Federal Court  Cour fédérale

Date: 20180920

Docket: T-2078-17

Citation: 2018 FC 937

Montréal, Quebec, September 20, 2018

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

SUSAN LYNN KOLIBABA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mrs. Susan Lynn Kolibaba has been a regular member of the Royal Canadian Mounted Police [RCMP] since 1995. She holds the rank of constable, and is currently on off-duty sick status. In 2010, Cst. Kolibaba was a member of the Vernon Detachment in British Columbia and she applied for a position at the rank of corporal in the Kelowna Detachment. She did not obtain the position and launched a Level I non-selection promotional grievance in 2010, followed by a

Level II grievance in 2017, both of which were denied. Cst. Kolibaba now applies for judicial review of the Level II Adjudicator's decision to deny her grievance. She seeks to have the Level II Adjudicator's decision overturned and to be promoted to the rank of corporal, with back pay and pension benefits backdated to August 31, 2010 – the date on which she submitted her grievance.

II. Preliminary Matters

[2] First, counsel for the Respondent rightfully requested that the style of cause be amended to identify the Attorney General of Canada as sole Respondent, pursuant to section 23 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50. The style of cause is so amended.

[3] Second, at the beginning of the hearing, Cst. Kolibaba's husband, Mr. Randy Kolibaba stood up and requested that he be permitted to make representations on behalf of his wife considering her medical condition. He presented the Court with a letter from Dr. Bill Tomm who reports having been Cst. Kolibaba's consulting psychiatrist since 2012. Dr. Tomm states that Cst. Kolibaba suffers from Post-Traumatic Stress Disorder, complicated by major depressive episodes and paroxysmal atrial tachycardia, which is frequently precipitated when she experiences anxiety. Considering the above and the fact that Mr. Kolibaba informed the Court that he retired from the RCMP after serving for 34 years and had also been appointed as an RCMP Adjudicator, the Court has exceptionally accepted the Applicant's request (See *Scheuneman v Canada (Attorney General)*, 2003 FCA 439 at para 5, and Rule 3 of the *Federal Courts Rules*, SOR/98-106).

III. Facts

[4] In order to best capture how Cst. Kolibaba's grievance process has stretched out over seven years, her history needs to be presented chronologically and in some details.

[5] The Job Opportunity Bulletin [Bulletin] was published on May 12, 2010. The position offered was described as: Staffing Action RPR-E-MRM 524-37-028/10-11, Corporal, Kelowna Detachment, Serious/Major Crimes Investigator/Supervisor/Interviewer (Serious Crime Investigator/Supervisor, Job Code 526) [Position]. The Bulletin listed several competencies that the ideal candidate for the Position should have.

[6] Cst. Kolibaba submitted her application for the Position on June 21, 2010. All applications were reviewed during the month of July by the Selecting Line Officer, [SLO] Superintendent McKinnon. Supt. McKinnon made a recommendation of his preferred candidate to Inspector Levy, the Human Resources Officer/delegate in charge of the Pacific Region Career Development and Resourcing Section. He provided his recommendation in Form 5180, the Line Officer Recommendation Rationale Form [Rationale Form]. Cst. Kolibaba was not the recommended candidate.

[7] Supt. McKinnon sent the Rationale Form to Cst. Kolibaba as his written reasons to explain why she was not promoted. In the Rationale Form, Supt. McKinnon justified his choice through a detailed review of the selected candidate's qualifications. Specifically, he noted that

the successful candidate "has extensive knowledge, experience and skills that will benefit the strategic priorities and needs at Kelowna Detachment Serious Crimes."

[8] Insp. Levy approved and implemented Supt. McKinnon's recommendation on August 6, 2010, and Cst. Kolibaba learned that she was not the promoted candidate a few days later. On August 31, 2010, she submitted her Level I grievance to the Office for the Coordination of Grievances. The basis for her grievance was that the standard assessment process for hiring was not followed, the decision-maker failed to take into account the totality of her promotional package, and too much emphasis was placed on competencies of the selected candidate that were not the subject of the Bulletin. The Respondent listed in the grievance was Supt. McKinnon.

[9] On October 19, 2010, as a result of amendments made to the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [Act] and certain RCMP policies, Cst. Kolibaba was asked to resubmit her grievance under the new framework for grievances, which she did.

[10] The RCMP policy required that the grievance process begin with an early resolution phase lasting approximately 45 days under the supervision of the Office for the Coordination of Grievances. In this case, the early resolution process took far longer than 45 days.

[11] On May 27, 2011, Supt. McKinnon provided Cst. Kolibaba with all the relevant material in his possession. Cst. Kolibaba requested two-week extension to review the material, as a result of a "serious and high profile criminal investigation" that she was working on.

[12] On July 21, 2011, a case manager from the Office for the Coordination of Grievances advised Cst. Kolibaba and Supt. McKinnon of her concerns with the slow pace of discussions between the parties, since the early resolution phase should have been completed by December 3, 2010.

[13] On August 3, 2011, Cst. Kolibaba and Supt. McKinnon met for a resolution conference. They did not reach an agreement. Nevertheless, they filled out and submitted Form 3081-1, the Early Resolution Outcome Document [ER Outcome Form], which as per the RCMP policy, must be filled out before advancing to the next phase of the grievance process (a decision by a Level I Adjudicator). Cst. Kolibaba alleges that during the meeting, Supt. McKinnon said that he did not consider her cover letter in his selection process since he only relies upon cover letters in the event of a tie between candidates.

[14] Cst. Kolibaba submitted her written arguments on the merits of her grievance on August 29, 2011, with a brief time extension as a result of her father being ill. In these arguments, she referenced Supt. McKinnon's alleged comments from their meeting.

[15] Supt. McKinnon provided his written arguments on September 27, 2011, after requesting and being granted a two-week time extension. His written arguments stipulated: "[T]hroughout her submission, Cst. Kolibaba references discussions she had with the respondent during Early Resolution, some of which may have been misconstrued by the Grievor". He asked that these alleged comments be disregarded, since early resolution discussions are meant to be without prejudice.

[16] Cst. Kolibaba submitted her rebuttal on October 14, 2011, wherein she further emphasized that Supt. McKinnon's alleged comments made during the early resolution phase be considered admissible.

[17] The parties' submissions and grievance materials were submitted to the Level I Adjudicator for consideration on the merits on February 28, 2012. In February 2013, Cst. Kolibaba first attempted to obtain an update on the status of her grievance, without success.

[18] On September 18, 2014, over two years after having been assigned this file, the Level I Adjudicator issued an interlocutory decision stating that Supt. McKinnon had been incorrectly named as the respondent. The correct respondent should have been Insp. Levy, the Human Resources Officer/delegate. The Level I Adjudicator directed that the grievance process return to the early resolution phase, this time with the correct respondent.

[19] On December 29, 2014, Cst. Kolibaba was provided with the Level I Adjudicator's decision identifying the correct respondent and on April 8, 2015, Insp. Levy, was notified of the filed grievance. The early resolution phase began for the second time.

[20] The delay between December 2014 and April 2015 was at least partially caused by the fact that the initial case manager from the Office for the Coordination of Grievances had left the unit and the new case manager worked reduced hours. As a result, the office manager took responsibility for the file.

[21] On May 28, 2015, Insp. Levy submitted an ER Outcome Form via email, with copy to Cst. Kolibaba. This form was not signed by either party.

[22] On June 11, 2015, Cst. Kolibaba was provided 14 days to submit written submissions on the substantive issue of the grievance. After having asked for an extension until February 29, 2016, as a result of going on off-duty sick status for a work-related medical condition, she was able to file on February 8, 2016. Amongst other arguments, Cst. Kolibaba stated that not all relevant material had been provided to her.

[23] Insp. Levy submitted her written submissions on March 2, 2016, and Cst. Kolibaba followed with her rebuttal on March 17, 2016.

[24] On May 2, 2016, the Office for the Coordination of Grievances emailed Cst. Kolibaba to ask whether the collateral issue of relevant material still needed to be resolved (the confusion arising from the ER Outcome Form indicating that the issue of relevant material had been agreed upon).

[25] Cst. Kolibaba confirmed that the issue of relevant material remained outstanding, and had become an issue as a consequence of naming a new respondent. The parties were invited to resolve the issue before the grievance could proceed to the Level I Adjudicator, as it was meant to be settled at the early resolution phase.

[26] On May 31, 2016, Insp. Levy informed the Office for the Coordination of Grievances that the parties could not agree on disclosure and that a Level I Adjudicator's decision on the issue of relevant material was required. On this date, Insp. Levy submitted a further ER Outcome Form that only she signed, indicating that relevant material remained an outstanding issue.

[27] Between June 24 and August 26, 2016, the parties exchanged their written submissions regarding Cst. Kolibaba's request for further relevant material. The Level I Adjudicator's interlocutory decision was issued on October 3, 2016. He found that Cst. Kolibaba "had not established that she has met the criteria for the disclosure of requested documents." The Level I Adjudicator concluded that the three categories of material sought by Cst. Kolibaba were not relevant or reasonably required to present the grievance.

[28] On October 25, 2016, the record was submitted to a Level I Adjudicator for a decision on the merits and on March 31, 2017, the grievance was denied. The Level I Adjudicator found that there was no evidence on the record to show that the selection decision failed to accord with the relevant legislation and the RCMP and Treasury Board policies. Further, there was no evidence that Supt. McKinnon failed to consider all the information in Cst. Kolibaba's application. Additionally, the Level I Adjudicator determined that:

> Communications made between the parties during the early resolution phase were not considered, given that they were made without prejudice.
>
> Supt. McKinnon's failure to retain his notes was not inconsistent with RCMP policy.
>
> The numerous delays were disregarded, since they did not impede Cst. Kolibaba's presentation of her grievance, nor was there evidence that the delay caused her physical or emotional stress.

[29] Cst. Kolibaba was served with the Level I Adjudicator's decision on April 6, 2017, and, a few weeks later, she requested that her grievance be presented to a Level II Adjudicator. She provided written submissions for a Level II decision and although her arguments at Level II remained largely the same, she added the following:

> The legal principle of "without prejudice" does not apply to Supt. McKinnon's alleged comments during the ER phase.
>
> It is problematic that Insp. Levy accepted Supt. McKinnon's recommended candidate for the promotion with very little supporting documentation (the only documentation submitted was the Rationale Form).

[30] Insp. Levy filed no further submissions as she agreed with the Level I Adjudicator's decision and on August 2, 2017, the parties' record was submitted to a Level II Adjudicator for a decision on the merits.

[31] On November 20, 2017, the Level II Adjudicator denied Cst. Kolibaba's grievance.

IV. Legislative Context

[32] When Cst. Kolibaba initiated her grievance in 2010, the applicable legislation governing the RCMP grievance process was Part III of the Act, as it appeared prior to being amended on November 28, 2014, and the *Commissioner's Standing Orders (Grievances)*, SOR/2003-181 [Standing Orders], as they appeared prior to being repealed on November 28, 2014.

[33] At that time, subsections 31(1) and 31(2) of the Act read as follows:

Right of member	**Règle**
31. (1) Subject to subsections (2) and (3), where any member is aggrieved by any decision, act or omission in the administration of the affairs of the Force in respect of which no other process for redress is provided by this Act, the regulations or the Commissioner's standing orders, the member is entitled to present the grievance in writing at each of the levels, up to and including the final level, in the grievance process provided for by this Part.	**31.** (1) Sous réserve des paragraphes (2) et (3), un membre à qui une décision, un acte ou une omission liés à la gestion des affaires de la Gendarmerie causent un préjudice peut présenter son grief par écrit à chacun des niveaux que prévoit la procédure applicable aux griefs prévue à la présente partie dans le cas où la présente loi, ses règlements ou les consignes du commissaire ne prévoient aucune autre procédure pour corriger ce préjudice.
Limitation period	**Prescription**
31 (2) A grievance under this Part must be presented	**31** (2) Un grief visé à la présente partie doit être présenté :
(a) at the initial level in the grievance process, within thirty days after the day on which the aggrieved member knew or reasonably ought to have known of the decision, act or omission giving rise to the grievance; and	a) au premier niveau de la procédure applicable aux griefs, dans les trente jours suivant celui où le membre qui a subi un préjudice a connu ou aurait normalement dû connaître la décision, l'acte ou l'omission donnant lieu au grief;
(b) at the second and any succeeding level in the grievance process, within fourteen days after the day the aggrieved member is served with the decision of the immediately preceding level in respect of the grievance.	b) à tous les autres niveaux de la procédure applicable aux griefs, dans les quatorze jours suivant la signification au membre de la décision relative au grief rendue par le niveau inférieur immédiat.

[34] Subsection 32(1) of the Act read as follows:

Final level in grievance process	**Dernier niveau**
32. (1) The Commissioner constitutes the final level in the grievance process and the Commissioner's decision in respect of any grievance is final and binding and, except for judicial review under the *Federal Courts Act*, is not subject to appeal to or review by any court.	**32.** (1) Le commissaire constitue le dernier niveau de la procédure applicable aux griefs; sa décision est définitive et exécutoire et, sous réserve du contrôle judiciaire prévu par la *Loi sur les Cours fédérales*, n'est pas susceptible d'appel ou de révision en justice.

[35] Section 17 of the Standing Orders set out:

17. (1) If the level considering the grievance determines that they have jurisdiction over the grievance under subsections 31(1) and (2) of the Act, the level shall determine if the decision, act or omission that is the subject of the grievance is consistent with applicable legislation and Royal Canadian Mounted Police and Treasury Board policies.	**17.** (1) Si le niveau saisi du grief juge qu'il a compétence à l'égard du grief au titre des paragraphes 31(1) et (2) de la Loi, il décide si la décision, l'acte ou l'omission qui fait l'objet du grief est compatible avec la législation applicable et les politiques applicables du Conseil du Trésor et de la Gendarmerie royale du Canada.
17 (2) If the level considering the grievance determines that the decision, act or omission is not consistent with applicable legislation or Royal Canadian Mounted Police or Treasury Board policies, and that it has caused a prejudice to the grievor, the level shall determine what corrective action is appropriate in the circumstances.	**17** (2) Si le niveau saisi du grief décide que la décision, l'acte ou l'omission est incompatible avec la législation applicable ou les politiques applicables du Conseil du Trésor ou de la Gendarmerie royale du Canada et a causé un préjudice au requérant, il détermine quelles sont les mesures correctives indiquées dans les circonstances.

[36] As noted in the Level II Adjudicator's decision, the RCMP's policies and guidelines applicable to the promotion process are found in :

> *Career Management Manual* [CMM], Chapter 4 - Promotion
>
> *Non Commissioned Officers Promotion Process, Selection Guide for Career Development and Resource Advisor, Validation Committee and Line Officers* [Selection Guide]
>
> *The RCMP's Administration Manual II.38* [Manual]

V. Impugned Decision

[37] The Level II Adjudicator denied Cst. Kolibaba's grievance following a *de novo* review of the record. She contextualized her decision by setting out the burden that Cst. Kolibaba had to meet, that is to establish that Insp. Levy's decision to adopt the recommendation of Supt. McKinnon and to promote a candidate other than herself was inconsistent with policies and other guidelines applicable to the promotion process. The Level II Adjudicator concluded that Cst. Kolibaba did not meet that burden. She separated her decision into the four following issues: (1) Supt. McKinnon's early resolution comments; (2) procedural errors; (3) reasonableness of Supt. McKinnon's reasons; and (4) delays causing prejudice.

A. *Supt. McKinnon's early resolution comments*

[38] The Standing Orders set out in subsection 9(3) that:

9 (3) Any discussion by the parties of terms for resolving the grievance is without prejudice to them in the grievance procedure.	**9** (3) Les discussions des parties portant sur les conditions de règlement du grief ne leur portent pas préjudice au cours de la procédure relative au grief.

[39] The Administration Manual further provides:

> 8.1.3. In the event the parties do not arrive at an agreement, any such discussions in the course of ER, including offers and concessions, cannot be used by the other party in subsequent phases of the process unless the parties agree to include the information discussed or provided in ER into the grievance file. That information may be used by the level to render a decision.

[40] The Level II Adjudicator concluded that Supt. McKinnon's alleged comments should be considered without prejudice. She also observed that Cst. Kolibaba reported Supt. McKinnon's alleged comments in an inconsistent manner throughout the record. Furthermore, she concluded that Supt. McKinnon must have considered Cst. Kolibaba's cover letter, since his written reasons refer to her "experience working in a supervisory position" and the only document in her application package to discuss her supervisory experience was the cover letter.

B. *Procedural errors*

[41] The Level II Adjudicator concluded that Cst. Kolibaba did not establish that the promotional process was influenced by procedural errors or otherwise inconsistent with the Act or any RCMP or Treasury Board policies.

[42] With regard to Supt. McKinnon's failure to retain his notes and scoring key, she qualified this conduct as "not tantamount to a fatal error in process" because the content of his notes and any kind of scoring used was reflected in his written reasons, the Rationale Form. She justified this conclusion by reviewing the RCMP policy in the CMM. She said that the CMM allows SLOs to use "other selection tools, e.g. structured interviews, job knowledge examinations" to determine the successful candidate (ch 4, s 10.5.4), which would include the use of a scoring

key. However, while questions and results from job knowledge examinations and candidates' answers to structured interviews must be retained, scoring key notes need not be since they are just "personal notes" that will be (and were in this case) reflected in the SLO's written reasons.

[43] Regarding Supt. McKinnon's reference to the selected candidate's business degree, a qualification not mentioned in the Bulletin, the Level II Adjudicator explained that the Bulletin simply serves to establish the minimum qualifications for the Position. Cst. Kolibaba met the minimum qualifications set out in the Bulletin, as did all the candidates who proceeded to the selection stage. Candidates can otherwise distinguish themselves in their cover letter, which is what the successful candidate did with his business degree. SLOs are given wide discretion when considering a candidate for promotion and may consider all components of an application package, including the cover letter.

[44] The Level II Adjudicator explained that the purpose of the SLO's written reasons is to justify the selection of the chosen candidate. The purpose is not to provide a detailed comparison between the selected candidate and the candidates who were not chosen, or to explain to the non-selected candidates why they were unsuccessful.

C. *Reasonableness of Supt. McKinnon's reasons*

[45] The Level II Adjudicator explained that she also had to determine whether the decision reached at the end of the promotion process was reasonable, whether it was "sound, defendable and sufficiently informative or meaningful" to allow Cst. Kolibaba to understand why she was not promoted.

[46] She concluded that Supt. McKinnon's decision to select a candidate other than Cst. Kolibaba was reasonable and justified in thorough written reasons, and that it should be granted deference:

> [91] …With the support of policy, the SLO benefits from broad latitude in selecting the right candidate for the position. Accordingly, I must grant the SLO great deference in making the choice, unless a grievor can clearly demonstrate an error so egregious that, but for this error, the grievor would have been the candidate chosen for the promotion. I found no such evidence in this Record.

D. *Delays causing prejudice*

[47] The Level II Adjudicator concluded that Cst. Kolibaba was not prejudiced by the numerous delays involved in the grievance process and that she herself was a contributing party to them. For example, Cst. Kolibaba named the wrong decision-maker as the respondent, she did not commit to the early resolution phase in a timely manner and she raised the issue of relevant material in her written submissions on the merits, after the ER Outcome Form had already been submitted by Insp. Levy, which indicated that the issue of relevant material had been agreed upon.

[48] The Level II Adjudicator further stated that Cst. Kolibaba's lack of success in the promotional process under review did not prevent her from applying to other promotional activities and that she did not establish that the delays influenced her health.

VI. Issues and Standard of Review

[49] This application for judicial review raises the following two issues:

A. *Did the Level II Adjudicator breach any duty of procedural fairness?*

B. *Did the Level II Adjudicator unreasonably err in dismissing the Applicant's grievance?*

[50] The standard of review for the first issue is correctness, with some deference to the decision-maker's choice of procedure (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at paras 221-222; *Mission Institution v Khela*, 2014 SCC 24 at paras 79, 89).

[51] The standard of review for the second issue is reasonableness (*Storozuk v Canada (Attorney General)*, 2017 FC 4 at para 24). The reasonableness standard requires this Court to determine whether the Level II Adjudicator's decision falls within a range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VII. Analysis

[52] At the hearing, both parties asked the Court to immediately rule on the admissibility of the alleged comments made by Supt. McKinnon during the first early resolution process. They also asked the Court to rule on the admissibility of any evidence or detail supporting the bald assertion made by the Applicant, in her written representations, that Supt. McKinnon had misrepresented facts and falsified documents. Nowhere in the Applicant's written representations is there any information as to what misrepresentation would have been made, nor as to what document would have been falsified.

[53] An oral order was issued during the hearing, declaring the evidence and new arguments on both issues inadmissible. In my view, it would be unfair to the Respondent, who respected the confidentiality of the discussions held during the early resolution stage and refrained from providing any comment or evidence regarding same, to allow the Applicant to use this evidence in support of her application for judicial review. It was therefore also reasonable for the Level II Adjudicator to find as she did on the issue.

[54] The same can be said about any evidence of misrepresentation or falsification of documents that was brought up for the first time during the hearing before this Court, thus taking the Respondent by surprise. This evidence was not presented to the Level II Adjudicator, it is not part of the decision under review and it will not be addressed in these reasons.

[55] That said, in reading the Applicant's written representations, it is difficult to understand what error allegedly made by the Level II Adjudicator falls under the procedural fairness category and which one(s) should lead the Court to find the decision unreasonable. The Applicant's argument was better articulated and structured at the hearing.

A. *Did the Level II Adjudicator breach any duty of procedural fairness?*

[56] The Applicant argues that Supt. McKinnon's failure to retain the notes he took during the selection process prevented her to present full and complete arguments in support of her grievance. She adds that the Level II Adjudicator erred in finding that because Supt. McKinnon's "scoring key" transpired in his Rationale Form, this was not tantamount to a fatal error. The Applicant argues that since there is no evidence in the record that this was actually the case, the

Level II Adjudicator simply fabricated facts to support her finding. The Applicant relies on this Court's decision in *McGuffin v Canada (Attorney General)*, 2017 FC 97 to support her position.

[57] With respect, I do not agree with the Applicant.

[58] First, in *McGuffin*, Justice Catherine Kane of this Court granted the applicant's judicial review application on the basis that that the Level II Adjudicator had decided the case on an issue that was neither brought by the parties nor discussed with them at the hearing. This is not the case here. The Applicant raised the issue of Supt. McKinnon's notes and it was fully considered by the Level II Adjudicator. The fact that the Applicant does not agree with the outcome or the reasons given by the Level II Adjudicator does not equate to a breach of procedural fairness as it was identified by Justice Kane in *McGuffin*.

[59] Second, the Level II Adjudicator did not decide there was no obligation for the SLO to retain his personal notes, but rather decided that the fact he might not have retained them did not amount to a fatal error. In doing so, the Level II Adjudicator implicitly acknowledged section 4.1.3. of the CMM which sets out that "notes made about a candidate will be retained".

[60] It was not clear before me whether notes were not taken or not retained by Supt. McKinnon. In any event, it is one thing to decide that not retaining notes does not conform to the CMM, but it is a different one to hold that this amounts to a breach of procedural fairness. I agree with the Level II Adjudicator that a "scoring key" or any other tools used by Supt. McKinnon to assist in the selection of the recommended candidate did not require the approval

of Insp. Levy as it sits within the broad flexibility that is afforded to SLOs. Since they are not required to make personal notes when assessing candidates' credentials and they are not bound by any particular method of ranking the candidates, the notes, if taken, are not part of the assessment tools. The "right fit" and the results of any form of scoring are duly reflected in the Rationale Form. In my view, the Applicant had all the information she needed to properly present her grievance.

[61] Furthermore, although not retaining notes might not conform to section 4.1.3. of the CMM, it does not mean that the selection process did not conform to the Act or the RCMP and Treasury Board policies. I see the former as a minor record-keeping non-conformity, whereas the latter would be a more substantive non-conformity in the selection process that could lead to the remedy sought by a grievor.

[62] I see no breach of procedural fairness or any other reason to interfere with the Level II Adjudicator's decision on this point.

B. *Did the Level II Adjudicator unreasonably err in dismissing the Applicant's grievance?*

[63] The role of the Court in the present application for judicial review, as was the case for the Level II Adjudicator, is not to reconsider and reweigh the Applicant's promotion application. The Level II Adjudicator rightfully understood her role as requiring her to assess whether the selection process and decision were consistent with the applicable legislation and policies. She also correctly identified the applicable policies and guidelines as being mainly the CMM and the

Selection Guide, to which she refers throughout her decision. She also relies on this Court's decision in *Storozuk* above, in which Justice Keith Boswell held:

> [43] The Applicant does not point to any specific or particular reasons as to how or why the Adjudicator's decision was unreasonable. The Adjudicator's role, as defined by subsection 17(1) of the Standing Orders, only allows an adjudicator to review whether a line officer's decision was "consistent with applicable legislation and Royal Canadian Mounted Police and Treasury Board policies." The Adjudicator did not have the authority or jurisdiction under subsection 17(1) to reweigh the Applicant's experience and qualifications against those of the successful candidate; nor, for that matter, does this Court. The Adjudicator's recognition of her role is not tantamount to ignoring the Applicant's request to have his experience and qualifications reweighed against those of the successful candidate.
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> [44] In this case, the Adjudicator consulted the CMM and the Selection Guide which outlined the SLO's role in selecting a candidate. The Adjudicator noted that these policies provided the SLO with "much latitude in selecting the candidate deemed the best candidate for the position." In my view, it was reasonable for the Adjudicator to find that the SLO was not "bound by strict rules for considering the information of each candidate".
>
> [45] It was also reasonable for the Adjudicator to determine that the SLO's decision to examine and assess attributes beyond those listed was consistent with policy or legislation. This was reasonable for various reasons. First, the wording of the job posting concerning the desirable attributes was not an issue because the Applicant addressed the listed attributes. Second, the posting expressly stated that there were no required desirables. And third, the job posting encouraged prospective applicants to provide information about how they exceeded requirements and any other relevant information. In this case, the Adjudicator reasonably determined that the SLO had not breached her discretionary mandate by considering additional relevant qualifications.

[64] As stated by the Level I Adjudicator and by the Level II Adjudicator, there is no doubt the Applicant met the minimum requirements for the Position. All of her arguments are directed at the weight Supt. McKinnon gave to the candidates' credentials exceeding the minimum

requirements. However, this assessment was well within the statutory discretion granted to SLOs. After having considered all of the Applicant's arguments, I am unable to see how the selection process was made in contravention of the applicable legislation or policies. The Applicant did not identify any section of the Act or of the RCMP or Treasury Board policies that was breached, except for the one regarding notes retention.

[65] The Applicant argues that the Level II Adjudicator failed to consider all the evidence and arguments she adduced, thus demonstrating "a lack of objectivity and transparency" that presents an obvious bias. She argues that the Level II Adjudicator's reasons for her decision do not sufficiently address her concerns. For example, the Applicant would have liked to see the Level II Adjudicator address her argument that Insp. Levy failed to exercise due diligence when deciding to accept Supt. McKinnon's recommended candidate for the promotion. The Applicant also believes that there was a lack of evidence on how and why Insp. Levy chose to accept Supt. McKinnon's recommendation – and that the Level II Adjudicator ought to have addressed this lack of evidence in her decision.

[66] It is a well-known administrative law principle that decision-makers can delegate part of their duties (*Contrevenant No 10 c Canada (Procureur général)*, 2018 CAF 150 at paras 41-44):

> [41] […] La Cour suprême reconnaît depuis longtemps qu'un décideur administratif n'est pas tenu de s'acquitter personnellement de toutes les tâches qui lui sont confiées par la loi, et qu'il peut déléguer à du personnel administratif le soin d'accomplir certaines tâches dont dépend nécessairement la prise de décision éclairée comme la cueillette et l'analyse de la preuve : voir *La Reine c. Harrison*, 1976 CanLII 3 (CSC), [1977] 1 R.C.S. 238 aux pages 245-246, 66 D.L.R. (3d) 660 [Harrison]. De fait, c'est précisément la situation qui sous-tendait la décision rendue par la Cour suprême dans l'affaire *Baker*, où la décision contestée

avait été prise par un agent d'immigration supérieur au nom du ministre, sur la base des notes que lui avait remise un agent d'immigration subalterne.

[42] Dans un État moderne et complexe comme le nôtre, comme le rappelait la Cour suprême il y a déjà plus de quarante ans dans l'affaire Harrison, l'on ne peut pas s'attendre à ce que la personne désignée par la loi pour exercer certaines fonctions s'en acquitte intégralement elle-même. Une telle exigence provoquerait le chaos, entraînerait des délais interminables et ne serait pas source d'efficience. Comme l'observait le juge Rothstein (alors juge à la Cour fédérale) dans l'arrêt *Armstrong c. Canada (Commissaire de la Gendarmerie royale du Canada)*, 1994 CanLII 3459 (CF), [1994] 2 CF 356 au paragraphe 59, 73 F.T.R. 81 (confirmé par cette Cour à 1998 CanLII 9041 (CAF), [1998] 2 CF 666) :

> Quatrièmement, il n'est pas réaliste de penser que le commissaire peut statuer sur des appels en matière de renvoi sans déléguer à ses subalternes une partie du travail qu'entraîne la préparation de la documentation devant lui permettre de s'acquitter rapidement de sa tâche. Dans la présente espèce, la sergente Swann a déclaré dans son affidavit qu'elle avait consacré environ deux cent cinquante heures à l'examen du dossier et à la préparation du résumé. On ne s'étonnera pas de ce que le commissaire de la GRC ait besoin de cette aide puisqu'il ne serait pas pratique qu'il consacre tout ce temps à l'étude de la documentation se rapportant aux renvois, aux griefs ou aux mesures disciplinaires dont on interjette appel devant lui. En soi, cette délégation n'implique pas que le commissaire ne s'est pas personnellement occupé de prendre la décision.

[43] Ce qui est essentiel, c'est que la personne désignée pour prendre une décision ou son délégué se penche personnellement sur le dossier et fasse sienne les recommandations qui ont pu lui être faites. En d'autres termes, c'est au décideur désigné par la loi qu'il incombe toujours de façon ultime de prendre la décision, après avoir pris connaissance suffisante de tous les aspects de la question litigieuse. Or, c'est précisément ce qu'a fait la sous-directrice ici. Dans le cadre de la décision qu'elle a transmise à l'appelant le 10 janvier 2014, elle écrit :

[TRANSLATION]

> J'ai examiné soigneusement le dossier à la lumière des observations que vous avez présentées et j'estime selon la prépondérance des probabilités que [redacted] a commis les violations décrites au procès-verbal. En conséquence, j'impose la pénalité administrative de [redacted].

[44] À moins de vouloir remettre en question cette affirmation ou d'en contester la véracité, par le biais d'une preuve crédible, je ne vois pas comment on pourrait contester la décision de la sous-directrice au motif qu'elle aurait illégalement sous-délégué son pouvoir décisionnel. L'appelant n'a pas même tenté de faire cette preuve, et n'est d'ailleurs pas revenu sur cet argument lors de l'audition. Par conséquent, cette première allégation de violation des principes d'équité procédurale doit être rejetée.

[TRANSLATION]

[41] … The Supreme Court has long recognized that administrative decision-makers are not required to personally perform all of the tasks conferred upon them by the legislation, and that they may delegate to administrative staff certain tasks upon which informed decision-making necessarily depends, such as the gathering and analyzing of evidence: see *The Queen v. Harrison*, [1977] 1 S.C.R. 238 at pages 245-246, 66 D.L.R. (3d) 660 [Harrison]. This was precisely the situation in the Supreme Court's decision in *Baker*, where a senior immigration officer had made the impugned decision on the Minister's behalf on the basis of notes that a subordinate immigration officer had given him.

[42] In a modern and complex state like ours, as the Supreme Court reiterated more than forty years ago in *Harrison*, it is unreasonable to expect that the person designated in the legislation to perform certain duties will perform all of them personally. Such a requirement would cause chaos, lead to interminable delays and be inefficient. Justice Rothstein (then of the Federal Court) stated the following in *Armstrong v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [1994] 2 FC 356 at paragraph 59, 73 F.T.R. 81 (affirmed by this Court in [1998] 2 FC 666):

> Fourth, it is not realistic for the Commissioner to make appeal decisions in discharge matters without delegating to his subordinates some of the work involved in preparing the material in a manner to enable him to expeditiously perform his function. In

> this case, Sgt. Swann states, in her affidavit, that she spent approximately 250 hours reviewing and preparing the résumé. It is to be expected that the Commissioner of the RCMP would require such assistance, it not being practical for him to expend that amount of time reviewing the material in discharge, grievance or disciplinary matters appealed to him. Such delegation does not, of itself, imply that the Commissioner did not put his mind, independently, to the decision-making process.

[43] What is essential is that the person designated to make a decision or his or her delegate personally consider the file and adopt the recommendations that have been made. In other words, the decision-maker designated in the legislation is always responsible for making the final decision after obtaining sufficient knowledge of all aspects of the issue. That is precisely what the deputy director did in this case. In the decision she sent to the appellant on January 10, 2014, she writes the following:

> I have carefully reviewed the file in light of the representations you submitted and find on a balance of probabilities that [redacted] committed the violations described in the notice. Consequently, I impose the administrative penalty of [redacted].

[44] Unless there is an attempt to challenge that statement or dispute its veracity with credible evidence, I do not see how the deputy director's decision could be disputed on the ground that she apparently unlawfully sub-delegated her decision-making authority. The appellant did not even attempt to prove this and did not return to this argument at the hearing. Consequently, this first allegation of a breach of the principles of procedural fairness must be rejected.

[67] In the present case, the Applicant was informed of the role and identity of the SLO chosen to manage the selection process and, as noticed by the Level II Adjudicator, she had the opportunity to object, but did not do so before she learned that she was not the selected candidate.

[68] The Applicant also argues that the Level II Adjudicator introduced a new burden of proof for her to meet in making her case, requiring her to prove that Supt. McKinnon's reasons for choosing his selected candidate were "not reasonable". The Applicant submits that this new burden was an additional requirement on top of her obligation to prove, on a balance of probabilities, that (i) Supt. McKinnon's reasons were not consistent with the Act or the RCMP and Treasury Board policies; and (ii) that she suffered a prejudice (subsection 17(2) of the Standing Orders). The Applicant was not advised of this new burden of "reasonableness", nor given an opportunity to address it.

[69] With respect, I see this comment made by the Level II Adjudicator as being favourable to the Applicant. In a case like this one, where a candidate is unable to demonstrate that the SLO's reasons were not consistent with the Act or the RCMP and Treasury Board policies, and that the candidate suffered a prejudice as a result, he or she might have an additional argument by trying to demonstrate that the decision was not reasonable. In other words, the fact that the Level II Adjudicator does not find the decision unreasonable has no bearing on her conclusions that Supt. McKinnon's reasons were consistent with the Act and the RCMP and Treasury Board policies and that, in any event, the Applicant did not suffer a prejudice resulting from the selection process.

[70] Finally, the Applicant argues that the Level II Adjudicator erred in concluding that she was not prejudiced by the numerous delays involved in the grievance process. She further submits that the Level II Adjudicator's summary of the grievance's history was unreasonably one-sided because it highlighted the few instances where the Applicant caused delays, without

addressing the delays caused by the RCMP, which were far longer and more substantial than her own.

[71] Delays in an administrative context do not necessarily amount to an abuse of process. In my view, the delays in the Applicant's grievance file are the responsibility of both parties and, as such, they are not "so oppressive as to taint the proceedings" (*Blencoe v British Columbia (Human Rights Commission*), 2000 SCC 44 at para 121).

[72] More importantly, the Applicant presented no evidence of any prejudice that would compromise the fair determination of her grievance, nor did she present evidence that she suffered any prejudice relating to past or future promotional activities.

[73] In sum, the Applicant was unable to convince the Court that the Level II Adjudicator's decision was outside the range of possible outcomes with regards to the facts of this case and the law.

VIII. Conclusion

[74] For the above reasons, the application for judicial review is dismissed and costs are granted in favour of the Respondent in an amount as may be agreed upon by the parties. If the parties are unable to agree as to the amount of such costs within 15 days of the date of this judgment, either party shall thereafter be at liberty to apply for an assessment of costs by an assessment officer in accordance with the *Federal Courts Rules*, SOR/98-106.

JUDGMENT in T-2078-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. The style of cause is amended to replace the "Minister of Public Safety and Emergency Preparedness" with the "Attorney General of Canada" as Respondent;
3. Costs are granted to the Respondent in an amount as may be agreed upon by the parties. If the parties are unable to agree as to the amount of such costs within 15 days of the date of this judgment, either party shall thereafter be at liberty to apply for an assessment of costs by an assessment officer in accordance with the *Federal Courts Rules*, SOR/98-106.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2078-17
STYLE OF CAUSE:	CONSTABLE SUSAN LYNN KOLIBABA v THE ATTORNEY GENERAL OF CANADA ET AL
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 4, 2018
JUDGMENT AND REASONS:	GAGNÉ J.
DATED:	SEPTEMBER 20, 2018

APPEARANCES:

Randy Kolibaba	FOR THE APPLICANT (SELF-REPRESENTED)
Edward Burnet	FOR THE RESPONDENT

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Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT