-IA-BC-15875. There has never been a question in anyone's mind, including the complainant's, about whether or not the complainant received a passing grade on three of the nine essential qualifications. He did not. The email in question was purely an administrative error.

[112] As stated in *Tibbs* at paragraph 65, much more is required than mere errors and omissions to constitute abuse of authority. In *Gaudreau*, at para. 49:

[49] The evidence shows that a letter should have been sent to the complainant on May 30, 2011, but the complainant did not receive the letter. However this error had no significant impact on the complainant. More particularly, it did not affect the outcome of the appointment process and it did not prevent him from making a complaint to the Tribunal. Thus the Tribunal finds that this was a simple error or omission, which does not constitute abuse of authority.

[113] As stated in *Gaudreau*, I find this administrative error did not affect the outcome of the appointment process and did not prevent the complainant from making a complaint. It does not constitute abuse of authority.

F. Did the respondent discriminate against the complainant on a prohibited ground, in violation of the *Canadian Human Rights Act*?

[114] As indicated at the outset of this decision, participation in union matters is not a prohibited ground under the *Canadian Human Rights Act*.

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

(The Order appears on the next page)

V. Order

[116] The complaint is dismissed.

November 2, 2022.

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