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Re The Queen in Right of the Province of Nova Scotia and Nova Scotia Government Employees Association

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RE THE QUEEN IN RIGHT OF THE PROVINCE OF NOVA SCOTIA AND NOVA SCOTIA GOVERNMENT EMPLOYEES ASSOCIATION

I. Christie (Nova Scotia) February 25, 1980.

EMPLOYEE GRIEVANCE alleging unjust suspension.

R. A. Pink and others, for the union.
R. M. Endres and others, for the employer.

AWARD (in part)

[That part of the award setting out the facts in detail has been omitted. The grievor, who was employed as an engineer by the Nova Scotia Department of Highways, had been suspended for five days without pay for actions considered to be inconsistent with the department's conflict of interest policy.]

The Deputy Minister's letter of July 5th appears to specify as bases for the discipline here in issue:

(1) that the grievor's consulting work with the developer was contrary to the chief engineer's memorandum of February 28, 1977;

(2) that accepting employment which led to (public) criticism of departmental policies and fellow employees involved "a conflict of interest"; and

(3) that the grievor's letter of February 8th constituted public criticism of department policies.

In his testimony and through counsel for the union Mr. Collins took the position that the chief engineer's memorandum of February 28, 1977, did not address itself to the kind of work he did for the developer in this case. He stressed that he was not working on the department's time nor was any survey involved in drawing the plans required for tentative approval. The plans were drawn, apparently, from aerial photographs. To substantiate the limited reach of the chief engineer's 1977 memorandum, a further memorandum from him dated June 13, 1979, was introduced. The wording of this memorandum, which was subsequent to and undoubtedly prompted by the matters here in issue, may be

contrasted with that of the 1977 memorandum. Where the 1977 memorandum provides

> Staff must not become involved in a private survey that might involve the Department of Highways. For example, new subdivisions require the approval of the Department and work of this nature tends to be in the "conflict of interest" category and may cause embarrassment to the Department and to the employee concerned.

the new memorandum provides:

> Staff members must not become involved in private survey, engineering or other work where the work itself might involve the Department of Highways and create a conflict of interest. An example of this would be a new subdivision which would require Department approval of the roads involved.

Technically, the grievor is correct in his submission that in this matter he was not involved in "a private survey". On the other hand, he was involved with a new subdivision which required the approval of the Department of Highways. Even if the 1977 memorandum is read as referring to subdivision work as an example of survey work only that "tends to be in the conflict of interest category", the spirit of the directive should have been readily apparent to a man of Mr. Collins' experience and intelligence. Without coming to any firm conclusion on the point, I would have thought that even in the absence of any directive whatever he would have perceived some difficulty in what he was doing and, had he been concerned about fulfilling his professional and employee obligations to his employer, would have at least sought clearance from his superior.

While the relatively restricted wording of the chief engineer's memorandum of 1977 may introduce some doubt about whether the grievor broke the specific rules about conflict of interest in the Department of Highways by doing the work in question I can see no room for doubt with regard to the letter of February 8th which went out over his signature. Despite his illness, as the grievor has readily acknowledged, he is responsible for that letter. In my view when Mr. Collins wrote to Mr. Haughn, to Mr. Hiltz and to Mr. Barkhouse that Mr. Archibald's sight stopping distance requirement "has to be about the most ridiculous statement made by any government agency"; that the requirement was "too ridiculous to even talk about and strongly bears out the inefficiency of people making these foolish and time-consuming and undesirable decisions" and that "if this matter is not straightened up immediately, we will be forced to seek a meeting with Mr. Thomas McInnis . . . at which time it will have to be pointed out to him the quality of people in his Department" he went too far. At that point his off-duty activities clearly conflicted with his duties to his employer.

In *Re Office & Professional Employees Int'l Union, Local 263, and Lord & Burnham Co. Ltd.* (1972), 24 L.A.C. 218 (Hanrahan), the board of arbitration, adopted with approval the three "useful tests" for determining whether misconduct outside working hours justifies discipline or discharge set out by Judge Fuller in *Re U.E.W., Local 524, and Canadian General Electric Co. Ltd.* (1959), 9 L.A.C. 83 [headnote]:

> (1) was the employee's conduct sufficiently injurious to the interests of the employer; (2) did he act in a manner incompatible with the due and faithful discharge of his duty; (3) did he do anything prejudicial or likely to be prejudicial to the interests of reputation of his employer.

In the *Lord & Burnham* case the board found that the grievor's public vilification of his general manager, in the context of a lunch time conversation, in a public place, properly constituted a culminating incident which led to discharge. In the words of the board (p. 223), ". . . the attitude of the grievor generally towards his obligations as an employee indicated a disregard for the duty of fidelity intrinsic in employee-employer relationship".

This same general duty of "fidelity", the obligation to further the interests of one's employer (in the absence, I suggest, of *legitimate* competing interests), has been held to underlie an employer's obligation not to compete with or take unauthorized personal benefit from his employer: see *Re United Brewery Workers, Local 304, and Pepsi Cola Canada, Ltd.* (1967), 18 L.A.C. 105 (Hanrahan); *Re Consumers' Gas Co. and Int'l Chemical Workers, Local 513* (1972), 1 L.A.C. (2d) 304 (H.D. Brown), and *Re Gray's Department Stores Ltd. and Retail, Wholesale and Department Store Union, Local 1002* (1973), 4 L.A.C. (2d) 111 (Palmer). Those cases all involved a degree of direct competition with the employer's interest not alleged here. However, particularly in the public sector, conflict of interest can arise far short of that, as pointed out by the arbitrator in *Re Regional Municipality of Hamilton-Wentworth and C.U.P.E., Local 167* (1978), 18 L.A.C. (2d) 46 (Kennedy) at p. 55, quoting from the decision of Edward B. Jolliffe, Q.C., under the *Public Service Staff Relations Act*, R.S.C. 1970, c. P-35, in the case of *McKendry and Treasury Board* (1973 — unreported), where Mr. Jolliffe said:

> "The essential requirements are that the public servant should serve only one master and should never place himself in a position where he could be even tempted to prefer his own interests or the interests of another over the interests of the public he is employed to serve."

In a similar vein see *Re Canadian Broadcasting Corp. and*

Employees & Technicians and National Assoc. of Broadcast (1977), 16 L.A.C. (2d) 57, in which arbitrator O'Shea upheld a five-day suspension imposed upon a C.B.C. employee who had invoked his connection with his employer in attempting to force a restaurant to revoke the dismissal of a waitress with whom he was acquainted.

On the facts before me the economic conflict of interest involved is less clear than in any of the cases cited (except perhaps the *C.B.C.* case), particularly in light of the restricted wording of the chief engineer's 1977 memorandum. But, as I have already said, there was quite obviously conflict within the spirit and intent of that memorandum and probably beyond what I would have thought to be our society's general understanding of the limits of propriety. Apart from that, however, when the grievor signed the letter of February 8th and authorized it to be sent he put himself into a conflict of a different sort with his employer's interest, a conflict that probably should have been foreseeable. When he took employment that involved seeking approval from the Department of Highways, surely he should have realized that in vigorously pursuing the interests of a private client in such an undertaking he might become involved criticizing the department. Even if he could not be expected to have realized it in advance, the conflict of interest in actually sending the letter was surely apparent. Pressing his advocacy to the point of ridiculing the department and fellow employees in the department and of threatening Ministerial action put the grievor into a clear conflict of interest and constituted a breach of his obligation to his employer which amply justified the discipline imposed.

The grievance is therefore dismissed.