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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

ISAC SCHENKMAN

Grievor

and

TREASURY BOARD
(Public Works and Government Services Canada)

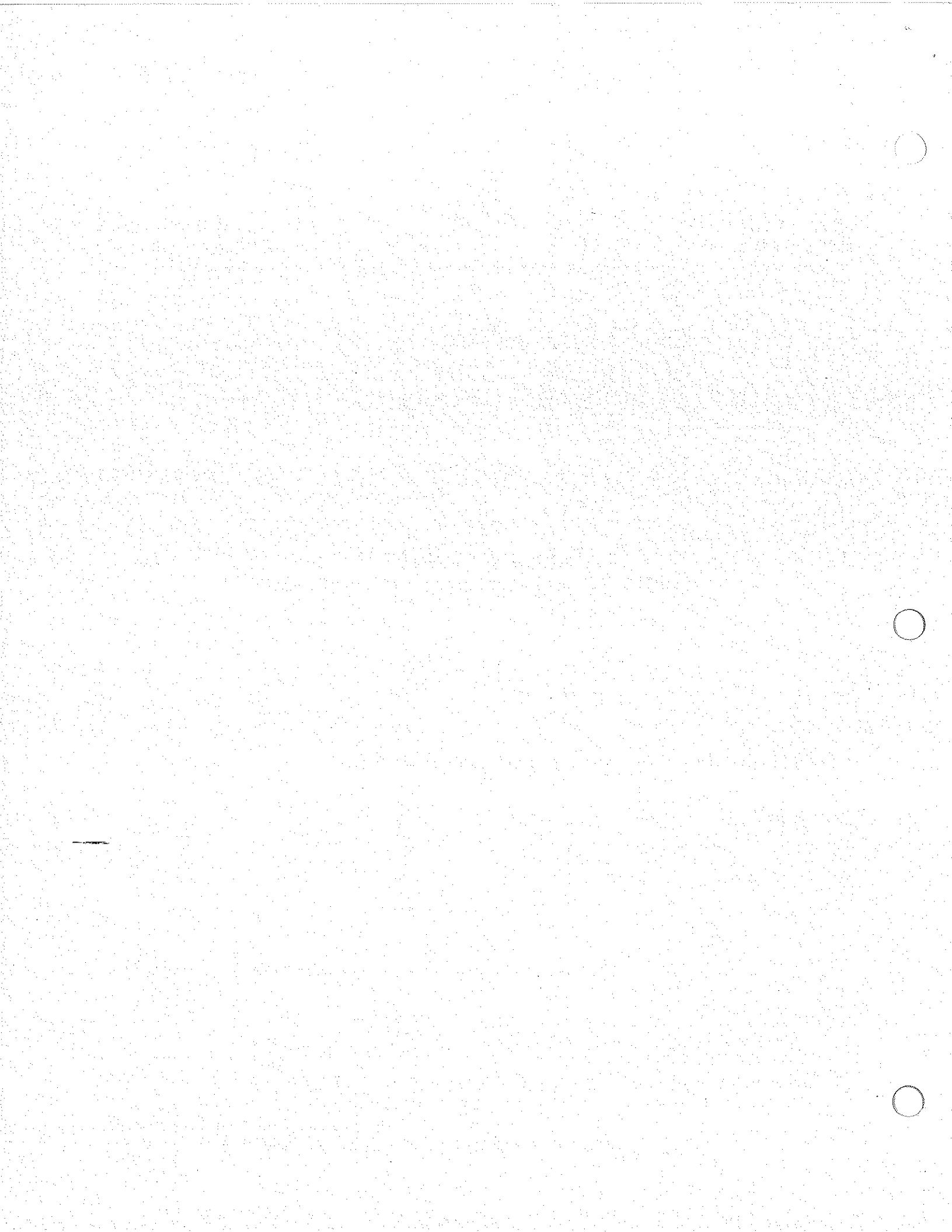
Employer

Before: Marguerite-Marie Galipeau, Deputy Chairperson

For the Grievor: Cynthia Sams, Counsel

For the Employer: Katherine Hucal, Counsel

Heard at Toronto and Ottawa, Ontario, April 23 to 27, June 12 to 14 and 25 to 29,
October 16 to 18 and November 6 to 9, 2001 and
January 15 to 17 and 29 and 30, 2002.
(Written submissions filed March 4 and April 15 and 26, 2002.)



DECISION

[1] This decision follows a hearing into a grievance referred to adjudication by Isac Schenkman, Senior Project Manager (ENG-05), following his discharge from the Department of Public Works and Government Services Canada (PWGSC).

[2] On January 4, 1999, the grievor's employment was terminated effective January 6, 1999, for the following reasons:

- gross negligence in performance of duties;
- circumventing normal contracting procedures and engaging in irregular and inappropriate contracting processes;
- failure to exercise due diligence in protecting public monies;
- preferential treatment of a particular contractor in the award of contracts in violation of the *Conflict of Interest and Post-Employment Code for Public Servants*; and
- actions resulting in an irreparable breach of trust.

[3] The grievor seeks reinstatement in his former position.

[4] Following requests for postponement, the hearing of this matter began on April 23, 2001.

Facts

[5] The following persons testified: Nancy Crawford, Regional Business Manager, PWGSC; Chris Maltas, Regional Manager of Supply and Services, PWGSC; Walter Luciw, Architect, Building Section, PWGSC; Paul Harasti, Regional Manager, Architecture and Engineering Resources, PWGSC; Paul Choquette, Regional Director, PWGSC; Harold Brillinger, PWGSC; Steve Morse, Manager, Accounting Management, PWGSC; Megeed Girgrah, Director, Marine Works, PWGSC; Peter Restoule, Supervisor/Foreman, PWGSC; and Isac Shenkman ("the grievor").

[6] The evidence can be summarized as follows.

[7] The grievor commenced employment in June 1982 at PWGSC.

[8] Prior to his discharge, the grievor had never been disciplined.

[9] The grievor's conduct has been the object of several investigations.

[10] In 1995, an anonymous source made allegations against the grievor and on the strength of these allegations, the employer launched several investigations, the last of which culminated in the grievor's discharge.

[11] Other than the allegations were in respect to fraud in the awarding of work orders and that the grievor had allegedly solicited money from private sector firms for the awarding of contracts, the allegations made by the anonymous source remain unclear to the undersigned. In addition, the identity of that source was not revealed, nor the intention of the anonymous source in coming forward with these allegations, nor has the evidence, if any, given by this source, been explicated, nor the relationship of this source to the grievor.

[12] Suffice it to say that, as a result of these allegations, an investigation was launched and conducted by internal investigators known as the Fraud Awareness Investigations Directorate (FAID).

[13] It was noted, as a result of a sampling exercise, that the grievor had exercised his right to his signing authority of \$30,000 on the sampled contracts and that there were important pieces of documentation missing. The tendering process appeared to have been bypassed. The six companies which had been awarded the contracts were owned by either John Patrick Wolfe or his brother, Clifford Wolfe.

[14] In 1996, the matter was referred to the Royal Canadian Mounted Police (RCMP). In 1997, the RCMP advised PWGSC that there was insufficient evidence to continue a criminal investigation.

[15] In April 1998, an Administrative Investigative Committee ("Committee") consisting of Chris Maltas, Regional Manager of Supply and Services at PWGSC, Paul Harasti, Regional Manager, Architecture and Engineering Services, and Walter Luciw, Regional Manager, Project Management, was formed. The Committee's mandate (Exhibit E-4, tab 14) was to examine the compliance and adherence to established departmental and Treasury Board contracting policies, guidelines, practices and delegated authorities by the grievor in order to identify any apparent administrative abuses in the grievor's management of marine engineering construction projects carried out by work orders between 1990 to 1996.

[16] According to the Committee, numerous work orders had been issued by the grievor, who had exercised his delegated authority to the maximum \$30,000, or just below it, to six different companies that used the same two Goods and Services Tax (GST) numbers. All these companies were owned or controlled by the same individuals, John Patrick Wolfe, or his relatives. A total of 79 work orders were awarded by the grievor for the period of 1990 to 1996 to the six firms. The grievor allegedly approved contract payments totalling approximately \$2,000,000.

[17] The Committee concluded that there were anomalies in contracting activities and that the grievor had seriously misconducted himself, had grossly neglected his duty, was guilty of breach of trust and had been in violation of the *Conflict of Interest and Post-Employment Code for Public Servants* guidelines.

[18] The Committee recommended that disciplinary action be considered, up to and including termination, and that further investigation into suspected fraudulent activity be reopened (Exhibit E-4, tab 14, page 6). The Committee also recommended that senior management undertake a review of administrative and contracting processes to ensure that the integrity of the systems be maintained and that appropriate checks be instituted to ensure compliance with policies and standards.

[19] A further formal request to have the matter re-investigated by the RCMP was made.

[20] The members of the Committee testified on the ACCORD System (Administration and Control of Contracts and Regional Data), a computer system listing contractors according to trade and geographic location, and on its purpose. They enumerated some of the documents which ought to have been on the files which they examined (work orders, plans and specifications, estimates, quotes, explanations of why the ACCORD System was not used and inspection reports).

[21] They also testified on their conclusions regarding the projects which they examined and the significance of some of the missing documentation relating to some of the 79 work orders. They testified that the grievor was responsible for ensuring that the proper documentation be placed on file in order to ensure the existence of an audit trail and pointed out that such audit trail was missing. They suggested that a negative inference should be drawn from the fact that the missing documentation related to 79 work orders given to six companies owned by one J.P. Wolfe and his

brother. Paul Harasti stated that no inventory of the documents found in the grievor's office was taken. He recalled that in the grievor's office they had found "bits and pieces, personal documents, piles of paper" but not pertaining to work orders. Paul Harasti also said that all three members of the Committee took notes during the grievor's interview but he was contradicted by another member of the Committee, Walter Luciw, who denied having taken any. Walter Luciw testified that he took pictures of some of the work contracted out. This, as we will see, was contradicted by Harold Brillinger, another of the employer's witnesses.

[22] For his part, the grievor testified that he had placed the proper documentation on file and was not in a position to explain its disappearance and should not be held responsible for its disappearance. He pointed out that his work had been approved in writing by his supervisor, Woody E.G. Wurts, Regional Manager, Marine and Transportation, Ontario Region, and that the Finance Section had paid the invoices. He further underlined that the work contracted had been done. His testimony on those points is not contradicted. The grievor's supervisor, Woody Wurts, does not appear as a witness in the table of content of the Committee's report (Exhibit E-1, tab 14), nor did he testify at the present hearing.

[23] The grievor pointed out that when the files were in his possession, they could be accessed by anyone entering his office. More importantly, the files were eventually filed in Central Records in the normal course of things and were accessible to a variety of people.

[24] The grievor worked in an open concept office until the summer of 1996. He kept documents and files on his desk and eventually passed them on for filing to a clerk or to one of his employees, Harold Brillinger, Project Engineer, or to Michael Brock, another project engineer, for the Kingston area.

[25] If he received correspondence after the implementation of a project, the grievor sent it, with a routing slip, to Central Records. Most of the time, in order to do his work, the grievor was out of the office. Managers, project engineers or clerks had access to the files and could either put documents on files or remove the files. For minor projects, it was part of Harold Brillinger's duties to refer to these files for instance, upon receiving requests from clients. It was also part of Harold Brillinger's duties to send these files to Central Records on the 12th floor of the building. The grievor's office as well as Harold Brillinger's were on the 11th floor. If the grievor

needed access to a file in the possession of Central Records, he had to obtain it from one of the six or eight clerks at Central Records and whose name was on the docket.

[26] At one point, 30 Central Record files went missing. The grievor hypothesized that some of the missing documentation might have been part of boxes which were misplaced by Harold Brillinger in 1994, or in a filing cabinet that went missing in 1998. In 1994, Harold Brillinger reported to the grievor that boxes containing files and documents were placed mistakenly on a garbage dolly and destroyed. Owen Korkhum, Regional Director, Architecture and Engineering Services, ordered that minor project files be sent back to Central Records, but allowed major project files to be kept in the grievor's office. The filing cabinet was the grievor's and became Woody Wurts' in 1997. It contained Central Record files and working files concerning old closed projects of the grievor or other project managers. When Woody Wurts had the filing cabinet, he had it under key.

[27] The grievor testified that when he was removed from his office in 1998, he had no working files or Central Record files in his office. He believes that his files, in April 1998, were in Central Records which, as already stated, is a section on a different floor than where the grievor worked.

[28] As a general practice, the grievor had been told in 1994 by Owen Korkhum not to keep minor files in his office more than 48 hours but that he could keep files on more important projects longer. The grievor explained that one project entailed a general file (number 4350), a consultant file (number 4360), a tender file (number 4380) and a working file. The first three files are Central Record files. The grievor testified that once a project was completed, he did not keep possession of the files.

[29] The grievor testified that his relationship with his subordinate, Harold Brillinger, was difficult. Harold Brillinger, on a given project, dealt with designers, clients, contractors, and consultants, while the grievor's time was mostly spent outside of the office. Harold Brillinger refused to go on site. He was reminded orally and in writing by the grievor that it was part of his duties to go on site. The issue was mentioned in his appraisal. He grieved successfully his appraisal. The grievor is of the opinion that Woody Wurts, his own supervisor, also had difficulties with Harold Brillinger. In 1994, Harold Brillinger was re-assigned, by Woody Wurts, to another manager, Ron Richards. The grievor had to do Harold Brillinger's tasks and go on site. Harold Brillinger was involved in the projects, in the filing of documents, and he placed them on the relevant

files as well, and transmitted them to Central Records. The grievor also pointed out that Harold Brillinger was involved in the work relating to the 79 work orders relied upon by the employer. He supervised projects and recommended change orders (for example, the one related to the Scada system, which change order was approved by Woody Wurts).

[30] Regarding the 79 work orders, the grievor pointed out that without the documentation he was at a loss to explain each and every decision he made. He did use the bidder system and sole sourcing. Even the Regional Director, Owen Korkhum knew that there was a general practice to use sole sourcing. The grievor's supervisor, Woody Wurts, was also aware of this practice and had the same practice. (For example, Woody Wurts authorized sole sourcing to Meridian (Exhibit E-16 and Exhibit A-46, tab 270). According to the grievor, there is no doubt that in matters of emergency, sole sourcing was allowed. A few of the work orders at issue had been matters of emergency.

[31] When the investigators met the grievor, in August 1999, they did not show him the documentation, which they had in their possession and on which they relied to draw their conclusions. Walter Luciw confirmed that during the interview, the grievor was not shown the evidence against him unless he asked for a specific document.

[32] During his testimony, the grievor also pointed out the following. His supervisor, Woody Wurts, approved his recommendations and decisions, as can be verified by the documentation produced by the employer. Prior to the hearing, the grievor was not given access to the documents that were intended to be used against him, except half of the files from the French River Dams Project. He was asked to answer questions concerning 79 work orders without their being shown to him and without his having had a chance to examine them previously. In his testimony, Paul Harasti confirmed this. The grievor only found out in 1998, through an Access to Information request, that he had been investigated in 1995 on the basis of a declaration made by a person at a party.

[33] The grievor also pointed out, by referring to the employer's documents (Exhibit E-29), that, contrary to an assertion made against him, he had travelled to French River Dams. At one point, counsel for the employer conceded that contrary to what had been affirmed by one of the three members of the Committee, there was

documentation to support a change from one contractor (Côté) to another (Meridian) and to support the three increases.

[34] In reply, counsel for the employer called one of the grievor's subordinates, Harold Brillinger. His testimony can be summarized as follows.

[35] He worked as a Marine Project Engineer (ENG-03) from 1990 to 1996. The grievor was his supervisor from 1990 to 1994, after which his supervisor was Woody Wurts from 1994 to 1996, following which Ron Richards supervised him.

[36] Harold Brillinger assisted the grievor, managed small projects and managed the operations of French River Dams. He received site conditions, prepared contract specifications and plans, tendered out the work, supervised or oversaw the work, and ensured compliance. He confirmed that he did not wish to go on site as frequently as the grievor thought he should and, he felt that this requirement affected his family responsibilities. The subject was an on-going issue for a number of years. He also confirmed that he had objected to a performance appraisal (Exhibit A-93) prepared by the grievor.

[37] On the subject of filing, he testified that filing was done by the Project Manager responsible for a particular project. He explained that the box lost in 1992 did not contain Central Record files or project files and that, hence, he never attempted to reconstitute files nor had he been asked to do so by the grievor. He did prepare documents for files on which the grievor was working.

[38] "As a favour to the grievor", he signed a request for progress payment (Exhibit E-5, tab 63). He did sign that an inspection had been done (Exhibit E-5, tab 70) but he did not do the inspection. "As a favour" to the grievor, he also signed an interim certificate of completion (Exhibit E-5, tab 71). He did sign the change order regarding building repairs (Exhibit E-5, tab 72) but, as can be seen, Woody Wurts approved it. It is not his practice to sign "as a favour" when he has not been involved in the work.

[39] At first, he declared never having dealt with the contractor, John Patrick Wolfe, directly, or having met him or dealt with him as a contractor.

[40] In cross-examination, he acknowledged that he had met John Patrick Wolfe and that he had received a quotation for prices from John Patrick Wolfe (Exhibit A-96). He qualified his earlier statement that he did not deal with him and said that he did when requested to do so by the grievor. He acknowledged having met John Patrick Wolfe at a site inspection (Exhibit A-96) but pointed out that it was for a "small job". He acknowledged having signed operation reports, such as Exhibit A-65, and having had discussions with Meridian (John Patrick Wolfe) (Exhibit A-97). He explained his role with respect to certain projects in which he had been involved (Exhibit E-17, tab 287), his signature (Exhibit E-5, tab 70) as well as cost breakdown for fixed price (Exhibit E-5, tab 71). His involvement was limited to transmitting documents in the Tobermory project (Exhibits A-91 and A-92).

[41] Harold Brillinger recalled having complained to management about the grievor's conduct with regards to the use of his telephone, as well as the framing of certificates and the use of a card to park underground. Harold Brillinger affirmed, then withdrew his affirmation, that he had written Exhibit 101.

[42] He affirmed having taken the pictures (Exhibit E-10) at French River Dams as stated in his memorandum (Exhibit E-4, tab 4, p. 92) to Walter Luciw. He said that he had been asked by the latter to take the pictures and make comments because Walter Luciw wanted to review the work done by John Patrick Wolfe and the grievor.

Arguments

[43] The complete written submissions of counsel for both parties are on file.

[44] In summary, counsel for the employer reviewed the evidence and argued that the evidence supported the conclusion that the grievor's termination was merited and that the bond of trust had been broken. The following cases were pointed out: *Armstrong v. Treasury Board (Public Works and Government Services Canada)*, 2000 PSSRB 39 (166-2-27973); *Matthews v. Canada (Attorney General)*, Federal Court, Trial Division file T-623-97 (December 8, 1997); *McIntyre v. Treasury Board (Revenue Canada - Customs and Excise)* (Board file 166-2-25417); *Threader v. Canada (Treasury Board)*, [1987] 1 F.C. 41 (C.A.); *Tipple v. Canada (Treasury Board)*, Federal Court of Appeal file A-66-85 (September 26, 1985).

[45] Counsel for the grievor reviewed the evidence and argued that the documentary evidence was unreliable, that the grievor's practices were condoned by his supervisors (Woody Wurts and Owen Korkhum), that the grievor did not have control over the files and his testimony on the latter point was uncontradicted. She also underlined that the grievor's superiors, including his immediate supervisor, did not testify. The following cases were pointed out: *Vasilas v. Treasury Board (Revenue Canada - Customs, Excise & Taxation)* (Board file 166-2-28149); *Bellavance v. Canada (Human Resources Development)*, Federal Court, Trial Division file T-434-99 (August 15, 2000); *Samra v. Treasury Board (Indian and Northern Affairs Canada)* (Board file 166-2-26543); *Emsley v. Treasury Board (National Defence)* (Board files 166-2-19905 and 20998); *Kulczycki v. Aéroports de Montréal* (Board file 166-2-25766); *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085; *Wallace v. United Grain Growers Limited*, [1997] 3 S.C.R. 701.

Reasons for Decision

[46] This grievance is granted for the reasons that follow.

[47] The matter before me is a disciplinary discharge. The employer had the burden of proof. The employer has failed to meet the onus and to establish on a balance of probabilities that the grievor has engaged in the misconduct alleged in the letter of discipline.

[48] The basis upon which rests this case is documentary evidence. The documentary evidence produced by the employer is incomplete and unreliable. It does not allow the conclusion that the grievor has committed any misconduct.

[49] Both sides agree that the documentary evidence is incomplete. Both parties agree that, as a result, there does not exist an "audit trail". But the question is whose fault is it?

[50] I am not convinced either by the testimonial or documentary evidence that the responsibility lies with the grievor or that he has engaged in any of the alleged misconduct for which he was discharged.

[51] The grievor testified that he put all relevant and required documentation on files. The grievor did not have the exclusive and continuous possession of the files. At times, the files were on his desk and accessible to anyone who came into his office. At

other times, the files were at Central Records, a section situated on another floor and accessible to many persons, including clerks and other employees responsible for the keeping of files. Thus, anyone could have removed documentation from these files including, if that person worked on the premises, the anonymous source whose allegations started this chain of events and investigations as well as any other person in the grievor's working environment.

[52] Basically, I am asked to conclude that, regardless of the fact that the grievor did not have the exclusive and continuous possession of these files, he should be held responsible for the missing documents.

[53] I disagree. These files could have been accessed by a number of persons and the evidence does not support the conclusion that, on the balance of probabilities, it is the grievor and not someone else who removed the relevant and requisite documentation.

[54] I should add that the evidence is not clear on the identity of persons, locations, duration and nature of the control exercised while the Committee itself was in possession of the files.

[55] What is left? What is left is the testimony of the persons who formed the Committee, none of the other witnesses having impugned the grievor's work or conduct, in addition to which the grievor's own supervisor did not testify. In fact, the role of the grievor's supervisor, Woody Wurts, appears to have been ignored altogether and given no weight by the Committee in assessing the grievor's conduct. Yet, documents were found showing that it was he and not the grievor who had made the final decisions in several of the projects.

[56] The testimony of the three members of the Committee was constituted of inferences, hypotheses and conclusions based on incomplete documentation.

[57] For my part, I have not been convinced that, on a balance of probabilities, it was the grievor who was behind the disappearance of the documents. Furthermore, I find that, on the basis of the documentary evidence placed before me, the decisions made by the grievor can neither be confirmed nor invalidated. In addition, some of the evidence produced by the employer has simply confirmed that the evidence is of questionable or unreliable probative value. For instance, in view of Harold Brillinger's

testimony that it was at the request of Walter Luciw that he took the pictures (Exhibit E-10), Walter Luciw's testimony, in evidence-in-chief, that he took the pictures, is called into question as well as his testimony that he physically reviewed the work done.

[58] The overriding consideration in this case is that, without sufficient documentary evidence, the employer cannot prove that the grievor has engaged in misconduct and the grievor is prevented from demonstrating the soundness and integrity of the work he has done on each file and the decisions he has either recommended or made, including not using ACCORD and awarding contracts to John Patrick Wolfe's companies.

[59] This leaves one question: who had the burden of proof? The burden of proof lied with the employer and, although the employer's suspicions and questions may have been legitimate, the evidence is inconclusive and therefore it is the employer who must fail. Hence, I find that the employer has failed to establish, on a balance of probabilities, that the grievor has engaged in any of the misconducts spelled out in the letter of discharge. Therefore, the grievance is granted, the employer is ordered to reinstate the grievor in his position retroactively to the date of his termination and remove any disciplinary reference from his file and to remit to the grievor the salary and other employment benefits from which he has been deprived as a result of this discharge.

**Marguerite-Marie Galipeau,
Deputy Chairperson**

OTTAWA, July 18, 2002.



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