

T.D. 3/96
Decision rendered on March 8, 1996

CANADIAN HUMAN RIGHTS ACT
R.S.C., 1985, c. H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

SHIV CHOPRA

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION
Commission

- and -

DEPARTMENT OF NATIONAL HEALTH AND WELFARE

Respondent

DECISION

TRIBUNAL

Daniel Soberman, Chair
Linda Dionne, Member
Gregory Pyc, Member

APPEARANCES: Prakash Diar, Counsel for the Canadian Human
Rights Commission

Michael Ciavaglia, Counsel for the Department of
National Health and Welfare

DATES AND

LOCATION OF HEARING: September 5 to 8, 1995
October 2 to 5, and 11, 1995
Ottawa, Ontario

TABLE OF CONTENTS

	Page
THE COMPLAINT	1
THE FACTS	2
1. PROFESSIONAL EXPERIENCE: 1957 TO 1969	2
2. The Administrative Structure Within the Health protection Branch	3
3. EMPLOYMENT HISTORY WITH THE DEPARTMENT	5
(a) Bureau of Human Prescription Drugs, 1969 to 1980	5
(b) Annual Written Appraisals, 1979 to 1987	8
(c) Bureau of Veterinary Drugs, 1987 to April 1990	12
(d) Management Opportunites for Dr. Chopra Prior to 1990	14
4. The Events of 1990 to 1992	16
(a) 1990: Vacancy in the Position of Director in the Bureau of Human Prescription Drugs	16
(b) 1991 and 1992: Dr. Chopra's Appeals Against the Appointment of Dr. Franklin	19
(c) Effects of the Events of 1990 to 1992 on Dr. Chopra's Work Environment and Appraisals	24
(d) The Department's View of Dr. Chopra Immediately before He Filed his Complaint	26
THE ISSUES	28
FINDINGS	29
1. THE TREATMENT OF DR. CHOPRA DURING HIS YEARS IN THE BUREAU OF HUMAN PRESCRIPTION DRUGS	29
2. DR. CHOPRA'S OPPORTUNITIES FOR PROMOTION, 1988 TO 1992	30
3. Management's view of Dr. Chopra	32
4. Management's views on Cultural Differences	34
THE DECISION AND ORDER	36

The complaint Dr. Shiv Chopra's complaint, filed on September 16, 1992, is that beginning in 1990 the Department of National Health

and Welfare was guilty of a discriminatory practice contrary to s. 7 of the Canadian Human Rights Act, when it differentiated adversely against him in employment, in failing to give him a proper opportunity to compete for the

1

management position of director in the Bureau of Human Prescription Drugs, and in subsequent treatment and appraisals of his performance.

On the same day that Dr. Chopra filed his complaint, the National Capital Alliance on Race Relations (NCARR) filed a complaint, also against the department, alleging that it engaged in a discriminatory practice contrary to s. 10 of the act, in pursuing a policy or practice that deprived or tended to deprive a class of individuals of employment opportunities. In contrast to Dr. Chopra's individual complaint, the NCARR complaint was one of "systemic discrimination", that is, that policies and practices in the department adversely affected certain groups of employees -- visible minorities -- particularly with respect to promotion. At a pre-hearing meeting in Ottawa on March 16, 1995, this Tribunal was informed that, in a letter to the Commission after his complaint was filed, Dr. Chopra had proposed that his complaint also raised issues relating to s. 10, that is, relating to systemic discrimination and should be amended for that purpose.

At the same meeting, the Commission gave notice, with the consent of Dr. Chopra, that it was considering requesting that both complaints -- the individual complaint and the systemic complaint -- be joined and heard together. All parties acknowledged that joinder would make the hearing more complex and would lead to delay. However, since it was uncertain whether the Commission definitely intended to request joinder of the complaints, the meeting was adjourned. Further discussions ensued among the parties.

The meeting reconvened on April 24, 1995, and at that time the Commission informed the Tribunal that all parties had decided they were opposed to joinder; the Tribunal would be hearing only Dr. Chopra's complaint. The Commission did not amend the complaint and consequently we would not be considering questions of systemic discrimination under s. 10 of the act; Dr. Chopra's complaint was brought solely under s. 7. Counsel for the Commission stated: my understanding is that this is a straight section 7 complaint. The

complaint form is restricted to section 7. I believe that you have been appointed to enquire into a section 7 complaint. Dr. Chopra's submissions might have been made to the Commission, and those submissions relating to section 10 obviously have not been accepted for that purpose, and therefore you have no jurisdiction.[italics added]

Counsel for the department agreed. He stated, "that ends it." both counsel agreed that the NCARR complaint under s. 10 would be dealt with separately before a different tribunal. Accordingly, this tribunal has restricted itself to the question of discrimination against Dr. Chopra personally.

The facts

A review of Dr. Chopra's professional career in sufficient detail, especially his career within the department of national health and welfare, is an essential part of the background to the events through 1990 to 1992, on which the complaint is based.

2

1. Professional experience: 1957 to 1969 Dr. Chopra was born in India and received a degree in veterinary science and animal husbandry in 1957 from Punjab University, followed by a post-graduate Diploma in Biological Drugs at the Central Indian Veterinary Research Institute. He worked for some months in a government veterinary hospital and then moved on to a research position at the Punjab Veterinary College, an institute that produced vaccines, serums and other biological products used by veterinarians. Dr. Chopra did a further nine months of post-graduate training in India. In 1960, three years after receiving his first degree, he came to Canada to study microbiology at McGill University. He completed his Masters Degree in 1962, and moved on to doctoral work, receiving his Ph.D in 1964. He then spent one year as a post-doctoral research fellow at the Royal Victoria Hospital in Montreal. In 1965, Dr. Chopra moved to England where he worked for Miles Laboratories, a large pharmaceutical company. He headed a section of researchers in biology, primarily testing new drugs.

The section had thirteen scientists in various related disciplines and, with support staff, employed a total of about 20 persons.

Late in 1968, Dr. Chopra was approached in England by Dr. Jeffrey Bishop, Director of the Bureau of Scientific Advisory Services in the Department of National Health and Welfare, Canada. Dr. Chopra was offered an appointment in the Division of Medicine and Pharmacology, within Dr. Bishop's bureau. (Subsequently, the name of the bureau was changed to "Human Prescription Drugs" and Dr. Chopra's division, to "Infection and Immunology".) Dr. Chopra accepted, and he gave Miles Laboratories six months' notice before returning to Canada in June 1969. He has remained with the Department of National Health and Welfare since then.

2. The administrative structure within the health protection branch in order to place the events of the following years and Dr. Chopra's resulting complaint in context -- and also to understand the response of the department -- it is helpful to describe the administrative structure of the Health Protection Branch. While the following description is based on charts as of September 1992, the general framework had been in place for much, if not all, of the time that Dr. Chopra has been employed in the department.

I. The branch was headed by an assistant deputy minister.

II. It contained seven directorates including the drugs directorate, each headed by a director general who reported to the deputy minister.

III. Within the drugs directorate were nine bureaux, each headed by a director who reported to the director general. The drugs directorate contained both the bureau of human prescription drugs,

3

where Dr. Chopra worked from 1969 to late 1987, and the bureau of veterinary drugs where he has worked from that time until the present.

IV. Each bureau in turn contained a varying number of divisions, each headed by a chief who reported to the director of the bureau. Dr. Chopra first worked for the division of Infection and Immunology within the bureau of Human Prescription Drugs and subsequently for the division of human safety within the bureau of veterinary drugs. Chiefs appear to supervise varying numbers of employees, both professional and others, perhaps as few as a half dozen, to fifteen or so. No evidence of precise numbers was provided. As we shall describe below, the tribunal received

evidence that at one time Dr. Chopra's chief suggested setting up sections within a division and appointing section managers one level below that of a chief of a division, but that development did not proceed. Accordingly, within the drugs directorate, the "entry-level, line-management" position -- where a manager would supervise a number of employees who would report to him or her -- would appear to be that of chief of a division.

No evidence was presented indicating whether employees promoted to management positions invariably began at the entry level just described, or whether some initially entered at the higher level of director of a bureau -- an issue at the centre of controversy in this case. (We are not here referring to persons hired from outside the public service to fill a specific position.) However, it seems reasonable to assume that, at least in most cases, an employee's first appointment to management was at the level of chief rather than director.

3. Employment history with the department

(a) bureau of human prescription drugs, 1969 to 1980 Dr. Chopra's original job classification was as a "scientific advisor 1" (SA-1).

Soon after his arrival in Canada, the position of Chief of his division became vacant and he applied for it. Although Dr. Michael Davis won the position in a competition and Dr. Chopra worked under his supervision, both scientists were promoted to the rank of SA-2.

According to Dr. Chopra, an SA-1 would today be the equivalent of a biologist 4 (BI-4), and an SA-2 the equivalent of a BI-5.

However, when the classification system was substantially revised in 1971, he was reclassified from an SA-2 to a BI-4; he questioned his new classification, but it was confirmed by the department as BI-4, not BI-5. During approximately the first five years working under Dr. Davis, Dr. Chopra frequently acted as chief during Dr. Davis's absences for varying lengths of time -- from a day or two

to as much as five or six weeks on one occasion when Dr. Davis was ill. An acting chief typically performs more or less all the duties of the chief as they arise on a day-to-day basis. There is substantial evidence that Dr. Chopra was interested in widening his

horizons beyond performing his duties as a biologist within his own division:

- i. In 1972, Dr. Chopra negotiated with his superiors and with the Science Council of Canada for a one-year secondment to the Science Council. Ultimately, it did not take place since his superiors decided they were not interested in the secondment.
- ii. In 1974, Dr. Carolyn Scott succeeded Dr. Bishop as director of the bureau. The following year, 1975, the treasury board decided to set up a committee to develop an improved accountability system for the health protection branch. The committee was called "Objectives Oriented Management" (OOM), under the direction of Dr. A.J. Liston. Dr. Scott, as a former chief of a division within the directorate, was already familiar with Dr. Chopra's competence.

She proposed him as the representative of the drugs directorate, one of about eight directorates at the time, each with a representative. Dr. Chopra's task was to examine the operations of his directorate and to propose a system of tracking and measurement to satisfy the treasury board's concerns. Dr. Chopra worked with the committee and reported on his project to Dr. Liston. One of Dr. Chopra's principal tasks was to discuss with managers at various levels the problems they were encountering, to do an analysis and to make recommendations. The work of the committee appears to have continued over three years with Dr. Liston renewing Dr. Chopra's appointment for the second and third years. We were not provided with information about the other members of the committee, and whether or not they were reappointed. Dr. Chopra's reappointments were consistent with his testimony that his work was satisfactory. He also gave evidence that Dr. Liston was very satisfied with the quality of his proposals. We have no direct evidence of the quality of Dr. Chopra's work from any other witness. We note, also, that while the project of the committee was clearly management oriented in terms of

developing management systems, there is no evidence that committee members acted as supervisors of other employees.

- iii. Early in 1977, Dr. Liston sent Dr. Chopra on a six-week, management in-residence training program at the Staff Development Bureau, now called the Canadian Centre for Management Development.

This "Senior Management Development Program" was offered to people who were recognized by a senior manager like Dr. Liston as having management potential. According to Dr. Chopra's recollection, there were about twenty persons in the class, he being the only one from his department. Dr. Chopra completed the program successfully.

iv. Late in 1977, Dr. Liston asked Dr. Chopra to serve as representative of the drugs directorate on another task force "Drug/Field Operations Directorate Interface Study". The task force was composed of Dr. Chopra, two representatives of field operations and Ms. J. Ulyat as the chair. The study lasted for more than a year and the project report went directly to the assistant deputy minister.

v. At about that same time, late 1977, Dr. Scott retired as director of the bureau and was succeeded by Dr. Ian Henderson.

Early in 1978, Dr. Henderson asked Dr. Chopra to prepare a report on the background to, and overview of, the drug program. Dr. Chopra was still an OOM consultant and had not yet returned to his division. He sent his report to Dr. Henderson on February 8, 1978.

In a memo of the same date, anticipating his imminent return from OOM to his division of Medicine and Pharmacology (as it was still called at that time), Dr. Chopra briefly set out his nine-year career in the bureau and the various management development elements in his work and training; he asked Dr. Henderson to examine his career and advise him as to whether he was likely to see a change (a promotion) in the near future, but nothing further occurred. Dr. Chopra then returned to his division, and some time in the following few months Dr. Henderson arranged for him to act as de facto "section head" over a small number of scientists working in the growing area of immunology. Dr. Henderson seriously considered setting up a "section" within his division to deal with developments in immunology, and he raised the prospect of formalizing the position of section head. However, for structural reasons, which would require revising the classification system within the bureau to create the position of section head, and because of a "downsizing" operation in the bureau late in 1978, the proposal did not proceed.

vi. In 1980, with Dr. Henderson's

support, Dr. Chopra applied successfully for a three-month fellowship with the World Health Organization (WHO), to study worldwide management of drug program systems, in particular, control and standardization of allergens. Dr. Chopra visited twelve countries in Eastern and Western Europe, meeting with people both in industry and in regulatory bodies, and he produced a written report.

(B) annual written appraisals, 1979 to 1987

In 1979, the government initiated a system of annual written appraisals for employees. In his first appraisal form, dated september 19, 1979, Dr. Chopra clearly expressed his interest in management: my career aspirations lie in a position of management in scientific, health and social programs... [there follows a review of his training and experience over The 22 years since receiving his veterinary degree] I look toward an opportunity to utilize the above-mentioned experience in a much wider context than I am able to in my present position.

As Director of the bureau, Dr. Henderson recognized Dr. Chopra's aspirations in his "additional comments" attached to the appraisal form:

It is obvious that this employee's interests for the future lie in the areas of policy-making and management. He has been acting de facto as a section head for the specialty of immunology, but this has not been formalized in his job description, nor in terms of his compensation. He is somewhat frustrated by his inability to rise within the management structure of the health protection branch, and is presently looking for an opportunity to enter a management career path, while attempting to maintain his expertise in the scientific discipline of immunology. He has recently applied for a world health organization travel scholarship. [italics added]

Dr. Chopra's immediate superior within his division, Dr. Davis, also commented in the appraisal on Dr. Chopra's qualities. He stated:

Functions more effectively in complex situations involving problems of a broad and conceptual nature. Is stimulated by additional responsibility.

There follows a series of subsequent appraisals noting Dr. Chopra's achievements and his continuing interest in planning and

management. In April 1981, under the heading, "Factors Affecting Performance", Dr. Davis stated:

Radical reorganization without

7

utilizing this employee's highly developed expertise in immunology especially in view of his most recently completed WHO fellowship in allergy is viewed as a lack of appreciation of quality and initiative on the part of management... [italics added]

Dr. Davis was commenting on the fact that at that time, a technical area of Dr. Chopra's principal expertise, immunology, had been transferred out of his bureau, thus affecting his work as a scientist. We were provided with no explanation of why this occurred, although Dr. Chopra in his evidence speculated that there might have been some internal rivalries between his bureau and another which Dr. Liston favoured. There is, however, no evidence upon which to base any conclusion on this matter.

The 1981 appraisal form contained at the bottom of the first page, a set of summary squares covering five rating categories: outstanding superior fully satisfactory satisfactory unsatisfactory no evidence was tendered to explain these categories, beyond what the words themselves imply. The square rating Dr. Chopra as "fully satisfactory" was checked. The "comments of review committee" ended with the following:

... he has been awarded a fully satisfactory rating at this time (returning to a scientific field different from his original training). This does not indicate that in many areas he is not of superior calibre. [italics added]

In all his subsequent appraisals, the same rating category, fully satisfactory, was checked. In Dr. Chopra's appraisal of April 1982, Dr. Davis repeated his earlier 1981 Assessment of Dr. Chopra's competence:

Notably sound judgment, discretion, analytical ability, effective oral and written communications, willingness to assume responsibility in a mature and adaptable manner.

Under "factors affecting performance" he stated:

the full potential of this employee remains underutilised. In spite of extensive training and experience in management systems and rare insight into international regulatory control of health care products no visible career advancement has been possible. Nevertheless, employee has managed to contain his frustration and continue to maintain his initiative and drive in typical professional manner. [italics added]

Appraisals for the years 1983, 1984, 1985 and 1986, continue to note Dr. Chopra's qualities in dealing with sensitive issues with respect to pharmaceutical manufacturers and the public interest.

8

For example, in the 1984 appraisal, Dr. Davis noted: this employee possesses an unusually wide training and experience in both scientific and management aspects of the development and control of drugs. However, due to a total lack of advancement opportunities there is little scope for making use of this background and potential. [italics added]

Dr. Chopra's own perception of the situation as given in his testimony was as follows: nothing was changing and I felt my immediate supervisors continued to recognize my work and potential, but nothing was changing above. So there was no reason for me to be critical of them. They did their best and it was senior management -- in fact, in this case Dr. Liston -- who appeared to be the problem. So there was nothing I could do.

These words represent only Dr. Chopra's perception, but they indicate his increasing frustration with his employment situation. During those years, he continued to perform as acting director from time to time; it appears that other employees of the same classification also did so in various divisions, but we were given no general indication of the norms in assigning such duties.

We note that Dr. Chopra's 1986 appraisal contained the following comments about his skills: Dr. Chopra has the ability to work perceptively and effectively. He presents his arguments lucidly in a controlled tactful manner and writes effectively.

In the appraisal of April 1987, Dr. Davis noted that Dr. Chopra acted as the representative of the drugs directorate in the Health Protection Branch Committee (HPB) for developing genotoxicity guidelines. Dr. Davis stated that "his contributions were

considered extremely valuable", and that he "worked diligently and effectively to assist in the overall management of division." With respect to Dr. Chopra's skills, Dr. Davis added: he is flexible to suggestions and negotiates well with manufacturers. For committee work he functions diligently and resourcefully. When provided the opportunity he acts as a competent manager.

In the same appraisal, Dr. Davis commented on another matter that led to Dr. Chopra applying to transfer from his bureau of Human Prescription Drugs, where he had worked for 18 years, to the bureau of Veterinary Drugs. In the appraisal, Dr. Davis noted that:

In 1985, the Ontario Veterinary Association accepted Dr. Chopra's request to become a licensed practitioner as "drug evaluator" for the Department of Health. However, to his dismay this has not been considered by the department to improve his pay classification. [from bi 4 to vm 4] He perceives this to be a case of personal discrimination since there are several precedents where other incumbent's classifications have been appropriately adjusted. [italics added]

9

Both Dr. Davis and Dr. Henderson had supported Dr. Chopra's request to become licensed, and it was Dr. Davis who used the words "personal discrimination" in his handwritten comments appended to a memorandum from Dr. Chopra, dated December 1, 1986. Dr. Chopra was upset by the Department's refusal to reclassify him; he believed that other employees in similar situations had been given the benefit of reclassification. On April 29, 1987, Dr. Henderson sent Dr. Chopra a memorandum setting out the department's position, namely that Dr. Chopra's duties in his current position did not make sufficient use of his veterinary qualifications to justify reclassification. In the last paragraph of his memorandum, Dr. Henderson stated:

I would suggest that if you wish to be reclassified as a veterinary scientist, you should ask for a transfer to the Bureau of Veterinary Drugs when a vacancy occurs.

The annual appraisals, as well as other written materials such as Dr. Henderson's memorandum, show that, after 18 years, and especially in the mid 1980s, Dr. Chopra was becoming increasingly frustrated with what he perceived as lack of opportunity for promotion despite his favourable evaluations. As the phrase

"personal discrimination" (used in Dr. Davis's appraisal above) implies, Dr. Chopra was beginning to suspect that he was being subjected to adverse differential treatment.

(C) Bureau of Veterinary Drugs, 1987 to April 1990

Dr. Chopra followed Dr. Henderson's advice and, when a vacancy occurred later in 1987, in the Human Safety Division within the Bureau of Veterinary Drugs at the VM-4 level, he applied for the position and was selected. Oddly enough, his new appointment at the VM-4 level was initially a probationary one; his superior, Dr. R.R. Mackay, Chief of the Human Safety Division, requested that in view of Dr. Chopra's 19 years' experience the probationary period be waived. Although there was considerable debate about what happened to this request, no evidence was submitted to clarify the issue. Dr. Chopra testified that he did not receive any communication from the department and no written response to Dr. Mackay's request was submitted in evidence by the department. In any event, Dr. Chopra completed probation without further discussion of the question and received a regular appointment.

Shortly after Dr. Chopra arrived in the Human Safety Division, Dr. Mackay retired and the position of chief was left vacant. For six months it was filled "on an acting rotational basis" and Dr. Chopra acted as chief for five weeks during that period. His first appraisal in his new position was completed late in 1988 (date uncertain) by Dr. Jacques Messier, director of the bureau of veterinary drugs. Dr. Messier's appraisal of Dr. Chopra was again

10

favourable. No appraisal for 1989 having been submitted in evidence, the next appraisal is dated may 1990. Dr. M.S. Yong had been appointed the new chief of the division in mid 1989, and it was he who signed Dr. Chopra's appraisal. Comments with respect to his skills were as follows:

Dr. Chopra has the ability to communicate in an effective manner. Interpersonal skills such as discretion/tact/courtesy are easily observed and transfer themselves into the work he performs.

Although the appraisal is favourable, Dr. Chopra's own comments disclose an ever-increasing anxiety with his position. He stated:

The performance rating in section 6 [the box that was checked with an x, as it had been since 1979, "fully satisfactory" rather than "superior" or "outstanding"] is not commensurate with designated goals and duties in section B.1. Output statistics clearly show that my contribution toward the division's success in reducing the pernicious backlog of work was inordinately in excess of what my duties called for. I feel, this should be appropriately and fairly reflected in the appraisal.

Dr. Messier was aware of Dr. Chopra's unhappiness, but did not agree that the appraisal was unfair, nor did he see a solution within the bureau. His response on the appraisal form was:

The review committee has assessed the appraisal and finds that it represents a fully satisfactory rating which is in keeping with the performance output. The review committee encourages Dr. Chopra to pursue the dap program initiative, experience gained would benefit both the candidate and the organization.

Thus, he was encouraging Dr. Chopra to apply to the department assignment program to seek reassignment to another bureau.

(D) Management opportunities for Dr. Chopra prior to 1990

The department asserted that Dr. Chopra had failed to take advantage of reasonable opportunities for appointment to entry-level, management positions. Counsel cross-examined him with respect to a number of positions that were advertised. Many of them were advertised after Dr. Chopra's complaint was filed, some as late as 1994, and accordingly are unrelated to the complaint. Some were for positions at the level of director and therefore not entry-level positions as the department claimed. For most of the others, Dr. Chopra claimed that he was not aware of the announcements or that in any event, he was not qualified for them because they were in different scientific disciplines from his own or were not in areas in which he had sufficient experience. The department did not introduce evidence of the appropriateness of these positions for

Dr. Chopra other than what might be gathered from the words of the announcements themselves. There were, however, two vacancies in Dr. Chopra's fields of expertise that he did learn of and for which he did not apply. The first was that of Chief of the Division of Infection and Immunology in the Bureau of Human Prescription Drugs;

this was the very position that he had applied for in competition with Dr. Davis soon after he came to work for the department, and it was in the division in which he had worked under Dr. Davis until 1987. As it happened, Dr. Davis departed not long after Dr. Chopra transferred from the division; we were not provided with the exact dates but it appears that Dr. Davis left late in 1987. According to Dr. Chopra -- and his evidence was not contradicted -- the position was not advertised and has been filled on an acting basis within the division until the present. In cross-examination, Dr. Chopra admitted that he did not inquire whether he might apply to fill the vacancy of chief. As we shall discuss below, about three years later he did apply for the higher position of director of the Bureau of Human Prescription Drugs although it, too, had not been advertised at the time he applied. The second vacancy occurred in the division of human safety where Dr. Chopra was working. The position of chief was advertised in February 1989, a little more than a year after he had joined the division. After Dr. Mackay's retirement, Dr. Chopra clearly was aware of the vacancy -- as we have noted, he had himself acted as chief for five weeks. Dr. Chopra stated that he refused to apply for the position because of a change in classification. Dr. Mackay, like Dr. Chopra, was a veterinarian and until Dr. Mackay retired, the chief's position in their division had been classified as VM-5 (as were two of the three other division chiefs in the bureau). However, after Dr. Mackay's departure, the classification was changed to BI-5, that of a biologist and not necessarily a veterinarian.

We were informed that because they are veterinary doctors, VMs receive a substantially higher salary (in the order of \$6000) than do BIs at the same level. Indeed, Dr. Chopra's major benefit from transferring to the Bureau of Veterinary Drugs in 1987, was in being reclassified from a BI-4 to a VM-4. Accordingly, if Dr. Chopra as a VM-4 had applied to fill the vacancy and been appointed division chief, newly classified as a BI-5, the pay increase for the promotion would have been very small; Dr. Chopra claimed that at most it would have been \$800. During cross-examination on this point, he said:

... It made no sense to me to apply for a position which gave me no financial Benefit, only additional work, and so, therefore, I chose not to apply. ... it makes no sense for me to apply for a position which gives me no further Benefit other than to say now I am a manager...

In reply to the question: Did you not believe, sir that at any

time, if you obtained this chief's position, this would be a starting point to move up through the hierarchy of management?

Dr. Chopra stated: It made no sense to me if I have to make the same amount of money which is relatively less than other colleagues who are now VM-5. It makes absolutely no sense to me. Why should I be differentially treated if the other division chiefs are VM-5s and now I, having a licence, will be classified as a BI-5 and obtain \$6000 or \$7000 less? [italics added]

By 1989, Dr. Chopra's concerns were dominated by what he perceived to be issues of fair treatment, more than by an opportunity to benefit from a possible first step into management.

4. The events of 1990 to 1992 in October 1990, Dr. Messier was transferred to the Bureau of Dangerous Drugs and was replaced as director by Dr. Leonard Ritter who came from the Environmental Health directorate.

(A) 1990: Vacancy in the position of director in the Bureau of Human Prescription Drugs

In early September 1990, it became known informally that the position of director in the Bureau of Human Prescription Drugs, where Dr. Chopra had worked for 18 years, would become vacant; Dr. Gordon Johnson, who had succeeded Dr. Henderson as director late in 1987, resigned to return to his university position. Dr. Chopra heard about the vacancy and on September 13, applied in writing to Dr. E. Somers, director general of the drugs directorate, proposing himself as a candidate for the position.

After describing what he considered to be shortcomings in the bureau, Dr. Chopra proposed:

It is with this in mind that I wish to be considered as a director... should I be appointed I would be prepared to work on a shorter-term assignment, according to the general principles of PS 2000, whereby only the acceptably efficient managers would be allowed to continue.

He also had a meeting with Dr. Somers. In order to further his candidacy, on September 27, he wrote to Dr. A.J. Liston, who by that time was assistant deputy minister. Dr. Liston replied the

following day, acknowledging the letter and stating that he had discussed Dr. Chopra's interest in the position with Dr. Somers.

He also noted that Dr. Somers "referred to his [Dr. Somers'] interest in examining the possibility of filling the position with someone with a medical background". The classification of director in the Bureau of Human Prescription Drugs was, and had been for a number of years, MD MOF-05: it required the director to be a

13

licensed physician, as had been Dr. Henderson and his predecessors.

Dr. Gordon Johnson was not a physician but a pharmacologist, and to cope with this change during his term as director, a new position of assistant director-medical was created to carry out the duties of the director requiring a medical licence. No competition was held to fill the vacancy created by Dr. Johnson's departure; on the same day that Dr. Chopra first wrote to Dr. Somers -- September 13 -- Dr. Liston sent a memo to the deputy minister, M. Catley-Carlson, stating that the department was:

...Actively recruiting for an MD-MOF-5 that I expect will take up to one year to finalize, if a qualified candidate is found. During that period of time it is extremely important to provide strong leadership in the Bureau of Human Prescription Drugs. Dr. Claire A. Franklin has demonstrated strong managerial abilities combined with professional qualifications and would be interested in undertaking this position on an acting basis. I would recommend that Dr. Franklin be appointed as acting director, Bureau of Human Prescription Drugs, EX-2 level effective October 22, 1990, for a one-year period. ...a job description is now being prepared and will be sent to personnel for classification action at the EX-2 level. Dr. Franklin is not bilingual at this time... [she] is, however, presently undertaking language training and I would request she be exempt from language requirements until she meets them in the near future...

We note that Dr. Franklin had already been a chief of division for about nine years within the Environmental Health directorate, first as chief of the Pesticides Division, 1981-84, and then chief of the Environmental and Occupation- A1 Toxicology division, 1984-90. She had substantial experience as a manager but was a physiologist, not a physician. In a further memo to the deputy minister, dated September 28, Dr. Liston requested that the appointment of Dr.

Franklin be for a four-month period. The job description ("statement of qualifications, director, bureau of human prescription drugs") referred to in the above quotation, was set out in writing on March 25, 1991 and made retroactive to October 1990; it did not contain a requirement that the director be a licensed physician. In a letter dated October 4, to Dr. Chopra, Dr. Somers said "we have made interim arrangements for Dr. C. Franklin to act in this position [vacated by Dr. Johnson]." Dr. Chopra replied on October 10, thanking Dr. Somers for informing him, and adding: However, at your convenience, I would very much appreciate knowing on what specific counts, in your view, did I fail to meet the desired qualifications for this position. This would assist me in better preparing myself for future consideration.

According to Dr. Chopra, Dr. Somers responded to this letter by

14

telephone about two weeks later. It was a difficult conversation in which Dr. Chopra suggested that preference in promotion had been given to British immigrants over people like himself. The conversation ended quickly after that point. Dr. Somers did not give evidence at the hearing. Dr. Chopra was clearly very disappointed by these events; in a letter to the Public Service Commission, dated October 22, he raised the question of employment equity and whether in filling this position without competition there had been discrimination against visible minorities. On December 7, 1990, Dr. Chopra formally requested the opinion of the Public Service Commission on the issue of whether making the appointment without competition had prejudicially affected his opportunity for advancement.

(B) 1991 and 1992:

Dr. Chopra's appeals against the appointment of Dr. Franklin at some point early in 1991 (not later than mid February), the department "Created a parallel term EX-02 director position" for the Bureau of Human Prescription Drugs, with the same qualifications as the MD-MOF-05 director position, except that it eliminated the requirement that the director be a licensed physician. We were told that the department made arrangements for those duties requiring a licensed physician and formerly carried out by the director to be looked after outside the bureau.

On February 21, 1991, Dr. Franklin's term as acting director ended, but she was "immediately reassigned on an acting basis to the term EX-02 director position" for four more months (and reassigned again in June 1991, to the end of November of that year).

On April 10, 1991, the Public Service Commission gave its opinion that Dr. Franklin's acting assignment had prejudicially affected Dr. Chopra. After receiving the Public Service Commission's opinion, Dr. Chopra filed an appeal against the department, pursuant to s. 21 of the Public Service Employment Act, claiming that in making the acting appointment the department did not comply with the Act.

The hearing before the Appeal Board was held on July 9, and Helen Barkley, Chairperson, handed down her decision on July 19, 1991. Citing the case of A.G. of Canada v. Appeal Board established by the Public Service Commission,⁽¹⁾ she concluded that where the appropriate management officers consider it is in the best interests of the public service not to conduct a competition, an appeal board may not overrule that decision unless it is "so unreasonable that no reasonable person could form that opinion". She further found that:

... it was not unreasonable

1 [1982] 1 f.c. 803.

15

for Dr. Somers to conclude that Dr. Chopra failed to meet... [the necessary qualifications of management experience]. The appellant [Dr. Chopra] had very limited line management experience during his 20 years in the department, and management experience acquired more than 20 years ago might well not be relevant to this position.

Having made the determination that the appellant did not meet one of the qualifications for the position, there was no requirement for the department to assess him further.

On the other hand, Ms. Barkley allowed the appeal on the basis that the department had not demonstrated that Dr. Franklin was fully qualified for the position of director with respect to bilingual qualifications and the required knowledge of marketed drugs for human use. Nevertheless, and despite protests by Dr.

Chopra and Iris Craig, President of the Professional Institute of Canada (Dr. Chopra's union), Dr. Franklin continued to act in the position of director for the following two months. On September 30, 1991, he informed the Public Service Commission that he wished to appeal once more the continuing appointment of Dr. Franklin.

On October 10, Robert Cousineau, Executive Director of the Public Service Commission, responded informing Dr. Chopra that Dr. Franklin's acting appointment was terminated on September 20, and that "two competitive processes [one for a four-month acting appointment and one for an indeterminate appointment] are being conducted". In the meantime, he said, "Dr. Franklin retains the responsibilities of the position... At her substantive level" [*italics added*].

This phrase appears to mean that she remained at the classification and salary she held before moving to the Bureau of Human Prescription Drugs, yet filled the position of director on a basis less formal than an "assignment".

The consequences of this informal arrangement, according to Mr. Cousineau, was that, "there appears to be no appointment or proposed appointment against which an appeal could be entertained in this case." On October 25, 1991, the Public Service Commission announced an internal competition for the position of director of the Bureau of Human Prescription Drugs. Those eligible were "employees occupying a position at or above the SM (senior management) level", that is, those who already occupied an entry level management position such as chief of a division.

Accordingly, Dr. Chopra, with a classification one below the SM level, was not eligible to apply. On December 4, 1991, believing he had exhausted all avenues of appeal within the Public Service, Dr. Chopra resorted to the Federal Court, requesting an order requiring the department to revoke the appointment of Dr. Franklin.

Toward the end of January 1992, Dr. Liston's secretary telephoned Dr. Chopra to arrange a meeting on February 4. The two met alone and the following day Dr. Chopra wrote down "minutes" of the meeting. The main discussion was about Dr. Chopra's qualifications for a management position. Dr. Liston asked him why he had not applied for management positions, to which Dr. Chopra replied that no competitions were held in the branch.

According to Dr. Chopra, Dr. Liston agreed that he was qualified somewhere between the EX-1 and EX-2 level and he would be given opportunity to compete in the future. Dr. Liston also assured Dr. Chopra that the court proceedings would not be held against him.

In the following days, the parties reached a settlement that was approved by an order of Joyal, J. On February 13, 1992, containing the following essential terms:

- (a) the immediate assignment of Dr. Franklin to other duties;
- (b) the department's formal request to the public service Commission to conduct an entirely new competition to staff the indeterminate position of director of the Bureau of Human Prescription Drugs;
- (c) Dr. E. Somers' exclusion from any involvement whatsoever in the staffing and selection process of the competition.

On March 20, 1992, the Public Service Commission announced an internal competition for the position of director of the bureau.

Those eligible were employees who occupied a position "at the EX-1 level or above", thus including employees such as Dr. Chopra at the VM-4 level. A Public Service-wide search, and circulation of a bulletin advertising the vacancy, elicited seven expressions of interest, including Dr. Chopra, Dr. Franklin and Dr. Michele Brill-Edwards, who had been Acting Assistant Director-Medical to the Director of the Bureau, during Dr. Johnson's tenure as Director and then to Dr. Franklin. In all, eighteen candidates were identified for screening purposes.

On March 31, the screening committee screened out Dr. Chopra on the grounds that he did not possess the necessary management experience. He was so informed on April 3, by letter from Thomas J. Kanigan, senior resourcing officer in the Public Service Commission. Dr. Franklin and Dr. Brill-Edwards were screened in. Subsequently, Dr. Brill-Edwards was found not to be qualified for the position and Dr. Franklin was found to be qualified. On April 21, Dr. Franklin's appointment as director was confirmed by the Public Service Commission, and on the same day the position of assistant director-medical, which had been occupied by Dr. Brill-Edwards, was abolished. Dr. Chopra and Dr. Brill-Edwards appealed

the appointment of Dr. Franklin to the Public Service Appeal Board.

On July 27, 1992, the Chairman, Gaston Carbonneau, delivered his decision, dismissing both appeals. He found, among other matters that:

(a) it was a management prerogative of the department to reorganize the Bureau of Human Prescription Drugs to eliminate the need for a licensed physician either as director or assistant director; it had not acted improperly in establishing the new classification and selection profile for the position of director;

(b) the selection committee had acted in good faith and without bias, and that its conclusions, including the screening-in and selection of Dr. Franklin as Director, were not unreasonable;

(c) Dr. Chopra did not possess the necessary management experience at the time he was screened out.

In August, Dr. Chopra and Dr. Brill-Edwards applied to the Federal Court to have Mr. Carbonneau's decision set aside. On August 12, 1992, a final-level grievance meeting was held between the Dr. Chopra, his representative, Danielle Auclair of the Professional Institute of the Public Service, the Deputy Minister of the Department, Margaret Catley-Carlson and Shirley Cuddihy of Staff Relations. Dr. Chopra presented a written statement outlining the grounds for his grievance. According to notes of the meeting taken by Ms. Cuddihy, nothing appeared to be resolved although it also appeared that Dr. Chopra was assured "that he would have the opportunity to be considered for future jobs."

This was the last meeting before September 16, 1992, when Dr. Chopra filed his complaint with the Canadian Human Rights Commission. On November 23, 1992, Gibson, J., of the Federal Court handed down his judgment, dismissing the application. He found that there was no reason to interfere with the Appeal Board's holding that Dr. Franklin was properly screened in and that she was properly selected. He held that the Appeal Board did not err in failing to find a breach of the merit principle. It appears that neither Dr. Chopra's qualifications nor his being screened out were raised by the applicants on appeal. Accordingly, Gibson, J. did not discuss these matters.

(C) Effects of the events of 1990 to 1992 on Dr. Chopra's work environment and appraisals

Dr. Chopra's appraisal in April 1991, took place after the following events had occurred:

18

1. In September 1990, he had sent his application for the position of Acting Director in the Bureau of Human Prescription Drugs.
2. Shortly after he was disappointed to learn of the selection of Dr. Franklin.
3. In December 1990, he asked the Public Service Commission to determine whether her appointment without competition had prejudicially affected his career opportunities.

In other words, by April 1991, he had become deeply concerned with his prospects for career advancement. Nevertheless, Dr. Yong, his supervisor, continued to describe his qualities in positive terms. Under the heading, "skills/abilities/suitability factors", is the following description:

As usual, Dr. Chopra proved to be a good asset to HSD. His ability at effective communication, interpersonal skills, discretion, tact, courtesy and willingness to adapt contributed to a very good harmony and efficiency of HSD. His communications with clients, particularly industry, was commendable.

Under the next heading, "factors affecting performance", the following positive comments were made:

Dr. Chopra is an energetic and resourceful worker and required little supervision. Dr. Chopra is willing to undertake new and challenging work. He possesses a considerable management experience which, within the mandate of HSD, could not be fully utilized. Apparently, since his last appraisal, he has been trying to seek other opportunities in the department and elsewhere. However, due to restraint and other difficulties, no substantive opportunity seems to have arisen for him. Nevertheless, it is hoped that the situation may improve in the future in which the department could find for him a more suitable assignment, which is more fully commensurate with his qualifications and potential. [italics Added]

However, in the photocopy tendered in evidence, the italicized words were stroked out by pen. The words, [Dr. Chopra] "works with little direct" [supervision.] were penned in above the first sentence. Above the third sentence, the word, [he] "has expressed interest in" [management] "but..." were penned in. These changes were not explained in evidence; we note that the words "possesses a considerable management experience" were removed. Before Dr. Chopra's 1992 appraisal took place, the following events had occurred:

1. In April 1991, the Public Service Commission had given

19

its opinion that making Dr. Franklin Acting Director of the Bureau had prejudicially affected his career opportunities.

2. In July, the Public Service appeal board allowed his appeal on the basis that it had not been demonstrated that Dr. Franklin was fully qualified for the position of Director.

3. In October, he learned that his appeal against Dr. Franklin continuing in the role of acting director had been rejected.

4. In December, he launched an appeal before the federal court requiring Dr. Franklin to be removed from her position.

5. In February 1992, by order of the federal court, Dr. Franklin had been removed from her position and a new competition for the position of director was agreed to be instituted.

6. At the beginning of April he learned that he had been screened out of the new competition on the basis that he lacked the necessary management experience.

By the time of his 1992 appraisal, he had been through a year of extremes: he had been partially successful before the Public Service Appeal Board, and successful before the Federal Court, but then had been denied the opportunity to oppose Dr. Franklin's continued appointment and, in particular, was screened out of the new competition.

The first draft of his appraisal contained the following statement:

Dr. Chopra works with little direct supervision. While he has expressed an interest in management, no suitable post or assignment is available for him in the department. [italics added]

The 1992 appraisal went through a series of redrafts that were the subject of disagreement between Dr. Chopra and his superiors: Dr. Chopra gave evidence that he agreed to the above initial wording prepared by his division chief, Dr. Yong, but Dr. Yong said at the time that he would need to consult first with the Director of the Bureau, Dr. Ritter. In a second version, the italicized words above were deleted and the following words were substituted:

... He did not apply for an acting chief position available in the bureau. Neither conference attendance, nor participation in bureau's exhibit has been requested by Dr. Chopra.

Dr. Chopra objected to this wording, and after several redrafts, in the final version it appears that the original wording was restored. Each version of the appraisal also included the

20

following "employee comments" by Dr. Chopra. They remained the same:

Department was asked to provide experience in a senior management position, either by acting appointment or under dap. Although numerous positions existed and appointments were made for others, no such opportunity was provided to me. No reasons were given.

It is evident that the level of disagreement between Dr. Chopra and his superiors had elevated, and their relations had deteriorated during 1990 and 1991.

(D) the department's view of Dr. Chopra

Immediately before he filed his complaint under the access to information act, Dr. Chopra obtained a copy of an electronic mail memorandum from Shirley Cuddihy to R. Ballantyne, Director General of the Personnel Administration Branch, dated September 1, 1992. It contained her notes of conversations on August 27, 1992, with Dr. Liston and Dr. Somers, two weeks after their final grievance

meeting with Dr. Chopra and Danielle Auclair, referred to at pages 23 and 24, above. The memorandum is divided into three parts. In the first part, under the heading of "general", Ms. Cuddihy reported that Dr. Liston commented on "cultural differences":

... "soft skills" such as communicating, influencing, negotiating - quite often their cultural heritage has not emphasized these areas and they [employees from different cultures] are at a disadvantage. ... [w]e do business in the North American Way - "Consensus Reaching Model" which to some cultures is very foreign.

Dr. Liston recalled having discussions with Ivy Williams, an employee in the department who chaired a Visible Minority Advisory Committee, and according to Ms. Cuddihy, he went on to note:

There is however a bit of a paradox in highlighting what we consider needs to be changed because we run the risk of having to defend ourselves against charges of assimilation. He suggests we need to provide minority groups with training - we need to point them in a direction of a mirror and say: because of your cultural background, you need to communicate better or adopt a less authoritarian style. It is not a color but a culture problem nor is it a branch or even department problem but appears to be most common in departments such as ours which are technically/scientifically oriented.

The memorandum then moves on to the second part, "specifics relating to S. Chopra":

He [Dr. Chopra] is authoritarian he [Dr. Liston] saw in SC [Dr. Chopra] a great textbook knowledge and

21

thought he could build on "soft skills". SC had a confrontational style the effects of which became apparent only sometime after his arrival in the staff position reporting to Dr. Liston. People avoided him after a period rather than being challenged by him. SC is not a negotiator - he doesn't make allies easily. He has not placed himself in a position for grooming to senior management level positions.

The third part of the Cuddihy memorandum is headed "Dr. Somers interview", and contains the following paragraph:

There is very little concrete from my encounter with Dr. Somers. The one objective and useful piece of information relates to a theme indicated by Dr. Liston and concerns the lack of initiative displayed by SC to compete for progressively more senior positions. They provided me with a list of some 11 positions which SC could have competed for but resisted...

This memorandum contains the only written information received in evidence, of management views of Dr. Chopra, views that were recorded two weeks after the final attempt at mediation and less than a month before he filed his human rights complaint. As we have noted, relations between him and management in his department had deteriorated significantly since 1990. Whatever the merits of Dr. Liston's debatable views of cultural minorities, they contain the suggestion -- made after at least two years of controversy -- that Dr. Chopra was the author of his own misfortunes, brought on because of his own shortcomings due at least in part to his cultural background.

The issues in order for the complainant and/or the Commission to be successful in their claim, they must first establish a prima facie case of discrimination, that is, they must produce sufficient evidence to justify a finding in their favour, in the absence of (2) contrary evidence by the respondent. The respondent chose not to call evidence beyond what was submitted in cross-examination, and it argued that a prima facie case had not been demonstrated by the complainant and Commission. Accordingly, it is the task of this tribunal to determine whether the evidence of the department's treatment of Dr. Chopra over the years of his employment, together with the evidence of management's views of him, constitute a prima facie case of discrimination against Dr. Chopra contrary to s. 7 of the Canadian Human Rights Act.

2 Ontario Human Rights Commission v. O'Malley and Simpsons-Sears, [1985] 2.S.R. 536 at 558

There are two elements in this issue. First, is it reasonable to conclude that the conduct of the department amounted to unfair treatment of Dr. Chopra? Second, if we conclude that the treatment was unfair, did it amount to discrimination prohibited by the Act? Bureaucratic insensitivity and unfairness -- even a reasonably based perception of discrimination by the complainant -- do not in themselves amount to discrimination. It is not enough to find that

the respondent treated the complainant unfairly over a number of years: in order for a tribunal to conclude that there was a breach of the act and to grant a remedy, it must first find that a prohibited ground under the act was a factor in the conduct of the respondent. A prohibited ground under the Act need not be the sole or even primary motivation, but it must be of some significance.

Findings 1. The treatment of Dr. Chopra during his years in the Bureau of Human Prescription Drugs

In our opinion, senior management failed to respond appropriately to the appraisals and recommendations of Dr. Chopra's immediate superiors over a long period, extending to the late 1980s. At the very least, his concerns needed to be addressed directly by senior management and kept in mind when vacancies occurred. Such responsibilities cannot properly be left entirely to the employee within such a large bureaucracy. Senior management's insensitivity and inaction led, quite understandably, to Dr. Chopra's increasing level of frustration and eventually to his suspicions that racial discrimination played a role in his being passed over. This employment history helps to explain Dr. Chopra's refusal, however unwise it may have been, to apply for the chief's position in his own division; he felt it unfair that a promotion with increased responsibilities should provide little or no salary increase. His frustration ultimately led to his emotional response to the rejection of his application for a position as director, and to seeking redress through formal appeals. In turn, these events supported management's view of Dr. Chopra as being confrontational and resulted in a downward cycle in relations between the parties.

Management's failings do not in themselves demonstrate prima facie discrimination contrary to s. 7 of the Act.

2. Dr. Chopra's opportunities for promotion, 1988 to 1992

As discussed at pages 9 and 10, Dr. Chopra did not pursue opportunities to apply for management positions of chief of a division. In cross-examination of Dr. Chopra, counsel for the department asserted that by ignoring the many posted announcements of vacancies Dr. Chopra himself was responsible for his failure to (3) this requirement has been stated in a number of cases. See, for example, *Balbir Basi v. Canadian National Railway Co.* (1988) 9 C.H.R.R.D/5029, at para. 38479:

... However, it is sufficient to reach a conclusion that discrimination was one of the factors that influenced the employer in refusing Mr. Basi the position; it is not incumbent on me to determine that it was the sole or primary reason for that decision.

Gain promotion. However, since the department did not introduce any evidence other than the announcements themselves, it remained unclear to what extent these positions were suitable for Dr. Chopra or whether the announcements were easily accessible to him. More important in our opinion were two vacancies clearly within his fields of expertise that he did know of. The first occurred late in 1987, within the Division Infection and Immunology where he had worked for over 18 years. He claimed that he did not apply because no announcement of a competition for the position was ever posted and it remained filled on an acting basis. Perhaps a more optimistic person would have pursued the prospect of an appointment by making inquiries, since the vacancy occurred in his field of expertise. We have already discussed Dr. Chopra's decision not to apply for the second vacancy, which occurred within his own Division of Human Safety in 1989, because he believed that reclassification had resulted in the salary being unfairly low. He was discouraged and suspicious, and had become highly sensitized to issues of fairness. It might be argued that bureaucratic insensitivity had led to his morale eroding to the point where he did not exercise the best judgment. While we may sympathize with Dr. Chopra, nevertheless, as subsequent events have shown, it was unwise of him to pass up an opportunity to enter the management stream at the level of a chief and thus gain experience to qualify for subsequent promotion:

1. A year later, in September 1990, Dr. Chopra applied for the not yet announced position of director of the Bureau of Human Prescription Drugs. However, the department appointed Dr. Franklin who had nine years' experience as a division chief.
2. Dr. Chopra appealed the appointment and in July 1991, Ms. Barkley of the Public Service Appeal Board rendered her decision that, "it was not unreasonable for Dr. Somers to conclude that Dr. Chopra failed to meet..." the necessary qualifications of management experience.
3. Subsequently, in March 1992, the screening committee in conducting a new search for the position of director screened out Dr. Chopra on the grounds that he did not possess the necessary management experience.

4. Dr. Chopra appealed again, and in July 1992, Mr. Carbonneau of the Public Service Appeal Board agreed that he did not possess the necessary management experience at the time he was screened out. We note that while Dr. Franklin had lengthy line-management experience, Dr. Chopra had comparatively little. We have no basis for disagreeing

24

with the findings of other administrative tribunals that the prerequisite of management experience for the position of director of a bureau was a reasonable justification for screening out Dr. Chopra.

3. Management's view of Dr. Chopra

Dr. Liston's portrayal of Dr. Chopra in the memorandum quoted in the previous section was quite negative, stating that he was, "authoritarian", "had a confrontational style", "people avoided him after a period", "not a negotiator", and "doesn't make allies easily". These observations are inconsistent with the descriptions of his skills in annual appraisals:

notably sound judgment, discretion, analytical ability, effective oral and written communications, willingness to assume responsibility in a mature and adaptable manner. (1981 and years following) [italics added] Dr. Chopra has the ability to work perceptively and effectively. He presents his arguments lucidly in a controlled tactful manner and writes effectively. (1986) [italics added]

He is flexible to suggestions and negotiates well with manufacturers. For committee work he functions diligently and resourcefully. When provided the opportunity he acts as a competent manager. (1987) [italics added] Dr. Chopra has the ability to communicate in an effective manner. Interpersonal skills such as discretion/tact/courtesy are easily observed and transfer themselves into the work he performs. (1990) [italics added]

While Dr. Liston in 1992, described him as "authoritarian" and "confrontational", his immediate superiors stated in 1986, that he was "tactful", in 1987, that he was "flexible" and "negotiates well", and as recently as 1990, that his "interpersonal skills" showed "discretion/tact/ courtesy". Assuming good faith on the part of both Dr. Liston and Dr. Chopra's immediate superiors, can

we explain the large differences in opinion between them? It appears that Dr. Chopra was tactful and negotiated well when he acted on behalf of the department with a healthy degree of detachment, when nothing personal to him was at stake. However, his conduct might well have changed when his own career was heavily involved.

Such change can be viewed as quite normal: lawyers who act with discretion on the part of their clients find it very difficult to act dispassionately in their own interest. Indeed, there is a well known saying that, "the lawyer who acts for himself has a fool for a client"; the prudent lawyer always retains a colleague to act for him. Another factor might well be that, as

25

time went by and Dr. Chopra became increasingly frustrated with the lack of opportunity for promotion through the late 1970s and well into the 1980s, he became not only frustrated but also suspicious that he was being passed over deliberately. Such a perception would certainly heighten his tension and make him appear more confrontational. Allegations of racial discrimination against senior management would also raise the level of conflict.

Management that believes itself to be acting fairly is almost certain to take offence at such accusations, and to perceive the accuser as confrontational and not a negotiator. In addition, the remarks about Dr. Chopra were made at the end of an extended period of conflict (four hearings before Public Service boards and the courts) including allegations by him of discrimination by the department.

Finally, describing the complainant as having these negative qualities helps to justify management's view of him as not being suitable for a management position. Apart from the question of management experience, all of these factors appear cumulatively to have created senior management's perception that Dr. Chopra was quite properly screened out because of his lack of skills in personal relations. We do not accept their perception. The repeated positive evaluations by Dr. Chopra's immediate superiors, their recognition that he had management potential -- sending him on management training programs and supporting him for a who fellowship -- indicate that, at the very least, until he transferred from the Bureau of Human Prescription Drugs in late 1987, it was the department that failed in its responsibility to be receptive to needs and interests of their employees within the

context of the department's own needs. The ultimately negative views of senior management do not appear to be based on prejudice but rather to be the consequence of the conflictual relations resulting from administrative failure over the years.

4. Management's views on cultural differences

The sole evidence before the tribunal containing more general views of management, views that arguably might be related to discrimination, are found in the electronic mail memorandum of Ms. Cuddihy (quoted more fully at pages 26 and 27, above):

... "soft skills" such as communicating, influencing, negotiating - quite Often their cultural heritage has not emphasized these areas and they [employees from different cultures] are at a disadvantage. ... [w]e do business in the north american way - "consensus reaching Model" which to some cultures is very foreign. ... because of your cultural background, you need to communicate better or Adopt a less authoritarian style. It is not a color but a culture problem..

26

These are the only references to a subject that could be considered as treading on prohibited ground -- to "culture", which may be interpreted to include "race, national or ethnic origin". The comments attributed to management may be viewed as unsophisticated and perhaps ill-informed, but at most they are rather equivocal.

This view is consistent with that of Dr. Frances Henry, Professor Emeritus of Social Anthropology at York University in Toronto, called by the Commission as an expert witness in matters of racism, particularly as it relates to employment. In cross-examination on the observations in the Cuddihy memorandum, Dr. Henry was asked:

Would you not agree with me, when you look at those general comments, that what is being said there is not that people with cultural differences cannot become managers with health and welfare? What it says is that they can become managers with health and welfare?

Dr. Henry replied, "yes." and added: the third paragraph [in the memorandum] specifically suggests a solution.

The Tribunal was not provided with the full context of the conversations in which the remarks were made; neither side chose to call either Dr. Liston or Dr. Somers to give evidence. We conclude that the remarks in this memorandum cannot reasonably be construed as demonstrating that a prohibited ground of discrimination was a factor in the adverse decisions made by the department in relation to Dr. Chopra's application for the position of director of the Bureau of Human Prescription Drugs and in subsequent evaluations.

If this tribunal had considered evidence of policies or practices that tend to deprive classes of individuals of employment opportunities contrary to s. 10 of the act (systemic discrimination), we might perhaps have viewed the comments in a different light. In the absence of such information -- and other matters to be determined before another tribunal hearing the NCARR complaint -- we find that there is not sufficient evidence with respect to the treatment of Dr. Chopra himself to conclude that he, individually, was discriminated against on the basis of such policies or practices. The decision and order as we have already observed, in terms of what is reasonable and fair treatment of employees generally, we would not hesitate to conclude on the balance of evidence that, at least until the late 1980s, Dr. Chopra was treated badly. The department's inaction toward Dr. Chopra from the 1970s through the mid 1980s, increasingly discouraged him.

As a result, by the time he applied for a transfer to the bureau of veterinary drugs in 1987, he felt his opportunity for experience at entry-level management positions was thwarted; he had become bitter and suspicious. However, reviewing the facts with the objectivity that Dr. Chopra could not himself be reasonably expected to muster,

27

we conclude that the equivocal and even contradictory conduct of management discloses insensitivity to employees generally and a failure to have a clear approach toward employee career development and that it is not the result of differential treatment prohibited by the Canadian Human Rights Act. We note that counsel for the department claimed that the complaint was baseless, frivolous and vexatious and asked for solicitor-client costs against the complainant and the Commission.

We mention this matter only to reject it entirely: Dr. Chopra's feelings of mistreatment were not at all unreasonable; his pursuit of his complaint was understandable and he comported himself with

dignity. The Canadian Human Rights Act contains no provisions for awarding costs, neither party-and-party costs nor solicitor-client costs. In any event, we would not award either type of costs even if the act gave us the power to do so.

Accordingly, and despite our concerns about the fairness of treatment of Dr. Chopra and his understandable fear of discrimination, this complaint is dismissed.

Dated this day of January, 1996.

Daniel Soberman

Linda Dionne

Gregory Pyc