The New Brunswick *Civil Service Act*

Annotated

1994-2003

Ten Years of Civil Service Appeals in New Brunswick
Prepared for the Office of the Ombudsman

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FOREWORD

The Legislature has entrusted the Ombudsman with responsibility to ensure that appointments to the civil service are consistent with the merit principle as declared in section 6 of the *Civil Service Act*. This is an important responsibility and one that is particularly shared with human resources officers and members of boards of examiners who everyday assess the relative merits of applicants in open and closed competitions for positions in the civil service. Those who serve on boards of examiners are not often given the recognition they deserve for the significant contribution they make to the effort to continue to provide the people of New Brunswick with a competent and efficient civil service.

The *Civil Service Act* permits existing employees who have not been successful in a competition to appeal to the Ombudsman under section 32 and permits persons who are not existing employees who have not been successful in an open competition to complain under section 33. In both situations the controlling principle is the merit principle declared by the Act though the procedures of review are different. Under section 32, the Ombudsman conducts a hearing of an appeal while under section 33, the Ombudsman undertakes an investigation.

The Legislature conferred this jurisdiction on the Ombudsman by enacting Bill 89, *An Act to Amend the Civil Service Act* on 10 December 1993. The Act came into effect on 16 January 1994 (S.N.B. 1993, c. 68, s. 24). In so doing, the Legislature gave effect to a recommendation from the then Board of Management which in 1992 initiated a review of all publicly funded Commissions, Boards, Agencies etc. That review recommended consolidation of certain functions of the then Civil Service Commission with the Office of the Ombudsman.

To commemorate ten years of jurisdiction under the *Civil Service Act*, I commissioned this annotation to provide greater access to the decisions on appeals under the Act and to the jurisprudence of the Courts of New Brunswick in relation to the Act. I hope that this Annotation will assist persons who find themselves presenting an appeal under section 32, those who are considering such an appeal, and that persons responsible for competitions will avoid deviations from the merit principle by learning from the good faith mistakes of others.

Ellen King
Ombudsman

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Section 1 definition of "employee"

"employee" means a person employed in the Civil Service under the provisions of this Act and the regulations but does not include a person appointed under section 17 or 18;

Definition of "employee"

***Chamberlain v. Department of Advanced Education and Labour* (27 February 1995)**
Ombudsman: Ellen King

Concerning competition number 94-6140-003 for the position of Community College Instructor, Saint John, N.B.

Appearances: R. W. Dixon, QC, for the appellant
C. Ross and B. Brideau, for the employer

Appellant employed on casual basis as Community College Instructor for initial period of 4 months from September to January, 1993. Term of employment extended to end of June, 1994. Appellant also worked month of September 1994. Employer deducted union dues for 7 months of appellant's employment. Appellant unsuccessful candidate in competition for Community College Instructor position at New Brunswick Community College in Saint John. Appellant sought to appeal under s. 32 of Act.

Appellant argues is "employee" under Act, s. 1 definition of "employee". Appellant argues had 13 months of continuous employment (September to September) and that length of employment exceeds maximum limit on casual employment imposed by s. 17(3) of Act. Appellant argues that exclusion of persons hired under s. 17 from s. 1 definition of "employee" is not applicable because of length of employment period.

Employer argues appellant employed on temporary basis pursuant to s. 17(1) of Act, and that term extended pursuant to s. 17(2) of Act. Employer also argues that appellant's employment in September 1994 not continuation of employment but rather that appellant re-hired on temporary basis. Employer argues application of s. 21(2) of Act which states that person employed on temporary basis ceases to be employed when temporary period of employment expires. Employer admits clerical error resulted in deduction of union dues from appellant's pay.

Decision: appeal dismissed.

Appellant not an employee within meaning of Act and has no right of appeal per s. 32. Appellant's employment resulted from temporary appointment pursuant to s. 17 of Act and terminated on June 30, 1994. Appellant's return to employment in September 1994 did not

result from employee status but from temporary appointment.

Appellant was not employee at time of competition:

> Since Mr. Chamberlain's employment at all relevant times was pursuant to an appointment(s) under section 17 of the Act, I cannot find that on being a candidate in this competition he was an "employee" in accordance with how this term is defined by the *Civil Service Act* (at p. 7).

Status under Act cannot be changed by fact of deducting union dues, whether or not such deduction in error.

Section 4 “qualified”

4 The Deputy Minister of the Office of Human Resources

(a) shall appoint or provide for the appointment of qualified persons to or from within the Civil Service in accordance with the provisions of this Act and the regulations and issue certificates with respect to such appointments…

Meaning of “qualified”

Snow v. Department of Transportation **(11 October 1994)**
Ombudsman: Ellen King

Concerning competition number 93-01-07 for the position of Transportation Maintenance Superintendent I-II (Bridges)

Appearances: E. Grenier,. for the appellant
R. Speight, Esq., for the employer

Notice of competition requiring candidates to have written competence in French language. No qualified candidates identified so competition closed without appointment.

Position re-advertised but without required qualification of competence in written French. Required language qualifications expressed as “written and spoken competence in English and spoken competence in French”. Of 34 applicants, only six (including appellant) satisfied qualification standards and were assessed by written and oral examinations. As result, one applicant assessed as qualified in relation to five modules: (1) Technical Knowledge/Operational Skills; (2) Position Suitability; (3) Communications/Interpersonal Skills; (4) Organizational/Decision Making Skills; (5) Supervisory/Management Skills. Board of examiners assessed appellant as “NQ” in relation to “Position Suitability” and “Communications/Interpersonal Skills”.

Appellant argues that he spoke French language with sufficient proficiency to satisfy competition standard. Evidence that appellant spoke French language at work on many occasion and did so without complaint about his language abilities. Appellant asserts that had been told during interview that French language would not be problem for him as conditions were relaxed and that, if need be, other employee available to respond. Appellant argues his skills on all other areas as high or higher than selected candidate and that language was main criterion for selection. Appellant also points out that board of examiners did not include technical representative from head office.

Evidence that usual practice is to have head office representative from Technical Services Branch serve as member of board of examiners but that no such representative available at

relevant time (because of transfer). Employer argues that board competent to assess candidates because two members had ample technical qualifications and that board used same written examination and oral questions as when have participation of representative from Technical Services Branch. Evidence that appellant received Basic + proficiency level in spoken French whereas qualification requirement set at advanced level 3. Appellant tested two more times, once with a different evaluator at different location, with same result. As result, appellant's rating on Communication/Interpersonal Skills and Position Suitability Modules fell below qualifying rating. Appellant's language proficiency assessed not by Board but by Department of Advanced Education and Labour.

Decision: **appeal allowed**

It was not shown that the Board did not have sufficient background to assess the technical knowledge of the candidates. Absence of technical representative did not have impact on outcome of competition. Board acted in compliance with Act:

> The Act does not specify that a Board is to be composed in any particular way, although it is understood that its composition must include members who are capable of assessing the qualifications of the candidates for the position in question (at p. 18).

Board had to reconcile differences in written examination scores, experience and education. No evidence that assessment with regards to written examination was unreasonable or that improper weight given to written examination.

Employer has right to set qualifications required for position, including any language qualification. Board of examiners obliged to establish proficiency level for each language qualification. On evidence, proficiency level of appellant below standard set for position. As such, board justified in concluding that appellant did not meet all of required qualifications for position.

However, language proficiency of selected candidate assessed differently than that of appellant. Second language proficiency of selected candidate not evaluated by means of language proficiency examination:

> … failure of the… Board to use assessment tools common and applicable to all of the candidates has resulted in an intrinsically unreliable, if not inequitable, evaluation of the relative merit of their qualifications (at p. 23).

Board did not assess selected candidate's oral competence in French language:

> [I]t cannot be assumed that a candidate has oral competence in a language simply because the application was submitted in that language.

As a result, selection violated requirement that selected applicant be "qualified" per Act, s. 4 and that selection be based on "merit" per Act, s. 6:

> … I cannot verify that the selected candidate is qualified as his language proficiency has not been evaluated in keeping with the requirements set for the competition. Additionally, without an equitable method of assessment that renders comparable results, it is not possible to find that merit has been respected (at p. 23).

Appeal must succeed because no evidence to demonstrate that selected candidate qualified with respect to all requirements set for competition and is most qualified as required by Act.

Section 5(1) board of examiners

Section 5(1) The Deputy Minister of the Office of Human Resources may select boards of examiners to test and pass upon the qualifications of candidates for appointment to or from within the Civil Service and shall designate chairmen for each board of examiners.

Board of examiners: competence to assess applicants and alleged reasonable apprehension of bias

Buck and McGuire v. Department of Health and Wellness **(19 February 2002)**
Ombudsman's delegate: J. McEvoy

Concerning competition number 35-01-0054 for the position of Community Mental Health Director, Mental Health Services Division, Saint John Region

Appearances: G. Buck, for himself
P. McGuire, for himself
B. McGaw, for the employer

Two separate appeals arising from the same competition were heard together. Both appellants satisfied the academic qualifications stated in the notice of competition. The third party satisfied the equivalency standard by virtue of her bachelor's degree and minimum 8 years management and administrative experience. Notice of competition reads, in part, as follows:

> You must have a Master's degree in a related mental health discipline with a minimum of 6 years management and administrative experience in diverse community human service delivery systems; or an equivalent combination of training and experience...

Appellant McGuire challenges board of examiners as lacking expertise to evaluate answers to questions posed during interviews. In particular, he questions the participation of a person with a public health background as a member of the three person board. Finally, appellant McGuire challenges board chair on ground of reasonable apprehension of bias because board chair encouraged persons to apply for the position in competition, including the selected third party.

Evidence that interview questions based on those used in prior competitions and divided into four assessment modules; three of which focussed on management abilities and one on clinical functions. Board members asked same questions to all three candidate. Evidence that board member with public health background selected because of extensive experience in selection of management level employees and experience in integrated health program in light of the expectation of a closer integration of mental health and public health services delivery. Evidence that interview responses of both appellants narrowly focussed on personal experience

rather than priorities of the region while responses of third party reflected solid knowledge base, good management skills, and a good understanding of the changing processes in this field.

Member of board of examiners who served as chair acknowledged that he encouraged third party and others to submit an application and had expected that appellant Buck, then serving in an acting capacity, would apply. He explained that he encouraged applications not only to increase awareness of the competition but also to attract the largest possible pool of candidates. Evidence is that these conversations not extensive but more of a "passing" or "hallway" type of conversation. Board chair testified that he kept an open mind when interviewing and assessing applicants.

Decision: appeals dismissed

Evidence clearly justifies participation of public health official as a member of board of examiners. Each member of the board brings into play their own areas of expertise in assessing each of the candidates. Together they reached a consensus and selected the successful candidate.

Allegation of reasonable apprehension of bias is not proved. Note that actual bias is not alleged but that a perception of bias:

> The legal standard by which to consider a reasonable apprehension of bias is the perspective of reasonable person informed of all the relevant circumstances. In the circumstances of this matter, as reflected in the evidence, I do not believe that a reasonable person would apprehend a bias. [The board chair] encouraged other employees in addition to the third party (whether they followed through and applied or not is irrelevant); his was a casual conversation of general encouragement; he testified that he kept an open mind and merely sought a pool of qualified applicants; and this was an internal competition with a relatively small pool of potential applicants. While not a practice to be encouraged, I conclude that the approach to potential applicants by [the board chair] does not raise a reasonable apprehension of bias in him as Board chair.

Board of examiners: alleged reasonable apprehension of bias

Chiasson and Duke v. Department of Natural Resources and Energy **(8 November 2001)**
Ombudsman's delegate: J. McEvoy

Concerning competition number 60-01-01 for the position of Forest Ranger V / District Ranger, Region 1, Department of Natural Resources and Energy, Bathurst

Appearances: F. Chiasson, for himself
H. Duke, for himself
R. Speight, Q.C. for the Employer

Two separate appeals arising from the same competition were heard together. Appellant Duke argues that a member of the board (who served in relation to both the 2000 and 2001 competitions) demonstrated bias against him by stating that he had not been selected because he was not respectful enough and due to involvement in a past incident. Questioned on this matter, the member rejected any such negative influence and did not recall making statement alleged. All board members testified that their assessments (achieved by consensus) reflected responses of each applicant to pre-determined questions and answers. Appellant Duke felt that board displayed a negative attitude and suggests that board should not have included a member with a human resources experience (without forest ranger experience) and a member from another district.

Decision: appeals dismissed

Appellant Duke failed to establish grounds of complaint. Board members testified that their decision reflected merits of applicants in competition process and they explained their reasoning in detail. Other than bare assertion, appellant Duke presented no evidence to undermine board's assessment of his qualifications. Evidence does not establish a "negative attitude" as alleged. It would appear that real complaint is that same board selected third party in both 2000 and 2001 competitions. Appellant Duke's suspicions arising from this fact alone do not rise to level of proof that board failed to respect merit principle.

Board of examiners: personal knowledge of applicant not factor in assessment

Miner v. Department of Transportation **(29 August 2001)**
Ombudsman: Ellen King

Concerning competition number 2000-D04-02 for the position of Mechanic III with the Saint John District Department of Transportation

Appearances: L. Saunders, CUPE representative, for the appellant
M. Estabrooks, for the employer

Following interviews, board of examiners assessed five applicants as "B" rating and one applicant at "A" rating. Only name of "A" rated applicant placed on eligibility list. Appellant feels he should have received an "A" rating given his experience of twenty-three years.

Board assessed applicants in relation to five assessment modules: Technical Knowledge/Expertise, Organizational/Decision Making Skills, Communication/ Interpersonal Skills, Positional Suitability, and Supervisory/Managerial Skills. Board assessed applicants through responses to interview questions (provided in advance); applicants' responses to specific

predetermined questions related to assessment modules; and results of reference checks to verify information received at interview. Same assessment approach applied to all applicants.

Employer argues that onus was on applicants to demonstrate, through their responses, degree to which they satisfied competition requirements. Board did not use personal knowledge of applicants nor experience of applicants as factor in making assessments. Appellant argues board should have taken into account what knew of his twenty-three years experience in assessing his merit for the position.

Decision: appeal dismissed

Appellant failed to establish that board assessment of applicants is not reasonable and that merit principle not respected. Board did not err by not relying on personal knowledge of appellant to make assessment of qualifications and assessment tools not shown to be inappropriate:

> Since the Board of Examiners had decided on the interview and verification through references as the tools by which the merit of the candidates would be assessed, as was its right to do under section 11 of the *Civil Services Act*, it was not then open for the Board to use its personal knowledge of the appellant's experience as part of the rating process… Under the *Act*, the Board had the right to decide on the selection criteria it would use and on the selection tools by which candidates would be assessed against the criteria, and neither the criteria nor the tools have been shown to be inappropriate.

Employer has right per Act, s. 7 to establish selection criteria. Employer could have chosen experience or supervisory experience as selection criteria but decision not to do so does not provide ground of appeal.

Board of examiners – alleged reasonable apprehension of bias due to relationship by marriage to niece of board member

Lamarche v. Department of Natural Resources and Energy **(January 2001)**
Ombudsman: Ellen E. King

Concerning Competition Number 60-00-04 for the position of Forest Ranger V (District Ranger), Kedgwick

Appearances: M. Lemarche, for himself
P. Elliott, Esq., for the employer

Following selection process, board of examiners assessed two applicants as "A" and placed their names on eligibility list. Deputy Minister selected applicant D for appointment.

Board assessed qualifications of appellant as "B" and his name not placed on eligibility list. Appellant, a Forest Ranger with fifteen years experience with Department, submitted application because his functions phased out in 2000 due to restructuring. Appellant argues that his name should have been placed on eligibility list regardless of relative merit because his job was affected by restructuring and because he received a qualified rating.

Appellant argues reasonable apprehension of bias in relation to one member of board of examiners. Selected applicant D married to board member's niece. Board member in issue served on board because of position as immediate supervisor of selected applicant. Prior to commencement of interview process, board member informed board chair of his conflict and told applicant D not to expect any assistance in competition. Board member testified that evaluated all applicants in same manner except that did not express opinion regarding quality of D's responses as readily as for other applicants, so as not to influence other board members. Employer argued important for immediate supervisor of prospective employees to participate in hiring process. Apparently not open to board member in issue to withdraw from board.

Disposition: appeal allowed, appointment revoked

Board did not err by not placing appellant's name on eligibility list as qualified employee affected by restructuring. Appellant not laid off so not entitled per Act, s. 26 to have name placed on eligibility list for positions for which qualified.

However, impossible to conclude that merit principle respected in circumstances of this competition. Though Act silent on composition of board of examiners, clear that board must not only be competent to assess qualifications of applicants but that board members "are entrusted with a duty of fairness in the exercise of their functions." Function of assigning relative scores to applicants on selection modules involves a subjective assessment of responses to interview questions. Here, interview questions not designed to elicit responses that could be scored in objective manner:

> [the board member] was in a position to influence the scores to a degree that would not be possible to measure either in respect to the selected candidate or those in competition with the selected candidate.
>
> Because of the relationship between a Board member and the selected candidate in this instance, it is impossible… to conclude that the Board, so comprised, carried out a fair assessment of the qualifications of the candidates. Candidates are entitled to be assessed fairly and objectively and, given all of the circumstances of this case, I can not say that this was done. The inability of the Board to discharge the duty of fairness owed to the candidates has tainted the assessment process.

Board of examiners: alleged reasonable apprehension of bias

Belanger v. Department of the Environment and Local Government **(31 August 2000)**

(Ombudsman's delegate: J. McEvoy)

Concerning competition number 21-99-04 for the position of Regional Manager, Department of the Environment and Local Government, Grand Falls

Appearances: J. Friel, Q.C. for the appellant
P. Blanchet, Esq, for the employer

Evidence that supervisor encouraged third party and assisted in preparation of application for position under competition. Supervisor later served as member of board of examiners which selected third party. Appellant learned of this assistance after announcement of results of competition. Supervisor acknowledges assisting third party to prepare English language version of covering letter for application and of personal resumé. Supervisor provided editorial assistance. No other candidate requested such assistance. Supervisor testifies that he provided information about new initiatives in Department and about normal staffing procedures to several employees who expressed interest in the several regional manager positions under competition. Competence in both English and French languages is a required qualification for position under competition. Supervisor helped prepare questions used in candidate interviews. Supervisor testified that he did not think about potential "bias" issue when providing assistance. Third party attended appeal hearing but did not testify so there is no evidence as to why he desired to submit application in English language.

Board of examiners considered applications for several regional manager positions. Only two applicants for position under appeal. Eligibility list contained only one name, that of third party.

Decision: appeal allowed and appointment of third party revoked. Employer directed to convene differently constituted board of examiners to assess candidates

Boards of examiners are entrusted with a public duty to exercise their functions consistent with procedural fairness. Reasonable bystander could not fail to perceive reasonable apprehension of bias in conduct of supervisor who then served as member of board:

> ..the composition of a Board of Examiners invariably includes persons in supervisory positions who may, over a number of years, have had interaction with one or more candidates under consideration by the committee. Depending on the nature of the interaction, there may or may not be a reasonable apprehension of bias. In this instance, however, a member of the Board of Examiners actively assisted one candidate in the preparation of documentation for submission to the Board for its review. That documentation included a cover letter specifically required by the notice of the competition in these words: "Applicants are requested to clearly detail, in a cover letter to their application, how their qualifications (education and experience) relate to the position as advertised." This lapse in judgment is compounded when it is combined with another required qualification for the position: "Spoken and written competence in both

official languages is required."

That supervisor not conscious of potential appearance of bias is not exculpatory. Concept of reasonable *apprehension* of bias not linked to intention of individual but to what a reasonable person informed of all the circumstances would perceive.

That two other persons participated as members of board of examiners in candidate interviews does not cure defect of reasonable apprehension of bias. Not only did the supervisor participate in the interviews but he assisted in preparation of application documentation considered by board.

Board of examiners: irregularities in process -- reference check of only one applicant, change in rating assigned one assessment module; differences between qualifications expressed in notice of competition and screening worksheet

Matchett v. Department of Transportation **(9 June 1998)**
Ombudsman: Ellen King

Concerning competition number 97-02-02 for the position of Stores Clerk in District 02 – Miramichi

Appearances: C. Hay, CUPE representative, for the appellant
M. Eastbrook, for the employer

Eight applications received in intra-departmental competition. Six applicants satisfied required qualifications and interviewed by board of examiners based on three assessment modules: (1) Technical Knowledge/Expertise; (2) Communication/ Interpersonal Skills; (3) Position Suitability. Board assessed two candidates at 'A' rating and one applicant at 'B' rating. Eligibility list prepared with names of two "A" rated applicants.

Evidence that in 1992, appellant assigned to stockroom as runner with duties including traveling to various locations for parts and supplies, unloading trucks, stocking shelves and serving clients. In 1995, appellant assigned Stores Clerk duties in acting capacity, performed those duties for two years, and was trained by Storekeeper in all duties associated with Stores Clerk position. Appellant argues that he satisfied all requirements for position and feels more qualified for that position than selected applicant.

Appellant argues that assessment process not capable of establishing candidates' merit. Appellant noted discrepancies between standards listed in advertisement and in screening worksheet. Appellant argues that changing his rating from 'NQ' to 'B' in one module suggests irregularities in assessment process. Appellant further argues that board not consistent because it contacted appellant's supervisor to discuss job performance but did not do so for other

candidates.

Evidence on behalf of employer that selected applicant rated at "B" in relation to two assessment modules and that his answers less clear and precise in comparison to those of selected appellant who board assessed at "A" rating. Employer argues that assessment process consistently applied to all candidates and that merit principle respected as required by s. 6 of Act. Discrepancies between notice of competition and screening worksheet acknowledged but employer argues that evidence supports board applied criteria expressed in notice of competition.

Decision: appeal dismissed

Appellant failed to establish that process as set out in documentation structurally flawed in respect to assessing merit of candidates. Proper application of assessment methodology to the selection criteria would identify candidates with most merit.

Anomalies with regards to language and experience between notice of competition and screening worksheet did not affect selection. Employer followed standards as advertised and selected applicant satisfied those standards.

It was irregular for the board to contact supervisor of one candidate to discuss performance without taking similar actions in respect of other candidates. Also irregular to change appellant's rating from 'NQ' to 'B' for reasons unrelated to assessment criteria. Merit of candidates must relate to selection criteria chosen by board. However, irregularities did not influence result:

> It is my opinion, that an irregularity must be such that it influences the results of a competition in respect to the merit of the appointment before I can rely upon that irregularity as a basis for allowing an appeal (at p. 22).

In this case, irregularities do not affect composition of eligibility list or selection for appointment available to Deputy Minister. Consequently, irregularities have not influenced results of competition in respect to selection for appointment.

Board of examiners: inconsistent application of standards – use of personal knowledge to supplement some applications

Thériault v. Department of Health and Community Services **(7 April 1997)**
Ombudsman: Ellen King

Concerning competition number 35-96-0036, for three positions as Regional Team Manager in the Moncton Department of Health and Community Services.

Appearances: S. Thériault, for herself

B. Owen, for the employer

Restructuring resulted in twenty-three old managerial positions being replaced by eighteen new "Team Manager" positions in intra-departmental competition. Employer conducted résumé writing and interview workshops to help prospective candidates prepare for competition and made available "Position Description Questionnaire" to all applicants.

Appellant screened out of competition because review of her résumé did not disclose to board of examiners required two years of managerial experience. Appellant had fourteen months as "Acting Director Ambulatory Care," a positions recognized by board as managerial, and a further nine years as "Nurse Coordinator" in Moncton Hospital Reproductive Health Clinic. Job title of latter position did not correspond to a management position but, in fact, "Nurse Coordinator" position at Moncton RHC is assigned duties which are managerial in nature. Board did not inquire into exact nature of this position before eliminating appellant from competition.

After screening applications but before starting interviews, board learned that appellant's "Nurse Coordinator" position in fact managerial. Board decided not to reconsider appellant's application "as to be fair to the other applicants who were also screened from the competition." Evidence that board screened into competition three applicants who may not in fact have satisfied required qualifications. Board deemed applicant A to have required two years of managerial experience despite unclear résumé and failure by board to confirm actual managerial experience. Board screened in applicants B and C, both of whom listed experience as Public Health Nursing Supervisors in excess of two years, because board members familiar with responsibilities of this position and did not inquire into actual duties performed.

Appellant not aware that non-public health managerial experience acceptable for purposes of competition so did not list such prior experience; board screened in applicant A based on non-public health managerial experience.

Decision: appeal allowed, appointments revoked

It is not Ombudsman's role on appeal to assess applications of appellant and selected candidates against screening criteria. Rather, role is limited to considering reasonableness of board's conclusions on assessing those applications against screening criteria and to determine whether merit principle respected in appointment.

Board's finding that appellant's résumé did not evince her management experience as "Nurse Coordinator" was reasonable. Further, board acted reasonably when it refuse to accept supplementary information from appellant after screening process complete, as this would be unfair to other eliminated applicants.

Notice of competition ambiguous whether non-public health managerial experience acceptable. Employer should have made this point clear. While efforts were made to make applicants aware that such experience acceptable, evidence clear that appellant not aware and thus put at disadvantage.

Board acted unreasonably when it screened in applicant A without further inquiry to

determine if she had required two years experience. This assumption of sufficiency contrasts with board's effort to determine period of time appellant had spent in her post as Acting Director Ambulatory Care (fourteen months), and calls into question the fairness of the process.

Appellant treated unfairly when board members took into consideration personal knowledge about positions previously held by applicants B and C. Board screened appellant's application based only on content of her resumé but gave advantage to applicants B and C by essentially reading in required experience:

> While I can accept that to use personal knowledge to screen [applicants B and C] into the competition probably resulted in a more accurate reflection of their real qualifications for the position of Team Manager as their qualifications and the requirements were described at the hearing, this could only be done if the Board undertook steps to put candidates whose experience was not known to the Board members in an equivalent situation.
>
> To compensate for the benefit conferred to some of the applicants through knowledge of the positions on the part of the Board members, the Board could have sought additional information through follow-up with candidates or by interviewing the candidates' current or former supervisors, or the Board could have conducted screening interviews to obtain a better account of each candidate's management experience...
>
> As a result, I cannot be satisfied that the selections for appointment to the Regional Team Manager positions in Moncton were based on merit as required by section 6 of the ***Civil Service Act***.

Board of examiners – composition of board – competence to undertake assessment of applicants

Section 6
Merit principle – inconsistent treatment of applicants by board of examiners at interview – questions/responses combined for some but not all applicants

Section 7
Assessment tools – whether interview appropriate tool to assess skills

Section 13
Eligibility list – list flawed when based on inconsistent treatment of applicants by board of examiners at interview

Grant v. Department of Natural Resources and Energy (2 December 1996)
Ombudsman: Ellen E. King

Concerning competition number 60-96-07 for the position of Forest Ranger IV (Assistant District Ranger) in Fredericton

Appearances: J. E. Stanley, Esq., for the appellant
I. Trueman, for the employer

Seven applicants satisfied required qualifications in closed competition and were interviewed by board of examiners. Four applicants, including appellant, received overall "A" rating and names placed on eligibility list. Deputy Minster selected successful applicant from eligibility list in accordance with s. 13(1) of Act.

Notwithstanding overall "A" rating, appellant disagrees with board of examiners assessment of "B" rating in relation to organizational skills. Evidence that appellant's supervisory and organizational skills are very good and that he has seniority over selected applicant. Evidence that appellant's supervisory experience includes experience as Hunter Education and Firearm Safety instructor, training military police officers, and work for Assistant District Ranger for short durations.

Witness with 16 years experience in staffing process testified on behalf of appellant that board of examiners lacked experience to assess applicants properly because one member sitting for first time as board member and experience of another member mainly in human resource rather than technical duties of position in competition. Witness of opinion that interview questions not suitable for purpose of assessing organizational ability and that both appellant and selected applicant not assessed on same basis in relation to one interview question. Selected applicant did not answer question six but board used answer to question seventeen and assessed selected applicant with "A" rating on both questions. No evidence that same treatment for appellant. Appellant answered question six specifically and board rated response a "B" rather than "A" rating assigned to response to question seventeen. Witness of opinion that, had board given similar benefit to appellant as given to selected applicant, appellant would have received "A" rating on question six, which would have changed his rating for Organizational Ability module from "B" to "A". Alternatively, if board had rated selected applicant's non-response to question six as "NQ" then rating on Organizational Ability module would have been less than "A". Witness also of opinion that board erred in assessing appellant's responses to four interview questions at "B" rather than "A" level. Second witness called by appellant testifies that did not submit own application in competition because felt outcome of competition pre-determined and that competition weighted in favour of selected applicant because of training opportunities.

Employer argues that seniority not a factor in assessment because no such requirement in collective agreement. Employer agues that board assessed both appellant and selected applicant as "A" but that Deputy Minister has discretion to choose anyone from eligibility list. Employer argues board had necessary experience and competence to perform duties, that composition of board accords with usual practice, and that one board member qualified in relation to technical skills of position. Employer argues presence of fourth board member (who did not know applicants) increased objectivity.

Evidence that board permitted applicants to address answer to question 6 in response to question 17. Evidence that board considered appellant's answers to some questions not most appropriate. Employer argues that rating for purpose of determining eligibility list and that rating of specific questions/responses does not appear on that list and is therefore not relevant.

Decision: appeal allowed

Board did not err by not considering seniority as factor in assessment. Employer has management right per Act, s. 7 to establish selection standards:

> The Board has the right to decide the selection criteria that candidates are to meet and how they are to be assessed against those criteria. There is no evidence before me to indicate that seniority had to be considered in establishing the merit of the candidates in this competition (at p. 24).

Appellant has not established that board not competent to undertake duties of assessing qualifications of applicants. Three board members had technical background related to position. Moreover, only one of five assessment modules related to technical knowledge and skills. Evidence that board members had sufficient experience in staffing process to assess merits of applicants.

However, board failed to treat applicants in same manner with regard to question number six, which had impact on rating of Organizational Ability module.

Board must be able to provide reasonable explanation for assessment of applicants. Evidence that board inconsistent in assessing responses to question nine (pertaining to Supervisory Skills module) but that inconsistency does not necessarily explain different rating on module for appellant. Totality of evidence raises doubt as to whether overall ratings awarded to appellant and selected applicant reflect comparative merit:

> In considering the significance of any flaws or inconsistencies that may be detected in the processing of a competition leading to an appointment, one must decide whether those matters that had been detected can influence the results of the competition (at p. 31).

> I do not feel that merit is served in a competition by applying a formula for establishing the eligibility list which effectively erases differences in the degree to which the candidates satisfied the selection criteria as determined by the Qualifications Appraisal Board (at p. 31).

In result, Deputy Minister made selection from flawed eligibility list because candidates may not have been of equal merit.

Board of examiners – composition of board – board member

responsible for grading examinations had expressed negative opinion of appellant – examination questions permit wider scope for subjective assessment

Section 6
Merit principle -- Board of examiners – board member responsible for grading examinations had expressed negative opinion of appellant – examination questions permit wider scope for subjective assessment

Merit principle -- board not bound by assessments made by another board in earlier competition

Section 8
Selection standards – residency qualification irrelevant if not expressed

St-Amand v. Department of Transportation **(19 June 1996)**
Ombudsman: Ellen E. King

Concerning competition number 95-10-01 for the position of Highway Supervisor I-II, District # 10 – Edmundston, St. Leonard Division

Appearances: V. St-Amand, for himself
J. Branscombe, for the employer

Appellant and four others applied in intra-departmental competition for position as Highway Supervisor I-II. Appellant not granted interview because of failing grade on examination. Other four applicants interviewed by board of examiners. Board assessed one applicant assessed at "A" level and that applicant selected from eligibility list as successful applicant.

Evidence that appellant employed by Department since 1985 and served as Highway Supervisor I-II until local depot closed. Appellant then accepted alternate employment assignment. Evidence of good work performance by appellant as Highway Supervisor I-II confirmed by performance evaluations. Evidence that appellant inquired about acting as temporary Highway Supervisor when supervisor absent but never granted that opportunity. Appellant argues that selected applicant benefited form such temporary assignments which enhanced qualifications for competition.

Appellant argues notice of competition inconsistent with usual practice because of absence of geographic restriction and that, if so restricted, he would have been only qualified applicant. Appellant argues employer did not include residence restriction because district did not consider him suitable applicant. Appellant argues should not have been required to write examination in this competition because of qualifying score on same examination in earlier

competition for similar position in another district. Finally, appellant argues should have been appointed to position without competition because of earlier lay-off. Evidence that, prior to competition, board member responsible for grading written examinations had expressed negative opinion about appellant's capacity to act in supervisory role.

Evidence on behalf of employer that three years had elapsed since appellant held Highway Supervisor position and therefore not open to employer to appoint appellant to position without competition. Evidence that employer decided not to include residence restriction to promote greater number of applications but that selected applicant satisfied usual residence requirement in any event. Employer argues that written examination used as screening tool and that though first implement in Edmundston District in this competition, it is current practice in New Brunswick for Highway Supervisor positions. Employer argues that notice of competition expressly permitted consideration of applicants based on equivalent combination of training and work experience.

Employer argues management right to select person to appoint on acting or interim basis to replace absent Highway Supervisor. Evidence that selected applicant gained experience on acting basis before appellant reassigned from supervisor's position and that continued to be appointed on acting basis because of quality of his work performance. Evidence that employer considered appellant for interim assignments but not offered because appellant questioned policies and procedures of Department and therefore there were doubts as to his ability to perform duties. Employer argues such doubts did not impact on competition. Employer argues that each applicant must complete all steps in competition process including written examination and that because composition of board of examiners may vary from competition to competition, assessment results may vary from one board to another.

Decision: **appeal allowed**

Defects in competition process sufficient to undermine respect for merit principle. Board member responsible for assessing results of written examination had previously expressed reservations about appellant's competence to perform interim work as Highway Supervisor. Unfortunately, approximately 50% of questions on written examination permit discretion in grading answers:

> In the absence of evidence to show that she divested herself of that opinion before becoming a member of the Screening Board, I cannot conclude that she was able to approach the assessment of the candidates in this competition with an open mind and void of any predisposition in respect to Mr. St-Amand (at p. 24).

In context and considering other circumstances of competition, evidence sufficient to conclude that process not carried out in manner calculated to identify most meritorious candidate.

Lay-off provisions of Act not applicable. No basis in Act to reverse lay-off after three years; moreover appellant not laid-off but reassigned. Also, no obligation to appoint appellant because his name on eligibility list for other competition.

Act, s. 8 confers right on employer to determine qualifications, including any residency requirement, but must do so before competition advertised. Notice of competition in present appeal did not express residency requirement, so an irrelevant consideration.

Non-selection of appellant for acting appointments does not undermine merit principle in competition in issue. Employer has discretion to select individuals for interim positions.

Board did not err by not considering assessment of written examination by appellant in previous competition. Board not bound by assessment in regards different competition:

> There is no requirement under the Civil Service Act for the results of one competition to be carried forward to another competition, and I cannot fault the board in this instance for having required Mr. St-Amand to submit to the same assessment process as the other candidates in this competition (at p. 20).

Board of examiners – reasonable apprehension of bias – by itself, personal knowledge of applicants does not invalidate decision

Board of examiners – independent assessment – board not bound by assessment of applicant made by another board in previous competition

Section 6
Merit principle -– personal knowledge of applicants by board members not unusual in practice
Merit principle – board of examiners not bound by assessment of applicant made by another board in previous competition

Section 11
Assessment tools – appropriateness of interview

Duguay v. Department of Health and Community Services **(14 November 1995)**
Ombudsman: Ellen E. King

Concerning competition number 35-94-0055 for the position of Social Work Supervisor, Bathurst.

Appearances: B. Duguay, for himself
S. Hallett, for the employer

Appellant served in position on acting basis pending competition for permanent

appointment. Position created as result of restructuring. Appellant and selected applicant were only applicants. Both applicants exceeded required qualifications and were interviewed by board of examiners with selection standards divided into 4 modules: (1) Technical/Intellectual Skills; (2) Supervision Skills; (3) Communication/Decision Making Skills; (4) Organizational Skills. Board assessed appellant as "A" on two modules and "NQ" on two modules; board assessed selected applicant as "A" on all four modules.

Due to length of period during which held position on acting basis, appellant argues should have been confirmed in position without competition pursuant to Exclusions Regulation 84-230, s. 3.

Appellant argues that board decision tainted by reasonable apprehension of bias. Appellant alleges his supervisor opposed appellant accepting acting appointment but that later stated would support appellant's candidacy for position. However, evidence that supervisor's written performance appraisal following interview did not reflect verbal expression of support. Appellant argues that he is known to two of three board members and that they were not impartial due to previously formed opinion of appellant. Appellant questions "NQ" assessment because differently constituted board had assessed him as qualified on same standards for different position in 1991.

Appellant argues that board should have consulted his file to confirm his competence in areas found deficient based on interview. Appellant further argues that nature of work makes adhering to a work plan impossible and that this reality caused alleged weakness in prioritizing work.

Evidence on behalf of employer that appellant received "NQ" rating on modules 2 and 4 (above) because responses did not demonstrate motivational skills and reflected problems in organizing and prioritizing work. Evidence that deficiencies noted by board also identified by supervisor in subsequent performance appraisal. Employer argues that not unusual for board members and applicants to know each other because usually appoint supervisor of position and Regional Director to serve as board members. Employer argues that mere knowledge of applicants does not render process partial and that, in any event, impartiality assured by participation of third board member, who had no personal knowledge of applicants.

Employer argues that employer (Regional Director) had right to decide how to fill new position and to do so by way of competition consistent with Act.

Decision: appeal dismissed

Employer not compelled to use Regulation 84-230 to fill vacant position. Employer exercised discretion to choose method of appointment as prescribed by Act.

In practice, difficult to avoid situations where board members do not have personal knowledge of other Department employees in competition. One feature of competition is to increase objectivity by reducing impact of personal opinions. Appellant failed to establish reasonable apprehension of bias:

> In this instance, I have considered the evidence and the arguments advanced by the

> appellant and I am not convinced that, at the time of the competition, there is any evidence that the Board members had any inclination to favor one candidate over another (at p. 17).

Employer has right under Act, s. 11 to decide assessment tools in regard to selection criteria. Evidence demonstrates that board determined ratings based on interview as selection tool. No evidence that interview incapable of comparing merit of candidates to selection criteria and to each other.

That previous board had assessed appellant as qualified is not relevant consideration. Board has duty to make independent assessment of applicants regardless of assessment made by different board in different process.

Delay in competition did not interfere with merit principle and does not compel employer to exercise discretion to invoke Exclusion Regulation 84-320.

Board of examiners: allegation of reasonable apprehension of bias due to nature of interview question and prompting by board member

Duke v. Department of Natural Resources and Energy **(2 September 1994)**
Ombudsman: Ellen King

Concerning competition number 60-94-06 for the position of Forest Ranger V

Appearances: H. Duke, for himself
I. Trueman for the Employer

Intra-departmental competition held to fill position to be created by retirement of incumbent. All three applicants met screening requirements as advertised and were further assessed by way of interviews. Board of examiners assessed successful applicant at "A" rating and other two applicants, including appellant, at "B" rating. Interview consisted of 17 questions divided into five modules: (1) Technical Knowledge; (2) Communication Skills; (3) Organizational Abilities; (4) Intellectual and Decision Making Abilities; (5) Personal Suitability, Interpersonal Skills and Motivation.

Appellant argues board did consider his additional training courses and that assessment influence by incumbent and perception of personality characteristics, not merit. Appellant argues that incumbent enhanced promotional opportunity of selected applicant by selected applicant assist incumbent in duties as Regional Inspector. Appellant argues such actions effectively pre-determined assessment by board. Appellant also argues that regional

management and board had preconceived impression of his personality, which worked against him in competition. Appellant identifies one question as evidence that personality conflicts taken into account in selection process. Appellant also claims one board member prompted him on three questions to which he claims he had given the correct answer. Appellant asserts board member did this to push appellant to make mistakes.

Evidence that most Forest Rangers with long service would have similar training records as appellant. Evidence that board member prompted other applicants at interview as well as appellant. Such prompting for purpose of helping candidates demonstrate their level of knowledge. Specific question challenged by appellant re personality conflicts actually directed at problem solving skills.

Selected applicant testified that his former responsibilities included assisting Regional Inspector and denied that any promise had been made to him in respect to Regional Inspector's position.

Decision: **appeal dismissed**

Results of competition cannot be faulted simply because board did not use training and experience as rating factors:

> Under section 7 of the Civil Service Act, the employer has the right to establish the standards against which the merit of candidates is to be assessed. The standards, of course, must be reasonable in regard to the nature of the duties to be performed. In this instance, the appellant did not provide any evidence which would suggest to me that the selection standards set out in the Applicant Rating Guide (Exhibit 3) are unreasonable (at p. 10).

Appellant failed to establish that board assessment not consistent with merit principle. On evidence, selected applicant assisted Regional Inspector because of assigned duties per job description and appellant failed to demonstrate that board improperly influenced by performance of such duties. Regional Inspector not member of board of examiners

Prompting at interview for purpose of assisting, not harming, applicants. Evidence that for each instance of prompting, appellant assessed at "A" rating so no detriment to appellant.

Appellant failed to establish that specific question posed for purpose of having candidates reveal personal conflicts indicating that personality characteristics considered in competition. No evidence that Board labeled appellant as unsuitable for position (board assessed appellant at "B" rating).

No evidence that assessment of appellant based on other than selection standards.

Board of examiners: competence to assess qualifications

Snow v. Department of Transportation **(11 October 1994)**

Ombudsman: Ellen King

Concerning competition number 93-01-07 for the position of Transportation Maintenance Superintendent I-II (Bridges)

Appearances: E. Grenier,. for the appellant
R. Speight, Esq., for the employer

Notice of competition requiring candidates to have written competence in French language. No qualified candidates identified so competition closed without appointment.

Position re-advertised but without required qualification of competence in written French. Required language qualifications expressed as "written and spoken competence in English and spoken competence in French". Of 34 applicants, only six (including appellant) satisfied qualification standards and were assessed by written and oral examinations. As result, one applicant assessed as qualified in relation to five modules: (1) Technical Knowledge/Operational Skills; (2) Position Suitability; (3) Communications/Interpersonal Skills; (4) Organizational/Decision Making Skills; (5) Supervisory/Management Skills. Board of examiners assessed appellant as "NQ" in relation to "Position Suitability" and "Communications/Interpersonal Skills".

Appellant argues that he spoke French language with sufficient proficiency to satisfy competition standard. Evidence that appellant spoke French language at work on many occasion and did so without complaint about his language abilities. Appellant asserts that had been told during interview that French language would not be problem for him as conditions were relaxed and that, if need be, other employee available to respond. Appellant argues his skills on all other areas as high or higher than selected candidate and that language was main criterion for selection. Appellant also points out that board of examiners did not include technical representative from head office.

Evidence that usual practice is to have head office representative from Technical Services Branch serve as member of board of examiners but that no such representative available at relevant time (because of transfer). Employer argues that board competent to assess candidates because two members had ample technical qualifications and that board used same written examination and oral questions as when have participation of representative from Technical Services Branch. Evidence that appellant received Basic + proficiency level in spoken French whereas qualification requirement set at advanced level 3. Appellant tested two more times, once with a different evaluator at different location, with same result. As result, appellant's rating on Communication/Interpersonal Skills and Position Suitability Modules fell below qualifying rating. Appellant's language proficiency assessed not by Board but by Department of Advanced Education and Labour.

Decision: appeal allowed

It was not shown that the Board did not have sufficient background to assess the technical

knowledge of the candidates. Absence of technical representative did not have impact on outcome of competition. Board acted in compliance with Act:

> The Act does not specify that a Board is to be composed in any particular way, although it is understood that its composition must include members who are capable of assessing the qualifications of the candidates for the position in question (at p. 18).

Board had to reconcile differences in written examination scores, experience and education. No evidence that assessment with regards to written examination was unreasonable or that improper weight given to written examination.

Employer has right to set qualifications required for position, including any language qualification. Board of examiners obliged to establish proficiency level for each language qualification. On evidence, proficiency level of appellant below standard set for position. As such, board justified in concluding that appellant did not meet all of required qualifications for position.

However, language proficiency of selected candidate assessed differently than that of appellant. Second language proficiency of selected candidate not evaluated by means of language proficiency examination:

> … failure of the… Board to use assessment tools common and applicable to all of the candidates has resulted in an intrinsically unreliable, if not inequitable, evaluation of the relative merit of their qualifications (at p. 23).

Board did not assess selected candidate's oral competence in French language:

> [I]t cannot be assumed that a candidate has oral competence in a language simply because the application was submitted in that language.

As a result, selection violated requirement that selected applicant be "qualified" per Act, s. 4 and that selection be based on "merit" per Act, s. 6:

> … I cannot verify that the selected candidate is qualified as his language proficiency has not been evaluated in keeping with the requirements set for the competition. Additionally, without an equitable method of assessment that renders comparable results, it is not possible to find that merit has been respected (at p. 23).

Appeal must succeed because no evidence to demonstrate that selected candidate qualified with respect to all requirements set for competition and is most qualified as required by Act.

Section 6 selection based on merit

6(1) Subject to this and any other Act, appointments to and from within the Civil Service shall be based on merit and shall be made by competition or by such other process of personnel selection designed to establish the merit of candidates as the Deputy Minister of the Office of Human Resources considers is in the best interests of the Civil Service.

6(2) No appointment shall be made to or from within the Civil Service unless a vacancy exists in the portion of the Civil Service to which the appointment is to be made.

6(3) Unless otherwise provided in this Act or the regulations, no person shall become an employee under this Act except by virtue of an appointment made in accordance with subsection (1).

6(4) An appointment under this Act takes effect on the date specified in the instrument of appointment.

Merit principle: applicant with highest assessment must be selected

***Munn v. New Brunswick (Department of Natural Resources and Energy)* (1999) 208 N.B.R. (2d) (Supp) '99/3 (Q.B.) (Russell J.)**

Ten persons applied in a closed competition for position as "Assistant District Forest Ranger". Seven applicants satisfied qualifications and interview/testing process resulted in names of four applicants being placed on eligibility list, including Munn. Deputy Minister did not select Munn. Munn and another applicant on the eligibility list appealed to the Ombudsman on basis that both had received higher scores in testing. Concluding that competition process not in conformity with merit principle, Ombudsman revoked appointment. Instead of filling position with another applicant on the eligibility list, Department filled position on a rotating basis due to a hiring and recruitment freeze. Adjudicator ordered that position be filled, as it had been posted prior to hiring freeze. Adjudicator concluded that process should revert to testing phase with all seven original qualified candidates participating rather than having deputy head merely choose again from eligibility list. On application for judicial review, Munn asked that Court hold adjudicator had exceeded jurisdiction in ordering testing to be redone and that adjudicator erred in characterizing Ombudsman's decision as finding that testing process fundamentally flawed.

Held: application dismissed

Ombudsman did not err in concluding that that eligibility list flawed because of practice of Department in placing candidates on eligibility list who were not equal in merit as determined by board of examiners. Where all assessment modules of equal weight, applicant with most number of "A" ratings (absent any "NQ" ratings) is the applicant who must be selected for appointment based on merit principle.

Adjudicator's decision not patently unreasonable. Adjudicator properly ordered competition to recommence immediately before point at which flaw developed. Adjudicator did not err by concluding that Ombudsman found competition process flawed:

> That being so it seems only reasonable that the process should start anew at the point immediately before the flaws developed. See: Re Domtar Inc. 28 L.A.C. (2d) 107 and Re B.C. Hydro, 10 L.A.C. (3d) 56.

Note: appeal to Court of Appeal dismissed (Rice, Turnbull, and Larlee JJ.A.) (1999) 215 N.B.R. (2d) 389 on basis that judge committed no error:

> For Mr. Munn to successfully appeal the reviewing Judge's decision he must convince us: firstly, that the reviewing Judge made an error in principle, or secondly, that his decision results in a serious injustice. We agree that the reviewing Judge applied the proper principles to determine whether the adjudicator exceeded his jurisdiction or made a patently unreasonable decision. We agree with the reviewing Judge that the adjudicator did not either exceed his jurisdiction or make a patently unreasonable decision. We also agree that the reviewing Judge's decision does not result in a serious injustice. Mr. Munn is still an eligible candidate for the vacancy. (at para. 10)

Merit principle is a term or condition of employment and not subject to alteration by collective agreement

New Brunswick, v. Canadian Union of Public Employees, Local 1190 and Allain **(1984) 56 N.B.R. (2d) 114 (C.A.)**

Respondent Allain employed by Department of Transportation. Allain unsuccessfully applied for advertised position within Department in open competition. Position sought constituted promotion. Allain grieved on basis of seniority clause of collective agreement which states that where two applicants have similar qualifications, applicant with most seniority "entitled to preference". Allain and selected applicant have similar qualifications but Allain has greater seniority. Employer argues seniority clause of collective agreement in conflict with merit principle per Act, s. 15 [now s. 6 though differently worded]:

> 15 Subject to this or any other Act, *appointments from within the Civil Service* shall be based on selection according to merit, as determined by the Commission, and shall be made by the Commission at the request of the deputy head concerned by competition or by such other

> process of personnel selection designed to establish the merit of candidates as the Commission considers is in the best interests of the Civil Service. (at para. 9).

Employer argues Act prevails over collective agreement. Allain argues s. 15 applies only to closed competition, and that collective agreement merely directs how deputy head should exercise discretion.

Held: appeal allowed

La Forest J.A. (Ryan and Stratton JJ.A. concurring):

Appointments from within civil service, whether from open or closed competition, are governed by s. 15 and must be based on merit.

Seniority clause of collective agreement in conflict with merit principle of Act such that collective agreement

> constitutes an alteration of the scheme of appointment on the basis of merit as determined by the Commission contemplated by s. 15 of the *Civil Service Act*. The question is whether s. 15 constitutes a term or condition of employment of a person employed in the civil service. That it does I have no doubt. (at para. 15)

Parties to collective agreement not free to alter terms and conditions of employment established by legislation as provided by *Public Service Labour Relations Act*, s. 63(2):

> 63(2) No collective agreement shall provide, directly or indirectly, for the alteration or elimination of any existing term or condition of employment or the establishment of any new term or condition of employment or the establishment of any new term or condition of employment,
>
> (a) the alteration or elimination of which or the establishment of which, as the case may be, would require or have the effect of requiring the enactment or amendment of any legislation by the Legislature, except for the purpose of appropriating money required for its implementation, …

Accordingly, seniority clause of collective agreement not applicable.

Notice of competition: qualifications

Hurkens v. Department of Education **(19 April 2003)**
Ombudsman s Delegate: J. McEvoy

Concerning competition number 01-2000-077 for the position of Library Assistant,

Nashwaaksis Public School Library

Appearances: C. Robbins, for the appellant
F. Finn, for the employer

Board of examiners interviewed five applicants. Twenty -five applications had been received and were pre-screened for qualifications. Board members based interview on questions developed for past competitions and were guided by advertised qualifications. Twenty-nine questions asked of each candidate and organized under six headings: (i) education and work experience; (ii) general knowledge of the public-school library and the community; (iii) library skills/knowledge of information sources; (iv) interpersonal, communication, leadership and team work; (v) organizational skills; and (vi) administrative wrap-up. Board members all participated by asking questions; all took notes; and all participated in the discussions by which the overall ranking of each candidate in relation to three assessment modules were determined: (i) technical skills; (ii) communication skills / interpersonal skills; and (iii) position suitability / motivation. Board rated two candidates as "A", one as "B", and two as "NQ". Appellant is the one "B" rated candidate. Several days later, board members met to finalize eligibility list. Appropriate Deputy Ministers then selected the third party from the "A" rated candidates.

Initially, appellant misunderstood meaning of "B" rating and thought she had been rated as "not qualified". At preliminary meeting to review relevant competition documents, appellant learned that "B" rating means a candidate is considered "qualified". Appellant argues that her candidacy was undermined by interview questions which were not supported by reference to the notice of competition. For example, she notes that the rating form included assessment of the ability to set priorities, knowledge of the Nashwaaksis Public-School Library and surrounding community, the ability to respond in a clear and focussed manner to interview questions, and the demonstrated ability to listen well. In relation to each of these matters, the board rated her responses as "B". Appellant argues that these matters were improperly included in the assessment because they are not identified as "qualifications" in the notice of competition. Notice of Competition 01-2000-077 reads, in part, as follows:

> **Qualifications:** In addition to possessing the necessary skills and abilities to perform the above noted duties, candidates must possess a high school diploma. Experience with e-mail, the Internet, Ms-Word and one (1) year of experience in the automated work environment are necessary. Knowledge of automated circulation and electronic reference tools are a definite asset. Enthusiasm for the mission of public libraries and experience in working with public of all ages is required.
>
> The successful candidate will demonstrate *initiative* and an ability to work both *independently* and in a team environment. *Strong interpersonal, communication and organizational skills are essential*. An equivalent combination of education and experience may be considered. Written and spoken competence in English and French are essential. [emphasis added]

Appellant asserts that on a date or dates after date on which board finalized eligibility list, (i) a board member (who is also appellant's supervisor) suggested that appellant withdraw her application and (ii) successful applicant informed appellant of her selection before appellant received letter advising her of competition results. Evidence that supervisor made suggestion to appellant as means to "save face" with colleagues in relation to competition.

Decision: appeal dismissed

To be selected for an interview, applicants must have satisfied education and experience qualifications expressed in the notice of competition — that is the reason for the pre-screening process. The challenged question areas are supported by the notice of competition. The ability to set priorities relates to the ability to work independently and to organizational skills as noted in the notice of competition. Knowledge of the Nashwaaksis Public School Library and surrounding community is relevant to the working location identified in the notice of competition, thus reflecting the clientele and connection to the library system. Evidence that board also considered this knowledge to assess a candidate's personal initiative (interview preparation). Ability to respond in a clear and focussed manner to interview questions and demonstrated ability to listen well are fully reflected not only in the list of duties for the position, which involve interaction and service to the public, but more particularly in the requirement of communication skills.

A notice of competition need not specify every detail relevant to vacant position. These are brief documents intended to bring to the attention of potential applicants sufficient information to enable them to make an informed decision as to whether or not to submit an application.

Events which occurred after board made its final decision on the rating awarded to each candidate insufficient to taint the result. Although, appellant felt being asked by supervisor to step aside in favour of another candidate, supervisor knew board had already submitted eligibility list to Deputy Ministers. Explanation accepted that supervisor offering a means by which appellant might inform colleagues of lack of success without embarrassment. That third party informed appellant of success before appellant learned of results of competition is consistent with confirmation of offer of position to selected applicant before notifying other applicants of result. Mere suspicions of appellant do not prove infringement of merit principle particularly when innocent explanations not challenged.

Merit principle: board of examiners – assessment factors of seniority, references, performance evaluations

Douthwright v. Department of Transportation **(29 March 2003)**
Ombudsman's delegate: J. McEvoy

Concerning competition number 2002-D03-07 for the position of Carpenter (District 03, Moncton)

Appearances: S. Barton (CUPE rep), for the appellant
M. Estabrooks, for the Employer

This is an intra-Departmental or closed competition. All three applicants satisfied the minimum qualifications established in the notice of competition. Competitive process consisted of a written multiple choice test (128 questions) and a personal interview. No applicant succeeded in achieving the pre-determined passing grade on the written test so the board members (by consensus) lowered minimum passing grade from 70% to 60% (position had been vacant for approximately four years and employer wishes to make permanent appointment). Even with the lower passing grade, only two applicants passed the test with a rating of B (the appellant and the third party). Appellant concedes that he suffered no prejudice by decision to lower passing grade. The written test constituted one of four assessment modules (technical skills) by which board assessed applicants. Interview assessed three modules: inter-personal skills, organizational skills, and communication skills. Board interviewed both appellant and third party and posed same questions to each. By consensus, board assigned overall rating of B to appellant and an overall rating of A to third party whose name was then placed on eligibility list.

Appellant argues that board members should have given greater weight to his more extensive experience compared to that of the third party; board should have consulted with his named referee to confirm his experience and skills; board should have given weight to his performance evaluations over the years; board should have considered his seniority relative to that of the third party; and that A, B, NQ assessment ratings are too subjective.

Decision: appeal dismissed

Appellant has not identified any failing by the board to respect the merit principle as expressed in section 6(1) of the *Civil Service Act*:

> What the appellant actually argues is that the board should have gone *outside* its assessment process and considered only factors more favourable to himself. In my opinion, the board fully respected and applied the merit principle by conducting a competition as mandated by the Act and Regulations and by treating each applicant in an identical manner. The evidence confirms that the board based its assessment of each applicant on pre-determined criteria and through a pre-determined process. The board was not under any duty to go outside that process. Instead, it was for the appellant to draw upon his skills and experience to formulate his responses to the questions posed on the written test and at the interview. The burden is upon an applicant to demonstrate his superior skills; it is not upon the board to search out evidence in support of an applicant.

Both appellant and third party satisfied minimum levels of requisite experience to be selected for an interview. Assessment criteria did not include length of experience nor annual appraisal reports.

Board did not err by not consulting appellant's referee. Having assessed appellant at an overall "B" rating and the third party an overall "A" rating, board had no reason to confirm appellant's experience and skills by consulting his referee . While seniority is a factor in circumstances identified by governing Collective Agreement, seniority not a factor given overall ratings assigned to appellant and to third party.

The A, B, and NQ ratings system is mandated by NB Regulation 84-229, section 5(2) and its alleged subjectivity is appropriately addressed by (i) the decisional control exercised by the presence of a three person board rather than a single decision-maker and (ii) by the discussion among the board members which led to a consensus on the ratings assigned to each applicant in relation to each selection module and in relation to the overall assessment ratings. While each of the board members exercised their individual judgments, they achieved a consensus on the ratings assigned and did so on the basis of pre-determined standards. This was not a purely subjective and thus arbitrary assessment process. That the A, B, NQ assessment scores represent ranges of values does not taint them as subjective.

Merit principle: pre-screening assessment of qualifications based on information in application only

Wilson v. New Brunswick Community College - St. Andrews **(18 March 2003)**
Ombudsman's delegate: J. McEvoy

Concerning competition number 02-6245-003 for the position of Program Manager, Hospitality and Tourism Department, New Brunswick Community College - St. Andrews

Appearances: L. Wilson, for himself
M. Ward, for the Employer

Appellant and twenty-two other applicants screened out by board of examiners for failure to satisfy qualifications expressed in the notice of competition. Evidence that board members individually screened applications based solely on documentation provided by each applicant and that same standards applied to all applications. Two board members testified that appellant failed to demonstrate "tourism industry experience" or "tourism education management experience" in his application ((cover letter and resumé). Appellant argues that does have such experience and that board members should have requested additional information from him; in the alternative, he argues that, as a co-worker, they should have known about his experience and

at least should have had such knowledge based on information provided in previous job competitions.

Appellant argues that notice of competition is inconsistent with classification specifications contrary to Act, section. 7. Position identified in notice of competition as "EPO4" (Education Program Officer 4). Classification specifications ("New 10-96") list Department Head, Project Manager and Curriculum Development Officer 2 under the heading "Typical Job Titles" and for each of these job titles, there is a description of duties. Classification specifications state under heading "Desirable Training And Experience":

> Graduation from University with major course work in a specialty related to the area of assignment and thorough experience in teaching.
>
> OR
>
> Graduation from University to the level of a Master's degree in a specialty related to the area of assignment and considerable experience in teaching.

Appellant argues that notice of competition failed to require either "*thorough* experience in teaching" or "*considerable* experience in teaching". Competition notice set qualifications as a university degree and a minimum of six years related experience defined in terms of a combination of tourism industry experience, instruction/training and tourism education management experience. Evidence that "thorough" and "considerable" interpreted in practice to require 8-10 years and 6-8 years, respectively. Employer argues that competition notice is not inconsistent with classification specifications because the latter merely describe the levels of "thorough" and "considerable" teaching experience as "desirable".

Notice of competition states, in part:

> The New Brunswick Community College - St. Andrews is looking for a Program Manager to provide educational and professional leadership in the Hospitality and Tourism Department...
>
> The successful candidate should possess a University Degree in a related field supplemented by a minimum of six (6) years related experience or a Master's Degree in a related field supplemented by a minimum of three (3) years related experience. The years of related experience required should include a combination of: tourism industry experience, instruction/training and tourism education management experience. An equivalent combination of education and experience may be considered... Preference may be given to those with post secondary professional course work in areas such as Business/Administration, Management or Tourism…
>
> *Candidates are required to demonstrate on their application, how, when, and where they have acquired the qualifications and skills required for this position Resumes should be in chronological order specifying education and employment in months and years including part-time and full-time employment* .[emphasis added]

Decision: appeal dismissed

Notice of competition clearly required each applicant to demonstrate requisite information "on their application". In the context of an open competition, it would not have been proper for board members to supplement applications by invoking personal knowledge of some applicants. To have done so, "would not have been to treat all applicants fairly and would certainly under undermined respect for the merit principle required by section 6(1) of the Act." Appellant's application failed to disclose that he satisfied the qualification in issue.

The notice of competition is not inconsistent with the classification specifications within meaning of Act, section 7. As argued by employer, classification specifications refer to levels of experience in teaching as "desirable" and do not establish minimum standards.

Merit principle: post-competition infringement of employer's policy Alleged defect in selection process must infringe merit principle Assessment factors: experience

Ouellet v. Department of Natural Resources and Energy **(11 March 2003)**
Ombudsman's delegate: J. McEvoy

Concerning competition number 60-02-33 for the position of Forest Ranger IV / Assistant District Ranger, (Saint-Quentin)

Appearances: J. Ouellet, for himself
K. Good Waite, for the Employer

During a pre-hearing conference, a number of matters raised in the appeal were determined not to relevant. In particular, the appellant's complaint to the Ombudsman asserted that the employer had failed to respect its own administrative policy # AD 4401 entitled " Information Requests, Appeals and/or Complaints". This policy reflects the employer's interpretation of its responsibilities in respect of competitions under the *Civil Service Act* and establishes certain standards and procedures applicable post-competition to deal with information requests, appeals and complaints by unsuccessful candidates. In his letter of appeal to the Ombudsman, the appellant had raised violations of this policy – for example, that contrary to the policy, the chair of the qualifications appraisal board had not signed the letter sent in response to the appellant's post-competition information request. These matters were held not relevant to an appeal under section 32 of the Act because the matters raised by the appellant in respect of policy # AD 4401 arose post-competition and are not directly related to the conduct of the competition under appeal nor to the merits of the candidates.

Notice of competition in issue was for ten positions as Assistant District Ranger at various locations throughout the province with each position identified by a distinct competition number. Two boards of examiners (one English language and one bilingual) assessed the applicants and conducted interviews. Only two persons submitted applications for the bilingual position in Saint-Quentin and were assessed by the members of the bilingual board. The appellant submitted separate applications for position in Saint-Quentin and one other location. Third party applied only for position in Saint-Quentin. Appellant argues that any error by the board of examiners justifies revoking the appointment of the third party as the successful candidate. He argues that he should have been granted two interviews (one for each position for which he submitted an application) and that the board members should have been knowledgeable about the specific organizational structures of the district in which the position under appeal is located. He argues that he suffered disadvantage because he had to be cognizant of two districts while successful candidate had to be knowledgeable about only one district. Appellant had been advised of only one interview and did not seek information about a possible second interview before meeting with board of examiners.

Evidence on behalf of employer that, because of generic nature of job descriptions for the ten positions, each applicant granted one interview regardless of number of applications actually submitted and that board of examiners asked ten generic questions of each qualified applicant. No applicant received more than one interview. Appellant testified that board of examiners asked that he respond to one hypothetical question by referring specifically to the two districts to which his two applications related. Board members testify that appellant himself chose to respond by distinguishing between the two districts. Board members acknowledge their own lack of detailed knowledge of structures in the district of Saint-Quentin.

Decision: appeal dismissed

Not every error or disadvantage justifies revocation of an appointment. There must be such disadvantage as to undermine respect for the merit principle (per section 6(1) of the Act) in the selection of the successful applicant.

It is not necessary to resolve the factual discrepancy as to whether appellant required or chose to distinguish between districts in his response to a single interview question. Appellant had not been advised that would be granted two separate interviews so did not suffer any last minute change that might be expected to upset an already nervous applicant. On the contrary, appellant would have gained a distinct advantage had he been interviewed twice using the same generic questions. Board acted reasonably, efficiently and consistently with the merit principle when it granted only one interview per applicant regardless of the number of applications submitted by any one applicant. These were generic interviews for generic positions. On same reasoning, it is not a detraction from merit principle that board members were not knowledgeable about the specific organizational structure of the Saint-Quentin district.

Appellant also argues two secondary points. First, that the board of examiners failed to

give appropriate weight to his experience which includes his supervision of successful applicant. This argument fails to recognize role of interview in competition process – it was through his responses to interview questions that appellant had opportunity to demonstrate strengths of his experience. Second, that language qualification should have required higher level of competence in English language – a competence which appellant claims to excel in comparison to successful applicant. However, on evidence presented, language competency qualification was established consistent with work team profile. On an appeal under section 32 of the Act, Ombudsman not to second-guess basic qualifications for civil service position. That, in general, is a management decision.

Merit principle: necessary qualifications

Keirstead and McLaughlin v. Department of Transportation **(2 December 2002)**
Ombudsman's Delegate: J. McEvoy

Concerning competition number 2001-D04-25 for the position of Mechanic III (Hampton Bus Garage)

Appearances: T. Steepe (CUPE rep), for the appellants
M. Estabrooks, for the employer

Two separate appeals were joined for the purpose of this hearing. The English language version of Competition 2001-D04-25, an intra-Departmental competition, is expressed (in part) as follows:

> The Department of Transportation is seeking a Mechanic Supervisor for the Hampton Bus Garage.
>
> **THE POSITION**: The primary duties will be to supervise the work of others as well as being responsible for the planning and scheduling, distribution and monitoring of the work activities to ensure an efficient and productive shop.
>
> **THE PERSON:** Possession of a Journeyman's Certificate in the Heavy Equipment Repair Trade or Motor Vehicle Mechanic (auto) Repair Trade; and a Motor Vehicle Mechanic (Truck & Transport) certificate as issued by the New Brunswick Department of Training and Employment Development. Written and spoken competence in English is required.

Both appellants challenge ratings assigned by board of examiners following their individual interviews. There were five assessment modules: Technical Knowledge / Operational Skills; Communication / Interpersonal Skills; Organizational / Decision Making Skills; Supervisory / Management Skills; and Positional Suitability. Board members posed 35 questions to each

candidate and made an overall assessment, by consensus, in relation to each assessment module. Evidence that employer's usual practice is to identify qualifications in notice of competition under heading "The Person". Evidence that members of board of examiners considered first appellant had perceived weakness in lack of supervisory skills and supervisory experience. Second appellant informed by member of board of examiners that his supervisory experience not the "same kind of work" as that intended for position of mechanic supervisor.

Appellants argue that rating process is too subjective and too general in use of "A", "B", "NQ" and that such rating is not grounded in objective pre-determined evaluative standards. The appellants also argue that the notice of posting does not comply with Regulation 84-229, section 3(2) because it did not specify necessary and desirable qualifications, particularly supervisory skills. Employer argues that express mention of "supervisory skills" qualification would have excluded otherwise interested applicants in this intra-Departmental and, in any event, "DUTIES" portion of notice sufficient to bring "supervisory skills" to attention of interested persons.

Decision: appeal allowed; appointment revoked

Evidence clear that interview and selection process conducted in good faith, professional and competent manner fully consistent with merit principle. Rating of applicants by use of "A", "B" and "NQ" system is established by NB Regulation 84-229, s. 5(2) and board of examiners conformed to that system. Board members rated applicants on basis of sufficient pre-determined skill standards for each module. That the board members kept individual notes during the interviews and may have varied in their individual assessment of particular answers to questions is not surprising. It is consensus achieved through give and take of discussion that is controlling; that is why there is a three person board rather than a (perhaps, arbitrary) decision by one person.

Notice of Competition in issue expresses three qualifications *viz*. journeyman's certificate, motor vehicle mechanic certificate, and written and spoken competence in English. Supervisory skills were left to implication by virtue of description of duties under heading "THE POSITION". Supervisory skills not identified as either necessary or desirable qualification. Yet, supervisory skills became one of five assessment modules under heading "Supervisory and Decision Making Skills" and key element in the rating of applicants in relation to the module entitled "Positional Suitability". Logical conclusion is that supervisory skills were more than even a "desirable" qualification within meaning of NB Regulation 84-229, sections 2 and subsection 3(2); supervisory skills were effectively treated as a "necessary" qualification -- such skills became a decisive factor. Clear purpose of NB Regulation 84- 229, subsection 3(2) is to provide such information to potential applicants that an informed decision can be made as to whether or not to submit an application. Critical to this knowledge, as expressed by subsection 3(2), is identification of required and desirable skills. Such information cannot and should not be left to implication.

Merit principle: assessment factors – equivalency standard

Doyle v. Department of Family and Community Services **(14 December 2002)**

Ombudsman's delegate: J. McEvoy

Concerning competition number 2002-FCS-048 for the position of Program Consultant, Adoption Services

Appearances: A. Doyle, for herself
P. Trask, for the Employer

Notice in Competition 2002-FCS-048 is expressed as follows:

> The Department… has an opening for a person to provide professional consultation in Adoption Services to both service delivery staff and management in the province...
>
> Candidates must possess a Masters Degree in Social Work and at least 5 years work experience, of which at least 3 years must be working with children's services. The ability to work effectively on an independent basis and within groups is essential. Project management skills are an asset. You must have strong oral and written communication skills, analytical and planning skills as well as the capacity to cope with short time deadlines. Some travel is required. Candidates must be actively registered with the New Brunswick Association of Social Workers. Written and spoken competence in English is required. An equivalent combination of training and experience may be considered.

Appellant, an employee with over thirty years experience, complains that board of examiners failed to assess her skills properly (particularly in light of her extensive experience) and takes particular exception to the "B" rating assigned to her by board in relation to three assessment modules. She also questions qualifications equivalency standard, observing that the third party does not have required graduate degree in Social Work.

The chair of the board of examiners testified that, when drafting the notice of vacancy, she established an unexpressed equivalency standard at a Bachelor of Social Work degree, the requisite registration, and seven years experience with at least three years experience in children's services. Ten applications were received. Only two applicants had a Master's degree in Social Work, including the appellant. Three applicants were screened out because of a lack of NBASW registration qualification and one applicant withdrew. Thus, of six applicants interviewed, four benefitted from pre-determined equivalency standard. Following interview process, board of examiners rated applicants by consensus in relation to each module. Board gave no preference to long serving employees as such a preference would have been inconsistent with an open competition.

Decision: appeal allowed and appointment revoked

Appellant complains that she, but not the selected third party, satisfies the qualification regarding a graduate degree in social work. This specific complaint calls into question the role and

function of the equivalency standard as applied in this Competition.

> Notice of Competition 2002-FCS-048 is expressed as follows:
>
> Candidates **must** possess a Masters Degree in Social Work and at least 5 years work experience, of which at least 3 years must be working with children's services... An equivalent combination of training and experience **may** be considered.

Interpreted literally, this notice of competition expresses both a mandatory and a permissive set of qualifications. This notice does not comply with the requirement, per section 3(2) of NB Regulation 84-229, that a statement of qualifications "specifies and differentiates between necessary qualifications and those qualifications, if any, that are desirable qualifications for the job". By selecting for interviews applicants who satisfied the equivalency standard, the board of examiners effectively reversed the standards of "necessary" and "desirable" qualifications. Instead of treating the graduate degree and work experience combination as the necessary qualifications (as expressed in the notice by use of the word "must"), the board applied the equivalency standard as if it expressed the *necessary* qualifications and thereby treated the actual necessary qualifications, per the notice, as if they were only *desirable* qualifications:

> The purpose of NB Reg. 84-229, section 3(2) is to facilitate effective notice to a potential applicant for a position in the civil service of New Brunswick. Such notice is intended to provide sufficient information to enable a potential applicant to decide whether s/he satisfies the necessary and desirable qualifications for a vacant position as well as information on the responsibilities and functions of the position. The potential applicant is thereby empowered to make an informed decision whether or not to submit an application. By applying the equivalency standard as it did, the board effectively established the actual necessary qualifications for the competition. *The board did not hold the equivalency standard in abeyance to be applied only if no applicant satisfied the "necessary" qualifications as expressed in the notice.* In this competition, the board applied the equivalency standard to screen in applicants notwithstanding that two applicants did in fact satisfy the "necessary" qualifications as expressed in the notice. A graduate degree in social work (combined with requisite work experience) is not a *necessary* qualification if some other combination of education and experience is also acceptable.

It is not a good practice to include a permissive reference to an undisclosed equivalency standard in a competition notice (as was done in this instance). First, such reference to an undisclosed equivalency standard fails to inform potential applicants of education and experience that is minimally acceptable with result that potential applicants are discouraged from submitting an application. Second, permissive reference to an equivalency standard implies that it is to be applied as an alternative standard if no applicant satisfies the necessary qualifications expressed in notice of competition. In present matter, this was a false implication because board applied equivalency standard notwithstanding existence of applicants who satisfied expressed "necessary" qualifications. Third, a willingness to accept an applicant who satisfies an

equivalency standard means that what are expressed as *necessary* qualifications are in reality only *desirable* qualifications. Necessary qualifications should be necessary to successful performance of job functions and responsibilities.

Merit principle: qualifications

Hachey v. Department of Natural Resources and Energy **(4 November 2002)**
Ombudsman's Delegate: J. McEvoy

Concerning competition number 60-02-13 for the position of Forest Ranger V (Protection Ranger), Region 3, Kingsclear

Appearances: J. C. Hachey, for himself
K. Good-Waite, for the Employer

Under heading "required qualifications", posted notice of competition included "successful completion of departmental code of practice process". Appellant considers his inability to satisfy this particular qualification is due solely to decisions of employer and that he should have been selected for position and then given an opportunity to complete required training.

Required qualification in issue refers to a specific training program, created in 1999 and provided by RCMP personnel, relating to investigative and offender apprehension techniques consistent. Training provided to designated headquarters employees in each administrative district and to other district staff with enforcement duties. Six applications received (an intra-Departmental competition). Four applicants satisfied all qualifications. Appellant and one other applicant screened out because of non-satisfaction of stated qualifications.

Appellant does not challenge relevance of the required qualification to the position in competition and does not allege bad faith by employer. Appellant did not receive training because of transfer to non-enforcement duties in 1992. On evidence, transfer made to resolve personal conflict with another employee. Thus, as a headquarters employee without enforcement responsibilities, appellant not selected for code of practice training when Department instituted that program, nor did he subsequently receive that training.

Decision: appeal dismissed

Connection between acceptance by appellant of transfer to non-enforcement duties in 1992 and failure to satisfy required qualification is too tenuous to cast responsibility on employer so as to taint selection of successful applicant.

On evidence, appellant did not receive code of practice training because it is not related to his assigned duties and responsibilities during past ten years. Though appellant believes such training should be available to other employees, there is no suggestion of any bad faith in the decision of the employer to provide training to designated employees. Evidence of attempts by appellant to obtain training generally relate to period after close of competition when appellant

knew did not satisfy qualification in issue.

Merit principle: board of examiners – expertise to make proper assessment
Board of examiners: reasonable apprehension of bias

Buck and McGuire v. Department of Health and Wellness **(19 February 2002)**
Ombudsman's delegate: J. McEvoy

Concerning competition number 35-01-0054 for the position of Community Mental Health Director, Mental Health Services Division, Saint John Region

Appearances: G. Buck, for himself
P. McGuire, for himself
B. McGaw, for the employer

Two separate appeals arising from the same competition were heard together. Both appellants satisfied the academic qualifications stated in the notice of competition. The third party satisfied the equivalency standard by virtue of her bachelor's degree and minimum 8 years management and administrative experience. Notice of competition reads, in part, as follows:

> You must have a Master's degree in a related mental health discipline with a minimum of 6 years management and administrative experience in diverse community human service delivery systems; or an equivalent combination of training and experience...

Appellants allege that the selected candidate does not satisfy advertised minimum qualifications and challenge appropriateness of selection process for this management level position. They suggest, for example, that the board of examiners should have (i) consulted with co-workers of each applicant in order to gain a better insight into individual performance skills and (ii) undertaken reference checks for each applicant. Following presentation of evidence, appellant Buck conceded evidence did not establish violation of Act. Appellant McGuire challenges board of examiners as lacking expertise to evaluate answers to questions posed during interviews. In particular, he questions the participation of a person with a public health background as a member of the three person board. Finally, appellant McGuire challenges board chair on ground of reasonable apprehension of bias because board chair encouraged persons to apply for the position in competition, including the selected third party.

Evidence that interview questions based on those used in prior competitions and divided into four assessment modules; three of which focussed on management abilities and one on clinical functions. Board members asked same questions to all three candidate. Board assessed

third party as only qualified applicant. Evidence that board member with public health background selected because of extensive experience in selection of management level employees and experience in integrated health program in light of the expectation of a closer integration of mental health and public health services delivery. Evidence that interview responses of both appellants narrowly focussed on personal experience rather than priorities of the region while responses of third party reflected solid knowledge base, good management skills, and a good understanding of the changing processes in this field.

Member of board of examiners who served as chair acknowledged that he encouraged third party and others to submit an application and had expected that appellant Buck, then serving in an acting capacity, would apply. He explained that he encouraged applications not only to increase awareness of the competition but also to attract the largest possible pool of candidates. Evidence is that these conversations not extensive but more of a "passing" or "hallway" type of conversation. Board chair testified that he kept an open mind when interviewing and assessing applicants.

Decision: appeals dismissed

On evidence presented, third party satisfied qualifications expressed in notice of competition by application of equivalency standard permitted by notice itself. That appellants believe that a different selection process should have been used is not decisive. Act clearly confers discretion to "establish selection standards that are necessary or desirable having regard to the nature of the duties to be performed" (per s. 7) and to conduct "such examinations, tests, interviews and investigations as he considers necessary or desirable" (per s. 11). While discretion not unlimited, evidence does not establish that process selected ― which is usual process ― is somehow deficient. Merely because result is not what appellants would have liked does not render process suspect or in violation of merit principle.

Evidence clearly justifies participation of public health official as a member of board of examiners. Each member of the board brings into play their own areas of expertise in assessing each of the candidates. Together they reached a consensus and selected the successful candidate.

Allegation of reasonable apprehension of bias is not proved. Note that actual bias is not alleged but that a perception of bias:

> The legal standard by which to consider a reasonable apprehension of bias is the perspective of reasonable person informed of all the relevant circumstances. In the circumstances of this matter, as reflected in the evidence, I do not believe that a reasonable person would apprehend a bias. [The board chair] encouraged other employees in addition to the third party (whether they followed through and applied or not is irrelevant); his was a casual conversation of general encouragement; he testified that he kept an open mind and merely sought a pool of qualified applicants; and this was an internal competition with a relatively small pool of potential applicants. While not a practice to be encouraged, I conclude that the approach to potential applicants by [the board chair] does not raise a reasonable apprehension of bias in him as Board chair.

Merit principle: required qualifications not generally reviewable; assessment factors
Board of examiners -- composition

Chiasson and Duke v. Department of Natural Resources and Energy **(8 November 2001)**
Ombudsman's delegate: J. McEvoy

Concerning competition number 60-01-01 for the position of Forest Ranger V / District Ranger, Region 1, Department of Natural Resources and Energy, Bathurst

Appearances: F. Chiasson, for himself
H. Duke, for himself
R. Speight, Q.C. for the Employer

Two separate appeals arising from the same competition were heard together. Appellant Chiasson argues that qualifications expressed in Notice of Competition are inappropriate for position. He argues that employer has "relaxed" the qualifications from previous competitions. In 2000, a previous Notice of Competition (60-00-06) expressed qualifications as:

> We require graduates from a recognized forest resource technical program with a minimum seven years related experience in forest management and protection, and fish and wildlife management and protection, including a minimum of three years supervisory experience.
>
> Les personnes désirant poser leur candidature avoir terminé un programme technique reconnu en ressources forestières et compter au moins sept ans d'expérience dans les domaines de la protection et de l'aménagement forestiers, de la gestion et de la conservation de la faune, y compris au moins trois ans à titre de superviseur(e).

Qualifications in issue in this appeal differ by the insertion of phrase "experience in any of the following"/ "d'expérience dans l'un des domaines suivants" followed by a modified version of the same areas of expertise and by deletion of the requirement of three years supervisory experience. Modification in areas of expertise from 2000 to 2001 is that "management and protection" categories are divided into distinct categories in relation to both forests and fish and wildlife, i.e. forest management, forest protection, etc.

Apellant Chiasson argues that he, but not selected third party, has experience in *all* identified areas of expertise and questions how a supervisor can properly supervise other employees without experience in all areas of responsibility. Employer's position is that it is a management right to establish required qualifications for each position and that such

qualifications are not reviewable under present appeal process.

Appellant Duke argues, first, that the board of examiners failed to consider his prior supervisory experience and his certificate in personnel administration. Second, that a member of the board (who served in relation to both the 2000 and 2001 competitions) demonstrated bias against him by stating that he had not been selected because he was not respectful enough and due to involvement in a past incident. Questioned on this matter, the member rejected any such negative influence and did not recall making statement alleged. All board members testified that their assessments (achieved by consensus) reflected responses of each applicant to pre-determined questions and answers. Third, appellant Duke felt that board displayed a negative attitude and suggests that board should not have included a member with a human resources experience (without forest ranger experience) and a member from another district.

Decision: appeals dismissed

Unless modified by either legislation or a collective agreement, it is a management right to establish qualifications for each position in its workforce. An appeal to the Ombudsman under the *Civil Service Act* relates generally to the merit principle under s. 6 of that Act, not underlying qualifications for civil service position in issue. What is reviewable is merit of candidates in relation to qualifications as established and not qualifications for the position. In this instance, change in wording in relation to qualifications reflects 2000 decision of Ombudsman which revoked appointment of successful candidate under Competition 60-00-06. Ombudsman ruled that then statement of required experience in Notice of Competition 60-00-06 was conjunctive and therefore required experience in all identified fields of expertise. It is for this reason that employer modified Notice of Competition 60-01-01 to require experience "in any of the following" domains of expertise / "dans l'un des domaines suivants". There is no evidence that modification of Notice of Competition due to any other factor or motive. Position of Forest Ranger V in issue is, on evidence, clearly a supervisory rather than a technical skills position and does not require that a selected applicant have experience in each field of expertise.

Appellant Duke failed to establish grounds of complaint. Evidence is that his certificate in personnel administration was mentioned at his interview and that both certificate and his former supervisory experience were indicated in his application. Therefore, both qualifications were before board for their consideration. Second, board members testified that their decision reflected merits of applicants in competition process and they explained their reasoning in detail. Other than bare assertion, appellant Duke presented no evidence to undermine board's assessment of his qualifications. Third, evidence does not establish a "negative attitude" as alleged. It would appear that real complaint is that same board selected third party in both 2000 and 2001 competitions. Appellant Duke's suspicions arising from this fact alone do not rise to level of proof that board failed to respect merit principle.

Merit principle: personal knowledge of applicants not factor for

board of examiners

Miner v. Department of Transportation **(29 August 2001)**
Ombudsman: Ellen King

Concerning competition number 2000-D04-02 for the position of Mechanic III with the Saint John District Department of Transportation

Appearances: L. Saunders, CUPE representative, for the appellant
M. Estabrooks, for the employer

Following interviews, board of examiners assessed five applicants as "B" rating and one applicant at "A" rating. Only name of "A" rated applicant placed on eligibility list. Appellant feels he should have received an "A" rating given his experience of twenty-three years.

Board assessed applicants in relation to five assessment modules: Technical Knowledge/Expertise, Organizational/Decision Making Skills, Communication/ Interpersonal Skills, Positional Suitability, and Supervisory/Managerial Skills. Board assessed applicants through responses to interview questions (provided in advance); applicants' responses to specific predetermined questions related to assessment modules; and results of reference checks to verify information received at interview. Same assessment approach applied to all applicants.

Employer argues that onus was on applicants to demonstrate, through their responses, degree to which they satisfied competition requirements. Board did not use personal knowledge of applicants nor experience of applicants as factor in making assessments. Appellant argues board should have taken into account what knew of his twenty-three years experience in assessing his merit for the position.

Decision: appeal dismissed

Appellant failed to establish that board assessment of applicants is not reasonable and that merit principle not respected. Board did not err by not relying on personal knowledge of appellant to make assessment of qualifications and assessment tools not shown to be inappropriate:

> Since the Board of Examiners had decided on the interview and verification through references as the tools by which the merit of the candidates would be assessed, as was its right to do under section 11 of the *Civil Services Act*, it was not then open for the Board to use its personal knowledge of the appellant's experience as part of the rating process… Under the *Act*, the Board had the right to decide on the selection criteria it would use and on the selection tools by which candidates would be assessed against the criteria, and neither the criteria nor the tools have been shown to be inappropriate.

Employer has right per Act, s. 7 to establish selection criteria. Employer could have chosen

experience or supervisory experience as selection criteria but decision not to do so does not provide ground of appeal.

Merit principle – screening process -- board of examiners interpreted required qualifications broadly and substituted required "experience" by "exposure" to required functions – board interpretation unreasonable

Merit principle – screening process – board of examiners bound by required qualifications expressed in notice of competition

Chiasson v. Department of Natural Resources and Energy **(21 February 2001)**
Ombudsman: Ellen E. King

Concerning Competition Number 60-00-06 for position of Forest Ranger V (District Ranger), Bathurst

Appearances: F. Chaisson, for himself
P. Elliot, Esq, for the employer

Competition held for position of District Ranger in Bathurst. Appellant and three other applicants placed on eligibility list. Deputy Minister selected applicant other than appellant.

Notice of competition stated (in part):

> The successful candidates will have experience representing the Department in related public education programs, thorough knowledge of current Departmental programs and policies, including District budget control and purchasing procedures, and competence in dealing with the public and the media.
>
> …specific duties include supervision of staff, scheduling and providing technical expertise and leadership in all activities relating to forest management, fish and wildlife management and protection, Crown land management and public education activities throughout the assigned area.

Evidence that board of examiners screened applicants into competition based on whether had seven years of experience with "exposure" to forest management and protection, as well as fish and wildlife management and protection. Board did not require that applicant have a certain number of years of experience in any one function "as long as they had 'exposure' to the various functions identified." Requirement that applicants have three years of supervisory experience

deemed satisfied if applicant had worked in a district as a Forest Ranger for at least seven years because Forest Ranger generally accumulates supervisory experience through "operational assignments."

Evidence that board considered required qualifications of "experience in forest management and protection" and "fish and wildlife management and protection" satisfied if applicant had experience in "forest management" *or* "forest protection" and in "fish and wildlife management" or "fish and wildlife protection."

Evidence that selected candidate had seven years experience working in forest management (silviculture) and three years experience as a Game Warden when would have gained experience in fish and wildlife protection. Accordingly, selected candidate exceeded required qualification of "a minimum of seven years related experience."

Appellant argues that board's interpretation of notice of competition in error because substituted "exposure" for "experience" and that this essentially changed the criteria on which screening based. Employer argued that liberal interpretation at screening stage merely increased number of applicants granted interviews and that merit of applicants assessed at interview stage.

Disposition: appeal allowed, appointment revoked

Onus is on each applicant to demonstrate satisfaction of required qualifications:

> The details provided in the notice [of competition] must be clear and provide the requirements that candidates are expected to meet so that candidates can make an informed decision whether or not to apply. On being advised of the requirements for a competition, it becomes the responsibility of the candidates to demonstrate that they meet them.

Here, notice of competition clearly placed onus on each applicant to demonstrate by their application that they satisfied required qualifications. In screening applications for required qualifications, respect for merit principle means that screening must be consistent with qualifications expressed in notice of competition:

> The first stage was the screening of the applications and the second stage involved the assessment of the merit of the candidates. The purpose of these two processes is different. The purpose of the screening stage is to determine if a candidate possesses the required qualifications to a minimum acceptable level, while the purpose of the assessment stage is to determine the comparative merit of the candidates.
>
> There is no question that the employer has the authority to prescribe the qualifications necessary for a position. Once the qualifications for a position have been set by the employer, then a Board of Examiners has no authority to change them. ... A Screening Board can interpret the requirements for a position described in a notice, but any such interpretation cannot… change the essential meaning of the requirements described in the notice. To go beyond interpreting to changing the requirements so as to broaden the qualifications enlarges the range of potential candidates and effectively brings into

> question the accuracy and the adequacy of the notice of competition and whether the competition respected the merit principle.

Accordingly, board of examiners "had no authority to substitute 'or' for 'and', nor did it have the authority to read out the word 'experience' and substitute the word 'exposure'" in interpreting required qualifications as expressed in notice of competition. Board's interpretation not reasonable.

Merit principle: interview vs. employment performance evaluations, experience

Allain v. Department of Transportation **(December 1999)**
Ombudsman: Ellen King

Concerning competition number 1998-D03-09 for the position of Highway Signs Supervisor in Moncton/Rexton District

Appearances: J. Sirois, for the appellant
M. Estabrooks, for the employer

Six candidates, including appellant, interviewed by board of examiners. Appellant had held position under competition for fifteen years appellant before reassignment as Bridge Worker II due to health reasons and because of working relationship with supervisor. Board of examiners assessed appellant at "B" rating and appellant not selected for position.

Appellant disagrees with assessment by board of his responses to interview questions. Appellant argues that responses reflect practices when he previously served as Highway Signs Supervisor. Appellant argues that selection tools to assess candidates inadequate and that result of assessment conflicts with evaluation reports regarding his performance while holding supervisor's position. These reports rate appellant as "very satisfactory" and "meets the requirements". Appellant argues that one interview question not worded to guide candidates to provide expected answer.

Employer argues that evidence supports finding that appellant's responses not improper but not deserving of rating higher than 'B'. Selected applicant had also worked under same practices as appellant claims influenced his answers. Employer recognizes appellant as qualified but not most qualified. Employer argues that evaluation reports received by appellant not inconsistent with board's assessment and that purpose of each evaluation is different. Evidence in relation to challenged question that board probed response of candidates to develop more complete answer.

Decision: **appeal dismissed**

Act, section 11 authorizes employer to determine what assessment tools to assess candidates in competition:

> In establishing the assessment methodology for this competition, the employer could have incorporated into the assessment the use of information obtained through the performance evaluation process. However, there was no requirement for the employer to do so. The employer has a right under the *Act* to determine the assessment tools to be used to assess merit (at p. 7).

Appellant has failed to establish that assessment tools not capable of comparing and measuring candidates against selection standards for competition. Evidence not refuted that employer probed candidates for more developed answer to challenged question.

Results of assessment by interview not in conflict with performance evaluation carried out on appellant.

Board is not required to adapt assessment to take into consideration particular supervisory milieu which appellant indicated existed with most recent supervisor:

> In assessing candidates for a position, a Board is not assessing familiarity with the job in question, but rather the level of competence to perform its duties… As I reviewed the several questions brought to my attention where the appellant identified that his responses were influenced by his previous supervisor, I can see nothing in the questions themselves which would limit a candidate to respond in consideration of his past experience (at p. 10).

Given appellant's extensive experience, his responses should not have been unduly influenced by one supervisory style. There is no evidence that supervisory style referred to represented general established practice by Department. Moreover, selected candidate worked under same supervisor yet there is no evidence that his responses influenced by that supervisor.

Merit principle – assessment of qualifications – expertise and technical skills not subject of interview – focus of interview on leadership skills

Mazerolle v. Department of Natural Resources and Energy **(22 December 1999)**
Ombudsman: Ellen King

Concerning competition number 60-99-05 for the position of District Ranger V, Saint-Louis-de-Kent

Appearances: J. A. Stanley, Esq., for the appellant
R. Speight, Q.C., for the employer

Eight applicants in closed competition for position of Forest Ranger V (District Ranger). Required qualifications include seven years experience in forest management, graduation from recognized forest resource technical program, and three years supervisory experience. All applicants satisfied required qualifications and were interviewed. Selection standards grouped into four modules comprising fifteen criteria with focus on behavioural questions. Board of examiners assessed appellant as not qualified.

Appellant argues selection standards and assessment did not include all duties established for position. Specifically, appellant argues board failed to assess applicants with regard to technical expertise and leadership relating to position, as well as ability to liaise with public stakeholders. Appellant argues interview questions did not allow applicants to demonstrate experience associated with position but were directed at administrative tasks. Appellant argues interview questions too general. Appellant notes that some questions not given value and that many questions used in more than one module.

Employer argues that required qualifications are verifiable through paper review and therefore no need to further probe qualifications during interview. Evidence that actual duties of District Ranger increasingly administrative due to amalgamation of two districts and that very little time to perform tasks usually associated with position of Forest Ranger. Board of examiners considered that all applicants had skills associated with Forest Ranger position because all applicants experienced Forest Rangers. Interview questions developed to assess merit with regard to leadership. Evidence that, following interview, board isolated questions/responses pertaining to particular assessment modules, and assigned rating to each module.

Decision: **appeal dismissed**

Process established by board of examiners respected assessment of applicants based on merit principle. Applicants who satisfy required qualifications and are selected for interview (screened in) can be expected to have expertise or technical skills in areas relating to position and it is not necessary that interview questions focus on such areas of expertise or technical skills:

> The expertise of these candidates could have been accepted based on their work assignments and accomplishments which would have been generally known to the Board, or could have been inferred from their backgrounds (at p. 16).

Evidence that board assessed leadership skills during interview and that one assessment criterion required candidates to "demonstrate strong motivation and leadership skills". Ability to liaise with public stakeholders assessed by assessment criterion asking each applicant to demonstrate could "interface effectively with customers, public and co-workers".

Interview questions designed to elicit sufficient information about each applicant to permit board to compare applicants' skills and abilities against selection criteria. Notice of competition clearly indicates administrative nature of position.

> There are different means at the disposal of a Board of Examiners for determining the merit of the candidates and I cannot fault the test because of its orientation unless it can be shown that it did not establish merit (at p. 20).

Appellant failed to establish that board failed to respect merit principle in its assessment of applicants.

Merit principle: board of examiners – assessment factors of journal publications, educational accomplishments, work performance

Pilgrim v. Department of the Environment **(8 June 1999)**
Ombudsman: Ellen King

Concerning competition number 21-98-08 for the position of Air Quality Specialist

Appearances: W. Pilgrim, for himself
P. Blanchet, Esq., for the employer

Appellant asserts that interview process used to assess candidates' abilities not adequate measure of qualifications. Board of examiners considered that appellant failed to provide satisfactory answers in relation to two assessment modules. Appellant argues board erred by failing to give proper weight to academic record and his journal publications relating to air quality issues. Appellant asserts that his qualifications for position would have been more realistically measured through assessment of educational accomplishments, publications, and work performance.

Employer argues that appellant did not show that assessment tools -- interview questions, written assignment and marking guide -- did not establish merit of applicants. Employer argues that role of ombudsman not to reassess candidates in competition.

Decision: **appeal dismissed**

Role of ombudsman in appeal process is to decide whether appointment based on merit as required by Act. Act, section 7 confers right on employer to establish selection standards against which merit of candidates is to be assessed. Section 11 permits employer to determine assessment tools to measure candidates' abilities as against standards.

> … it is conceivable that in establishing the assessment methodology to be used in this competition the employer could have incorporated into its assessment the measurements suggested by the appellant. However, there was no requirement for the employer to do so. Because such measurements were not incorporated do not, in my opinion, suggest that the assessment process was flawed (at p. 6).

Evidence fails to establish that assessment tools used by board of examiners did not establish merit of candidates in respect of selection standards.

Merit principle – selected applicant did not satisfy required qualification re experience

Section 11
Assessment tools – interview process as tool to assess experience

Bonenfant v. Department of Transportation **(March 1999)**
Ombudsman: Ellen E. King

Concerning competition number 98-07-01 for the position of Responsable De L'Entretien Regional, District #7 – Edmundston

Appearances: R. Bonenfant, for himself
M. Levesque, for the employer

Seven applicants satisfied required qualifications in intra-departmental competition and were interviewed by board of examiners. Board assessed applicants based on selection criteria grouped into five modules: (1) Knowledge and technical skills; (2) Communication and interpersonal skills; (3) management and supervisory skills; (4) organizational and decision-making skills; (5) aptitude for the position. Board assessed one applicant as "A", four applicants as "B" (including appellant) and two applicants as "NQ".

Appellant argues merit principle not respected and that interview incapable of distinguishing between applicants based on experience and past performance. Appellant argues that during twenty three years of work he had accumulated training and experience necessary to meet requirements for position. Appellant argues notice of competition requires extensive experience in maintenance and that selected applicant did not satisfy experience required per notice of competition:

> …De plus, une tres grande experience de travail connexe – y compris de l'experience en administration et en surveillance – est exigee…

Appellant argues that road maintenance and construction are different. Considering his experience and positive performance evaluations, appellant argues board of examiners should have assessed him at higher rating.

Evidence that practice to interpret extensive experience / "*une tres grande experience*" in notice of competition as requirement of at least six years of experience and that board interpreted notice of competition to permit experience in either road maintenance or road construction. Evidence that many techniques used for road maintenance similar to those used for road

construction, and that expertise in road construction can be applied to road maintenance. Evidence that board of examiners considered appellant's answers to some questions evasive and that he did not always provide specific examples from his experience. Employer argues that based on interview responses, board assessed appellant as "qualified" but that selected applicant "most qualified". Employer argues that board interpreted required qualification of "*une tres grande experience connexe*" to mean six to ten years of experience in maintenance or construction activities involved in road building.

Decision: appeal allowed

Appellant failed to establish that merit principle not respected because applicants not required to have experience in road maintenance. Board's interpretation with regard to type of experience required not unreasonable.

However, board erred in determining that selected applicant satisfied required experience qualification. Board's interpretation of "*une tres grande experience*" as being at least six years consistent with interpretation of phrase in New Brunswick Administration Manual System. Notice of competition requires extensive experience (use of expression "*est exigee*"):

> The conclusion I draw from this is that something "est exigee" establishes a condition that must be met. In other words, that which is identified as "est exigee" must be found to be present in order to satisfy the condition. In the context of this competition, it is my view that the advertisement makes it mandatory that candidates have at least six years of related work experience to include supervisory and administrative experience (at p. 19).

Wording of notice of competition does not permit substitution of training as equivalent to required experience. Applicants who did not have six years of experience cannot be considered to meet requirements of competition. Selected candidate's experience assessed by board at five years. Therefore, selected candidate did not satisfy required qualifications.

No need to address manner in which Board assessed relative merit of candidates.

Merit principle: irregularities in process -- reference check of only one applicant, change in rating assigned one assessment module; differences between qualifications expressed in notice of competition and screening worksheet

Matchett v. Department of Transportation **(9 June 1998)**
Ombudsman: Ellen King

Concerning competition number 97-02-02 for the position of Stores Clerk in District 02 – Miramichi

Appearances: C. Hay, CUPE representative, for the appellant
M. Eastbrook, for the employer

Eight applications received in intra-departmental competition. Six applicants satisfied required qualifications and interviewed by board of examiners based on three assessment modules: (1) Technical Knowledge/Expertise; (2) Communication/ Interpersonal Skills; (3) Position Suitability. Board assessed two candidates at 'A' rating and one applicant at 'B' rating. Eligibility list prepared with names of two "A" rated applicants.

Evidence that in 1992, appellant assigned to stockroom as runner with duties including traveling to various locations for parts and supplies, unloading trucks, stocking shelves and serving clients. In 1995, appellant assigned Stores Clerk duties in acting capacity, performed those duties for two years, and was trained by Storekeeper in all duties associated with Stores Clerk position. Appellant argues that he satisfied all requirements for position and feels more qualified for that position than selected applicant.

Appellant argues that assessment process not capable of establishing candidates' merit. Appellant noted discrepancies between standards listed in advertisement and in screening worksheet. Appellant argues that changing his rating from 'NQ' to 'B' in one module suggests irregularities in assessment process. Appellant further argues that board not consistent because it contacted appellant's supervisor to discuss job performance but did not do so for other candidates.

Evidence on behalf of employer that selected applicant rated at "B" in relation to two assessment modules and that his answers less clear and precise in comparison to those of selected appellant who board assessed at "A" rating. Employer argues that assessment process consistently applied to all candidates and that merit principle respected as required by s. 6 of Act. Discrepancies between notice of competition and screening worksheet acknowledged but employer argues that evidence supports board applied criteria expressed in notice of competition.

Decision: appeal dismissed

Appellant failed to establish that process as set out in documentation structurally flawed in respect to assessing merit of candidates. Proper application of assessment methodology to the selection criteria would identify candidates with most merit.

Anomalies with regards to language and experience between notice of competition and screening worksheet did not affect selection. Employer followed standards as advertised and selected applicant satisfied those standards.

It was irregular for the board to contact supervisor of one candidate to discuss performance without taking similar actions in respect of other candidates. Also irregular to change appellant's rating from 'NQ' to 'B' for reasons unrelated to assessment criteria. Merit of candidates must relate to selection criteria chosen by board. However, irregularities did not influence result:

> It is my opinion, that an irregularity must be such that it influences the results of a competition in respect to the merit of the appointment before I can rely upon that irregularity as a basis for allowing an appeal (at p. 22).

In this case, irregularities do not affect composition of eligibility list or selection for appointment available to Deputy Minister. Consequently, irregularities have not influenced results of competition in respect to selection for appointment.

Merit principle – holistic approach to assessment inconsistent with merit principle

Merit principle – screening applications -- board not to assume that applicant satisfies required qualification

Section 32
Revocation of appointment – appeal relates to only one of two appointments from eligibility list – notice to second appointee – failure to respect merit principle -- both appointments revoked

NB Reg. 84-229
Disclosure of documentation – rating guides, application forms, interview questions and expected responses, notes of members of board of examiners

Kennedy v. Department of the Solicitor General **(14 January 1998)**
Ombudsman: Ellen E. King

Concerning competition number 96-78-18 for the position of Deputy Sheriff/ Coroner, Woodstock

Appearances: C. Hay, CUPE representative for the appellant
S. Cameron, for the employer

Appellant appealed one of two appointments made following competition on basis that selected applicant M did not satisfy required qualifications. Appellant did not challenge second appointment and expressly excluded second appointment from appeal. Second appointee H notified of appeal because of possible adverse outcome.

Preliminary issue regarding disclosure of documents. Appellant requested disclosure of

Applicant Rating Guides in respect of all of the applicants on eligibility list (including the selected applicants); application forms of all applicants on eligibility list; questionnaires and responses recorded by members of board of examiners for all applicants on eligibility list; and expected responses to questions.

Board assessed all applicants on eligibility list, including appellant, at "A" level. Appellant argues that selected applicant M did not satisfy required qualification of "a minimum of five years experience in a law enforcement and security environment or an equivalent combination of training and experience" as stated in notice of competition. Evidence from M's resumé that employment commenced on 10 April 1992 but that seniority date recorded by employer as 2 July 1993. Both these dates reflect less than five years relevant experience. Evidence that M had worked as part-time RCMP officer from 1981 through 1986. Board satisfied that experience qualification satisfied and did not consider it necessary to establish specific length of experience for applicant M.

Evidence of board member that board considered standards general rather than specific and that applicants assessed globally on responses to all nineteen interview questions. Board did not rate applicants in relation to each assessment module nor in relation to each question. Board member acknowledged that assessment not tied to number of acceptable responses to interview questions (i.e. points system not used because considered improper). Appellant argues that global assessment is too subjective and fails to respect merit principle because fails to identify applicants with most merit.

Disposition: **appeal allowed, both appointments revoked**

On preliminary issue, appellant entitled to all requested documents relating to appointment of M. However, as appointment of H not directly in issue (even though might be adversely affected by appeal decision), appellant not entitled to documents relating to applicant H and not entitled to access to documents relating to applications and assessments of other applicants named on eligibility list.

Global assessment process used by board not consistent with requirements of merit principle:

> [a] process whereby candidates are assessed in keeping with the requirements of the ***Civil Service Act*** must be capable of comparing the candidates to the selection standards in a manner that not only allows for determining which candidates meet the standards but also to identify the extent to which the candidates meet the standards. In other words, the process must meaningfully compare candidates to the standards and ultimately to each other so that the candidate or candidates who possess the most merit are distinguishable from the other candidates who also meet the selection standards but to a lesser degree.
>
> To assign an overall rating of A where the Board decided that, in total, the responses provided were acceptable, is simply too broad, subjective and generalized a rating plan to produce a reasonable account of the merit of the candidates.

> …a rating system based on a number of questions where many are subjective as in this case, must be comprised of manageable components. In terms of this competition, it could mean assigning ratings to the individual questions or to the specified selection modules in such a way that the ratings would allow for arriving at an overall rating by way of a roll-up of individual ratings. There are undoubtedly other ways for arranging a rating system into manageable components which can be used to arrive at an overall rating and which meaningfully compares the merit of the candidates to the standards and thereby to each other.

Act does not preclude use of numerical ratings in assessing candidates at intermediate stages leading to final assessment of A, B, or NQ.

Further, evidence does not demonstrate that M satisfied required qualification of five years experience. Evidence that experience of only 53 months with Department and that board accepted experience as part time RCMP officer to fulfill qualification. Board decision to permit M to pass screening stage not unreasonable but board should have confirmed that qualification satisfied before permitting M's name to be placed on eligibility list:

> [t]he purpose of the screening process is to determine if a candidate possesses a qualification(s) at a minimum acceptable level. The onus is on applicants in a competition to show clearly in their applications that they possess the minimum qualifications.
>
> …where assumptions were made as to the amount of experience that [M] had accumulated to allow him to be screened in for an interview… the Qualifications Appraisal Board should have confirmed that indeed he did meet the requirements of the competition. Such confirmation could have occurred either at the time of screening or at the time of interview, but certainly before the candidate was deemed to be eligible for appointment.

Thus, appointment of M revoked. Second appointment (of applicant H) also revoked because inadequacy of assessment process calls into question comparative merit of applicants and reasonableness of appointments.

Merit principle: notice of competition permits appointment of less qualified applicant at lower classification; relevance of professional license

Arseneault-Thibodeau v. Department of Health and Community Services **(December 1997)**
Ombudsman: E. King

Concerning competition number 35-96-0062 for the position of Clinical Psychologist I, Moncton, N.B.

Appearances: C.J. Sirois, CUPE rep., for the appellant
M. Léger, for the employer

Board of examiners interviewed four applicants in this open competition. Board assessment of applicants made by consensus based on responses to 22 pre-determined questions reflecting specific duties of position in competition. Questions organized into four assessment modules. Two applicants assessed as "A" rating and one of them selected as successful applicant after reference check. Appellant rated as "NQ" by board of examiners because of "NQ" rating assessed in relation to only one module, "Technical Knowledge". Appellant is licensed clinical psychologist presently employed in Clinical Psychologist I position. Successful applicant and one other applicant were rated as "A" applicants and are both psychometrists, a classification reflecting lower qualifications than that of Clinical Psychologist I. Evidence that notice of competition undertaken with knowledge that more persons are trained at psychometric level than to level of clinical psychologist and that competition stated that applicants not possessing all qualifications would be considered for appointment at the psychometric level. Evidence that board assigned overall "NQ" rating if applicant assessed as "NQ" in any module and assessed each module in relation to entirety of relevant questions so that non-response to any one question did not automatically result in "NQ" rating for that module.

Appellant argues that, as an experienced and licensed clinical psychologist, selection method/ assessment tool adopted by board of examiners failed to assess her qualifications properly in relation to other applicants – in particular, that an oral interview of approximately 60 minutes covering 22 questions is an inappropriate assessment tool. She argues that board should have given greater weight to her professional licence as a clinical psychologist and to her superior annual performance appraisals which did not identify any deficiency in technical knowledge. Appellant argues that she did not answer two of the seven questions in the "Technical Knowledge" module because of advice received from board member not to answer questions on licensing examination if unsure of response and, further, that non-response to question about identifying specific instruments used in relation to specific treatments does not indicate a lack of knowledge about the use of such instruments.

Held: appeal dismissed

Role of the Ombudsman on appeal is not to reassess the applicants nor "whether the tools or the process should have been different but whether they were sufficient to establish the merit of the candidates" as required by the Act, s. 6. Employer has right per Act., s. 7 to establish selection standards for a position under competition. In this matter, employer established four selection modules and rating guide expressed level of expertise expected in respect of each standard. Appellant did not challenge selection standards.

Act, s. 11 grants employer right to select assessment tools:

> The Act does not prescribe what tools must be utilized but it would have to be understood that the tools chosen must be capable of comparing and measuring the extent to which the candidates meet the standards set for the competition.

Interview questionnaire designed consistent with nature of duties of position and of associated clientele.

Board assessment acted reasonably in assessment of appellant's non-response to two interview questions. Whether or not appellant able to *use* the instruments was not in issue because question required her to *identify* relevant instruments. Appellant is responsible for decision not to respond and cannot rely on due given to her regarding examination at different time and different context:

> What I conclude from this, is that the appellant did not know the answers to the questions asked or that she was unsure of the answers, and in such a situation she decided against making a response. The appellant must accept responsibility for her actions in this regard and her decision not to offer a response does not diminish the suitableness of the questionnaire to assess the candidates.

Board did not err in treatment of appellant's professional licence qualification as representing knowledge and skills. Board must make own assessment:

> …I cannot conclude that being licensed in a field whether it be psychology, teaching, mechanics, etc. means that the person has the knowledge, skills and abilities to immediately undertake any job duties that fall within the field in which the person is Licensed. This is particularly so in fields of work which are subject to specialization. It is my view, that it was open for the Board of Examiners to assess the candidates in respect to the particular requirements of the position and to rate the candidates against the standards for that position. In carrying out its duty to establish the merit of the candidates, a Board cannot be bound by the results of an assessment process undertaken by a licensing body, but must be able to explain and justify the results of its assessment.

For similar reasons, board did not err in not attaching more weight to appellant's performance appraisals /evaluations which are "completed at different times, often by different parties and for different purposes and usually, as in this case, they relate to a different set of duties and responsibilities than those assigned to the position under competition."

Board acted reasonably in treating differently a "NQ" rating on a module and a "NQ" on a single question:

> …there is a significant difference between failing to respond to one question and failing to demonstrate a knowledge, skill or ability determined to be necessary for carrying out the duties of a position in an effective manner.

Notice of competition clearly expressed that applicants who did not satisfy qualifications could be appointed at lower classification. Appointment of successful applicant at Psychometric level is not inappropriate in circumstance that no applicant qualified as clinical psychologist assessed as qualified by board. But, "view may well be different if one of the candidates in this competition had received a qualifying rating at the Clinical Psychologist I level thereby certifying the possession of qualifications at a higher level than that of Psychometrist."

Merit Principle – board assessment on basis of seven general questions not appropriate tool to assess merit

Section 11
Assessment tools -- board assessment on basis of seven general questions not appropriate tool to assess merit

NB Regulation 84-230
Re-deployment list – applicant not selected from eligibility list to be treated as selected from eligibility list notwithstanding position on re-deployment list

Carr v. Department of Advanced Education and Labour (NBCCSJ) **(31 July 1997)**
Ombudsman: Ellen E. King

Concerning Competition Number 96-6140-004 for five positions as Field Services Officer at the NBCC Saint John

Appearances: J. E. Stanley, Esq. for the appellant
H. Cossaboom, for the employer

Appellant held position of Field Service Officer on term basis for periods totalling about six years. Board of examiners assessed appellant as not qualified in relation to two of six assessment modules.

Board assessment based on written response to one question and oral interview involving six other questions. Selection standards divided into six modules based on thirty-one selection criteria. Employer acknowledged that board assessment "took on a holistic approach" as board assigned score for each module based on responses to the seven questions. As such, the expected responses (which were "identified to be the benchmarks for assessing the responses") were not used as direct comparison in evaluation process. Appellant argues that subjective process failed to assess "merit" by substituting "impressions and feelings" of board members.

As preliminary matter, employer argued that one applicant appointed from eligibility list could have been appointed without regard to merit on application of Regulation 84-230 re redeployment list.

Disposition: **appeal allowed; appointments revoked**

On preliminary matter, appointment of applicant in issue made from eligibility list and not pursuant to Regulation 84-230 re deployment list. While Deputy Minister could have made appointment pursuant to that Regulation, did not do so and selection from eligibility list is subject to appeal under Act.

Assessment process used by board failed to satisfy merit principle. What is important is "not whether the tools or the process should have been better, but whether they were sufficient to establish merit." Though board had right to determine selection tools,

> The Board must... be able to provide a reasonable explanation for the manner in which the merit of the candidates was assessed and for the scores awarded to the candidates as a reflection of that merit.
>
> [i]t is also accepted, that the tools and procedures used must allow the Board to obtain some significant insight of the candidates' knowledge, skills and abilities in relation to the position requirements.

On evidence, seven questions provide insufficient basis to assess applicants in relation to thirty-one evaluation criteria:

> While the Board identified to the candidates prior to the interview the modules on which they were being measured, the candidates were not informed that their responses to each question were expected to reveal qualifications in each module, nor were they informed, and understandably so, of the selection criteria within the modules. Although, as already indicated, the questions are quite broad, it is unreasonable, in my opinion, to expect candidates to frame responses to each question which encompass elements of all of the selection modules, and especially without the direction that they were expected to do so.
>
> …the questions which are used to assess the merit of candidates must be such that a knowledgeable and capable candidate can reasonably determine from the question, or the directions given regarding the question, what the Board requires in response to the question.

Board used a small number of broad questions to rate applicants directly against selection criteria rather than against expected responses. On evidence, employer failed to satisfy burden of proof that board evaluated all applicants against a common frame of reference. Therefore, employer has failed to establish that board's assessment consistent with merit principle.

Merit principle: equivalency standard; union leadership as

supervisory experience; employment performance appraisals

Dubé v. Department of Transportation **(May 1997)**
Ombudsman: E. King

Concerning competition number 96-10-03 for the position of Automotive Shop Superintendent, District 10, Edmundston

Appearances: G. Dubé, for himself
J. Branscombe, for the employer

Appellant not selected in intra-departmental competition. Appellant a mechanic (Mechanic II) with 26 years employment experience and 20 years of active union experience including ten years as local president. Though not a high school graduate, appellant has journeyman's certificate and completed trade school course in motor vehicle repair and several other technical courses. Through union, appellant completed two courses on leadership. Qualifications stated in notice of competition include high school graduation followed by recognized mechanics course, extensive work related experience and extensive supervisory experience. Notice stated that applications from persons with "equivalent training and experience" would be considered. Evidence that appellant's application did not clearly identify required supervisory experience and that board scheduled interview to permit him opportunity to further assess qualifications. Board of examiners assessed appellant as "NQ" in relation to all five assessment modules. Successful applicant did not satisfy required mechanics course but has journeyman's certificates in the trade. Of six applicants who wrote skills and knowledge test and were interviewed, one assessed at "A" rating and two assessed at "B" rating.

Appellant argues that board of examiners should have credited him with supervisory experience because of his union activity and should have given weight to his annual performance appraisals, his extensive experience and should have considered relevant his reduced physical capacity due to injury. Appellant interprets negatively a question mark placed (by board member) beside his name on screening worksheet under column in relation to satisfaction of qualifications.

Held: appeal dismissed

Notice of competition clearly expressed acceptance of equivalent training and experience. That successful applicant did not satisfy course requirement is, on evidence, offset by equivalent journeyman's certificates training and related experience.

Appellant's own application does not disclose supervisory experience but board granted opportunity through interview to establish that qualification. Given this fact, placing of question mark on screening sheet should not, on the evidence, be interpreted as exactly for what it is – a doubt as to whether appellant has required supervisory experience. Evidence does not support

any other interpretation.

Employer did not err by not favouring appellant because of his physical incapacity:

> …when proceeding to fill a position by way of competition it is not open for the employer in assessing the merit of the candidates to take into account factors that do not have regard to the nature of the duties to be performed. In rating and ranking the candidates in a competition, a qualifications appraisal board can no more favour a candidate simply because of a physical condition than it can reject a candidate based on that same condition.

Applicants were assessed based on selection standards established for the competition. Training and experience were considered only to establish that applicants had satisfied minimum qualification standards.

Employer has right under Act, s. 7 to establish standards by which to assess merit. No reason to intervene on appeal "unless standards are found to be unreasonable in consideration of the duties to be performed, or the method of assessment against those standards is faulty…." No evidence to warrant intervention. While appellant more experienced as employee that successful applicant, such experience was not a factor in assessment by board. Based on method of assessment, value of experience is to enhance performance before the board in responding to interview questions.

Board did not err in treatment of appellant's favourable performance appraisals. Position under competition and position for which appellant appraised are "vastly different" and "cannot be concluded that… fundamental contradiction… [exists] where the positions and the circumstances are so different.

Merit principle – board of examiners – relevance of experience as assessment factor
Merit principle – equivalency standard
Merit principle – relevance of employment appraisal reports
Merit principle – board of examiners interviewing unqualified applicants – whether undermines appointment of selected applicant

Section 7
Selection standards – relevance of experience

Bérubé v. Department of Transportation **(May 1997)**
Before: Ellen E. King, Ombudsman

Concerning Competition Number 96-10-03 for the position of Automotive Shop Superintendent in District #10, Edmundston

Appearances: L. Bérubé, for himself
J. Branscombe, for the employer

Following competition, board of examiners assessed qualifications of one applicant at "A' rating and that applicant appointed from eligibility list. Board assessed qualifications of two other applicants, including appellant, at "B" rating.

Appellant argued that board of examiners did not give proper weight to appellant's experience and that board "should not have relied exclusively on the oral interview to determine the score for the competition." Evidence that appellant worked as automotive shop superintendent on interim basis for 4,026 hours in five years preceding the competition, that his performance evaluations in that position were satisfactory, and that appellant's seniority exceeded that of selected candidate by roughly 1,000 days.

Appellant argued that selected applicant did not satisfy qualification of completion of related mechanical course as required by notice of competition. Evidence that selected candidate held Journeyman Certificate in Heavy Equipment Repair and that notice of competition permitted "an equivalent combination of training and experience". Appellant also argued that "several candidates [were] called to the interview who did not have the required supervisory experience."

Disposition: appeal dismissed

Experience is not the determining factor in assessing merit. Selection standards established for each competition per Act, s. 7 and no requirement that experience be such a standard:

> [a]n assessment of the merit of candidates may well take into account their respective experience but under the ***Civil Service Act*** there is no requirement to do so and an assessment process cannot be faulted simply because experience was not a rated factor for the competition.

Board must make independent assessment of qualifications and is not bound by prior employment performance appraisals. On evidence, prior appraisals not inconsistent with board assessment:

> In reviewing the evidence, I can find no fundamental contradiction between the Performance Evaluation Reports and the score awarded to the appellant in this competition. The Performance Evaluation Reports showed the appellant to have satisfied the Department's performance expectations and his score in the competition identified him to be a qualified candidate. Even if there was some fundamental contradiction between the Performance Evaluation Reports and the assessment carried out by the Qualifications Appraisal Board, that would not necessarily prove an inaccurate assessment had been completed. Nevertheless, should a Qualifications Appraisal Board have contradictory information in its possession, such as Performance Evaluation Reports

> and the initial results of the assessment arrived at by a Board, the only obligation on a Board is to make a reasonable effort to reconcile that contradiction before finalizing the assessment.

Employer acknowledged that selected applicant did not complete mechanical course as argued by appellant but this deficiency not fatal because of equivalency standard permitted by notice of competition. Employer also acknowledged that unqualified applicants (per resumés submitted with applications) were interviewed by board of examiners in order to determine if in fact were qualified. If determined not to be qualified, board did not assess as qualified.:

> the Board having interviewed candidates in this competition who might otherwise have been screened [out] if more information had been available did not infringe on the merit principle or call into question the selection for appointment.

Merit principle: board of examiners applying personal knowledge to screen applications

Thériault v. Department of Health and Community Services **(7 April 1997)**
Ombudsman: Ellen King

Concerning competition number 35-96-0036, for three positions as Regional Team Manager in the Moncton Department of Health and Community Services.

Appearances: S. Thériault, for herself
B. Owen, for the employer

Restructuring resulted in twenty-three old managerial positions being replaced by eighteen new "Team Manager" positions in intra-departmental competition. Employer conducted résumé writing and interview workshops to help prospective candidates prepare for competition and made available "Position Description Questionnaire" to all applicants.

Appellant screened out of competition because review of her résumé did not disclose to board of examiners required two years of managerial experience. Appellant had fourteen months as "Acting Director Ambulatory Care," a positions recognized by board as managerial, and a further nine years as "Nurse Coordinator" in Moncton Hospital Reproductive Health Clinic. Job title of latter position did not correspond to a management position but, in fact, "Nurse Coordinator" position at Moncton RHC is assigned duties which are managerial in nature. Board did not inquire into exact nature of this position before eliminating appellant from competition.

After screening applications but before starting interviews, board learned that appellant's "Nurse Coordinator" position in fact managerial. Board decided not to reconsider appellant's application "as to be fair to the other applicants who were also screened from the competition."

Evidence that board screened into competition three applicants who may not in fact have satisfied required qualifications. Board deemed applicant A to have required two years of managerial experience despite unclear résumé and failure by board to confirm actual managerial experience. Board screened in applicants B and C, both of whom listed experience as Public Health Nursing Supervisors in excess of two years, because board members familiar with responsibilities of this position and did not inquire into actual duties performed.

Appellant not aware that non-public health managerial experience acceptable for purposes of competition so did not list such prior experience; board screened in applicant A based on non-public health managerial experience.

Decision: appeal allowed, appointments revoked

It is not Ombudsman's role on appeal to assess applications of appellant and selected candidates against screening criteria. Rather, role is limited to considering reasonableness of board's conclusions on assessing those applications against screening criteria and to determine whether merit principle respected in appointment.

Board's finding that appellant's résumé did not evince her management experience as "Nurse Coordinator" was reasonable. Further, board acted reasonably when it refuse to accept supplementary information from appellant after screening process complete, as this would be unfair to other eliminated applicants.

Notice of competition ambiguous whether non-public health managerial experience acceptable. Employer should have made this point clear. While efforts were made to make applicants aware that such experience acceptable, evidence clear that appellant not aware and thus put at disadvantage.

Board acted unreasonably when it screened in applicant A without further inquiry to determine if she had required two years experience. This assumption of sufficiency contrasts with board's effort to determine period of time appellant had spent in her post as Acting Director Ambulatory Care (fourteen months), and calls into question the fairness of the process.

Appellant treated unfairly when board members took into consideration personal knowledge about positions previously held by applicants B and C. Board screened appellant's application based only on content of her resumé but gave advantage to applicants B and C by essentially reading in required experience:

> While I can accept that to use personal knowledge to screen [applicants B and C] into the competition probably resulted in a more accurate reflection of their real qualifications for the position of Team Manager as their qualifications and the requirements were described at the hearing, this could only be done if the Board undertook steps to put candidates whose experience was not known to the Board members in an equivalent situation.
>
> To compensate for the benefit conferred to some of the applicants through knowledge of the positions on the part of the Board members, the Board could have sought additional information through follow-up with candidates or by interviewing the candidates' current or former supervisors, or the Board could have conducted screening interviews to obtain a better account of

each candidate's management experience...

As a result, I cannot be satisfied that the selections for appointment to the Regional Team Manager positions in Moncton were based on merit as required by section 6 of the ***Civil Service Act***.

Merit principle – board of examiners -- assessment factors of experience and performance evaluations

Section 7
Selection standards – board of examiners -- assessment factors of experience and performance evaluations

Cyr v. New Brunswick Department of Transportation **(March 1997)**
Ombudsman: Ellen E. King

Concerning Competition Number 96-DOT-10 for the position of Highway Supervisor I-II in Edmundston, St. Leonard.

Appearances: J.-M. Cyr, for himself
J. Branscombe, for the respondent

Following pre-selection and evaluation process, board of examiners assessed two applicants as qualified for position of Highway Supervisor. Board assessed selected applicant as "A" and appellant as "B". Appellant argues that "his training and acquired expertise were not sufficiently taken into consideration" by board of examiners and that board erred by not awarding him an "A" rating, as he had held position of acting Bridge Supervisor on a seasonal basis for several years and that position required equal, if not superior, technical competence to Highway Supervisor position. Evidence that appellant's performance evaluations reflect that employer satisfied with his performance as acting Bridge Supervisor.

Evidence on behalf of employer that "B" rating reflected appellant's technical expertise and that appellant not considered by board as best qualified applicant. While Bridge Supervisor position may require greater technical competence than position of Highway Supervisor, latter position involves more interaction with public and less "static" and "clearly defined" than Bridge Supervisor position. Evidence that board considered appellant "not disposed to manage and assume responsibility for a situation" and that board considered appellant's answers at interview at times unclear, incomplete or inappropriate.

Disposition: **appeal dismissed**

Board may determine selection criteria and assessment tools in relation to any competition under Act, section 7 and section 11. In doing this, there is no requirement that training and experience be selection criteria. In any event, evidence in present matter is that board assessed technical training and experience of all applicants during both pre-selection and evaluation process. Thus, appellant failed to establish that board did not take into account his experience and technical expertise.

Board not bound by performance evaluations of applicant but must make independent assessment of qualifications. In present matter, no significant contradiction between information presented in performance evaluation reports and ratings assigned to appellant by board. However, "even if there [had been] some considerable incompatibility between the performance evaluations and the assessment on the competition that would not necessarily prove an inaccurate assessment had been carried out," since performance evaluations are completed "at different times, by different parties, for different purposes and usually... they relate to a different set of duties and responsibilities than those contained in the competition."

In making assessments, board placed greater weight on supervisory and communication skills than on technical competence. Board did not err in making such assessment of qualifications consistent with duties of the position.

Board's assessment of applicants reasonable. Appellant failed to establish that board's assessment of applicants inconsistent with merit principle.

Merit principle – inconsistent treatment of applicants by board of examiners at interview – questions/responses combined for some but not all applicants

Section 11
Assessment tools – whether interview appropriate tool to assess skills

Section 13
Eligibility list – list flawed when based on inconsistent treatment of applicants by board of examiners at interview

Grant v. Department of Natural Resources and Energy **(2 December 1996)**
Ombudsman: Ellen E. King

Concerning competition number 60-96-07 for the position of Forest Ranger IV (Assistant District Ranger) in Fredericton

Appearances: J. E. Stanley, Esq., for the appellant

I. Trueman, for the employer

Seven applicants satisfied required qualifications in closed competition and were interviewed by board of examiners. Four applicants, including appellant, received overall "A" rating and names placed on eligibility list. Deputy Minster selected successful applicant from eligibility list in accordance with s. 13(1) of Act.

Notwithstanding overall "A" rating, appellant disagrees with board of examiners assessment of "B" rating in relation to organizational skills. Evidence that appellant's supervisory and organizational skills are very good and that he has seniority over selected applicant. Evidence that appellant's supervisory experience includes experience as Hunter Education and Firearm Safety instructor, training military police officers, and work for Assistant District Ranger for short durations.

Witness with 16 years experience in staffing process testified on behalf of appellant that board of examiners lacked experience to assess applicants properly because one member sitting for first time as board member and experience of another member mainly in human resource rather than technical duties of position in competition. Witness of opinion that interview questions not suitable for purpose of assessing organizational ability and that both appellant and selected applicant not assessed on same basis in relation to one interview question. Selected applicant did not answer question six but board used answer to question seventeen and assessed selected applicant with "A" rating on both questions. No evidence that same treatment for appellant. Appellant answered question six specifically and board rated response a "B" rather than "A" rating assigned to response to question seventeen. Witness of opinion that, had board given similar benefit to appellant as given to selected applicant, appellant would have received "A" rating on question six, which would have changed his rating for Organizational Ability module from "B" to "A". Alternatively, if board had rated selected applicant's non-response to question six as "NQ" then rating on Organizational Ability module would have been less than "A". Witness also of opinion that board erred in assessing appellant's responses to four interview questions at "B" rather than "A" level. Second witness called by appellant testifies that did not submit own application in competition because felt outcome of competition pre-determined and that competition weighted in favour of selected applicant because of training opportunities.

Employer argues that seniority not a factor in assessment because no such requirement in collective agreement. Employer agues that board assessed both appellant and selected applicant as "A" but that Deputy Minister has discretion to choose anyone from eligibility list. Employer argues board had necessary experience and competence to perform duties, that composition of board accords with usual practice, and that one board member qualified in relation to technical skills of position. Employer argues presence of fourth board member (who did not know applicants) increased objectivity.

Evidence that board permitted applicants to address answer to question 6 in response to question 17. Evidence that board considered appellant's answers to some questions not most appropriate. Employer argues that rating for purpose of determining eligibility list and that rating of specific questions/responses does not appear on that list and is therefore not relevant.

Decision: **appeal allowed**

Board did not err by not considering seniority as factor in assessment. Employer has management right per Act, s. 7 to establish selection standards:

> The Board has the right to decide the selection criteria that candidates are to meet and how they are to be assessed against those criteria. There is no evidence before me to indicate that seniority had to be considered in establishing the merit of the candidates in this competition (at p. 24).

Appellant has not established that board not competent to undertake duties of assessing qualifications of applicants. Three board members had technical background related to position. Moreover, only one of five assessment modules related to technical knowledge and skills. Evidence that board members had sufficient experience in staffing process to assess merits of applicants.

However, board failed to treat applicants in same manner with regard to question number six, which had impact on rating of Organizational Ability module.

Board must be able to provide reasonable explanation for assessment of applicants. Evidence that board inconsistent in assessing responses to question nine (pertaining to Supervisory Skills module) but that inconsistency does not necessarily explain different rating on module for appellant. Totality of evidence raises doubt as to whether overall ratings awarded to appellant and selected applicant reflect comparative merit:

> In considering the significance of any flaws or inconsistencies that may be detected in the processing of a competition leading to an appointment, one must decide whether those matters that had been detected can influence the results of the competition (at p. 31).

> I do not feel that merit is served in a competition by applying a formula for establishing the eligibility list which effectively erases differences in the degree to which the candidates satisfied the selection criteria as determined by the Qualifications Appraisal Board (at p. 31).

In result, Deputy Minister made selection from flawed eligibility list because candidates may not have been of equal merit.

Merit principle -- Board of examiners – board member responsible for grading examinations had expressed negative opinion of appellant – examination questions permit wider scope for subjective assessment

Merit principle -- board not bound by assessments made by another

board in earlier competition

Section 8
Selection standards – residency qualification irrelevant if not expressed

St-Amand v. Department of Transportation **(19 June 1996)**
Ombudsman: Ellen E. King

Concerning competition number 95-10-01 for the position of Highway Supervisor I-II, District # 10 – Edmundston, St. Leonard Division

Appearances: V. St-Amand, for himself
J. Branscombe, for the employer

Appellant and four others applied in intra-departmental competition for position as Highway Supervisor I-II. Appellant not granted interview because of failing grade on examination. Other four applicants interviewed by board of examiners. Board assessed one applicant assessed at "A" level and that applicant selected from eligibility list as successful applicant.

Evidence that appellant employed by Department since 1985 and served as Highway Supervisor I-II until local depot closed. Appellant then accepted alternate employment assignment. Evidence of good work performance by appellant as Highway Supervisor I-II confirmed by performance evaluations. Evidence that appellant inquired about acting as temporary Highway Supervisor when supervisor absent but never granted that opportunity. Appellant argues that selected applicant benefited form such temporary assignments which enhanced qualifications for competition.

Appellant argues notice of competition inconsistent with usual practice because of absence of geographic restriction and that, if so restricted, he would have been only qualified applicant. Appellant argues employer did not include residence restriction because district did not consider him suitable applicant. Appellant argues should not have been required to write examination in this competition because of qualifying score on same examination in earlier competition for similar position in another district. Finally, appellant argues should have been appointed to position without competition because of earlier lay-off. Evidence that, prior to competition, board member responsible for grading written examinations had expressed negative opinion about appellant's capacity to act in supervisory role.

Evidence on behalf of employer that three years had elapsed since appellant held Highway Supervisor position and therefore not open to employer to appoint appellant to position without competition. Evidence that employer decided not to include residence restriction to promote greater number of applications but that selected applicant satisfied usual residence requirement in any event. Employer argues that written examination used as screening tool and that though first implement in Edmundston District in this competition, it is current practice in New Brunswick for Highway Supervisor positions. Employer argues that notice of competition

expressly permitted consideration of applicants based on equivalent combination of training and work experience.

Employer argues management right to select person to appoint on acting or interim basis to replace absent Highway Supervisor. Evidence that selected applicant gained experience on acting basis before appellant reassigned from supervisor's position and that continued to be appointed on acting basis because of quality of his work performance. Evidence that employer considered appellant for interim assignments but not offered because appellant questioned policies and procedures of Department and therefore there were doubts as to his ability to perform duties. Employer argues such doubts did not impact on competition. Employer argues that each applicant must complete all steps in competition process including written examination and that because composition of board of examiners may vary from competition to competition, assessment results may vary from one board to another.

Decision: appeal allowed

Defects in competition process sufficient to undermine respect for merit principle. Board member responsible for assessing results of written examination had previously expressed reservations about appellant's competence to perform interim work as Highway Supervisor. Unfortunately, approximately 50% of questions on written examination permit discretion in grading answers:

> In the absence of evidence to show that she divested herself of that opinion before becoming a member of the Screening Board, I cannot conclude that she was able to approach the assessment of the candidates in this competition with an open mind and void of any predisposition in respect to Mr. St-Amand (at p. 24).

In context and considering other circumstances of competition, evidence sufficient to conclude that process not carried out in manner calculated to identify most meritorious candidate.

Lay-off provisions of Act not applicable. No basis in Act to reverse lay-off after three years; moreover appellant not laid-off but reassigned. Also, no obligation to appoint appellant because his name on eligibility list for other competition.

Act, s. 8 confers right on employer to determine qualifications, including any residency requirement, but must do so before competition advertised. Notice of competition in present appeal did not express residency requirement, so an irrelevant consideration.

Non-selection of appellant for acting appointments does not undermine merit principle in competition in issue. Employer has discretion to select individuals for interim positions.

Board did not err by not considering assessment of written examination by appellant in previous competition. Board not bound by assessment in regards different competition:

> There is no requirement under the Civil Service Act for the results of one competition to be carried forward to another competition, and I cannot fault the board in this instance for having required Mr. St-Amand to submit to the same assessment process as the other candidates in this competition (at p. 20).

Merit principle -– personal knowledge of applicants by board members not unusual in practice
Merit principle – board of examiners not bound by assessment of applicant made by another board in previous competition

Section 11
Assessment tools – appropriateness of interview

Duguay v. Department of Health and Community Services **(14 November 1995)**
Ombudsman: Ellen E. King

Concerning competition number 35-94-0055 for the position of Social Work Supervisor, Bathurst.

Appearances: B. Duguay, for himself
S. Hallett, for the employer

Appellant served in position on acting basis pending competition for permanent appointment. Position created as result of restructuring. Appellant and selected applicant were only applicants. Both applicants exceeded required qualifications and were interviewed by board of examiners with selection standards divided into 4 modules: (1) Technical/Intellectual Skills; (2) Supervision Skills; (3) Communication/Decision Making Skills; (4) Organizational Skills. Board assessed appellant as "A" on two modules and "NQ" on two modules; board assessed selected applicant as "A" on all four modules.

Due to length of period during which held position on acting basis, appellant argues should have been confirmed in position without competition pursuant to Exclusions Regulation 84-230, s. 3.

Appellant argues that board decision tainted by reasonable apprehension of bias. Appellant alleges his supervisor opposed appellant accepting acting appointment but that later stated would support appellant's candidacy for position. However, evidence that supervisor's written performance appraisal following interview did not reflect verbal expression of support. Appellant argues that he is known to two of three board members and that they were not impartial due to previously formed opinion of appellant. Appellant questions "NQ" assessment because differently constituted board had assessed him as qualified on same standards for different position in 1991.

Appellant argues that board should have consulted his file to confirm his competence in areas found deficient based on interview. Appellant further argues that nature of work makes adhering to a work plan impossible and that this reality caused alleged weakness in prioritizing work.

Evidence on behalf of employer that appellant received "NQ" rating on modules 2 and 4 (above) because responses did not demonstrate motivational skills and reflected problems in organizing and prioritizing work. Evidence that deficiencies noted by board also identified by supervisor in subsequent performance appraisal. Employer argues that not unusual for board members and applicants to know each other because usually appoint supervisor of position and Regional Director to serve as board members. Employer argues that mere knowledge of applicants does not render process partial and that, in any event, impartiality assured by participation of third board member, who had no personal knowledge of applicants.

Employer argues that employer (Regional Director) had right to decide how to fill new position and to do so by way of competition consistent with Act.

Decision: appeal dismissed

Employer not compelled to use Regulation 84-230 to fill vacant position. Employer exercised discretion to choose method of appointment as prescribed by Act.

In practice, difficult to avoid situations where board members do not have personal knowledge of other Department employees in competition. One feature of competition is to increase objectivity by reducing impact of personal opinions. Appellant failed to establish reasonable apprehension of bias:

> In this instance, I have considered the evidence and the arguments advanced by the appellant and I am not convinced that, at the time of the competition, there is any evidence that the Board members had any inclination to favor one candidate over another (at p. 17).

Employer has right under Act, s. 11 to decide assessment tools in regard to selection criteria. Evidence demonstrates that board determined ratings based on interview as selection tool. No evidence that interview incapable of comparing merit of candidates to selection criteria and to each other.

That previous board had assessed appellant as qualified is not relevant consideration. Board has duty to make independent assessment of applicants regardless of assessment made by different board in different process.

Delay in competition did not interfere with merit principle and does not compel employer to exercise discretion to invoke Exclusion Regulation 84-320.

Merit principle – required qualifications and equivalency standard

Section 32(9)
Remedy – Not every error justifies revocation: irregularity in process – some but not all applicants invited to supplement application

NB Regulation 84-229
Qualifications and equivalency standard

Martin and Warfield v. Department of Advanced Education and Labour **(25 July 1995)**
Ombudsman: Ellen E. King

Concerning Competition Number 93-6140-011 for two positions of Community College Instructor - Electronics, NBCC Saint John

Appearances: R. Dixon, Q.C., for the appellants
C. Ross and R. Mabey, for the employer

Two appeals arising from same competition were heard together. Notice of competition in issue reads, in part:

> The successful candidate will be required to provide classroom and laboratory instruction in Electronics and also perform related duties in the areas of Mathematics, Physics, Computer and Communications (oral and written).
>
> Applicants must have a university degree in Science or Engineering and 3 years related industrial experience. Preference may be given to those with teacher training or a degree in Education and teaching experience in a post-secondary technical environment. Strong communication and inter-personal skills are also required. An equivalent combination of training and experience may be considered. Written and spoken competence in English is required.

Initially, board of examiners screened out both appellants because their applications did not demonstrate satisfaction of required qualifications. Later, board re-screened applications and screened in an additional eight applicants, including both appellants. Evidence that board requested appellant Warfield to provide additional information.

Appellants argues that selected applicant D did not satisfy the required qualification of 3 years of related industrial experience. Employer acknowledges this deficiency but noted that applicant D satisfied equivalency standard of "equivalent combination of training and experience as expressed in the notice of competition. Appellant Warfield argues that, on proper interpretation of notice of competition, "3 years related industrial experience" is a required qualification and could not be satisfied by equivalency standard. Evidence that selection tools included an interview and time limited written (30 minutes) exercise consisting of two questions. Evidence that applicant D, thinking someone would interrupt to announce end of 30 minutes period, continued to write for approximately 45 minutes but that other applicants submitted test responses within time limit.

Appellants argue that selected applicant A did not have training as a teacher nor any teaching experience and that A may have been unfairly advantaged because his wife also interviewed for position and board of examiners utilized standardized interview questions. However, evidence that applicant A's interview preceded that of his wife.

Disposition: **appeal allowed; appointment of selected applicant D revoked**
appeal denied re appointment of selected applicant A

Board erred in using equivalency standard to screen in applicants. Notice of competition expresses required qualifications in use of mandatory word "*must*" in relation to phrase "*university degree in Science or Engineering and 3 years related industrial experience*":

> The advertisement contained the statement 'applicants must have...' which the employer did not feel was binding because of the statement also contained in the advertisement which indicates that an equivalency may be considered... the use of the 'must' sets up a mandatory requirement that in the situation hereunder review, candidates possess certain qualifications... It is not what one might mean to say, but what one does say that is the guiding rule. By using the word 'must' in the initial statement of qualifications, the employer set up a mandatory requirement that candidates possess certain qualifications. In this instance, the qualifications were a university degree in Science or Engineering and 3 years related industrial experience.

Accordingly, equivalency standard not applicable and appointment of selected applicant D revoked. In context and on proper interpretation of notice of competition, equivalency standard expresses only possibility of preference.

Extra time taken by applicant D to complete written exercise (for which he is not responsible) raises question as to merit but issue is moot because of ruling on equivalency standard.

That selected applicant A has neither teacher training or teaching experience is irrelevant because not a required qualification. Notice of competition states that "preference may be given" to an applicant with these qualifications but does not require such qualifications. On evidence, applicant A did not gain interview advantage because of wife's participation as an applicant. His interview preceded hers.

That board requested additional information from appellant Warfield and may not have extended same benefit to all applicants is not shown to be relevant. Not every defect in process justifies revocation of appointment. Alleged defect must be relevant to appointment under Act:

> However, even if compensatory steps were not taken for other candidates resulting in this being an irregularity in the process, I could not allow an appeal on this basis because, in my opinion, the irregularity did not affect the outcome of the competition. An appeal is not directed against a selection process but against one or more appointments.

Merit principle: assessment factors of training and experience

Duke v. Department of Natural Resources and Energy **(2 September 1994)**
Ombudsman: Ellen King

Concerning competition number 60-94-06 for the position of Forest Ranger V

Appearances: H. Duke, for himself
I. Trueman for the Employer

Intra-departmental competition held to fill position to be created by retirement of incumbent. All three applicants met screening requirements as advertised and were further assessed by way of interviews. Board of examiners assessed successful applicant at "A" rating and other two applicants, including appellant, at "B" rating. Interview consisted of 17 questions divided into five modules: (1) Technical Knowledge; (2) Communication Skills; (3) Organizational Abilities; (4) Intellectual and Decision Making Abilities; (5) Personal Suitability, Interpersonal Skills and Motivation.

Appellant argues board did consider his additional training courses and that assessment influence by incumbent and perception of personality characteristics, not merit. Appellant argues that incumbent enhanced promotional opportunity of selected applicant by selected applicant assist incumbent in duties as Regional Inspector. Appellant argues such actions effectively pre-determined assessment by board. Appellant also argues that regional management and board had preconceived impression of his personality, which worked against him in competition. Appellant identifies one question as evidence that personality conflicts taken into account in selection process. Appellant also claims one board member prompted him on three questions to which he claims he had given the correct answer. Appellant asserts board member did this to push appellant to make mistakes.

Evidence that most Forest Rangers with long service would have similar training records as appellant. Evidence that board member prompted other applicants at interview as well as appellant. Such prompting for purpose of helping candidates demonstrate their level of knowledge. Specific question challenged by appellant re personality conflicts actually directed at problem solving skills.

Selected applicant testified that his former responsibilities included assisting Regional Inspector and denied that any promise had been made to him in respect to Regional Inspector's position.

Decision: **appeal dismissed**

Results of competition cannot be faulted simply because board did not use training and experience as rating factors:

> Under section 7 of the *Civil Service Act*, the employer has the right to establish the standards

> against which the merit of candidates is to be assessed. The standards, of course, must be reasonable in regard to the nature of the duties to be performed. In this instance, the appellant did not provide any evidence which would suggest to me that the selection standards set out in the Applicant Rating Guide (Exhibit 3) are unreasonable (at p. 10).

Appellant failed to establish that board assessment not consistent with merit principle. On evidence, selected applicant assisted Regional Inspector because of assigned duties per job description and appellant failed to demonstrate that board improperly influenced by performance of such duties. Regional Inspector not member of board of examiners

Prompting at interview for purpose of assisting, not harming, applicants. Evidence that for each instance of prompting, appellant assessed at "A" rating so no detriment to appellant.

Appellant failed to establish that specific question posed for purpose of having candidates reveal personal conflicts indicating that personality characteristics considered in competition. No evidence that Board labeled appellant as unsuitable for position (board assessed appellant at "B" rating).

No evidence that assessment of appellant based on other than selection standards.

Merit principle: qualifications - assessment of language skills
Merit principle: competence of board of examiners to make proper assessment of technical skills

Snow v. Department of Transportation **(11 October 1994)**
Ombudsman: Ellen King

Concerning competition number 93-01-07 for the position of Transportation Maintenance Superintendent I-II (Bridges)

Appearances: E. Grenier,. for the appellant
R. Speight, Esq., for the employer

Notice of competition requiring candidates to have written competence in French language. No qualified candidates identified so competition closed without appointment.

Position re-advertised but without required qualification of competence in written French. Required language qualifications expressed as "written and spoken competence in English and spoken competence in French". Of 34 applicants, only six (including appellant) satisfied qualification standards and were assessed by written and oral examinations. As result, one applicant assessed as qualified in relation to five modules: (1) Technical Knowledge/Operational Skills; (2) Position Suitability; (3) Communications/Interpersonal Skills; (4) Organizational/Decision Making Skills; (5) Supervisory/Management Skills. Board of examiners assessed appellant as "NQ" in relation to "Position Suitability" and

"Communications/Interpersonal Skills".

Appellant argues that he spoke French language with sufficient proficiency to satisfy competition standard. Evidence that appellant spoke French language at work on many occasion and did so without complaint about his language abilities. Appellant asserts that had been told during interview that French language would not be problem for him as conditions were relaxed and that, if need be, other employee available to respond. Appellant argues his skills on all other areas as high or higher than selected candidate and that language was main criterion for selection. Appellant also points out that board of examiners did not include technical representative from head office.

Evidence that usual practice is to have head office representative from Technical Services Branch serve as member of board of examiners but that no such representative available at relevant time (because of transfer). Employer argues that board competent to assess candidates because two members had ample technical qualifications and that board used same written examination and oral questions as when have participation of representative from Technical Services Branch. Evidence that appellant received Basic + proficiency level in spoken French whereas qualification requirement set at advanced level 3. Appellant tested two more times, once with a different evaluator at different location, with same result. As result, appellant's rating on Communication/Interpersonal Skills and Position Suitability Modules fell below qualifying rating. Appellant's language proficiency assessed not by Board but by Department of Advanced Education and Labour.

Decision: **appeal allowed**

It was not shown that the Board did not have sufficient background to assess the technical knowledge of the candidates. Absence of technical representative did not have impact on outcome of competition. Board acted in compliance with Act:

> The Act does not specify that a Board is to be composed in any particular way, although it is understood that its composition must include members who are capable of assessing the qualifications of the candidates for the position in question (at p. 18).

Board had to reconcile differences in written examination scores, experience and education. No evidence that assessment with regards to written examination was unreasonable or that improper weight given to written examination.

Employer has right to set qualifications required for position, including any language qualification. Board of examiners obliged to establish proficiency level for each language qualification. On evidence, proficiency level of appellant below standard set for position. As such, board justified in concluding that appellant did not meet all of required qualifications for position.

However, language proficiency of selected candidate assessed differently than that of appellant. Second language proficiency of selected candidate not evaluated by means of language proficiency examination:

> … failure of the… Board to use assessment tools common and applicable to all of the candidates has resulted in an intrinsically unreliable, if not inequitable, evaluation of the relative merit of their qualifications (at p. 23).

Board did not assess selected candidate's oral competence in French language:

> [I]t cannot be assumed that a candidate has oral competence in a language simply because the application was submitted in that language.

As a result, selection violated requirement that selected applicant be "qualified" per Act, s. 4 and that selection be based on "merit" per Act, s. 6:

> … I cannot verify that the selected candidate is qualified as his language proficiency has not been evaluated in keeping with the requirements set for the competition. Additionally, without an equitable method of assessment that renders comparable results, it is not possible to find that merit has been respected (at p. 23).

Appeal must succeed because no evidence to demonstrate that selected candidate qualified with respect to all requirements set for competition and is most qualified as required by Act.

Section 7 necessary or desirable selection standards

Section 7 The Deputy Minister of the Office of Human Resources may, in determining pursuant to subsection 6(1) the basis of assessment of merit in relation to any position or class of positions, establish selection standards that are necessary or desirable having regard to the nature of the duties to be performed, but any such selection standards shall not be inconsistent with any classification standards established pursuant to the Financial Administration Act for that position or any position in that class.

Classification standards and qualifications per Notice of Competition

Notice of competition required applicants to demonstrate that qualifications satisfied – board of examiners not to supplement application by personal knowledge of applicant

Wilson v. New Brunswick Community College - St. Andrews **(18 March 2003)**

Concerning competition number 02-6245-003 for the position of Program Manager, Hospitality and Tourism Department, New Brunswick Community College - St. Andrews

Appearances: L. Wilson, for himself
M. Ward, for the Employer

Appellant and twenty-two other applicants screened out by board of examiners for failure to satisfy qualifications expressed in the notice of competition. Evidence that board members individually screened applications based solely on documentation provided by each applicant and that same standards applied to all applications. Two board members testified that appellant failed to demonstrate "tourism industry experience" or "tourism education management experience" in his application ((cover letter and resumé). Appellant argues that does have such experience and that board members should have requested additional information from him; in the alternative, he argues that, as a co-worker, they should have known about his experience and at least should have had such knowledge based on information provided in previous job competitions.

Appellant argues that notice of competition is inconsistent with classification specifications contrary to Act, section. 7. Position identified in notice of competition as "EPO4" (Education Program Officer 4). Classification specifications ("New 10-96") list Department Head, Project Manager and Curriculum Development Officer 2 under the heading "Typical Job Titles" and for each of these job titles, there is a description of duties. Classification specifications state under heading "Desirable Training And Experience":

> Graduation from University with major course work in a specialty related to the area of assignment and thorough experience in teaching.
>
> OR
>
> Graduation from University to the level of a Master's degree in a specialty related to the area of assignment and considerable experience in teaching.

Appellant argues that notice of competition failed to require either "*thorough* experience in teaching" or "*considerable* experience in teaching". Competition notice set qualifications as a university degree and a minimum of six years related experience defined in terms of a combination of tourism industry experience, instruction/training and tourism education management experience. Evidence that "thorough" and "considerable" interpreted in practice to require 8-10 years and 6-8 years, respectively. Employer argues that competition notice is not inconsistent with classification specifications because the latter merely describe the levels of "thorough" and "considerable" teaching experience as "desirable".

Notice of competition states, in part:

> The New Brunswick Community College - St. Andrews is looking for a Program Manager to provide educational and professional leadership in the Hospitality and Tourism Department...
>
> The successful candidate should possess a University Degree in a related field supplemented by a minimum of six (6) years related experience or a Master's Degree in a related field supplemented by a minimum of three (3) years related experience. The years of related experience required should include a combination of: tourism industry experience, instruction/training and tourism education management experience. An equivalent combination of education and experience may be considered... Preference may be given to those with post secondary professional course work in areas such as Business/Administration, Management or Tourism…
>
> *Candidates are required to demonstrate on their application, how, when, and where they have acquired the qualifications and skills required for this position Resumes should be in chronological order specifying education and employment in months and years including part-time and full-time employment* .[emphasis added]

Decision: appeal dismissed

Notice of competition clearly required each applicant to demonstrate requisite information "on their application". In the context of an open competition, it would not have been proper for board members to supplement applications by invoking personal knowledge of some applicants. To have done so, "would not have been to treat all applicants fairly and would certainly under

undermined respect for the merit principle required by section 6(1) of the Act." Appellant's application failed to disclose that he satisfied the qualification in issue.

The notice of competition is not inconsistent with the classification specifications within meaning of Act, section 7. As argued by employer, classification specifications refer to levels of experience in teaching as "desirable" and do not establish minimum standards.

Selection standards: employer need not chose experience

Miner v. Department of Transportation **(29 August 2001)**
Ombudsman: Ellen King

Concerning competition number 2000-D04-02 for the position of Mechanic III with the Saint John District Department of Transportation

Appearances: L. Saunders, CUPE representative, for the appellant
M. Estabrooks, for the employer

Following interviews, board of examiners assessed five applicants as "B" rating and one applicant at "A" rating. Only name of "A" rated applicant placed on eligibility list. Appellant feels he should have received an "A" rating given his experience of twenty-three years.

Board assessed applicants in relation to five assessment modules: Technical Knowledge/Expertise, Organizational/Decision Making Skills, Communication/ Interpersonal Skills, Positional Suitability, and Supervisory/Managerial Skills. Board assessed applicants through responses to interview questions (provided in advance); applicants' responses to specific predetermined questions related to assessment modules; and results of reference checks to verify information received at interview. Same assessment approach applied to all applicants.

Employer argues that onus was on applicants to demonstrate, through their responses, degree to which they satisfied competition requirements. Board did not use personal knowledge of applicants nor experience of applicants as factor in making assessments. Appellant argues board should have taken into account what knew of his twenty-three years experience in assessing his merit for the position.

Decision: **appeal dismissed**

Appellant failed to establish that board assessment of applicants is not reasonable and that merit principle not respected. Board did not err by not relying on personal knowledge of appellant to make assessment of qualifications and assessment tools not shown to be inappropriate:

> Since the Board of Examiners had decided on the interview and verification through references as the tools by which the merit of the candidates would be assessed, as was

> its right to do under section 11 of the *Civil Services Act*, it was not then open for the Board to use its personal knowledge of the appellant's experience as part of the rating process… Under the *Act*, the Board had the right to decide on the selection criteria it would use and on the selection tools by which candidates would be assessed against the criteria, and neither the criteria nor the tools have been shown to be inappropriate.

Employer has right per Act, s. 7 to establish selection criteria. Employer could have chosen experience or supervisory experience as selection criteria but decision not to do so does not provide ground of appeal.

Selection standards : journal publications, educational accomplishments, work performance

Pilgrim v. Department of the Environment **(8 June 1999)**
Ombudsman: Ellen King

Concerning competition number 21-98-08 for the position of Air Quality Specialist

Appearances: W. Pilgrim, for himself
P. Blanchet, Esq., for the employer

Appellant asserts that interview process used to assess candidates' abilities not adequate measure of qualifications. Board of examiners considered that appellant failed to provide satisfactory answers in relation to two assessment modules. Appellant argues board erred by failing to give proper weight to academic record and his journal publications relating to air quality issues. Appellant asserts that his qualifications for position would have been more realistically measured through assessment of educational accomplishments, publications, and work performance.

Employer argues that appellant did not show that assessment tools -- interview questions, written assignment and marking guide -- did not establish merit of applicants. Employer argues that role of ombudsman not to reassess candidates in competition.

Decision: appeal dismissed

Role of ombudsman in appeal process is to decide whether appointment based on merit as required by Act. Act, section 7 confers right on employer to establish selection standards against which merit of candidates is to be assessed. Section 11 permits employer to determine assessment tools to measure candidates' abilities as against standards.

> … it is conceivable that in establishing the assessment methodology to be used in this competition the employer could have incorporated into its assessment the measurements

> suggested by the appellant. However, there was no requirement for the employer to do so. Because such measurements were not incorporated do not, in my opinion, suggest that the assessment process was flawed (at p. 6).

Evidence fails to establish that assessment tools used by board of examiners did not establish merit of candidates in respect of selection standards.

Selection standards: union leadership as supervisory experience

Dubé v. Department of Transportation **(May 1997)**
Ombudsman: E. King

Concerning competition number 96-10-03 for the position of Automotive Shop Superintendent, District 10, Edmundston

Appearances: G. Dubé, for himself
J. Branscombe, for the employer

Appellant not selected in intra-departmental competition. Appellant a mechanic (Mechanic II) with 26 years employment experience and 20 years of active union experience including ten years as local president. Though not a high school graduate, appellant has journeyman's certificate and completed trade school course in motor vehicle repair and several other technical courses. Through union, appellant completed two courses on leadership. Qualifications stated in notice of competition include high school graduation followed by recognized mechanics course, extensive work related experience and extensive supervisory experience. Notice stated that applications from persons with "equivalent training and experience" would be considered. Evidence that appellant's application did not clearly identify required supervisory experience and that board scheduled interview to permit him opportunity to further assess qualifications. Board of examiners assessed appellant as "NQ" in relation to all five assessment modules. Successful applicant did not satisfy required mechanics course but has journeyman's certificates in the trade. Of six applicants who wrote skills and knowledge test and were interviewed, one assessed at "A" rating and two assessed at "B" rating.

Appellant argues that board of examiners should have credited him with supervisory experience because of his union activity and should have given weight to his annual performance appraisals, his extensive experience and should have considered relevant his reduced physical capacity due to injury. Appellant interprets negatively a question mark placed (by board member) beside his name on screening worksheet under column in relation to satisfaction of qualifications.

Held: appeal dismissed

Notice of competition clearly expressed acceptance of equivalent training and experience. That

successful applicant did not satisfy course requirement is, on evidence, offset by equivalent journeyman's certificates training and related experience.

Appellant's own application does not disclose supervisory experience but board granted opportunity through interview to establish that qualification. Given this fact, placing of question mark on screening sheet should not, on the evidence, be interpreted as exactly for what it is – a doubt as to whether appellant has required supervisory experience. Evidence does not support any other interpretation.

Employer did not err by not favouring appellant because of his physical incapacity:

> …when proceeding to fill a position by way of competition it is not open for the employer in assessing the merit of the candidates to take into account factors that do not have regard to the nature of the duties to be performed. In rating and ranking the candidates in a competition, a qualifications appraisal board can no more favour a candidate simply because of a physical condition than it can reject a candidate based on that same condition.

Applicants were assessed based on selection standards established for the competition. Training and experience were considered only to establish that applicants had satisfied minimum qualification standards.

Employer has right under Act, s. 7 to establish standards by which to assess merit. No reason to intervene on appeal "unless standards are found to be unreasonable in consideration of the duties to be performed, or the method of assessment against those standards is faulty…." No evidence to warrant intervention. While appellant more experienced as employee that successful applicant, such experience was not a factor in assessment by board. Based on method of assessment, value of experience is to enhance performance before the board in responding to interview questions.

Board did not err in treatment of appellant's favourable performance appraisals. Position under competition and position for which appellant appraised are "vastly different" and "cannot be concluded that… fundamental contradiction… [exists] where the positions and the circumstances are so different.

Selection standards – relevance of experience

Bérubé v. Department of Transportation **(6 May 1997)**
Before: Ellen E. King, Ombudsman

Concerning Competition Number 96-10-03 for the position of Automotive Shop Superintendent in District #10, Edmundston

Appearances: L. Bérubé, for himself
J. Branscombe, for the employer

Following competition, board of examiners assessed qualifications of one applicant at "A' rating and that applicant appointed from eligibility list. Board assessed qualifications of two other applicants, including appellant, at "B" rating.

Appellant argued that board of examiners did not give proper weight to appellant's experience and that board "should not have relied exclusively on the oral interview to determine the score for the competition." Evidence that appellant worked as automotive shop superintendent on interim basis for 4,026 hours in five years preceding the competition, that his performance evaluations in that position were satisfactory, and that appellant's seniority exceeded that of selected candidate by roughly 1,000 days.

Appellant argued that selected applicant did not satisfy qualification of completion of related mechanical course as required by notice of competition. Evidence that selected candidate held Journeyman Certificate in Heavy Equipment Repair and that notice of competition permitted "an equivalent combination of training and experience". Appellant also argued that "several candidates [were] called to the interview who did not have the required supervisory experience."

Disposition: appeal dismissed

Experience is not the determining factor in assessing merit. Selection standards established for each competition per Act, s. 7 and no requirement that experience be such a standard:

> [a]n assessment of the merit of candidates may well take into account their respective experience but under the ***Civil Service Act*** there is no requirement to do so and an assessment process cannot be faulted simply because experience was not a rated factor for the competition.

Board must make independent assessment of qualifications and is not bound by prior employment performance appraisals. On evidence, prior appraisals not inconsistent with board assessment:

> In reviewing the evidence, I can find no fundamental contradiction between the Performance Evaluation Reports and the score awarded to the appellant in this competition. The Performance Evaluation Reports showed the appellant to have satisfied the Department's performance expectations and his score in the competition identified him to be a qualified candidate. Even if there was some fundamental contradiction between the Performance Evaluation Reports and the assessment carried out by the Qualifications Appraisal Board, that would not necessarily prove an inaccurate assessment had been completed. Nevertheless, should a Qualifications Appraisal Board have contradictory information in its possession, such as Performance Evaluation Reports and the initial results of the assessment arrived at by a Board, the only obligation on a Board is to make a reasonable effort to reconcile that contradiction before finalizing the

assessment.

Employer acknowledged that selected applicant did not complete mechanical course as argued by appellant but this deficiency not fatal because of equivalency standard permitted by notice of competition. Employer also acknowledged that unqualified applicants (per resumés submitted with applications) were interviewed by board of examiners in order to determine if in fact were qualified. If determined not to be qualified, board did not assess as qualified.:

> the Board having interviewed candidates in this competition who might otherwise have been screened [out] if more information had been available did not infringe on the merit principle or call into question the selection for appointment.

Selection standards – board of examiners -- assessment factors of experience and performance evaluations

Cyr v. New Brunswick Department of Transportation **(March 1997)**
Ombudsman: Ellen E. King

Concerning Competition Number 96-DOT-10 for the position of Highway Supervisor I-II in Edmundston, St. Leonard.

Appearances: J.-M. Cyr, for himself
J. Branscombe, for the respondent

Following pre-selection and evaluation process, board of examiners assessed two applicants as qualified for position of Highway Supervisor. Board assessed selected applicant as "A" and appellant as "B". Appellant argues that "his training and acquired expertise were not sufficiently taken into consideration" by board of examiners and that board erred by not awarding him an "A" rating, as he had held position of acting Bridge Supervisor on a seasonal basis for several years and that position required equal, if not superior, technical competence to Highway Supervisor position. Evidence that appellant's performance evaluations reflect that employer satisfied with his performance as acting Bridge Supervisor.

Evidence on behalf of employer that "B" rating reflected appellant's technical expertise and that appellant not considered by board as best qualified applicant. While Bridge Supervisor position may require greater technical competence than position of Highway Supervisor, latter position involves more interaction with public and less "static" and "clearly defined" than Bridge Supervisor position. Evidence that board considered appellant "not disposed to manage and assume responsibility for a situation" and that board considered appellant's answers at interview at times unclear, incomplete or inappropriate.

Disposition: **appeal dismissed**

Board may determine selection criteria and assessment tools in relation to any competition under Act, section 7 and section 11. In doing this, there is no requirement that training and experience be selection criteria. In any event, evidence in present matter is that board assessed technical training and experience of all applicants during both pre-selection and evaluation process. Thus, appellant failed to establish that board did not take into account his experience and technical expertise.

Board not bound by performance evaluations of applicant but must make independent assessment of qualifications. In present matter, no significant contradiction between information presented in performance evaluation reports and ratings assigned to appellant by board. However, "even if there [had been] some considerable incompatibility between the performance evaluations and the assessment on the competition that would not necessarily prove an inaccurate assessment had been carried out," since performance evaluations are completed "at different times, by different parties, for different purposes and usually... they relate to a different set of duties and responsibilities than those contained in the competition."

In making assessments, board placed greater weight on supervisory and communication skills than on technical competence. Board did not err in making such assessment of qualifications consistent with duties of the position.

Board's assessment of applicants reasonable. Appellant failed to establish that board's assessment of applicants inconsistent with merit principle.

Selection standards – employer not required to provide equivalency standard

Section 9
Notice of competition – purpose of notice – technical defect in providing notice corrected by application by appellant

Bourque v. Department of the Solicitor General **(November 4, 1996)**
Ombudsman: Ellen E. King

Concerning competition number 96-78-03 for the position of Superintendent, Moncton Detention Centre

Appearances: D. Bourque, for the appellant
V. Peddie, for the employer

Three applications submitted in intra-departmental competition for position at Moncton Detention Centre. Only one applicant satisfied screening criteria and following interview, that applicant selected for appointment. Appellant is deputy superintendent and served as acting

superintendent pending appointment. Appellant did not satisfy required educational qualification. Educational and experience requirements in notice of competition expressed as: "university degree with experience in managing human resources and systems…."

Appellant asserts that notice of competition not posted within Moncton Detention Centre and that learned from third party that his application not being considered because of lack of university degree. Appellant argues that his combination of completed university courses, experience as Deputy Superintendent and as Acting Superintendent, and demonstrated dedication should have been considered by board of examiners as equivalent to posted qualifications.

Similar position at Saint John Regional Correctional Centre not filled by internal competition so open competition held. Appellant argues that employer adopted different qualification requirements for open competition than for closed competition. Appellant interprets newspaper advertisement for Saint John position as not requiring university degree and to express different experience requirements. That advertisement reads (in part):

> This position would be of interest to someone with a university degree with a minimum of five years of progressively responsible management experience.

Evidence that notice of competition sent by fax to Moncton Detention Center but may not have been posted. Evidence that second copy of notice of competition sent by fax the next day. Employer argues that notice of competition requires university degree and that employer not obligated to include equivalency provision with respect to education and experience. Employer argues that appellant could only be notified of non-selection after selected applicant accepted position. Evidence that, despite wording of newspaper advertisement, applicants in open competition for Saint John position also required to possess university degree and that experience qualification expressed differently because cannot expect external applicants to have background in corrections.

Decision: **appeal dismissed**

Purpose of notice of competition, per Act, s. 9, is to give eligible persons reasonable opportunity to apply. Despite problems with sending fax and possibility that notice not posted, appellant received copy of notice and submitted application. Therefore, outcome of competition not affected by alleged problems with distribution of notice of competition.

Employer has right to establish selection standards for competition and not obligated to include equivalency standard. On evidence, standards established in this competition are relevant and related to competition as mandated by Act, s. 7 and board of examiners not free to disregard such standards:

> Regardless of the value which may have been placed on his experience and years of service, the Board could not overlook the educational requirements which had been placed on the position (at p. 17).

Evidence submitted by appellant with regards to allegation that open competition required different standard of applicants than position under appeal incomplete and therefore cannot be considered. However, wording of newspaper advertisement consistent with interpretation of employer that applicants were required to have university degree. Difference in experience qualification requirement between open and closed competitions does not affect appellant's candidacy in closed competition and is reasonable in the circumstances:

> While there is obviously a difference in the type and the amount of experience that potential candidates were required to bring to the competitions, I find the Department's explanation for the difference in wording to be reasonable. It cannot be expected that candidates from outside the public service would have the same background as candidates within the public service in areas of work that are particular to the public service (at p. 18).

Appellant failed to establish that board of examiners did not assess his application properly and consistent with selection standards of competition.

Selection standards: supervisory experience and seniority

Nicol v. Department of Natural Resources and Energy **(29 September 1994)**
Ombudsman: Ellen King

Concerning competition number 60-94-10 for the position of Operations Ranger, Hampton, N.B.

Appearances: D. Nicol, for himself
L. McCarthy, for the employer

In closed competition, board of examiners interviewed three applicants based on three assessment modules: (1) Technical Knowledge; (2) Management/Analytical Ability; (3) Communication/ Interpersonal Skills. Both appellant and selected candidate received 'A' rating and names placed on eligibility list. Appellant not selected by Deputy Minister.

Appellant argues that selection process failed to recognize his supervisory experience or seniority. Appellant questions whether selected applicant has sufficient supervisory experience to satisfy requirements as set out in advertisement. Appellant interprets notice of competition as requiring extensive supervisory experience as well as extensive experience in variety of field activities and administration. Appellant argues that position available because of early retirement of incumbent and that selection of other applicant influenced by need to eliminate another position of equal salary.

Employer argues that once candidate meets screening standard, experience no longer a

factor in determining merit. With regards to selection, employer argues that Act, s. 13(1) confers discretion on Deputy Minister in making appointments from eligibility list. Evidence that early retirement option not premised on forfeiting vacant position of same pay range or from same region of early retiree. Must only forfeit position within same salary range. Evidence that notice of competition required candidates to have eight years experience is variety of fields, involving supervision, not eight years of supervisory experience. Evidence that selected applicant had 8 years supervisory experience nonetheless.

Decision: appeal dismissed

Evidence establishes that possible appointment not restricted to selected applicant because of location and salary of position he occupied, but open to all employees of Department who possessed required qualifications:

> …the evidence indicates that positions at salary levels lower than that held by Mr. Lamb would have been an acceptable trade-off, and that included positions of District Rangers as occupied by the appellant (at p. 10).

Under Act, s. 13(1), Deputy Minister may exercise discretion in making selection from eligibility list. No requirement that Deputy Minister justify selection. Issue of seniority not included in Act as factor to be considered in assessing merit.

Section 7 of Act gives right to employer to set selection standards.

> Unless the standards are found to be unreasonable in consideration of the duties to be performed, or the method of assessment against those standards is faulty, I have no reason to intervene (at p. 13).

No evidence that method of evaluation faulty.

Notice of competition not specific with respect to requirement for supervisory and administrative experience. Employer's interpretation not unreasonable in consideration of wording and option available, as expressed in notice of competition, to apply equivalency standard to stated training and experience. No evidence that experience of selected applicant does not satisfy standards set for competition.

Selection standards: training and experience

Duke v. Department of Natural Resources and Energy **(2 September 1994)**
Ombudsman: Ellen King

Concerning competition number 60-94-06 for the position of Forest Ranger V

Appearances: H. Duke, for himself
I. Trueman for the Employer

Intra-departmental competition held to fill position to be created by retirement of incumbent. All three applicants met screening requirements as advertised and were further assessed by way of interviews. Board of examiners assessed successful applicant at "A" rating and other two applicants, including appellant, at "B" rating. Interview consisted of 17 questions divided into five modules: (1) Technical Knowledge; (2) Communication Skills; (3) Organizational Abilities; (4) Intellectual and Decision Making Abilities; (5) Personal Suitability, Interpersonal Skills and Motivation.

Appellant argues board did consider his additional training courses and that assessment influence by incumbent and perception of personality characteristics, not merit. Appellant argues that incumbent enhanced promotional opportunity of selected applicant by selected applicant assist incumbent in duties as Regional Inspector. Appellant argues such actions effectively pre-determined assessment by board. Appellant also argues that regional management and board had preconceived impression of his personality, which worked against him in competition. Appellant identifies one question as evidence that personality conflicts taken into account in selection process. Appellant also claims one board member prompted him on three questions to which he claims he had given the correct answer. Appellant asserts board member did this to push appellant to make mistakes.

Evidence that most Forest Rangers with long service would have similar training records as appellant. Evidence that board member prompted other applicants at interview as well as appellant. Such prompting for purpose of helping candidates demonstrate their level of knowledge. Specific question challenged by appellant re personality conflicts actually directed at problem solving skills.

Selected applicant testified that his former responsibilities included assisting Regional Inspector and denied that any promise had been made to him in respect to Regional Inspector's position.

Decision: appeal dismissed

Results of competition cannot be faulted simply because board did not use training and experience as rating factors:

> Under section 7 of the Civil Service Act, the employer has the right to establish the standards against which the merit of candidates is to be assessed. The standards, of course, must be reasonable in regard to the nature of the duties to be performed. In this instance, the appellant did not provide any evidence which would suggest to me that the selection standards set out in the Applicant Rating Guide (Exhibit 3) are unreasonable (at p. 10).

Appellant failed to establish that board assessment not consistent with merit principle. On

evidence, selected applicant assisted Regional Inspector because of assigned duties per job description and appellant failed to demonstrate that board improperly influenced by performance of such duties. Regional Inspector not member of board of examiners

Prompting at interview for purpose of assisting, not harming, applicants. Evidence that for each instance of prompting, appellant assessed at "A" rating so no detriment to appellant.

Appellant failed to establish that specific question posed for purpose of having candidates reveal personal conflicts indicating that personality characteristics considered in competition. No evidence that Board labeled appellant as unsuitable for position (board assessed appellant at "B" rating).

No evidence that assessment of appellant based on other than selection standards.

Section 8 competition restrictions

8 Before conducting a competition, the Deputy Minister of the Office of Human Resources shall

(a) determine the area in which applicants must reside in order to be eligible for appointment, and

(b) in the case of a closed competition, determine the portion, if any, the Civil Service and the portion, if any, of the public service prescribed by regulation for the purposes of paragraph (b) of the definition "closed competition" and the occupational nature and level of positions, if any, in which prospective candidates must be employed in order to be eligible for appointment.

Selection standards – residency qualification irrelevant if not expressed

St-Amand v. Department of Transportation **(19 June 1996)**
Ombudsman: Ellen E. King

Concerning competition number 95-10-01 for the position of Highway Supervisor I-II, District # 10 – Edmundston, St. Leonard Division

Appearances: V. St-Amand, for himself
J. Branscombe, for the employer

Appellant and four others applied in intra-departmental competition for position as Highway Supervisor I-II. Appellant not granted interview because of failing grade on examination. Other four applicants interviewed by board of examiners. Board assessed one applicant assessed at "A" level and that applicant selected from eligibility list as successful applicant.

Evidence that appellant employed by Department since 1985 and served as Highway Supervisor I-II until local depot closed. Appellant then accepted alternate employment assignment. Evidence of good work performance by appellant as Highway Supervisor I-II confirmed by performance evaluations. Evidence that appellant inquired about acting as temporary Highway Supervisor when supervisor absent but never granted that opportunity. Appellant argues that selected applicant benefited form such temporary assignments which enhanced qualifications for competition.

Appellant argues notice of competition inconsistent with usual practice because of

absence of geographic restriction and that, if so restricted, he would have been only qualified applicant. Appellant argues employer did not include residence restriction because district did not consider him suitable applicant. Appellant argues should not have been required to write examination in this competition because of qualifying score on same examination in earlier competition for similar position in another district. Finally, appellant argues should have been appointed to position without competition because of earlier lay-off. Evidence that, prior to competition, board member responsible for grading written examinations had expressed negative opinion about appellant's capacity to act in supervisory role.

Evidence on behalf of employer that three years had elapsed since appellant held Highway Supervisor position and therefore not open to employer to appoint appellant to position without competition. Evidence that employer decided not to include residence restriction to promote greater number of applications but that selected applicant satisfied usual residence requirement in any event. Employer argues that written examination used as screening tool and that though first implement in Edmundston District in this competition, it is current practice in New Brunswick for Highway Supervisor positions. Employer argues that notice of competition expressly permitted consideration of applicants based on equivalent combination of training and work experience.

Employer argues management right to select person to appoint on acting or interim basis to replace absent Highway Supervisor. Evidence that selected applicant gained experience on acting basis before appellant reassigned from supervisor's position and that continued to be appointed on acting basis because of quality of his work performance. Evidence that employer considered appellant for interim assignments but not offered because appellant questioned policies and procedures of Department and therefore there were doubts as to his ability to perform duties. Employer argues such doubts did not impact on competition. Employer argues that each applicant must complete all steps in competition process including written examination and that because composition of board of examiners may vary from competition to competition, assessment results may vary from one board to another.

Decision: **appeal allowed**

Defects in competition process sufficient to undermine respect for merit principle. Board member responsible for assessing results of written examination had previously expressed reservations about appellant's competence to perform interim work as Highway Supervisor. Unfortunately, approximately 50% of questions on written examination permit discretion in grading answers:

> In the absence of evidence to show that she divested herself of that opinion before becoming a member of the Screening Board, I cannot conclude that she was able to approach the assessment of the candidates in this competition with an open mind and void of any predisposition in respect to Mr. St-Amand (at p. 24).

In context and considering other circumstances of competition, evidence sufficient to conclude

that process not carried out in manner calculated to identify most meritorious candidate.

Lay-off provisions of Act not applicable. No basis in Act to reverse lay-off after three years; moreover appellant not laid-off but reassigned. Also, no obligation to appoint appellant because his name on eligibility list for other competition.

Act, s. 8 confers right on employer to determine qualifications, including any residency requirement, but must do so before competition advertised. Notice of competition in present appeal did not express residency requirement, so an irrelevant consideration.

Non-selection of appellant for acting appointments does not undermine merit principle in competition in issue. Employer has discretion to select individuals for interim positions.

Board did not err by not considering assessment of written examination by appellant in previous competition. Board not bound by assessment in regards different competition:

> There is no requirement under the Civil Service Act for the results of one competition to be carried forward to another competition, and I cannot fault the board in this instance for having required Mr. St-Amand to submit to the same assessment process as the other candidates in this competition (at p. 20).

Section 9 Notice of Competition

9 The Deputy Minister of the Office of Human Resources shall give such notice of a proposed competition as in his opinion will give all eligible persons a reasonable opportunity of making an application.

Notice of competition – purpose of notice – technical defect in providing notice corrected by application by appellant

Bourque v. Department of the Solicitor General **(November 4, 1996)**
Ombudsman: Ellen E. King

Concerning competition number 96-78-03 for the position of Superintendent, Moncton Detention Centre

Appearances: D. Bourque, for the appellant
V. Peddie, for the employer

Three applications submitted in intra-departmental competition for position at Moncton Detention Centre. Only one applicant satisfied screening criteria and following interview, that applicant selected for appointment. Appellant is deputy superintendent and served as acting superintendent pending appointment. Appellant did not satisfy required educational qualification. Educational and experience requirements in notice of competition expressed as: "university degree with experience in managing human resources and systems…."

Appellant asserts that notice of competition not posted within Moncton Detention Centre and that learned from third party that his application not being considered because of lack of university degree. Appellant argues that his combination of completed university courses, experience as Deputy Superintendent and as Acting Superintendent, and demonstrated dedication should have been considered by board of examiners as equivalent to posted qualifications.

Similar position at Saint John Regional Correctional Centre not filled by internal competition so open competition held. Appellant argues that employer adopted different qualification requirements for open competition than for closed competition. Appellant interprets newspaper advertisement for Saint John position as not requiring university degree and to express different experience requirements. That advertisement reads (in part):

> This position would be of interest to someone with a university degree with a minimum of five years of progressively responsible management experience.

Evidence that notice of competition sent by fax to Moncton Detention Center but may not have been posted. Evidence that second copy of notice of competition sent by fax the next day. Employer argues that notice of competition requires university degree and that employer not obligated to include equivalency provision with respect to education and experience. Employer argues that appellant could only be notified of non-selection after selected applicant accepted position. Evidence that, despite wording of newspaper advertisement, applicants in open competition for Saint John position also required to possess university degree and that experience qualification expressed differently because cannot expect external applicants to have background in corrections.

Decision: **appeal dismissed**

Purpose of notice of competition, per Act, s. 9, is to give eligible persons reasonable opportunity to apply. Despite problems with sending fax and possibility that notice not posted, appellant received copy of notice and submitted application. Therefore, outcome of competition not affected by alleged problems with distribution of notice of competition.

Employer has right to establish selection standards for competition and not obligated to include equivalency standard. On evidence, standards established in this competition are relevant and related to competition as mandated by Act, s. 7 and board of examiners not free to disregard such standards:

> Regardless of the value which may have been placed on his experience and years of service, the Board could not overlook the educational requirements which had been placed on the position (at p. 17).

Evidence submitted by appellant with regards to allegation that open competition required different standard of applicants than position under appeal incomplete and therefore cannot be considered. However, wording of newspaper advertisement consistent with interpretation of employer that applicants were required to have university degree. Difference in experience qualification requirement between open and closed competitions does not affect appellant's candidacy in closed competition and is reasonable in the circumstances:

> While there is obviously a difference in the type and the amount of experience that potential candidates were required to bring to the competitions, I find the Department's explanation for the difference in wording to be reasonable. It cannot be expected that candidates from outside the public service would have the same background as candidates within the public service in areas of work that are particular to the public service (at p. 18).

Appellant failed to establish that board of examiners did not assess his application properly and

consistent with selection standards of competition.

Section 11 assessment tools

11 The Deputy Minister of the Office of Human Resources shall examine and consider all applications received within the time fixed by him for the receipt of applications and, after considering such further material and conducting such examinations, tests, interviews and investigations as he considers necessary or desirable, shall select the candidates who are qualified for the position or positions in relation to which the competition is conducted.

Assessment tools: interview process vs performance evaluations, experience

Allain v. Department of Transportation **(December 1999)**
Ombudsman: Ellen King

Concerning competition number 1998-D03-09 for the position of Highway Signs Supervisor in Moncton/Rexton District

Appearances: J. Sirois, for the appellant
M. Estabrooks, for the employer

Six candidates, including appellant, interviewed by board of examiners. Appellant had held position under competition for fifteen years appellant before reassignment as Bridge Worker II due to health reasons and because of working relationship with supervisor. Board of examiners assessed appellant at "B" rating and appellant not selected for position.

Appellant disagrees with assessment by board of his responses to interview questions. Appellant argues that responses reflect practices when he previously served as Highway Signs Supervisor. Appellant argues that selection tools to assess candidates inadequate and that result of assessment conflicts with evaluation reports regarding his performance while holding supervisor's position. These reports rate appellant as "very satisfactory" and "meets the requirements". Appellant argues that one interview question not worded to guide candidates to provide expected answer.

Employer argues that evidence supports finding that appellant's responses not improper but not deserving of rating higher than 'B'. Selected applicant had also worked under same practices as appellant claims influenced his answers. Employer recognizes appellant as qualified but not most qualified. Employer argues that evaluation reports received by appellant not inconsistent with board's assessment and that purpose of each evaluation is different. Evidence in relation to challenged question that board probed response of candidates to develop more complete answer.

Decision: **appeal dismissed**

Act, section 11 authorizes employer to determine what assessment tools to assess candidates in competition:

> In establishing the assessment methodology for this competition, the employer could have incorporated into the assessment the use of information obtained through the performance evaluation process. However, there was no requirement for the employer to do so. The employer has a right under the *Act* to determine the assessment tools to be used to assess merit (at p. 7).

Appellant has failed to establish that assessment tools not capable of comparing and measuring candidates against selection standards for competition. Evidence not refuted that employer probed candidates for more developed answer to challenged question.

Results of assessment by interview not in conflict with performance evaluation carried out on appellant.

Board is not required to adapt assessment to take into consideration particular supervisory milieu which appellant indicated existed with most recent supervisor:

> In assessing candidates for a position, a Board is not assessing familiarity with the job in question, but rather the level of competence to perform its duties… As I reviewed the several questions brought to my attention where the appellant identified that his responses were influenced by his previous supervisor, I can see nothing in the questions themselves which would limit a candidate to respond in consideration of his past experience (at p. 10).

Given appellant's extensive experience, his responses should not have been unduly influenced by one supervisory style. There is no evidence that supervisory style referred to represented general established practice by Department. Moreover, selected candidate worked under same supervisor yet there is no evidence that his responses influenced by that supervisor.

Assessment tools : interview process vs journal publications, educational accomplishments, work performance

Pilgrim v. Department of the Environment **(8 June 1999)**
Ombudsman: Ellen King

Concerning competition number 21-98-08 for the position of Air Quality Specialist

Appearances: W. Pilgrim, for himself
P. Blanchet, Esq., for the employer

Appellant asserts that interview process used to assess candidates' abilities not adequate measure of qualifications. Board of examiners considered that appellant failed to provide satisfactory answers in relation to two assessment modules. Appellant argues board erred by failing to give proper weight to academic record and his journal publications relating to air quality issues. Appellant asserts that his qualifications for position would have been more realistically measured through assessment of educational accomplishments, publications, and work performance.

Employer argues that appellant did not show that assessment tools -- interview questions, written assignment and marking guide -- did not establish merit of applicants. Employer argues that role of ombudsman not to reassess candidates in competition.

Decision: appeal dismissed

Role of ombudsman in appeal process is to decide whether appointment based on merit as required by Act. Act, section 7 confers right on employer to establish selection standards against which merit of candidates is to be assessed. Section 11 permits employer to determine assessment tools to measure candidates' abilities as against standards.

> … it is conceivable that in establishing the assessment methodology to be used in this competition the employer could have incorporated into its assessment the measurements suggested by the appellant. However, there was no requirement for the employer to do so. Because such measurements were not incorporated do not, in my opinion, suggest that the assessment process was flawed (at p. 6).

Evidence fails to establish that assessment tools used by board of examiners did not establish merit of candidates in respect of selection standards.

Assessment tools – interview process as tool to assess experience

Bonenfant v. Department of Transportation **(29 March 1999)**
Ombudsman: Ellen E. King

Concerning competition number 98-07-01 for the position of Responsable De L'Entretien Regional, District #7 – Edmundston

Appearances: R. Bonenfant, for himself
M. Levesque, for the employer

Seven applicants satisfied required qualifications in intra-departmental competition and were interviewed by board of examiners. Board assessed applicants based on selection criteria grouped

into five modules: (1) Knowledge and technical skills; (2) Communication and interpersonal skills; (3) management and supervisory skills; (4) organizational and decision-making skills; (5) aptitude for the position. Board assessed one applicant as "A", four applicants as "B" (including appellant) and two applicants as "NQ".

Appellant argues merit principle not respected and that interview incapable of distinguishing between applicants based on experience and past performance. Appellant argues that during twenty three years of work he had accumulated training and experience necessary to meet requirements for position. Appellant argues notice of competition requires extensive experience in maintenance and that selected applicant did not satisfy experience required per notice of competition:

> …De plus, une tres grande experience de travail connexe – y compris de l'experience en administration et en surveillance – est exigee…

Appellant argues that road maintenance and construction are different. Considering his experience and positive performance evaluations, appellant argues board of examiners should have assessed him at higher rating.

Evidence that practice to interpret extensive experience / "*une tres grande experience*" in notice of competition as requirement of at least six years of experience and that board interpreted notice of competition to permit experience in either road maintenance or road construction. Evidence that many techniques used for road maintenance similar to those used for road construction, and that expertise in road construction can be applied to road maintenance. Evidence that board of examiners considered appellant's answers to some questions evasive and that he did not always provide specific examples from his experience. Employer argues that based on interview responses, board assessed appellant as "qualified" but that selected applicant "most qualified". Employer argues that board interpreted required qualification of "*une tres grande experience connexe*" to mean six to ten years of experience in maintenance or construction activities involved in road building.

Decision: **appeal allowed**

Appellant failed to establish that merit principle not respected because applicants not required to have experience in road maintenance. Board's interpretation with regard to type of experience required not unreasonable.

However, board erred in determining that selected applicant satisfied required experience qualification. Board's interpretation of "*une tres grande experience*" as being at least six years consistent with interpretation of phrase in New Brunswick Administration Manual System. Notice of competition requires extensive experience (use of expression "*est exigee*"):

> The conclusion I draw from this is that something "est exigee" establishes a condition that must be met. In other words, that which is identified as "est exigee" must be found to be present in order to satisfy the condition. In the context of this competition, it is my view that the advertisement makes it mandatory that candidates have at least six years of related work

experience to include supervisory and administrative experience (at p. 19).

Wording of notice of competition does not permit substitution of training as equivalent to required experience. Applicants who did not have six years of experience cannot be considered to meet requirements of competition. Selected candidate's experience assessed by board at five years. Therefore, selected candidate did not satisfy required qualifications.

No need to address manner in which Board assessed relative merit of candidates.

Assessment tools: interview vs professional licence, experience

Arseneault-Thibodeau v. Department of Health and Community Services **(December 1997)**
Ombudsman: E. King

Concerning competition number 35-96-0062 for the position of Clinical Psychologist I, Moncton, N.B.

Appearances: C.J. Sirois, CUPE rep., for the appellant
M. Léger, for the employer

Board of examiners interviewed four applicants in this open competition. Board assessment of applicants made by consensus based on responses to 22 pre-determined questions reflecting specific duties of position in competition. Questions organized into four assessment modules. Two applicants assessed as "A" rating and one of them selected as successful applicant after reference check. Appellant rated as "NQ" by board of examiners because of "NQ" rating assessed in relation to only one module, "Technical Knowledge". Appellant is licensed clinical psychologist presently employed in Clinical Psychologist I position. Successful applicant and one other applicant were rated as "A" applicants and are both psychometrists, a classification reflecting lower qualifications than that of Clinical Psychologist I. Evidence that notice of competition undertaken with knowledge that more persons are trained at psychometric level than to level of clinical psychologist and that competition stated that applicants not possessing all qualifications would be considered for appointment at the psychometric level. Evidence that board assigned overall "NQ" rating if applicant assessed as "NQ" in any module and assessed each module in relation to entirety of relevant questions so that non-response to any one question did not automatically result in "NQ" rating for that module.

Appellant argues that, as an experienced and licensed clinical psychologist, selection method/ assessment tool adopted by board of examiners failed to assess her qualifications properly in relation to other applicants – in particular, that an oral interview of approximately 60 minutes covering 22 questions is an inappropriate assessment tool. She argues that board should have given greater weight to her professional licence as a clinical psychologist and to her superior annual performance appraisals which did not identify any deficiency in technical knowledge. Appellant argues that she did not answer two of the seven questions in the

"Technical Knowledge" module because of advice received from board member not to answer questions on licensing examination if unsure of response and, further, that non-response to question about identifying specific instruments used in relation to specific treatments does not indicate a lack of knowledge about the use of such instruments.

Held: appeal dismissed

Role of the Ombudsman on appeal is not to reassess the applicants nor "whether the tools or the process should have been different but whether they were sufficient to establish the merit of the candidates" as required by the Act, s. 6. Employer has right per Act., s. 7 to establish selection standards for a position under competition. In this matter, employer established four selection modules and rating guide expressed level of expertise expected in respect of each standard. Appellant did not challenge selection standards.

Act, s. 11 grants employer right to select assessment tools:

> The Act does not prescribe what tools must be utilized but it would have to be understood that the tools chosen must be capable of comparing and measuring the extent to which the candidates meet the standards set for the competition.

Interview questionnaire designed consistent with nature of duties of position and of associated clientele.

Board assessment acted reasonably in assessment of appellant's non-response to two interview questions. Whether or not appellant able to *use* the instruments was not in issue because question required her to *identify* relevant instruments. Appellant is responsible for decision not to respond and cannot rely on due given to her regarding examination at different time and different context:

> What I conclude from this, is that the appellant did not know the answers to the questions asked or that she was unsure of the answers, and in such a situation she decided against making a response. The appellant must accept responsibility for her actions in this regard and her decision not to offer a response does not diminish the suitableness of the questionnaire to assess the candidates.

Board did not err in treatment of appellant's professional licence qualification as representing knowledge and skills. Board must make own assessment:

> …I cannot conclude that being licensed in a field whether it be psychology, teaching, mechanics, etc. means that the person has the knowledge, skills and abilities to immediately undertake any job duties that fall within the field in which the person is Licensed. This is particularly so in fields of work which are subject to specialization. It is my view, that it was open for the Board of Examiners to assess the candidates in respect to the particular requirements of the position and to rate the candidates against the standards for that position. In carrying out its duty to establish the merit of the

> candidates, a Board cannot be bound by the results of an assessment process undertaken by a licensing body, but must be able to explain and justify the results of its assessment.

For similar reasons, board did not err in not attaching more weight to appellant's performance appraisals /evaluations which are "completed at different times, often by different parties and for different purposes and usually, as in this case, they relate to a different set of duties and responsibilities than those assigned to the position under competition."

Board acted reasonably in treating differently a "NQ" rating on a module and a "NQ" on a single question:

> …there is a significant difference between failing to respond to one question and failing to demonstrate a knowledge, skill or ability determined to be necessary for carrying out the duties of a position in an effective manner.

Notice of competition clearly expressed that applicants who did not satisfy qualifications could be appointed at lower classification. Appointment of successful applicant at Psychometric level is not inappropriate in circumstance that no applicant qualified as clinical psychologist assessed as qualified by board. But, "view may well be different if one of the candidates in this competition had received a qualifying rating at the Clinical Psychologist I level thereby certifying the possession of qualifications at a higher level than that of Psychometrist."

Assessment tools – interview questions must be appropriate means to assess merit – use of assessment tool in one competition to select appointee to different position held improper

Section 13
Eligibility list – appointments made to different positions from same eligibility list improper

Gautreau v. Department of Natural Resources and Energy **(17 March 1998)**
Ombudsman: Ellen E. King

Concerning Competition Number 60-95-13, originally used to fill position of Fire Equipment Officer and eligibility list later used to fill position of Forest Fire Operations Officer – both positions in the class of Forest Ranger V

Appearances: J. E. Stanley, Esq. for the appellant
P. Blanchet, Esq. for the respondent

Appointment made in 1995 from eligibility list after competition held for position of Fire Equipment Officer. In 1997, second appointment made from same eligibility list for position of Forest Fire Operations Officer, vacated by a retirement. Both positions classified as "Forest Ranger V," and both positions located in Fredericton area. No notice given that 1995 eligibility list might be used to fill subsequent openings for Forest Ranger V positions. Appellant challenged 1997 appointment on basis of differences between the two positions.

Evidence that questions used in 1995 competition were tailored to position of Fire Equipment Officer. Member of board of examiners admitted "that he has no evidence which indicates that [the selected candidate] is the best qualified individual to fill the job of Forest Fire Operations Officer" but maintained that a number of questions used in 1995 competition had bearing on assessment of merit for position of Forest Fire Operations Officer.

Disposition: appeal allowed; appointment revoked

On evidence, including review of job descriptions, positions "not the same and are indeed different… notwithstanding that the positions are both classified at the Forest Ranger V level, both positions have responsibilities associated with forest fires, and the positions at different times were assigned [some overlapping responsibilities]." Evidence that Forest Ranger V classification includes either "senior administrative and supervisory *or* senior technical and administrative work." Review of two positions reveals that Fire Equipment Officer position relates to "senior technical and administrative work" and that of Forest Fire Operations Officer relates to "senior administrative and supervisory" duties.

Differences in the two positions are such that tools used to assess applicants for one may not be appropriate to assess applicants for the other:

> It is my opinion, that where two positions are different it cannot be said that the selection standards and the means of measuring candidates against those standards which have been established in respect to one of the positions equally apply to both positions.
>
> If it cannot be demonstrated that an assessment process is capable of establishing the merit of candidates for a position, it cannot be said that an appointment to that position as a result of that process is in keeping with the merit principle.

When two positions differ and employer wishes to re-use eligibility list, employer must "provide convincing evidence to demonstrate that the results of a determination of merit for one position can readily be transferred to a second position."

Assessment tools – board assessment on basis of seven general questions not appropriate tool to assess merit

NB Regulation 84-230
Re-deployment list – applicant not selected from eligibility list to be treated as selected from eligibility list notwithstanding position on re-deployment list

Carr v. Department of Advanced Education and Labour (NBCCSJ) **(31 July 1997)**
Ombudsman: Ellen E. King

Concerning Competition Number 96-6140-004 for five positions as Field Services Officer at the NBCC Saint John

Appearances: J. E. Stanley, Esq. for the appellant
H. Cossaboom, for the employer

Appellant held position of Field Service Officer on term basis for periods totalling about six years. Board of examiners assessed appellant as not qualified in relation to two of six assessment modules.

Board assessment based on written response to one question and oral interview involving six other questions. Selection standards divided into six modules based on thirty-one selection criteria. Employer acknowledged that board assessment "took on a holistic approach" as board assigned score for each module based on responses to the seven questions. As such, the expected responses (which were "identified to be the benchmarks for assessing the responses") were not used as direct comparison in evaluation process. Appellant argues that subjective process failed to assess "merit" by substituting "impressions and feelings" of board members.

As preliminary matter, employer argued that one applicant appointed from eligibility list could have been appointed without regard to merit on application of Regulation 84-230 re redeployment list.

Disposition: appeal allowed; appointments revoked

On preliminary matter, appointment of applicant in issue made from eligibility list and not pursuant to Regulation 84-230 re deployment list. While Deputy Minister could have made appointment pursuant to that Regulation, did not do so and selection from eligibility list is subject to appeal under Act.

Assessment process used by board failed to satisfy merit principle. What is important is "not whether the tools or the process should have been better, but whether they were sufficient to establish merit." Though board had right to determine selection tools,

> The Board must... be able to provide a reasonable explanation for the manner in which the merit of the candidates was assessed and for the scores awarded to the candidates as a reflection of that merit.
>
> [i]t is also accepted, that the tools and procedures used must allow the Board to obtain

> some significant insight of the candidates' knowledge, skills and abilities in relation to the position requirements.

On evidence, seven questions provide insufficient basis to assess applicants in relation to thirty-one evaluation criteria:

> While the Board identified to the candidates prior to the interview the modules on which they were being measured, the candidates were not informed that their responses to each question were expected to reveal qualifications in each module, nor were they informed, and understandably so, of the selection criteria within the modules. Although, as already indicated, the questions are quite broad, it is unreasonable, in my opinion, to expect candidates to frame responses to each question which encompass elements of all of the selection modules, and especially without the direction that they were expected to do so.
>
> …the questions which are used to assess the merit of candidates must be such that a knowledgeable and capable candidate can reasonably determine from the question, or the directions given regarding the question, what the Board requires in response to the question.

Board used a small number of broad questions to rate applicants directly against selection criteria rather than against expected responses. On evidence, employer failed to satisfy burden of proof that board evaluated all applicants against a common frame of reference. Therefore, employer has failed to establish that board's assessment consistent with merit principle.

Assessment tools: relevance of employment performance appraisals

Dubé v. Department of Transportation **(May 1997)**
Ombudsman: E. King

Concerning competition number 96-10-03 for the position of Automotive Shop Superintendent, District 10, Edmundston

Appearances: G. Dubé, for himself
J. Branscombe, for the employer

Appellant not selected in intra-departmental competition. Appellant a mechanic (Mechanic II) with 26 years employment experience and 20 years of active union experience including ten years as local president. Though not a high school graduate, appellant has journeyman's certificate and completed trade school course in motor vehicle repair and several other technical courses. Through union, appellant completed two courses on leadership. Qualifications stated in

notice of competition include high school graduation followed by recognized mechanics course, extensive work related experience and extensive supervisory experience. Notice stated that applications from persons with "equivalent training and experience" would be considered. Evidence that appellant's application did not clearly identify required supervisory experience and that board scheduled interview to permit him opportunity to further assess qualifications. Board of examiners assessed appellant as "NQ" in relation to all five assessment modules. Successful applicant did not satisfy required mechanics course but has journeyman's certificates in the trade. Of six applicants who wrote skills and knowledge test and were interviewed, one assessed at "A" rating and two assessed at "B" rating.

Appellant argues that board of examiners should have credited him with supervisory experience because of his union activity and should have given weight to his annual performance appraisals, his extensive experience and should have considered relevant his reduced physical capacity due to injury. Appellant interprets negatively a question mark placed (by board member) beside his name on screening worksheet under column in relation to satisfaction of qualifications.

Held: appeal dismissed

Notice of competition clearly expressed acceptance of equivalent training and experience. That successful applicant did not satisfy course requirement is, on evidence, offset by equivalent journeyman's certificates training and related experience.

Appellant's own application does not disclose supervisory experience but board granted opportunity through interview to establish that qualification. Given this fact, placing of question mark on screening sheet should not, on the evidence, be interpreted as exactly for what it is – a doubt as to whether appellant has required supervisory experience. Evidence does not support any other interpretation.

Employer did not err by not favouring appellant because of his physical incapacity:

> …when proceeding to fill a position by way of competition it is not open for the employer in assessing the merit of the candidates to take into account factors that do not have regard to the nature of the duties to be performed. In rating and ranking the candidates in a competition, a qualifications appraisal board can no more favour a candidate simply because of a physical condition than it can reject a candidate based on that same condition.

Applicants were assessed based on selection standards established for the competition. Training and experience were considered only to establish that applicants had satisfied minimum qualification standards.

Employer has right under Act, s. 7 to establish standards by which to assess merit. No reason to intervene on appeal "unless standards are found to be unreasonable in consideration of the duties to be performed, or the method of assessment against those standards is faulty…." No evidence to warrant intervention. While appellant more experienced as employee that successful applicant, such experience was not a factor in assessment by board. Based on method of

assessment, value of experience is to enhance performance before the board in responding to interview questions.

Board did not err in treatment of appellant's favourable performance appraisals. Position under competition and position for which appellant appraised are "vastly different" and "cannot be concluded that… fundamental contradiction… [exists] where the positions and the circumstances are so different.

Assessment tools: board of examiners – inconsistent use of personal knowledge to assess some applications

Thériault v. Department of Health and Community Services **(7 April 1997)**
Ombudsman: Ellen King

Concerning competition number 35-96-0036, for three positions as Regional Team Manager in the Moncton Department of Health and Community Services.

Appearances: S. Thériault, for herself
B. Owen, for the employer

Restructuring resulted in twenty-three old managerial positions being replaced by eighteen new "Team Manager" positions in intra-departmental competition. Employer conducted résumé writing and interview workshops to help prospective candidates prepare for competition and made available "Position Description Questionnaire" to all applicants.

Appellant screened out of competition because review of her résumé did not disclose to board of examiners required two years of managerial experience. Appellant had fourteen months as "Acting Director Ambulatory Care," a positions recognized by board as managerial, and a further nine years as "Nurse Coordinator" in Moncton Hospital Reproductive Health Clinic. Job title of latter position did not correspond to a management position but, in fact, "Nurse Coordinator" position at Moncton RHC is assigned duties which are managerial in nature. Board did not inquire into exact nature of this position before eliminating appellant from competition.

After screening applications but before starting interviews, board learned that appellant's "Nurse Coordinator" position in fact managerial. Board decided not to reconsider appellant's application "as to be fair to the other applicants who were also screened from the competition." Evidence that board screened into competition three applicants who may not in fact have satisfied required qualifications. Board deemed applicant A to have required two years of managerial experience despite unclear résumé and failure by board to confirm actual managerial experience. Board screened in applicants B and C, both of whom listed experience as Public Health Nursing Supervisors in excess of two years, because board members familiar with responsibilities of this position and did not inquire into actual duties performed.

Appellant not aware that non-public health managerial experience acceptable for purposes of competition so did not list such prior experience; board screened in applicant A based on non-public health managerial experience.

Decision: appeal allowed, appointments revoked

It is not Ombudsman's role on appeal to assess applications of appellant and selected candidates against screening criteria. Rather, role is limited to considering reasonableness of board's conclusions on assessing those applications against screening criteria and to determine whether merit principle respected in appointment.

Board's finding that appellant's résumé did not evince her management experience as "Nurse Coordinator" was reasonable. Further, board acted reasonably when it refuse to accept supplementary information from appellant after screening process complete, as this would be unfair to other eliminated applicants.

Notice of competition ambiguous whether non-public health managerial experience acceptable. Employer should have made this point clear. While efforts were made to make applicants aware that such experience acceptable, evidence clear that appellant not aware and thus put at disadvantage.

Board acted unreasonably when it screened in applicant A without further inquiry to determine if she had required two years experience. This assumption of sufficiency contrasts with board's effort to determine period of time appellant had spent in her post as Acting Director Ambulatory Care (fourteen months), and calls into question the fairness of the process.

Appellant treated unfairly when board members took into consideration personal knowledge about positions previously held by applicants B and C. Board screened appellant's application based only on content of her resumé but gave advantage to applicants B and C by essentially reading in required experience:

> While I can accept that to use personal knowledge to screen [applicants B and C] into the competition probably resulted in a more accurate reflection of their real qualifications for the position of Team Manager as their qualifications and the requirements were described at the hearing, this could only be done if the Board undertook steps to put candidates whose experience was not known to the Board members in an equivalent situation.
>
> To compensate for the benefit conferred to some of the applicants through knowledge of the positions on the part of the Board members, the Board could have sought additional information through follow-up with candidates or by interviewing the candidates' current or former supervisors, or the Board could have conducted screening interviews to obtain a better account of each candidate's management experience...
>
> As a result, I cannot be satisfied that the selections for appointment to the Regional Team Manager positions in Moncton were based on merit as required by section 6 of the ***Civil Service Act***.

Assessment tools – whether interview appropriate tool to assess skills

Section 13
Eligibility list – list flawed when based on inconsistent treatment of applicants by board of examiners at interview

Grant v. Department of Natural Resources and Energy (2 December 1996)
Ombudsman: Ellen E. King

Concerning competition number 60-96-07 for the position of Forest Ranger IV (Assistant District Ranger) in Fredericton

Appearances: J. E. Stanley, Esq., for the appellant
I. Trueman, for the employer

Seven applicants satisfied required qualifications in closed competition and were interviewed by board of examiners. Four applicants, including appellant, received overall "A" rating and names placed on eligibility list. Deputy Minster selected successful applicant from eligibility list in accordance with s. 13(1) of Act.

Notwithstanding overall "A" rating, appellant disagrees with board of examiners assessment of "B" rating in relation to organizational skills. Evidence that appellant's supervisory and organizational skills are very good and that he has seniority over selected applicant. Evidence that appellant's supervisory experience includes experience as Hunter Education and Firearm Safety instructor, training military police officers, and work for Assistant District Ranger for short durations.

Witness with 16 years experience in staffing process testified on behalf of appellant that board of examiners lacked experience to assess applicants properly because one member sitting for first time as board member and experience of another member mainly in human resource rather than technical duties of position in competition. Witness of opinion that interview questions not suitable for purpose of assessing organizational ability and that both appellant and selected applicant not assessed on same basis in relation to one interview question. Selected applicant did not answer question six but board used answer to question seventeen and assessed selected applicant with "A" rating on both questions. No evidence that same treatment for appellant. Appellant answered question six specifically and board rated response a "B" rather than "A" rating assigned to response to question seventeen. Witness of opinion that, had board given similar benefit to appellant as given to selected applicant, appellant would have received "A" rating on question six, which would have changed his rating for Organizational Ability module from "B" to "A". Alternatively, if board had rated selected applicant's non-response to

question six as "NQ" then rating on Organizational Ability module would have been less than "A". Witness also of opinion that board erred in assessing appellant's responses to four interview questions at "B" rather than "A" level. Second witness called by appellant testifies that did not submit own application in competition because felt outcome of competition pre-determined and that competition weighted in favour of selected applicant because of training opportunities.

Employer argues that seniority not a factor in assessment because no such requirement in collective agreement. Employer agues that board assessed both appellant and selected applicant as "A" but that Deputy Minister has discretion to choose anyone from eligibility list. Employer argues board had necessary experience and competence to perform duties, that composition of board accords with usual practice, and that one board member qualified in relation to technical skills of position. Employer argues presence of fourth board member (who did not know applicants) increased objectivity.

Evidence that board permitted applicants to address answer to question 6 in response to question 17. Evidence that board considered appellant's answers to some questions not most appropriate. Employer argues that rating for purpose of determining eligibility list and that rating of specific questions/responses does not appear on that list and is therefore not relevant.

Decision: **appeal allowed**

Board did not err by not considering seniority as factor in assessment. Employer has management right per Act, s. 7 to establish selection standards:

> The Board has the right to decide the selection criteria that candidates are to meet and how they are to be assessed against those criteria. There is no evidence before me to indicate that seniority had to be considered in establishing the merit of the candidates in this competition (at p. 24).

Appellant has not established that board not competent to undertake duties of assessing qualifications of applicants. Three board members had technical background related to position. Moreover, only one of five assessment modules related to technical knowledge and skills. Evidence that board members had sufficient experience in staffing process to assess merits of applicants.

However, board failed to treat applicants in same manner with regard to question number six, which had impact on rating of Organizational Ability module.

Board must be able to provide reasonable explanation for assessment of applicants. Evidence that board inconsistent in assessing responses to question nine (pertaining to Supervisory Skills module) but that inconsistency does not necessarily explain different rating on module for appellant. Totality of evidence raises doubt as to whether overall ratings awarded to appellant and selected applicant reflect comparative merit:

> In considering the significance of any flaws or inconsistencies that may be detected in the processing of a competition leading to an appointment, one must decide whether those

matters that had been detected can influence the results of the competition (at p. 31).

I do not feel that merit is served in a competition by applying a formula for establishing the eligibility list which effectively erases differences in the degree to which the candidates satisfied the selection criteria as determined by the Qualifications Appraisal Board (at p. 31).

In result, Deputy Minister made selection from flawed eligibility list because candidates may not have been of equal merit.

Assessment tools – appropriateness of interview

Duguay v. Department of Health and Community Services **(14 November 1995)**
Ombudsman: Ellen E. King

Concerning competition number 35-94-0055 for the position of Social Work Supervisor, Bathurst.

Appearances: B. Duguay, for himself
S. Hallett, for the employer

Appellant served in position on acting basis pending competition for permanent appointment. Position created as result of restructuring. Appellant and selected applicant were only applicants. Both applicants exceeded required qualifications and were interviewed by board of examiners with selection standards divided into 4 modules: (1) Technical/Intellectual Skills; (2) Supervision Skills; (3) Communication/Decision Making Skills; (4) Organizational Skills. Board assessed appellant as "A" on two modules and "NQ" on two modules; board assessed selected applicant as "A" on all four modules.

Due to length of period during which held position on acting basis, appellant argues should have been confirmed in position without competition pursuant to Exclusions Regulation 84-230, s. 3.

Appellant argues that board decision tainted by reasonable apprehension of bias. Appellant alleges his supervisor opposed appellant accepting acting appointment but that later stated would support appellant's candidacy for position. However, evidence that supervisor's written performance appraisal following interview did not reflect verbal expression of support. Appellant argues that he is known to two of three board members and that they were not impartial due to previously formed opinion of appellant. Appellant questions "NQ" assessment because differently constituted board had assessed him as qualified on same standards for different position in 1991.

Appellant argues that board should have consulted his file to confirm his competence in areas found deficient based on interview. Appellant further argues that nature of work makes

adhering to a work plan impossible and that this reality caused alleged weakness in prioritizing work.

Evidence on behalf of employer that appellant received "NQ" rating on modules 2 and 4 (above) because responses did not demonstrate motivational skills and reflected problems in organizing and prioritizing work. Evidence that deficiencies noted by board also identified by supervisor in subsequent performance appraisal. Employer argues that not unusual for board members and applicants to know each other because usually appoint supervisor of position and Regional Director to serve as board members. Employer argues that mere knowledge of applicants does not render process partial and that, in any event, impartiality assured by participation of third board member, who had no personal knowledge of applicants.

Employer argues that employer (Regional Director) had right to decide how to fill new position and to do so by way of competition consistent with Act.

Decision: **appeal dismissed**

Employer not compelled to use Regulation 84-230 to fill vacant position. Employer exercised discretion to choose method of appointment as prescribed by Act.

In practice, difficult to avoid situations where board members do not have personal knowledge of other Department employees in competition. One feature of competition is to increase objectivity by reducing impact of personal opinions. Appellant failed to establish reasonable apprehension of bias:

> In this instance, I have considered the evidence and the arguments advanced by the appellant and I am not convinced that, at the time of the competition, there is any evidence that the Board members had any inclination to favor one candidate over another (at p. 17).

Employer has right under Act, s. 11 to decide assessment tools in regard to selection criteria. Evidence demonstrates that board determined ratings based on interview as selection tool. No evidence that interview incapable of comparing merit of candidates to selection criteria and to each other.

That previous board had assessed appellant as qualified is not relevant consideration. Board has duty to make independent assessment of applicants regardless of assessment made by different board in different process.

Delay in competition did not interfere with merit principle and does not compel employer to exercise discretion to invoke Exclusion Regulation 84-320.

Assessment tools: training and experience

Duke v. Department of Natural Resources and Energy **(2 September 1994)**
Ombudsman: Ellen King

Concerning competition number 60-94-06 for the position of Forest Ranger V

Appearances: H. Duke, for himself
I. Trueman for the Employer

Intra-departmental competition held to fill position to be created by retirement of incumbent. All three applicants met screening requirements as advertised and were further assessed by way of interviews. Board of examiners assessed successful applicant at "A" rating and other two applicants, including appellant, at "B" rating. Interview consisted of 17 questions divided into five modules: (1) Technical Knowledge; (2) Communication Skills; (3) Organizational Abilities; (4) Intellectual and Decision Making Abilities; (5) Personal Suitability, Interpersonal Skills and Motivation.

Appellant argues board did consider his additional training courses and that assessment influence by incumbent and perception of personality characteristics, not merit. Appellant argues that incumbent enhanced promotional opportunity of selected applicant by selected applicant assist incumbent in duties as Regional Inspector. Appellant argues such actions effectively pre-determined assessment by board. Appellant also argues that regional management and board had preconceived impression of his personality, which worked against him in competition. Appellant identifies one question as evidence that personality conflicts taken into account in selection process. Appellant also claims one board member prompted him on three questions to which he claims he had given the correct answer. Appellant asserts board member did this to push appellant to make mistakes.

Evidence that most Forest Rangers with long service would have similar training records as appellant. Evidence that board member prompted other applicants at interview as well as appellant. Such prompting for purpose of helping candidates demonstrate their level of knowledge. Specific question challenged by appellant re personality conflicts actually directed at problem solving skills.

Selected applicant testified that his former responsibilities included assisting Regional Inspector and denied that any promise had been made to him in respect to Regional Inspector's position.

Decision: appeal dismissed

Results of competition cannot be faulted simply because board did not use training and experience as rating factors:

> Under section 7 of the *Civil Service Act*, the employer has the right to establish the standards against which the merit of candidates is to be assessed. The standards, of course, must be reasonable in regard to the nature of the duties to be performed. In this instance, the appellant did not provide any evidence which would suggest to me that the selection standards set out in the Applicant Rating Guide (Exhibit 3) are unreasonable (at p. 10).

Appellant failed to establish that board assessment not consistent with merit principle. On evidence, selected applicant assisted Regional Inspector because of assigned duties per job description and appellant failed to demonstrate that board improperly influenced by performance of such duties. Regional Inspector not member of board of examiners

Prompting at interview for purpose of assisting, not harming, applicants. Evidence that for each instance of prompting, appellant assessed at "A" rating so no detriment to appellant.

Appellant failed to establish that specific question posed for purpose of having candidates reveal personal conflicts indicating that personality characteristics considered in competition. No evidence that Board labeled appellant as unsuitable for position (board assessed appellant at "B" rating).

No evidence that assessment of appellant based on other than selection standards.

Assessment tools: supervisory experience and seniority

Nicol v. Department of Natural Resources and Energy **(29 September 1994)**
Ombudsman: Ellen King

Concerning competition number 60-94-10 for the position of Operations Ranger, Hampton, N.B.

Appearances: D. Nicol, for himself
L. McCarthy, for the employer

In closed competition, board of examiners interviewed three applicants based on three assessment modules: (1) Technical Knowledge; (2) Management/Analytical Ability; (3) Communication/ Interpersonal Skills. Both appellant and selected candidate received 'A' rating and names placed on eligibility list. Appellant not selected by Deputy Minister.

Appellant argues that selection process failed to recognize his supervisory experience or seniority. Appellant questions whether selected applicant has sufficient supervisory experience to satisfy requirements as set out in advertisement. Appellant interprets notice of competition as requiring extensive supervisory experience as well as extensive experience in variety of field activities and administration. Appellant argues that position available because of early retirement of incumbent and that selection of other applicant influenced by need to eliminate another position of equal salary.

Employer argues that once candidate meets screening standard, experience no longer a factor in determining merit. With regards to selection, employer argues that Act, s. 13(1) confers discretion on Deputy Minister in making appointments from eligibility list. Evidence that early retirement option not premised on forfeiting vacant position of same pay range or from same region of early retiree. Must only forfeit position within same salary range. Evidence that notice of competition required candidates to have eight years experience is variety of fields, involving

supervision, not eight years of supervisory experience. Evidence that selected applicant had 8 years supervisory experience nonetheless.

Decision: appeal dismissed

Evidence establishes that possible appointment not restricted to selected applicant because of location and salary of position he occupied, but open to all employees of Department who possessed required qualifications:

> …the evidence indicates that positions at salary levels lower than that held by Mr. Lamb would have been an acceptable trade-off, and that included positions of District Rangers as occupied by the appellant (at p. 10).

Under Act, s. 13(1), Deputy Minister may exercise discretion in making selection from eligibility list. No requirement that Deputy Minister justify selection. Issue of seniority not included in Act as factor to be considered in assessing merit.

Section 7 of Act gives right to employer to set selection standards.

> Unless the standards are found to be unreasonable in consideration of the duties to be performed, or the method of assessment against those standards is faulty, I have no reason to intervene (at p. 13).

No evidence that method of evaluation faulty.

Notice of competition not specific with respect to requirement for supervisory and administrative experience. Employer's interpretation not unreasonable in consideration of wording and option available, as expressed in notice of competition, to apply equivalency standard to stated training and experience. No evidence that experience of selected applicant does not satisfy standards set for competition.

Assessment tools: appropriateness of interview process

Matchett v. Department of Transportation **(9 June 1998)**
Ombudsman: Ellen King

Concerning competition number 97-02-02 for the position of Stores Clerk in District 02 – Miramichi

Appearances: C. Hay, CUPE representative, for the appellant
M. Eastbrook, for the employer

Eight applications received in intra-departmental competition. Six applicants satisfied required qualifications and interviewed by board of examiners based on three assessment

modules: (1) Technical Knowledge/Expertise; (2) Communication/ Interpersonal Skills; (3) Position Suitability. Board assessed two candidates at 'A' rating and one applicant at 'B' rating. Eligibility list prepared with names of two "A" rated applicants.

Evidence that in 1992, appellant assigned to stockroom as runner with duties including traveling to various locations for parts and supplies, unloading trucks, stocking shelves and serving clients. In 1995, appellant assigned Stores Clerk duties in acting capacity, performed those duties for two years, and was trained by Storekeeper in all duties associated with Stores Clerk position. Appellant argues that he satisfied all requirements for position and feels more qualified for that position than selected applicant.

Appellant argues that assessment process not capable of establishing candidates' merit. Appellant noted discrepancies between standards listed in advertisement and in screening worksheet. Appellant argues that changing his rating from 'NQ' to 'B' in one module suggests irregularities in assessment process. Appellant further argues that board not consistent because it contacted appellant's supervisor to discuss job performance but did not do so for other candidates.

Evidence on behalf of employer that selected applicant rated at "B" in relation to two assessment modules and that his answers less clear and precise in comparison to those of selected appellant who board assessed at "A" rating. Employer argues that assessment process consistently applied to all candidates and that merit principle respected as required by s. 6 of Act. Discrepancies between notice of competition and screening worksheet acknowledged but employer argues that evidence supports board applied criteria expressed in notice of competition.

Decision: appeal dismissed

Appellant failed to establish that process as set out in documentation structurally flawed in respect to assessing merit of candidates. Proper application of assessment methodology to the selection criteria would identify candidates with most merit.

Anomalies with regards to language and experience between notice of competition and screening worksheet did not affect selection. Employer followed standards as advertised and selected applicant satisfied those standards.

It was irregular for the board to contact supervisor of one candidate to discuss performance without taking similar actions in respect of other candidates. Also irregular to change appellant's rating from 'NQ' to 'B' for reasons unrelated to assessment criteria. Merit of candidates must relate to selection criteria chosen by board. However, irregularities did not influence result:

> It is my opinion, that an irregularity must be such that it influences the results of a competition in respect to the merit of the appointment before I can rely upon that irregularity as a basis for allowing an appeal (at p. 22).

In this case, irregularities do not affect composition of eligibility list or selection for appointment available to Deputy Minister. Consequently, irregularities have not influenced results of

competition in respect to selection for appointment.

Section 13 Eligibility List

Section 13(1) Subject to this or any other Act, appointments to and from within the Civil Service shall be made through selection by the appropriate deputy head from an eligibility list provided by the Deputy Minister of the Office of Human Resources.

Eligibility list: selection of successful candidate by Deputy Minister

Breen and McNamee v. Department of Public Safety **(17 December 2001)**
(Ombudsman's delegate: J. McEvoy)

Competition number 01-78-15 for the position of Correctional Officer III (shift supervisor), Saint John Regional Correctional Center

Appearances: G. Breen, for himself
J. McNamee, for himself
G. Price, for the employer

Following interviews, board of examiners rated seven candidates as "B" and four candidates as "A" in accordance with rating system mandated by NB Reg. 84-229, s. 5(2). Deputy Minister made selection of successful candidate per Act, section 13(1).

Eligibility list presented the four "A" rated candidates in alphabetical order and did not include any ranking of these candidates. Contrary to usual practice, members of board of examiners had informally ranked the "A" candidates but Deputy Minister did not select first such ranked candidate. Appellants learned of this informal ranking of the candidates and appealed selection of third party in belief that consideration other than merit influenced selection of successful candidate.

Held: appeal dismissed

Appellants based appeal on misconception of process established for appointments under the *Civil Service Act*. Contrary to belief of appellants, Deputy Minister not required to select top ranked candidate presented on eligibility list. Eligibility list presents candidates in alphabetical order and Deputy Minister may, per subsection 13(1) of the Act, make a selection from that list.:

> Implicit in the legislation is that the Deputy Minister may exercise his or her discretion in making this selection... It is important to note that all persons placed on the eligibility list have been determined by the Qualifications Appraisal Board to be equally meritorious in relation to the performance of the functions and responsibilities of the position under consideration. It is that determination which assures that the merit

> principle, proclaimed by subsection 6(1) of the Act, is respected. Existence of a discretion in the Deputy Minister to select from among the equally capable candidates on the eligibility list does not detract from the merit principle under the Act.

In any event, no evidence that Deputy Minister failed to exercise discretion consistent with merit principle.

Eligibility list – appointments made to different positions from same eligibility list improper

Gautreau v. Department of Natural Resources and Energy **(17 March 1998)**
Ombudsman: Ellen E. King

Concerning Competition Number 60-95-13, originally used to fill position of Fire Equipment Officer and eligibility list later used to fill position of Forest Fire Operations Officer – both positions in the class of Forest Ranger V

Appearances: J. E. Stanley, Esq. for the appellant
P. Blanchet, Esq. for the respondent

Appointment made in 1995 from eligibility list after competition held for position of Fire Equipment Officer. In 1997, second appointment made from same eligibility list for position of Forest Fire Operations Officer, vacated by a retirement. Both positions classified as "Forest Ranger V," and both positions located in Fredericton area. No notice given that 1995 eligibility list might be used to fill subsequent openings for Forest Ranger V positions. Appellant challenged 1997 appointment on basis of differences between the two positions.

Evidence that questions used in 1995 competition were tailored to position of Fire Equipment Officer. Member of board of examiners admitted "that he has no evidence which indicates that [the selected candidate] is the best qualified individual to fill the job of Forest Fire Operations Officer" but maintained that a number of questions used in 1995 competition had bearing on assessment of merit for position of Forest Fire Operations Officer.

Disposition: appeal allowed; appointment revoked

On evidence, including review of job descriptions, positions "not the same and are indeed different… notwithstanding that the positions are both classified at the Forest Ranger V level, both positions have responsibilities associated with forest fires, and the positions at different times were assigned [some overlapping responsibilities]." Evidence that Forest Ranger V classification includes either "senior administrative and supervisory *or* senior technical and administrative work." Review of two positions reveals that Fire Equipment Officer position

relates to "senior technical and administrative work" and that of Forest Fire Operations Officer relates to "senior administrative and supervisory" duties.

Differences in the two positions are such that tools used to assess applicants for one may not be appropriate to assess applicants for the other:

> It is my opinion, that where two positions are different it cannot be said that the selection standards and the means of measuring candidates against those standards which have been established in respect to one of the positions equally apply to both positions.
>
> If it cannot be demonstrated that an assessment process is capable of establishing the merit of candidates for a position, it cannot be said that an appointment to that position as a result of that process is in keeping with the merit principle.

When two positions differ and employer wishes to re-use eligibility list, employer must "provide convincing evidence to demonstrate that the results of a determination of merit for one position can readily be transferred to a second position."

Eligibility list – list flawed when based on inconsistent treatment of applicants by board of examiners at interview

Grant v. Department of Natural Resources and Energy (2 December 1996)
Ombudsman: Ellen E. King

Concerning competition number 60-96-07 for the position of Forest Ranger IV (Assistant District Ranger) in Fredericton

Appearances: J. E. Stanley, Esq., for the appellant
I. Trueman, for the employer

Seven applicants satisfied required qualifications in closed competition and were interviewed by board of examiners. Four applicants, including appellant, received overall "A" rating and names placed on eligibility list. Deputy Minster selected successful applicant from eligibility list in accordance with s. 13(1) of Act.

Notwithstanding overall "A" rating, appellant disagrees with board of examiners assessment of "B" rating in relation to organizational skills. Evidence that appellant's supervisory and organizational skills are very good and that he has seniority over selected applicant. Evidence that appellant's supervisory experience includes experience as Hunter Education and Firearm Safety instructor, training military police officers, and work for Assistant District Ranger for short durations.

Witness with 16 years experience in staffing process testified on behalf of appellant that

board of examiners lacked experience to assess applicants properly because one member sitting for first time as board member and experience of another member mainly in human resource rather than technical duties of position in competition. Witness of opinion that interview questions not suitable for purpose of assessing organizational ability and that both appellant and selected applicant not assessed on same basis in relation to one interview question. Selected applicant did not answer question six but board used answer to question seventeen and assessed selected applicant with "A" rating on both questions. No evidence that same treatment for appellant. Appellant answered question six specifically and board rated response a "B" rather than "A" rating assigned to response to question seventeen. Witness of opinion that, had board given similar benefit to appellant as given to selected applicant, appellant would have received "A" rating on question six, which would have changed his rating for Organizational Ability module from "B" to "A". Alternatively, if board had rated selected applicant's non-response to question six as "NQ" then rating on Organizational Ability module would have been less than "A". Witness also of opinion that board erred in assessing appellant's responses to four interview questions at "B" rather than "A" level. Second witness called by appellant testifies that did not submit own application in competition because felt outcome of competition pre-determined and that competition weighted in favour of selected applicant because of training opportunities.

Employer argues that seniority not a factor in assessment because no such requirement in collective agreement. Employer agues that board assessed both appellant and selected applicant as "A" but that Deputy Minister has discretion to choose anyone from eligibility list. Employer argues board had necessary experience and competence to perform duties, that composition of board accords with usual practice, and that one board member qualified in relation to technical skills of position. Employer argues presence of fourth board member (who did not know applicants) increased objectivity.

Evidence that board permitted applicants to address answer to question 6 in response to question 17. Evidence that board considered appellant's answers to some questions not most appropriate. Employer argues that rating for purpose of determining eligibility list and that rating of specific questions/responses does not appear on that list and is therefore not relevant.

Decision: appeal allowed

Board did not err by not considering seniority as factor in assessment. Employer has management right per Act, s. 7 to establish selection standards:

> The Board has the right to decide the selection criteria that candidates are to meet and how they are to be assessed against those criteria. There is no evidence before me to indicate that seniority had to be considered in establishing the merit of the candidates in this competition (at p. 24).

Appellant has not established that board not competent to undertake duties of assessing qualifications of applicants. Three board members had technical background related to position. Moreover, only one of five assessment modules related to technical knowledge and skills.

Evidence that board members had sufficient experience in staffing process to assess merits of applicants.

However, board failed to treat applicants in same manner with regard to question number six, which had impact on rating of Organizational Ability module.

Board must be able to provide reasonable explanation for assessment of applicants. Evidence that board inconsistent in assessing responses to question nine (pertaining to Supervisory Skills module) but that inconsistency does not necessarily explain different rating on module for appellant. Totality of evidence raises doubt as to whether overall ratings awarded to appellant and selected applicant reflect comparative merit:

> In considering the significance of any flaws or inconsistencies that may be detected in the processing of a competition leading to an appointment, one must decide whether those matters that had been detected can influence the results of the competition (at p. 31).
>
> I do not feel that merit is served in a competition by applying a formula for establishing the eligibility list which effectively erases differences in the degree to which the candidates satisfied the selection criteria as determined by the Qualifications Appraisal Board (at p. 31).

In result, Deputy Minister made selection from flawed eligibility list because candidates may not have been of equal merit.

Eligibility list: selection of successful candidate by Deputy Minister

Nicol v. Department of Natural Resources and Energy **(29 September 1994)**
Ombudsman: Ellen King

Concerning competition number 60-94-10 for the position of Operations Ranger, Hampton, N.B.

Appearances: D. Nicol, for himself
L. McCarthy, for the employer

In closed competition, board of examiners interviewed three applicants based on three assessment modules: (1) Technical Knowledge; (2) Management/Analytical Ability; (3) Communication/ Interpersonal Skills. Both appellant and selected candidate received 'A' rating and names placed on eligibility list. Appellant not selected by Deputy Minister.

Appellant argues that selection process failed to recognize his supervisory experience or seniority. Appellant questions whether selected applicant has sufficient supervisory experience to satisfy requirements as set out in advertisement. Appellant interprets notice of competition as requiring extensive supervisory experience as well as extensive experience in variety of field

activities and administration. Appellant argues that position available because of early retirement of incumbent and that selection of other applicant influenced by need to eliminate another position of equal salary.

Employer argues that once candidate meets screening standard, experience no longer a factor in determining merit. With regards to selection, employer argues that Act, s. 13(1) confers discretion on Deputy Minister in making appointments from eligibility list. Evidence that early retirement option not premised on forfeiting vacant position of same pay range or from same region of early retiree. Must only forfeit position within same salary range. Evidence that notice of competition required candidates to have eight years experience is variety of fields, involving supervision, not eight years of supervisory experience. Evidence that selected applicant had 8 years supervisory experience nonetheless.

Decision: **appeal dismissed**

Evidence establishes that possible appointment not restricted to selected applicant because of location and salary of position he occupied, but open to all employees of Department who possessed required qualifications:

> …the evidence indicates that positions at salary levels lower than that held by Mr. Lamb would have been an acceptable trade-off, and that included positions of District Rangers as occupied by the appellant (at p. 10).

Under Act, s. 13(1), Deputy Minister may exercise discretion in making selection from eligibility list. No requirement that Deputy Minister justify selection. Issue of seniority not included in Act as factor to be considered in assessing merit.

Section 7 of Act gives right to employer to set selection standards.

> Unless the standards are found to be unreasonable in consideration of the duties to be performed, or the method of assessment against those standards is faulty, I have no reason to intervene (at p. 13).

No evidence that method of evaluation faulty.

Notice of competition not specific with respect to requirement for supervisory and administrative experience. Employer's interpretation not unreasonable in consideration of wording and option available, as expressed in notice of competition, to apply equivalency standard to stated training and experience. No evidence that experience of selected applicant does not satisfy standards set for competition.

Section 13(3)-(4) Right of appeal: notice or information from Deputy Minister

13(3) Where the initial selection of a person for appointment to a position within the Civil Service is made from an eligibility list provided after a closed or open competition, the Deputy Minister of the Office of Human Resources shall give to every unsuccessful candidate for that position a notice in writing that shows

(a) that he has not been appointed; and

(b) that he has,

(i) if he is an employee, a right to proceed under section 32, or

(ii) if he is not an employee and was a candidate in an open competition, a right to proceed under section 33,

within fourteen days after the date on which the notice under this subsection was sent to him.

13(3.1) Notwithstanding subsection (3), the Deputy Minister of the Office of Human Resources may direct that a notice in writing be given in accordance with subsection (3) where a subsequent selection of a person for appointment to a position within the Civil Service is made from the eligibility list.

13(4) Where the selection of a person for appointment to a position within the Civil Service is made without competition, the Deputy Minister of the Office of Human Resources shall by such method of notification as is considered appropriate in accordance with the regulations made by the Board, bring to the attention of every employee who would have been eligible to compete had a competition been held to fill that position

(a) the name of the person selected for appointment; and

(b) the right of every such employee to proceed under section 32 within fourteen days after the date on which notification was given under this subsection.

Right of appeal: selection of second appointee from eligibility list; Deputy Minister has discretion whether to issue notice; no right of appeal if no notice

Enman v. New Brunswick Community College – Saint John **(28 June 2001)**
Ombudsman: Ellen King

Concerning competition number 00-6240-008 for the position of Dean for Information and Technology, Health and Academic Studies at NBCC Saint John

Appearances: A. Enman, for himself
C. Spinney, Q.C., for the employer

Following selection of successful applicant in closed competition, employer informed appellant that been unsuccessful and advised of right to request reasons for decision. Appellant applied for reasons and employer informed appellant of right to appeal to Ombudsman under Act, s.32(3). Appellant did not appeal to Ombudsman because, per notice of appeal in this case, he "could not see valid grounds for such an appeal at that time."

Later, second position of dean came open and employer decided to fill position by selecting a person from eligibility list established in first competition. Appointment announced by internal memo on 16 January 2001. Per Act, s. 5, eligibility list for first competition valid for period of twenty-four months.

Appellant appealed second appointment to Ombudsman. Appellant argues that employer should have informed him of right of appeal in relation to second appointment. Employer challenged appellant's right to appeal and Ombudsman's jurisdiction to hear appeal.

Decision: **no right to appeal existed**

Employer under no obligation to inform appellant of right of appeal in relation to second appointment. Though appointment in issue made without competition, appointment made from eligibility list from first competition. Act, s. 13(3.1) states that in such circumstances, Deputy Minister "may" direct notice: " '*May*' is indicative of discretion, whereas '*shall*' denotes a mandatory action… therefore, that there was no requirement to give notice in writing to the appellant of the selection…."

In any event, appellant has no right of appeal under Act, s. 32(1). Right of appeal conditioned, per Act, s. 32(3) , that employee is "not satisfied with the statement of reasons or the information provided by the Deputy Minister of the Office of Human Resources". Here, Deputy Minister provided no such information:

Appeals of appointments by competitive process under section 32 of the *Act* are predicated…on the provision of notice, in accordance with the requirements of subsection 13(3) of the *Act*.

Section 17: temporary and casual appointment

Section 17(1) Temporary or casual appointments may be made by a deputy head or his or her delegate

(a) when, from a temporary pressure of work, extra assistance is required...

***Ross et al v. New Brunswick* (2002) 250 N.B.R. (2d) 198 (C.A.)**

For nearly a decade, Department of Transportation hired group of workers on a temporary or casual basis to assist in highway snow removal during winter months. Generally, work commenced in December and ended in March or April. In 1999, Department did not hire these workers who commenced an action for damages.

Trial judge found that workers were hired on a "temporary or casual basis," and were not "employees" within meaning of *Civil Service Act*, section 1. Accordingly, workers were not entitled to relief. Workers appealed to Court of Appeal.

Held: appeal dismissed

Drapeau J.A. (Larlee and Deschênes JJ.A. concurring):

Civil Service Act, section 17(1)(a) encompasses workers who are hired for any temporary work even that which is "recurrent and entirely predictable" such as annual snow removal.
A person appointed per section 17 is not an "employee" within the meaning of the *Act* (see s.1). Thus, s.20 (which provides that for application of ordinary rules of contract upon termination of employment) is not applicable to individuals appointed under s.17. Without an employment relationship, there is no implied right to a reasonable notice period for dismissal without cause.

Casual employee remaining beyond term does not gain permanent status as "employee"

***New Brunswick Public Employees Association and Thomas v. New Brunswick* (1989) 106 N.B.R. (2d) 287 (Q.B.) (Russell J.)**

Appellant Thomas employed as clerical employee on casual basis. She received two extensions of employment period and continued to work after expiration of extension periods. Thomas' work position approved for permanent status and competition held for permanent position. Thomas not selected for permanent position and laid off due to shortage of work. Thomas

grieved termination of employment. Adjudicator ruled in favour of preliminary motion by employer challenging jurisdiction of adjudicator to hear grievance. Thomas and appellant Union seek judicial review of adjudicator's decision.

Thomas argues she can only be "dismissed" for cause and that had gained status as "employee" per *Public Service Labour Relations Act* because of continued employment after expiration of term extension. Employer argues that continued service as casual worker gives rights under collective agreement but not under *Civil Service Act*, and a casual worker must be hired following competition to become an "employee". Employer argues that bureaucratic error which allowed Thomas to continue working after expiration of term extension does confer status as "employee".

Held: application dismissed

A temporary employee does not acquire permanent status because remains on the job for more than 6 months:

> The fact that the Commission or a Minister exceeds his jurisdiction under the Act in this respect confers no rights on the temporary employee [(*Re Lagace* (1977), 18 N.B.R.(2d) 670 at 676) at para. 12].

Section 17 authorizes temporary appointments and employees so appointed cannot acquire probationary status under Act.

Section 20 termination of deputy head or other employee – ordinary rules of contract

Section 20: Subject to the provisions of this Act or any other Act, termination of the employment of a deputy head or an employee shall be governed by the ordinary rules of contract.

Civil Service Act s. 20 re rules of contract vs s. 26 re lay-off

Flieger v. New Brunswick **(1991) 125 N.B.R. (2d) 228 (C.A.)**

Action for damages for wrongful dismissal. Plaintiff terminated as result of decision by Province to contract out highway patrol function to RCMP. Plaintiff claims not given reasonable notice of termination. Plaintiff argues application of Act, s. 20 regarding ordinary rules of contract and that termination of employment not result of "discontinuance of function" (per Act, s. 26) which mandates 30 days' notice under Regulation 84-229, s. 9(1)(b). In alternative, plaintiff submits 30 days referred to in regulation not maximum notice period but minimum. Respondent argues a discontinuance of function, that Act, s. 26 applies, and that Act, s. 20 is subject to s. 26. Respondent argues that discontinuance of function can result from contracting out work.

Held: **appeal dismissed**

Stratton C.J.N.B. (Hoyt and Rice JJ.A. concurring):

Appellant laid off as result of discontinuance of function:

> It is my opinion that the word "function" as used in s. 26 of the *Civil Service Act* has reference to the duties of the holder of an office. In the instant case, prior to February 1, 1989, Messrs. Flieger and McNutt held the office of Sergeant in the Highway Patrol. When they carried out their duties as officers of the Patrol they were performing the function of that office. Effective February 1, 1989, the New Brunswick Highway Patrol was abolished and disbanded. Their function as officers of the Patrol ceased to exist. When the duties of their office were terminated, there was, in my view, a discontinuance of a function within the meaning of that expression in s. 26.

Appellant's continued employment several months after notice and acceptance of alternative employment constitute reasonable compensation.

Section not applicable when position abolished by legislation

Welch v. New Brunswick **(1991) 116 N.B.R. (2d) 262 (Q.B.)(Jones J.)**

Plaintiff appointed to Licence Suspension Appeal Board created under *Motor Vehicle Act*. That Act later amended to repeal section creating Board and plaintiff's employment terminated. Plaintiff claims breach of employment contract and loss of wages until end of original contract. Defendant argues that abolition of statutory authority under which plaintiff means there is no authority to continue his employment and no obligation to pay damages in lieu of lack of reasonable notice (referring to *Reilly v. The King* (1934) 1 D.L.R. 434). Defendant argues plaintiff not "employed" within meaning of *Civil Service Act* and therefore s. 20 imposing ordinary rules of contract not applicable. Plaintiff argues cannot be terminated without cause.

Held: **action dismissed**

Defendant did not breach employment contract and thus not subject to liability. No statutory protection applicable to plaintiff. Plaintiff not "employed" under Act. Therefore, common law rule (as stated in *Reilly v. The King* (1934) 1 D.L.R. 434) applies:

> But the present case appears to their Lordships to be determined by the elementary proposition that if further performance of a contract becomes impossible by legislation having that effect the contract is discharged. In the present case the office held by the appellant was abolished by statute: henceforward it was illegal for the executive to continue him in that office or pay him any salary: and impossible for him to exercise his office.

Civil Service Act, s. 20 prevails over *Interpretation Act*, s. 20

Gregory v. New Brunswick **(1989) 97 N.B.R. (2d) 144 (Q.B.) (Russel J.)**

Plaintiff, former deputy minister in Department of Attorney General and Department of Justice, seeks declaration that termination of employment void and to set aside order-in-council effecting dismissal; to reinstate lost benefits; and to determine reasonable notice period for termination. In alternative, plaintiff seeks damages resulting from wrongful dismissal. Plaintiff claims decision to dismiss taken before first meeting of Executive Council, did not have approval of Executive Council and is therefore void. Plaintiff claims not provided with hearing and denied opportunity to defend his position. Plaintiff relies on s. 20 of *Civil Service Act* for damages in lieu of notice:

> Termination of the employment of a deputy head or an employee shall be governed by the ordinary rules of contract.

Defendant concedes plaintiff not dismissed for just cause but argues that plaintiff's public and personal identification with policies of former government incompatible with continued employment by newly elected government. Based on *Interpretation Act* which provides for appointments to be "at pleasure" though subject to any other Act, defendant argues that plaintiff held position "at pleasure" and not entitled to notice or damages in lieu of notice. Defendant argues *Interpretation Act* takes precedence over *Civil Service Act*.

Held: for plaintiff; damages awarded

Plaintiff's employment properly terminated. Allegation that dismissal void because not approved by Executive Council is without merit:

> The decision may well have been made by the Premier and his confidantes before October 27, 1987, and indeed, even before the election was held. Many positions are taken by political parties before they achieve power resulting in decisions implemented after a government is formed, and to say that the decision is invalid because its genesis took place prior to the formal shaping of the government is not a valid proposition. Order-in-Council 87-975 validly and effectively terminated the plaintiff's employment. (at para. 17)

Plaintiff not entitled to hearing and opportunity to defend his position. Plaintiff has another avenue in form of action for damages in lieu of notice.

Section 20 of *Interpretation Act* does not take precedence over section 20 of *Civil Service Act*:

> The *Interpretation Act* says in part that the public officer remains in office during pleasure only unless it is otherwise expressed in the Act under or in pursuance of which he is appointed… Thus the [*Civil Service*] Act which empowers the Lieutenant-Governor in Council to appoint deputy heads also says that the ordinary rules of contract shall apply with reference to the dismissal of deputy ministers, and I conclude this is the express reference mentioned in Section 20 of the *Interpretation Act*. Accordingly, s. 20 of the *Interpretation Act* has no bearing on this matter because the *Civil Service Act* is the Act controlling the method of appointment of a deputy minister….(at para. 26)

In absence of contract for definite period of employment, law presumes termination upon reasonable notice. Notice period began on date of dismissal. Reasonable notice ample to enable aggrieved person find similar employment or employment suited to skills. Age and length of service also important factors. Reasonable period of notice of termination is 18 months in circumstances. Plaintiff had duty to mitigate loss. Onus on employer to prove failure to mitigate and that comparable position likely would have been found. Defendant failed to satisfy onus of proof that plaintiff failed to mitigate loss; as result, notice period not reduced.

Civil Service Act, s. 20 prevails over *Interpretation Act*, s. 20

Hache v. New Brunswick **(1989) 97 N.B.R. (2d) 78 (Q.B.) (Stevenson J.)**

Action for wrongful dismissal. Plaintiff employed as Deputy Minister of Fisheries. Dismissed by order-in-council following change of government. Plaintiff argues termination of employment subject to ordinary rules of contract per *Civil Service Act*, s. 20:

> 20. Subject to the provisions of this Act or any other Act, termination of the employment of a deputy head or an employee shall be governed by the ordinary rules of contract.

Defendant argues that plaintiff subject to tenure "at pleasure" per *Interpretation Act*, s. 20:

> 20. Every public officer now or hereafter appointed by or under the authority of an Act, or otherwise, shall remain in office during pleasure only, unless it is otherwise expressed in his commission or in the Act under or in pursuance of which he is appointed.

Held: for plaintiff

In absence of statutory provision to contrary, public servants hold appointment at pleasure of Crown and are subject to dismissal at any time without cause.

If *Civil Service Act* subject to *Interpretation Act*, affirmative protection in s. 20 of *Civil Service Act* meaningless. Legislature did not intend to enact meaningless provision:

> In enacting s. 20 of the *Civil Service Act* the Legislature must be taken to have intended the words "termination of the employment of a deputy head ... shall be governed by the ordinary rules of contract" to have some real meaning. Under the ordinary rules of contract an employee who is dismissed without cause and without notice is entitled to damages. In my opinion, the only reasonable interpretation of s. 20 is that, despite the fact a deputy minister holds office at pleasure and may be removed by Order-in-Council without notice, in the absence of cause a deputy minister who is so removed is entitled to damages…

If there is a conflict between statutes, the one enacted later in time prevails. Therefore *Civil Service Act* prevails over *Interpretation Act*.

Section 21 employee for specified period, temporary or casual basis

Section 21(1) An employee who is appointed for a specified period ceases to be an employee at the expiration of that period.

21(2) A person who is appointed on a temporary or casual basis ceases to be employed at the expiration of the temporary or casual employment.

***New Brunswick (Treasury Board) v. New Brunswick Public Employees Assn. and Campbell* (1983) 49 N.B.R. (2d) 181 (Q.B.) (Creaghan J.)**

Respondent Campbell employed under term contracts as community college teacher in Bathurst for period September 1980 to February 1981 and March 1981 to July 1981 and further extension to December 1981. In January 1982, Civil Service Commission appointed another person to teaching position in Bathurst under term contract (for a "specified time"). Campbell grieved and argued violation of her recall rights under collective agreement. Adjudicator held in favour of Campbell. Previous adjudication had resulted in declaration that Campbell an "employee" for purposes of collective agreement. Community college employees became subject to *Civil Service Act* upon proclamation of *New Brunswick Community College Act*, S.N.B. 1980, c. N-4.01 on 2 October 1980.

Employer, Treasury Board, applies for judicial review of adjudicator's decision. Employer argues Campbell not an "employee" under Act and that adjudicator failed to consider Act, s. 25 [now s. 21(1)].

Held: application dismissed

Prior to 2 October 1980 when *New Brunswick Community College Act* proclaimed in force, Campbell not subject *to Civil Service Act*, s. 25 and enjoyed status as "employee" of Community College at Bathurst. Section 25 not intended to apply to person already engaged as probationary or regular employee when *Civil Service Ac*t applicable. By designation on employment form, employer could not modify status of Campbell as an "employee" so as to make s. 25 applicable.

Definition of "employee" per Act refers merely to "person employed" without reference to time frame. Reference to collective agreement furthers definition by providing that person remains "employee" for twelve continuous months after layoff.

Note: Appeal to Court of Appeal allowed and adjudicator's decision quashed. Adjudicator lacked jurisdiction to hear grievance because grievance not filed within the time periods per collective. See: ***Re Campbell; New Brunswick (Treasury Board) v. New Brunswick Public Employees Assn. and Campbell (1983) 49 N.B.R. (2d) 149 (C.A.)***

Former section of Act re indeterminate period of employment -- repealed

Mallet v. New Brunswick **(1982) 43 N.B.R. (2d) 309 (Q.B.) (Higgins J.)**

Action for wrongful dismissal due to mandatory retirement. Plaintiff employed by Department of Municipal Affairs as assistant to supervisor of Shippegan water plant. Plant commenced operations as federally funded project and plaintiff employed by town. Later, plaintiff accepted to be employed by Department with same duties at water plant. Employer unsuccessfully attempted to classify plaintiff as civil servant. Plaintiff did not wish to retire at 65 years age as required by Departmental policy. Employer advised plaintiff to use vacation days or would lose them and that he could not work after age 65. Plaintiff accepted retirement allowance. Plaintiff argues retirement contrary to *New Brunswick Human Rights Act* as discrimination in employment on basis of age. Employer argues that plaintiff voluntarily retired and received adequate notice. Evidence that plaintiff talked of retirement with other employee and aware of Department's retirement policy. Employer argues inherent right of Crown to dismiss an employee without notice in absence of contractual or statutory provisions to contrary and that Act, s. 24 applicable: "Subject to the provisions of this and any other Act and unless some other period of employment is specified, the tenure of office of an employee is for an indeterminate period". Employer argues plaintiff not an employed within civil service establishment.

Held: for plaintiff

Plaintiff did not voluntarily retire but rather was led to believe had to retire at age 65. Plaintiff employed by Crown but not employed within civil service as no such position or job classification within civil service. No statutory provisions or written contract assist plaintiff. Attempt by employer to reclassify plaintiff as civil servant signifies plaintiff more than servant at pleasure. Implied term of employment contract that plaintiff entitled to reasonable notice. In circumstances, reasonable period of notice is nine months.

Section 23 probationary employee

Section 23:
23(1) An employee appointed on other than a temporary or casual basis shall be considered to be on probation from the date of his appointment for a period of six months immediately following the date on which the person reports to the deputy head or his designate for duty;
...

23(3) Where an appointment is made from within the Civil Service, the deputy head or his designate may, if he considers it appropriate in any case, reduce or waive the probationary period.

23(4) The deputy head may, at any time during the probationary period, give notice to the employee and to the Deputy Minister of the Office of Human Resources that he intends to reject the employee at the end of such notice period as the Deputy Minister of the Office of Human Resources may establish for any employee or class of employees and, unless the Deputy Minister of the Office of Human Resources appoints the employee to another position in the Civil Service before the end of the notice period applicable in the case of the employee, the employee ceases to be an employee at the end of that period.

23(5) Notwithstanding anything in this Act, a person who ceases to be an employee pursuant to subsection (4)

(a) shall, if the appointment held by him was made from within the Civil Service, and

(b) may in any other case,

be placed by the Secretary of the Board on such eligibility lists and in such place thereon as in the opinion of the Secretary of the Board is commensurate with his qualifications.

New Brunswick Public Employees Association and Mazerolle v. New Brunswick (Board of Management) **[1991] N.B.J. No. 1137 (QL) (Stevenson J.)**

Individual applicant, a civil servant for 17 years, held position of Secretary II in Department of Agriculture. On 27 August 1990 she was promoted to Secretary III. On 31 January 1991 employer informed her that she would be rejected at the end of probationary period. Individual applicant dismissed and name placed on eligibility lists for positions for which qualified. Grievance unsuccessful. Individual applicant and union apply for judicial review.

Held: **application dismissed**

Act, section 23 is clear that only concessions made to permanent employee who accepts new position within the civil service are: possible waiver under s.24(3), at the discretion of the deputy head; and guarantee of place on appropriate eligibility lists under s.23(5). Employees who accept new appointment are not entitled to principles of natural justice during probationary period, and may be dismissed without cause:

> …the *Civil Service Act* makes that person's employment subject to special rules. One of those rules is that the deputy head concerned may reject the employee. In a case such as Mrs. Mazerolle's, because she was appointed from within the civil service, the Secretary of the Board of Management was required to place her on appropriate eligibility lists. That gives a limited form of protection to a career civil servant who, because of the provisions of subsection 23(4) of the Act, places his or her career in jeopardy by accepting an appointment to a better position unless the deputy head waives the probationary period.

Probationary rules per Act apply notwithstanding provision in collective agreement that employee who has completed probationary period not subject to discipline without just cause. By accepting new position and becoming probationary employee under Act, such employees are subject to termination without cause even though they may have already completed a probationary period.

Probationary status – when commenced

New Brunswick (Board of Management) v. Tessier **(1988) 91 N.B.R. (2d) 361 (C.A.)**

Appellant hired by New Brunswick Highway Patrol and commenced service 15 July 1985. In October 1985, appellant received letter stating that probationary period started 1 October 1985, but was told by Chief of Highway Patrol that six month probationary period commenced 15 July 1985 and that letter a clerical error. Employment of appellant terminated 24 February 1986. Appellant grieved dismissal and sought reinstatement. Appellant argues probationary period began 15 July 1985 and that termination, after expiration of 6 months probationary period, contrary to Act, s. 23(4). Adjudicator ruled in favour of appellant and found that probationary period commenced 15 July 1985. Decision quashed on judicial review. Judge held adjudicator exceeded jurisdiction and that probationary period began 1 October 1985.

Appeal to Court of Appeal. Appellant argues adjudicator's decision not based on interpretation of Act but a finding of fact. Respondent argues adjudicator entered upon interpretation of provisions of *Civil Service Act* and thus exceeded his jurisdiction.

Held: **appeal allowed**

Hoyt J.A. (Stratton C.J.N.B. and Ayles J.A. concurring):

Adjudicator did not exceed jurisdiction. Adjudicator's decision not based on interpretation of Act, s. 23 but finding of fact regarding appellant's employment status: :

> He considered that section, as he was obliged to do, to determine Mr. Tessier's employment status, and, on the facts found by him, concluded that Mr. Tessier's probationary period had expired by February 24, 1986 and thus he was protected by Article 10.02 of the Collective Agreement. This conclusion was, in my view, amply supported by the evidence and accordingly the first reason given by Mr. Collier [the adjudicator] should not have been disturbed.

Accordingly, appellant was not a probationary employee who could be discharged during probationary period without cause.

Probationary status – a term or condition of employment not subject to collective agreement

Petts and Canadian Union of Public Employees, Local 1251 and New Brunswick Council of Institutional Unions v. New Brunswick **(1984) 58 N.B.R. (2d) 68 (C.A.)**

Appellant Petts laid off from civil service position because of lack of work. Petts subsequently hired to different position in civil service on probationary basis and employment later terminated during probationary period. Appellant argues that, per collective agreement, he retains status as "employee" for one year after termination. Employer argues that clause in collective agreement is subject to Act, s. 26 which states that person ceases to be an employee upon lay off for lack of work.

Held: appeal dismissed.

La Forest J.A. (Stratton C.J.N.B. and Ryan J.A. concurring):

Parties to a collective agreement cannot change statutory term or condition of employment per *Public Service Labour Relations Act*, s. 63(2)(b). Provisions of *Civil Service Act* relating to probationary period are terms and conditions of employment that cannot be changed by collective agreement. Act, s. 26:

> is a term or condition of employment. So are the provisions of s. 19(1)(a) and s. 19(4) which provide that to be employed in the civil service a person must first be hired on a probationary basis, and that during such probationary period an employee is subject to

> being rejected. These terms or conditions of employment must prevail, and I do not think the provisions of the collective agreement can be harmonized with them except by altering them... The alteration required to harmonize them is not permitted by s. 63(2)(b) of the *Public Service Labour Relations Act*. (at para. 5)

Former provision permitting credit towards probationary period of time employed on temporary basis

New Brunswick (Treasury Board) v. Canadian Union of Public Employees, Local 1418 and Lebouthillier, **(1983) 56 N.B.R. (2d) 246 (Q.B.) (Deschênes J.)**

On 17 May 1982, respondent Lebouthillier hired as social worker on temporary basis. Permanent position became available and on 4 October 1982, Lebouthillier hired on probationary basis. Lebouthillier worked continuously between 17 May 1982 and 22 February 1983 when notified by employer of termination of employment.

Lebouthillier grieved termination seeking reinstatement and compensation for lost benefits. Treasury Board challenged jurisdiction of adjudicator to jurisdiction to adjudicate grievance. In preliminary ruling, adjudicator held in favour of jurisdiction and that Lebouthillier could not be discharged without cause.

Treasury Board seeks judicial review of adjudicator's decision. Treasury Board argues adjudicator has no jurisdiction because appellant has absolute right conferred by Act, s. 19(4) [now s. 23(4)] to dismiss a probationary employee. Lebouthillier argues that probationary period expired six months after she commenced employment on temporary basis (17 November 1982) and therefore not subject to termination without just cause per collective agreement. Treasury Board argues period of employment on temporary basis is cannot be credited towards probationary period.

Held: **judicial review granted and adjudicator's decision quashed.**

Act, s. 23(3) provides that period of time served as temporary employee *may* be credited against probationary period. However:

> In the context of the *Civil Service Act* and especially section 19 of this Act [now s. 23] it is clear that the legislator intended to leave this decision to the Deputy Minister and the parties to a collective agreement cannot take away from the Deputy Minister a decisional power conferred upon him by subsection 23(3). (at para. 20).

Collective agreement does not confer jurisdiction on adjudicator to determine that period during which employee works on temporary basis must or may be applied to probationary period. Therefore, adjudicator without jurisdiction.

Note that section 23(3) of the former Act (which permitted credit towards the probationary period of time employed on temporary basis) was repealed.

Section 26: lay-off

Section 26: 26(1) When the services of an employee are no longer required because of lack of work or because of the discontinuance of a function, the deputy head, in accordance with regulations made by the Board, may lay off the employee.

26(2) An employee ceases to be an employee when he is laid off pursuant to subsection (1).

26(3) Notwithstanding anything in this Act, for a period of one year after an employee has been laid off, the name of the employee who has been laid off shall be placed by the Deputy Minister of the Office of Human Resources on those eligibility lists for which in the opinion of the Deputy Minister of the Office of Human Resources the employee is qualified.

26(4) Notwithstanding subsection (2), an employee who is laid off is entitled during such period as the Deputy Minister of the Office of Human Resources may determine for any case or class of cases, to enter any closed competition for which he would have been eligible had he not been laid off.

Civil Service Act s. 20 re rules of contract vs s. 26 re lay-off

Flieger v. New Brunswick **(1991) 125 N.B.R. (2d) 228 (C.A.)**

Action for damages for wrongful dismissal. Plaintiff terminated as result of decision by Province to contract out highway patrol function to RCMP. Plaintiff claims not given reasonable notice of termination. Plaintiff argues application of Act, s. 20 regarding ordinary rules of contract and that termination of employment not result of "discontinuance of function" (per Act, s. 26) which mandates 30 days' notice under Regulation 84-229, s. 9(1)(b). In alternative, plaintiff submits 30 days referred to in regulation not maximum notice period but minimum. Respondent argues a discontinuance of function, that Act, s. 26 applies, and that Act, s. 20 is subject to s. 26. Respondent argues that discontinuance of function can result from contracting out work.

Held: **appeal dismissed**

Stratton C.J.N.B. (Hoyt and Rice JJ.A. concurring):

Appellant laid off as result of discontinuance of function:

> It is my opinion that the word "function" as used in s. 26 of the *Civil Service Act* has reference to the duties of the holder of an office. In the instant case, prior to February 1, 1989, Messrs. Flieger and McNutt held the office of Sergeant in the Highway Patrol. When they carried out their duties as officers of the Patrol they were performing the function of that office. Effective February 1, 1989, the New Brunswick Highway Patrol was abolished and disbanded. Their function as officers of the Patrol ceased to exist. When the duties of their office were terminated, there was, in my view, a discontinuance of a function within the meaning of that expression in s. 26.

Appellant's continued employment several months after notice and acceptance of alternative employment constitute reasonable compensation.

Lay off provisions are terms and conditions of employment and not subject to change by collective agreement

Petts and Canadian Union of Public Employees, Local 1251 and New Brunswick Council of Institutional Unions v. New Brunswick **(1984) 58 N.B.R. (2d) 68 (C.A.)**

Appellant Petts laid off from civil service position because of lack of work. Petts subsequently hired to different position in civil service on probationary basis and employment later terminated during probationary period. Appellant argues that, per collective agreement, he retains status as "employee" for one year after termination. Employer argues that clause in collective agreement is subject to Act, s. 26 which states that person ceases to be an employee upon lay off for lack of work.

Held: appeal dismissed

La Forest J.A. (Stratton C.J.N.B. and Ryan J.A. concurring):

Parties to a collective agreement cannot change statutory term or condition of employment per *Public Service Labour Relations Act*, s. 63(2)(b). Provisions of *Civil Service Act* relating to lay off of an employee are terms and conditions of employment that cannot be changed by collective agreement. Act, s. 26:

> is a term or condition of employment. So are the provisions of s. 19(1)(a) and s. 19(4) which provide that to be employed in the civil service a person must first be hired on a probationary basis, and that during such probationary period an employee is subject to being rejected. These terms or conditions of employment must prevail, and I do not think

> the provisions of the collective agreement can be harmonized with them except by altering them... The alteration required to harmonize them is not permitted by s. 63(2)(b) of the *Public Service Labour Relations Act*. (at para. 5)

Lay-off and eligibility lists

Lamarche v. Department of Natural Resources and Energy **(January 2001)**
Ombudsman: Ellen E. King

Concerning Competition Number 60-00-04 for the position of Forest Ranger V (District Ranger), Kedgwick

Appearances: M. Lemarche, for himself
P. Elliott, Esq., for the employer

Following selection process, board of examiners assessed two applicants as "A" and placed their names on eligibility list. Deputy Minister selected applicant D for appointment. Board assessed qualifications of appellant as "B" and his name not placed on eligibility list. Appellant, a Forest Ranger with fifteen years experience with Department, submitted application because his functions phased out in 2000 due to restructuring. Appellant argues that his name should have been placed on eligibility list regardless of relative merit because his job was affected by restructuring and because he received a qualified rating.

Appellant argues reasonable apprehension of bias in relation to one member of board of examiners. Selected applicant D married to board member's niece. Board member in issue served on board because of position as immediate supervisor of selected applicant. Prior to commencement of interview process, board member informed board chair of his conflict and told applicant D not to expect any assistance in competition. Board member testified that evaluated all applicants in same manner except that did not express opinion regarding quality of D's responses as readily as for other applicants, so as not to influence other board members. Employer argued important for immediate supervisor of prospective employees to participate in hiring process. Apparently not open to board member in issue to withdraw from board.

Disposition: appeal allowed, appointment revoked

Board did not err by not placing appellant's name on eligibility list as qualified employee affected d by restructuring. Appellant not laid off so not entitled per Act, s. 26 to have name placed on eligibility list for positions for which qualified.

However, impossible to conclude that merit principle respected in circumstances of this competition. Though Act silent on composition of board of examiners, clear that board must not only be competent to make assess qualifications of applicants but that board members "are entrusted with a duty of fairness in the exercise of their functions." Function of assigning relative

scores to applicants on selection modules involves a subjective assessment of responses to interview questions. Here, interview questions not designed to elicit responses that could be scored in objective manner:

> [the board member] was in a position to influence the scores to a degree that would not be possible to measure either in respect to the selected candidate or those in competition with the selected candidate.
>
> Because of the relationship between a Board member and the selected candidate in this instance, it is impossible… to conclude that the Board, so comprised, carried out a fair assessment of the qualifications of the candidates. Candidates are entitled to be assessed fairly and objectively and, given all of the circumstances of this case, I can not say that this was done. The inability of the Board to discharge the duty of fairness owed to the candidates has tainted the assessment process.

Section 32 Right of Appeal

32(1) Where a person is appointed or is about to be appointed under this Act to a position within the Civil Service and the selection of the person for appointment was made

(a) by closed or open competition, every employee who competed unsuccessfully in the competition, or

(b) without competition, every employee who would have been eligible to compete had a competition been held before an appointment was made,

may, within the time prescribed under subsection 13(3) or (4) as the case may be, apply in writing to the Deputy Minister of the Office of Human Resources for a statement of the reasons why he has not been appointed or for such other information that would assist him in deciding whether or not to appeal to the Ombudsman against the appointment.

32(2) The Deputy Minister of the Office of Human Resources shall provide the applicant employee with the statement referred to in subsection (1) or with the information requested under that subsection as soon as possible but in any case not later than thirty days after the date on which the Deputy Minister of the Office of Human Resources received the application.

32(3) Where the applicant employee is not satisfied with the statement of reasons or the information provided by the Deputy Minister of the Office of Human Resources, the applicant employee may, by notice of appeal, within fourteen days after the date on which the statement of reasons or the information was provided to him, appeal to the Ombudsman against the appointment.

Right of appeal: selection of second appointee from eligibility list; Deputy Minister has discretion whether to issue notice; no right of appeal if no notice

Enman v. New Brunswick Community College – Saint John **(28 June 2001)**
Ombudsman: Ellen King

Concerning competition number 00-6240-008 for the position of Dean for Information and Technology, Health and Academic Studies at NBCC Saint John

Appearances: A. Enman, for himself

C. Spinney, Q.C., for the employer

Following selection of successful applicant in closed competition, employer informed appellant that been unsuccessful and advised of right to request reasons for decision. Appellant applied for reasons and employer informed appellant of right to appeal to Ombudsman under Act, s.32(3). Appellant did not appeal to Ombudsman because, per notice of appeal in this case, he "could not see valid grounds for such an appeal at that time."

Later, second position of dean came open and employer decided to fill position by selecting a person from eligibility list established in first competition. Appointment announced by internal memo on 16 January 2001. Per Act, s. 5, eligibility list for first competition valid for period of twenty-four months.

Appellant appealed second appointment to Ombudsman. Appellant argues that employer should have informed him of right of appeal in relation to second appointment. Employer challenged appellant's right to appeal and Ombudsman's jurisdiction to hear appeal.

Decision: no right to appeal existed

Employer under no obligation to inform appellant of right of appeal in relation to second appointment. Though appointment in issue made without competition, appointment made from eligibility list from first competition. Act, s. 13(3.1) states that in such circumstances, Deputy Minister "may" direct notice: " '*May*' is indicative of discretion, whereas '*shall*' denotes a mandatory action… therefore, that there was no requirement to give notice in writing to the appellant of the selection…."

In any event, appellant has no right of appeal under Act, s. 32(1). Right of appeal conditioned, per Act, s. 32(3) , that employee is "not satisfied with the statement of reasons or the information provided by the Deputy Minister of the Office of Human Resources". Here, Deputy Minister provided no such information:

> Appeals of appointments by competitive process under section 32 of the *Act* are predicated…on the provision of notice, in accordance with the requirements of subsection 13(3) of the *Act*.

Right of appeal: applicant withdrew from interview

Duke v. Department of Natural Resources and Energy **(5 January 2001)**
Ombudsman: Ellen King

Concerning competition number 60-00-06 for the position of Forest Ranger V, in the Bathurst Department of Natural Resources and Energy

Appearances: H. Duke, appellant, for himself
P. Elliot, Esq., for the employer

Appellant is unsuccessful applicant in closed competition. Appellant's interview with board of examiners scheduled for 22 August 2000 at 3 p.m. but was advised that interviews running roughly 30 minutes late, so arrived for interview at approximately 3:15. Interview actually commenced at 4:50 p.m, when appellant brought to interview room. According to appellant, board members immediately proceeded to ask questions "without him first being given the opportunity to ask questions as is normally the case." Appellant asserts that no opening statement made prior to commencement of interview, that he felt uncomfortable with composition of board, and that he felt interview would be rushed owing to lateness of day. Appellant refused to proceed with interview and left.

Evidence that appellant requested a differently constituted board on basis that felt board member prejudiced against him but board informed him that was a common board and would be his only opportunity for an interview. Evidence of board members that no questions asked of appellant prior to his departure. Board considered that appellant had withdrawn from competition by refusal to participate in interview.

Employer challenged appellant's right to appeal and Ombudsman's jurisdiction to entertain appeal on basis that appellant had not unsuccessfully competed for position in question.

Decision: no right to appeal exists

Sole issue is whether appellant had right of appeal under s.32 i.e. did he unsuccessfully compete for position in competition. By withdrawing from interview process, appellant not "employee who competed unsuccessfully in the competition" within meaning of Act, s. 32(1)(a).:

> Mr. Duke knowingly and willingly refused to proceed with scheduled interview in circumstances that [the Ombudsman] find to reasonably have been interpreted by the Board as withdrawing from the competition.

Not necessary to consider appellant's allegations of possible prejudice because of feeling interview might be rushed etc.

Right of appeal: timeliness

Belanger v. Department of the Environment **(24 January 2000)**
Ombudsman: Ellen King

Concerning competition number 21-99-04 for the position of Regional Manager – Grand

Falls

Appearances: J. C. Friel, Esq., for the appellant
P. Blanchet, Esq., employer

Preliminary issue arose at hearing concerning jurisdiction.

Appellant an unsuccessful applicant for position. Appellant requested statement of reasons for decision. Employer responded by letter to appellant dated 1 November 1999 which is presumed to have been placed in postal system on 1 or 2 November 1999. Appellant asserts that he received letter on 5 November 1999. Appellant faxed notice of appeal "in confidence" to Ombudsman on 19 November 1999. Appellant understood from letter that he had 14 days to file appeal with Ombudsman. Appellant sent shorter notice of appeal on 22 November 1999 after being notified by Office of Ombudsman that original notice too long.

Employer argues that appeal was out of time as fourteen days appeal period commenced on date of letter, 1 November 1999. Employer argues that letter is property of recipient as soon as placed in care of Post and therefore November 1, 1999 letter belonged to appellant on November 2 at latest. Appellant asserts that staff of Office of the Ombudsman told him that if faxed notice of appeal by 19 November would satisfy fourteen day period provided under Act for filing appeal. Appellant argues that letter not "provided" until it is received and that Rules of Court provide 4 days for delivery by mail where no evidence to contrary.

Decision: objection to jurisdiction held good and appeal dismissed

Ombudsman could not proceed with 19 November 1999 notice of appeal because sent "in confidence". Hence, request that appellant send new notice of appeal. However, for purposes of limitation period, appeal held filed on 19 November 1999.

Appellant's evidence that he received letter on November 5, 1999 accepted. However, appeal period commenced when letter "provided" by Department not when received by appellant:

> …the term "*provided*" is imprecise in the context of subsection 32(3) of the *Act*, and, because of this, I have, as I am advised the Civil Service Commission did before me, turned to the *Act* to assist in interpreting what the legislators may have intended in respect to the appeal process.
>
> In the past, my Office has interpreted "*provided*" as contained in subsection 32(3) of the *Act* in the same manner as "*sent*" as per subsection 13(3) of the *Act*… It has been the practice of my Office, to calculate the time-frame for filing an appeal as commencing on the date on which the statement of reasons or the information was mailed to an employee by the Department which conducted the competition (at pp. 12-13).

Appeal period commenced with mailing of statement of reasons.

> I consider that an article is mailed when it is deposited with, or turned over to, the entity which is authorized by law to perform such operation as are necessary to deliver the article to the addressee. In other words, an article is mailed only when it is placed in the hands of Canada Post (at p. 13).

Evidence that letter mailed on 2 November 1999 and therefore appellant "provided" with statement of reasons on that date. Appeal period expired fourteen days later, on 16 November 1999.

Receipt of notice sent by fax is almost instantaneous and no time is lost in transit. Cannot be said that notice brought at any earlier date than received.

Because letter uses expression "within fourteen (14) days from the date on which the Statement of Reasons '*is given*'" instead of "*was provided*" as used in s. 32(3) of Act does not make information submitted improper.

Right of appeal: role of Ombudsman on appeal

Pilgrim v. Department of the Environment **(8 June 1999)**
Ombudsman: Ellen King

Concerning competition number 21-98-08 for the position of Air Quality Specialist

Appearances: W. Pilgrim, for himself
P. Blanchet, Esq., for the employer

Appellant asserts that interview process used to assess candidates' abilities not adequate measure of qualifications. Board of examiners considered that appellant failed to provide satisfactory answers in relation to two assessment modules. Appellant argues board erred by failing to give proper weight to academic record and his journal publications relating to air quality issues. Appellant asserts that his qualifications for position would have been more realistically measured through assessment of educational accomplishments, publications, and work performance.

Employer argues that appellant did not show that assessment tools -- interview questions, written assignment and marking guide -- did not establish merit of applicants. Employer argues that role of ombudsman not to reassess candidates in competition.

Decision: appeal dismissed

Role of ombudsman in appeal process is to decide whether appointment based on merit as required by Act. Act, section 7 confers right on employer to establish selection standards against which merit of candidates is to be assessed. Section 11 permits employer to determine

assessment tools to measure candidates' abilities as against standards.

> … it is conceivable that in establishing the assessment methodology to be used in this competition the employer could have incorporated into its assessment the measurements suggested by the appellant. However, there was no requirement for the employer to do so. Because such measurements were not incorporated do not, in my opinion, suggest that the assessment process was flawed (at p. 6).

Evidence fails to establish that assessment tools used by board of examiners did not establish merit of candidates in respect of selection standards.

Revocation of appointment – appeal relates to only one of two appointments from eligibility list – notice to second appointee – failure to respect merit principle -- both appointments revoked

NB Reg. 84-229
Disclosure of documentation – rating guides, application forms, interview questions and expected responses, notes of members of board of examiners

Kennedy v. Department of the Solicitor General **(14 January 1998)**
Ombudsman: Ellen E. King

Concerning competition number 96-78-18 for the position of Deputy Sheriff/ Coroner, Woodstock

Appearances: C. Hay, CUPE representative for the appellant
S. Cameron, for the employer

Appellant appealed one of two appointments made following competition on basis that selected applicant M did not satisfy required qualifications. Appellant did not challenge second appointment and expressly excluded second appointment from appeal. Second appointee H notified of appeal because of possible adverse outcome.

Preliminary issue regarding disclosure of documents. Appellant requested disclosure of Applicant Rating Guides in respect of all of the applicants on eligibility list (including the selected applicants); application forms of all applicants on eligibility list; questionnaires and responses recorded by members of board of examiners for all applicants on eligibility list; and expected responses to questions.

Board assessed all applicants on eligibility list, including appellant, at "A" level. Appellant argues that selected applicant M did not satisfy required qualification of "a minimum

of five years experience in a law enforcement and security environment or an equivalent combination of training and experience" as stated in notice of competition. Evidence from M's resumé that employment commenced on 10 April 1992 but that seniority date recorded by employer as 2 July 1993. Both these dates reflect less than five years relevant experience. Evidence that M had worked as part-time RCMP officer from 1981 through 1986. Board satisfied that experience qualification satisfied and did not consider it necessary to establish specific length of experience for applicant M.

Evidence of board member that board considered standards general rather than specific and that applicants assessed globally on responses to all nineteen interview questions. Board did not rate applicants in relation to each assessment module nor in relation to each question. Board member acknowledged that assessment not tied to number of acceptable responses to interview questions (i.e. points system not used because considered improper). Appellant argues that global assessment is too subjective and fails to respect merit principle because fails to identify applicants with most merit.

Disposition: **appeal allowed, both appointments revoked**

On preliminary issue, appellant entitled to all requested documents relating to appointment of M. However, as appointment of H not directly in issue (even though might be adversely affected by appeal decision), appellant not entitled to documents relating to applicant H and not entitled to access to documents relating to applications and assessments of other applicants named on eligibility list.

Global assessment process used by board not consistent with requirements of merit principle:

> [a] process whereby candidates are assessed in keeping with the requirements of the ***Civil Service Act*** must be capable of comparing the candidates to the selection standards in a manner that not only allows for determining which candidates meet the standards but also to identify the extent to which the candidates meet the standards. In other words, the process must meaningfully compare candidates to the standards and ultimately to each other so that the candidate or candidates who possess the most merit are distinguishable from the other candidates who also meet the selection standards but to a lesser degree.
>
> To assign an overall rating of A where the Board decided that, in total, the responses provided were acceptable, is simply too broad, subjective and generalized a rating plan to produce a reasonable account of the merit of the candidates.
>
> …a rating system based on a number of questions where many are subjective as in this case, must be comprised of manageable components. In terms of this competition, it could mean assigning ratings to the individual questions or to the specified selection modules in such a way that the ratings would allow for arriving at an overall rating by way of a roll-up of individual ratings. There are undoubtedly other ways for arranging a rating system into manageable components which can be used to arrive at an overall

> rating and which meaningfully compares the merit of the candidates to the standards and thereby to each other.

Act does not preclude use of numerical ratings in assessing candidates at intermediate stages leading to final assessment of A, B, or NQ.

Further, evidence does not demonstrate that M satisfied required qualification of five years experience. Evidence that experience of only 53 months with Department and that board accepted experience as part time RCMP officer to fulfill qualification. Board decision to permit M to pass screening stage not unreasonable but board should have confirmed that qualification satisfied before permitting M's name to be placed on eligibility list:

> [t]he purpose of the screening process is to determine if a candidate possesses a qualification(s) at a minimum acceptable level. The onus is on applicants in a competition to show clearly in their applications that they possess the minimum qualifications.
>
> …where assumptions were made as to the amount of experience that [M] had accumulated to allow him to be screened in for an interview… the Qualifications Appraisal Board should have confirmed that indeed he did meet the requirements of the competition. Such confirmation could have occurred either at the time of screening or at the time of interview, but certainly before the candidate was deemed to be eligible for appointment.

Thus, appointment of M revoked. Second appointment (of applicant H) also revoked because inadequacy of assessment process calls into question comparative merit of applicants and reasonableness of appointments.

Right of Appeal: Definition of "employee"

Chamberlain v. Department of Advanced Education and Labour **(27 February 1995)**
Ombudsman: Ellen King

Concerning competition number 94-6140-003 for the position of Community College Instructor, Saint John, N.B.

Appearances: R. W. Dixon, QC, for the appellant
C. Ross and B. Brideau, for the employer

Appellant employed on casual basis as Community College Instructor for initial period of 4 months from September to January, 1993. Term of employment extended to end of June, 1994. Appellant also worked month of September 1994. Employer deducted union dues for 7 months of appellant's employment. Appellant unsuccessful candidate in competition for

Community College Instructor position at New Brunswick Community College in Saint John. Appellant sought to appeal under s. 32 of Act.

Appellant argues is "employee" under Act, s. 1 definition of "employee". Appellant argues had 13 months of continuous employment (September to September) and that length of employment exceeds maximum limit on casual employment imposed by s. 17(3) of Act. Appellant argues that exclusion of persons hired under s. 17 from s. 1 definition of "employee" is not applicable because of length of employment period.

Employer argues appellant employed on temporary basis pursuant to s. 17(1) of Act, and that term extended pursuant to s. 17(2) of Act. Employer also argues that appellant's employment in September 1994 not continuation of employment but rather that appellant re-hired on temporary basis. Employer argues application of s. 21(2) of Act which states that person employed on temporary basis ceases to be employed when temporary period of employment expires. Employer admits clerical error resulted in deduction of union dues from appellant's pay.

Decision: **appeal dismissed.**

Appellant not an employee within meaning of Act and has no right of appeal per s. 32. Appellant's employment resulted from temporary appointment pursuant to s. 17 of Act and terminated on June 30, 1994. Appellant's return to employment in September 1994 did not result from employee status but from temporary appointment.

Appellant was not employee at time of competition:

> Since Mr. Chamberlain's employment at all relevant times was pursuant to an appointment(s) under section 17 of the Act, I cannot find that on being a candidate in this competition he was an "employee" in accordance with how this term is defined by the *Civil Service Act* (at p. 7).

Status under Act cannot be changed by fact of deducting union dues, whether or not such deduction in error.

Subsection 32(9) Remedies

Subsection 32(9) Upon having heard the appeal, the Ombudsman shall within ten days
(a) allow the appeal and deny or revoke the appointment, or
(b) dismiss the appeal.

Effective remedy

***MacDonald v. New Brunswick (Board of Management)* (1992) 131 N.B.R. (2d) 100 (Stevenson J.)**

MacDonald and 30 other individuals applied for position of Revenue Officer IV. Two applicants placed on eligibility list, including MacDonald. MacDonald not selected and appealed. Commission revoked appointment because selected applicant did not have required supervisory skills/experience. MacDonald had required skills/experience.

For various reasons, Department considered MacDonald not an appropriate fit in position and filled position through a secondment program – bringing in an individual office of Registrar of Motor Vehicles. On application for judicial review, MacDonald seeks an order that she, as only remaining eligible candidate, be appointed to position.

Held: order granted

Under Act, s. 32(9) Commission [now Ombudsman] is not authorized to select applicant from eligibility list who should have been appointed and award position to that person:

> The effect of a Commission decision revoking an appointment [in the circumstances of this case] is to restore the process or turn the clock back to the point when the eligibility list had been completed but the selection - appointment steps had not been taken.

Though employer not obliged to make appointment with every competition because competition may be cancelled, once process complete and appointment made, employer should not be able to then cancel competition:

> But once an appointment has been made and the appeal process invoked it is implicit that those responsible for the selection and appointment of someone to the position competed for should complete the process once the appeal has been concluded.

Here, MacDonald deprived of appointment by failure to respect requirement that appointment be based on merit. Department could not substitute its opinion for assessment made by board of examiners. Thus, Deputy Minister "exceeded his jurisdiction when he failed to select and appoint Ms. MacDonald after the Commission's decision."

Not every error in process justifies revocation of appointment – must be deviation from merit principle

Ouellet v. Department of Natural Resources and Energy **(11 March 2003)**
Ombudsman's delegate: J. McEvoy

Concerning competition number 60-02-33 for the position of Forest Ranger IV / Assistant District Ranger, (Saint-Quentin)

Appearances: J. Ouellet, for himself
K. Good Waite, for the Employer

During a pre-hearing conference, a number of matters raised in the appeal were determined not to relevant. In particular, the appellant's complaint to the Ombudsman asserted that the employer had failed to respect its own administrative policy # AD 4401 entitled " Information Requests, Appeals and/or Complaints". This policy reflects the employer's interpretation of its responsibilities in respect of competitions under the *Civil Service Act* and establishes certain standards and procedures applicable post-competition to deal with information requests, appeals and complaints by unsuccessful candidates. In his letter of appeal to the Ombudsman, the appellant had raised violations of this policy – for example, that contrary to the policy, the chair of the qualifications appraisal board had not signed the letter sent in response to the appellant's post-competition information request. These matters were held not relevant to an appeal under section 32 of the Act because the matters raised by the appellant in respect of policy # AD 4401 arose post-competition and are not directly related to the conduct of the competition under appeal nor to the merits of the candidates.

Notice of competition in issue was for ten positions as Assistant District Ranger at various locations throughout the province with each position identified by a distinct competition number. Two boards of examiners (one English language and one bilingual) assessed the applicants and conducted interviews. Only two persons submitted applications for the bilingual position in Saint-Quentin and were assessed by the members of the bilingual board. The appellant submitted separate applications for position in Saint-Quentin and one other location. Third party applied only for position in Saint-Quentin. Appellant argues that any error by the board of examiners justifies revoking the appointment of the third party as the successful candidate. He argues that he should have been granted two interviews (one for each position for which he submitted an application) and that the board members should have been knowledgeable about the specific organizational structures of the district in which the position under appeal is located. He argues that he suffered disadvantage because he had to be cognizant of two

districts while successful candidate had to be knowledgeable about only one district. Appellant had been advised of only one interview and did not seek information about a possible second interview before meeting with board of examiners.

Evidence on behalf of employer that, because of generic nature of job descriptions for the ten positions, each applicant granted one interview regardless of number of applications actually submitted and that board of examiners asked ten generic questions of each qualified applicant. No applicant received more than one interview. Appellant testified that board of examiners asked that he respond to one hypothetical question by referring specifically to the two districts to which his two applications related. Board members testify that appellant himself chose to respond by distinguishing between the two districts. Board members acknowledge their own lack of detailed knowledge of structures in the district of Saint-Quentin.

Decision: appeal dismissed

Not every error or disadvantage justifies revocation of an appointment. There must be such disadvantage as to undermine respect for the merit principle (per section 6(1) of the Act) in the selection of the successful applicant.

It is not necessary to resolve the factual discrepancy as to whether appellant required or chose to distinguish between districts in his response to a single interview question. Appellant had not been advised that would be granted two separate interviews so did not suffer any last minute change that might be expected to upset an already nervous applicant. On the contrary, appellant would have gained a distinct advantage had he been interviewed twice using the same generic questions. Board acted reasonably, efficiently and consistently with the merit principle when it granted only one interview per applicant regardless of the number of applications submitted by any one applicant. These were generic interviews for generic positions. On same reasoning, it is not a detraction from merit principle that board members were not knowledgeable about the specific organizational structure of the Saint-Quentin district.

Appellant also argues two secondary points. First, that the board of examiners failed to give appropriate weight to his experience which includes his supervision of successful applicant. This argument fails to recognize role of interview in competition process – it was through his responses to interview questions that appellant had opportunity to demonstrate strengths of his experience. Second, that language qualification should have required higher level of competence in English language – a competence which appellant claims to excel in comparison to successful applicant. However, on evidence presented, language competency qualification was established consistent with work team profile. On an appeal under section 32 of the Act, Ombudsman not to second-guess basic qualifications for civil service position. That, in general, is a management decision.

Not every error justifies revocation of appointment: irregularities in

process -- reference check of only one applicant, change in rating assigned one assessment module; differences between qualifications expressed in notice of competition and screening worksheet

Matchett v. Department of Transportation **(9 June 1998)**
Ombudsman: Ellen King

Concerning competition number 97-02-02 for the position of Stores Clerk in District 02 – Miramichi

Appearances: C. Hay, CUPE representative, for the appellant
M. Eastbrook, for the employer

Eight applications received in intra-departmental competition. Six applicants satisfied required qualifications and interviewed by board of examiners based on three assessment modules: (1) Technical Knowledge/Expertise; (2) Communication/ Interpersonal Skills; (3) Position Suitability. Board assessed two candidates at 'A' rating and one applicant at 'B' rating. Eligibility list prepared with names of two "A" rated applicants.

Evidence that in 1992, appellant assigned to stockroom as runner with duties including traveling to various locations for parts and supplies, unloading trucks, stocking shelves and serving clients. In 1995, appellant assigned Stores Clerk duties in acting capacity, performed those duties for two years, and was trained by Storekeeper in all duties associated with Stores Clerk position. Appellant argues that he satisfied all requirements for position and feels more qualified for that position than selected applicant.

Appellant argues that assessment process not capable of establishing candidates' merit. Appellant noted discrepancies between standards listed in advertisement and in screening worksheet. Appellant argues that changing his rating from 'NQ' to 'B' in one module suggests irregularities in assessment process. Appellant further argues that board not consistent because it contacted appellant's supervisor to discuss job performance but did not do so for other candidates.

Evidence on behalf of employer that selected applicant rated at "B" in relation to two assessment modules and that his answers less clear and precise in comparison to those of selected appellant who board assessed at "A" rating. Employer argues that assessment process consistently applied to all candidates and that merit principle respected as required by s. 6 of Act. Discrepancies between notice of competition and screening worksheet acknowledged but employer argues that evidence supports board applied criteria expressed in notice of competition.

Decision: appeal dismissed

Appellant failed to establish that process as set out in documentation structurally flawed in respect to assessing merit of candidates. Proper application of assessment methodology to the

selection criteria would identify candidates with most merit.

Anomalies with regards to language and experience between notice of competition and screening worksheet did not affect selection. Employer followed standards as advertised and selected applicant satisfied those standards.

It was irregular for the board to contact supervisor of one candidate to discuss performance without taking similar actions in respect of other candidates. Also irregular to change appellant's rating from 'NQ' to 'B' for reasons unrelated to assessment criteria. Merit of candidates must relate to selection criteria chosen by board. However, irregularities did not influence result:

> It is my opinion, that an irregularity must be such that it influences the results of a competition in respect to the merit of the appointment before I can rely upon that irregularity as a basis for allowing an appeal (at p. 22).

In this case, irregularities do not affect composition of eligibility list or selection for appointment available to Deputy Minister. Consequently, irregularities have not influenced results of competition in respect to selection for appointment.

Remedy – Not every error justifies revocation: irregularity in process – some but not all applicants invited to supplement application

NB Regulation 84-229
Qualifications and equivalency standard

Martin and Warfield v. Department of Advanced Education and Labour **(25 July 1995)**
Ombudsman: Ellen E. King

Concerning Competition Number 93-6140-011 for two positions of Community College Instructor - Electronics, NBCC Saint John

Appearances: R. Dixon, Q.C., for the appellants
C. Ross and R. Mabey, for the employer

Two appeals arising from same competition were heard together. Notice of competition in issue reads, in part:

> The successful candidate will be required to provide classroom and laboratory instruction in Electronics and also perform related duties in the areas of Mathematics, Physics,

> Computer and Communications (oral and written).
>
> Applicants must have a university degree in Science or Engineering and 3 years related industrial experience. Preference may be given to those with teacher training or a degree in Education and teaching experience in a post-secondary technical environment. Strong communication and inter-personal skills are also required. An equivalent combination of training and experience may be considered. Written and spoken competence in English is required.

Initially, board of examiners screened out both appellants because their applications did not demonstrate satisfaction of required qualifications. Later, board re-screened applications and screened in an additional eight applicants, including both appellants. Evidence that board requested appellant Warfield to provide additional information.

Appellants argues that selected applicant D did not satisfy the required qualification of 3 years of related industrial experience. Employer acknowledges this deficiency but noted that applicant D satisfied equivalency standard of "equivalent combination of training and experience as expressed in the notice of competition. Appellant Warfield argues that, on proper interpretation of notice of competition, "3 years related industrial experience" is a required qualification and could not be satisfied by equivalency standard. Evidence that selection tools included an interview and time limited written (30 minutes) exercise consisting of two questions. Evidence that applicant D, thinking someone would interrupt to announce end of 30 minutes period, continued to write for approximately 45 minutes but that other applicants submitted test responses within time limit.

Appellants argue that selected applicant A did not have training as a teacher nor any teaching experience and that A may have been unfairly advantaged because his wife also interviewed for position and board of examiners utilized standardized interview questions. However, evidence that applicant A's interview preceded that of his wife.

Disposition: **appeal allowed; appointment of selected applicant D revoked**
appeal denied re appointment of selected applicant A

Board erred in using equivalency standard to screen in applicants. Notice of competition expresses required qualifications in use of mandatory word "*must*" in relation to phrase "*university degree in Science or Engineering and 3 years related industrial experience*":

> The advertisement contained the statement 'applicants must have...' which the employer did not feel was binding because of the statement also contained in the advertisement which indicates that an equivalency may be considered... the use of the 'must' sets up a mandatory requirement that in the situation hereunder review, candidates possess certain qualifications... It is not what one might mean to say, but what one does say that is the guiding rule. By using the word 'must' in the initial statement of qualifications, the employer set up a mandatory requirement that candidates possess certain qualifications. In this instance, the qualifications were a university degree in Science or Engineering and

> 3 years related industrial experience.

Accordingly, equivalency standard not applicable and appointment of selected applicant D revoked. In context and on proper interpretation of notice of competition, equivalency standard expresses only possibility of preference.

Extra time taken by applicant D to complete written exercise (for which he is not responsible) raises question as to merit but issue is moot because of ruling on equivalency standard.

That selected applicant A has neither teacher training or teaching experience is irrelevant because not a required qualification. Notice of competition states that "preference may be given" to an applicant with these qualifications but does not require such qualifications. On evidence, applicant A did not gain interview advantage because of wife's participation as an applicant. His interview preceded hers.

That board requested additional information from appellant Warfield and may not have extended same benefit to all applicants is not shown to be relevant. Not every defect in process justifies revocation of appointment. Alleged defect must be relevant to appointment under Act:

> However, even if compensatory steps were not taken for other candidates resulting in this being an irregularity in the process, I could not allow an appeal on this basis because, in my opinion, the irregularity did not affect the outcome of the competition. An appeal is not directed against a selection process but against one or more appointments.

NB Regulation 84-229: desirable and necessary qualifications

2 "desirable qualifications" means the factors or circumstances, in relation to a position or class of positions, that are desirable, having regard to the nature of the duties to be performed, and that are to be taken into account, in addition to the necessary qualifications for the position or class of positions, when assessing candidates for the position or class of positions;

"necessary qualifications" means the minimum factors or circumstances, in relation to a position or class of positions, that are essential, having regard to the nature of the duties of the position or class of positions;

3(2) The Deputy Minister of the Office of Human Resources shall ensure that every statement of qualifications for a position specifies and differentiates between necessary qualifications and those qualifications, if any, that are desirable qualifications for the job.

Qualifications: other assessment facts – seniority, experience and performance evaluations

Douthwright v. Department of Transportation **(29 March 2003)**
Ombudsman's delegate: J. McEvoy

Concerning competition number 2002-D03-07 for the position of Carpenter (District 03, Moncton)

Appearances: S. Barton (CUPE rep), for the appellant
M. Estabrooks, for the Employer

This is an intra-Departmental or closed competition. All three applicants satisfied the minimum qualifications established in the notice of competition. Competitive process consisted of a written multiple choice test (128 questions) and a personal interview. No applicant succeeded in achieving the pre-determined passing grade on the written test so the board members (by consensus) lowered minimum passing grade from 70% to 60% (position had been vacant for approximately four years and employer wishes to make permanent appointment). Even with the

lower passing grade, only two applicants passed the test with a rating of B (the appellant and the third party). Appellant concedes that he suffered no prejudice by decision to lower passing grade. The written test constituted one of four assessment modules (technical skills) by which board assessed applicants. Interview assessed three modules: inter-personal skills, organizational skills, and communication skills. Board interviewed both appellant and third party and posed same questions to each. By consensus, board assigned overall rating of B to appellant and an overall rating of A to third party whose name was then placed on eligibility list.

Appellant argues that board members should have given greater weight to his more extensive experience compared to that of the third party; board should have consulted with his named referee to confirm his experience and skills; board should have given weight to his performance evaluations over the years; board should have considered his seniority relative to that of the third party; and that A, B, NQ assessment ratings are too subjective.

Decision: appeal dismissed

Appellant has not identified any failing by the board to respect the merit principle as expressed in section 6(1) of the *Civil Service Act*:

> What the appellant actually argues is that the board should have gone *outside* its assessment process and considered only factors more favourable to himself. In my opinion, the board fully respected and applied the merit principle by conducting a competition as mandated by the Act and Regulations and by treating each applicant in an identical manner. The evidence confirms that the board based its assessment of each applicant on pre-determined criteria and through a pre-determined process. The board was not under any duty to go outside that process. Instead, it was for the appellant to draw upon his skills and experience to formulate his responses to the questions posed on the written test and at the interview. The burden is upon an applicant to demonstrate his superior skills; it is not upon the board to search out evidence in support of an applicant.

Both appellant and third party satisfied minimum levels of requisite experience to be selected for an interview. Assessment criteria did not include length of experience nor annual appraisal reports.

Board did not err by not consulting appellant's referee. Having assessed appellant at an overall "B" rating and the third party an overall "A" rating, board had no reason to confirm appellant's experience and skills by consulting his referee . While seniority is a factor in circumstances identified by governing Collective Agreement, seniority not a factor given overall ratings assigned to appellant and to third party.

The A, B, and NQ ratings system is mandated by NB Regulation 84-229, section 5(2) and its alleged subjectivity is appropriately addressed by (i) the decisional control exercised by the presence of a three person board rather than a single decision-maker and (ii) by the discussion among the board members which led to a consensus on the ratings assigned to each applicant in relation to each selection module and in relation to the overall assessment ratings.

While each of the board members exercised their individual judgments, they achieved a consensus on the ratings assigned and did so on the basis of pre-determined standards. This was not a purely subjective and thus arbitrary assessment process. That the A, B, NQ assessment scores represent ranges of values does not taint them as subjective.

Required qualifications: phrase "related experience"

Rickard v. Department of the Environment and Local Government
(18 March 2003) Ombudsman's delegate: J. McEvoy

Concerning competition number 80-02-32 for the position of Director, Project Assessment Branch, Department of the Environment and Local Government

Appearances: K. Rickard, for himself
C. Spinney, QC, for the Employer
P. Vanderlaan, for himself (third party)

Board of examiners screened out appellant's application because considered him not to have "a minimum of eight (8) years of progressively responsible related experience". Appellant satisfied other qualifications. Evidence that board of examiners considered appellant to have "exposure" but not "experience" in relation to environmental matters. Board of examiners interpreted requisite experience "to be environmental related including such experience as: environmental management, environmental planning, environmental impact assessment, environmental protection, etc." Appellant argues that notice of competition should have expressed restricted interpretation applied by board.

Employer argues that "related experience" must mean related to the position and notes that, as this is an internal competition, appellant could have sought clarification of required qualifications specified in notice. Employer also argues that appeal should be dismissed because no effective remedy is available to appellant personally. Standard approach is if appeal allowed then competition reverts to point at which deviation from merit principle intervened. In this matter, that point is the drafting of the notice of competition. Notice would then be redrafted to express actual qualification consistent with interpretation of board of examiners. Thus, appellant could not satisfy qualifications and can achieve no personal benefit from this appeal.

The notice of competition states, in part:

> The Department of the Environment and Local Government is inviting applications for the position of Director, Project Assessment Branch.
>
> Reporting to the Assistant Deputy Minister, Science and Planning Division, this position plays a key role within the Department and in government, for the review and

> assessment of public and private sector projects requiring registration under the provincial Environmental Impact Assessment Regulation. The Director will manage a group of professional staff representing various scientific, engineering and planning disciplines.
>
> **Duties :** The duties include the oversight of the provincial Environmental Impact Assessment Regulation. This includes determining the need for proposed projects to be registered under the Regulation and making recommendations on the environmental acceptability of the projects. The job requires liaison with other provincial and federal departments, including the Canadian Environmental Assessment Agency, municipalities, the private sector and the general public. This position participates in various scientific assessment and planning initiatives of broad and
> strategic importance to the Province, including those of an inter-governmental and national nature.
>
> **Qualifications :** The candidate will bring to this position a master's degree in sciences, applied sciences, planning, engineering, public business administration, or other related disciplines, and have a minimum of eight (8) years of progressively responsible related experience, including management experience... As well, the candidate must have a minimum of two years experience in the direct management /supervision of employees.

Appellant argues that the phrase "related experience" is linked to the various academic disciplines which precede it in the same sentence; the employer argues that, in the context of the notice as a whole, the phrase refers to the duties of the position.

Decision: appeal dismissed

Primary issue on appeal is meaning of phrase "related experience" under heading "Qualifications" in notice of competition. Standard for interpretation is not what was intended or understood by person or persons who drafted notice of competition (an informed interpretation) but is grounded in "merit principle" as expressed in Act and Regulations. Section 3(2) of N.B. Regulation 84-229 requires that every statement of qualifications differentiate between "necessary" and "desirable" qualifications. Critical feature is that a potential applicant should be given such notice as to permit an informed decision regarding competition.

Phrase "related experience" is textually related to position rather than enumerated academic disciplines. Sentence begins with phrase "[t]he candidate will bring to this position" and then states two factors (i) an educational qualification and (ii) related experience. It is critical that these factors are expressed conjunctively. Literally and grammatically construed, phrase "related experience" is linked to "the position" earlier in the sentence. Considered in broader context of notice as a whole, environmental factor becomes clearer. Position is described as one with a "key role... for the review and assessment of public and private sector projects" under the E.I.A. Regulation. Knowledge and experience in environmental fields would appear essential to the proper functioning of position. Considered literally and in context,

competition notice is reasonably sufficient to inform a potential applicant that related environmental experience is a necessary qualification.

A notice should not present to interested potential applicants an exercise in interpretation; it should be clear, precise and unambiguous. Statement of qualifications could easily have been drafted to express "experience related to the position" or "related experience in environmental matters". The more informative the notice, the better served are both the employer and potential applicants.

Qualifications: required and desirable – role of equivalency standard

Doyle v. Department of Family and Community Services **(14 December 2002)**
Ombudsman's delegate: J. McEvoy

Concerning competition number 2002-FCS-048 for the position of Program Consultant, Adoption Services

Appearances: A. Doyle, for herself
P. Trask, for the Employer

Notice in Competition 2002-FCS-048 is expressed as follows:

> The Department… has an opening for a person to provide professional consultation in Adoption Services to both service delivery staff and management in the province...
>
> Candidates must possess a Masters Degree in Social Work and at least 5 years work experience, of which at least 3 years must be working with children's services. The ability to work effectively on an independent basis and within groups is essential. Project management skills are an asset. You must have strong oral and written communication skills, analytical and planning skills as well as the capacity to cope with short time deadlines. Some travel is required. Candidates must be actively registered with the New Brunswick Association of Social Workers. Written and spoken competence in English is required. An equivalent combination of training and experience may be considered.

Appellant, an employee with over thirty years experience, complains that board of examiners failed to assess her skills properly (particularly in light of her extensive experience) and takes particular exception to the "B" rating assigned to her by board in relation to three assessment modules. She also questions qualifications equivalency standard, observing that the third party does not have required graduate degree in Social Work.

The chair of the board of examiners testified that, when drafting the notice of vacancy, she established an unexpressed equivalency standard at a Bachelor of Social Work degree, the

requisite registration, and seven years experience with at least three years experience in children's services. Ten applications were received. Only two applicants had a Master's degree in Social Work, including the appellant. Three applicants were screened out because of a lack of NBASW registration qualification and one applicant withdrew. Thus, of six applicants interviewed, four benefitted from pre-determined equivalency standard. Following interview process, board of examiners rated applicants by consensus in relation to each module. Board gave no preference to long serving employees as such a preference would have been inconsistent with an open competition.

Decision: appeal allowed and appointment revoked

Appellant complains that she, but not the selected third party, satisfies the qualification regarding a graduate degree in social work. This specific complaint calls into question the role and function of the equivalency standard as applied in this Competition.

> Notice of Competition 2002-FCS-048 is expressed as follows:
>
> > Candidates **must** possess a Masters Degree in Social Work and at least 5 years work experience, of which at least 3 years must be working with children's services... An equivalent combination of training and experience **may** be considered.

Interpreted literally, this notice of competition expresses both a mandatory and a permissive set of qualifications. This notice does not comply with the requirement, per section 3(2) of NB Regulation 84-229, that a statement of qualifications "specifies and differentiates between necessary qualifications and those qualifications, if any, that are desirable qualifications for the job". By selecting for interviews applicants who satisfied the equivalency standard, the board of examiners effectively reversed the standards of "necessary" and "desirable" qualifications. Instead of treating the graduate degree and work experience combination as the necessary qualifications (as expressed in the notice by use of the word "must"), the board applied the equivalency standard as if it expressed the *necessary* qualifications and thereby treated the actual necessary qualifications, per the notice, as if they were only *desirable* qualifications:

> > The purpose of NB Reg. 84-229, section 3(2) is to facilitate effective notice to a potential applicant for a position in the civil service of New Brunswick. Such notice is intended to provide sufficient information to enable a potential applicant to decide whether s/he satisfies the necessary and desirable qualifications for a vacant position as well as information on the responsibilities and functions of the position. The potential applicant is thereby empowered to make an informed decision whether or not to submit an application. By applying the equivalency standard as it did, the board effectively established the actual necessary qualifications for the competition. *The board did not hold the equivalency standard in abeyance to be applied only if no applicant satisfied the "necessary" qualifications as expressed in the notice.* In this competition, the board applied the equivalency standard to screen in applicants

> notwithstanding that two applicants did in fact satisfy the "necessary" qualifications as expressed in the notice. A graduate degree in social work (combined with requisite work experience) is not a *necessary* qualification if some other combination of education and experience is also acceptable.

It is not a good practice to include a permissive reference to an undisclosed equivalency standard in a competition notice (as was done in this instance). First, such reference to an undisclosed equivalency standard fails to inform potential applicants of education and experience that is minimally acceptable with result that potential applicants are discouraged from submitting an application. Second, permissive reference to an equivalency standard implies that it is to be applied as an alternative standard if no applicant satisfies the necessary qualifications expressed in notice of competition. In present matter, this was a false implication because board applied equivalency standard notwithstanding existence of applicants who satisfied expressed "necessary" qualifications. Third, a willingness to accept an applicant who satisfies an equivalency standard means that what are expressed as *necessary* qualifications are in reality only *desirable* qualifications. Necessary qualifications should be necessary to successful performance of job functions and responsibilities.

Required qualifications – implication that supervisory skills required is not sufficient

Keirstead and McLaughlin v. Department of Transportation **(2 December 2002)**
Ombudsman's Delegate: J. McEvoy

Concerning competition number 2001-D04-25 for the position of Mechanic III (Hampton Bus Garage)

Appearances: T. Steepe (CUPE rep), for the appellants
M. Estabrooks, for the employer

Two separate appeals were joined for the purpose of this hearing. The English language version of Competition 2001-D04-25, an intra-Departmental competition, is expressed (in part) as follows:

> The Department of Transportation is seeking a Mechanic Supervisor for the Hampton Bus Garage.
>
> **THE POSITION**: The primary duties will be to supervise the work of others as well as being responsible for the planning and scheduling, distribution and monitoring of the work activities to ensure an efficient and productive shop.

> **THE PERSON:** Possession of a Journeyman's Certificate in the Heavy Equipment Repair Trade or Motor Vehicle Mechanic (auto) Repair Trade; and a Motor Vehicle Mechanic (Truck & Transport) certificate as issued by the New Brunswick Department of Training and Employment Development. Written and spoken competence in English is required.

Both appellants challenge ratings assigned by board of examiners following their individual interviews. There were five assessment modules: Technical Knowledge / Operational Skills; Communication / Interpersonal Skills; Organizational / Decision Making Skills; Supervisory / Management Skills; and Positional Suitability. Board members posed 35 questions to each candidate and made an overall assessment, by consensus, in relation to each assessment module. Evidence that employer's usual practice is to identify qualifications in notice of competition under heading "The Person". Evidence that members of board of examiners considered first appellant had perceived weakness in lack of supervisory skills and supervisory experience. Second appellant informed by member of board of examiners that his supervisory experience not the "same kind of work" as that intended for position of mechanic supervisor.

Appellants argue that rating process is too subjective and too general in use of "A", "B", "NQ" and that such rating is not grounded in objective pre-determined evaluative standards. The appellants also argue that the notice of posting does not comply with Regulation 84-229, section 3(2) because it did not specify necessary and desirable qualifications, particularly supervisory skills. Employer argues that express mention of "supervisory skills" qualification would have excluded otherwise interested applicants in this intra-Departmental and, in any event, "DUTIES" portion of notice sufficient to bring "supervisory skills" to attention of interested persons.

Decision: appeal allowed; appointment revoked

Evidence clear that interview and selection process conducted in good faith, professional and competent manner fully consistent with merit principle. Rating of applicants by use of "A", "B" and "NQ" system is established by NB Regulation 84-229, s. 5(2) and board of examiners conformed to that system.

Notice of Competition in issue expresses three qualifications *viz*. journeyman's certificate, motor vehicle mechanic certificate, and written and spoken competence in English. Supervisory skills were left to implication by virtue of description of duties under heading "THE POSITION". Supervisory skills not identified as either necessary or desirable qualification. Yet, supervisory skills became one of five assessment modules under heading "Supervisory and Decision Making Skills" and key element in the rating of applicants in relation to the module entitled "Positional Suitability". Logical conclusion is that supervisory skills were more than even a "desirable" qualification within meaning of NB Regulation 84-229, sections 2 and subsection 3(2); supervisory skills were effectively treated as a "necessary" qualification -- such skills became a decisive factor. Clear purpose of NB Regulation 84- 229, subsection 3(2) is to provide such information to potential applicants that an informed decision can be made as to whether or not to submit an application. Critical to this knowledge, as expressed by subsection

3(2), is identification of required and desirable skills. Such information cannot and should not be left to implication.

Required qualifications: notice of competition permits appointment of less qualified applicant at lower classification

Arseneault-Thibodeau v. Department of Health and Community Services **(December 1997)**
Ombudsman: E. King

Concerning competition number 35-96-0062 for the position of Clinical Psychologist I, Moncton, N.B.

Appearances: C.J. Sirois, CUPE rep., for the appellant
M. Léger, for the employer

Board of examiners interviewed four applicants in this open competition. Board assessment of applicants made by consensus based on responses to 22 pre-determined questions reflecting specific duties of position in competition. Questions organized into four assessment modules. Two applicants assessed as "A" rating and one of them selected as successful applicant after reference check. Appellant rated as "NQ" by board of examiners because of "NQ" rating assessed in relation to only one module, "Technical Knowledge". Appellant is licensed clinical psychologist presently employed in Clinical Psychologist I position. Successful applicant and one other applicant were rated as "A" applicants and are both psychometrists, a classification reflecting lower qualifications than that of Clinical Psychologist I. Evidence that notice of competition undertaken with knowledge that more persons are trained at psychometric level than to level of clinical psychologist and that competition stated that applicants not possessing all qualifications would be considered for appointment at the psychometric level. Evidence that board assigned overall "NQ" rating if applicant assessed as "NQ" in any module and assessed each module in relation to entirety of relevant questions so that non-response to any one question did not automatically result in "NQ" rating for that module.

Appellant argues that, as an experienced and licensed clinical psychologist, selection method/ assessment tool adopted by board of examiners failed to assess her qualifications properly in relation to other applicants – in particular, that an oral interview of approximately 60 minutes covering 22 questions is an inappropriate assessment tool. She argues that board should have given greater weight to her professional licence as a clinical psychologist and to her superior annual performance appraisals which did not identify any deficiency in technical knowledge. Appellant argues that she did not answer two of the seven questions in the "Technical Knowledge" module because of advice received from board member not to answer questions on licensing examination if unsure of response and, further, that non-response to question about identifying specific instruments used in relation to specific treatments does not indicate a lack of knowledge about the use of such instruments.

Held: appeal dismissed

Role of the Ombudsman on appeal is not to reassess the applicants nor "whether the tools or the process should have been different but whether they were sufficient to establish the merit of the candidates" as required by the Act, s. 6. Employer has right per Act., s. 7 to establish selection standards for a position under competition. In this matter, employer established four selection modules and rating guide expressed level of expertise expected in respect of each standard. Appellant did not challenge selection standards.

Act, s. 11 grants employer right to select assessment tools:

> The Act does not prescribe what tools must be utilized but it would have to be understood that the tools chosen must be capable of comparing and measuring the extent to which the candidates meet the standards set for the competition.

Interview questionnaire designed consistent with nature of duties of position and of associated clientele.

Board assessment acted reasonably in assessment of appellant's non-response to two interview questions. Whether or not appellant able to *use* the instruments was not in issue because question required her to *identify* relevant instruments. Appellant is responsible for decision not to respond and cannot rely on due given to her regarding examination at different time and different context:

> What I conclude from this, is that the appellant did not know the answers to the questions asked or that she was unsure of the answers, and in such a situation she decided against making a response. The appellant must accept responsibility for her actions in this regard and her decision not to offer a response does not diminish the suitableness of the questionnaire to assess the candidates.

Board did not err in treatment of appellant's professional licence qualification as representing knowledge and skills. Board must make own assessment:

> …I cannot conclude that being licensed in a field whether it be psychology, teaching, mechanics, etc. means that the person has the knowledge, skills and abilities to immediately undertake any job duties that fall within the field in which the person is Licensed. This is particularly so in fields of work which are subject to specialization. It is my view, that it was open for the Board of Examiners to assess the candidates in respect to the particular requirements of the position and to rate the candidates against the standards for that position. In carrying out its duty to establish the merit of the candidates, a Board cannot be bound by the results of an assessment process undertaken by a licensing body, but must be able to explain and justify the results of its assessment.

For similar reasons, board did not err in not attaching more weight to appellant's performance

appraisals /evaluations which are "completed at different times, often by different parties and for different purposes and usually, as in this case, they relate to a different set of duties and responsibilities than those assigned to the position under competition."

Board acted reasonably in treating differently a "NQ" rating on a module and a "NQ" on a single question:

> …there is a significant difference between failing to respond to one question and failing to demonstrate a knowledge, skill or ability determined to be necessary for carrying out the duties of a position in an effective manner.

Notice of competition clearly expressed that applicants who did not satisfy qualifications could be appointed at lower classification. Appointment of successful applicant at Psychometric level is not inappropriate in circumstance that no applicant qualified as clinical psychologist assessed as qualified by board. But, "view may well be different if one of the candidates in this competition had received a qualifying rating at the Clinical Psychologist I level thereby certifying the possession of qualifications at a higher level than that of Psychometrist."

Qualifications and equivalency standard

Martin and Warfield v. Department of Advanced Education and Labour **(25 July 1995)**
Ombudsman: Ellen E. King

Concerning Competition Number 93-6140-011 for two positions of Community College Instructor - Electronics, NBCC Saint John

Appearances: R. Dixon, Q.C., for the appellants
C. Ross and R. Mabey, for the employer

Two appeals arising from same competition were heard together. Notice of competition in issue reads, in part:

> The successful candidate will be required to provide classroom and laboratory instruction in Electronics and also perform related duties in the areas of Mathematics, Physics, Computer and Communications (oral and written).
>
> Applicants must have a university degree in Science or Engineering and 3 years related industrial experience. Preference may be given to those with teacher training or a degree in Education and teaching experience in a post-secondary technical environment. Strong communication and inter-personal skills are also required. An equivalent combination of training and experience may be considered. Written and spoken competence in English is required.

Initially, board of examiners screened out both appellants because their applications did not demonstrate satisfaction of required qualifications. Later, board re-screened applications and screened in an additional eight applicants, including both appellants. Evidence that board requested appellant Warfield to provide additional information.

Appellants argues that selected applicant D did not satisfy the required qualification of 3 years of related industrial experience. Employer acknowledges this deficiency but noted that applicant D satisfied equivalency standard of "equivalent combination of training and experience as expressed in the notice of competition. Appellant Warfield argues that, on proper interpretation of notice of competition, "3 years related industrial experience" is a required qualification and could not be satisfied by equivalency standard. Evidence that selection tools included an interview and time limited written (30 minutes) exercise consisting of two questions. Evidence that applicant D, thinking someone would interrupt to announce end of 30 minutes period, continued to write for approximately 45 minutes but that other applicants submitted test responses within time limit.

Appellants argue that selected applicant A did not have training as a teacher nor any teaching experience and that A may have been unfairly advantaged because his wife also interviewed for position and board of examiners utilized standardized interview questions. However, evidence that applicant A's interview preceded that of his wife.

Disposition: **appeal allowed; appointment of selected applicant D revoked**
appeal denied re appointment of selected applicant A

Board erred in using equivalency standard to screen in applicants. Notice of competition expresses required qualifications in use of mandatory word "*must*" in relation to phrase "*university degree in Science or Engineering and 3 years related industrial experience*":

> The advertisement contained the statement 'applicants must have...' which the employer did not feel was binding because of the statement also contained in the advertisement which indicates that an equivalency may be considered... the use of the 'must' sets up a mandatory requirement that in the situation hereunder review, candidates possess certain qualifications... It is not what one might mean to say, but what one does say that is the guiding rule. By using the word 'must' in the initial statement of qualifications, the employer set up a mandatory requirement that candidates possess certain qualifications. In this instance, the qualifications were a university degree in Science or Engineering and 3 years related industrial experience.

Accordingly, equivalency standard not applicable and appointment of selected applicant D revoked. In context and on proper interpretation of notice of competition, equivalency standard expresses only possibility of preference.

Extra time taken by applicant D to complete written exercise (for which he is not responsible) raises question as to merit but issue is moot because of ruling on equivalency standard.

That selected applicant A has neither teacher training or teaching experience is irrelevant

because not a required qualification. Notice of competition states that "preference may be given" to an applicant with these qualifications but does not require such qualifications. On evidence, applicant A did not gain interview advantage because of wife's participation as an applicant. His interview preceded hers.

That board requested additional information from appellant Warfield and may not have extended same benefit to all applicants is not shown to be relevant. Not every defect in process justifies revocation of appointment. Alleged defect must be relevant to appointment under Act:

> However, even if compensatory steps were not taken for other candidates resulting in this being an irregularity in the process, I could not allow an appeal on this basis because, in my opinion, the irregularity did not affect the outcome of the competition. An appeal is not directed against a selection process but against one or more appointments.

Eligibility Lists

NB Reg 84-229

> **5(2) The Deputy Minister of the Office of Human Resources shall**
> **(a) when establishing an eligibility list**
> **(i) specify in writing on the list the effective date and period of validity of the list,**
> **(ii) in accordance with subsection (2.1), award to each candidate in a competition one of the following assessment scores:**
> **(A) A, to those most qualified,**
> **(B) B, to those qualified, or**
> **(C) NQ, to those not qualified, and**
> **(iii) place on the list, surname first in alphabetical order, the names of all candidates who have been awarded the assessment score referred to in clause (ii)(A) and**
> **(b) when extending the period of validity of an eligibility list, inform the deputy head in writing that the period of validity of that list is extended and specify the period of extension.**

Eligibility list: selection of successful candidate by Deputy Minister

Breen and McNamee v. Department of Public Safety **(17 December 2001)**
(Ombudsman's delegate: J. McEvoy)

Competition number 01-78-15 for the position of Correctional Officer III (shift supervisor), Saint John Regional Correctional Center

Appearances: G. Breen, for himself
J. McNamee, for himself
G. Price, for the employer

Following interviews, board of examiners rated seven candidates as "B" and four candidates as "A" in accordance with rating system mandated by NB Reg. 84-229, s. 5(2). Deputy Minister made selection of successful candidate per s. 13(1) of the Act:

> 13(1) Subject to this or any other Act, appointments to and from within the Civil Service shall be made through selection by the appropriate deputy head from an eligibility list provided by the Secretary of the Board.

Eligibility list presented the four "A" rated candidates in alphabetical order and did not include any ranking of these candidates. Contrary to usual practice, members of board of examiners had informally ranked the "A" candidates but Deputy Minister did not select first such ranked candidate. Appellants learned of this informal ranking of the candidates and appealed selection of third party in belief that consideration other than merit influenced selection of successful candidate.

Held: appeal dismissed

Appellants based appeal on misconception of process established for appointments under the *Civil Service Act*. Contrary to belief of appellants, Deputy Minister not required to select top ranked candidate presented on eligibility list. Eligibility list presents candidates in alphabetical order and Deputy Minister may, per subsection 13(1) of the Act, make a selection from that list.:

> Implicit in the legislation is that the Deputy Minister may exercise his or her discretion in making this selection... It is important to note that all persons placed on the eligibility list have been determined by the Qualifications Appraisal Board to be equally meritorious in relation to the performance of the functions and responsibilities of the position under consideration. It is that determination which assures that the merit principle, proclaimed by subsection 6(1) of the Act, is respected. Existence of a discretion in the Deputy Minister to select from among the equally capable candidates on the eligibility list does not detract from the merit principle under the Act.

In any event, no evidence that Deputy Minister failed to exercise discretion consistent with merit principle.

Assessment ratings: appropriateness of NQ question vs NQ module

Arseneault-Thibodeau v. Department of Health and Community Services **(December 1997)**
Ombudsman: E. King

Concerning competition number 35-96-0062 for the position of Clinical Psychologist I, Moncton, N.B.

Appearances: C.J. Sirois, CUPE rep., for the appellant
M. Léger, for the employer

Board of examiners interviewed four applicants in this open competition. Board assessment of applicants made by consensus based on responses to 22 pre-determined questions reflecting specific duties of position in competition. Questions organized into four assessment modules. Two applicants assessed as "A" rating and one of them selected as successful applicant after

reference check. Appellant rated as "NQ" by board of examiners because of "NQ" rating assessed in relation to only one module, "Technical Knowledge". Appellant is licensed clinical psychologist presently employed in Clinical Psychologist I position. Successful applicant and one other applicant were rated as "A" applicants and are both psychometrists, a classification reflecting lower qualifications than that of Clinical Psychologist I. Evidence that notice of competition undertaken with knowledge that more persons are trained at psychometric level than to level of clinical psychologist and that competition stated that applicants not possessing all qualifications would be considered for appointment at the psychometric level. Evidence that board assigned overall "NQ" rating if applicant assessed as "NQ" in any module and assessed each module in relation to entirety of relevant questions so that non-response to any one question did not automatically result in "NQ" rating for that module.

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Held: appeal dismissed

Role of the Ombudsman on appeal is not to reassess the applicants nor "whether the tools or the process should have been different but whether they were sufficient to establish the merit of the candidates" as required by the Act, s. 6. Employer has right per Act., s. 7 to establish selection standards for a position under competition. In this matter, employer established four selection modules and rating guide expressed level of expertise expected in respect of each standard. Appellant did not challenge selection standards.

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Board assessment acted reasonably in assessment of appellant's non-response to two interview questions. Whether or not appellant able to *use* the instruments was not in issue because question required her to *identify* relevant instruments. Appellant is responsible for

decision not to respond and cannot rely on due given to her regarding examination at different time and different context:

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Board did not err in treatment of appellant's professional licence qualification as representing knowledge and skills. Board must make own assessment:

> …I cannot conclude that being licensed in a field whether it be psychology, teaching, mechanics, etc. means that the person has the knowledge, skills and abilities to immediately undertake any job duties that fall within the field in which the person is Licensed. This is particularly so in fields of work which are subject to specialization. It is my view, that it was open for the Board of Examiners to assess the candidates in respect to the particular requirements of the position and to rate the candidates against the standards for that position. In carrying out its duty to establish the merit of the candidates, a Board cannot be bound by the results of an assessment process undertaken by a licensing body, but must be able to explain and justify the results of its assessment.

For similar reasons, board did not err in not attaching more weight to appellant's performance appraisals /evaluations which are "completed at different times, often by different parties and for different purposes and usually, as in this case, they relate to a different set of duties and responsibilities than those assigned to the position under competition."

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NB Reg 84-229 section 12 Confidential information

NB Reg 84-229:

CONFIDENTIALITY
12(1) Unless otherwise determined by the Deputy Minister of the Office of Human Resources, no information supplied by or on behalf of a candidate shall be disclosed to any person who is not involved in the process of selection for appointment to the position.

12(2) Examinations, test papers and related aids used to assess the qualifications of candidates for positions in the Civil Service are the exclusive property of the Deputy Minister of the Office of Human Resources.

12 (3) Subsections (1) and (2) do not apply to the Commission in the exercise of its duties under the Act.

Disclosure of confidential documents for purposes of hearing appeal

Belanger v. Department of the Environment and Local Government **(31 August 2000) (Ombudsman's Delegate: J. McEvoy)**

Concerning competition number 21-99-04 for the position of Regional Manager, Department of the Environment and Local Government, Grand Falls

Appearances: J. Friel, Q.C. for the appellant
P. Blanchet, Esq, for the employer

Decision: appeal allowed and appointment of third party revoked. Employer directed to convene differently constituted board of examiners to assess candidates

Preliminary issue:

NB Reg. 84-229, s. 12 provides that "information supplied by or on behalf of a candidate" is confidential and shall not be disclosed. By consent of both counsel, documentary material provided to appellant's counsel following his undertaking (i) not to copy documentary material; (ii) to restrict access to documentary material; and (iii) to return documentary material to Office of the Ombudsman upon expiration of time period for an application for judicial review

of this decision, if no such application is made by appellant, or at expiration of any proceedings, should an application for judicial review be made by any party.

Disclosure of documentation – rating guides, application forms, interview questions and expected responses, notes of members of board of examiners

Kennedy v. Department of the Solicitor General **(14 January 1998)**
Ombudsman: Ellen E. King

Concerning competition number 96-78-18 for the position of Deputy Sheriff/ Coroner, Woodstock

Appearances: C. Hay, CUPE representative for the appellant
S. Cameron, for the employer

Appellant appealed one of two appointments made following competition on basis that selected applicant M did not satisfy required qualifications. Appellant did not challenge second appointment and expressly excluded second appointment from appeal. Second appointee H notified of appeal because of possible adverse outcome.

Preliminary issue regarding disclosure of documents. Appellant requested disclosure of Applicant Rating Guides in respect of all of the applicants on eligibility list (including the selected applicants); application forms of all applicants on eligibility list; questionnaires and responses recorded by members of board of examiners for all applicants on eligibility list; and expected responses to questions.

Board assessed all applicants on eligibility list, including appellant, at "A" level. Appellant argues that selected applicant M did not satisfy required qualification of "a minimum of five years experience in a law enforcement and security environment or an equivalent combination of training and experience" as stated in notice of competition. Evidence from M's resumé that employment commenced on 10 April 1992 but that seniority date recorded by employer as 2 July 1993. Both these dates reflect less than five years relevant experience. Evidence that M had worked as part-time RCMP officer from 1981 through 1986. Board satisfied that experience qualification satisfied and did not consider it necessary to establish specific length of experience for applicant M.

Evidence of board member that board considered standards general rather than specific and that applicants assessed globally on responses to all nineteen interview questions. Board did not rate applicants in relation to each assessment module nor in relation to each question. Board member acknowledged that assessment not tied to number of acceptable responses to interview questions (i.e. points system not used because considered improper). Appellant argues that global assessment is too subjective and fails to respect merit principle because fails to identify

applicants with most merit.

Disposition: appeal allowed, both appointments revoked

On preliminary issue, appellant entitled to all requested documents relating to appointment of M. However, as appointment of H not directly in issue (even though might be adversely affected by appeal decision), appellant not entitled to documents relating to applicant H and not entitled to access to documents relating to applications and assessments of other applicants named on eligibility list.

Global assessment process used by board not consistent with requirements of merit principle:

> [a] process whereby candidates are assessed in keeping with the requirements of the ***Civil Service Act*** must be capable of comparing the candidates to the selection standards in a manner that not only allows for determining which candidates meet the standards but also to identify the extent to which the candidates meet the standards. In other words, the process must meaningfully compare candidates to the standards and ultimately to each other so that the candidate or candidates who possess the most merit are distinguishable from the other candidates who also meet the selection standards but to a lesser degree.
>
> To assign an overall rating of A where the Board decided that, in total, the responses provided were acceptable, is simply too broad, subjective and generalized a rating plan to produce a reasonable account of the merit of the candidates.
>
> …a rating system based on a number of questions where many are subjective as in this case, must be comprised of manageable components. In terms of this competition, it could mean assigning ratings to the individual questions or to the specified selection modules in such a way that the ratings would allow for arriving at an overall rating by way of a roll-up of individual ratings. There are undoubtedly other ways for arranging a rating system into manageable components which can be used to arrive at an overall rating and which meaningfully compares the merit of the candidates to the standards and thereby to each other.

Act does not preclude use of numerical ratings in assessing candidates at intermediate stages leading to final assessment of A, B, or NQ.

Further, evidence does not demonstrate that M satisfied required qualification of five years experience. Evidence that experience of only 53 months with Department and that board accepted experience as part time RCMP officer to fulfill qualification. Board decision to permit M to pass screening stage not unreasonable but board should have confirmed that qualification satisfied before permitting M's name to be placed on eligibility list:

> [t]he purpose of the screening process is to determine if a candidate possesses a qualification(s) at a minimum acceptable level. The onus is on applicants in a

> competition to show clearly in their applications that they possess the minimum qualifications.
>
> …where assumptions were made as to the amount of experience that [M] had accumulated to allow him to be screened in for an interview… the Qualifications Appraisal Board should have confirmed that indeed he did meet the requirements of the competition. Such confirmation could have occurred either at the time of screening or at the time of interview, but certainly before the candidate was deemed to be eligible for appointment.

Thus, appointment of M revoked. Second appointment (of applicant H) also revoked because inadequacy of assessment process calls into question comparative merit of applicants and reasonableness of appointments.

Confidentiality -- disclosure

Arseneault-Thibodeau v. Department of Health and Community Services **(December 1997)**
Ombudsman: E. King

Concerning competition number 35-96-0062 for the position of Clinical Psychologist I, Moncton, N.B.

Appearances: C.J. Sirois, CUPE rep., for the appellant
M. Léger, for the employer

Prior to hearing, appellant's representative had access to interview questions used by board of examiners through arrangement. Access provided at office of Ombudsman through arrangement with Department.

As preliminary matter, appellant's representative at hearing sought disclosure of competition documentation including assessment forms including assessment scores of appellant and successful applicant, responses to interview questions by appellant and successful applicant and eligibility list. Employer entered into evidence copies of requested assessment forms but objected to disclosure of eligibility list on ground that it contained personal information regarding other applicants and objected to disclosure of interview notes prepared by board members regarding responses to questions by applicants ("working notes").

Held: disclosure ordered in part

Notes prepared by board members ordered to be disclosed to for review by appellant at hearing. Key is whether the material is "relevant in view of the grounds of the appeal and the purpose of the appeal provision under the *Civil Service Act*". Requested information is directly relevant to

appeal because board assessed appellant as "NQ" in relation to one assessment module. It is open to employer to call board member as witness to explain content of working notes.

Eligibility list not ordered disclosed. On consideration of grounds of appeal and arguments re disclosure, eligibility list not relevant to these proceedings.

Disclosure of confidential information for purposes of hearing

Gautreau v. Department of Natural Resources and Energy **(13 November 1997)**
Ombudsman: Ellen E. King

Concerning Competition Number 60-95-13, originally used to fill position of Fire Equipment Officer and eligibility list later used to fill position of Forest Fire Operations Officer – both positions in the class of Forest Ranger V

Appearances: J. E. Stanley, Esq. for the appellant
P. Blanchet, Esq. for the respondent

Preliminary issue regarding disclosure of documentation. Employer refused to provide appellant with assessment criteria and interview questions used in competition because disclosure would require employer to devise new questions for future interviews and this process, when repeated, would require the employer to devise progressively more difficult interviews in the future.

Disposition: documentation ordered released

Documents/information requested "directly relevant to the decision to be made in the appeal," and therefore should be available to appellant as relevant information in relation to his case on appeal. Employer ordered to provide Ombudsman with requested documents and that appellant and his representative be permitted to review documents in care of Ombudsman with understanding that not to make copies and that documents to be returned at conclusion of the hearing.

NB Reg 84-230 Subsection 3(c) employee laid off

(c) where an employee is laid off or is about to be laid off and a position within the Civil Service, for which the employee is qualified, is vacant or becomes vacant within the period determined by the Secretary of Board and the employee or former employee, as the case may be, is appointed to the vacant position, the provisions of subsection 6(1) and sections 13 and 32 of the Act do not apply to the position to which the employee or former employee, as case may be, is appointed.

Re-deployment list – applicant not selected from eligibility list to be treated as selected from eligibility list notwithstanding position on re-deployment list

Carr v. Department of Advanced Education and Labour (NBCCSJ) **(31 July 1997)**
Ombudsman: Ellen E. King

Concerning Competition Number 96-6140-004 for five positions as Field Services Officer at the NBCC Saint John

Appearances: J. E. Stanley, Esq. for the appellant
H. Cossaboom, for the employer

Appellant held position of Field Service Officer on term basis for periods totalling about six years. Board of examiners assessed appellant as not qualified in relation to two of six assessment modules.

Board assessment based on written response to one question and oral interview involving six other questions. Selection standards divided into six modules based on thirty-one selection criteria. Employer acknowledged that board assessment "took on a holistic approach" as board assigned score for each module based on responses to the seven questions. As such, the expected responses (which were "identified to be the benchmarks for assessing the responses") were not used as direct comparison in evaluation process. Appellant argues that subjective process failed to assess "merit" by substituting "impressions and feelings" of board members.

As preliminary matter, employer argued that one applicant appointed from eligibility list could have been appointed without regard to merit on application of Regulation 84-230 re redeployment list.

Disposition: **appeal allowed; appointments revoked**

On preliminary matter, appointment of applicant in issue made from eligibility list and not pursuant to Regulation 84-230 re deployment list. While Deputy Minister could have made appointment pursuant to that Regulation, did not do so and selection from eligibility list is subject to appeal under Act.

Assessment process used by board failed to satisfy merit principle. What is important is "not whether the tools or the process should have been better, but whether they were sufficient to establish merit." Though board had right to determine selection tools,

> The Board must... be able to provide a reasonable explanation for the manner in which the merit of the candidates was assessed and for the scores awarded to the candidates as a reflection of that merit.
>
> [i]t is also accepted, that the tools and procedures used must allow the Board to obtain some significant insight of the candidates' knowledge, skills and abilities in relation to the position requirements.

On evidence, seven questions provide insufficient basis to assess applicants in relation to thirty-one evaluation criteria:

> While the Board identified to the candidates prior to the interview the modules on which they were being measured, the candidates were not informed that their responses to each question were expected to reveal qualifications in each module, nor were they informed, and understandably so, of the selection criteria within the modules. Although, as already indicated, the questions are quite broad, it is unreasonable, in my opinion, to expect candidates to frame responses to each question which encompass elements of all of the selection modules, and especially without the direction that they were expected to do so.
>
> …the questions which are used to assess the merit of candidates must be such that a knowledgeable and capable candidate can reasonably determine from the question, or the directions given regarding the question, what the Board requires in response to the question.

Board used a small number of broad questions to rate applicants directly against selection criteria rather than against expected responses. On evidence, employer failed to satisfy burden of proof that board evaluated all applicants against a common frame of reference. Therefore, employer has failed to establish that board's assessment consistent with merit principle.