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File: 771-02-46262

Citation: 2025 FPSLREB 1

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

MARY D'ANGELO PROSPERI

Complainant

and

DEPUTY HEAD
(Canada Border Services Agency)

Respondent

and

OTHER PARTIES

Indexed as
D'Angelo Prosperi v. Deputy Head (Canada Border Services Agency)

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

Before: Amélie Lavictoire, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Tara Baxter, representative

For the Respondent: Sarah Rajguru, counsel

For the Public Service Commission: Marc-Olivier Payant, senior analyst

Heard via videoconference,

June 27 and 28, 2024.

REASONS FOR DECISION

I. Complaint before the Board

[1] In November 2022, the deputy head of the Canada Border Services Agency ("the respondent" or CBSA) appointed an employee to a manager of regional trade operations position on an indeterminate basis. It did so via a non-advertised appointment process. In this decision, the individual appointed will be referred to as "the appointee".

[2] That position, classified FB-06, is in the respondent's Trade Operations Division ("the Division") in Hamilton, Ontario. The incumbent has managerial responsibility for the Adjustment Risk Management unit, otherwise known as the "ARM unit".

[3] The complainant, Mary D'Angelo Prosperi, made a complaint with the Federal Public Sector Labour Relations and Employment Board ("the Board") under ss. 77(1)(a) and (b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*). She alleges that the respondent abused its authority by choosing a non-advertised process and in its assessment of the merit criteria.

[4] When it is distilled to its essence, this complaint pertains to the fact that before the appointment process at issue (numbered 2022-INA-GTAR-FB6-9341) was launched, the respondent gave the appointee one or more lengthy acting assignments in the position without first notifying all employees of the acting opportunity and allowing them to have their candidacies considered. The appointee occupied the manager of regional trade operations position on an acting basis since the creation of the ARM unit. It would appear that she occupied the position for almost two years before the indeterminate appointment at issue was made.

[5] The complainant, who is now retired, would have wanted to be considered for the acting appointment and the subsequent indeterminate appointment. According to her, she was not provided with the opportunity to make her interest known. She believes that she met all the merit criteria.

[6] The complainant also argues that the respondent abused its authority in the assessment of merit when it relied on the appointee's résumé, a performance management assessment that someone other than the delegated manager conducted, and the delegated manager's personal knowledge of the appointee's work to complete

the assessment of the merit criteria. She argues that the respondent relied on inadequate and incomplete information when it assessed the appointee's candidacy.

[7] The Public Service Commission filed written submissions but did not participate in the hearing.

[8] In staffing matters, the burden of proof rests with the complainant. Although she feels that the respondent's staffing practices at the time lacked transparency and that they hindered the career progressions of qualified employees in the Division, the evidence that she presented at the hearing was insufficient to establish that on the balance of probabilities, the respondent abused its authority by choosing a non-advertised process. Similarly, her allegation that it abused its authority in the assessment of the merit criteria was unsupported by the evidence adduced at the hearing.

[9] For the reasons that follow, the complaint is dismissed.

II. Summary of the evidence

A. The witnesses

[10] Four witnesses testified at the hearing. I will describe the general nature of their testimonies, to contextualize the summary of the evidence that will follow with respect to the choice of a non-advertised process and the assessment of the merit criteria.

[11] The complainant testified. Although she is now retired, at the relevant time, she was a senior officer (classified FB-04) in Trade Compliance (part of the Division). She learned about the appointee's indeterminate appointment when she saw a "Notification of Consideration" posted on a federal government jobs website. According to her, she met all the essential qualifications listed on the Notification of Consideration and would have wanted to have been considered for the FB-06 position. Although at one point, she had been in an FB-06 pool, she no longer was as of the appointment process at issue.

[12] The complainant also testified that in the Division, acting appointments were the gateway to subsequent indeterminate appointments via non-advertised appointment processes. According to her, in the six or seven years before the appointment process at issue, she had never seen what is termed a "call letter" seeking expressions of interest for acting appointments in FB-06 positions like the one at issue.

She would generally learn of acting appointments and subsequent indeterminate appointments only once someone had already been appointed. She testified that management issued no call letter before the appointee received an acting appointment in the position at issue. She indicated that had she seen a call letter, she would have expressed an interest in the position and would have asked to be considered for an acting appointment.

[13] The complainant also called Danny Rinaldi as a witness. He was the acting director of the Division for approximately one week in late 2022. That week coincided with the appointment at issue. Mr. Rinaldi reviewed the selection decision rationale and the narrative assessment. Satisfied that the documents were complete and that they provided the required information to support choosing the non-advertised process and the appointee's appointment, he signed them. He did not know the appointee or the complainant well; nor did he have detailed knowledge of the ARM unit's operational requirements. For those reasons, his evidence at the hearing with respect to the appointment process at issue was of limited relevance and will not be described in this decision. However, his testimony with respect to the respondent's general practice for communicating acting appointment opportunities was relevant and will be described briefly later in this summary of the evidence.

[14] The complainant's last witness was David George, the Customs and Immigration Union's (CIU) local branch president. The CIU is one of the Public Service Alliance of Canada's member unions and was her bargaining agent. Mr. George testified about discussions that occurred at a 2019 meeting of a Regional Labour-Management Consultation Committee about transparency in the respondent's use of acting appointments. His testimony will be described in the portion of the summary of the evidence titled "Evidence with respect to the respondent's commitments in staffing matters".

[15] The respondent called one witness, Christopher Yau. At the relevant time, he was the acting assistant director of the Division for the greater Toronto, Ontario, area. He was responsible for the oversight of the ARM unit, and in that capacity, he supervised the appointee for the duration of her acting appointment, until her indeterminate appointment. He prepared and signed the selection decision rationale and the narrative assessment described previously. He was the delegated manager.

B. The position, and the Division's work

[16] Mr. Yau and the complainant testified about the ARM unit's creation, the nature of its work, and the nature of the work of the unit in which the complainant worked before the ARM unit was created.

[17] The ARM unit was created in December 2020 as part of a divisional restructuring aimed at preparing the CBSA for what was described at the hearing as a major systems transformation that included implementing a new electronic system for receiving, processing, and analyzing requests to import goods. That system is known as the "CBSA Assessment and Revenue Management System". The witnesses referred to it as "CARM". I will as well.

[18] CARM had been in development for several years, and as of the hearing date, it had not yet been implemented. At the relevant time, its launch was planned for October 2023, roughly 11 months after the appointment process at issue.

[19] Before the divisional restructuring that was done in preparation for implementing CARM, a team commonly referred to as the "B2 Analysis team" made adjustments to import accounting that importers requested.

[20] The work of the B2 Analysis team also included something termed "risking", which the complainant described as conducting a risk assessment of incoming requests to import goods. Risking allowed triaging requests and transferring the lower-risk ones to other units for processing.

[21] Processing requests to reassess or refund duties and taxes was a lengthy endeavour. It could take months to process a request, and it was common for the B2 Analysis team to have a backlog of them. At times, the team could not respect the existing service standard for processing and closing requests. Although he did not say so expressly, it was generally apparent from Mr. Yau's testimony that when the ARM unit was created and it replaced the B2 Analysis team, there was a backlog, and that service standards were not being met.

[22] The complainant's and Mr. Yau's testimonies about the B2 Analysis team's work were generally consistent. However, they differed in their descriptions of the extent to which the B2 Analysis team's work was similar or the same to that of the ARM unit

that replaced it. According to the complainant, the work was the same. In his testimony, Mr. Yau indicated that there were important differences.

[23] It is not necessary for me to describe the similarities and differences, according to them. The position at issue is the manager of regional trade operations. The incumbent is responsible for the ARM unit, not the B2 Analysis team. The work done by the ARM unit, the essential qualifications required to be its manager, and the appointee's qualifications are the factors relevant to determining the complaint at issue.

[24] The complainant's insistence on the identical nature of the two teams' work was directly tied to her argument that she was qualified for the position and that she should have been considered for it. As I will explain later, although she would have liked to be considered for the position and might well have been qualified for it, whether she was qualified is not at issue.

C. The choice of a non-advertised process

[25] I will first describe Mr. Yau's testimony about his decision to staff the position at issue via a non-advertised process. I will then describe the two-page selection decision rationale that he prepared to the extent that it differs from or supplements his testimony at the hearing.

[26] In his testimony, Mr. Yau identified workplace climate, the need to prepare the ARM unit for the CARM transition, and the nature of the qualifications required for the position as the factors that led him to select a non-advertised process.

[27] Mr. Yau indicated that the Division in Hamilton had four FB-06 manager positions. Each incumbent of those positions oversaw a different team. At the relevant time, three of the four teams had experienced significant management turnover. He described those teams as having had a "revolving door" of managers. A series of individuals occupying management positions on an acting basis had transitioned through those teams over an extended period. A lack of consistent management and oversight of those teams had led to an increase in labour relations issues and employee dissatisfaction.

[28] The ARM unit was the only team in the Division that had stability at the management level. The appointee had been its acting manager since its creation in

2020. Before then, she was the acting manager of the Tariff Classification team. In addition to managing the ARM unit, she mentored and assisted the acting managers rotating in and out of the other teams. According to Mr. Yau, her efforts led to a better workplace climate.

[29] Mr. Yau testified that in preparation for the transition from the legacy system used by the Division to CARM, the backlog of requests had to be brought down to zero or as close to zero as possible. It was a significant endeavour.

[30] As indicated, the ARM unit was created in 2020 in preparation for CARM's implementation. According to Mr. Yau, the appointee's work as the unit's acting manager led to a decrease in its requests backlog and to service standards improving. The unit was on track to eliminate its backlog for the transition to CARM. She had also developed policies and procedures to guide the unit in the CARM transition. Mr. Yau testified that keeping her in place was instrumental for the Division's internal readiness for CARM's implementation.

[31] At the hearing, Mr. Yau described his assessment of the needs of the ARM unit and the Division. He indicated that the ARM unit's manager required significant experience in trade compliance, in tariff classification, and in risking. According to him, the manager had to be knowledgeable of things such as litigation holds, landmark cases under appeal, and laboratory analyses ongoing in important files.

[32] According to Mr. Yau, the appointee possessed that knowledge. She also had extensive experience in trade operations, risking, and tariff qualification. She had also demonstrated her managerial competencies over more than three years, the period during which she occupied management positions on an acting basis.

[33] The complainant testified that she met all the essential qualifications for the position. She had 35 years of experience as an FB-04. She had experience in leading people, in enforcement under the customs tariff legislation and in risking. She had experience dealing with complex claims and requests. She testified that she would not have required significant training to take over the role at issue.

[34] At the relevant time, there was one FB-06 qualified pool, which had been created as a part of a national staffing process that sought to identify qualified candidates for different CBSA sectors and roles. Neither the appointee nor the complainant were in

that pool. According to Mr. Yau, appointing someone from that pool was not feasible because all the candidates in it who possessed significant trade experience had previously been appointed to other positions.

[35] As previously indicated, Mr. Yau prepared a selection decision rationale. A significant portion of it pertains to the appointee's qualifications, including her extensive experience as a senior officer trade compliance in both the Tariff Classification Program (6.5 years) and the Risk Management Unit (7 years) and her significant management experience (3.5 years). The rationale describes her as possessing a "… unique blend of advanced [trade compliance] knowledge, core program knowledge, and risk management principles knowledge are vital to the success of the ARM team."

[36] In the selection decision rationale, Mr. Yau identified the factors supporting his decision to proceed with the appointment via a non-advertised process. They included the critical nature of the ARM unit's operations to CARM's overall successful implementation and the need to maintain the improvements that were made to the unit's service standards under the appointee's leadership. He indicated that a change in management in the ARM unit at such a critical time could impact the success of the Division's preparation for the CARM transition.

[37] The relevant factors identified in the selection decision rationale also included the appointee's previously described role in improving the workplace culture.

[38] The selection decision rationale adduced into evidence differs from Mr. Yau's testimony at the hearing in one significant way. The rationale provides a different explanation than the one described previously for the respondent's decision not to use the existing FB-06 pool to staff the position at issue. Its focus is on the appointee's candidacy and not on the fact that all the candidates in the pool who possessed the required experience and knowledge had already been appointed to other positions.

[39] The selection decision rationale indicates as follows:

> …
>
> *While there is an active FB-06 qualified pool, it is not being used as* [the appointee] *is deemed critical to the success of the ARM team, maintaining our B2 service standards and keeping* [the Division] *on track for the successful implementation of CARM … Continuity*

> *of program delivery at the current level is critical to* [the Division's] *positioning for the* [CBSA's] *number one priority, CARM. Managing the* [ARM unit] *since its inception, only* [the appointee] *has the [sic] working knowledge of required detailed elements ….*
>
> …
>
> *A change to the management within the ARM unit at this time would impact the success of our divisional reorganization, cause a large detrimental impact to meeting service standards and readiness for CARM, and put a strain on management due to increased labour relations strife. A new manager from outside* [the Division] *would need a prohibitive amount of time to get up to even basic working level in the* [ARM unit], *and that is not something* [the Division] *can afford.* [The Division] *cannot afford to go backwards with the ARM team, as its role is too critical to* [CBSA] *priorities.*
>
> …

D. The assessment of the merit criteria

[40] Much of the complainant's evidence and argument at the hearing focused on how the respondent assessed the appointee's ability to communicate effectively in writing. Although she took issue with some of the adjectives that Mr. Yau used to describe the nature and extent of the appointee's contribution to the ARM unit, at the hearing, the complainant did not argue that the appointee did not meet the position's education, experience, and personal suitability criteria.

[41] Mr. Yau prepared a six-page narrative assessment setting out how and why the appointee met the merit criteria. The portion of it that pertains to the appointee's ability to communicate effectively in writing indicates this:

> [The appointee] *interacts effectively in writing with internal and external stakeholders; employees, managers, senior management and clients, in order to communicate program requirements.* [The appointee] *prepares written information and reviews case files written by her team. She provides guidance to all levels of management in writing on program issues; sometimes explaining complex case issues and the impacts.* [She] *is in regular e-mail contact with headquarters to clarify policy and ensure program consistency.*

[42] Additional information with respect to the appointee's writing ability is included in a section of the narrative assessment that addresses her official language

proficiency. In that section, Mr. Yau indicated that she had demonstrated her written proficiency by creating standard operating procedures and through her lead role on a committee tasked with reviewing briefing notes addressed to senior management.

[43] Mr. Yau testified that he prepared the narrative assessment by relying on the appointee's résumé, her previous performance assessments, and his personal knowledge of her work as her direct supervisor. He testified that he assessed her ability to communicate effectively in writing based on her entire body of work; that is, based on all the written materials that she had prepared and that he had reviewed while he was her supervisor. He had been her supervisor since at least 2020, when she became the ARM unit's acting manager.

[44] He considered her daily email communications, including those that provided him with updates and information or that sought his guidance. He considered her contributions to preparing standard operating procedures and her efforts to ensure that those procedures were written in plain language. He also considered her work on a committee responsible for reviewing briefing notes prepared for senior management. She would regularly review the content of briefing notes that others had prepared, to ensure that the documents were of adequate quality to be presented to senior management. She would review the recommendations and information articulated in the briefing notes, to ensure that the recommendations presented were clear, adequately explained, and supported by facts.

E. Evidence with respect to the respondent's commitments in staffing matters

[45] As previously indicated, Mr. George is the CIU's local branch president. He attended a November 2019 meeting of the Regional Labour-Management Consultation Committee that addressed transparency in the respondent's use of acting appointments, among other things. At that meeting, CBSA management for the greater Toronto area presented bargaining agent representatives with a document entitled "Transparency in Staffing - Management Commitments".

[46] The document contained a series of measures meant to address concerns that bargaining agent representatives had previously raised with respect to a lack of transparency in acting appointments. The document is composed of 11 bullet points under the heading, "Steps to achieve transparency, fairness and consistency". Those bullet points can generally be described as management's commitments to

communicate acting opportunities to employees through team meetings, emails, briefings, and by posting information on a wiki (a collaborative website); to consider existing pools and talent management; and to inform employees when it considered extending acting appointments.

[47] The minutes of the November 2019 meeting describe the document as setting out "… guiding principles for managers in order to achieve a level of transparency, fairness and consistency when sharing information regarding employment opportunities with staff." One of the action items listed in the minutes was management's commitment to share a link to a wiki in which call letters for employment opportunities would be posted. Mr. Rinaldi and Mr. Yau testified that as of the hearing, the wiki no longer existed.

[48] Mr. George described "Transparency in Staffing - Management Commitments" as outlining a strategy and management's commitment to address concerns that bargaining agents had expressed. However, according to the complainant, its content constituted an agreement between management and her bargaining agent.

[49] Mr. Rinaldi and Mr. Yau disagreed with her. They both described the document as management's commitment with respect to acting appointments. They both stressed that the commitment did not apply to indeterminate appointments like the one at issue.

[50] In their testimonies, Mr. Rinaldi and Mr. Yau indicated that they believed that the respondent respected the commitment when the appointee was provided earlier acting appointment opportunities in the position at issue. They indicated that at that time, the respondent had issued what is called a verbal "call-out" for interest in the acting appointment. Mr. Yau indicated that one of his colleagues performed the call-out, but he could not recall which one.

[51] He testified that he was subsequently informed that the Hamilton office employees had been canvassed for their interest and that those who had expressed an interest had been informed of the opportunity in greater detail. According to Mr. Yau, the appointee was not the only one who expressed an interest in the acting appointment opportunity.

[52] I will pause to make a distinction between a call-out and a call letter. In her arguments, the complainant greatly emphasized the respondent's failure to issue a call letter before the appointee's appointment on an acting basis.

[53] A call-out, as described by Mr. Yau and Mr. Rinaldi, is a verbal request or inquiry addressed to employees and made during a team meeting or a briefing or in individual meetings with employees to seek expressions of interest. Call-outs are not done in writing.

[54] Mr. Yau and Mr. Rinaldi described a call letter as a written notice or letter seeking expressions of interest. They indicated that the respondent issued them only for at-level assignments. It did not issue them for acting opportunities. If the respondent issued a call letter for an acting opportunity, the staffing process would constitute an advertised process under the *PSEA*'s terms. The process would have to respect all the *PSEA*'s requirements applicable to advertised processes, including posting the opportunity on the Government of Canada's jobs website and abiding by the requirements with respect to priorities in the federal public service.

[55] Mr. George could not recall if there were instances of acting appointment opportunities not being communicated to employees after the "Transparency in Staffing – Management Commitments" document was issued.

III. Reasons

[56] As indicated, the burden of proof rests with the complainant. She has the onus of establishing that on the balance of probabilities, the respondent abused its authority; see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at paras. 48 to 55.

[57] An abuse of authority is more than an error and omission; see *Tibbs*, at para. 65. It requires bad faith, personal favouritism, serious wrongdoing, or evidence of an act that is inconsistent with Parliament's intention when delegating the discretionary power set out in s. 33 of the *PSEA* to the respondent; see *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7 at para. 40; *Portree v. Deputy Head of Service Canada*, 2006 PSST 14 at para. 47; and *Davidson v. Canada (Attorney General)*, 2021 FCA 226 at para. 25.

[58] The complainant alleges that the respondent abused its authority in the choice of a non-advertised process and in the assessment of the merit criteria. I will address those allegations, including the parties' arguments with respect to those allegations, in turn.

A. The choice of a non-advertised process

[59] Most of the evidence and arguments that the complainant presented at the hearing pertained to the respondent's choice of a non-advertised process, although indirectly so. She mostly focused on acting appointments.

[60] She argued that there was a lack of transparency with respect to acting appointments and an absence of equal access to acting opportunities. She described acting appointments generally as gateways to subsequent indeterminate appointments via non-advertised processes.

[61] The complainant argues that in this case, the respondent acted in bad faith by offering the appointee an acting appointment in the position at issue without first informing the Division's employees and providing interested candidates with the opportunity to make their interest known to management. According to her, the respondent contravened an agreement that it had made with her bargaining agent in 2019, which is set out in "Transparency in Staffing - Management Commitments". She argues that the appointee's subsequent appointment via a non-advertised process after the appointee had occupied the position at issue on an acting basis was tainted by bad faith and constituted an abuse of authority.

[62] The complainant argues that during the relevant period, the respondent frequently resorted to appointing candidates through non-advertised processes who already occupied the position on an acting basis, thus depriving qualified and experienced candidates of the opportunity to apply and be considered for promotional appointments. According to her, this happened in the present case. On this issue, she relies on *Tibbs*.

[63] The respondent argues that its choice of a non-advertised process fell well within its broad discretion in staffing matters. It submits that its choice of process was based on legitimate concerns pertaining to the impact of a management change in the ARM unit, including but not limited to workplace climate, the continuity of program

delivery, and the ARM unit's readiness for the CARM implementation. The operational considerations that led it to select a non-advertised process were amply supported by the evidence presented at the hearing. The respondent relies on *Brown v. Commissioner of Correctional Service of Canada*, 2011 PSST 15, among others.

[64] Section 33 of the *PSEA* gives deputy heads and their delegated managers broad discretion in the choice of appointment process. The *PSEA* states no preference between advertised or non-advertised appointment processes. Accordingly, it is well established that deputy heads and their delegated managers enjoy broad discretion in the choice of appointment process; see, for example, *Clout v. Deputy Minister of Public Safety and Emergency Preparedness*, 2008 PSST 22; and *Morris v. Commissioner of Correctional Service of Canada*, 2009 PSST 9. However, they must exercise that discretion in accordance with the *PSEA*'s legislative purpose and with fair and transparent employment practices; see *Beyak v. Deputy Minister of Natural Resources Canada*, 2009 PSST 7.

[65] Stated otherwise, choosing to conduct a non-advertised process is not, in and of itself, an abuse of authority. For the Board to allow a complaint alleging abuse of authority in the choice of a process, the complainant must establish that on a balance of probabilities, the deputy head's decision to choose a non-advertised process was an abuse of authority; see *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 6 at para. 7.

[66] The complainant is required to establish that on the balance of probabilities, her allegations of abuse of authority are founded. Those allegations must be grounded in the complaint made with the Board. It is important to note that her complaint pertains to the appointee's indeterminate appointment via a non-advertised process and not prior acting appointments.

[67] No information was provided to me with respect to the duration, or extension of, if applicable, the acting appointment at issue. As such, it is impossible for me to determine whether the complainant would have had a right of recourse before the Board to challenge the appointee's acting appointment. However, one thing is certain. The complainant did not make a complaint with respect to the appointee's acting appointments, and she cannot now reach back in time to challenge an acting appointment that occurred years ago.

[68] That is not to say that the complainant's arguments and evidence with respect to the acting appointments are completely irrelevant; they form part of the backdrop of her complaint with respect to the choice of a non-advertised process, specifically to her vaguely worded allegation that the respondent had a generalized and long-standing practice of using non-advertised processes to appoint individuals who had occupied the positions at issue on an acting basis. I accept that the fairness and transparency of the acting appointment processes is tangentially related to her allegation of abuse of authority in the choice of appointment process.

[69] The evidence presented at the hearing was insufficient to allow me to conclude that the respondent had a practice like the one that the complainant described. Other than her vague references to other situations in which lengthy acting appointments ended in indeterminate appointments via non-advertised processes, no documentary evidence was presented to support that allegation, and her witnesses, Mr. George and Mr. Rinaldi, did not specifically address the issue in their testimonies at the hearing.

[70] A central element of the complainant's theory of the case is the existence of an agreement between the respondent and her bargaining agent, according to which the respondent was required to inform the Division's employees of all acting appointment opportunities and to provide them the chance to make their interest known.

[71] Unfortunately, the evidence presented at the hearing did not support a conclusion that such an agreement existed at the relevant time. Mr. George, Mr. Rinaldi, and Mr. Yau were unanimous in their descriptions of "Transparency in Staffing - Management Commitments" as constituting a commitment by CBSA's management. Its title and content state as much. A commitment does not constitute a binding agreement.

[72] Even if such an agreement existed, Mr. Rinaldi and Mr. Yau testified that notice of the acting appointment opportunity for the position at issue was provided to employees, but not in writing. Although the complainant indicated that she never received a call letter about the acting appointment, she did not challenge Mr. Rinaldi's and Mr. Yau's evidence about a verbal call-out.

[73] Mr. George's testimony also generally supported their evidence. He did not recall being informed of acting appointment opportunities that had not been communicated to employees after CBSA management had committed to greater

transparency in that regard. As the local branch president, it is reasonable to expect that he would have been made aware of such situations, given that the respondent had recently committed to communicating those acting appointment opportunities to employees.

[74] In her closing arguments, the complainant argued that because Mr. Rinaldi and Mr. Yau could not recall when or by whom the call-out was conducted, the Board should conclude that the respondent did not conduct one, that it failed to achieve transparency and fairness, and that a conclusion of bad faith should follow. I disagree.

[75] It is hardly surprising that a witness would have difficulty recalling the name of the individual who conducted a call-out, or the date on which it was made, for an acting appointment in a work environment in which such appointments were routine when asked to recall the information more than a year-and-a-half later.

[76] Moreover, seeing as the complainant did not provide evidence of a generalized or long-standing practice of using non-advertised processes to appoint individuals who occupied the same position on an acting basis, whether a call-out occurred is of limited relevance, if not irrelevant, to the question of whether the respondent abused its authority by selecting a non-advertised process years later.

[77] A choice of process is normally supported by a written description of the deputy head's rationale for that choice. In this case, this description was set out in a selection decision rationale that Mr. Yau completed and signed. Mr. Rinaldi also signed it.

[78] The selection decision rationale is detailed. It outlines the serious and pressing operational needs that compelled the respondent to appoint the appointee via a non-advertised process. It indicates that a change in management in the ARM unit at such a critical time could impact the success of the Division's preparation for the CARM transition.

[79] Mr. Yau's testimony at the hearing was consistent with the rationale that he wrote in 2022. His testimony was clear, concise, and credible. As outlined in the summary of the evidence, he described recent improvements to the workplace climate, the need to prepare the ARM unit for the CARM transition, and the nature of the

qualifications required for the position as the factors that led him to select a non-advertised process.

[80] The ARM unit was preparing to transition to CARM. It had to get its caseload down to zero or as close to zero as possible, to ensure its readiness for the transition. Although the complainant disagreed with Mr. Yau's description of the significance of that transition or the scope of the work and effort required of management to prepare for it, she did not present objective evidence to the contrary.

[81] The complainant also did not challenge Mr. Yau's testimony or his description in the selection decision rationale of the workplace climate and the potential impact that a management change could have had on that climate at a critical time for the ARM unit and the Division as a whole.

[82] During her testimony, the complainant responded to the respondent's evidence with respect to the unique combination of qualifications required for the position. However, the evidence that she presented on the issue pertained mostly to her knowledge and work experience. She compared her candidacy to that of the appointee and argued that the appointee was not the only one who possessed that unique combination of qualifications.

[83] I am cognizant that the complainant believes that it was unjust that her candidacy was not considered. She had significant experience and relevant knowledge. She was interested in a promotional appointment. However, the decision to consider only one person, as was done in this case, is expressly permitted under s. 30(4) of the *PSEA*. Her assertion that she too was qualified for the position does not establish that the respondent abused its authority in this appointment process; see *Jack v. Commissioner of the Correctional Service of Canada*, 2011 PSST 26 at para. 18; see also *Clout*, at paras. 31 and 32.

[84] As previously indicated, there was a valid FB-06 pool at the relevant time. The respondent decided not to staff the position with a candidate from that pool. Mr. Yau's evidence at the hearing was to the effect that the pool no longer contained candidates with trade compliance experience. He had previously decided that the ARM unit's manager required significant trade compliance experience.

[85] The selection decision rationale does not mention that the respondent's decision not to use the pool was due to a lack of candidates with that experience. Rather, it indicates that the pool was not used because the appointee was deemed critical to the success of the ARM team and the CARM transition.

[86] I do not see the two explanations as contradictory or incompatible. Mr. Yau had determined that trade compliance experience and knowledge were important requirements, given the then-current and future challenges that the ARM unit and the Division faced generally. The complainant did not challenge his evidence that the pool no longer contained candidates possessing that experience. There could have been no candidates with trade compliance experience left in the pool, just as the appointee could have been critical to the success of the ARM unit and the CARM transition. Those statements or conclusions are not mutually exclusive; nor are they contradictory.

[87] In conclusion, on this issue, I accept that an overuse of non-advertised processes could result in low morale and discouragement to employees who would like to be considered for promotional appointments and would relish the opportunity to make their interest known. However, the Board was not presented with any evidence to support a finding that the respondent's choice of a non-advertised appointment process to appoint the appointee to the manager of regional trade operations position constituted an abuse of authority.

B. The assessment of the merit criteria

[88] At the hearing, the complainant argued that the respondent abused its authority in the assessment of the merit criteria for the position at issue by relying on inadequate or incomplete information when it carried out that assessment. According to her, the delegated manager, Mr. Yau, could not reasonably attest that the appointee met the merit criteria by relying solely on the appointee's résumé, his personal knowledge of her work during the period in which he supervised her, and a performance management assessment that someone else had prepared. The complainant relies on *Hunter v. Deputy Minister of Industry*, 2019 FPSLREB 83; and *Ross v. Commissioner of the Correctional Service of Canada*, 2017 PSLREB 48.

[89] The respondent argued that the delegated manager prepared a detailed narrative assessment that demonstrated that the appointee satisfied all the merit criteria when she was appointed. The delegated manager relied on acceptable and

adequate information sources to assess her candidacy, including her entire body of written work.

[90] According to the respondent, the fact that the complainant might have been qualified and interested in the position is irrelevant to the issue of whether there was an abuse of authority in the assessment of merit. The Board's jurisprudence indicates that a deputy head has considerable discretion when choosing between candidates and that an interested candidate does not have a guaranteed right of access to an appointment. The respondent relies on *Jack* and *Visca v. Deputy Minister of Justice*, 2007 PSST 24.

[91] The terms of the *PSEA*, and the case law interpreting it, provide relevant guidance to the Board when it decides a staffing complaint. I will set out some well-known and well-established concepts in the following paragraphs.

[92] Appointments must be based on merit; see s. 30(1) of the *PSEA*. What constitutes merit for a given position is defined by the merit criteria. Deputy heads have the authority to establish the merit criteria for the position for which a staffing action is planned; see s. 30(2). They have considerable discretion in doing so; see *Visca*, at para. 42. However, their discretion is not absolute. The merit criteria that the deputy head selects must relate to the work to be performed and be equal to or exceed the applicable qualification standards; see s. 31.

[93] Before appointing someone, a deputy head must satisfy itself that the individual satisfies the merit criteria at the moment they are appointed; see ss. 30(2)(a) of the *PSEA*. To make that determination, a deputy head may use any assessment method that it considers appropriate; see s. 36 of the *PSEA*.

[94] At the hearing, the complainant did not allege or argue that the appointee did not meet the position's education, experience, and personal suitability criteria. However, as previously indicated, she argued that Mr. Yau could not reasonably attest that the appointee met the merit criteria by relying solely on the appointee's résumé, his personal knowledge of her work, and a performance management assessment that someone else had prepared.

[95] That argument is not supported by the *PSEA*'s requirements or the jurisprudence of the Board and its predecessors. Personal knowledge can be a valid

assessment tool; see *Robertson v. Deputy Minister of National Defence*, 2010 PSST 11 at para. 63; and *De Santis v. Commissioner of the Correctional Service of Canada*, 2016 PSLREB 34 at para. 33. I see no principled reason that a delegated manager should be prohibited from relying on a performance assessment prepared by someone else to assess whether a candidate satisfies the merit criteria. Nothing in the *PSEA* or the jurisprudence supports concluding that a deputy head is prohibited from assessing a candidacy based on a performance assessment prepared by another supervisor or manager. In fact, the fact that a performance assessment was prepared by another individual could, in circumstances such as this, arguably add an element of objectivity to the assessment of the merit criteria.

[96] At the hearing, the complainant did not maintain her allegation that the appointee was assessed against a less-stringent "Statement of Merit Criteria" than had been used for an earlier advertised process for the position at issue, nor did she question or challenge the merit criteria that the respondent selected.

[97] The complainant's cross-examination of Mr. Yau and her closing submissions focused largely on the respondent's assessment of the appointee's ability to communicate effectively in writing. She argued the respondent abused its authority by relying on Mr. Yau's assessment of the entire body of the appointee's written work rather than on specific types or categories of texts that she had written, to determine that she had satisfied the criteria of being able to communicate effectively in writing.

[98] The respondent was entitled to choose the assessment method that it considered appropriate to assess the ability to communicate effectively in writing. It was entitled to rely on Mr. Yau's personal knowledge and on his assessment of the appointee's writing ability. He had been her supervisor for an extended period, and he had received multiple daily written communications from her.

[99] Nothing in the *PSEA* or in the jurisprudence supports concluding that a deputy head is prohibited from assessing a candidate's entire body of written works. Also, nothing prohibits it from considering, as part of its assessment, written works authored by another person that the candidate reviewed for clarity and comprehensiveness.

[100] A deputy head must satisfy itself that a candidate has demonstrated an ability to communicate effectively in writing. Written works authored by the candidate should

and must form part of that assessment. However, written works authored by another person and reviewed by the candidate as part of his or her duties need not be discounted. They too can provide relevant information, particularly when those works are addressed to an audience such as senior management.

[101] In this case, the correspondence that comprised the appointee's body of work varied in detail and form. It included a significant amount of correspondence authored by the complainant. Based on Mr. Yau's description of the correspondence, I am satisfied that their quantity was sufficient and their nature sufficiently varied to allow the respondent to conduct a thorough and diligent assessment of the appointee's writing ability.

[102] The respondent assessed the appointee's candidacy against the merit criteria. It did so using an assessment method that it considered appropriate. Its reliance on the delegated manager's personal knowledge, the appointee's résumé, and a performance assessment was permissible under the *PSEA*'s terms. On the whole of the evidence presented at the hearing, I conclude that the respondent did not abuse its authority in the assessment of merit.

IV. Conclusion

[103] Although the complainant is now retired and had been for some time as of the hearing date, her disappointment and frustration at not having had access to promotional appointments that interested her was still evident. She had worked for the respondent for a very long time. She believed that she was qualified for the position, and she wanted to be considered for it. However, the *PSEA* grants deputy heads considerable discretion in the choice of appointment process and in the assessment of merit. She may disagree with the respondent's decision and actions, but the evidence presented at the hearing leads me to conclude the respondent did not abuse its authority.

[104] In closing, I would like to address the following comments to the complainant's and respondent's representatives.

[105] The hearing in this matter was the first time that both representatives appeared before the Board in a staffing matter. I commend them for the quality of their submissions and for the collaboration that they demonstrated throughout the hearing.

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

(The Order appears on the next page)

V. Order

[107] The complaint is dismissed.

January 7, 2025.

Amélie Lavictoire,
a panel of the Federal Public Sector
Labour Relations and Employment Board