



Chapter 11- Recourse

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11.1 SOURCES OF INFORMATION

11.1.1 Legislation

[Public Service Employment Act: 2\(1\), 5, 6, 6.1, 7, 7.1, 7.2, 7.3, 7.5, 10, 12.1, 21, 23, 34.3, 34.4, 34.5, 42 and 43](#)

[Public Service Employment Regulations, 2000, 1, 2, 6, 7 & 19-29](#)
[Inquiries Act, Part II](#)

11.1.2 Other References

[Treasury Board's Policy on Deployment](#)

Appendix A — [Treasury Board directives for deployment and recourse](#)
[Deployment Complaints](#)

[Appeal Board' Practice & Procedures Guide](#)

Alternate Dispute Resolution - [ADR in Appeals \(Early Intervention Program\)](#)

Mediation of Complaints - [Mediation Guide](#)

[Recourse Branch](#)

[Guide to Corrective Measures Following an Allowed Appeal](#)

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11.2 POLICY STATEMENT

Unsuccessful candidates or persons adversely affected by a staffing decision and persons who believe that a serious irregularity has occurred in connection with such a decision shall be provided with appropriate recourse. To the extent possible, and where appropriate, employees and departmental decision-makers are encouraged to make every effort to address and resolve the dispute themselves.

11.3 VALUES-BASED APPROACH

Recourse is a means for ensuring that staffing decisions in the Public Service are taken in a fair, equitable and transparent manner, free from bureaucratic or political patronage and contribute to selection of competent individuals in a manner that is consistent with the various legislative requirements.

11.4 APPEALS

[Section 21](#) of the Public Service Employment Act gives employees a right to appeal appointments from within the Public Service, whether made by closed competition or without competition. The grounds for bringing an appeal are that the selection has not been made according to merit.

In the case of an appointment based on relative merit, the appeal will focus on whether the person being selected is the best qualified candidate and the process by which this was established, i.e. whether it permitted selection of the best qualified person in a fair, transparent, equitable and non-partisan manner. Appeals dealing with appointments based on individual merit will be examined on slightly different criteria, i.e. whether the standard of competence was reasonable and applied in a fair, equitable and transparent manner, as well as whether the person being appointed met the standard.

Certain appointments are not subject to the right to appeal, including those:

- made as a result of an entitlement to a statutory or regulatory priority;
- within the Executive Group;
- made on acting basis if the total duration is less than the period specified in the Regulations (usually four months);
- made in the context of an employment equity program under [section 5.1](#) of the Act;
- that pertain to casual employment;
- that result from open competitions; and
- made under certain exclusion approval orders, if the order specifies that they are not subject to section 21 of the PSEA.

Deployments, which are not appointments, may not be appealed but are subject to recourse. The deployment recourse process is described in greater detail in [section 11.10](#) of this chapter.

When an employee is being appointed or is about to be appointed, the department must inform unsuccessful candidates by letter or written public notice of the following:

- the name of the person being appointed or proposed for appointment;

- the name and ranking of successful candidates on the eligibility list, if the appointment is as a result of a closed competition;
- the unsuccessful candidate's right to appeal and the relevant legal authority, i.e. subsection [21\(1\)](#) or [21\(1.1\)](#), PSEA; and
- the period within which the appeal must be brought.

The period within which an appeal must be brought is specified in [section 21](#) of the Public Service Employment Regulations. It is 14 days from the date on which the unsuccessful candidate is considered to have been informed of his or her right to appeal. This date will vary depending on the means used to inform the unsuccessful candidate of the right to appeal. Letters sent through the mail may take longer to arrive at the unsuccessful candidate's location than those sent by email, fax or by hand or those posted publicly. Consequently, if a letter is sent by mail, the Regulations deem that an unsuccessful candidate has been informed of their right to appeal six days after the date of the postmark or postage meter impression that appears on the envelope.

Employees wishing to exercise their right to appeal must send a written document to the Commission within the appeal period. In exceptional circumstances, an appeal board may authorize an unsuccessful candidate to bring an appeal after the appeal period has expired. The unsuccessful candidate must be able to demonstrate that there were exceptional circumstances beyond their control that prevented them from bringing the appeal within the normal period. In such situations, the unsuccessful candidate must bring his or her appeal within 14 days after the exceptional circumstances cease to exist, but not more than 45 days after being informed of the right to appeal. Employees must also inform the Commission whether they wish their appeal to be heard in English or in French.

When an appeal is received, the Commission's Registrar acknowledges receipt of the appeal document and informs the department and the successful candidate(s). The Registrar will also examine the appeal document to determine if there are jurisdictional issues, such as whether the appeal is timely, whether the person bringing an appeal is an unsuccessful candidate or if they were within the area of selection at the time of a selection without competition. In situations where jurisdiction is not clear, the person bringing the appeal may be asked to provide additional information to help the Registrar or an appeal board determine how and by whom the matter should be addressed.

The Commission establishes an appeal board, which may be made up of one or more members, to conduct an inquiry to determine if the appointment or proposed appointment has been made according to merit. Appeal boards have all the powers of a Commissioner under Part II of the Inquiries Act including the right to summon witnesses, order the production of documents and administer oaths.

For more information about the role and jurisdiction of appeal boards, or in preparation for an appeal, please consult the list of Federal Court and Supreme Court of Canada decisions found at http://www.psc-cfp.gc.ca/recours/titlepage/decisions_e.htm.

11.5 FULL DISCLOSURE

Appellants (including their representatives) and the department (i.e. the representative, the manager and the members of the Selection Board) must complete full disclosure within 45 days of the acknowledgment of receipt of the appeal document. This means that the appellant has been given access to information and documents that pertain to him or herself or to the successful candidate(s) and that may be presented to the appeal board. Appellants and their representatives may request copies of this material. The Commission or the department may refuse to provide access to or copies of material that might threaten national security or a person's safety; prejudice the continued use of a standardized test; or affect the results of a standardized test by giving someone an unfair advantage. If an appeal involves the use of a standardized test that is owned by the [PSC's Personnel Psychology Centre](#) it must be contacted before any information about the test is disclosed.

For their part, appellants must submit their written allegations to the department during the disclosure period. The allegations must be sufficiently detailed to enable the department to respond. In exceptional circumstances, an appeal board may allow the allegations to be presented orally. However, new or amended allegations may only be presented at an appeal if they result from information that the appellant could not reasonably have obtained during disclosure. If problems arise during disclosure, e.g. difficulty obtaining copies of documents or allegations, the appellant or the department may contact the Registrar at any time to have an appeal board intervene to resolve the matter.

Although an appeal board may order an extension to the disclosure period, every effort should be made to complete the exchange of information, documents and allegations within the 45 days. Prolonged disclosure does not contribute to harmonious employee-employer relations, nor is it an effective or efficient means to resolve disputes. An appeal board may also order other measures that it believes are necessary to complete full disclosure.

11.6 EARLY INTERVENTION IN APPEALS

Early intervention is a voluntary process designed to assist appellants and departments to resolve matters before proceeding through an appeal hearing. It aims to address concerns relating to a selection process in a non-adversarial context; to facilitate an early, interest-based resolution; to assist with communication between the parties; and to increase the efficiency and effectiveness of appeal hearings. Successful candidates are not normally invited to participate in early intervention, because their rights and interests are protected by the appeal hearing itself, in the event that matters proceed to that stage.

The Commission, represented by a Recourse Officer, facilitates the early intervention process. The individual also ensures that the merit principle, the parties' rights and the independence of an appeal board are not compromised. The Recourse Officer also strives to facilitate:

- disclosure by helping to identify documents and information relevant to the appeal;

- resolution of concerns related to the staffing action, by discussing the jurisprudence and standards of proof applicable to the appeal and by identifying and resolving contextual or systemic matters that are unrelated to specific allegations;
- preparation for an appeal hearing by identifying issues that are within an appeal board's jurisdiction and by assisting the parties to clarify the allegations, so that they are concise and complete.

If asked to do so, the Recourse Officer may give an oral opinion on the merits of the arguments advanced by the parties. This opinion will not in any way bind an appeal board that may eventually hear the appeal.

Both the department and the appellant must be agreeable to early intervention, which is scheduled through the Registrar's Office. A joint request from the appellant(s) and the department, should be sent via fax to the Registrar at ((613) 996-7029). The request should indicate a range of availability dates and the location where the meeting will be held, which will help to expedite the process. Every effort will be made to conduct the early intervention within three weeks of the request from the parties. An appeal hearing will not normally be delayed because of an early intervention meeting, although in some cases it may be necessary to request an extension to the disclosure period.

If there is more than one appellant to a particular staffing action, the Recourse Officer will determine, in consultation with the parties, whether one or more early intervention meetings are appropriate. The preferred method is to conduct a joint meeting involving all appellants.

The appellant(s) and the department may wish to be accompanied during the early intervention meeting by a person whose role is to help them present their views and to work towards a mutually satisfactory resolution. This could include an appellant's union representative or legal counsel for either party.

Generally speaking, communications between the parties about the selection process will not be considered confidential, because this is information that could be obtained during the disclosure process. Information relating to the resolution of concerns may be treated as confidential. This will be determined by the parties with the advice of the Recourse Officer. In such a case, the parties may be asked to sign a confidentiality agreement.

All expenses incurred by the parties or their representatives are the responsibility of the appellant or the department, as the case may be. The cost of the services of the Recourse Officer will be assumed by the Commission.

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11.7 SCHEDULING

The Registrar will normally schedule a hearing 14 days from the end of the disclosure period and will inform the department and the appellant, as well as their respective representatives of the date and the place of hearing. In certain exceptional cases, such as where an acting or specified period appointment is due to end shortly, the hearing may be scheduled before disclosure has been completed. Under the terms and conditions of employment and the various collective

agreements, appellants, their representatives (if they are employees of the department), witnesses, members of the Selection Board and the successful candidates are entitled to leave with pay if they attend the appeal hearing.

Occasionally, appeal hearings may be conducted by conference call. This is often done when a department wishes to concede an appeal or to resolve an issue relating to disclosure or jurisdiction.

Departments and appellants, or their representatives are encouraged to inform the Registrar's Office immediately if they believe that the appeal should be fast-tracked.

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11.8 CORRECTIVE MEASURES FOLLOWING ALLOWED APPEALS

If an appeal board decides that an appeal must be allowed and depending on the nature of the defect(s) identified in the decision, the Commission will either revoke the appointment or take measures that it believes are necessary to remedy the defect(s). A Commission representative will contact the parties about the appropriate [corrective measures](#). This is normally done by teleconference, but may be done in a meeting, and is followed-up in writing.

Any appointments resulting from the corrective measures will be subject to a new right to appeal, however, unsuccessful candidates may only appeal on the ground that the corrective measures do not result in a selection according to merit.

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11.9 INVESTIGATIONS

The Commission -- through its Recourse Branch -- may investigate any matter within its jurisdiction and for which there is no other recourse under the PSEA. The Commission may inquire into such things as complaints about open competitions, whether the [statement of qualifications](#) affords a basis for selection according to merit under section [12.1 of the Act](#), reverse order of merit processes and the administration of eligibility lists or priorities for appointment.

Employees may bring a complaint about a reverse order of merit process to the Commission within 14 days of having been notified of the outcome of the process.

An investigation may be initiated by an individual contacting the Commission in writing. Based on the information provided, the Recourse Branch will determine if the issue is within the Commission's jurisdiction, whether there are reasonable grounds to investigate and whether the matter has been brought to the Commission on a timely basis. Normally, an investigation will be considered if the request comes within a year of the action giving rise to the complaint.

The department will be informed that a complaint has been received and offered an opportunity to respond. The Recourse Branch will offer the parties the option of addressing the complaint and attempting to resolve the dispute with the assistance of a mediator. A mediated resolution is not based on a finding of fault, it is simply an alternate means to address the issue. In those cases where mediation is not successful, an investigation will be carried out.

The inquiry can take many forms, but begins by establishing the facts, either on-site, in writing or by teleconference. The parties may be represented or not, at their discretion. The parties have a right to know the allegations or complaints against them and to respond in kind. The Recourse Branch officer will prepare a written report setting out their findings, conclusions and recommendations. This report is provided to the parties and to the Commission.

In the event that it is concluded that the complaint is founded, action is taken with the parties to conciliate a resolution of the case. The Commission also may take or order a deputy head to take such corrective action as it considers appropriate. If, at any time during the investigation, an agreement can be reached between the parties the complaint may be resolved.

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11.10 DEPLOYMENT INVESTIGATIONS

As described in [Chapter 9, Deployments](#), the employee being deployed and employees in the work unit to which a deployment is being made have the right to complain to the deputy head (or their delegate) about that deployment. The PSEA sets out the grounds for bringing a complaint, which are that the deployment was not authorized by or made in the accordance with the Act or that it constituted an abuse of authority. The [Treasury Board Directives for Deployment and Recourse](#) require that employees be informed of the deployment and the related recourse no later than 10 days from the effective date of the deployment. Although departmental policies may vary, as a minimum employees must be given at least 10 working days within which to bring a deployment complaint.

After reviewing the complaint, deputy heads must inform the complainants in writing of the disposition of the complaint or any proposed action related to corrective action arising from the review. This must be done within 20 working days of receipt of the complaint, unless this period has been extended to afford the parties an opportunity to state their case and to give the deputy head (or delegate) sufficient time to inquire into the matter and reach a decision. It is in everyone's best interests for the inquiry to be conducted and resolved as quickly as possible.

At the time that the deputy head (or delegate) informs the employees of the disposition of the complaint, they must also be informed of their right to refer their complaint to the Commission in writing if they are not satisfied with the deputy head's disposition. A complaint to the Commission, which may be brought by the employee being deployed or others in the work unit who had complained to the deputy head, must be brought within 14 calendar days of being notified of the deputy head's decision.

When a deployment complaint is received, the Commission's Registrar acknowledges receipt and refers the case to a deployment investigator. The investigator will first determine if there are jurisdictional considerations, such as whether the complaint is timely, whether the person bringing the complaint is eligible to do so, and whether the complaint was previously reviewed and disposed of by the deputy head. As with the departmental review, the purpose of the Commission's deployment investigation is to establish whether the deployment was not authorized by or made in accordance with the PSEA, or constituted an abuse of authority.

The employee bring the deployment complaint, the employee being deployed, their respective representatives, and the deputy head's representative may all be present at a hearing into a

deployment complaint. The investigator will report his or her findings and recommendations in writing to the parties as soon as possible following the hearing or the reception of the last piece of evidence submitted by the parties.

If the investigator is not satisfied with the deputy head's response to the recommendations, he or she may report this to the Commission. The Commission may order the deputy head to take appropriate corrective action including revocation of a deployment, however, the Commission may not order a deputy head to deploy an employee.

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11.11 BOARD OF INQUIRY

In instances where it appears that there may be grounds for revoking an appointment to or from within the Public Service other than in the context of an appeal, (i.e. if a person has been or is about to be appointed who does not possess the necessary qualifications to perform the duties or if the appointment would contravene the terms and conditions under which staffing authority was delegated) a Board of Inquiry is established. Its role is to conduct an inquiry and to make recommendations to the Commission regarding revocation. The Commission may only revoke the appointment if the Board recommends this be done.

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11.12 OTHER INQUIRIES AND INVESTIGATIONS

The Commission may also conduct inquiries and investigations into allegations that irregularities or a fraudulent practice may have occurred in a selection process. The Commission may summon and examine under oath anyone who can provide relevant information. If the person appointed or about to be appointed is proven to have been involved in irregularities, a fraudulent practice, or a breach of the Act or Regulations, the Commission may refuse to consider the person further or revoke the appointment, as required. Irregularities and fraudulent practices may result in a person being found guilty of an offence punishable on summary conviction.

11.13 JUDICIAL REVIEW

Decisions rendered by appeal boards or the Commission (e.g. deployment and other investigations) are final and binding. The decision may be subject to judicial review by the Federal Court of Canada, if requested by the appellant, the successful candidate, the department or the Commission, within **30** calendar days of being informed of the decision in writing. As soon as a department believes that there may be grounds to take an appeal or investigation decision to court it should consult with its department's legal counsel and contact the PSC's Resourcing Policy and Legislation Directorate.

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