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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

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BETWEEN

**YOGINDER GULIA**

Complainant

and

**CHIEF ADMINISTRATOR OF THE COURTS ADMINISTRATION SERVICE**

Respondent

and

**OTHER PARTIES**

Indexed as

*Gulia v. Chief Administrator of the Courts Administration Service*

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

**Before:** David Orfald, a panel of the Federal Public Sector Labour Relations  
and Employment Board

**For the Complainant:** Jena Russell, Union of Safety and Justice Employees (USJE-  
PSAC)

**For the Respondent:** Jean-Charles Gendron, counsel

**For the Public Service Commission:** Maude Bissonnette Trudeau, senior analyst

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Heard via videoconference,  
October 3 and 4, 2023.

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**REASONS FOR DECISION**

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**I. Complaint before the Board**

[1] On December 31, 2019, Yoginder Gulia, (“the complainant”) made a complaint to the Federal Public Sector Labour Relations and Employment Board (“the Board”) under ss. 77(1)(a) and (b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*).

[2] He alleged that the chief administrator of the Courts Administration Service (“the respondent”) abused their authority when they appointed Alejandra Gutierrez (“the appointee”) to the position of Director, Operations, which was at the PM-06 group and level and located in the Toronto, Ontario, regional office of the Courts Administration Service (“the CAS”). The complainant alleged that an abuse of authority occurred in both the application of merit (under s. 77(1)(a) of the *PSEA*) and in the choice of a non-advertised process to make the appointment (under s. 77(1)(b)). The appointment process number was 19-CAJ-INA-766. A notice of consideration was issued on December 16, 2019. The notice of appointment was issued on December 24, 2019.

[3] The complainant made these three allegations in his complaint:

1. The respondent abused their authority by choosing a non-advertised process and by not considering other candidates who might have been a right fit, to appoint their chosen candidate.
2. The respondent abused their authority by establishing merit criteria that did not reflect the duties of the position.
3. Picking just one employee and appointing her to the position by matching her qualifications with the bare minimum requirements was an abuse of authority, demonstrating personal favouritism.

[4] The respondent denied abusing its authority in the appointment process.

[5] The Public Service Commission (PSC) did not attend the hearing and provided written submissions to address applicable policies and guidelines. It did not take a position on the merits of the complaint.

[6] For the following reasons, the complaint is dismissed.

## II. Summary of the evidence

[7] The complainant testified for himself and relied on five documents that were entered on consent.

[8] The complainant testified that at the time this appointment was made, he was a registry officer at the PM-03 group and level at the CAS. He had worked at the CAS for approximately 12 years. He testified that the work environment in the CAS's Toronto regional office is toxic. He said that he obtained access to acting opportunities at a higher level only after making a staffing complaint. He testified that since 2019 or 2020, he has been in a pool for positions at the AS-04 group and level, he has a master's degree, and he is the best-qualified employee among the registry officers.

[9] The complainant testified that there are two directors of operations at the Toronto regional office of the CAS. He said that one position handles general registry affairs and that the other one handles special case-management issues but that otherwise, the positions are identical.

[10] During his testimony and cross-examination, the complainant compared the statements of merit criteria (SOMCs) used in the following appointment processes:

- An advertised process (numbered 10-CAJ-IA-TOR-3050) initiated in 2010 to create a pool of candidates from which indeterminate or acting appointments could be made to director of operations positions in the CAS's Toronto regional office ("the 2010 appointment process").
- The non-advertised appointment process at issue, numbered 19-CAJ-INA-766 ("the 2019 appointment process").
- An advertised appointment process (numbered 20-CAJ-IA-058) initiated in February 2020 to create a pool of candidates from which indeterminate or acting appointments could be made to positions across Canada at the AS-06, PM-05, and PM-06 groups and levels, including director of operations positions ("the 2020 appointment process").

[11] The complainant also referenced the content of an undated generic work description for the "Director, Operations (Regions)" position.

[12] The complainant testified that there were several differences between the SOMCs used in the three processes. He agreed that all three processes required that

applicants have recent experience interpreting legislation and policy. He testified that the three SOMCs used somewhat different wording with respect to the experience required in providing advice to senior management and the experience required in managing a work unit. In particular, he said that the 2010 process required “[r]ecent experience in managing a large work unit through subordinate supervisors”, while the 2019 and 2020 processes only required experience in managing a work unit.

[13] The complainant also highlighted these differences in the required competencies stated in the SOMCs for the three appointment processes:

- The 2010 appointment process listed 11 competencies as essential, including strategic thinking, engagement, management excellence, ability to communicate effectively orally, ability to communicate effectively in writing, effective interpersonal relationships, judgement, initiative, dependability, leadership, and team player.
- The 2019 appointment process listed 5 competencies as essential, including ability to communicate effectively orally and in writing, effective interpersonal relationships, judgement, initiative, and dependability.
- The 2020 appointment process listed 11 competencies as essential, including vision and strategy, mobilize people, uphold integrity and respect, collaborate with partners and stakeholders, promote innovation and guide change, achieve results, ability to communicate effectively in writing, ability to communicate effectively orally, dependability, effective interpersonal relationships, and initiative.

[14] The complainant testified that in his view, the SOMC used in the 2019 process was watered down to fit the appointee’s qualifications. In particular, he highlighted three competencies that were not listed in the 2019 notice of consideration but that were listed in the 2020 advertisement as essential: vision and strategy, promotion of innovation, and guiding of change.

[15] The complainant was asked in cross-examination if he had requested an informal discussion after the notice of consideration was published. He said that he did but could not recall who the request was made to or whether one was held.

[16] The complainant also testified in cross-examination that he was screened in after applying to the 2020 appointment process but that he did not pass the final exam and did not make it to the interview stage.

[17] The respondent called Imtiaz Rajab as witness. It also relied on a book of documents comprising seven tabs, which was entered on consent.

[18] At the time the appointment was made, Mr. Rajab was the CAS's regional director general in Toronto. He was the delegated staffing authority for the 2019 appointment process. He testified that the CAS's Toronto regional office was the busiest in the country. In the fall of 2019, both directors of operations in the office left their positions without much warning, leaving the office with an urgent requirement.

[19] Mr. Rajab testified that the CAS's appointment policy allows for the use of either advertised or non-advertised processes. In this case, he articulated a rationale for the use of a non-advertised process, which the respondent approved. The rationale stated that the position in question "... requires extensive experience in both operational and management skills." It noted that the appointee had successfully applied in a pool for appointments at this level and that she had over 28 years of experience in the CAS, of which 19 were in operations and 9 were as a manager. The rationale stated that she "... has the minimum experience and competencies to fulfil the duties of the position in question ..." and that "[n]o other staff member has the experience level that [the appointee] has." The rationale also noted that the appointee had been acting in the position since September of 2019.

[20] Mr. Rajab performed and documented an assessment of the appointee against the SOMC for this appointment. The assessment notes that from 2010 to the time of the appointment, she was the director of management services at the AS-06 group and level. The assessment documented that she met all the essential requirements for the position.

[21] Mr. Rajab testified that PM-03 registry officers (the position that the complainant occupied at the time the complaint was made) do not manage a work unit. The CAS has senior registry officer positions at the PM-04 group and level, which manage a group of about 8 registry officers. He testified that in his 17 years at the CAS, he could not recall anyone being promoted directly from a PM-03 to a PM-06

director position, although during cross-examination, he said that a PM-03 might have been promoted to a PM-06 assessment officer position that did not supervise staff.

[22] Mr. Rajab testified that the 2020 advertised appointment process was initiated because the CAS faced senior-level vacancies across its organization and wanted to develop a pool of possible appointees. He said that the job advertisement poster was broader because it sought applications for three different levels and streams of positions and reflected input from across the organization. He testified that he had input into developing the 2020 appointment process advertisement and that the SOMC reflected the requirements for the positions listed.

[23] Asked during cross-examination why the 2019 process did not assess candidates against the same competencies as did the 2020 process, Mr. Rajab testified that in 2019, the appointee had already been qualified in a pool for appointments at this level. He said that the 2019 list of competencies was shorter because the appointee was already in a pool and because a non-advertised process was being chosen.

[24] Mr. Rajab said that because the 2020 appointment process was national in scope, it took a long time before appointments were made to other vacant positions in the CAS's Toronto office. He initially testified that he recalled the complainant applying for the 2020 appointment process and being screened out, but during cross-examination, he acknowledged that the complainant might have been screened in and then been found unsuccessful in the written portion of the process.

### **III. Summary of the arguments**

#### **A. For the complainant**

[25] The complainant argued that the choice of a non-advertised process for this appointment was not aligned with the CAS's staffing policy. He argued that the respondent's witness testified that the appointee was the only candidate with the "minimum qualifications" but that other candidates also met the minimum criteria. The use of a non-advertised process was neither fair nor transparent, he argued.

[26] In the *PSEA*, s. 30(2)(a) states that the PSC must be satisfied that the essential qualifications of the position are met. The complainant argued that the evidence before the Board is that the essential merit criteria were watered down for this

appointment. The SOMC used to make the appointment listed only five competencies, far fewer than the number used in the 2010 and 2020 appointment processes, which was not reflective of the job description for the position.

[27] The complainant argued that the respondent's witness admitted that the SOMC used in the 2020 appointment process reflected the needs of the position. Given that, the assessment of the appointee in the 2019 appointment process should have considered all those same criteria, he argued. In particular, the 2019 appointment process should have assessed the following competencies: vision and strategy, mobilizing people, upholding integrity and respect, promotion of innovation and change, and achieving results, he argued.

[28] The complainant argued that watering down the appointment's merit criteria demonstrated personal favouritism, relying on *Beyak v. Deputy Minister of Natural Resources Canada*, 2009 PSST 35 at para. 185, which reads as follows:

*[185] As the Tribunal stated in Glasgow, undue personal interests should never be the reason for appointing a person as this constitutes personal favouritism. The appointment of a person as a personal favour, or to gain personal favour with a manager, is an example of personal favouritism. Preparing a work description that does not reflect the actual duties of the position to ensure a higher classification and therefore a higher salary in order to reward an employee is personal favouritism. Establishing the essential qualifications of the position and assessing an employee to ensure his or her appointment without regard to the actual requirements of the position is also personal favouritism. Appointing an employee who does not meet the essential qualifications of a position because the manager wants to reward that employee also constitutes personal favouritism.*

[Emphasis added]

[29] For this argument, the complainant also relied on *Ayotte v. Deputy Minister of National Defence*, 2009 PSST 21 at para. 124, which reads as follows:

*124 The Tribunal further determined in Glasgow that undue personal interests, such as a personal relationship between the person selecting and the appointee should never be the reason for appointing a person. Modifying the essential qualifications of a position to ensure the appointment of an employee without regard to the actual requirements of the position is another example of personal favouritism. Appointing an employee who does not meet the essential qualifications of a position for the*

*purpose of giving the employee indeterminate tenure constitutes personal favouritism.*

[Emphasis added]

[30] In summary, the complainant argued that the respondent watered down the essential merit criteria for the position. In doing so, they demonstrated personal favouritism. The appointee was not assessed against all the essential criteria for the position, he argued. He argued that the Board should revoke the appointment.

#### **B. For the respondent**

[31] The respondent argued that they appropriately applied their appointment policy, which clearly states that they may select a non-advertised process to fill vacancies. The policy requires that a rationale be documented for using a non-advertised process. That was done in this case. The written rationale indicated that two key staff resources had left, that the CAS faced urgent operational needs, that the appointee had extensive experience and had been prequalified in a pool, and that she met the requirements of the position. Under their policy, all these are legitimate reasons for using a non-advertised process, the respondent argued.

[32] The respondent also argued that s. 33 of the *PSEA* allows the deputy head to choose between advertised and non-advertised processes. A complainant cannot allege an abuse of authority simply because a non-advertised process was chosen; see *Robbins v. Deputy Head of Service Canada*, 2006 PSST 17 at para. 36. As stated in s. 30(4) of the *PSEA*, the respondent is not required to consider more than one person to make an appointment based on merit; see *Robbins*, at paras. 42 to 45, referencing *Aucoin v. President of the Canada Border Services Agency*, 2006 PSST 12 at paras. 42 and 43, and *Thompson v. President of the Canada Border Services Agency*, 2017 PSLREB 22 at para. 54.

[33] The respondent argued that s. 30(2) of the *PSEA* allows managers to determine the essential qualifications for a position and that the Board and its predecessors have found that managers are given broad discretion to do so; see *Thompson*, at para. 71, and *Visca v. Deputy Minister of Justice*, 2007 PSST 24 at para. 42. The complainant did not establish that the respondent abused its authority in establishing the qualifications for this posting. His argument focused on the fact the 2020 appointment process contained additional requirements, but managers have the discretion to modify these



requirements. The 2020 appointment process covered more positions and regions, the respondent argued. Furthermore, a comparison between the SOMCs used in the 2010, 2019, and 2020 appointment processes demonstrates that they have many identical or similar qualifications, such as experience providing advice to management, experience managing a work unit, dependability, and initiative.

[34] The Board should pay limited attention to past appointment processes when determining whether an abuse of authority has taken place, the respondent argued, citing *Brown v. Commissioner of Correctional Service of Canada*, 2011 PSST 15 at para. 28, which reads as follows:

***28 The Tribunal finds that it can examine incidents and events that occurred in previous appointment processes. Such incidents may be part of the context of a complaint and can shed light on the current appointment process. The Tribunal can, for example, take into consideration a racial remark made in the context of a previous appointment process and determine whether that remark can be construed as a part of a pattern of discrimination. However, while the Tribunal can consider the evidence presented by the complainant as to his experience in past appointment processes, pursuant to ss. 77 and 81 of the PSEA, the Tribunal's jurisdiction to determine whether a complaint of abuse of authority has been substantiated is limited to this appointment process, not appointments in previous processes.***

[Emphasis added]

[35] The same principle should apply to **future** appointment processes, such as the 2020 appointment process, the respondent argued. Limited weight should be given to the merit criteria used in that process, they argued.

[36] As for the personal favouritism allegation, the respondent argued that the word “personal” precedes the word “favouritism” and that there was no evidence at all of a personal relationship between Mr. Rajab and the appointee; see *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7 at paras. 39 and 41. None of the elements of personal favouritism found in *Beyak* or *Ayotte* are present in this case, the respondent argued.

[37] The respondent argued that this complaint should be dismissed as the complainant did not discharge his burden of proof; see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at para. 50. An allegation of abuse of authority is a serious matter, and no wrongdoing by the respondent would justify the Board's

intervention; see *Portree v. Deputy Head of Service Canada*, 2006 PSST 14 at para. 47. The choice of process was appropriate, the process was transparent, and the appointee met all the essential requirements established for the appointment, and then some, the respondent argued.

#### **IV. Reasons**

[38] Section 77(1) of the *PSEA* provides that a person may make a complaint that he or she was not appointed because the PSC or a deputy head abused their authority in making an appointment. At s. 2(4), the *PSEA* states that "... abuse of authority shall be construed as including bad faith and personal favouritism."

[39] I agree with the respondent that the complainant had the burden of proof of demonstrating that an abuse of authority took place; see *Tibbs*, at para. 50. I also agree with the respondent that allegations of an abuse authority are a serious matter and must not be made lightly; see *Portree*, at para. 47.

[40] As stated in s. 30 of the *PSEA*, public service appointments must be made based on merit. An appointee must, at a minimum, meet the essential qualifications for the position.

[41] The evidence in this case demonstrates that the respondent had a key vacancy to fill; they had a person acting in the role who had been found qualified for appointments at this level through a previous pool, and she had the extensive management experience that the respondent required. They applied the departmental policy and opted to use a non-advertised process because the potential candidate was known well enough, had highly specialized skills and was in an established pool of qualified candidates for a position with similar competencies at the same occupational group and level or equivalent. The hiring manager developed a rationale consistent with that policy and had it approved by the respondent. The ways in which the appointee met the qualifications were documented thoroughly, and she was found to have met all the essential merit criteria.

[42] The complainant did demonstrate that some of the essential qualifications that the respondent used in the previous 2010 appointment process for the same position, and some of the essential qualifications that the respondent used a few months later in the 2020 appointment process, were not used in the 2019 appointment process. The

most notable differences were several competencies used in the 2010 and 2020 appointment processes that were not listed as part of the merit criteria for the 2019 process, namely, those related to strategic thinking, innovation, integrity and the mobilization of people and management of change.

[43] However, I find that there were far more similarities between the SOMCs used in the three appointment processes than differences. All three required similar educational experience. All three required experience interpreting and applying legislation, regulations, and policies. The wording used varied somewhat, but the essential requirements were consistent across all three processes. Both the 2010 and the 2019 SOMCs required experience providing advice to management, and experience managing a work unit. The same requirements were listed in the 2020 SOMCs, but were listed as “other qualifications”, in other words asset qualifications. In a way, it can be said that management established less stringent qualifications in 2020 than it did in 2019, because several of the criteria listed as essential in 2019 were only listed as asset qualifications in 2020.

[44] The complainant was wrong when he said that the 2010 appointment process required “[r]ecent experience in managing a large work unit through subordinate supervisors.” In fact, it was listed as an “Asset Qualification” in the 2010 process.

[45] Furthermore, the five competencies that were assessed in the 2019 process (the ability to communicate effectively orally and in writing, effective interpersonal relationships, judgement, initiative, and dependability) were also listed in the 2010 and 2020 appointment processes.

[46] It is not the Board’s role to determine whether the respondent ought to have included in the 2019 appointment process the same competencies they used in either the 2010 or 2020 appointment processes. The *PSEA* provides that the PSC and deputy heads will establish essential qualifications for a position. It is well established that they are given broad discretion to set those qualifications; see *Thompson*, at para. 71, and *Visca*, at para. 42. It is not the Board’s role to assess whether the managers involved could have done a better job of establishing the merit criteria.

[47] The only reason for the Board to scrutinize what essential qualifications the respondent included in the SOMC is to determine whether the respondent abused its

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authority, for reasons such personal favouritism (as it did in *Beyak*) or bad faith and personal favouritism (as it did in *Ayotte*).

[48] It is easy to distinguish this case from *Beyak* and *Ayotte*.

[49] In *Beyak*, after an extensive review of the evidence before it, the former Public Service Staffing Tribunal (PSST), one of the Board's predecessors, concluded that the appointee was not doing the work of the position and had received the appointment as a reward and that personal favouritism was involved in making the appointment; see paras. 173, 177 to 179, and 183 to 188. No similar evidence was put forward in this case. Furthermore, in that case, the PSST found that the respondent's "record keeping was in disarray" (at paragraph 175). That is certainly not so in this case, as the respondent clearly documented their rationale for the decision to use a non-advertised process and thoroughly documented how the appointee met the requirements of the position.

[50] In *Ayotte*, the evidence was that the essential qualifications were altered "... without regard to the actual requirements of the position ..." (at paragraph 124). Specifically, the respondent in that case had removed "experience in teaching" from a position that involved curriculum development and did so after it received an indication that complaints might be made about the process. Furthermore, the PSST found that the respondent used "urgency" as a rationale to fill the position, while the evidence showed that there was no urgency, that the decision to appoint the appointee had been predetermined, and that there was evidence of both bad faith and personal favouritism. None of these *Ayotte* elements are found in this complaint.

[51] I find that the essential qualifications that the respondent used in the 2019 appointment process were very similar to what they used in the 2010 and 2020 appointment processes for the same position. I am satisfied that the SOMC used in the 2019 appointment process was reasonable and appropriate to the position. The complainant provided no evidence whatsoever that the respondent demonstrated bad faith or that they were motivated by personal favouritism in making the appointment.

[52] The case law on complaints such as this one is extremely clear. As the PSST stated clearly in *Thompson*, at para. 54, there is no need for a deputy head to consider more than one person, and "[a]n assertion by a complainant that he or she and others might be qualified does not establish that a respondent abused its authority in

deciding to appoint someone else”; see also *Aucoin*, at paras. 42 to 43, and *Robbins*, at paras. 42 to 45.

[53] The *PSEA* clearly provides deputy heads with considerable discretion in choosing between an advertised and a non-advertised process and in establishing the essential qualifications that an appointee must meet. The case law is also very clear: the Board will intervene only if a complainant is able to prove that an abuse of authority took place, for example as a result of bad faith or personal favouritism.

[54] In the face of the legislation and the case law, it is hard to understand why a complainant would proceed with allegations that involve nothing more than a disagreement with a choice made by the deputy head, or a desire that he or she had been considered for appointment, in the absence of any **evidence** that the appointment was made in bad faith, personal favouritism, or some other behaviour that amounts to an abuse of authority. I do not think that it serves either complainants or respondents well (or for that matter, the Board) to proceed to hearings in situations in which the evidence so clearly does not give rise to a finding that the respondent abused its authority.

[55] The evidence before me is that less than two months after the appointee was appointed, the respondent advertised the 2020 appointment process, to be used to fill the same kind of positions at issue. According to his own testimony, the complainant applied to that process and was screened in. However, he failed to pass a written exam and therefore not given further consideration. There is no indication that he made a complaint about that process.

[56] I have placed no weight on the complainant’s testimony about the work environment at the CAS. That testimony was brief and was well outside the scope of the allegations made in this complaint.

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

*(The Order appears on the next page)*

**V. Order**

[58] The complaint is dismissed.

February 16, 2024.

**David Orfald,  
a panel of the Federal Public Sector  
Labour Relations and Employment Board**