

Federal Court



Cour fédérale

Date: 20190208

Docket: T-322-18

Citation: 2019 FC 168

Ottawa, Ontario, February 8, 2019

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

BRIAN DOYLE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondents

JUDGMENT AND REASONS

Introduction

[1] This is an application for judicial review of a decision of the Director of Investigations, Public Service Commission of Canada (“PSC”), dated January 5, 2018, concerning the allegation of Mr. Brian Doyle, the Applicant, that his written examination, prepared in connection with an advertised internal appointment process, was altered. The PSC determined that the allegation

was unfounded, which conclusion was based on an investigation conducted pursuant to section 69 of the *Public Service Employment Act*, SC 2003, c 22 (“PSEA”) and resultant Investigation Report.

[2] For the following reasons, this application for judicial review is dismissed.

Preliminary Matter

[3] The style of cause lists the Respondent as the Public Service Commission of Canada, Investigations and Oversight Sector. The parties agreed at the hearing that, in accordance with Rule 303(3) of the *Federal Courts Rules*, SOR/98-106, the proper respondent is the Attorney General of Canada. The style of cause will be amended as part of this judgment.

Background

[4] The Applicant was an indeterminate public servant employed as an Executive Administrator with the National Energy Board (“NEB”) in Calgary, Alberta when he applied, on June 17, 2016, to participate in an internal selection process for a Communications Officer position with Western Economic Diversification Canada (“WEDC”) in Edmonton, Alberta. On July 14, 2016 the Applicant was advised he met the screening criteria and was invited to attend an interview to be held on the morning of July 21, 2016, at WEDC’s Calgary office, followed by a written assessment to be conducted at the NEB’s Calgary office.

[5] These arrangements were made by Ms. Donna Kinley, Regional Manager, Consultations, Marketing and Communications, WEDC, the hiring manager for the selection process. Ms. Kinley contacted Ms. Catherine Barclay, a former WEDC colleague whom she believed now to be the Human Resources Director at NEB, for assistance administering the Applicant's exam. Ms. Barclay, who was in fact the Chief of Staff and Acting Vice President of People and Knowledge at NEB, in turn requested that Ms. Sandrine Futi, a NEB Human Resources Assistant with experience administering such exams, assist in this regard.

[6] On July 21, 2016, the Applicant attended the interview at WEDC and then proceeded to NEB to the testing area to write the exam at 1:00 p.m. The Applicant wrote the exam on a computer in the testing room, which was provided for that purpose, and completed it within the allotted 90 minutes. After the exam, Ms. Futi printed the exam from a printer in the test room and the Applicant signed the first page and initialed the remaining pages of the exam, all in blue ink. That same afternoon, Ms. Futi scanned the exam and emailed it to herself. Ms. Futi then emailed the exam to Ms. Barclay who, in turn emailed the exam to Ms. Kinley. There is a discrepancy concerning the time that these emails were sent. After Ms. Barclay received the scanned exam, Ms. Futi shredded the Applicant's working notes and deleted the electronic copy of his exam that had been saved on the test room computer.

[7] On July 25, 2016, the Applicant emailed Ms. Kinley and the second interviewer thanking them for the interview and forwarding a copy of a document that previously had not transmitted properly. Ms. Kinley replied to this email on August 18, 2016, asking the Applicant whether he was available to discuss the job competition. During an August 19, 2016 phone call, Ms. Kinley

advised the Applicant he had not been successful in the selection process. On August 25, 2016, the Applicant received written confirmation that he was eliminated from the process.

[8] On April 25, 2017, the Applicant made a *Privacy Act*, RSC 1985, c P-21 request to WEDC seeking information relating to the selection process. WEDC responded with the requested information on May 11, 2017. Upon review of this response, the Applicant sent WEDC a follow-up letter on June 16, 2017, advising that two pieces of information were missing from the provided documents: page 20/68 of his online application, and the exam completed on July 21, 2016. On June 21, 2017, WEDC sent the Applicant the missing page and a black and white copy of the Applicant's graded exam, and apologized for and explained the oversight.

[9] On June 26, 2017, the Applicant initiated a complaint with the PSC. The Applicant requested an investigation into his application to WEDC, specifically alleging potential fraud, which the Applicant noted the PSC would have exclusive authority to investigate pursuant to section 69 of the PSEA. The Applicant's allegations were founded on the documents he had received through his information request. Specifically: page 20/68 of his resume/application lacked photocopy marks found on the preceding and following pages of the document as originally provided to him and were therefore inconsistent with those pages; some pages from the graded exam (pages 1, 2, 4 and 5) did not have his initials, which he remembered adding to each page of his written exam; some the pages of the exam (pages 1, 2, 4 and 5) had no photocopy lines while others (pages 3, 6, 7 and 8) had a distinctive line on the right of each page; on page 6, his initial was distorted; on page 7, the initial was placed over another word that was greyed out and there were no web links or contact information, which the Applicant claimed he

recalled inserting; and, the exam contained errors which the Applicant claimed he did not make and which Ms. Kinley did not disclose to him during the August 2016 telephone call.

[10] A jurisdiction officer with PSC, Ms. Ghislaine MacKenzie, undertook information gathering concerning the complaint and on August 1, 2017 set out her findings and recommended that an investigation be conducted. This recommendation was accepted and acted upon by the PSC. Ms. Julie Murphy was assigned as the PSC investigator (“Investigator”) to conduct an investigation pursuant to section 69 of the PSEA. During the course of that investigation, she sought information and documentation concerning the appointment process from various sources, including Ms. Futi, Ms. Kinley, Ms. Barclay and the Applicant, and conducted interviews of those persons. On November 23, 2017, the Investigator sent a copy of the Factual Report, which she had prepared, to each of the Applicant, Ms. Futi, Ms. Barclay and Ms. Kinley. She provided each of them with the opportunity to comment on information supplied by others and to provide submissions regarding the allegation raised in the investigation.

[11] Ms. Barclay provided brief comments on November 28, 2017; Ms. Futi and Ms. Kinley advised that they had no comments. On December 1, 2017 the Applicant sent a six page response dated November 30, 2017; he had also sent an email on November 29, 2017 asking if the Investigator could obtain and review other information, including the interview questions. On December 9, 2017, the Applicant provided the Investigator with supplemental information, which he stated was outside the events of the selection process, but which he perceived to demonstrate a similar pattern of events. The Applicant outlined an instance in his current role,

while now reporting to Ms. Barclay, where he felt the uploading of a template document served to foster a perception that he had not done this work or that it needed editing.

[12] On January 5, 2018 the Investigator produced the Investigation Report (or “Report”). This states that the investigation was conducted pursuant to section 69 of the PSEA and concluded that the evidence did not show, on the balance of probabilities, that any individual involved in the appointment process tampered with the Applicant’s written exam. For that reason, the evidence did not establish that fraud was committed under section 69 of the PSEA. On the same date, Ms. Suzanne Charbonneau, Director, Investigations, PSC, wrote to the Applicant providing him with a copy of the Investigation Report and advising him that the Investigation had concluded that his complaint was not well founded.

[13] On February, 15, 2018, the Applicant filed his Notice of Application seeking judicial review of PSC’s decision.

Decision Under Review

[14] The PSC’s decision is based on the Investigation Report findings.

[15] In describing its purpose, the Report states that the investigation was conducted under section 69 of the PSEA to determine if fraud occurred in an advertised internal appointment process (19-WCO-IA-EDM-710). More specifically, that concerns were raised by the Applicant, a candidate in the appointment process, that his written exam may have been tampered with. This

raises the possibility that one or more persons involved in the appointment process may have falsified exam material.

[16] The Report sets out its methodology, being a review of the documentary evidence and the conducting of the interviews described above, and references the issuance of the Factual Report. The Investigation Report states that all comments, submissions and information obtained in the course of the investigation were given consideration. However, only relevant comments, submissions and information were included in the Report and were used in the analysis and conclusions.

[17] The Investigation Report sets out the background and provides a summary of the facts gathered during the investigation. It describes the Applicant's concerns about the graded exam, including that: his initials were missing on pages 1, 2, 4 and 5; there was a mark under his initial on page 7 and it looked like someone had tried to grey something out; the text on certain pages was lighter and fainter than others; there were inconsistencies in photocopy marks on the sides of pages; and he recalled inserting links and providing more complete contact information on page 7, but this was absent from the corrected exam.

[18] Based on the gathered information, the Report then describes the circumstances that led to the Applicant writing the exam at NEB, how the exam was administered at NEB, how NEB sent the exam to WEDC, and the assessment in the context of the appointment process. This latter topic includes the Applicant's concerns regarding Ms. Kinsley contacting him about his elimination from the process before he received the official notification, as well as Ms. Kinley's

observation that the content of the graded exam was identical to the PDF copy of the exam that she had received from NEB; she could not explain why some initials and other colour content found in the PDF version of the exam were missing from the black and white copy that she graded. The Report also notes additional concerns raised by the Applicant following the issuance of the Factual Report, being his disagreement with the assessment of some of his exam responses and that he was not informed about some of his errors made in the written exam during his telephone conversation with Ms. Kinley.

[19] In its analysis, the Investigation Report again notes that it was conducted under section 69 of the PSEA which states that the Commission may investigate the appointment process if it has reason to believe that fraud occurred. Although the term “fraud” is not defined in that legislation the, Federal Court of Appeal in *Seck v Canada*, 2012 FCA 314, at paragraphs 39 to 41 (“*Seck*”), defined fraud in the context of the PSEA appointment process, a portion of which decision the Report quotes as follows:

...Fraud thus has two essential elements: (1) dishonesty, which can include non-disclosure of important facts; and (2) deprivation or risk of deprivation. Dishonesty is established where deceit, lies or other fraudulent means are knowingly used in an appointment process. This may include the non-disclosure or concealment of important facts in circumstances where that would be viewed by a reasonable person as dishonest. [...] the victim of the fraud is not required to prove that the fraudulent acts caused actual injury or loss. With regard to section 69 of the Act, to prove the second element, it therefore suffices to establish that the appointment process could have been compromised.

[20] Based on *Seck*, the Report states that, to conclude that fraud occurred pursuant to section 69, the evidence must show, on the balance of probabilities, that one or more persons involved in

the appointment process acted dishonestly by tampering with the Applicant's written exam and thereby falsifying exam material. The evidence must also show, on the balance of probabilities, that the individual's actions could have compromised the appointment process.

[21] The Investigator first addresses the element of dishonesty. She notes that the evidence shows that three individuals were involved in the administering of, and had access to, the written exam: Ms. Kinley, Ms. Barclay and Ms. Futi.

[22] The Investigator then addresses the Applicant's concerns about the location of the written exam. The Investigator notes that, pursuant to section 36 of the PSEA, a manager may use any assessment method it considers appropriate. Considering Ms. Kinley's decision to administer the exam in a supervised setting and the lack of appropriate WEDC office space in Calgary, the Investigator concludes that it was reasonable for Ms. Kinley to reach out to a contact at NEB, who she believed to work in Human Resources, to help coordinate the administration of the exam. There was also no evidence to support that the location of the exam was chosen for any reason other than to facilitate the administration of the exam close to the Applicant's residence, which is in Calgary.

[23] The Investigator also found the actual exam content (that is, the Applicant's answers to the exam questions) was identical across all exam versions reviewed, namely the version scanned by Ms. Futi after the exam, the version of the exam sent from Ms. Futi to Ms. Barclay, the version sent by Ms. Barclay to Ms. Kinley, and the graded (corrected) version. Because the Applicant's evidence was that his exam responses were not as he remembered them, and because all of the exam versions were identical to that scanned by Ms. Futi, the Investigator concludes that any modification

of the written exam answers would have to have been made between the time of the end of the exam and the time it was scanned.

[24] The Investigator found that the evidence supports that Ms. Futi routinely administers written exams, and that she had clearly described her usual process for doing so. The Investigator found her to be credible and that there was no reason to question that she followed the same routine for the appointment process at issue. And while the Applicant recalled handing his completed exam to Ms. Barclay, Ms. Futi recalled being the one to take his exam. The exam was scheduled to start at 1:00 p.m. and the Applicant took the entire 90 minutes to complete it. Ms. Futi's evidence was that she then printed the exam and a short time later, she scanned it as it was when the Applicant handed it to her, and that she did not make any modification to it. The evidence shows that she scanned the exam at 2:57 p.m.

[25] Concerning the Applicant's initials appearing in a mix of blue or greyscale, and being missing on different versions of the exam, the Investigator found the following. On the exam scanned by Ms. Futi, the initials on four pages (pages 3, 6, 7, and 8) are in greyscale while the rest are in blue (pages 1, 2, 4, and 5). Of the greyscale pages, page 3 contains only an exam question while pages 6, 7, and 8 contain the Applicant's answers. The greyscale initials are found on pages where the Applicant had concerns (pages 7 and 8) but also on pages that were not of concern (page 3) and on a page where the Applicant recalled the response to be his own (page 6). As such, the Investigator notes it was not possible to make a link between the pages with greyscale initials and pages where the Applicant believed his exam was modified. Further, as some pages where the

initials appear in colour had other items that were also in colour (e.g. highlighting and a web link), it was plausible the scanner scanned those pages in colour, but not the others.

[26] The Investigator also notes that the evidence was that Ms. Barclay had offered to send the original copy of the Applicant's exam to Ms. Kinley but Ms. Kinley determined that she did not need it. This was because she had the electronic copy, which was sufficient to assess him. The Investigator states that although it was unfortunate that she was unable to access the original written exam from the testing room (from the testing computer) and the original initialed exam (which was destroyed), the mere fact of unavailability was not sufficient to support that Ms. Futi or Ms. Barclay tampered with the Applicant's exam. Further, the evidence was that at the time of the appointment process, the Applicant had a positive working relationship with both Ms. Futi and Ms. Barclay. Nor was there evidence to support why either of them would have tampered with the exam. Neither had a vested interest in the outcome of the process or had anything to gain from modifying the exam. As such, the Investigator found there was no evidence to establish either Ms. Futi or Ms. Barclay were dishonest in the appointment process.

[27] As to Ms. Kinley, she did not know the Applicant at the time of the appointment process and had no vested interest in modifying the exam. Further, the evidence supports that Ms. Kinley printed and graded the exam as she received it from NEB. Accordingly, there was no evidence to support that she tampered with the exam.

[28] The Investigator acknowledged that the Applicant's initials were missing from certain pages of the exam when it was printed in black and white for grading, but found that it was reasonable to

believe that the discrepancy was due to the scanner not capturing colour in the document. And, as Ms. Kinley was nonetheless able to assess the Applicant's exam responses, the discrepancy had no impact on his assessment. Given this, there was no evidence establishing that Ms. Kinley was dishonest in the appointment process.

[29] Considering the evidence in whole, including the length of time that passed since the exam took place (nearly a year), documentary evidence containing the copy of the Applicant's exam scanned shortly after he completed the exam, that the responses were identical across all available versions of the exam, and the fact that none of the individuals involved in the administration of the exam had any vested interest in modifying it, the Investigator concludes that it was unlikely that any of the individuals involved would have tampered with the exam. Accordingly, the first element of fraud, dishonesty, was not established.

[30] Having found no dishonesty, the Investigator found that it was not necessary to address the second element, deprivation or risk of deprivation.

[31] The Investigator concludes the evidence did not show, on a balance of probabilities, that any individual involved in the appointment process tampered with the Applicant's exam. Therefore, the evidence did not establish that fraud was committed under section 69 of the PSEA.

[32] I note that the Investigator also prepared a comparison of the available versions of the exam, which is attached as Annex A of the Report. As this clearly explains the differences

between the reviewed copies of the exam, a copy of that chart is also attached as Annex A of these reasons.

Issues and standard of review

[33] As a preliminary point I note that the Applicant was self-represented during this proceeding.

[34] His submissions identify three issues as arising in this judicial review, being that: the Investigator erred in fact and law by finding that the complaint was unfounded; the Investigator was biased, or would be perceived as biased, and therefore erred in fact and law in concluding the complaint was unfounded; and, the Investigator fettered her discretion.

[35] In my view, having reviewed the record, the Applicant's written submissions in whole as well as the Respondent's submissions, and having heard from both parties, I am of the view that there is really only one issue in this matter and that is whether the PSC's decision, based on the Investigative Report, was reasonable. The parties submit and I agree that the standard of review is reasonableness (*Canada (Attorney General) v Shakov*, 2017 FCA 250 at paras 61–62; *Lemelin v Canada (Attorney General)*, 2018 FC 286 at para 41; *Challal v Canada (Attorney General)*, 2009 FC 1251 at paras 24–25).

[36] In judicial review, reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process and whether the decision falls

within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 (“*Dunsmuir*”). Further, reasonableness is a deferential standard, recognizing the principle that certain questions do not lend themselves to a single result (*Dunsmuir* at para 47). There can be “more than one reasonable outcome” (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

Was the PSC’s Decision Unreasonable?

[37] The crux of the Applicant’s position is that because the electronic copy of his exam was deleted from the computer in the testing room without saving a copy, and the original printed off hard copy of his completed exam was destroyed, this amounts to dishonesty and supports a finding of fraud. The stated basis for the Applicant’s view is that, within the context of a selection process within the federal public service, “whereby convention and in respect of the *Privacy Act* and the *Public Service Employment Act*, all exam materials are collected, retained and available for review for a two-year period,” the destruction of the original exam and the deletion of the electronic file must be seen as a form of concealment and a dishonest act as defined in *Seck*. The difficulty with this position is that the Applicant is unable to point to any provision within the *Privacy Act* or the PSEA that supports the two year retention period that he asserts. Nor is there any evidence of the existence of the convention upon which the Applicant relies, although it may certainly be seen as a good practice and one to be aspired to.

[38] The Applicant also submits that the Investigator’s finding that the hard copy of his exam was shredded approximately one hour after the exam is not supported by the evidence. Further,

that the omission of any reference to evidence that disputes the timing of the destruction of the exam demonstrates collusion by the Commission with the acts of concealment.

[39] I pause here to set out the evidence as described in the Investigation Report concerning the completion of the exam and its transmittal and destruction.

[40] Ms. Futi's evidence was that she has been a Human Resources Assistant with the NEB since 2011. As such, she administers approximately 50 different exams in the context of appointment processes each year, both on behalf of NEB and other organizations. She explained the process that she typically follows at the end of exams, being that she asks the candidate to stand up, she goes to the testing computer and prints the exam on the printer next to the computer. She then scans the screen and scrolls down to double check that the printed document matches what is on the screen. For all exams, she consistently ensures that the candidate signs the bottom of each page. In the case of Mr. Doyle's exam, she recalled going to the testing room and printing the document; she was unable to recall what Mr. Doyle used to sign each page, but his evidence was that he initialed each page with a blue pen.

[41] Ms. Futi recalled scanning the document right after the exam to send it to herself. Further, that she scanned the exact document signed by Mr. Doyle and did not make any changes to the exam or tamper with it. The documentation gathered by the Investigator and found in the certified tribunal record includes an email by which the scanned document was sent by Ms. Futi to herself. The scan date is July 21, 2016 at 14:57:41, or 2:57 p.m. At Mr. Doyle's request, the Investigator noted in the Report that this was not "right after the exam" as Ms. Futi had stated.

The time stamp on the email sending the scanned exam to Ms. Futi was 4:48 p.m. By an email with the time stamp of 5:09 p.m., Ms. Futi sent the attached email (being the same pdf as she scanned and sent to herself) to Ms. Barclay with the message “Attached and completed. Will leave original on your desk.” By email with the time stamp of 3:14 p.m., Ms. Barclay sent the exam to Ms. Kinley stating that “The completed work is attached. I can send you the original in the mail if you need it.”

[42] Ms. Futi’s evidence was that within an hour following the end of the exam she confirmed with Ms. Barclay that she had received the scanned document. When this was confirmed she shredded any notes made by Mr. Doyle as well as the printed paper copy of the exam. She also deleted the document from the test room computer which is common practice given that the computer is used by other candidates for testing purposes in the context of appointment processes.

[43] The Applicant takes issue with the two hour time difference in the email time stamps, the fact that an email indicates that the original exam was left of Ms. Barclay’s desk, and the fact the email to Ms. Barclay does not show the pdf attachment. He asserts that as this was not addressed by the Investigator, the “narrative crafted” is either a gross oversight or a corroborated act of non-disclosure and concealment.

[44] While it is true that the Investigator explicitly references only that the documentation supports that Ms. Futi scanned the document at 2:57 p.m. and that Ms. Barclay sent the scanned exam to Ms. Kinley at 3:14 p.m., the Investigator pointed out that the evidence showed that the

actual content of the exam responses is identical in all versions of the exam received by the Investigator. Because of this, the Investigator concluded that any modification to the written exam response would have had to have been made between the end of the exam and the time it was scanned. That is, within the 27 minutes between the time the Applicant finished his exam and when Ms. Futi scanned it. In my view, once this conclusion was reached – which conclusion is not contested by the Applicant – the exact time that Ms. Futi emailed the exam to Ms. Barclay and Ms. Barclay emailed it to Ms. Kinsley had little relevance to the allegation of fraud. Accordingly, the Investigator's failure to further address the time stamp issue does not render the Commission's decision unreasonable.

[45] For the same reason, the exact time that the hard copy of the Applicant's exam was shredded is not relevant to the Investigator's conclusion as to whether there was fraud in the appointment process. It is correct, as Mr. Doyle contends, that an email time stamped 5:09 p.m. indicates that the original exam would be left on Ms. Barclay's desk by Ms. Futi. The record of the documents gathered by the Investigator also includes an email of 5:21 pm on July 21, 2016 to Ms. Barclay indicating that Ms. Futi had collected from Mr. Doyle the notes that he had made during the exam and shredded them. In an email to the Investigator, Ms. Barclay explained that it was her practice to shred any notes made by a candidate during a written assessment or in preparation for an oral assessment and that her email to Ms. Futi was to ensure that this practice had been followed. When interviewed by the Investigator, Ms. Futi stated that she had shredded the exam along with the notes.

[46] In sum, while the evidence was not entirely consistent as to exactly when the hard copy of the Applicant's exam was shredded, once it was established that the content of all versions of the exam was the same as the scanned copy, then outside of the relevant 27 minute window, when the exam was shredded was not relevant to the investigation of fraud. Further, and significantly, the Investigator interviewed Ms. Futi and found her to be credible. The Investigator was entitled to accept her interview evidence that she did in fact shred the exam shortly after it was completed. As to the time stamps, it is of note that while the email from Ms. Futi to Ms. Barclay was time stamped 5:09 p.m. the email from Ms. Barclay to Ms. Kinley was time stamped 3:14 p.m., which is more in keeping with the time line described by Ms. Futi. Further, while the Applicant takes issue with the fact that the 3:14 p.m. email does not show an attachment, it is part of a chain of emails, and the email below it also refers to but does not show an attachment. And, again, as the exam versions are the same, the fact that this particular point is not made by the Investigator in her report is not evidence of either a corroborated act of non-disclosure or concealment, nor does it render the decision unreasonable.

[47] The Applicant raises a number of other issues. These include that the candidate rating sheet was signed by only one of the two selection committee members. He again asserts that this is at odds with unspecified standard practices and convention. Further, that this deviation removes the perception of fairness and is an act of non-disclosure and concealment. In my view, this issue is unrelated to the allegation of tampering with the Applicant's exam answers.

[48] The Applicant is also concerned that the Investigator chose to limit the investigation to section 69 of the PSEA and ignored several other elements contained in his complaint and which he raised during the course of the investigation.

[49] The other matters raised by the Applicant are the fact that one page of the resume he submitted as part of the appointment process was originally omitted from the response to his request for information, as was the exam. However, the evidence is clear that this was quickly rectified and an explanation for the oversight was provided. The omission also occurred and was rectified before he brought his complaint.

[50] As to the limiting of the investigation, the Applicant points out that on November 29, 2017 he asked if it was possible for the Investigator to access and review the interview questions, the interview scoring guide or key and other information. The reason for this request was that he sought to confirm the content of a question posed and compare it to the answer he had given, for which he had been assessed a “fail.” The Investigator responded on December 1, 2017 advising that the ongoing investigation was being conducted under section 69 of the PSEA in order to determine if fraud occurred in the appointment process as it related to his written exam. The Investigator noted that Applicant’s email raised additional questions concerning the assessment of one of his interview responses.

[51] She stated that the Oversight and Investigations Sector does not have jurisdiction to investigate internal appointment processes unless there is reason to believe that fraud or political influence may have occurred. The Investigator suggested other possible avenues of inquiry that

the Applicant could follow pertaining to his additional concern about how his interview was graded. In my view, in the absence of any evidence to suggest that the Investigator's jurisdiction was not limited to section 69 investigations, this does not demonstrate unreasonableness on the part of the Investigator. Further, although the Applicant submits that it was open to the Commissioner, pursuant to section 66 of the PSEA, to expand its investigation if it was satisfied that there was an error, omission or improper conduct that affected the selection of the person appointed, or proposed for appointment, and revoke or not make the appointment and take any appropriate corrective action, section 66 applies to external appointments. That said, a similar investigation process for internal appointments is found under section 67. However, there is no evidence that the Applicant sought to pursue a separate complaint under section 67.

[52] On this same point, the Applicant also submits that the Investigator erred by refusing to address his responses given during the oral interview, despite the investigation collecting that information at the outset. On this point, I accept the Respondent's argument that the Applicant conflates the information gathering stage of the investigation with the investigative stage. In determining whether to proceed to the investigation stage, the jurisdiction officer did gather information related to the oral interview. However, at the investigative stage, the Investigator was concerned with the possibility that someone may have tampered with the Applicant's exam. This was the matter to be investigated, not whether there had been an error in the marking of his interview.

[53] The Applicant also submits that the Investigator's findings are based on evidence that might lead one to believe that there was no tampering with his exam. However, because the

Investigation was unable to establish why there was no signature and no initials on several pages of the scanned exam, or to establish what really happened to the hard copy of the exam, it did not establish that there was no tampering with the exam. He submits that the more logical conclusion, based on the evidence, is that the exam was tampered with and fraud occurred.

[54] This argument cannot succeed. The burden is on the Applicant to establish that the Commission's decision was unreasonable. The Investigation Report acknowledged that it was unable to establish why some of the initials did not appear in colour on the scanned copy. However, it accepted Ms. Futi's evidence that while she had not noticed this discrepancy when she scanned and sent the document, that she scanned and sent the document exactly as it was provided to her. The Investigator also found no link between the pages where the initials appeared in greyscale and pages where the Applicant claimed his exam had been modified. As to the lack of initials on some pages of the copy of the exam Ms. Kinsley graded, her evidence was that the scanned copy had not been printed in colour. The best the Investigator could suggest was that where the initials had scanned in colour, they, and other items in colour on the scanned copy, were not picked up when the exam was printed in black and white to be graded.

[55] While I agree with the Applicant that this is not a definitive answer resolving the discrepancies, the Investigator's conclusion, based on all of the evidence before her, was reasonable. She was not required to find fraud simply because she could not definitively explain the copying discrepancies. And, although the Applicant recalled that he had given his exam to Ms. Barclay when he completed it, this was not Ms. Futi's evidence, which the Investigator found to be credible. Ms. Barclay herself had little recollection of events given the passage of

time and her other responsibilities at the time. However, her agenda indicated a meeting at 2:30 to 3:00 on the day of the exam which she thought she would likely have attended. In short, it was open to the Investigator to accept Ms. Futi's evidence. And, in the absence of any other person having access to the exam during the 27 minute window, to accept that the evidence did not establish that the exam had been tampered with.

[56] Looked at in another way, the task of this Court is not to determine whether the Investigator correctly established why there were such discrepancies. Rather, it must determine if the Applicant has established the Investigator unreasonably found that the complaint was unfounded.

[57] In his affidavit filed in support of this application for judicial review, the Applicant repeated his concerns, made in his response to the Factual Report, that Ms. Kinley stated he had followed up with her about the selection process after his exam. While the Applicant did not include this concern in his written submissions, he did raise it during the hearing. Therefore, for the sake of completeness, I note that the Applicant is correct that the record contains no evidence that he followed up with Ms. Kinley after his interview. However, Ms. Kinley's evidence was that the Applicant followed up with her by phone. Regardless of who is factually correct, nothing in the Investigative Report turns on this evidence. Nor does the Applicant's sentiment that the process was "abnormal" in this regard amount to a reviewable error or render the decision unreasonable.

[58] The Applicant also submits that the Investigator presented a bias or a perception of bias, therefore erring in law. Amongst other things, the Applicant faults the Investigator for accepting, without challenging, Ms. Kinley's assertion that the scanned copy of the Applicant's exam was sufficient and she did not need the original paper or electronic copies and Ms. Kinley's explanation for why only one set of interview notes was scored. The Applicant claims that because this violates "convention, norms and policy" (which he does not identify), it was not open to the Investigator to ignore this irregularity, and therefore proves the Investigator was biased towards condoning the behavior of the assessment panel. The Applicant further claims one of the documents referenced in the report, the scanned exam forwarded from Ms. Futi to Ms. Barclay, is not in the record and therefore shows a lack of transparency and the perception of bias.

[59] Much of the Applicant's submission on this point is a repetition of his previously raised concerns. Nor can the Applicant's submission as to bias succeed. In that regard, the Respondent submits that a reasonable apprehension of bias requires the possibility that the decision-maker be influenced towards one party by improper consideration (citing Sara Blake, *Administrative Law in Canada*, 4th ed (Markham: LexisNexis Canada, 2006) at 101–102 ("Blake")) but that the Applicant has not pointed towards any such considerations. I would add that the test for what comprises a reasonable apprehension of bias has been accepted (see, for example, *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at para 20) as that set out by Justice de Grandpré, writing in dissent, in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at 394:

...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [T]hat test is “what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

[60] Further, an applicant alleging bias must meet a very high threshold. He or she must provide “cogent evidence” demonstrating that something a decision-maker has done gives rise to a reasonable apprehension of bias (*R v RDS*, [1997] 3 SCR 484 at paras 116–117). As stated in *Arthur v Canada (Attorney General)*, 2001 FCA 223, allegations of bias cannot be made lightly:

[8] ...An allegation of bias, especially actual and not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard ...

[61] In my view, the Applicant has not established the existence of a reasonable apprehension of bias on the part of the Investigator.

[62] Finally, the Applicant submits that the Investigator fettered her discretion. As I understand this submission, the Applicant claims that the Investigator’s application and interpretation of *Seck*, requiring that one of the persons involved in the appointment process acted dishonestly, is neither prescribed in its administration guidelines “or the case law cited.” The Applicant contends the Investigator unduly narrowed the investigation’s focus by limiting

herself to whether Ms. Barclay, Ms. Futi or Ms. Kinley could have altered the exam before it was transmitted to Ms. Kinley and by refusing to consider his concerns about the interview questions.

The Applicant submits that “through the insertion of an absolute threshold that is not evident in its policies the PSC [...] appears to arbitrarily abrogate or fail to exercise power within its mandate.” The Applicant does not explain, however, how this amounts to be a fettering of discretion contrary to PSC’s mandate, and I see no error in the Investigator’s adoption and application of the definition of fraud as set out in *Seck*.

[63] Moreover, and as the Respondent submits, this is not a circumstance where a decision-maker has allowed a policy or guideline to become mandatory and binding, or to become absolute rules rather than to providing guidance (citing Blake at 98). I also agree with the Respondent that the Applicant’s submissions, which revisit his concerns about the initials on his exam, the fate of the exam, the timing of the scanning and emailing of the exam and the assessment of his exam, do not pertain to a fettering of discretion.

[64] In conclusion, the Investigator’s determination falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law. The Commission’s finding that the Applicant’s complaint was unfounded is based on the Investigation Report and is reasonable.

JUDGMENT IN T-322-18

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to name the Attorney General of Canada as the Respondent;
2. The application for judicial review is dismissed; and
3. The Respondent shall have its costs in the amount of \$750.00 inclusive of taxes and disbursements.

“Cecily Y. Strickland”

Judge

ANNEX A

2017-WCO-00145.27297 (Doyle)

PROTECTED "B"

ANNEX A- Comparison of the various copies of the written exams

	Exam scanned by Ms. Futi	Exam sent from Ms. Futi to Ms. Barclay	Exam sent from Ms. Barclay to Ms. Kinley	Original Corrected exam
Content of Mr. Doyle's exam answers	Identical in all versions			
Printing colour of exam	Colour			Black and white; all elements in colour missing including website on page 2 and highlighting on pages 4 and 5
Mr. Doyle's initials	Initials in colour on pages 1, 2, 4, 5 Initials in greyscale on pages 3, 6, 7 and 8. All initials are clear and do not appear greyed out or to have been written over			No initial on pages 1, 2, 4 and 5 Initials in greyscale on pages 3, 6, 7, 8 All initials are clear and do not appear greyed out or to have been written over
Photocopy lines	Clear photocopy lines on right side of each page			No photocopy marks on pages 2, 4 and 5
Faintness of printing	Pages 3, 6, 7, 8 appear somewhat fainter but not significant difference		Pages appear similar in faintness	Pages 1, 2, 4, 5 appear lighter

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FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-322-18

STYLE OF CAUSE: PUBLIC SERVICE COMMISSION OF CANADA,
INVESTIGATIONS AND OVERSIGHT SECTOR

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 16, 2019

JUDGMENT AND REASONS STRICKLAND, J.

DATED: FEBRUARY 8, 2019

APPEARANCES:

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Christine Ashcroft FOR THE RESPONDENTS

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