

# Independent Recourse Mechanism

June 2017

# Incumbent based process

- For the purposes of subsection 34(1) of the Act, the internal appointment process within the Research and University Teaching Groups, if there is a career progression framework established by the deputy head in consultation with the authorized bargaining agents that includes an **independent recourse mechanism**, is an incumbent-based process.

<http://laws-lois.justice.gc.ca/eng/regulations/SOR-2005-334/page-1.html>

# The Basics

- The DS, SE-RES and HR subgroups adopted Career Progression Frameworks to comply with legal obligations stemming from the *Canadian Human Rights Act* and the *Public Service Employment Act and Regulations*.
- It should be noted that the recourse process does not replicate the role of a Career Progression Committee (CPC) to assess an applicant's suitability for progression.
- It is also important to note that there is no link between this Recourse Mechanism and the Public Service Staffing Tribunal (PSST). The PSST has no role or mandate to review decisions made within the context of this Recourse mechanism.

# Key Concepts

- The RE Recourse Mechanism has been designed to provide an independent review of the process used by a CPC to arrive at their decisions. The major principles on which the Recourse Mechanism was founded are independence, impartiality, fairness, transparency (including disclosure), knowledge and representation.
- The principles of natural justice should apply to the process used for all applications for Recourse submitted by Researchers. These principles include, among others, the right to procedural fairness, including: the right to be heard, the right to representation, and the right to ask questions and contradict evidence.

# Right of Recourse (SE-RES/HR)

- Federal researchers may exercise their right of recourse by using the Independent Recourse Mechanism if they meet all of the following criteria:
  - are indeterminate employees of the federal public service within the SE-RES and HR groups (RE);
  - submitted a formal application within a structured Career Progression Management Framework; and
  - were denied a promotion.

# Right of Recourse (DS)

- Federal researchers may exercise their right of recourse by using the Independent Recourse Mechanism if they meet all of the following criteria:
  - are indeterminate employees of the federal public service within the DS group;
  - submitted a formal application within a structured Career Progression Management Framework; and
  - were denied a promotion or for decisions related to a non-disciplinary demotion or variation in the increment to salary.

# Exclusions from Recourse

- A researcher may not utilize this Recourse Mechanism if any one of the following criteria is met. If he/she is:
  - an unsuccessful applicant of an internal or external RE recruitment and appointment process;
  - a non RE-group applicant who has been appointed to an RE position and wishes to question the appointment process or the results;
  - an employee who is moving between RE sub-groups;
  - citing grounds of discrimination which are covered by the *Canadian Human Rights Act* or where other mechanisms, like the organizational informal conflict management system or the Canadian Human Rights Commission, are available within the department/agency or the public service; or
  - citing grounds that fraud occurred in the appointment process or that an appointment or proposed appointment was not free from political influence.

# Grounds for Recourse

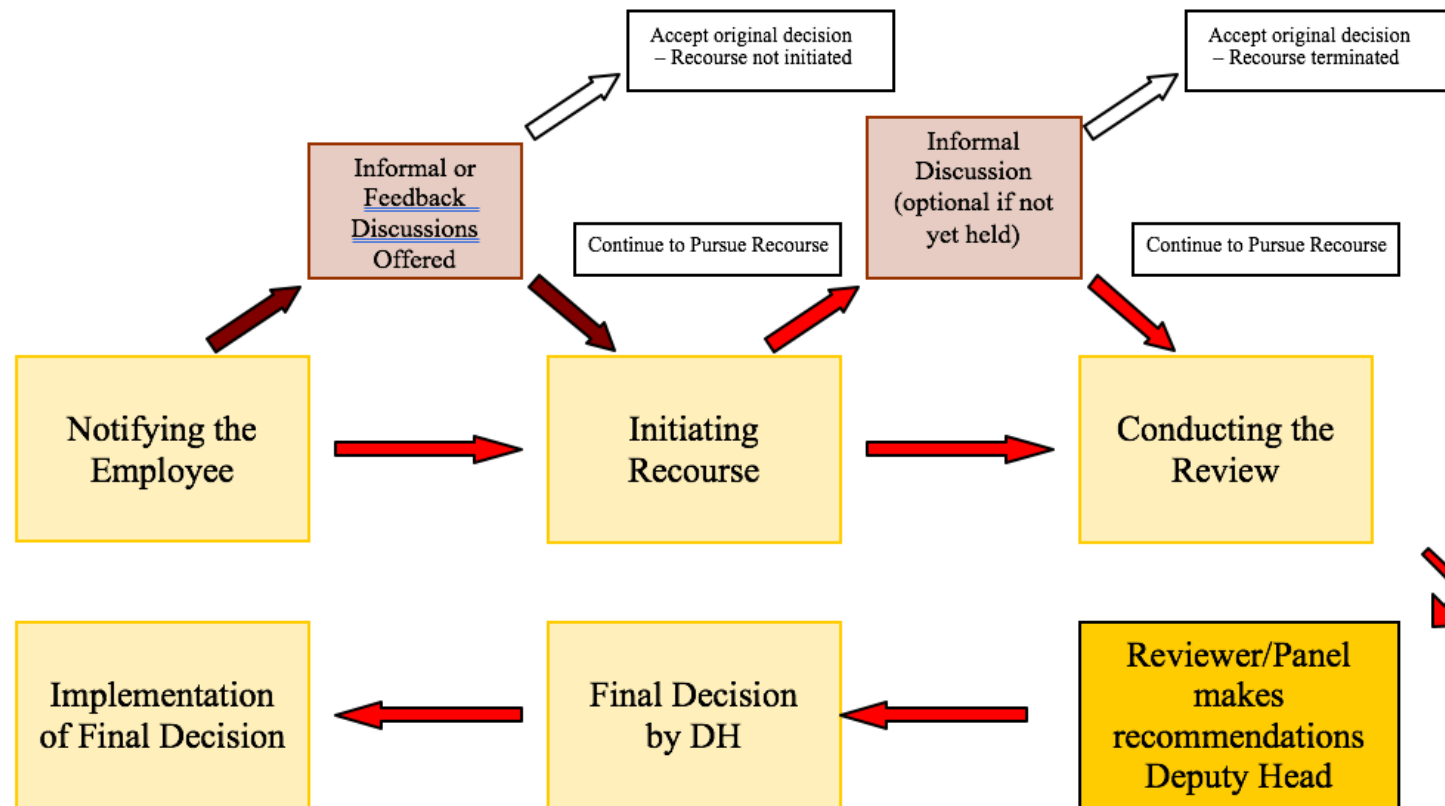
- The applicant did not have access to guidance material pertaining to the career progression process, and would have presented her/his case differently if she/he had had access to this information. This different presentation could potentially have changed the decision of the CPC.
- The CPC, in making its decision, took into consideration additional information not originally included in the applicant's submission to the CPC, and this additional information proved inaccurate.
- The CPC did not translate the dossier or failed to assess the dossier in the official language of the applicant's choice.
- The decision of the CPC was based on grounds other than the career progression criteria.
- **Abuse of Authority.**



# Abuse of Authority

- Although there is no official definition of abuse of authority, this definition is based on, *Tibbs v. Deputy Minister of National Defence et al.*, 2006 PSST 0008:
  - A delegate exercises discretion with an improper intention in mind (including acting for an unauthorized purpose, in bad faith or on irrelevant considerations);
  - A delegate acts on inadequate material (including where there is no evidence or without considering relevant matters);
  - There is an improper result (including unreasonable, discriminatory or retroactive administrative actions);
  - A delegate exercises discretion on an erroneous view of the law; or
  - A delegate refuses to exercise discretion by adopting a policy which fetters the ability to consider individual cases with an open mind.

# General Schematic View



# Informing the Employee

- The applicant is to be notified by letter of the decision of a CPC within forty-five (45) calendar days after the date of the decision.
- The letter must:
  - provide a clear rationale, explaining the reasons for the committee's decision (disclosure) and, in cases where the promotion is denied, the areas in which the applicant needs to strengthen his/her case.
  - indicate the date on which the Career Progression Committee (CPC) met and reference information describing the process undertaken during the CPC's deliberations
  - inform the unsuccessful applicant that he or she may request an informal discussion concerning the decision with a member of the CPC, or proceed directly to an independent review, invoking specific grounds through the Recourse Mechanism
- In the case of successful applicants, the letter offers a “post-assessment feedback” to those wishing to seek clarification of the CPC's specific recommendations for career progression.

# Informal Discussion

- An applicant must be offered an opportunity to have an ‘informal discussion’ with a member of the CPC. Informal discussions between the concerned researcher and a member of the CPC are encouraged and should occur before recourse is initiated. A request for an informal discussion is at the discretion of the applicant and participation in this process must not be interpreted as limiting, in any way, the right of the applicant to access the Recourse Mechanism.
- Denied applicants are given twenty (20) calendar days from the date of receipt of notification to request an informal discussion. Parties to the informal discussion have up to twenty (20) calendar days to hold and complete the informal discussion, unless they mutually agree, in writing, to a longer period up to a maximum of twenty (20) calendar days.
- Provisions must be put in place to conduct the informal discussion on a priority basis (use of other CPC members, tele/video conferencing etc).

# Initiating the Recourse Process

- If an unsuccessful candidate chooses not to participate in an informal discussion and wishes to request an independent recourse review, a written request must be received by the departmental recourse coordinator responsible for RE or HR Group staffing matters, with a copy to the Chair of the relevant CPC, within twenty (20) calendar days of the denial notification.
- If the applicant participates in an informal discussion, a written request for independent recourse review must be received within five (5) calendar days of completion of the informal discussion.
- The recourse review request must cite the decision in question, the decision date (provided in the decision letter), the grounds for recourse, all information substantiating the request, and the coordinates of the researcher's authorized representative.

# Establishing an Independent Review Mechanism (IRM)

- The Deputy Head (or delegate) will appoint an IRM reviewer or review panel within fifteen (15) calendar days from the date of the applicant's request for recourse, and will inform all concerned parties of the appointment(s).
- If an IRM Review Panel is established, the Deputy Head or his/her representative will appoint one of the Reviewers as the Chair of the Panel.
- Reviewers selected for this process must have not participated in the initial review of the application.

# Reviewer Pool and Reviewer/Review Panel (1)

- Appointed IRM Reviewer(s) or the IRM review panel will be selected from a pre-qualified, trained and centralized pool of qualified individuals from participating departments and agencies, or appropriately trained and approved individuals from outside the participating departments and agencies (for example, PIPSC).
- This 'IRM Reviewer Pool' will be used by all participating departments and agencies. The department or agency and the applicant will agree on the size and make-up of a Review Panel (i.e. could be one or more individuals), and must use only those selected from the 'IRM Reviewer Pool' for the recourse process.

# Reviewer Pool and Reviewer/Review Panel (2)

- To be pre-qualified for the 'IRM Reviewer Pool', a Reviewer must:
  - have a good knowledge and understanding of the federal scientific community;
  - have a good knowledge and understanding of the appropriate Framework (SE-RES or HR) including its Recourse Mechanism;
  - have a good understanding of the grounds for recourse in the context of the Frameworks,
  - be independent, and
  - be agreed to by all parties.
- Should agreement on the selection of a reviewer/review panel not be possible, the complainant and the department will each select a panel member from the pool, and these two reviewers will select a third independent reviewer from the pool to form the review panel.



# Conducting the Review

- The reviewer/panel shall not replicate the role of a CPC. The reviewer's/panel's purpose is to review the recourse case, with regard to the process used by the CPC to assess the candidate's readiness for promotion and the alleged ground(s) of the complaint.
- The Reviewer(s) will meet with the applicant, representatives of the employer, and any other individuals as required, to formulate their recommendation(s). If a review committee is established, the Chair will develop a consensus among the members of the review panel to reach a final recommendation.

# Transparency/Exchange of Information

- Each party will provide a list of material to be considered by the recourse reviewer(s) to the recourse coordinator, within five (5) calendar days after the appointment of a reviewer or review panel.
- The listed information shall be provided to the recourse reviewer(s) no later than twenty-five (25) calendar days after receiving the list.
- The recourse reviewer will assess the relevance of the material and distribute all that he/she deems relevant to each party. This distribution will take place no later than five (5) calendar days following receipt of all of the material by the reviewer.
- An initial list of documents that should be accessible to all parties is provided in the IRM.
- Personal notes taken during all deliberation and/or decision-making meetings of CPC members may be considered evidence for possible recourse reviews. All such material is to be retained by individual CPC members until the deadline for recourse requests has passed. After this deadline has passed, all personal notes may be destroyed.

# Initial List of Required Documents

- Name and contact information (telephone and email address) for:
  - The applicant and/or his representative
  - All members of all CPCs involved in the challenged process
  - The departmental recourse coordinator responsible for RE Group staffing matters
- The final version of the applicant's submission to the original CPC.
- The relevant Treasury Board Secretariat Classification Standard.
- The department's "call letter."
- The in-depth report of the CPC.
- Final management recommendations to the applicant, prior to the dossier being prepared.
- The final recommendation of each level of CPC that has considered the case, as provided in writing to the applicant.
- The minutes of all levels of CPC that assessed the applicant's submission.

# Recommendation to the Deputy Head

- Within seventy-five (75) calendar days from their appointment, the Reviewer(s) will either:
  - confirm to the Deputy Head or their delegate the appropriateness of the process used by the original career progression committee, or,
  - identify the issue(s) that may have negatively affected the decision of the career progression committee.
- The Reviewer(s) may then recommend to the Deputy Head that a new career progression committee (with a majority of the members not having been members of the original committee) re-examine the case.
- The Reviewer(s) may not recommend that career progression be granted.

# Final Decision by the Deputy Head

- The authority to consider the recommendations of the Reviewer(s) and take appropriate action arising from recourse remains with the DH.
- The final decision, along with any supporting documentation (including the Reviewer's report, and any reasons for their decision that the DH may wish to provide), must be communicated in writing to the applicant, the applicant's authorized representative and the Chair of the original CPC, within thirty (30) calendar days after the recommendation of the Reviewer(s) has been made to the Deputy Head.

# Implementation of the Final Decision (1)

- Implementation of the Deputy Head's or delegate's decision must be undertaken within thirty (30) calendar days of the release of the Deputy Head's final decision.
- If the Deputy Head's decision requires that the case be re-considered by a CPC, it must be convened within thirty (30) calendar days of the release of the final decision. The new CPC shall consider the submission in its entirety, as the various parts of the submission tend not to be independent.
- The new CPC must inform the applicant (copy to the Deputy Head) of its decision in writing within ten (10) calendar days of taking the decision. This written decision of the CPC is final and must provide an explanation which includes the grounds on which the recourse was sought and the rationale for the new decision. It will be retroactive to the implementation date of the decision of the original career progression committee.

# Implementation of the Final Decision (2)

- The applicant is to be informed of any processes available if he/she disagrees with the second CPC decision (these processes cannot include the recourse mechanism).
- In these situations, researchers may seek advice from their union representative regarding any next steps.
  - Depending on the case, processes could include a grievance, or to refer the case to the Federal Court, to the Canadian Human Rights Commission or to the Official Languages Commissioner.