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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

MASARA ALDHAHI

Complainant

and

**DEPUTY HEAD
(Department of Citizenship and Immigration)**

Respondent

and

PUBLIC SERVICE COMMISSION

Indexed as

Aldhahi v. Deputy Head (Department of Citizenship and Immigration)

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

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations
and Employment Board

For the Complainant: Herself

For the Respondent: Marc Séguin, counsel

For the Public Service Commission: Alain Jutras, by written submission

Heard via videoconference,
May 10, 2022.

REASONS FOR DECISION

I. Complaint before the Board

[1] Masara Aldhahi (“the complainant”) made a complaint with the Federal Public Sector Labour Relations and Employment Board (“the Board”) against the deputy head of the Department of Citizenship and Immigration (“the respondent”). She was a candidate in an advertised appointment process (2017-IMC-IA-26238) for PM-05 senior program advisor positions.

[2] The respondent eliminated her candidacy from further consideration because she failed to appear for her second-language evaluation (“SLE”) without providing a timely doctor’s note as requested, and because she failed the essential qualification of “dependability” based on communications that took place during the assessment process. Her complaint under s. 77 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “*PSEA*”) alleged abuse of authority in the application of merit and choice of process, as well as discrimination. The allegations regarding choice of process and discrimination were not pursued.

[3] The complainant argued that it was an abuse of authority for the respondent to schedule her for an SLE prior to her interview, to assess her dependability on the basis of communications that took place during the assessment process, and to eliminate her from the selection process for failing to attend her SLE.

[4] I find that the respondent abused its authority by scheduling the complainant’s SLE prior to her interview and by assessing her dependability solely on the basis of her communications during the selection process. However, the respondent did not abuse its authority when it eliminated her from the selection process for failing to attend her SLE or provide a timely doctor’s note.

II. Summary of the facts

[5] The complainant applied for the position(s) on October 1, 2017 and wrote the exam on November 14, 2017. She failed the exam and was eliminated from the selection process. However, she requested an informal discussion, which was scheduled, cancelled, rescheduled, and finally began on January 16, 2018. This discussion ran out of the time allotted. The complainant requested a continuation,

which was scheduled for February 21, then rescheduled by the respondent for February 23, 2018. The respondent was responsible for all these delays.

[6] During the informal discussion, the complainant noticed that the assessment board member was missing the last page of her exam. As a result, she was reintegrated into the process on February 27, 2018, three months after having been eliminated. She was first told that she would proceed to a group interview and a reference check, but then the respondent changed the order of the process and advised that she would first be scheduled for an SLE.

[7] On March 5, 2018, she received her first invitation to attend an SLE, scheduled for March 13 with a deadline of March 7 at 4:00 p.m. to confirm attendance. The complainant responded that she could not attend due to a morning meeting with her home department manager. The respondent then offered her an afternoon time slot on the same day. It asked for proof of the meeting with her manager and confirmation of her attendance in the afternoon.

[8] The complainant did not provide proof of the morning meeting with her manager as requested and, according to the respondent, did not respond to the offer of the afternoon time slot. The complainant said that she did respond by verbally explaining that a morning meeting with her home department manager and an SLE in the afternoon would mean being away from work for the whole day. Being in a new seconded position, she felt that she could not take this amount of time away from work. On March 9 she was eliminated from the process as she had not confirmed attendance at either of the offered times for an SLE.

[9] On March 14, the complainant was offered a third opportunity for an SLE with a deadline for confirmation of March 21 at 5:00 p.m. It is not clear how the complainant responded to this offer. She said that she spoke with a team leader in Human Resources on the same day and that they “cleared a few issues”.

[10] On April 9, she was offered another opportunity to be tested on April 30 at 8:15 a.m. The respondent asked for confirmation of attendance by April 25 at 12:00 p.m. On April 23, since it had not heard from her, the respondent sent a reminder email, again asking for confirmation of attendance by no later than April 25 at 12:00 p.m. She then responded and confirmed her attendance. In the respondent’s view, she

responded only because of the reminder. The complainant agreed that she responded upon receiving the reminder but said that she would have responded in any case.

[11] On the morning of her April 30 SLE scheduled for 8:15 a.m., the complainant advised that she was ill and unable to take the test. She acknowledged the respondent's request that she provide a medical note by May 3 at 5:00 p.m.

[12] The respondent then offered her a May 8 appointment for her SLE, pending receipt of a medical note justifying the missed April 30 appointment. On May 2, the respondent sent a reminder to the complainant that she had to send her doctor's note by no later than May 3 at 5:00 p.m. On May 4, as no medical note had been provided, the respondent cancelled the SLE scheduled for May 8 and advised the complainant that she was eliminated from the process. The complainant acknowledged that the medical note might not have been received within the requested time frame. She said that she had tried to send it but that it might not have been delivered. No reason or explanation was given as to why it might not have been delivered.

[13] On May 7, the respondent asked for proof (a delivery receipt or screenshot) that she had tried to send the medical note within the requested time frame and offered to reschedule the SLE were it provided. The complainant sent a date-stamped photo of the note itself but nothing to indicate that she had tried to send it on May 3.

[14] On May 10, the complainant was eliminated from the process for the last time. The respondent said that it could not assess the essential second-language qualification as she had failed to attend the SLE or provide a medical note within the required time frame and further, that based on her communications during the appointment process, she had failed to demonstrate that she met the essential qualification of "dependability".

III. The parties' submissions

[15] The Public Service Commission did not attend the hearing or take a position on the merits of the complaint. It made general and policy-specific written submissions.

A. Scheduling the SLE before an interview

[16] The complainant testified that as of the date of the hearing, she had just started her French-language training and was aiming to obtain the BBB level. She said that she did not think she would get a position because she did not have her French lined-up.

However, she submitted that it could not be known for sure that she would not have been able to pass the SLE at the BBB level at the time of these events.

[17] As well, even if the respondent's immediate need had been to fill BBB or CBC positions, had she had her interview and been otherwise fully assessed, she could perhaps have partially qualified for a pool and had access to opportunities for later English-essential positions that might have arisen. She pointed out that partially qualified pools are commonly used in the public service.

[18] She felt that scheduling the SLE before her interview did not align with public service procedures or equity. She had applied to many processes and had never been asked to take an SLE before an interview — the departments always first determined if a candidate was qualified for the job and only then looked at the language requirements. The respondent was disorganized in its staffing process, which resulted in several changes to it, to which she had to adjust. She was first told that she would be interviewed but was then scheduled for an SLE before the interview. This was not the normal process, and she was disadvantaged as a result.

[19] In her view, if every department screened people out because they did not meet the French-language requirements, no staffing would take place. She felt that candidates should be screened out if they did not meet the job requirements, such as knowledge or education, but not for their second-language abilities. She acknowledged that sometimes a position requires abilities in French but said that that did not mean that the respondent had to screen her out. It had been interested in her candidacy as she had initially been offered an interview so she did not understand why it could not have pursued her full candidacy before scheduling the SLE.

[20] She was initially eliminated from the process because the last page of her exam was missing. She was reintegrated when this error was identified through the informal discussion, but the process of scheduling that discussion and being reintegrated took too long and put her at a disadvantage. Had the respondent not lost her exam page, and had it not taken so long to hold the informal discussion, she would have had her interview earlier, along with the other candidates who had group interviews before their SLEs. In her view, the respondent had a situation to deal with and scheduled her SLE first to facilitate something on its end. That disadvantaged her and it was neither professional nor ethical for the respondent to change things at the last minute.

[21] Sylvain DeCotret, the director of workforce management, testified that while the respondent had some English-essential PM-05 positions, the intent of this process was specifically to staff positions requiring BBB and CBC language levels. The language requirements were essential.

[22] He described the difficulty of scheduling about 100 candidates for 12 group interviews, each of which involved 5 assessors and 4 candidates, some of whom were out of country. He said that SLEs could be scheduled before or after interviews and that there should be no disadvantage either way. In this case, because it was so hard to co-ordinate agendas to schedule group interviews, they were trying to do SLEs first to reduce the number of candidates and make sure that everyone met the requirements. Although it was originally planned for the complainant to have her group interview along with several others who were similarly behind schedule in the process, they had withdrawn their candidacies, so that option was no longer available. He mentioned that a mock interview with false candidates had been an option.

[23] In Mr. DeCotret's view, the order of things should not matter - there was no disadvantage to the complainant from having her SLE scheduled before her interview. In fact, she had more time to prepare than other candidates did. Further, it was safe to say that she would not have met the language requirements, in any event, as she had not yet begun her language training. In the circumstances, it was not unreasonable to schedule an SLE to ascertain if she met the language requirements before proceeding with an interview.

B. "Dependability" assessed on communications during the process

[24] The complainant submitted that she should not have failed the "dependability" qualification based on her communications with the respondent during the process. She said that this criterion was not about taking a French exam, it was about determining if one would be dependable on the job. She said that criteria such as dependability were to be assessed via references and noted that the title of the rating guide for dependability was "Rating Guide - References".

[25] Mr. DeCotret testified about the importance of dependability at the PM-05 level as these were senior positions and incumbents were expected to be fully autonomous. Timeliness and responsiveness were extremely important; at times, they had to quickly respond to fluid, fast-changing situations such as those in Afghanistan and Ukraine.

[26] He agreed that dependability was normally assessed through references but said that candidate communications during the selection process can be used to assess this, or any qualification, as stated in the job poster: “All communication relating to this process, including email correspondence, may be used in the assessment of qualifications.” Certain aspects of communication with the complainant were noted, such as a lack of timeliness, difficulty with information being provided and repeated non-responsiveness. This led to a decision that she did not meet the qualification of dependability.

[27] The respondent submitted that s. 36 of the *PSEA* and *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11 confirm that any assessment method can be used to determine whether a candidate meets the essential qualifications. This includes assessing communications that occur during the selection process itself, as was clearly expressed in the job poster.

C. Complainant failed to attend second language evaluation

[28] The complainant said that she fell ill on April 30, the day of her scheduled SLE. She acknowledged that the required doctor’s note was not sent within the requested time frame but said that she had tried to send it and that the respondent could have been more flexible, just as she had been patient about the respondent’s earlier delays.

[29] She submitted that all the SLE invitations stated that there could be “other exceptional circumstances” that could be considered valid reasons for not attending an SLE. The invitations listed the acceptable reasons for non-attendance as follows:

- *Medical reasons with doctor’s certificate;*
- *Death in the immediate family;*
- *Confirmation of pre-approved travel plans;*
- *Religious reasons;*
- *Participation in a different appointment process;*
- *Other exceptional circumstances.*

A doctor’s certificate or other proof may be required.

[30] With respect to the SLEs scheduled in March, the respondent should have considered the exceptional circumstance that she was just starting a new secondment at the time and felt that she could not ask for time away from her new work

obligations to accommodate scheduling her SLE. She was new and temporary and had to prove herself.

[31] With respect to the SLE scheduled in April, the complainant felt that the respondent did not respect the fact that her doctor's note put her off work until May 4 and instead harassed her by asking for the note to be sent by May 3. As she put it, "the note was until May 4 so hypothetically I was out of the office until May 4."

[32] The respondent said that although every effort had been made to accommodate the complainant in order to schedule her SLE, she did not appear at the confirmed time and did not provide a doctor's note within the required time frame. As a result, she could not be assessed on the essential second-language qualification and, therefore, could not be found to have met it, as required by ss. 30(1) and (2) of the *PSEA*.

D. Discrimination

[33] The complaint referred to discrimination, and the complainant filed a notice to the Canadian Human Rights Commission (CHRC). However, the complaint was not clear that a discrimination allegation was in fact being made and if so, on what ground it was based. The complainant's notice to the CHRC simply confirmed that her allegations were all in her initial complaint form, which stated, "I'm tired of being discriminated against by my own department...". Her allegations stated this:

... Sick time was needed for me to rest and re-collect [sic] myself from the traumatic events that have been taking place in my life. This is not what happened, they were harassing me about the medical note for which I did obtain and did attempt sending and they were completely neglectful and disrespectful of my medical condition.

[34] The respondent submitted that the complaint did not properly make an allegation of a discriminatory practice, as set out in ss. 7 and 8 of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6), which stipulate that such an allegation must be made on a prohibited ground of discrimination set out at s. 3(1). The respondent noted that if the complainant was alleging discrimination based on disability, the only evidence was that she was sick for five days, and that accordingly, she had not made out a *prima facie* case that would require a reasonable explanation from the respondent.

[35] The complainant did not particularize any ground of discrimination. If she intended to allege discrimination on the basis of disability, she did not do so at the hearing, nor did she provide any evidence that her medical condition at the time of her SLE was a disability. As such, I need not decide this issue.

E. Choice of Process

[36] While mentioned as a ground in the complaint, neither the materials nor the evidence or submissions at the hearing referred to the choice of process. I need not decide this issue.

IV. Reasons for decision

[37] Abuse of authority is not defined in the *PSEA*, which simply states at s. 2(4) that it includes bad faith and personal favouritism. However, the jurisprudence has elaborated on its meaning, as for example, *Portree v. Deputy Head of Service Canada*, 2006 PSST 0014 at para. 47, as follows:

... [A] complaint for abuse of authority must demonstrate on a balance of probabilities a serious wrongdoing or flaw in the process that is more than a mere error, omission or improper conduct that justifies the Tribunal's review and intervention.

[38] An abuse of authority may involve an act, omission, or error that Parliament cannot have envisaged as part of the discretion given to those with delegated staffing authority (see *Tibbs v. Deputy Minister of National Defence et al.*, 2006 PSST 8, at paras. 66 to 71). There is no requirement that a deputy head's actions be intentional to find that there was an abuse of authority (see *Tibbs*, at paras. 73 and 74).

A. Scheduling the SLE before an interview

[39] Most of the group interviews had been completed by the time the complainant was re-integrated into the process. This was due to the respondent losing her exam page, delaying the scheduling of the informal discussion, and failing to allow sufficient time for it resulting in the need for a second discussion. As a result, it took three months for the complainant to be reintegrated into the process. Despite this carelessness on the part of the respondent, the fairness of the process could have been salvaged once the complainant was reintegrated simply by scheduling her for an interview.

[40] Mr. DeCotret testified that the order of steps in a process should not matter, that the order is often varied and does not result in disadvantage. The respondent was trying to schedule SLEs first because of the large number of candidates and the difficulty scheduling group interviews. The documentary evidence does not bear this out. It does not show that other candidates were scheduled for an SLE prior to an interview.

[41] He further testified that the respondent initially planned to schedule the complainant into a group interview with other candidates who were behind in the schedule, but that was no longer possible when they withdrew their candidacies. However, there was no evidence as to why she was not simply interviewed alone, or in a group interview with false candidates, as she presumably would have been had she attended and passed her SLE.

[42] His testimony that it was highly unlikely that she could have attained the required language levels suggests that the decision to hold the SLE first was made for reasons of expediency and without consideration of possible disadvantage to the complainant.

[43] The evidence was not clear that the complainant could have been put in a partially qualified pool had she passed the interview but failed the SLE. She thought it was possible because, she said, partially qualified pools are often used in the public service. Mr. DeCotret did not say it was impossible but stressed that the purpose of this process was to find candidates with BBB or CBC levels and that these language requirements were essential. I cannot make a finding on this evidence, but I note that it is at least possible that the complainant was disadvantaged in this way.

[44] I find on a balance of probabilities that scheduling the complainant's SLE before her interview, in these circumstances, was an abuse of authority.

B. "Dependability" assessed on communications during the process

[45] The complainant argued that she should not have failed the "dependability" qualification based on her communications during the process, that "dependability" meant dependability on the job, not with respect to taking a French exam, and that assessing it that way was evaluating her differently than other candidates.

[46] The respondent argued that the job poster specifically stated that: “All communication relating to this process, including email correspondence, may be used in the assessment of qualifications.” In its view, this meant that it could assess the complainant’s dependability based on her communications during the process and that she had notice from the job poster that it might do so.

[47] In *Hill v. Deputy Minister of Public Works and Government Services*, 2017 FPSLRB 21 the Board noted that:

46 Section 36 of the PSEA grants discretionary power to delegated managers concerning the choice and use of assessment methods. However, it is not an absolute power. Consequently, the Board can conclude that there was abuse of authority if, for example, it is determined that there was a fundamental flaw in the assessment method. The discretionary power granted to the assessment board is not absolute either. In effect, the board must exercise it in accordance with the nature and purpose of the PSEA. See Bowman v. Deputy Minister of Citizenship and Immigration Canada, 2008 PSST 12 at paras. 121 to 123.

[48] And, as the Board said in *Fang v. Deputy Head (Department of Industry) and Treasury Board (Department of Industry)*, 2023 FPSLRB 52:

[115] ... a finding of an abuse of authority may be made if the complainant can prove that the methods used were unreasonable or did not allow the assessment of the qualifications set out in the statement of merit criteria (see Jogarajah v. Chief Public Health Officer of the Public Health Agency of Canada, 2008 PSST 15). An assessment tool must also truly assess what has to be assessed — if the tool is flawed, the outcome cannot be considered reasonable or fair; see Chiasson v. Deputy Minister of Heritage Canada, 2008 PSST 27.

[49] There were a number of issues with the way the respondent evaluated the complainant’s dependability. Firstly, it assessed the dependability of other candidates on the basis of two references but did not contact the complainant’s referees, although it had requested references from her and had them in hand. Neither the assessment chart nor the rating guide contain any reference to process-related communications being used to assess dependability. The questions and expected answers shown in the rating guide were clearly designed to evaluate work references and not process communications. The assessment chart of all the candidates’ results did not include the complainant’s failing mark on dependability.

[50] Further, it is not clear that the assessment board or any member of it assessed the complainant's dependability - it appears that human resources representatives did so. The completed rating guide for the complainant's dependability states:

Board Member Notes:

As stated on the job advertisement: All communication relating to this process, including email correspondence, may be used in the assessment of qualifications. When reviewing the correspondence and behaviour of the candidate over the course of the past few months of the process, HR noticed that the candidate did not demonstrate consistent behaviours that demonstrated dependability.

In reviewing the correspondence and behaviour, HR Advisors considered the following questions that are asked on the candidate's reference check questionnaire.

[51] Having given notice of that possibility in the job poster and faced with a candidate that repeatedly tended toward untimeliness and non-responsiveness, the respondent was, in my view, within its rights to consider this in its assessment of her dependability. If a candidate cannot be depended upon to respond in a timely fashion without reminders, or to send a timely doctor's note, or to arrange her normal work schedule so as to be available for a second language evaluation, I cannot fault the respondent for taking this into consideration when assessing whether she demonstrated the degree of dependability required for the job.

[52] However, I do not think it was open to the respondent to consider only the process communications. The job poster did not say that these communications could be used to assess qualifications, only that they could be used "in the assessment of qualifications". That says to me that they could be used in addition to and in conjunction with the planned method of assessment, that is, the references. The job poster does not say or even imply that such communications could be used to completely displace the references as an assessment tool.

[53] This is borne out by Mr. DeCotret's testimony. He acknowledged that the information on which dependability was assessed did come mostly from references but said that if they saw anything relevant during the process, they could use that information.

[54] In my view, the respondent could consider those communications, but only along with the references, not as a substitute for them. In that respect, on a balance of probabilities, I find that the assessment method used to assess the complainant's dependability was flawed and did not allow for an appropriate assessment of her dependability.

C. Complainant failed to attend second language evaluation

[55] The complainant did not attend her scheduled SLE. She told the respondent on the morning of her 8:15 a.m. test that she had fallen ill. This followed a series of earlier attempts to schedule her SLE, during which she had said that she could not attend at the offered times or had failed to confirm her attendance in a timely way.

[56] She did not give any cogent reasons for her inability to attend on the offered dates or for her failures to respond in a timely way. Absent special circumstances, normal work meetings and obligations are not sufficient reason to repeatedly refuse offered dates or to fail to provide timely responses. That is true even if a candidate is in a new and temporary job and does not feel able to be absent from the workplace. All candidates have work obligations and pressures. If there was anything exceptional about the pressure on her to not be absent from her office, she did not provide that information to the respondent or testify to it at the hearing.

[57] Illness is an acceptable reason to not attend an SLE, but a medical note must be provided, if and when required. Although the complainant failed to provide one within the time requested, the respondent still offered another date for her SLE, subject only to her providing proof that she had attempted to send the note.

[58] The complainant felt that by asking for the note by May 3, when the note put her off work until May 4, the employer had not respected her medical note however, she gave no explanation as to why she was unable to send the note. She did not say that she could not send it because she was ill. She said that she tried to send it and did not know why it was not sent, that maybe her internet was down that day or perhaps it was a technical glitch. In her view, the employer should simply have been reasonable. It should have noted that May 3 had passed, that the note had not been received, and it should have asked her to send it.

[59] The complainant clearly did not feel that it was important to send the doctor's note when requested or to ensure timely responses to the respondent. Nor did she prioritize the scheduling of her SLE. As she said "I had just started a new secondment and was trying to prioritize my job."

I was in a new job and under a lot of stress, just learning the job trying to show I was there and not taking time off. The employer wants to see this at all times but especially when you're new. It was difficult, I would have liked to be understood and accommodated rather than being eliminated so quickly. I am a productive efficient public servant, I value taxpayers' money and do not want to take time off when unnecessary.

[60] The respondent's requests were not unreasonable in the circumstances. While the respondent should have scheduled the complainant's interview before her SLE, there was no evidence that her lack of co-operation in scheduling her SLE was due to the change in the order of the process. The only reasons she gave for the conduct were her work obligations and her hesitancy to take any time off work. Had the respondent scheduled her interview first, she would still have been a newly-seconded employee when it came time to have her SLE and, based on the reasons given, I draw the inference that her reluctance to make time for an SLE would have been no different.

[61] I find on a balance of probabilities that the respondent did not abuse its authority when it eliminated the complainant's candidacy from the process because she failed to attend her SLE or provide a timely doctor's note.

V. Conclusion

[62] I find on a balance of probabilities that the respondent abused its authority when it scheduled the complainant's SLE before offering her an interview and when it assessed her dependability solely on her process communications.

[63] I further find that the respondent did not abuse its authority when it eliminated her candidacy from the process because she failed to attend her SLE or provide a timely doctor's note.

VI. Remedies

[64] The complainant requested PM-05 wages lost up to when she received an appointment elsewhere that brought her to that wage level. She also indicated that she was interested in an appointment with the department.

[65] The PSEA sets out the following with respect to remedies:

Corrective action when complaint upheld

81 (1) *If the Board finds a complaint under section 77 to be substantiated, the Board may order the Commission or the deputy head to revoke the appointment or not to make the appointment, as the case may be, and to take any corrective action that the Board considers appropriate.*

Restrictions

82 *The Board may not order the Commission to make an appointment or to conduct a new appointment process.*

[66] Section 82 is clear that the Board does not have jurisdiction in a staffing complaint to order that an appointment be made. According to the jurisprudence, nor can the Board order lost wages, as follows:

[151] The complainant requested damages for lost salary. Although I am sympathetic to this request, this remedy would have the same effect as an order that he be appointed to the ENG-04 level, which I am clearly not permitted to do under s. 82 of the PSEA (also, see Spruin, at para. 117).

[67] Regardless of jurisdiction, however, I would not find either order to be appropriate on the facts of this case. I found that the respondent abused its authority by scheduling the complainant's SLE first and by assessing her dependability solely on her process communications. However, I did not find that it abused its authority when it eliminated her from the process for failing to attend her SLE or provide a timely doctor's note. Nor did the evidence indicate any link between the respondent's abuses of authority and the complainant's conduct with respect to scheduling her SLE. Accordingly, I find that the appropriate remedy is a declaration that the respondent abused its authority in two respects.

[68] For all these reasons, the Board makes the following order:

(The Order appears on the next page)

VII. Order

[69] I declare that the respondent abused its authority by scheduling the complainant's second-language evaluation before her interview.

[70] I further declare that the respondent abused its authority by assessing the complainant's dependability solely on her communications during the appointment process.

December 12, 2023

**Nancy Rosenberg,
a panel of the Federal Public Sector
Labour Relations and Employment Board**