Date: 20231018

Files: 771-02-40973, 41010, 41011, 41095, 41205, 41762, 41764, 41851, 42147, 42401, 42755, 42756, 42757, 43012, 43035, 43168, and 43183

Citation: 2023 FPSLREB 94

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

PRESTON WARFORD

Complainant

and

DEPUTY HEAD (Canada Border Services Agency)

Respondent

and

OTHER PARTIES

Indexed as
Warford v. Deputy Head (Canada Border Services Agency)

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

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

For the Complainant: Himself

For the Respondent: Andréanne Laurin and Lauren Benoit, counsel

For the Public Service Commission: Louise Bard

Decided on the basis of written submissions, filed April 14 and 28 and June 2 and 9, 2023.

REASONS FOR DECISION

I. Introduction and background to the staffing complaints

[1] Preston Warford ("the complainant") is employed with the Canada Border Services Agency ("CBSA" or "the respondent"). In April of 2018, the CBSA ran an advertised internal appointment process carrying appointment process number 2018-IA-OPS-FB_05-192 ("the advertised process") to staff several positions at the FB-05 group and level. The advertised process closed on April 19, 2018.

[2] The complainant applied but was eliminated from the process when he did not obtain a pass mark in two competencies assessed through a standardized online test.

[3] Between September 20, 2019, and July 4, 2021, the complainant made 17 complaints pursuant to s. 77(1)(a) of the *Public Service Employment Ac*t (the "*PSEA*") related to that appointment process. These were consolidated into one lead file, namely, Board file no. 771-02-40973 for the purpose of the complaint process and the hearing. They were consolidated because they all pertain to the same appointment process and contain the same arguments.

[4] The complainant alleges that the respondent abused its authority in the application of merit since the appointees do not meet the essential experience qualifications.

[5] The text of the job opportunity advertisement ("the advertisement") for this appointment process included this sentence: "In order to be considered, your application must clearly explain how you meet the following (essential qualifications)". The advertisement listed two essential qualifications relating to education and experience.

[6] Under the essential qualification entitled "Experience" was the following:

> **** AMENDED EXPERIENCE ***:*
>
> E1: Recent and significant* experience in the interpretation** or enforcement*** of legislation administered by the Canada Border Services Agency. Please describe your experience for two (2) legislations. Legislations include but are not limited to the following:
> • Customs Act
> • Immigration and Refugee Protection Act

> • Criminal Code
> • Privacy Act
> • Canadian Charter of Rights and Freedoms
> • Canada Evidence Act
> • Controlled Drugs and Substances Act
> • Customs Tariff Act
> • Special Imports Measures Act
> • Canadian Food Inspection Act
> • Health of Animals Act
> • Plant Protection Act
> • Proceeds of Crime (Money Laundering) and Terrorist Financing Act
>
> **Recent and significant is defined as being continuous for three (3) years within the last five (5) years. This would normally be associated with the complexity, depth, and breadth of duties performed at the FB-03, FB-04 and FB-05 levels on a regular basis. Experience acquired as an instructor in delivering border services training in a learning environment will be considered equivalent to years of experience acquired in the operational environment.*
>
> …

[7] The complainant interpreted the definition of recent and significant to mean that the only candidates who could possibly have been considered must have had, when they applied, at least three continuous years of experience at the FB-03 group and level within the past five years. The complainant accused applicants classified lower than FB-03 (those classified FB-02, to be precise) of having acted dishonestly by submitting applications for positions for which they knew they were not entitled to apply. He also characterized management's consideration of those FB-02 candidates as dishonest or corrupt and therefore as an abuse of process.

[8] According to the respondent, the use of the word "normally" allowed for some necessary flexibility in the consideration process. The case law provides ample precedent for management to exercise discretion when considering essential qualifications.

[9] On March 21, 2023, a pre-hearing conference was held in preparation for the upcoming hearing, where I decided that the matter could be determined by written submissions. Pursuant to s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), the Board may render a decision on any matter without holding an oral hearing.

[10] For the reasons that follow, I find that the respondent did not abuse its authority in the application of merit. The complaints, consolidated into the one file that forms the basis for this decision, are dismissed.

II. Summary of the submissions

A. For the Public Service Commission, April 14, 2023

[11] The Public Service Commission ("PSC") referred to its appointment policy, which reiterates the statutory requirements set out in s. 30(1) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "*PSEA*"). The PSC's appointment policy sets out the following expected results, which the PSC submitted are in line with the spirit of the *PSEA*:

- a non-partisan and representative workforce of individuals drawn from across the country, benefitting from the diversity, linguistic duality, and range of backgrounds and skills of Canadians;
- appointment processes designed to not discriminate or create systemic barriers;
- appointment processes conducted fairly, transparently, and in good faith;
- appointments of highly competent persons who meet organizations' needs; and
- the timely correction of errors and omissions.

[12] The PSC submitted that under s. 16 of the *PSEA*, deputy heads and anyone exercising its delegated authority are required to comply with its policies when exercising their delegation.

[13] The PSC took no position on the merits of the consolidated complaint or on whether its *Appointment Policy* was respected in the advertised process.

B. For the complainant, April 28, 2023

[14] According to the complainant, the only candidates permitted to apply for the advertised process must have worked with the CBSA and been classified FB-03 or higher for three continuous years within the last five years (as of the date of their applications). In his written submissions, he interpreted the parameters of that essential qualification in the following manner: "CBSA has set merit criteria for experience, and one of these criteria is to have three continuous years of service at the

FB-03 level minimum… all applicants must have 3 continuous years of service at the FB-03 level minimum in order to apply …".

[15] In the next paragraph of his written submissions, the complainant supplied a lengthy list of applicants who did not have three continuous years of experience at the FB-03 group and level as of the date of their applications. He based his calculations on the dates of their individual promotions to FB-03.

[16] The complainant submitted that each of those applicants submitted untrue information because when they applied, they knew they did not have three years of continuous experience at the FB-03 group and level. He calculated the amount of time by which each was short of the required three continuous years. According to him, it is an indication of dishonesty.

[17] The complainant cited the CBSA's standards of integrity, honesty, fairness, and impartiality as well as the Treasury Board's *Values and Ethics Code for the Public Sector*. He also referred to the PSC's statement on the application itself, to the effect that "[a]ny false and/or fraudulent information may result in … the rejection of your application …". He feels that the FB-02 applicants' applications should have been rejected and that the Board should rescind their appointments.

[18] The complainant referred to s. 30 of the *PSEA*, which reads, in part, as follows:

30 (1) *Appointments by the Commission to or from within the public service shall be made on the basis of merit ….*	***30 (1)*** *Les nominations — internes ou externes — à la fonction publique faites par la Commission sont fondées sur le mérite* […]
(2) *An appointment is made on the basis of merit when*	***(2)*** *Une nomination est fondée sur le mérite lorsque les conditions suivantes sont réunies :*
(a) *the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head; and*	***a)*** *selon la Commission, la personne à nommer possède les qualifications essentielles* […] *établies par l'administrateur général pour le travail à accomplir;*

(b) the Commission has regard to	*b) la Commission prend en compte :*
(i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,	*(i) toute qualification supplémentaire que l'administrateur général considère comme un atout pour le travail à accomplir ou pour l'administration, pour le présent ou l'avenir,*
(ii) any current or future operational requirements of the organization that may be identified by the deputy head, and	*(ii) toute exigence opérationnelle actuelle ou future de l'administration précisée par l'administrateur général,*
(iii) any current or future needs of the organization that may be identified by the deputy head.	*(iii) tout besoin actuel ou futur de l'administration précisé par l'administrateur général.*
[…]	[…]

[19] The complainant then referred to s. 77(1) of the *PSEA*, which states:

***77 (1)** When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse … may … make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of*	***77 (1)** Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d'un processus de nomination interne, la personne qui est dans la zone de recours* […] *peut* […] *présenter à celle-ci une plainte selon laquelle elle n'a pas été nommée ou fait l'objet d'une proposition de nomination pour l'une ou l'autre des raisons suivantes :*
***(a)** an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);*	***a)** abus de pouvoir de la part de la Commission ou de l'administrateur général dans l'exercice de leurs attributions respectives au titre du paragraphe 30(2);*
[…]	[…]

[20] The complainant submitted that the FB-02 applicants should never have applied. Those who were successful "… were essentially rewarded for either lying or being incompetent and failing to understand basic math." The respondent, according to the complainant, abused its authority by accepting and considering those applications.

[21] The complainant referred to *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, for the definition of "abuse of authority". The five categories of abuse are listed as follows in *Tibbs*, at para. 70:

> *[70] … The five categories of abuse are:*
>
> *1. When a delegate exercises his/her/its discretion with an improper intention in mind (including acting for an unauthorized purpose, in bad faith, or on irrelevant considerations).*
>
> *2. When a delegate acts on inadequate material (including where there is no evidence, or without considering relevant matters).*
>
> *3. When there is an improper result (including unreasonable, discriminatory, or retroactive administrative actions).*
>
> *4. When the delegate exercises discretion on an erroneous view of the law.*
>
> *5. When a delegate refuses to exercise his/her/its discretion by adopting a policy which fetters the ability to consider individual cases with an open mind.*

[22] The complainant also submitted *Abi-Mansour v. Deputy Minister of Fisheries and Oceans*, 2021 FPSLREB 3, and *Ross v. Commissioner of the Correctional Service of Canada*, 2017 PSLREB 48, for the proposition that an abuse of authority does not have to be intentional for the Board to find that it occurred.

[23] The complainant states the respondent should have explicitly indicated that FB-02 trainee experience could have been acceptable, and that this should have been articulated under the heading of "Experience".

[24] The complainant submitted that a broad interpretation of the word "normally" in the advertisement creates ambiguity and unfairness. In this case, the use of the word "normally" permitted those classified FB-02 to apply, thinking that they met the essential experience qualification, when in fact they did not, according to him.

[25] An unfortunate consequence, argued the complainant, of an overly broad invitation is a flood of applications from thousands of unqualified individuals, which the respondent does not have the resources to administer.

[26] The complainant wrote:

…

> *This means that the employer was negligent, corrupt, incompetent or failed to be due diligent in their initial application vetting. The Tibbs decision (PSST) already established the five elements of "abuse of authority" and the employer (respondent) in this case crosses the gamut of these elements.*
>
> …
>
> [*Sic* throughout]

[27] The complainant requested that the Board find his complaints to be well founded, to make a declaration of abuse of authority, and to revoke the appointments.

C. For the respondent, June 2, 2023

[28] The respondent opened with the observation made in *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11, which was that a complainant has the burden of presenting evidence and making a convincing argument that on a balance of probabilities, an abuse of authority occurred in an appointment process. The respondent submitted that the complainant did not meet that burden.

[29] The respondent contends that in "… assessing the applications of candidates, the word 'normally' found in the statement of merit criteria provided flexibility to the Respondent to consider experience gained by candidates at the FB-02 level."

[30] The respondent added, "The word 'normally' does not mean 'must'. The word 'normally' leaves room for flexibility and allows the assessor to consider experience outside … of the FB classification altogether."

[31] At paragraphs 18 to 22 of its submissions, the respondent noted as follows:

> *18. The interpretation proposed by the Complainant is contrary to the plain wording of the poster. Any reasonable person reviewing the poster would understand that "normally" provides flexibility, and as such, experience outside the FB-03, FB-04 and FB-05 classifications may be considered.*
>
> *19. An argument very similar to the Complainant's was dismissed by the former Public Service Staffing Tribunal (the "Tribunal") in* Morrissette v. Deputy Minister of Transport, Infrastructure and Communities [2012 PSST 5]. *In* Morrissette*, the poster required "extensive experience" in planning and managing service delivery mechanisms. "Extensive experience" was defined as "having performed a broad range of related activities, which could* normally *be acquired over a period of 3 years" (emphasis added). The complainant argued that the appointee did not have the requisite experience as she had not been performing the requisite*

> *tasks for three years. The respondent disagreed, asserting that although such experience could be acquired over a period of three years, it could also be acquired over a lesser period of time and through experience acquired in several different jobs. The Tribunal agreed with the respondent's interpretation of the essential experience qualification and dismissed the complaint.*
>
> *20. In the present case, it was reasonable for the Respondent to consider experience gained at the FB-02 level, as FB-02 employees gain valuable experience interpreting and applying legislation in this role. A comparison of the FB-02 and FB-03 job descriptions confirms that the tasks performed by each level are largely the same, but FB-02 employees perform these tasks under the guidance of more senior employees.*
>
> *21. It was entirely within the Respondent's discretion to consider FB-02 experience in this selection process. The case law confirms that sub-delegated managers have broad discretion in determining and assessing candidate experience. In circumstances where the Respondent does not wish to include certain experience, it states this in the job poster. See, for example, the job poster provided by the Complainant for another selection process (Reference No. BSF21J-023823-000173). This poster expressly states that "*Experience acquired as a Student or as a CBSA officer Trainee in a developmental program will not be considered for this selection process*". In the present case, the Respondent did not exclude student or trainee experience, and as such, it was appropriate for candidates to draw upon this experience in their applications and for assessors to consider it.*
>
> *22. With respect to the allegation that the Respondent* allowed *individuals to apply, the Respondent did not have any authority to prevent a person from applying to the selection process, as the process was not limited to the FB classification. Any person could apply regardless of their group and level, and it was up to that person to demonstrate that they met the essential qualification.*

[32] To support its arguments, the respondent offered *Visca v. Deputy Minister of Justice*, 2007 PSST 24 at paras. 51 to 53, for the proposition that s. 36 of the *PSEA* provides sub-delegated managers with broad discretion in determining and assessing candidate experience, including which assessment tools they consider appropriate to determine whether a person meets the essential qualifications. It also cited *Purchase v. President of the Atlantic Canada Opportunities Agency*, 2011 PSST 14 at para. 38, for the proposition that it is the candidates' responsibility to clearly demonstrate on their applications that they meet all the essential qualifications.

[33] With respect to establishing whether an abuse of authority occurred, the respondent referred to *Portree v. Deputy Head of Service Canada*, 2006 PSST 14,

Bowman v. Deputy Minister of Citizenship and Immigration Canada, 2008 PSST 12, and *Tibbs* for the proposition that the exercise of managerial discretion is broad. The respondent argued as follows at paragraphs 25 to 27 of its submissions:

> *25. …* [T]*he complaint provisions in the* PSEA *are not intended to be the "catch all" recourse for complainants who allege abuse of authority when they are not satisfied with the results of a selection process. A complainant must not treat the Board as a forum of last resort to appeal a Deputy Head's decision on the appointment or proposed appointment simply because he or she was not selected.*
>
> *26. There was no abuse of authority in this case. All candidates were assessed in a fair and consistent manner. The selection committee used their discretion and looked at the nature of each candidate's experience, not solely the candidate's group and level.*
>
> *27. In accordance with the Board's case law, which requires assessors to keep an open mind and refrain from applying experience criteria in a mechanical manner, the assessors examined each application individually and recorded their findings on a personalized Application Screening spreadsheet. When they were unsure about a rating, they requested a second review.*

[34] With respect to a respondent's ability to exercise discretion when it selects assessment methods and reviews candidate experience, the respondent also submitted the following cases:

- *Lavigne v. Canada (Justice)*, 2009 FC 684;
- *Oddie v. Deputy Minister of National Defence*, 2007 PSST 30;
- *Kavanagh v. President of Shared Services Canada*, 2017 FPSLREB 38
- *Feeney v. Deputy Minister of National Defence*, 2008 PSST 17; and
- *Jolin v. Canada (Deputy Head of Service Canada)*, 2007 PSST 11.

[35] For all those reasons, submitted the respondent, the complainant did not provide a convincing argument that, on the balance of probabilities, an abuse of authority occurred, and thus did not discharge the burden of proof. The complaints should be dismissed.

D. The complainant's rebuttal, June 9, 2023

[36] The complainant argued that the word "normally" in the advertisement cannot be construed as broadly as the respondent suggested because it is qualified in the following manner: "Experience acquired as an instructor in delivering border services

training in a learning environment will be considered equivalent to years of experience acquired in the operational environment."

[37] The complainant argued that the applicant is thereby warned "… they need the 3 continuous years at FB03, FB04 or FB05 or time as an instructor in order to apply."

[38] The complainant repeated his earlier argument that the use of the word "normally" in the advertisement created a risk of "… being over burdened by too many [applications]. We already agree that the employer lacks the time and resources to vet a large amount of applications…".

[39] The complainant also repeated his earlier argument that the exercise of discretion in receiving applications from FB-02 applicants resulted in a process that was not fair or transparent and that was an abuse of authority.

[40] In his rebuttal, the complainant repeated his assertion that *Tibbs* stands for the proposition that a complainant need not prove an intentional abuse of authority, only that "… there was an abuse of authority where the expectation [was] that such a process would be fair, transparent and processed in good faith."

[41] The complainant stated that the respondent is held to a higher standard as the subject matter expert and that the additional leeway created by its use of the word "normally" amounted to "… confusion, trickery or safety nets as the standard defence when caught in the wrong".

[42] In summary, the complainant took issue with the respondent's apparent discretion to do the following:

> …
>
> *… change its course daily, are FB2's equal to 3's, can they or can they not limit criteria in their postings, can they use specific words to exclude/include applicants overtly or covertly. Is their discretion unlimited and completely flexible or are there limits, is their action within the noted norm.*
>
> …

[43] The complainant stated that the respondent's interpretation of *Morrissette v. Deputy Minister of Transport, Infrastructure and Communities*, 2012 PSST 0005, is flawed because that case involved a different set of criteria, and the former Public

Service Staffing Tribunal's ("the Tribunal") decision in that case does not necessarily apply to this situation.

III. Decision and reasons

[44] I have read and carefully considered the parties' submissions, as well as the cases that they submitted. In my reasons I will refer only to those decisions which support my reasoning.

[45] The Tribunal indicated in *Tibbs*, at paras 63 and 64, that the respondent has considerable discretion when choosing who it will appoint:

> *[63] …one of the key legislative purposes of the PSEA [is] that managers should have considerable discretion when it comes to staffing matters. To ensure the necessary flexibility, Parliament has chosen to move away from the previous staffing regime with its rules-based focus under the former PSEA. The old system of relative merit no longer exists. The definition of merit found in subsection 30(2) of the* PSEA *provides managers with considerable discretion to choose the person who not only meets the essential qualifications, but is the right fit because of additional asset qualifications, current or future needs, and/or operational requirements.*
>
> *[64] However, this does not mean that the* PSEA *provides for absolute discretion. The preamble clarifies the values and ethics that should characterize the exercise of discretion ….*

[46] In *Jolin*, the Tribunal stated that the deputy head can exercise discretion when setting the necessary qualifications for a given position and decide on an appropriate assessment method:

> *[25] The PSC is thus empowered, under subsection 30(2) of the* PSEA, *to assess whether a person to be appointed has the essential qualifications, taking into account any additional qualifications, operational requirements and current or future needs of the organization. Furthermore, the deputy head is specifically empowered to establish essential and additional qualifications and to specify any operational requirements or current or future needs of the organization. In the present case, the PSC delegated the exercise of its powers to the respondent under section 15 of the* PSEA. *It was thus the respondent, as delegate, who evaluated the person to be appointed.*
>
> …
>
> *[26] Section 36 of the* PSEA *sets out the means that the deputy head may employ to assess the essential and additional qualifications of the person to be appointed, as established by the*

> *deputy head pursuant to subsection 30(2). For example, section 36 refers directly to paragraph 30(2)*(a) *and to subparagraph 30(2)*(b)*(i). Section 36 reads as follows:*
>
> > ***36.** In making an appointment, the Commission* **may use** *any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)*(a) *and subparagraph 30(2)*(b)*(i).*
>
> …
>
> *[27] The purpose of this section is to confer the discretion to choose among the available methods for assessing candidates, and to proceed with an appointment based on merit under subsection 30(2) of the* PSEA*. At different steps in the process of selecting the person to be appointed, the deputy head will be called upon to choose and use various assessment methods, including examinations and interviews.…*
>
> [Emphasis in the original]

[47] The complainant believes that the appointees do not meet the required essential experience qualification since they did not have three continuous years of service at the FB-03 group and level at the time of application. Does the wording of the advertisement exclude anyone? It is useful to review the wording of the qualification, which is as follows:

> …
>
> **** AMENDED EXPERIENCE ***:*
>
> *E1: Recent and significant* experience in the interpretation** or enforcement *** of legislation administered by the Canada Border Services Agency. Please describe your experience for two (2) legislations…*
>
> **Recent and significant is defined as being continuous for three (3) years within the last five (5) years. This would normally be associated with the complexity, depth, and breadth of duties performed at the FB-03, FB-04 and FB-05 levels on a regular basis. Experience acquired as an instructor in delivering border services training in a learning environment will be considered equivalent to years of experience acquired in the operational environment.*
>
> …

[48] I find that the advertisement's wording did not exclude anyone; nor did the final sentence narrow the scope of required experience. If a candidate felt that they had recent and significant experience in the interpretation or enforcement of legislation

administered by the respondent without having worked at the FB-03, FB-04, or FB-05 group and level (or indeed in the FB group at all), they could apply. It was up to the respondent to assess the candidates' qualifications. If the respondent wanted to limit the number of applicants, it would have drawn tighter parameters around the definition of "experience".

[49] Section 30(2)(a) of the *PSEA* states that an appointment is made on the basis of merit when the PSC is satisfied that the person to be appointed meets the essential qualifications for the work to be performed. Section 36 provides the respondent the flexibility to choose any assessment method that it considers appropriate to make that determination.

[50] In the present case, it was reasonable for the respondent to consider experience gained at the FB-02 level, as FB-02 employees gain valuable experience interpreting and applying legislation. A comparison of the FB-02 and FB-03 job descriptions confirms that the tasks performed by each level are largely the same, but FB-02 employees perform them under the guidance and supervision of more senior personnel.

[51] It was entirely within the scope of the respondent's discretion to consider FB-02 experience under these circumstances. The case law confirms that sub-delegated managers have broad discretion in determining and assessing candidate experience. In circumstances where the respondent does not wish to include certain experience, it states this in the job advertisement. See, for example, the job advertisement supplied by the complainant for another selection process (reference no. BSF21J-023823-000173). This poster expressly states that "Experience acquired as a Student or as a CBSA officer Trainee in a developmental program will not be considered for this process". In the present case, the respondent did not exclude student or trainee experience, and as such, it was appropriate for candidates to draw upon this experience in their applications and for assessors to consider it.

[52] The complainant correctly asserted in his rebuttal that "[e]ach case must be assessed based on its own merits and the specific wording of the criteria at hand", which is precisely what I am doing in this case.

[53] The complainant asserted that *Morrissette* does not apply to the present circumstances.

[54] I find the facts in *Morrissette* to be remarkably similar to the facts of the present matter. At paragraph 10 of *Morrissette*, the wording of the essential qualification under consideration in that case is reproduced as follows:

> ***10*** *…*
>
> *Extensive experience* in the planning and management of service delivery mechanisms and provision of services relating to the administrative, financial, human resources, contract management, purchasing and graphic design functions of a directorate.*
>
> *(…)*
>
> ** Extensive experience is defined as having performed a broad range of related activities, which could normally be acquired over a period of 3 years.*

[55] In its submissions, the respondent used italics to emphasize the word "normally" in the final sentence because that is precisely the word at issue in this case.

[56] In *Morrissette*, the Tribunal considered essentially the same type of arguments that the complainant and respondent made in this case.

[57] Because of its importance and similarity to the present case, I will examine *Morrissette* in some detail. In *Morrissette*, at paragraph 11, the Tribunal heard argument that "[s]ince the closing date for submitting an application was May 2009, meeting the requirement for three years of extensive experience would mean that the appointee should have been performing such duties since about May 2006."

[58] The complainant in *Morrissette* thus made a similar argument to the complainant in this case, who took great pains to document the promotion dates to FB-03 for each appointee and how each one fell short of three years of continuous service.

[59] To return to *Morrissette*, the Tribunal considered the position of the manager, Ms. Dagenais, who initiated the staffing process in question and who drafted the statement of merit criteria. At paragraph 19, the Tribunal in that case documented its considerations as follows:

> ***19*** *… that her review of the appointee's application combined with her personal knowledge convinced her that the appointee met all of the essential qualifications. Ms. Dagenais relied greatly on the appointee's knowledge and experience to get the work of her office done, particularly given her own lack of experience with the TDG*

> *Directorate. Although such experience could normally be acquired over a period of three years, Ms. Dagenais explained that it could also be acquired over a lesser period of time and through experience acquired in several different jobs.…*

[60] In *Morrissette*, the Tribunal framed its abuse-of-authority analysis the same way as I do in this case, namely, in terms of s. 30(2) of the *PSEA*, which provides that an appointment is made on the basis of merit when the deputy head is satisfied that the appointee meets the essential qualifications of the work to be performed.

[61] In the present case, the advertisement suggested that the essential qualification of recent and significant experience in the interpretation or enforcement of legislation administered by the Canada Border Services Agency "… would normally be associated with the complexity, depth, and breadth of duties performed at the FB-03, FB-04 and FB-05 levels on a regular basis". It did not suggest that the essential qualification could not be met otherwise.

[62] What the respondent actually did in this case shows its careful consideration of the essential qualification in question. In verifying continuity of three years' experience within the past five years, assessors examined each candidate's written responses, checking them against the candidate's resume if necessary. Where reference was made to the Officer Induction Training Program or Officer Induction Development Program, the application was flagged for second review to ensure the experience was sufficient.

[63] Thus, I find that the respondent carefully considered the essential qualification in question. *Jolin* and *Tibbs* provide ample authority for managerial discretion in a staffing process. Had the respondent wanted to strictly limit the field of applicants to employees classified FB-03 and higher, it would have been a simple matter to say as much, explicitly, in the advertisement. It chose not to.

[64] The complainant, quite uncharitably, characterized the actions of the FB-02 applicants as dishonest. I find nothing dishonest about putting one's name forward for a promotion and hoping that one's existing set of qualifications will carry the day.

[65] Consequently, I find that the complainant has not demonstrated, on a balance of probabilities, that the respondent abused its authority when it determined that the appointees met the essential experience qualification in question.

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

(The Order appears on the next page)

IV. Order

[67] The 17 complaints (771-02-40973, 41010, 41011, 41095, 41205, 41762, 41764, 41851, 42147, 42401, 42755, 42756, 42757, 43012, 43035, 43168, and 43183) are dismissed.

October 18, 2023.

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