



Office of the
Merit Commissioner

Report on Staffing Reviews

2016/17

UPHOLDING FAIR HIRING IN THE
BC PUBLIC SERVICE



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Executive Summary

This Staffing Review Report outlines the steps in the staffing review process and provides an overview of the staffing review activity that occurred at Step 2 (internal inquiry) and Step 3 (review) stages during the 2016/17 fiscal year. The report also summarizes the key issues identified in the reviews conducted by the Office of the Merit Commissioner (the office) at the third step in the process.

During the 2016/17 fiscal year, the Merit Commissioner received 14 staffing review requests, three of which were found to be ineligible for consideration. In one of the 11 reviews conducted, the Merit Commissioner directed a reconsideration of the appointment and in the other 10, upheld the appointment decision.

There were some common issues raised in the requests for review related to insufficient consideration given to training and experience, incorrect marking of test or interview responses, flawed test or interview administration, and unfair evaluation of past work performance. A reconsideration was directed in a case where stated experience requirements were not used to short-list candidates thereby disadvantaging individuals who may have applied had they known lesser qualifications would have been acceptable.

Also, two other notable issues highlighted limitations of the current statutory provisions related to employees' right to recourse with respect to appointment decisions: one of which concerned a request for a review made outside of the prescribed timelines and the other related to the limitation of conducting a review on the submitted grounds only.

Introduction

The *Public Service Act* (the *Act*) states that appointments to and from within the public service must be based on the principle of merit. Merit is commonly accepted to mean that appointments are based on an assessment of competence and ability to do the job, and are non-partisan. Since December 2003, Part 4 of the *Act* has given BC Public Service employees who are unsuccessful applicants in a competition the right to request a review of the hiring decision for permanent appointments or temporary appointments of more than seven months. Any request by an employee must be based on their reasons for considering that the appointment did not comply with the principle of merit, and/or was not a result of a process designed to appraise the knowledge, skills and abilities of applicants.

There are three steps in the staffing review process which an employee may initiate after being notified of a competition outcome.



In the first step of the staffing review process, an employee applicant requests feedback or an explanation from the hiring manager as to why he or she was unsuccessful. This request must be made within five calendar days of receiving notice of the staffing decision. After receiving feedback, the applicant may choose to proceed to the second step if he or she believes the appointment and/or hiring process was not merit-based, and request the deputy minister or organization head to conduct an internal inquiry into the staffing decision. This request must be made within five calendar days of receiving feedback or explanation from the hiring manager.

With respect to excluded positions, the second step is the final level of review. For unionized positions, an employee applicant may request a review of the staffing decision by the Merit Commissioner, the third step of the process, if the applicant is dissatisfied with the response he or she received at the second step. In accordance with the *Act*, such a request may only be based on the grounds submitted in support of the applicant's request for an internal inquiry and must be made within five calendar days of receipt of the deputy minister or organization head's decision.

The Merit Commissioner is responsible for making an objective determination as to whether the aspects of the selection process related to the employee's grounds complied with the requirements of section 8(1) of the *Public Service Act*.

A review by the Merit Commissioner is guided by the requirements of legislation, collective agreement provisions, and policy related to hiring. It takes into consideration whether the process was fair and transparent, the assessment was relevant to the job, and the decisions made were reasonable.



In order to make a determination, all related documentation is examined and the employee requesting the review, the hiring manager, and others involved in the process may be contacted to explore the issues and establish facts. The review examines the hiring process to determine whether it was fair and based on the merit principle. After completing the review, the Merit Commissioner may find that the employee's concerns, as indicated by their grounds, had no impact on the merit of the process and dismiss the review, or that there were impacts on the merit of the process and direct that the deputy minister or organization head reconsider the appointment or proposed appointment. The Merit Commissioner's decision is final and binding.

Step 1 - Feedback

Notification to unsuccessful employee applicants of the competition outcome is an important part of a hiring process and a precursor to step one of the staffing review process. The 2015/16 Merit Performance Audit found that in eight per cent of audited appointments not all employee applicants were issued notification of the final hiring decision and, as such, their access to recourse may have been obstructed. Further, these audit findings also noted that in over 15 per cent of audited appointments, transparency with respect to notification practices was lacking with missing details such as the establishment of eligibility lists, proposed multiple initial appointments, and information related to the successful employee candidates.

Generally, feedback provides applicants with the opportunity to improve their performance as well as to increase their confidence in the hiring process. Feedback also creates the opportunity to help unsuccessful applicants understand the competition process and their performance within it. In responding to a number of reviews brought forward in recent years, the Merit Commissioner has raised concerns to deputy ministers and the BC Public Service Agency about the provision of feedback. Again in 2016/17, issues with feedback were identified in a number of reviews conducted.

Both the accuracy and completeness of feedback are essential for candidates should they choose to pursue an internal inquiry as they must detail the specific grounds for the request. Given that feedback is typically provided verbally, there are often differing perspectives on what information was exchanged. This type of discrepancy was evident in two of the reviews conducted in 2016/17 where the requestor and hiring manager held conflicting views of the feedback provided. While some employees may not be willing to receive or accept feedback, it can also be challenging for hiring managers to be candid. Nonetheless, hiring managers have a responsibility to ensure that employees have a clear account of their performance and assessment in the competition process, as well as the opportunity to ask for and receive additional details or clarifying information. Both the provision of proper notification and sufficient feedback are necessary if unsuccessful employee applicants are to make an informed decision about whether to exercise their right to request a staffing review.



Step 2 – Internal Inquiry

The BC Public Service Agency provides the office with data on the number and outcome of requests received by deputy ministers for internal inquiries, which is Step 2 of the review process. The office also collects the same type of data directly from other public service organizations subject to the Merit Commissioner's oversight.

The 2016/17 fiscal year saw an increase in the number of internal inquiries submitted over the last several years, including an increase of 20 additional inquiries between 2015/16 and 2016/17. There were 60 internal inquiries requested by unsuccessful employee applicants, and an internal inquiry was conducted in 42 of these cases. With respect to the other 18 requests, two were withdrawn and 16 were deemed ineligible. The reasons for ineligibility included: the request was premature as the competition had not fully concluded; the request was received outside the timelines; and the process was for a temporary appointment less than seven months or a lateral transfer, both of which are exempt from the staffing review process. It was noted that the number of requests for an internal inquiry received from excluded employees went from four last fiscal year to 10 this fiscal year.

In nearly all cases, the BC Public Service Agency provided the deputy minister or organization head with support in the conduct of the internal inquiry. At the conclusion of 37 of the 42 internal inquiries, the deputy minister or head of the organization ultimately upheld (i.e., supported) the appointment decision. In the other five inquiries, the hiring panel's appointment decision was not supported and a direction was made to reconsider the decision.

Of particular interest to the office, is the number of employee applicants who proceed to request a review by the Merit Commissioner following the internal inquiry. Of the 37 inquiries where the hiring decision was upheld by the deputy minister or organization head, nine involved excluded positions and, therefore, were ineligible for the third step of the review process. Twelve of the remaining 28 inquiries moved forward to the third stage of the staffing review process.

Approximately 43 per cent of eligible reviews proceeded from an internal inquiry to a review by the Merit Commissioner.

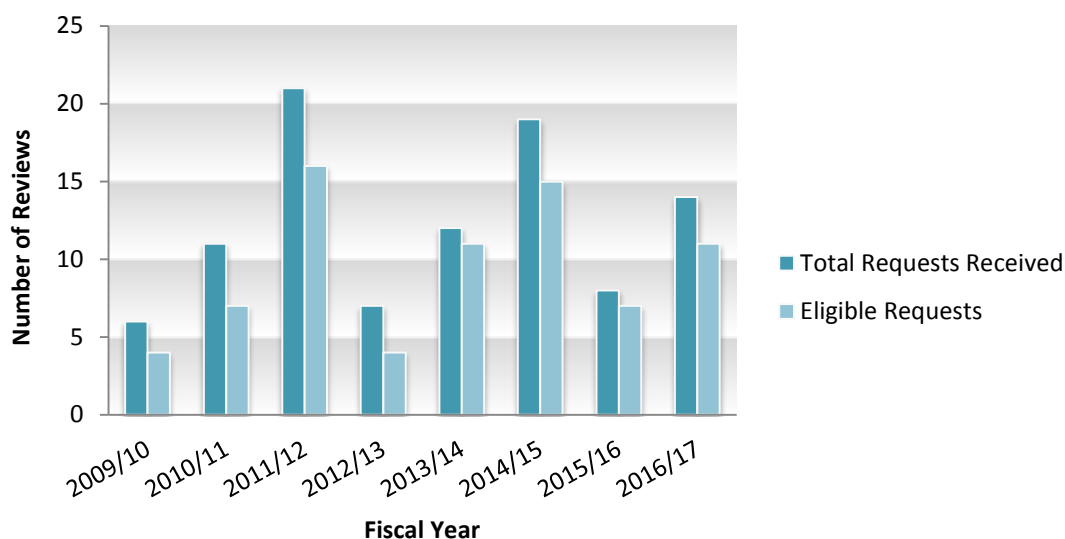


Step 3 – Requests for Review

In total, the Merit Commissioner received 14 requests for review in fiscal 2016/17 and conducted 11 reviews. As noted in the preceding section, 12 of these requests came forward following the deputy minister or organizational head’s internal inquiry decision to uphold the proposed appointment. As one of the 12 requests was received outside of the statutory timeline, it was ineligible for consideration. The two additional requests were also found ineligible. In one case, no internal inquiry had been conducted which is a required step prior to the Merit Commissioner review. In the other case, while an internal inquiry had been conducted, it resulted in the rescindment of the appointment and cancellation of the competition. Without a proposed appointment, there is no legislative basis to conduct a staffing review.

Chart 1 illustrates the number of review requests submitted to the Merit Commissioner and the number determined to be eligible, since 2009/10.

Chart 1 – Review Requests Received by the Office of the Merit Commissioner



The number of requests for review received in relation to the total number of permanent and long-term temporary appointments made in the BC Public Service continues to remain low.

Requests for review were submitted for less than one per cent of applicable appointments in the BC Public Service.



Of the 11 reviews conducted in 2016/17:

- all were for permanent appointments;
- seven involved in-service competitions and four involved out-of-service competitions;
- the competitions were held by seven different ministries and for various locations around the province; and
- 10 were for positions covered by the BC Government and Service Employees' Union (BCGEU) and one was a dual position covered jointly by the BCGEU and the Professional Employees' Association (PEA).

In all but one of the reviews, the Merit Commissioner found the appointment was the result of a merit-based process and upheld the ministry's appointment decision. In one review, the Merit Commissioner found a serious flaw in the competition which impacted the outcome and as a result, directed a reconsideration of the appointment.

In addition to the one reconsideration, the Merit Commissioner identified two serious concerns regarding limitations of the current staffing review process: one arose during the assessment of a request for eligibility and the other during the conduct of a review. Neither of these concerns could be taken into account as they were outside of the statutory provisions which define the Merit Commissioner's authority. She did, however, make comment and raise the matters to the attention of the relevant deputy minister and the BC Public Service Agency. In one case, an individual requested a review on the basis that the deputy minister had incorrectly decided that his or her request for an internal inquiry was ineligible. As the Merit Commissioner has no legislative authority with respect to the internal inquiry stage, this issue could not be reviewed. In another case, it was apparent during the course of the review that a factor of merit (past work performance) had not been appropriately considered for all candidates. However, as this concern did not form part of the requestor's grounds at the internal inquiry stage, in keeping with the relevant provisions of the legislation, it could not be considered in reaching a review decision. The circumstances of these requests are examined in more detail in the next section of this report.

The Merit Commissioner's decisions related to reviews conducted were issued between 16 and 35 days from receipt of the appointment documentation, with an average response time of 27 days.

In over 90 per cent of the reviews completed in 2016/17,
the Merit Commissioner upheld the proposed appointment.



Grounds for Review

The following section discusses the common elements or themes that were identified in the requestor's grounds. Of note was the marking of tests and interviews which continues to be a recurring concern, and the administration of tests and interviews, which has increasingly become of concern. It should be noted that several of the requests for review were based on two or more grounds. Also, the two issues which limited the review process are described at the end of this section.

Common Grounds

Qualifications Consideration

According to the *Act*, there are several factors that must be considered in determining merit in a hiring process. A number of requestors put forward that one or more of these factors had not been appropriately considered. In particular, requestors were concerned that their related education or years of related experience had not been given sufficient credit or that candidates with less experience, seniority or training were advanced. The examination of the related hiring processes found that in all cases, education and experience were directly considered at the short-listing stage where applicants were assessed for the minimum requirements typically on a pass/fail basis. Those who met the requirements were advanced and subsequently assessed through testing, interviewing and reference checking. These further assessments also assessed experience, albeit indirectly, by requiring candidates to demonstrate their knowledge, skills and competencies. The majority of reviews concluded that education and experience factors were given sufficient and fair consideration.

In one review, it was found that the panel did not use two of the experience requirements which were included in the job profile and considered part of the minimum standard for the short-listing process. This short-listing approach disadvantaged other potential candidates who may have applied had the lesser qualifications been advertised. Consequently, the Merit Commissioner directed a reconsideration of the appointment decision.

Interview and Test Marking

Several grounds related to the marking of tests or interview responses with requestors questioning the assessment of one or more of their answers. Within a specific staffing process it is the panel's prerogative to establish the requirements to be assessed and the associated standards, as long as they are relevant, reasonable and fairly applied. In each of these cases, the review found there were established marking guidelines that laid out the criteria or elements required in an acceptable response, as well as standardized scoring schemes with target levels or pass marks. It was evident from comparisons of candidates' responses with the associated marking criteria that there was a rational basis for the points awarded. Further, marking was found to be consistent across candidates within each competitive process.



Interview and Test Administration

Almost half of the requestors raised concerns about the administration of interviews and tests. Some of these issues involved the reasonableness of a panel's decisions such as: choosing to conduct all interviews by phone regardless of candidate proximity; opting to eliminate an interview question at the time of marking; or requiring candidates to bring proof of their education but not collecting it at the time of the interview. Other issues involved fairness concerns such as: being disqualified for having been perceived as reading from notes during the interview, or not being provided with all the information that had been provided to other candidates.

While there are no legislative or policy provisions prescribing how a panel should administer interviews and tests, in all cases, the Merit Commissioner gave consideration to whether the approach taken was logical based on the competition circumstances and fairly applied to all candidates. Following an examination of the facts in each case, the reviews concluded that the panels made reasonable decisions and that candidates were consistently and objectively treated.

Past Work Performance Assessment

In accordance with the *Public Service Act*, past work performance is one of the factors of merit that must be considered in a selection process. BC Public Service staffing policy also requires an assessment of past work performance be conducted prior to making an offer, which must include a reference from a supervisor or equivalent.

Grounds involving the assessment of past work performance were cited in four of the review requests. In two cases, the requestors were concerned their past work performance was not properly considered. In the other two cases, the requestors put forward that a referee contacted by the panel was unduly influenced by either ongoing or previous labour relations or medical issues. In all cases, the review found that the panel's decisions were substantiated by sufficient and relevant observations provided by supervisory referees best positioned to speak to work performance. Further, the references contained detailed and balanced information with no indication of bias.

The most common review grounds in 2016/17 involved interview and test marking and administration and past work performance assessment.



Limitations of Review Process

The following issues highlight the Merit Commissioner's concerns that the current statutory provisions have implications for the fairness of the staffing review process. While these were each unique issues this fiscal year, similar concerns have been identified in previous years and continue to limit the Merit Commissioner's ability to address real and perceived inequities in the staffing review process.

Eligibility Limitations

A request for an internal inquiry was determined by the deputy minister to be outside the prescribed timelines and therefore deemed ineligible. The requesting employee did not consider that feedback had been concluded and therefore, did not submit a request for internal inquiry in what the deputy minister considered to be a timely manner. However, based on the information provided to the Merit Commissioner, it was unclear on which day the employee received proper notification and feedback and as such, whether the request was in fact timely. In accordance with section 19 of the *Public Service Act*, and section 4 of the Review of Staffing Decisions Regulation, the Merit Commissioner may undertake a staffing review when an internal inquiry has been concluded. The Merit Commissioner has no authority to either direct a deputy minister to conduct an inquiry, or to conduct a review without an inquiry having been conducted. As a result, in this case, the extent of the Merit Commissioner's authority, regardless of the circumstances involved, only permitted her to recommend to the responsible deputy minister that he re-examine the circumstances.

Similar matters have arisen in the past, underlining the legislative restriction placed on the Merit Commissioner to only review appointments a deputy minister has decided are eligible for examination at the second stage—a decision with which the Merit Commissioner may not always be in agreement.

This case also highlights challenges with the existing recourse procedures and strict timelines with which employees who wish to exercise their review rights must comply. It is not clear given current practice whether employee applicants receive complete and accurate feedback with respect to their performance, or are aware of their rights to recourse and the timelines associated with such rights. Also, under most circumstances, the statute does not allow for time extensions.

Grounds Limitations

As noted earlier in this report, in conducting a review, a fundamental flaw with respect to the assessment of past work performance was found. However, according to legislation, a request for review may only be based on the same grounds as those submitted to the deputy ministry at step two, and in this case, past work performance was not part of the requestor's grounds. As such, there was no statutory basis for the Merit Commissioner to make a review finding based on this issue. While the Merit Commissioner was unable to direct a reconsideration in this case, she advised the deputy minister of the flaw; therefore, any corrective action would have to have been determined at that level.



This review and others before it, raise an issue of fairness in the process. Requestors are compelled to formulate their grounds for requesting an internal inquiry based for the most part on feedback received from the hiring manager. It is not unusual that requestors have incomplete or inaccurate information, or may have in fact misunderstood the feedback they were provided, putting the requestor at a disadvantage in terms of making a compelling case for reconsideration. At the same time, it is acknowledged that in the interest of efficiency, that an inquiry must have some focus and that the limits of an inquiry should be defined by those matters that are of concern to the requestor. Therefore, should the Merit Commissioner in the course of undertaking a review, identify an error with the selection process serious enough to call into question the overall merit of an appointment decision, the legislation currently limits the Merit Commissioner from making a finding on that basis.

Conclusion

During 2016/17, the office conducted 11 staffing reviews. Given this relatively small number of cases in relation to the overall number of appointments made to and within the BC Public Service, it is not reasonable to draw broad conclusions. Nevertheless, the more predominant issues or elements identified in review requests have been highlighted in this report to provide insight into areas of concern for employees and to provide hiring managers with potential opportunities to improve their hiring practices and their communications with applicants.

Also, noted in this report are impacts due to some statutory limitations. These matters have raised questions for the Merit Commissioner related to fairness in the process related to reviews of staffing decisions.

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