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*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

FRANK DUSKE

Grievor

and

CANADIAN FOOD INSPECTION AGENCY

Employer

Indexed as

Duske v. Canadian Food Inspection Agency

In the matter of a grievance referred to adjudication pursuant to section 92 of the
Public Service Staff Relations Act

REASONS FOR DECISION

Before: Paul Love, adjudicator

For the Grievor: Laurin Mair, Public Service Alliance of Canada

For the Employer: Karen Clifford, counsel

Heard at Calgary, Alberta,
January 30 and 31 and May 8, 2007.

REASONS FOR DECISION

Grievance referred to adjudication

[1] Frank Duske (“the grievor”), a feed specialist, grieves a decision made on May 20, 2004, by Scott Acker, Regional Director, Alberta South Operations, Canadian Food Inspection Agency (CFIA or “the Agency”) to suspend him for 10 days for insubordination and potential conflict of interest arising from his off-duty employment with a company in the March and November 2003 muskox harvests. In his reference to adjudication, Mr. Duske asks that the letter of suspension be revoked and that he be reimbursed all pay and benefits.

[2] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35.

Summary of the evidence

[3] I heard testimony from the employer’s witnesses: Phillip Amundson, Executive Director of Operations for the Agency, Eric Bach, then Director of Management Services for the Western Operations Branch of the Agency, and Mr. Acker. I heard testimony from Mr. Duske and his witnesses: Murray Arsenault, Manager, 974120 NWT Ltd., operating as the Muskox Product Company (MPC or “the Northern Corporation”), and Dr. Robert Sturm, Program Manager, Meat Programs Division, Western Area, CFIA.

[4] Mr. Duske is a long-term employee of the Agency and is currently a feed specialist in the Alberta South Region. He was a butcher before accepting his first public service position as a meat inspector. He later left government service and operated abattoirs, then rejoined the public service as a meat inspector. He has approximately 24 years of experience with the Agency and its departmental predecessors.

[5] When Mr. Duske rejoined the Agency’s departmental predecessor, he worked as a meat inspector. He has since worked as a fresh fruit and vegetable inspector, a livestock grader and as a fertilizer and crop inspector with an Environmental Management Program and Feed Program. At the time of the hearing, Mr. Duske said more than 10 years have passed since he last worked as a meat inspector.

[6] According to Mr. Amundson, the Agency now employs in excess of 6000 people in Canada. The Agency is mandated to regulate many aspects of food safety, including the export of meat products. One of the Agency's activities involves regulating the muskox harvest, a slaughter that takes place in northern Canada. Mr. Duske testified that to his knowledge muskox do not run from predators and can be herded. For public perception reasons it is described as a harvest rather than a slaughter, as the Agency does not want to be known as "clubbers of muskox." The Agency inspects and regulates all aspects of the slaughter to ensure the meat is safe for consumption. Local Inuit people undertake the slaughter, and it is important to the local economy.

[7] Mr. Arsenault testified that under a land claims settlement, the Inuit have the exclusive right to commercial opportunities related to wildlife. The western Arctic has 75% of the world's muskox, and the Inuit have been interested in commercializing it for its meat, leather and wool (known as "kiviat"). The residents of Sachs Harbour on Banks Island have few employment opportunities, and the Sachs Harbour Hunters and Trappers Committee decided to conduct a muskox harvest on Banks Island. While the Inuit are skilled hunters and knowledgeable about muskox, there was a lack of management capacity and expertise to undertake the muskox harvest and related marketing activities. Mr. Arsenault was on loan from the MPC to the Sachs Harbour Hunters and Trappers Committee.

[8] The muskox harvest takes place in a remote arctic environment that has the potential for weather problems. Considerable logistics are required for a successful harvest. The demands on Agency staff participating in the harvest are set out in an article entitled "Harvesting in the North" prepared by Gordon Hann, an animal health inspector in Alberta South, and published on the Agency's website (Exhibit E-7):

...

Although interest and enthusiasm are important assets, CFIA staff considering northern duty need to be aware of the rigors and hazards of living and working in Canada's Arctic. Beginning with a Komatic (4 to 5 metre sled) ride from town to the harvest site, which has been as far as 129 kilometres at -40 Celsius, participants arrive to a camp environment where they will stay for up to and sometimes exceeding a month. Staff need also to get adjusted to the cultural differences between northern and southern communities. The work and "down time" require a degree of self-reliance and preparedness not normally required in southern communities. Proper Arctic clothing, survival equipment,

first aid supplies and a contingency plan for medical emergencies are all part of the pre-harvest preparations.

Living in camp settings can be demanding both mentally and physically. There can be many “down days” due to extreme weather conditions. During these periods of relative inactivity, the dining hall can become a lively meeting place where story telling, card games, reading and general comradery serve to pass the time. Many pots of coffee and tea are consumed and usually people have a good time. However, being weathered into a small tent or cabin with two or three other people can become uncomfortable.

...

[9] Dr. Sturm has been involved in the inspection of harvests in the North since 1985. He testified that the meat from a game harvest destined for export was under the Agency’s regulatory authority. There were no registered establishments in the North for meat processing. The meat had to be dealt with in such a way that it could enter a registered establishment in southern Canada and be upgraded for export. The harvest had to be conducted in a safe and humane manner, and the meat had to be moved in a controlled way to a federal establishment. The Agency never sent one of its own employees north to be a harvest or site manager, but it was important for a company harvesting muskox to have a harvest or site manager to facilitate the logistics of an operation.

[10] During the relevant period, according to Mr. Amundson, Dr. Sturm was one of the senior veterinarians in the Agency’s Meat Program. He was one of the technical experts involved in the northern harvest. He had no line responsibilities for staff. He was not a delegated authority to make conflict of interest decisions.

[11] The Agency has a *Conflict of Interest and Post-Employment Code* (“the Code”). It is published on the Agency’s Internet site and is available to all employees. Every employee is required to conform to the principles it sets out. Every employee is responsible for examining and reviewing his or her personal and professional interests and activities to “recognize, avoid, report and resolve any situation of actual, potential or apparent conflict of interest.” Its salient principles are:

...

Public Scrutiny

2. *CFIA employees have an obligation to perform their official duties and arrange their private affairs in a manner that will bear the closest public scrutiny, an obligation that is not fully discharged by simply acting within the law.*

...

Private Interests

4. *CFIA employees shall not have private interests, other than those permitted pursuant to this Code, that would be affected particularly or significantly by government actions in which they participate.*

Public Interest

5. *On appointment to CFIA, and thereafter, CFIA employees shall arrange their private affairs in a manner that will prevent real, potential or apparent conflicts of interest from arising but if such a conflict does arise between the private interests of a CFIA employee and the official duties and responsibilities of that employee, the conflict shall be resolved in favour of the public.*

...

[12] The Agency maintains a Conflict of Interest Secretariat (“the Secretariat”) in its Labour Relations Division, Human Resources Section, in Ottawa as a central point for reviewing and determining conflict of interest disclosures filed by employees. The *Code* indicates that the Secretariat deals with queries, bulletins or reminders, and that it receives conflict of interest reports and consults and advises managers on potential resolutions for identified conflict situations (Exhibit E-2, p. 4). According to Mr. Amundson, the Vice-President of the section in which an employee worked and the President of the Agency are the only persons with the delegated authority to make conflict of interest decisions. This is borne out by an examination of the *Guide to the Delegation of Human Resources Authorities* (Exhibit E-5) and the *Human Resources Delegation of Authorities* (Exhibit E-6), documents published by the Agency.

[13] Mr. Amundson testified that the onus is on an employee to make a conflict of interest disclosure. Since these disclosures are confidential, he does not see a disclosure form unless it is brought to his attention by a request for information or some other method. The disclosure report is submitted directly to the Secretariat. It is then submitted to the appropriate Vice-President for a decision along with any

required legal advice and more detail in addition to the employee's report, if needed. The Vice-President then considers the materials and issues a decision by letter. If there is a change in circumstances, the employee may submit a new disclosure; however, the old disclosure remains in effect until another decision is rendered.

[14] Mr. Duske testified that he was aware of the *Code*. He was given some orientation with respect to the *Code*. He was told by his employer where to find it on the Agency's website. Mr. Duske testified that he knew the disclosure forms went to Ottawa and that it was R.L. Hillier, Vice-President of Operations for the Agency, who made the decisions.

[15] In 1995, Mr. Duske became involved with a small company from Rankin Inlet, Northwest Territories, that operated a meat plant. The company wished to become federally regulated so that it could export its meat. At that time, Dr. Sturm was Regional Veterinarian Supervisor, and Mr. Duske was one of the meat inspectors in the Alberta region. Dr. Sturm suggested Mr. Duske's name as one of three suitable candidates to assist the company in becoming federally regulated. Two of the three candidates put forward by Dr. Sturm were employees of the Agency. Mr. Duske was selected by the company to work with them because of his superior credentials and experience, which included experience as a butcher and a meat packer, and because of his interpersonal skills. Mr. Duske took this work on an understanding with Dr. Sturm that he would never work for the Agency in the Northwest Territories as a meat inspector. Dr. Sturm also testified that Mr. Duske had never worked in the North as a meat inspector. Mr. Duske performed this work while on leave from his position with the Agency.

[16] The company that Mr. Duske became involved with was interested in the export of caribou and muskox meat. Because of the remote nature of the harvest, it was not possible to fully regulate a plant in the North or to obtain an establishment number for it. The operation obtained temporary federal approval, which meant that it could operate for the harvest and export the carcasses to a federally regulated establishment in southern Canada before export abroad. Mr. Duske's initial involvement in Rankin Inlet was for two to three weeks. During that time he was not involved in managing or overseeing the harvest, and his work was confined to the setup and operation of the processing plant.

[17] Between 1995 and 1998, Mr. Duske worked as a harvest manager for the Northern Corporation and continued his involvement with muskox meat processing at facilities on Banks Island and in Cambridge Bay. He performed the work while on leave from his position with the Agency.

[18] During that period he received positive feedback from other Agency employees. The majority of his work was as a harvest manager. There were a variety of job duties, including “putting together the abattoir,” making sure the abattoir equipment was on site, providing water samples to Health Canada, ensuring safety guidelines were met and arranging flights and accommodation for staff. He would arrive a week before the harvest to ensure that the staff was properly trained. The Agency provided inspectors, veterinarians and research scientists. He addressed particular problems that were raised by the Agency’s veterinarians and inspectors. He did not engage in any meat inspection duties on behalf of the Agency at those sites. He had no control over the Agency’s veterinarians, inspectors or research scientists.

[19] Part of Mr. Duske’s duties with the Northern Corporation involved preparing a harvest proposal or plan. This is a detailed and lengthy document of up to 40 or 50 pages setting out all of the details of the proposed harvest, which would be submitted to Dr. Sturm at the Agency. After submission, a conference call would be held between the Agency and the Northern Corporation to address any concerns. Once the Agency approved the proposal, it would be signed off by Dr. Sturm and form the basis of the Agency’s decision to grant a temporary federal operating authority. After approval of the harvest plan, the Agency would send up an experienced veterinarian to see whether the negotiated terms had been implemented, whether the facilities existed and whether the harvest would have a good chance of success. If this were the case, the balance of the team, consisting of one or two inspectors and a veterinarian, would then fly north for the harvest.

[20] Before 1998, the Agency provided no official feedback to the grievor about his involvement in the muskox harvest. In 1998, Mr. Duske was advised that he was required to submit a conflict of interest disclosure and to obtain a ruling on it from the Agency.

[21] Mr. Duske submitted his first conflict of interest disclosure in writing on July 20, 1998. At that time, he was employed in Lethbridge, Alberta, as a meat inspector. His conflict of interest disclosure reads as follows:

...

On my own time (Leave) I train employe's [sic] of the NWT, usually Inuit on butchering teqniques [sic]. This is usually done during a MuskoX or Caribou Harvest. I do not do or am [not] involved in any Meat Inspection duties while I train the Inuit.

...

[22] Between July 1998 and 2000, Mr. Duske continued to work as a harvest manager with the Northern Corporation. Mr. Duske received a written reply from Mr. Hillier on May 9, 2000. That reply reads in full as follows:

I have carefully reviewed and considered your conflict of interest disclosure dated July 20, 1998 in which you describe your outside activity as teaching butchering techniques to the Inuit.

Based on the information provided to us, I have decided that this outside activity constitutes a perceived conflict of interest. This determination is made on the basis that the CFIA should not knowingly permit itself to be associated in any way with an activity for which we have an enforcement role, it follows therefore that I am unable to sanction such an activity.

While I understand that you have participated in this activity in the past, you must abandon any plans you may have to continue your participation in the future. I wish to remind you that failure on your part to follow the foregoing advice will be considered a breach of conduct and may result in disciplinary action.

I look forward to your continued cooperation in this regard.

...

[23] Mr. Duske did not understand why it took from July 20, 1998, to May 9, 2000, for Mr. Hillier to make his decision. Mr. Duske did not agree with the decision, and he did not understand the reasons behind it. After filing his conflict of interest disclosure, he was never contacted by anyone at the Agency for further information. He acknowledged in cross-examination that he had a written job description. As far as he knew, Mr. Hillier did not consult any of the Agency personnel involved in the muskox harvest, anyone from the Northern Corporation or any of his supervisors at the Agency. He did not file a grievance based on Mr. Hillier's letter.

[24] After Mr. Duske received Mr. Hillier's letter he no longer taught butchering to the Inuit in a northern harvest setting. In cross-examination, Mr. Duske testified that he did not participate in the harvests in the fall of 2000, the spring of 2001 and the fall of 2001 because Mr. Hillier had told him not to.

[25] In July 2000, Eric Bach was Director of Management Services for the Western Operations Branch of the Agency. He remained in that position until 2004, when he left to join the National Energy Board. During that period, Mr. Duske accepted an assignment as environmental management systems coordinator, and Mr. Bach supervised him for a period of one-and-a-half years. Mr. Bach became aware that Mr. Duske was involved in the muskox harvest when Mr. Duske applied for leave. Mr. Bach thought it odd and advised him to make a conflict of interest disclosure. He believed that there was a potential conflict of interest. Mr. Bach said that he approved leave requests but did not approve what Mr. Duske chose to do on his time off. Generally, employees did not tell him what they intended to do while on leave.

[26] Mr. Duske submitted another confidential conflict of interest report on September 12, 2001, and faxed an additional report on October 19, 2001 (Exhibit E-3, tab C). At this time, he was an Environmental Manager with the Agency and he said that his duties did not involve meat inspection. His duties with the Agency involved assessing Agency owned property and identifying environmental issues. In his conflict of interest report he described his participation with the Northern Corporation as follows:

...

I assist a Northern Corporation out of Inuvik N.T. in operating Muskox Harvests. I was referred to this corporation by the CFIA in 1997. I have filed previous conflict of interest activities. In my previous filings it was deemed that there was a "perceived" conflict. I did not engage in this activity in 1999. My position has changed within the CFIA and has no direct relationship with my outside activity. My position is environmental coordinator for the CFIA Western Area. The environmental file has not included any work on CFIA's behalf in the N.T. If you require more information please contact myself. . . .

...

[27] Mr. Duske testified in chief that he had never been contacted by anyone in the Agency about his conflict of interest application. In cross-examination, he admitted that his testimony in chief on this point was incorrect. Some of the contact between the Agency and Mr. Duske is set out in the exhibits. Mr. Duske received a telephone call from Joanne Lapierre on November 27, 2001, indicating that “the file” was being sent to legal services for review, along with Ms. Lapierre’s recommendations. As a result of the call, Mr. Duske emailed Ms. Lapierre on November 28, 2001 (Exhibit E-3, tab D), asking for clarification of the perceived conflict within 14 days.

[28] Ms. Lapierre responded by email on November 29, 2001, indicating that she was not the delegated authority for making conflict of interest decisions and that she could not commit the Vice-President of Operations to a deadline for a review or response. Mr. Duske emailed Ms. Lapierre on November 29, 2001, reiterating his request for a response within a reasonable time. He also objected to Ms. Lapierre’s earlier telephone advice to him that he should not make any plans to participate in an upcoming northern harvest. Ms. Lapierre emailed Mr. Duske later in the day on November 29, 2001, as follows:

...

This office receives and reviews conflict of interest disclosures and makes a recommendation to the appropriate delegated authority. The recommendation is first reviewed by Legal Services before it is presented to the Vice-President. The Vice-President is then in a position to consider all the information before he/she renders a decision.

I’m sure you will agree that a careful review of the disclosure is essential to a sound decision. As it may take several weeks before a decision is made, and because there is no change in your outside activity, I felt it prudent to inform you of my recommendation. I regret any confusion this has caused for you.

I am available if you wish further clarification on the process. . . .

...

[29] Mr. Duske received a reply from Mr. Hillier on December 14, 2001. It is in a substantially similar form to the reply he received on May 9, 2000. It reads as follows:

I have carefully reviewed and considered your conflict of interest disclosure dated September 12, 2001, in which you describe your outside activity as assisting a Northern Corporation in operating Muskox Harvests.

Based on the information provided to us, I have decided that this outside activity constitutes a perceived conflict of interest. This determination is made on the basis that the CFIA should not knowingly permit itself to be associated in any way with an activity for which we have an enforcement role, it follows therefore that I am unable to sanction such an activity.

While I understand that you have participated in this activity in the past, you must abandon any plans you may have to continue your participation in the future. I wish to remind you that failure on your part to follow the foregoing advice will be considered a breach of conduct and may result in disciplinary action.

I look forward to your continued cooperation in this regard.

[30] On receiving the decision, Mr. Duske met with Mr. Bach and Mr. Amundson. After the meeting he received an email from Mr. Bach on January 28, 2002, indicating that the matter had been reviewed by Mr. Amundson and the Vice-President of Operations. The email advised that the decision previously rendered on his disclosure was confirmed and that he was advised not to make any plans for upcoming northern harvests.

[31] Mr. Bach explained his view of the potential for conflict of interest. He said that as an environmental management systems coordinator, Mr. Duske's duties had little to do with the work of the Agency's inspectors in a muskox harvest. He said that perception was important, however. The fact that Mr. Duske was an Agency employee working in an Agency-regulated business could be seen as showing a lack of impartiality on the part of the Agency in doing its regulatory duties. He said that "the facts" often had little to do with perception and that a member of the public would see an Agency employee regulating another Agency employee in a private business and would ask why this was the case.

[32] Mr. Bach said that Mr. Amundson approached the Vice-President of Operations as a result of a meeting with Mr. Duske following his receipt of Mr. Hillier's letter. Mr. Duske was given a verbal dispensation of the conflict ruling to permit him to attend

the 2002 harvest on Banks Island, but it was the only time it was to happen. Mr. Bach said that in 2002 Mr. Duske again raised the issue of his participation in the muskox harvest for 2003. He was aware of Mr. Duske's application for a new ruling and of the emails that had been sent. He had no active involvement after the dispensation for the 2002 harvest.

[33] According to Mr. Amundson, Mr. Duske received a dispensation from Mr. Hillier to participate in the 2002 harvest because one of the senior persons in the Northern Corporation had contacted Dr. Gravel, Executive Vice-President of the Agency, and Dr. James Marjerrison, Associate Executive Director for the Western Region, and had indicated that the Northern Corporation did not have time to make alternative arrangements for the muskox harvest and that it would have a huge economic effect on the local people if the harvest were cancelled.

[34] Mr. Amundson is Executive Director of Western Operations for the Agency and is responsible for the four western provinces and the three northern territories. He has been with the Agency and its predecessor departments for 31 years. He has been in his present position for nine years. Mr. Amundson testified that the Mr. Hillier was the delegated authority for making conflict of interest decisions. He said that at the time of hiring an Agency employee receives a copy of the guidelines and that updates are issued from time to time. The most recent reminder was sent out on May 30, 2002 (Exhibit E-4).

[35] Mr. Amundson testified that the Agency sometimes becomes aware of an employee's outside activities through an employee's disclosure, tips from other employees or complaints from the public. The Agency is then required to investigate. He is not aware of anyone in the Agency who performed duties similar to those performed by Mr. Duske in the northern harvest. Had the Agency been aware, he believes that it would also have determined that there was a conflict or potential conflict of interest. For example, he is aware that other employees have been approached by industry to help prepare a *Hazard Analysis and Critical Control Points (HACCP) Plan*, and that those employees were told that to do so constituted a conflict of interest.

[36] Mr. Amundson testified that there was no suggestion that Mr. Duske's duties with the Agency were affected by his participation in the muskox harvest. He did not see that there was an actual conflict. He said Mr. Duske assisting a regulated party with

regulated requirements could be perceived as a conflict. The concern was one of public perception. It would put the Agency in an awkward position if a problem arose and it became known that one of its employees was working for a company, assisting it to comply with the Agency's regulations. Most members of the public do not know the individual duties of employees and simply focus on the employment relationship.

[37] In cross-examination, Mr. Amundson said that perceptions of concern to the Agency could be being seen as helping an individual company or being seen as giving a company an advantage in complying with regulations that another company did not have. He further said that the Agency wants all of its regulated parties to understand and comply with applicable regulations. Although Mr. Duske was not working in a regulatory role with the Agency in the North, helping a company regulated by the Agency and being paid for it could be seen as a problem by the public. He said that it gives a company an unfair advantage when it employs an Agency employee to help it comply with regulations. Mr. Amundson said that as a regulator the Agency certifies commodities for export and that part of the Agency's international credibility is that it is, and is seen to be, at a distance from the parties it regulates. While Mr. Duske's work benefited the people in the North, his involvement had the potential to impact on the Agency's reputation of impartiality respecting the companies it regulates. Mr. Amundson said that Canada enjoys a high level of respect because of the Agency's inspection and regulatory programs.

[38] Mr. Amundson was cross-examined about the livestock grading program. At one time this function was performed entirely by Agency employees, but it has since been privatized. For a transitional period, Agency employees were permitted to do this type of work for outside companies but were advised that they had to submit a conflict of interest disclosure. Mr. Amundson was not directly involved in any of the conflict of interest decision making. It was his view that the employees doing that work eventually had to choose between working for the Agency and working as a livestock grader with private industry. He denied the suggestion that Agency employees were encouraged to bid on the grading contracts.

[39] In re-examination, Mr. Amundson testified that the independent and impartial reputation of the Agency is important. The Agency has to be seen as impartial, and it is concerned about the potential for an individual employee to compromise its independence and reputation through outside activities. Mr. Amundson is not familiar

with the meat inspection programs or with the companies that harvest muskox in the North but indicated that the Agency's programs operate throughout Canada and that there is an initiative regarding consistent application of the Agency's programs throughout the country. He testified that there was nothing in the Agency's mandate requiring it to treat a company in one part of the country differently than a company in another part of the country.

[40] Mr. Duske submitted a further conflict of interest form on December 16, 2002. At that time his Agency duties had not changed; he remained in his environmental management position. Before he filed his 2002 submission, Mr. Duske said that he consulted with Dr. Marjerrison to distance himself further from the Agency in the North so as to alleviate their perceptions. Mr. Duske emailed Dr. Marjerrison on November 8, 2002, indicating that he wished to continue his involvement with the northern muskox harvest and to also retain his position with the Agency. He indicated that there would be a change in the reporting structure, with other individuals in reporting positions being responsible for on-site contacts with the Agency, that he would no longer be the Agency's sole contact, that he would be responsible for the labour pool, accommodations, food, mobilization, demobilization and equipment, and that he would not make any decisions or give advice to the Agency on the disposition of the product.

[41] Patricia Schmidt, Managing Director of the Northern Corporation, wrote to Dr. Marjerrison on November 4, 2002, indicating that the Northern Corporation wished Mr. Duske's continuing involvement with the hunt and that it was prepared to work with the Agency to ". . . see that this issue does not pose any threat to the credibility of either Frank or the CFIA." This letter was in fact prepared by Mr. Arsenault for her signature.

[42] Dr. Marjerrison suggested, in an email to Mr. Duske dated November 17, 2002 (Exhibit E-3, tab I), that he send a submission:

. . .

. . . clearly outlining the circumstances and differences relative to the previous submission. I would also suggest that you include a cover letter requesting the COI Board contact Eric Bach and me. I can offer an additional perspective on the following:

- there is significant value that a person such as you can offer re: the Northern Harvest to the groups of people in the North (particularly native peoples) trying to meet requirements and achieve compliance with the Meat Inspection Act and Regulations.

- There is also significant benefit to the CFIA in having the involvement of someone during the Harvest planning phase familiar with safety requirements that must be met for our CFIA staff in the harsh Northern environment.

- There is an extreme scarcity of individuals with expertise in both Northern Harvests and CFIA regulatory requirements

- the perception of conflict appears to be significantly reduced with the structural and reporting relationship changes proposed at this time in this submission.

...

[43] Mr. Duske included names of specific persons from the Northern Corporation that the Agency could deal with if they had problems with the abattoir so that they did not have to deal with him. There would be an abattoir foreman. Mr. Arsenault would arrange flights for Agency personnel. Mr. Duske said, "We went one step further to take away their perceptions." Mr. Duske believes that the Northern Corporation took the issue all the way to the Minister's office. Under the new working arrangement, if the Agency had a problem, it would go to the abattoir foreman. If he or she could not fix the problem, he or she would go to Mr. Duske. Mr. Duske had a good working relationship with the Agency; prior to these changes, Agency staff sought Mr. Duske to fix problems.

[44] Mr. Duske's 2002 submission attached a letter from Mr. Arsenault, Manager of the Northern Corporation, that set out the roles Mr. Duske performed while in the employment of the MPC:

1. *Management of Mobilization - ensuring the operation is designed and set up to be efficient and in compliance with provincial and federal regulations.*
2. *Management of labour - management of the labour pool in Sachs Harbour during the harvest, matching individuals to appropriate tasks, co-ordinating the training of individuals to expand their skills with regard to the project.*

3. *Equipment & Site Supplies - Researching and purchasing equipment that will work in extreme harsh environmental conditions of the Canadian Arctic. Educating staff on proper use of specialized equipment for safety and also ease of operations.*
4. *Management of Debominization [sic] - ensuring equipment is cleaned and stored properly, while planning for the next mobilization.*
5. *Logistics - Assist the Inuvik office with flight schedules and issues pertaining to accommodations, food and transportation in Sachs Harbour.*

Regarding the management of the harvest, and CFIA's contacts, Mr. Duske will have no reporting responsibilities on behalf of our company to CFIA. MPC will have area specific managers reporting directly to the CFIA. There will be a separate manager for the Abattoir, Herding & Finished Federal Product.

...

[45] In his application, Mr. Duske also provided a letter from Dr. Sturm then the National Lead & Beef Programs, dated November 21, 2002, indicating that he had no concerns with the former roles played by Mr. Duske as harvest manager for the Northern Harvest. The letter reads in part as follows:

...

I appreciate there may be perceived or real concerns around the optics and conflict of interest with your previous arrangement, hence if other options are taken to address these concerns, no problem. The important thing is to have a viable harvest while allowing the harvest to operate. With all northern harvests, the on site management and arrangements must be functional. Usually, in CFIA, we like to have a single contact with the harvest in order that we do not experience disjointed efforts that may lead to a problem harvest.

As I said, if an option is to use the local managers to manager [sic] and interact with us in CFIA in organizing and conducting the harvest rather than a single contact then that is what we would do. The important thing is that the harvest is done on a regular yearly basis with the development of organizational management skills that pass from year to year. If the option you suggested is accepted, then all parties will need to work to be sure it continues to function in a coordinated seamless [sic] fashion as in the past.

...

[46] I note that Dr. Sturm has no role in making conflict of interest decisions. He was not consulted by anyone in the Agency about any of the conflict of interest decisions made concerning Mr. Duske's participation in the muskox harvest. Based on the evidence of both Mr. Amundson and Mr. Bach, it appears that neither of these managers was contacted by Mr. Hillier for further information before any of the conflict of interest rulings were issued.

[47] Dr. Sturm was an Agency employee who signed off on harvest proposals that were prepared by Mr. Duske.

[48] Dr. Sturm testified that the Northern Corporation was not granted any special privileges because Mr. Duske was involved in the harvest. Dr. Sturm said it was probably worse, as "we expected him to know better." Having Mr. Duske as the on-site manager made the operations for the Northern Corporation and the Agency run smoother. Having Mr. Duske as the manager made a huge difference in the success of the harvest.

[49] In cross-examination, Dr. Sturm testified that he was not delegated the power or responsibility to make conflict of interest decisions. His main concern was to have the muskox harvest run smoothly and successfully. Dr. Sturm testified both in chief and in cross-examination that he did not see a conflict of interest. He testified that the regulations were the same whether it was an operation in the North or the south. His job was setting policy and he did not supply the inspectors that went north. Dr. Sturm confirmed that besides the Northern Corporation, which employed Mr. Duske, other companies were involved in muskox harvest. Dr. Sturm also clarified that his task in "signing off" on the harvest was a policy review type of decision and not an approval of Mr. Duske being sent north. He said that it had nothing to do with Mr. Duske going north. He did not have any operational responsibility to assign inspectors to the inspection teams; the inspectors he designated had to have approval from their managers.

[50] Mr. Duske applied for and was granted vacation leave for March 3 to 26, 2003, and October 27 to November 28, 2003, by Dr. John Nightingale, his supervisor in Lethbridge. Mr. Duske attended the muskox harvests during these two periods.

[51] Mr. Duske said that he submitted a new conflict of interest form because of his new job as an environmental manager. He thought that with this new job, there could be no perception of conflict of interest because he had no job duties related to the North. In his job as environmental manager he reviewed Agency-owned properties, reported on environmental conditions and implemented environmental programs related to the Agency. He had no duties related to the inspection of meat, vegetables or feed.

[52] He phoned the Human Resources (HR) section in October 2003. They told him that they could not find the September form that he had submitted, so he faxed it to them.

[53] Mr. Duske said that he felt that his 2001 submission was not investigated. He was not contacted about his submission and neither was anyone else. He viewed the Agency's position as vague. He said the Agency has over 6000 employees in 12 programs, and if everyone were painted with the same brush, no Agency employee could own farms or acreages and veterinarians could not perform outside work. Mr. Duske agreed in cross-examination that the Agency relies on its employees to make conflict of interest disclosures. Mr. Duske testified that other employees who worked for the Agency also worked privately as livestock graders. In cross-examination, Mr. Duske agreed that a conflict of interest disclosure is confidential and that he would not necessarily know what conflict of interest rulings had been issued by the Agency regarding the outside activities of other employees. Further, Mr. Duske agreed that the grievance process was confidential and that he would not be aware of discipline accorded to other employees for breaching a conflict of interest ruling. The employees he named had either retired or departed from the Agency.

[54] Mr. Duske said that he went on the 2003 harvests because he had not heard anything about his disclosure. He did not hear anything until 2004, when he received his discipline letter from Mr. Acker. In the harvest proposals for 2003 Mr. Duske is named as the site coordinator, Peter Van Bravant is named as the abattoir foreman and Mr. Arsenault is named as the project coordinator. Mr. Duske said that he had not heard anything about his disclosure and that his leave had been approved. He also said that he had not signed the harvest proposal and that changes had been made to insulate him from the Agency's inspection and regulatory responsibilities.

[55] In cross-examination, Mr. Duske agreed that the Agency should apply the *Code* uniformly. He pressed the point, however, that for the Inuit on Banks Island, the muskox harvest is one of their few economic activities. Mr. Duske said that as part of the federal government, the Agency should take into account the limited economic activities available to the Inuit and overlook his connection with the Agency if it would mean his involvement would help lead to a successful harvest.

[56] Mr. Duske's participation in the 2003 muskox harvests came to the attention of the Agency. As a result, Mr. Acker arranged for a fact finding meeting to be conducted by Delores Nelson. As a result of information confirmed in that meeting, Mr. Acker imposed a 10-day suspension on May 20, 2004. The salient portion of the discipline letter reads as follows:

...

This is in reference to your participation in the muskox harvest in March, 2003 and November 2003, despite written instructions to refrain from such activity in Mr. Larry Hillier's letters of May 9, 2000 and December 14, 2001. You were also clearly advised by Mr. Eric Bach, by e-mail dated January 28, 2002, to make no future plans to participate in such harvests.

Participation in these harvests is a violation of the Conflict of Interest and Post Employment Code of the Canadian Food Inspection Agency. When you were questioned about your participation on January 9, 2003, you acknowledged that you knew about the Code and the direction provided by Mr. Hillier and your supervisor. Moreover, you have not provided a satisfactory explanation in defence of your behaviour.

For these reasons, by the authority delegated to me by the President pursuant to Section 7 of the Canadian Food Inspection Agency Act, I am suspending you from your duties without pay for a period of 10 working days. This suspension will be served from May 31, 2004 to June 11, 2004. Normally this type of infraction would attract termination of employment. However in awarding this suspension, I have taken into consideration the following mitigating factors:

- a) the e-mail message of November 17, 2002 to you from Dr. James Marjerrison, that might have left you with the impression that your participation in a different role might be acceptable;*

- b) *the fact that you were permitted to participate in the spring harvest of 2002 by the Agency;*
- c) *the length of time that has elapsed since you received a response since the date of the filing of the Conflict of Interest Report*
- d) *your long service with the Federal Public Service*

...

I hope that you will use this period of your suspension to reflect on the circumstances which gave rise to it. You are instructed that you are not to participate in the muskox harvest in any capacity in the future. In addition, effective immediately, you are required to submit a Conflict of Interest Report on a bi-annual basis (June and December). Upon your return to work, and in the future, should you fail to respect the Conflict of Interest and Post-Employment Code of the Canadian Food Inspection Agency, you may be subject to more severe disciplinary action up to and including termination of your employment with the Agency.

...

[57] Before making his disciplinary decision, Mr. Acker sought advice from the HR department. Mr. Acker had two concerns. His first concern was that Mr. Duske had sufficient information from the Agency to know that he should not have participated in the muskox harvest. His second concern was that Mr. Duske chose to participate in the harvest despite the Agency's concerns and Mr. Hillier's directions. Mr. Acker received advice to impose a 20-day suspension, which was far more severe than what he imposed. He took into account, as mitigating factors, the fact that Mr. Duske had received an earlier dispensation to participate in the harvest and might have considered it more than a one-time dispensation. Mr. Acker also considered that Dr. Marjerrison had given Mr. Duske information on how to make a submission and that he might have considered it to be permission, but it had not been received from the Vice-President.

[58] Mr. Acker considered that Mr. Duske's participation was a perceived conflict of interest. While the Agency distinguishes between inspector jobs internally, to members of the public all employees are perceived as inspectors. While his regular duties were not impacted, he was working for a party regulated by the Agency, and there could have been a potential conflict of interest. Public perception is important because Canada currently enjoys a high public perception for food and herd safety, and

involvement with a regulated party could compromise the Agency's international reputation in carrying out its role.

[59] In cross-examination, Mr. Acker admitted that he had no detailed knowledge of the work that Mr. Duske performed for the Northern Corporation. Although Mr. Acker was not present during the investigator's interview of Mr. Duske, he understood that Mr. Duske did not deny having worked with the Northern Corporation during 2003. Although he did not understand the precise details of the research that was done by an HR representative, he understood that there was a range of punishment for insubordinate acts up to and including termination. He did not do any research as to the possible range of punishments. He was questioned about mitigating factors. He admitted that he did not consider the "economic impact on the North" as a mitigating factor, as this was not within the Agency's mandate. He did not consider Mr. Duske's lack of a disciplinary record, but he did consider the economic impact on him.

[60] In re-examination, Mr. Acker said that Mr. Duske would have known all the inspectors, that he would have had contact with people from the Agency, and that from a public perception standpoint, he would have had the opportunity to speak with and to influence inspectors. Mr. Acker said that there were approximately 250 employees of the Agency in the Alberta South Region.

[61] Mr. Arsenault indicated that he received a letter on February 7, 2002, from Mr. Duske (Exhibit E-3, Tab G) indicating that Mr. Duske could not work as a harvest manager after the spring 2002 harvest unless a workable solution was found between himself and the Agency. Mr. Arsenault was distressed, as he could not understand why there was any conflict of interest. He was never able to mitigate it since he could not understand it. Mr. Arsenault indicated that the Northern Corporation hired two additional people and that he took on extra tasks himself in attempt to structure the duties in a way that would be acceptable to the Agency.

[62] Mr. Duske has been a valuable employee to the Northern Corporation, and Mr. Arsenault has not been able to replace him. Mr. Duske's involvement was for a five-week period each year. The company remains in operation with some difficulties. Mr. Arsenault said that the Northern Corporation has not done a fall harvest for a couple of years.

[63] In cross-examination, Mr. Arsenault said that Mr. Duske's preferred skills were those in meat industry and cutting practices, and in sanitation and hygiene standards. To retain Mr. Duske's services, Mr. Arsenault and Mr. Duske tried to build in a layer of reporting between Mr. Duske and the Agency veterinarian in charge to alleviate the Agency's concerns of a potential conflict of interest. Mr. Arsenault said that he was responsible for preparing the proposals for the 2003 harvests (Exhibits G-3 and G-4) for submission to the Agency for approval. Formerly, this was an activity performed by Mr. Duske. Mr. Arsenault said that Mr. Duske is in a management role and is remunerated by contract. Since he is a consultant, tax deductions are not made.

[64] At the outset of the hearing Mr. Duske indicated, through counsel, that he wished to call Dr. Nightingale by telephone to have him give evidence that he was the person who approved Mr. Duske's leave applications in 2003. After hearing arguments from the parties, I ruled that Dr. Nightingale must attend in person as there was the potential for some controversy, and that the employer would be denied an effective cross-examination if he attended by telephone. At the hearing, which resumed in May 2007, I was advised by Mr. Mair that discussions had taken place between the parties and that as a result, Dr. Nightingale was not going to be called to give evidence and that Mr. Mair had sought an admission from the employer that Dr. Nightingale had not been contacted with respect to the conflict of interest rulings in 2003. The employer was not in a position to confirm or deny this. I find that it is more probable than not that Dr. Nightingale was not contacted by Mr. Hillier before he made his decision, as none of Mr. Duske's other managers were contacted.

[65] In cross-examination, Mr. Duske agreed that he went on the spring 2003 harvest about three months after he submitted his 2002 conflict of interest disclosure. He admitted that he had not received an answer from Mr. Hillier within three months on his earlier submissions. He admitted that it was important to him to ensure that his employer was "okay" with his outside work. He recognized that if he did not have a favourable conflict of interest decision there was a risk to his employment. In cross-examination, Mr. Duske said that he did not have any problem with the letters written by Mr. Hillier as long as he understood Mr. Hillier's rationale, although this was never clearly explained to him by the Agency.

[66] In cross-examination, Mr. Duske said that he was aware that another Inuit group in Nunavut conducted muskox harvests. He was aware that the Agency shut down one harvest in 2001 for abattoir deficiencies because that group did not have an effective harvest manager. Mr. Duske said that he understood that this group did not know the regulations and that when the Agency performed an inspection, the group was not in compliance with the regulations.

[67] Mr. Duske's salary with the Agency is \$52,000 per year. He was paid \$400 per day for each day of the harvest. In the spring of 2003 he was gone for 23 days, including travel.

[68] Mr. Duske and Dr. Sturm testified that there were other employees who also worked outside of the Agency. In his direct examination, Mr. Duske was reluctant to name any of them. Counsel for the employer indicated as an objection that she would require details from Mr. Duske on cross-examination. Mr. Duske then asked me for advice as to whether he was required to disclose the names. I indicated that I was not prepared to give him advice but would give him a brief adjournment to discuss the point with his representative. The employer's counsel did not object to Mr. Duske consulting with representative. After the consultation, Mr. Mair asked more general questions and obtained evidence from Mr. Duske that farmers also worked for the Agency and that a cattle grader that he knew, who recently retired, worked for industry as well as for the Agency. In cross-examination, Mr. Duske alleged that "R.H.", now retired, worked for a private livestock grading company while at the same time working for the Agency as an inspector. He testified that "J.K." owned a custom feedlot and worked for the Agency as an animal health inspector. Mr. Duske does not know if J.K. filled out a conflict of interest disclosure statement.

[69] Dr. Sturm said that "A.O." worked for a shipping company to learn that industry before he retired. He said that other Agency inspectors, R.H., "M.V." and "D.C." also worked in private industry as graders. This was the only way that industry could acquire experienced graders after the Canadian Beef Grading Agency was formed, as this function was previously carried out by the CFIA. Dr. Sturm also testified in cross-examination that "G.R.", an employee, now retired, worked in provincial facilities as well as in federal facilities as an inspector, but he also admitted that this was under a Memorandum of Understanding. In cross-examination, however, Dr. Sturm testified that he was not aware whether A.O. was retired or whether he was on leave when he

worked for the shipping company. Dr. Sturm did not know whether R.H., M.V. or D.C. filed conflict of interest disclosure statements, whether the Agency had ruled on those disclosures or whether the Agency had taken disciplinary proceedings, as these were confidential matters. In re-examination, Mr. Duske said that he never tried to influence the Agency's inspectors involved with the muskox harvest.

Summary of the arguments

[70] The employer submits that it is quite clear that Mr. Duske's participation in the 2003 muskox harvests constitutes a perceived conflict of interest and insubordinate conduct. A 10-day suspension was appropriate in the circumstances. The employer asks that the grievance be dismissed.

[71] Mr. Duske is employed by a federal agency. As a public servant he has a particular duty to prevent a real, potential or apparent conflict of interest: Caron, *Employment in the Federal Public Service* (2007). The *Code* is designed to enhance public confidence in the integrity of the Agency's inspection and certification programs. It is up to the employee to arrange his or her affairs to avoid the suggestion of a perceived or apparent conflict of interest: *McIntyre v. Treasury Board (Revenue Canada - Customs and Excise)*, PSSRB File No. 166-2-25417 (19940718).

[72] At the time that Mr. Duske went on the harvests in 2003 he had in his possession two letters from the Vice-President of Operations and a confirming email from Mr. Bach advising him not to participate. The letters from Mr. Hillier also advised of the potential for disciplinary consequences.

[73] Mr. Duske was aware of the conflict of interest policy and of the contents of Mr. Hillier's letters and Mr. Bach's email, but he chose to participate in the muskox harvests anyway.

[74] Mr. Duske was employed in a managerial capacity in the muskox harvest, which is an industry heavily regulated by the Agency. The Agency maintains close control of the industry's operations, and Agency staff on-site is in close proximity to the Northern Corporation's staff. The performance of those duties did not affect the day-to-day performance of Mr. Duske's duties for the Agency. There is, however, significant potential for adverse publicity in this business, which is structured as a harvest. The Northern Corporation wanted Mr. Duske in part because he knew about the Agency's regulations and guidelines and had had practical experience in the past interpreting

and working with the guidelines. After the harvest, all Agency staff and Mr. Duske would return to their usual Agency jobs in Alberta. The relationship between the parties was “too close or proximate,” and therefore there were concerns about impartiality. If the Agency had ever been required to take enforcement action, significant potential existed for adverse publicity directed at the Agency.

[75] Mr. Duske’s participation in the muskox harvest was viewed as a problem by the Agency’s senior managers. In particular, when Mr. Bach learned of Mr. Duske’s participation, without knowing of the contents of an earlier ruling, he asked Mr. Duske to apply for a conflict of interest ruling.

[76] Further, the employer says that public servants often develop specialized skills and knowledge that would be advantageous in a business setting. Mr. Arsenault pointed out that Mr. Duske’s technical knowledge gave the Northern Corporation a high degree of comfort. Dr. Sturm confirmed that Mr. Duske’s skill and knowledge gave that operation an advantage. There were other regulated businesses involved in the muskox harvest that did not have the benefit of Mr. Duske’s expertise. It is important to have a clear demarcation for public servants who do work in the private sector, which draws on their specialized expertise. The public sector can demand a higher standard than the private sector: *Threader v. Canada (Treasury Board)*, [1986] F.C.J. No. 411 (FCA) (QL).

[77] A public service employer should be given a high degree of latitude by an adjudicator in the enforcement of its code of conduct: *Canada (Attorney General) v. Assh*, [2006] F.C.J. No. 1656 (FCA) (QL).

[78] It is clear that Mr. Duske did not like the conflict of interest rulings made against him. It was open to him to grieve these rulings, but he chose not to. The general rule in labour relations is “work now and grieve later”: Brown and Beatty, *Canadian Labour Arbitration*, 4th ed. (2006), at 7-108. Mr. Duske was given clear directions not to participate in the northern harvest. At the time of his participation in 2003, he knew that the process of handling his disclosure involved the Vice-President of Operations making a ruling after obtaining legal advice. While he claims he did not get a timely response, he had been exchanging correspondence with Ms. Lapierre; he knew the process involved and the length of time required to get a ruling. At the time that he applied for the last ruling, he knew, or should have known, that he would not

obtain a ruling in time for the harvest. Conflict of interest decisions are made by specialists within the Agency, and this takes time.

[79] Mr. Duske was insubordinate. He disobeyed the directions of Mr. Hillier. At the time of the 2003 harvests he had clear and lawful directions, given by a person in authority, that he disobeyed. The employer relied upon the following authorities on insubordination: Mitchnick and Etherington, *Leading Cases on Labour Arbitration, vol. 2 Discharge and Discipline* (2002) at 13-4; *Noel v. Treasury Board (Human Resources Development Canada)*, 2002 PSSRB 26; *Doucette v. Treasury Board (Department of National Defence)*, 2003 PSSRB 66; and *Dandivino v. The National Film Board of Canada*, PSSRB File No. 166-8-14215 (19831206). All the elements of insubordination are proven. It was incumbent on him to obey the order even if he did not understand the rationale; an understanding of the rationale is not essential if clear and lawful directions are given by a person in authority.

[80] Mr. Duske's attempts to structure his involvement in the Northern Corporation missed the point. He remained as a manager in a venture that was heavily regulated by the Agency. While his job was not inspecting meat, it never would have been his work anyway since that is the job of Agency personnel who were on-site. His prime benefit to the Northern Corporation was his ability to navigate through the complex regulations to ensure that the harvest took place.

[81] The discipline imposed by the employer was reasonable in the circumstances. The employer considered the relevant mitigating factors: Brown and Beatty, *Canadian Labour Arbitration*, 4th ed., at 7-150. Mr. Acker considered Mr. Duske's long years of service, the financial impact and the delays associated with decisions to allow him to attend the harvest in the past as mitigating factors. Mr. Duske's conduct was premeditated and occurred more than once. These factors aggravate the conduct. The employer provided a number of cases setting out a range of punishment for insubordinate conduct ranging from suspension to termination: *Cloutier v. Treasury Board (Department of Citizenship and Immigration)*, 2007 PSLRB 38; *Cottingham v. Treasury Board (Transport Canada)*, PSSRB File No. 166-2-15243 (19860121); and *Sarin v. Treasury Board (Energy, Mines and Resources Canada)*, PSSRB File No. 166-2-15600 (19860516). The adjudicator should not reduce a penalty unless it was clearly wrong: *Hogarth v. Treasury Board (Supply and Services)*, PSSRB File No. 166-2-15583 (19870331).

[82] Mr. Duske argued that he made every reasonable effort to arrange his affairs to avoid a conflict. He relied on a summary of *Faryna v. Chorney*, [1952] 2 D.L.R. 354 (BCCA), contained in *Cara Operations Ltd. v. Hotel Employees Restaurant Employees Union, Local 75*, 23 L.A.C. (4th) 1, 25 C.L.A.S. 23. The Agency never responded to him in a timely manner. He submitted a new proposal in 2002 attempting to address all aspects of the conflict. The lack of employer response led him to believe that he could go to the harvest in 2003. The new information that he provided in his last disclosure countered whatever objections the employer might have had as indicated by its earlier decision. Employers must give reasonable decisions in a timely manner to prevent an employee from falling into error.

[83] The employer has not adequately explained the nature of the perceived conflict. As a food and vegetable inspector, it is difficult to see what conflict was posed by his participation in a northern muskox harvest. Part of the skills that he applied had been developed in the private practice of abattoir operations before his employment with the Agency and its predecessor departments.

[84] Even if this case properly found cause for the discipline, it was too harsh. There are substantial mitigating factors, and Mr. Duske relies on the summary of mitigating factors contained in *Cara Operations*. These are listed as: previous good record; long service; isolated incident; provocation; lack of premeditation; special economic hardship to the grievor; discriminatory or lack of uniform enforcement of rules; circumstances negating intent; seriousness of the offence in terms of the employer's policy and obligations; and other proper circumstances that an adjudicator should consider. Mr. Duske has long service, and this is an isolated incident. Mr. Duske did not attempt to deceive anyone. He was confused about the offence. There are circumstances negating his intent, as he discussed this matter with Dr. Marjerrison and Dr. Sturm prior to filing his disclosure in 2002. He has an unblemished disciplinary record. Although the employer views this as serious, it ought to render its decisions in a timely way to prevent an employee from "falling into error." There are other employees who work for outside employers, and the employer did not apply its policy uniformly to them. Mr. Duske asks that the suspension be rescinded and that a letter of reprimand be substituted for the suspension.

[85] In reply, the employer argued that Mr. Duske did not resubmit his disclosure because his duties at the Agency had changed. During his last two disclosures, he was

employed with the Agency's Environmental Management Program. Mr. Duske should not have been confused about who made the conflict of interest decisions. He had access to bargaining agent representatives for advice in grievance matters. There is no evidence that other employees have been treated any differently than Mr. Duske. There is no clear evidence that there are other employees working in private industry while also working with the employer. The employer has 6000 employees; it relies on them to make disclosures. Disclosures are confidential, and the discipline process for breach of directions made by the employer is also confidential. There is no reliable evidence that the employer singled out Mr. Duske for different treatment.

[86] Mr. Duske argued finally that some changes to his duties both inside and outside the Agency had been made.

Reasons

[87] Since this grievance concerns discipline, I must consider the following three issues:

- (a) Has the employee given cause for some discipline?
- (b) Was the discipline excessive in the circumstances of the case?
- (c) What alternative appropriate disciplinary sanction should be imposed?

[88] Whether or not Mr. Duske has given cause for some discipline depends on a finding of whether he was in a potential conflict of interest when he performed off-duty work for the Northern Corporation in the 2003 spring and fall muskox harvests.

[89] When he worked in the Northern Corporation in a capacity related to the muskox harvest, he was working in an activity that was intensely regulated by the Agency with which he was employed. He was employed by the Northern Corporation for the particular skills that he had developed before and during his employment with the Agency. He has never exercised regulatory actions over the Northern Corporation or meat inspection activities in the Northwest Territories, so he is not in an actual conflict of interest. He did not work in meat inspection duties since at least 2001 when he obtained his environmental manager position, some three years prior to the discipline imposed by the employer. The question is whether he is in a potential conflict of interest.

[90] The definition of conflict of interest is set out in the Code:

...

Any situation in which personal assets, interests or activities affect in any way or have the potential or appear to affect, the honest, impartial performance of an employee's duties or their judgement to act in the public interest.

...

[91] In *Threader*, the Federal Court of Appeal proposed a test for assessing whether there is an apparent conflict of interest. The Court said:

...

The term "appearance of conflict of interest" is not defined in the Guidelines and the absence of judicial commentary is understandable in view of the position at common law already indicated. The notion of the appearance of a conflict of interest giving rise to legal consequences is entirely modern. Legal consequences only flow from reality. However there is a well established analogue in which mere perception does entail legal consequences. That has to do with the apprehension of judicial bias. In such a case, the question to be asked is:

Would an informed person, viewing the matter realistically and practically and having thought the matter through, think it more likely than not that the judge, whether consciously or unconsciously, would not decide fairly?

While simply stated, its application is by no means easy... The parallel question, to be answered in a case such as this, might be phrased:

Would an informed person, viewing the matter realistically and practically and having thought the matter through, think it more likely than not that the public servant, whether consciously or unconsciously, will be influenced in the performance of his official duties by considerations having to do with his private interests?

Such an approach may be equally difficult in its application but it is essential if I am correct in my appreciation that the existence or not of an appearance of a conflict of interest is properly to be determined on an objective, rational and informed basis.

. . .

[92] Mr. Duske asks that I view the *Code* in a very narrow way; that I focus on the job duties he performed in the Northern Corporation and the job duties he performed for the Agency. Mr. Duske argued that because he did not have any regulatory authority over the muskox harvest, that he was not working in meat inspection in the Agency and that a buffer was created between himself and the Agency's inspectors, there was no conflict of interest. It is clear on the facts that Mr. Duske was not in an actual conflict of interest, as he had no decision-making authority at the Agency over muskox meat matters. This argument, however, does not address potential conflicts of interest. The *Code* also covers potential conflicts of interest.

[93] In my view, the *Code* should be given a purposive interpretation. It is clear from the principles in the *Code* that conflicts must be resolved in favour of the public interest and not interpreted in favour of permitting an employee to carry on suspect activity. Mr. Duske works for the CFIA, an agency that regulates food safety. The evidence establishes that the reputation of the Agency depends on an impartial and arms-length relationship with the industry it regulates. This is critical to its export work.

[94] The Northern Corporation's activity was the production of muskox meat and other muskox products for export. This activity is highly regulated by the Agency. It seems odd to me that Mr. Duske chose to become involved in this private industry while he was working for the Agency. It seems to me that from the moment of his involvement in 1995, there was a potential for conflict of interest, and particularly so in 1995 since he was a meat inspector teaching butchering techniques that would have included techniques to comply with the Agency's regulations. Dr. Sturm appears to have recognized that there was a problem, since he determined that Mr. Duske would never be permitted to work in the North as a meat inspector, but it appears that the full potential of this conflict of interest was not recognized. There is no evidence before me that the Agency had a conflict of interest policy in 1995. However, the Vice-President of Operations recognized the conflict of interest in 1998, when the Agency was first given the opportunity to make a ruling on Mr. Duske's conflict of interest disclosure. At that time, Mr. Duske was a meat inspector who was involved in training people to handle meat in compliance with regulations. The nature of the potential conflict of interest was described as ". . . the CFIA should not knowingly permit itself to be associated in any way with an activity for which we have an enforcement role."

The essential nature of that potential conflict of interest remains when an employee of the Agency works for a regulated party while on leave.

[95] Mr. Duske then moved to a broader role with the Northern Corporation, a different company, involving all aspects of coordinating the harvest. He was hired as the harvest manager because of his skills, some of which were his ability to interpret the Agency's regulations. When the incoming Agency manager, Mr. Bach, became aware of this outside activity, he told Mr. Duske to file a conflict of interest report. The activity reported in the 2001 disclosure also resulted in a finding of a potential conflict of interest and a direction to cease working with the Northern Corporation.

[96] In my view, Mr. Duske was clearly told by Mr. Hillier on two occasions prior to the 2003 harvests that as an employee of the Agency, he could not work for the Northern Corporation, which the Agency regulated. In my view, the nature of his involvement with the Northern Corporation is somewhat irrelevant given that he remained a manager, that the Northern Corporation relied on his expertise for success in its venture and that this was a venture that the Agency regulated.

[97] The Agency has in the past forbidden its employees from being involved with the preparation of HACCP plans, which is a critical part of reducing the hazard to the public from food processing. This was done because it could not have its employees, although highly knowledgeable, participating in, and being paid for ensuring, compliance with federal regulations. In principle, I see no difference between a person preparing a HACCP plan and an Agency employee managing or assisting in managing a harvest to ensure compliance with regulations enforced by the Agency.

[98] It appears that Mr. Duske took a deliberate risk in by participating in the harvest without giving the Agency a chance to rule on his modified duties with the Northern Corporation, knowing of two earlier directions not to participate and knowing the time required for the Agency to render a decision.

[99] In my view, Mr. Duske's participation in any capacity in connection with the Northern Corporation's muskox harvest violated principle 4 of the *Code*:

...

Private Interests

4. *CFIA employees shall not have private interests, other than those permitted pursuant to this Code, that would be affected particularly or significantly by government actions in which they participate.*

...

[100] He was paid a per-diem rate by the Northern Corporation. The Northern Corporation was subject to regulation by the Agency. The Agency had the power to shut down the muskox harvest and done so to other companies. Mr. Duske's private interest of working with the Northern Corporation and being paid, were and could have been significantly impacted by the Agency's actions in regulating the muskox harvest.

[101] In my view, "... government actions in which they participate" has to be given a wide meaning. In this case, it means the Agency's regulatory programs. Although Mr. Duske was not a meat inspector, he did participate in the regulatory programs of the Agency.

[102] A significant value explicit in the *Code* is the upholding of public confidence and trust in the integrity, objectivity and impartiality of government. In my view, an Agency employee who works during leave in an industry regulated by the Agency has a significant potential to impact on this value. If, for example, there were a significant problem with "tainted muskox meat," the media would have a field day focusing on why the Agency permitted its employee to work in a private company that produced tainted meat and whether the company had received preferential treatment because it employed an Agency employee. This type of public criticism bears directly on the impartiality of the Agency's inspection programs, which are critical to meat exports.

[103] One of the prime values of Mr. Duske to the Northern Corporation was his ability to directly or indirectly assist the business by ensuring compliance with regulations enforced by the Agency. This involved using specialized knowledge developed from his work with the Agency in interpreting regulations. Further, another company whose participation in the muskox harvest was shut down by the Agency could complain that a competitor was receiving unfair preferential treatment and an unfair competitive advantage because it employed an Agency employee familiar with the Agency's meat inspection programs, to assist it in complying with regulations. Allegations of unfair preferential treatment bear on the Agency's reputation for impartiality in the administration of its inspection programs.

[104] Mr. Duske was aware of the Agency's decision concerning his work with the muskox harvest. I do not accept his argument that "he thought he could go" because of the change in his duties and the Agency's delay in making a decision. The Agency's two earlier decisions were predicated on him working with a corporation that was subject to the Agency's regulatory activity while remaining its employee. This reasoning is independent of Mr. Duske's specific job functions with either the Northern Corporation or the Agency. The problem for Mr. Duske is that he did not accept this decision and sought to isolate himself from possibly influencing Agency inspectors, veterinarians and scientists. The point, however, is that regardless of his role with the Northern Corporation, he was still working for an organization that was highly regulated by the Agency, with whom he had a full-time employment relationship.

[105] Even items 1 to 4 of the modified job duties set out in paragraph 44 covered matters that were regulated by the Agency. Mr. Duske was to ensure compliance with federal regulations and to train staff and purchase equipment also to ensure compliance with federal regulations. He was employed with the Agency. If, for example, he engaged in some activity with the Northern Corporation that raised media attention, one would think the first focus might be on his relationship with the Agency and how it could possibly regulate a business with which one of its employees was involved.

[106] In my view, the Agency has established on a balance of probabilities that Mr. Duske was in a potential conflict of interest when he worked for the Northern Corporation.

[107] I accept Mr. Duske's evidence that he could not understand the Agency's reasoning. I do not accept Mr. Duske's evidence that he was unaware of the conflict of interest process. He knew that he had to submit an application, that the application was forwarded to the Vice-President with legal advice and that the Vice-President made the decision. He was aware from his three earlier applications that it was a time-consuming process. He was aware of the instructions not to participate in the harvest. He made the choice to participate knowing that his conflict of interest disclosure was not dealt with and knowing that it took 21 months before the Agency ruled on his past disclosures. There was no evidence presented to me as to why it took such a long time to make conflict of interest rulings; however, in my view the delay in making a decision does not afford a justification for insubordinate conduct.

[108] Mr. Duske's leave was approved by the Agency. He did not disclose in his leave form that he was seeking leave to work for the Northern Corporation in the muskox harvest. The fact that the leave was approved did not amount to an approval for him to work for the Northern Corporation. Dr. Nightingale did not have the delegated authority to make conflict of interest decisions, and Mr. Duske knew this from Ms. Lapierre's email of November 29, 2001. Furthermore, the fact that Dr. Sturm approved harvest proposals that contained information about Mr. Duske's participation cannot be viewed as a defence to insubordination. Mr. Duske knew that Dr. Sturm had no authority to make decisions on conflict of interest disclosures.

[109] Mr. Duske worked for the Northern Corporation when he was directed not to by the employer. While there was a benefit to the Northern Corporation and to Inuit hunters in ensuring a viable muskox harvest, there is no duty on the Agency to make any allowance or exception or to make him available for the harvest. The duty rests with Mr. Duske to arrange his affairs to avoid the potential for a conflict of interest. In my view, there is likely no employment arrangement in connection with the muskox harvest that he could make with the Northern Corporation that would not give rise to a potential conflict of interest.

[110] Mr. Duske did not like the employer's decision and went to work for the Northern Corporation anyway. He should have filed a grievance. While ultimately he may not have had access to adjudication, there may have been other avenues, including judicial, to review Mr. Hillier's decision. In my view, the employer has established insubordinate conduct. For the above reasons, there was some cause for discipline.

[111] The next issue I must consider is whether the discipline was excessive in the circumstances. The cases before me include discipline up to and including termination for insubordinate acts. Here the employer was dealing with two instances of working for another employer during a leave that had involved a potential conflict of interest. The conduct was premeditated in that Mr. Duske chose to work knowing that the employer had in the past directed that he not do so and knowing that he did not have a ruling on his most recent disclosure. The employer considered his lengthy service and the financial considerations arising from a 10-day suspension. The Agency also took into account an earlier dispensation and Dr. Marjerrison's role in advising Mr. Duske. While the Agency took a lengthy period to make its decisions, this cannot

afford Mr. Duske a defence to insubordination given the earlier instructions not to participate in the harvest and the rationale that was advanced. The *Code* places the duty on the employee to avoid conflicts, and Mr. Duske could have avoided discipline by waiting for the Vice-President's decision. Mr. Duske does not appreciate the conflict. In my view, simply substituting a disciplinary letter would not bring to Mr. Duske an appreciation of the seriousness of the conduct. I am not satisfied that the discipline was excessive in the circumstances.

[112] I am not satisfied that there is evidence supporting Mr. Duske's argument that he was singled out for special treatment when there were other employees working for the Agency who also worked in conflict of interest with other employers. Firstly, none of the alleged other persons were called as witnesses, so there was no first-hand evidence on this point. Mr. Duske was reluctant to "name names." Some of the employees pointed out by Mr. Duske and Dr. Sturm worked for other employers during a transitional period when the Canadian Beef Grading Agency was formed. This was a special case where the Agency had previously performed this function, and it was being devolved to private industry. Mr. Amundson testified that the Agency's employees who worked for the Canadian Beef Grading Agency were asked to submit conflict of interest disclosure statements. There was no evidence as to whether other individuals had been determined by the Agency to be working in a conflict of interest situation and whether these employees were disciplined. In my view, it is for the employer to determine whether it should waive its policy in particular instances, and such a waiver does not impact the ability of the Agency to generally demand compliance. Mr. Duske had received one waiver in the past because of the pressing need of the Northern Corporation, but he was also advised that the Agency would not waive its policy again and agree to his participation.

[113] Mr. Duske has raised a policy argument that the Agency should not consider his participation a conflict or that it should disregard the conflict because he was helping the Inuit. While I appreciate that there is an impact of this decision on the Northern Corporation and its other employees, the adjudicative task is to sort out the grievance between Mr. Duske and the Agency contained in the reference to adjudication. I have no doubt that Mr. Duske provided valuable services to the Northern Corporation, that there may be limited persons with Mr. Duske's skill set available to the Northern Corporation, that there are limited employment opportunities for Inuit hunters and that there is no evidence of an actual conflict of interest. There is, however, a high duty

owed by an employee to a public service employer, and there is no legal obligation on the Agency to waive its *Conflict of Interest and Post Employment Code*.

[114] For all of the above reasons, I make the following order:

(The Order appears on the next page)

Order

[115] The grievance is dismissed.

August 31, 2007.

**Paul Love,
adjudicator**