

Date: 20230413

File: 771-02-40124

Citation: 2023 FPSLREB 37

*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

HÉLÈNE MONFOURNY

Complainant

and

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

Respondent

and

OTHER PARTIES

Indexed as

Monfourny 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: Laetitia Auguste, counsel

For the Public Service Commission: Alain Jutras, senior analyst

Heard via videoconference,
November 9 and 10 and December 14, 2022.
[FPSLREB Translation]

REASONS FOR DECISION**FPSLREB TRANSLATION**

I. Complaint before the Board

[1] In 2018, the deputy minister of National Defence (“the respondent”) launched an advertised process to staff three indeterminate positions. This complaint is about only the appointment to the newly created senior language programs manager position in the Canadian Forces Language School (CFLS) National Capital Region Training Company (“the Company”) in Gatineau. The appointment was made in 2019.

[2] H el ene Monfourny (“the complainant”) made this complaint with the Federal Public Sector Labour Relations and Employment Board (“the Board”) under ss. 77(1)(a) and (b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*). At the hearing, she withdrew the part of her complaint on the choice of process (s. 77(1)(b)).

[3] She alleged an abuse of authority in the assessment of her candidacy, namely, there was a reasonable apprehension of bias against her. She also said that the respondent abused its authority by appointing a person who did not meet the position’s essential qualifications and by selecting a merit criterion that did not fit the position’s requirements.

[4] The Public Service Commission (PSC) did not participate in the hearing but submitted written arguments. It did not take a position on the merits of the complaint.

[5] The complainant established, on a balance of probabilities, a reasonable apprehension of bias in the appointment process. However, I am not persuaded that there was an abuse of authority in the choice of merit criteria and the application of merit.

II. Summary of the evidence

[6] This part contains two sections, a summary of the evidence related to the overall conduct of the appointment process, and a summary of the evidence with respect to the relationship between the complainant and the delegated manager and things allegedly said during and after the process about the complainant and her candidacy.

A. The appointment process

[7] The CFLS has a mandate to provide second-language training to members of the Canadian military. It is headquartered at the Asticou Centre (“Asticou”) in Gatineau. It comprises two training units, the Company, located at Asticou, and a detachment in Saint-Jean-sur-Richelieu (“the detachment”). The deputy commanding officer administrative section and the standards section are also part of the CFLS and are situated at Asticou.

[8] The Company and the detachment provided language training using pedagogical programs, tests, and tools developed by the Canadian Forces language program in Kingston.

[9] Major Nathalie Lévesque (now Lieutenant-Colonel Lévesque) was the Company’s commanding officer from about July 2017 to July 2019. She created the senior language programs manager position in response to a recommendation from a workplace wellness committee. She was the delegated manager responsible for the appointment process at issue. The new position’s incumbent would report to her and would have six positions under him or her that used to report to her, namely, pedagogical advisor and program coordinator positions.

[10] From July 2017 to January 2018, the complainant worked as a pedagogical advisor (ED-LAT-02) in the Company and reported directly to Major Lévesque. In January 2018, she was appointed to a standards officer position (EDS-02) in the standards section. From that date, she no longer reported to Major Lévesque.

[11] As of the appointment process, Annie Letendre (“the appointee”) held the deputy commanding officer position in the CFLS’s deputy commanding officer administrative section.

[12] In September 2018, the respondent posted the advertised process at issue (18-DND-IA-MPC-437709). Initially, it was to staff two indeterminate positions, namely, the senior language programs manager position in the Company, and the deputy chief of standards position in the detachment. Both were classified at the ED-EDS-04 group and level. ED-EDS corresponds to an education services subgroup, specifically, education specialists. The process also sought to create a pool of qualified candidates.

[13] Two delegated managers participated in the appointment process, each with responsibility for the process for the position under their responsibility. As was stated, Major Lévesque was the delegated manager for the process for the appointment at issue (“the delegated manager”). Major Paul Gillies, the senior staff officer of the Canadian Forces language programs in Kingston, was the delegated manager for the standards chief position at Saint-Jean-sur-Richelieu.

[14] At one point, the process was expanded to include a third position, namely, the senior pedagogical advisor (ED-LAT-03) in the detachment.

[15] The three positions had the same merit criteria that were approved by a selection committee with five members, namely, Majors Lévesque and Gillies, Major Sacha Amédé and Sylvie Kucharski, both from the detachment, as well as the complainant’s supervisor in the standards section, Lieutenant-Commander Neil Martindale. After the screening was complete and it was time to assess the candidates, the committee broke into two smaller assessment committees, one for the position at Asticou, and the other for the positions in the detachment. The assessment committee for the position at issue comprised Major Lévesque, Lieutenant-Commander Martindale, and Ms. Kucharski.

[16] Only two essential qualifications were identified for the positions. One was education, and the other was experience supervising or managing personnel. Only the essential qualification of education is at issue.

[17] The required education was a bachelor’s degree from a recognized university with a specialization in education or linguistics or another specialty associated with the positions in the group. The education criterion was defined further. The advertisement specified that the specialization could come from an acceptable combination of education, training, and/or experience. An acceptable combination included a bachelor’s degree with approximately six months’ supervision or management experience in the learning or training field. That experience must have been acquired in the previous three years.

[18] Majors Gillies and Lévesque testified about their efforts to develop an essential education qualification that reflected the positions’ needs and requirements. According to them, training in education, linguistics, or another education-related specialty was not necessarily required. The Company and the detachment required

managers more than education specialists. Majors Gillies' and Lévesque's testimonies were unanimous on that point. They felt that it was desirable to broaden the education criterion to allow a wider range of candidates to apply. Major Gillies said that he proposed changes to the draft education criterion to remove the importance placed on pedagogy, namely, by broadening the range of recognized education and including an acceptable combination of education and experience.

[19] According to Major Lévesque, the senior language programs manager would have primarily management duties, namely, contract management, the supervision and performance management of six employees, staffing, and project management and planning. The position's incumbent would not be involved in daily education or in assessing the quality of education provided by the Company. The pedagogical advisors and program coordinators (ED-LAT-02 and ED-EDS-01) were and would continue to be involved with supervising teachers, organizing classes and schedules, and implementing programs developed by the Canadian Forces language program in Kingston. If a student had particular difficulties or if an educator required additional support, the ED-LAT-02 position incumbents, not the manager, would be called to intervene.

[20] Both Major Lévesque and Major Gillies testified that all candidates were assessed the same way, using the same tools, marking grids, and pass marks. The screened-in candidates were assessed using a written exam, an interview, and an in-basket exam. Major Gillies reviewed all the initial applications and commented on the candidates' screening reports for the Asticou position. However, he did not participate in assessing the candidates who applied for the position at issue.

[21] Ms. Kucharski and Major Lévesque marked the written exam for the Asticou position. Lieutenant-Commander Martindale joined them to assess the candidates in the interviews. The PSC marked the in-basket exam.

[22] During the process, a change was made to the written exam marking methods. As is often the case in a written exam, a candidate who exceeded the maximum number of words failed it. However, after observing that candidates who wrote their answers by hand instead of using a computer had a harder time correctly counting the number of words in their answers, the five committee members decided to increase the allowed maximum number of words, for all candidates.

[23] In mid-February 2019, 10 candidates qualified for the positions and were placed in a pool. Five candidates qualified for the Asticou position, including the complainant and the appointee. The delegated manager chose from those 5 candidates.

[24] According to the narrative assessment that the delegated manager prepared, she used the supervision and management experience criterion to select the appointee. She considered that criterion the most important because of the position's complex and diverse tasks. Major Lévesque's testimony and the narrative assessment referred to the diverse mandates in the Company, the extent and complexity of the incumbent's human resources responsibilities, and the incumbent's lack of involvement in pedagogical matters.

[25] Initially, Major Lévesque offered the position to a candidate in the pool who had strong management experience in a military environment. That candidate turned down the offer. She then reviewed the pool's other four candidates' applications again, including those of the appointee and the complainant.

[26] Major Lévesque testified that she decided to offer the appointee the position because she believed that the appointee had the most management experience. Before making the offer, she consulted the CFLS's most senior leader, Lieutenant-Colonel Loïc Roy. She expressed her fear that appointing the appointee could cause frustration and questions within the CFLS, as other CFLS employees were also in the pool. Lieutenant-Colonel Roy suggested that she start by confirming that she wanted to prioritize management experience when selecting the person who would be appointed to the position and then consult two selection committee members (Major Amédé and Ms. Kucharski) to validate the approach, which she did.

[27] The delegated manager maintained her position that management experience was a priority and that an offer would be made to the appointee.

[28] The appointee was the candidate in the pool who had the most extensive management and supervision experience. The narrative assessment described her supervisory experience from 1999 to 2008 and then from 2013 to her appointment date in March 2019. The appointee held a bachelor's degree in space science and had over five years' supervision and management experience in the learning field, namely, as a deputy commanding officer in the deputy commanding officer administrative section at Asticou and briefly as an acting lieutenant-colonel at the CFLS.

[29] On March 11, 2019, Major Lévesque offered the position to the appointee.

[30] On March 12, 2019, after hearing that the appointee received an offer, the complainant wrote to a human resources advisor at the respondent to state that an abuse of procedure occurred in the appointment process. She copied multiple people on the email, including Major Lévesque, the other two assessment committee members for the Asticou position, Lieutenant-Colonel Roy, and her superior. In the email, she expressed her opinion that the appointee's appointment was not based on the criteria set out for the process but instead on a subjective criterion chosen by Major Lévesque that did not reflect the position's requirements. She also said that the delegated manager harassed her and described their exchange on March 5, 2019, which led her to believe that her candidacy was not treated fairly in the process. That exchange will be described later, in the summary of the evidence.

[31] On April 5, 2019, the complainant made her complaint with the Board.

B. The relationship of the complainant and the delegated manager

[32] It is undisputed that the complainant and the delegated manager had disagreements before and during the appointment process.

[33] According to the complainant, it was clear from Major Lévesque's arrival at the Company in July 2017 that they had different perspectives and opinions about teaching and managing personnel and students. Their conflicts and disagreements eventually led the complainant to change jobs within the CFLS so that she no longer had to report to Major Lévesque. The complainant testified about incidents that she felt were relevant to her allegation of a reasonable apprehension of bias.

[34] The first incident occurred in October 2017 and arose from a situation in which the complainant and Major Lévesque disagreed about how to respond to a student complaint about a teacher in the Company. A confrontation followed. Major Lévesque turned to the complainant, visibly angry, pointed a finger at her and accused her of trying to intervene in a discussion between Major Lévesque and the students. Major Lévesque confirmed that that incident occurred. She did not contradict the complainant's description of it.

[35] A second incident occurred in December 2017 as the complainant prepared to take on the standards officer role. She had to change offices. Major Lévesque allegedly

suggested that she first move to an office that was too small for her ergonomic workstation. Then, Major Lévesque allegedly rejected the complainant's three suggestions about vacant offices that she could use as a workspace. Later, Major Lévesque reportedly suggested an office that the complainant described as a very tight room that had no ventilation or windows and that was used for storage. She allegedly told Major Lévesque that the suggested office was not suitable. In the days that followed, Major Lévesque insisted every day that the complainant had to find an office soon, until one day, Major Lévesque informed her that she had to move the next day. Major Lévesque apparently added that if the complainant was unhappy, she would have to move to the "[translation] hole upstairs", referring to the room with no ventilation or windows. Again, Major Lévesque did not contradict the complainant's description of the incident.

[36] In addition to the incidents with Major Lévesque, the complainant described a verbal exchange in which a colleague supposedly said that the "major" did not want the colleague to speak to the complainant. According to the complainant, the word from command appeared to be that no one should speak to her. She felt alone and isolated. She also described what she perceived as Major Lévesque blocking her ability to accomplish her tasks, namely, by withholding information and impeding her efforts to conduct classroom observations.

[37] She also said that Major Lévesque held several meetings to which she was not invited, even though the topics discussed were her responsibility. When she asked Major Lévesque why she was not invited to one meeting in particular, Major Lévesque reportedly got in her face and replied that the complainant was not her equal. Major Lévesque described that incident as one of her "[translation] clashes" with the complainant. Once again, she did not contradict the complainant's description.

[38] In January 2019, while the appointment process was underway, the complainant and her supervisor, Lieutenant-Commander Martindale, went to see Master Warrant Officer Beauchemin to discuss what the complainant described as Major Lévesque obstructing their work. According to the complainant, it led to nothing. Lieutenant-Commander Martindale did not testify.

[39] In February 2019, shortly after passing the interview stage of the appointment process, the complainant met with Lieutenant-Colonel Roy. During that meeting, she

allegedly described harassment situations involving Major Lévesque and expressed her fear that those situations and her relationship with Major Lévesque hindered her chances of being appointed to the senior language programs manager position. She said that Lieutenant-Colonel Roy did nothing to address her complaint. According to the delegated manager, Lieutenant-Colonel Roy informed her shortly after that the complainant had made a complaint against her.

[40] On March 5, 2019, the complainant and Major Lévesque met to discuss a student issue. After their discussion, the complainant reportedly asked Major Lévesque to confirm a rumour that an offer was made for the senior language programs manager position. Major Lévesque confirmed that an offer was made but that it was turned down. After stating that she intended to again review the applications of the candidates in the pool, the complainant asked her if, despite their disagreements, she could expect that her candidacy would be treated fairly in the process.

[41] At this point, the complainant's and Major Lévesque's testimonies diverge.

[42] According to the complainant, Major Lévesque replied that the complainant made a complaint against her to Lieutenant-Colonel Roy and that she "[translation] ... took it like a slap in the face". In the weeks that followed, the complainant documented a description of that exchange in writing three times, namely, in her March 12, 2019, email to Human Resources, in her staffing complaint, and in a workplace-harassment complaint against Major Lévesque and the CFLS in April 2019.

[43] Major Lévesque said that she replied that despite their past disagreements, the complainant's candidacy would be treated like the others. She admitted that she made a comment about a slap in the face but said that it was not made in response to the complainant's question about her candidacy. Rather, she made it at another time in the same conversation, when they talked about the complainant's recent complaint against her to Lieutenant-Colonel Roy. According to Major Lévesque, the reference to the slap was a way to describe her surprise at learning that the complainant had made a complaint against her, as she thought that they had resolved their disagreements in previous conversations. She said that the past disagreements did not affect the complainant's assessment or her choice of the appointee. In December 2019, Major Lévesque described the exchange in an email to herself.

[44] In cross-examination, the complainant admitted that Major Lévesque expressed her belief that they had resolved their disagreements and her surprise that the complainant had made a complaint against her. However, according to the complainant, the exchange did not take place on March 5, 2019, but rather in the context of a previous conversation, after Major Lévesque learned that the complainant had discussed their tense work relationship with Master Warrant Officer Beauchemin.

[45] Shortly after making her complaint with the Board, the complainant also made a harassment complaint against Major Lévesque and the CFLS about events that occurred between October 2017 and April 2019. The complaint refers to several of the incidents described earlier in this decision. The Board refused to admit into evidence the harassment complaint investigation report.

[46] The overview of the complainant's relationship with the delegated manager was supplemented by the testimony of Captain Brett Jones. In 2018, Captain Jones reported directly to Major Lévesque and was the language teacher training coordinator. He was not involved in the appointment process but was allegedly present during conversations in which Major Lévesque or other CFLS senior officials discussed the process and the complainant's candidacy.

[47] His testimony was hearsay. The Board agreed to admit it into evidence subject to the respondent's arguments about the weight it should be given.

[48] He described four conversations that he allegedly heard. Three were at the lunch table, which was located near his office. It is not clear if he was seated at the lunch table or in his office when he heard the three conversations. The fourth reportedly took place during a meeting that he attended.

[49] The first conversation supposedly took place at lunch in early November 2018, during the initial stages of the appointment process. Two Company employees ("the two employees") allegedly expressed concern that the complainant would be appointed to the position and stated that they did not want her appointed. In response, Major Lévesque reportedly agreed. She allegedly added that the complainant would not obtain the position.

[50] After the candidates in the process completed the written exam, Captain Jones heard Major Lévesque conversing with the appointee at the lunch table. They spoke of

the written exam. The appointee explained that her answer exceeded the maximum number of words permitted. Major Lévesque reportedly replied that it mattered little that she exceeded the maximum number and that her answer would be retained and considered anyway.

[51] In December 2018, Captain Jones was also present during a conversation at the lunch table after the in-basket exam. He heard the appointee talking about the exam in Major Lévesque's presence. She replied that they could talk about it later that day or the next day. Captain Jones admitted that he did not know if such a conversation took place after that.

[52] In January 2019, at a meeting involving Major Lévesque, Captain Jones, and the two employees, the employees allegedly again expressed concern that the complainant would be appointed to the position, as she had passed the written exam, interview, and in-basket exam. Major Lévesque reportedly replied that the complainant would not obtain the position.

[53] Several weeks later, after the appointee was appointed, Captain Jones attended a meeting with Lieutenant-Colonel Roy and Master Warrant Officer Beauchemin. Major Lévesque was not present. The complainant's staffing complaint was discussed. Lieutenant-Colonel Roy allegedly made an unkind comment about the complainant because she had complained. Master Warrant Officer Beauchemin reportedly told everyone present that they should not speak to the complainant.

[54] Captain Jones did not inform the complainant of what he had heard about her and the appointment process until long after it ended. At the time, he did not want to become involved or inform the complainant of what was said about her. According to him, much workplace drama surrounded the process, and he did not want to be involved. He feared reprisal from his supervisors because according to him, it was known that CFLS senior officials did not like the complainant.

[55] Lieutenant-Colonel Roy, Master Warrant Officer Beauchemin, and the two employees did not testify.

III. Summary of the arguments

A. For the complainant

[56] The complainant argued that there was a reasonable apprehension of bias in the appointment process, which constituted an abuse of authority under the *PSEA*. She referred to *Amirault v. Deputy Minister of National Defence*, 2012 PSST 6; and *Denny v. Deputy Minister of National Defence*, 2009 PSST 29.

[57] According to her, she was never truly considered for the position. The delegated manager was ultimately responsible for selecting the person appointed to the position. She could not be objective when assessing the complainant's candidacy. They had an adversarial relationship. Many conflicts arose between them during the short time that they worked together that led to informal complaints being made against the delegated manager shortly before the appointment process completed. After the process, the complainant made a staffing complaint and a formal harassment complaint against the delegated manager and the CFLS. The delegated manager knew that the complainant had recently made a complaint against her and expressed frustration about it a few days before the appointee was appointed. And uncontradicted and credible hearsay evidence demonstrated that several times, the delegated manager expressed her intention to ensure that the complainant was not appointed to the position.

[58] During the process, the complainant wrote to a staffing advisor to express her concerns about it. She copied all the assessment committee members, the most senior CFLS official, and her superior, thus informing them of a major abuse of procedure. No action was taken. The respondent took no steps to eliminate the reasonable apprehension of bias against her. It allowed the process to run its course, which resulted in a process that disadvantaged her.

[59] She also argued that the process was flawed because the essential education qualification was inconsistent with the Treasury Board qualification standards for the ED group. According to her, an ED-EDS-04 incumbent must be able to critically review new pedagogical approaches and advise subordinates on the pedagogical strategies to employ. The appointee holds a bachelor's degree in space science, which has nothing to do with education. According to the complainant, it is unbelievable that that degree would constitute an acceptable combination of education and experience.

[60] The corrective measures that the complainant seeks include a declaration of abuse of authority, an order to revoke the appointment, and an order of damages.

B. For the respondent

[61] The respondent argued that the complainant did not discharge her burden of proof. She failed to provide sufficient and convincing evidence to support a finding of a reasonable apprehension of bias or abuse of authority in the appointee's appointment (see, among others, *Lavigne v. Canada (Justice)*, 2009 FC 684; *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11; and *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8).

[62] The *PSEA* gives deputy heads broad discretion in choosing the person to appoint based on the merit criteria (see *Rajotte v. President of the Canada Border Services Agency*, 2009 PSST 25; and *Visca v. Deputy Minister of Justice*, 2007 PSST 24). In this case, the delegated manager exercised that discretion by choosing the appointee after ensuring that she met the merit criteria.

[63] The position's essential qualifications were chosen carefully, and a five-member committee approved them. The education merit criterion was developed based on the nature of the tasks for the position's incumbent to perform, taking into account the Company's and the detachment's operational needs, namely, a need more focused on management and supervision experience than on an educational background in teaching or linguistics. The appointee met this merit criterion, specifically the combination of education and management and supervision experience in the training or learning field.

[64] The committee as a whole developed and selected the assessment tools and pass marks and applied them uniformly to all candidates. No candidate was advantaged or disadvantaged. The candidacies of the complainant and the appointee were assessed the same way, by the same people, using the same tools that were used for all the candidates who applied for the Asticou position. The delegated manager did not complete any assessment alone. The involvement of Major Gillies and the other two assessment committee members (Lieutenant-Commander Martindale and Ms. Kucharski) reduced any apprehension of bias against the complainant. The complainant and the appointee were deemed qualified and placed in a pool.

[65] The delegated manager offered the position to the appointee because of her management and supervision experience, the determining criterion that the delegated manager selected based on operational needs. Of the candidates in the pool, the appointee had the most extensive management and supervision experience. Choosing her candidacy was in keeping with the considerable discretion that delegated managers are accorded under the *PSEA* (see s. 30(2) of the *PSEA* and *Visca*, at para. 42). The complainant's disagreement with the choice is insufficient to conclude that an abuse of authority occurred (see *Broughton v. Deputy Minister of Public Works and Government Services*, 2007 PSST 20).

[66] The respondent argued that the complainant failed to present evidence that would lead a reasonable person, looking at the matter realistically and practically, to believe that the delegated manager's actions were biased in favour of the appointee or against the complainant (see *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394; and *Appleby v. Deputy Head of the Royal Canadian Mounted Police*, 2021 FPSLREB 142 at para. 58). The delegated manager recognized that she and the complainant had had conflicts but believed that they had been resolved through their discussions and that they were in the past. She reassured the complainant that despite their disagreements, her candidacy would be assessed fairly. When the appointment was made, the complainant had not yet made her formal harassment complaint against the delegated manager. The respondent relied on *Lesage v. Deputy Minister of Transport, Infrastructure and Communities*, 2021 FPSLREB 97, in which the delegated manager was unaware of the alleged source of conflict between her and the complainant.

[67] Any reasonable apprehension of bias was also reduced, if not eliminated, by the fact that the delegated manager initially offered the position to a third person, could explain what she said to the complainant about how her candidacy would be assessed, and consulted her superior and other selection committee members before going ahead with the appointee's appointment. According to the respondent, the outcome of the complaint, specifically the allegation of a reasonable apprehension of bias, ultimately turns on the delegated manager's credibility compared to that of the complainant.

IV. Analysis

[68] At the hearing, the complainant withdrew several allegations that she made in her complaint. The allegations that the Board is seized of cover these two themes: a reasonable apprehension of bias in the assessment of the complainant's candidacy, and abuse of authority in the application of merit, namely, abuse of authority in the choice of a merit criterion and the appointment of a person who did not meet the position's essential qualifications.

[69] In her argument, the complainant focused on the first theme, and rightly so. I find that there is a reasonable apprehension of bias in this case but that there is no evidence of abuse of authority in the selection of the merit criteria or in the application of merit. For that reason, these reasons will focus more on the issue of bias than on the allegation of abuse of authority in the application of merit.

[70] An abuse-of-authority allegation is very serious and must not be made lightly. To succeed, the complainant must demonstrate, on a balance of probabilities, a serious wrongdoing or a major flaw in the process (see *Tibbs*). Abuse of authority requires actions inconsistent with Parliament's intention when it delegated to the respondent its discretionary power in staffing processes (see *Davidson v. Canada (Attorney General)*, 2021 FCA 226).

[71] I will consider each of the complainant's allegations under the notion of abuse of authority as evidenced in the jurisprudence of the Board and the Public Service Staffing Tribunal ("the Tribunal").

A. The allegation of a reasonable apprehension of bias

[72] In *Committee for Justice and Liberty*, at 394, the Supreme Court of Canada described a reasonable apprehension of bias as follows:

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude..."

[73] It is not necessary to prove that the respondent truly had a bias against the complainant (see *Amirault*, at para. 57). The Board must determine if a relatively

informed bystander could reasonably perceive bias on the part of the respondent (see *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623). If so, the Board may conclude that abuse of authority occurred. As the Tribunal stated in *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10 at para. 72, it is not enough to suspect or assume bias; it must be real, likely, or reasonably evident.

[74] In my opinion, a relatively informed bystander who is aware of all the circumstances of this case could reasonably perceive bias, conscious or not, on the respondent's part with respect to the complainant's candidacy. This is not a situation in which a complainant alleged a reasonable apprehension of bias without supporting testimonies and documents. The allegations are many and are supported by the complainant's and Captain Jones's testimonies, along with documents that she prepared at the time.

[75] The respondent argued that the complaint's outcome would depend largely on the complainant's and the delegated manager's credibility.

[76] The complainant testified at length about her adversarial relationship with the delegated manager, noting several disputes and disagreements between them before and during the appointment process. Her description of the events was clear, detailed, and specific. She also documented their adversarial relationship in an email that she sent to the respondent before an appointment was made. Captain Jones's testimony supported the complainant's description of a contentious work environment in which senior CFLS officials and the delegated manager did not appreciate her.

[77] The delegated manager's testimony was unclear, and sometimes, her answers were vague. As will be described later, her testimony included vague statements or descriptions of events that were not supported by examples or descriptions. Her recollection of events was sometimes hazy. I do not question the veracity of her testimony. However, overall, I find the complainant's account consistent with the probabilities surrounding the facts of this case (see *Faryna v. Chorny*, 1951 CanLII 252 (BC CA)).

[78] Setting aside credibility, it is clear that the complainant and the delegated manager had an adversarial relationship, of which the respondent was aware. The complainant had two discussions with senior CFLS officials about their strained

relationship. She made a complaint against the delegated manager. She also wrote to the respondent to express her concerns about the appointment process, particularly due to the adversarial relationship.

[79] The delegated manager admitted that she and the complainant had several disputes in the months before to the appointment. With one exception, she did not attempt to contradict or qualify the complainant's description of the disputes.

[80] The delegated manager recognized that while the appointment process was underway, she was aware that the complainant made a complaint against her to senior management, namely, the one she made to Lieutenant-Colonel Roy. It is unclear whether Master Warrant Officer Beauchemin informed Major Lévesque about the complainant's complaint to him. Major Lévesque's knowledge of a complaint against her brings me to distinguish *Lesage*.

[81] In *Lesage*, the Board found no reasonable apprehension of bias based on evidence of an adversarial relationship between a complainant and an assessment committee member. However, the Board's conclusion was based, among other things, on the fact that the assessment committee member was unaware that a complaint had been made or a grievance had been filed against her. That is not so in this case. The delegated manager knew of at least one complaint against her when she selected the appointee. She also received a copy of an email that the complainant sent to Human Resources on March 12, 2019, alleging bias against her.

[82] The delegated manager testified that in her opinion, her disputes with the complainant were in the past, and they resolved their disagreements. She said that she conversed with the complainant to resolve their disputes. However, her testimony was vague. She offered no concrete examples of efforts to resolve their disagreements. She offered no indication or example to demonstrate to the Board that their relationship actually improved. In fact, her entire testimony about her relationship with the complainant was very unclear. The passage of time alone cannot explain the lack of clarity.

[83] The evidence is compounded by Captain Jones's hearsay evidence.

[84] Under s. 20(e) of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), the Board may accept any evidence, whether

admissible in a court of law or not. I am not bound to accept hearsay evidence, but I may if I believe that it is reliable (see *Basra v. Canada (Attorney General)*, 2010 FCA 24 at para. 21). As stated earlier, I dismissed the respondent's related objection but invited it to submit arguments as to the weight that the Board should give that testimony.

[85] In its oral argument, the respondent said that the Board should not give any weight to Captain Jones's testimony and suggested that it was not credible because he also had disputes with Major Lévesque. However, no evidence of such disputes was adduced, and the respondent made no attempt to cross-examine him about it. Therefore, my assessment of his credibility and the weight to be given to his testimony is based on its clarity and consistency of his testimony and his stated reason for not speaking up when the appointment process was underway.

[86] Captain Jones testified about several conversations that he allegedly overheard while the appointment process was underway. He provided approximate dates, gave the names of those present, and described the conversations in detail. The respondent could have called as witnesses the employees and senior officials who participated in the conversations that he described, but it did not. It also could have asked Major Lévesque to rebut his testimony as to the statements attributed to her. It did not. That was a litigation strategy available to the respondent, which it used. However, the strategy left Captain Jones's credible and clear evidence uncontradicted.

[87] Captain Jones said that at the relevant time, he feared a reprisal from senior CFLS officials if he informed the complainant of what had been said about her and her candidacy. His description of the work environment at that time leads me to accept that he had a genuine fear of reprisal if he came forward to defend the complainant at that time. He no longer works at the CFLS and no longer fears such a reprisal.

[88] Overall, his testimony supported the complainant's claim that a well-informed observer could reasonably believe that her candidacy would not have been treated fairly in the process.

[89] Captain Jones's evidence demonstrated that the course of the appointment process was openly discussed. Confidentiality was not maintained. The delegated manager discussed the process and the complainant's candidacy with employees. Captain Jones's testimony also described a work environment in which the

complainant was not appreciated by senior managers, who made unkind comments about her.

[90] To conclude that there was a reasonable apprehension of bias, I do not have to find that the respondent was truly biased against the complainant. I do not have to find that the delegated manager truly said that the complainant would not be appointed to the position or that CFLS senior management was truly hostile toward her. It is sufficient that a relatively informed bystander could reasonably perceive bias by the respondent.

[91] Considering the uncontradicted evidence about the complainant's adversarial relationship with the delegated manager, the complaints against the delegated manager, her knowledge of at least one of those complaints during the process, and Captain Jones's evidence of her comments that the complainant would not be selected for the position, I find that a relatively informed bystander could reasonably perceive that the respondent was biased, consciously or not, against the complainant's candidacy.

[92] That reasonable apprehension of bias constitutes abuse of authority.

[93] Before concluding on this topic, I will address the respondent's argument that Lieutenant-Commander Martindale's and Ms. Kucharski's participation in the process reduced or eliminated any reasonable apprehension of bias in the assessment of the complainant's candidacy. Although the involvement of third parties in the assessment may, to some extent and in some circumstances, reduce an apprehension of bias in the assessment of a candidacy, it does not remove a reasonable apprehension of bias in the choice of the person to appoint from the candidates in a pool. Although she consulted third parties about the management experience criterion that would guide her choice, the delegated manager alone decided whom to appoint to the position. No one else was involved, although the respondent was aware of the complainant's concerns and her disputes with the delegated manager. A well-informed observer could reasonably believe that the complainant was not treated fairly when the time came to choose the person to appoint to the position.

[94] The respondent also argued that Major Gillies' participation reduced or eliminated any reasonable apprehension of bias. However, he was not involved in assessing the candidates for the position at issue or in choosing the appointee.

Nothing indicated that the delegated manager consulted him before making the decision. His role was minimal in the process for the Asticou position. Other than being involved in approving the merit criteria and deciding to change the maximum number of words permitted on the written exam, he had nothing to do with the process for the Asticou position after the screening stage. His involvement in the process did not reduce the reasonable apprehension of bias against the complainant's candidacy.

B. Alleged abuse of authority in the selection of the merit criteria and in the application of merit

[95] The complainant alleged that abuse of authority also occurred in the selection of the merit criteria and the application of merit to the appointee's candidacy.

[96] The complainant's argument rests largely on her view that the senior language programs manager position required a bachelor's degree with a specialization in education or linguistics or a specialty associated with the EDS group. She argued that choosing an essential education qualification that allows a "[translation] specialization" to be a combination of any bachelor's degree and management or supervision experience, as the respondent did in this process, results in an unacceptable reduction of the position's essential qualifications. She also argued that the respondent could not reasonably conclude that the appointee met the combination in question because her bachelor's degree is in space science, which has nothing to do with education or linguistics.

[97] The *PSEA* provides the respondent, as it does all deputy heads, the authority to establish merit criteria. The essential qualifications must be related to the work to be performed and must meet the applicable qualification standards established by the employer, which includes education standards (ss. 30(2)(a) and 31(2) of the *PSEA*).

[98] The education criterion at issue in this case meets the qualification standard for the position in question, as established by the Treasury Board Secretariat. The standard recognizes a combination of a degree that is not related to education, combined with experience. The complainant did not dispute that but still argued that a position such as the senior language programs manager requires a bachelor's degree with a specialization in education or linguistics or a specialty associated with the EDS group. Although she may disagree with the standard and, consequently, with the

chosen essential education qualification, a disagreement does not lead to a finding of abuse of authority.

[99] Five committee members selected the position's essential qualifications. Majors Lévesque and Gillies explained that the education merit criterion was selected based on the nature of the tasks to be performed by the position's incumbent and an operational need that focused more on management and supervision experience than on an educational background in teaching or linguistics. The complainant did not dispute the nature of the tasks for the incumbent to carry out or the importance of management and supervision experience in a teaching environment.

[100] Everything indicated that the education criterion was selected to meet the position's requirements and operational needs. Although the complainant may disagree with the respondent's explanation about the relative importance of studies in education versus a bachelor's degree plus management experience in a teaching environment, nothing indicates an abuse of authority in the choice of education criterion.

[101] The complainant also claimed that there was abuse of authority in the appointee's assessment because she did not meet the position's essential qualifications.

[102] What about the assessment of the appointee's candidacy?

[103] The respondent concluded that the appointee met the essential qualifications. The complainant did not dispute that the appointee had several years of management experience in a teaching environment. She also did not dispute that the appointee held a bachelor's degree. However, she argued that the appointee did not meet the education criterion because her bachelor's degree is in space science. She claimed that such studies could not be part of an acceptable combination of education and experience.

[104] I have already concluded that nothing indicates an of abuse of authority in the choice of the education criterion, which provided for an acceptable combination of education and experience. The criterion met the qualification standard for the position at issue. It is undisputed that the appointee holds a bachelor's degree and had more

than six months' supervision or management experience in the learning field. When she was appointed, she met the education criterion.

[105] I would add that the evidence demonstrated that the selection committee developed and selected the assessment tools and pass marks. Nothing suggests that the tools and pass marks were not applied uniformly to all candidates. The candidacies of the complainant and the appointee were assessed by the same people using the same tools that were used for all the candidates who applied for the Asticou position. The delegated manager did not complete any assessments alone. Both the complainant and the appointee were deemed qualified and placed in a pool.

[106] The determining criterion in selecting the appointee was management experience, which was consistent with the nature of the position and the committee's initial discussions about establishing the merit criteria. Of the candidates in the pool, the appointee had the most management experience, which the complainant did not contest.

[107] The complainant did not demonstrate on a balance of probabilities that there was abuse of authority in the selection of the merit criteria and in the application of merit.

C. Corrective measures

[108] What corrective measure is required when the Board finds a reasonable apprehension of bias against the complainant but also finds that there was no abuse of authority in the application of merit to appoint the appointee?

[109] The corrective measures that the complainant seeks include a declaration of an abuse of authority, an order to revoke the appointment, and an order of damages. I believe that an abuse of authority declaration is warranted, but what about the other two measures that she seeks?

[110] The complainant stated that if the *PSEA* is to have a truly binding effect and encourage the deputy heads subject to it to comply with its requirements, in cases in which the Board concludes that there has been an abuse of authority, its abuse of authority declaration should always include an order to revoke the appointment. No exceptions should be made for circumstances in which the appointee met the merit criteria. She also argued that if the Board finds that an abuse of authority occurred, it

should award her damages. She referred to *Tipple v. Canada (Attorney General)*, 2012 FCA 158, in which the Federal Court of Appeal conducted a judicial review of a decision that the Board made under the *Public Service Labour Relations Act* (now the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*)). In her opinion, if the Board has the inherent authority to award damages to remedy an abuse of process in labour relations, it is logical to believe that it has the same authority to remedy an abuse of authority in staffing matters.

[111] The complainant did not cite any jurisprudence that would support her suggestion that a revocation order must follow a finding of abuse of authority. She was also unable to identify any Board decision awarding pecuniary, punitive, or exemplary damages in staffing matters.

[112] The Board is a statutory tribunal. It derives its authorities from its enabling legislation and related statutes that form part of its statutory mandate. The *PSEA* is one such statute.

[113] Under s. 81 of the *PSEA*, if the Board finds a complaint founded, it “may” order the deputy head to revoke the appointment. The *PSEA* in no way obliges the Board to order an appointment revoked when it finds an abuse of authority. That authority is discretionary. By asking the Board to find that a revocation order must always be issued when it finds an abuse of authority, she asked it to disregard the wording of s. 81 of the *PSEA*, which Board members benefit from when exercising their decision-making authority. Ordering a remedy is a discretionary exercise that is closely linked to the facts of each case before the Board.

[114] The complainant cited *Amirault* and *Denny* to support her request for an order revoking the appointee’s appointment. In *Amirault*, the Tribunal revoked an appointment after finding a reasonable apprehension of bias because of a business relationship between an assessment committee member and the successful candidate. This reasonable apprehension of bias was compounded by a finding that the assessment of the qualifications for which the complainant did not achieve a pass mark was subjective, which gave the assessment committee ample opportunity to influence the complainant’s results. In *Denny*, the Tribunal ordered appointments revoked in the context of a reasonable apprehension of bias and major deficiencies in one of the factors that was used to assess all the candidates.

[115] Each case is individual and must be considered on its facts. I must decide whether to revoke the appointee's appointment considering the facts that were established in evidence at the hearing.

[116] In this case, although I have found a reasonable apprehension of bias against the complainant, I am not convinced that it affected the appointment process's outcome. Nothing indicates that bias against the complainant affected the assessment of her candidacy, meaning her results at different stages of the appointment process. The tools and pass marks were applied uniformly to all candidates. The delegated manager conducted no assessments on her own. The complainant was deemed qualified for the position and was placed in a pool from which she was subsequently appointed to another position.

[117] I also concluded that there was no abuse of authority in the selection of the merit criteria or the application of merit. The appointee met the merit criteria when she was appointed, and nothing indicates that she would have had an advantage in the assessment. The determining criterion used to select the appointee from the pool was the nature and extent of her management experience. She was selected based on her management experience and not her results at any stage of the appointment process compared to the complainant's or other candidates' results.

[118] The assessment process at issue did not have serious deficiencies such as those that the Tribunal identified in *Amirault* and *Denny*.

[119] Ordering the appointee's appointment revoked is not an appropriate measure in the circumstances. The appointee met the merit criteria and was selected because she was the candidate in the pool with the most management and supervision experience.

[120] The complainant also asked the Board to award her damages.

[121] Besides her unclear request for damages to reimburse lost wages, when she was asked to elaborate on the nature of the damages she seeks, she replied that it was up to the Board to identify the damages to which she may be entitled.

[122] It is clear from the complainant's argument that she seeks punitive and exemplary damages that could, in her view, make the *PSEA* more binding and encourage the deputy heads subject to it to comply more fully with its requirements.

[123] The *PSEA* states that in specific circumstances, corrective measures ordered by the Board may include compensation. It may order compensation when it concludes that the *Accessible Canada Act* (S.C. 2019, c. 10; *ACA*) (see s. 81(3) of the *PSEA* and s. 102 of the *ACA*) or the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*) (see s. 81(2) of the *PSEA* and ss. 52(2)(e) and 53(3) of the *CHRA*) has been violated. Those two Acts are not at issue in this case.

[124] Section 81(1) of the *PSEA* requires that corrective action ordered by the Board address the problem with the appointment or appointment process that is the subject of the complaint. The Board does not have the authority to impose a corrective measure that is beyond the scope of the appointment process that led to the complaint. The corrective measure must aim to remedy the default identified in the appointment process at issue and cannot address faults in past or future appointment processes not before the Board under a complaint made according to the *PSEA* (see *Canada (Attorney General) v. Cameron*, 2009 FC 618 at para. 18).

[125] By asking the Board to recognize a right to punitive or exemplary damages to make the *PSEA* more binding and to encourage deputy heads to comply more fully with its requirements, the complainant seeks a corrective measure beyond the appointment process that gave rise to her complaint. The Board must respect its jurisdiction, which includes the remedial authorities that Parliament granted it. It must also respect the PSC's jurisdiction as recognized in the *PSEA*. Under the *PSEA*, the PSC, not the Board, has a role to provide overall oversight of staffing in the public service. It also has a duty to monitor how a deputy head exercises its delegated authority and to take appropriate action when necessary (see s. 15 of the *PSEA* and *Cameron*, at para. 30).

[126] The staffing jurisprudence is unanimous that the Board has no jurisdiction to order damages under the *PSEA* (see, among others, *Gignac*, at para. 102; *Pugh v. Deputy Minister of National Defence*, 2007 PSST 25 at para. 43; and *Rizqy v. Deputy Minister of Employment and Social Development*, 2021 FPSLREB 12 at para. 59). And the Board cannot award the complainant compensation for the employment opportunity of which she might have been deprived (see *De Santis v. Commissioner of the Correctional Service of Canada*, 2016 PSLREB 34 at para. 53). Such remedies are beyond the authority provided by ss. 81 and 82 of the *PSEA*.

[127] A legislative amendment is required to provide the Board with broader remedial discretion.

[128] The complainant asked the Board to draw on the remedial authority granted to it under the *FPSLRA* to conclude that it implicitly has the same remedial authority under the *PSEA*. However, the *PSEA* and the *FPSLRA* have different objectives, and the Board's role differs in each regime. Corrective measures that the Board orders under the *PSEA* must respect the essence of its preamble, the wording of ss. 81 and 82, and the PSC's legislative role and mandate.

[129] I find that a declaration that the respondent abused its authority is the only appropriate corrective measure in the circumstances. Such a declaration may seem insufficient to someone whose candidacy was not treated fairly in the appointment process. However, the Board does not have the jurisdiction to award the damages that the complainant claimed.

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

(The Order appears on the next page)

V. Order

[131] The complaint is allowed.

[132] I declare that there was an abuse of authority, including a reasonable apprehension of bias with respect to the complainant's candidacy.

April 13, 2023.

FPSLREB Translation

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