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



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

BETWEEN

PETER TATICEK

Complainant

and

**DEPUTY HEAD
(Department of Employment and Social Development)**

Respondent

and

OTHER PARTIES

Indexed as

Taticek v. Deputy Head (Department of Employment and Social Development)

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

Before: Patricia H. Harewood, a panel of the Federal Public Sector Labour
Relations and Employment Board

For the Complainant: Lydia Dobson and Stacey Mirowski, representatives

For the Respondent: Noémie Lebel, counsel

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

Heard via videoconference,
July 6, 7, and 19, 2023.

REASONS FOR DECISION

I. Complaint before the Board

[1] Peter Taticek (“the complainant”) made a complaint under ss. 77(1)(a) and (b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “the *Act*”) on March 19, 2020 when he was notified that Sarah Lipski (“the appointee”) was appointed to a senior advisor (CS-04) indeterminate position within the Information, Innovation and Technology Branch (“IITB”) at the Department of Employment and Social Development (“the respondent” or “ESDC”) in Gatineau, Quebec. At the time, the complainant had recently been promoted to a CS-03 position on the Vendor Management Team within IITB.

[2] The complainant submitted that the respondent abused its authority by choosing a non-advertised process and in the application of merit. The complainant submitted that the application of merit was biased and the complainant did not meet the essential qualifications. He also alleged that the assessment methods had no connection to the qualifications being assessed and that there was personal favouritism and bad faith. As a remedy, he requested that the Federal Public Sector Labour Relations and Employment Board (“the Board”) issue a declaration that the respondent breached ss. 77(1)(a) and (b) of the *PSEA* and that the appointment be revoked under s. 81.

[3] The respondent alleged that it complied with the spirit and the letter of the *PSEA*, ESDC’s “Guidance on Use of Non-Advertised Appointment Processes” document, and Public Service Commission (PSC) policies.

[4] The respondent claimed that the appointee met all items in the statement of merit criteria (SOMC) and that there was no evidence of bias or personal favouritism towards her. The appointment process was reasonable, transparent, fair, and within the parameters of legislative and policy requirements. The respondent requested that the complaint be dismissed.

[5] The PSC did not attend the hearing but provided policy submissions, which I have considered as part of my analysis. It did not take a position on the merits.

[6] For the reasons that follow, I conclude that there was no abuse of authority in the choice of a non-advertised appointment process, the application of merit or the

assessment methods used. Further, there was insufficient evidence of a reasonable apprehension of bias in favour of the appointee in the application of merit. Finally, I find that there was no evidence of personal favoritism. There was simply no evidence that the hiring manager and the appointee knew each other professionally or personally before the staffing process began.

II. Procedural matters

[7] The hearing was held over three days via videoconference. At the beginning, an order was made, on consent of the parties, to exclude the respondent's sole witness, Martin Mondor. I briefly explained that the order was being made to protect the integrity of the evidence.

[8] The complainant and the respondent submitted a joint book of documents ("JBOD"), which I will refer to throughout the decision. The respondent's counsel submitted that in spite of the JBOD, the documents were not all being submitted on consent. Each document would have to be introduced and assessed individually, based on general rules of evidence. I agreed that given the Board's authority under s. 20(e) of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) to accept any evidence, whether admissible in a court of law or not, each document in the JBOD would be assessed individually to determine its admissibility. If admitted, it would be up to the Board, as the decision-maker to determine the weight to attribute to its content.

III. Questions at issue

[9] The questions at issue in this matter are as follows:

- 1) Was there an abuse of authority under s. 77(1)(b) of the *PSEA* in the choice of a non-advertised process?
- 2) Was there an abuse of authority under s. 77(1)(a) in the application of merit?
- 3) Was there a reasonable apprehension of bias in the application of merit?
4. Was there personal favoritism in the assessment of merit?

IV. Summary of the evidence

[10] On March 18, 2020, the complainant was informed of the Notification of Appointment or Proposal of Appointment (“NAPA”) of the appointee to the position of Senior Advisor, Infrastructure Operations (CS-04), in the IITB at ESDC (JBOD, Tab 8) in Gatineau, Québec. This was a promotional appointment made through a non-advertised process (2020-CSD-INA-NHQ-0025552). Mr. Mondor was the delegated manager with the authority for the staffing process at all relevant times. He was the director of the Information Technology (IT) Service Management, Vendor Management, and Strategy Teams within the IITB

[11] The IITB has about 1500 to 1800 employees at any given time. It provides all IT services to ESDC, the communications and networking required to run ESDC’s day-to-day business and the systems that provide services to Canadians. A service-delivery component is focused on planning, governance, and strategic planning — the “softer skills”, in Mr. Mondor’s words, which uplift technical delivery. Mr. Mondor worked in the area of Strategy and Architecture Business Relationships, which focuses on business management and strategic planning.

[12] The complainant made his complaint the day after he received the notification. He did not know the appointee at that time. He had been working as a technical advisor on the Vendor Management Team, reporting to manager, Alain Gauthier. In cross-examination, Mr. Taticek acknowledged that, at the time, he had recently been promoted to a CS-03 position on the team. Neither he nor Mr. Mondor could confirm whether it was through an advertised or non-advertised process.

[13] Mr. Taticek felt that he was qualified for the CS-04 position, and he would have liked the opportunity to apply for it. He had expressed a desire to eventually end his public service career as a CS-05.

[14] The complainant did not believe that the appointee had the education or essential qualifications required for the job.

[15] The complainant found out that the appointee had previously worked in a PG-05 position at Shared Services Canada (“SSC”). She had qualified in a PG-06 pool, which the complainant considered to be more for managerial than technical positions. She had never worked in a computer science position before.

[16] The Vendor Management Team was made up of CS-02s and CS-03s at the time. Mr. Mondor testified that the complainant had been a good employee on the Vendor Management Team for two years but that he was more tactical than strategic.

[17] Mr. Mondor had recently worked to “elevate” Mr. Taticek to a higher position from a CS-02 to a CS-03 about a month before the non-advertised CS-04 staffing process began. He testified that Mr. Taticek would have needed more experience in the CS-03 role before being considered for a CS-04 position.

[18] The appointee was the first and only individual in a purchasing and supply (PG) position who Mr. Mondor appointed to a CS role.

[19] Mr. Taticek had over 20 years of experience working in the federal government, first as an independent contractor and then as a public servant (as a technician and senior analyst). He went over his 59-page CV in some detail. The respondent did not materially contest its contents (JBOD, Tab 15).

[20] He holds a Bachelor of Science degree in biology and completed two years of computer science at the University of Ottawa in Ottawa, Ontario. He also holds a three-year computer science technologist diploma from Algonquin College in Ottawa.

[21] Mr. Taticek spent some time going over the many IT certifications he completed from 2002 to 2019. He provided uncontradicted testimony that he completed at least 25 training sessions or certifications, including in project management, procurement, and material management between 2002 and 2019.

[22] When asked why ongoing training and certification were so important, Mr. Taticek noted that the IT field is ever-changing. One must stay current with what is going on in the industry, he said.

[23] The complainant spoke of his work experience as an IT instructor for a networking company. He also worked at Nortel Networks as a senior systems analyst. He highlighted his experience working as an independent IT contractor for the Department of National Defence (DND), ESDC, and other federal government departments.

A. The meeting with Mr. Mondor

[24] When the complainant learned that the appointee had been appointed to the CS-04 position, he asked to speak to Mr. Mondor. Mr. Mondor had received a copy of the complainant's CV some months back. The complainant had a keen interest in learning about how the position had been staffed. Mr. Taticek had no idea that there had been a vacant CS-04 position within Mr. Mondor's branch with a BBB language profile, which matched his profile. He believed he had all the essential qualifications for the job. Mr. Taticek provided no further details about the date, time, or outcome of his meeting with Mr. Mondor.

[25] After making his complaint, he sent Ms. Chubey—who was ESDC's senior Human Resource (HR) advisor, policy and programs, at the time—a list of questions during the exchange-of-information period. Ms. Chubey did not testify but attended the hearing. He received a response back on August 4, 2020.

[26] Mr. Mondor was not included in the email exchange and during the hearing, when questioned about the document in cross-examination, he appeared to be unaware of the responses provided by Ms. Chubey to the complainant's email.

[27] Through the exchange of information, Mr. Taticek learned that the appointee had been in an acting PG-06 position at SSC before being appointed to the CS-04 position.

[28] She held a Bachelor of Arts ("BA") degree in English literature, and a two-year diploma in computer systems networking and telecommunications from Novatech college.

[29] In reviewing the PG-06 job description, the complainant also noted that it did not include any of the key job activities of a CS-04 infrastructure position. There was no reference to providing expert advice on municipal networks or to any expertise on servers, mainframes, and connectivity. There was no reference to providing expert advice on IT acquisition and life-cycle management or voice-data systems or to the roll-out of enterprise software to achieve objectives.

[30] Based on the complainant's experience, he understood that the requirement to provide technical direction in a CS-04 senior advisor position included providing advice, answering clients' questions, engaging in problem solving on, in his words, a

“tiger team”, and providing direction. He explained that a tiger team is a rapid-response team put together to find a solution to a massive IT problem. As an example, he said that a tiger team could be set up to fix a commercial website that crashes.

[31] The complainant reviewed ESDC’s CS-04 senior advisor generic job description (JBOD, Tab 2). He downloaded it from the Internet between March and May 2020, when he became aware that the appointee had been appointed to the indeterminate CS-04 position. He also went over the senior advisor, various streams, generic job description, including the infrastructure operations stream, in which he had worked at ESDC before going to DND.

[32] In cross-examination, Mr. Taticek admitted that he did not have any experience negotiating service-level agreements. He did have some experience negotiating since when systems fail, you have to negotiate with management.

[33] Mr. Mondor testified that the CS-04 position was developed based on ESDC’s generic job description for it.

B. How the CS-04 position was created

[34] As the director of the IT Service Management, Vendor Management, and Strategy Teams within the IITB, Mr. Mondor’s job was to manage the programs for those teams while being responsible for their budgets, financial management, and HR. The teams were made up of anywhere between 30 and 40 individuals, depending on the time of year.

[35] Mr. Mondor stated that over the past 20 years, he worked in IT in the private and public sectors for both Crown corporations and federal government agencies. He completed his staffing training at the Canada School of Public Service in 2018, when he was fairly new to the job. He also did the annual training required of all executives.

[36] The “Guidance on the Use of Advertised and Non-Advertised Appointment Processes” (JBOD, Tab 14) document would have been similar to the documents he reviewed in his training on staffing delegations.

[37] At the time he began the staffing process for the CS-04 position, Mr. Mondor testified that he understood that all available tools in government could be used for staffing to recruit the right talent, skill and diversity required for the work. He stated

that managers were not just restricted to one staffing tool. As a manager, his view was that he had the option of choosing an advertised or non-advertised process when staffing.

[38] By 2020, he had staffed several positions and had built new functionality within his teams. He filled several empty positions and participated in staffing processes at several levels. He had also hired students to attract and identify talent to bring into ESDC.

[39] The Vendor Management Team within the IITB is responsible for engaging with hundreds of vendors, understanding which vendors are available, briefing senior leadership on vendor risks and challenges, improving the ability to onboard vendors, and understanding service-delivery options to make good decisions to support service delivery at ESDC. As of the staffing process at issue, about five or six people were on the team; they all were classified CS-02, CS-03, or CS-04.

[40] Mr. Mondor provided uncontested testimony that in late 2019, the team went through some changes. The IITB goes through regular assessments, and the vendor-management function required more capacity and rigour, so an effort was underway in the IITB to support it.

[41] The team was in the process of maturing and expanding its functions. Mr. Mondor explained that a third party had conducted an independent assessment and created an action plan for his teams that had to be implemented. Previously, the team had a very focused mandate, and the recommendation was to broaden the scope of services offered to be able to better engage with vendors and to understand the impact of contractual vehicles and “how to get best bang for [the] buck” to support delivering services at the departmental level. This included increasing the structure and capacity of the Vendor Management Team and changing the delivery of services and splitting it into one team with two managers.

[42] Mr. Mondor explained that an organizational chart would be created each time a new position was developed and that several could be created within any given year. However, no organizational chart was entered into evidence for the relevant period when the CS-04 position was created, developed, and eventually staffed.

[43] Before creating the CS-04 position, Mr. Mondor met with the classification part of HR within his branch to develop it.

[44] The IITB is so large, it has its own internal HR support function to assist with this work and to ensure that a certain standard and rigour is applied before going to ESDC's formal HR branch, which is ultimately responsible for approving the creation of new positions.

[45] Mr. Mondor described what he was looking for to a classification advisor, and they assessed the criteria to determine the position's level. The classification advisor then developed a list of questions after the initial consultation. This occurred before the staffing process for the position began.

[46] The CS-04 senior advisor position would have been created after March 2018, but Mr. Mondor could not confirm exactly when the position was created - whether it was before or after he first met with the appointee in December 2019.

[47] In cross examination, Mr. Mondor acknowledged that at the time of the hearing, he had no notes or emails detailing conversations with ESDC's HR branch about developing the position, but he stated that many of these discussions were largely verbal.

[48] Mr. Mondor confirmed that ESDC's generic job description was used to develop the SOMC for the position once HR recommended with his input that it was a CS-04 position on the technical side.

C. Completing the SOMC

[49] In coordination with colleagues in the HR branch, Mr. Mondor developed the SOMC based on the generic job description for the CS-04 senior advisor position. He could not remember exactly when he authored the document.

[50] The merit criteria were established based on operational requirements and the need to focus on specific skills set out in the generic job description. Mr. Mondor went over the merit criteria that were established in some detail, which included the following:

...

- 1) ... *experience in providing options and recommendations to senior management ... both orally and in writing*
- 2) *Experience in providing technical direction and guidance to solutions/technical teams, on an on-going [sic] basis.*
- 3) *Experience working on inter-departmental working groups.*

...

KNOWLEDGE

1. *Knowledge of current Government of Canada wide trends, policies and initiatives affecting the management and delivery of IM/IT services.*
2. *Knowledge of the roles and responsibilities of the central agencies as related to IM/IT in the Government of Canada*

COMPETENCIES

1. *Analytical Thinking*
2. *Client Focus*
3. *Communication (Spoken and written)*
4. *Continuous Learning*
5. *Innovative Thinking*
6. *Influence*
7. *IT Procurement and Asset Management*

ABILITIES

1. *Ability to communicate effectively in writing*
2. *Ability to communicate effectively orally*

ASSET QUALIFICATIONS

1. *Experience representing the branch on departmental, national, or international working groups or committees to facilitate networking and promote partnership.*
2. *Experience writing contract specifications, correspondence and/or documentation.*
3. *Experience in negotiating on behalf of the IT Organization, as the department's technical authority with senior business-line or IT managers within the Department, and with senior IT officials in other federal departments and external organizations.*
4. *Experience coaching or mentoring individuals in technical skills and abilities.*
5. *Experience analyzing and evaluating proposals from external suppliers and internal technical staff to determine viability, conformity and adaptability to IT frameworks.*
6. *Experience in the integration of solutions using a variety of platforms and technologies: SAP, PeopleSoft, .NET, Java, Oracle ...*

7. Experience in completing procurement options analysis including estimation of level of effort and risk.

...

[51] A big part of the position was providing options in writing and orally to senior management when it came to vendor relationships and managing risks. Experience providing technical direction was also necessary, to know which mechanisms to procure. The position also required experience working on interdepartmental working groups, as ESDC had to improve its ability to communicate with central agencies. He required an individual who had experience working on these types of third-party engagements.

[52] In terms of knowledge, he needed someone who knew the trends impacting the federal government and the other large initiatives that might impact the services being delivered.

[53] In terms of competencies, he needed someone with good analytical thinking and communication skills, both spoken and written, to be able to communicate at different levels to the Vendor Management Team and senior leadership.

[54] Being able to influence others was also a key competency, since the position's incumbent had to work with vendors, him, and others and even challenge him. Mr. Mondor emphasized that a key competency was the ability to write "at a good level", to be able to communicate effectively with senior leadership and vendors.

[55] One of the areas of weakness on the Vendor Management team was supporting teams, to write different "procurement vehicles"; the ability to inform contractual language. He wanted someone who could also coach and mentor others and share their knowledge, in his words "helping to lift people up and bring them along".

[56] Mr. Mondor said that the SOMC was completed during the staffing process but he insisted that the conversations around the criteria occurred with HR before the staffing process began.

[57] Mr. Mondor acknowledged in cross-examination that asset qualification number 6 was a cut and paste error from a generic job description that should not have appeared on the SOMC at all. It was not included in the Articulation of Selection

Decision or the NAPA. It was not an asset that was assessed because it was not meant to be included.

D. Choosing a non-advertised process

[58] Mr. Mondor testified that he chose a non-advertised process because he had reviewed existing pools in the past for the CS-04 position and found that the candidates did not have the type of skill set that he was looking for. He said that the pools in the past had been relatively empty. The CS candidates did not have the more strategic and planning-focused skills that he was looking for.

[59] An opportunity arose, when he received the appointee's résumé, to leverage the non-advertised staffing process, which he took advantage of to attract the right talent for what ESDC required.

[60] The area of selection on the NAPA was the National Capital Region. Mr. Mondor did not consider any other candidate in the existing CS-04 pools for the position. On cross-examination, he acknowledged that no formal risk analysis was performed for the choice of process, but he clarified that none was required.

[61] Further, he acknowledged in cross-examination that he was aware of some of the business reasons that may be considered for choosing a non-advertised process that are listed in the "Guidance on the Use of Advertised and Non-Advertised Appointment Processes" (JBOD, Tab 14) document for choosing a non-advertised process. He testified that many of these potential reasons were not applicable in this context. It was a question of taking advantage of an existing situation to staff the position given the needs of the Vendor Management Team.

E. The assessment process: the first interview

[62] Mr. Mondor explained that he first obtained a copy of the appointee's CV through the DG's office ("the DGO"). The DGO had an administrative team of three or four who often received unsolicited "reach outs", in Mr. Mondor's words, from federal government employees. These messages were then sent to the leadership team. He said that he works in a clean-inbox environment and that he kept the CV but would have deleted the DGO's email.

[63] Mr. Mondor testified that he had no professional or personal knowledge of the appointee before receiving her CV. Initially, he took a cursory look at her CV and thought that it was interesting in terms of what he was looking for.

[64] The appointee had significant procurement experience. She had formal education and qualifications that were requirements for the position. Specifically, she held a BA in English literature. He said that one of the challenges in IT is that “it’s hard to find people who can write very well” — people who can write briefing notes and correspond with vendors.

[65] He did not take immediate action. A few weeks went by. He said that the appointee was having a meeting with the director general (DG), Denis Skinner, who had reached out to him since the appointee was looking for new opportunities. He was called into the discussion, which became the initial interview with the appointee to assess her experience, skills, and ambitions in terms of career growth.

[66] This would have been in late 2019. But when pressed in cross-examination, Mr. Mondor could not recall the exact date of the initial meeting or how he had been invited to it. At the time, Mr. Skinner’s office and his own were side by side, so it would not have been a stretch for Mr. Skinner to send him an informal invitation, something like “Martin, I’m meeting with an appointee at 2 p.m. ... if you’re there, join me ...”, but he could not remember exactly what happened.

[67] On cross-examination, Mr. Mondor also acknowledged that he had no record, other than his memory, about the initial meeting with the appointee. He said that he took notes in a black office notebook; he goes through those books quickly, and he no longer has the notes. After he met with the DG and the appointee, he decided to move forward with the process.

F. The assessment process: the second interview

[68] The appointee was interviewed a second time in December 2019 or early January 2020, this time with Mr. Gauthier present; he was one of the managers on the Vendor Management Team. Mr. Mondor conducted the second interview with Mr. Gauthier, and they continued the assessment to determine whether the appointee would be a good fit for the team since it was important to have a good team dynamic.

G. The narrative assessment for the SOMC

[69] Mr. Mondor completed the narrative assessment for the SOMC during the staffing process. He said that it was based on knowledge gained during the interviews, notes regarding the appointee's responses to questions, and her CV. He went over his narrative assessment in detail.

[70] He said that the appointee met the language profile of BBB and that she had produced valid language-test results.

[71] She met the educational qualification based on her five years of post-secondary education, two of which were in an IT-related field.

[72] Mr. Mondor testified that all the experience and knowledge criteria were evaluated based on their conversations during the interviews and her CV. Competencies were assessed during the interview, and subsequent written communications were just observational. He said that with respect to the asset qualifications, the appointee had worked on large procurement vehicles at SSC. She had coached and mentored individuals in her leadership role as an acting PG-06 and had demonstrated analytical and evaluation skills based on her work in procurement for over a decade.

[73] In cross-examination, Mr. Mondor explained that asset qualification number 6 was a cut-and-paste error and should not have been included on the SOMC. He had taken this language from a generic job description but had never intended for it to be part of the final SOMC. He testified that it was not assessed, was not mentioned in the Articulation of Selection Decision and was not included in the NAPA.

[74] Following the second interview, the completed SOMC was sent to a Workforce Management Committee (WMC) that met on February 4, 2020. The WMC was made up of seven DGs and Chief Information Officer and Assistant Deputy Minister of the Branch, Peter Littlefield.

[75] The WMC's role is to approve staffing processes that are for positions of four months or more. The WMC must approve a staffing action before it is sent to ESDC's formal HR branch. It provides an additional layer of vigilance and review.

[76] In cross-examination, the complainant suggested that the ADM at the time, Peter Littlefield, knew the appointee. However, Mr. Mondor testified that he knew they had both worked at Shared Services which was a fairly big department, but he was not aware of any direct reporting relationship in the past between Mr. Littlefield and the appointee.

[77] Mr. Mondor submitted the rationale to the WMC two weeks before the meeting, to obtain approval to appoint the appointee to the vacant CS-04 position. However, he did not attend the meeting and was not familiar with its governance structure. The rationale reads as follows:

Seeking WMC approval for the Non-Advertised Indeterminate Appointment of Sarah Lipski in Vacant CS-04 Senior Advisor # 116626, effective April 2, 2020.

She successfully qualified in a pool as a PG-06 (2018-COLL-TBS-EA-PG06). Open to IITB. This role will support the maturing of the IITB Vendor Management Function.

Sarah is currently working as an acting PG-06 within Shared Service Canada. She has been active in the procurement and vendor management role for several years supporting the establishment of supply arrangements and contracting vehicles that support service delivery from SSC.

Her acquired skills and experience in contracting, procurement and vendor management would benefit ESDC as IITB evolves and improves its vendor management program.

Sarah is a demonstrated high performer and has received several departmental awards for Excellence in Innovation and Service Excellence. She was interviewed for knowledge and fit by Martin Mondor and Denis Skinner. This staffing action is supported by both.

This appointment process is consider a promotion by HRSB. There is a difference between the maximum salary for these two classifications. For a PG-06, it is 114 277\$ per year and for a CS-04 it is 118 499\$ per year.

She will be renewing her oral results on January 9th, 2020. She meets the position language requirement for both writing (B) and reading (C).

The candidate meets the security and education requirements.

**** PSC Clearance will be obtained prior to the Appointment.***

...

[Emphasis in the original]

[Sic throughout]

[78] In cross-examination, he was asked to explain if he was aware of the additional information in the columns entitled “Current TOR Risk level and Considerations” and “Proposed TOR Risk level and Considerations”, notably the part that stated the following: “Ind [sic] non advertised appointment CS-04 Level. Demonstrated Merit in a PG-06 Appointment Process”.

[79] Mr. Mondor stated that the “red flag” meant that it was not flagged for automatic approval but that it required further discussion. He said that HR never raised any of these risks with him. He was not aware that a risk had been flagged at the WMC since he did not attend its meeting, and he was not sure what it meant by the risk. He said that the fact that the appointee qualified as a PG-06 was not given much weight.

[80] Following the WMC’s approval, the staffing action was sent to ESDC’s HR branch and was processed. One of the final steps in the staffing documentation process was the “Articulation of Selection Decision” (JBOD, Tab 12), which Mr. Mondor said that he prepared. He could not remember when he prepared it but said that it had to have been after the WMC meeting. In cross-examination, he explained that he wrote, “[she is] [c]oming highly recommended by the IIT [sic] executive”, in the third person but that it meant that he and Mr. Skinner had recommended her. He acknowledged that no formal reference check was performed.

[81] Mr. Mondor acknowledged in cross-examination that he never thought of creating a PG position in his department. He felt that the appointee’s résumé demonstrated that she had the skills to be in the CS field. He agreed in cross-examination that it was also easier to hire someone into an existing CS position than to create a new PG position, since PG positions did not exist in his teams.

V. Summary of the arguments

A. For the complainant

1. The choice of process

[82] The complainant argued that this is a clear case of abuse of authority in the choice of process and the application of merit.

[83] The complainant submitted that s. 30(1) of the *PSEA* states that appointments to the public service are to be made based on merit.

[84] Mr. Taticek had career aspirations to reach the highest level as a CS-05 but first sought a CS-04 role. However, he claims he was not given the opportunity to participate due to the respondent's decision to choose a non-advertised process.

[85] The complainant submitted that Mr. Mondor received the appointee's résumé from the DGO on an unknown date in 2019. There is no evidence of when or if he received an email or of any communication submitted relating to the appointee's résumé.

[86] Mr. Mondor's evidence was that he deletes all emails and calendar invitations when the relevant tasks are complete.

[87] Mr. Mondor also testified that no formal interview was held when the appointee's résumé was received. Instead, the DG entered Mr. Mondor's office on an unknown date in late 2019 or early 2020 and informed him of a previously arranged meeting with the appointee.

[88] The respondent provided no witness statements from the DGO, no email, no notes, and not even a calendar invitation that it occurred. The second meeting with the appointee also occurred on an unknown date in early 2020. Again, the respondent provided no witness statements, no emails related to the meeting, no notes, and not even a calendar invitation to establish that it occurred.

[89] The complainant submitted that for fairness and transparency reasons, public servants are expected to keep accurate records, and that there is a right to make staffing complaints and to disclosure as part of the process.

[90] The complainant submitted that Mr. Mondor's testimony about not retaining emails, calendar entries, and notes is not credible. No witness statement was provided from anyone from HR; nor were emails, notes, records of conversations, or calendar invitations retained indicating that the two meetings occurred.

[91] Further, the complainant argued that Mr. Mondor's testimony that he never had a conversation with any party that identified a risk in the staffing action and that he never completed a risk assessment is not credible.

[92] The complainant also argued that the respondent provided no witness statement, no email about the risk of using a non-advertised process to hire a PG-06 into a CS-04 position, no notes about conversations, and no evidence to substantiate how the risk was identified or resolved when asked how the risks were addressed.

[93] The complainant indicated that s. 33 of the *PSEA* gives management discretion to choose between an advertised and non-advertised appointment process, but this discretion it is not absolute (see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at para. 64).

[94] Reading from the *PSEA*'s preamble, it is clear that the federal government is committed to a public service that is characterized by fair employment processes, effective dialogue, etc.

[95] As discussed at paragraph 125 of the *Beyak v. Deputy Minister of Natural Resources Canada*, 2009 PSST 7, decision, discretion must be exercised in accordance with the *PSEA*'s legislative purpose, which includes a transparent staffing process.

[96] Further, abuse of authority is not limited to favouritism (see *Canada (Attorney General) v. Lahlali*, 2012 FC 601 at paras. 21 and 38). The definition of "abuse of authority" is not exhaustive and can include other forms of inappropriate behaviour.

[97] Mr. Mondor testified that he had the authority to decide whether to proceed with an advertised or a non-advertised process, but that discretion is not absolute or untrammelled. ESDC's "Guidance on the Use of Advertised and Non-Advertised Appointment Processes" document articulates the key considerations. Mr. Mondor admitted that none of the business reasons existed for choosing such a process. The respondent produced no documentation to justify why a non-advertised process was required and not an advertised process.

[98] The respondent admitted that no risk analysis was done. The complainant submits that it chose to ignore the risks of appointing someone classified PG-06 to a CS-04 indeterminate position.

[99] In *Beyak*, the former Public Service Staffing Tribunal ("the Tribunal") found the given rationale insufficient and an abuse of authority. Similarly, the Board must find that abuse of authority occurred in this case because no documentation demonstrates that any review was done of the reasons required for a non-advertised process.

2. The assessment of merit

[100] The assessment of merit is an important part of the staffing process. As discussed in *Rochon v. Deputy Minister of Fisheries and Oceans*, 2011 PSST 7, appointees who do not meet official requirements do not meet essential qualifications.

[101] The complainant submitted that the essential qualifications were marked globally rather than separately. Further, Mr. Mondor could not explain why the appointee was deemed qualified. He stated that she had met the asset qualifications based on her PG-06 work.

[102] The complainant's view was that the appointee was not qualified for the job. She did not meet asset criterion number 6. Mr. Mondor claimed that it was a copy-and-paste error and that that criterion was not meant to be included.

[103] Mr. Mondor's testimony is that the SOMC document was finalized after meeting with the appointee. Notably, the complainant submitted that its components were drastically reduced.

[104] In spite of significant documentary evidence that the appointee's qualification in a PG-06 pool was used to justify the appointment, Mr. Mondor testified that he did not give it much weight. The complainant claims that this evidence is contradictory and that his testimony lacked credibility.

[105] The complainant submitted that Mr. Mondor manipulated the merit criteria to convince the respondent that the appointee could be appointed.

[106] The complainant noted that assuming that someone possesses an essential skill without verifying it constitutes bias. In the *Desalliers v. Deputy Head (Department of Citizenship and Immigration)*, 2022 FPSLREB 70, decision, as in this one, the appointee lacked certain qualifications, and the respondent was found to have abused its authority in the evaluation of merit.

[107] Section 2(4) of the *PSEA* notes that abuse of authority includes bad faith and personal favouritism. In *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10, the Tribunal set out the test for establishing a reasonable apprehension of bias and commented on the need for an assessment without bias. The

Tribunal found that those responsible have a duty to carry out an assessment that is not biased and that does not create a reasonable apprehension of bias.

[108] Mr. Mondor testified that the employee met the requirements based on the completion of an acceptable program in CS, IT. The complainant alleged the diploma Mr. Mondor relied on was from an institution not recognized in Canada.

[109] This was a completely inadequate and deliberate disregard for staffing processes, including the goal to provide equitable opportunities for others.

[110] The complainant referred to paragraph 72 of *Rochon*, where the Tribunal notes that s. 36 of the *PSEA* provides broad discretion but that staffing methods must effectively assess the qualifications and be used in a fair and reasonable manner. He submits that if the assessment methods used have no connection to the qualifications or do not allow assessing them, then the outcome is not reasonable or fair. He stated that it is impossible to claim that the methods used in this case effectively assessed the qualifications or that they were fair or equitable.

[111] The complaint stated in his closing submissions that it appears that Mr. Mondor was told to “make it work”.

[112] Appointing a person who does not meet the essential qualifications is an abuse of authority. It need not be intentional (see *Tibbs*, at paras. 73 and 74).

3. Requested remedy

[113] The complainant submitted that he met his burden of proof.

[114] When abuse of authority is found, the Board has the authority to issue a declaration and to order the appointment revoked.

[115] The complainant acknowledged that the appointee is no longer in the CS-04 position. He still seeks a declaration that the respondent breached the relevant provisions of the *Act* and the revocation of the appointment.

B. For the respondent

[116] The respondent submitted that the complainant appears to have confused the party that bears the burden of proof. The complainant had the burden of establishing on a balance of probabilities that there was an abuse of authority under ss. 77(1)(a)

and (b) of the *Act* (see *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11 at paras. 42 to 44).

[117] The respondent submitted that there was no abuse of authority in the choice of process or the application of merit. The appointee met all the qualifications. There was no personal favouritism, undue pressure, political influence, or bias.

[118] To succeed with his allegation that an abuse of authority occurred, the complainant had to demonstrate on a balance of probabilities that a serious wrongdoing or flaw took place that was more than a mere error or omission. *Portree v. Deputy Head of Service Canada*, 2006 PSST 14 at para. 47, reads as follows:

47 An allegation of abuse of authority is a very serious matter and must not be made lightly. In summary, in order to succeed before the Tribunal, a complaint for [sic] abuse of authority must demonstrate on a balance of probabilities a serious wrongdoing or flaw in the process that is more than a mere error, omission or improper conduct that justifies the Tribunal's review and intervention.

[119] Section 2(4) of the *Act* notes that abuse of authority includes bad faith or personal favouritism. It also includes serious recklessness or carelessness (see *Morris v. Commissioner of Correctional Service of Canada*, 2009 PSST 9 at paras. 72 and 74; and *Tibbs*, at paras. 64 and 65). The error and omission must be so egregious that it could not have been part of the delegated manager's decision. It must be more than an administrative error in documentation.

[120] Nothing in the evidence indicates the degree of errors required to prove bad faith.

[121] Since the complainant did not prove abuse of authority, there can be no revocation of the appointment. If the Board finds that an abuse of authority occurred, then revocation would not be the appropriate remedy since the appointee is no longer in the position.

[122] The Board's authority over a corrective measure is limited by ss. 81 and 82 of the *Act* to the appointment process before it (see *Canada (Attorney General) v. Cameron*, 2009 FC 618 at para. 18). Revocation is theoretical at this stage and would

have the same effect as a declaration. The Board is limited to a declaration since the appointment process no longer exists.

[123] This case can be distinguished from *Turner v. Deputy Head (Royal Canadian Mounted Police)*, 2021 FPSLRB 52, in which the Board concluded that the essential qualifications were watered down and that they no longer represented the work being performed.

1. The choice of process

[124] Section 33 of the *Act* explicitly states that a non-advertised process may be used. There is no preference for an advertised over a non-advertised process, and the decision to use a non-advertised process does not itself constitute an abuse of authority.

[125] In *Robbins v. the Deputy Head of Service Canada*, 2006 PSST 17 at paras. 26 and 36, the Tribunal noted that the complainant must prove that the decision itself to choose a non-advertised process was an abuse of authority. In *D’Almeida v. Royal Canadian Mounted Police*, 2020 FPSLRB 23 at paras. 55 and 57, the Board noted that the *PSEA* allows for the choice of an advertised or a non-advertised process. The allegation of abuse of authority must be based on reasons other than finding a person who met the criteria to be filled. The decision must be justified and free of bias.

[126] There is no requirement to advertise all processes and no guarantee of a right of access to every position that exists (see *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 6 at paras. 32 to 35).

[127] There is also no obligation to select appointees from an existing pool. Further, Mr. Taticek did not present evidence that he was qualified for a CS-04 pool.

[128] There was an operational need for choosing a non-advertised process. In *Chuey v. Commissioner of the Correctional Service of Canada*, 2021 FPSLRB 58, the Board ruled that operational needs are a sufficient reason to choose a non-advertised process.

[129] The respondent submitted that the choice of process complied with ESDC’s “Guidance on the Use of Advertised and Non-Advertised Appointment Processes” document as well as the PSC’s *Appointment Policy* and the spirit of the *Act*. His

evidence was that he reviewed the entirety of the Guidance document. Further, the guidance document is just for guidance and does not set out requirements.

[130] There is no requirement to carry out a risk analysis; it is encouraged but not required (JBOD, page 48).

[131] Further, the respondent cannot agree with the importance given to the red column in the WMC's document. Mr. Mondor required highly specialized skills, which was why he chose the non-advertised process.

[132] As per the PSC's submissions, the deputy head must ensure that the SOMC, the narrative assessment, and the Articulation of Selection Decision are provided and these requirements were met.

[133] The complainant tried to establish a flaw in the lack of documentation, but a written rationale is no longer required, so this argument should be given little weight.

[134] To conclude, as for the choice of process, management proceeded objectively with the goal of finding someone with the relevant skills. The appointee was the best person because of her ability to work with IT vendors and her managerial experience.

2. The application of merit

[135] The respondent submitted that there was no abuse of authority in the application of merit.

[136] Sub-delegated managers benefit from broad discretion under s. 32 of the *Act* to establish the necessary qualifications for a position.

[137] Mr. Mondor testified that the appointee was the right fit. He conducted interviews, reviewed her CV, and provided a narrative assessment that assessed each essential qualification against the SOMC (JBOD, Tab 11). There were enough factors and information to support the conclusion that the appointee had the required experience criteria (see *Bérubé v. Deputy Minister of Industry*, 2021 FPSLRB 78 at para. 159).

[138] The assessment was reasonable, transparent, and fair.

[139] With respect to education, Mr. Mondor testified that the appointee met that qualification with her BA and technical diploma.

[140] Mr. Mondor was credible in his explanation for the cut-and-paste error for asset criterion number 6. This qualification was not in the Notification of Consideration, and it was the final step in the process. It was just a “nice to have” and not an essential qualification.

[141] With respect to allegations of bias, convincing evidence is required, and it was not provided (see *Clout v. Deputy Minister of Public Safety and Emergency Preparedness*, 2007 PSST 22 at paras. 41 and 42).

[142] There is no evidence that the merit criteria were lowered to favour the appointee.

[143] The complainant did not provide any evidence to substantiate the personal favouritism allegation.

[144] The complainant failed to prove that the respondent was reckless with its document retention. Several Board decisions mention that omissions do not amount to abuse of authority (see *Thompson v. President of the Canada Border Services Agency*, 2017 PSLREB 22; and *Adkin v. Deputy minister of the Department of the Environment*, 2017 FPSLREB 40).

[145] For those reasons, the respondent submitted that the complainant did not establish bias or abuse of authority in the selection of merit and requested that the complaint be dismissed.

C. For the PSC

[146] The PSC filed general policy and specific submissions. It did not take a position on the merits of the complaint. In its submissions, it reviewed the concept of merit under s. 30 of the *Act*. It also highlighted the broad discretion that managers have to choose the assessment methods that they consider most appropriate. The PSC also outlined what the PSC's *Appointment Policy* requires of deputy heads when making an appointment. It submitted *Robert v. Deputy Minister of Citizenship and Immigration*, 2008 PSST 24 at para. 69, where the Tribunal concluded that deputy heads are subject

to policies that the PSC establishes and that there is an obligation under s. 29(3) of the PSEA to abide by those policies.

VI. Analysis

A. On the issue of credibility

[147] Assessing credibility has been canvassed in the oft-cited case of *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (BC CA), which the Board has repeatedly applied. In that decision, the Court confirmed that when assessing credibility, a court cannot rely only on the demeanour (the behaviour of a witness). It must subject the witness's story to "an examination of its consistency" or "... harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." In essence, the decision maker must ask whether the witness's story is consistent with what a practical and informed person would easily recognize as reasonable.

[148] On the issue of credibility, I found Mr. Mondor's testimony, for the most part, to be clear and forthright. While there were dates in the chronology of the staffing process that he could not recall, including the date the CS-04 position was created or the date he initially met with the candidate, this is to be expected since the passage of time can affect any witness's memory. I accept as credible the explanation he provided during the hearing for choosing a non-advertised process. Overall, the complainant seems to equate the absence of additional documentation to substantiate Mr. Mondor's *viva voce* testimony and his inability to recall minute parts of the chronology of a 2020 staffing process with a lack of credibility. However, the assessment of credibility is a more rigorous exercise that requires a decision-maker to look at the consistency of the totality of the evidence of any witness.

[149] Following the exchange of information between July 2020 and August 4, 2020, the complainant could have requested an order for the production of arguably relevant documents from the respondent if he was not satisfied with the responses provided or if the complainant had reason to believe that the respondent's explanations were not credible. For example, the complainant could have asked for an order for the production of information regarding when the position was created, information from Mr. Mondor's electronic calendar regarding when meetings with the appointee first took place, but no such requests were made. Instead, the complainant asks that the Board rely on

speculation and what it deems as documentary omissions to substantiate its claim that there was an abuse of authority in the choice of a non-advertised process.

[150] When looking at the evidence as a whole, I found that Mr. Mondor's testimony was consistent with the preponderance of probabilities which a practical and informed person would recognize as reasonable under the circumstances.

[151] Mr. Mondor's uncontradicted testimony was that he chose a non-advertised process for operational reasons and due to the need to focus on specific skills in the generic job description that he did not usually see in a CS-04's profile. They included good writing skills and IT procurement experience with vendors.

[152] In cross-examination, he noted that some of the business reasons for choosing a non-advertised process were not applicable to the process, and he clarified that they were suggestions, not requirements. He said that there was little chance that he would find the appointee's skill set within ESDC because existing CS-04 pools had been "relatively empty" in the past. The complainant did not provide any evidence to refute this testimony and I accept Mr. Mondor's testimony regarding the reason he chose a non-advertised process.

[153] While I do find it odd that a delegated manager would not have been advised by HR of the risk in choosing a non-advertised process to appoint a PG-06 to a newly created indeterminate CS-04 position, Mr. Mondor's uncontradicted testimony was that 1) he did not know how the WMC was governed, and 2) HR and WMC members never raised any risk with him. In the absence of any evidence from the complainant contradicting this testimony and in light of the totality of Mr. Mondor's evidence, I find it to be a reasonable explanation.

Issue 1: Was there abuse of authority in the choice of a non-advertised appointment process?

[154] Section 77(1)(b) of the *Act* provides the right to make a complaint that the respondent abused its authority in choosing between an advertised and a non-advertised process.

[155] The burden of proof lies with the complainant to prove on a balance of probabilities that there was an abuse of authority.

[156] While the *Act* does not provide an extensive definition of abuse of authority, it includes bad faith, personal favouritism, and other forms of inappropriate behaviour, "... more is required than mere errors and omissions ..." (see *Tibbs*, at paragraph 65).

[157] Section 33 of the *Act* allows the PSC to choose between an advertised and a non-advertised process.

[158] There is no preference for one process over the other. Further, the mere fact of choosing a non-advertised process does not immediately lead to a conclusion of an abuse of authority. Nonetheless, the discretion afforded by s. 33 is not absolute (see *Tibbs*, at para. 64). It is constrained by the objectives of the *Act* to ensure a fair, merit-based, and transparent staffing process within the public service.

[159] A choice of a process that is tainted with bias or a reasonable apprehension of bias cannot be fair.

[160] In *Beyak*, at paragraph 125, the Tribunal cited the Supreme Court of Canada's precedent decision on the parameters of administrative discretion, *Roncarelli v. Duplessis*, [1959] SCR 121. In *Roncarelli*, at paragraph 140, Justice Rand made the following comments on the good-faith exercise of administrative discretion are particularly relevant:

In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the 'Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud

[Emphasis added]

[161] In this case, the complainant claimed that there was an abuse of authority because the respondent did not document reasons for choosing such a process or effectively review these reasons. Further, the complainant claimed that the reasons provided by the respondent during the hearing were not credible.

[162] I disagree.

[163] Although Mr. Mondor could have better documented and retained documentation regarding this staffing process, there is no requirement in the *Act* for the extent of documentation that the complainant seeks. Further, a written rationale regarding the choice of process or a written review of the reasons is not required by the legislation or policies cited by the parties. I agree with the respondent that there was no obligation to meet any of the potential business reasons for choosing a non-advertised process that are enumerated in the ESDC's "Guidance on the Use of Advertised or Non-Advertised Appointment Processes".

[164] This policy is a guidance document for sub-delegated managers to help them make sound decisions when choosing the type of appointment process. In fact, "Annex B" of the Guide specifically notes that the reasons enumerated are examples and that the sub-delegated manager may invoke other reasons based on the manager's evaluation of the circumstances. In the case at bar, I find that based on Mr. Mondor's evidence, it is clear that he used a non-advertised process as a way to efficiently recruit the skills he needed that were missing from the Vendor Management Team.

[165] Further, this case can be distinguished from *Beyak* where the Tribunal found that the rationale provided for the use of a non-advertised process (i.e., high turnover of staff in the unit and the need to retain corporate knowledge) was essentially a sham. In *Beyak*, the respondent chose a non-advertised process to avoid scrutiny and reward the appointee. In the case at bar, the complainant has stated that the respondent's rationale for choosing a non-advertised process is not credible without providing any evidence to refute it. Moreover, I cannot accept that there was no effective review of this rationale since the uncontradicted evidence is that Mr. Mondor sent the recommendation to appoint the appointee to the WMC — a senior management committee within the ESDC — that reviewed the rationale provided and approved it.

[166] Section 33 of the *Act* gives broad discretion to managers to choose a process that meets their needs. It is a provision that is designed to facilitate flexibility in staffing. It provides discretion to choose between a non-advertised process or an advertised process. Generally, a non-advertised process may involve the consideration of only one candidate who meets the essential qualifications including language proficiency, while an internal advertised process may be longer and involve one or

more candidates. Clearly, in the case at hand, the respondent chose a process that allowed for a more efficient recruitment of talent that the Vendor Management Team needed.

[167] As Mr. Mondor testified, after receiving the appointee's CV and interviewing her, he took advantage of the opportunity to fill an organizational need that had been identified earlier following a third-party review and a recommendation that there was a need for more strategic planning-focused, and strong communication skills. The Board accepts this explanation. This is not evidence of an abuse of authority. This is the exercise of a discretionary power that s. 33 of the *Act* enables. Therefore, the Board finds that there was no abuse of authority in the choice of process.

B. Issue 2: Did the respondent abuse its authority in the application of merit?

[168] Sections 30(1), (2), and (3) and 77(1)(a) of the *Act* read as follows:

30 (1) *Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.*

30 (1) *Les nominations — internes ou externes — à la fonction publique faites par la Commission sont fondées sur le mérite et sont indépendantes de toute influence politique.*

Meaning of merit

Définition du mérite

(2) *An appointment is made on the basis of merit when*

(2) *Une nomination est fondée sur le mérite lorsque les conditions suivantes sont réunies :*

(a) *the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and*

a) *selon la Commission, la personne à nommer possède les qualifications essentielles — notamment la compétence dans les langues officielles — établies par l'administrateur général pour le travail à accomplir;*

(b) *the Commission has regard to*

b) *la Commission prend en compte :*

(i) *any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,*

(i) *toute qualification supplémentaire que l'administrateur général considère comme un atout pour le travail à accomplir ou pour l'administration, pour le présent ou l'avenir,*

(ii) any current or future operational requirements of the organization that may be identified by the deputy head, and

(iii) any current or future needs of the organization that may be identified by the deputy head.

Needs of public service

(3) The current and future needs of the organization referred to in subparagraph (2)(b)(iii) may include current and future needs of the public service, as identified by the employer, that the deputy head determines to be relevant to the organization.

...

Grounds of complaint

77 (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Board's regulations — make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of

(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2)

[Emphasis added]

(ii) toute exigence opérationnelle actuelle ou future de l'administration précisée par l'administrateur général,

(iii) tout besoin actuel ou futur de l'administration précisé par l'administrateur général.

Besoins

(3) Les besoins actuels et futurs de l'administration visés au sous-alinéa (2)b)(iii) peuvent comprendre les besoins actuels et futurs de la fonction publique précisés par l'employeur et que l'administrateur général considère comme pertinents pour l'administration.

[...]

Motifs des plaintes

77 (1) Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d'un processus de nomination interne, la personne qui est dans la zone de recours visée au paragraphe (2) peut, selon les modalités et dans le délai fixés par règlement de la Commission des relations de travail et de l'emploi, présenter à celle-ci une plainte selon laquelle elle n'a pas été nommée ou fait l'objet d'une proposition de nomination pour l'une ou l'autre des raisons suivantes :

a) abus de pouvoir de la part de la Commission ou de l'administrateur général dans l'exercice de leurs attributions respectives au titre du paragraphe 30(2) [...]

[169] Allegations of abuse of authority must be taken seriously. Further, establishing an abuse of authority in the assessment of merit on the basis of bad faith or bias requires more than administrative errors or omissions.

C. The SOMC

[170] The Board and the former Tribunal have noted that a deputy head benefits from significant discretion when establishing the SOMC. Further, the essential qualifications selected need not appear word for word in the job description.

[171] In this case, the respondent provided uncontradicted testimony that the criteria in the SOMC were drawn from the departmental generic job description for the CS-04 position (JBOD, Tab 2). It was certainly within the respondent's right to identify the essential qualifications from the generic job description that would form part of the SOMC.

[172] While the complainant spent some time comparing the PG-06 job description to the generic CS-04 job description, I have no jurisdiction to determine whether the CS-04 position was properly classified. Further, generic job descriptions for other CS-04 positions that the complainant reviewed in the IT infrastructure stream are not relevant given that the respondent's uncontradicted testimony was that he created a unique CS-04 position to support the new direction of the Vendor Management Team based on the departmental job description. Mr. Mondor's uncontradicted testimony was that the team was expanding its scope and that it needed a position that required strong skills in communications with senior management, in vendor relations, and in procurement and a more strategic IT lens to support service delivery.

[173] On reviewing the generic job description for the CS-04 position and the SOMC, it is clear that the respondent chose to focus on the few essential qualifications required to fulfil the new role in the Branch. I do not find any evidence that the SOMC was watered down. Rather, I find that the respondent created a CS-04 position that suited the particular needs of the Vendor Management Team within IITB.

[174] The complainant further claimed that the appointee did not meet the minimum education criterion, which was at least two years of acceptable post-secondary education in CS, information management, IT, or another specialty relevant to the position to be staffed.

[175] I find that the appointee's CV and Mr. Mondor's testimony that the respondent relied on the appointee's five years of post-secondary education, including a two-year diploma in IT are sufficient proof that there was no abuse of authority in the

assessment of this criterion. The complainant provided no evidence that the appointee's diploma in CS was invalid nor did he substantiate his claim that her IT qualifications were from an unrecognized institution. Moreover, her degree in English was certainly relevant to a position that required excellent writing and communication skills.

[176] The narrative assessment provided on the experience criteria was relatively comprehensive. I do agree with the complainant that the respondent relied, in part, on the appointee's experience as an acting PG-06. However, I also find that the respondent relied on the appointee's 13 years of PG experience to explain how she met all the essential qualifications, namely, 1) providing options orally and in writing to senior management, 2) providing technical direction and guidance to technical teams, and 3) working on interdepartmental working groups.

[177] In the submission to the WMC and in the Articulation of Selection Decision, the appointee's PG experience is also highlighted with a focus on her years spent in procurement, negotiating contracts, and managing procurement projects. I find nothing unusual about relying on an appointee's relevant experience in previous positions, even if those positions are not from the same classification group since experience in one position may be relevant and transferable to another.

[178] Further, I found the narrative assessment to be more than a global assessment since each essential qualification in the SOMC is numbered and corresponds to a numbered paragraph in the adjacent column which describes quite specifically how the appointee meets the essential qualification. A global assessment would not include the level of detail that is in the appointee's SOMC and narrative assessment.

[179] The SOMC assessment noted that the appointee "continually registers for training". When pressed in cross-examination, Mr. Mondor could not provide a list of the kind of training that the appointee had actually been engaged in and noted that not all appointees provide lists of their training. While there was no requirement to provide a laundry list of all the training that the appointee had completed, it would have been preferable to provide additional information about this training in staffing a senior advisor position in IT infrastructure.

D. Asset criterion number 6

[180] Regarding asset criterion number 6, I accept the respondent's evidence that this was an administrative error and should never have appeared as one of the asset criteria on the SOMC.

[181] Specifically, Mr. Mondor testified in cross-examination that the final SOMC erroneously included asset criterion number 6 but that it was due to a "cut-and-paste error" from the generic job description on which the SOMC was based. In other words, it was just an administrative error.

[182] The asset criterion was "Experience in the integration of solutions using a variety of platforms and technologies: SAP, PeopleSoft, .NET, Java, Oracle ...". However, it did not appear in the Notification of Consideration, which is the notice sent out. It was just a cut-and-paste error, nothing else.

[183] I accept this explanation for three reasons. First, as Mr. Mondor testified, this asset criterion appears nowhere else in any of the subsequent steps, including the Articulation of the Selection Decision or the Notification of Consideration or in the Notification of Appointment. Secondly, based on Mr. Mondor's testimony, it is clear that, although this criterion was in the generic job description, it is not experience that would have been required to fulfill the CS-04 job that had been created. Thirdly, looking at the SOMC, there is no corresponding narrative assessment for this asset criterion. Instead, the narrative paragraph corresponds to asset criterion number 7, which is experience in completing procurement options analysis, including estimation of level and risk.

E. The method of assessment

[184] With respect to the methods used for assessing the appointee, the respondent reviewed the appointee's CV, conducted two interviews to assess whether the appointee met the essential qualifications, asset criterion and overall fit for the team and then sent its recommendation to a senior oversight body that reviewed the recommendation made by the hiring manager. A narrative assessment of the SOMC was provided that included notations for each qualification and asset criterion. Furthermore, the hiring manager provided a rationale to the WMC Committee that was more than cursory. It included an explanation as to how the appointee's combined

experience and knowledge would benefit IITB within the department and the maturing role of the Vendor Management Team.

[185] Therefore, I find the methods used effectively assessed the qualifications. This case is vastly different from *Rochon* where the former Tribunal determined that the assessment tool used did not assess two of the essential qualifications and where a global score was used to assess two essential qualifications, rather than assessing each individually. In the case at bar, the hiring manager provided a narrative assessment that clearly demonstrates that each applicable essential qualification and asset criterion were evaluated with a specific explanation as to how the appointee's knowledge and experience in procurement, vendor management and negotiation would benefit IITB within the department.

[186] Consequently, based on all of the evidence before me, I find that the complainant has not established that the respondent abused its authority in the application of merit.

F. Issue 3: Was there a reasonable apprehension of bias in the application of merit?

[187] The test that the Board has applied for a reasonable apprehension of bias is from the Supreme Court of Canada's decision in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369, which states, "The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information ...". In the words of the Federal Court of Appeal, quoted in *Committee for Justice and Liberty*, the test is "... what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude."

[188] In *Gignac*, at para. 74, the Tribunal restated the test in the staffing context as follows: "If a relatively informed bystander can reasonably perceive bias on the part of one or more persons responsible for assessment, the Tribunal can conclude that abuse of authority exists." While *Gignac* involved reviewing an appointment process in which a hiring manager's conduct and comments were found to have given rise to a reasonable apprehension of bias against the complainant, the test applies equally to the situation at hand, in which bias is alleged to have operated in favour of the appointee.

[189] I find that on a balance of probabilities, there was no reasonable apprehension of bias in favour of the appointee in the application of merit.

[190] While it may be more difficult to assess bias in a non-advertised process where there is only one candidate, the complainant could point to no convincing evidence of conduct or pattern of conduct, on the part of the respondent, that rises to the level of bias or a reasonable apprehension of bias.

[191] The complainant's argument on bias seems to have been greatly influenced by the fact that the appointee was not from the CS group. Mr. Mondor admitted in cross-examination that it was uncommon for a person in a PG position to obtain a CS position and that this was the first and only time he had done it. However, Mr. Mondor also explained in cross-examination that it was easier to staff a CS position than create a new PG position given that no PG positions existed on the team. I find that there is simply no evidence that Mr. Mondor was in any way told by his superiors to "make it work", and I find the complainant's allegation to be without any material foundation.

[192] I also find that there was no evidence that Mr. Mondor manipulated the merit criteria to favour the appointee. Making such allegations without any foundation can be damaging to any hiring manager in the public service, even if the allegations are deemed unfounded by the Board. It can also impact relationships in the workplace which often continue long after a staffing complaint process has ended. While the right to file a staffing complaint under the *Act* may contribute to the fairness, transparency and integrity of certain internal staffing processes in the public service, I would urge any complainant to refrain from making allegations without sufficient evidence.

[193] I find that the evidence is that Mr. Mondor interviewed the appointee both informally with the DG, Mr. Skinner and then more formally with his team manager, Mr. Gauthier. He prepared a narrative assessment along with the SOMC which detailed how the appointee met the essential qualifications. Further, in keeping with staffing within IITB, he submitted his recommendation to a senior management committee within his branch which reviewed it, adding an additional level of scrutiny and rigour to Mr. Mondor's recommendation. After approval, the staffing process proceeded to the final stages, notably the Articulation of Selection Decision and the posting of the Notification of Consideration.

[194] This case is far from the factual reality of *Gignac* where the Tribunal found that a selection Board chair's comments towards the complainant before the interview clearly indicated a negative perception of the complainant's participation in the appointment process. There is no such evidence here.

[195] In fact, during Mr. Mondor's testimony, he spoke favourably of the complainant, noting that when the staffing process for the CS-04 position began, he had recently promoted the complainant to a CS-03 position. He was of the view, at the time, that the complainant would have needed more experience in a CS-03 role before being considered for a CS-04 position. In addition, the complainant himself acknowledged in cross-examination that he had no experience negotiating service level agreements with vendors, which was an asset in the SOMC that the appointee clearly met given her many years of work in procurement.

[196] Further, I find there is no evidence that there was any bias exhibited towards the appointee who was subject to an assessment process to evaluate her qualifications and was not provided any preferential advantages, as suggested by the complainant. Therefore, I find that the respondent did not abuse its authority because there was no reasonable apprehension of bias towards the appointee in the assessment of merit.

G. Issue 4: Was there personal favouritism in the assessment of merit

[197] Mr. Mondor's uncontradicted testimony was that he had no personal or professional relationship with the appointee prior to the staffing process, and no one at ESDC brought up any potential issues of personal relationships.

[198] A finding of personal favouritism must be grounded in more than pure speculation. In *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7, the Tribunal held that evidence of personal favouritism may be direct or substantial. However, at a minimum, there must be evidence of a personal relationship between the person selecting the person to appoint and the appointee. The complainant provided no evidence of a personal relationship between the appointee and Mr. Mondor or anyone else involved in the staffing process.

[199] In the absence of any evidence of a personal relationship, I find that the complainant failed to meet his burden of establishing personal favouritism. Therefore, there is no abuse of authority. While the respondent noted that there was no evidence

of undue influence in the assessment of merit, I find it unnecessary to respond to this argument since the complainant provided no evidence or arguments on this point.

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

(The Order appears on the next page)

VII. Order

[201] The complaint is dismissed.

May 10, 2024.

**Patricia H. Harewood,
a panel of the Federal Public Sector
Labour Relations and Employment Board**