

Date: 20250124

File: 771-02-43797

Citation: 2025 FPSLREB 7

*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

CLAIRE HARKNESS

Complainant

and

COMMISSIONER FOR CORRECTIONAL SERVICES

Respondent

Indexed as

Harkness v. Deputy Head (Correctional Service of Canada)

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

Before: Guy Giguère, a panel of the Federal Public Sector Labour Relations and
Employment Board

For the Complainant: Maria Azevedo, Union of Safety and Justice Employees

For the Respondent: Andréanne Laurin, counsel

For the Public Service Commission: Alain Jutras, senior analyst

Heard by videoconference, March 12, 13, and 25, 2024,
and decided on the basis of written submissions,
filed April 16 and May 1 and 10, 2024.

REASONS FOR DECISION

Introduction

[1] The complainant, Claire Harkness, complains against the indeterminate appointment of Jana Grassing, as a nurse, at the NU-HOS-03 group and level, through a non-advertised process at the Grand Valley Institution for Women (GVI). She alleges that Susan Martin, Acting Chief of Health Services, abused her authority by choosing to proceed through a non-advertised process and by improperly assessing Ms. Grassing.

[2] The complainant claims that Ms. Martin made this appointment for reasons of personal favouritism. She also alleges that she was discriminated against when Ms. Martin denied her accommodation request for a partial return to work after surgery, so that Ms. Martin could hire Ms. Grassing.

[3] In her complaint, made on November 23, 2021 to the Federal Public Sector Labour Relations and Employment Board (“the Board”), the complainant submits that the respondent, the deputy head of Correctional Services Canada (CSC), abused its authority under ss. 77(1)(a) and (b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “the PSEA”).

[4] The respondent denies any abuse of authority in the choice of a non-advertised process or in Ms. Grassing’s assessment. Ms. Martin completed a narrative assessment against the Statement of Merit Criteria and assessed all the qualifications required to perform the work. The respondent explains that Ms. Martin had no personal relationship with Ms. Grassing; thus, the personal favouritism allegation is groundless. The respondent also submits that the complainant failed to properly establish discrimination.

[5] To resolve this complaint, I must determine if the respondent abused its authority by proceeding through a non-advertised process and by improperly assessing Ms. Grassing to perform the functions of position. I must decide if the respondent demonstrated personal favouritism in the appointment process. I must also determine if it discriminated against the complainant by denying her accommodation to return to work, so that it could hire Ms. Grassing.

[6] For the following reasons, I find that the respondent abused its authority by proceeding with a non-advertised process. I also find that the respondent also abused

its authority by making an appointment that was not based of merit as the respondent improperly assessed Ms. Grassing. However, the complainant has not established that the respondent demonstrated personal favouritism in the appointment process or that the denial of accommodation for her return to work was linked to the fact that she was not appointed.

Background

[7] In January 2020, the complainant, who has been a registered practising nurse (RPN) since 2016, begins working with the CSC as a nursing student at the GVI which is located in Kitchener, Ontario. To live closer to work, she relocates from Hamilton, Ontario, and gives up her position as a staff nurse at Hamilton Health Sciences. A few months later, the COVID-19 pandemic (COVID) strikes our country and the world.

[8] With the COVID crisis, Ms. Martin needs to staff a full-time registered nurse (RN) at the GVI and proceeds to change the complainant's employment status. On April 8, 2020, the complainant becomes a casual employee. Soon after that, Ms. Martin prepares the documentation for a non-advertised process for an RN position for the complainant. On April 24, 2020, she receives her temporary RN certificate from the College of Nurses of Ontario ("the College"). On the same date, her tenure changes through a non-advertised process to a six-month term employee classified at the NU-HOS-03 group and level.

[9] With the change of her tenure to casual and then to term, the complainant experiences problems with the Phoenix pay system (Phoenix) and does not receive paycheques for three to four weeks. She complains about it to Ms. Martin, who inquires on her behalf, so that the complainant receives in advance her pay and insurance benefits. On April 28, 2020, the public service's pay centre advises that a paycheque or an emergency cheque should be issued as of the next payday.

[10] On May 7, 2020, the complainant writes to Ms. Martin that she has not received overtime pay since April 8, 2020. She also informs her that she has a chronic illness, diabetes, that she cannot pay for her medical supplies and has not received further information on her insurance coverage and benefits. Ms. Martin responds the same day that she will contact the pay centre.

[11] On May 15, 2020, Ms. Martin prepares an assessment against the Statement of Merit Criteria for the complainant.

[12] On June 5, 2020, the complainant writes to Katherine Mathieson, Chief of Health Services at the CSC's Fraser Valley Institution in Abbotsford, British Columbia, to inquire about a transfer to that institution for a job opportunity beyond a six-month contract.

[13] The complainant continues to experience problems with overtime pay. On July 8, 2020, she writes to Ms. Martin that some of her overtime hours in April 2020 are still not recorded. On July 31, 2020, she follows up on the missing overtime pay and asks if someone else could fill in the form on behalf of Ms. Martin. By that time, the complainant feels that Ms. Martin is indifferent to her difficulties.

[14] On August 13, 2020, Ms. Martin selects the complainant for an interregional flight, to accompany some patients. The complainant is excited at the opportunity. Upon her return, she is directed to isolate, as one of the patients claims that he has COVID symptoms.

[15] Ms. Martin is understanding of the complainant's need to isolate; however, she asks her to look for the patient's COVID testing results. The complainant refuses, as more than 24 hours have passed since he was in her care, and he is no longer considered her patient, according to College's standards and the CSC's offender management system policy and guidelines.

[16] The complainant finds out later that because she did not have the appropriate training, she was not permitted to go on a flight and would not have had insurance coverage had an incident occurred. She is upset that Ms. Martin did not inform her of this and feels that she was set up for failure.

[17] On August 17, 2020, Ms. Martin writes to the complainant about her transfer inquiry to the Fraser Valley Institution. She notes that she learned about it from her colleague and asks the complainant to let her know in advance of any future transfer requests.

[18] On November 18, 2020, the complainant's term appointment is extended until December 5, 2021. On December 12, 2020, in a staff meeting, Ms. Martin indicates that

the complainant, along with two other nurses, will be offered an indeterminate position.

[19] Later, Carrie Byfield, Chief of Health Services, who is on maternity leave, visits the unit unannounced. Ms. Martin is away, and when she learns about the visit, she phones the unit. The complainant answers the phone and Ms. Martin questions her about the purpose of Ms. Byfield's visit. The complainant refuses to answer these questions. Soon after, she begins to feel ostracized. She hears that Ms. Martin made negative comments about her to colleagues. She feels that from then on, she is the target of Ms. Martin's personal attacks.

[20] On February 3, 2021, the complainant is studying critical-care nursing during her lunch break. Ms. Martin asks her to assist with a case study of a complex patient. Ms. Martin makes a negative remark about her studying during work. The complainant explains that she has her textbook out because she is on her lunch break. Later, Ms. Martin request by email that the complainant provide accountable tasks lists of everything she has done when she is not present in the office.

[21] On February 24, 2021, the complainant is offered a part-time staff nursing position at a local hospital, which accommodates her full-time schedule at the GVI. On the same day, she informs Ms. Martin, who is supportive of the offer. The complainant explains that it will not impact her commitment to the GVI, which would be her priority if a COVID outbreak were to occur.

[22] On February 25, 2021, Dr. Jeremy Mills, Regional Director of Health Services, signs the "Articulation of the Selection Decision" form for the complainant's appointment, of which she is not informed. The other two nurses who were also offered an indeterminate position by Ms. Martin at the December 12, 2020, staff meeting, receive their hiring paperwork. However, Ms. Harkness never receives hers.

[23] On March 30, 2021, she meets with Ms. Martin to discuss her "Performance Management Plan" (PMP). The meeting goes well, and Ms. Martin confirms that the complainant's indeterminate appointment will take place.

[24] On April 13, 2021, the complainant is called to discuss an incident with Ms. Martin. Brittany Flowers, RN, asked the complainant to observe another nurse, who was doing bloodwork. The complainant informed the nurse about this, which caused an

incident. Ms. Martin explains to the complainant that the nurse was returning to work and that the complainant had made the situation more complicated.

[25] On April 21, 2021, the complainant arrives at a morning meeting at the GVI a few minutes late. At the end of the meeting, Ms. Martin asks everyone to show up at meetings on time, as it is disrespectful to arrive late.

[26] When the complainant would ask about her indeterminate appointment, Ms. Martin would attribute the delay to either a lack of funding, the decreased patient population, or paperwork delays and backlogs.

[27] In July 2021, an issue arises between Dr. Thong, an institutional physician, and the complainant about a clinical note written about a patient. The complainant feels that the issue is resolved as the physician thanks her for her clarifications. However, Ms. Martin calls the complainant into her office to discuss it and includes this event in the complainant's PMP.

[28] In the summer of 2021, Ms. Martin hears from a colleague that Ms. Grassing wants to return to work at the GVI. Ms. Flowers will be leaving her NU-HOS-03 indeterminate position in the fall of 2021 and must be replaced. Ms. Martin knows Ms. Grassing, as she worked at the GVI as a student nurse for a period of 4 months in 2010 and 2011. Ms. Martin interviews her and wants to hire her, as Ms. Grassing has 11 years of relevant experience working as an RN at the Homewood Health Centre in Guelph, Ontario, which treats patients with similar addiction and mental health issues as those at the GVI. She uses the information gathered in the interview, along with her CV, to assess Ms. Grassing.

[29] On August 11, 2021, the complainant goes on sick leave, to have hip surgery. She advises Ms. Martin that her surgeon estimates that her time off work will be three months, after which she will be able to resume her regular duties.

[30] On August 12, 2021, Ms. Martin signs the evaluation to appoint Ms. Grassing as a term employee. She also signs the rationale for a non-advertised appointment. On August 19, 2021, clearance is received from the PSC and CSC that no employees need be considered with priority or internal permanent accommodation status.

[31] On August 19, 2021, approval is given for Ms. Grassing to be paid at step 6 of the pay scale, in recognition of her 11 years of clinical experience. On August 21, 2021, Ian Irving, Acting Regional Director of Health Services, signs the letter of offer for Ms. Grassing's term appointment from September 20, 2021, to September 20, 2022.

[32] On September 15, 2021, the complainant's surgeon completes a form for St. Mary's General Hospital in Kitchener ("the St. Mary's form") in which he assesses her physical abilities and the restrictions for her return to work. The surgeon indicates as a restriction that she should not walk more than 100 meters.

[33] On September 20, the complainant sends a copy of the St. Mary's form to Ms. Martin and asks if there are some modified duties that she would be able to do. On the same date, Ms. Grassing begins to work at the GVI as term employee.

[34] On September 22, 2021, Ms. Martin responds to the complainant that there is no work that she can assign her that meets the restriction. Ms. Martin indicates that the complainant will use up all her sick leave hours as of October 2, 2021. She informs the complainant that she consulted Labour Relations about advancing sick leave but that it is not an option. She asks the complainant if she would consider disability leave.

[35] On September 24, 2021, the complainant writes back, suggesting some work that she could do. She also indicates that she is not eligible for disability leave. On October 15, 2021, her surgeon provides a note indicating that she can now resume work on a reduced shift of 7 a.m. to 11 a.m. and that as of November 11, 2021, she can return to her regular hours.

[36] Meanwhile, Ms. Flowers' departure is announced. On October 3, 2021, a Notice of Consideration for Ms. Grassing's indeterminate appointment is posted. On October 18, 2021, Ms. Martin assesses Ms. Grassing as meeting the merit criteria. On October 25, 2021, Ms. Martin prepares the Articulation of the Selection Decision form for Ms. Grassing, which Ms. Byfield approves as Acting Manager of Health Rehabilitation.

[37] On October 21, 2021, the complainant meets with Ms. Martin, to discuss her return to work. Mr. Martin indicates that the offer for the complainant's indeterminate appointment has been undone as there are not enough inmates. Ms. Martin also discuss the complainant's PMP. The complainant does not agree with the PMP, which contains negative comments. In the early morning of October 29, 2021, Ms. Martin

emails the complainant and asks her to sign the PMP before completing any tasks. The complainant signs the PMP but later asks for its review.

[38] On November 9, 2021, the Notification of Appointment or Proposal of Appointment” (NAPA) is posted. On November 23, 2021, the complainant makes her complaint with the Board against Ms. Grassing’s indeterminate appointment.

Analysis

[39] Question 1: Did the respondent abuse its authority by proceeding through a non-advertised process?

[40] The Preamble of the *PSEA* is an integral part of the *Act* and assists with the determination of its legislative purpose. It states that the public service embodies fair and transparent employment practices and respect for employees. The Preamble also indicates that managers must exercise their delegated authority within a framework that ensures that they are accountable. As jurisprudence has confirmed, managers are required to conform to the PSC’s appointment policies under Section 16 of the *PSEA*. See *Tibbs v. Canada (National Defence)*, 2006 PSST 8 at paras. 61 to 64; *Robert and Sabourin v. Deputy Minister of Citizenship and Immigration*, 2008 PSST 24.

[41] The *PSEA* under section 33 does not differentiate between an advertised and a non-advertised process, and either can be used to make an appointment. Nevertheless, managers must be fair and transparent in their choice to proceed with a non-advertised process. As only one person is considered in a non-advertised process, to be fair and transparent, it is important that managers document and explain how they proceeded and why they chose a non-advertised process. See *Beyak v. The Deputy Minister of Natural Resources Canada*, 2009 PSST 35 at paras. 119 to 127; *Robert and Sabourin, Hunter v. Deputy Minister of Industry*, 2019 FPSLREB 83 paras. 53 to 93.

[42] The PSC’s former policy, *Choice of Appointment Process*, considered non-advertised appointments a risk area and required a written rationale to demonstrate how the choice of a non-advertised process respected fairness and transparency. See *Beyak* at paras. 123 and 124.

[43] Since April 2016, PSC’s *Appointment Policy*, requires that an Articulation of the Selection Decision form be completed for all appointments that are subject to merit. From that point, deputy heads now establish directions on the use of advertised and

non-advertised appointment processes in their organization. This direction is found in the CSC's *Staffing Management Policy*.

[44] The CSC's *Staffing Management Policy* requires management to assess the risks of choosing the appointment process on a case-by-case basis. Risk refers to the uncertainty that may impede achieving staffing and management outcomes or respect for appointment values, notably, fairness and transparency. The risk assessment is based on the likelihood of a negative impact and its severity, as not all non-advertised processes are high risk. The scope and depth of the explanation required in the Articulation of the Selection Decision should reflect the appointment's level of risk.

[45] I have found that the justification documents had many errors or were missing from the staffing file. For instance, for the term appointment, there is no Articulation of the Selection Decision form. There is an "Approval for Non-advertised Appointment" form that Ms. Martin signed in August 2021 and that explains the rationale for using a non-advertised process. In the form, Ms. Martin refers to the "National Staffing Strategies" and explains that the term appointment is the best option, as it will provide stability and increase staff morale.

[46] The form wrongly identifies the appointment as internal and Ms. Martin explains the need to fill the position immediately, to retain a nurse who had demonstrated that she was the right fit. That explanation could not apply to Ms. Grassing, who had not yet started to work at the GVI. This also appears to have been taken word for word from the Approval for Non-advertised Appointment form for the complainant that Ms. Martin signed on May 15, 2020.

[47] There were similar mistakes and missing information for the indeterminate appointment. An Articulation of the Selection Decision form was signed in October 2021, but it wrongly identifies the non-advertised process as an external appointment. It contains little information and states only that Ms. Grassing had worked at the GVI in 2011 and after that at Homewood Health Centre. It states that she is in good standing as an RN and that she will fill a true indeterminate position. It does not set out the reasons for using a non-advertised process or assess its risk. In this process, no Approval for Non-advertised Appointment form was completed to explain the rationale for using a non-advertised process for the indeterminate appointment.

[48] Ms. Martin testified that she never ran an advertised process at the GVI. She never questioned using an advertised process for any appointments, which was her approach to the indeterminate appointment at issue. There is no evidence of a strategic discussion with a human resources advisor about risk assessment when selecting a non-advertised process. Neither the likelihood of a negative impact from using a non-advertised process or its impact on hindering fairness and transparency in appointments was considered.

[49] I consider that the *Staffing Management Policy*'s requirements were not followed for the choice of a non-advertised process. There was no assessment of the risks of choosing a non-advertised process for the indeterminate appointment of a term employee who had just began working at the GVI and for the CSC. The Articulation of the Selection Decision was incomplete and filled with errors. No evaluation or mention was made of, or consideration given to, the high risk of a negative impact on the employees' morale and the perception of a lack of fairness and transparency.

[50] I conclude that the respondent choice of proceeding through a non-advertised process did not conform to the PSC's appointment framework. Moreover, the respondent's evidence did not demonstrate that it was fair and transparent to proceed through a non-advertised process a few weeks after Ms. Grassing had begun working at the GVI as a term employee. As discussed later in the decision, she could not be properly assessed against the Statement of the Merit Criteria on October 18, 2021, in such a short period.

[51] Ms. Martin testified that she could not hire Ms. Grassing as an indeterminate employee through an external process because Ms. Flowers was still in the position in August 2021. Once Ms. Flowers' departure was announced, Ms. Martin proceeded with a non-advertised indeterminate appointment. Ms. Martin wanted to tie up the loose ends as she was leaving her position at the GVI.

[52] However, Ms. Grassing had already been hired as a term employee, so there was no urgency to fill the indeterminate vacancy before Ms. Flowers left. Ms. Grassing was not properly assessed against the Statement of the Merit Criteria as explained later in this decision. Ms. Martin's successor would have been in a better position to properly assess the merit criteria after Ms. Grassing had worked several months at the GVI.

[53] Dr. Mills testified that managers at the GVI typically proceeded with non-advertised processes to staff positions, as there were not sufficient interested candidates to run advertised processes. Dr. Mills explained that due to the competition between organizations that hire nurses, and the significant time frame required to complete advertised processes, most candidates will often have found another job before such a process ends.

[54] Nonetheless, I consider that those reasons for using a non-advertised process would apply only to an external process. The respondent did not present evidence to support using a non-advertised process internally. The complainant's uncontradicted evidence is that term employees at the GVI would have been interested in participating in an advertised process.

[55] For all those reasons, I find that there was abuse of authority in the choice of a non-advertised process under s. 77(1)(b) of the *PSEA*.

[56] Question 2: Did the respondent abuse its authority by improperly assessing the merit criteria?

[57] The complainant alleges that Ms. Martin copied the complainant's assessment against the Statement of Merit Criteria and used it as her evaluation of Ms. Grassing. Moreover, she argues that Ms. Martin could not assess Ms. Grassing as meeting the merit criteria, since Ms. Grassing began working at the GVI only 23 workdays earlier. Furthermore, Ms. Grassing would have worked not all those days, as the shifts are 11 hours, and an RN often will work 4 days or less a week.

[58] The respondent submits that Ms. Grassing was properly assessed and that she met the merit criteria for the appointment. Ms. Martin testified that she sat with Ms. Grassing, went through the job description and qualifications "word for word", and cross-referenced her interview against the Statement of Merit Criteria through a paper checklist.

[59] Ms. Martin was cross-examined on the similarities in the text used for the assessment against the Statement of Merit Criteria for Ms. Grassing and the complainant. Ms. Martin admitted that she would use previous assessments and that she would copy and paste relevant sections when assessing candidates.

[60] I find that the text used in the complainant's assessment was in good part the same that was used for that of Ms. Grassing. Both texts are very similar, as Ms. Martin admitted that she would copy and paste previous assessments.

[61] What is problematic is that Ms. Martin could not have made some of the assessments in such a short period. She does not work side by side with the nurses, and Ms. Grassing began working at the GVI only 23 workdays before the assessment was made. For example, when she assessed the criterion of working effectively with others, Ms. Martin wrote that Ms. Grassing "... encourages innovation and creativity as demonstrated by her various tasks/projects completed ..." at the GVI. She also wrote that Ms. Grassing "... builds team spirit and promotes co-operation and interaction with others."

[62] Furthermore, Ms. Grassing could not have accomplished many of the things that she is credited for in the assessment. When she assessed the criterion of showing initiative and being action oriented, Ms. Martin wrote that Ms. Grassing "... is able to work shift work, overtime and variable hours", "... had established targets for quality and for productivity within [the] unit by implementing change", and "... is able to move projects forward to achieve effective and timely results."

[63] The complainant also alleges that Ms. Grassing was on leave for a long period and that she did not have the 11 years of experience as a nurse reported in her résumé. Ms. Martin was cross-examined on the reference checks that were done for Ms. Grassing. She explained that she checked if Ms. Grassing had been registered with the College for those 11 years. She believes that she contacted Ms. Grassing's previous managers, but she did not recall verifying the number of hours that Ms. Grassing worked yearly as an RN.

[64] Ms. Martin wrote in the assessment against the Statement of Merit Criteria that the interview and reference checks were used to assess if Ms. Grassing met the merit criterion of "Showing initiative and being action-oriented". The complainant requested the disclosure of the notes of the interview and the reference checks, but the respondent could not find them.

[65] A candidate's assessment of their qualifications, which includes interview notes and reference checks, should be accessible for a minimum of five years, as specified in the Public Service Commission's (PSC) *Appointment Policy*. Transparent and fair

appointment practices require that interview notes and reference checks be formally recorded for all appointments, whether advertised or non-advertised.

[66] In the absence of any record and on a balance of probabilities, I conclude that there were no interview notes taken and no reference checks with Ms. Grassing's former managers. References were especially important, as Ms. Martin had a period of only 23 workdays to assess Ms. Grassing against the merit criteria. Her work experience with Ms. Grassing of 11 years before was too old to be determinant.

[67] For all these reasons, I find that Ms. Grassing was not properly assessed against the Statement of the Merit Criteria. I conclude that her appointment was not made on the basis of merit as Ms. Grassing did not meet the merit criteria when she was appointed. Therefore, the respondent abused its authority under s. 77(1)(a) of the *PSEA*.

[68] Question 3: Did the respondent abuse its authority by making the appointment based on personal favouritism?

[69] Some of the complainant's allegations of personal favouritism are of a general nature. She alleges that Ms. Martin favoured nurses who had a personal relationship with her by providing them with career-advancement opportunities. The favoured nurses were eventually given indeterminate positions. The complainant testified that all nurses at the GVI received their indeterminate status via non-advertised processes.

[70] The complainant's personal favouritism allegation against Ms. Martin toward Ms. Grassing can be summarized as follows. Ms. Martin ensured that Ms. Grassing was paid at level 6 of the pay scale. However, Ms. Grassing did not have 11 years of clinical experience, as she had children and had been on leave for some of that time. She also argued that Ms. Martin ignored priorities so that she could appoint Ms. Grassing.

[71] Ms. Martin indicated that she interviewed Ms. Grassing and that she found her to be the best fit, as Ms. Grassing had 11 years of nursing experience at Homewood Health Centre. When she was cross-examined, she explained that she checked that Ms. Grassing had been registered with the College for those 11 years. She did not recall verifying the number of hours that Ms. Grassing worked yearly as an RN with her previous managers.

[72] The complainant presented evidence that Ms. Martin had knowledge that Ms. Quigg, an RN, wanted to relocate to the GVI, which is where her husband worked. However, the respondent provided evidence that the appointment was made after documented priority clearances were received from the PSC and CSC.

[73] The complainant argued that Ms. Martin was required to verify whether Ms. Grassing had worked the full 11 years at the Homewood Health Centre. However, she did not present any evidence documenting this as a requirement. The respondent's evidence was that Amy Shell, a human resources advisor, indicated to Ms. Martin that the assessment of experience was at management's discretion. Ms. Martin then recommended level 6 of the pay scale, which Mr. Irving approved under the proper subdelegated authority during the COVID pandemic.

[74] Ms. Martin indicated that in 2010 and 2011, she worked for three months with Ms. Grassing, who was then a student nurse at the GVI. She testified that she did not maintain any personal relationship and was not in contact with Ms. Grassing after she left the GVI to work at Homewood Health Centre. She also testified that she interviewed Ms. Grassing after she heard from a colleague that Ms. Grassing wanted to return to work at the GVI.

[75] At s. 2(4), the *PSEA* states that for greater certainty, a reference to abuse of authority shall be construed as including personal favouritism. As established by the jurisprudence, the word personal precedes the word favouritism, emphasizing that both words should be read together, and that personal favouritism, not other types of favouritism, constitutes abuse of authority. See *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7 at paras. 39 to 41.

[76] For example, undue personal interests in appointing a person, such as appointing a person as a personal favour or to gain personal favour with a manager, constitute personal favouritism. Establishing the position's essential qualifications and assessing an employee, to ensure his or her appointment without respecting the position's actual requirements, is also personal favouritism. See *Beyak*, at para. 185.

[77] Furthermore, appointing a candidate who does not meet the position's essential qualifications as a personal favour to the candidate also constitutes personal favouritism. Ms. Martin did not properly assess Ms. Grassing as meeting the merit

criteria, as explained earlier. However, there is no evidence that she did it as a personal favour or that undue personal interests were the reason for appointing Ms. Grassing.

[78] I find that the reason that Ms. Martin assessed Ms. Grassing as meeting the merit criteria was not personal favouritism. Ms. Martin proceeded hastily and did not properly assess Ms. Grassing against the Statement of Merit Criteria. However, Ms. Martin had lost contact with Ms. Grassing after she had worked at the GVI as a student nurse in 2010 and 2011. Ms. Martin had no professional or personal relationship with Ms. Grassing. Her 11 years of relevant clinical experience was the determinative factor for Ms. Martin when she evaluated Ms. Grassing as the right fit for the appointment.

[79] For these reasons, I find that the complainant has not established that the appointment was made based on personal favouritism.

[80] Question 4: Did the respondent discriminate against the complainant by denying her accommodation to return to work, so that she could hire Ms. Grassing?

[81] As the respondent submits, the test to determine if discrimination in employment has occurred proceeds in two steps. In the first step, the grievor must establish *prima facie* discrimination; that is, evidence that in the absence of a response from the employer would be sufficient to conclude that discrimination occurred. See *McCarthy v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLRB 45 at para. 83; *Moore v. British Columbia (Education)*, 2012 SCC 61 at para 33.

[82] These three elements are required to establish *prima facie* discrimination in employment matters:

- 1) the complainant has a characteristic protected from discrimination under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6),
- 2) the complainant has experienced an adverse impact in their employment, and
- 3) the protected characteristic was a factor in the adverse impact.

[83] In this case, the complainant meets the two first elements. She was disabled after her surgery and was not appointed to the indeterminate appointment. She then had to demonstrate a connection (also known as nexus) between those two elements, her disability (the protected characteristic) and the fact that she was not appointed (the adverse impact), while recognizing that other factors might be present. Both evidentiary steps are necessary. Without both, there is no *prima facie* case. See *Bourdeau v. Treasury Board (Immigration and Refugee Board)*, 2021 FPSLRB 43.

[84] If a *prima facie* case is established, the onus shifts to the respondent to provide a reasonable explanation or to establish that there is a Bona Fide Occupational Requirement (BFOR) defence. See *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

[85] The complainant testified that Ms. Martin stalled and denied her accommodation for a partial return to work, to appoint Ms. Grassing. The “Notice of Consideration” was posted on October 3, 2021, while the complainant was on sick leave.

[86] Ms. Martin testified that the complainant’s disability period after her surgery had no impact on the staffing decision. The complainant was on a three-month leave, after which she was to return to work.

[87] The respondent argues that the forms for Ms. Grassing’s term appointment were completed before the complainant indicated that she was able to come back to work. The NAPA for the indeterminate position was posted on November 9, 2021, which was after the complainant returned to work.

[88] I consider that in August 2021, Ms. Martin would likely have preferred to appoint Ms. Grassing to an indeterminate position. However, as she testified, she could not as Ms. Flowers was still in the position. As soon as her departure was announced, a Notice of Consideration for Ms. Grassing’s appointment was posted.

[89] I find that the decision not to appoint the complainant to an indeterminate position had nothing to do with her disability after the surgery. As the evidence demonstrates, there was a falling out in her professional relationship with Ms. Martin earlier in 2021. Ms. Martin could arguably have proceeded to appoint the complainant after Dr. Mills signed the Articulation of the Selection Decision form on February 25, 2021. However, Ms. Martin decided not to appoint her after the incidents that they both documented. Clearly, Ms. Martin decision not to appoint the complainant was made before she had her surgery.

[90] Ms. Martin did not tell the complainant that her indeterminate appointment was off the table until the last week before her departure. She did the same with the

complainant's PMP. It appears that Ms. Martin wanted to avoid a confrontation with her.

[91] The complainant argues that Ms. Martin failed to accommodate her by stalling her partial return to work. As the respondent argued, the proper recourse at the time, was for the complainant to grieve the failure to accommodate her return to work. In the context of this staffing complaint, it is not opportune for the Board to assess whether the complainant was properly accommodated.

[92] For all these reasons, I find that the complainant has not established that her disability after her surgery was a factor in her not being appointed to the indeterminate position. There is no connection between her disability and the fact that she was not appointed. Therefore, I conclude that she has not established a *prima facie* case of discrimination.

Recommendations

[93] It is well established that the Board can inform a respondent of concerns that arise from hearing an abuse-of-authority complaint. Recommendations can also be made to a respondent to avoid repeating the same underlying problem see *Ayotte v. Deputy Minister of National Defence*, 2010 PSST 16; and *Beyak*.

[94] I have the following general recommendations. This complaint demonstrates that stronger accountability and review mechanisms are required to assess delegated managers' statements, to support non-advertised processes. Delegated managers are not required to have expertise in staffing matters; therefore, it is important that they have strategic discussions with a human resources advisor, as mentioned in the *Staffing Management Policy*. It is not clear if they happened in this case. A sign-off from a human resources advisor would ensure that those discussions are held.

[95] As was found in this decision, the staffing file was incomplete and filled with errors. I recommend more involvement by human resources advisors in assessing whether non-advertised appointment processes are a high risk, provide more support to delegated managers, and alert them of errors in staffing files.

[96] I believe that the format of Articulation of Selection Decision form should be reviewed as the space provided for the manager's explanation for the selection decision is minimal, about half the size of section B identifying the type of internal

appointment process. This suggests that the explanation is not important as the space is insufficient to explain both the choice of the selected person and how the choice of the appointment process align with the *Staffing Management Policy*. This could be done by providing separate boxes at section C for the manager's explanation for both choices.

[97] To ensure transparent and fair appointment practices, when reference checks are used for assessment, the respondent must ensure that they are systematically recorded for all processes. The respondent should also take measures to safeguard the accessibility of the references checks for a minimum of five years, as specified in the PSC's *Appointment Policy*.

Corrective measures

[98] The complainant specified in the pre-hearing conference that she was asking for the revocation of the appointment. In her written arguments, she asked more generally for corrective measures sufficient to ensure there are real consequences to the disregard of the *PSEA* and the respondent's own policy.

[99] Under section 81 of the *PSEA*, the Board may order the revocation of an appointment as a corrective measure. The Board may also take any corrective measure that it considers appropriate to address the appointment process that is the subject of the complaint. See *Canada (Attorney General) v. Cameron*, 2009 FC 618 at para. 18.

[100] Determining the appropriate corrective measures or whether they should be ordered is discretionary and depends on the assessment of facts of each case. In some circumstances, a declaration that there has been an abuse of authority can be sufficient. While in other instances, the facts of the case may require the revocation of the appointment and other corrective measures.

[101] As the Federal Court of Appeal established in *Turner v. Canada (Attorney General)*, 2022 FCA 192, revocation is often ordered when abuse of authority is found to have occurred. Where revocation is not ordered, the decision should explain why it is not warranted in the circumstances of the case and why it should depart from established jurisprudence.

[102] Following the *Turner* decision, the matter dealing with remedy was remitted to the Board. In *Turner v. Deputy Head (Royal Canadian Mounted Police)*, 2024 FPSLREB

33 at paras 43 to 55, the Board did a review of the *PSEA*'s jurisprudence on revocation. It established that revocation will generally be ordered when the appointment was not based on merit or when it was not demonstrated to have been based on merit. The Board also found that revocation is often ordered when there is a finding of personal favouritism, reasonable apprehension of bias or significant flaws in the appointment process.

[103] I find for the following reasons that the appropriate corrective measure for this complaint is the revocation of the appointment. The choice of a non-advertised process was unfair and not transparent, but most importantly, the appointment was not made on the basis of merit. Ms. Martin did not properly evaluate the appointee against the Statement of Merit Criteria. She had been working only a few weeks at the GVI and could not have met the merit criteria described in the assessment.

[104] It is a fundamental principle of the *PSEA* and preceding legislation, that appointments in the public service be based on merit. To uphold the merit principle, a person whose appointment was not found to be based on merit, should not continue to occupy the appointed position. However, ordering corrective measures is discretionary and exceptionally some distinguishing facts may justify not revoking the appointment.

[105] The *PSEA* does provide for what can happen to the appointee when the revocation of the appointment is ordered by the Board. Under Section 86, the respondent can appoint that person to another position. The person must meet the essential qualifications of the other position to ensure that merit is safeguarded.

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

(The Order appears on the next page)

Order

[107] The complaint is allowed.

[108] The Board orders Ms. Grassing's indeterminate appointment revoked.

January 24, 2025.

**Guy Giguère,
a panel of the Federal Public Sector
Labour Relations and Employment Board**