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



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

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BETWEEN

**MARTIN HALLER**

Complainant

and

**DEPUTY HEAD  
(Department of National Defence)**

Respondent

and

**OTHER PARTIES**

Indexed as

*Haller v. Deputy Head (Department of National Defence)*

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

**Before:** Amélie Lavictoire, a panel of the Federal Public Sector Labour Relations  
and Employment Board

**For the Complainant:** Louis Bisson, Union of National Defence Employees

**For the Respondent:** Peter Doherty, counsel

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

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Heard by videoconference,  
August 3 and 4, 2022.

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## REASONS FOR DECISION

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### I. Complaint before the Board

[1] Martin Haller (“the complainant”) was the deputy fire chief at Canadian Forces Base Shilo (“CFB Shilo”) in Manitoba. He is now retired.

[2] On September 26, 2018, he made a complaint with the Federal Public Sector Labour Relations and Employment Board (“the Board”) against the deputy head of the Department of National Defence (“the respondent”) with respect to an appointment process to staff the fire chief (FR-06) position at CFB Shilo (appointment process number 18-DND-INA-CA-436180). The complaint alleged that abuse of authority occurred in the choice of a non-advertised process and in the application of merit.

[3] For the reasons that follow, the complaint is dismissed. The evidence that the complainant adduced does not allow the Board to find that the respondent abused its authority in this case.

### II. Summary of the evidence

#### A. The state of affairs in the Fire Hall

[4] The complainant was the deputy fire chief at CFB Shilo from 2005 to his retirement in 2021. His position was classified FR-04, and he reported to the fire chief.

[5] Until March 2015, CFB Shilo’s Fire Hall was under the responsibility of the Engineering Branch, to which the fire chief reported. On April 1, 2015, the responsibility for the Fire Hall was transferred to the Operations Branch (“G3 Branch” or “the Branch”), and the fire chief began reporting to an operations officer responsible for operations at CFB Shilo.

[6] In 2018, and as of the appointment process at issue, the operations officer was Major Talon Desjardins (“the delegated manager”) who, at that time, held the rank of captain. Major Desjardins occupied the operations officer position twice, from December 2014 to July 2015, and then again from mid-2017 to July 2021. He was not stationed at CFB Shilo between those dates.

[7] Major Desjardins testified about the state of affairs in the Fire Hall when it came under his responsibility in April of 2015. He had had no real prior dealings with the Fire Hall or its staff, including the complainant. In the days leading up to the transfer

of responsibility, he received oral briefings from the Labour Relations Branch and the Base Engineering Officer responsible for the Fire Hall until that time. They described the situation in the Fire Hall as poisonous and one of turmoil. There were performance-related issues involving both the fire chief and deputy fire chief as well as issues with respect to the allocation of resources and training. However, most problematic was infighting between the fire chief, the deputy fire chief, and other members of the Fire Hall. According to Major Desjardins, much of the dysfunction in the Fire Hall was attributable to the fire chief and the deputy fire chief. The complainant's testimony confirmed that he and the fire chief had an acrimonious and difficult working relationship. He described the fire chief's behaviour toward him as harassment.

[8] When he assumed responsibility for the Fire Hall in April 2015, Major Desjardins met with the fire chief. He testified that the fire chief might have spoken to him about the complainant on that occasion. If so, he was confident that the fire chief provided no information about the complainant that had not already been relayed to him by the Labour Relations Branch or the Base Engineering Officer.

[9] In 2013 or 2014 — well before the Fire Hall came under Major Desjardins's responsibility — the complainant was removed from the Fire Hall due to what Major Desjardins described as performance issues and issues with the fire chief. The complainant testified that he was removed from the Fire Hall at the fire chief's request for having questioned his leadership. According to Major Desjardins, the Base Commander made the decision to remove the complainant from the Fire Hall on the recommendation of the Base Engineering Officer. Major Desjardins was not involved in the decision.

[10] The complainant continued to hold the title of deputy fire chief and to receive the salary associated with that position, but he worked in another building and no longer had a deputy fire chief's duties and responsibilities. He was assigned to special projects. The complainant did not work in the Fire Hall or with Fire Hall staff until a time that roughly coincided with the end of the appointment process at issue.

[11] Between April 2015 and his departure from CFB Shilo in July 2015, Major Desjardins met with the complainant several times, to discuss projects on which the complainant worked. They exchanged numerous emails. He witnessed the

complainant's oral and written communication style and reviewed the complainant's written work, including briefing notes, emails, and information packages.

[12] Major Desjardins described his relationship with the complainant as cordial and professional. The complainant's testimony did not contradict that description of their relationship.

[13] After Major Desjardins returned to the G3 Branch in 2017, he had several conversations with the complainant about his performance. A specific focus of those discussions was the complainant's written communication style when he wrote while feeling frustrated or angry. Major Desjardins offered mentorship and suggestions aimed at helping the complainant develop strategies to avoid sending written communications from a place of anger.

[14] Major Desjardins testified that several letters of expectations were issued to the complainant with respect to the need to communicate in an acceptable manner, behave in a respectful and courteous manner, and follow directions.

[15] The complainant was also suspended for disciplinary reasons four times. Suspensions were issued by Major Desjardins and another member of management for reasons including leaving work without authorization, unprofessional behaviour, and issues related to communication, notably shouting at others. According to the complainant's testimony, Major Desjardins imposed two of the suspensions, both in early 2018, before the appointment process at issue took place.

[16] The complainant filed grievances with respect to the disciplinary measures. The grievances did not include allegations related to Major Desjardins personally. When asked whether the grievances might have impacted his impartiality as a delegated manager, Major Desjardins testified that they did not. He described the grievance process as a tool available to all employees to address and resolve workplace issues, a process that he, himself, has used.

## **B. Departure of the fire chief**

[17] When Major Desjardins returned to the G3 Branch in 2017, there were issues with the fire chief, which resulted in the fire chief going on leave. The fire chief appointed Daniel Barney ("the appointee") as the acting fire chief in his absence. When the fire chief extended his leave, he recommended to Major Desjardins that Mr.

Barney's acting appointment be extended. Satisfied with the appointee's work performance as the acting fire chief, Major Desjardins extended the acting appointment. The fire chief subsequently continued to extend his leave in increments of approximately three months. The appointee's acting appointment was similarly extended.

[18] The fire chief never returned to the workplace. He decided to retire once he had exhausted his leave. Major Desjardins testified that when the fire chief retired unexpectedly, he extended the appointee's acting appointment to ensure consistent leadership in the Fire Hall. He then began the process of replacing the fire chief, who was not involved in the selection process at issue.

[19] In all, the appointee was the acting fire chief for approximately one year and until the appointment process was complete. Major Desjardins did not know the appointee before he was made the acting fire chief but had the chance to see the appointee perform during the acting appointment.

### **C. The choice of appointment process**

[20] Major Desjardins was the delegated manager responsible for the appointment process. He was assisted by labour relations staff.

[21] Major Desjardins testified that throughout the appointment process, he was focused on the best interests of the G3 Branch and the Fire Hall. He knew that he would soon be posted elsewhere. He wanted to set the Branch up for success.

[22] After consulting a staffing advisor and reviewing a Department of National Defence document of available staffing options and important considerations (entitled *Fact Sheet: Non-Advertised Appointment Process* and prepared by the Directorate of Civilian Employment Policies, June 2016), Major Desjardins decided to proceed with an internal non-advertised process. His reasons for doing so included the following:

- the importance of staffing the position quickly due to the fact that the Fire Hall offered important public-safety and emergency-response services at CFB Shilo and in the surrounding community;
- his initial review of the available internal resources, according to which there was personnel within the Branch who, at least on paper, appeared to have the minimum qualifications for the position; and
- the importance of finding a candidate who would rapidly understand the environment and was familiar with the intricacies of the Fire Hall so as to address the turmoil that had been brewing there for more than 10 years.

[23] Major Desjardins testified that additional considerations in his choice of a non-advertised process included the remote nature of CFB Shilo, the specialized nature of the work of a fire chief on a Canadian Forces Base, the need for a professional development program, and the life-and-death consequences of an emergency should one arise while the Fire Hall was without a fire chief.

[24] Leaving the position vacant or without a strong leader was even more problematic because the Fire Hall was also without a deputy fire chief, as the complainant had been removed from the Fire Hall several years earlier. Normally, the deputy fire chief was responsible for operations, while the fire chief would focus mostly on administration, including financial reporting and requirements. With the deputy fire chief removed from the Fire Hall, the fire chief was required to oversee all aspects of Fire Hall operations. Major Desjardins was concerned that leaving the Fire Hall without an indeterminate fire chief could jeopardize operations and lead to resourcing challenges and decreased employee morale.

[25] The “Articulation of Selection Decision” prepared by Major Desjardins contains some, but not all, of the reasons previously mentioned for selecting a non-advertised process.

#### **D. The assessment of merit criteria**

[26] The essential qualifications for the position included a series of five courses or their equivalent, experience leading firefighter and rescue services and experience supervising fire-department personnel. They also included the ability to lead fire-service operations, communicate effectively orally, and communicate effectively in writing, along with effective interpersonal relationships, leadership, judgment, initiative, and dependability.

[27] As previously mentioned, Major Desjardins had identified employees who, on paper, appeared to have the minimum qualifications for the fire chief position. There were three potential candidates: the appointee, the complainant, and another employee who did not work in the Fire Hall. He identified them by comparing the list of essential courses and certifications required of a fire chief to an existing list of the certifications and training that each Branch employee possessed or had completed. He then reviewed the candidacy of each potential candidate more closely, to confirm whether each did,

in fact, meet all the essential qualifications. To conduct the more detailed review, he relied on his personal knowledge of the employees and the information he had on file with respect to their training.

[28] He testified that he spent one to one-and-a-half weeks on the review process and that he prepared a handwritten document assessing each candidate against each essential qualification. He reviewed all the candidacies based on the same criteria. He did not inform the employees that he was assessing their candidacies at the time; nor did he later inform them that they had been considered for the position. His written assessment of the appointee was used as the basis for the narrative assessment produced in support of the appointment.

[29] Major Desjardins's handwritten assessments of the complainant's candidacy and that of the third employee were not produced in evidence. The existence of those assessments came to light during Major Desjardins's testimony. Because he testified at length — and was cross-examined — about the results of those assessments and the qualifications that he felt that the complainant and the other employee possessed and lacked, I declined to pause the hearing, require the respondent to locate the handwritten assessments, and allow it to reopen its evidence.

[30] Major Desjardins's review of the candidacies led him to conclude that the appointee, who occupied the position of Chief Fire Inspector (FR-03) at the time of his appointment, was the only employee who possessed all the essential qualifications. Major Desjardins reached out to him to confirm his interest in the position and subsequently prepared a six-page narrative assessment in support of the appointment.

[31] Because the complainant did not contest that the appointee possessed all the essential qualifications and because most of his allegations pertain to how his candidacy was assessed, a detailed review of the content of the narrative assessment is not required. A summary will suffice.

[32] According to the narrative assessment, the appointee possessed all the training required for the position. He had firefighting and rescue-service experience and had the ability to lead fire-services operations. He had experience supervising and leading firefighting teams and experience overseeing Fire Hall operations. He was dependable and responsive to requests and to others' needs. He maintained effective interpersonal relationships by supporting and mentoring team members. He had repeatedly

demonstrated initiative by replacing the fire chief when the fire chief was away and addressing any unexpected issues that arose during those times. He demonstrated judgment in the context of infrastructure projects that required Fire Hall input to ensure the respect of policies and adherence to requirements. He also had the ability to communicate effectively as demonstrated by his oral briefings and written communications on complex issues. Lastly, the narrative assessment provided examples of the appointee's leadership skills motivating a team and coordinating efforts to enhance the Fire Hall's presence on CFB Shilo.

[33] In comparison, Major Desjardins testified that the complainant lacked the leadership skills required for the job. He described leadership as a "soft skill" intimately tied to dependability and initiative. A leader must command respect by being there for his or her team, considering others' needs, and taking ownership of past mistakes. According to Major Desjardins, not only did the complainant never admit to making mistakes, he also did not seize opportunities offered to him to facilitate his return to the Fire Hall or to interact with Fire Hall staff. He described feeling as though he dragged the complainant through the process of returning to his deputy-fire-chief duties.

[34] He also testified at length about the complainant's communication skills. He described the complainant's written communication style as brief, choppy, difficult to understand, and almost incoherent, particularly when the complainant was angry or frustrated when writing. Major Desjardins was often required to call the complainant after receiving an email from him, to understand the email's meaning. The complainant's oral communication was also described as unclear and difficult to understand. According to Major Desjardins, the complainant would on occasion "shut down", display body language that hindered communication, and have to leave the room to calm down before returning to continue a conversation.

[35] The assessment of the complainant's candidacy also led Major Desjardins to conclude that the complainant lacked the judgment required for the position. He explained that the complainant had not demonstrated judgment when working on projects assigned to him. The complainant would shout at others and communicate in a non-respectful manner. Major Desjardins testified that the complainant's tendency to react emotionally — orally and in writing — demonstrated that he lacked the judgment required to focus on the best interests of the Branch and its staff.



[36] Major Desjardins's knowledge of the complainant, based on numerous interactions, led him to believe that the complainant also lacked the ability to develop and maintain effective interpersonal relationships, and dependability. He explained that other organizations at CFB Shilo preferred to work with Fire Hall staff other than the complainant. According to him, this was due to the complainant's approach and nature. Major Desjardins also testified that he would encourage the complainant to reach out to Fire Hall staff to improve relationships and set the conditions to allow him to return to the Fire Hall. However, the complainant generally refused to speak with most Fire Hall staff, and often, Fire Hall staff did not want to engage with the complainant, due to past issues and conflicts. According to Major Desjardins, the complainant did not appear to want to engage with Fire Hall staff.

[37] The complainant testified that he possessed all the essential qualifications and more, including training that the appointee did not possess.

[38] The third employee considered for the position possessed most, but not all, of the essential qualifications. He lacked two training courses. Although it would have been possible for him to take the required training over the span of a few months, Major Desjardins felt that the urgency of the situation required him to prioritize staffing the position with someone who already possessed all the qualifications.

[39] On August 31, 2018, a "Notice of Consideration" was posted, indicating that the appointee was being considered for a promotional appointment to the fire chief position. On September 12, 2018, he was appointed to the position.

[40] When he was cross-examined about a potential conflict of interest, given his involvement in disciplining the complainant and his role as the delegated manager responsible for the appointment process, Major Desjardins testified that his military training emphasized the importance of learning from mistakes and moving on. He did not hold past mistakes or disciplinary issues against the complainant and did not feel that he needed to delegate the task of assessing the complainant's candidacy to someone else. He dismissed as improper and impracticable the idea presented to him on cross-examination that he should have asked the fire chief of another Canadian Forces Base to assess the complainant's candidacy. Fire chiefs on Canadian Forces Bases have close professional relationships. According to him, involving another fire chief would not have eliminated concerns with respect to bias.

### III. Summary of the arguments

#### A. For the complainant

[41] The complainant describes this case as involving layers of bad faith and abuse of authority.

[42] He submits that the choice of a non-advertised appointment process was an abuse of authority because the Articulation of Selection Decision did not reflect the reality of the workplace situation and thus did not make sense in the circumstances; see *Hunter v. Deputy Minister of Industry*, 2019 FPSLREB 83. Although the respondent claims that it was urgent that the position be filled, roughly four months elapsed between the fire chief's retirement and the date on which the Notice of Consideration was issued. There was no urgency. An acting fire chief was in place, and the respondent could well have taken the time to conduct an advertised process. Moreover, although the respondent argues that it could not take the time to carry out an advertised process that would have required assessing several candidates without jeopardizing its operations, the evidence reveals that the delegated manager did in fact take the time to assess three employees' candidacies, one of which was the complainant's.

[43] The complainant also argues that there was a reasonable apprehension of bias in the assessment of the merit criteria and that thus, bad faith and an abuse of authority occurred; see *Denny v. Deputy Minister of National Defence*, 2009 PSST 29. The respondent had the duty to be fair and to be perceived as being fair in its assessment of the complainant's candidacy; see *Amirault v. Deputy Minister of National Defence*, 2012 PSST 6. An informed third party looking at the facts of this case would reasonably perceive bias on the part of the delegated manager. The respondent could have delegated the assessment of the complainant's candidacy to another reviewer, but it did not. Rather, his candidacy was assessed by someone who had imposed disciplinary measures against him. An informed person would assume that the nature of the complainant's relationships with others in the CFB Shilo chain of command, the history of disciplinary measures involving the complainant and the delegated manager, and the fact that the complainant had been removed from the Fire Hall for almost three years before the selection process clouded the judgment of the person who assessed the complainant's candidacy.

[44] According to the complainant, the respondent also abused its authority in the application of merit by breaching the values of access and fairness when it assessed his candidacy without his knowledge. Assessing someone in secret is a violation of staffing values; see *Renaud v. Deputy Minister of National Defence*, 2013 PSST 26. By assessing his candidacy without his knowledge, the respondent deprived the complainant of the knowledge that he had been found to lack essential qualifications, which meant that he could not challenge his elimination from consideration or seek an informal discussion.

[45] He further submits that his candidacy was excluded for reasons having nothing to do with the assessment criteria, that the criteria used to assess his candidacy differed from those used to assess the other candidates, and that some criteria were assessed more harshly with respect to him. For example, the delegated manager testified that he considered the complainant's lack of certain soft skills, but there is no indication that he examined the other candidates with respect to those same skills. He also assessed the complainant's leadership capacity in a negative light, due to the complainant's hesitation to return to the Fire Hall when that opportunity was offered.

[46] The complainant submits that on the whole, the evidence demonstrates that his candidacy was not retained because he was a difficult employee who was assessed, in secret, by an individual who relied on his personal knowledge of the complainant and their past shared history — including disciplinary measures — to conduct his assessment.

## **B. For the respondent**

[47] The respondent denies that there was abuse of authority in the choice of the appointment process and in the application of merit. The delegated manager properly exercised his discretion, and the appointment was conducted in a fair and transparent manner, pursuant to the *PSEA*.

[48] Section 33 of the *PSEA* grants deputy heads discretion in the choice of the appointment process. It does not confer a preference for an advertised over a non-advertised appointment process. The Board's jurisprudence similarly recognizes that discretion; see *Robbins v. the Deputy Head of Service Canada*, 2006 PSST 17; *Clout v. Deputy Minister of Public Safety and Emergency Preparedness*, 2008 PSST 22; and *Morris v. Commissioner of Correctional Service of Canada*, 2009 PSST 9. The

respondent suggests that *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 6, and *Marin-Lazarescu v. President of Shared Services Canada*, 2020 FPSLREB 52, are particularly relevant to the facts of this case, notably with respect to the unexpected retirement of the incumbent of a critical position with an important leadership role in a team under strain.

[49] In this case, the delegated manager justified his selection of a non-advertised process by stressing the pressing need to staff the fire chief position due to the critical emergency services that the Fire Hall offered to CFB Shilo's military operations, the on-base residential housing units, and the surrounding community. The CFB Shilo Fire Hall was unique in that it provided off-base emergency and fire-response services to two neighbouring communities.

[50] The delegated manager also identified the need for a strong leader capable of immediately addressing and resolving interpersonal and resource issues to avoid a further deterioration in morale and a reduction in the unit's ability to operate efficiently and effectively. Serious and pressing operational needs compelled the use of a non-advertised process. Those needs were documented in the Articulation of Selection Decision and were thoroughly explained at the hearing.

[51] Because he selected a non-advertised process, the delegated manager did not solicit applications. He was not required to; see s. 30(4) of the *PSEA*. While the appointee, the complainant, and another employee were considered and assessed based on his personal knowledge, he had no obligation to consider more than one candidate. The complainant and another candidate were found not to meet the essential qualifications.

[52] The appointment was subject to merit, as required by s. 30(1) of the *PSEA*. The appointee met all the essential qualifications, and it is not contested that he did. He was the only employee who met all the essential qualifications.

[53] The delegated manager assessed all the candidates using his personal knowledge of them and their past performance, which was an acceptable assessment method; see *Bérubé-Savoie v. the Deputy Minister of Human Resources and Skills Development Canada*, 2013 PSST 2, and *Visca v. Deputy Minister of Justice*, 2007 PSST 24. His reasoning for selecting the appointee was set out in the narrative assessment of merit criteria. Those reasons included the need for an incumbent with strong

leadership and interpersonal skills who was capable of providing stability and consistency to the strained Fire Hall team.

[54] The delegated manager also explained at length how and why he determined that the complainant did not meet the essential qualifications. The complainant did not demonstrate bias in favour of the appointee's candidacy or a reasonable apprehension of bias against his candidacy.

[55] The Board cannot conclude that there exists a reasonable apprehension of bias based on speculation or a suspicion. An apprehension of bias must be real, probable, or reasonably obvious; see *Hansen v. Deputy Head (Department of Justice)*, 2022 FPSLREB 9. The complainant presented no evidence capable of elevating his suspicions to a real, probable, or reasonably obvious apprehension of bias.

[56] The fact that the complainant filed grievances is not sufficient to allow the Board to infer that the delegated manager lost his impartiality; see *Gandhi v. Canada (Canada Border Services Agency)*, 2015 FC 436, upheld in 2016 FCA 124; *Hansen*; and *Saunders v. Deputy Minister of National Defence*, 2014 PSST 13. The complainant's grievances were against the respondent, not the delegated manager. Moreover, only one or two of the grievances pertained to a disciplinary measure that the delegated manager had imposed. *Denny* and *Amirault* are distinguishable since both involved complaints against the individual who conducted the assessment at issue. That is not so in this case; nor is there evidence of a personal conflict or animosity between the complainant and the delegated manager. The delegated manager was not involved in the decision to remove the complainant from the Fire Hall. He inherited a situation that involved significant interpersonal and performance issues. He did his job, and the complainant exercised his right to grieve. It is common for discipline to be imposed and then grieved. Such a routine occurrence cannot be held as compromising impartiality in the appointment process.

### **C. For the Public Service Commission**

[57] The Public Service Commission did not attend the hearing. In its written submissions, it did not take a position on the merits of the complaint.

#### IV. Analysis

[58] The complainant has the onus of establishing that on the balance of probabilities, the respondent abused its authority; see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at paras. 48 to 55, and *Davidson v. Canada (Attorney General)*, 2021 FCA 226 at para. 27.

[59] The complainant does not dispute that the appointee possessed all the essential qualifications. He also does not dispute the choice of the essential qualifications in the statement of merit criteria and the delegated manager's use of his personal knowledge as an assessment method. He challenges the choice of a non-advertised process and the assessment of his candidacy without his knowledge by an individual with involvement in past disciplinary measures imposed on him and knowledge of grievances he filed with respect to those measures. He alleges that there is a reasonable apprehension of bias.

##### A. The choice of a non-advertised process

[60] Section 33 of the *PSEA* gives the respondent the discretion to choose an advertised or a non-advertised appointment process. The *PSEA* states no preference. Accordingly, it is well established that deputy heads and their delegated managers enjoy broad discretion in the choice of the appointment process; see *Clout, Jarvo*, and *Morris*. However, they must exercise that discretion in accordance with the *PSEA*'s legislative purpose and with fair and transparent employment practices; see *Beyak v. Deputy Minister of Natural Resources Canada*, 2009 PSST 7.

[61] During the hearing, and as evidence was presented confirming that the complainant had been considered and assessed for the position, he no longer insisted that a non-advertised process had been selected to exclude him from consideration. However, he continued to maintain that the Articulation of Selection Decision did not reflect reality and thus did not make sense in the circumstances. He argued that there was no urgency to staff the position because an acting fire chief had been appointed. The Fire Hall was not without leadership. He also disputed the notion of urgency by highlighting the fact that the delegated manager did not focus on a single candidacy for the sake of efficiency but took the time to review three candidacies and prepare written assessments of them.

[62] The present case is unlike *Hunter*, on which the complainant relies. In *Hunter*, the documentation supporting the choice of a non-advertised process was lacking in many respects, and the delegated manager did not have a clear recollection of events. There were discrepancies between statements included in the supporting documentation alleging urgency and evidence revealing a long period of inaction on the part of the delegated manager in responding to news of an impending retirement.

[63] In this case, the Articulation of Selection Decision is complete and detailed. It demonstrates serious and pressing operational needs that compelled choosing a non-advertised process. The delegated manager's testimony at the hearing was credible, detailed, and consistent with the rationale that he wrote in 2018 as part of the appointment process.

[64] Urgency was not the only factor that the respondent relied on to support its choice of a non-advertised process. However, even if it was, the evidence presented reveals that although the total time elapsed between the fire chief's unexpected retirement (May 4, 2018) and the "Notice of Appointment" (September 12, 2018) might appear long, the delegated manager was actively engaged in the process throughout that period. He consulted the Labour Relations Branch and examined his staffing options. He then conducted an initial review to confirm the existence of internal candidates who could potentially meet the essential qualifications. He prepared the Articulation of Selection Decision at the end of June or in early July 2018 and signed the narrative assessment on August 9, 2018. At some time between those dates, he conducted a detailed assessment of three candidates. The Notice of Consideration was posted on August 31, 2018, and the Notice of Appointment shortly after that. The concerns expressed in *Hunter* with respect to inaction are not relevant to this case.

[65] *Jarvo* and *Marin-Lazarescu* underscore the importance of considering the entire context in which the decision to proceed with a non-advertised process was made.

[66] The Fire Hall had been in a state of turmoil for years. Morale was low. The deputy fire chief had been removed from the Fire Hall, which meant that the fire chief was responsible for all aspects of operations. The workload was heavy. The fire chief retired unexpectedly. This left the Fire Hall on which CFB Shilo and the surrounding community relied for emergency and fire services without a leader with the clear and unquestionable authority that comes with an indeterminate appointment. Leaving the

position unstaffed could have resulted in emergency services being compromised. There was an immediate need for a strong leader capable of addressing long-standing interpersonal and resource issues.

[67] The complainant may disagree that urgency was a legitimate concern in the circumstances; however, the respondent presented ample evidence to demonstrate a need to act expeditiously.

[68] The fact that an acting fire chief was appointed to the position does not render the selection of a non-advertised process contrary to the *PSEA*'s legislative purpose. Given the nature of the emergency services that it offers, a Fire Hall cannot be left without a leader. An acting appointment was an operational necessity made in reaction to the fire chief's unexpected retirement. The respondent cannot be prevented from invoking a sense of urgency because it addressed an important operational concern. Similarly, I cannot conclude that the fact that the delegated manager assessed three candidacies rather than one renders this appointment process contrary to the *PSEA*'s legislative purpose and to fair and transparent employment practices; see *Beyak*.

[69] There is no evidence to suggest that a non-advertised process was selected to exclude the complainant. Far from it. The delegated manager selected that process in part because he thought that it was important for the person appointed to know and understand the history and dynamics of the Fire Hall team. He selected that process because he knew that internal candidates appeared to possess the essential qualifications. The complainant was one of them. His candidacy was considered, although unbeknownst to him.

[70] The delegated manager documented his reasons for selecting a non-advertised process. He testified at length about the reasons that led him to reach that conclusion. There is no evidence of abuse of authority in the respondent's choice to proceed as it did. On the contrary, choosing a non-advertised appointment process demonstrated the use of the flexibility provided in the *PSEA* to allow the respondent to address a situation in which important and pressing operational needs required an expeditious staffing action.



**B. Reasonable apprehension of bias**

[71] The complainant submits that there existed a reasonable apprehension that the respondent was biased in its assessment of his candidacy.

[72] The burden of demonstrating the existence of a reasonable apprehension of bias rests on the complainant. Suspicions, speculations, or possibilities of bias are not enough. Evidence must show that bias is real, probable, or reasonably obvious; see *Denny*, at para. 124.

[73] The test for a reasonable apprehension of bias is well established; see *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394, and *Newfoundland Telephone Company v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623. Paraphrased to fit the context of this case, the test is whether a reasonably informed person, viewing the matter realistically and practically — and having thought the matter through — would conclude that it was more likely than not that the delegated manager, whether consciously or unconsciously, would not assess the complainant's candidacy fairly. If a reasonably informed bystander looking at the process at issue in this case could reasonably perceive bias on the part of the respondent or the delegated manager, then the Board can conclude that an abuse of authority occurred; see *Denny*, at para. 126, and *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10 at paras. 72 to 74.

[74] The complainant provided no evidence capable of reasonably supporting an allegation of a reasonable apprehension bias or differential treatment. He provided only speculation and suspicion in support of his argument that the delegated manager was biased in his assessment of the complainant's candidacy.

[75] The complainant did not allege that his relationship with the delegated manager was strained or that there was any animosity between them. He did not dispute Major Desjardins's description of his efforts to mentor the complainant and to help the complainant address specific issues with respect to his job performance so that the complainant could return to the Fire Hall. In essence, the complainant asks the Board to infer a reasonable apprehension of bias due to the delegated manager's imposition of disciplinary measures against him and that manager's knowledge of grievances that

the complainant filed with respect to those measures and to disciplinary measures imposed by others.

[76] At first glance, it may appear problematic that the complainant's candidacy was assessed solely by a manager who had imposed discipline against the complainant and who had knowledge of grievances filed by the complainant with respect to those disciplinary measures. However, more is required for a reasonably informed person, viewing the matter realistically and practically, to conclude that the delegated manager was more likely than not to assess the complainant's candidacy unfairly.

[77] The delegated manager's testimony about the complainant and his qualifications was clear and consistent. It was neutral in tone and content. He acknowledged relying on his personal knowledge of all the candidates to assess whether they met the essential qualifications. He provided numerous examples of observations, interactions, and situations that led him to conclude that the complainant lacked several essential qualifications. The complainant did not challenge him with respect to those statements; nor did he suggest that in his assessment, the delegated manager relied on the facts that gave rise to the disciplinary measures.

[78] Although the complainant argued that his leadership skills were assessed more harshly than were those of the other candidates, he presented no challenge to the delegated manager's assessment of him with respect to most of the other essential qualifications for the position, notably, initiative, dependability, judgment, effective interpersonal relationships, and oral and written communication skills. His challenge with respect to leadership skills is largely one of semantics; it focuses on the delegated manager's use of the term "soft skills" in reference to leadership. Nothing substantiates the complainant's suggestion that the use of that term is indicative of a bias or differential treatment in the assessment of that merit criteria.

[79] Unlike in *Denny* and *Amirault*, the delegated manager was not the subject of complaints made or grievances filed by the complainant. In those cases, the Board concluded that a reasonable apprehension of bias existed due to previous conflicts between the complainants and members of an assessment board. Those cases involved allegations of a reasonable apprehension of bias in contexts in which those conducting the assessment had been the subject of complaints made by the individual being assessed. That is not so in this case. The complainant did not allege that there had

been conflicts between him and the delegated manager. His grievances were against management generally, not the delegated manager. Moreover, not all the disciplinary measures that he grieved were imposed by the delegated manager.

[80] Disciplinary measures and subsequent grievances are common in labour relations. Imposing discipline against employees, where warranted, was part and parcel of the delegated manager's duties as the complainant's direct supervisor at the time, as it is for all managers. It cannot be inferred that the delegated manager lost his impartiality toward the complainant because he imposed disciplinary measures against the complainant. The imposition of discipline alone does not demonstrate that bias was real, probable, or reasonably obvious.

[81] It also cannot be inferred that the delegated manager lost his impartiality toward the complainant because the complainant filed grievances pertaining to disciplinary measures that the delegated manager had imposed. The same can be said of the delegated manager's knowledge of the complainant's other grievances; see *Gandhi*, at para. 58, and *Saunders*, at para. 39. Nothing in the delegated manager's testimony suggested the presence of frustration, hostility, or animosity toward the complainant for having exercised his right to grieve. A mere involvement in disciplinary and grievance processes is insufficient to support a reasonable apprehension of bias. The evidence before the Board is insufficient to establish that the grievances affected, or was more likely than not to affect, the delegated manager's assessment of the complainant's qualifications.

[82] I would add that the delegated manager testified that discipline and grievances are tools commonly used to address workplace issues. While discussing disciplinary measures, the delegated manager testified that, in accordance with his military training, he did not hold past disciplinary issues against the complainant. He also indicated that he, himself, had used the grievance process in the past. For those reasons, he did not feel that he needed to delegate the assessment of the complainant's candidacy to a third party.

[83] The delegated manager's belief in his own impartiality is not determinative of the presence or absence of a reasonable apprehension of bias. The Board can conclude to the existence of a reasonable apprehension of bias where there is evidence that

discloses bias that is “real, probable or reasonably obvious”; see *Denny*. There is no such evidence in the present case.

[84] A reasonably informed person looking at the appointment process at issue realistically and practically would not reasonably perceive bias on the part of the respondent in its assessment of the complainant’s candidacy. Although it might have been preferable had the delegated manager involved a third party in the assessment of the complainant’s candidacy given his involvement in disciplining the complainant, his failure to do so does not amount to an abuse of authority.

### **C. Assessment of the complainant**

[85] Lastly, the complainant submits that it was an abuse of authority for the respondent to assess his candidacy without informing him of that fact, which deprived him of the opportunity to provide information capable of supporting his candidacy. By doing so, the respondent failed to respect the staffing values of access and transparency. The complainant described his concern with respect to access as being related to the fact that he was deprived of an informal discussion and of the opportunity to provide additional information in response to the respondent’s decision to eliminate him from consideration.

[86] Advising the complainant that his candidacy was being considered for the position would have alleviated his concerns that the appointment process was not transparent. However, I cannot conclude that the failure to inform him of that fact constitutes an abuse of authority in the context of a non-advertised process in which the respondent was not required to consider more than one candidate.

[87] The key staffing value of transparency creates specific obligations. It requires that assessments and decisions be properly documented contemporaneously with the appointment process; see *Morris*, at para. 82. It also requires that persons in the area of recourse be notified of their right to complain. In a non-advertised process, transparency also requires the deputy head to explain its choice of process; see *Robert v. Deputy Minister of Citizenship and Immigration*, 2008 PSST 24 at para. 60. All those requirements were met in the present case.

[88] The complainant’s reliance on the key staffing value of accessibility is misplaced. Accessibility, in the staffing context, refers to the need to ensure that

people have a reasonable opportunity to apply and to be considered for employment, subject to the limits recognized in the *PSEA*; see *Jarvo*, at paras. 29 to 32, and *Vaudrin v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 19 at para. 54. In this case, the complainant was considered for the fire chief position, although he did not know it at the time.

[89] Access does not mean that all employees can apply and be considered for appointment in all staffing processes; see *Vaudrin*, at para. 54. As previously mentioned, deputy heads have considerable discretion in the choice of the appointment process, and there is no requirement to consider more than one person for an appointment to be made on the basis of merit; see ss. 30(4) and 33 of the *PSEA*.

[90] Moreover, the value of accessibility does not create a right to an informal discussion. Those discussions are not a mechanism by which a candidate can seek a reassessment of their qualifications; see *Rozka v. Deputy Minister of Citizenship and Immigration Canada*, 2007 PSST 46 at para. 76. They are a means of communication for a candidate to discuss the reasons for having been eliminated from a process. Although informal discussions are strongly encouraged, the *PSEA* does not make them mandatory; see s. 47 of the *PSEA*. Accordingly, the complainant was not deprived of a right to an informal discussion; nor was the staffing value of accessibility breached in this case.

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

*(The Order appears on the next page)*

**V. Order**

[92] The complaint is dismissed.

December 7, 2022.

**Amélie Lavictoire,  
a panel of the Federal Public Sector  
Labour Relations and Employment Board**