

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

RONALD HAMPTON

Grievor

and

TREASURY BOARD
(Revenue Canada -Taxation)

Employer

Before: P. Chodos, Vice-Chairperson

For the Grievor: Robert Fredericks, Professional Institute of the Public Service of
Canada

For the Employer: Harvey Newman, Counsel

Heard at Victoria, British Columbia,
October 7, 8 and 9, 1998.

DECISION

Mr. Hampton is a Certified General Accountant who had been employed for thirteen years with Revenue Canada, for the last three years as Team Leader, Audit (AU-2), in the Verification and Enforcement Division of the Vancouver Island Tax Services Office (TSO), until his dismissal on September 29, 1997. The reasons for his termination of employment are set out in a letter to Mr. Hampton from Mr. Fred Vivash, the Director of the Vancouver Island TSO; this letter states the following:

(Exhibit E-1)

Following suspected irregularities concerning a recent AU-3 Team Leader Audit competition, management in the office conducted a review of their concerns that you inappropriately obtained protected information, specifically questions and answers developed for the above-mentioned competition, and that you subsequently used that information in an interview in an attempt to seek unfair advantage in order to gain a position at a higher classification than your current substantive position.

The evidence revealed that, on Sunday, July 6, 1997, you entered the Revenue Canada office located at 747 Fort Street in Victoria and that you accessed, without authorization, questions and answers to a selection board for which you were a candidate. These questions and answers were located in a board member's office to which you had no reason to enter.

The evidence uncovered during the investigation further revealed that, while being interviewed for the AU-03 position on Wednesday, July 9, 1997, you provided answers that corresponded in content, phrasing and presentation to such an extent that the responses could only have been formulated from the answer sheet developed by the board.

The evidence also revealed that during your interview with the Assistant Director of Regional Security Services on August 7, 1997, you deliberately attempted to deceive the investigator as to the purpose for your visitation to the offices located at 747 Fort Street on the evening of July 6.

On Tuesday, August 11, 1997, you were advised by members of the board of your unsuccessful results on the competition due to their beliefs that you had obtained, in advance, and made use of their suggested answers during your interview of July 9. However, you denied their allegations. Further, on August 11 you had an opportunity to discuss the matter with

the selection board and on August 13, 1997, you were advised by Mr. Bruce Donaldson, Assistant Director, Verification and Enforcement Division, that he, too, believed you had obtained and used the board's suggested questions and answers. You continued to deny this at every opportunity. Despite the opportunities afforded you to provide management with the true purpose of your visit on the evening of July 6, you chose not to do so until August 28, 1997, at which time you wrote to Mr. Donaldson to confess the true purpose of your July 6 visit to the offices at 747 Fort Street.

In summary, you gratuitously obtained protected information using your after-hours access privileges to Revenue Canada. You subsequently used that falsely-acquired information in an attempt to gain unfair advantage over your colleagues in a competition for a position that would have provided you with personal and financial gain. You repeatedly denied your actions despite the opportunities afforded you by management to completely explain the matter. By these very serious and deliberate actions, you have demonstrated a lack of the honesty and integrity necessary to function as an Auditor or in any other position of responsibility. In so doing, you have irreparably damaged the relationship of trust essential to maintaining your involvement in the ongoing day-to-day operations of the Department.

There are a number of Audit Team Leaders working in this division including Mr. Ken Cormack (AU-4) and Mr. Glen Heatley (AU-4); the Team Leaders report to the Assistant Director of the Division, Mr. Bruce Donaldson, who in turn reports to Mr. Vivash. Apparently, Mr. Hampton was the only Team Leader classified at the AU-2 level and at age 37, was the youngest of the Team Leaders in this organization. In his capacity as Team Leader, Mr. Hampton would at various times have approximately 14 to 16 employees reporting to him.

In 1997 Mr. Cormack was asked to head up a selection committee in respect of a competition for the staffing of up to three AU-3 positions; Mr. Gordon Heatley and Cheryl Hildebrand from the Vancouver Tax Services Office were also members of the selection committee. Over a two-week period, beginning about a month before the first candidate was interviewed on July 4th, Mr. Cormack and Mr. Heatley developed a set of questions and answers to be used in this competition; approximately fifteen candidates would be participating in the competition and it was the intention of the selection

committee to establish an eligibility list in respect of these positions, which were avidly sought after.

The interviews were held in the sixth floor board room at the TSO Offices at 747 Fort Street in Victoria. Each of the selection board members had a copy of the questions as well as the suggested answers. Following the first interview on Friday, July 4th, Mr. Cormack placed the questions and answers in a file folder in his filing cabinet which is located in his office on the third floor. Mr. Cormack noted that his office door locks automatically and one copy of the key to his office is kept at the work station of a clerk, Mr. Paul Wilson, which is adjacent to Mr. Cormack's office. Mr. Cormack testified that this key is normally kept underneath a ledge which is out of sight. It is common practice to keep the key in this location, and this would generally be known to the staff. Mr. Cormack observed that Mr. Hampton's office is located on the sixth floor, and normally he would not have business to conduct on the third floor.

Prior to the AU-3 examination and interview process, candidates were required to take an "in-basket" test prepared by the Public Service Commission. This test was worth 60 marks out of a total of 200; candidates who did not achieve the pass mark of 27 were screened out of the competition; however, the results of the "in-basket" test were not known prior to the interview process. Mr. Hampton in fact achieved the second highest mark in the "in-basket" test; several candidates were screened out as a result of being unsuccessful in this test. It was anticipated that Mr. Hampton would do well in the selection process; he was the only candidate who already was a Team Leader and was viewed by his immediate superior, Mr. Donaldson, as being a "excellent manager" and a very capable employee.

On Wednesday, July 9, 1997, Mr. Hampton took the written test prepared by the selection committee, which was followed by an interview. Mr. Cormack noted that Mr. Hampton's interview went very well; he answered the questions relatively quickly, concisely and very completely. When the committee members reviewed the answers to his interview, they were all of the opinion that his responses were very similar to their own prepared answers; one member of the selection committee, Ms. Hildebrand, jokingly remarked that "Boy, can he read upside down?". At that point the committee members were not suspicious of anything. The next day Mr. Cormack and Mr. Heatley were marking the exams of all the candidates; after having marked seven or eight tests,

prior to doing Mr. Hampton's test, they noted that generally the candidates had not done as well as expected. This caused to believe at that moment that perhaps the test was too difficult. However, when they reviewed Mr. Hampton's test, he received a perfect mark on the written test, including a series of questions on the Goods and Services Tax, which was not his area of expertise; in fact, he was the only person to get perfect marks on the GST questions. In some questions the similarity of Mr. Hampton's answers to the answer key prepared by the committee was "striking"; even the order of possible responses was the same as the answer key. Mr. Cormack then concluded that Mr. Hampton must have somehow obtained the answers in advance.

Mr. Cormack then approached Mr. Ken Esplen, the Local Security Officer, and indicated that there might be a security breach in that someone may have entered the offices without authorization. The computerized building access records in fact indicated that on Sunday, July 6, 1997, Mr. Hampton used his access card to enter the 6th floor at 2024 hours; he then entered the 3rd floor where Mr. Cormack's office is located at 2031 hours; he apparently returned to the 6th floor at 2039 hours, accessed the 3rd floor again at 2047 hours and returned back to the 6th floor at 2050 hours. The records contain no information to when he may have left the building that day.

In his testimony in chief, Mr. Hampton outlined his actions on July 6th. He arrived at the office at 8:15 p.m., and went to the 6th floor where his work station is located. He retrieved from his cabinet a folder containing questions and answers for a PM competition which he would be chairing. His purpose was to finalize one particular question which required obtaining the exact wording from the *Income Tax Act*. It was also his intention to take the folder home in order to do some further preparation. While at his desk, he came across his "To Do" list where he noticed the name Clinton Marr. This had reminded him that Mr. Marr, a personal acquaintance, had sought some general information concerning probate estate matters. He had not known the answer to the question but knew that a colleague of his, Mr. Calvin Poon, was familiar with this area. According to Mr. Hampton, some time prior to July 6th he had gone to see Mr. Poon concerning this query. Mr. Poon had referred him to the CCH (Commerce Clearing House Publishing) manual on estate and trusts, including a particular chapter entitled How to Avoid Probate Fees; Mr. Hampton indicated that he did not then have the time to read this chapter through and he therefore decided to

return at some point to read it through. Accordingly, on July 6th he went down to the 3rd floor to obtain this manual from Mr. Poon's desk. Upon returning from Mr. Poon's work station, he passed Mr. Cormack's office; he then went into Mr. Paul Wilson's desk, obtained a key from the top of his tray and used it to enter Mr. Cormack's office. He walked over to Mr. Cormack's cabinet, and observed that the bottom drawer was open. He saw a blue folder upon which was written "AU-3 Competition". He then took that folder and the CCH manual back to the 6th floor. He looked through the folder, photocopied the questions and answers as well as the 20-page chapter of the manual; he then returned to the 3rd floor and returned the manual and the folder. He went back to the 6th floor, re-armed the building and left. Mr. Hampton estimated that he was in the building about 20 to 30 minutes in total. The grievor testified that his sole purpose in going to the office that day was to pick up the PM competition folder, finish preparing one question and bring the folder home to do some more work on it. He explained that he was under some time pressure to finish the questions as the Staffing Officer, Mr. Boyer, wanted to review the questions the week of July 7th to 11th because he was about to go on vacation. Mr. Hampton also stated that he originally intended to go to the 3rd floor only to obtain the probate chapter and that he had no plans to access the AU competition questions prior to proceeding to the 3rd floor. He formed the intention to obtain the questions only when he was approaching Mr. Cormack's office, at which time *"something came over me"*. He examined the questions and answers when he got home and looked at them again the following Tuesday, July 8th.

Mr. Hampton maintained that he had done extensive preparation for the competition, including spending approximately 150 hours of study time. On Saturday, July 26 Mr. Hampton took vacation leave until August 10th, during this time he was staying in Penticton, British Columbia.

Mr. Gilles Croze is the Assistant Director, Security Services, Pacific Region. Mr. Croze saw a Security Incident Report (Exhibit E-6) prepared by Mr. Cormack which outlined his concerns about *"an unauthorized access to my office during non-office hours in order to obtain questions and answers pertaining to the competition."* Mr. Croze was advised by Mr. Vivash that he wanted two separate investigations done. The first, which would require Mr. Croze to interview Mr. Hampton, concerned whether the grievor had obtained access to the building on July 6th; the second investigation concerned the competition process, and would not be dealt with by Mr. Croze. On

July 29 or July 30 Mr. Hampton received a call from a colleague, Mr. Brian Miller, who indicated that Mr. David Watson, the Chief of Finance and Administration, wanted to get in touch with him. Mr. Hampton contacted Mr. Watson who advised him that Mr. Croze wanted to interview him and would be in Penticton the following week. According to Mr. Hampton, he asked Mr. Watson what it was about; Mr. Watson indicated that Mr. Croze will be going over the matter at the meeting and that he (i.e. Watson) did not want to discuss it. Mr. Hampton then phoned his immediate superior, Mr. Bruce Donaldson, to inquire if he knew what this meeting would be about. Mr. Donaldson said that he knew that Mr. Watson was going to get in touch with him, but he did not know why. Mr. Croze contacted Mr. Hampton in Penticton and it was agreed that they would meet at 4:00 p.m. on August 7th at the Penticton Tax Services Office. Mr. Croze advised Mr. Hampton that he was entitled to bring with him a union representative.

Mr. Hampton attended the meeting with Mr. Mark Marischuk, a union shop steward from the Penticton area. Also in attendance was Mr. Len Laughlin, a Security Officer from the Penticton area who acted as Mr. Croze's scribe. Both Mr. Laughlin and Mr. Croze took handwritten notes of the meeting (Exhibits E-9 and E-10). According to Mr. Croze he began the meeting by explaining that the purpose was administrative, not investigative and was to determine if Mr. Hampton had obtained access to 747 Fort Street on the evening of July 6th, and if so, the reasons why. In response to Mr. Croze's questions, Mr. Hampton indicated that he had access to the building, that he did enter it on the evening of July 6th and had proceeded to his work station on the 6th floor in order to do some work on a pending PM competition; he had gone to the 3rd floor to get information concerning probate fees from Calvin Poon's work station on behalf of an acquaintance, Mr. Clinton Marr.

Mr. Croze testified that Mr. Hampton was asked at least two other times during the meeting about his reasons for entering the building on July 6th; on each occasion he referred to the PM competition and obtaining information with respect to a probate matter. He indicated that he had gone back to his own floor in order to photocopy a chapter in the probate manual. Mr. Croze testified that he did not advise Mr. Hampton that he was suspected of cheating on the competition; he did not ask Mr. Hampton if he had gone to the 3rd floor in order to get information about the AU-3 competition, nor did Mr. Hampton make any reference to it in his responses. Mr. Croze

acknowledged in cross-examination that he advised Mr. Hampton that he was not privy to any other details concerning this investigation. He agreed that the interview was in support of this investigation which could have led to disciplinary action, and that he did tell Mr. Hampton that this was “not an investigation”. Mr. Croze indicated that, to his knowledge, no one had contacted Mr. Marr concerning this matter. According to Mr. Hampton, Mr. Croze concluded the meeting by stating that he had been asked to determine if and why Mr. Hampton was in the building, and that Mr. Hampton had confirmed that he had been in the building, and that was all that he needed.

After the meeting Mr. Hampton contacted Mr. David Gray; Mr. Gray is an auditor with the Revenue Canada, Tax Services Office in Victoria and is also the steward for Professional Institute (PIPSC) members employed by Revenue Canada in British Columbia and the Yukon; as well, he is the AU subgroup Chair, the Chair of the Regional Executive of the Professional Institute for B.C. and the Yukon, and is a Member of the National Board of Directors of PIPSC. Mr. Hampton told Mr. Gray about the meeting. According to Mr. Gray, Mr. Hampton was “baffled” as to the purpose of the interview. Prior to this meeting Mr. Gray had contacted Mr. Donaldson to inquire about what the meeting would be about; Mr. Donaldson didn’t want to discuss it. He had then contacted Mr. Vivash to ask him as to the purpose of the meeting. According to Mr. Gray, Mr. Vivash stated that the security meeting had to go ahead before Mr. Hampton returned from vacation. Mr. Vivash said that he would apprise Mr. Gray of the purpose once the meeting had occurred.

On August 8th Mr. Gray again contacted Mr. Vivash, and was told by him that the security meeting took place because the AU-3 selection board believed that Mr. Hampton had obtained access to the selection competition questions and answers, and that the board would be meeting with Mr. Hampton on August 11th when he returned from vacation. Mr. Hampton attempted to contact Mr. Gray on August 8th but was unsuccessful; he did speak with Mr. Donaldson on that day; Mr. Hampton indicated that Mr. Donaldson told him that the meeting with Mr. Croze was about the AU-3 competition. According to Mr. Hampton, Mr. Donaldson apologized for lying to him when he had told him that he did not know the purpose of the interview; he also advised Mr. Hampton that on August 11th Mr. Cormack and Mr. Heatley would be meeting with Mr. Hampton to review the selection board questions and answers.

On the morning of August 11th Mr. Heatley asked Mr. Hampton to accompany him to the 6th floor board room. Mr. Cormack stated that he began the meeting by advising Mr. Hampton that the answers he provided to the selection board were so similar to the board's own answers that they felt he must have had advance access to the questions. He was then asked for an explanation. According to Mr. Cormack, Mr. Hampton explained that the reason why his answers were so similar was because he had been a supervisor for a number of years, had attended a number of management meetings during this period and therefore was familiar with their thought processes. He denied that he had access to the questions and answers prior to the board interview. Mr. Heatley again stated that Mr. Hampton must have had access to the questions and Mr. Hampton again denied it. After the meeting Mr. Heatley and Mr. Cormack again compared Mr. Hampton's answers with their own and again concluded that he must have had access to the information before the interviews.

Immediately following the meeting with the members of the selection board, Mr. Hampton went to see Mr. Donaldson in his office. He gave Mr. Donaldson a folder containing the information that he had used to prepare for the selection board and advised him what had happened at the meeting with Mr. Cormack and Mr. Heatley. Mr. Donaldson indicated that he would go to Personnel and find out what was going on. That afternoon Mr. Donaldson asked to see him again. He then indicated to him that he had reviewed the questions and answers and that he had signed off a letter (Exhibit G-8) from Mr. Donaldson to Mr. Hampton advising that Ms. K. Etches had been declared the successful candidate; attached to this letter was the eligibility list with seven other names; Mr. Hampton's name was not on this list. Mr. Hampton denied again that he had obtained access to the questions and answers.

On August 12th Mr. Gray met with Mr. Heatley and Mr. Cormack; they presented Mr. Gray with Mr. Hampton's answers and the answer key and indicated the similarities. Following this meeting Mr. Gray met with Mr. Hampton and advised him that he had gone through the evidence. Mr. Gray told him that if he appealed the selection board decision he would probably win since they had given him no marks for personal suitability, however, he cautioned him that the accusations would then become public and if he made no admission, the disciplinary consequences would be more serious (Exhibit G-10, Mr. Gray's notes of August 12th meeting with Messrs. Heatley and Cormack).

Mr. Gray also met alone with Mr. Vivash on August 12th. According to Mr. Gray, he asked Mr. Vivash where management was going with Mr. Hampton, whether there would be a disciplinary board, what were the options, and what he envisaged as punishment. Mr. Gray testified that Mr. Vivash spoke of various possibilities; Mr. Vivash indicated that he felt the selection board decision would stand up if appealed; he thought it was very important that there be some evidence of remorse and admission of guilt. It was also Mr. Gray's recollection that at this time Mr. Vivash had raised the possibility of imposing no more than a written reprimand if Mr. Hampton would come forward with an admission. According to Mr. Gray, in a subsequent meeting with Mr. Vivash on August 20th, Mr. Vivash gave a firm indication that he would agree to a reprimand in return for Mr. Hampton's admission. Mr. Gray testified that he made notes of these meetings immediately after their conclusion reflecting this understanding (Exhibits G-11 and G-12).

Mr. Vivash had a different recollection of these meetings. While he did not recall the specific dates when these meetings took place with Mr. Gray, nor did he make any notes of these meetings, he was certain that while he discussed the various disciplinary responses and the factors which are relevant in imposing discipline, he made no promise that he would impose only a written reprimand in return for an admission from Mr. Hampton. Mr. Hampton recalled that Mr. Gray had told him that Mr. Vivash had said that this was a serious matter which could result in discipline up to and including discharge; however there was a possibility that if he were to admit he had access, discipline would be limited to a written reprimand, to be placed on his file for two years. Mr. Gray encouraged him to admit it if he had in fact accessed the questions; if he had not, he urged him to appeal the competition.

Mr. Hampton attempted to contact Mr. Donaldson on August 14th but was advised he was not in the office that day, or the next day, Friday, August 15th. From Monday, August 18th to August 22nd, Mr. Hampton was on vacation leave. He came into the office on August 18th to speak with Mr. Donaldson; however, he was not there. He returned again on August 19th, but again Mr. Donaldson was not in the office. On August 19th the grievor spoke with Mr. Gray on the telephone; Mr. Gray advised him that he met with Mr. Vivash that day who assured him that if Mr. Hampton came forward and admitted access, discipline would be restricted to no more than a written

reprimand. He was also advised from Mr. Gray that a disciplinary meeting would take place on September 5th.

On August 25th Mr. Hampton returned to work; Mr. Gray was not in the office that day or the next. On August 27th he met with Mr. Gray who told him that he would be seeing Mr. Vivash to get an update on this matter. According to Mr. Gray, he spoke on the phone with Mr. Vivash on August 27th; Mr. Vivash indicated to him that *“the door is still open”*, and if Mr. Hampton admitted to cheating, the discipline would be restricted to a written reprimand. Mr. Hampton testified that Mr. Gray encouraged him again to come forward if he had done it, and if not, to appeal the competition. Mr. Hampton stated that he drafted a letter of apology addressed to Mr. Donaldson and presented it to him that day. The text of that letter reads as follows:

(Exhibit E-13)

The bond of trust between the employer and employee is essential to the performance of my duties within the Certification and Enforcement Division.

I very regretfully confirm that I accessed the board questions and answers on July 6, 1997, during a period of time in my life which was extremely busy and stressful. I have no explanation as to why since I had prepared myself extensively for this particular board. This action is absolutely and totally out of character for me.

I am deeply sorry and embarrassed by this incident and very humbly apologize to all concerned.

I am very interested in putting this isolated incident behind me in order to immediately begin to restore the degree of confidence and trust that the Department has placed in me for the past thirteen years. I can assure you that my integrity and honesty will be above reproach.

Mr. Hampton testified that by August 11th he knew that he was going to *“make this right and come forward and admit it”*. He stated that it took him so long to meet with Mr. Donaldson on this matter because he *“could not make sense of what happened”*. He also felt that Mr. Donaldson was the one individual he had to go to, and that during this period either Mr. Donaldson, himself or Mr. Gray had been out of the office for much of the time; August 27th and 28th were the only two days that they were all

there at the same time. Mr. Hampton stated that he wrote the letter himself and did not discuss it with anyone prior to preparing it.

Mr. Gray and Mr. Hampton met with Mr. Donaldson at 4:00 p.m. on August 28th at which time Mr. Hampton gave Mr. Donaldson the letter. According to Mr. Hampton, Mr. Donaldson said that his (Mr. Hampton's) conduct was totally out of character and that he knew this was an isolated incident. He also stated that it was a serious issue and there would be a disciplinary meeting on September 3rd. Mr. Hampton recollected that Mr. Donaldson also said that he did not believe this to be a "hanging offence" but was more serious than a verbal reprimand. In his testimony in chief, Mr. Hampton stated that he was "appreciative" of the fact that Mr. Vivash had agreed to restrict the discipline to a written reprimand, but he knew he was coming forward even if the "deal" was not before him. He also observed that knowing of the deal did not affect his decision to make the admission. Mr. Gray also recalled Mr. Donaldson stating at this meeting that termination was not on the table. In earlier meetings with Mr. Donaldson about this matter, Mr. Donaldson had advised Mr. Gray that he thought Mr. Hampton's misconduct would stall his career but it was recoverable; he also recalled that at the time, Mr. Donaldson said in effect that there was a deal on a disciplinary response.

Mr. Gray testified that on September 2nd he had another conversation with Mr. Vivash about this matter; Mr. Vivash advised him that Mr. Donaldson would be chairing the committee. Mr. Gray stated that he then contacted Mr. Donaldson; Mr. Donaldson told him that he had discussions with Mr. Vivash and that it was Mr. Donaldson's understanding that a disciplinary response would be restricted to a written reprimand.

It was Mr. Donaldson's testimony that on August 11th he had told Mr. Hampton that this was a "serious issue" that needed to be cleared up. He also recalled conveying to him that the conclusion of the selection board was strong and that he had to come clean. Mr. Hampton at that time denied the accusation. Mr. Donaldson maintained that he made no representations as to what would happen to Mr. Hampton if he confessed, and that there was no reference to any sanction. Mr. Donaldson stated that he believes he did meet with Mr. Hampton sometime after August 11th, but before August 28th, although he made no reference to this in the chronology that he had prepared during this period (Exhibit E-12). He believed that he may have been absent

during part of this time; in cross-examination he acknowledged that he may be wrong about having had a meeting between August 11th and August 28th. Mr. Donaldson observed that Mr. Hampton's recollection of these events is probably more accurate than his own. He agreed that he may have said on August 28th that the misconduct was totally out of character, and that it was not a "hanging offence". He believes that he did tell Mr. Gray that Mr. Hampton's career is stalled but it could recover in a few years. He did not recall referring to any discussion with Mr. Vivash concerning a written reprimand. Mr. Donaldson observed that he never gave the impression that a written reprimand was an appropriate response and he made no promises about this to anyone.

Mr. Vivash asked Mr. Donaldson if he was prepared to chair a disciplinary committee along with Mr. Gary Boyer, who is the Staffing Officer, as well as Ms. Susan Allen, who had recently been appointed as Assistant Director at the Victoria Tax Services Office. Mr. Donaldson agreed to undertake this task and on September 3rd the committee met with Mr. Hampton, who was accompanied by Mr. Gray and Rob Fredericks of the Professional Institute. At the commencement of the committee meeting Mr. Donaldson outlined the findings of the security report and the selection board. He indicated that Mr. Hampton's actions were viewed as serious misconduct. He also noted that it was to his credit that he finally had owned up. Mr. Fredericks made submissions on behalf of Mr. Hampton to the effect that a written reprimand was the appropriate response to Mr. Hampton's misconduct. Mr. Hampton made no submissions; it was his understanding that he was there to answer any questions, however none was put to him. He did not expand further upon his letter of apology; Mr. Hampton stated that the letter was intended as an unequivocal apology without putting forward excuses.

Mr. Donaldson testified that the committee members were in agreement that this matter warranted more than a written reprimand. Both Mr. Boyer and Ms. Allen felt strongly that dismissal should be considered as an option. The committee was also of the view that they needed further submissions directly from Mr. Hampton explaining his behaviour. Accordingly, on Monday, September 8 Mr. Donaldson asked Mr. Gray to request from Mr. Hampton that he provide additional information in writing concerning any matters which were going on in his life at the time. As a consequence, Mr. Hampton prepared a lengthy letter on September 9, 1997 to

Mr. Donaldson outlining in detail a number of events and circumstances which impinged on him prior to the incident in question (Exhibit E-14). Mr. Hampton also elaborated upon these matters in his testimony in chief. In brief, there were a number of marital, family, financial and other problems and pressures that were seriously affecting his life during the events in question. These primarily concerned his wife's pregnancy and impending investment losses which put in jeopardy almost all of his savings (ref. Exhibits G-14, 15, 16).

The disciplinary committee met on September 15th to consider their recommendations. Mr. Boyer continued to be of the view that termination was the appropriate response. Mr. Donaldson believed that there were several mitigating factors which should be recognized, and therefore a more suitable disciplinary response would be a one-month suspension. According to Mr. Donaldson, Ms. Allen was not comfortable with either positions and changed her mind several times; she finally agreed to the one-month suspension, which was reflected in a draft letter prepared by Mr. Donaldson and forwarded to June Lensen, the Manager of Human Resources (Exhibit E-15).

Mr. Vivash, who had been kept apprised of the disciplinary committee process throughout, was told by Mr. Donaldson that there were differences of opinion as to the appropriate disciplinary response. As a result, Mr. Vivash spoke with each of the committee members individually. Mr. Boyer was clearly of the view that termination was appropriate; according to Mr. Vivash, Ms. Allen indicated to him that she had difficulty with the decision; originally she was leaning towards termination, but was swayed over to Mr. Donaldson's side. Mr. Vivash concluded that he did not have a consistent decision from the committee. He advised Mr. Donaldson that he would be reviewing this matter himself. He then consulted with Ms. Lensen as well as headquarters' Staff Relations Officers, and concluded that the committee report did not stand up to the Department's Code of Conduct. Accordingly, Mr. Vivash drafted the termination letter (Exhibit E-1, *supra*). Mr. Donaldson was informed of Mr. Vivash's decision in advance. While he had a different view of what the appropriate discipline should be, he recognized that Mr. Vivash had the ultimate responsibility for determining the penalty. Mr. Donaldson acknowledged in cross-examination that he continued to feel that a one-month suspension was appropriate as in his view, Mr. Hampton's remorse was genuine, and that he felt the grievor could return to work.

He also acknowledged that he had been on six previous disciplinary committees and this was the first occasion that the recommendation of the committee had been overturned. Mr. Donaldson also agreed that Mr. Hampton was a “*well respected, very capable manager*” who had a “*full plate*” of responsibilities.

In his testimony Mr. Vivash elaborated upon his reasons for dismissing Mr. Hampton. Mr. Vivash viewed Mr. Hampton’s conduct as a “*series of thought-out decisions*”. That is, there were several distinct steps in his actions at any which time he could have put a stop to his misconduct, but failed to do so. According to Mr. Vivash, he also had numerous opportunities to acknowledge what he did, yet he only admitted his misconduct when he realized he was facing disciplinary action. Mr. Vivash concluded that his confession was “*too little, too late*”. It only came after he had repeatedly denied it. With respect to the personal pressures in his life, Mr. Vivash was of the view that these were no different than what most people face; he noted that throughout these difficulties he was still able to do his job. Mr. Vivash was also concerned that as an auditor, Mr. Hampton had considerable discretion in dealing with the files of companies that involved many millions of dollars of revenue. He felt that Mr. Hampton might accept financial gain from these companies and this was an unacceptable risk in this organization. Mr. Vivash agreed that there was nothing negative in Mr. Hampton’s previous employment history, that the decision was based solely on the series of events in question, which in his view constituted gross misconduct and consequently Mr. Hampton could no longer be trusted as an auditor.

When Mr. Gray learned of Mr. Vivash’s decision to dismiss Mr. Hampton he asked Mr. Vivash why he did not respect their “deal”. According to Mr. Gray, Mr. Vivash responded: “*Did you get it in writing?*” Mr. Gray questioned Mr. Vivash’s credibility; he indicated to him that in his capacity as National Director he would be instructing the Professional Institute to no longer communicate with Mr. Vivash, and they would not participate in any union/management committees involving the Vancouver Island Tax Services Office. In addition, grievances would not be presented to Mr. Vivash as the third level in the grievance process. Mr. Gray said he followed through with his threat; among other things, he so advised the Professional Institute’s National Office in Ottawa and he notified all AU’s as well as CS’s at the Vancouver Island Tax Services Offices that they would be terminating union/management relations on his authority as National Director, because Mr. Vivash had lied to him on

three occasions and he could not be trusted. In support of his testimony Mr. Gray referred to his notes of the September 3rd disciplinary committee meeting and the meeting he had on September 24th with Mr. Vivash (ref. notation for September 24, Exhibit G-13).

Mr. Vivash recalls advising Mr. Gray that he would be making the decision concerning Mr. Hampton's discipline, and what that decision would be. According to Mr. Vivash, Mr. Gray said he was appalled by the decision and as a result, in his capacity as union representative he would have no more dealings with Mr. Vivash. Mr. Vivash did not recall Mr. Gray stating: *"What happened to our deal"*; however he denies that he replied: *"Did you get the deal in writing?"*. He did recall Mr. Gray saying that he was appalled at Mr. Vivash's "lack of integrity" in terminating Mr. Hampton. Mr. Vivash stated again that he did not make any deal with respect to Mr. Hampton's discipline, nor did he entice a confession in order to support the decision to terminate the grievor.

Argument

Counsel for the employer characterized the grievor as a talented and skilled professional who had committed several egregious errors, and had acted disgracefully; while the consequences to the grievor are tragic, he was the author of his own misfortune. Mr. Newman maintained that when Mr. Hampton had gone to the office on Sunday, July 6th it was for the sole purpose of gaining access to the questions and answers for the AU-3 competition. Even if it was not the case, his actions were more than merely spur of the moment.

Mr. Newman argued that the grievor had several opportunities to backtrack as he went down the path of fraud, cover-up and deceit. He was fully aware of the importance of maintaining the integrity of the selection board particularly in view of his own participation in these processes. Moreover, he is in a strong position of trust as an auditor, where the utmost trust is required.

Mr. Newman asserted that Mr. Vivash had the ultimate authority to determine the appropriate response to Mr. Hampton's misconduct. He did take into account Mr. Donaldson's opinion that a less serious sanction should be imposed; however, after weighing all the considerations and taking into account the various and differing views

of the discipline committee, he came to a different conclusion. Mr. Newman maintained that Mr. Hampton's expression of remorse are less than convincing given their belated nature; his contrition relates more to his fear of losing his job than to what he actually had done. He noted that his confession came almost two months after the events in question. In the interim he deceived the selection board during the investigation, as well as his superiors. He had many opportunities to admit his wrongdoing but failed to do so. There was in fact a sustained pattern of misconduct here, involving moral turpitude and cover-up, and a confession was only forthcoming when there was nothing left to lose.

Counsel also submitted that there was no "deal" between Mr. Vivash and the bargaining agent; in any event, the so-called deal is irrelevant given the grievor's evidence that it did not act as an inducement. The grievor's problems as outlined in Exhibit E-14 do not in any way explain his misconduct. There must be a causal link between the stresses and the misconduct in question; that is, the grievor must demonstrate that the stresses amounted to a mental breakdown. Furthermore, his behaviour were not spontaneous acts which could be explained as a momentary aberration. Counsel urged that I take into consideration that the grievor was a supervisor as well as being an auditor who must have the trust of the public. Whatever mitigating factors exist here do not outweigh the seriousness of his misconduct. In view of this serious misconduct management's response was reasonable and should not be set aside.

The grievor's representative replied that I would be remiss in my responsibilities if, as urged by counsel for the employer, I ignored the mitigating factors such as the admission, personal circumstances and other relevant considerations. Mr. Hampton had admitted his misconduct and fully recognizes the seriousness of his actions, and realizes that it warrants more than a written reprimand. Mr. Fredericks agreed that where acts of dishonesty directly vitiates the integrity of the tax system it warrants discharge. However that is not the case here. Mr. Hampton's actions were clearly irrational for a number of reasons, including that he had already done very well on 30% of the test, had prepared himself extensively for it, was the only Team Leader in the competition, and was expected by everyone to do well. Furthermore, his use of the questions and answers was such that he would inevitably bring suspicion upon himself.

Mr. Fredericks maintained that there were elements of bad faith in the conduct of the employer in this case. Where there is such bad faith it should be a mitigating factor in respect of the discipline imposed. Otherwise it would send a message that actions such as failing to respect promises have no consequences. While Mr. Hampton was not induced to admit his conduct by the “deal”, it was clearly in his mind that it was meant to be an enticement. Mr. Fredericks also maintained that Mr. Hampton had only denied his misconduct on August 11th; there is ample evidence that Mr. Hampton agonized over what he should do almost immediately following that time, and concluded that he should bear his soul to Mr. Donaldson first, who was his direct supervisor and with whom he had a close relationship. However, because of circumstances beyond his control, he was unable to make the admission to Mr. Donaldson before August 28th. Yet, Mr. Vivash made it clear that this delay resulted in the confession being “too little, too late”.

Mr. Fredericks also maintained that the evidence supports the conclusion that Mr. Vivash had indeed made a deal to impose a written reprimand in return for Mr. Hampton’s admission and to thereby induce an admission in order to bolster the employer's case at adjudication.

The grievor’s representative also submitted that the case law does not support the view that this kind of misconduct is akin to theft, nor is there a case law supporting the conclusion that such conduct warrants dismissal. In support of this submission Mr. Fredericks referred to *Re Hydro-Electric Commission of City of Ottawa and International Brotherhood of Electrical Workers, Local 1569* (1991), 19 L.A.C. (4th) 338 (Bendel); and *Re Public Utilities Commission of City of Scarborough and Utility Workers of Canada, Local 1* (1996), 54 L.A.C. (4th) 442 (Craven). Mr. Fredericks also argued that there is considerable jurisprudence in support of the principle that personal circumstances and an admission, as well as evidence of remorse are relevant mitigating factors (Ref. *Green v. Canada*, [1997] F.C.J. No. 964; *Green* (Board file: 166-2-26720); *Re Canpar and Transportation Communications Union* (1997), 66 L.A.C. (4th) 1 (Picher); *Sample* (Board file: 166-2-27610); *Re International Minerals and Chemical Corp. Canada Ltd. and Energy & Chemical Workers Union, Local 892* (1990), 12 L.A.C. (4th) 244 (Norman); *Re Sunnybrook Health Science Centre and Service Employees’ International Union, Local 777* (1995), 47 L.A.C. (4th) 44 (Kaplan)).

Mr. Fredericks also cited *Re Toronto East General Hospital Inc. and Service Employees International Union* (1975), 9 L.A.C. (2d) 311 (Beatty) in support of the proposition that the denial of wrongdoing should not be viewed as a separate and discrete act of misconduct. Mr. Fredericks also argued that as a matter of policy, adjudicators should encourage employees to come clean by recognizing that an admission and expressions of remorse are mitigating factors.

In summary, the grievor's representative submitted that the grievor's misconduct was not premeditated, there was an eventual admission given by his own free will, as well as a sincere expression of remorse. Furthermore, this is an exemplary employee with thirteen years of service who is still viewed as a trustworthy employee by his immediate supervisor. Mr. Fredericks proposed that, because of the ongoing tensions in the office and the lapse of time since the grievor's termination, this case is an appropriate one for an award of damages in lieu of reinstatement. Mr. Fredericks noted that adjudicators have on a number of occasions awarded damages as an alternative to reinstatement where dismissal was unwarranted, and there were difficulties in reintegrating the grievor into the workplace. He cited *McMorrow* (Board file 166-2-23967); *Lawrence* (Board file 166-2-21341); *Anonsen* (Board file 166-2-17113); and *Slattery* (Board file 166-13-17850). Mr. Fredericks suggested that one to two years' salary would be an appropriate award of damages. Alternatively, it is the grievor's submission that he be reinstated with a short suspension.

In rebuttal counsel for the employer argued that the adjudicator's discretion to overturn the employer's decision should be exercised cautiously; the adjudicator should not interfere if the penalty is within the range of reasonable responses. Mr. Newman submitted that there was a pattern of misconduct here which could even be characterized as criminal, it included a break-in, as well as a perversion of the selection process. Mr. Newman also maintained that the mitigating factors referred to by Mr. Fredericks were considered by management, but it was concluded that it did not outweigh the reasons for discharge. Mr. Newman disputed that there was any deal; he submitted that it did not make sense for Mr. Vivash to make a deal in view of the strong evidence against Mr. Hampton at the time; furthermore, there can be no doubt that a written reprimand would have been a totally inadequate response for the serious misconduct in question. With respect to the jurisprudence cited by Mr. Fredericks, counsel for the employer suggested that there were a number of extenuating

circumstances in those cases; for example, in the *Green* case (supra) the important consideration was the lack of alternative employment for Air Traffic Controllers. In the *Toronto Easts General Hospital* case (supra) there was simple theft of a trivial amount of goods which constituted a momentary lapse of conduct. In the *International Minerals and Chemical Corp.* case (supra) the grievor was in effect mentally ill. Furthermore, the misconduct involved a relatively minor theft.

Mr. Newman also argued that there is no basis for reinstatement or damages in this case; the grievor has in effect recognized that he had broken the bonds of trust here. In the alternative, Mr. Newman submitted that a good benchmark for an award of damages would be the severance pay the grievor would be entitled to if he had voluntarily resigned.

Reasons for Decision

In essence, the issue in this case is whether the admitted misconduct by the grievor warranted the ultimate penalty of dismissal. There is no dispute that on the evening of Sunday, July 6, 1997, Mr. Hampton used his building access card to gain entry to the 3rd floor of 747 Fort Street, and while there entered Mr. Cormack's locked office without authorization and surreptitiously procured and copied the questions and answers to the AU-3 competition; he later reviewed the material and on July 9th used it in the selection process. There is also no dispute that, when confronted with management's suspicions, he denied several times to Mr. Donaldson, his immediate supervisor and to the selection board members, that he had engaged in any misconduct. On August 28th he did submit a letter to Mr. Donaldson admitting his actions and expressing remorse; in another letter to Mr. Donaldson dated September 14th (Exhibit E-14), in which he again reiterated his remorse, he elaborated on the personal stresses and pressures that were impinging on his life on or about the time of the incident in question.

The matters that are in dispute are, in my view, of somewhat less significance and relevance to a determination of this case. I am prepared to accept Mr. Hampton's testimony that he formed the intent to take the questions and answers only when he was on the 3rd floor on July 6th and not before then. His evidence in this regard is uncontradicted; the employer could have adduced evidence concerning, for example,

the *bone fides* of Mr. Marr's query and/or Mr. Hampton's earlier communication with Mr. Poon; however, it did not do so. There is in fact no evidence at all to suggest that Mr. Hampton is inclined to dishonest acts. In fact, the Assistant Director, Mr. Donaldson, who knew him well testified that this misconduct was entirely out of character. This lends credence to the grievor's assertion that his initial actions in obtaining the questions and answers were spontaneous and unpremeditated.

I also attach little significance to whether or not Mr. Hampton had "deceived" Mr. Croze in the course of his interview with Mr. Croze on August 7th. It is clear to me that Mr. Hampton was generally aware of the essential reasons behind Mr. Croze's interview and chose not to reveal the true and full extent of his activities on July 6th. What is much more significant is his outright denial when confronted with these accusations on August 11th. That day or soon thereafter would have been the most appropriate time to come clean, whether to Mr. Donaldson or to some other member of management. While I find Mr. Hampton's testimony that he felt compelled to confess to Mr. Donaldson to be credible, that does not change the fact that he did not come forward with an admission in a more timely fashion. However, his acknowledgment, albeit belated, does weigh in the balance to some degree.

Furthermore, I do not agree with counsel for the employer's characterization of Mr. Hampton's conduct as involving several discrete and separate acts of misconduct. When the grievor took the fateful step of procuring the questions and answers from Mr. Cormack's office, he took a leap down the slippery slope; that is, it was virtually inevitable that this act would lead to Mr. Hampton utilizing the questions and answers during the selection board process and later denying it when initially confronted with this accusation. In this context, the following findings in the *Toronto East General Hospital* case (*supra*) is instructive:

... (at p.323)

It is true, as we noted, that Mr. Hogan's case would have merited a much milder sanction had he in fact admitted to his offence. Further, the falsification of evidence under oath itself can only be viewed in the most serious terms. If the arbitration process is to have any meaning and utility such conduct simply cannot be tolerated. It is also true however that this second manifestation of untrustworthiness and dishonesty is inextricably interwoven to the first. This simply is not the case of an employee who, having been disciplined

for some act of aggravated dishonesty, subsequently and in apparent disregard of that earlier sanction repeats that or some similar offence. In such a case one might reasonably conclude that the employee is not capable of responding to some lesser form of discipline and is simply incapable or unwilling to reform his conduct. In such a case, repetition of what is universally regarded as most serious misconduct may appropriately be met by the discharge of that employee.

However, that is not the case of this grievor. Here, if as we have found, the discovery of the six cans of juice in his coat is on the preponderance of the evidence, consistent with his having misappropriated them, then his subsequent dishonesty in denying that conclusion must be considered as part and parcel of that initial act of misconduct. It is in a sense simply his having been caught up in his own dishonest act. At the moment he failed to admit to his misconduct he was in effect committed to one course of action. He was caught up in and tied to maintaining his falsification of the actual events.

I am also of the view that Mr. Hampton's personal circumstances should be taken into account as a mitigating factor. There is in fact considerable arbitral jurisprudence supporting the conclusion that substantial personal stress can bring on isolated, aberrant acts of misconduct which would not otherwise have occurred, and which therefore warrant consideration as a mitigating circumstance (See Brown and Beatty, *Canadian Labour Arbitration*, 3rd edition, Paragraph 7: 4424, particularly footnote 4 and the cases cited therein). I believe that the coming together of a number of significant stressful factors in his life, which are quite extraordinary when considered in their totality, had just such an impact on the grievor. The fact that these unfortunate events occurred within a few weeks of his actions on July 6th (Exhibits E-14 and G-14), as well as Mr. Donaldson's testimony to the effect that the grievor's misconduct was entirely out of character, strongly supports this conclusion, particularly when considered in light of his thirteen years of exemplary service. Accordingly, I find that the grievor's substantial personal stresses at the relevant time in question are an important mitigating factor.

I have also considered what impact, if any, the promise allegedly made by Mr. Vivash to Mr. Gray in his capacity as a union representative, should have in these proceedings. In view of the grievor's own testimony on these matters, I have concluded that the alleged "deal" is in fact largely irrelevant. The grievor stated in effect that his decision to admit his wrongdoing and apologize for it was due to his remorse for his

behaviour, and was not motivated by the alleged promise. It cannot be cogently argued here that the principle of promissory estoppel has any application, given that there clearly is no detrimental reliance on the part of the grievor. Consequently, I see no basis in law for concluding that the promise or "deal" should play a role in the determination of Mr. Hampton's grievance. I therefore make no finding as to whether or not the "deal" was in fact made.

In all the circumstances, I have concluded that, while the grievor engaged in serious misconduct (see for example, the *Maria Thomas* decision (Board file 466 H-155), where the adjudicator upheld the discharge of a Language Testing Clerk who was found to have dishonestly obtained and used a language test for her own benefit) his actions did not warrant the ultimate penalty of discharge. I fully understand the need for this Department in particular to maintain the higher standards of probity and integrity; I have no doubt that the decision to discharge Mr. Hampton was motivated by these legitimate concerns. I would note however, that the grievor's misconduct did not relate to his work as an auditor *per se*, or involved the clientele of the Department. Furthermore, as I have elaborated above, I must give consideration to other important mitigating factors which are relevant to this case.

In light of these facts, I would normally find that instead of termination, a four month suspension is warranted, and consequently I would direct the employer to reinstate the grievor. However, I am taking cognizance of the submissions of the grievor's representative that the grievor would prefer not to be reinstated, but rather be compensated for the loss of his job. There have been a number of Board adjudication decisions (*supra*), as well as arbitral jurisprudence in the private sector, that have recognized that an award of compensation, rather than reinstatement may be a more appropriate response in some circumstances, following a finding that discharge is too severe a penalty. I believe that is the case here. I am therefore prepared to accede to the grievor's request for compensation in lieu of reinstatement. In determining the appropriate amount of compensation I have considered the following factors:

1. the grievor's thirteen years of service;
2. his relatively young age (37);

3. his professional status and qualifications as a Certified General Accountant;
4. his misconduct and the suspension that should have been imposed upon him.

Taking these factors into account I am directing that the grievor be compensated in an amount equivalent to nine months' salary plus the monetary value of his other terms and conditions of employment. I shall remain seized of this matter for a period of six weeks from the date of this decision in the event that the parties encounter any difficulties in the implementation of this award.

**P. Chodos,
Vice-Chairperson.**

OTTAWA, November 23, 1998.