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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

DEREK VIGGERS

Complainant

and

DEPUTY HEAD (Department of National Defence)

Respondent

and

OTHER PARTIES

Indexed as
Viggers v. Deputy Head (Department of National Defence)

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

Before: Audrey Lizotte, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Louis Bisson, Union of National Defence Employees

For the Respondent: Stephanie White, counsel

For the Public Service Commission: Alain Jutras, senior analyst

Heard via videoconference,
June 26 and 27, 2023.

REASONS FOR DECISION

I. Complaints before the Board

[1] On April 8, 2019, Derek Viggers ("the complainant") made two complaints 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, 13; "*PSEA*").

[2] The complaints concern two separate staffing actions (numbered 19-DND-INA-RCN-444362 and 19-DND-INA-RCN-444364) at the Department of National Defence (DND), which resulted in the appointments of Jason Morgan and Edward Anderson ("the appointees") as class A vessel pool masters ("the appointments") classified at the SO-MAO-04 group and level ("the SO-04 positions"). The complaints were consolidated as the grounds for them are the same.

[3] The complainant alleges that the deputy head of DND ("the respondent") abused its authority when it established the mandatory qualifications for the SO-04 positions by changing the required certification level from "Transport Canada Certification as Master 500 GT …" ("the 500 GT certificate or certification") to "Transport Canada Certificate of Competency Master 150 GT Domestic" ("the 150 GT certificate or certification").

[4] The complainant acknowledges that he did not meet the essential qualifications for the SO-04 positions when the appointments were made as he did not possess either the 500 GT or the 150 GT certification. He further acknowledges that the appointees met the position's essential qualifications as they each possessed the 150 GT certification. For this reason, the complainant seeks only a declaration that the respondent abused its authority.

[5] The complainant argues that the change to the certification level violated the values of fairness and transparency required by the *PSEA*, the Public Service Commission's (PSC) *Appointment Policy*, and the respondent's directive and guide for appointments since the change was not made public sufficiently in advance of when it made the appointments.

[6] The complainant was notified of the certification-level change when the respondent made the "Notification of Consideration" postings ("the notifications") for

the proposed appointments. However, he considers that a longer notice period was required, given the previous representations made to him that this criterion would not be changed and the consequential multi-year training plan he undertook to achieve the 500 GT certification based on the representations.

[7] The complainant further alleges that the respondent abused its authority in the choice of process when it decided to proceed by way of non-advertised appointment processes as the information about the appointments was not communicated in accordance with the respondent's duty to ensure access and transparency in the staffing process.

[8] At the hearing, the complainant also raised the allegation that an abuse of process occurred based on a reasonable apprehension of bias in relation to his roles as the president of two Union of National Defence Employees (UNDE) locals.

[9] Subsequent to the appointments, the complainant obtained his 150 GT certification and was appointed to a SO-04 position through a separate appointment process.

[10] The respondent denies abusing its authority. It claims that its actions were justified, given the severe staffing shortage that was present at the time of the appointments and the urgent need to staff the positions as quickly as possible.

[11] The PSC did not attend the hearing or take a position on the merits of the complaints. However, it did provide written submissions on the relevant sections of the *PSEA* and its *Appointment Policy*.

[12] For the reasons set out in this decision, I have determined that the complaints should be dismissed.

II. Summary of the evidence

[13] Two witnesses were called to testify, the complainant, on his own behalf, and Steven Mahneke, for the respondent, who was the authorized manager responsible for the appointments.

[14] The complaints are about the SO-04 positions, which are commonly referred to as ship's officer positions, with the Auxiliary Fleet Section of the Port Operations and Emergency Services Branch in Esquimalt, British Columbia ("the Auxiliary Fleet").

[15] Because of the nature of the services provided, the Auxiliary Fleet is an essential part of the Royal Canadian Navy's operations. These services include providing tugboat assistance for large navy ships entering port, moving large containers measuring up to 35 feet, moving equipment onto and off navy ships, moving small barges with equipment such as scaffolding, pumping oil from contaminated waters, and moving pollution booms.

[16] The Auxiliary Fleet is composed of vessels varying in size from smaller to medium-sized tugboats as well as a "Firebrand" vessel, which is the fire-department vessel that is staffed on a 24-7 basis. The two appointment processes of concern in this case were intended to staff 2 of the smaller tugboats.

[17] Ship's officers are responsible for and have complete authority over the operation of their vessels and crews.

[18] The complainant occupied the position of deckhand (also known as a ship's crew position) and aspired to become a ship's officer. He testified that after he commenced working for the respondent, he had annual discussions with his immediate supervisor about his training plan to become a ship's officer. He stated that he was told in the discussions that he would have to obtain a 500 GT certificate.

[19] Transport Canada issues the 500 GT certificate. The requirements for obtaining it include a number of courses and a requisite number of hours spent at sea on a vessel. The complainant commenced the process for obtaining it. In early 2018, he went on personal leave without pay, during which he pursued this education. He stated that before he went on leave, he was told again that he should focus on obtaining the 500 GT certificate if he wished to become a ship's officer.

[20] When the appointments were made, the complainant was one course short of completing the necessary courses to obtain the 500 GT certificate.

[21] According to the complainant, the requirement to have a 500 GT certificate had been the topic of many discussions that spanned several years.

[22] In 2013, the complainant became president of UNDE local 1013, and in January of 2016, he became president of a different local (1017). He stated that during union-management consultations, numerous times he questioned the need for a 500 GT certificate since he did not believe that that certification level was required to operate

all the vessels in the Auxiliary Fleet. In his opinion, 4 of the vessels required only a 150 GT certificate or even the lesser 60 GT certificate. His opinion was based on his experience working on vessels with the Canadian Coast Guard as well as in private industry.

[23] The complainant stated that during each consultation, the respondent repeatedly confirmed that it required a 500 GT certificate and that it did not intend to change that requirement. He stated that these statements were made to him by the then-auxiliary vessels marine superintendent, Roger Miller; the then-detachment superintendents Satinder Singh and Larry Hickie; and finally by the vessel master, Robert Beauregard, who was his direct supervisor.

[24] The complainant testified that in the past, one exception was made. It occurred in approximately 2015, when he saw that an advertisement for a ship's officer position was based on having only a 150 GT certificate. He stated that he asked the auxiliary vessels marine superintendent at that time, Mr. Miller, whether the criteria had been changed and was told that it was a one-time exception and that it was for a specific vessel that would be considered a training vessel.

[25] However, on March 11, 2019, the notifications were posted on the Government of Canada's jobs website. They advised that a non-advertised process was being considered for the promotional appointments of Mr. Morgan and Mr. Anderson to the ship's officer positions. The essential qualifications were based on a 150 GT certificate, instead of a 500 GT certificate. The notifications indicated that DND employees occupying a position in the Port Operations and Emergency Services Branch could request an informal discussion.

[26] The complainant availed himself of the opportunity. He stated that after seeing the notifications, he spoke with his vessel master and direct supervisor, Mr. Beauregard, and with detachment superintendent Edward Dahlgren, to whom Mr. Beauregard reported. He stated that Mr. Dahlgren had just started in his position and was not aware of any change but that he had been told of some staffing challenges and that staffing smaller vessels with the lower 150 GT certificate was being considered.

[27] In cross-examination, the complainant indicated that he also spoke with Mr. Mahneke, the delegated manager responsible for the appointments. The complainant stated that he asked Mr. Mahneke why the certification had changed, and that Mr.

Mahneke did not want to answer or speak to it. Mr. Mahneke testified that he recalled them having a conversation and that it was about the promotions of two individuals and the reasons behind it, but he could not recall the details as it occurred several years ago. He stated that he made notes of the conversation in a notebook but that he has since lost the notebook due to the passage of time.

[28] On March 22, 2019, two postings of a "Notification of Appointment or Proposal of Appointment" were made on the Government of Canada's jobs website. They advised of the appointments. The closing date to make a complaint was April 8, 2019, which is the date on which the complainant made both complaints with the Board.

[29] Mr. Mahneke testified that at the time of the appointments, he was the auxiliary vessels marine superintendent and was responsible for the Auxiliary Fleet and its staff. In terms of the vessels, he was responsible for their mechanical condition and ensuring that they were seaworthy. As for its staff, he was responsible for ensuring that the vessels were adequately staffed and that their crews were sufficiently trained. He took care of the day-to-day staffing activities, such as approving leave, assigning work, staffing vacancies, and planning for anticipated retirements.

[30] Mr. Mahneke testified that he was the authorized manager responsible for the staffing process and the appointments. The Auxiliary Fleet manager, Mr. Singh (who replaced Mr. Miller), was the delegated staffing manager and had sub-delegated that authority to Mr. Mahneke.

[31] Mr. Mahneke indicated that he was familiar with the staffing process as he had received training and had several years of experience with it. He also relied on several human resources staffing advisors to support and advise him during the staffing process.

[32] Mr. Mahneke stated that he prepared the "Statement of Merit Criteria", which defined the essential qualifications required for the SO-04 positions based on having a 150 GT instead of a 500 GT certificate. He stated that this was done in late 2018 and that Mr. Singh agreed and approved his decision. He stated that no one else played a role in the decision.

[33] Mr. Mahneke explained that the primary difference between the 500 GT and the 150 GT certificates is how large a vessel may be operated. He stated that historically,

DND had always targeted the 500 GT certificate as the gold standard and that it enabled upward assignments, if required. He agreed with the complainant that not all vessels in the Auxiliary Fleet required that certification level and that a 150 GT certificate would suffice for the smaller tugboats.

[34] Mr. Mahneke stated that the rationale for requiring only the 150 GT certificate in the appointment processes at issue resulted from the urgent staffing situation he faced. He explained that, at the time of the appointments, he was grappling with a significant number of vacancies. According to the organizational chart for the Auxiliary Fleet dated March 8, 2019, 14 out of a total of 51 positions reporting to him were vacant. According to the "Articulation of Selection Decision" document that he prepared, 5 SO-04 positions were vacant when the appointments were made.

[35] Mr. Mahneke stated that the Auxiliary Fleet was losing people as a result of retirements and that it was uncompetitive with the private sector, which made it difficult to recruit. He stated that the situation had to be addressed urgently since the longer it was left unaddressed, the more it increased the risk of losing additional individuals as people were continuously juggled to meet urgent staffing demands and were unable to take the leave that they had accumulated. He stated that the risk of losing more individuals would have resulted in further recruiting challenges since it was not a pleasant working environment.

[36] Mr. Mahneke stated that he constantly ran off his feet trying to figure out how to manage everything with the resources that he had. He stated that at times, he was required to manage the ships himself because there was no one else to do it. He stated that on some days, he managed four vessels at once. He stated that he did so because of his fear of losing more staff if he denied their leave requests.

[37] In his testimony, the complainant acknowledged that there were staffing challenges, and he did not provide any evidence that would refute any of Mr. Mahneke's evidence about the dire staffing situation that he described. The complainant stated that to his knowledge, one of the positions had been vacant for approximately three years, and the other had recently been made vacant when the person who had occupied the "training vessel" position had moved to another position.

[38] Mr. Mahneke testified that his decision to change the requirement from the 500 GT to the 150 GT certificate was motivated solely by the staffing shortage. He stated

that it was not changed sooner because there was quite a bit of resistance to the idea. He stated that before, despite being the marine superintendent for the Auxiliary Fleet, he was not given full leeway to make this change. He stated that the previous line of command seemed to prefer to manage by consensus. He personally thought that some individuals might have been motivated by the fact that since they had been required to have the 500 GT certificate, then everyone should, even though it was not necessary to operate some of the smaller vessels.

[39] Mr. Mahneke stated that he saw an opportunity to change the practice of requiring the 500 GT certificate for all the vessels after a couple of senior-level managers retired. He stated that he used the example of the exception in 2015 to justify the change since that individual had only the 150 GT certificate and had proven competent for the position.

[40] In terms of the appointment processes' timing, Mr. Mahneke stated that he did not have any control over when he could staff vacancies on his team. He explained that the "salary wage envelope", known as the "SWE", was controlled at the level of the entire DND base at Esquimalt and that all he could do was submit staffing requests highlighting his top five needs. He stated that the decisions as to which positions to staff and when to staff them were made at a higher level after considering all the different vacancies that had to be staffed throughout the base. He stated that it could take a very long time to obtain permission to staff a position. He stated that that time created staffing challenges since if an experienced external tug master indicated some interest in a position, they would no longer be available by the time he was able to make them an offer.

[41] Mr. Mahneke stated that when he received permission to staff the two ship's officer positions, he wanted to move as quickly as possible, due to the staffing challenges he faced. He stated that he decided to proceed by way of a non-advertised appointment process since it was the most expedient way to proceed, and only two individuals were qualified for the positions at the Port Operations and Emergency Services Branch at Esquimalt since they already possessed the 150 GT certification.

[42] He stated that a staffing advisor advised him that an advertised appointment process could take up to a year to complete. He stated that he did not question it but

that he knew through his experience that an advertised process could require considerable time.

[43] He stated that he was aware of the "Assistant Deputy Minister (Human Resources - Civilian) Directive on Appointments" and the "Guide to the Assistant Deputy Minister (Human Resources - Civilian) Directive on Appointments" and believed that he had followed them. He stated that he decided to proceed by way of a non-advertised process as he believed that he considered the organization's best interests, and he wanted to avoid the snowballing negative effects of a severe staffing shortage. He stated that making his decision was necessary to avoid a further deterioration of the situation and that he did not have the time to run an advertised appointment process.

[44] In cross-examination, he agreed that likely, there had been other candidates outside the area of selection, such as with the Canadian Coast Guard, who would have had the 150 GT certificate, as well as others in private industry. He also confirmed that no prequalified inventory list had been prepared of candidates with the 150 GT certificate. He also agreed that other than the appointees, no crew member in Esquimalt possessed the 150 GT or the 500 GT certificate.

[45] Mr. Mahneke agreed that he did not review any inventory of pre-screened candidates who might have possessed the 500 GT certificate. However, he explained that candidates in an inventory list do not necessarily possess the required qualifications since "people will say anything" to get screened in. He stated that it would have required further screening of the applicants on that list to determine whether they actually met the qualifications, which would have required time.

[46] Mr. Mahneke testified that absolutely, he would have promoted the complainant had he had the 150 GT certification at the time of the appointment processes, but that the complainant was not considered since he did not yet possess either the 150 GT or the 500 GT certifications. Mr. Mahneke stated that he did not have prior knowledge of the complainant's training plan.

[47] The complainant agreed that at the time of the appointments, he did not meet the minimum qualifications as he did not possess the 150 GT or the 500 GT certification. He also acknowledged that the appointees were properly qualified for the positions.

[48] The complainant stated that after the appointments were made in March 2019, he completed his courses and contacted Transport Canada to learn of the requirements to obtain the 150 GT certificate. He obtained one in December 2019 and was appointed to a ship's officer position in November 2021.

[49] In support of his argument that there had been a reasonable apprehension of bias against him, the complainant testified that as the president of two UNDE locals, his relationship with management "was not always great" and was "very strained at certain times". He stated that most of his interactions were with Mr. Singh, then-detachment superintendent, as well as with the then-auxiliary fleet manager, Doug Kimmett. He stated that as the president of a UNDE local, he discussed a number of difficult issues with management, such as training needs and grievances and other complaints. He stated that the appointees were not involved in the UNDE other than their participation in a ship's crew study.

[50] The complainant and Mr. Mahneke both testified to the fact that they had previously worked together and that they had a good working relationship. Mr. Mahneke stated that the complainant had worked for him on two separate vessels. He stated that the complainant was a very competent deckhand and that they had a good rapport. In his opinion, the complainant was ambitious and showed a definite talent for the ship's officer job.

[51] The complainant acknowledged that Mr. Mahneke was the delegated hiring manager responsible for the appointments. But he stated that he was not certain of the extent to which Mr. Mahneke had been in charge of making the decisions. Mr. Mahneke testified that he had been delegated the authority to perform all the staffing activities associated with the two appointments, which included determining the Statement of Merit Criteria, making the decision to proceed by a non-advertised process, assessing the two candidates, conducting discussions with interested parties after the notifications were posted (of which only the complainant requested a discussion), and deciding to appoint Mr. Morgan and Mr. Alexander after the notice-of-appointment period expired.

[52] The complainant concluded his testimony by stating that he believed that the positions should have been based on the 150 GT certificate a long time before, in light

of the lack of staff on those vessels, and that his training plans should have been made accordingly.

III. The PSC's position

[53] The PSC, which is a party to complaints made under s. 77 of the *PSEA*, provided written submissions in advance of the hearing on the general concept of abuse of authority as well as on the appointment process. It emphasized that under the *PSEA* and its *Appointment Policy*, appointments must respect the principles of merit and transparency stipulated in the *PSEA*. Failing to comply with that policy's requirements could constitute an abuse of authority.

[54] The PSC did not comment on the merits of the complaints.

IV. Analysis and reasons

A. Issue #1 - Allegation of abuse of authority in the establishment of the essential qualifications

[55] Section 30(2) of the *PSEA* provides broad discretionary powers to the respondent to set the essential qualifications that it deems necessary in an appointment process. However, the exercise of that power is subject to review.

[56] Section 77(1)(a) of the *PSEA* provided the complainant with the ability to make a complaint to the Board if, in his opinion, he was not appointed or proposed for an appointment by reason of an abuse of authority in the exercise of the powers conferred under s. 30(2).

[57] In such complaints, the complainant bears the burden of proof. This means that to be successful in this case, he had to establish that on a balance of probabilities, the respondent abused its authority while exercising its discretionary powers (see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at paras. 48 to 55).

[58] "Abuse of authority" is not defined in the *PSEA*; however, s. 2(4) provides that "[f]or greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism."

[59] The reference to **including** in s. 2(4) means that abuse of authority is not limited to acts of bad faith or personal favouritism. However, the Board and its predecessors have consistently held that much more is required than mere errors and omissions.

Rather, abuse of authority requires wrongdoing. As was noted in *Tibbs* "… abuse of authority will always include improper conduct, but the degree to which the conduct is improper may determine whether or not it constitutes abuse of authority" (at paragraph 66).

[60] The complainant argues that the respondent's decision to change the essential qualifications for the SO-04 positions from a 500 GT to a 150 GT certificate represented an abuse of authority.

[61] From the complainant's perspective, for many years, he was told that he had to obtain the 500 GT certificate to be promoted to a SO-04 position, only to have the requirement changed to the 150 GT certificate without prior notice. His representative argues that the respondent abused its authority by not providing any **advance** information to employees that it was planning to change the requirement.

[62] To be clear, the complainant does not object to the legitimacy of the essential qualifications in question. To the contrary, he had advocated for some time that the assessment criteria should be based on the 150 GT certification rather than the 500 GT certification for staffing SO-04 positions on smaller tugboats.

[63] The complainant objects to the **timing** of the change. In essence, he argues that in light of the multiple representations that were made to him over the years about the essential qualifications for the SO-04 positions, the respondent should have given advance notice of its intention to change the qualifications such that he could similarly have changed his training plans to obtain the 150 GT certification instead of the 500 GT certification. His representative further argues that the fact that the requirement for the 500 GT certificate was so well known throughout the organization warranted transparency were it to be changed.

[64] The complainant's representative argues that the respondent's failure to provide advance notice breached its fairness and transparency obligations and represented a major error in the process to the point that it constitutes bad faith. He relies on *Renaud v. Deputy Minister of National Defence*, 2013 PSST 26, which stated at paragraphs 34 and 35 as follows:

> ***34*** *As expressed in the preamble to the PSEA, the exercise of discretion in staffing within the public service must be characterized by fair and transparent employment practices (see*

> Tibbs *at para. 64). The appointment values of fairness and transparency are also set out in the PSC Appointment Policy - General.*
>
> ***35** In this case, it was unfair to reopen the process only for one candidate. Furthermore, the respondent could not reopen the process secretly without telling anyone. This contravened the value of transparency.*

[65] The complainant also relies on *Lavigne v. Canada (Deputy Minister of Justice)*, 2009 FC 684, which held that the broad powers conferred under the *PSEA* are not limitless and must be applied in a manner that reflects the intent of the *PSEA* as expressed in its preamble (see paragraphs 58 and 59).

[66] The preamble of the *PSEA* includes the following statements of relevance:

…	[…]
delegation of staffing authority should be to as low a level as possible within the public service, and should afford public service managers the flexibility necessary to staff, to manage and to lead their personnel to achieve results for Canadians; and	*que le pouvoir de dotation devrait être délégué à l'échelon le plus bas possible dans la fonction publique pour que les gestionnaires disposent de la marge de manoeuvre dont ils ont besoin pour effectuer la dotation, et pour gérer et diriger leur personnel de manière à obtenir des résultats pour les Canadiens;*
the Government of Canada is committed to an inclusive public service that reflects the diversity of Canada's population, that embodies linguistic duality and that is characterized by fair, transparent employment practices, respect for employees, effective dialogue, and recourse aimed at resolving appointment issues ….	*que le gouvernement du Canada souscrit au principe d'une fonction publique inclusive qui reflète la diversité de la population canadienne, qui incarne la dualité linguistique et qui se distingue par ses pratiques d'emploi équitables et transparentes, le respect de ses employés, sa volonté réelle de dialogue et ses mécanismes de recours destinés à résoudre les questions touchant les nominations* […]

[67] The respondent argues that the complainant did not establish on a balance of probabilities the presence of an abuse of authority. In support of its argument, it also relies on *Appleby v. Deputy Head of the Royal Canadian Mounted Police*, 2021 FPSLREB 142; *Clout v. Deputy Minister of Public Safety and Emergency Preparedness*, 2008 PSST 22; *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 6; *Mahakul v. Deputy*

Minister of Transport, Infrastructure and Communities, 2011 PSST 23; *Patton v. Deputy Minister of National Defence*, 2011 PSST 8; *Vaudrin v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 19; and *Visca v. Deputy Minister of Justice*, 2007 PSST 24.

[68] The respondent argues that Mr. Mahneke gave a reasonable justification for his decision to require a 150 GT certificate as an essential qualification in these cases. It argues that the transparency requirement was met when it posted the notifications in advance of the appointments.

[69] For the reasons that follow, I agree.

[70] Mr. Mahneke testified that he was the manager delegated with the responsibility to staff the two vacancies in question and that it was his decision to change the level required from the 500 GT to the 150 GT certification. He testified that his decision was motivated solely by the major staffing challenges within the group at the time of the appointments and the consequential need to staff vacant positions as quickly as possible. The complainant did not contest the staffing challenges that the respondent described or lead any evidence that would refute the need to staff the vacancies urgently. If anything, he corroborated them by acknowledging that he knew of vacancies and by opining that the certification level should have been changed a long time before, due to the staffing challenges.

[71] Both Mr. Mahneke and the complainant agreed that a 150 GT certificate was sufficient to operate the smaller tugboats. Mr. Mahneke stated that he would have changed the certification level required earlier but that the previous senior management in place did not support that change. He stated that after certain senior managers retired in 2018, the opportunity arose to make that change. This testimony is consistent with the complainant's evidence of his discussions with the previous senior management and its adverseness to changing the required certification level, despite his multiple attempts to advocate for it.

[72] Both Mr. Mahneke and the complainant testified that a SO-04 position had been staffed in 2015 based on the 150 certificate and that it had proven successful. Mr. Mahneke stated that he used this example to support his argument for changing the essential qualifications in the appointment processes.

[73] Mr. Mahneke testified that he did not control the timing of the staffing actions since the approval was made at the base level. However, he stated that he was motivated to act as quickly as possible when he received the approval to staff the two vacancies due to the acute staffing challenges he faced. This evidence was unchallenged.

[74] Mr. Mahneke testified that he was not aware of the complainant's training plan. He stated that he had twice worked previously with the complainant, and he described his opinion of the complainant in favourable terms. He stated that he would "absolutely" have promoted the complainant had he possessed the required qualifications. The complainant did not provide any evidence that would challenge those assertions. If anything, his testimony supported it as he agreed that his previous working relationship with Mr. Mahneke had been positive. The complainant also testified that he was promoted to the SO-04 position after he obtained his 150 GT certification and met its essential qualifications.

[75] Based on that and the totality of the evidence, I find no evidence to support that Mr. Mahneke's decision to change the essential qualifications for the positions to be staffed was motivated by anything other than trying to staff them urgently, given the acute staffing challenges he faced.

[76] Although I can certainly sympathize with the situation that the complainant found himself in, I do not find evidence of bad faith or wrongdoing as his representative suggested.

[77] Similar to the conclusions reached in *Appleby*, I find that the respondent exercised its discretion in keeping with the objectives of the preamble of the *PSEA* to act in a fair and transparent manner when it posted the notifications in advance of the appointments. The notifications led to the complainant's ability to meet with Mr. Mahneke in advance of the appointments being made and to share his concerns about them. Mr. Mahneke, in turn, was within his rights to proceed with the appointments, given his assessment of the need to proceed urgently.

[78] It should also be noted that the complainant does not contest that he did not have the 500 GT certificate at the time of the appointment processes. Therefore, he would not have been eligible to apply for the positions, even had the respondent decided to proceed with staffing them based on the prior 500 GT certification.

[79] As a result, the evidence does not support a finding that the respondent's decision to change the essential qualifications in the appointment processes constituted an abuse of authority.

B. Issue #2 - Allegation of abuse of authority in the choice of process (non-advertised)

[80] Section 33 of the *PSEA* provides that an appointment can be made using an advertised or a non-advertised appointment process.

[81] Section 77(1)(b) of the *PSEA* provides the complainant with the ability to make a complaint to the Board if, in his opinion, the respondent abused its authority when it chose to proceed by way of a non-advertised process instead of an advertised process.

[82] As the right to proceed by way of an advertised or a non-advertised process is specifically recognized under the *PSEA*, considerable discretion is provided to the respondent when making the choice (see *Clout*).

[83] The complainant once again bore the burden of proof and had to establish that on a balance of probabilities, the respondent abused its authority while exercising its discretionary powers under s. 33 of the *PSEA* (see *Tibbs*).

[84] The complainant's representative argues that the decision to choose a non-advertised process was an abuse of authority on the basis of the lack of transparency, which is contrary to the preamble of the *PSEA* as well as the respondent's policy, directive, and guide on appointments.

[85] The complainant's representative refers to Mr. Mahneke's testimony when he stated that he had a number of vacancies and that a non-advertised process was selected as it was the quickest way to proceed since he had been advised that an advertised process would take a year to complete. The complainant's representative argues that no tangible evidence was given as to why a year would have been required.

[86] The complainant's representative relies on *Tibbs* and argues that the respondent abused its authority on the basis that it used its delegated authority based on irrelevant or incorrect information. He states that there is no evidence that it would have taken 12 months to staff the vacancies.

[87] The complainant's representative argues that it did not matter what Mr. Mahneke testified to since the respondent is DND, and therefore, it was the actions of all DND management that constituted the abuse of authority. He states that this could be a classic case of the right hand not knowing what the left hand was doing. He argues that Mr. Mahneke might not have been aware of the representations that had been made to the complainant. However, the delegated manager was Mr. Singh, who was aware of it. He states that the fact that the appointments were made in secrecy was an abuse of authority.

[88] The complainant's representative relies on the principles that the Federal Court of Appeal enunciated in *Bergey v. Canada (Attorney General)*, 2017 FCA 30, and argues that the Board should look at the complaints not only from the respondent's perspective but also from the complainant's perspective. He argues that although *Bergey* involved a disciplinary matter, the same principles should be applied in this case. The relevant paragraphs of *Bergey* provide as follows:

> …
>
> *[55] On the issue of disguised discipline, the adjudicator quoted from the Federal Court's decision in* Frazee *as setting out the principles applicable to determining whether an impugned employer act amounts to disguised discipline. However, in applying these principles, the adjudicator focussed solely on the employer's intent and did not consider the impact of the decision on Ms. Bergey, as the case law instructs. In addition, in finding that a disciplinary intent was absent, the adjudicator focussed on the subjective intent of the members of the RCMP who made the decisions that impacted Ms. Bergey and accepted the employer's argument that it was open to it to decide to terminate for either disciplinary or security related reasons in any given case where employee misconduct could give rise to both a disciplinary and a non-disciplinary response. The adjudicator outlined the relevant considerations to be applied in determining whether the RCMP's actions constituted disguised discipline at paragraph 838 of her decision in the following manner:*
>
> > *[…] The employer could not use the security review process to simply avoid adjudication for disciplining an employee. If there is no valid concern with an employee's RCMP reliability status, then revoking it would be improper.*
>
> *[56] In finding there to be no subjective intent to discipline Ms. Bergey, the adjudicator focussed on the fact that the revocation decision was made by Chief Superintendent Lanthier, who did not know Ms. Bergey and did not supervise her. She also noted that Chief Superintendent Lanthier was not influenced or duped by Superintendent Morris and that the latter had a good faith belief*

> *that the RCMP had valid security concerns that warranted Ms. Bergey's termination. In consequence, the adjudicator found there to be no disguised discipline and dismissed the grievances.*
>
> …
>
> *[78] In addition, the adjudicator unreasonably focussed her assessment of the disguised discipline issue almost exclusively on the employer's lack of bad faith in deciding to initiate the security review process and to eventually revoke Ms. Bergey's reliability status. However, the case law discussed above teaches that an employer's subjective intent is not determinative of whether it has engaged in disguised discipline. Thus, an employer's good faith but mistaken belief that it is not making a disciplinary determination is not conclusive. Rather, what is required is an objective assessment by the adjudicator of what actually occurred. Relevant to this inquiry are several factors in addition to the employer's good faith.…*
>
> …

[89] The complainant also relied on *Silke v. Deputy Minister of National Defence*, 2010 PSST 9.

[90] The respondent denies the presence of any facts that could support a finding of abuse of authority. It relies on the same facts stated in the previous section to justify its decision. In support of its arguments, it also relies on *D'Almeida v. Royal Canadian Mounted Police*, 2020 FPSLREB 23; *Jarvo*; *Robbins v. the Deputy Head of Service Canada*, 2006 PSST 17; *Tibbs*; and *Lysak v. Commissioner of the Royal Canadian Mounted Police*, 2019 FPSLREB 51.

[91] I find the analysis in *Jarvo* to be of particular value. It provides a detailed review of the balance to be struck between the respondent's right to select a non-advertised process while at the same time meeting its obligation to ensure fairness and transparency. The following passages, albeit lengthy, are directly on point with the present dispute:

> …
>
> ***25*** *Section 33 of the PSEA provides the explicit authority to conduct a non-advertised appointment process. There is no preference given to advertised over non-advertised processes in the PSEA.*
>
> ***26*** *In its* Appointment Policy *the PSC has identified fairness, transparency, access and representativeness as guiding values for managers who are delegated to make appointment decisions. The allegations in this case relate to the values of fairness,*

> *transparency and access. Accordingly, those are the values that are examined in these reasons.*
>
> ***27*** *According to the PSC's* Appointment Policy*, transparency is achieved when information about strategies, policies, practices and decisions is communicated in an open and timely manner. The Tribunal has held that, in the context of a non-advertised appointment process, notification to employees, the opportunity to discuss the reasons for the decision informally, and an examination of the process through recourse to the Tribunal are measures that contribute to transparency. See* Morris *for example.*
>
> ***28*** *The* Appointment Policy *characterizes fair appointment decisions as those that are made objectively and without personal favouritism or political influence. The policy goes on to state that practices must reflect the just treatment of persons. This definition underscores that, in the context of staffing in the public service, one cannot consider fairness through the narrow lens of one individual's perception or perspective. To make objective appointment decisions, delegated managers must consider several perspectives and seek to balance often competing interests when they consider the options available to them to staff a position. It could be said that a manager needs to consider fairness from several perspectives, knowing that the decision is unlikely to be perceived as fair by everyone.*
>
> ***29*** *With respect to access, the preamble to the PSEA describes a public service whose members are drawn from across the country. The PSEA does not, however, require access each time an appointment is made in the public service. Section 29 permits internal appointment processes, which limit consideration to people already employed in the public service. Section 34 permits further restriction of access to appointment processes based on where a person lives or works, for example.*
>
> *…*
>
> ***32*** *Neither the PSEA nor PSC's* Appointment Policy *guarantees an employee a right of access to every appointment opportunity. The PSC expressly promotes the application of reason and discretion with respect to the value of access and appointment decisions.*
>
> *…*

[92] I am of the opinion that the same conclusion is to be drawn in this case. Indeed, for the reasons noted in the previous section, I find no evidence to support that Mr. Mahneke's decision to proceed by way of a non-advertised appointment process was motivated by anything other than trying to staff the SO-04 vacancies on an urgent basis, given the acute staffing challenges he faced.

[93] I find that the respondent met its duty to exercise its discretion in a fair and transparent manner as per the preamble of the *PSEA* and the respondent's policy,

directive, and guide on appointments. It did so when it posted the notifications in advance of the appointments and provided the complainant with the opportunity to share his concerns before the appointment decisions were made.

[94] After hearing the complainant's concerns, the respondent could have decided to cancel one of the appointment processes to allow him the time to finish obtaining his certification. However, it chose not to. It was within its right to make that decision, and I see no evidence of abuse of authority in it. As stated in *Jarvo*, to make objective appointment decisions, delegated managers must consider several perspectives and seek to balance often-competing interests. In this case, the negative impact of not staffing the position immediately affected the Auxiliary Fleet's ability to operate and to meet the Royal Canadian Navy's needs. This negative impact was viewed as surpassing the negative impact on the complainant. Although unfortunate for him, it did not constitute an abuse of authority.

[95] Finally, and importantly, the complainant does not contest that he did not meet the position's essential qualifications at the time of the appointment processes as he did not possess either the 150 GT or the 500 GT certification. As a result, whether the appointment processes were advertised or non-advertised is of no consequence since the complainant did not meet the essential qualifications in either case.

[96] As a result, the evidence does not support a finding that the respondent's decision to proceed by non-advertised appointment processes constituted an abuse of authority.

C. Issue #3 - Reasonable apprehension of bias

[97] At the outset of the hearing, the complainant's representative alleged that there had been an abuse of authority based on a reasonable apprehension of bias in relation to the complainant's role as the president of two UNDE locals. These allegations were not made in the original complaints or in the particulars of the allegations provided to the Board.

[98] The usual process for a complainant to add a new allegation is to request and obtain the Board's permission per s. 23 of the *Public Service Staffing Complaints Regulations* (SOR/2006-6). In this case, no request was made, and the respondent did

not raise an objection. Nonetheless, I have considered the allegation and find it has no merit.

[99] The complainant's representative states that the *PSEA* specifically contemplates bias as a type of abuse of authority. He states that when establishing a reasonable apprehension of bias, it is not necessary to show intent. He argues that the complainant had held positions as the president of two different UNDE locals and that it was not clear whether the lack of transparency in the appointment processes occurred because of it.

[100] In support of his position, the complainant's representative referred to *Denny v. Deputy Minister of National Defence*, 2009 PSST 29. I find the following passages to be of particular relevance:

> …
>
> ***123*** *The allegation of bias must be analyzed separately as a specific test has been established in jurisprudence where bias is alleged. The courts have acknowledged that direct evidence of actual bias is difficult to establish and have found that fairness requires that there be no reasonable apprehension of bias.*
>
> ***124*** *The test for reasonable apprehension of bias is well established.* ***Suspicions, speculations or possibilities of bias are not enough and bias must be real, probable or reasonably obvious.*** *See Robert W. Macauley & James L.H. Sprague,* Practice and Procedure before Administrative Tribunals, *vol. 4 (Toronto: Thomson Carswell, 2004), at 39.4.*
>
> ***125*** *In* Committee for Justice and Liberty v. Canada (National Energy Board), *[1978] 1 S.C.R. 369, at 394, the reasonable apprehension of bias test is set out as follows:*
>
> > *[T]he apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information.…[****T]hat test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.*** *Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.*
>
> …
>
> [Emphasis added]

[101] The respondent argues that the complainant failed to make a case of a reasonable apprehension of bias. It relies on *Appleby*, which provides this:

> *[58] I find that the Board was not presented with evidence of a reasonable apprehension of bias. No reason was given for Ms. Wild to be biased. Furthermore, nowhere in the evidence is there a suggestion of actions, errors, or omissions that a reasonable person, viewing the matter realistically and practically, would conclude exhibit bias, whether in favour of the appointee or against the complainant.*

[102] I find that the same conclusion may be drawn in this case. The complainant did not make out a case that would support a reasonable apprehension of bias. The mere fact that he was involved with the UNDE and described his relationship with management as being difficult at times was insufficient. As stated in *Denny*, suspicions, speculations, or possibilities of bias are not enough. Evidence of bias must be real, probable, or reasonably obvious. No such evidence was offered in this case.

[103] To the contrary, the complainant's relationship with Mr. Mahneke, the person who made the appointment decisions, was described in favourable terms. Equally notable is the fact that the complainant was appointed to a SO-04 position after he obtained the 150 GT certificate and met its essential qualifications.

[104] As a result, I find that that the complainant did not establish that an abuse of authority occurred as the evidence does not support a finding of a reasonable apprehension of bias.

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

(The Order appears on the next page)

V. Order

[106] The complaints are dismissed.

March 18, 2024.

Audrey Lizotte,
a panel of the Federal Public Sector
Labour Relations and Employment Board