



Office of the
Merit Commissioner

Report on Staffing Reviews

2021/22

UPHOLDING FAIR HIRING IN THE
BC PUBLIC SERVICE



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Executive Summary

The Report on Staffing Reviews 2021/22 outlines the steps in the staffing review process and provides a brief overview of the staffing review activity that occurred at Step 2 (internal inquiry) and a more detailed examination of the staffing review activity that occurred at Step 3 (review). The report also summarizes the key grounds submitted for a staffing review and the Merit Commissioner's findings.

During the 2021/22 fiscal year, the Merit Commissioner received 22 staffing review requests including one which was subsequently withdrawn and two which were ineligible.

Of the 19 reviews conducted, the Merit Commissioner:

- directed the reconsideration of the appointment decision in three cases; and
- upheld the appointment decision in the other 16 cases.

Most of the requestors had concerns about the interviewing and testing stage of the hiring process. These grounds were varied and included the interview format, question design, and marking responses. There were also a number of grounds concerning the proper consideration and weighting of one or more of the factors of merit, in particular the requestor's experience. Several grounds questioned the short-listing process or the panel's objectivity. Less frequent were grounds related to past work performance or process administration. Several of the grounds were outside the scope of the Merit Commissioner's statutory responsibilities such as perceived harassment or the introduction of a new ground that had not been raised to the deputy minister at the internal inquiry step of the process.

Of the 19 staffing reviews conducted, the Merit Commissioner directed reconsiderations for three competitions. In two of these competitions, the flaws involved issues of reasonableness during short-listing. In the other competition, the flaw involved inconsistent treatment of candidates due to a problem with the administration of a test. These reviews highlight the fundamental importance of a well-designed assessment processes to avoid or mitigate errors.



Introduction

Since December 2003, the *Public Service Act* (the *Act*) has given employees the right to request a review of an appointment decision. This right may be exercised by unsuccessful employee applicants who are concerned that the process did not comply with requirements under section 8(1) of the *Act*.

Section 8(1) of the *Act* requires appointments to the BC Public Service be:

- based on the principle of merit, and
- the result of a process designed to appraise the knowledge, skills, and abilities of eligible applicants.

Although there is no formal definition of the principle of merit, it is understood as:

- Hiring and promoting individuals based on an assessment of competence and ability to do the job, and not on any political or personal connections.

With respect to a process designed to appraise the knowledge, skills, and abilities of eligible applicants:

- Eligibility means:
 - conditions of employment (e.g., Canadian citizenship, legal age to work) are met.
 - mandatory requirements (e.g., restrictions, education, experience) are met.
- There are appropriate method(s) of assessing applicant's knowledge, skills and abilities relative to each other including behavioural competencies which are a form of knowledge and skills.
- The outcome results in the highest-ranked candidate being appointed to the position.

Other terms for such a process include: competition, competitive process, hiring process, selection process and expression of interest.

Factors of Merit

Section 8(2) also sets out all the factors that must be considered in determining merit. The specifics of these factors are identified based on the nature of the position's responsibilities and duties. The factors of merit include:

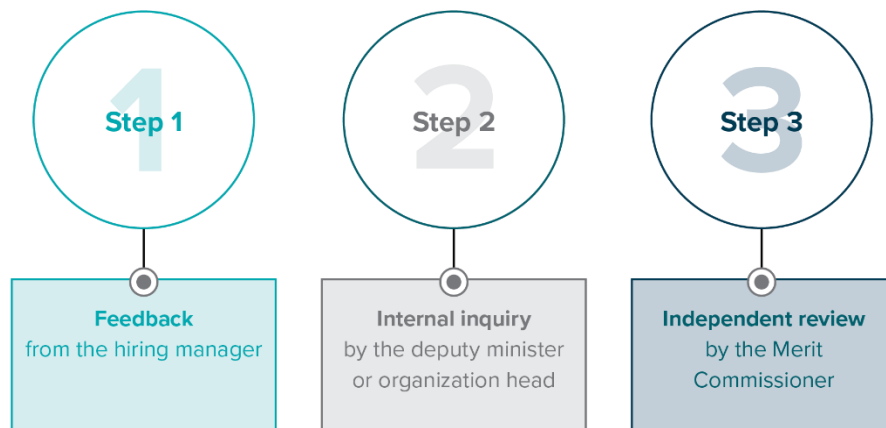
- education
- experience
- knowledge
- skills
- past work performance, and
- years of continuous service in the BC Public Service. The requirements for considering and assessing this factor vary based on whether there are any collective agreement provisions that apply to the position.



To be eligible for a review of the appointment decision, employees must be:

- working (or on layoff at the time of requesting feedback);
- appointed to their current position under the *Act* (e.g., Order in Council appointments are not eligible); and
- unsuccessful in a competition for a permanent or long-term appointment (over 7 months).

Following notification of the competition outcome, an employee may start the staffing review process. The process has three steps. For each step, the employee must act within a defined time limit before moving on to the next step.



At Step 1, an unsuccessful employee applicant:

- requests feedback or an explanation from the hiring manager as to why they were unsuccessful;
- makes the request within five calendar days of receiving notice of the staffing decision; and
- may choose to proceed to Step 2 after receiving feedback if they are concerned that the appointment decision or the hiring process was not merit-based.

At Step 2, an unsuccessful employee applicant:

- requests that the organization head conduct an inquiry;
- makes the request within five calendar days of receiving feedback or an explanation as to why they were unsuccessful from the hiring manager; and,
- may choose to proceed to Step 3 after receiving the inquiry decision, if:
 - they still believe the appointment or the hiring process was not merit-based; and
 - the appointment decision is for a position in a bargaining unit.



At Step 3, an unsuccessful employee applicant to a position covered by a union agreement who is dissatisfied with the inquiry decision:

- requests that the Merit Commissioner conduct a staffing review;
- makes the request within five calendar days of receiving the organization head’s decision; and
- bases their request on the grounds submitted to the organization head at Step 2.

As an Officer of the Legislature, the Merit Commissioner is independent from ministries and other government organizations (e.g., BC Public Service Agency, BC Pension Corporation). This independence allows the Commissioner to conduct a fresh and impartial examination of the process that led to the appointment. The review is conducted through a thorough and timely investigation that does not involve a hearing and the Merit Commissioner’s decision is final and binding.

The staffing review process for eligible requests is summarized in the box below.

Review Process for Eligible Staffing Review Request	
We examine	Aspects of the hiring process that are related to the employee’s concerns (“grounds”). Facts and evidence obtained from: <ul style="list-style-type: none">• the competition file;• discussions with the employee requesting the review, the panel chair and, where necessary, other relevant individuals, such as hiring panel members.
We consider	Compliance with relevant legislation, policy, and provisions of collective agreements. Application of the fair hiring principles, including: <ul style="list-style-type: none">• open and transparent approach• objective and job-related assessments• reasonable decisions, and• fair and equitable treatment
The Merit Commissioner decides	To uphold the appointment decision where the aspects comply with the requirements of section 8(1) of the <i>Act</i> , or To direct a reconsideration of the appointment decision, where the aspects do not comply with the requirements of section 8(1) of the <i>Act</i> .



2021/22 Staffing Reviews

Step 1 – Feedback

Providing unsuccessful applicants with feedback and proper notification of the competition outcome is an important part of the hiring process. Final notification is also a critical precursor to Step 1 of the staffing review process for unsuccessful employee applicants to fairly consider and access their rights to a staffing review.

The annual merit performance audits have generally observed that almost all applicants have been provided with proper final notification. This is a reassuring indicator that unsuccessful employee applicants are offered the opportunity to seek feedback once they are notified of the competition outcome and can exercise their right to begin the review process.

While the provision of feedback does not fall within the scope of the staffing review process, it is an important step in any competition. In 2021/22, several requestors expressed concerns with the feedback provided to them. Two of the requestors believed that they should have received feedback in writing rather than verbally. One of the same requestors also expressed concern that during feedback the hiring manager failed to disclose that a referee had provided a less than favourable assessment of their past work performance. Another requestor stated that the quality and manner of feedback was vague, unhelpful, and not provided by a person on the hiring panel. However, there is no requirement in legislation or the associated regulation that requires feedback be provided by the hiring manager or that it be provided to candidates in writing. Standard practice in the BC Public Service is for an individual who was directly involved in the selection process, such as the hiring manager or a panel member, to provide feedback verbally.

Often the requestor and the hiring manager have different views of what information was exchanged during feedback. Hiring managers are required to provide employees with a complete account of their performance in the process, and employees must be receptive to hearing the panel's observations of their performance. Not only should feedback be constructive to help candidates improve their work performance but it also must be accurate to allow them to make an informed decision whether to exercise their right to request a staffing review, and on what grounds to base their request. Specific and informative feedback can also provide candidates with assurance that the staffing process was fair and objective.



Step 2 – Internal Inquiry

According to information provided by the BC Public Service Agency and other public service organizations subject to oversight by the Merit Commissioner, 75 internal inquiry requests were considered during 2021/22.

Of the 75 requests:

- 30 were deemed ineligible

For the remaining 45 requests, an internal inquiry was conducted.

- In 43 of these cases, the deputy minister or head of the organization upheld, i.e. supported, the appointment decisions.
- In two cases, the deputy minister or head of the organization directed the hiring panel to reconsider the appointment decisions.

Of the 45 appointments where an internal inquiry was completed:

- Five involved competitions for excluded positions which are ineligible for Step 3 of the staffing review process.

This left 40 appointment decisions for which a requestor may have sought a further staffing review by the Merit Commissioner.

Step 3 – Requests for Review

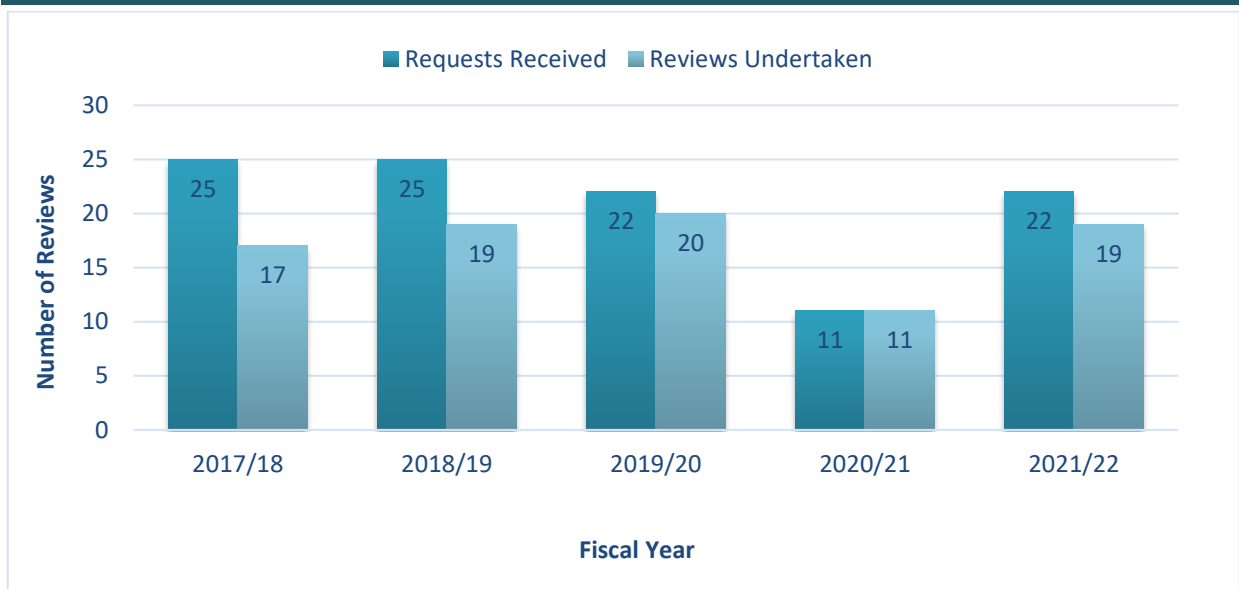
In 22 of the 40 eligible appointment decisions, the unsuccessful employee applicant requested a review by the Merit Commissioner.

The percentage of requests that advanced from Step 2 to Step 3 this year (55%) was considerably higher compared to the previous two fiscal years, where the percentages were 25% and 39%.

Chart 1 illustrates the number of review requests submitted to the Merit Commissioner and the number of reviews undertaken since 2017/18.



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 very low.

Requests for review were submitted for less than one percent of eligible appointments in the BC Public Service.

The Office of the Merit Commissioner has an established 30-day target to issue decisions following receipt of the competition documents.

For the review requests received in 2021/22, the Merit Commissioner issued decisions:

- between 19 and 36 days of receiving the documentation; and
- with an average response time of 28 days.

Of the 22 reviews requests submitted in 2021/22:

- 19 decisions were issued, 18 in 2021/22 and 1 at the start of 2022/23;
- two were determined to be ineligible; and
- one was withdrawn.

Of the 19 decisions issued:

- all were for permanent appointments;
- ten involved external competitions and nine involved internal competitions; and
- the competitions were held in 10 different ministries/organizations and in various locations around the province.



Results of the Merit Commissioner's Reviews

In 16 of the 19 reviews conducted, the Merit Commissioner:

- determined that the aspects of the selection process related to the employee's grounds complied with the requirements of section 8(1) of the *Act*; and
- upheld the hiring decision.

In the other three reviews, the Merit Commissioner:

- determined that one or more aspects of the hiring process related to the employee's grounds failed to meet the requirements of section 8(1) of the *Act*; and
- directed a reconsideration of the appointment.

The Merit Commissioner upheld the proposed appointment in
16 of the 19 reviews received and conducted for 2021/22.

In addition, a number of individuals contacted our office during the fiscal year regarding the staffing review process, but were ineligible to request a review. Most of these individuals were members of the public or BC public service employees who wished to express concerns about a specific competition or the general hiring practices within an organization. In some cases, the organization in question was also outside the jurisdiction of the Merit Commissioner (e.g., BC Health Authorities, BC post-secondary institutions, federal institutions). We advised these individuals that the Merit Commissioner did not have the legislated mandate to investigate their concerns and if possible, suggested other avenues for redress. For example, the Office of the Ombudsperson deals with concerns involving the administrative fairness of government decisions or the BC Human Rights Tribunal deals with issues concerning discrimination.

Grounds for Review

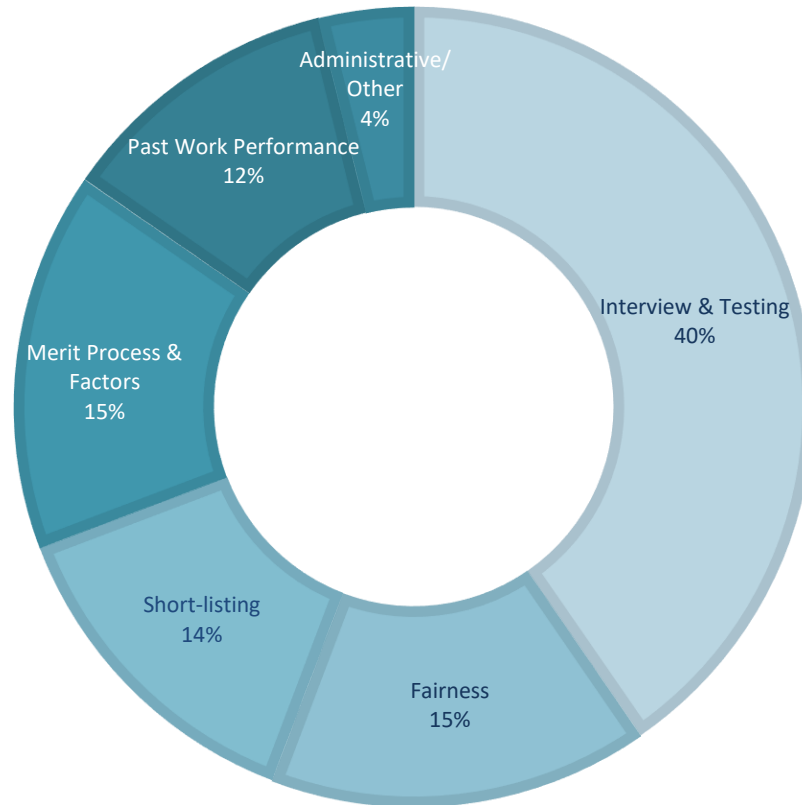
Requests for a staffing review must be based on the ground(s) that the appointment decision did not comply with section 8(1) of the *Act*. The grounds considered in a staffing review are restricted to those raised to the organization head at Step 2.

There is no limit to the number of grounds an individual may put forward in their request. Further, as there is no prescribed format in which a review request must be submitted, often the requestor's written narrative of interwoven concerns is translated into clear and concrete grounds for review. These grounds are then shared with the requestor by the Office of the Merit Commissioner and either confirmed or revised, if required.



In 17 of the 19 reviews conducted in 2021/22, we identified more than one ground, and in one case, we identified six grounds for review. Only two of the reviews had a single ground. The following chart categorizes the grounds and the number of each type.

GROUNDS FOR REVIEW 2021/22



The following section examines notable elements or themes that were identified in requestors' grounds.

Merit Process and Factors

A frequently-cited ground for review was that the hiring process did not adequately assess one or more factors of merit – in particular, experience, knowledge or skills, or a combination thereof. Several of the requestors felt their directly-related experience either working in similar positions or acting in the position under competition, should have been awarded greater credit. Others believed they were more meritorious or better qualified than the successful candidate and therefore thought the hiring process did not properly assess all the factors of merit.



While the *Act* lays out the factors of merit which must be considered, it also requires appointments be the result of a process designed to appraise the knowledge, skills and abilities of eligible applicants, placing an additional emphasis on the assessments of these factors. This process provides a common basis upon which the panel can differentiate among candidates and determine who is best qualified for the position. While directly-related experience acting in the job or performing some of the functions may provide candidates an opportunity to be more competitive, there is nothing in the *Act* that requires greater consideration of this type of experience.

In all of the reviewed competitions, the panel used a tiered process in which the factors of merit were considered at different stages. Some requestors had more years of related experience or more directly relevant experience than others; however, these qualifications were assessed during short-listing on a pass/fail basis with those who met the minimum requirements advancing. It is in the subsequent assessments that individuals were required to demonstrate the extent of the knowledge, skills and abilities they had acquired relative to other candidates. In these cases, the requestors appeared well-qualified for the positions; however, there were other candidates who were able to better demonstrate their capabilities related to the job. The reviews found that the factors of merit were given sufficient and fair consideration consistent with the principle of merit.

One requestor expressed concern that they were not successful in a competition when they had previously been successful and placed on an eligibility list for the same position. There are many reasons why competitions for the same position vary including the strength of the applicant pool and individual candidate performance. As a result, the Merit Commissioner does not consider whether consistency has been maintained between competitions. Instead, the Merit Commissioner considers whether consistency was maintained within the competition under review.

Short-listing

A few requestors expressed concerns with the fairness of the short-listing process. It is regular practice in the BC Public Service to determine which applicants meet the basic requirements through checking applications for mandatory qualifications and, sometimes, preferred qualifications. The qualifications reviewed at this stage are usually education and experience (two factors of merit in the *Act*) and other easily identifiable requirements (e.g., certifications, licenses, training courses).

In two requests for review, while the requestors believed that they had demonstrated the qualifications necessary for short-listing, the review concluded the panel's determination that they had not, was reasonable. In both cases, it was evident that the requestors' applications did not contain the information stated as required in either the notice or the self-assessment questionnaire. It is the panel's responsibility to clearly state the qualifications and application requirements necessary to be considered; however, the onus is on the applicant to clearly demonstrate they have the qualifications and to abide by any application requirements.



In two other staffing reviews, flaws in the process were identified. In one process, the requestor asserted that due to inaccurate punctuation they misinterpreted a question on the self-assessment questionnaire and as a result, they were not short-listed. The review found that the description of the required qualification in the job profile and posting, and the associated question, were poorly structured and easily misunderstood. The review concluded that, given the design of the question, the panel's determination that the candidate had not demonstrated the requirement was unfair, and the Merit Commissioner directed a reconsideration.

In the other process, one of the requirements to be short-listed was several years of a specific type of experience. While the instructions indicated that a cover letter and resumes were necessary to apply, the panel credited applicants with the required experience only where it was expressly stated as part of a specific job and time period in the same location in one of the two documents. Although it was evident that several applicants including the requestor had the requisite experience, the panel did not cross reference sections within a document or consider the information provided in the two documents as a whole. A fairer short-listing process would have been based on merit criteria rather than consideration of where and how the required information was presented in applications. The review concluded the unduly rigid assessment of applications was not a fair means of identifying candidates who met the requirements and as a result, a reconsideration was directed.

Interviewing and Testing

The majority of the grounds involved methods of assessment, in particular, a number of candidates asserted that their responses to written tests and/or interviews were not fairly marked. Typically, knowledge, skills and behavioural competencies required for the position are assessed through various means such as interviews, written exercises, standardized tests, and presentations. For each means of assessment, there must be some form of substantive marking criteria (e.g., behavioural interpretative guides, answer keys, or expected elements of a response).

To consider the most frequent grounds that involved marking, all related materials were examined for the requestors and a number of other candidates including questions, responses and marking criteria. The intent of the analysis was not to remark candidate responses but to determine if the panel was consistent and fair in their assessment. It was apparent in all the processes that the panels used structured means of assessing knowledge, skills and competencies that were relevant to the duties and, in most cases, stated in the job profile. There were also marking criteria for each method which the panel used to guide their marking. Further, the point scores awarded to candidate responses were reasonable based on the expected responses, and answers were consistently marked across candidates.

An unusual ground involving marking came from a requestor who asserted that it was inappropriate to use behavioural interpretive guides to mark written assignments. The underlying premise of behaviourally-based assessment is that past performance is the best predictor of future performance. While conventionally this method is used for interviews, it can be reasonably extended to other



assessments such as written assignments where, in order to complete the assignment, candidates must demonstrate the behaviour being assessed.

Several other interviewing and testing grounds involved whether a behavioural interview question or a test question was appropriate given the candidate had not had to exhibit that behaviour in the past or they believed the level of skill required was not necessary for the job. According to the *Public Service Act*, the factors of merit (e.g., experience, knowledge and skill) must be considered based on the nature of the duties to be performed. As such, assessment questions must be designed for the needs of the position as opposed to the experience of the individual applicants. From an examination of the evidence in these processes, the reviews found the contested questions were both objective and appropriate for the job.

One review, in which a serious flaw was identified, questioned the fairness of the test administration. The requestor advised that a distraction during a test negatively impacted their performance. In this competition, several groups of candidates underwent a timed test. During the test for the first group, which included the requestor, a problem was identified with the test which created confusion and took the proctors some of the allotted time to resolve. While the panel tried to rectify the issue by eliminating the problem portion of the test, the first group had a different test experience than the subsequent groups. Both the initial distraction and the attempts to resolve the problem impacted the time the first group had to complete the test. The review concluded that some candidates had less time to complete the test and the Merit Commissioner directed a reconsideration.

In a few other cases, requestors expressed concerns that their interview score had been negatively impacted for reading their competency examples from notes when in their view, they had not. In examining the interview materials for these processes, it was clear that more than one panel member recorded similar observations when the requestors and others were perceived to be reading. Often, candidates are given a period of time to prepare their competency examples prior to the interview. A risk to this approach is that candidates may deliver over-prepared responses that do not demonstrate their true qualifications. To mitigate rehearsed responses, it is standard practice in the BC Public Service to advise candidates not to read from their notes and to downgrade scores or disqualify candidates who do so. The reviews noted that candidates had been treated fairly and consistently in these cases.

Past Work Performance

Only two requests had grounds involving past work performance. In accordance with the *Act*, past work performance is one of the factors of merit to be considered in a selection process. Also, the BC Public Service hiring policy requires an assessment of past work performance be conducted with a supervisor or equivalent.

One request had several grounds involving the way in which past work performance had been assessed. Of note were concerns that the referees had provided inaccurate and potentially confidential



performance information that was contradictory to documented performance appraisals. An examination of the reference materials confirmed the referees were supervisors who were best positioned to speak to the candidates' work, and that their performance observations were balanced and consistent with each other. It is not uncommon for employees to have a different view of their performance than that of their supervisor, or than that of the panel who assess candidates' performance in the context of the vacant position.

While there is no legislative or policy requirement that requires a panel to consider candidates' performance appraisals as a part of assessing past work performance, BC Public Service hiring policy does require at least one reference from a supervisor or equivalent. Further, assessing a candidate's past work performance for a new job and providing performance appraisals to employees in their current position are distinctly different processes and are completed for different purposes. While both evaluate employees' performance, the requirements or standards for the position under recruitment differ from those assessed in the candidate's regular position, and the assessment is conducted by different assessors.

Fairness

Several requestors expressed concerns with the objectivity of one or more panel members. A fair competition is one where applicants are treated equitably and reasonably throughout the process.

While one requestor asserted that panel members were biased against them, most requestors stated that other candidates had been favoured for various reasons including friendships or mentorships with panel members, or having a similar work background as a panel member. It is not uncommon for panel members to have a friendships or work relationship with a candidate(s) and it does not necessarily mean the panel cannot conduct an objective process where these circumstances exist. It is by adhering to good staffing practices such as convening a multiple person panel, asking the same questions of all candidates, and having established marking criteria, that potential bias is mitigated. All the competitions had these safeguards in place and the examinations of the marking of candidate responses found no evidence that any of these requestors had been treated unfairly.

Out of Scope Grounds

According to section 19 of the *Public Service Act*, requests for reviews by the Merit Commissioner may be made based on the belief that section 8(1) of the *Act* was contravened. Section 8(1) of the *Act* requires appointments to be based on the principle of merit and the result of a process designed to assess knowledge, skills and abilities. Further, the Merit Commissioner may only consider grounds based on those submitted to the organization head at the internal inquiry stage. On occasion, a ground or part of a ground submitted by the requestor may not fall within the parameters of this section and we refer to these grounds as "out-of-scope".



A number of requestors had concerns regarding feedback including that it had not been provided in writing and that the manner in which it was provided was inappropriate (e.g., vague, incomplete, disrespectful). Concerns involving the provision of feedback or other sections of the *Act* (e.g., long-term career development of employees) are outside of the scope of 8(1). However, given the importance of feedback to the review process, the staffing review reports made observations on this communication. See Step 1 Feedback on page 5 of this report.

A number of other grounds or background information cited issues with harassment, discrimination and negative environments in which the requestor currently works. The nature of these issues, while very serious, are not within the Merit Commissioner's mandate. Candidates were advised that there are other established avenues by which they may seek redress including human resources policy, collective agreement provisions and laws (e.g., *BC Human Rights Code*).

In two cases, requestors introduced new grounds that had not formed part of their original submission to the organization head at the internal inquiry stage. Notably, a requestor who had not been properly notified of the names and classifications of the successful candidates at the end of the competition, learned who these individuals were during the internal inquiry and wished to raise a ground involving the appointment of these individuals. While the Merit Commissioner cannot review a new ground, she advised the responsible deputy minister of the error made at the notification stage.

Observations

This fiscal year of staffing reviews observed several grounds that are raised each year. Notably with respect to requestors, the majority thought their qualifications were not fairly considered. This included grounds where requestors were concerned that their directly-related or wealth of experience, was not given sufficient weight, or their knowledge and skills were not given sufficient credit in the marking process. It is understandable that requestors, particularly those who are acting in the position under competition, have a personal investment and interest in the job and may feel frustrated, under-appreciated or embarrassed if unsuccessful in the competition. However, part of the legislative intent of the *Act* is to ensure a fair opportunity for all prospective applicants regardless of their connection to the position in question. As such, our investigation process considers information from all parties and focusses on whether the hiring process was properly designed and conducted, and whether all applicants were treated fairly. While the Merit Commissioner recognizes the courage it requires for requestors to challenge hiring decisions, as an independent decision maker, she is responsible for evaluating evidence and making staffing review decisions on an impartial basis.

Also, of note this year for hiring managers, is the concept of clarity and its significance in a fair hiring process. This concept is important with respect to the initial stages of a competition when establishing clear qualifications, application requirements, the design of assessment questions, as well as the final stage of providing candidates with proper feedback.



Conclusion

During 2021/22, the Merit Commissioner received 22 requests for staffing reviews. This is a relatively small number of requests compared to the overall number of appointments made to and within the BC Public Service. Reasons for the low number of requests are not evident and cannot be attributed to any particular organization or event. However, year over year, we see similar concerns and as such, this information is an opportunity for insight into areas of concern for employees. Also, in examining any contraventions of merit, hiring managers have opportunities to improve their own hiring practices.