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



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

BETWEEN

NARCISSE DE SOUZA

Complainant

and

**DEPUTY HEAD
(Royal Canadian Mounted Police)**

Respondent

Indexed as

De Souza v. Deputy Head (Royal Canadian Mounted Police)

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

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

For the Complainant: Catherine Bergeron, Union of Safety and Justice Employees

For the Respondent: Patrick Turcot, counsel

For the Public Service Commission: Louise Bard, senior analyst

Heard by videoconference,
June 6 and 7, 2023.
[FPSLREB Translation]

REASONS FOR DECISION**FPSLREB TRANSLATION**

I. Complaint before the Board

[1] The complainant, Narcisse De Souza, made a complaint that alleged that the deputy head of the Royal Canadian Mounted Police (“the respondent” or RCMP) abused its authority during an appointment process to staff a financial analyst position (at the FI-01 group and level; “the position”) within the RCMP’s Budget Planning Service (BPS). He argued that the respondent abused its authority in the choice of a non-advertised process and in the application of merit with respect to the appointee’s application.

[2] The complainant made his complaint with the Federal Public Sector Labour Relations and Employment Board (“the Board”) under ss. 77(1)(a) and (b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12 and 13; *PSEA*).

[3] In his allegations, the complainant argued that the respondent selected a non-advertised process in bad faith and out of bias against him, particularly due to past differences of opinion between him and his manager, Tarik Khali (“the delegated manager”), who lacked transparency with respect to the choice of process. In addition, he argued that the respondent was biased in favour of the appointee and that it did not truly assess the appointee’s application before making her indeterminate appointment. At the hearing, the complainant did not address the allegation of bad faith in the choice of process.

[4] For the following reasons, I find the complaint unfounded.

II. Summary of the evidence

[5] The complainant and the delegated manager testified at the hearing. The complainant has occupied a salary reviewer position (at the CR-05 group and level) at the BPS for almost 15 years. Mr. Khali is a manager there and has been the complainant’s supervisor since January 2015.

[6] On November 17, 2021, the respondent issued a “Notification of Consideration” indicating that the appointee’s application had been selected to fill the position through a non-advertised process. On December 1, 2021, the respondent issued a notification of appointment that the appointee had been appointed to the position for an indeterminate period.

[7] The complainant had been in the position on an acting basis for several years. Except for a break of about six months, he been in it for about six years between 2012 and late 2018. Those repeated acting periods were made possible because the position's incumbent had received an appointment on an acting basis to a position elsewhere in the department. Only in 2021, when the incumbent left the department, did the position become vacant.

[8] The complainant was not in the position on an acting basis in 2021 when it became vacant. He had previously informed the delegated manager that he no longer wished to be considered for acting appointments to the position but that he still wished his application considered for it once it became vacant.

[9] After the incumbent left the position, the delegated manager appointed the appointee to the position on an acting basis. Due to ambiguity in the documentary evidence and the testimonies, some confusion exists as to how long the appointee was in the position on an acting basis before she received the indeterminate appointment. The acting appointment was for at most two-and-a-half months but could have been for as little as two weeks.

[10] When she was appointed to the position on an acting basis, the appointee was on secondment to Canada Economic Development (CED), where she was in a program support officer position for about six months, from April to October 2021. Her substantive position was as a salary reviewer at the BPS, which she was in from June 2014 to April 2021 first as a student and then from 2015 as an indeterminate employee.

[11] The delegated manager was the appointee's supervisor from January 2015 to April 2021, as well as during the period when she was in the position on an acting basis.

[12] The delegated manager supervised the complainant and the appointee for several years. He had many opportunities to evaluate their performance. He evaluated the complainant's performance while he was in the position on an acting basis for several years, as well as when he was in his substantive salary reviewer position. The delegated manager was also able to evaluate the appointee's performance while she was in the salary reviewer position and during her short time in the position on an acting basis.

A. The appointee's and the complainant's performance

[13] The delegated manager's testimony set out that according to him, the complainant and the appointee were not equally qualified. He stated that he noted that the appointee had the skills, knowledge, and experience required to occupy the position on an indeterminate basis. He indicated that he reached that conclusion in light of the appointee's skills, the quality of her work when she was in the salary reviewer's position, and her satisfactory performance for the duration of her acting appointment. He also indicated that he inquired into her performance by consulting CED's performance evaluation for when she was on secondment.

[14] The delegated manager testified that according to him, the complainant did not have the skills required for the position, despite the fact that he had been in the position on an acting basis for a long time. It appears that the delegated manager's predecessor initially offered the complainant an acting appointment because of an urgent operational need. According to the delegated manager, the complainant's performance during his acting appointments was unsatisfactory. He testified that he wanted to be patient with the complainant and give him the time and feedback necessary to allow the complainant to familiarize himself with the position's duties and expectations and thus improve his performance. According to the delegated manager, the desired improvements never materialized.

[15] There is no dispute that the complainant made some errors while he was in the position on an acting basis, particularly in calculating averages. There is also no dispute that at least once, he reportedly sent erroneous calculations to a client without following the procedure by which a financial analyst had to present his or her calculations for approval before sending them to a client.

[16] The complainant testified that his performance, both during his long acting appointment as a financial analyst and in his salary reviewer position, was satisfactory. He stated that he performed the tasks satisfactorily and that he managed well a large workload.

B. The choice of process, and the appointee's appointment

[17] Long before the appointment process that is the subject of this complaint, the delegated manager informed the complainant that the position in question would be filled through an advertised process once it was vacant.

[18] After the incumbent left the position, it remained vacant for two months, until the appointee's acting appointment.

[19] Shortly after that, the delegated manager consulted the department's Human Resources branch. At that point, he still intended to launch an advertised process. However, after consulting Human Resources, he changed his mind. He did not inform the complainant that he had decided not to proceed any further with an advertised process.

[20] The delegated manager gave two main reasons for choosing a non-advertised process. First, there was an operational need that ensured that the position had to be filled quickly so that the BPS could provide its services. The workload was high, and the deadlines for carrying out certain key tasks were tight. The BPS team was very small; it was composed of five employees in addition to the delegated manager. The position provided significant support to the incumbents of two senior financial analyst positions. It was imperative that the position be filled quickly. According to the delegated manager, the appointee, who had acted in the position, met the merit criteria. The position required mathematics and data-analysis skills. The appointee had proven herself over several years on the team and had demonstrated that she could perform the position's duties effectively. The delegated manager testified that he knew that he had already identified the right person for the position because the appointee was the only BPS employee who met its requirements.

[21] The delegated manager stated that he had considered the complainant's application and interest in the position. However, he quickly dismissed the idea because the complainant did not have the skills required for the position.

[22] The delegated manager's second reason to support his choice of a non-advertised process was the significant delay that an advertised process would cause. Human Resources was short-staffed and could not provide the timely administrative support and guidance required for an advertised process. The delegated manager testified that he was informed that due to Human Resources' challenges at that time, an advertised process could take as long as several months to a year.

[23] The delegated manager did not check references. He contacted a CED representative by telephone and email. He consulted the appointee's employee file and the performance evaluation that CED had prepared during her secondment there. He

used the information from those different sources to prepare the narrative assessment of the appointee's application. He also relied on his knowledge of her skills and abilities, as well as his information about the experience and skills she acquired while seconded at CED. In addition, he considered those findings and observations about her skills and abilities while she was in the position on an acting basis.

[24] In addition to preparing the narrative assessment of the appointee's application, the delegated manager completed a form to justify his choice of process and his selection of her.

[25] In December 2021, the complainant was surprised and disappointed to learn of the appointee's indeterminate appointment. He had believed that he would have an opportunity to apply. On December 2, 2021, he made this complaint with the Board.

C. The relationship between the complainant and the delegated manager

[26] The complainant and the delegated manager provided considerably different descriptions of their relationship that however reveal a relationship that was at times strained.

[27] According to the complainant, the relationship was difficult and confrontational. The delegated manager denied him the training he requested and did not acknowledge his successes or quality work or even his significant workload. The delegated manager focused on the deficiencies and errors and became defensive when the complainant asserted his opinion that his performance evaluations reflected only his mistakes and ignored his achievements and successes.

[28] The complainant argued that the delegated manager became defensive when the complainant contested an evaluation of his performance that the delegated manager had prepared. The delegated manager reportedly replied to the complainant's text messages about his performance evaluation with language that according to the complainant illustrated the delegated manager's animosity toward him. The delegated manager also emailed Labour Relations after the complainant added a comment to his performance evaluation in the electronic performance management system that his manager had told him to "[translation] only" sign his performance evaluation, which the delegated manager interpreted as suggesting that he had discouraged the complainant from commenting on or challenging the performance evaluation's

contents. In his email to Labour Relations, the delegated manager stated that according to his interpretation, the complainant tried to suggest that he had ordered the complainant to sign his evaluation without being able to question it.

[29] As indicated earlier, the delegated manager's opinion was that the complainant did not meet the position's requirements when he was in it on an acting basis. The complainant made significant errors that demonstrated that he was lacking in certain core competencies, including analytical skills. According to the delegated manager, the complainant did not accept suggestions to improve his skills and abilities, namely, mentorship and training. He did not take action, and even more, he insisted on taking training that was intended for an audience with more advanced knowledge and experience than he had. According to the delegated manager, the complainant insisted that he already had the knowledge, skills, and abilities that the delegated manager's suggestions had brought up. He had the impression that the complainant wanted to attain the position without making the necessary efforts to acquire the skills that it required.

III. Analysis

A. The allegation of a reasonable apprehension of bias against the complainant

[30] The complainant alleged that the choice of process was tainted by a reasonable apprehension of bias against him.

[31] The complainant was in the position on an acting basis for approximately six years. His acting appointments had been renewed several times. He had the impression that he was performing the duties satisfactorily and had expressed an interest in being appointed to the position once it became vacant. The delegated manager had told him that the position would be staffed through an advertised process and that he would have the opportunity to apply. The complainant was surprised and disappointed to learn of the appointee's indeterminate appointment after she had spent a short time in the position on an acting basis.

[32] The many renewals of the complainant's acting appointments created an expectation on his part that he would be appointed to the position on an indeterminate basis.

[33] The delegated manager's opinion was that the complainant had not performed the position's duties satisfactorily when he was in it on an acting basis for several years. Initially, he wanted to be patient with the complainant and give him the time to gain the experience and skills required for the position. The desired improvement never happened. After several years of acting appointments, the complainant still did not demonstrate the sense of initiative and analytical skills required for the position. The feedback from senior management and clients about the work that he completed was sometimes very negative.

[34] Although he indicated that he has a bachelor's degree in business management and that he has studied the basic concepts of calculations and statistics, the complainant made significant errors when performing tasks that called for the basic skills of a financial analyst, such as calculating averages or calculating using Excel formulas. According to the delegated manager, the complainant's errors demonstrated that he had not acquired certain essential abilities for the position, despite years of experience acting in it. His opinion was also that the complainant downplayed the significance of his mistakes, overestimated his performance while he was in the position on an acting basis, and resisted suggestions to improve his performance.

[35] I accept the delegated manager's testimony that although the complainant had been in the position on an acting basis for several years, it had been out of necessity. It was not a sign of the respondent's satisfaction. Operational needs meant that someone had to be in the position at all times.

[36] The complainant's and the delegated manager's professional relationship was at times strained. The complainant did not feel valued. He had the impression that the delegated manager focussed only on the mistakes and took no notice of successes. He argued that when he questioned the delegated manager's observations and conclusions about his performance, the delegated manager became defensive and perceived his questions as a form of rebellion. Meanwhile, the delegated manager described him as stubborn and unwilling to accept management's suggestions for training and mentoring. According to the delegated manager, the complainant felt attacked when his errors were brought to his attention. He tried to downplay the significance of his mistakes and described himself as a victim instead of taking responsibility for his mistakes. The delegated manager testified that he had considered the complainant's

staffing complaint an affront and that making it had been an act of rebellion by the complainant.

[37] The truth is probably somewhere between those two descriptions of their relationship. I find that each had a degree of stubbornness and that each was frustrated with the other. The evidence demonstrated that the complainant and his manager could both sometimes be defensive. Their email and text message exchanges revealed that they both had very direct communication styles. They went right to the point when expressing their views. Although I accept that their relationship was strained at times, the evidence on the record did not allow me to conclude that they had disputes or an animosity that could found a conclusion that there was a reasonable apprehension of bias against the complainant.

[38] As part of his testimony, the delegated manager stated that the complainant's performance in his substantive salary reviewer position was satisfactory. According to him, the complainant met that position's requirements but not those of the position. At the hearing, the delegated manager did not criticize the complainant as a person or as a salary reviewer. Nothing indicated any animosity toward the complainant. Although the delegated manager was unsatisfied with the complainant's performance in the position on an acting basis, the delegated manager's criticisms of him, both at the hearing and in the documentary evidence, reflected his frustrations with an employee resisting his manager's attempts to provide ways to improve and develop and trying to downplay his performance shortcomings.

[39] The parties presented me with only one performance evaluation while the complainant was in the position on an acting basis, the one for 2018-2019. It contains comments both favourable to the complainant and indicating that improvements were required in terms of analysis and thinking things through. The progress he had made was also identified. The assessment is nuanced and balanced. It does not support the allegation of a reasonable apprehension of bias against the complainant.

[40] The complainant argued that the respondent's bias against him can be seen when reading an email exchange that he had with the delegated manager that followed their text-message exchange about his performance evaluation.

[41] Communicating by text message or email about a performance evaluation is not recommended. One purpose of a performance evaluation is to maintain a collaborative

dialogue about expectations, performance, and steps to take to better meet the employer's expectations. Text messages favour brief communications that go straight to the point. Emails can be longer and detailed but are not much better at encouraging genuine dialogue.

[42] The emails that the complainant and the delegated manager exchanged were about the comment that the complainant added to his performance evaluation, specifically about the delegated manager's decision to send the comment to Labour Relations as information.

[43] As part of his testimony, the delegated manager stated that he felt targeted by the complainant's comment that according to him, could have suggested that he had ordered the complainant to sign the evaluation without giving him the opportunity to ask questions or discuss it. He wanted to inform Labour Relations about it and tell it his version of the facts. Although his decision to forward the complainant's comment to Labour Relations before discussing it with the complainant is somewhat surprising, I find that his interpretation of the complainant's comment was reasonable. In addition, the tone and content of his email to Labour Relations were neutral.

[44] When he read the delegated manager's email to Labour Relations, the complainant wrote to him, stating that the complainant did not understand why Labour Relations was informed about the comment that he added to his performance evaluation. The tone of the delegated manager's emailed response reveals frustration and impatience with the complainant, specifically impatience because the complainant did not appear to understand how his comment to his evaluation could have suggested a failure on the delegated manager's part.

[45] While the tone of the delegated manager's email leaves something to be desired, I do not see it as a sign of animosity as the complainant alleged. I find that the absence of meaningful dialogue between the complainant and the delegated manager — not bias against the complainant — is the source of the frustration and impatience implicitly communicated in the delegated manager's email.

[46] Although at the time, the complainant and the delegated manager were working remotely due to the COVID-19 pandemic and an in-person meeting was not possible, a telephone call or videoconference discussion would certainly have been preferable.

[47] To find that an abuse of authority occurred, the Board must conclude that a reasonably informed bystander would perceive bias on the part of the respondent (see *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394, and *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623). Suspicions, speculations, or possibilities of bias are not enough. The reasonable apprehension of bias must be real, likely, or reasonably evident (see *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10 at para. 72).

[48] The evidence adduced at the hearing did not enable me to conclude that a reasonably informed bystander, who is aware of all the circumstances of this case, could reasonably perceive bias — conscious or not — in the respondent's choice of process. The evidence presented to me was well below that threshold.

B. Abuse of authority in the application of merit, and the allegation of bias in favour of the appointee

[49] It is important to note that the complainant did not argue that the appointee did not meet the merit criteria when she was appointed. The delegated manager's evidence that she met the merit criteria when she was appointed was not challenged.

[50] Instead, the complainant alleged that the respondent abused its authority by not genuinely evaluating the appointee's application. He challenged how merit was applied. He argued that the respondent did not properly assess her application. According to him, the delegated manager's narrative assessment was incomplete and too much of a summary. It relied only on the appointee's performance evaluation from CED for a period of six months before she returned to the BPS to fill the position on an acting basis and on the delegated manager's observations during the very short time in which she was in the position on an acting basis. Based on the documentary evidence, it is possible that the acting appointment was for two weeks. According to the complainant, clearly, it was insufficient time for the delegated manager to attest to the appointee's skills and abilities.

[51] The complainant also argued that although the appointee was in a BPS position for several years, the total time she worked in the BPS was, in reality, very short because of the leave that she reportedly took. He did not specify in his opinion how

short the period would have been. He simply stated that the time she was really at work was too short for the delegated manager to assess her skills and abilities.

[52] The *PSEA* sets out that a deputy head has broad discretion when selecting an appointee based on the merit criteria (see *Visca v. Deputy Minister of Justice*, 2007 PSST 24). In this case, the delegated manager exercised that discretion by selecting the appointee after ensuring that she met the merit criteria.

[53] The delegated manager knew of the professional experience that the appointee gained while she was a BPS employee. He supervised her for several years. He had also supervised her when she was in the position on an acting basis, which would have allowed him to assess her performance while she carried out the tasks of the position in question, if only briefly.

[54] The appointee was in the position on an acting basis for a short time. However, it was not the only time in which the delegated manager had been able to observe her on the job and to learn about her skills and knowledge. She had worked on his team as a student and as a salary reviewer.

[55] Although, during her career, the appointee worked part time when she was a student and twice took paid leave, the delegated manager still had many opportunities to assess the quality of her work and learn about her skills and competencies. He also learned about the experience and skills that she acquired during her CED secondment. It was reasonable and appropriate for him to learn about the experience and skills that CED described in her performance evaluation, which was a reliable and credible source of information. The experience and skills that she acquired in her secondment were equally relevant to those that she might have acquired while working at the BPS.

[56] The documentary evidence demonstrated that the delegated manager described how and why he determined that the appointee met all the merit criteria. He provided specific examples illustrating her education, experience, knowledge, and skills, which evidence was not contradicted. When she was appointed, she met the merit criteria. The respondent did not abuse its authority in the application of merit. It properly assessed merit.

[57] I also find that there was no evidence that the appointee's appointment was tainted with bias toward her. She was appointed to the position because she met the

merit criteria. The complainant's allegation that she received preferential treatment due to the training that she would have been entitled to was not supported by the evidence on record. Experienced employees mentored her during her appointment to the position on an acting basis. Although the complainant did not receive such training while he was in the position on an acting basis, nothing indicated that the difference in treatment was due to bias in favour of the appointee or against him.

C. The allegation of abuse of authority in the choice of process

[58] I will now analyze the complainant's allegation that the respondent abused its authority in the choice of a non-advertised process.

[59] Section 33 of the *PSEA* provides the respondent the discretion to choose an advertised or a non-advertised appointment process. However, this power is not absolute. Section 77(1)(b) provides a right to make a complaint of abuse of authority because a delegated deputy head — in this case, the respondent — chose a non-advertised internal appointment process.

[60] The complainant had the burden of establishing that on a balance of probabilities, the respondent's decision to choose a non-advertised process constituted an abuse of authority (see *Rozka v. Deputy Minister of Citizenship and Immigration Canada*, 2007 PSST 46). A finding of abuse of authority requires evidence of conduct inconsistent with Parliament's intention when it delegated the discretionary power to the respondent under s. 33 (see *Davidson v. Canada (Attorney General)*, 2021 FCA 226).

[61] The complainant argued that the choice of process did not meet the principle of transparency. He also argued that the respondent's justification in support of its choice of process was inaccurate and unreliable. He disputed the existence of operational needs that justified choosing a non-advertised process. According to him, the respondent chose to fill the position through that type of process because of bias in favour of the appointee and against the complainant. I have already concluded that his bias allegations were unfounded. The evidence adduced at the hearing did not support his argument that the respondent reportedly chose a non-advertised process to deprive him of the opportunity to apply.

[62] Disagreement over the choice of process is not evidence of abuse of authority. More is required to found a conclusion that the respondent abused its authority by choosing to fill the position through a non-advertised process. The complainant did not discharge his burden in that respect.

[63] I accept the delegated manager's testimony that the process was chosen due to operational needs and because of the significant delays that an advertised process would have brought in the circumstances of this case.

[64] The BPS's workload was high. It was imperative that an indeterminate appointment be made as soon as possible. The fact that the respondent had repeatedly filled the position on an acting basis instead of leaving it vacant shows how important it was that the position was not left vacant. An indeterminate appointment had not been possible for several years. Once the incumbent departed, it became possible to provide stability to the team.

[65] The delegated manager's team is small. It has five employees, including two in positions at a higher group and level than the one at issue in this complaint. The delegated manager was convinced that in his team, only one person met the merit criteria; i.e., the appointee. Through his observations and evaluations of the complainant's performance, he had already concluded that the complainant did not meet all the merit criteria and could not be selected for the position.

[66] The complainant believed that he would have the opportunity to apply because the delegated manager had informed him that an advertised process would take place. However, the delegated manager changed his mind after consulting Human Resources and considering a number of factors, which included the BPS's operational needs, the presence of a candidate who met all the merit criteria, and the information that Human Resources had provided him about the approximately one-year delay that an advertised process would have caused due to Human Resources' staff shortage. The complainant did not adduce any evidence that could have contradicted or denied the respondent's detailed, clear, and credible evidence in that respect.

[67] It would have been preferable had the delegated manager informed the complainant that he had changed his mind and that he would make an appointment through a non-advertised process. However, I accept the delegated manager's testimony that he had not been aware that the appointment notices would be posted

so quickly and that he had intended to inform the complainant of the choice of process. Unfortunately, the complainant learned the news before the delegated manager could discuss it with him. It is unfortunate that the events unfolded that way, but I do not consider it an intention to proceed with a non-advertised process without the complainant's knowledge.

[68] Shortly before her appointment to the position on an acting basis, the appointee received an offer of indeterminate employment from CED. According to the complainant, it is unlikely that she would have declined an indeterminate employment offer and left CED for an acting appointment at the BPS. He asked the Board to infer that the respondent must have promised her that an indeterminate appointment through a non-advertised process would follow shortly after her acting appointment. Such an inference was in no way supported by the evidence.

[69] The complainant did not adduce evidence that could support a finding of a reasonable apprehension of bias or abuse of authority in the choice of process or in the application of merit.

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

(The Order appears on the next page)

IV. Order

[71] The complaint is dismissed.

December 6, 2023.

FPSLREB Translation

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