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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

ANDRÉANNE SAMSON

Complainant

and

**DEPUTY HEAD
(Correctional Service of Canada)**

Respondent

and

OTHER PARTIES

Indexed as

Samson v. Deputy Head (Correctional Service of Canada)

In the matter of a complaint of abuse of authority pursuant to paragraph 77(1)(a) of
the *Public Service Employment Act*

Before: Adrian Bieniasiewicz, a panel of the Federal Public Sector Labour
Relations and Employment Board

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

For the Respondent: Maryse Lepage and Geneviève Brunet Baldwin, counsel

For the Public Service Commission: Lissa Mussely and Fabien Vadnais,
counsel

Heard by videoconference,

November 14 and 15, 2023, and January 31, 2024.
[FPSLREB Translation]

REASONS FOR DECISION**FPSLREB TRANSLATION**

I. Complaint before the Board

[1] Andréanne Samson (the “complainant”) filed a complaint under paragraph 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12 and 13; the *PSEA*) alleging that the Deputy Head of the Correctional Service of Canada (the “respondent” or CSC) abused his authority in connection with the advertised selection process 2019-PEN-IA-QUE-156219 (the “Selection Process”). The purpose of this process was to fill the positions of parole officer supervisor and manager, Community Correctional Centre (CCC), classified at the WP-05 group and level

[2] More specifically, the complainant alleges that the manager’s assessment of her written exam raises a reasonable apprehension of bias because of the remarks he made about her and the actions she took in her capacity as local union president.

[3] The respondent denies having abused his authority in the application of merit. In essence, he argues that the evidence does not support the allegation of a reasonable apprehension of bias or conflict of interest between the complainant and the manager because of her union responsibilities.

[4] The Public Service Commission (PSC) participated in the hearing. Although it did not take a position on the merits of the complaint, it did present arguments designed to refute the complainant’s initial allegation that it was also a respondent in this case, along with the respondent. That said, the complainant conceded during closing arguments that the PSC is not a respondent in this complaint.

[5] For the following reasons, I have determined that the respondent abused his authority. Specifically, I find that the manager’s remarks that the complainant would have difficulty remaining impartial and non-partisan, in some respects, because of her union responsibilities, give rise to a reasonable apprehension of bias in the assessment of the complainant’s application.

II. Sealing and confidentiality order

[6] Before the hearing began, the respondent and the PSC requested that certain documents be sealed in order to protect the validity or continued use of all or part of a standardized test prepared by the Personnel Psychology Centre (PPC). After considering the arguments of the parties, I have determined that the request satisfies

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

the three prerequisites established by the Supreme Court of Canada in *Sherman Estate v. Donovan*, 2021 SCC 25, specifically that:

- 1) court openness poses a serious risk to an important public interest;
- 2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- 3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[7] More specifically, I agree with the respondent's and the PSC's arguments that allowing public access to the documents identified below poses a serious risk to an important public interest. Protecting the merit principle in the context of staffing processes in the federal public service, by preserving the validity or continued use of all or part of a standardized test, is definitely in the public interest. In particular, the merit principle helps maintain public confidence in the federal public service staffing system. Its importance is codified in paragraph 17(4)(c) and subsection 17(5) of the *Public Service Staffing Complaints Regulations* (SOR/2006-6; the "*Regulations*").

[8] As for the second part of the test, I find that the risk is related to the disclosure of the documents identified in the order below. I do not believe that there are any other reasonably alternative measures to prevent the apprehended risk. Given the information contained in the documents in question, I do not believe that redacting them would be a reasonable and sufficient measure in the circumstances.

[9] In view of the foregoing, I consider that the advantages of the confidentiality order outweigh the detrimental effects on the open court principle.

[10] Accordingly, I have endorsed the draft sealing and confidentiality order jointly proposed by all parties and ordered that:

- 1) the documents filed in evidence entitled "*Dossier des réalisations du candidat (DRC) Lignes directrices pour les évaluateurs*" [candidate achievement record (CAR) guidelines for assessors] and "*Formation des évaluateurs – Service Correctionnel Canada – Processus WP-05 – Dossier des réalisations du Candidat*" [assessor training - Correctional Service Canada - WP-05 process - candidate achievement record] are to be sealed;
- 2) the complainant's representative, the complainant and Anne Côté, for the respondent, inform the PSC that they have been exposed to the contents of the documents identified in paragraph 1 above, if they participate in an internal recruitment process within the federal public service using

simulation test 528 or 557. This undertaking remains in effect as long as these tests are used by the PSC;

- 3) the complainant's representative must not copy, photocopy or otherwise reproduce the documents identified in paragraph 1 above, in whole or in part, and must not give them to the complainant.

[11] I also ordered that the part of the hearing during which the contents of the documents identified in paragraph 1 of my order were discussed be held in private.

III. Summary of the evidence

[12] In the summer of 2019, the complainant applied for the selection process. At that time, she was a parole officer at the Ville-Marie parole office, classified at the WP-04 group and level. In short, her duties involved ensuring that offenders, some of whom were dangerous, complied with the conditions imposed on them. She had approximately nine years' experience in this field of work.

[13] There are four CCCs in the Montréal Metropolitan district: CCC Hochelaga, CCC Martineau, CCC Ogilvy and CCC Sherbrooke. CCCs are residential facilities for federal offenders, managed by CSC. They house people on various forms of release, such as day parole, full parole and statutory release, including those under long-term supervision orders. According to the complainant, CCC clients are unstable and at risk of reoffending. The Martineau CCC also offers specialized mental health services. It houses offenders with intellectual disabilities and mental health problems, some of them profound.

[14] Parallel to her employment, the complainant had assumed union responsibilities since 2014. During the relevant period, she held the position of President of Local No. 10088, Union of Safety and Justice Employees (USJE). This is a component of the Public Service Alliance of Canada (PSAC). In the fall of 2019, the complainant took a leave of absence to work at the PSAC regional office as a union advisor.

[15] According to the complainant, CSC is steeped in a military culture. You do not question, and if you do, you get judged. Beginning in the second half of 2017, the complainant had "[translation] several heated disagreements" at the CCCs in her capacity as local president. Throughout the relevant period, Michel Morin held the position of Acting Area Director and was responsible for four previously identified CCCs. Mr. Morin evaluated the complainant as part of the selection process and is the

subject of an allegation of reasonable apprehension of bias. The incidents described by the complainant can be summarized as follows.

A. Incident on August 1, 2017, CCC Martineau

[16] On August 1, 2017, because of a defective door mechanism, a beneficiary entered the secure employee area with a razor blade. There he barricaded himself and mutilated himself in front of employee members of the USJE. Specialized police intervention (SWAT) was required to evacuate the beneficiary from the CCC. Several employees were shaken by the event. Following the incident, the complainant asked Mr. Morin to implement several safety measures to alleviate the employees' fear. The complainant also asked the union vice-president at the time to raise safety issues at CCC Martineau, of which Mr. Morin was director, with the CSC's deputy commissioner. According to the complainant, there was a sense of fear among member employees that things were not moving fast enough.

B. Incident on December 28, 2017, CCC Martineau

[17] The second incident occurred on December 28, 2017. An offender threw a fire extinguisher through a window in the secure employee area. The employee on the scene had to activate his panic button

C. Incident on December 31, 2017, CCC Martineau

[18] On December 31, 2017, there was a disturbance at another gate in the secure area. Given the absence of surveillance cameras, the perpetrator could not be identified.

[19] The complainant discussed these incidents with Mr. Morin, as well as the issue of workplace safety. Her members were contacting her to find out about a strategy to make the workplace safer. They felt unsafe.

D. Complaint under the *Canada Labour Code*

[20] According to the complainant, Mr. Morin took no immediate action to secure the CCC. Noting Mr. Morin's inaction, the complainant suggested that the employee members of CCC Martineau file a complaint under section 127.1 of the *Canada Labour Code* (R.S.C. 1985, c. L-2; the "*Code*") ("complaint under section 127.1 of the *Code*"). The employees filed the complaint on January 5, 2018. The complainant assisted the

members in drafting it and guided them through its filing. According to the complainant, Mr. Morin knew she was involved.

[21] The complainant testified that her relationship with Mr. Morin was extremely strained in January 2018. The complainant was trying to find a solution with the employer to prevent similar incidents from happening again. Mr. Morin did not understand why the employees had filed the complaint under section 127.1 of the *Code*. He trivialized the incidents. In his view, these were isolated incidents; the offender was not targeting a particular employee, and safety was everyone's responsibility. In short, he felt that this was just another difficulty with a mental health inmate. According to the complainant, this situation caused tension, and tempers flared between her and Mr. Morin.

[22] During her meeting with Mr. Morin in early January 2018, following the filing of the complaint under section 127.1 of the *Code*, the complainant noted that there was a discrepancy in terms of the seriousness of the situation. It should be noted that three other people were present at the meeting. The complainant told Mr. Morin that the employees were not happy, that they feared for their safety and that they would not go to work in the administrative area on the 2nd floor of CCC Martineau where the incidents took place until she had received a written response to the complaint from him. She added that without additional safety measures, she would ask members to keep pursuing the complaint.

[23] Mr. Morin responded in writing to the complaint on January 11, 2018. In it, he summarizes the January 9 meeting, makes recommendations and suggests possible solutions. Towards the end of the response, Mr. Morin states that he expected the USJE member employees to return to the 2nd floor offices on January 15, 2018. On January 12, 2018, the employees responded that they would reassess the risk of returning to the 2nd floor before returning. This response was drafted by the complainant.

[24] The complaint under section 127.1 of the *Code* was ultimately referred to Employment and Social Development Canada (ESDC) for investigation on February 14, 2018. The complainant helped draft the complaint registration form. ESDC upheld the complaint, and Mr. Morin was informed that an inspection of CCC Martineau would take place on March 28, 2018, to understand the entire problem. According to the complainant, Mr. Morin was very upset about this. He wrote an email somewhat in a

panic to find out when and under which section ESDC would investigate. The situation was tense and confrontational between the complainant and Mr. Morin, who was irritated. His tone was curt and cold.

E. Problems at CCC Hochelaga

[25] In February 2018, the complainant had another confrontation with Mr. Morin over portable panic buttons, the only security tool with cameras, at CCC Hochelaga. The CCC Hochelaga houses high-risk sex offenders, and most of its employees are women. This problem had already been raised at an occupational health and safety meeting. It was a known situation.

F. Sanitation problems, CCC Martineau

[26] Also in early 2018, the complainant raised sanitation issues at CCC Martineau with Mr. Morin. She suggested that a cleaning firm be hired to remedy the problem. Mr. Morin's superior got wind of this and told Mr. Morin that "[translation] his CCC is dirty". Mr. Morin was unhappy and defensive. He was irritated. He did not agree with the complainant's proposed solution. Mr. Morin discredited the complainant's concerns to his superior, the acting district manager. According to Mr. Morin, the situation was under control and cleaning duties were the responsibility of the residents. In her testimony, the complainant also referred to an email from the CCC Martineau manager in which she confirmed that there were sanitation problems in certain areas.

[27] At a labor-management meeting held on February 22, 2018, the complainant reiterated existing occupational health and safety issues at CCC Martineau and those related to panic buttons at CCC Hochelaga. She pressed for action. On the same day, following the union-management meeting, Mr. Morin sent her an email in which he mentioned that the alarms were working and that the site was safe. According to the complainant, Mr. Morin did not acknowledge the facts.

G. Renovations at CCC Ogilvy

[28] In March 2018, the complainant made her dissatisfaction known to Mr. Morin in connection with renovation work at CCC Ogilvy, because at one of the local occupational health and safety committee meetings, it had been reported that traces of asbestos might be present in the joints and plaster. She asked USJE employees to be vigilant. She contacted Mr. Morin and asked that air quality tests be carried out and

that an incident report be produced. According to the complainant, Mr. Morin was irritated by her call.

H. Media releases

[29] The complainant made two media appearances to denounce the conditions and workload of the members, as well as to defend their work. The employer did not appreciate it, and in the case of the second media release, which took place in January 2020, a manager yelled at her during a union-management meeting.

[30] According to the complainant, her relationship with Mr. Morin between early 2018 and summer 2019 was strained and difficult. This situation went beyond the normal relationship between an employer representative and a union representative. When she submitted her application as part of the selection process, her relationship with Mr. Morin was difficult. They were in open conflict with each other. She stood up to Mr. Morin and often openly criticized him.

[31] The complainant testified that Mr. Morin and another manager, Karine Dutil, were involved in the selection process. The complainant fulfilled the first two requirements, but failed the third, which was designed to assess two key leadership competencies: “[u]phold integrity and respect” and “[p]romote innovation and guide change”. These competencies were assessed using the CAR assessment tool. The CAR is designed and supplied by the PSC. The complainant recalls being invited to a training session on the CAR offered by PPC assessment specialist Dr. Caroline van de Velde. However, she was unable to attend because of her workload. She asked to take the session again, but no further sessions were offered. She was still able to contact Dr. van de Velde to ask CAR-related questions.

[32] In June 2020, after being notified that she had not been successful, she requested an informal discussion. This took place on July 7, 2020. It was during this discussion that she learned that Mr. Morin had rated her CAR. The complainant is of the opinion that with the examples of situations she provided in the CAR, Mr. Morin could easily identify her.

[33] During the meeting, the complainant and Mr. Morin reviewed each of the competencies, as well as the related behavioural indicators. The complainant took notes. When they came to the behavioural indicator “[c]arries out decisions in an

impartial, transparent and non-partisan manner”, linked to the competency “[u]phold integrity and respect”, Mr. Morin mentioned that the complainant had difficulty acting in an impartial and non-partisan manner because of her union responsibilities. The complainant testified that she was left a little shocked. She repeated to Mr. Morin word by word what she had heard. He confirmed that this was indeed the case. She learned from this meeting that, because she is a union representative, she was incapable of adopting a certain behaviour or attitude. On July 14, 2020, the complainant sent Mr. Morin, as an email attachment, a summary of their discussion. The relevant extract from the summary reads as follows:

[Translation]

...

Then we discussed the third indicator, Carrying out decisions in an impartial, transparent and non-partisan manner [sic]. I allegedly failed this indicator too. In fact, the example mentioned for this one refers to a situation where I was making a point at a union-management meeting as a union representative. You told me that when I represent members, it's difficult for me to be impartial and non-partisan. To make sure that I had heard and understood what you were saying, I dictated your reply verbatim. You then validated it. You asked me if I had understood it, to which I replied in the affirmative. However, I wanted to make it clear that I did not agree with it.

...

[34] The email concludes with the sentence, “[translation] If I do not hear from you by Friday, July 17, I will assume that no additions are necessary.”

[35] Mr. Morin replied to the complainant’s email on July 17, 2020. The relevant excerpt from his email reads as follows:

[Translation]

...

I am surprised by your document in connection with the feedback / informal discussion that took place on July 7, 2020, around 1:30 p.m. Considering the objectives and purpose of the feedback and informal discussion (as stated below), I will not comment on the content of the document you submitted to me.

...

[36] The complainant filed a grievance contesting Mr. Morin’s attitude, who she felt was discriminating against her because of her union duties.

[37] On cross-examination, the complainant confirmed that she had applied for the position of WP-05 parole officer supervisor.

[38] Mr. Morin was her immediate supervisor very briefly, for a few months only, starting in February or March 2020. As for the frequency of her meetings with Mr. Morin in the course of her union duties during the relevant period, 2017 onwards, it was at least four times a year at union-management meetings. They also had ongoing email and telephone exchanges. She recalls also having a follow-up meeting with Mr. Morin in early January 2018, following the filing of the complaint under section 127.1 of the *Code*. After January 2018, she did not really have any formal meetings with Mr. Morin. Their exchanges were more by email and telephone.

[39] The complainant confirmed that the complaint under section 127.1 of the *Code* had been filed by her members and that she had not signed it. However, although the employer was not aware of the extent of her involvement in the complaint, it was aware her involvement in it.

[40] The complainant confirmed that the exchanges she had described as extremely tense with Mr. Morin had taken place during meetings and in emails. At the January 9, 2018 meeting, Mr. Morin downplayed the importance of the complaint under section 127.1 of the *Code*.

[41] Regarding the email exchanges concerning the issue of portable panic buttons, the complainant admitted that Mr. Morin had not written that the requests were futile, as she had stated in her testimony. Rather, it was her interpretation of Mr. Morin's email dated March 22, 2018, considering that the requested safety measures had not been implemented. Finally, the complainant was unable to specify precisely what in Mr. Morin's email to ESDC of March 19, 2018, where he asked questions regarding the inspection of CCC Martineau following the complaint under section 127.1 of the *Code*, gave her the impression that he was in a panic. She confirmed that it was Nawel Dendani, Mental Health Officer at CCC Martineau, who was the complainants' representative in the complaint under section 127.1 of the *Code*.

[42] The complainant named Yves Bernard as her next witness. Mr. Bernard is a former employee with CSC. During the relevant period, he was the parole officer supervisor, at the WP-05 group and level, at the Ville-Marie parole office. He began

working with Mr. Morin at the start of the pandemic, when Mr. Morin was assigned to that office.

[43] Mr. Bernard testified that, in late September or early October 2017, Mr. Morin had told him that [TRANSLATION] “he was having trouble dealing with the complainant”.

[44] On cross-examination, Mr. Bernard stated that this comment had been made during a happy hour get together, outside of work. He shared this comment with the complainant’s representative and the complainant in this case, four to six months ago.

[45] When asked by the respondent’s lawyer if these were the exact words Mr. Morin had uttered about the complainant during the get together, Mr. Bernard replied that he could not confirm this. However, he does recall the following words spoken by Mr. Morin: “Andréanne” and “[translation] difficult”. This is the only time Mr. Morin shared his feelings about the complainant.

[46] The PSC called Dr. Aoife Brennan as its sole witness. Since September 2023, Dr. Brennan has been head of Test Defence Services within the Research and Development Division, which is part of the PSC’s PPC. The PPC provides federal departments and agencies with assessment tools and services that can be used for recruitment, selection or personnel development. As for the Test Defence Services unit, its main task is to manage challenges to PSC tests. At all relevant times, Dr. Brennan held the position of senior psychologist responsible for test defence, within the Research and Development Division.

[47] Dr. Brennan summarized the process generally followed by client departments to obtain assessment tools and services from the PPC or PSC. In this case, CSC, the client department, submitted a request for assessment services. In summary, the PSC’s responsibilities included developing the CAR templates in consultation with the client department, providing candidates with two orientation sessions related to the CAR, validating the CAR examples, providing training to assessment board members to grade CARs, and providing an assessment specialist to grade CARs. She emphasized that it is the client who determines the passing grade for each competency.

[48] The assessment specialist provides training sessions for selection board members, sits on the selection board to oversee the process, and acts as an evaluation

member. The selection board is made up of one or two subject-matter experts, at the client's discretion, and an assessment specialist.

[49] During her questioning by the respondent, Dr. Brennan confirmed that she had had discussions with Dr. van de Velde, the assessment specialist involved in the grading of CARs as part of the selection process, about the issues that are the subject of this complaint. Dr. Brennan also stated that she did not know when the candidates learned who was on the selection board.

[50] As for the evaluation of the CARs, Dr. Brennan explained that each member of the selection board had to evaluate the CARs individually. This was the first round. Then, as part of the second round, the selection board member with expertise in the field and the assessment specialist review their CAR assessments together for each candidate. If their assessments do not match, they hold discussions to reach a consensus. They must reach a consensus, not an average.

[51] When asked by the respondent what could be done to prevent bias in the assessment, Dr. Brennan explained that bias can be conscious or unconscious. It is not possible to completely eliminate bias. However, the CAR evaluation process is designed to be as objective as possible. The assessor must be able to explain their rating. Many steps are required to minimize bias. One of the roles of the assessment specialist is to ensure the quality of the evaluation process. If the assessment specialist notices that someone is being too harsh or too lenient, he or she can bring that person back on track. An assessment specialist is also an active member of the board and receives the rationale for the other members' assessments. Moreover, to preserve the anonymity of the candidates, their names are not available to the client department's assessors. However, a board member can guess who he or she is assessing on the basis of the information included by the candidate in the assessment tool. Anonymity cannot therefore be completely guaranteed.

[52] On cross-examination, Dr. Brennan confirmed that the complainant's email to Mr. Morin, along with the attachment summarizing the informal discussion, had been forwarded to her by Dr. van de Velde. Dr. Brennan believes she discussed it with Dr. van de Velde, who was involved in the selection process as an assessment specialist. However, the summary of the informal meeting alone did not allow her to

conclude that the assessment had not been done in accordance with the rules in place. She did not know the context.

[53] In July 2021, the complainant's representative sent Dr. Brennan emails, including one detailing problems with the complainant's evaluation in the selection process. Valérie Beaulieu, Human Resources Advisor, CSC, was copied on the email. In summary, the representative wrote that the complainant alleged that she had a conflict of interest with the manager who assessed her, and referred to the concept of reasonable apprehension of bias. Dr. Brennan confirmed that this email gave her a better understanding of the context in which these allegations had been made.

[54] After receiving the email, Dr. Brennan contacted Ms. Beaulieu to discuss it and obtain more information. Ms. Beaulieu told Dr. Brennan that she would look into the issues raised in the email. Dr. Brennan told Ms. Beaulieu that, if CSC considered there had been a perceived or actual conflict of interest, the PPC could have a PPC assessment specialist and a CSC manager who were not aware of the situation between Mr. Morin and the complainant re-evaluate the complainant's CARs. Ms. Beaulieu replied that, since a formal staffing complaint had been filed and they were in the midst of a document exchange, this would not be an appropriate time to reassess the complainant's CARs.

[55] Dr. Brennan confirmed that there is no mandatory minimum pass mark for CARs. This is determined by the clients. She also confirmed that the documents provided to assessors in this case, namely the "[translation] Candidate Achievement Record (CAR) Guidelines for Assessors" and the PowerPoint presentation "[translation] Assessor Training - Correctional Service Canada - WP-05 Process - Candidate Achievement Record", do not address the issues of conflict of interest and bias.

[56] On re-examination, Dr. Brennan stated that shortly before the mediation, Ms. Beaulieu had asked her if the PPC was prepared to re-evaluate the complainant's CARs if CSC so requested. Dr. Brennan replied in the affirmative. That was the last time she heard from Ms. Beaulieu.

[57] The respondent called two witnesses, Dr. van de Velde and Mr. Morin.

[58] Dr. van de Velde has been acting manager of PPC Psychology Assessment Services at the PSC since September 2023. During the relevant period, she held the

position of assessment specialist, at the PPC. Dr. van de Velde has participated as an assessor in several staffing processes, including approximately five where the CAR was used. The CAR is used to assess key leadership competencies in light of examples of performance and professional achievements provided by candidates. The two key leadership competencies assessed in the selection process were: “[p]romote innovation and guide change” and “[u]phold integrity and respect”. For each key competency, there were three behavioural indicators. A total of 30 candidates were assessed using the CAR. It should be noted that each competency is assessed using a separate CAR.

[59] Dr. van de Velde testified that a copy of “[translation] Candidate Achievement Record (CAR) Guidelines for Assessors” and the PowerPoint presentation “[translation] Assessor Training - Correctional Service Canada - WP-05 Process - Candidate Achievement Record”, which serve as a rating guide for assessors and explain the stages of the CAR, were given to Mr. Morin and Ms. Dutil before they attended the CAR training. During this training, the expert assessors and the assessment specialist discussed the key competencies and behavioural indicators that candidates were required to demonstrate. They also “[translation] calibrated” what a WP-05 score of 3 out of 5 means in terms of competencies, to ensure consistency of scoring.

[60] Dr. van de Velde explained that the behaviours sought in the examples provided by candidates were rated on a scale of 1 to 5. The same scale is used at the competency level to give an overall rating. The pass mark, which is determined by the hiring manager, is normally set at 3, again on a scale of 1 to 5. It was set at 3 out of 5 in the selection process, prior to the assessment of the candidates’ CARs.

[61] In February 2020, Dr. van de Velde offered candidates two training sessions related to CARs. They were held by videoconference to preserve the candidates’ anonymity, on the same day: one in the morning, the other in the afternoon. Mr. Morin was also on call should candidates have any questions about the selection process. The complainant did not attend the session. She did, however, ask Dr. van de Velde if she could take the session another time. As no further sessions were scheduled, Dr. van de Velde invited the complainant to contact her if she had any questions, which she did.

[62] Candidates had to validate or attest to the events and examples they had provided in their CAR, through a validator. More specifically, the validator had to attest whether the events and examples provided were representative of the candidate’s

usual job performance. The assessment specialist could contact the validators if he or she had any questions needing clarification.

[63] Mr. Morin graded the CARs of 16 candidates; Ms. Dutil graded the CARs of 14 candidates. It was necessary to ensure that the assessor was not also a validator for the person he or she was assessing. The assessment specialist, for her part, graded all the candidates' CARs. Copies of completed CARs distributed to assessors, other than those of the assessment specialist, were anonymized. Their names were replaced by a number. In the first round, each assessor, including the assessment specialist, was asked to rate the CARs individually. The assessors were asked to look for behavioural indicators for each competency in the examples provided by the candidates. Mr. Morin's rating of the behavioural indicators for the complainant differed from that of the assessment specialist.

[64] The second round consisted of an integration session. During this session, assessors shared the ratings they had assigned to each behavioural indicator, for each competency and each candidate. If there were any discrepancies in the ratings, they had to reach a consensus; they could not give an average of the ratings assigned. To reach a consensus, they reviewed the examples provided by the candidates and explained the reason for the rating assigned

[65] Dr. van de Velde testified that it can happen that the hiring manager knows the candidate. To ensure that scoring remains as impartial as possible, the assessment tool is standardized. Candidates receive the same documents and information, they have the same amount of time to complete the CAR, and they know in advance which competencies will be assessed and what the behavioural indicators are. Training is provided for board members. There are clear guidelines as to the steps to be followed during marking. In addition, during the integration session, the assessment specialist ensures that the ratings are based on the examples provided. In addition, the validation of example situations provided by candidates by validators ensures that they are representative of the candidate's usual performance.

[66] During the integration session, Mr. Morin and Dr. van de Velde agreed to give the complainant an overall score of 2 out of 5 for the competency "[u]phold integrity and respect" and an overall score of 1 out of 5 for the competency "[p]romote innovation and guide change". As a result, the complainant was eliminated from the

process. Dr. van de Velde pointed out that, even taking into account only the ratings she had assigned in the first round, the complainant would not have received a passing grade for either of the two key competencies.

[67] The assessment specialist confirmed that Mr. Morin had said nothing to her about the complainant, and that she had noticed nothing in the process that might have caused her to doubt the impartiality of the CAR grading process.

[68] On cross-examination, Dr. van de Velde confirmed that, during the first round, Mr. Morin had given a rating lower than hers for all behavioural indicators. She also confirmed that the 3 rating does not exist in the rating guide; however, she used it for discussion purposes during the integration session.

[69] She also confirmed that the organization could have set the pass mark at 2 out of 5. However, there would be a risk of the candidate being appointed to the position without actually having all the required competencies. During the training given to assessors, Dr. van de Velde recommended that the validator should not be the assessor, in order to minimize the risk of a potential conflict of interest.

[70] Dr. van de Velde admitted that there was no way for her to know whether the assessor was assessing an example of a situation in which he had been involved. Mr. Morin did not disclose to her that he had been involved in an example provided by the complainant. They cannot guarantee total anonymity. It is possible that situations where the hiring manager can identify a candidate from the example provided may occur in an internal process or within a small organization. The first time she became aware of allegations of a possible conflict of interest, reasonable apprehension of bias or bias was during a discussion surrounding the selective disclosure of documents relating to this complaint. She could not say when the candidates had found out the name of their assessor. She could not recall Mr. Morin commenting on the fact that the complainant was a union steward.

[71] On re-examination, Dr. van de Velde confirmed that, during the February 2020 orientation session offered to candidates, she had mentioned that Mr. Morin was present on the conference call to answer their questions in connection with the selection process.

[72] The respondent called Mr. Morin as its second witness. Mr. Morin has held the position of associate district manager Montréal-Métro since August 2018. At the time of the incidents the complainant described, Mr. Morin held the position of acting area manager. He was director of the Ogilvy, Martineau, Hochelaga and Sherbrooke CCCs. Between February and July 2020, he was assigned to the Ville-Marie parole office as acting area director. It was only during this period that he was the complainant's immediate manager, and then only on paper, as the complainant was on leave to work for PSAC. He knew the complainant before the selection process was launched

[73] Mr. Morin testified that he had a cordial professional relationship with the complainant. They met mainly at union-management meetings, four or five times a year. Both the management and union teams were present at these meetings. His interactions with the complainant at these meetings went well. There were no personal exchanges with her; discussions took place in groups. In 2020, as her immediate manager, he exchanged emails with her about her leave requests related to her work with PSAC.

[74] Mr. Morin recalled the incident at Martineau CCC in 2017 when an offender mutilated himself. Management had a lot of discussions with employees about surveillance cameras, the door locking system, etc. He issued security reminders. Employees were asking the employer to install surveillance cameras everywhere. However, this initiative required money and approval at a higher level.

[75] Following discussions with the team in place, Mr. Morin, the CCC Martineau manager and two people from the union agreed that the employees would be able to file a complaint under section 127.1 of the *Code*. As a result, he knew the complaint was coming. He agreed that it should be filed, as it would probably help him obtain funds and resolve safety issues raised by the employees. The complaint was ultimately referred to ESDC, as certain elements had not been resolved to the employees' satisfaction. ESDC came to inspect CCC Martineau. The complaint under section 127.1 of the *Code* resulted in recommendations and modifications to the CCC in question.

[76] Mr. Morin also recalled the incident in December 2017 when an offender tried to smash a window with a fire extinguisher. There was a follow-up of the incident.

[77] He knew that employees at CCC Martineau were concerned about their health and safety. He had discussions with employees and managers on the subject. It was

part of his job as area manager to ensure the safety and well-being of employees. The filing of the complaint under section 127.1 of the *Code* had no impact on his relations with the union representatives or, more specifically, with the complainant.

[78] He and Ms. Dutil volunteered to take part in the selection process. They were involved from start to finish. The objective of the process was to establish a pool of qualified candidates for appointment to the positions of parole officer supervisor and CCC manager. The delegated managers were the Montréal-Metro district director and the East-West district director. They chose the assessment tools. Approximately 80 candidates applied.

[79] Among other things, Mr. Morin participated in the development of common statements of merit criteria for the two positions, which have different responsibilities, and he posted the process with Ms. Dutil and screened the candidates. Again with Ms. Dutil, he supervised the first written exam. However, he did not grade it; the grading was done externally. He participated in the development and grading of the second exam. He was also involved in the third exam, the CAR, and graded it jointly with Dr. van de Velde.

[80] According to him, candidates knew that he was involved in the selection process. All emails sent to candidates specified that he and Ms. Dutil were reference persons. As far as CARs were concerned, the selection board consisted of Ms. Dutil, Dr. van de Velde and himself.

[81] Mr. Morin received relevant training in the administration of a CAR. Dr. van de Velde was also on hand to answer any questions he had about this assessment tool. A human resources advisor was also on hand to provide guidance, if required. Dr. van de Velde was responsible for quality control of CAR administration.

[82] Once the CARs had been completed by the candidates and their examples validated by the validators, they were sent to Dr. van de Velde. Dr. van de Velde gave him the CARs of the 16 candidates; the CARs of the 14 remaining candidates were given to Ms. Dutil. The CARs were anonymized and identified by a number.

[83] Following discussions with Dr. van de Velde to be more efficient and to ensure that he was consistent in assessing all candidates, he assessed the first competency for all 16 candidates, and then did the same for the second competency. Once he had

completed his grading, he reviewed his work once more to ensure that his assessment was as accurate as possible.

[84] Grading was done individually, using the manual provided. Grading was not final. Once the grading of the CARs was complete, there was a pooling of the grading with Dr. van de Velde, who had also graded the CARs on her own. They discussed the ratings they had assigned, with the aim of arriving at a consensus when the ratings diverged.

[85] In borderline cases, for anything approaching a pass mark of 3 out of 5, he and Ms. Dutil exchanged copies for a second grading. This was followed by a pooling with Dr. van de Velde. The CAR grading was finalized towards the end of February or beginning of March 2020.

[86] The complainant did not obtain a passing grade in this test. As a result, she was not invited to take part in the final test, which consisted of a situational simulation.

[87] Although the CARs were anonymized, Mr. Morin confirmed that it had been possible for him to identify that he was grading the complainant's CARs from the situation she had described in them. However, in his opinion, the aim of the exercise was to make a rigorous grading, not to identify the candidates.

[88] Mr. Morin described the informal discussion with the complainant as particularly difficult. She asked him about the training he had received in grading CARs. He felt he was the one being evaluated. Following the informal discussion, the complainant emailed him a summary of the meeting and asked him to confirm the content.

[89] The person appointed to the parole officer supervisor position has since left.

[90] Mr. Morin has known Mr. Bernard for a long time. During the period in question, Mr. Bernard was the parole officer supervisor at the Ville-Marie parole office. They saw each other outside work. Since Mr. Morin was assigned to the Ville-Marie parole office in the first half of 2020, their relationship has evolved. They do not talk anymore. He did not remember the comment he allegedly made to Mr. Bernard in 2017 about the complainant.

[91] Mr. Morin concluded his testimony by saying that he had always made sure to treat people fairly when marking exams. He stated he was a fair and just person in life.

[92] On cross-examination, Mr. Morin clarified that the subject of impartiality had not been addressed at the CAR training session. However, he confirmed that he had received the necessary training to make appointments. He has taken relevant staffing training offered by the Canada School of Public Service, he has taken human resources training and he has received the necessary coaching. Human Resources is always involved in selection processes and provides him with advice. He has also received training in the fundamental values of staffing. In the training he has received, issues of conflict of interest and bias have certainly been addressed. He has also received training on unconscious bias, which is mandatory. That said, he could not remember whether he had taken it before or after the selection process.

[93] In response to the question as to whether he knew that he was grading the complainant's CAR, he reiterated that he did not try to find out the identity of the CAR he was grading. He graded the complainant's CAR in the same way he graded the CARs of the other candidates. He did admit, however, that he knew the complainant was the president of Local No. 10088. This information appeared in the example provided by the complainant in one of these CARs.

[94] He recalled having had many exchanges with Ms. Beaulieu in connection with the selection process, but could not recall whether the issue of conflict of interest had been addressed.

IV. Summary of the arguments

A. For the complainant

[95] From the start, the complainant concedes that, contrary to her allegations of September 1, 2021, there is only one respondent in this case, and that is the Deputy Head of CSC. The PSC is not a respondent, although it may have contributed to the alleged abuse of authority.

[96] The complainant's primary argument is that there was a reasonable apprehension of bias on the part of a member of the selection board. More specifically, because of her union responsibilities, and in particular because of her involvement in the complaint under section 127.1 of the *Code*, Mr. Morin did not evaluate her fairly.

As soon as he knew he was assessing her CAR, he should have withdrawn. The mitigation measures put in place were insufficient, given the circumstances. Every candidate in a selection process has the right to be assessed by a fair and impartial person. A third party could not conclude that Mr. Morin had assessed her impartially. The complainant did not expect Mr. Morin to evaluate her. The fact that Dr. van de Velde was involved in the evaluation of her CAR is not a sufficient mitigating measure and does not dismiss the allegation that there was a reasonable apprehension of bias. The rating given by Mr. Morin was always lower than that given by the assessment specialist. The PSC also made a few blunders by failing to train assessors on impartiality and conflict of interest.

[97] There was also an outside witness who testified that the relationship between the complainant and Mr. Morin was difficult. On this point, the complainant referred me to the decision *Monfourny v. Deputy Head (Department of National Defence)*, 2023 FPSLREB 37. In addition, Mr. Morin admitted in his testimony that he gossiped with Mr. Bernard about people. According to the complainant, there was even a witness from the PSC who testified that the situation was problematic. Whether Mr. Morin supported the complaint under section 127.1 of the *Code* is irrelevant. During the informal discussion, Mr. Morin emphasized her union responsibilities. According to the complainant, Mr. Morin evaluated her when he knew he was in conflict with her. On this point, the complainant refers me to *Amirault v. Deputy Minister of National Defence*, 2012 PSST 6. According to the complainant, you have to put yourself in her shoes (see *Bergey v. Canada (Attorney General)*, 2017 FCA 30)

[98] Finally, the complainant points out that it is not necessary to prove a link between her failure and a reasonable apprehension of bias. She is entitled to an impartial assessment. It is not necessary to show that Mr. Morin had any improper intent in evaluating the complainant.

[99] As remedies, the complainant asks the Board to declare that there was an abuse of authority in the application of merit and to order the revocation of the appointee's appointment. The complainant points out that it is not necessary to demonstrate that the appointee did not meet the application of merit criterion to revoke their appointment. In support of this argument, she refers me to *Denny v. Deputy Minister of National Defence*, 2009 PSST 29. In her view, the serious violation of her rights in the selection process justifies a revocation. The complainant admits, however, that given

that the person is not in the position, such an order would be without effect and rather moot. The complainant concedes that in the circumstances of this case, a declaration of abuse of authority would be a satisfactory remedy.

B. For the PSC

[100] Although the PSC provided assessment services to CSC, the Deputy Head of CSC is the sole respondent in this complaint. The PSC is a party to all complaints filed with the Board under the *PSEA*. However, it is the respondent only when the PSC itself was the hiring organization, or if the authority to appoint for the process in question was not delegated to the deputy head by the PSC (the latter case is extremely rare). In support of its argument, the PSC refers me to section 1 of the *Regulations* and sections 77 and 81 of the *PSEA*. Indeed, according to section 81 of the *PSEA*, a corrective action order can only be made against the holder of the authority to appoint for the process in question.

[101] Moreover, section 24 of the *Regulations* provides for only one respondent: the deputy head or the PSC (in the latter case, when the PSC held the authority to appoint), not both. This is also supported by the Procedural Guide for Staffing Complaints (January 2021 version), in the section “Who are the parties?”.

[102] In the present complaint, since the department responsible for staffing is the CSC and the authority to appoint has been delegated to the Deputy Head of CSC, the holder of the authority to appoint is the Deputy Head of CSC, who is the only respondent in the present complaint.

[103] Contrary to the complainant’s argument, the duty to ensure that any selection process is impartial rests with the client department under the *PSEA* and PSC policies. In this case, the CSC assessors signed a form confirming that there was no conflict of interest or otherwise. In short, the burden is on the assessor to indicate whether there is a conflict of interest.

C. For the respondent

[104] The respondent points out that the intentions imputed to Mr. Morin are not supported by the evidence. This complaint is based on paragraph 77(1)(a) of the *PSEA*. Subsection 2(4) of the same Act defines what constitutes abuse of authority. The burden of proof required to demonstrate abuse of authority is very high. While it is

true that intent is not required to establish abuse of authority, the complaining party must demonstrate, on a balance of probabilities, that serious errors or omissions were committed. In this case, such evidence was not presented.

[105] The complainant is not attacking the assessment tool. Rather, she alleges that Mr. Morin's grading of her CARs was tainted by a reasonable apprehension of bias.

[106] The issue in this case is whether there was an abuse of authority on the part of the respondent in that Mr. Morin acted in a biased manner. In other words, was he in a conflict of interest with the complainant, resulting in an abuse of authority when he graded her CARs? The complainant errs in assuming Mr. Morin's bias simply because she exercised union responsibilities. There is nothing in the jurisprudence to establish that there is a presumption of conflict of interest, or that the complainant was assessed in a biased way, by virtue of the fact that she was a union representative or had union duties. The complainant's position is based on the presumption that her employer will be biased in grading her CARs because she holds union office.

[107] The CAR is a serious assessment tool developed by the PSC. Its purpose is to assess key leadership competencies. As part of the selection process in question, the respondent was looking for candidates with key leadership competencies. This is why the respondent turned to the PSC for a CAR. The PSC's mandate is to ensure that appointments are made on the basis of merit. Ultimately, it is up to the candidates to complete the CAR, using examples or events of their own choosing.

[108] The assessors, Mr. Morin and Ms. Dutil, received training in how to assess CARs. As explained by Dr. Brennan and Dr. van de Velde, a PSC psychologist is involved in the assessment of a CAR to ensure the most objective evaluation possible. However, the participation of a manager who is an expert in the field is also necessary to enable the psychologist to better understand the requirements at field level. The mere fact that Mr. Morin knew the complainant did not justify his withdrawal from the process. The responsibility for avoiding a conflict of interest can be presumed to be shared in this case. The complainant could also have denounced the situation, but did not. Furthermore, there is no evidence that Mr. Morin believed there was a reasonable apprehension of bias. In his view, there was no conflict, so he did not have to withdraw. The respondent refers me to the attestation signed by Mr. Morin in which he undertakes to respect the staffing values listed therein. In this case, there are no

concrete examples that would have led him to believe that there was a conflict of interest. Consequently, he did not withdraw from the complainant's CAR assessment. Moreover, the fact that the complainant had made media appearances, that she had been involved in the preparation of the complaint under section 127.1 of the *Code* or that she had denounced the working conditions at the CCCs did not bother Mr. Morin. In fact, he admitted that the incident at CCC Martineau had been traumatic. What is more, he worked with the union to file the complaint under section 127.1 of the *Code*. In one of the emails, Mr. Morin stated that he was taking the complaint seriously.

[109] As far as union-management meetings are concerned, discussions were always held in committee. It is perfectly normal for the union to raise concerns about employees' working conditions. However, there was no evidence of animosity between the complainant and Mr. Morin.

[110] The *Amirault* and *Monfourny* decisions are distinguishable from this case because, unlike the facts in those decisions, there was no complaint against Mr. Morin and no actual conflict between him and the complainant.

[111] The CAR was supposed to remain anonymous. However, the complainant identified herself with the story she chose to include. The respondent does not dispute that Mr. Morin was able to identify the complainant. However, the question that must be asked is whether there are facts to support the allegation that there was a reasonable apprehension of bias. With respect to the conversation that took place in 2017 between Mr. Morin and Mr. Bernard, in a private context and outside working hours, the fact that two people argued does not demonstrate that Mr. Morin was biased. Moreover, Mr. Bernard's testimony was inconclusive; he does not recall the exact words Mr. Morin used.

[112] Finally, even if only Dr. van de Velde's assessment were taken into account, the complainant would still have failed. Dr. van de Velde's involvement in the grading of the CAR should reassure us. The respondent referred me a number of Board decisions that deal with the issue of bias and union activities. I discuss them briefly in my reasons.

[113] The respondent requests that the complaint be dismissed. However, if the Board upholds the complaint, it should not revoke the appointee's appointment. First,

revocation is not an automatic remedy. In addition, the appointee is no longer in the position, and there is no evidence that he or she failed to meet the merit criteria.

V. Reasons

[114] The question at the heart of the dispute is whether Mr. Morin's conduct, in relation to the complainant's assessment in the selection process, gave rise to a reasonable apprehension of bias and, consequently, resulted in an abuse of authority by the respondent in the application of merit.

[115] Before addressing this issue, however, I feel it is important to note that the complainant conceded in her closing remarks that the Deputy Head of CSC is the only respondent in this complaint. Consequently, it is not necessary to determine whether the PSC could also have been considered a respondent in the context of this complaint, as originally alleged by the complainant. That said, and as a purely incidental matter, the PSC's arguments that it should not be considered a party respondent in the present complaint appear, at first glance, to be convincing.

A. Abuse of authority and reasonable apprehension of bias

[116] The *PSEA* does not provide an exhaustive definition of what constitutes abuse of authority. However, subsection 2(4) of the *PSEA* specifies that abuse of authority includes bad faith and personal favouritism. The word "including" necessarily implies that wrongdoing other than that enumerated in subsection 2(4) is an abuse of authority within the meaning of the *PSEA*.

[117] In *Canada (Attorney General) v. Lahlali*, 2012 FC 601, at paragraphs 33 to 38, the Federal Court of Canada confirmed that Parliament did not intend to impose a static definition of abuse of authority. It is up to the Board to interpret the notion of abuse of authority in light of the specific circumstances of each case, while avoiding adopting an interpretation that would minimize its scope and, consequently, preclude employees from pursuing a remedy under the *PSEA*.

[118] That said, a simple error, omission or irregular conduct is not sufficient to conclude that there has been an abuse of authority. The impugned conduct, error or omission must be unreasonable, unacceptable or outrageous in some way, such that Parliament could not have intended the person with authority should exercise their discretion in this way (see *Davidson v. Canada (Attorney General)*, 2021 FCA 226, at

para. 25). Indeed, to establish abuse of authority, the complainant must demonstrate, on a balance of probabilities, that there was a serious wrongdoing or major fault in the appointment process. The act need not be intentional (see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, at paragraphs 73 and 74)

[119] It is well established in the Boards jurisprudence that a reasonable apprehension of bias constitutes an abuse of authority within the meaning of subsection 2(4) of the PSEA (see *Denny*, at para. 122; *Bédard v. Deputy Minister of National Defence*, 2010 PSST 15, at para. 51 (“*Bédard 2010*”); *Amirault*, at para. 77; *Palmquist v. President of the Canada Border Services Agency*, 2020 FPSLREB 6, at para. 77)

[120] It is also well recognized in federal public service staffing matters that it is not necessary to establish intent in order to conclude that the actions or omissions of the person concerned give rise to a reasonable apprehension of bias (see *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10, at para. 62; and *Monfourny*, at para. 70). That said, mere supposition, speculation or states of mind are not sufficient to conclude that there is a reasonable apprehension of bias. Such an apprehension must be real, probable or reasonably obvious (see *Palmquist*, at para. 77).

[121] In *Committee for Justice and Liberty v. National Energy Board et al*, [1978] 1 S.C.R. 369, the Supreme Court of Canada formulated the test for a reasonable apprehension of bias as follows:

...
[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. ... that test is “what would an informed person, viewing the matter realistically and practically ... conclude.
...

[122] In the context of staffing complaints under the PSEA, this test has been slightly restated in the following terms (see *Green v. Deputy Minister of National Defence*, 2018 FPSLREB 69, at para. 89; *Palmquist*, at para. 78; and *Denny*, at paras. 125 and 126):

89 ... Would a reasonably informed bystander looking at the process reasonably perceive bias on the part of one or more of the persons involved in the assessment of the complainant?

[123] Finally, I would like to reiterate that it is not necessary for a complainant to establish that the decision maker was, in fact, biased against him or her. Case law recognizes that it is very difficult, if not impossible, to determine whether a decision maker approached the case with genuinely preconceived ideas. Consequently, it is sufficient to demonstrate that the decision maker's conduct gives rise to a reasonable apprehension of bias, according to a well-informed observer (see *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 109; and *Monfourny*, at para. 90).

B. Mr. Morin's remarks raise a reasonable apprehension of bias

[124] As I will discuss at greater length below, I believe that a relatively well-informed observer of the facts of the case would reasonably perceive an apprehension of bias on the part of Mr. Morin regarding the complainant. More specifically, he or she would conclude that Mr. Morin's comments about the complainant's union responsibilities, made in the very context of the complainant's evaluation, give rise to a reasonable apprehension of bias.

[125] The content of these comments must be assessed in light of the interactions between the complainant and Mr. Morin during the relevant period, from the summer of 2017 and thereafter, as well as their context.

[126] The respondent does not dispute that, in the course of her duties as President of Local No. 10088, USJE, the complainant raised several issues related to the health and safety of its members in the various CCCs, as detailed earlier in the Reasons. The respondent does not dispute that the complainant raised these issues directly with Mr. Morin, whether orally, by email or, in committee, at union-management meetings, and insisted that a solution be found to protect members' health and safety. As manager of the four CCCs involved in this case, Mr. Morin was responsible for managing and responding to the issues raised by the complainant, in her capacity as president of the local union. The evidence also reveals that the complainant even informed Mr. Morin's superior, Acting District Manager Sébastien Pilon, of some of these issues in the CCCs for which Mr. Morin was responsible.

[127] More specifically, regarding to the complaint under section 127.1 of the *Code*, it is true that the complainant did not sign it; however, the respondent did not deny that Mr. Morin knew that the complainant was involved in the preparation of this

complaint. It was no secret. Moreover, Mr. Morin himself mentions in his memo dated January 11, 2018, summarizing the follow-up meeting in connection with the complaint under section 127.1 of the *Code* filed on January 5, 2018, at which the complainant was in fact present, that the complainant “[translation] supports” the representative of the complainants at CCC Martineau “[translation] in the process”, alluding to this complaint. Furthermore, during this same meeting, the complainant verbally emphasized to Mr. Morin, again in connection with the complaint under section 127.1 of the *Code*, the following:

[Translation]

...

... that it would ask its members not to go to work on the 2nd floor until it had received the written report [in response to the complaint]. Subsequently, CCC-Martineau employees will be consulted. Since this is a complaint under section 127.1, they will see if they are satisfied with what is proposed, or if they proceed by requesting an investigation.

...

[128] The complaint was eventually referred for investigation and upheld by ESDC, leading to an inspection of CCC Martineau, of which Mr. Morin was the director. In short, I have no doubt that Mr. Morin knew that the complainant was involved in this complaint and had strongly denounced the situation at CCC Martineau.

[129] The complainant and Mr. Morin have diametrically opposed perceptions of the impact that these numerous interventions by the complainant, as detailed above, had on their professional relationship. According to the complainant, during the relevant period, their relationship was strained and difficult. They were very openly in conflict, and the complainant stood up to him and often openly criticized him. Their relationship “[translation] went beyond the normal relationship between an employer representative and a union representative”. On the other hand, according to Mr. Morin, he and the complainant had a cordial professional relationship, and his interactions with the complainant at union-management meetings went well.

[130] However, even if I were to give credence to Mr. Morin’s testimony that he maintained a cordial professional relationship with the complainant, despite her multiple interventions in her capacity as president of the local union, a well-informed person would have concluded that Mr. Morin’s comments to the effect that the

complainant is unable to carry out decisions in an impartial and non-partisan manner, or would have difficulty doing so, because she represents members, give rise to a reasonable apprehension of bias.

[131] At the outset, it is important to note that Mr. Morin knew he was grading the complainant's CARs, even though the review was supposed to be anonymous. In his testimony, he confirmed that it had been possible for him to identify that he was grading the complainant's CARs from the situation she had described in one of her CARs. In closing arguments, the respondent reiterated that Mr. Morin knew he was grading the complainant's CARs.

[132] The first time Mr. Morin questioned the complainant's ability to be impartial and non-partisan in carrying out decisions, because of her union responsibilities, was in writing, in the complainant's CAR.

[133] More specifically, it was in the context of assessing the following behavioural indicator "[c]arries out decisions in an impartial, transparent and non-partisan manner", linked to the competency "[u]holds integrity and respect", that Mr. Morin concluded, on the basis of the example situation provided by the complainant, that she lacks impartiality and is partisan because of her union responsibilities, more specifically, because she represents members. Her exact words read as follows: "[translation] represents members therefore Ø impartiality - partisan". This is the only comment on this behavioural indicator in the CAR. Mr. Morin assigned a score of 1 out of 5 for this indicator: "[translation] [i]nferior to WP-05 level criteria". The example of the situation in question presented by the complainant in the CAR deals with suggestions she made as president of the local union at a union-management meeting attended by Mr. Morin. The aim of the meeting was to find common solutions to the concerns of members and the local executive. It may be that the events recounted by the complainant in the situation example do not demonstrate that she is behaving in the desired manner. I am not saying they do. I am not here to re-evaluate her CAR. However, I do find it troubling that Mr. Morin attributed the complainant's alleged difficulty in carrying out decisions in an impartial and non-partisan manner to the mere fact that she represents members. This conclusion raises the question of whether a manager, who represents management, is capable of carrying out decisions in an impartial and non-partisan manner. In my opinion, a well-informed person, looking at the matter realistically and practically, would conclude that Mr. Morin's remark that

the complainant would have difficulty performing certain tasks because she represents members raises a reasonable apprehension of bias against her.

[134] I gather from the assessment specialist's testimony that each behavioural indicator was to be assessed on the basis of the example situations provided by the candidates. However, it appears that instead of asking whether the complainant has demonstrated, on the basis of the example situation provided, that she is capable of carrying out decisions in an impartial, transparent and non-partisan manner, Mr. Morin concluded that she is not because she represents members. This conclusion seems to be based on a preconceived idea that a union representative is unable or has difficulty being impartial and non-partisan in carrying out decisions. Nothing could be further from the truth. Mr. Morin's assessment of this behavioural indicator was based on an irrelevant consideration. The fact that the complainant acts as local president should not favour or prejudice her in an appointment process (see *Bédard v. Deputy Head (Department of National Defence)*, 2023 FPSLREB 23 ("*Bédard 2023*"), at para. 96).

[135] Furthermore, I note that there is no suggestion in the copy of the CAR graded by the assessment specialist that the complainant would be unable to carry out decisions in an impartial and non-partisan manner, due to her union responsibilities. The fact that the complainant had to represent members does not seem to have been considered by the psychologist as a relevant factor in the assessment of the complainant's CARs. The only comments made by Dr. van de Velde in connection with this behavioural indicator read as follows: "[translation] demonstrates honesty and transparency, believes it is important to inform all why decisions are made, demonstrates impartiality and acted in a non-partisan manner". She gave her a score of 2 out of 5: "[translation] [s]omewhat below WP-05 level criteria". I find it hard to understand the difference between Mr. Morin's remarks and those of Dr. van de Velde.

[136] During the informal discussion, Mr. Morin reiterated his view that the complainant may have difficulty remaining impartial and non-partisan because of her duties as a union representative. This comment is made once again in relation to the behavioural indicator designed to measure whether the complainant would be able to "carry out decisions in an impartial, transparent and non-partisan manner" at WP-05 level. Specifically, he mentions to the complainant that, when representing members, it is difficult for her to be impartial and non-partisan. Mr. Morin did not deny making

these remarks. In fact, this remark merely reflects the comment Mr. Morin made in writing in the complainant's CAR, as discussed above.

[137] However, I consider this remark to be irrelevant to the assessment of the complainant. Mr. Morin did not have to assess whether the complainant is impartial and non-partisan when representing members. This was not the issue that the CAR was seeking to assess. Instead, Mr. Morin should have questioned whether, on the basis of the example situation provided in the CAR, the complainant has demonstrated that she is able to carry out decisions in an impartial, transparent and non-partisan manner, and explain why. I reiterate that the complainant's union responsibilities should not have been a factor in her assessment (see *Bédard 2023*, at para. 96). I also note that the psychologist's comments recorded in the complainant's CAR do not support such a conclusion.

[138] A well-informed person would conclude that Mr. Morin's remarks that the complainant could not carry out decisions in an impartial and non-partisan manner, or would have difficulty doing so, at the WP-05 level because she represents members, raise a reasonable apprehension of bias against her

[139] The evidence does not say whether, during the integration session, the expert assessor noticed Mr. Morin's written comment that the complainant "[translation] represents members therefore Ø impartiality - partisan". However, if she did, I would have expected her to sound the alarm, given the troubling nature of this comment.

[140] This case would probably not exist if Ms. Dutil had been given a copy of the complainant's CAR for grading, or had at least been asked to grade the complainant's CAR on her own to ensure the validity of the results. After all, Ms. Dutil had not acted as a validator for any of the example situations provided by the complainant. I do not know why this was not done.

[141] Contrary to the respondent's submission, the issue is not whether the presence of the psychologist constituted a sufficient mitigating measure to rebut the allegation of reasonable apprehension of bias. Rather, the question is whether each of the individuals involved in the assessment of the complainant was impartial, since every candidate has the right to be assessed by an impartial member of the selection board (see *Bédard 2010*, at para. 52, and *Denny*, at para. 126). To preserve the integrity of the staffing system in the federal public service, both in substance and in appearance, this

right cannot be subject to compromise or half-measures. In fact, each member of the assessment board was required to sign a declaration attesting that he or she had respected the guiding values in staffing.

[142] The corollary of this right is that it is irrelevant to ask whether the candidate would still have passed the assessment had he or she been assessed by a person who is not the subject of an allegation of bias or reasonable apprehension of bias. The fact that the complainant would not have passed her exam even if Mr. Morin had not participated in the grading of her CAR is irrelevant. Moreover, this factor does not figure among the elements to be considered when applying the test for a reasonable apprehension of bias.

[143] Contrary to the respondent's argument, the complainant could not have raised the issue of conflict of interest between herself and Mr. Morin prior to his assessment, as it was only during the informal discussion that she learned that Mr. Morin had graded her CAR.

[144] In addition to the above, I also note that Mr. Morin's score for each behavioural indicator is, without exception, lower than that of the assessment specialist, and that his comments are more negative. Specifically, Mr. Morin gave a rating of 1 out of 5 for all behavioural indicators, with the exception of one, for which he gave a rating of 2 out of 5. The assessment specialist, who did not know the complainant, gave a score of 2 out of 5 for four behavioural indicators, and a score of 3- for the other two. In all, there were six behavioural indicators, three for each competency.

[145] With respect to Mr. Morin's alleged remarks to Mr. Bernard about the complainant in 2017, in a private context, I agree with the respondent that Mr. Bernard's testimony on this subject is inconclusive. It is not clear what Mr. Morin said in relation to the complainant, and it would be imprudent of me to speculate on this.

[146] Finally, I note that the jurisprudence submitted by the respondent dealing with bias and union activities is very specific to the facts presented in each of the decisions cited. These decisions do not address the issue of reasonable apprehension of bias in connection with negative comments made by one or more selection board members about a candidate, whether because of his or her union responsibilities or for other reasons. These decisions are of limited relevance to this case.

C. Remedy

[147] It is not disputed that the Board has the discretionary power, under section 81 of the *PSEA*, to order the revocation of an appointment where it concludes that there has been an abuse of authority. It is for the Board to decide, in light of the facts presented, whether to exercise this discretion and revoke the appointee's appointment.

[148] The complainant does not allege that the appointee did not meet the merit criteria, that there was abuse of authority in the development of the merit criteria, or that the respondent showed favouritism towards the appointee.

[149] I find that the circumstances of this case do not require the Board to revoke the appointment of the appointee. A declaration will suffice to send a clear message to the respondent that he has abused his authority in the application of merit, because of a reasonable apprehension of bias.

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

(The Order appears on the next page)

VI. Order

[151] The complaint is allowed.

[152] I find that the respondent abused its authority in the application of merit in the selection process, because of a reasonable apprehension of bias in the assessment of the complainant.

[153] I order that Exhibit I-1 - “[translation] Candidate Achievement Record (CAR) Guidelines for Assessors” - and Exhibit I-2 - “[translation] Assessor Training - Correctional Service Canada - WP-05 Process - Candidate Achievement Record” - be sealed.

[154] I order the complainant’s representative, the complainant and Anne Côté, for the respondent, to inform the PSC that they have been exposed to the contents of the sealed documents, if they participate in an internal recruitment process within the federal public service using simulation test 528 or 557 (the “tests”). This undertaking remains in effect for as long as the tests are used by the PSC.

[155] I order the complainant’s representative not to copy, photocopy or otherwise reproduce the sealed documents, in whole or in part, and not to transmit them to the complainant.

December 13, 2024.

FPSLREB translation.

**Adrian Bieniasiewicz,
a panel of the Federal Public Sector
Labour Relations and Employment Board**