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Citation: 2016 PSLREB 11

Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

TODD MERCER

Grievor

and

DEPUTY HEAD
(Department of Human Resources and Skills Development)
Respondent

Indexed as
Mercer v. Deputy Head (Department of Human Resources and Skills Development)

In the matter of an individual grievance referred to adjudication

Before: Margaret T.A. Shannon, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: Rebecca Thompson, Public Service Alliance of Canada

For the Respondent: Maureen Crocker, counsel

Heard at Corner Brook, Newfoundland,
October 27 to 30, 2015.

I. Individual grievance referred to adjudication

[1] The grievor, Todd Mercer, grieved a two-day suspension without pay imposed upon him for April 27 and 28, 2011. He alleged that that discipline was a violation of articles 17 and 18 of the agreement between the Treasury Board and the Public Service Alliance of Canada for the Program and Administrative Services Group (all employees) that expired on June 20, 2011 ("the collective agreement").

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before November 1, 2014, is to be taken up and continue under and in conformity with the *Public Service Labour Relations Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

II. Summary of the evidence

[3] The grievor was employed as a client services agent (CSA) at the Service Canada centre in Corner Brook, Newfoundland ("the Corner Brook office"). As a CSA, he was to provide certain services to clients who contacted the Corner Brook office about employment insurance and other programs offered by the Department of Employment and Social Development ("the respondent or the employer"). In fulfilling his CSA duties, the grievor allowed people with whom he had a personal relationship to bypass the employer's fundamental service charter or protocol of "call, click, visit" (CCV). He personally accessed his family members' employment insurance information and provided a service to them that was not available to other Canadian citizens, who were required to follow the CCV protocol. In so doing, he created at the very least a perception of preferential treatment, which the employer considered a conflict of interest and a violation of the *Values and Ethics Code for the Public Service* ("the *Code*"; Exhibit 3) and of the employer's guidelines for conduct ("the guidelines"; Exhibit 7).

[4] Debbie Evans supervised the Corner Brook office. She described the nature of CSA work. CSAs are the points of contact for Canadians seeking information about or assistance accessing the programs administered by the employer. The grievor was employed in the front end of the process and dealt with all walk-in traffic at the Corner Brook office. Clients have three ways of obtaining assistance with their files, either online through the Service Canada website, by calling the Service Canada toll-free number and dealing with a CSA, or by visiting a local office, from which the CCV protocol was developed. When dealing face-to-face with a client, a CSA has a limited role. In contentious employment insurance claims, CSAs such as the grievor have no role. Files are assigned by social insurance number. If an employee is assigned a file belonging to a family member, he or she is expected to identify the relationship and ask to have the file reassigned. CSAs are not to work on files if the client is a family member.

[5] She also testified that it came to the employer's attention that the grievor was providing his family members with preferential treatment when he reported a conversation his mother had had with his ex-wife. The grievor and his ex-wife were both employed at the Corner Brook office. His ex-wife reported to his mother that she was aware that he had accessed his mother's files and had divulged certain confidential information in them to her. Allegedly, the grievor's ex-wife, who was a claims investigator, indicated that she could make his life at work very difficult if she shared this information with the employer. He brought his ex-wife's comments to Ms. Evans' attention, who consulted the employer's labour relations representative on how best to proceed with the matter, following which she met with the grievor to obtain his side of the story.

[6] An administrative investigation was then convened to look into the two allegations, which were that the grievor had improperly accessed personal information and that he had divulged that information to someone outside the employer. The allegations concerning the grievor's ex-wife were dealt with separately. In the course of the investigation, the employer became aware that the grievor had accessed his niece's employment insurance claim. So, the investigation was expanded to determine whether he had accessed the employment insurance claims of other family members.

[7] It would not have been unusual for a friend's or relative's employment insurance claim to have been processed in the same office where the grievor worked, if

they lived in the same community. However, there is a distinction between conducting an inquiry on a claim, which produces a status update, and accessing a claim, which includes using transaction screens that allow for input and changes to be made to what exists on those screens. To obtain a payment status update or for anything to do with processing a claim, a file has to be accessed. Regardless of which method is used, if the grievor's relative was involved, accessing those screens was to be done by someone other than him.

[8] Karen Young became involved once the investigation had been completed and the investigation report (Exhibit 1) had been submitted to Michael Alexander, the employer's regional executive head for Newfoundland. In consultations with Mr. Alexander, Bonnie Pope, area director, Citizen Services, and Woody Francis, section manager, Citizen Services, it was concluded that the grievor's actions had violated the *Code*. She consulted with labour relations on the appropriate discipline and met with the grievor to give him a copy of the report and ask for his comments. The investigation concluded that the grievor had accessed the employment insurance claims of his niece, mother, father-in-law, and brother, as well as his own. It was determined that since the grievor had accessed his own employment insurance claim for training purposes that no discipline was warranted. However, his accessing other family members' files did warrant discipline. His accesses included both inquiry and transaction screens. Based on labour relations' recommendations, a two-day suspension without pay was imposed on the grievor.

[9] The employer was concerned that the grievor provided preferential treatment to members of his family and was therefore in a conflict of interest. Citizens would not normally have access to the screens he accessed. In the disciplinary letter provided to him (Exhibit 5), the employer wanted to make him understand that he needed to take ownership of his actions. His good service record was taken into account as was his cooperation throughout the investigation when the disciplinary penalty was being determined. He claimed that he was not aware that what he had done was inappropriate and stated that now that he knew, he would not access family records in that fashion again. However, the nature of the conduct and its repetition were aggravating factors.

[10] By signing his letter of offer, the grievor acknowledged that the *Code* was part of his conditions of employment (Exhibit 8). By providing information and service to

his family members that was not readily available to other Canadians, the grievor violated the requirement in the *Code* to avoid preferential treatment (Exhibit 3, page 28), and by failing to discuss a potential conflict of interest with his direct manager or supervisor, he violated the *Code*'s conflict-of-interest measures (Exhibit 3, pages 19 to 21). Whether the records were accessed at the request of or were specifically authorized by the family member does not change the nature of the accesses. Nor did the fact that the grievor submitted letters of authorization to the employer after the fact (Exhibit 2, tab 3). His family members could not authorize him to access internal systems on their behalf, particularly retroactively.

[11] During the investigation into the grievor's accesses of personal records, he claimed he was unaware of the *Code*. He also argued that everyone else in the Corner Brook office did the same thing. The employer was not aware of any other employees who thought it was acceptable to access their family members' personal records. While the grievor appeared to be apologetic at the disciplinary meeting, he continued to assert that he did nothing wrong. He provided no explanation as to why he felt accessing the files via the inquiry screen was acceptable.

[12] Ms. Young stated that it was possible that the grievor had not completed specific values-and-ethics training; however, he had completed two courses, including the "Putting Citizens First" course, offered by the employer in 2009 (see the training records in Exhibit 6). Included in the two courses was values-and-ethics-related training.

[13] Doug Johnson has been the executive director, processing and payments, Service Canada, Atlantic Region, since 2010. He was part of the discussion of the investigation report and provided advice to the assistant deputy minister on how the matter should be handled. He was involved in preparing the terms of reference and mandate for the investigation and extending the mandate to include alleged accesses to a number of the grievor's family members' files. This was the first such investigation in the Corner Brook office, although other such investigations had been carried out elsewhere in Newfoundland.

[14] Mr. Johnson was concerned with the grievor's repeated accesses of his family members' files, even if his actions did not prejudice or impact the family members' claims. He was also concerned about the information the grievor had provided to those

family members and about the grievor providing them with a level of service and access not available to other clients. The grievor was demonstrating favouritism based on family relationship and on his status as an employee. The number of accesses demonstrated that he had made them repeatedly and deliberately, which had an impact on the quantum of discipline imposed. He had no reason to access files to which he had not been assigned.

[15] In 2008, all employees were emailed the guidelines. Like the *Code*, they address conflicts of interest. The managers discussed them with the employees. They also deal with protecting employer assets, including information, and clearly state that employer information is not to be shared or used inappropriately (see Exhibit 7, page 15).

[16] Kim Pike testified on behalf of the grievor. She has been a CSA in the Corner Brook office for the last two years of her career, which started in 1991. She is aware of the *Code* and stated that it had been delivered to employees via a desk drop. She had received no formal training on it. She acknowledged that compliance with the *Code* was a term and condition of employment as a CSA. She was not aware of her obligations under the *Code* other than avoiding conflicts of interest. Ms. Pike was familiar with the CCV approach to client service. She admitted that providing service to a client that would allow him or her to avoid the CCV protocol would provide that client with preferential treatment and would constitute a conflict of interest. She would not serve a member of her immediate family even in person, to avoid the perception of impropriety, but she had never been told through training that that would be unacceptable.

[17] Gerard Lee started as a CSA in 1988 and retired in 2010. He was a team lead for employment insurance claim processing between 1998 and 2000. He worked with the grievor. Mr. Lee testified that he was not familiar with the *Code* and that he had not been provided with any training on it, although he was aware of his duty to comply with it and to avoid appearing to treat clients preferentially. He testified that it would not have been uncommon to find his handwriting on his family members' files as he had often assisted them with their applications. He filled in their paperwork but did not sign their applications; nor did he certify any documents. He was never told that doing so was not allowed. Once the applications were filed, he never asked to have them processed in advance of others in the queue and did not access his family members' files. Mr. Lee was unaware of the nature of the allegations against the grievor

and was unaware that they had nothing to do with preparing applications for benefits on behalf of elderly family members.

[18] The grievor testified that he started as a CSA in 2003 and that since then he has worked in the client service area as well as in acting assignments as a team lead and as a PM-02. When he signed his letter of offer, nothing concerning the *Code* was reviewed with him. If he had read the *Code*, he would have recognized that employees are to avoid the perception of a conflict of interest and that he should raise any question about a conflict of interest with his manager. The employer never indicated to him that a failure to comply with the *Code* would result in discipline.

[19] Over his career, the grievor has attended several training sessions and professional development opportunities. His only training in values and ethics was that mandated in his letter of discipline. He never saw the *Code* until he was shown it during the investigation. He was not told anything about it at the time of his hiring. He did not remember any values-and-ethics or conflict-of-interest training at those sessions, although he did recall several role-playing components.

[20] In March 2010, the grievor reported in writing a conversation that his ex-wife had had with his mother. In it, he reported his ex-wife's unethical conduct and his fear that she would use her position to investigate his family members (Exhibit 2, tab 4). Ms. Evans appeared to understand and told the grievor that she would look into the matter. On March 19, 2010, the grievor again met with Ms. Evans, following which he heard nothing further about the matter until September 2010.

[21] In September 2010, he received a notice from Ms. Young that he was to be interviewed on September 22, 2010, as part of the investigation into his unauthorized accesses of client files. At this point, he became aware of the nature of the investigation into those accesses. He thought the questions were over once he explained the nature of his accesses to his niece's file. He was then asked to explain the nature of the relationships with four other people whose files he had accessed. The investigator showed him the *Code* and asked him if he had seen it before; he had not.

[22] The next day, following the meeting with the investigator, the grievor advised Ms. Young and another member of the management team that he had met with the investigator. He left this meeting believing that he had their support, as they had told him that everything would be all right. He had been afraid of how it would look in the

community if people learned he had been investigated for wrongdoing. He was also still wondering about how the employer had dealt with the allegations against his ex-wife.

[23] The grievor testified that he did not previously know that the *Code* existed. Staff meetings in the Corner Brook office were few and far between, and the *Code* had not been discussed at any of them, to the best of his recollection. As to the guidelines, the first time he had seen them was the day before he testified at the hearing. He regularly deleted such emails without reading them. If they were important, his team lead would follow up with him. Most of the staff meetings the grievor attended were about actions or directions from the employer's headquarters, for example, the introduction of a new program, and not about employer policies.

[24] The grievor testified that he did nothing more for his family members than he was authorized to do if a client was in the office in front of him. At the time of the investigation, a CSA was authorized to complete five transactions on behalf of a client who comes into a Service Canada office. Previously, seven had been allowed, but with the change to Service Canada and the CCV protocol, things changed. With CCV, a client can access information through an online Service Canada account. The grievor has assumed that since CCV was implemented, if a client comes into the office and meets with him, he or she has tried phoning and has been unsuccessful and does not have a computer. Elderly clients want to speak to a real person and not deal with matters electronically. He was saving his family members the time required to stay on hold waiting to have their phone call answered or to try navigating the employer's website. When he mentioned to his mother that he was being investigated for accessing family member files, she wrote a letter of support for him. Other family members wrote to the employer, authorizing his accesses (Exhibit 2, tab 3).

[25] The grievor was not aware of any service standard that stated that a client should not feel free to directly contact a CSA with whom he or she has a personal relationship. He regularly took calls from his mother and family members, both at work and at home. He provided his private work number to his family members so that they could contact him directly, as his workstation phone number was not published.

[26] The question of his mother's employment insurance claim might have arisen in any such call. If he was at work, the grievor testified that he would look up her file and

answer her question. When he accessed his niece's file, she had contacted him on his direct line. She was living in Nova Scotia at the time and needed his help resolving issues in her claim related to her reason for leaving her employment. She would also call him for status reports on the claim's progress.

[27] Mr. Johnson provided rebuttal evidence related to the guidelines of conduct. It is clearly stated in them that an employee may assist a family member to fill out forms. An employee working to assist a relative outside work hours is acting as a regular citizen. If the employee uses information available only to him or her through work to complete a form, then that person exceeds the role of a regular citizen. Accessing employment insurance information through the inquiry screen and relaying information to a family member to avoid a delay processing a claim exceeds the employee's role as a regular citizen. The employee is not entitled to use the employer's system to provide information to a family member that is not available to the general public, meaning an average person or the average applicant.

III. Summary of the arguments

A. For the employer

[28] The employer recognized its onus to establish that the acts alleged occurred; that they constituted misconduct; that when determining disciplinary action, mitigating and aggravating factors were considered; and that the penalty imposed was appropriate. There is no dispute that the grievor accessed confidential employment insurance information of the family members listed in the investigation report (Exhibit 1). The employer established on the balance of probabilities that the acts occurred and that they amounted to misconduct, specifically the term and condition of the grievor's employment that he avoid conflicts of interest. He had an obligation to avoid the perception of a conflict of interest and perceptions of preferential treatment. Case law from the new Board and its predecessors supports the employer's stand that a failure to comply with this obligation is misconduct worthy of disciplinary action.

[29] The evidence also clearly established that when determining the penalty to be imposed on the grievor, the employer considered mitigating and aggravating factors. The onus was on him to establish mitigating factors he wished to have considered. The penalty imposed was reasonable and appropriate in the circumstances.

[30] Public servants are a special category of employees who are not like private-sector employees. They have fundamental terms and conditions of employment aimed at protecting the public interest. Each public-sector employee has an onus of compliance. The employer has well-established and published rules of conduct in the form of the *Code* and the guidelines, with which the grievor failed to comply. Both were clearly brought to his attention. The essential requirement for all public servants is that they should never place themselves in such a position that their personal interests conflict with the public's interests (see *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62).

[31] The fundamental service line of the employer, through its Service Canada operations, is service to Canadians. The grievor, like others CSAs, is the front-line face of Service Canada for clients who go to its local offices. CSAs must appear impartial and avoid circumstances that could give rise to a conflict of interest or preferential treatment. The grievor ought to have known that providing a different level of service to family members would raise the perception of a conflict of interest. When dealing with close family members, he should have exercised caution rather than offering a phone service not available to other Canadians. His accesses to his family members' records provided an inappropriate level of service to close family members and were therefore inappropriate and a conflict of interest.

[32] Conflict of interest is a serious offence in the public service. Avoiding one goes to the root of the public service's integrity (see *Brazeau*, at paras. 181, 187, and 188). The grievor's misconduct goes to the root of the employer's business, which is equal service to all Canadians. If his neighbour needs service, then that person is required to follow the CCV protocol. People who had a personal relationship with the grievor could circumvent the process by calling him on his direct line at work or at home. While others would have had to travel to the Corner Brook office, wait on hold on the telephone, or try to navigate the Service Canada website, his family members had an open offer to contact him, and he would make inquiries on their files. His witness, Ms. Pike, agreed that the circumstances described could appear as preferential treatment for his family members.

[33] The quantum of discipline imposed against the grievor, given all the circumstances of this case, was reasonable. In *Perry v. Treasury Board (Employment and Immigration)*, PSSRB File No. 166-02-17340 (19880620); [1988] C.P.S.S.R.B. No. 166

(QL), the grievor in that case was given a three-day suspension without pay for taking his wife's employment insurance application into the office and placing it in the mail tray. The employer chose to rely on a violation of the code of conduct and a conflict of interest rather than on insubordination for not following its policies. It was determined that the grievor had accorded his wife preferential treatment, which could have made the public think that the employer was not completely impartial when dealing with files.

[34] Like in the *Perry* case, the idea of accessing his family members' files should have raised a red flag for the grievor. Additionally, he offered his family members a priority service, as was the case in *Perry*, which should also have raised red flags. He was provided with a copy of the *Code* and the guidelines. In addition, values and ethics training formed components of at least two training sessions that he completed and did not deny completing. He took issue with the fact that he was not given training specifically titled "Values and Ethics Training", which is a red herring. The course title is irrelevant.

[35] The grievor does not get to determine how the employer chooses to make employees aware of the applicable terms and conditions of employment. He was informed via his letter of offer that he was subject to the *Code*, which was reiterated in 2005 with the launch of the CCV protocol (see the email in Exhibit 4). It was clearly communicated to him that the employer expected him to perform his mandate and avoid conflicts of interest. In 2008, the employer followed this up with the guidelines, which were not new terms and conditions of employment. The message in them is fundamentally the same as that contained in the *Code*. Had the grievor not deleted the email without reading it, he would have seen the additional guidelines sent to him in 2008, which specifically referenced what occurred in this case.

[36] There is no evidence that the grievor was singled out. Managers were not aware that other employees were doing the same type of thing. When they found out, those cases were investigated and dealt with. The employer has not condoned the behaviour.

[37] The new Board should reduce a penalty only if it is clearly unreasonable or wrong (see *Ranu v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 89; and *Cooper v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 119). The employer provided the grievor with training and advised him that the *Code* was part of

his terms and conditions of employment (see *Foon v. Canada Customs and Revenue Agency*, 2001 PSSRB 126; *Blair-Markland v. Treasury Board (Citizenship and Immigration Canada)*, PSSRB File No. 166-02-28988 (19991103); [1999] C.P.S.S.R.B. No. 123 (QL), and *Shaver v. Deputy Head (Department of Human Resources and Skills Development)*, 2011 PSLRB 43).

[38] Despite all that, the grievor accessed his family members' files several hundred times over a period of years. The fact that he showed remorse was considered when determining the amount of discipline to impose on him, but throughout the process, he never accepted responsibility for what had happened. He always claimed ignorance of the *Code* because he had not read it. Not once did he say he should have read it. He acknowledged that he was aware of the CCV protocol but made excuses about wait times and older people needing help, which were irrelevant. He deleted the email announcing the guidelines of conduct because the employer sent him too many emails. He blamed the employer for not providing him with a values and ethics course.

[39] That does not change the fact that the grievor had everything he needed to know the rules and that it was up to him to follow them. The onus is on employees to comply with the *Code* (see *Lalla v. Treasury Board (Industry, Science and Technology)*, PSSRB File No. 166-02-23969 (19940113); [1994] C.P.S.S.R.B. No. 4 (QL)). A public servant must be aware of the general terms of important documents that govern their conduct at work (*Labadie v. Deputy Head (Correctional Service of Canada)*, 2008 PSLRB 85 at para. 245).

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

[40] This case is an issue of a notice and warning and of procedural fairness in the administration of discipline. For the employer to make a rule with disciplinary consequences, it must be brought to the attention of employees, including what discipline may result. The rules must be reasonable, clear, and unequivocal. They must be consistently enforced once introduced (Brown and Beatty, *Canadian Labour Arbitration*, 4th edition, at para. 4:1520).

[41] The *Code*, as a term and condition of the grievor's employment, was raised by the employer in October 2009. It had been in effect since 2003, and yet it was not brought to the grievor's attention. He did not remember any specific training on the topic of values and ethics until he took the training mandated in his disciplinary letter.

Training needs to be reinforced. Mr. Johnson testified that the topic of values and ethics was contained in training that the grievor attended, but the grievor testified that he could not remember it, while he could remember the specifics of other parts of the training. The first time he saw the *Code* was when the investigator gave him a copy in 2010. If the employer intended to rely on a violation of the rules, then the rules must have first been clearly communicated to the grievor, consistent with the decision in *KVP Co. v. Lumber & Sawmill Workers' Union, Local 2537* (1965), 16 L.A.C. 73 ("*KVP*").

[42] The grievor testified as to the reality of staff meetings in the Corner Brook office, which were rare, and their content was mostly operational in nature. The testimonies of the employer's witnesses indicated the theory and high-level expectations for staff meetings, while the grievor testified to the reality of what happened in the Corner Brook office.

[43] The grievor repeated several times that when this issue was raised as a breach of the *Code*, management gave him the impression that everything would be fine. He was given no opportunity to correct or reform his behaviour before discipline was imposed. The employer's failure to warn him is a mitigating factor (Brown and Beatty, at 7:4416). The first warning he received was at the investigation meeting. Following that, at a meeting he requested with Ms. Young, he was again told that this type of behaviour was unacceptable. Now that he knows, he will not repeat the behaviour. The investigation was sufficient to alter his behaviour. The discipline that was imposed was punitive and was not intended to correct his behaviour.

[44] The grievor's employment records are the single most important mitigating factor (Brown and Beatty, at para. 7:4428). He had eight years of service and a clean record and had been given increased responsibility through acting assignments as a team lead and a PM-02. He was an average employee. There was no testimony from his direct supervisors to the effect that his performance was anything less than satisfactory.

[45] The disciplinary letter does not reflect the grievor's apology. The employer placed undue weight on the aggravating factors of the number of accesses and the repetitive nature of the behaviour, all of which predate the grievor's awareness of the rule. The level of service he provided to his family members was the same level he would have provided to them had they come into the Corner Brook office. It was

merely conveyed by a different means. He was under the impression that it was allowed since he did not disclose the information to a third party or make changes to a file. The family members could have obtained the information from any CSA employed by Service Canada via the CCV protocol.

[46] The cases cited by the employer's counsel are distinguishable. The employees in those cases took actions on files, such as moving them forward, or took steps that cost the employer money. In *Perry*, the employee had been warned not to fill in forms for his spouse. He did it anyway and then provided courier service and expedited processing. He saved his wife from having an interview and from having to fill out other forms. The grievor in this case did not give preference to his family members' calls over his regular duties. In *Blair-Markland*, the grievor in that case went beyond her assigned duties to assist someone. There is a material and relevant difference between reading an inquiry screen to a family member and processing a claim. The grievor did not perform his job differently for family members; he merely used a different medium.

[47] The employer's position taken at this hearing conflicted with the client-focused service it promotes. The grievor's actions would not have caused a major perception of bias, particularly in small centres such as Corner Brook. His understanding was that through his actions, he provided the same service to his family members as he provided to others. Ms. Pike testified that according to her training, nothing specifically prohibited what he did, even though she would not do it. Mr. Lee's testimony described the level of assistance he provided to his family members. The grievor's mere involvement with a family member was not understood to be a conflict of interest. He did not provide a service above or beyond what he provided to others; he merely responded to their inquiries.

[48] The employer's action of disciplining the grievor was punitive rather than corrective. A lesser penalty would have accomplished the employer's aim. The grievor did not know that what he was doing was considered improper, and as soon as he found out it was, he stopped doing it. His behaviour changed when the investigator gave him a copy of the *Code*. Ten factors must be considered when determining a penalty (see *United Steelworkers of America, Local 3257 v. Steel Equipment Co. Ltd.* (1964), 14 L.A.C. 356). The grievor's conduct was an unwitting and unintentional violation of the *Code*. At worst, it might have seemed slightly preferential treatment,

but that degree of preference matters when determining blameworthiness. There was no significant detrimental impact on the employer's operations. He did not neglect his duties, and the employer incurred no tangible additional costs. The grievor did not flout instructions he was given. He acted in a way he believed was acceptable. Under the *Globe and Mail* test (would you be embarrassed to see what you have said or done on the front page of the Globe and Mail?), the grievor's conduct was not so damaging to the employer's reputation as those relied on by the employer in its arguments.

[49] Given the minor infraction and the corrective effect of the investigation, the employer's purpose would be well served with a lesser, if any, penalty. A verbal or written reprimand would have been sufficient.

IV. Reasons

[50] I am satisfied based on the testimony before me and the documents submitted as evidence that at family members' requests, the grievor accessed their personal records as maintained by the employer. I am also satisfied that such accesses were not authorized or conducted within the scope of the grievor's normal duties as it was clear from all witnesses including the grievor that handling a family member's file was prohibited. I am also satisfied that the employer met the burden of proving that the grievor was in a conflict of interest, no matter how minor, and as such, his conduct was worthy of discipline.

[51] While it is true that pursuant to the *KVP* factors, a rule must be clearly communicated to an employee before the employee can be disciplined for violating it, it is also true that the employer clearly advised the grievor in his letter of offer that he was subject to the *Code* and that compliance with it was a term and condition of his employment. He acknowledged receiving this notice by signing his letter of offer. Yet, he took no steps to determine what the *Code* was and how it would impact his employment. He did not follow the process for identifying a conflict of interest. He completely disregarded communications from the employer related to the guidelines and cavalierly deleted emails from the employer when it disseminated news of the guidelines. The onus is on the grievor to be aware of important documents that govern his conduct at work (see *Labadie*, at para. 245). Ignorance of the law is no excuse for violating it; neither is ignorance of the employer's policies of which notice has been received.

[52] The question before me comes down to whether the employer appropriately considered any mitigating factors that would have affected the quantum of discipline and whether, in the circumstances, the quantum imposed was reasonable. The onus was on the grievor to identify any such mitigating factors; I heard nothing by way of testimony or saw anything in the documents submitted that would indicate that he had identified mitigating factors that the employer had not considered. The employer's witnesses clearly identified the factors they considered as mitigating, including the grievor's work record.

[53] Furthermore, it was clear throughout his testimony that the grievor has not yet accepted responsibility for his actions, which in my assessment amounts to a considerable aggravating factor. His repeated attempts to minimize his actions by arguing that he provided only a service that he would have provided had his family members come into the Corner Brook office ring hollow. He did not provide the same service to his family members as he did to others in the local community. Others did not have his personal unlisted phone number. Others had to follow the CCV protocol. The treatment provided to his family members was clearly preferential, as agreed by his witness, Ms. Pike.

[54] Conflicts of interest are not always apparent. Some are very obscure, while others are based on perception. If employees ask themselves if they are in a conflict of interest, in all likelihood, they are. Did the grievor pay attention to the portions of his training related to conflicts of interest and values and ethics? Did he accept as a condition of his employment his continued obligation to abide by the *Code* when he signed his letter of offer? If he had taken these steps, and had he not been so cavalier in deleting corporate policy communications from his employer, he might well have known what questions to ask and what processes to follow to determine if he was in a conflict of interest. He did not. And as a result, he has run afoul of the employer's rules. The employer was justified in imposing a disciplinary penalty significant enough to reinforce the requirement to comply with the *Code* and guidelines.

[55] As I stated in *Ranu* and *Cooper*, an adjudicator should reduce a disciplinary penalty only if it is clearly unreasonable or wrong. In these circumstances, the grievor was wilfully ignorant of the terms and conditions of his employment. He took no steps to determine if he was in a conflict of interest. Even at the hearing, he refused to accept that he provided a level of preferential service to his family members that far

exceeded what was available to a normal client through the CCV protocol. He demonstrated no remorse for his actions and repeatedly tried to deflect responsibility for them by blaming the employer for his ignorance or alluding to others doing the same thing.

[56] The grievor has not met his onus to convince me that it is just and reasonable to substitute a lesser penalty. His actions went directly to the core of how the employer delivers its services to the Canadian public and were clearly a violation of the *Code* and the guidelines. In light of this and of the case law cited, the penalty imposed by the employer was not unreasonable or wrong.

[57] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[58] This grievance is dismissed.

February 8, 2016.

Margaret T.A. Shannon,
a panel of the Public Service Labour Relations and Employment Board