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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

JANNETTE MUNDEN

Complainant

and

COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Respondent

and

OTHER PARTIES

Indexed as

Munden v. Commissioner of the Royal Canadian Mounted Police

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

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

For the Complainant: Milena Gonzalez, bargaining agent representative

For the Respondent: Milica Palinic, counsel

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

Heard by videoconference,
January 10 and 11, 2024,
and on the basis of written submissions,
filed February 2 and 22 and March 1, 2024.

REASONS FOR DECISION

I. Complaint before the Board

[1] This matter concerns a staffing complaint made by Jannette Munden (“the complainant”) on July 5, 2021, against the Commissioner of the Royal Canadian Mounted Police (RCMP) (“the respondent”). She alleged that it abused its authority under ss. 77(1)(a) and (b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) in the application of merit and in the choice of a non-advertised appointment process.

[2] The complaint was made after the internal appointment of Joan Badger (“the appointee”) to a property and building manager/coordinator position with the RCMP, classified at the AS-02 group and level. The appointment was made after the appointee’s position was reclassified from the CR-05 group and level. As part of the reclassification exercise, additional duties that the appointee did not perform previously were added to the newly created AS-02 position.

[3] The complainant alleged that the appointee did not meet the merit criteria for the AS-02 position and that it should have been advertised since a new position was created.

[4] The complaint reads as follows:

...

I am in the opinion that this process was not fair and transparent in that I who have employed at the Newmarket detachment for the past 13 years was not given an opportunity to apply for this position. I have worked 8 years in the Property Unit Newmarket as the Admin Assistance as well as 7 years experience as a Property Manager in the private sector. Merit was not applied.

...

[Sic throughout]

[5] During the exchange-of-information phase of the complaint process, the complainant clarified that she believed that the appointee did not meet the merit criteria of “Experience managing the operation and maintenance of leased or owned buildings and property” and “Experience working with external clients” when she was appointed.

[6] The complainant further detailed her allegations by completing the Board's Form 7 on December 23, 2021, which detailed her complaint as follows:

The Complainant alleges the Employer abused it's [sic] authority in the choice of process. The addition of significant duties obligates a new position number, therefore an Advertised process.

The Complainant alleges the Appointee did not meet the Essential Qualifications of the position.

The Complainant alleges the Employer abused it's [sic] authority in not being fair or transparent when reclassifying the position and not following policy or legislation.

[7] In advance of the hearing, pre-hearing conferences were held with the parties on December 8 and 14, 2023, at which the complainant's representative indicated that she planned to call several witnesses to speak to the reclassification of the appointee's position. She claimed that the reclassification was inappropriate since the respondent added several new job duties to the position that the appointee did not previously perform. She argued that rather than a reclassification, the property and building manager/coordinator position was new, and as such, the appointment process should have been advertised.

[8] The respondent objected to the complainant's list of witnesses, as the Board lacks jurisdiction over classification matters. The complainant's representative clarified that she was not challenging the reclassification itself and conceded that the Board did not have jurisdiction over the matter. However, she argued that the reclassification exercise provided important context that supported her position that the respondent abused its authority.

[9] I ruled that the complainant was allowed to lead general information related to the reclassification as contextual information.

[10] The Public Service Commission (PSC) did not attend the hearing or take a position on the merits of the complaint. However, it did provide written submissions on the relevant sections of the *PSEA* and its *Appointment Policy*.

[11] For ease of reading, the term "Board" in this decision refers to both the former Public Service Labour Relations and Employment Board and the Federal Public Sector Labour Relations and Employment Board.

[12] For the reasons set out in this decision, I have determined that the respondent abused its authority.

II. Issues to be determined

- Was the appointment made on the basis of merit?
- Was the decision to proceed with a non-advertised appointment process an abuse of authority?
- If an abuse of authority occurred, what is the appropriate remedy?

III. Summary of the relevant evidence

[13] The complainant testified on her behalf. She also called Lynn Church, an employee who worked in the same location as the appointee at the time of the reclassification. Ms. Church was called as a witness to support the complainant's position that before the reclassification, Ms. Church performed certain job duties of the newly reclassified AS-02 position. The respondent called Inspector Timothy Dell'Anna as its sole witness, who was the detachment commander and spoke to the decision to appoint the appointee.

A. Timeline of the key events

[14] On January 22, 2021, an email was sent to all employees in the Toronto North Detachment from Inspector Diane Cockle, the then detachment commander, informing them that it was her last day in the position, that Inspector Dell'Anna would soon replace her, and that the appointee had recently been appointed to the detachment coordinator position (which was later renamed the property and building manager/coordinator position).

[15] On February 1, 2021, Inspector Dell'Anna began in the detachment commander role at the Toronto North Detachment.

[16] After arriving, Inspector Dell'Anna was provided with a draft statement of merit criteria. The specific date was not provided, and the statement of merit criteria submitted in evidence is undated.

[17] On May 31, 2021, the PSC sent an email in which it provided a priority clearance number for the appointment. It stated, "We are appointing the incumbent that holds position#3865, as the position was recently reclassified at a higher level."

[18] On June 14, 2021, Inspector Dell'Anna completed the narrative assessment detailing the appointee's qualifications for the AS-02 position.

[19] On June 16, 2021, the "Notification of Consideration" (NOC) for the non-advertised process (numbered 21-RCM-INA-O-LON-GTSOC-NEW-97670) was posted with a waiting period end date of June 22, 2021. It identified that the appointee was being considered for the property and building manager/coordinator position, classified at the AS-02 group and level. It stated that it was due to a reclassification.

[20] On June 28, 2021, the "Notification of Appointment or Proposal of Appointment" (NAPA) was posted, confirming the appointee's appointment. The complaint period's closing date was July 13, 2021.

[21] On July 5, 2021, the complainant made this complaint.

[22] On July 20, 2021, Denise Pitre, Human Resources Advisor, emailed Inspector Cockle and Inspector Dell'Anna, articulating in writing the rationale for the selection decision as she neglected to do so at the time the position was reclassified.

B. The complainant's testimony

[23] The complainant testified that she has been working in the public service since 1989. She started at the Immigration and Refugee Board and worked there for 18 years. In September 2007, she became an administrative assistant in property management in the respondent's York region. She stated that she also held a part-time job as a superintendent for a building, so she had property management experience. She stated that her position was abolished in 2015 and that she was placed into another position as part of a workforce adjustment process. She still held that position as of the hearing. She stated that she would have liked to have been considered for the AS-02 position but that she did not have the opportunity, as the position was staffed without an advertised appointment process.

[24] The complainant stated that she was made aware of the appointment process for the AS-02 position when a co-worker sent her the NOC. The complainant stated that had an advertised appointment process been run, she might have been placed in a pool of candidates for other positions. She stated that fairness and transparency require that everyone should have felt valued and appreciated and should have

received an opportunity to participate in the appointment process, even if none of them was the manager's preferred candidate.

[25] The complainant testified that she believed that the appointee was appointed based on personal favouritism since the manager was to leave the detachment, liked the appointee, and wanted to give her a hand before leaving. She stated that she did not believe that the appointee would have acquired the required knowledge for the AS-02 position from her previous CR-05 position.

[26] To support her belief, the complainant pointed to the CR-05 job description and noted that it did not include property management experience. She stated that she compared the job description of the appointee's former CR-05 position to the appointee's reclassified AS-02 position. She stated that to her knowledge, the CR-05 position involved only administrative work, while the new AS-02 position involved a management role overseeing the building, so it was not the same position.

[27] The complainant was referred to Inspector Dell'Anna's June 14, 2021, narrative assessment and the essential merit criteria of "Experience managing the operation and maintenance of leased or owned buildings and property." The appointee's narrative assessment reads as follows:

As mentioned above, [the appointee] is the Detachment coordinator and oversees the detachment operations. Toronto North Detachment is an RCMP owned building and as such [the appointee] deals with a multitude of partners as she manages the building. On a daily basis she interacts with BGIS, Real property and each of the 23 RCMP units that occupy the building. [The appointee] very effectively manages day to day operations and ensures she communicates to all parties in a timely fashion to ensure operations are not hindered. When issues are brought to her attention she quickly collects all required information, analyses the factors, proposes opportunities to me as the OIC as well as her suggested course of action. She then communicates to all effected [sic] parties in a timely fashion inviting feedback and making any necessary changes if required.

[28] The complainant stated that she was not sure where the appointee would have obtained that experience before beginning in the role.

[29] The complainant was then referred to the part of the narrative assessment on the essential merit criteria of “Experience working with external clients”. She was asked to comment on the part that reads as follows:

[The appointee] works very well with others. She is the one point of contact in the detachment for most of the external clients as well. I have witnessed her deal with some problematic people with diplomacy and patience. She takes the time to listen with compassion while someone is expressing their frustration. She can often de-escalate a complainant with her words of advice and support. [The appointee] manages to create and maintain effective working relationships with all of her external clients.

[The appointee] consistently demonstrates a superior working knowledge of procurement and financial processes in her dealings with external contractors. She manages new and ongoing contractors and contracts in a very professional manner.

[30] The complainant stated that unfortunately, she was not well versed on the appointee’s CR-05 duties, so she was not able to comment on whether the appointee had acquired that experience in that role.

[31] On cross-examination, she agreed that she did not have firsthand knowledge of the appointee’s previous CR-05 position and that she could not comment on exactly what the appointee did in that role. However, she stated that Ms. Church was responsible for the property management work before the reclassification. As a result, she found it hard to believe that the appointee would have obtained experience managing property in her CR-05 role.

C. Ms. Church’s testimony

[32] Ms. Church testified that she was a police officer and regular member of the RCMP. From 2018 to 2020, she occupied the site commander position at the Toronto North Detachment. She was responsible for the day-to-day management of the building, and she retired in 2021. On cross-examination, she agreed that according to the organizational chart, she occupied the FP administrative support IC position (the acronyms were not explained).

[33] Ms. Church testified that some of her duties became part of the appointee’s duties after the CR-05 position was reclassified to AS-02. She stated that she was not involved in the reclassification process. However, before it, she was aware that the respondent wanted to “civilianize” her position, meaning to turn it from a police

officer to a public servant position. She stated that the detachment commander at the time, Inspector Cockle, asked her to provide a list of the duties that she performed and that she emailed it to her. The email was not entered into evidence.

[34] During her testimony, Ms. Church was referred to the AS-02 work description. She confirmed that she reviewed it before the hearing. She testified that she recognized many of the duties in the AS-02 work description from the list that she provided to Inspector Cockle. When asked how many of the tasks included in the AS-02 position belonged to her former position, she replied that “quite a few” of those descriptions or “a lot of them” were performed as part of her role. I noted that the job description was very long (five pages of single-spaced text, with narrow margins). Ms. Church did not identify any specific tasks or quantify how many of the tasks she was referring to.

[35] Ms. Church testified that the AS-02 work description was not an accurate description of the appointee’s role while she worked as a CR-05, as she, not the appointee, performed many of the tasks of the newly created AS-02 position.

[36] On cross-examination, Ms. Church agreed that she did not work closely with or supervise the appointee. She stated that they each had their own functions. When asked how she could comment on whether the appointee performed some of the same duties as she did, Ms. Church replied that some of those functions were performed by only one person.

[37] Still referring to the AS-02 job description, Ms. Church was pointed to the duties of liaising and coordinating with a company referred to as BGIS. She replied that those duties had been mostly hers. She was pointed to the duty of coordinating security clearances for contracted employees or service providers. She replied that the appointee would have done it, not her. She was pointed to the duties of coordinating and liaising with the Real Property team for building-related projects. She replied that based on her recollection, the appointee prepared requisitions for certain office furniture and liaised with the Real Property team to find the furniture. Ms. Church did not carry out those duties. She was pointed to liaising with the Divisional Property and Procurement Units on general building and day-to-day issues. She stated that that duty was hers alone.

[38] On cross-examination, Ms. Church stated that she worked in the same office as the appointee but that they did not work closely together. She stated that her duties did not overlap with those of the appointee and that they had different duties that were part of different job functions. She stated that the appointee did not act as her backup and that the appointee would refer duties to her when they were not hers. She stated as an example that if someone emailed the appointee, stating that a car was illegally parked, the appointee would always refer it to her.

[39] When asked whether anyone ever approached her and stated that there was confusion between their duties, Ms. Church replied that in the beginning, some people would email the appointee and ask her to do something, and the appointee would forward them to her, but that soon after, most people understood that they had two distinct roles.

D. Inspector Dell'Anna's testimony

[40] Inspector Dell'Anna testified that he became the detachment commander on February 1, 2021, and that he replaced Inspector Cockle, who had been in that position for approximately 1.5 years.

[41] Inspector Dell'Anna was referred to Inspector Cockle's January 22, 2021, email, which provides as follows:

***From:** Cockle, Diane*

***To:** EVERYONE_ODIV_NEWMARKET*

***Subject:** The New Detachment Commander & Coordinator*

***Date:** January 22, 2021 1:19:50 PM*

*Today is my last day as the Newmarket Detachment Commander. It's been a privilege to serve you all. I'm passing the torch to 'soon to be' Insp. Tim Dell'anna [sic] who will do a fantastic job as your new Detachment Commander. [The appointee] **has recently been appointed the new Detachment Coordinator.** A huge congratulations to both of them. Between Tim and [the appointee], I'm leave [sic] the place in excellent hands. We have certainly gone through some interesting times as a detachment; thank you for all of your patience, understanding and at times, sense of humour.*

...

[Emphasis added]

[42] When asked whether he was aware of a personal relationship between Inspector Cockle and the appointee, Inspector Dell'Anna replied that they reported to each other but that he did not believe that they had a personal relationship before the appointment was made. When asked if he had a personal relationship with the appointee, he replied that she reported to him. He added that since he was new in the position, he relied on her heavily.

[43] He testified that when he took over from Inspector Cockle, the CR-05 position had already been sent to the Organization and Classification Group, and that the decision had been made to reclassify it to a higher level and to appoint the appointee without an advertised appointment process. He stated that it was Inspector Cockle's decision to appoint the appointee. He stated that to his knowledge, the appointee had been in the CR-05 position since approximately 2016. He stated that his knowledge of the reclassification of the appointee's position was secondhand information that Inspector Cockle had shared with him. He stated that she had noticed that the appointee had been doing considerably more than what she was supposed to do, so Inspector Cockle put together a list of the appointee's tasks and submitted it to the Organization and Classification Group. It was evaluated at a higher level.

[44] On cross-examination, Inspector Dell'Anna was asked to explain the content of the emails that he, Inspector Cockle, and Ms. Pitre exchanged on July 20, 2021, which read as follows:

From: Pitre, Denise <Denise.Pitre@rcmp-grc.gc.ca>

Sent: July 20, 2021 8:11 AM

To: Cockle, Diane <diane.cockle@rcmp-grc.gc.ca>; Dell'Anna, Tim <tim.dellanna@rcmp-grc.gc.ca>

Subject: Selection Decision - Reclassified position - 3865

Good morning,

In reviewing the file for the a/n, I neglected to articulate in writing the selection decision of reclassifying [the appointee] into her reclassified substantive position.

The position was reclassified at the beginning of January 2021. Supt. Cockle was preparing for transfer and Insp. Dell'Anna took command of Toronto North Detachment at the end of January 2021.

I had conversations with both of you with regards to the reclassification of [the appointee] and the decision was based on the following:

-[the appointee] had been performing the majority of the duties of the reclassified position since 2016

-[the appointee] is qualified to perform all of the duties of the reclassified position

-If [the appointee] was not selected for reclassification in the position, it could result in a workforce adjustment situation

Please confirm this information by replying to this e-mail. As well, if this information is incorrect or if you recall additional details, please advise.

...

Denise Pitre

Human Resources Advisor, Public Service and Civilian Member Staffing "O" Division Career Development and Resourcing

Royal Canadian Mounted Police

...

From: *Cockle, Diane*

To: *Pitre, Denise*

Subject: *RE: Selection Decision - Reclassified position - 3865*

Date: *July 20, 2021 8:19:03 AM*

Good Morning Denise: Yes, I can confirm that this is the information that you provided me in relation to [the appointee].

Thanks, Diane

...

From: *Dell"Anna, Tim*

To: *Pitre, Denise*

Cc: *Cockle, Diane*

Subject: *RE: Selection Decision - Reclassified position - 3865*

Date: *July 20, 2021 5:11:31 PM*

Hi Denise,

It was my understanding when I assumed command the selection decision had been made by Supt. Cockle based on your first two points. The part about workforce adjustment certainly may have been part of Supt. Cockles decisioning however I can not comment on it as I had limited knowledge of the process at the time. I do know and had discussions with Supt. Cockle about [the appointee] having preformed the duties of the reclassified position for some

time and that she was certainly qualified to preform the duties of the reclassified position.

*Thank you,
Tim*

[Sic throughout]

[45] Inspector Dell'Anna stated that Ms. Pitre's email summarized the decision that had been made. He stated that when he started in his position on February 1, 2021, the decision to appoint the appointee to the AS-02 position had already been made. He did not know the exact date of it. He stated that he was given the responsibility to finalize the process. He testified that although the decision had already been made, he believed that the decision was sound and that it was only a question of gathering the information to complete the process.

[46] Inspector Dell'Anna testified that he was provided with a draft of the statement of merit criteria that had been prepared. He stated that he reviewed it with the staffing advisor, to understand the process. He stated that he was instrumental in creating the narrative assessment for the appointee's appointment, which bears his signature.

[47] He was asked to explain the five-month gap between the announcement of the appointee's appointment and the NOC. He replied that the delay occurred because he was new to the detachment commander role and was very busy. He stated that he knew that he had to complete the narrative assessment but that he had to familiarize himself and better understand the appointee's qualifications and how she met them. He explained that he had no previous experience in that role and that he was responsible for the RCMP's Transnational Serious and Organized Crime Newmarket Detachment, so that took a significant amount of his attention. He stated that he also had a lot on his plate at the time since a decision had been made to merge two units into one.

[48] When asked whether he could have decided not to appoint the appointee, he replied that he did not know and that he had never turned his mind to that. He stated that she was already in the role but that he guessed that until the appointment was advertised, the process was not finished, so it was not yet official.

[49] Inspector Dell'Anna testified about the appointee's work experience both before and after January 22, 2021. I have included only his testimony on her experience

before that date, as the experience that she acquired after she was appointed is irrelevant. I also note that the narrative assessment is based almost exclusively on his observations of the appointee after February 1, 2021.

[50] When asked about his work experience with the appointee before February 1, 2021, Inspector Dell'Anna testified that he did not work with her directly but that he saw her regularly when he dealt with Inspector Cockle, as the appointee's desk was next to her office. He stated that he knew the appointee as the go-to person for anything involving Inspector Cockle. He stated that he also knew the appointee from many years before when she was in the Proceeds of Crime Unit. He stated that at that time, he was in the Stock Market Unit, so they did not work together, but that he knew of her. He did not set out her position while she was in the Proceeds of Crime Unit.

[51] When asked on cross-examination how much time he spent observing the appointee before February 1, 2021, he stated that he would on occasion speak with her while waiting to see Inspector Cockle but that he had not observed her work firsthand. However, he added that he contacted her whenever issues arose with the building, such as a lighting problem, and she would have them addressed.

[52] In cross-examination, Inspector Dell'Anna was asked whether he looked into the appointee's experience back to 2016. He replied, "No", and stated that he did not go back to previous detachment commanders. He spoke only with Inspector Cockle. He stated that he could speak only to the appointee's work in 2019 going forward as that was the time in which she reported to Inspector Cockle.

[53] In terms of the appointee's experience dealing with external clients, he stated that while in the Proceeds of Crime Unit, her name was on its website as the contact person for questions from the public. He stated that while in that role, she was the first person to answer calls, so she had a fair amount of experience dealing with the public. I note that that experience was not included in the narrative assessment.

[54] In terms of experience managing leased buildings and property, Inspector Dell'Anna testified that he was aware that the appointee had assisted his predecessor, Inspector Cockle, on a number of projects as part of modernizing their offices. He stated that she was responsible for helping to prepare small-business plans by completing a template so that funds could be approved before the Real Property team was involved. He stated that that team was responsible for working directly with third

parties. Inspector Dell'Anna testified that he was able to observe that the appointee had experience managing real property since she explained to him what he had to know when he began in his position. He stated that she had a good understanding of day-to-day operations and how the parts related. He stated that several different entities and companies were involved in their facility's property management. He testified that he observed that she was very knowledgeable as to how things worked in the building and that she knew who was responsible for doing what in the building, so she could direct people to the right person if she was not responsible for doing something.

[55] In cross-examination, Inspector Dell'Anna was asked to clarify how he had satisfied himself as to the appointee's experience managing real property before January 2021. He replied that he spoke with Inspector Cockle when he completed the narrative assessment. He stated that the appointee gained that experience while working for Inspector Cockle and that she interacted with the Real Property team and BGIS, which was an external service provider. He stated that when he assumed the detachment commander role, the appointee had been involved in a number of projects and was responsible for coordinating several aspects of projects with the Real Property team. Some of these carried over after his arrival.

[56] Inspector Dell'Anna also testified to the appointee's experience managing a budget and to her knowledge of procurement policies. However, I have not included that testimony, as the complainant did not contest that the appointee met those essential qualifications.

[57] When asked if the appointee ever approached him with questions about how to do her job, he replied that only one instance came to mind. He stated that it involved the annual renewal of the bunker licence. She approached him stating that the renewal was coming up and that she had never done it before. She asked for his help and they figured it out. He stated that he believed that Ms. Church had done it before. He stated that that was one of the few times she asked him for assistance because she did not know how to do something.

[58] Inspector Dell'Anna testified that the decision to proceed with a non-advertised appointment process was made because the appointee was more than qualified for the position and because it was desired to avoid a workforce adjustment situation. He

explained that the appointee's position was not new but was an upgrade to the existing position. He stated that had management decided to create a new position, the appointee's position would have been eliminated, and she would have been subjected to the workforce adjustment process. He added that he had only limited knowledge of the workforce adjustment process when the decision was made. When asked who made the decision not to create a new position, he said Inspector Cockle and Human Resources but that the Organization and Classification Group did not recommend creating one.

[59] Inspector Dell'Anna testified that Ms. Church reported to Inspector Cockle. However, she did not report to him after he took over from Inspector Cockle. He stated that he had limited interactions with Ms. Church aside from receiving the reports that she prepared for the Serious and Organized Crimes Unit. He stated that Ms. Church was not at work very often and that she went on sick leave for an extended period until she retired. He stated that her position still exists.

[60] On cross-examination, Inspector Dell'Anna was asked where the additional duties added to the newly reclassified AS-02 position came from. He stated that the only duty that he was aware that the appointee did not carry out previously was licensing the bunker. He stated that he could not speak to what she did before her position was reclassified. He stated that he knew of some of her duties while she reported to Inspector Cockle but that he could not speak to the duties that had not been hers before the reclassification. He stated that when Inspector Cockle took over the position, she observed that the appointee was doing significantly more tasks than were in her position, so she listed those duties and submitted them to the Organization and Classification Group for reassessment. That is how the appointee was reclassified.

[61] On cross-examination, Inspector Dell'Anna testified that he was not aware of Ms. Church's day-to-day duties. He stated that she was on leave for three to five months before he arrived and that she then used up her leave before she retired. He stated that he was not aware that Inspector Cockle had requested that Ms. Church provide a list of her duties. However, he stated that he was aware that Inspector Cockle was trying to figure out everyone's duties.

[62] On cross-examination, Inspector Dell'Anna was shown the job description of the appointee's previous CR-05 position and the one for the newly reclassified AS-02 position. He agreed that they had notable differences. He stated that he saw some overlap but that the AS-02 position had more responsibilities. He noted that the job descriptions were generic. As such, some of the tasks would apply and others would not, depending on the detachment and its size. He testified that the appointee's previous CR-05 position no longer exists. He stated that her position evolved over the years and that Inspector Cockle observed that the appointee did much more than a detachment clerk would normally do.

[63] On cross-examination, he was asked whether he received any complaints after the appointee's appointment. He replied that he was aware of three. He stated that he believed that they resulted from a misunderstanding since people believed that a public service (civilian) position and a regular member (police officer) position had been merged. However, it was not so. He stated that public servants' roles and police officers' roles are completely separate. He speculated that it was possible that Inspector Cockle might have thought that Ms. Church did things that she should not have been doing. However, he did not know that for a fact.

[64] Inspector Dell'Anna was referred to the PSC's May 31, 2021, email, which refers to the AS-02 position and states as follows:

In order to give the PSC some time to monitor, the below included clearance number WILL ONLY BECOME VALID TWO WORKING DAYS after the date of this reply. Organizations MUST NOT make offers and/or appointments until this period has elapsed...

...

[65] It also provides the following under the heading "Additional information":

2021-05-31 - Use of Section 43 of the PSEA requested. We are appointing the incumbent that holds position#3865, as the position was recently reclassified at a higher level. Should a priority be considered for this appointment and be selected, it would result in the current incumbent becoming a priority. C.Tate

Appointment Process : Appointment Process in consideration of s. 43 PSEA

Reason : Internal Non-Advertised Appointment Process (restricted area within department)

[66] Inspector Dell'Anna stated that he was not familiar with the priority clearance process other than his understanding that there is a process for priority placements.

IV. Summary of the arguments

A. For the complainant

1. Whether the appointee met the merit criteria for the position

[67] The complainant submitted that the evidence did not support the claim that the appointee met the essential qualifications of the position as of her appointment in January 2021. She pointed to the narrative assessment, which was based on experience that the appointee obtained after she was appointed to the position. She argued that Inspector Dell'Anna's testimony that he discussed the appointee's previous experience with Inspector Cockle lacked credibility. She stated that had that conversation actually taken place, details would have been included as part of the appointment rationale. Their absence renders his subsequent testimony suspect.

[68] The complainant also referred to Inspector Dell'Anna's acknowledgement that he did not know what the appointee or Ms. Church had done before the reclassification as support for the claim that he did not engage in a meaningful conversation with Inspector Cockle about the appointee before completing the narrative assessment. Furthermore, the complainant relied on Ms. Church's testimony that she alone performed many of the tasks of the newly reclassified AS-02 position before the reclassification as proof that the appointee did not acquire the necessary experience while working in her CR-05 position.

[69] The complainant submitted that the narrative assessment should have included only the appointee's experience before her appointment in January 2021. By including examples of experience acquired while in the position, the respondent bent the rules to justify its decision. The complainant argued that that is unfair and evidence of bad faith.

[70] Lastly, the complainant argued that the evidence demonstrated that the property and building manager/coordinator position was entirely new. She argued that the respondent's argument that it was just the appointee's position with a few added duties was not supported by the evidence. The complainant submitted that the respondent misused the reclassification process to avoid following the proper procedures. She acknowledged that the position's reclassification is outside the

Board's jurisdiction. However, nonetheless, this information is relevant as it provides further evidence of the respondent's bad faith. She submitted that the proper procedure would have been to abolish the appointee's position, as it ceased to exist, and to follow the workforce adjustment process.

[71] The complainant relied on *Ayotte v. Deputy Minister of National Defence*, 2009 PSST 21 at para. 121, in which the former Public Service Staffing Tribunal ("the Tribunal") held that the respondent in that case abused its authority by not ensuring that the appointee in that case met all the essential qualifications of the position **before** it made the appointment. In *Ayotte*, as in this case, the respondent appointed someone to a position that it considered similar to the appointee's previous position, with the exception of some additional duties. However, the Tribunal held that the essential qualifications were fundamentally different and that they required different skills.

[72] The complainant urged the Board to reach the same conclusion as in *Ayotte*. She argued that the property and building manager/coordinator position required property management skills, while the appointee's previous detachment clerk position mostly involved administrative work.

[73] The complainant submitted that the evidence supports the claim that the respondent committed errors and omissions during the appointment process that amounted to bad faith and that the evidence, taken as a whole, demonstrates that it abused its authority.

2. Whether the choice of a non-advertised appointment process was an abuse of authority

[74] The complainant submitted that the respondent abused its authority in the choice of the appointment process when it chose a non-advertised process.

[75] The complainant alleged that while employers have significant discretion when they staff positions, in this case, the respondent failed to follow the few rules it is subject to under the PSC's *Appointment Policy*. Specifically, she argued that it did not provide a written rationale for its decision until after the decision was made and that once it was produced, it was subpar and based on inadequate information.

[76] The complainant submitted that the respondent's rationale as articulated in its July 20, 2021, email does not satisfy the concerns that the Tribunal articulated in *Beyak v. Deputy Minister of Natural Resources Canada*, 2009 PSST 7 at para. 151 (which the Board reaffirmed in *Hunter v. Deputy Minister of Industry*, 2019 FPSLREB 83 at para. 85), which stated this:

151 The Tribunal is concerned that the requirement for producing a rationale for a non-advertised appointment appears to be only the filing of a document without consideration of its content. In these complaints, there was no effective review of the reasons invoked in the rationale.

[77] In *Hunter*, the Board recognized that the PSC's *Appointment Policy* "... obliges deputy heads to properly document and retain information for a minimum of five years after the last administrative action for each appointment" (at paragraph 64). It determined that the rationale was developed in bad faith due to the errors and omissions that included in part that the rationale was written after the decision to hire the appointee was made and that the reasons in it were not supported by the evidence.

[78] The complainant argued that the same thing occurred in this case. The respondent's rationale was prepared on July 20, 2021, which was after the complaint was made. It was also over a month after the NOC was posted and almost six months after the appointment was made.

[79] The complainant also relied on *Cameron v. Deputy Head of Service Canada*, 2008 PSST 16, and *Ayotte*, in which the Tribunal found that errors and omissions amounted to bad faith such that there was an abuse of authority. In those decisions, as in *Beyak* and *Hunter*, the rationale was written after the decision stage.

[80] The complainant referred to *Merkley v. Deputy Minister of National Defence*, 2017 PSLREB 47 at para. 25, in which the Board stated, "When choosing a non-advertised process, an employer must be careful not to favour an individual and must fairly and objectively assess the candidate's qualifications ...".

[81] In the present case, the complainant argued that the evidence did not support the claim that the respondent fairly and objectively assessed the appointee. Rather, Inspector Dell'Anna's evidence was that Inspector Cockle made the appointment decision before she departed on January 22, 2021.

[82] The complainant relied on *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, in which the Tribunal identified five categories of abuses of authority. At paragraphs 71 and 73, it stated the following:

71 What these five types of abuse all have in common is that Parliament could not have intended to delegate the authority to act in such an outrageous, unreasonable or unacceptable way

...

73 While abuse of authority is more than simply errors and omissions, acting on inadequate material and actions which are, for example, unreasonable or discriminatory may constitute such serious errors and/or important omissions to amount to abuse of authority even if unintentional.

[83] The complainant submitted that in the present case, the respondent exercised its discretion in bad faith and with an improper intention to avoid doing things properly, to justify appointing the appointee. It made few efforts to follow the few rules that it is subject to under the PSC's *Appointment Policy*. The complainant submitted that by doing so, the respondent made it clear that it wanted to appoint the appointee to the position for reasons other than merit.

B. For the respondent

1. Whether the appointee met the merit criteria for the position

[84] The respondent submitted that the complainant failed to meet her burden of demonstrating that it abused its authority in the application of merit. It submitted that the appointee was qualified to perform the reclassified position's duties and pointed to the narrative assessment as demonstrating that she was qualified. It also relied on Inspector Dell'Anna's testimony as to the appointee's relevant experience while working in the Proceeds of Crime Unit, as well as her experience involving real-property projects that she started while working for his predecessor, Inspector Cockle, and that she completed under his supervision.

[85] The respondent stated that candidates are assessed against the statement of merit criteria to establish their qualifications for a position, as reflected by the language in s. 30(2) of the *PSEA*. That is the method used to determine whether candidates are qualified to perform a position's associated duties. Candidates are not assessed against work descriptions.

[86] The respondent argued that this case is distinguishable from *Ayotte*, a case that also involved reclassified positions. For example, under education requirements, a bachelor's degree was required for one position but a 'master's degree was required for the other. As for experience, one position required experience working as a designer in education or training, and the other required experience with software and learning-management systems.

[87] It argued that the complainant provided no evidence of the CR-05's position's essential qualifications that would allow indulging in the same analysis. The respondent restated that candidates are assessed against merit criteria and not work descriptions. It noted that as of the reclassification, the position's title was changed from detachment clerk to detachment coordinator, and those titles are perceivably on the same continuum. Similarly, its classification changed from CR (clerical and regulatory) to AS (administrative services) — both of which are administrative job codes.

[88] The respondent argued that *Ayotte* is also crucially distinguishable from this case in that the issue in *Ayotte* was the appointment of a person from one position into a completely different position. That was not done in this case, which is about the incumbent's appointment to her reclassified position. It stated that the CR-05 position that she occupied was converted to AS-02 by the Organization and Classification Group based on the duties associated with it, a majority of which she was doing before the position was reclassified.

[89] It stated that the appointee met the reclassified position's merit criteria.

2. Whether the choice of a non-advertised appointment process was an abuse of authority

[90] The respondent submitted that the complainant failed to meet her burden of demonstrating that it abused its authority when it chose to proceed with a non-advertised appointment process.

[91] It stated that the rationale for its decision was articulated in the July 20, 2021, email. It argued that neither the omission of documenting it initially nor the rationale itself indicated bad faith or recklessness on its part. It argued that one omission was not sufficient to displace the complainant's burden and that the rationale did not bear indicators of bad faith on its part.

[92] The respondent relied on *Tibbs* and argued that abuse of authority is a matter of degree. For such a finding to be made, an error or omission must have been so egregious that it could not have been part of the delegated manager's discretion. Relying on *Tibbs*, it argued that a serious wrongdoing or flaw in the process is required.

[93] The respondent argued that despite the timing of its rationale for its decision, nonetheless, it met the requirements of the PSC's *Appointment Policy*. It stated that that policy does not specify when the articulation must be prepared or what it should contain, only that deputy heads must ensure that the information is accessible for a minimum of five years. The fact that it was prepared after the appointment was made is not sufficient to find an abuse of authority.

[94] The respondent referred to *Bérubé-Savoie v. the Deputy Minister of Human Resources and Skills Development Canada*, 2013 PSST 2, in which the written rationales were signed after one of the acting appointments at issue had already ended and shortly before another acting appointment ended. Even though they were submitted late, the witness in *Bérubé-Savoie* explained how the appointments met the relevant criteria. The Tribunal concluded that while the written rationales should have been more detailed and were not fully compliant with departmental and PSC policies and guidelines, it did not demonstrate negligence or carelessness that would have constituted an abuse of authority.

[95] The respondent argued that the situation in *Bérubé-Savoie* is comparable to this case. It referred to Ms. Pitre's July 20, 2021, email, in which she admitted that she neglected to document the reasons for choosing a non-advertised appointment process. Ms. Pitre confirmed the rationale with both Inspector Cockle and Inspector Dell'Anna. Inspector Cockle confirmed the rationale in a follow-up email, while Inspector Dell'Anna went a step further. In his emailed response, he was candid about being unable to comment on the workforce adjustment part of the reasoning, as he had limited knowledge of that process at the time. He confirmed that he knew and that he had discussions with Inspector Cockle about the appointee having performed the duties of the position for some time and that she was qualified to perform them. However, unlike in *Bérubé-Savoie*, the reasons in the rationale were clear in this case.

[96] The respondent argued that this case is distinguishable from the complainant's cited case law. In *Beyak*, no written rationale was prepared for one of the acting periods. There were also many other errors, such as deciding to make two separate retroactive acting appointments intentionally, to avoid being subject to the requirement in the *Public Service Employment Regulations* (SOR/2005-334) of notifications of acting appointments, the rationale did not address the acting appointment's retroactivity, and the rationale stated that prospective candidates would have access to the position through recourse.

[97] In *Hunter*, the errors and omissions were also far more egregious. They included the rationale being undated and the respondent being unable to produce a coherent narrative about its conclusion. Also, the hiring manager initially refused to provide the complainant with a written rationale and said that there was no obligation to provide one.

[98] On the contrary, in this case, the rationale indicated self-reflection in neglecting to document the selection decision and the desire to correct the omission. It then provided coherent reasons for choosing a non-advertised process, which were supported by witness testimony.

[99] The respondent stated that it was not obligated to canvass other individuals for the position. Section 33 of the *PSEA* states that managers may use either an advertised or a non-advertised process to make an appointment. The Tribunal has established that the simple fact of using a non-advertised process does not constitute, in and of itself, abuse of authority (see *Vaudrin v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 19 at para. 51).

[100] The respondent stated that the "Articulation of Selection Decision" indicated three comprehensible reasons for its decision. It argued that the reasons were clear and coherent and that they were supported by the evidence and the case law. It stated that the evidence reflected that the appointee performed a majority of the reclassified position's duties before she was appointed to the role.

[101] The respondent also argued that it was a fair and common-sense decision to use a non-advertised appointment process to appoint a qualified employee when otherwise, she would have faced a workforce adjustment situation. The respondent

relied on *Vaudrin* to support its case. The Tribunal held as follows at paragraph 56 of that decision:

56 ... the respondent appointed to these positions individuals who were already performing the duties and who, in some cases, had been doing so for a number of years, in order to avoid having them lose their employment. The respondent made a fair and common-sense decision.

[102] It argued that as in *Vaudrin*, the respondent made a fair and common-sense decision to appoint the appointee via a non-advertised process, to prevent a potential job loss that could have resulted from an advertised process. It argued that altogether, the rationale exhibited cogent reasons for choosing a non-advertised process.

[103] The respondent also made representations that the Board does not have jurisdiction over the decision to reclassify the position. As that point was not contested, I have not included the respondent's arguments on it.

C. For the PSC

[104] The PSC provided written submissions before the hearing and stated that it would not attend the hearing. It provided an overview of the applicable legislation and policy. It stated that it did not take a position on whether its *Appointment Policy* was respected. It stated that whether it was respected depended on the context of the situation when the decisions were made and on witness testimony and credibility.

[105] In its book of authorities, the PSC included *Robert v. Deputy Minister of Citizenship and Immigration*, 2008 PSST 24, as providing the generally accepted principles for non-advertised appointment processes.

D. The complainant's response to the respondent's submissions

[106] The complainant objected to certain information in the respondent's submissions that was not presented at the hearing. I noted it, as well as those made by the complainant's representative, and have not included any of those references in this decision, as no evidence was led to support them.

V. Analysis and reasons

A. Was the appointment made on the basis of merit?

[107] The complainant claimed that the appointment was not made on the basis of merit. The complainant had the burden of proof and had to meet it based on a balance of probabilities (see *Tibbs*).

[108] The *PSEA* provides that an appointee's qualifications must be assessed **before** an appointment decision is made.

[109] Section 30(1) of the *PSEA* provides that all appointments in the public service "... shall be made on the basis of merit ...". The meaning of "merit" is defined in s. 30(2) as follows:

Meaning of merit

30(2) An appointment is made on the basis of merit when

(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

Définition du mérite

30(2) Une nomination est fondée sur le mérite lorsque les conditions suivantes sont réunies :

a) selon la Commission, la personne à nommer possède les qualifications essentielles — notamment la compétence dans les langues officielles — établies par l'administrateur général [...]

[110] The requirement to assess merit before making an appointment decision is also found in the PSC's *Appointment Policy*. It provides the following relevant information:

...

Application

The Public Service Commission's (PSC) *Appointment Policy* **applies to all appointments to and within the public service made in accordance with the Public Service Employment Act.**

Policy objective

Appointments to and within the public service **shall be based on merit and free from political influence.**

...

Policy requirements

Deputy heads must:

...

Prior to appointing:

...

14. Communicate notifications for internal appointment processes, in writing, to persons entitled to be notified;

- Notifications of persons being considered for appointment must include the end date of the waiting period. The duration of the waiting period must be a minimum of five calendar day [sic].
- Notifications of appointment or proposed appointment must include information regarding the rights and the grounds to make a complaint to the Federal Public Sector Labour Relations and Employment Board and the manner and time period within which it may be made.

When appointing:

15. Ensure persons **to be** appointed:

- Meet each essential qualification

...

[Emphasis added and in the original]

[111] Section 77(1)(a) provides the Board with jurisdiction to review appointments to determine whether an abuse of authority occurred in the exercise of the authority conferred under s. 30(2); i.e., to determine whether an appointment was made on the basis of merit.

[112] In this case, having reviewed the totality of the evidence presented, I find that the respondent abused its authority by failing to ensure that the appointee met two of the essential qualifications for the work to be performed **before** she was appointed. I have reached this determination for the following reasons.

1. The appointment date

[113] As noted above, the appointment date is important as it dictates the date on which an appointee must meet the essential qualifications for a position. In its submissions, the respondent argued that the appointment was not finalized until after the waiting period indicated in the NOC posted on June 16, 2021, elapsed.

[114] The NOC was posted on June 16, 2021, and stated that the appointee “was being considered” for the property and building manager/coordinator position, classified at the AS-02 group and level. The NAPA was posted on June 28, 2021, confirming the appointee’s appointment. It did not state the date of the appointment, however, the complaint period’s closing date was July 13, 2021.

[115] In direct contradiction with the NOC and NAPA, Inspector Cockle's January 22, 2021, email bearing the subject, "The New Detachment Commander & Coordinator", states, "[The appointee] has recently been appointed the new Detachment Coordinator."

[116] Consistent with that, Inspector Dell'Anna testified that the decision to reclassify the appointee's position and to appoint her to it without running an advertised appointment process had already been made when he became the detachment commander on February 1, 2021. He testified that his role was to finish the appointment process but that the appointee "was already in the role" when he arrived. He stated that he did not know of the actual appointment date.

[117] Based on the evidence presented, I am unable to determine the actual appointment date, however, I find that it occurred at some point in January 2021 or earlier. This is problematic since the NOC and NAPA were only posted in June 2021, five months after the appointment. This is clearly contrary to the *PSEA*.

2. The assessment of the appointee's qualifications

[118] The complainant claims that the appointee did not meet two of the essential qualifications required for the AS-02 position. More specifically, the experience managing the operation and maintenance of buildings and property, and the experience working with external clients.

[119] In support of her claim, she led evidence that 1) before the reclassification, Ms. Church was the only person performing many of the tasks included in the new AS-02 position, thereby establishing that some of the task for the newly created AS-02 position were new to the appointee, and 2) the narrative assessment was prepared five months after the appointment decision was made and relied on the appointee's experience after she was appointed to the position.

[120] This, I find, is sufficient evidence to cast doubt on whether the respondent adequately assessed the appointee's qualifications against the merit criteria **before** appointing her.

[121] The complainant relied on *Ayotte*, in which the Tribunal held that the respondent in that case abused its authority by not ensuring that the appointee in that

case met all the essential qualifications of the position **before** it made the appointment. I find the following passages from *Ayotte* of use in this case:

...

118 *The Tribunal stated in Tibbs, that in the absence of evidence to the contrary, the Tribunal may draw reasonable inferences from uncontested facts:*

[54] While it is open to the respondent, for its part, to simply deny the assertion, once the complainant has presented some evidence in support of his or her assertion that abuse of authority has occurred, then the respondent will likely wish to raise a positive defense to the assertion. Moreover, it is open to the Tribunal to draw reasonable inferences from uncontested facts and, thus, if the respondent does not present evidence to explain its reasons for a particular course of action or conduct, it risks being faced with an adverse finding by the Tribunal, namely, a substantiated complaint: Gorsky, Uspich & Brandt, supra, at 9-15, 9-16.

119 *Ms. Seidman's curriculum vitae was not introduced in evidence. That could have provided some insight as to whether Ms. Seidman had the requisite experience. All the Tribunal has before it is Maj. Cyr's testimony that Ms. Seidman was qualified and that she was hired as a determinate employee in the fall of 2006 through an external process to replace the incumbent of the Chief Educational Technology position. That testimony alone is not sufficient to refute the complainants' allegations. **The respondent is responsible for conducting appointment processes. It holds all the information relating to such processes. It is therefore in a position to present evidence that can explain how an appointment process was conducted.***

120 *The Tribunal dealt with a similar situation in Cameron and Maheux, where the respondent failed to submit the appointee's curriculum vitae and assessment report into evidence:*

*[81] The Tribunal is perplexed by the fact that the curriculum vitae and the assessment report on Ms. Bouchard were not submitted by the respondent. It does not believe that the mere statement by Ms. Domingue that Ms. Bouchard met all the qualifications is sufficient, given the evidence offered by the complainants. The respondent holds all the information on the appointment process, and is in a position to submit complete evidence to explain the process if it took place in a manner different from that stated by the complainants. **It may be that the respondent elected not to place these documents in evidence because they do not exist, or because their disclosure would cast doubt on Ms. Bouchard' [sic] essential qualifications. There may be other reasons, but in the absence of these documents, the Tribunal is rendering a decision based on the evidence tendered at the hearing.***

121 The evidence before the Tribunal leads it to conclude that the respondent abused its authority because it did not ensure that Ms. Seidman met all the essential qualifications before it appointed her. The respondent relied on insufficient material when it appointed Ms. Seidman to the position. Consequently, the Tribunal finds that Ms. Seidman's appointment to the Chief English Curriculum position was not made in accordance with merit because there is no evidence that all the essential qualifications were assessed or that Ms. Seidman met them all.

...

[Emphasis added]

[122] As stated in *Ayotte*, the respondent holds all the information on the appointment process and therefore should be in a position to lead complete evidence to counter the complainant's assertion that an abuse of authority occurred.

[123] The respondent failed to. It led no direct evidence that when the decision was made in January 2021, or before, the appointee's qualifications were truly assessed. Its only witness, Inspector Dell'Anna, testified that the decision had already been made when he took over the process in February 2021. His narrative assessment for the two contested experience criteria was based on his personal observations of the appointee after she was already in the position.

[124] Inspector Dell'Anna testified that his role was to document the appointment decision that Inspector Cockle had already made. However, Inspector Cockle was not called to testify.

[125] Inspector Dell'Anna testified that after starting in the detachment commander role on February 1, 2021, he was provided with a "draft" statement of merit criteria. He did not state when it was finalized. This is again problematic, as the appointee was appointed before that date. Furthermore, no evidence was led that Inspector Cockle assessed the appointee's qualifications against those criteria when she made her decision to appoint the appointee.

[126] Two of Inspector Cockle's emails were entered into evidence. The first was her January 22, 2021, email in which she announced the appointment. The second, dated July 20, 2021, specifically addressed the rationale for her decision. It was in response to Ms. Pitre, who sought confirmation from her of the reasons for the selection decision. However, it is interesting to note that Inspector Cockle did not state that she

agreed with the rationale. Rather, she stated this: "... I can confirm that this is the information that you provided me in relation to [the appointee]." This evidence does not support in any way that Inspector Cockle assessed the appointee's qualifications before making her decision. If anything, it demonstrates an attempt by Inspector Cockle to distance herself from the decision.

[127] Inspector Dell'Anna testified that he was instrumental in preparing the narrative assessment of the appointee's qualifications, which bears his signature. He stated that his role was to gather all the information to finish the appointment process.

[128] The document was completed five months after the appointment was made. When asked to explain the delay, Inspector Dell'Anna stated that he was new to the position and very busy and that he had to familiarize himself and better understand the appointee's qualifications and how she met the merit criteria. That statement is consistent with the narrative assessment, which is based on his personal observations of the appointee. This is once again problematic, as his observations were made **after** the appointment had already been made.

[129] Despite the shortcomings in the narrative assessment, at the hearing, Inspector Dell'Anna spoke to the appointee's work experience in relation to the essential qualifications **before** she was appointed. I will focus only on "Experience managing the operation and maintenance of leased or owned buildings and property", and "Experience working with external clients", as the other qualifications are not contested.

[130] In terms of the appointee's prior experience working with external clients, Inspector Dell'Anna spoke of her experience working in the Proceeds of Crime Unit. However, he admitted that he had not worked with her directly at that time and that he had only known of her. He did not state the position she occupied in that unit or how he became aware of her experience. Most importantly, none of that experience was included in the narrative assessment. As such, there is no evidence to support that this previous experience was relied upon by Inspector Cockle when the appointment decision was made. If anything, the evidence supports that it was not relied upon since it stands to reason that it would have been included in the narrative assessment had it been the case.

[131] When asked how he satisfied himself as to the appointee's experience managing the operation and maintenance of leased or owned buildings and property, Inspector Dell'Anna stated that he had discussions with Inspector Cockle when preparing the narrative assessment. The complainant argued that that testimony lacked credibility since had those discussions occurred, the content of the narrative assessment would have reflected them. I agree that their absence casts doubt on the degree of detail of those discussions, which I will return to later in this decision.

[132] Inspector Dell'Anna testified that he was aware that the appointee had assisted Inspector Cockle with a number of projects to modernize their offices. He stated that she was responsible for helping prepare small-business plans by completing a template so that funds could be approved before involving the Real Property team. However, he also stated that the Real Property team was responsible for working directly with third parties. He stated that he was able to observe that the appointee had experience managing real property since she explained to him what he had to know when he first started. He stated that she had a good understanding of day-to-day operations and how each part interrelated with the other. He stated that several different entities and companies were involved in their facility's property management. He testified that he observed that she was very knowledgeable as to how things worked in the building and that she knew everyone's responsibilities, so she could direct people to the right person if she was not responsible for doing something.

[133] In cross-examination, Inspector Dell'Anna added that the appointee interacted with the Real Property team and BGIS. He stated that when he assumed the detachment commander role, the appointee had been involved in a number of projects and was responsible for coordinating several aspects of them with the Real Property team. He stated that some of the things that she did on these projects before he arrived, carried over after his arrival.

[134] On that topic, Ms. Church testified that it was mostly her responsibility to liaise and coordinate with BGIS, but that the appointee would prepare the requisition forms for certain office furniture and would liaise with the Real Property team to find the furniture. Those requisition forms are most likely the templates that Inspector Dell'Anna testified to.

[135] Having considered the parties' testimonies, I find that none of the respondent's evidence speaks to the appointee's actual experience managing real property. Rather, it speaks only to her being knowledgeable of the several entities involved in their facility's property management, as well as her experience completing templates or requisition forms to be sent to the Real Property team to procure furniture. His testimony that the appointee had been involved in a number of projects and was responsible for coordinating various aspects of the project with the Real Property team was simply too broad to be conclusive of anything.

[136] The respondent also provided conflicting submissions about the appointee's experience while in her CR-05 position. At times, it argued that her CR-05 position had evolved over the years and that it was simply reassessed at a higher level, while at other times, it stated that some new tasks were added to the position before it was reclassified. Inspector Dell'Anna's opinion was certainly based on the first one. He stated twice during his testimony that he believed that the appointee had been doing the job since 2016. He based his belief on Inspector Cockle telling him that after her arrival, she noticed that the appointee was doing more duties than were part of her CR-05 position, that she prepared a list of what the appointee was doing, that she sent it to the Organization and Classification Group for review, and that it came back at a higher level. As far as he was concerned, the only new task that had been added to the appointee's position was renewing the bunker licence.

[137] This is confirmed in his July 20, 2021, email sent in response to Ms. Pitre's articulation of the rationale for the selection decision. In that email, he stated this: "I do know and had discussions with Supt. Cockle about [the appointee] having preformed the duties of the reclassified position for some time and that she was certainly qualified to perform the duties of the reclassified position."

[138] Ms. Church provided evidence to the contrary. She testified that "a lot of" or "quite a few" of the duties in the reclassified AS-02 position came from her position. Further, she stated that, before its reclassification, she had performed "many" of the tasks in the new AS-02 position, not the appointee. Although Ms. Church agreed that the appointee played a role in at least some of the tasks identified in the AS-02 job description, she stated that she alone liaised with the property and procurement units on general building and day-to-day issues.

[139] Ms. Church's assertions are corroborated by the July 20, 2021, email regarding the rationale for the selection decision, which states that the appointee was performing "... the majority of the duties of the reclassified position since 2016". This supports that some of the tasks were new to the appointee. It is noted that the term majority simply means more than half.

[140] Inspector Dell'Anna's testimony did nothing to refute the testimony of Ms. Church. In fact, he admitted that he did not know the work that either the appointee or Ms. Church did before the reclassification. His lack of awareness of what the appointee did before the reclassification supports the determination that he simply accepted Inspector Cockle's assertion that the appointee had been doing the job since 2016 without probing into the details of her experience before she was appointed.

[141] As stated in *Merkley*, when choosing a non-advertised process, an employer must be careful not to favour an individual and must fairly and objectively assess the candidate's qualifications. I have not been provided with evidence to support that the respondent did so.

[142] Based on the evidence presented, I am unable to find that the appointee was assessed against the statement of merit criteria for the AS-02 position **before** she was appointed to ensure that she met the essential qualifications for the work to be performed. As such, I find that the respondent abused its authority.

B. Was the decision to proceed with a non-advertised appointment process an abuse of authority?

[143] Section 33 of the *PSEA* provides considerable discretionary authority to the respondent to select an advertised or a non-advertised appointment process. However, s. 77(1)(b) provides the Board with jurisdiction to review that decision, to determine if an abuse of authority occurred in the exercise of that discretion.

[144] The complainant had the burden of proof of establishing on a balance of probabilities that the respondent abused its authority. The Board has consistently held that abuse of authority involves more than mere errors and omissions (see *Tibbs*, for example).

[145] The complainant argued that the decision to choose a non-advertised process was an abuse of authority on the basis that the rationale for the selection decision was

written after the decision to appoint the appointee had been made and that the reasons provided in it were not supported by the evidence.

[146] The respondent conceded that initially, it omitted to document its rationale. However, it argued that the delay was due to a simple oversight, and once prepared, it met the requirements of the PSC's *Appointment Policy*. It argued that one omission is insufficient to establish an abuse of authority. It noted that the *Appointment Policy* does not specify when the articulation of the selection decision must be prepared and what it should contain.

[147] In its submissions, the PSC referred to *Robert* as providing the generally accepted principles of non-advertised appointment processes. Paragraph 59 speaks specifically to the link between the written rationale for a decision and the respondent's duty to ensure transparency and read as follows:

59 The Preamble to the PSEA sets out the legislative purpose of the Act and refers to a public service that embodies "transparent employment practices". The Canadian Oxford Dictionary defines transparent, with reference to transactions and activities in business and government, as "open to examination by the public". Thus, for non-advertised appointment processes, persons in the area of recourse may complain to the Tribunal on the ground of abuse of authority. The PSEA requires that persons in the area of recourse be notified of appointments made or proposed.

[148] As highlighted in *Robert* in reference to the preamble to the *PSEA*, the written articulation of the selection decision plays an essential role in ensuring transparency and accountability by detailing the reasons that a decision was made.

[149] The articulation of selection decision detailed in the July 20, 2021, email refers to three grounds for the decision to appoint the appointee without holding an advertised appointment process: 1) the appointee had been performing the majority of the duties of the reclassified position since 2016, 2) the appointee was qualified to perform all the duties of the reclassified position, and 3) were the appointee not selected, it could have resulted in a workforce adjustment situation. I review each ground in turn in the following sections.

1. The appointee had been performing the majority of the duties of the reclassified position since 2016

[150] No evidence was led to support this first statement. Inspector Dell'Anna testified that he did not verify what the appointee was doing before she began reporting to Inspector Cockle. He testified that he did not speak with any of the appointee's prior detachment commanders. He had only second-hand knowledge from Inspector Cockle that the appointee was doing more tasks than were in her CR-05 job description, but he did not know what they were. As stated earlier, he was not aware of what the appointee and Ms. Church did before the reclassification. As such, he could not speak to whether the appointee performed the majority of the duties of the reclassified position since 2016.

2. The appointee was qualified to perform all the duties of the reclassified position

[151] For the reasons already articulated in this decision, the evidence does not support a determination that the appointee was qualified to perform all of the duties of the reclassified position.

3. Were the appointee not selected, it could have resulted in a workforce adjustment situation

[152] Although the evidence alluded to a belief that the appointee might have been subjected to a workforce adjustment process had she not been appointed, no actual evidence was led in support of this statement.

[153] However, even if I were to accept this possibility, it was not a legitimate ground for appointing her, as the two previous statements in the articulation of the selection decision are not supported by the evidence.

[154] The respondent relied on *Vaudrin* to support its case. In *Vaudrin*, the Tribunal held that the respondent in that case made a fair and common-sense decision when it appointed individuals to avoid a workforce adjustment situation. However, *Vaudrin* held that the appointees had already been performing the position's duties, in some cases for many years.

[155] As noted earlier, the evidence does not support the claim that the appointee was already performing the duties of the position before the reclassification or that a workforce adjustment could occur. As such, I cannot reach the same conclusion as in *Vaudrin*.

[156] The respondent also relied on *Bérubé-Savoie*, in which the Tribunal reached the following conclusion:

...

60 The Tribunal finds that these processes were not properly documented from the outset. The respondent should have prepared a more detailed rationale each time the acting appointments of Ms. Goral and Ms. Paulin were extended. Moreover, the assessments of the appointees should have been more detailed and demonstrated how they met the required qualifications. In addition, the acting appointment notifications should have been published at the time the appointments of Ms. Goral and Ms. Paulin were extended. However, at the hearing, the respondent provided details about the rationales, the assessments and the notifications, and demonstrated that the appointments of Ms. Goral and Ms. Paulin were justified. Overall, the facts and the evidence do not show that there was an abuse of authority.

...

[157] Having reviewed the facts in *Bérubé-Savoie*, I am unable to reach the same conclusion. In *Bérubé-Savoie*, the appointment's decision maker testified to, and led evidence of, having satisfied herself that the appointees had the requisite experience before they were appointed. This cannot be said in this case.

[158] As a result, I find that the rationale provided for proceeding with a non-advertised appointment was improper, as the three grounds cited in the respondent's articulation of the selection decision were not supported by the evidence. Therefore, I find that the respondent abused its authority by proceeding with a non-advertised appointment process.

C. If an abuse of authority occurred, what is the appropriate remedy?

[159] In terms of corrective action, the complaint stated as follows: "I believe that the department should run a [*sic*] open selection process allowing all employees an opportunity to apply and be assessed fairly."

[160] During the pre-hearing conferences, the issue of remedy was discussed, specifically the fact that the Board does not have the jurisdiction to order that a new appointment process be held (see s. 82 of the *PSEA* below).

[161] Sections 81(1) and 82 of the *PSEA* speak to the Board's remedial discretion. The relevant excerpts provide the following:

Corrective action when complaint upheld

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

...

Restrictions

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

Plainte fondée

81 (1) Si elle juge la plainte fondée, la Commission des relations de travail et de l'emploi peut ordonner à la Commission ou à l'administrateur général de révoquer la nomination ou de ne pas faire la nomination, selon le cas, et de prendre les mesures correctives qu'elle estime indiquées.

[...]

Restriction

82 La Commission des relations de travail et de l'emploi ne peut ordonner à la Commission de faire une nomination ou d'entreprendre un nouveau processus de nomination.

[162] The complainant's representative clarified the corrective action sought by the complainant. She stated that the complainant did not seek the appointment's revocation. Rather, she wished to obtain a declaration that the respondent abused its authority and to obtain damages from its improper actions.

[163] The issue of the Board's remedial authority in cases where an appointment was not made on the basis of merit has been the topic of several of its decisions. In this case, I am not prepared to order the appointment revoked, as the complainant does not seek that remedy.

[164] With respect to the complainant's damages request, she testified that an advertised process would have enabled her to be placed in a pool of candidates, which could have led to other appointment opportunities at a higher level. She testified that she would retire soon and that an appointment at a higher level would represent higher wages and ultimately a larger pension.

[165] This evidence is highly speculative and it remains hypothetical that the complaint would have been in a pool of candidates and be promoted. Further, the complainant's representative made no representations in support of its claim for damages.

[166] For those reasons, I limit the remedy in this decision to a declaration that the respondent abused its authority.

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

(The Order appears on the next page)

VI. Order

[168] The complaint is allowed.

[169] I declare that the respondent abused its authority in the application of merit and by selecting a non-advertised appointment process in the appointment process bearing the number 21-RCM-INA-O-LON-GTSOC-NEW-97670.

October 17, 2024.

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