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File: 566-02-5021

Citation: 2013 PSLRB 21

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

GARTH MULLINS

Grievor

and

DEPUTY HEAD
(Department of the Environment)

Respondent

Indexed as
Mullins v. Deputy Head (Department of the Environment)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Kate Rogers, adjudicator

For the Grievor: Bertrand Myre, Canadian Association of Professional Employees

For the Respondent: Karen Clifford, counsel

Heard at Ottawa, Ontario,
October 3 to 5, 2012.

I. Individual grievance referred to adjudication

[1] Garth Mullins ("the grievor") is a policy analyst, classified EC-03. He is employed in the Aboriginal and Stakeholder Affairs branch of the Department of the Environment ("the employer") in Vancouver, British Columbia. At all relevant times, he was covered by the collective agreement between the Treasury Board and the Canadian Association of Professional Employees for the Economics and Social Science Services bargaining unit, expiry date June 21, 2011 ("the collective agreement").

[2] On April 16, 2010, the grievor received a five-day suspension for misconduct arising from his participation at an anti-Olympic protest rally, where he spoke publicly and was identified as an anti-Olympic organizer in a video of the event posted on the Internet.

[3] The grievor filed a grievance alleging that he had been disciplined without just cause. As corrective action, he asked that the disciplinary action be rescinded, that any reference to it be removed from his personnel file, that he be reimbursed for the five-day suspension and that he be made whole. The grievance was denied at the second level of the grievance process on August 20, 2010, the first level having been bypassed by mutual consent of the parties, and at the final level on December 17, 2010. It was referred to adjudication on January 10, 2011, under paragraph 209(1)(*b*) of the *Public Service Labour Relations Act*.

II. Summary of the evidence

[4] The employer called Robin Hare, Steven Wright and Okenge Yuma Morisho to testify and introduced 14 documents into evidence. The grievor called no witnesses and did not testify.

[5] Ms. Hare became the acting director in the Aboriginal Affairs and Stakeholder Affairs branch of the Department of the Environment in June 2009. The directorate provides policy advice, analysis and coordination on issues relating to the environment, including environmental assessments affecting aboriginal communities, among others. The grievor was one of its 13 employees and reported to Ms. Hare. However, he also performed duties in two other branches, the Environmental Protection Directorate and the Environmental Stewardship Branch. Because of that, he had a functional reporting relationship with three directors, including Ms. Hare. Although the grievor was located in Vancouver, Ms. Hare worked in Ottawa, Ontario.

[6] Ms. Hare stated that, among the grievor's duties, he provided information and advice on land claim and aboriginal self-government agreement negotiations taking place within the British Columbia treaty process, he participated in a national group of managers within the Department of the Environment, providing expert advice on developing guidelines for negotiators to use in federal negotiations on aboriginal self-government and on land claim issues, and he consulted with a large number of aboriginal groups on the development and review of environmental assessments. The grievor also participated in national meetings on aboriginal issues as a representative of the Crown. The relationship between aboriginal groups and the Crown is important and unique. Ms. Hare stated that the Crown's fiduciary duty means that the Crown's honour is paramount. She testified that aboriginal history and culture must be understood and respected because aboriginal affairs have a unique legal and constitutional place in the country.

[7] When Ms. Hare became acting director and the grievor's supervisor in June 2009, she was briefed on the grievor's involvement in an anti-Olympics protest group, the Olympics Resistance Network ("ORN"), which held as one of its tenets the belief that the Olympics were being held on stolen aboriginal land. She reviewed the file prepared by the labour relations advisor in the region, which contained copies of the notes from a meeting and emails exchanged between the grievor and the former director, Kevin Guérin, about the grievor's activities. After reading the emails (Exhibit E-2), Ms. Hare believed that, on February 26, 2009, the grievor had agreed in writing, that he would no longer be the ORN's spokesperson or its face media communications and that, if he participated in this organisation as a private citizen, it would be only from behind the scenes, on his own time and without using any government resources.

[8] On July 8, 2009, the employer's security office forwarded to Ms. Hare copies of two newspaper articles identifying the grievor as a member of the ORN. His photograph appeared in both articles and he was identified and quoted as a member of the ORN (Exhibits E-3 and E-4). Ms. Hare testified that, when she saw these articles, she was concerned that the grievor had disregarded the commitments that he had made to Mr. Guérin. She was also troubled that an employee was associated with anti-Olympics activities, since the federal government as a whole, and the employer in particular, were actively involved in and supportive of the Olympic games.

[9] Given her concerns about the grievor's continuing role in the ORN, Ms. Hare arranged to meet with him for half a day in Vancouver on September 14, 2009. She stated that she was a new director and that she was aware that his work was exemplary, so she wanted to introduce herself to him. She also wanted to discuss his breach of the agreement with his former director. Finally, she wanted to review the *Values and Ethics Code for the Public Service* ("the *Code*") (Exhibit E-6) and to encourage him to fill out the conflict of interest evaluation form, that employees involved in outside activities that could potentially conflict with their jobs are required to submit. The grievor had not yet completed one. Ms. Hare testified that the meeting was not disciplinary but, among other things, was intended to reinforce the employer's earlier direction to him.

[10] Ms. Hare stated that she wanted an acknowledgement from the grievor that he had made prior written commitments not to appear in the press, which he had broken. The grievor acknowledged that he had made that commitment and that he had contravened it. Ms. Hare testified that he tried to justify his actions by explaining that he felt compelled to correct public assumptions about him and the ORN. He told her that he felt he should clear up any assumption that the ORN was disruptive, unlawful or a threat, as he did not want to be perceived as having done anything illegal. Ms. Hare stated that she told him that he was in a potential conflict of interest and that it was critical for him to file a conflict of interest evaluation form. She reviewed the *Code* with him. She stated that she read out loud to him the specific sections of the *Code* that would apply to his circumstances and left the marked copy with him.

[11] Ms. Hare prepared notes after the meeting that summarized the main points of discussion (Exhibit E-5). She sent them to the grievor for his review and agreement. He made some comments and amendments and signed the final copy. She said that she felt that he fully understood the employer's concerns and direction as well as the gravity of the situation. Reflecting back on the meeting, she testified that the grievor seemed genuinely apologetic and concerned about his job. She also felt that her directions to him could not have been clearer.

[12] Although Ms. Hare did not see the conflict of evaluation form the grievor submitted to the Values, Integrity and Disclosure Directorate, she did see the response from the director, Aïda Warah. She also saw an email exchange between the grievor and a senior ethics advisor, Jason Evans, about Ms. Warah's opinion that the grievor

was in a conflict of interest arising from his activities in three external organizations (Exhibit E-7). Ms. Hare said that she understood from reading the director's response that the grievor was to cease and desist from any public criticism of the Olympics in any media, whether electronic, print, radio or television, including Internet and social networks. He was told that he was not to agree to be interviewed, nor participate in press conferences or demonstrations in which he might be identified or asked to comment. Ms. Hare also received a briefing from Mr. Evans on February 9, 2010. Therefore, she knew that the grievor had questioned some aspects of Ms. Warah's decision and that he had been told that the decision applied (Exhibits E-7 and E-8).

[13] On February 12, 2010, Ms. Hare saw a video clip of the grievor at an anti-Olympic rally (Exhibit E-9). She testified that she was in a state of disbelief because his presence on the video was obvious and was in direct contravention of the direction. She said that he blatantly participated in the very act that he was told not to participate in, and from her perspective, it was disrespectful. Furthermore, he overstepped his rights as an employee and put himself in a conflict of interest. In her view, it was impossible for him to address an audience with a microphone without knowing exactly what he was doing.

[14] Ms. Hare acknowledged that the grievor was not identified as a federal public employee in the video, but she believed that that fact could have been discovered. She believed that his actions had the potential to embarrass the Minister and the government. Further, in her view, he accepted a paycheque from the government, and one of his core duties was to meet with aboriginal groups on land issues. Yet, he was a visible member and spokesperson for a group that questioned the Crown's title to land in the context of aboriginal land issues. She believed that, in essence, it was a criticism of the government as well as a direct conflict of interest.

[15] Steven Wright was the acting regional director in the employer's Environmental Protection Operation Directorate during the events in question and was situated in Vancouver. Although the grievor had a direct reporting relationship with Ms. Hare, he also had a functional reporting relationship with Mr. Wright through another manager, Barry Jeffrey. In particular, the grievor supported staff in the directorate who performed environmental reviews by providing advice for those consulting with aboriginal groups. His role was significant because there are a large number of

unresolved land claims in British Columbia, and the employer had an obligation to consult with aboriginal groups on environmental assessment issues.

[16] Mr. Wright was aware of Ms. Warah's instructions to the grievor (Exhibit E-7). Because of them, he and Mr. Jeffrey had a discussion with the grievor on February 9, 2010. Mr. Wright wished to ensure that the grievor understood what he had to do to comply with Ms. Warah's direction. He testified that his primary purpose in meeting with the grievor was to underline the restrictions placed on him and to point out how easily he could violate them just by being present and identified at a demonstration. Mr. Wright conceded that he did not tell the grievor not to attend the demonstration but instead told him what he risked if he did attend and were publicly identified.

[17] Mr. Wright testified that he believed that the grievor fully understood the directions given to him because a significant part of the conversation concerned the grievor's struggle between his obligations to his colleagues in the ORN and to his work. Mr. Wright stated that the grievor did not discuss his future role with the ORN but was clearly reconsidering his participation.

[18] Mr. Wright confirmed that, sometime in January 2010, he approved a request from the grievor for paid leave for February 12, 2010. Mr. Wright did not know the purpose of the leave as that was not required information. All he needed to know to approve the request was whether the grievor had leave time available and whether there were any operational requirements on that day. The leave request was approved before Ms. Warah issued her judgement with respect to the grievor's activities.

[19] Mr. Yuma Morisho was the acting director general of the employer's Intergovernmental Affairs and Stakeholder Relations, during the relevant period. The grievor's direct supervisor, Ms. Hare, reported to him. Like Ms. Hare, he was located in Ottawa.

[20] Mr. Yuma Morisho testified that the meeting between Ms. Hare and the grievor in September 2009 was held at his request. He wanted Ms. Hare to meet in person with the grievor to convey in very clear terms management's direction and expectation as to his behaviour. Mr. Yuma Morisho stated that he became concerned when it was brought to his attention that the grievor breached the agreement made with his former

supervisor. In particular, it was brought to his attention that the grievor was quoted in the press in the context of the ORN.

[21] Mr. Yuma Morisho stated that his concerns were based on his belief that the grievor's actions presented clear values and ethics issues. He noted that adherence to the *Code* is a condition of employment for federal public employees and imposes upon them the obligation to ensure the neutrality of the public service and to avoid the appearance of a conflict of interest. Given the federal government's role in the Olympics, it was clear to him that the grievor's statements to the press in June 2009 were not consistent with the obligation of federal public employees to be neutral.

[22] Mr. Yuma Morisho noted that the Olympic Games did not happen by accident in Vancouver. Canada competed for the opportunity, and the federal government was very much involved and supportive of the bid. Once Canada won the bid, the entire federal government, including the employer, was supportive. For the employer, in particular, weather forecasting for the games was critical, because it was relied upon in the choice of venues and event planning, among other things. The entire federal government was involved in providing resources to ensure the success of the games.

[23] Mr. Yuma Morisho knew about Ms. Warah's decision and knew that the grievor had acknowledged that decision. Ms. Warah's decision followed earlier directions to the grievor. Each time, the grievor acknowledged the employer's concerns and committed to abide by its direction. Mr. Yuma Morisho believed that the employer's direction was without ambiguity. In particular, Ms. Warah's directions provided context and rationale, as well as advice and boundaries for other activities by the grievor that he was permitted to continue as long as they were carried out in an appropriate manner.

[24] Given all the direction and advice, Mr. Yuma Morisho testified that he was shocked and disappointed when he was given a copy of the video of the grievor's address to the anti-Olympic protest on February 12, 2010. He stated that the grievor's decision to attend the protest and to address the crowd flew in the face of every decision and direction issued to him.

[25] On March 5, 2010, a telephone conversation was held between Mr. Yuma Morisho, Ms. Hare and the grievor. Its purpose was to clearly establish the facts of the incident. Mr. Yuma Morisho wanted to establish with certainty that it was

the grievor on the video. He also wanted to set out the context in which they found themselves in light of all the earlier discussions with the grievor. He said that the grievor did not apologize but that he tried to explain his reasons for his actions by stating that he was torn between his loyalty to his employer and his loyalty to his ORN associates. Mr. Yuma Morisho prepared a summary of the discussion, which he sent to the grievor and Ms. Hare (Exhibit E-11). In it, he provided further direction to the grievor. He explained that he wished to be very clear that the grievor was to refrain from making any public criticism or political comment related to his official duties. That included removing from his email signature block the reference to "Coast Salish Territory," which Mr. Yuma Morisho believed conveyed a political comment.

[26] On March 17, 2010, Mr. Yuma Morisho held another teleconference with the grievor, his union representative and two labour relations specialists. Its purpose was to establish the facts of the event of February 12, 2010, to ensure that there was no misunderstanding between management and the grievor. During the teleconference, the grievor stated that he had told Mr. Wright that he would participate in the February 12 event and that he was on approved leave. Mr. Yuma Morisho again sent notes of the meeting to the grievor and his union representative (Exhibit E-12).

[27] On March 24, 2010, Mr. Yuma Morisho sent the grievor an email, requiring him to attend a disciplinary meeting on March 26, 2010, which was to be held by teleconference. A list of the allegations that the employer intended to discuss was attached (Exhibit E-13). The grievor was told that he was entitled to be accompanied by his union representative.

[28] On April 16, 2010, Mr. Yuma Morisho took disciplinary action against the grievor, issuing a five-day suspension. He testified that he disciplined the grievor because he simply ran out of other options. The grievor had been given clear warnings. The consequences of his actions had been explained to him. Ms. Warah had provided clear direction with context and explanation. The employer had tried everything. Despite all that, the grievor repeatedly breached the agreements he made with the employer to cease his public activities with the ORN. His decision to attend the protest on February 2010 flew in the face of every decision and direction issued to him.

[29] Mr. Yuma Morisho testified that he did not pretend to know what the appropriate disciplinary penalty should be. Therefore he received advice on the amount of time he should impose, with rationales and precedents, from the employer's

labour relations experts. He accepted that advice and imposed the five-day suspension (Exhibit E-14).

III. Summary of the arguments

A. For the employer

[30] The employer argued that this is a case of insubordination. As such, the employer was required to establish that a direction was given, that it was lawful, that the grievor understood it and that he contravened it. In this case, all the elements of insubordination were established by the evidence.

[31] The employer's concern about the grievor's activities arose from his role as a representative of the Crown dealing with aboriginal communities on sensitive land claims issues. His participation in an anti-Olympic protest touched directly on this issue because the protest concerned a claim that the Olympics were being held on stolen aboriginal land. Furthermore, the federal government both supported and helped fund the Olympics, and the employer was directly involved in key Olympic activities. The employer was concerned that one of its employees had such a public anti-Olympic profile. That formed the basis of its directions to the grievor not to be a public face in the anti-Olympic protest or to have his name or photo in the news in connection with it.

[32] The employer gave clear directions to the grievor. Ms. Hare met with him in September 2009 and reviewed with him the employer's concerns. She told him that his involvement with public protests on land claims issues could put him in a conflict of interest. She told him that he could no longer have his name and photograph in the news protesting the Olympics. She testified that he was aware that having his photograph in the news in June 2009 was a violation of an agreement he had made with the employer in February 2009.

[33] Following his meeting with Ms. Hare in September 2009, the grievor completed a report of his activities for Ms. Warah, the employer director for values and ethics. As a result of that report, she gave him clear direction, which he agreed to follow. He did not grieve that ruling.

[34] On February 9, 2010, Mr. Wright also provided clear instruction to the grievor. He testified that he met with the grievor to ensure that he understood that, even if he

were photographed at a protest, he would be in violation of the directive. He stated that it was clear that the grievor understood the direction and was torn between his obligations to his anti-Olympic colleagues and to his employer.

[35] Mr. Wright also testified that the grievor's leave request was approved before the ruling given by Ms. Warah and without knowledge of his plans to attend the protest during his leave.

[36] Mr. Yuma Morisho testified that, once he learned that the grievor had appeared on stage at an anti-Olympic rally in contravention of the employer's directives, he felt that he had no choice but to act. He stated that the employer had tried everything to get the grievor to comply with its directions, including face-to-face meetings and written directions. The grievor said that he would comply and then did not. Clearly, the employer had to do something because the grievor had violated a lawful direction.

[37] The employer argued that the "obey now, grieve later" rule applied. It argued that, had the grievor not agreed with the conflict of interest ruling, he could have grieved it, even though such a grievance would not necessarily have been adjudicable. The employer cited *Assh v. Treasury Board (Department of Veterans Affairs)*, 2005 PSLRB 152, which followed the decision of the Federal Court (2005 FC 734) that set aside the adjudicator's earlier award.

[38] Citing Brown and Beatty, *Canadian Labour Arbitration* (4th Ed.), at 7:3610, the employer noted that an employee's refusal to follow instructions can lead to a finding of insubordination even when the instructions relate to activities outside work. In *Association of Management, Administrative and Professional Crown Employees of Ontario v. Ontario (Ministry of Health and Long-Term Care)* (2006), 153 L.A.C. (4th) 385, an employee's refusal to end involvement in a charity that was potentially critical of the government's policies was found to be insubordination. In that case, a perceived conflict of interest, as opposed to an actual conflict, was sufficient for the arbitrator to find that the employer's direction to the employee was reasonable and that, therefore, the refusal to follow the direction was insubordination.

[39] The employer argued that the right of a public service employee to speak out is not unfettered. Since *Fraser v. Canada (Public Service Staff Relations Board),* [1985] 2 S.C.R. 455, it has been recognized that there is an important public interest in maintaining an impartial public service. Therefore, the right of public service

employees to engage in behaviour that might call into question the neutrality or impartiality of the public service is subject to restriction. Because the goal of impartiality and neutrality is legitimate, it will over-ride a private interest. The employer also cited *Chopra et al. v. Treasury Board (Department of Health)*, 2011 PSLRB 99; *Read v. Canada (Attorney General),* 2006 FCA 283; *Haydon v. Canada (Treasury Board),* [2001] 2 F.C. 82; *Gendron v. Treasury Board (Department of Canadian Heritage),* 2006 PSLRB 27; *Labadie v. Deputy Head (Correctional Service of Canada),* 2008 PSLRB 85; *Laboucane v. Treasury Board (Indian and Northern Affairs Canada)* PSSRB File Nos. 166-02-16086 to 16088 (19870219); *Scott v. Canada Customs and Revenue Agency,* 2001 PSSRB 82; and *Goyette and Guidon v. Treasury Board (Unemployment Insurance Commission, Department of Manpower and Immigration),* PSSRB File Nos. 166-02-2914 and 2915 (19770428).

[40] The employer cited *Duske v. Canadian Food Inspection Agency,* 2007 PSLRB 94, in support of its contention that it had a legitimate interest in ensuring that employees do not engage in behaviour that would give rise to the perception that they are in a conflict of interest and that failing to follow such a direction is insubordination. In that case, the adjudicator found that there was no evidence of the grievor's duties being affected or of an actual conflict of interest. The simple perception of conflict was sufficient to give the employer's direction legitimacy.

[41] The employer noted that, in *Duske,* the grievor's conduct was premeditated and repetitive and that he showed no remorse. That was taken into account in the assessment of the 10-day suspension that was reviewed and upheld in that case. In this case, there is also evidence of repetitive behaviour that was taken into account in the imposition of the penalty. Nor did the grievor in this case show any remorse.

[42] The employer argued that the penalty imposed in this case was at the lower end of the spectrum for such cases. Therefore, it should be maintained. Despite the repeated direction to stop being the public face of the anti-Olympic protest, the grievor engaged in behaviour that he knew or ought to have known would result in media coverage. It is disingenuous for him to suggest that he did not know that he would receive publicity when he stepped up to the microphone on February 12. Given those facts, the employer contended that the discipline was warranted, that a five-day suspension was completely reasonable and that the grievance should be denied.

B. <u>For the grievor</u>

[43] The grievor stated that the facts of this grievance are straightforward. He contended that the employer did not prove that an act of misconduct was committed that warranted a disciplinary response. The employer had to demonstrate improper or illegal conduct on his part that was pre-meditated and intentional. However, although the employer told the grievor that he should not be identified in the media, it did not produce any evidence to show that he intentionally or deliberately asked to be identified publicly in the video. In fact, the evidence showed that the grievor emailed his supervisor on February 26, 2009, agreeing not to act as a spokesperson for the ORN.

[44] To support the discipline, the employer argued that the grievor was insubordinate. However, the letter of discipline does not use the term "insubordination." In fact, the only reason given for the discipline was the grievor's alleged act of misconduct by being identified at an anti-Olympic protest. He argued that the employer introduced a new ground at the hearing to support the discipline. Citing Brown and Beatty, at para 7:2200, the grievor stated that altering the grounds for discipline is not proper and that the employer must be held to the grounds set out in the letter of April 16, 2010.

[45] The grievor noted that all three witnesses explained in some detail how they met with him to reinforce the employer's position on his personal activities. In particular, he noted that the employer sought and received his commitment to stop being a spokesperson for the ORN. Even though he resigned as spokesperson, once the employer realized that he was still involved with the ORN, efforts were renewed to have him end his involvement. He was advised that he was not to have his photo or be identified in newspaper articles protesting the Olympics. It was clear that the employer was not comfortable with the grievor's personal views and opinions.

[46] The grievor stated that Ms. Warah's decision was broad and restrictive without providing a rationale as to how his activities violated *Code* or how they would undermine his ability to perform his duties in an objective manner. However, the employer relied on that decision in support of its position.

[47] The grievor noted that he was not told that he could not attend the protest. In fact, his leave was approved. In the meeting with Messrs. Wright and Jeffrey on

February 9, 2010, he was told that he was not to be identified in the press but not told not to attend.

[48] All the direction given to the grievor came from non-disciplinary meetings. The grievor was never told that he could have union representation at those meetings. Therefore, the employer could not rely on those meetings to support any later disciplinary action. Furthermore, although the employer was aware of his conduct at all those meetings, it did not discipline him, even when Ms. Warah suggested that action should be taken. Consequently, the employer must be deemed to have tolerated and condoned the grievor's behaviour. To consider all the earlier alleged incidents when determining the disciplinary penalty for a single event is contrary to the purpose of discipline.

[49] The grievor argued that the heart of the issue is how his fundamental rights should be balanced against his duty of loyalty to his employer. He noted that at no time did he publicly criticize his employer or its programs. He was disciplined for a 29-second video clip in which he was shown holding a microphone in front of a crowd. He stated that such conduct does not constitute a disciplinary offence because he never publicly criticized his employer nor was he identified as an employee of the employer.

[50] The grievor contended that the employer has no jurisdiction or authority over what an employee does outside working hours or any right to dictate the organizations or groups to which an employee may belong unless it can demonstrate that its legitimate business interests are affected in some way. To justify discipline for misconduct committed outside working hours, the employer must prove that the behaviour in question detrimentally affected its reputation, rendered the employee incapable of properly discharging his or her employment obligations or inhibits the employer's ability to efficiently manage and direct production. In this case no evidence was adduced that would meet that criteria. The grievor cited *Threader v. Canada (Treasury Board),* [1987] 1 F.C. 41 (C.A.) and *Gendron* in support of that contention. He stated that it was not possible to conclude that the Olympic Games and his job were connected.

[51] The grievor argued that the real and only issue was that he publicly voiced his views on a subject matter with which the employer was not comfortable. He stated that his fundamental right to free speech should be protected. He asked that the grievance

be allowed and that he be reimbursed for all wages and benefits lost as a result of the disciplinary action.

C. Employer's rebuttal

[52] The employer stated that the grounds for discipline were not altered. The misconduct identified in the letter of discipline must be read in the context of all the directions given to the grievor, as set out in the letter. The employer cited the letter of discipline set out at paragraph 56 of the *Duske* decision as an example of a similar approach in a case of insubordination under analogous circumstances.

[53] The employer further noted the grievor's undertaking, as set out in Exhibit E-2, which must be read in its entirety. The grievor promised to stop being a public face for the ORN.

[54] The employer stated that, in determining whether the grievor's conduct was deliberate, it must be concluded that he knew exactly what he was doing. He demonstrated as much by his actions and by his acknowledgement that his loyalties were divided.

[55] Article 35 of the collective agreement refers to a disciplinary meeting. It does not capture all meetings that managers might have with staff to provide direction. Accordingly, the employer was not required to provide the grievor with the right to union representation every time it met with him to give him direction.

IV. Reasons

[56] The facts in this grievance are not in dispute. The grievor elected not to testify and not to call any other evidence. Therefore, the facts are those established through the testimony of the employer's witnesses.

[57] The evidence established that the grievor is a policy analyst and that his duties include, among other things, the requirement to provide advice and information on aboriginal land claims and self-government agreements taking place within the British Columbia treaty process, as well as to provide advice on the development of guidelines for negotiators to use in federal negotiations on aboriginal self-government and land claims. Off-duty, he was actively involved as a spokesperson for the ORN, which publicly proclaimed that the Olympics were being held on stolen aboriginal land. When

the employer became aware of that off-duty activity, it was concerned about the appearance of a conflict of interest and directed him to cease his public involvement with the ORN.

[58] On February 12, 2010, the grievor participated in an anti-Olympics rally and addressed the crowd. His participation became part of a video posted on the Internet. He was identified by name. As a result of his participation in the rally, the grievor received a five-day suspension. While the letter of discipline characterized the offence simply as misconduct, at the hearing, the employer argued that it was a straightforward case of insubordination, on the basis that the grievor breached a lawful direction.

[59] The grievor argued that, by characterizing the offence as insubordination at the hearing, the employer altered the grounds for discipline. He believed the misconduct in the letter of discipline related solely to his participation in the protest and not to his failure to follow the order not to participate, which would be insubordination. He argued that the employer should be held to the grounds for discipline set out in the letter of discipline and should not be permitted to rely on insubordination to justify the discipline.

[60] Misconduct is a fairly general term that can encompass insubordination. I believe that the letter of discipline sets out all the elements of insubordination. It refers both to the act of publicly participating in the rally and to the earlier instructions not to be the ORN's public face. While I do not believe that the employer altered the grounds for discipline at the hearing, the distinction being argued by the grievor would in any case matter only if I found that his participation in the protest was not misconduct.

[61] The grievor also argued that, to justify discipline for misconduct, the employer was required to prove that he was guilty of improper or illegal conduct that was premeditated and intentional. He stated that there was no evidence that his conduct was premeditated or intentional as the employer did not prove that he asked to be quoted in the media.

[62] I believe that, whether it is characterized as insubordination or misconduct, the grievor's participation in the protest on February 12, 2010, was improper. I do not accept his contention that there was no evidence that his behaviour was intentional. He

might not have asked to be identified in the video, but his experience as an ORN spokesperson is sufficient to find that he knew or ought to have known that, by taking the stage and addressing the crowd, he was risking the very exposure he had been told to avoid. Therefore, I find that his conduct was deliberate.

[63] As noted, the grievor did not dispute the essential facts of this case, even though he questioned their characterization. The real issue between the parties is the legitimacy of the direction to cease being a public spokesperson for the ORN. The grievor contended that the employer could not discipline him for off-duty behaviour unless there was some evidence that his conduct detrimentally affected its operations or impeded his ability to perform his employment obligations. He further argued that the direction to cease his public involvement in the ORN violated his fundamental right to free speech. He stated that at no time did he publicly criticize the employer; nor was he ever identified as a public service employee. Furthermore, he was not in a position of authority and played no role in policy-making.

[64] The employer argued that the grievor's right to free speech is not unfettered and must be balanced against his duty of loyalty and his obligation to ensure that his private actions do not affect public perception of his impartiality and neutrality in the performance of his duties. The employer contended that its direction to the grievor to cease being the public face of the ORN was reasonable and justifiable.

[65] As a general rule, the courts have held that a public service employee's right to freedom of expression is not absolute but must be balanced against the employee's concomitant duty of loyalty to the employer, the Government of Canada, arising from the legitimate public interest in an impartial and effective public service (see, for example, *Fraser, Haydon, Read*, *Chopra* and *Gendron*, among others). Although a public service employee's freedom of expression is not absolute, it is clear that any restriction on it must be rationally linked to the employee's job and must not exceed what is required to achieve the objective of an impartial and effective public service. As the Supreme Court of Canada noted in *Fraser*, at paragraph 34, "[a]n absolute rule prohibiting all public participation and discussion by all public servants would prohibit activities which no sensible person in a democratic society would want to prohibit."

[66] It is fact that the grievor did not expressly criticize the employer and that he was not identified as a public service employee. If the issue in this case were simply

the opposition of a public service employee to the Olympic Games, the result might be somewhat different. I do not believe that criticism of the Olympic Games constitutes criticism of the employer or its policies, despite the federal government's support of the Olympics. To suggest that an employee of Environment Canada cannot criticize the Olympics because Environment Canada provides weather forecasting for the Olympics or because the federal government provides financial support to the Olympics is, in my view, overly restrictive of the freedom of expression. To support such a restriction of a constitutionally-protected right, there must be some link to the grievor's job and some reasonable basis on which to infer that his impartiality as a public service employee was impaired. Without that, I believe it falls within the category of examples of permissible public discussion by public service employees, like a municipal bus driver speaking out at a town council meeting against a zoning bylaw, which example the Supreme Court of Canada provided in *Fraser*.

[67] But this case concerns more than the grievor's opposition to the Olympics. The reason for that opposition is the real issue. The evidence given at the hearing by Ms. Hare and Mr. Yuma Morisho was that the employer's main concern arose from the fact that the ORN publicly questioned the Crown's title to the land on which the Olympics were being held, on the grounds that it was stolen aboriginal land. Given the grievor's role as an advisor to the Crown on land title issues in treaty negotiations, the employer believed that his public participation in the ORN gave rise to a perception of a conflict of interest. Ms. Warah confirmed that belief. She issued a decision based on the *Values Code* (Exhibit E-8) in which she ruled that the grievor's participation in the ORN and other organizations gave rise to a conflict of interest. She gave the grievor explicit directions that he should have heeded.

[68] As held by the Federal Court of Appeal in *Threader,* the employer is entitled to protect the impartiality and neutrality of the public service by ordering that its employees avoid real and apparent conflicts of interest. The Court asked the following question, at p. 56:

> *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?*

[69] I believe that it is reasonable to infer that an employee, hired to provide advice to the government on aboriginal land claims and treaty negotiations, among other things, who publicly participates in a group that holds as a principle tenet the belief that the Olympics are being held on stolen aboriginal lands and whose email signature in official government correspondence contains a reference to "Coast Salish Territory," is in a conflict of interest. Treaty negotiations and land claims issues are sensitive, and the grievor's public expression of such a partisan opinion was inconsistent with his role as a public service employee.

[70] In expressing such a partisan position publicly, I believe that the grievor's situation is analogous to that of the grievor in *Gendron*. In that case, the grievor, a program administrator in the Official Languages Branch of the Employer of Heritage, which was responsible for promoting Canadian unity, among other things, became the president of an organization whose object was to promote Quebec sovereignty. The adjudicator found in that case that the grievor's personal interests brought her into a conflict of interest. The adjudicator stated the following, at paragraph 176:

> *[176] No public servant is obliged to adopt the employer's convictions. For public servants, whether to accept a position that fosters "corporate" values and interests that may contradict their own values and interests is a personal choice. That said, under the duty of loyalty, public servants may not allow their own actions to impair the performance of their duties or the credibility of their employer's actions, directly or indirectly, or to create such a perception. In fact, according to the constitutional convention recognized by the Supreme Court of Canada in* Fraser *and* Osborne, *public servants have a duty to preserve the reality and the perception of an impartial, effective public service. That is why legitimate limits on certain activities may be imposed on public servants, as on any other employee.*

[71] I believe that the employer was perfectly within its rights to instruct the grievor to cease his public role with the ORN. This was clearly a situation in which the public interest had to come before the grievor's personal interests. When he took the stage on February 12, 2010, he knew that he was breaching the direction given to him and that there was a reasonable risk that his image as a leader in the ORN would again be in the news. He did it anyway. Therefore, I find that the employer established that the grievor committed the misconduct for which he was disciplined.

[72] The grievor received a five-day suspension for his action. I do not believe that, by failing to take disciplinary action for his earlier activities with the ORN, the employer condoned his behaviour. The employer met with the grievor on three separate occasions to explain its position and to provide direction. Each time, the grievor indicated that he understood and agreed with the employer's direction. I do not consider that the meetings were disciplinary, as no penalty was considered or imposed; nor do I believe the grievor had any reason to believe that his public participation in the ORN was condoned. It is clear that the meetings were intended to provide information and to caution the grievor about his future behaviour. For those reasons, and taking into account the nature of the offence and the fact that the grievor knew that he was placing himself in a conflict of interest, I do not find a five-day suspension excessive.

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

(The Order appears on the next page)

V. Order

[74] The grievance is denied.

March 12, 2013.

Kate Rogers,
adjudicator