Date: 20240605

Files: 771-02-43342 and 44435

Citation: 2024 FPSLREB 78

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

REBECCA SAVOIE

Complainant

and

DEPUTY HEAD
(Department of Employment and Social Development)

Respondent

and

OTHER PARTIES

Indexed as
Savoie v. Deputy Head (Department of Employment and Social Development)

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

Before: Christopher Rootham, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Jean-Charles Gendron

For the Public Service Commission: Maude Bissonnette Trudeau

Heard by videoconference,
December 18 and 19, 2023.

REASONS FOR DECISION

I. Overview

[1] This complaint is about two appointments. On August 6, 2021, the respondent extended the appointee's acting appointment beyond the four-month threshold using a non-advertised appointment process. On March 15, 2022, the respondent appointed the appointee to the same position on an indeterminate basis, again using a non-advertised appointment process. This complaint is about whether the respondent abused its authority by using a non-advertised appointment process for either appointment and whether the assessment of merit of the appointee in either case constituted an abuse of authority.

[2] I have concluded that the respondent abused its authority by selecting a non-advertised appointment process for the indeterminate appointment. I have also concluded that the respondent abused its authority in the application of merit both times when it assessed the qualifications of recent and significant experience managing human resources and financial resources.

[3] I have decided not to revoke the appointee's appointments because doing so would serve no practical benefit. Despite these abuses of authority, the appointee was qualified for the position by the time the indeterminate appointment was made. Therefore, I have issued a declaration of those two abuses of authority instead of revoking the appointments.

II. Factual background to the complaint

[4] The position at issue in this complaint is the Director of Integrity Services in the Atlantic Region of Employment and Social Development Canada ("ESDC"), classified at the EX-01 group and level. Broadly speaking, the position is responsible for managing a team of employees who investigate whether clients are entitled to receive the benefits being paid to them — mainly, but not exclusively, employment insurance benefits. The position reports to the Director General for ESDC's Atlantic Region Integrity and National Services, Carson Littlejohn.

[5] In early 2021, the previous Director of Integrity Services (Kathy Lusk) left the position for a promotional opportunity. That opportunity was initially temporary. Mr. Littlejohn decided to appoint the appointee to that position on an acting basis on April

6, 2021, for a period of four months less a day. Before the four-month period expired, the appointee was appointed on an acting basis effective from August 6, 2021, to March 31, 2022, using a non-advertised appointment process. Mr. Littlejohn was away on vacation the week that the decision was made, and therefore the decision was actually made by Jody Doyle, who was acting as the Director General during Mr. Littlejohn's absence. Mr. Littlejohn and Mr. Doyle both testified that they worked collaboratively on this acting appointment, but Mr. Doyle also testified that he made his own independent assessment of the appointee and that he did not simply sign what Mr. Littlejohn had already decided.

[6] For ease of reference, I will refer to this as the acting appointment from now on, even though it was the second such appointment.

[7] Ms. Lusk's promotion became permanent in early 2022. Mr. Littlejohn decided to appoint the appointee to the position on an indeterminate basis using a non-advertised appointment process after receiving the approval of a panel of Assistant Deputy Ministers called the Workforce Management Committee. The Notification of Consideration for this appointment was posted on March 10, 2022, and the appointment was made on March 16, 2022. I will refer to this as the indeterminate appointment from now on.

III. Procedural background to the Board's hearing of the complaint

[8] The complainant made a complaint against the acting appointment, process 2021-CSD-ACIN-ATL-0102193, which is Board file number 771-02-43342. The complaint alleges that the respondent abused its authority by using a non-advertised appointment process and that the appointment itself constituted an abuse of authority for reasons that I will describe in greater detail later. The complainant also made a complaint against the indeterminate appointment, process 2022-CSD-INA-ATL-0042616, which is Board file number 771-02-44435, again complaining about both the use of a non-advertised process and the appointment itself. In light of the similarity between the two files, the Federal Public Sector Labour Relations and Employment Board ("the Board", which in this decision refers to any of its forms through the years) consolidated them, and they were heard together by videoconference on December 18 and 19, 2023. This is why I refer to these two complaints in the singular.

[9] The Public Service Commission ("the PSC") filed brief written submissions but did not take a position on the complaint's outcome. I have considered those submissions but I do not refer to them further in these reasons.

[10] The complainant represented herself. In addition to testifying on her own behalf, she adopted her written allegations for both complaints. The parties agreed that I may treat her written allegations as if they were her verbal evidence. The respondent cross-examined her on both her written allegations and verbal testimony. Mr. Littlejohn and Mr. Doyle testified for the respondent.

IV. The choice of a non-advertised appointment process constituted an abuse of authority in the indeterminate appointment

[11] The *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) states that the PSC (in practice, a hiring manager exercising authority that the PSC delegated to a deputy head who in turn delegated it to a hiring manager) may use either an advertised or a non-advertised appointment process. The *PSEA* then goes on to state that a person in the area of recourse may make a complaint with the Board that the hiring manager abused their authority by choosing between an advertised or a non-advertised internal appointment process.

[12] The complainant was at pains to emphasize that she does not deny that a hiring manager has the right to use either an advertised or a non-advertised appointment process. Mr. Littlejohn and Mr. Doyle both testified that they understood that advertised and non-advertised appointment processes were equally legitimate. The respondent also emphasized that the hiring manager has the discretion to choose between an advertised and a non-advertised appointment process.

[13] The complainant argued instead that the respondent abused its authority in the choice of a non-advertised process in this case because that choice was unjustified.

A. The justification for a non-advertised appointment process for the acting appointment

[14] For the acting appointment, Mr. Doyle prepared a document called "Articulation of Selection Decision" in collaboration with Mr. Littlejohn. This is a form used at ESDC to explain the reason for using either an advertised or a non-advertised appointment process. The form has a box checked off stating that the reason for a non-advertised appointment process was "[a]cting appointment of 4 months or more where a non-

advertised appointment is deemed to be the most appropriate staffing option". Of course, this tells me nothing about why the choice was made.

[15] The form goes on to have a box for "[o]ther reason(s) – **only** if reasons above do not apply" [emphasis in the original]. Despite having already checked off one reason, as noted in the last paragraph, the form explains the reasons for using a non-advertised appointment process as follows:

> …
>
> ***Please provide an unbiased, fact-based explanation of your decision:***
>
> *Based on the assessment of the candidate against the Statement of Merit Criteria,* [the appointee] *was selected as a proven leader, who has held several positions of increasing complexity and scope within the department.* [The appointee's] *training and experience in integrity (specifically, Employment Insurance Investigations), as well as her demonstrated ability to mobilize people and act strategically, makes her suitable for this acting appointment extension till end of March 2022.*
>
> *A need exists, and is currently being fulfilled by the candidate, in promoting innovation and guiding change in Employment Insurance Investigations post EI-ERB/CERB. to ensure operational success and the health and safety of our employees. Her ability to envision the end goal and effectively strategize within her team and her national counterparts will aid the Atlantic region in attaining goals established for the fiscal year.*
>
> *A non-advertised acting appointment is being used to ensure that the region is well engaged and able to quickly adjust during this important and challenging period, when a delicate balance is required to continue to mobilize and motivate employees in the modernization efforts. The selection is values based as it respects linguistic duality, is a fair and transparent process, and respects the employees involved. Consistent and competent leadership to an integral team, is essential and this is achieved with this staffing action.*
>
> *The candidate in question is well positioned and possesses the requisite competencies and experience to maintain the role, specifically to mobilize and motivate the team, share valuable points of view and to work closely with stakeholders including her colleagues in Integrity regionally and NHQ. She continues to build good will and achieve results. This will also continue the foundational work that will assist with ongoing transformation into the future.*
>
> ***Selection Rationale***
>
> [The appointee] *is a proven leader, who has held several positions of increasing complexity and scope within the department*

> *including recent acting opportunities at the EX-1 level.* [The appointee's] *training and experience in integrity, as well as her demonstrated ability to mobilize people makes her suitable for this acting assignment. As a result,* [the appointee] *has been deemed the right fit candidate for this position.*
>
> …
>
> [Emphasis in the original]

[16] The first, second, and fourth paragraphs of that rationale amount to the following: the respondent used a non-advertised process because it decided to appoint the appointee. The fifth paragraph is also about why the appointee was chosen.

[17] The third paragraph requires some context to properly understand it. Both Mr. Doyle and Mr. Littlejohn testified that when the COVID-19 pandemic started in March 2020, the employees in the investigation team pivoted away from investigating clients and were deployed to assist other teams, including working in call centres to provide benefits to clients during the pandemic. This resulted in what Mr. Doyle described as change fatigue. Mr. Doyle further explained that one of the reasons for using a non-advertised appointment process was that he wanted to appoint someone who was already on that team, to reduce the amount of change fatigue. Therefore, the appointee was promoted from that same team because the team was familiar with her.

[18] Mr. Littlejohn testified about this context as well, but his evidence was vaguer about the reasons for choosing a non-advertised appointment process. He testified that the appointee had earned his respect during the acting period of less than four months that preceded this appointment and that he discussed the matter with human resources professionals. Mr. Littlejohn did not say anything about the content of that discussion but instead appeared to rely on the fact of the discussion as being sufficient. As a result of the vagueness of his testimony, I asked the respondent during closing argument whether I could rely upon this broader operational context or whether, alternatively, the justification for using a non-advertised process was limited to liking the appointee. The respondent submitted that I could rely on this broader operational context. After considering the respondent's submissions and reviewing Mr. Doyle's testimony more carefully because he was the one who actually completed the form, Mr. Doyle's testimony was sufficiently clear that this operational context was a factor in deciding to use a non-advertised appointment process.

B. The justification for a non-advertised appointment process for the indeterminate appointment

[19] For the indeterminate appointment, Mr. Littlejohn completed the same form. He only checked the box for "Other reason(s)" for the decision to use a non-advertised appointment process. The written rationale for that decision was as follows:

> …
>
> ***Please provide an unbiased, fact-based explanation of your decision:***
>
> *This is a request to indeterminately appoint* [the appointee] *to the [sic] EX-01 Director of Integrity Services, Atlantic Region on a non-advertised basis.*
>
> [The appointee] *is a substantive PM05 and has been acting EX-01 since April 6, 2021. Since acting in this position,* [the appointee] *has proven effective in leading the team and has been assessed to meet all the requirements of the position.* [The appointee] *has been with our department for 16 years, has shown great leadership skills and potential, and has been on a talent management plan and in the Aspiring Directors Program.* [The appointee] *meets the language requirements for the position (CBC) and has self-identified as a person with disabilities.*
>
> *This appointment is in alignment with the Region's HR staffing priorities and will increase diversity within the executive leadership cadre. A talent-based non-advertised appointment is the most appropriate staffing option in the current context. This appointment will not increase the EX complement of our region.*
>
> *This decision is objective and free from political and personal favoritism.*
>
> ***Selection Rationale***
>
> [The appointee] *is a proven leader, who has held several positions of increasing complexity and scope within the department including recent acting opportunities at the EX-1 level.* [The appointee's] *training and experience in integrity, as well as her demonstrated ability to mobilize people makes her suitable for this acting assignment. As a result,* [the appointee] *has been deemed the right fit candidate for this position.*
>
> …
>
> [Emphasis in the original]

[20] Mr. Doyle played no role in this decision and did not testify about the indeterminate appointment in any way.

[21] Mr. Littlejohn did not testify extensively about this document or his reasons for using a non-advertised appointment process for the indeterminate appointment either.

He stated that once Ms. Lusk's promotion had stabilized and become permanent, he wanted to fill this position permanently, and that his style is that he likes to keep positions encumbered. He testified that by March 2022, the appointee had been reporting to him for a year and that he was pleased with her performance. Mr. Littlejohn also testified that it was still a challenging time with COVID-19 and public services but did not elaborate on those challenges. Most importantly, he did not state that those challenges were a reason for using a non-advertised appointment process. He also made a passing reference to the appointee being a member of an employment equity group (both in writing and during his oral testimony). However, the document in which he articulated the selection decision has a box to check for employment equity being a reason for choosing a non-advertised appointment process, and Mr. Littlejohn did not check that box, indicating that employment equity was not a factor in this appointment process and that his passing reference to employment equity was just that.

[22] The complainant also correctly pointed out that this document for the indeterminate appointment stated that the appointee's abilities made her suitable for "this **acting assignment**" [emphasis added]. It is clear that Mr. Littlejohn simply cut-and-pasted the final paragraph from the justification for the acting appointment into his document justifying the indeterminate appointment. This undermines Mr. Littlejohn's assertion during his testimony that he takes executive appointments, like this one, seriously.

C. Factual conclusion about the reasons for choosing non-advertised appointment processes

[23] I have considered both the written rationale and the verbal testimonies of Mr. Doyle and Mr. Littlejohn in rendering this decision. As the Federal Court stated when reviewing a decision by the PSC investigating a non-advertised appointment process, "… it was not sufficient for the investigator to focus solely on the rationale document — the mission of the [PSC] investigator is to gather further evidence"; see *Shakov v. Canada (Attorney General)*, 2015 FC 1416 at para. 68 (appeal allowed in part but not on this point in 2017 FCA 250). The Board is not an investigator, and its role is not to gather evidence; however, the Board is similarly not limited to reviewing the written rationale for using a non-advertised appointment process. It may consider the explanation by the decision maker by verbal testimony as well as the written rationale for the decision.

[24] I will begin with the non-advertised appointment process. Having reviewed the written rationale for using a non-advertised appointment process and the evidence of both Mr. Doyle and Mr. Littlejohn, I have concluded that the main reason they used a non-advertised appointment process for the acting appointment was that they had already decided to appoint the appointee. The bulk of the written justification for that appointment process was about the qualifications and characteristics of the appointee. Even the operational context behind the acting appointment was largely another reason to appoint the appointee — the need to avoid change fatigue meant promoting someone from within the team, and the appointee was the only possible candidate from within that team.

[25] That said, this notion of change fatigue was an operational justification for using a non-advertised appointment process. It was not the main reason, but it was one reason for using a non-advertised appointment process for the acting appointment.

[26] Operational circumstances can justify the choice of a non-advertised appointment process. While I do not agree that appointing someone simply because they are already on the team is a good reason to do so (because new people bring new ideas, and new ideas are good things), it is not my role to second-guess managers' decisions (see *Myskiw v. Commissioner of the Correctional Service of Canada*, 2018 FPSLREB 70 at para. 32). The Board's role is not to second-guess the operational reasons given for choosing a non-advertised appointment process.

[27] By contrast, Mr. Littlejohn never said that this operational context played a role in choosing a non-advertised appointment process for the indeterminate position. The written rationale does not say anything about operational context being the reason for choosing a non-advertised appointment process, and he did not elaborate on the written rationale during his verbal testimony. The sole reason for using a non-advertised appointment process for the indeterminate appointment was that Mr. Littlejohn had already identified the appointee as the person he wanted to appoint.

D. It is an abuse of authority to choose a non-advertised appointment process solely because the hiring manager has already identified a suitable candidate

[28] The issue in the complaint against the indeterminate appointment is whether having already identified a candidate to be hired is a proper justification for using a

non-advertised as opposed to an advertised process. I asked the respondent directly during its closing submissions whether having identified a candidate to be hired is a sufficient justification for using a non-advertised appointment process, and it submitted that the answer to that question is yes. The complainant disagreed.

1. There are no previous Board decisions on this point

[29] In support of its position, the respondent could only point to previous Board decisions to the effect that the *PSEA* permits a non-advertised appointment process and that there is no requirement to consider more than one candidate for a position; see *Bérubé-Savoie v. the Deputy Minister of Human Resources and Skills Development Canada*, 2013 PSST 2 at para. 38; *Karoulis Newman v. Canada Border Services Agency*, 2020 FPSLREB 22 at para. 29; and *Clout v. Deputy Minister of Public Safety and Emergency Preparedness*, 2008 PSST 22 at paras. 31 and 34. None of those cases discuss whether it is an abuse of authority to choose a non-advertised appointment process solely because the appointee has already been identified. Instead, those cases discuss whether, having decided to use a non-advertised appointment process, it was proper for the hiring manager to consider only one candidate. Subsection 30(4) of the *PSEA* clearly states that the PSC (in practice, a hiring manager) is not required to consider more than one person for an appointment to be made on the basis of merit. That is not in dispute in this case. However, this is a separate issue from whether to choose an advertised or non-advertised process, as shown by Parliament's use of a different provision (s. 33 of the *PSEA*) to grant the discretion to choose between those two processes.

[30] The closest the Board has come to addressing this issue directly is in *Huard v. Deputy Head (Office of Infrastructure of Canada)*, 2023 FPSLREB 9. In that case, the respondent ran an advertised appointment process. When that advertised process did not yield a successful candidate for the position (although it was used successfully to fill other positions), the respondent used a non-advertised appointment process to fill the position. The complainant in that case argued that using a non-advertised appointment process was an abuse of authority because that choice was tailored toward ensuring that the appointee was appointed. The Board dismissed that element of the complaint, stating this:

…

> *[108] It seems clear to me in this situation that the non-advertised process was chosen to appoint Ms. Barros. However, the justification for the non-advertised process appears reasonable to me. The advertised process did not yield any candidates interested in the vacant position on Ms. Payette's team, as illustrated by the fact that no qualified candidates in the advertised process were in the end appointed to that team (but were placed elsewhere). Ms. Barros already knew the tasks, she was already at level, and she did not displace an existing pool. All those facts distinguish this situation from that in* Hunter.
>
> …
>
> *[110] The fact of proceeding with a non-advertised process is not in itself abusive. The non-advertised process is necessarily a choice made for one person. The ideal person is found, and provided that the person satisfies the merit criteria, nothing is amiss. Delegated managers are not required to consider more than one candidate. It would have been abuse of authority in that choice had it been demonstrated that it was used specifically to exclude other qualified persons. That was not so.*
>
> …

[31] While the Board's decision in *Huard* correctly points out that a non-advertised process usually means that only one candidate is considered, the Board did not consider whether a respondent could choose a non-advertised appointment process solely because it had already chosen the successful candidate. This is not a case in which the respondent used a non-advertised appointment process specifically to exclude other qualified persons (which *Huard* prohibits, at paragraph 110); however, this is a case in which the respondent used a non-advertised appointment process solely because it had already selected the appointee.

[32] In every other case that I am aware of, a respondent has justified using a non-advertised appointment process in part because of something unrelated to the person selected. The most common justification is speed, as in *De Souza v. Deputy Head (Royal Canadian Mounted Police)*, 2023 FPSLREB 114 at para. 63, *Bérubé-Savoie*, at para. 18 (in that case, an urgent need to fill the position), and *Martin v. Deputy Head (Correctional Service of Canada)*, 2024 FPSLREB 66 (where the Board concluded at para. 115 that there was in fact no urgent need to fill the position, so the choice of a non-advertised process was an abuse of authority). There are other justifications in other cases, such as that an earlier advertised process did not provide qualified candidates, as in *Huard*. There are other operational reasons to choose a non-advertised appointment process that the Board has not yet considered but that would justify

choosing that process, particularly (as is the case here) when appointing someone who has been acting in the position for some time. However, while Mr. Littlejohn testified that his style is that he likes to keep positions encumbered, he never suggested that advertising this position would have left the position unencumbered because an advertised process would have been too slow.

2. The respondent's internal guidance document does not assist it

[33] ESDC has also prepared guidance on the use of advertised or non-advertised appointment processes, which lists 16 different considerations to guide managers in choosing between those two processes. That same guidance then lists 18 possible reasons for using a non-advertised appointment process. The only reason that could apply in this case is the appointment of a person who self-declares as a member of a designated employment equity group (in this case, persons with disabilities). As I stated earlier, Mr. Littlejohn referred to that ground as part of his justification for using a non-advertised appointment process for the indeterminate (but not the acting) appointment. However, the reference to the appointee's employment equity group status was made only in passing. Having heard his testimony and read the rationales in detail, I have found that it was not the true basis for this decision. It was something he added after having already decided to appoint the appointee.

[34] The ESDC guidance document does not explicitly prohibit using a non-advertised appointment process because the hiring manager has already identified a candidate. It also lists reclassifications and appointment from a pre-existing pool created through an advertised appointment process as justifications for a non-advertised appointment process. Those situations are somewhat similar to using the identification of a qualified candidate to justify a non-advertised appointment process because they involve circumstances when the appointee's qualifications have already been assessed, but they are still not quite the same as in this case (there was no reclassification and no pre-existing pool of qualified candidates).

[35] Having reviewed that guidance document in detail, it did not provide guidance one way or the other on this issue.

3. The answer to this issue derives from the architecture of the *PSEA*

[36] Since there are no decided cases directly on this point and no policy documents that can guide my decision, I am left to revert to first principles.

[37] The Board's jurisdiction over this case derives from s. 77(1)(b) of the *PSEA*, which prohibits the abuse of authority in choosing between an advertised and a non-advertised internal appointment process. The Federal Court of Appeal has recently described the term "abuse of authority" in *Davidson v. Canada (Attorney General)*, 2021 FCA 226 at para. 25, as follows:

> *[25] … The jurisprudence has expanded this meaning to include requiring more than simply establishing errors and omissions. The impugned conduct, error or omission, must be unreasonable, unacceptable or outrageous in some way, such that Parliament could not have intended the person with the authority to exercise its discretion in this manner ….*

[38] Most Board decisions emphasize the first sentence from that quote — namely, an abuse of authority requires more than mere error. However, I want to emphasize the final thing that the Federal Court of Appeal stated in that passage — that I should consider whether Parliament intended that the person with the authority could exercise its discretion in this manner. To do this, I have turned to the text of the *PSEA* for the answer.

[39] Subsection 77(1) of the *PSEA* grants the Board the authority to hear a complaint against an internal appointment on three grounds in three paragraphs: under s. 77(1)(a) that there was an abuse of authority in the assessment of merit, under s. 77(1)(b) that there was an abuse of authority in choosing between an advertised and a non-advertised appointment process, and under s. 77(1)(c) that there was a failure to assess the complainant in the official language of their choice. The presumption against tautology in statutory construction means that Parliament must be presumed to avoid superfluous or meaningless words and that every word in a statute is presumed to have a role to play in advancing the legislative purpose; see *Canada v. Canada North Group Inc.*, 2021 SCC 30 at para. 64. This means that I must interpret s. 77(1)(b) in a manner that ensures that it has meaning independent from s. 77(1)(a). To put that another way, there must be some way in which choosing a non-advertised appointment process constitutes an abuse of authority even when there has been no abuse of authority in the assessment of merit of the appointee.

[40] Therefore, the architecture of s. 77(1) of the *PSEA* requires that the choice of appointment process must take place independently from the selection of an appointee.

[41] The respondent's position that a non-advertised appointment process is justified solely because a qualified appointee has already been chosen is inconsistent with the structure of s. 77(1) of the *PSEA*. If I were to adopt the respondent's position, I would render s. 77(1)(b) superfluous, contrary to the presumption against tautology, because every complaint would become about s. 77(1)(a) and whether the choice of appointee is consistent with the merit principle. Had Parliament intended that identifying a qualified person justifies using a non-advertised appointment process, it would not have included s. 77(1)(b) and would instead have limited the Board's jurisdiction to reviewing whether the appointee was in fact qualified which is part of the Board's jurisdiction under s. 77(1)(a).

[42] In conclusion, upon careful consideration of the written justification for choosing a non-advertised appointment process and the verbal testimony of Mr. Littlejohn, the reason for choosing a non-advertised appointment process for the indeterminate appointment was that he had already chosen the appointee for the position and was not interested in looking at other possible candidates. Using that reason alone for choosing a non-advertised appointment process is inconsistent with Parliament's intention as expressed in the structure of s. 77(1) of the *PSEA*, which requires that both the selection of a candidate and the choice of appointment process be justified. Therefore, the respondent abused its authority by choosing a non-advertised appointment process for the indeterminate appointment.

[43] By contrast, the respondent has shown an operational reason (namely, change fatigue) for choosing a non-advertised appointment process for the acting appointment. That operational reason did not constitute an abuse of authority.

4. Three caveats to this conclusion

[44] I want to end by including three caveats to my conclusion about the indeterminate appointment.

[45] First, I acknowledge again that the *PSEA* expressly authorizes considering only one person for an appointment. If, having decided to use a non-advertised appointment process, a hiring manager considers only a single person and appoints that person, there is nothing wrong with that so long as the appointment does not constitute an abuse of authority in some other way. My decision also does not require a hiring manager to choose a non-advertised process before they consider whom to

appoint. A hiring manager is not expected to decide to use a non-advertised appointment process without having someone in mind for the position.

[46] Second, I acknowledge that one acceptable justification for a non-advertised process is that there is only one potential candidate who possesses the required qualifications and skills for the position or who could be located within a reasonable time. In *Shakov*, both the Federal Court and the majority of the Federal Court of Appeal were critical of the PSC for concluding that a non-advertised appointment process was unjustified in the face of there being only one person likely available who could perform the tasks required in that job; see the Federal Court's decision at paragraphs 67 to 69 and the Court of Appeal's decision at paragraphs 43 and 72. In this case, Mr. Littlejohn did not suggest that the appointee was the only candidate who could fill this indeterminate role, so this principle does not apply here.

[47] Finally, I acknowledge that there is a broader debate over whether and when non-advertised appointment processes are appropriate in the federal public administration. As I said at the outset of this section of my decision, both parties agreed that non-advertised appointments are valid and appropriate; this decision is limited to the facts of this case, and I have expressly decided not to consider this broader context in light of the parties' joint submission. I did note that the complainant's allegations complained about staffing processes within ESDC's Atlantic Region, specifically that non-advertised appointments were too common. She did not discuss this element during the hearing in any way, and in fact, she chose to take out two documents from her book of documents that would have addressed that allegation. Therefore, I have not considered that point further.

V. The respondent abused its authority in the application of merit when it assessed two qualifications

[48] The complainant also stated that the respondent abused its authority in the assessment of the appointee. Both parties agreed that simply establishing errors or omissions is insufficient to demonstrate an abuse of authority. I also agree. For example, in *Bérubé-Savoie*, at para. 29, the Board stated that "… whether or not an error or omission constitutes an abuse of authority will depend on the nature and seriousness of the error or omission." It said similar things in *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at paras. 65 ("… Parliament intended that much more is required than mere errors and omissions to constitute abuse of authority" and 73

("… abuse of authority is more than simply errors and omissions …"); and in *Fang v. Deputy Head (Department of Industry)*, 2023 FPSLREB 52 at para. 105 ("Abuse of authority is a matter of degree — for such a finding to be made, an error or omission must be of such an egregious nature that it cannot be part of the delegated manager's discretion …").

[49] The complainant has identified a number of actions that she characterized as significant errors and stated that these errors, particularly in combination, amount to an abuse of authority. The respondent denied having made any errors but also stated that if an error was made, it did not amount to an abuse of authority.

[50] I have gone through the complainant's allegations, her verbal testimony, and her verbal submissions in detail to identify all the errors that she has complained about. Having carefully reviewed her evidence and submissions, I have identified eight areas or items that she characterized as errors. I have divided them into two categories: seven items in which I conclude that there was in fact no error or the error was minor and not serious enough to warrant concern, and then one more serious area requiring more detailed review.

A. Allegations in the complaint that were not meaningful errors

1. Alleged errors for which there was no evidence or submissions

[51] There are some errors alleged in the allegations that the complainant did not refer to verbally (in her testimony or her submissions) and for which I had no information in the supporting documents. For example, the complainant alleged that the assessment of merit criteria incorrectly stated that the appointee had previously held the position of "senior manager", when she had been only a manager (lower than a senior manager) or a director (higher than a senior manager). The complainant said nothing further about this issue and provided me with no information about what difference, if any, there is between being a manager and a senior manager or why this is relevant. In light of the absence of any evidence or information about this and other similar allegations, I cannot address them further.

2. Over-reliance on human resources advisors

[52] The complainant argued that Mr. Littlejohn was over-reliant on advice from human resources officials when exercising his delegated authority in appointing the appointee. Mr. Littlejohn's evidence was that he worked closely with human resources

officials, but that ultimately he made the final decision to use a non-advertised appointment process and to select the appointee. I cannot conclude that obtaining advice, and acting on the basis of that advice, could amount to an abuse of authority.

3. Identifying who actually conducted the assessment for the acting appointment

[53] The complainant argued that it remains unclear who actually assessed whether the appointee was qualified for the acting appointment — Mr. Littlejohn or Mr. Doyle. However, their testimonies were consistent: they both said that Mr. Doyle made the final decision to appoint the appointee because he was responsible during the week that the appointment was made but that he consulted Mr. Littlejohn extensively about it. I see nothing wrong with the idea that a hiring manager acting for a short time to cover a vacation would make a decision only after hearing the opinion of the permanent hiring manager. There is no issue about whether either manager lacked the delegated authority to make this appointment. The narrative assessment for the acting appointment should have stated that it was made on the basis of the observations and conclusions of both Mr. Doyle and Mr. Littlejohn. It would have been even better had the assessment separated the observations of both executives and had them both sign it off. However, I am satisfied that the assessment was done collaboratively but that the final written assessment was made by the signatory, Mr. Doyle.

4. Using competencies outside the statement of merit criteria

[54] The complainant argued that the appointee was assessed using competencies that were not found in the statement of merit criteria for the position. I do not agree that that is what happened. The complainant conflated two separate documents: the Articulation of Selection Decision and the Assessment of Merit Criteria. As its name suggests, the latter document is where the assessment of merit criteria took place. The first document is about why a non-advertised appointment process was used.

[55] In any event, the complainant's argument is premised on the notion that a hiring manager may consider only the essential and asset qualifications set out in the statement of merit criteria for a position. This is not so. Subsection 30(2) of the *PSEA* states that an appointment is made on the basis of merit when the appointee meets the essential qualifications for the work and the PSC (in practice, the hiring manager) has regard to additional qualifications (typically referred to as "asset qualifications"), the current or future operational requirements of the organization, and the current or

future needs of the organization. In this way, the *PSEA* states expressly that appointments are made on the basis of merit when the hiring manager considers things in addition to the essential and asset qualifications of the position. As the Board put it in *Gannon v. Deputy Minister of National Defence*, 2009 PSST 14 at para. 70:

> ***70*** *Thus, managers have broad discretion in determining who the right fit is for the position. In some cases, a manager may select the appointee on the basis of strength in one or more of the essential qualifications,* ***or*** *by applying an organizational need or asset qualification to choose who will be appointed.*
>
> [Emphasis added]

[56] In other contexts, departing wildly from the statement of merit criteria may constitute an abuse of authority. However, since this was a non-advertised appointment process, there is no concern over a potential candidate being misled about how to word their application package or any other form of prejudice for potential candidates. Using competencies or other factors in addition to what is set out in the statement of merit criteria is not automatically an abuse of authority and was not abusive in this case.

5. Informal discussions and the exchange of information fall outside the scope of this complaint

[57] The complainant expressed concern about having to ask twice before Mr. Littlejohn would engage in an informal discussion with her about the acting appointment. As the respondent pointed out, there is no requirement to offer an informal discussion at all, and the fact that a complainant has to ask for it is not problematic; see *Pond v. Deputy Minister of Indian Affairs and Northern Development Canada*, 2015 PSLREB 44 at para. 35.

[58] Similarly, the complainant also complained that during the exchange-of-information stage of the complaint against the acting appointment, she was not provided with documents unless she requested them by name. For example, she requested the disclosure of all sharable documents about how merit was assessed. The respondent provided her with the assessment of merit criteria. When the complainant found out that the appointee had submitted a curriculum vitae (CV), she had to ask for the CV by name before it was disclosed to her.

[59] While I agree with the complainant that the response to her request was unnecessarily pedantic, a failure to disclose documents in a timely fashion is not relevant to my assessment of whether the appointments constitute an abuse of authority. If documents are not disclosed, complainants may file a request under s. 17 of the *Public Service Staffing Complaints Regulations* (SOR/2006-6) for the Board to order the respondent to produce those documents. An allegation about the failure to provide relevant information is not relevant to whether the appointment constitutes an abuse of authority; see *Menzies v. Deputy Head (Correctional Service of Canada)*, 2023 FPSLREB 68 at para. 10.

[60] The complainant also stated that during the informal discussion that took place, Mr. Littlejohn used what she called "comparative language" to describe the appointee (i.e., the appointee was "stronger" or a "better fit" than other people). As I understand the complainant's concern, she stated that it was inconsistent for Mr. Littlejohn to use comparative language while at the same time stating that only one candidate was assessed or considered for the position. Mr. Littlejohn's testimony was that by using terms like "stronger", he was simply trying to explain that the appointee was a solid leader, but that he did at some point turn his mind to the possibility of considering other candidates. I do not see any error by Mr. Littlejohn on this point; it makes sense to me that a hiring manager would brainstorm or turn their mind to the possibility of considering other employees before deciding not to. The complainant also complained that Mr. Littlejohn referred to a "talent pipeline" yet there was no formal talent management program in place; however, I also see nothing wrong or unusual with a department or region informally keeping an eye on high performers whom they expect to move into executive positions.

[61] Having heard from both the complainant and Mr. Littlejohn, I have concluded that they were speaking at cross purposes during the informal feedback. The complainant wanted to debate the minutiae of the appointee's assessment alongside several appointment policies. Mr. Littlejohn wanted to reassure the complainant that she was a valued employee who remained on track for promotion to an executive position. It was entirely appropriate for him to use informal feedback in this way.

6. The assessment of all but two qualifications was sufficient

[62] The complainant argued that the assessment of the appointee was insufficient. On several occasions, the complainant criticized the assessment of merit criteria for

both appointments as comprising only approximately 1800 words. She relied upon *Regier v. Deputy Head of the Correctional Service of Canada*, 2021 FPSLREB 123 at paras. 34 to 37, for the proposition that the assessment of merit must provide an explanation for how, where, and why a candidate meets the qualifications for the position.

[63] However, in *Regier* the respondent appointed a candidate on the basis of their strong performance in an appointment process for a different job. The two jobs in *Regier* had different qualifications, so the first appointment process did not assess one of the criteria for appointment in the second job. The respondent in that case prepared a narrative assessment of the missing criteria that "… provided little more than general, impressionistic statements" (see *Regier*, at para. 34). The Board was not just concerned about the length or level of detail in the narrative assessment; it was concerned that there was no evidence to show that the relevant criteria were ever actually assessed (see *Regier*, at paras. 36 and 38).

[64] By contrast, in this case, the complainant argued only that the text used in the narrative assessment was too short and not detailed enough. I have rejected that argument. The merit criteria themselves are fairly broad and generic — as one would expect for an executive position, where broad managerial acumen is more important than specialized knowledge or skill. The narrative assessment reflects the nature of the criteria being assessed. Additionally, the assessment document provided concrete examples of duties that the appointee had performed to show that she met most of the listed criteria. The explanations for some criteria were more vague than others; I have set out the most vague explanations as follows:

Merit Criteria	Explanation
Knowledge of Government of Canada priorities and how they relate to the mandate and priorities of Employment and Social Development Canada	*Observed as a direct report,* [the appointee] *has held various leadership positions within Service Canada where she has demonstrated her knowledge and understanding of the Government of Canada priorities and their value in the work of her team, region and department.*
Create Vision and Strategy	*Observed as a direct report,* [the appointee] *demonstrates this competency through her strategic thinking. She is a forward thinker who can create concrete solutions through collaboration, research and personal experience. She is able to*

	visualize an end result and works with her team to ensure the required results are attained through responsible and innovative means.
Uphold Integrity and Respect	*Observed as a direct report,* [the appointee] *encourages and supports work/life balance for her employees. She models and supports public service values including integrity, fairness, transparency, trust and respect.*

[65] I agree with the complainant that these explanations are vague; however, this reflects the merit criteria themselves, which are incapable of being measured precisely. Both Mr. Littlejohn and Mr. Doyle also testified about how they personally observed the appointee meeting these criteria, and the Board has previously held that a vague or otherwise unsatisfactory written explanation for an appointment can be supplemented by verbal testimony at a hearing (see *Bérubé-Savoie*, at para. 60). I am satisfied that they actually assessed the criteria and concluded that the appointee met those criteria. If the explanation is vague, so are the qualifications.

[66] The complainant further argued that the Board should assess the quality of the assessment from the perspective of others and that from her perspective, the rationale is not comprehensive enough, which is unfair. She cited *Amirault v. Deputy Minister of National Defence*, 2012 PSST 6, for this proposition. However, *Amirault* is about the appropriate test when a complainant alleges that a hiring manager is biased against them. The Board decided to use the test for a reasonable apprehension of bias, which requires it to decide whether a reasonable person (i.e., an "other") would perceive bias. This is a different test for a different issue and has no bearing on how the Board goes about judging the quality of a hiring manager's assessment of merit.

7. The error in the appointee's CV

[67] The CV prepared by the appointee for the acting appointment stated that she had held the position of Director, Integrity and National Services, on an acting basis between April 2021 and March 2022. Since the CV was for the purpose of an acting appointment that started in August 2021, this was clearly an error in the CV. Mr. Littlejohn testified that he did not notice the error in the CV until the complainant pointed it out to him after she received it as part of the exchange of information. Mr. Doyle was also unable to explain this error in the CV. The respondent admitted that

this was an error but submitted that it was not notable and that it should be given no weight.

[68] I agree with the respondent. An error in a CV does not render the appointment invalid. I also cannot draw the inference urged on me by the complainant that this error shows that the appointee was promised the job before she was assessed for it. As Mr. Littlejohn explained during his verbal testimony on this point, the appointee might have just been optimistic. Finally, neither Mr. Doyle nor Mr. Littlejohn relied upon the CV in making the acting appointment. Mr. Doyle in particular testified that he was required to have a copy of the CV, but neither manager testified that they read the CV or relied upon it in any way.

B. The assessment of two qualifications constituted an abuse of authority

[69] There remains one other item in this complaint that is more concerning: how the assessment of the appointee actually occurred with respect to the qualifications of recent and significant experience managing human resources and financial resources.

[70] The assessment of each merit criteria of the appointee (aside from her official language proficiency and education background) was made by a narrative assessment dated July 9, 2021, and March 9, 2022. As I set out earlier in this decision, many of those assessments start with the phrase, “Observed as a direct report.” In particular, the assessment of recent and significant experience managing human resources and financial resources state that they were made on the basis of observation as a direct report. The assessment describes work done by the appointee back to April 2019. The problem with this assessment is twofold.

1. The assessment was purportedly on the basis of observation as a direct report but was in fact based on a reference as well

[71] The first problem is that the statement on the narrative assessment is untrue because the assessment was not based solely upon direct observation. For the acting appointment, as I stated earlier, it was a collaborative assessment by Mr. Doyle and Mr. Littlejohn (with Mr. Doyle being ultimately responsible for the assessment). Mr. Littlejohn’s verbal testimony was that when Ms. Lusk was leaving the job for her new opportunity, he discussed her replacement with her. Mr. Littlejohn testified that he asked Ms. Lusk for her opinion and that he took that opinion into consideration. Mr. Littlejohn also testified that he did not consider this a formal reference check but that

Ms. Lusk certainly had an opinion that she shared with him. Finally, Mr. Littlejohn also testified that his personal knowledge of the appointee, his discussion with Ms. Lusk, and a discussion with Mr. Doyle (who validated his personal knowledge) all played a role.

[72] While Mr. Littlejohn stated that there was no formal reference check, his discussion with Ms. Lusk was clearly used as a reference — just with no notes, no agenda, and no record of what she said aside from Mr. Littlejohn's recollection at the hearing which was only that Ms. Lusk had a favourable opinion of the appointee.

2. There was no observation as a direct report for a sufficient period to assess those two qualifications

[73] The second problem is about the nature and duration of this direct observation. Four of the merit criteria for this position required recent and significant experience. "Recent experience" was defined as having been acquired within the last three years. "Significant experience" was defined as "… the depth and breadth of the experience normally acquired over a period of one (1) year."

[74] The appointee started reporting directly to Mr. Littlejohn only when she started her initial acting appointment on April 6, 2021. Therefore, Mr. Littlejohn had observed her as a direct report only for three months when the form was completed for the second acting appointment on July 9, 2021. This in turn means that Mr. Littlejohn could not have observed the appointee as having had significant experience since he observed her as a direct report for only three months.

[75] Mr. Littlejohn testified that he is familiar with the managers on his team, and therefore, he was familiar with the appointee's work before the April 6, 2021, acting appointment. While that may be the case, the narrative assessment states that it was prepared on the basis of what was "[o]bserved as a direct report". That is not the same thing as being familiar with an indirect report.

[76] Mr. Littlejohn also testified that the appointee would occasionally act for Ms. Lusk while Ms. Lusk was away. Mr. Littlejohn referred to this as "covering" for Ms. Lusk while she was away on vacation or other short absences. While this means that the appointee was a direct report of Mr. Littlejohn for short periods before April 6, 2021, I cannot see how his observations for these short periods could form the basis of a

conclusion that the appointee had the depth and breadth of the experience normally acquired over a period of one year.

[77] Mr. Doyle testified that the appointee was one of his direct reports when, during the initial four-month period of her acting appointment, he was acting for Mr. Littlejohn. As he put it, when he was acting for Mr. Littlejohn, the appointee was his direct report. Again, I cannot see how Mr. Doyle's observations for these short periods could form the basis of a conclusion that the appointee had the depth and breadth of the experience normally acquired over a period of one year.

[78] Mr. Doyle also testified that in his substantive role, he was responsible for training and monitoring employees and advising them about issues that arose. This included providing training, monitoring, and advice to the appointee before and after her April 6, 2021, acting appointment. He gave as one example the appointee's advice to senior management about how to adjust priorities as a result of COVID-19. Mr. Doyle testified that he was familiar with the appointee's work in those contexts. I have no problem with Mr. Doyle basing his assessment on what he observed in that context, and I note that the description of how the appointee met a different qualification that he linked to the advice about adjusting priorities did not start with the phrase, "[o]bserved as a direct report".

[79] The problem remains that two of the merit criteria that required significant experience were assessed on the basis of observation as a direct report. At the time of the acting appointment, there was no such observation **as a direct report** for a period of time that would have permitted them to decide whether she had the depth and breadth of experience required for those two merit criteria.

[80] I have also considered whether Ms. Lusk's reference could have provided the necessary information, but as I have said earlier Mr. Littlejohn's evidence about this reference was only that Ms. Lusk had a positive impression of the appointee. There was no evidence that Ms. Lusk provided any information to Mr. Littlejohn about the appointee having experience managing human resources and financial resources.

[81] By the time of the assessment for the indeterminate appointment (which was signed on March 9, 2022), the appointee had been reporting directly to Mr. Littlejohn for just over 11 months. I am prepared to accept that this 11-month period, coupled with the periods in which the appointee was "covering" for Ms. Lusk since April 2019,

would add up to one year. However, there is no evidence that Mr. Littlejohn actually considered the work done by the appointee after the July 9, 2021, assessment. The narrative assessment for the indeterminate appointment is identical to the assessment for the acting appointment. Mr. Littlejohn clearly just cut-and-pasted that assessment. His verbal testimony about the March 9, 2022, one was that it was "similar to" the July 9, 2021, assessment. That is an understatement: it is identical, except for having added a row at the end of the document about employment equity.

[82] Since Mr. Littlejohn testified that the July 9, 2021, assessment was prepared by Mr. Doyle (with his previous input), I note that Mr. Littlejohn just cut-and-pasted Mr. Doyle's work and passed it off as his own. Copying someone else's work is not necessarily an abuse of authority, but fettering one's discretion can be. The complainant did not argue that Mr. Littlejohn fettered his discretion by copying Mr. Doyle's assessment and passing it off as his own, and so I leave it for another case to decide whether doing so constitutes an abuse of authority.

[83] The larger point is that since the narrative assessment dated March 9, 2022, is identical to the one dated July 9, 2021, Mr. Littlejohn must not have used information he learned while the appointee was his direct report between July 9, 2021, and March 9, 2022. In other words, the assessment remains based entirely upon what he observed before July 9, 2021. This means that the assessment for the indeterminate appointment retains the same flaws as in the acting appointment: it was not (contrary to what it says) made entirely on the basis of personal observation as a direct report, the period of personal observation as a direct report was not long enough to permit Mr. Littlejohn to satisfy himself that the appointee had significant (i.e., at least one year's) experience managing human resources and financial resources, and there is nothing to indicate that the reference check provided that information either.

[84] I note that the Board has previously expressed concern when a referee provided a reference that was based on personal observations of an employee and not on personal experience of supervising them; see *Bazinet v. Deputy Minister of Employment and Social Development*, 2021 FPSLREB 82 at para. 54. The decision in *Bazinet* confirms my own view that there is a material difference between observations of an employee generally and observations of that employee as a direct report.

[85] A hiring manager does not need to have personally observed the qualifications of an appointee to conduct a fair appointment process. Conversely, there is nothing inherently wrong with conducting a narrative assessment based on the personal knowledge of an appointee. As the Board has put it, a hiring manager "… is not required to consider personal knowledge in assessing candidates", but also, a hiring manager "… should not take a rigid and inflexible approach …" to whether to consider personal knowledge of a candidate's qualifications; see *Payne v. Deputy Minister of National Defence*, 2013 PSST 15 at para. 51; and *Lirette v. Deputy Minister of National Defence*, 2011 PSST 42 at paras. 17 and 27 (in which a candidate was properly screened out for failing to clearly demonstrate her qualifications in her application because she relied on the knowledge of the assessors about the nature of her current job).

[86] I am not faulting the respondent for having relied upon Mr. Littlejohn's or Mr. Doyle's personal knowledge of the appointee in this case. I am also not faulting the respondent because Mr. Littlejohn asked Ms. Lusk for her opinion of the appointee in this case.

[87] I am faulting the respondent in the acting appointment because the narrative assessment of two qualifications stated that it was made on the basis of personal observation of the appointee as a direct report when the assessment was in fact made on a combination of personal observation as a direct report, personal observation as an indirect report, personal observation in other contexts, and a reference provided by a previous manager. I am also faulting the respondent because: (1) the two qualifications assessed required more than one year's experience and the personal observations of Mr. Littlejohn and Mr. Doyle of the appointee as a direct report amounted to much less than one year in duration at the time of the acting appointment, (2) their observations as an indirect report were unclear and unreliable, and (3) there is nothing to indicate that Ms. Lusk's reference included anything about managing human resources and financial resources.

3. This failure was of a character that renders it an abuse of authority

[88] As I discussed earlier, not every error amounts to an abuse of authority. I do not find it helpful in this case to use adjectives such as "serious" or "egregious" to identify errors that amount to an abuse of authority as was done in the cases cited earlier. In my view, the crucial question is whether a particular error jeopardizes the *PSEA*'s superordinate purpose of ensuring that appointments are made based on merit. As the

Federal Court of Appeal put it in *Bambrough v. Public Service Commission*, [1976] 2 FC 109 at page 115, "[s]election according to merit is the dominant objective and consideration of the *Public Service Employment Act* and the essential criterion by which the exercise of powers under the Act is to be judged." While the Court was writing about the pre-2005 version of the *PSEA*, this passage remains true today under the current version. Therefore, an error rises to the level of an abuse of authority when it jeopardizes the merit principle.

[89] The *PSEA* defines "merit" to mean among other things that an appointee must meet the essential qualifications of the position (see s. 30). The faults I have described have jeopardized that rule. The written narrative assessment for the acting appointment, taken on its face and even buttressed with the verbal testimonies of Mr. Littlejohn and Mr. Doyle, does not show that the appointee met the qualifications of recent and significant experience managing human resources and financial resources. The narrative assessment is also misleading in that it states that the sole source of the assessment was observation as a direct report, when in fact it was based in part on the observations of Ms. Lusk. Finally, I have no evidence about what Ms. Lusk said about the appointee's experience managing human resources and financial resources and whether she could provide the necessary information to provide that the appointee met those two qualifications.

[90] Therefore, I have concluded that there was an abuse of authority in the assessment of those two qualifications for the acting appointment.

[91] I have come to a similar conclusion for the indeterminate appointment because Mr. Littlejohn did not engage in a fresh assessment of those qualifications with the benefit of his roughly one year's experience as the appointee's direct supervisor. Since he just cut-and-pasted the assessment for the acting appointment, I have to take his evidence at face value that he did not engage in a new assessment in March 2022.

[92] I want to distinguish between my findings about the acting and indeterminate appointments. For the acting appointment, I have no evidence to indicate that the appointee met the qualifications of the position at the time of her appointment. For the indeterminate appointment, on the other hand, I do have this evidence. As I stated earlier, the evidence before me is that the appointee had been in the job for 11 months and had periods during which she "covered" for Ms. Lusk that added up to one year.

This means that I have concluded that the appointee was not appointed according to merit for the acting appointment. By contrast, I have concluded that the assessment process followed for the indeterminate appointment jeopardized the merit principle (which is what makes it an abuse of authority) but that as it turns out the appointee was qualified for the position and that the appointment itself was therefore made in accordance with merit.

[93] As a final note, the respondent could easily have avoided this result in a number of ways, assuming of course that the appointee actually met the qualifications for the position. The respondent could have been upfront that the assessment of the appointee was in part based on the recommendation of Ms. Lusk and then had Ms. Lusk confirm that she personally observed the appointee meet these two qualifications over the necessary one-year period. Ms. Lusk did not even need to confirm this in writing; as the Board stated in *Dionne v. Deputy Minister of National Defence*, 2008 PSST 11 at para. 66, and in *Bazinet*, at para. 65, it is important to take and retain notes of a reference check but it is not automatically an abuse of authority to fail to do so. Mr. Doyle could have worded the narrative assessment differently to make it clear that he was not basing his assessment on his observation of the appointee as a direct report but, instead, was basing it on his observation of her (over a period of more than one year) in other contexts discussed earlier and explained why those other contexts showed the necessary experience. Mr. Littlejohn could have conducted a fresh assessment of the appointee in March 2022 instead of copying Mr. Doyle's assessment word-for-word. Mr. Littlejohn could have interviewed the appointee instead of relying solely on his personal observations. I am sure there are a myriad of other ways in which the respondent could have avoided this finding.

[94] Therefore, I have concluded that the assessment of the appointee's qualifications constitutes an abuse of authority.

VI. The appropriate remedy is a declaration

[95] The complainant seeks three remedies in this complaint: a suspension of the hiring manager's sub-delegated appointment authority, a reassessment of the appointee by the PSC, and a revocation of the appointment by me. The respondent submits that the Board does not have the jurisdiction to order the first two remedies and that it should not order the third because it did not violate the *PSEA* and did not act recklessly.

A. The Board does not have the power to suspend a hiring manager's sub-delegated appointment authority

[96] To begin with the first remedy, I agree with the respondent that the Board does not have the jurisdiction to suspend a hiring manager's sub-delegated appointment authority. As the Federal Court put it in *Canada (Attorney General) v. Cameron*, 2009 FC 618 at para. 18:

> *[18] The combined reading of sections 77, 81 and 82 of the Act indicates that any corrective action ordered by the Tribunal must address only the appointment process that is the subject of the complaints before it. The corrective action must aim at remedying the default identified by the Tribunal in hearing the complaint before it, and cannot address other past or future appointment processes not before the Tribunal further to a complaint made according to the Act.*

[97] An order suspending a hiring manager's sub-delegated appointment authority would relate to future appointment processes that are not before the Board. As the Federal Court pointed out in *Cameron*, at para. 30, such an order also falls within the exclusive jurisdiction of the PSC and not the Board.

B. This is not an appropriate case in which to revoke the appointee's appointment

[98] Turning to the request for an order revoking the appointee's appointments, recently, in *Turner v. Canada (Attorney General)*, 2022 FCA 192, the Federal Court of Appeal set aside an order from the Board refusing to revoke an appointment because the Board stated that such an order is available only under rare circumstances. In so doing, the Court of Appeal listed 21 cases in which revocation was ordered, 1 case in which it would have been ordered if requested, and then 13 cases in which the Board considered but declined to order that an appointment be revoked. The Court of Appeal did not provide any guidance about when an appointment should be revoked but stated that the Board must justify its decision either way. The Board has also recently reconsidered its decision as ordered by the Court of Appeal in *Turner v. Deputy Head (Royal Canadian Mounted Police)*, 2024 FPSLREB 33 ("*Turner 2024*"). I begin by considering those decisions.

1. Revocation is not automatic

[99] Revocation is not automatic. It remains a discretionary remedy. As the Board has recently stated in *Monfourny v. Deputy Head (Department of National Defence)*, 2023 FPSLREB 37 at para. 113:

> *[113] Under s. 81 of the* PSEA*, if the Board finds a complaint founded, it "may" order the deputy head to revoke the appointment. The* PSEA *in no way obliges the Board to order an appointment revoked when it finds an abuse of authority. That authority is discretionary. By asking the Board to find that a revocation order must always be issued when it finds an abuse of authority,* [the complainant] *asked it to disregard the wording of s. 81 of the* PSEA*, which Board members benefit from when exercising their decision-making authority. Ordering a remedy is a discretionary exercise that is closely linked to the facts of each case before the Board.*

[100] This is a significant departure from the pre-2004 version of the *PSEA*. Under that statute, the PSC was required to revoke an appointment after a successful appeal against that appointment; see *Maassen v. The Public Service Commission of Canada*, 2001 FCT 633 at para. 16. Had Parliament intended the Board to revoke appointments in all successful complaints, it would not have amended the *PSEA* to make this remedy discretionary.

2. The factors the Board has used to assess whether to revoke an appointment

[101] I have reviewed all 35 cases cited by the Court of Appeal in *Turner*. I have also reviewed two Board decisions released after *Turner* in which revocation was sought (*Monfourny v. Deputy Head (Department of National Defence)*, 2023 FPSLREB 37 and *Huard*); both times, the Board did not revoke the appointments. I have reviewed these cases in an effort to assess any principled basis on which to make my decision in this case.

[102] Before turning to those cases, I considered the preamble to the *PSEA* which states that one of its purposes is to ensure a "… public service that is based on merit …". The factors I identify below are consistent with that purpose.

[103] In 12 cases, the Board revoked an appointment without giving detailed reasons for selecting that remedy: *Martin v. Deputy Minister of National Defence*, 2010 PSST 19; *Bain v. Deputy Minister of Natural Resources Canada*, 2011 PSST 28; *Amirault*; *Whalen*

v. Deputy Minister of Natural Resources Canada, 2012 PSST 7; *Pardy v. Deputy Minister of Aboriginal Affairs and Northern Development Canada*, 2012 PSST 14; *Spirak v. Deputy Minister of Public Works and Government Services Canada*, 2012 PSST 20; *Renaud v. Deputy Minister of National Defence*, 2013 PSST 26; *Ryan v. Deputy Minister of National Defence*, 2014 PSST 9; *De Santis v. Commissioner of the Correctional Service of Canada*, 2016 PSLREB 34; *Goncalves v. Commissioner of the Royal Canadian Mounted Police*, 2017 FPSLREB 2; *Sachs v. The President of the Public Health Agency of Canada*, 2017 FPSLREB 3; and *Regier*.

[104] In two cases, the Board decided not to revoke an appointment without giving detailed reasons: *Cameron v. Deputy Head of Service Canada*, 2008 PSST 16 (overturned in 2009 FC 618; as discussed earlier, the Board's other remedies were overturned); and *Chiasson v. Deputy Minister of Canadian Heritage*, 2008 PSST 27 (although the complainant did not ask for revocation in that case). In another case, the Board did not revoke an appointment because the complainant did not ask for that remedy: *Hammouch v. Deputy Minister of National Defence*, 2012 PSST 12.

[105] Finally, *Patton v. Deputy Minister of National Defence*, 2011 PSST 8; and *Myskiw v. Commissioner of the Correctional Service of Canada*, 2019 FPSLREB 107, are unhelpful on this point, *Patton* because the Board made the unusual order that the respondent assess a qualification that had not yet been assessed (that I will discuss later), and *Myskiw* because the complainant did not seek revocation but the Board declared that it would have made such an order without explaining why in detail.

[106] This means that I did not need to seriously consider 17 of the 35 cases cited in *Turner*.

[107] Of the remaining cases in which the Board ordered revocation, thrice it did so because of the severity of the abuse of authority: *Beyak v. Deputy Minister of Natural Resources Canada*, 2009 PSST 35 (upheld in 2011 FC 629; "the unethical and improper manner" in which the appointments were made); *Ayotte v. Deputy Minister of National Defence*, 2010 PSST 16 (the "serious misconduct"); and *Healey v. Chairperson of the Parole Board of Canada*, 2014 PSST 14 (the "serious errors and omissions", even though there was no evidence that the appointees were not qualified for their appointments). I have decided not to follow this line of authority for two reasons.

[108] First, as I have described earlier, the Board (including in those three cases) has concluded that a finding of abuse of authority already requires "serious" or "egregious" errors or misconduct. I have already explained my discomfort with basing a decision on those adjectives. However, if an error must be serious to breach s. 77 of the *PSEA*, stating that "serious misconduct" (for example) justifies revoking an appointment is tautological because all breaches must be serious in order to get to the remedy stage of a complaint.

[109] Second, focussing on the degree of the problem with the appointment process takes the focus away from the people directly affected by the complaint (complainants and appointees) and places it on the hiring managers. By focussing on the extent or degree of the error, the Board was treating the revocation of an appointment as a form of punishment for the hiring manager. It is not; in fact, the hiring manager is the person least affected by the revocation of an appointment.

[110] In *Turner 2024*, the Board identified at paragraph 48 that it has been more likely to order an appointment revoked in certain types of cases, namely when the appointment was not based on merit, when there has been personal favouritism, or when there have been significant flaws in the appointment process. This statement is different from the Board's decisions I have declined to follow, as the Board in *Turner 2024* was simply identifying the types of cases in which the Board has tended to order revocation and not stating that such findings are a factor to consider when deciding whether to revoke an appointment. The Board in *Turner 2024* was identifying correlation, not causation.

[111] In the remaining cases, the Board considered the following factors (which I likewise will consider):

a) Whether the nature of the abuse of authority resulted in an appointment that was inconsistent with the merit principle in that the appointee was unqualified for the position; see *Rochon v. Deputy Minister of Fisheries and Oceans*, 2011 PSST 7; *Marcil v. Deputy Minister of Transport, Infrastructure and Communities*, 2011 PSST 31; *Burt v. Deputy Minister of Veterans Affairs*, 2019 FPSLREB 31, and *Turner 2024* in which the appointments were revoked because the appointees did not meet the qualifications for the positions. See also *Hughes v. the Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 16; *Ostermann v. the Deputy Minister of Human Resources and Skills Development Canada*, 2012 PSST 28; *Gabon v. the Deputy Minister of Environment Canada*, 2012 PSST 29; *Laviolette v. Commissioner of the Correctional Service of Canada*, 2015 PSRLEB 6; *Hill v.*

Deputy Minister of Public Works and Government Services, 2017 FPSLREB 21; *Hunter v. Deputy Minister of Industry*, 2019 FPSLREB 83; *Gomy v. Deputy Minister of Health*, 2019 FPSLREB 84; and *Monfourny*, in which the appointments were not revoked because the appointees were qualified for their positions.

b) Whether a revocation is necessary to make the complainant whole or provide practical relief to a complainant; see *Denny v. Deputy Minister of National Defence*, 2009 PSST 29; and *Kress v. Deputy Minister of Indian and Northern Affairs Canada*, 2011 PSST 41. See also *Payne*, in which the Board did not order revocation because the complainant did not want to continue in the appointment process — i.e., revocation was not helpful to the complainant.

c) The delay in hearing the case; see *Gomy* and *Huard*.

d) Whether the impact of revocation on the appointee is fair; see *Gomy* and *Huard* on this point as well.

[112] On that last point about whether revocation is fair to an appointee, the Board's powers under s. 81(1) of the *PSEA* are almost identical to the PSC's powers under ss. 66 through 69 — namely, to revoke an appointment and take any corrective action that it considers appropriate. In *Seck v. Canada (Attorney General)*, 2012 FCA 314, the Federal Court of Appeal stated the following about the nature of an order revoking an appointment, at paragraphs 50 and 51:

> *[50] When the Commission revokes an appointment under section 69, it is not taking disciplinary action, as such an appointment is void* ab initio. *This is not a dismissal or a lay-off that may be grieved. Nor are the other corrective measures that the Commission may take subject to grievance.*
>
> *[51] If the Commission cannot take disciplinary action under section 69, the corrective action that it takes under that section cannot be grieved under the* Public Service Labour Relations Act. *The appropriate remedy is, rather, an application for judicial review before the Federal Court. Thus, labour law principles, such as proportionality and progressive discipline, do not apply to corrective action under section 69. Such corrective action must instead be reviewed using the principles of administrative law, that is, it must be within the jurisdiction of the Commission and be reasonable.*

[113] In *MacAdam v. Canada (Attorney General)*, 2014 FC 443 at para. 112, the Federal Court confirmed that these principles apply to s. 66 of the *PSEA* as well as s. 69.

[114] In light of the virtually identical wording between ss. 66 and 69 of the *PSEA* on the one hand and s. 81(1) on the other, I have concluded that this principle applies to the Board's remedial power under s. 81(1). Specifically, when the Board exercises its jurisdiction under s. 81(1) of the *PSEA*, it does not take disciplinary action against any of the participants in an appointment process, and it should not consider the "labour law principles" of proportionality and progressive discipline.

[115] However, in *Shakov*, at para. 80, the Federal Court of Appeal also concluded that the PSC acted unreasonably by failing to consider the fact that the appointee "… was not at all complicit in the impugned decisions and the remedy [of revocation] affects him in a very harsh manner" when it revoked the appointee's appointment. Again, in light of the virtually identical wording between ss. 66 and 69 of the *PSEA* on the one hand and s. 81(1) on the other, the Board should follow the same factors as the Court of Appeal required the PSC to follow when deciding whether to revoke an appointment.

[116] The combined effect of *Seck*, *MacAdam*, *Shakov*, *Gomy*, and *Huard* is that the Board should consider and give some weight to the consequences on the appointee of revoking an appointment when the appointee was not complicit in the abuse of authority in a particular case. The Board in doing so does not consider concepts such as progressive discipline but, rather, takes into account the consequences on the appointee and assigns those consequences appropriate weight.

[117] I conclude this point by noting that the Board in *Turner 2024* revoked two appointments but nevertheless stated at paragraph 54 that it "… must stress that because of that possible impact on the appointees, I have not reached this conclusion easily." The Board therefore considered the impact on the appointees as a factor when deciding whether to revoke their appointments, even though it ultimately decided to revoke their appointments despite the impact on them.

[118] I conclude by stating that these are only factors and not a test that the Board follows. These are also non-exhaustive factors, and there may be other factors that are relevant in future cases.

3. Assessment of those factors

[119] I will now turn to the assessment of these factors in this case.

a. The abuse of authority implicates the merit principle for the acting appointment

[120] First, the abuse of authority in this case was twofold: the respondent abused its authority by choosing a non-advertised appointment process for the indeterminate appointment and in its assessment of two of the essential qualifications for the position.

[121] A finding that there was an abuse of authority in choosing a non-advertised appointment typically weighs against revoking the appointee's appointment because it does not usually mean that the appointee is unqualified for the position. By contrast, a finding of an abuse of authority in the application of merit is more likely to lead to a revocation when the Board also finds that the appointee is unqualified for the position. Finally, in most cases, this factor is given the greatest weight, as explained in *Turner 2024* at paras. 44 and 45.

[122] In this case, this factor weighs against revoking the indeterminate appointment. My finding that there was an abuse of authority in the choice of a non-advertised selection process does not mean the appointee was unqualified for the position, which weighs against revocation. Further, while I found an abuse of authority in the assessment of merit because of the process followed, I also concluded that the appointee met the qualifications despite the process followed. In addition, unlike in *Turner 2024*, there was no bad faith that would more seriously implicate the merit principle.

[123] By contrast, this factor does weigh in favour of revoking the acting appointment because I have no evidence that the appointee was qualified for the position when she was appointed on an acting basis.

b. Revocation is not necessary to provide practical relief to the complainant

[124] Second, revocation is not necessary to make the complainant whole or provide practical relief. In many complaints, the complainant had applied to the job (or wanted to apply to a job that was not advertised), and the abuse of authority meant that the complainant did not have a fair opportunity for the position, as in *Denny* and *Kress*. In this case, the complainant has never stated that she wanted this job. I acknowledge that the act of making a complaint expresses an interest in a position that has been staffed using a non-advertised appointment process (see *Lafrance v. Deputy Head*

(Canada Border Services Agency), 2022 FPSLREB 36 at para. 40), but I have no other indication that the complainant wanted this job.

[125] After she made her complaint, the complainant was appointed to an EX-01 position — initially in an acting capacity, and now in an indeterminate one. The respondent attempted to insinuate that the complainant was acting inappropriately by complaining about a non-advertised appointment process when she had been appointed to an EX-01 position through a non-advertised appointment process as well. I wholeheartedly reject that insinuation. I see no reason that a complainant should have to refuse to accept an opportunity for promotion, or cut themselves off from non-advertised appointments, just because they made a complaint with the Board.

[126] With that said, this factor does not favour revocation. The complainant does not want to or need to be made whole and she would not benefit from the revocation of this appointment, as she has her EX-01 job and never said that she even wanted or was qualified for this job.

c. The delay hearing this case

[127] Third, the delay hearing this case has not been inordinate. I appreciate that the appointee had been in the indeterminate position for almost two years by the time this case was heard, but this is much less than the five years in *Huard* or the three years in *Gomy*.

[128] I also appreciate that the Board revoked two appointments in *Turner 2024* after much longer delays and suggested at paragraph 55 that improved scheduling times would mean that "… the passage of time will **soon** no longer be a relevant consideration to the identification of appropriate corrective measures" [emphasis added].

[129] This factor does not favour revocation, but I have assigned it very little weight and much less weight than the Board did in *Huard* and *Gomy*. I also share the hope expressed in *Turner 2024* that this factor will soon no longer be relevant.

d. The impact of revocation on the appointee

[130] Finally, I have considered the impact of this decision on the appointee together with the appointee's involvement in the abuse of authority. The impact of revoking the indeterminate appointment could include a return to her AS-05 position if that

position even exists, subject to whether she is appointed to another EX-01 position (or some other position) under s. 86 of the *PSEA*. Aside from the error in her CV discussed earlier, the appointee is entirely blameless in this matter — and as I said earlier, the issue with the CV played no role in the disposition of this case. The appointee was offered a job, and she accepted it. This factor does not favour revocation.

e. The four factors together do not favour revocation

[131] I have considered the Board's decision in *Patton* in particular as a midway point between revoking and not revoking an appointment. In that case, the Board found an abuse of authority because the respondent did not assess one of the qualifications for a position. That failure made it impossible to ascertain whether the appointee's appointment conformed to the merit principle and was also an abuse of authority. For a remedy, the Board wrote as follows at paragraphs 39 to 41 (headings omitted):

> ***39*** *Prior to concluding the hearing of this complaint, the complainant and respondent were asked to speak to the issue of appropriate corrective action in the event that this complaint was substantiated. They both expressly addressed the issue of assessment and neither party indicated that they were opposed to taking measures to complete the assessment.*
>
> ***40*** *After considering the submissions of the parties on the matter of corrective action, the Tribunal finds that in the circumstances of this case, the abuse of authority can be addressed first by assessing Mr. King for the essential qualification K7, and then by taking further action commensurate with the outcome of the assessment.*
>
> ***41*** *The Tribunal orders the respondent, within 30 days of this decision:*
>
> 1. *To complete the assessment of Mr. King for the essential qualification K7 in order to determine whether he is qualified for appointment to the ESO position.*
> 2. *If Mr. King is found not to meet the essential qualification K7, his appointment will be revoked.*
> 3. *The respondent will notify the parties to this complaint of the outcome of the corrective action*

[132] This is an attractive remedy because it would allow me to identify the error in how the appointee was assessed and then give the respondent the opportunity to assess her themselves. Ultimately, however, I have decided not to order it, for two reasons.

[133] First, s. 82 of the *PSEA* prohibits the Board from ordering the PSC to conduct a new appointment process. This prohibition applies to the PSC's delegates as well, so that the Board may not order a hiring manager exercising this delegated authority to conduct a new appointment process. I have concluded that an order that the respondent reassess the appointee would be tantamount to an order to conduct a new appointment process. I note that in *Patton*, both parties expressly agreed that the Board had the jurisdiction to make that order. In the absence of such an agreement in this case, I must be more mindful of the jurisdictional guardrails placed around the Board.

[134] Section 82 of the *PSEA* also addresses the complainant's request for an order that the PSC (instead of the respondent) reassess the appointee's qualifications. I do not have the jurisdiction to make that order.

[135] Second, the qualifications in this case are very different from those in *Patton*. In *Patton*, the qualification was a knowledge qualification: the appointee had to have knowledge of acts, regulations, and orders involved in the storage and handling of radioactive sources. There was no guarantee that the appointee had that knowledge. By contrast, the qualifications in this case are experience qualifications. As I explained earlier at length, the respondent failed to properly assess those two qualifications. However, the appointee has been serving in that role continuously since April 6, 2021. The appointee has been an executive for almost three years; surely, by now she has at least one year's experience managing human resources and finances. *Patton* implies that the re-assessment should take place on the basis of what the appointee (now candidate) knows at the time of the re-assessment — because someone cannot forget what they have learned in the years between the first appointment and the re-assessment. When dealing with an experience qualification, it is less clear whether *Patton* would require the re-assessment of experience to take place on the basis of the appointee's experience at the time of the initial appointment or at the time of the re-assessment.

[136] I appreciate that the Board, at paragraph 56 of *Turner 2024*, stated that it must determine whether revocation is appropriate based on the facts at the time the abuse of authority occurred and the complaint was filed. However, that statement was made in the context of the Board considering whether the delay in light of the judicial review application should be a factor. Additionally, the respondent's main argument in *Turner*

2024 was that revoking the appointments would be moot because both appointees had moved on to new positions and been replaced using an unchallenged appointment process. The Board's statement that it must base its decisions on the facts as of the time of the abuse of authority must be read in the context of explaining why the remedy of revocation was not moot. However, this still raises questions about how a *Patton* type remedy could work here.

[137] Therefore, I am left with whether or not to revoke the appointment. In light of the factors I have identified earlier, I have decided not to revoke the appointee's appointment in this case.

[138] I do not need to revoke the appointment to provide a practical remedy for the complainant. The appointee bears no responsibility for the abuse of authority, and she was qualified for the indeterminate appointment. Revoking this appointment would serve only to deprive her of a job that she has held for almost three years and would place her at the mercy of her department about whether to appoint her to another position under s. 86 of the *PSEA*. Unlike *Turner 2024*, I have no evidence of bad faith by the respondent.

[139] I acknowledge that there is a chance that the appointee may have been qualified for the indeterminate position only because she was improperly appointed to the acting one. However, I am not able to order that the respondent ignore the work experience that she gained through the acting appointment. Finally, there would be no practical consequence of revoking the acting appointment since it was overtaken by the indeterminate appointment.

[140] In conclusion, revoking these appointments would serve no practical purpose and not serve the public interest in ensuring a public service that is based on merit.

4. No recommendations in this case

[141] Finally, I have considered whether I should make any recommendations in this case. The Board has the jurisdiction to make recommendations even when it does not have the jurisdiction to order compliance with those recommendations; see *Beyak*. I could, for example, recommend that the respondent revoke the sub-delegation of appointment authority granted to Mr. Littlejohn or Mr. Doyle under s. 24 of the *PSEA*

— in essence, I could recommend the remedy sought by the complainant, even though I cannot grant that remedy directly.

[142] I have decided not to make any recommendations in this case. I have evidence about one acting appointment that became an indeterminate appointment. I have no evidence about whether the issues raised in this case are widespread or isolated to this case. I also have no evidence of bad faith or malice on the part of any of the actors in this case. I have very little evidence about how appointments are generally made in this department. The *PSEA* gives the deputy head the power to decide who gets to exercise delegated authority (see s. 24(2)) and gives the PSC the power to conduct audits (see s. 17). I do not want to interpose my own, uninformed opinions on whether or how the respondent or PSC should exercise their regulatory function. They are better placed to decide what, if anything, to do next after reading this decision.

[143] Instead, I will simply declare that the respondent abused its authority in selecting a non-advertised appointment process for the indeterminate appointment and that it abused its authority in the assessment of the qualifications of recent and significant experience managing human resources and financial resources in both appointment processes.

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

(The Order appears on the next page)

VII. Order

[145] The complaint is allowed.

[146] I declare that the respondent abused its authority in selecting a non-advertised appointment process in appointment process 2022-CSD-INA-ATL-0042616.

[147] I declare that the respondent abused its authority in the application of merit in appointment processes 2021-CSD-ACIN-ATL-0102193 and 2022-CSD-INA-ATL-0042616.

June 5, 2024.

Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board