

**Date:** 20230725

**Files:** 771-02-39788 to 39791

**Citation:** 2023 FPSLREB 73

*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

**MAURICE HUTLET, BRIAN MARSHALL, KEVIN KIDD, AND DENNIS WILCOX**

Complainants

and

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

Respondent

and

**OTHER PARTIES**

Indexed as

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

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

**Before:** Caroline E. Engmann, a panel of the Federal Public Sector Labour  
Relations and Employment Board

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

**For the Respondent:** Calvin Hancock, counsel

**For the Public Service Commission:** Louise Bard, senior analyst

---

Heard via videoconference,  
September 6 and 7, 2022.

---

## REASONS FOR DECISION

---

### I. Introduction

[1] On February 13, 2019, Maurice Hutlet, Brian Marshall, Kevin Kidd, and Dennis Wilcox (“the complainants”) each made a complaint to 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”). They alleged that the deputy head of the Department of National Defence (“the respondent”) abused its authority when it staffed the preventative maintenance supervisor position (also known as the “crew chief” position) classified at the GL-COI-10 (C3) group and level at Canadian Forces Base (CFB) Detachment Shilo, east of Brandon, Manitoba (“CFB Shilo”). On March 11, 2019, the Board consolidated the complaints.

[2] The complainants alleged that the respondent abused its authority in the choice of a non-advertised process as well as in the establishment and assessment of merit with the primary purpose in the process of appointing the appointee, while excluding one of the complainants. They alleged that the respondent specifically lowered the position’s qualification criteria to favour the appointee. A Red Seal Certificate had historically been required for the crew chief position; however, in this case, the respondent removed it and added the power engineer ticket, level 4, to favour the appointee.

[3] The respondent denied that it abused its authority in the appointment process. In July 2018, it decided to revamp and stabilize its Preventative Maintenance program at CFB Shilo by staffing several preventative maintenance positions internally and initially on a long-term acting basis that would eventually lead to indeterminate appointments. One of the positions was the crew chief position. The respondent initially received four expressions of interest for it, including one from Mr. Hutlet. One person withdrew his candidacy, and ultimately, Mr. Hutlet and two other candidates were assessed. At the end of the assessment process, it was determined that all three candidates met the essential qualifications, but the appointee was selected as the right fit for the position.

[4] The Public Service Commission (“the PSC”) did not appear at the hearing but filed written submissions on the legislative framework applicable to the appointment

process, including a discussion of its relevant policies and guidelines. The PSC took no position on the merits of the complaints.

[5] The Board finds that the complainants failed to substantiate their allegations, on a balance of probabilities. The complaints are dismissed.

## **II. The allegations, and the deputy head's reply**

[6] The allegations of abuse of authority can be briefly summarized as follows:

- the removal of the Red Seal Certificate qualification as essential, and the lowering of the occupational qualification to a level 4 power engineer ticket;
- the appointment was not based on merit because the appointee does not have a Red Seal Certificate;
- setting the power engineer ticket at level 4 unfairly excluded one of the complainants from the process;
- a non-advertised process was chosen to ensure the appointment of a preselected candidate for reasons (such as accommodation) other than those specified in the articulation of selection decision ("ASD");
- the respondent did not respect staffing values because the contents of the ASD were not accurate;
- the respondent failed to properly assess the complainants' qualifications; and
- the appointee was favoured over other candidates by providing him with specific training, which the other candidates did not receive.

[7] The respondent denied all the allegations and maintained that it did not abuse its authority in the appointment process and in the application of merit and that it respected all the relevant staffing values.

## **III. Summary of the evidence**

### **A. For the complainants**

[8] Messrs. Hutlet, Marshall, and Wilcox testified on their own behalf. Mr. Kidd did not testify. In addition, Lawrence Cotter testified on behalf of Mr. Hutlet. Mr. Cotter is currently employed as a preventative maintenance planner classified at the GL-COI-10 group and level and has been in that position for approximately five years.

[9] The complainants were employed in different trades positions at the Real Property Operations Unit (West) at CFB Shilo when the appointment at issue in these complaints was made. As of the hearing, Mr. Wilcox had retired from the public service.

[10] Mr. Hutlet is currently employed as a carpenter classified at the GL-WOW-09 group and level. He has held this position since 2019. Before it, he was a GL-MAM-05 carpenter. He holds two Red Seal Journeyperson Certificates, one for carpentry, and the other for painting.

[11] He remains interested in the crew chief position. He applied for it but was not appointed to it, although he met all the essential qualifications. According to him, a GL-COI-10 position, which is the classification of the crew chief position, has historically required a Red Seal or a Journeyperson Certificate, but in this process, management changed the essential qualifications by removing the Red Seal Certificate requirement and adding a level 4 power engineer ticket requirement, which is lower than a Journeyperson Certificate. According to him, management, in effect, lowered the essential qualification to favour the appointee, who has a level 4 power engineer ticket. Management further favoured the appointee by accommodating him in the preventative maintenance planner position for a year-and-a-half before the appointment at issue.

[12] When Mr. Hutlet acted in the crew chief position, he did not receive any feedback from his direct supervisor, Ashley Denbow. He worked side by side with Mr. Cotter, who attested to the fact that Mr. Hutlet did well in the position and that he was a good fit for it.

[13] A document entitled “Assessment for Mr. M. Hutlet for the position of Preventative Maintenance Supervisor” was shown to him. He testified that it was never shared with him at the relevant time. He vehemently disagreed with certain portions of it, specifically those stating that he had failed to display the adequate supervisory skills required for the position and that he had failed to direct and monitor his subordinates in the daily work and to hold them accountable to timelines. The assessment board attributed it to him “having no previous supervisory experience.”

[14] In the document, the assessment board concluded that Mr. Hutlet was not the right fit for the position because his supervisory skills were inadequate. He contested that part of the assessment and testified that he had run his own carpentry business before joining the respondent and that he had supervisory experience as he had successfully run his own business.

[15] He referred to a work description for a position entitled “Preventative Maintenance (PM) Inspector” classified at the GL-COI-10 group and level to establish that historically, GL-COI-10 positions required a Journeyperson Certificate. The effective date of the work description is October 4, 2001. It was conceded that it was not the work description for the position at issue. I also note that it expressly states that the position has “no ongoing supervisory responsibilities.”

[16] Mr. Cotter worked side by side with Mr. Hutlet when the latter acted in the crew chief position for two months. He was not Mr. Hutlet’s direct supervisor. His view was that Mr. Hutlet would be excellent in the crew chief position. He testified that during one of his discussions with Mr. Denbow, he told Mr. Denbow that Mr. Hutlet would be good in the supervisor position and that Mr. Hutlet was a good supervisor. On cross-examination, he confirmed that he did not personally assess Mr. Hutlet; nor was he involved in management’s decision to appoint the appointee to that role.

[17] Mr. Marshall testified on behalf of the complainants. He currently works as an overhead door technician classified at the GL-MAM-06 group and level. He has no Red Seal or Journeyperson Certificate, but he does have a level 5 power engineer ticket. He was interested in the crew chief position. He emailed Major Jérémie Dulong’s administrative assistant, but he never heard back as to whether he had been screened in or out of the process. Major Dulong was the commanding officer at CFB Shilo during the relevant period. Mr. Marshall made a complaint because he believed that the addition of the level 4 power engineer ticket criterion to the essential qualifications was an accommodation for the appointee. He believed that the historical qualifications, namely, a Journeyperson or Red Seal Certificate, should have been maintained.

[18] When asked if he had any evidence about the appointee’s accommodation issue, he stated that he would repeat what Mr. Hutlet had already said on that issue. On cross-examination, he admitted that with his level 5 power engineer ticket, he did not meet the essential qualifications for the crew chief position.

[19] Mr. Wilcox testified that he is retired. He worked for the respondent for 14 years as a journeyperson electrician classified at the GL-EIM-10 group and level. As he was close to retirement, he did not participate in the process.

[20] He was asked to explain the designations and certifications in the trades field. He testified that a Journeyperson Certificate requires 7200 hours of practical training

or apprenticeship and successfully completing 4 examinations. He stated that the Journeyman Certificate equivalent in the power engineering realm is the level 1 power engineer ticket, not level 4, which the respondent used for the process. According to him, a power engineer, level 4, ticket requires 1200 hours of training and successfully completing 1 examination. For GL-COI-10 positions, the required qualification had always been journeyman status for tradespeople. He referred to the 2001 work description for the preventative maintenance inspector position, which included the following:

...

**Skill**

...

***A building construction trade at the journeyman level and sufficient experience with other trades (such as carpentry, plumbing and electrical) to provide technical advice and assistance to designers and team leaders, on-site guidance to Maintenance/Construction Inspectors/Supervisors and to conduct inspections, oversee construction and maintenance projects and verify the quality of work performed regarding Preventative Maintenance direction/program.***

...

[Emphasis added]

[21] He acknowledged that as of 2017, the preventative maintenance inspector position was split into two positions.

**B. For the respondent**

[22] Mr. Denbow and Major Dulong testified on behalf of the respondent.

[23] Mr. Denbow is a construction maintenance manager at Real Property Operations Unit (West), CFB Shilo. He is responsible for managing 7 construction and maintenance crews consisting of the engineering crew, the water and sewage crew, the roads and grounds crew, the electrical crew, the plumbing and heating crew, the structural crew, and the preventative maintenance crew. He was the hiring manager responsible for the process. He has staffing training and has been involved in 16 to 24 staffing processes. The assessment board comprised him, Major Dulong, and acting officer commanding, Blaine Fraser.

[24] CFB Shilo's Preventative Maintenance program had fallen into neglect since the previous manager retired. The respondent decided to revive and stabilize it by creating a dedicated preventative maintenance unit, which meant that it had to staff a dedicated team of employees internally. It decided initially to staff the positions on a long-term acting basis with the view to making indeterminate appointments in the future. The approach was communicated to all of CFB Shilo in an email dated July 19, 2018, as follows:

...

*In an effort to provide more stability for the detachment's preventative maintenance (PM) program and also speed up the staffing process, we intend to conduct staffing processes internally over the next couple months. Any indeterminate employee of RP Ops Det Shilo showing interest in PM positions will have a chance to act in the position for a period of time, then based on best performance we will be assigning the best fit personnel to specific positions for long term acting while the HR world catches up on indeterminately appointing the person to the position. This will eventually put an end to the constant rotating door of personnel in and out of the cell.*

*Therefore I am asking that anyone interested in the following positions makes it known to the Admin O Tannis Bolduc via e-mail no later than 3 August 18. If you are interested in more than one, please indicate so.*

...

*- PM Supervisor COI 10 with supervisory differential [crew chief]*

...

*Full disclosure; the intent is to use this e-mail as part of the justification of best fit for an internal non advertised appointment of certain interested individuals into the above mentioned positions. We reserve the right to continue with the current external staffing process if deemed reasonable to do so.*

...

[25] One of the six positions listed was the crew chief position. According to Mr. Denbow, a preventative maintenance inspector position was initially created as part of revamping the Preventative Maintenance program, but it was soon discovered that the duties and responsibilities were too much for one person. Therefore, the position was split into two: 1) the preventative maintenance planner position, and 2) the preventative maintenance supervisor or crew chief position.

[26] The crew chief's primary duties are to take care of preventative maintenance inspections at CFB Shilo. The role has 7 GL-MAM-05 and GL-MAM-06 direct reports. The unit's main role was to ensure that the 52-week scheduled inspection plan in all the trades areas was carried out on schedule.

[27] The respondent initially received four expressions of interest for the crew chief position, including from Mr. Hutlet. One person withdrew his candidacy. Ultimately, Mr. Hutlet and two other candidates were assessed. At the end of the assessment, it was determined that all three candidates met the essential qualifications, but the appointee was selected as the right fit for the position.

[28] Mr. Denbow explained that he selected the occupational certification listed on the statement of merit criteria ("SOMC") because realistically, many of the tradespersons at CFB Shilo met the merit criteria. He added the power engineer ticket, level 4, because about 11 employees had one, and he wanted to provide them access to the position. They were about 1/6 of all the employees, and it was felt that it would be unfair to exclude them from the opportunity.

[29] He explained that the Treasury Board's qualification standard does not specify any minimum educational or occupational requirements for the General Labour and Trades occupational group ("the GL group"); rather, it gives management the discretion to set those requirements for the work to be performed. For the crew chief position, he did not include the Red Seal Certificate requirement because it was not necessary for the work to be performed.

[30] That certificate is important when work is performed interprovincially. In this case, the work to be done was within the province of Manitoba, so there was no need for that requirement. The essential qualifications listed on the SOMC included the following:

Occupational certification	The possession of a valid Journeyperson Certificate in the electrical, plumbing, painting, or carpentry trade, or a power engineer ticket (minimum level 4). Journeyperson status in a specific trade may be a requirement for certain appointments.
Experience	Experience in the maintenance, repair, and inspection of buildings and building systems. Experience supervising a multidisciplinary maintenance team.

## Abilities and skills

The ability to produce scope-of-work and cost estimates.

The ability to coordinate, manage, and inspect construction projects.

The ability to supervise other employees.

[31] He explained that the position was a supervisory role; therefore, it was necessary that candidates had supervisory skills.

[32] He was not aware that Mr. Marshall had expressed an interest in the crew chief position, but he was aware that in addition to the appointee, two other candidates had expressed interest in it. All three candidates acted in the position for two months each, during which they were assessed against the essential criteria outlined in the SOMC. He held monthly supervisory meetings with them. Each candidate received training on the Defence Resource Management Information System (“DRMIS”).

[33] All three candidates met the essential qualifications. The assessment board chose the appointee as the right fit for the position because he demonstrated superior supervisory skills. Although Mr. Hutlet met the essential qualifications, he was not chosen as the right fit. While he performed well in the technical aspects of the job, he did not demonstrate strong supervisory skills. During the acting period, he was unable to hold his teams to the inspection schedule and timelines; therefore, they fell behind on the inspection schedule. On the other hand, the appointee’s performance was excellent.

[34] The assessment board met after all three candidates had gone through their two-month acting periods in the position, and its members discussed their observations. They then decided that the appointee was the right fit for the position. Mr. Denbow testified that the other two candidates were verbally informed of the decision; neither requested an informal discussion or feedback.

[35] He testified that he had no relationship with the appointee outside the workplace; nor did he have any conflicts with him. Similarly, he had no relationship with any of the complainants.

[36] On cross-examination, he explained that in addition to the Journey person Certificate, he added the level 4 power engineer ticket to the occupational qualifications, to be as inclusive as possible. He did not add the Red Seal Certificate

requirement as it was not necessary; all the work would be carried out within the province. Excluding that requirement also opened the process to more applicants.

[37] Major Dulong is currently the deputy commanding officer of the respondent's Real Property Unit in its Pacific Region. When he was the commanding officer at CFB Shilo during the relevant period, he had approximately 100 employees under his command, along with 7 direct reports. He has the relevant staffing and labour relations training and had the delegated authority to sign off on offer letters. He holds a science degree and has worked in the past as a combat engineer.

[38] For the appointment process at issue, he delegated the responsibility for the process to Mr. Denbow but retained ultimate authority for the final decision. He provided a historical rationale for the position that was staffed. It was new and was created to enhance and formalize CFB Shilo's Preventative Maintenance program. The crew chief was a generic supervisory position and was complementary to the preventative maintenance planner position. The email seeking expressions of interest was sent to all of CFB Shilo. The idea was to have interested candidates act in the position for approximately two months each as part of the assessment.

[39] With respect to the required training, all candidates received DRMIS training. Knowledge of "IERIS" was not relevant for the crew chief position, and in any event, everyone received IERIS training in 2017. IERIS is a module in DRMIS that is used to generate and manage infrastructure work orders. Note that the parties did not provide the Board with the acronym's meaning.

[40] Major Dulong was part of the assessment board. Four candidates expressed interest; one withdrew early in the process. Although he did not observe the candidates day to day during their respective two-month acting periods, he had monthly meetings with Mr. Denbow and reviewed everything during the periods. According to Major Dulong, Mr. Hutlet exhibited a change in attitude when he was in the acting role, which ruffled a few feathers.

[41] Major Dulong found that the appointee was more independent and that he was able to get work orders out and jobs done on time as compared to Mr. Hutlet's performance as a supervisor. The assessment board determined that the appointee's supervisory skills were superior overall. It met and discussed how the candidates performed. It concluded that all the candidates who met the minimum qualifications

were given equal time to act in the position and that when the assessment period ended, they were all found to meet the required essential criteria. It determined that the appointee was the right fit for the position.

[42] Major Dulong had no personal relationship with the appointee; their only interaction was in the workplace and when he had to deal with the appointee's accommodation request. By contrast, he played hockey with Mr. Hutlet outside the workplace. He also testified that in the workplace, he was involved in trying to have Mr. Hutlet appointed to a GL-COI-09 position.

[43] When Major Dulong arrived at CFB Shilo, an accommodation plan for the appointee was already in place, based on family status. During his tenure, the plan came up for renewal. Major Dulong prepared a new one that accommodated the appointee in his substantive position.

#### **IV. Summary of the arguments**

##### **A. For the PSC**

[44] The PSC did not attend the hearing; rather, it made written submissions on its policies and guidelines. In essence, the PSC outlined the relevant appointment policy and the applicable statutory provisions of the *PSEA*. It took no position on the merits of the complaints.

##### **B. For the complainants**

[45] The complainants referred me to the following cases: *Denny v. Deputy Minister of National Defence*, 2009 PSST 29 at paras. 121 to 141, *Amirault v. Deputy Minister of National Defence*, 2012 PSST 6 at paras. 50 to 97, *Hunter v. Deputy Minister of Industry*, 2019 FPSLREB 83 at paras. 82 to 95, *Renaud v. Deputy Minister of National Defence*, 2013 PSST 26 at paras. 30 to 37, *Tibbs v. Canada (National Defence)*, 2006 PSST 8 at paras. 70 and 71, and *Bergey v. Canada (Attorney General)*, 2017 FCA 30 at paras. 40, 55, 56, and 78.

[46] The complainants acknowledged that they had to prove that the respondent abused its authority on a balance of probabilities. What happened in this case falls squarely within one of the categories of abuse of authority outlined in *Tibbs*. The respondent committed several errors that in total amounted to an abuse of authority.

[47] The respondent abused its authority in the application of merit and in how it established the SOMC for the process. According to s. 31 of the *PSEA*, management has the discretion to establish qualification standards, as long as they are above the minimum requirements specified in the Treasury Board's qualification standard. In this case, the standard does not specify a minimum; therefore, one must look to the employer's historical and conventional practices. Historically, GL-COI-10 positions, due to their supervisory nature, have required a Journeyperson or Red Seal Certificate. The respondent abused its authority when it lowered the occupational qualification to include a level 4 power engineer ticket, which was inconsistent with s. 31 of the *PSEA*.

[48] The complainants referred to the *PSEA*'s preamble and focused on the statement that the federal government is committed to, among other things, "transparent employment practices". According to the complainants, the decision to lower the qualification requirements lacked transparency; so did how the change to the qualification criteria was communicated.

[49] The respondent's explanation that the qualification was lowered to allow creating a larger pool of candidates was simply not credible as it could not have been simply coincidental that the appointee held a level 4 power engineer ticket. The process was orchestrated to ensure that the appointee could apply and then be selected as the right fit. The lowering of the qualification criteria was made for an ulterior purpose.

[50] With respect to the assessment, the complainants argued that Mr. Hutlet's was an abuse of authority because he was not given his right to request an informal discussion as to why he was not the right fit. More than a simple error occurred because his assessment was not transparent.

[51] With respect to the choice of process, the complainants argued that the respondent chose a non-advertised process to ensure that a preselected candidate was appointed. They conceded that despite that, the process was opened to assess more than one person.

[52] The ASD confirmed that the appointee was favoured because he received 18 months of training in the preventative maintenance inspector position as a form of accommodation before the process. The assessment board admitted as much when it stated in the email dated October 18, 2018 [Right Fit Decision], as follows:

... [the appointee] was determined to be the right fit. He has more knowledge and experience in the preventative maintenance aspect of Real Property management. He acquired these skills by being trained in the IERIS role as Maintenance Planning Manager and his approximately year and a half acting in the Preventive Maintenance Inspector position....

[53] The ASD further confirmed the edge that the appointee gained over the other candidates from the prior acting opportunities.

[54] According to the complainants, “accommodation should not favour someone in a future process.” Although they did not challenge the appointee’s qualifications, the respondent chose a non-advertised process and placed the appointee in a job to ensure that his accommodation would be permanent, which created an abuse of authority. In these circumstances, revoking the appointment would be an appropriate remedy.

[55] Despite their position on the appointee’s qualifications, they argued that a breach of staffing values, namely, a lack of transparency that rose to the level of an abuse of authority could still warrant revoking the appointment (see *Renaud*).

[56] The complainants relied on *Renaud* to argue that the appointment must be revoked. In *Renaud*, the former Public Service Staffing Tribunal (“the tribunal” and a Board predecessor) found that there was an abuse of authority because a serious error was made in the assessment of the appointee’s qualifications. It found that the appointee did not have the requisite essential qualifications; therefore, his appointment was not based on merit.

### **C. For the respondent**

[57] The respondent referred me to the following cases: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 372, *Canada (Attorney General) v. Cameron*, 2009 FC 618 at paras. 16 to 18, 24 to 27, 29, 30, and 34 to 36, *Lavigne v. Canada (Justice)*, 2009 FC 684 at paras. 60 to 62 and 86, *Clout v. Deputy Minister of Public Safety and Emergency Preparedness*, 2008 PSST 22 at paras. 32, 38, 41, and 42, *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7 at paras. 36 to 41, *Robbins v. the Deputy Head of Service Canada*, 2006 PSST 17 at paras. 35 and 36, *Tibbs*, at paras. 49 to 73, *Visca v. Deputy Minister of Justice*, 2007 PSST 24 at paras. 34, 42, and 51 to 57, *Dhalla v. Commissioner of the Correctional*

*Service of Canada*, 2018 FPSLREB 12 at paras. 41, 50, and 51, and *Thompson v. President of the Canada Border Services Agency*, 2017 PSLREB 22 at paras. 71 and 72.

[58] The respondent informed all of CFB Shilo of its intention to make appointments through a non-advertised process and reached out to all employees, asking them to express their interest in the position. The assessment board met to assess all three candidates and determined that they all met the essential criteria but that the appointee was the right fit for the position. A high level of supervisory skills was required, and the appointee's were superior.

[59] The complainants had the burden of proof of establishing their case on a balance of probabilities, which they failed to discharge (see *Tibbs*). More than mere errors or omissions are required to find improper conduct, and the principle of bad faith requires an element of intent (see *Lavigne*).

[60] The employer has broad discretion to set and establish qualifications. According to the Treasury Board's qualification standard for the position to be filled, there were no minimum education or occupational requirements. Mr. Denbow explained why he expanded the qualification criteria to include the power engineer, level 4, ticket. He did not want to unfairly limit the pool of potential candidates, since approximately 1/6 of the workforce was power engineers at level 4 or higher. The complainants did not present any evidence to contradict this testimony.

[61] Mr. Denbow also acknowledged that historically, several GL-COI-10 positions required a Journeyman Certificate. He settled on a level 4 power engineer ticket as a minimum because attaining one required one year of training and one year of working in a steam plant in addition to successfully completing one written examination. Each candidate received a two-month acting appointment in the position, following which each was assessed. There was no preselection.

[62] With respect to the choice of a non-advertised process, the respondent has the discretion to choose the process type and is not required to consider more than one person for a position (see *Robbins*, at paras. 35 and 36). It was transparent with its intention to use a non-advertised process through its email to all of CFB Shilo. No convincing evidence was adduced to support the allegation that a non-advertised process was chosen to skew the process.

[63] With respect to the assessment process, neither respondent witness recalled that Mr. Marshall expressed any interest in it. Furthermore, the respondent argued that as a matter of procedural fairness, this allegation was never raised before the hearing. Had it been raised in the allegations, the respondent could have made the relevant inquiries with the alleged recipient of Mr. Marshall's email to ascertain what happened. In any event, this allegation changed little or nothing since in cross-examination, Mr. Marshall admitted that he did not meet the qualification criteria. The proper inference from this allegation is that Mr. Marshall's application was screened out at the initial stage.

[64] Each candidate who met the criteria acted in the position for two months, during which Mr. Denbow observed and assessed them. Furthermore, each candidate received DRMIS training; therefore, there was no unfair advantage. There is no merit to the complainants' argument that the appointee received IERIS training, which gave him an advantage over the others because that training is not relevant to the position.

[65] As the manager, Mr. Denbow checked in periodically with each candidate during the assessment process. His overall assessment was that the appointee excelled in the role. Mr. Hutlet is an excellent tradesperson, but he struggled with the supervisory aspects of the position. Mr. Cotter's opinion that Mr. Hutlet would have been good in the role should be given limited, if any, weight.

[66] The uncontested evidence from Major Dulong and Mr. Denbow indicates that neither had any personal conflict with Mr. Hutlet or any personal relationship with the appointee that would support a personal-favouritism allegation (see *Glasgow*).

[67] The respondent requested that the complaints be dismissed.

## **V. Issues**

[68] The complainants' allegations can be crystallized into three key issues, as follows:

- 1) Was there abuse of authority in the choice of appointment process?
- 2) Was there abuse of authority in the establishment of the essential qualifications?
- 3) Was there abuse of authority in the assessment of merit?

## VI. Reasons

### A. The statutory framework

[69] The relevant sections of the *PSEA* are ss. 2, 30, 31, 33, 77, and 81.

[70] Section 2(4) of the *PSEA* defines abuse of authority as including bad faith and personal favouritism. That definition is not exhaustive, and the jurisprudence has firmly established that Parliament did not intend the concept of abuse of authority to be static (see *Canada (Attorney General) v. Lahlali*, 2012 FC 601 at paras. 21 and 33 to 35).

[71] While intention is not required to establish abuse of authority, any action or inaction underlying an allegation of abuse of authority must be serious and objectionable enough that a reasonable person would conclude that Parliament must not have envisioned the delegate behaving in the impugned manner (see *Tibbs*, at para. 74, and *Rizqy v. Deputy Minister of Employment and Social Development*, 2021 FPSLRB 12 at para. 10).

[72] Section 30 of the *PSEA* requires that all appointments be made based on merit and free of political influence. An appointment is based on merit when the PSC is satisfied that the proposed appointee meets the essential qualifications that the deputy head established for the work to be performed as well as any other specified asset or organizational requirements.

[73] For an appointment to be based on merit, the PSC is not required to consider more than one person. In other words, an appointment can be based on merit if only one candidate is considered. The tribunal explained the merit principle in *Rinn v. Deputy Minister of Transport, Infrastructure and Communities*, 2007 PSST 44 at paras. 34 and 35, as follows:

[34] *The Tribunal explained in Visca v. Deputy Minister of Justice et al, [2007] PSST 0024, at paragraph 44, how merit in the PSEA has changed from the former PSEA:*

Under the former PSEA, the ground for an appeal was that relative merit was not achieved. The process was prescriptive, ranking was mandatory, and any discrepancy in the process could lead to an appeal being allowed. Now, under subsection 30(2) of the *PSEA*, considerable discretion is given to choose amongst the applicants who meet the

essential qualifications, the person who in the manager's judgment is **the right fit for the job**.

*[35] Merit now relates to individual merit where the person to be appointed must meet the essential qualifications for the work to be performed. **There is considerable flexibility in selecting the person to be appointed; however, the fundamental requirement in appointing a person on the basis of merit is that the person must be qualified for the position.***

[Emphasis added and in the original]

[74] Section 31 of the *PSEA* provides that the employer may establish qualification standards that it considers necessary or desirable, considering the nature of the work to be performed and the present and future needs of the public service. Qualification standards relate to education, knowledge, experience, occupational certification, language, and any other qualifications. When establishing the essential criteria for an appointment process for a particular position, the deputy head must meet or exceed, but not fall short of, the qualification standards specified by the employer for that occupational group or classification (see *Rinn*, at paras. 40 and 41).

[75] Section 33 of the *PSEA* provides the respondent the discretion to choose between an advertised or a non-advertised appointment process. The *PSEA* does not require any preference; nor does it specify the factors that may be considered when exercising that discretion. Although that discretion appears quite broad, it is not absolute. The choice of one process over the other must not be tainted by abuse of authority. In *Beyak v. Deputy Minister of Natural Resources Canada*, 2009 PSST 7 at paras. 119 to 121, the tribunal addressed the issue of whether the choice of a non-advertised process constituted an abuse of authority. It explained that although the discretion is written broadly, its parameters are constrained by the scheme of the legislation, as follows:

*[119] As the Tribunal's jurisprudence has emphasized, the Preamble of the PSEA is an integral part of the Act; it highlights at the outset its legislative purpose. The following sections of the Preamble are particularly noteworthy:*

Canada will continue to benefit from a public service that is based on merit [...];

delegation of staffing authority [...] should afford public service managers the flexibility necessary to staff, to manage and to lead their personnel to achieve results for Canadians.

the Government of Canada is committed to a public service that embodies linguistic duality and that is characterized by fair, transparent employment practices, respect for employees, effective dialogue and recourse aimed at resolving appointment issues.

*[120] ... Managers have considerable discretion in staffing matters, but their discretion must be exercised in accordance with fair, transparent employment practices, and respect for employees....*

*[121] Requirements for fair, transparent employment practices and respect for employees are found in the PSEA, the PSST Regulations, the PSER and the PSC policies. For example, a non-advertised process requires under section 48 of the PSEA that notification be given to persons in the area of selection when a person is considered for an appointment, or when an appointment is made or proposed. For an advertised process, this notification must be given to employees who participated in the appointment process. As well, when a person is eliminated from further consideration in an appointment process, [sic] informal discussion may be held.*

[Emphasis added]

[76] Sections 77(1)(a) and (b) of the *PSEA* provide that persons in the area of recourse of an appointment or a proposed appointment may complain to the Board that an abuse of authority occurred in the appointment process either in the choice of appointment process or in the assessment of merit.

[77] Section 81 of the *PSEA* defines the remedial scope of the Board's authority when a complaint of abuse of authority is substantiated. The Board may order the PSC to revoke or to refrain from making an appointment and to take any corrective action that the Board considers appropriate.

## VII. Analysis

### A. Choice of process

[78] The respondent has the discretion to choose an advertised or a non-advertised appointment process when it makes an appointment. While the legislation does not specify when or how a choice between an advertised or a non-advertised process is to be made, the jurisprudence suggests that a complainant must present evidence to demonstrate an improper motive, bad faith, or favouritism, for example, to establish an abuse of authority based on the choice of process (see *Clout*, at para. 34, and *D'Almeida v. Royal Canadian Mounted Police*, 2020 FPSLRB 23 at para. 55).

[79] The facts in this case mirror those in *De Santis v. Commissioner of the Correctional Service of Canada*, 2016 PSLREB 34, in which the respondent described its process as non-advertised, but it had the trappings of an advertised process (see paragraphs 21 to 30). In this case, there appears to have been some confusion with respect to semantics, as in an advertised versus a non-advertised process. I received no evidence as to the definitions of those terms. However, in *De Santis*, the Board's predecessor referred to an internal bulletin that explained or defined the terms "advertised" and "non-advertised" as follows:

...

21 ...

**Advertised Appointment Process:** an appointment process where persons in the area of selection are informed of the appointment opportunity and have an opportunity to apply and to demonstrate their suitability against the merit criteria.

**Non-Advertised Appointment Process:** an appointment process which does not meet the conditions for an advertised appointment process

...

[Emphasis in the original]

[80] In this case, the respondent sent an email dated July 19, 2018, to all staff at CFB Shilo, inviting them to express their interest in any of the six positions in the preventative maintenance unit. It explained the rationale for the call for expressions of interest and outlined the assessment method that would be used. The email also stated as follows:

...

*Full disclosure; the intent is to use this e-mail as part of the justification of best fit for an internal non advertised appointment of certain interested individuals into the above mentioned positions. We reserve the right to continue with the current external staffing process if deemed reasonable to do so.*

...

[81] Four individuals, including Mr. Hutlet, expressed an interest in the crew chief position. One person withdrew, and the remaining three were assessed in accordance with the tools described in the email. Each candidate was allowed to act in the position for two months. Therefore, it would appear that the reference to a non-advertised

process was in form only, as substantively, the respondent conducted an internal advertised process.

[82] The complainants argued that the choice of a non-advertised process resulted from bad faith and an abuse of authority because it was used to appoint the appointee into the position and to exclude one of the complainants. They further argued that the ASD did not respect staffing values as it contained inaccurate content. They were unable to point to the alleged inaccuracies in the ASD.

[83] The complainants argued that the process of establishing the SOMC was shrouded in secrecy and that the SOMC was not attached to the July 19, 2018, email that advertised the position. The respondent explained that there were no attachments because it listed six positions, and it would have been unwieldy to attach six SOMCs. I note that the interested employees were given approximately two weeks to express interest, which provided ample time to obtain or become aware of the SOMCs. In fact, none of the complainants testified to being unaware of the merit criteria at the relevant time.

[84] The SOMC for the crew chief position is dated April 11, 2018, which predates the job opportunity advertisement that went out in July 2018. The complainants provided no evidence to suggest that any amendments were made after the advertisement was broadcast.

[85] I find that the complainants did not establish that there was an error or omission, or that there was anything nefarious about the choice of process.

## **B. The determination of the essential qualifications**

[86] Under s. 31(1) of the *PSEA*, the employer establishes the qualification standards related to education, knowledge, experience, occupational certification, language or other qualifications that are considered necessary or desirable, considering the nature of the work to be performed as well as the present and future needs of the public service.

[87] In an appointment process, the deputy head establishes the essential qualifications for the work to be performed (see s. 30(2)(a) of the *PSEA*) that must meet or exceed the qualification standards that the employer has specified for the

occupational group or classification to which the position belongs. In other words, the employer's qualification standards are recognized as the minimum requirements.

[88] In *Rinn*, the tribunal explained that the deputy head's established essential qualifications for the position to be staffed "must meet or exceed" the employer's qualification standards for the occupational group. The tribunal also held that it had the jurisdiction to hear a complaint that the deputy head abused its authority by establishing essential or additional asset qualifications that did not meet or exceed the employer's established applicable qualification standards (see *Rinn*, at paras. 40 and 41).

[89] The complainants argued that the respondent abused its authority when it established the essential qualifications for the crew chief position in two ways. First, it lowered the historically established criteria for GL-COI-10 positions by adding the power engineer, level 4, ticket as a requirement. According to the complainants, this was inconsistent with s. 31 of the *PSEA* because that ticket is not equivalent to the historically established qualifications for the position. Second, the removal of the Red Seal Certificate as an essential qualification was done for an ulterior motive and therefore was an abuse of authority.

[90] The parties tendered into evidence the employer's qualification standards for the core public administration by occupational group or classification. The crew chief position forms part of the GL group. The document states as follows:

...

*No qualification standards are prescribed for positions in the Operational Services Occupational Group, but managers may establish qualifications that they consider necessary for appointment or deployment.*

*The Ellis Chart (a comparative chart of apprentice training programs across Canada) may assist managers to establish education and/or **occupational certification** qualifications for positions for which they consider trades training necessary. The chart provides an interprovincial overview of the 13 Canadian apprenticeship systems and is a key product that provides governments, industry and educational institutions with data on designated trades, more specifically on training, certification, education/entrance requirements and prior learning assessment and accreditation process. The chart is produced by Employment and Social Development Canada (ESDC) in collaboration with the Canadian Council of Directors of Apprenticeship (CCDA), which*

*represents a partnership between the provincial, territorial and federal governments.*

...

[Emphasis in the original]

[91] There are no prescribed qualification standards for the GL group. The employer's qualification standard states that managers may establish the qualifications that they consider necessary to make appointments or deployments. Managers may use the "Ellis Chart" (a comparative chart of apprentice training programs across Canada) to help them establish education and occupational certification for the occupational group for the crew chief position in the GL group.

[92] The crew chief position is classified GL-COI-10 with supervisory differential 3 ("COI-10"). The complainants testified that a Red Seal or a Journeyperson Certificate in the specified trades has historically been required for COI-10 positions. They did not direct me to any historical SOMC or any internal policy document or guideline to support their assertion. They referred to and relied upon a 2001 work description for the preventative maintenance inspector position classified at the GL-COI-10 group and level that lists, among other required skills, the following:

...

**Skill**

...

***A building construction trade at the journeyman level and sufficient experience with other trades (such as carpentry, plumbing and electrical) to provide technical advice and assistance to designers and team leaders, on-site guidance to Maintenance/Construction Inspectors/Supervisors and to conduct inspections, oversee construction and maintenance projects and verify the quality of work performed regarding Preventative Maintenance direction/program.***

...

[Emphasis added]

[93] The parties agreed that this work description is not the same as the one for the crew chief position. I find that this document has very limited, if any, relevance. I specifically note that that position had no supervisory responsibilities, unlike the crew chief position.

[94] The respondent did not contest the complainant's testimony that COI-10 positions have historically required a Journeyperson Certificate. Therefore, I find that historically, the occupational qualifications for GL-COI-10 positions included Journeyperson Certificates in the relevant specified trades.

[95] The occupational certification in the SOMC and the conditions of employment for the preventative maintenance crew chief position, dated April 11, 2018, specified as follows:

**Attestation professionnelle**

Être titulaire d'un certificat de compagnon valide dans le domaine de l'électricité, de la plomberie, de la peinture de la menuiserie ou d'ingénieur en électricité. Le statut de compagnon dans un métier spécifique peut être une exigence pour certaines nominations

**Occupational Certification**

Possession of a valid Journeyperson certification in the electrical, plumbing, painting or carpentry trade or a power engineer ticket (min class 4). Journeyperson status in a specific trade may be a requirement for certain appointments

[96] The respondent explained that it did not include the Red Seal Certificate requirement in the SOMC because the work to be performed was not interprovincial, so such a certification was not necessary. The complainants did not dispute the respondent's assertion that the work to be performed was not interprovincial.

[97] The complainants had the burden of demonstrating that the respondent abused its authority when it established the merit criteria (see *Tibbs*). They alleged that the respondent abused its authority when it removed the requirement for a Red Seal Certificate. The respondent explained that since the work to be carried out was exclusively in the province, a Red Seal Certificate was not required.

[98] The respondent explained that an organizational change was made to revamp its Preventative Maintenance program and to ensure staffing stability. As a result, it added the level 4 power engineer ticket to attract a larger candidate pool. The complainants countered in argument that that explanation was not credible. However, they did not present any evidence to support their argument.

[99] I accept the respondent's explanation for settling on the level 4 power engineer ticket. Unlike the Red Seal and Journeyperson Certificates, there was no concrete evidence that the power engineer, level 1, ticket was historically required for the GL-

COI-10 positions. Mr. Wilcox testified that a Journeyperson Certificate requires 7200 hours and completing 4 written examinations. He surmised that the equivalent of one in the power engineer system would be a level 1. I received no concrete evidence on equivalencies. I heard evidence that attaining a level 4 power engineer ticket requires 1 year of training and 1 year of apprenticeship in a steam plant. Since the employer did not specify any minimum occupational requirements, the allegation I must assess is whether the respondent abused its authority when it added the power engineer, level 4, ticket to the essential criteria. It is not my role to assess the equivalencies between the 2 qualification standards.

[100] The Qualification Standards specify that "... managers may establish qualifications that they consider necessary for appointment or deployment." In this case, the complainants did not establish that adding the power engineer, level 4, ticket to the SOMC fell short of what was necessary for the crew chief position or that the change to the qualification standard was done for an ulterior motive.

[101] The complainants referred to *Renaud*, in which the tribunal concluded that the respondent contravened the value of transparency when it secretly reopened an appointment process for only one candidate. There is no evidence in this case that the addition of the power engineer, level 4, criterion was shrouded in secrecy or was added after the fact.

[102] Overall, the complainants did not establish that the respondent made any error or omission, or acted in bad faith, when it opened the candidate pool by adding the level 4 power engineer ticket as a merit criterion on the SOMC and by excluding the Red Seal Certificate.

### **C. The assessment and the application of merit**

[103] I have determined that the particulars of the appointee's accommodation requests are not relevant to the process.

[104] According to the complainants, the respondent groomed the appointee in his acting preventative maintenance inspector position in anticipation of creating the new crew chief position.

[105] All three candidates who expressed an interest for the crew chief position were given the same opportunity to act in the position for two months.

[106] I do not accept the complainants' argument that the appointee's acting preventative maintenance inspector role gave him an unfair advantage in the appointment process. There is no evidence to support the allegation that the respondent effectively groomed the appointee for the position.

[107] I reached that conclusion for two reasons. First, the respondent's uncontested evidence was that it wanted to revamp and stabilize its Preventative Maintenance program at CFB Shilo by creating a stable and dedicated preventative management unit, and the crew chief position was newly created as part of this effort. Second, both respondent witnesses testified to having no relationship with the appointee other than in the workplace context. That evidence was not contested.

[108] The complainants referred to *Denny* and *Amirault* to support their argument on this point. I find that the facts in those two cases can be clearly distinguished from this case. Both *Denny* and *Amirault* had clear evidence of a prior conflict between a candidate and a member of the assessment board. In this case, there was no evidence of a prior conflict between Mr. Hutlet and any assessment board member.

[109] Mr. Hutlet disagreed with the written assessment presented at the hearing, but he did not provide any positive or cogent evidence that the assessment was incorrect, particularly the concerns about the timeliness of his inspections and sticking to the maintenance schedule. For instance, he could have produced documentary evidence that the inspections were done on time or called direct evidence from the employees to that effect. Mr. Hutlet further claims that there was an abuse of authority because he was not given his right to request an informal discussion as to why he was not the right fit. Again, no evidence or explanation was provided in this regard to understand how Mr. Hutlet was prevented from requesting an informal discussion.

[110] I find that Mr. Cotter's evidence of Mr. Hutlet's suitability for the position was self-serving, and I give it no weight. Mr. Cotter was not on the assessment board; nor did he have any supervisory or evaluative role in the assessment process.

[111] I am not persuaded that there was an error or omission in Mr. Hutlet's assessment as to the quality of his supervisory skills and his fitness for the crew chief position.

**VIII. Conclusion**

[112] The complainants alleged that the respondent committed several errors that in total amounted to an abuse of authority. As explained in the preceding analysis, I find that the complainants did not establish that there were any such errors in the choice of appointment process, in the establishment of the essential qualifications or in the assessment of merit. It follows that the complainants did not demonstrate that the respondent abused its authority.

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

*(The Order appears on the next page)*

**IX. Order**

[114] The complaints are dismissed.

July 25, 2023.

**Caroline E. Engmann,  
a panel of the Federal Public Sector  
Labour Relations and Employment Board**