

Files: 166-2-8153 and
166-2-8405 to 8408

PUBLIC SERVICE STAFF RELATIONS ACT
BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

R.M. LISKE,

Grievor,

*copy Bd of
B/F
file Grievance
R.M. Liske
BL
22/3/81*

AND:

TREASURY BOARD
(Department of Transport),

Employer.

DECISION

Before: David H. Kates, Deputy Chairman.

For the Grievor: Catherine H. MacLean, counsel.

For the Employer: Robert Cousineau and Harvey A. Newman, counsel.

Heard in Vancouver on February 19 to 21, April 30, May 1, 2, 5,
and November 17 and 18, 1980.

*ART 7
CODR 402/79*

RELEASE FROM EMPLOYMENT

DECISION

1. This case pertains to a series of references to adjudication filed under paragraph 91(1)(b) of the Act. Mr. Liske has challenged the propriety of the employer's decision to terminate his employ from the Public Service. The grievor has also challenged the employer's imposition of three ten-day suspensions and an indefinite suspension that occurred before his termination. Since the circumstances that gave rise to these grievances are part of one continuous event that culminated in Mr. Liske's discharge, the parties agreed to a consolidation of each of the references to adjudication.

2. Because the evidence that was adduced during the course of these proceedings spans a time frame of approximately seven years, I propose to restrict myself in delineating the circumstances that resulted in the grievor's termination to the most salient facts. In this regard, it should be noted that counsel, prior to the first hearing, presented the adjudicator with an agreed statement of facts enclosing approximately sixty documents. In addition, the parties, during the course of nine days of hearing, adduced further viva voce and documentary evidence. To say the least, the issues that underlied the evidence are both difficult and complex.

3. Mr. Reid Liske, at the material time of his discharge, was employed as an air traffic controller (AI-1) at the employer's airport facility at Kamloops, B.C. The grievor was initially hired as an air traffic control trainee on June 5, 1972. He was licenced as an air traffic controller on September 10, 1973 and has since been employed in this capacity at the Kamloops Control Tower. Mr. Liske's credentials as an air traffic controller were described in evidence as almost impeccable. The sole blemish on his record pertained to an incident referred to me as the P.W.A. Flight episode. Mr. Liske was disciplined for giving false information as to wind direction, speed and runway in use, thereby causing considerable inconvenience to a P.W.A. Flight.

Mr. Liske referred the suspension to adjudication and the employer's decision to discipline was sustained. Counsel for the employer indicated he was not relying on this particular incident to support the employer's case for the grievor's discharge. Nonetheless, the documentary evidence does disclose that the employer's representatives were influenced by the incident in their treatment of the grievor's predicament (see Liske, File 166-2-2898).

4. The reasons for Mr. Liske's discharge are set out in his termination letter dated September 7, 1979 and signed by Mr. Sylvain Cloutier, the then Deputy Minister, Department of Transport (D.O.T.). The letter reads as follows:

Mr. R.M. Liske,
1330 Highland Drive South,
Kelowna, B.C.
V1Y 7R1

Dear Mr. Liske:

You were advised on March 20, 1978 by a letter from Mr. J.S. Melvin, Regional Manager Air Traffic Services that a conflict of interest existed between your duties and your involvement in Kelowna Fun Seekers Ltd. and Fun Seekers Okanagan Ltd. You were directed to divest yourself of all holdings in both companies and to sever all connections with both companies. You were further directed to certify compliance with this direction by means of a sworn affidavit.

Despite a number of opportunities, and my specific instructions to you, which have prevailed over a long period of time, you have persisted in your refusal to disassociate yourself completely from these companies and to eliminate the conflict of interest situation.

Since you have been cautioned on several occasions that failure to comply with this direction would result in severe disciplinary action being taken and because of your continued failure to comply

with my direction, you are hereby discharged from the Public Service effective September 14, 1979.

If you feel this decision is unwarranted, you may present a grievance in accordance with the terms of the AI collective agreement.

Yours sincerely,

Sylvain Cloutier

This letter typed on September 7, 1979.

5. In the autumn of 1970 Mr. Liske was interviewed by Mr. Norman J. Dyck, who at that time was Superintendent of Career and Trainee Development, for a trainee's position in air traffic control. Mr. Dyck is now employed as Superintendent of Operations of Air Traffic Services, Pacific Region, and in that capacity was very much involved in the decision that resulted in Mr. Liske's separation from the Public Service. In 1970, Mr. Dyck considered the grievor, owing to his avid interest in aviation, to be a prime candidate for an air traffic control position. At the interview Mr. Liske disclosed his interest in a modest enterprise located in Kelowna, B.C. The business operated under the corporate name of Kelowna Fun Seekers Ltd. Mr. Liske was the chief pilot, the chief executive officer and major shareholder of the company. On April 3, 1970 the corporation was duly incorporated under the laws of the Province of British Columbia. Kelowna Fun Seekers at that time was described by Mr. Liske as being engaged in the business of renting aircraft for transport. At that time the corporation owned one aircraft and was later to purchase a second. In 1971 Mr. Liske increased his pilot's qualifications by securing commercial and later pilot instructor's licences endorsing his capacity to engage in these endeavours. By June, 1971, Kelowna Fun Seekers (hereinafter referred to as "K.F.S.") was engaged in the business of providing a limited flying training program serving the Kelowna area.

.../4

6. Initially K.F.S. was viewed simply as a flying club. Students purchased a share in K.F.S. as part of their fee for securing flying lessons. The students' purchase of shares represented a commonly accepted manoeuvre to circumvent the requirement for licencing K.F.S. as a certified aviation school by the Air Transport Committee of the Canadian Transport Commission (C.T.C.). As the enterprise grew, K.F.S. was duly licenced by the C.T.C. to operate a specialty flying, training and recreational flying commercial air service based in Kelowna. Moreover, Mr. Liske indicated that owing to the success of the flying school, he also found it necessary on September 23, 1971 to incorporate a second company referred to as Funseekers Okanogan Ltd. (hereinafter referred to as F.S.O.). F.S.O. was described as merely a holding company which was never licenced to operate nor did it ever operate a commercial air service. Mr. Liske was President and the sole shareholder of F.S.O.

7. The evidence indicates that at his interview, Mr. Dyck asked the grievor what he would do with the company (K.F.S.) if he were offered a job. Mr. Liske testified that he evaded a direct answer in suggesting that Mr. Dyck's concerns were premature in that, "I haven't passed the exams yet." Mr. Liske eventually did qualify for an air traffic controller position and was duly hired in that capacity in accordance with the rules and regulations governing the hiring of public servants. At the time of his hiring, it is interesting to note that no formal guideline pertaining to conflict of interest was in existence. Nonetheless, it was the understanding of both Mr. Melvin and Mr. Dyck that when Mr. Liske was posted to the Kamloops Tower on September 10, 1973, his assignment was made for the purpose of avoiding any potential difficulty that might be attributed to the grievor's interests in Kelowna Fun Seekers. Incidentally, Mr. John Stewart Melvin, at all material times, was engaged in the capacity of Regional Manager of the Air Traffic Services Branch, Pacific Region.

Mr. Melvin was Mr. Dyck's supervisor and was very much involved in the decision recommending the grievor's discharge. Mr. Liske testified that he was never advised of any problem potential or otherwise pertaining to his interest in K.F.S. that resulted in his assignment to the Kamloops Tower. He was always under the impression that his assignment was influenced by manpower considerations.

8. Kelowna is approximately sixty miles from Kamloops. During his free time, Mr. Liske continued to perform duties as the chief pilot and the chief flying instructor of K.F.S. I was advised that Mr. Liske commuted between the two cities by air. The Kelowna Tower was described in evidence as being similar to the Kamloops Tower in terms of the air traffic control service that was offered. In August 1974, Mr. Liske submitted a request for a transfer from the Kamloops Tower to the Kelowna Tower. Mr. Melvin testified that the request was denied "in part because of a staff shortage at Kamloops, but primarily because of his business interests in Kelowna." Mr. Liske testified that notwithstanding his numerous requests for reasons for the employer's rejection of his request for the transfer, he was under the impression that the employer's concern was primarily related to a staff shortage at the Kamloops Tower. Moreover, he stated that the request for the transfer was made because of family considerations and had nothing to do with his outside business interests. He was quite emphatic in stating that the employer had never raised his financial interests in K.F.S. as a consideration in denying him his request.

9. In January 1976, the employer distributed to each of its employees in the Pacific Region a circular referred to in evidence as "P.R.A. Circular 39/75, Personnel Policy 75/5 - Conflict of Interest". The document deals generally with the directives and guidelines pronounced by Governor-in-Council on December 18, 1973 under P.C. 1973-4065 and is intended to be adhered to by public servants with respect to any

involvement in external business pursuits. A more detailed reference will be made to this document later in this decision. For present purposes, it suffices to point out the directive places the onus specifically upon the public servant to read and understand the "Conflict of Interest Guidelines" and to sign a declaration to that effect. In addition, the onus rests upon the public servant, if appropriate, to make full disclosure of any outside interest which would create "an actual or potential conflict with the duties and responsibilities of the position occupied." The relevant portion of the Conflict of Interest Guidelines that pertains to disclosure reads as follows:

9. Disclosure

- a. The onus rests on individual employees to provide written details of actual or potential conflicts of interest, including those arising as a result of:
 - (1) changes in financial interests;
 - ...
 - (4) employment, with or without remuneration, outside their official departmental responsibilities.
- b. Disclosure of personal holdings will include and normally be confined to those business, commercial, financial, or property interests which might improperly influence or appear to improperly influence an employee or a perspective appointee...
- c. Employees who consider that they may be involved in an actual or a potential conflict of interest should disclose the details in writing to a grievance step officer classified at or above the Programme Administration 4 or equivalent level and, if circumstances permit, consult with that officer prior to submitting the written disclosure. An

employee may, if he prefers, submit his disclosure directly to the Office of the Deputy Minister.

...

- e. Heads or Deputy Heads of Administrations and Agencies, and officers at or above the level of Assistant Deputy Minister, and persons acting in these capacities will:
 - (1) review and forward disclosure material with their recommendations to the Deputy Minister, through the Assistant Deputy Minister, Personnel;
 - (2) advise the employee and the senior manager concerned in writing of the Deputy Minister's decision;
 - (3) ensure that the employee provides written confirmation of compliance with any required corrective action, and
 - (4) transmit verification of corrective action to the Deputy Minister through the Assistant Deputy Minister, Personnel.

...

- g. The Deputy Minister will retain the authority for the final review of and decision on all written disclosures submitted by employees and prospective appointees, and for the approval of time extensions requested by employees to correct real or potential conflicts of interest.

...

- i. The form at Annex D may be used to make a declaration regarding conflict of interest.

A copy of the declaration that was adopted by the employer under paragraph i. (above) as an incident to the disclosure directives is set out as follows:

ANNEX: D

CONFIDENTIAL
(When Completed)

Declaration - Conflict of Interest

1. I have read the 'Public Servants Conflict of Interest Guidelines' and hereby declare that I hold no business, commercial, financial, property or similar interest(s) which in my opinion might be construed as being in actual or potential conflict with the duties and responsibilities of the position offered/occupied.*

Date: _____ Signature: _____

OR

2. I have read the 'Public Servants Conflict of Interest Guidelines' and hereby disclose the following holding(s) which I fully understand will have to be modified or divested if found to be in actual or potential conflict with the duties and responsibilities of the position offered/occupied:*

Date: _____ Signature: _____

*Delete as appropriate.

10. In compliance with the conflict of interest directives for disclosure, Mr. Liske made the following declarations respectively on January 26, 1976 and February 17, 1977:

I am aware and have read P.R.A. Circular
No. 39/75.

I have read and understood the Conflict
of Interest Guidelines as detailed in
Personnel Policy 75/5.

During the course of his testimony Mr. Liske was asked why he had not disclosed both the scope and nature of his interest in K.F.S. and O.F.S. as anticipated by the Conflict of Interest Guidelines. His response suggested that he did not view these enterprises as creating a conflict of interest with his duties as an air traffic controller.

11. Both Mr. Melvin and Mr. Dyck testified that it has been and continues to be departmental policy to encourage air traffic controllers to cultivate, during their leisure time, an interest in aviation. The employer views it to be of departmental advantage for its controllers to maintain an interest in endeavours related to aviation in order that they keep in touch with the rapidly changing nature of the industry. In this light, the grievor's superiors were prepared to allow Mr. Liske to engage in his outside enterprises while an air traffic controller at the Kamloops Tower, provided the business was restricted to the City of Kelowna. At all material times, both Messrs. Melvin and Dyck appeared to operate on the assumption that this was indeed the case.

12. The practice adopted by Mr. Melvin for the Pacific Region seems to have conformed with the policy adopted at National Headquarters in Ottawa with respect to D.O.T.'s interpretation and application of the Conflict of Interest Guidelines. Mr. Cullen Clifford, Policy Co-ordination Officer at Departmental Headquarters, Transport Canada, testified

that he was responsible for the development of these departmental policies in administrating the Conflict of Interest Guidelines. In Mr. Liske's particular case, he indicated that he authored many of the documents that were presented to his superior, the Deputy Minister, for his signature. In fact, Mr. Clifford recommended, based on his understanding of the relevant facts, Mr. Liske's termination. Mr. Clifford testified that D.O.T. policy allowed an air traffic controller to engage in any outside activity so long as it did not create an actual or potential conflict of interest. In implementing this policy "the general rule of thumb" was to permit involvement by an air traffic controller in a flying enterprise, whether as a proprietor or as an employee, "so long as he is not operating in the primary control zone where he is employed." In Mr. Liske's situation, Mr. Clifford indicated that the grievor's enterprise expanded substantially beyond the geographic area of Kelowna and involved activities that impinged upon "the primary control zone" at Kamloops.

13. The grievor's difficulties began in July, 1977. The employer received a complaint from a Mr. Rudi Bauer of Yellowhead Air Services, Clearwater, B.C. Yellowhead Air Services was an enterprise engaged in commercial aviation including air cargo transport and the operation of a recreational flying school. During the course of pursuing its business, Yellowhead had occasion to use the air traffic control facilities at Kamloops. Mr. Bauer enumerated in a letter addressed to the Regional Administrator of Airways a number of complaints pertaining to the mediocre air traffic control service his enterprise received from the Kamloops Tower. Mr. Liske's name was not specifically mentioned in his letter of complaint. Mr. Bauer alleged that one of Yellowhead's aircraft had been unduly delayed by air traffic controllers at Kamloops, that one of his students had received intimidating instructions from an air traffic controller and that Mr. Bauer personally had been subjected to abuse and embarrassment while training students at Kamloops.

14. Upon receipt of the complaint Mr. Melvin directed an investigation of the allegations and dispatched Mr. R.L. Johannson, an operational specialist, to determine their validity. Mr. Johannson in due course inquired into the situation and for the most concluded that the allegations were either without foundation or were impossible to substantiate. Nonetheless, during the course of his interview with Mr. Bauer, Mr. Liske and his enterprise were discussed in the context of an alleged "apparent conflict of interest" with his duties as an air traffic controller. The gist of Mr. Johannson's report indicated that Mr. Bauer viewed Mr. Liske's corporate enterprise to be in competition with his own and that certain advantages accrued to the grievor that were directly attributable to his position as an air traffic controller. Mr. Johannson emphasized in his report that Mr. Bauer's allegations of a conflict of interest were serious but would have to be supported by "hard evidence". He concluded his report (dated August 22, 1977) by making the following recommendation:

Considering the wording of the conflict of interest guidelines however (no conflict should exist or appear to exist), I think this situation warrants continued close scrutiny.

15. Mr. Melvin testified that he adopted Mr. Johannson's suggestion and characterized it as good advice. By this time a second letter of complaint had been received by Mr. Bauer complaining in essence that both Mr. Liske and Mr. Bourne were undermining his business. Mr. Bourne at the time was an air traffic controller employed at the Kamloops Tower and was a part-time flying instructor engaged by Kelowna Fun Seekers. Mr. Bauer was not satisfied with the Department's initial response to his complaint and insisted that his allegations be treated more seriously. Mr. Melvin indicated that he was very much concerned about the conflict of interest allegation both in terms of the public's perception of the

Department and the professional comportment of an air traffic controller under his responsibility. Accordingly, he directed Mr. Dyck to conduct another investigation and attempt to get at the root of the matter.

16. Mr. Dyck did not simply confine his investigation to an interview of Mr. Bauer of Yellowhead Air Services at Clearwater. The scope of his inquiry was much wider. He also visited Mr. Gordon Darnbrough of Northland Aviation Ltd., Kamloops, and Mr. A. Giesbrecht, Central B.C. Air Services, Kamloops. Mr. Dyck asked each of the persons interviewed to commit in writing any information that was adduced that would support or amplify the complaint that was advanced with respect to the scope and nature of the grievor's enterprise. Such information was eventually mailed to Mr. Dyck and formed a part of his report.

17. Because the employer's counsel is relying solely upon the allegation that Mr. Liske at all material times was properly concluded to have engaged in an "apparent" conflict of interest, it is not necessary for me to detail Mr. Dyck's report and the supporting documentation arising out of his investigation. Simply put, the employer relied at the hearing upon the plausibility of the allegations in arriving at its conclusion of the existence of an apparent or perceived conflict of interest on the grievor's part. Accordingly, the employer conceded at the outset that the allegations advanced by Mr. Bauer of actual wrongdoing by Mr. Liske could not be proven. In this regard, it is also worth noting that prior to the commencement of these proceedings, Mr. Bauer was involved in a plane crash from which he did not survive. The documents arising out of Mr. Bauer's complaint were admitted as evidence in these proceedings for the very limited purposes expressed by counsel in the advancement of the employer's case.

18. The list of allegations that were determined to be sufficiently credible by the employer's representatives in arriving at the ultimate

conclusion that Mr. Liske was engaged in an apparent conflict of interest may be summarized as follows:

- (i) Mr. Liske, at all material times, was conducting through K.F.S. an aviation flying school, a recreational flying service and an air transport service out of the Kamloops airport and in the surrounding areas of Clearwater and Salmon Arms, B.C.;
- (ii) Mr. Liske allegedly engaged in a campaign to disparage his competitor, namely Mr. Bauer, by questioning his credentials as a pilot;
- (iii) Mr. Liske allegedly harrassed and intimidated, while performing air traffic control services, the students of a competitive flying school;
- (iv) Mr. Liske, allegedly while performing air traffic control duties, accorded preferences on landing and take-off privileges of air-planes operated by his own flying school students;
- (v) Mr. Liske, while employed as an air traffic controller, had access to information (e.g. flight schedules, etc.) that would confer an advantage over his competitors in securing business;
- (vi) Mr. Liske, during the course of his duties as an air traffic controller, used departmental facilities such as the air control radio frequencies to arrange appointments with his students;

- (vii) Mr. Liske's enterprise while an air traffic controller was not restricted to operating a flying school but included leasing his aircraft in competition with other air carriers for purposes of air cargo transport and for flying fire patrols.

19. Following receipt of Mr. Dyck's report dated September 8, 1977, Mr. Melvin advised Mr. Liske of his concerns and arranged a meeting. Prior to the meeting, he asked Mr. Liske to update his conflict of interest declaration. A meeting was scheduled for November 16, 1977 in order "to give Mr. Liske the opportunity to discuss informally our concerns about a conflict of interest situation regarding K.F.S." In due course, a declaration of conflict of interest dated October 19, 1977 was signed by Mr. Liske indicating under paragraph 2:

I own a 70% interest in a general aviation company - Kelowna Funseekers Ltd., Kelowna Airport, Kelowna, B.C. I do not hold any other aviation related assets.

20. At this juncture it is perhaps appropriate to describe the nature of the grievor's business interests as he described them during his testimony. At all material times, he was the President and Chief Pilot and Flying Instructor of K.F.S. By 1977, K.F.S. owned three airplanes and leased three others. The company had as many as five employees, including Mr. Bourne who assisted him with flying instruction services. He had as many as fifty students enrolled in his flying school. K.F.S. also provided recreational flying services that included flying tours of the British Columbia interior. Mr. Liske did not contradict the allegation that flying instruction was carried out in the Kamloops vicinity. Moreover, he did not deny that he "dry" leased K.F.S. aircraft to Central B.C. Air Services for fire patrol and cargo transport purposes

in the Kamloops, Salmon Arms and Clearwater regions. In addition, Mr. Liske did not challenge the fact that he hired himself out as a part-time pilot to B.C. Air Transport for the purpose of engaging in air transport and other services. Of utmost importance, Mr. Liske did not make any effort to dissuade me of the notion that he failed to make full and appropriate disclosure of his extra-curricular business pursuits, as was his duty under the Conflict of Interest Guidelines.

21. On November 16, 1977 Mr. Liske met with Mr. Melvin in the company of Mr. Dyck, Mr. English (Regional Manager, Personnel for the Pacific Region) and Mr. Derek Smyth. At the meeting Mr. Melvin indicated that a discussion ensued with respect to the grievor's objectivity as an air traffic controller owing to a potential conflict of interest attributable to his personal enterprises. Mr. Liske denied the validity of any of the complaints that were filed by Mr. Bauer. Mr. Melvin did mention that he discerned from the discussion that there might have been "a great deal of personal enmity" between Mr. Bauer and Mr. Liske. At the close of the meeting Mr. Liske was cautioned to maintain a "low profile" in the conduct of his outside business interests until such time as his predicament was resolved.

22. A detailed memorandum dated November 28, 1977 to Mr. K. Johnson, Acting Regional Administrator, was authored by Mr. Melvin setting out his perception of the grievor's predicament and his recommendation as to the manner in which the difficulty should be resolved. Mr. Melvin (as well as Mr. Dyck) was subjected to intensive cross-examination on the contents of the memorandum. Notwithstanding the nature of the cross-examination, the credibility of Mr. Melvin and Mr. Dyck remained unshaken with respect to their ultimate motive in striving on the one hand to protect the integrity of the air traffic control service offered by the employer in the Pacific Region, and on the other hand, to preserve the grievor's employment status as an air traffic controller. The evidence disclosed,

particularly during the course of the grievor's testimony, that some personal acrimony existed between Mr. Melvin and Mr. Liske. Even so, Mr. Liske indicated that the meeting of November 16, 1977 was conducted in a professional manner irrespective of his personal dislike of Mr. Melvin. It appears that Mr. Melvin in the drafting of the memorandum was not about to suggest that the employer necessarily inconvenience itself in striving to accommodate the grievor's employment status with his outside business interests. In substance he recommended that, owing to an allegedly potential conflict of interest, Mr. Liske should be urged to divest himself of his business interests should he wish to continue to remain a public servant. The memorandum concludes:

...we feel that Mr. Liske's operation of Kelowna Fun Seekers Ltd. has been such that it has reflected unfavourably on him as an air traffic controller and on Transport Canada as a whole. The standard and objectivity of control personnel at Kamloops Tower has been questioned. There is a distinct possibility that Transport Canada facilities have been misused to further Mr. Liske's aviation interests. Aside from the fact that our investigation has brought to light a number of items that may require some disciplinary action on our part, we submit that a strong conflict of interest exists and recommend that Mr. Liske be asked to either divest himself of all interest in Kelowna Funs Seekers Ltd. and Fun Seekers Okanagan Ltd. or that action be taken to terminate his employment with Transport Canada.

23. Mr. Melvin's recommendations were adopted by the Acting Regional Administrator in a memorandum dated November 28, 1977 to the Deputy Minister. The memorandum authored by Mr. K.A. Johnson reads as follows:

28 November 1977

Conflict of Interest - R.M. Liske

The attached report documents, in my opinion, conflict of interest of an employee of this Region. My recommendation is that he be directed to divest himself of the interests that are causing the conflict or leave the Department.

The option of moving the employee to another location is not recommended. His present location was chosen to separate him from his business interests but he has brought those interests with him. If he is moved we would expect that his business interests would follow him. His record as an employee is not good and it would not be in the interest of the Department to go out of its way to accommodate his business endeavours.

Specifically, the employee appears to be in violation of five of the seven Conflict of Interest Guidelines (PC 1973-4065):

Guideline No.

1. He has a pecuniary interest that could conflict with his official duties.
2. Conflict appears to exist between his private interests and his official duties.
3. He has appeared to benefit from the use of information acquired during the course of his official duties, which information is not generally available to the public.
4. He did not disclose some of his business interests where such interests might conceivably be construed as being in actual or potential conflict of interest with his official duties.

5. His outside employment could place on him demands inconsistent with his official duties.

The employee seems to have met most of the legal requirements of conducting his business. At the same time, the aviation community in the area of his operations sees him as having a conflict of interest.

I trust that this submission provides the information necessary to bring the matter to a conclusion.

Ken Johnson
Acting Regional Administrator

24. The Deputy Minister in a memorandum dated February 3, 1978 to Mr. W. McLeish, Head of Canada Air Transportation Administration, Ottawa, advised him of his conclusions with respect to Mr. Liske's outside business interests. Mr. McLeish, as the memorandum indicates, is asked to implement the Deputy Minister's directive which was designed to have an obvious impact on the grievor's business dealings:

Memorandum to: Mr. W. McLeish Feb 3, 1978

Re: Conflict of Interest - R.M. Liske

Concerning the conflict of interest disclosure of Mr. R.M. Liske, this is to advise that I consider that a conflict of interest exists between Mr. Liske's duties as an employee of Transport Canada and his outside holdings in Kelowna Fun Seekers Ltd. and Fun Seekers Okanagan Ltd. Specifically, I consider that these holdings call into question Mr. Liske's capacity to perform his duties in an objective manner and that they place him in a position where his clients may seek to gain special treatment from him in the course of his official duties.

I hereby direct that Mr. Liske divest himself of all holdings in Kelowna Fun Seekers Ltd. and Fun Seekers Okanagan Ltd.

within three months of the date on which he is informed of my decision. Furthermore, I require that when Mr. Liske has divested himself of these holdings, he inform me that he has done so by means of a sworn affidavit in which he is to confirm that the divestiture has taken place, that he is no longer connected with these companies in any way, and that he derives no further profit from them, either directly or indirectly.

Would you please take steps to ensure that this decision is conveyed to Mr. Liske and that I receive Mr. Liske's confirmation of compliance with the corrective action I have directed.

Sylvain Cloutier

25. In due course Mr. Melvin by letter dated February 24, 1978, advised Mr. A.R. Husband, Chief, Kamloops Airport Control Tower, (i.e. the grievor's immediate supervisor) to inform Mr. Liske of the Deputy Minister's ruling. The receipt of the letter is seen to have been acknowledged by Mr. Liske on March 20, 1978:

February 24, 1978

Mr. A.R. Husband
Chief, Kamloops
Airport Control Tower
Transport Canada
2960 Aviation Way
Kamloops, B.C. V2B 7W1

RE: Conflict of Interest - R.M. Liske

As you are aware, the subject of Mr. R.M. Liske's possible conflict of interest was referred to the Deputy Minister for decision.

The Deputy Minister has issued the following ruling and direction in this matter:

It is considered that a conflict of interest exists between Mr. Liske's duties as an employee of Transport Canada and his outside holdings in Kelowna Fun Seekers Limited and Fun Seekers Okanagan Limited. Specifically, it is considered that these holdings call into question Mr. Liske's capacity to perform his duties in an objective manner and that they place him in a position where his clients may seek to gain special treatment from him in the course of his official duties.

Mr. Liske is directed to divest himself of all holdings in Kelowna Fun Seekers Limited and Fun Seekers Okanagan Limited within three months of the date on which he is informed of this decision. When he has divested himself of these holdings, he is required to inform the Deputy Minister that he has done so by means of a sworn affidavit in which he is to confirm that the divestiture has taken place, that he is no longer connected with these companies in any way, and that he derives no further profit from them, either directly or indirectly.

Please insure that this decision is conveyed to Mr. Liske and acknowledged and that we receive his confirmation of compliance with the corrective action as directed.

For your convenience, we are enclosing three copies of this letter - one for Mr. Liske's retention, a second for your unit files, and a third, which is to be signed by Mr. Liske acknowledging receipt of the decision and returned to this office.

J.S. Melvin
Pacific Regional Manager
Air Traffic Services

(Reid M. Liske)
Signature of Employee

March 20/78
Date Received

(A.R. Husband)
Chief, Kamloops Tower

Received March 20, 1978

26. By letter dated March 27, 1978, Mr. Liske initiated a strategy to convince the Deputy Minister to reverse his ruling. He asked Mr. Husband to request that his superiors in Air Transport supply him with all correspondence and other documentary evidence relating to the Deputy Minister's conclusion that he was engaged, by virtue of his private business pursuits, in a conflict of interest with his duties as an air traffic controller. To represent him in his efforts to nullify the Deputy Minister's decision, the grievor retained counsel, Mr. D. Coates of Robinson, Morelli, Barristers and Solicitors, Kamloops, B.C. By letter dated May 16, 1978 addressed to Mr. Coates, Mr. Melvin is seen to offer counsel his cooperation with respect to furnishing any information relevant to his client's predicament.

27. The record of these proceedings show that for a period of approximately twenty months (between March 1978 and September 1979) Mr. Coates and various representatives of Air Transport were in constant communication both by telephone and through written correspondence on the subject matter of the Deputy Minister's directive. The grievor indicated that his objective in retaining Mr. Coates to act on his behalf was not so much to undermine the Deputy Minister's ruling but to expose the perceived unfairness of the procedures adopted by him prior to reaching his conclusion. Mr. Liske indicated that he had every intention of complying with the Deputy Minister's directive to divest provided that was Mr. Cloutier's conclusion after a fair hearing. His appeal for reconsideration of the ruling was a matter of principle in that he felt he was a victim of circumstances. The employer's representatives indicated that as events ensued they viewed the strategy adopted on behalf of Mr. Liske by counsel as a ploy to delay, impede and ultimately frustrate the Deputy Minister's directive to divest. Mr. Coates, it should be emphasized, was not called as a witness to give evidence in these proceedings.

28. In early June 1978, Mr. Coates asked for an extension of the deadline of three months (due to expire on June 20, 1978) allowed Mr. Liske to comply with the Deputy Minister's directive in order to permit counsel to investigate all the facts. This request was repeated in a letter to Mr. Melvin dated June 9, 1978 and whose contents outline the basis of Mr. Coates' grounds for persuading the Deputy Minister to reconsider. Without detailing those grounds, it appears that Mr. Coates treated the process by which the Deputy Minister arrived at his conclusion as some form of quasi-judicial proceeding analagous to a court of record. For example, he states:

...It is my preliminary opinion that a full and formal hearing relating to Mr. Liske's duties and alleged conflict of interest should be held and that the hearing should be chaired by the Deputy Minister, Mr. Cloutier. It would appear from the information I have received from Mr. Liske that this opportunity to present all of the material he considers relevant and to rebut any evidence put forward by your department was not afforded him and, in fact, that both the investigation and the hearing was dealt with in a reasonably loose manner and not in a manner which would allow Mr. Liske his normal privileges with respect to the matters to be dealt with at such a hearing... I think that if the Deputy Minister is making decisions that the recommendations and evidence presented to him should have been made available to Mr. Liske and the direct communication indicating his decision and reasons for it should have been provided to Mr. Liske. It becomes quite unusual, in my opinion, for such serious rulings to be made in such an obscure manner.

29. Whatever the merits of Mr. Coates' submission, he succeeded in persuading the employer's representatives in Ottawa to extend the deadline by seven days from the receipt of his correspondence (dated June 14). The record further indicates that the extension was not communicated to

Mr. A.A. Bach, the then newly appointed Pacific Regional Administrator. For, by letter dated June 21, 1978, Mr. Bach presented the grievor with an ultimatum of complying with the directive to divest (with a signed affidavit to that effect) or face suspension "until such time as you have provided satisfactory evidence that the required divestiture has taken place." Mr. Bach later withdrew the ultimatum upon learning of the extension conferred by the employer. Nonetheless, Mr. Bach's letter is indicative of the employer's dominant purpose at that time. That is to say, Mr. Bach's letter was not written for the purpose of securing Mr. Liske's termination under the pretext of accusing him, in a mal fides manner, of an apparent conflict of interest. It shows that the ultimate objective was to retain Mr. Liske as an employee so long as compliance was made with the Deputy Minister's directive.

30. By letter dated July 19, 1978, Mr. Coates submitted to Mr. Bach a number of documents indicating that Mr. Liske had resigned as officer of K.F.S. and F.S.O. and had taken the necessary steps towards divestiture in compliance with the employer's wishes. Absent in the letter was a sworn affidavit confirming that Mr. Liske had divested himself of all his holdings in the companies. Mr. Coates concluded his letter by saying:

These transfers and resignation of Mr. Liske are made under protest and made without prejudice to his dispute with yourself and your department. He does not acknowledge either that you have the authority to make such an order or that if you do have such authority that you have exercised it in a proper manner.

We have instructions from Mr. Liske to commence legal action against Transport Canada and the individual management personnel involved in this unless we have confirmation that a full and proper hearing will be held in Kamloops without delay, at which time the position of all parties and complaints of all parties

can be examined publically and properly.
We do not acknowledge, at this time, that
the terms of his employment bind him to
any conflict of interest rules.

It can be discerned from counsel's letter that not only was the propriety of the procedures adopted by the employer to compel the grievor's divestiture being challenged, but also the employer's very authority to bind the grievor to any conflict of interest directive.

31. The transaction negotiated by Mr. Liske that compelled the conclusion that he had complied with the employer's directive ought to be described. Mr. Graham Dolynuk was a junior shareholder in K.F.S. and was employed as a flying instructor. Mr. Dolynuk was a qualified pilot and was licenced to teach aviation flying to students. Owing to the pressures exerted upon him to dispose of his companies, on July 20, 1978 Mr. Liske negotiated their sale to Mr. Dolynuk. Both Mr. Dolynuk and the grievor were counselled in the transaction by Mr. Coates. Mr. Dolynuk signed a promissory note in the amount of \$56,500.000 representing the perceived value of the business. No deposit was paid. The terms of the sale were verbal and were to be confirmed in writing at a later date. The note was to bear interest at 12% "to commence one year from the date of this note." Mr. Liske conceded he never collected any payment pursuant on the note and indeed the evidence indicates that he had no intention of collecting any monies under the note.

32. Mr. Liske testified that Mr. Dolynuk was intended to hold legal ownership of the companies while he withdrew from performing any of the company's managerial functions. He was to remain employed by K.F.S. as the chief pilot on a part-time basis. While the companies were under the legal ownership and control of Mr. Dolynuk, it was anticipated that at a future date another buyer could be found. One of the problems

confronting Mr. Liske at the time was the low market value of the company owing to the company's particularly unfortunate fiscal year. In short, for the reasons cited by Mr. Liske during the course of his testimony, the market was not propitious with respect to the sale of K.F.S. at the specific moment when the employer required that the grievor divest. Once a suitable purchaser could be found at the right price, then Mr. Dolynuk was expected to discharge the obligations assumed under the promissory note.

33. Mr. Liske was subjected to intensive and effective cross-examination by Mr. Newman on the genuineness of the transaction. The evidence indicated that Mr. Liske, to all intents and purposes, remained at least for the short term in effective control of the company. He performed and discharged all of the managerial, administrative and financial obligations of operating the enterprise. Of course, by necessity he remained the chief pilot of K.F.S. in order that the company's "C.T.C." licence and endorsement could be maintained. Moreover, no effort was made to secure C.T.C. approval for the sale of the companies (perhaps for obvious reasons) as is required under the Regulations of the National Transportation Act. Indeed, it was not until one year later on July 18, 1979 that a formal agreement (backdated to July 18, 1978) between Mr. Dolynuk and Mr. Liske for the purchase and the transfer of shares of the company was entered into. Mr. Newman established during the course of his cross-examination of Mr. Liske that the promissory note was actually signed by the parties on July 20, 1979 but was changed and initialled to read July 20, 1978. Mr. Liske explained that the transfer agreement was backdated for purposes of applying to the C.T.C. for the necessary approval of the sale to Mr. Dolynuk. He made every effort to assure me that no fraudulent objective was intended. He indicated to me that a promissory note was legitimately entered into on the date shown (i.e. July 20, 1978) and was kept in his briefcase during the ensuing months. In February 1980, Mr. Dolynuk was hired by Air Canada as a pilot. As a result, another "buyer" had to be found. The new purchasers of the shares turned out to be Ms. Nancy Davis

and Mr. Daniel Johnson, employees who were hired by K.F.S. in administrative capacities.

34. Without commenting further upon the dubious legal effect of the "paper transaction" consummated with Mr. Dolynuk, Mr. Liske relied upon that transaction as grounds for supporting the claim that he had divested himself from K.F.S. as directed by the employer. As counsel indicated, he did so without prejudice to any claim he may have had at law with respect to the employer's authority to have imposed that directive. Mr. Cloutier, the Deputy Minister, was not impressed with the documentary evidence dispatched by Mr. Coates to support the claim that Mr. Liske had complied with the directive. On August 10, 1978 the Deputy Minister writes:

...

After a review of the above-mentioned documents, I have to inform you that these documents are evidently unsatisfactory; I expected to receive at least certified copies of these documents and confirmation by a Transfer Agent that the shares concerned were effectively transferred.

Furthermore, Mr. Liske was informed on more than one occasion that he was required to provide me with a sworn affidavit in which he was to confirm that he had divested himself of all his holdings in the companies concerned, that he was no longer connected with these companies in any way and that he would be deriving no further profit from them, either directly or indirectly.

Finally, I should appreciate receiving a copy of the letter of the Registrar of Companies acknowledging that notice of change of director has been received and filed.

...

Mr. Cloutier concludes by indicating that should the necessary documents not be advanced he would follow through on the employer's ultimatum to

impose disciplinary sanction. It is interesting to note that one of the concerns expressed by the Deputy Minister pertained to "confirmation by a Transfer Agent that the shares were effectively transferred." Of course, Mr. Liske admitted that such confirmation was not fulfilled until July 18, 1979 (albeit the document was backdated to read July 18, 1978) when a formal bill of sale was signed.

35. Notwithstanding Mr. Cloutier's ultimatum, the evidence indicates that by September 23, 1978, the required compliance had not been fulfilled. Mr. Bach proceeded to impose a month's suspension. Moreover, it was further indicated in the letter advising the grievor of his suspension that "...if you complete the divesting in these two companies prior to October 14, (i.e. the expiry date of the suspension) you will be permitted to return to duty immediately." Of course, if he did not divest by that time, Mr. Bach informed him that severer sanction including discharge may be imposed. Then on September 25, 1978, Mr. English wrote Mr. Coates to inform him that "the suspension of Mr. R.M. Liske is delayed until October 6th to permit the necessary processing of the documentation to comply with the terms of the Deputy Minister of Transport."

36. By letters dated October 31 and November 1, 1978 to the Deputy Minister, Mr. Coates forwarded certified copies signed by the Registrar of Companies, Province of British Columbia, confirming the corporate transfer of shares in K.F.S. from Mr. Liske to Mr. Dolynuk and an affidavit, required by the employer, evidencing Mr. Liske's divestiture from the company. The employer at all material times insisted that the affidavit contain a statement, endorsed by Mr. Liske, indicating that "he was no longer connected with this company in any way..." The affidavit dated November 1, 1978 was signed by Mr. Liske and contained no such undertaking. Indeed, the affidavit revealed that the transaction for the transfer of the shares in the company to Mr. Dolynuk still remained

to be finalized "...by December 31, 1978, the year-end of Kelowna Fun Seekers Ltd." Mr. Coates followed these last letters with another letter dated November 7, 1978 where he is somewhat critical of the employer's perception that "Mr. Liske had had ample opportunity to present his case" with respect to the finding of his conflict of interest. Of course, the evidence disclosed that the conflict of interest allegations were presented to Mr. Liske at the meeting held on November 16, 1977. He goes on to say:

Surely we can assume in this country that if an employee, whether it be by the government or otherwise, is to be dealt with on a very serious matter and asked to dispose of an asset which he has spent substantial number of years of his lifetime building up, that he is at least entitled to have whatever issue is to be heard, heard in a proper manner and in a form wherein he can be represented and call evidence and in a form where he has an opportunity to question and cross-examine any persons making applications about him either directly or indirectly.

Also I would suggest to you that if in fact, under the terms of your appointment, you are given the responsibility to make decisions based on a hearing that you should actually be present at the hearing and hear the evidence.

It is my information from Mr. Liske that, in fact, the investigation was carried on in a very haphazard manner, that at one time he was brought to Vancouver to a hearing but it was not one where he could properly put forward his case or where he could examine the persons who had made the complaints. I think that if Mr. Liske's case is at all typical of what goes on within your department that it is reprehensible that employees and Canadian citizens would be treated with such disrespect.

37. After a delay of approximately five months, Mr. Coates, on March 7, 1979, received an affirmative reply from the Deputy Minister acceding to his request for a rehearing of the issue. During this entire period dating from the Deputy Minister's initial directive received by Mr. Liske on March 20, 1978, the grievor continued to perform in the capacity of chief pilot the very significant responsibilities of managing and operating the affairs of K.F.S. At the same time, the evidence is also clear that the Deputy Minister, because of the information advanced to him by counsel, appears to have operated on the assumption that Mr. Liske had indeed divested himself of K.F.S. All that appeared to remain for Mr. Liske to do, in the event that the Deputy Minister reaffirmed his original decision, was to perfect his affidavit affirming that he had severed all connection with K.F.S. Mr. Cloutier's letter dated March 1, 1979 to Mr. Coates reads in part:

Attention: Mr. D. Coates

Dear Sir:

Re: Conflict of Interest - R.M. Liske

This is in reply to your letter to me of November 7, 1978 concerning the above-noted topic. After considering your request for a new investigation of this matter, and with the advice of Departmental legal counsel, I have decided that Mr. Liske should be given an opportunity to present his case anew in order that he may be fully satisfied that he has been fairly heard. To this end, I have directed Mr. A.A. Bach, the Regional Administrator of the Pacific Region, C.A.T.A., to convene a meeting with Mr. Liske, yourself, a union representative and a regional representative of the Department of Justice at which

.../30

Mr. Liske or his representative will be invited to present the full details of this case for my consideration.

...

In that regard, I would add two points. First, until such time as I may see fit to direct otherwise, my original decision in this matter still stands. Consequently, Mr. Liske may not re-invest in his former enterprises until further specific notice from me that he may do so. Second, I did not find the affidavit by Mr. Liske and dated 1 November 1978, an entirely satisfactory document to comply with my direction of 8 February 1978 and the Departmental legal counsel is in agreement. Accordingly, should I eventually confirm my original decision in this case, Mr. Liske would be required to swear a new affidavit drafted by the Departmental legal counsel.

Yours sincerely,

Sylvain Cloutier

(Emphasis added)

39. On April 12, 1979 a "hearing" held for the purpose of permitting Mr. Liske to "present your case anew" took place. In attendance representing the employer were Messrs. Melvin, Dyck, English, Smith and Heinmiller. The latter was a solicitor seconded by the employer from the Department of Justice. Mr. Coates represented the grievor. The meeting was chaired by Mr. Bach. Minutes of the meeting were prepared by Mr. English. The parties appear to have discussed and reviewed the employer's charges, the conflict of interest guidelines and the supporting evidence that impelled the employer's conclusion of Mr. Liske's "apparent" conflict. Mr. Coates indicated for purposes of the meeting

.../31

that he simply was appearing for the purpose of being advised of the basis of the employer's conclusions. He expressed the intention to submit written representations on all relevant matters at a later date. Indeed, the meeting terminated with Mr. Coates indicating that "a brief would be submitted by Mr. Liske by May 4, 1979, responding to all items raised in the meeting and in the documentation."

40. The evidence disclosed that Mr. Coates never discharged his undertaking to submit a written brief. On May 3, 1979 he asked Mr. Bach to grant a two-week extension "to file our report while we continue to review the material." Mr. English replied by telex (dated May 14, 1979) refusing the request for the extension, indicating "...you are advised that (the) report is required immediately and that any further delay could result in the Deputy Minister being informed that no report has been received." Mr. Coates replied by telex (dated May 16, 1979) confirming that "(the) letter of submission will be sent by Loomis on Friday, May 18, 1979." No report arrived. On May 31, 1979 Mr. Bach wrote Mr. Liske indicating that "As this brief has not been received, you are advised that unless the attached affidavit (indicating his severance from all connection with K.F.S. and F.S.O.) is signed, sworn and returned to this office by June 13, 1979, you will be suspended from your position without pay for an indefinite period effective June 14, 1979." Moreover, it was indicated that failing receipt of the affidavit, "a recommendation for termination of your employment with the Public Service may be initiated."

41. Although the correspondence shows that Mr. Liske is given an ultimatum to file his affidavit by June 14, 1979, the time consumed by the exchange of correspondence effectively generated a delay of over

a month beyond the May 4 deadline established for the submission of a brief. Mr. Coates was described in evidence as a very busy but disorganized solicitor. Mr. Liske testified that he relied upon counsel completely to represent his interests in the matter and entrusted to Mr. Coates his fate in resolving the issue. Whatever the justification for his failing to file a brief, Mr. Coates was not called as a witness to provide me with any explanation. The mood of the employer with respect to the Liske issue from that point forward changed from tolerant consideration to outright impatience. Mr. Melvin testified that he became more than suspicious that the grievor's tactic was to delay, postpone, and frustrate the necessity for compliance with the Deputy Minister's directive. In short, the employer's representatives were being persuaded by counsel's actions of being duped and deceived. These suspicions were confirmed by subsequent events. For example, on June 1, 1979 Mr. Coates advised Mr. Bach by telex "...my understanding of the procedure is that you would submit a new report following (the) hearing which may or may not include my written submission. Confirm if this is or is not correct." Nothing on the record demonstrated that this notion represented an accurate view of the purpose of the proceedings that took place on April 12, 1979.

42. On June 12, 1979 Mr. Coates forwarded a statutory declaration purportedly in compliance with the employer's direction. The ensuing period was consumed in debate between departmental representatives and Mr. Coates with respect to whether it was a requisite for purposes of compliance with the directive for Mr. Liske to attest under paragraph 3 of the affidavit:

I am no longer connected in any way with
Kelowna Fun Seekers Ltd. and Fun Seekers
Okanagan Ltd.

The implication of paragraph 3 of the affidavit was clear and unequivocal. Mr. Liske was no longer to be permitted employment by K.F.S. as its chief pilot. The evidence, as I understand it, suggested that if this transpired, K.F.S. would, owing to C.T.C. regulations, lose its endorsement allowing it to provide flying training services until such time as a new chief pilot could be retained. But whatever the reason, Mr. Liske deferred signing the affidavit in the form prescribed by the employer. Instead he signed the affidavit without supplying the employer with any advance explanation for the additional sentence amending the employer's requirement:

I am no longer connected in any way with Kelowna Fun Seekers Ltd. or Fun Seekers Okanagan Ltd. The intended meaning of "connected" is as a shareholder, investor officer or manager.

43. The employer's response to the affidavit was immediate and decisive. On June 14, 1979 Mr. Bach writes Mr. Liske

...

I acknowledge receiving, on June 13th, 1979, an affidavit which you have signed incorporating the words - "the intended meaning of 'connected' is as a shareholder, investor, director, officer or manager" in paragraph 3 of same. The addition of these words by you would entitle you to be connected with the companies referred to in paragraph 3, as an employee of same. This is not acceptable as you will recall that the former Manager of Air Traffic Services, Mr. J.S. Melvin, told you on March 20th, 1978, that you were to inform the Deputy Minister, by means of a sworn affidavit, that you are no longer connected in any way with these companies.

You are hereby advised that I am suspending you without pay for 10 working days

(Emphasis added)

.../34

effective June 15, 1979 for contravening the Public Servants Conflict of Interest Guidelines in failing to demonstrate that you are no longer connected with the companies in question as an employee or otherwise. The dates are as follows:

You are further advised that a recommendation has been made to the Deputy Minister of Transport that you be suspended until such time as you can inform us by affidavit that you are no longer connected in any way with the companies in question. Should the affidavit not be completed and returned within a reasonable period of time, a recommendation for termination of your employment in the Public Service may be initiated.

44. Mr. Coates responded to the employer's letter by advising that the ten-day suspension would be grieved and that a civil action for damages would be initiated arising out of the losses incurred by Mr. Liske as a result of the Department's actions. Mr. Melvin and Mr. English were accused of conducting a "personal vendetta" against his client. But of some significance, Mr. Coates embarks upon an explanation of why he added the impugned sentence to paragraph 3 of the affidavit. The letter omits to mention that the employer's approval of the affidavit as formulated by counsel would enable Mr. Liske to continue his employment with K.F.S. as its "chief pilot":

...

You mention in your June 14th letter that the affidavit was received and that the word "connected" as an essential portion of the affidavit (sic). In my opinion the word "connected" is not a legal term as in proper legal definition and its use was clarified at my suggestion. If you would advise what other areas on "connection" you are concerned about we will consider them and perhaps exclude them. I would take exception to the use of the word "connected" without

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some over-riding definition. I would take issue with any allegation that the term "connected" is one to be used in an affidavit type of document.

...

45. Mr. Bach's letter replying to Mr. Coates' dated June 26, 1979 serves not only to reflect the employer's continuing concerns about Mr. Liske's business interests but also to underline Mr. Liske's failure to appreciate the very reason he was asked to divest himself of K.F.S. Mr. Bach writes:

...

It is obvious from our discussions throughout in this matter, both with you and Mr. Liske, that the form of the affidavit which you submitted on June 11th would permit Mr. Liske to continue doing things in connection with the company which would create a conflict of interest or at least be perceived as a conflict of interest.

...

(Emphasis added)

46. Since no sworn affidavit was received in the form required by the Department by the expiry date of his first ten-day suspension, a second ten-day suspension was imposed with the concomitant warning that unless the employer's requirement for the affidavit was satisfied, "...action to discharge you from the Public Service may be initiated." Apparently, the second ten-day suspension prompted Mr. Coates on July 16, 1979 to forward an amended affidavit, signed and sworn by Mr. Liske. The controversial paragraph now read:

3. I will be applying for work from Kelowna Fun Seekers Ltd., Fun Seekers Okanagan Ltd. or any other aviation company I may chose strictly as a part time employee.

.../36

4. I am no longer connected in any way with Kelowna Fun Seekers or Fun Seekers Okanagan Ltd. (subject to my statement set out in #3 above).

47. The employer's reaction to the amended affidavit was again both swift and decisive. Mr. Bach advises Mr. Liske by telex dated July 17, 1979:

Your statutory declaration dated July 16, 1979 transmitted by Robinson, Morelli letter of the same date is not acceptable. Unless an affidavit as specified in our letters of May 31, 1979 and July 2, 1979 is submitted by 4 p.m., July 18, 1979 action will be initiated to discharge you from the Public Service.

48. In reaction to this ultimatum, Mr. Liske contacted the representatives of his bargaining agent (C.A.T.C.A.) who had supported his dispute with the employer. It was clear from the testimony of Mr. John Pottinger, Director of C.A.T.C.A. for the Pacific Region, that the bargaining agent was quite concerned about the very wide interpretation the Department was giving to the Conflict of Interest Guidelines. Mr. Pottinger advanced an interpretation of those guidelines that he perceived represented in a more equitable way the interests of the C.A.T.C.A. membership. At this particular juncture, Mr. Pottinger actively intervened on the grievor's behalf to persuade the employer, through Mr. English, to delay implementing its ultimatum of initiating discharge action against Mr. Liske. Mr. English received Mr. Pottinger's representations with some forbearance and indicated he would see what he could do. Indeed, Mr. Pottinger revealed to the employer, what appears to have been for the first time, that Mr. Liske was experiencing difficulties in finding a buyer at a suitable price. Mr. English testified that he could not remember any complaint made by Mr. Pottinger or the grievor at any time before July 18, 1979 with respect to any difficulty encountered

by Mr. Liske in disposing of the companies. Moreover, nothing was mentioned about the adverse effect on the marketability of K.F.S. should Mr. Liske be forced to renounce his position as chief pilot. Notwithstanding Mr. English's efforts to "see what he could do", the employer did not reply favourably (if at all) to Mr. Pottinger's request. On July 19, 1979 Mr. Pottinger telephoned Mr. English to advise that the affidavit in the prescribed form would be submitted. Because the affidavit was filed one day beyond the deadline set for 4:00 p.m., July 18, 1979, a third ten-day suspension was imposed.

49. Mr. Liske conceded that the effect of the affidavit was to leave K.F.S. without a chief pilot. His prospective replacement was on medical suspension and therefore could not assume the responsibilities of chief pilot. Ms. Davis and Mr. D. Johnson, who were former students of K.F.S., were authorized to discharge all of the administrative and managerial obligations of operating the company. In addition, the evidence indicates that K.F.S. was encountering difficulties with the C.T.C. in that its licence might be cancelled for being in violation of its terms, namely the company was providing flying training services from a base other than the base shown on the licence. In order to resolve the company's predicament occasioned by the loss of its chief pilot, Mr. Liske forwarded a letter dated July 21, 1979 to Transport Headquarters in Ottawa, indicating that he had applied for a part-time position in K.F.S. and enclosed a Declaration - Conflict of Interest, indicating:

I have agreed to part-time employment
with Fun Seekers subject to consent of
the Deputy Minister.

The Department's reply signed by Mr. Grainger, Chief, Staffing and Policy Co-ordination, requested further information with respect to "the full legal name of Fun Seekers", the nature of its business and the operational personnel involved. Mr. Liske simply expressed frustration at the bureaucratic nature of the response. However, Mr. Grainger's letter

did warn Mr. Liske that, in accordance with the Conflict of Interest Policy, "...you must receive approval of the Deputy Minister before you start employment."

50. On August 5, 1979 Mr. Bach wrote Mr. Liske advising him of the employer's imposition of an indefinite suspension. The reason for the suspension indicated that, following Mr. Liske's signing of the affidavit on July 19, 1979, "...the Department has become aware of information which is believed relevant to the matter of your association with Kelowna Fun Seekers, Ltd. and Fun Seekers Okanagan Ltd." Mr. Liske was invited to contact the Department immediately with a view to meeting departmental officials where the information prompting the employer's action could be presented and discussed. This letter was followed by a second letter dated August 10, 1979, signed by Mr. Melvin where it is noted inter alia that Mr. Liske had failed to reply to Mr. Bach's letter urging him to contact the Department. Nonetheless, contact had been made with the grievor through his union representatives and a meeting relating to the employer's concerns that prompted the indefinite suspension had been tentatively arranged. Mr. Melvin advises:

...

In order to provide you with an opportunity to respond to Departmental officials, please be advised that we require your explanations on the following information:-

1. Letter to the Department of Transport from Kelowna Fun Seekers Limited referring to you, dated June 13, 1979; to the Canadian Transport Commission signed by you for Kelowna Fun Seekers Limited, dated June 30, 1979; and to the Department of Transport signed for you on behalf of Kelowna Fun Seekers Limited, dated July 16, 1979.

2. As of August 1, 1979, the Registrar of Companies, Victoria listed you as Director, President and Secretary of Fun Seekers Okanagan Limited.
3. We are informed that to date no application has been made by you to the Air Transport Committee of the Canadian Transport Commission to sell your interest in Kelowna Fun Seekers Limited. It is our further information that a disposition of your interest in this company would constitute a change in control of the company which must be approved by the Canadian Transport Commission.

...

Mr. Coates continued to act as counsel for the grievor and indicated that he would be attending the meeting scheduled for August 21, 1979. The purpose of the meeting was "to provide an opportunity for Mr. Liske to persuade the Department that no conflict of interest exists."

51. Prior to the meeting, Mr. Coates replied to the concerns cited in Mr. Melvin's letter demonstrating that all of the correspondence signed by Mr. Liske as chief pilot prior to July 19, 1979 was consistent with his role as a part-time employee of the company. He attributed the failure of the company records to show Mr. Dolynuk as officer of F.S.O. as a mistake that was to be corrected immediately. Lastly, he suggested that the failure by Mr. Liske to make application to the C.T.C. for approval of the transfer of shares (and thereby ownership) of K.F.S. was being delayed until "the Deputy Minister had reviewed the material and ruled on the conflict of interest allegations." Since "to my knowledge this decision, one way or the other, has not been made by Mr. Cloutier", the grievor was advised by counsel to postpone securing the approval of C.T.C. In summary, Mr. Coates insinuated that the allegations itemized in Mr. Melvin's letter did not warrant the employer's decision to impose an indefinite suspension.

52. On July 15, 1979 Nancy Davis, who had previously performed administrative and clerical functions for K.F.S. on a voluntary basis, was nominated Managing Director of K.F.S. She had previously been appointed the Operations Manager but that appointment met with opposition from the Air Transport Committee of the C.T.C. because she was "unacceptable as her qualifications, experience and aviation background as a private pilot are not considered satisfactory for the position." The position of Operations Manager was subsequently filled by Mr. Dan Johnson. But, to all intents and purposes, Ms. Davis assumed the general day to day administrative responsibilities of running K.F.S. In her capacity as Managing Director, she received correspondence, particularly from Air Transport, addressed to Mr. Liske as President. Notwithstanding her efforts to persuade people to address their correspondence to her, she kept on receiving mail addressed to Mr. Liske. In some cases, certain matters required a company reply, and so she signed such correspondence in Mr. Liske's name. Ms. Davis also indicated that she signed correspondence on behalf of Mr. Dolynuk, the actual President of K.F.S. Ms. Davis testified that K.F.S. generally was having difficulties with M.O.T. personnel who were constantly calling at the K.F.S. office premises in Kelowna. One such inspector was Inspector Barnes. He asked some general questions including whether Reid Liske was still around. One specific question asked was whether Mr. Liske was still flying for K.F.S. To this Ms. Davis indicated that there was one occasion (after July 19, 1979) when a particular student was on the verge of securing his pilot's licence and needed one more lesson to qualify. Because the company was without a chief pilot, Mr. Liske was asked and he agreed to give the lesson without pay. Ms. Davis indicated that it was not until August 21, 1979 that Mr. Robin Christiansen was hired as chief pilot. This appointment was made coincidentally on the day of the scheduled meeting between departmental personnel and Mr. Liske.

53. Mr. Barnes also inquired as to whether Ms. Davis was authorized to sign correspondence on behalf of Mr. Liske. She replied by indicating

"Come on Tom, you know the war." The suggestion was made by Ms. Davis that Mr. Liske and K.F.S. personnel were the object of constant harrassment by the Air Transport inspectors with respect to the continuing viability of its licence. As a result of the inquiries he made, Mr. Barnes prepared a report dated August 7, 1979 which indicated that, in his view, Mr. Liske was actively involved with the operations of K.F.S. The contents of the report to some extent precipitated the employer's actions that culminated in the meeting scheduled for August 21, 1979. Mr. Barnes noted in his report:

...

None of the information gained can be considered hard evidence. It is, however, the opinion of this Investigator that, if an examination of records or full investigation were to be undertaken, evidence would be found showing Mr. Liske still actively involved with the training and administration functions of Kelowna Fun Seekers Ltd.

54. On August 21, 1979 a meeting took place at Transport Headquarters, Vancouver. Mr. Liske was in attendance represented by Mr. Coates and Mr. Pottinger. Mr. Dyck (who was appointed acting Regional Director), Mr. English and Mr. Hobson, counsel, represented the employer. Mr. English took extensive notes of the meeting. Mr. Pottinger and Mr. Liske challenged some of the subjects that were said to have been discussed at the meeting and that were contained in Mr. English's notes. Notwithstanding these concerns, I have not had put to me any evidence that would cause me to question the credibility of Mr. English who testified that his minutes reflected an accurate account of the meeting. These minutes do demonstrate and substantiate that Mr. Liske, through his counsel's admission, is seen to have performed flying instruction services for K.F.S. in contradiction with the sworn statement that was made in his affidavit. The minutes indicate:

.../42

...

10. Mr. Hobson then suggested that Mr. Liske was still connected with Kelowna Funseekers. Mr. Coates stated that in July 1978 Mr. Liske gave up his executive position with Kelowna Funseekers but still flew part time. In July 1979, the Chief Flying Instructor lost his licence and Mr. Liske was evidently filling in for him. Mr. Liske stated that because Transport Canada had refused to allow Nancy Davis or a Mr. Johnson to be appointed to executive positions, he, as a free lance instructor, was doing the job.

11. When questioned as to why he had signed letters, nominated Ms. Davis as Manager of Operations and conducted other business on behalf of Kelowna Funseekers, Mr. Liske said Mr. Dolynuk was away so Liske had signed instead.

(Note: No correspondence has ever been seen with Mr. Dolynuk's signature.)

(Emphasis added)

55. At the end of the meeting Mr. Coates indicated that he was going to make a written submission with respect to the issues that were discussed. On August 23, 1979 he wrote a rather long letter to Mr. Bach in most part lecturing departmental personnel with respect to his perception of what ought to constitute a "conflict of interest". In that letter he did make a very telling admission with respect to Mr. Liske's involvement in K.F.S. after July 19, 1979:

...

As indicated at the hearing, the complaints as set out in the August 10th letter to Mr. Liske under the signature of Mr. Melvin deal with the scepticism which your Department has as to whether Liske has, in fact, fully divested himself of his interest in Kelowna Fun Seekers. In fact, the discussion on

Tuesday confirmed Mr. Liske's continuing connection by virtue of the unpaid purchase moneys from Mr. Dolynuk in the amount of \$55,000.00. The hearings also made reference to Mr. Liske's continuing position as a designated chief instructor for Kelowna Fun Seekers Ltd. I am informed that he has been trying to rid himself of this position for sometime and that finally a suitable replacement has been accepted. It is my opinion that the position of chief instructor does not conflict with the affidavit submitted and that, in any event, this problem has now been resolved.

(Emphasis added)

In my opinion, any necessity for meeting Mr. Barne's concerns, i.e. that his report required to be supported by "hard evidence", in light of the above, became superfluous.

56. For Mr. Bach's information, Mr. Hobson summarized in memorandum form the events discussed at the meeting of August 21, 1979 and arrived at the conclusion that Mr. Liske's dissociation from the company as evidenced by the affidavit of July 19th was a "sham". He goes on to suggest that, "I am firmly of the view that Mr. Liske is playing games with your Department in view of the long standing nature of this particular controversy." He closes his report by suggesting that appropriate employer action follow:

You may wish to take these matters into account in considering disciplinary action, if any, or any other action in respect of Mr. Liske's continued employment.

57. In a memorandum dated September 7, 1979, Mr. Wilkins, the Assistant Deputy Minister, reviews the entire history of Mr. Liske's predicament. Mr. Wilkins sums up his report by recommending to the Deputy Minister that:

...you affirm your decision of February 3, 1978 that a conflict of interest exists between Mr. Liske's duties as an air traffic controller and his involvement with Kelowna Fun Seekers Ltd. and Fun Seekers Okanagan Ltd. I further recommend that Mr. Liske be discharged for failure to comply with your direction.

Of course, Mr. Cloutier, as indicated at the outset of these proceedings, acceded to that recommendation and advised Mr. Liske of his discharge effective September 14, 1979.

58. Counsel for Mr. Liske submitted evidence, both verbal and documentary, indicating that on February 20, 1980 ownership of K.F.S. (and F.S.O.) was conveyed to Ms. Nancy Davis and Mr. Daniel Johnson through a share transfer from Mr. Dolynuk. Both Ms. Davis and Mr. Johnson assumed, with the grievor's consent, the promissory note for \$56,500 signed by Mr. Dolynuk. In May 1980 a transfer of K.F.S. was made conditionally to Park Air Ltd. for \$22,000. The sale was made conditional upon C.T.C. approval of the transfer. I have since been informed by counsel that in reply to Ms. Davis' application dated March 20, 1980, the C.T.C. by decision dated December 3, 1980 did not disallow "the proposed change of control in Kelowna Fun Seekers from R.M. Liske to Graham Dolynuk." A formal order from the C.T.C. was to follow "incorporating this and the subsequent change of control from G. Dolynuk to Nancy Davis and Daniel Johnson...by the committee." A cheque dated May 16, 1980 was signed by Ms. Davis and Mr. Johnson in the amount of \$17,918.22 payable to Mr. Liske, presumably towards satisfaction of the promissory note. All of the foregoing transpired after the commencement of these proceedings on February 19, 1980.

59. The issue in this case is basically two-fold. The employer asserts in support of its decision to discharge that Mr. Liske was engaged in a conflict of interest through his involvement in Kelowna Fun Seekers Ltd. In failing to comply with the Deputy Minister's directive to divest he was insubordinate and thereby was properly terminated. The grievor, on the other hand, denied that he had ever been involved in a conflict of interest owing to his outside business interests. It followed therefore that the employer was without cause to order that he divest himself from those business interests. In any event, it was submitted that compliance was made, albeit under protest, with the Deputy Minister's directive in that an appropriate disposition of his shares in Kelowna Fun Seekers Ltd. and Funseekers Okanagan Ltd. was effected initially to Graham Dolynuk and thereafter to Ms. Davis and Mr. Johnson. Moreover, it was alleged that the employer in frustrating the grievor's efforts to assume the position of chief pilot with K.F.S., was discriminating against him with respect to his involvement during his leisure time in permissible aviation pursuits. Accordingly, the employer was without just cause to effect his discharge. The appropriateness of the employer's decision to impose each of the suspensions will be dealt together with the question of whether Mr. Liske's discharge was warranted.

60. The Public Servants Conflict of Interest Guidelines, P.C. 1973-4065 that the grievor allegedly had violated and formed the basis for the Deputy Minister's conclusion of an apparent conflict are set out in part as follows:

PUBLIC SERVANTS CONFLICT OF INTEREST
GUIDELINES

(PC 1973-4065 of December 18, 1973)

1. It is by no means sufficient for a person in a position of responsibility in the Public Service to act within the law. There is an obligation not simply

to obey the law but to act in a manner so scrupulous that it will bear the closest public scrutiny. In order that honesty and impartiality may be beyond doubt, public servants should not place themselves in a position where they are under obligation to any person who might benefit from special consideration or favour on their part or seek in any way to gain special treatment from them. Equally, a public servant should not have a pecuniary interest that could conflict in any manner with the discharge of his official duties.

2. No conflict should exist or appear to exist between the private interests of public servants and their official duties. Upon appointment to office, public servants are expected to arrange their private affairs in a manner that will prevent conflicts of interest from arising.

3. Public servants should exercise care in the management of their private affairs so as not to benefit, or appear to benefit, from the use of information acquired during the course of their official duties, which information is not generally available to the public.

4. Public servants should not place themselves in a position where they could derive any direct or indirect benefit or interest from any government contracts over which they can influence decisions.

5. All public servants are expected to disclose to their superiors all business, commercial or financial interest where such interest might conceivably be construed as being in actual or potential conflict with their official duties.

6. Public servants should hold no outside office or employment that could place on them demands inconsistent with their official duties or call into question their capacity to perform those duties in an objective manner.

In addition, the Policy Directive attached to the Conflict of Interest Guidelines reads: (Article 4 of Policy Directive)

General. Subject to the provisions of collective agreements, and without limiting the generality of the Conflict of Interest Guidelines, employees may accept appointments, offices or other employment outside the Public Service, or hold commercial, business, financial or property interests, provided that the activity engaged in or proposed does not:

- a. result in the employee or other persons gaining or appearing to gain improper advantage or benefit;
- b. impair or appear to impair the judgement or objectivity of the employee or otherwise reduce the efficiency or effectiveness of the employee in the performance of his official duties;
- c. give rise to the unauthorized use or divulgence of privileged or classified information;
- d. inhibit or improperly influence the development, application or enforcement of legislation, regulations, policies, standards or specifications;
- ...
- g. occasion the unauthorized use of federal government property.

(Emphasis added)

In the event an employee is in contravention of the Conflict of Interest Guidelines or the provisions of Article 7 of the Policy Directive, he may be subject to disciplinary action under section 106 of the Public Service Terms and Conditions of Employment Regulations. Specifically, the policy directive provides that:

...It will be considered a breach of discipline where an employee:

- a. enters knowingly into an action, activity or commitment which places the employee in an actual or potential conflict of interest situation, or prejudices in any other way his employment in the Department;
- b. having been advised to make disclosure, deliberately conceals either wholly or in part, an actual or a potential conflict of interest;
- c. fails to comply with any written direction to avoid or correct a conflict of interest;

...

61. The employer's case rests upon the simple notion that the grievor, owing to his refusal to comply with the employer's directive was in breach of the Conflict of Interest Guidelines and his severance as a public servant thereby became mandatory. Mr. Newman pointed out in argument that so long as the Conflict of Interest Guidelines, on their face, appear to be reasonable in that they are neither arbitrary, whimsical nor discriminatory, then this adjudicator is without reason to question their validity. Moreover, nothing contained in the relevant collective agreement between the bargaining agent and the employer can be read to limit their application to air traffic controllers generally and Mr. Liske specifically. Mr. Liske, contrary to those guidelines, was involved in an apparent conflict of interest which he refused, when given the opportunity, to correct. Accordingly, Mr. Liske was engaged in a clear case of insubordination.

62. Mr. Newman's remarks should be viewed in light of Miss MacLean's argument that the Conflict of Interest Guidelines are essentially irrelevant to air traffic control personnel, particularly those employed in the operational group. As I understand her position, the Conflict of Interest Guidelines are superfluous to air traffic control personnel in that the code of conduct governing air traffic control service, as reflected

particularly in the Manual of Operations and Procedures (MANOPS), represents a sufficient deterrent to inhibit the perpetration of the type of misconduct or wrongdoing that Mr. Liske was accused of. In short, should any of the wrongdoings that formed the subject matter of Mr. Rudi Bauer's complaints or any of the other complaints filed by the persons mentioned in these proceedings be established, then recourse by the employer to disciplinary sanctions for violation of the MANOPS would be warranted. Moreover, the nature of the complaints itemized against Mr. Liske and that prompted the Deputy Minister to conclude that Mr. Liske was involved in an apparent conflict cannot be seen, even if true, to have conferred any real advantage to his business pursuits. For example, it was emphasized by counsel that no real or lasting benefit could result to Mr. Liske in according landing and take-off preference to his own students. Nor was there any real advantage in his having access to Air Transport information such as his competitors' flying schedules that are otherwise available to the public at large. Accordingly, if no advantage could feasibly result, then there was no motive for the grievor to exploit his position as alleged and thereby jeopardize his job security.

63. The Conflict of Interest Guidelines, it must be explained, are not intended to establish a code of permissible conduct for purposes of imposing discipline. Clearly had any of the allegations that were made against the grievor been susceptible to proof, then the Department, as Mr. Melvin suggested, would have taken appropriate disciplinary action. The object of the guidelines, however, represents an effort on the employer's part to balance its concerns for honesty and objectivity on the part of its employees in according services to the public at large and yet still enable those same employees, during their leisure hours, to cultivate to their best personal advantage outside business interests. The pursuit of such interests may include the employee's own operation of a business or his engagement as an employee of another business. Their purpose is to confer a privilege upon public servants

in circumstances where the employer could otherwise require, as a condition of employment, that they desist from any outside business activity whatsoever. Indeed, in the event of a perceived conflict of interest, the employer's foremost and overriding consideration is the integrity of the service that its public servants are duty bound to provide at the taxpayer's expense. In this regard, the complaints from persons utilizing directly or indirectly a Government service, particularly when a conflict of interest is alleged, must be treated both seriously and with circumspection. In this particular case, the employer concluded that Mr. Liske, having regard to the nature and extent of his interests, exceeded the bounds of propriety and requested that he divest himself from those businesses or otherwise sever himself from the public's employ. He did neither and therefore invited the difficulties that have been already described in detail.

64. I do not wish to leave the impression that Miss MacLean's argument with respect to the deterrent effect of MANOPS is totally without merit as it may apply to air traffic controllers. The Conflict of Interest Guidelines are intended to have wide application to all public servants throughout the Public Service, irrespective of their rank, position and classification. Indeed, the Guidelines do indicate that they are intended to be read subject to any provision contained in a collective agreement. In short, there is some recognition that negotiation in the collective bargaining context is both feasible and anticipated with respect to the thrust of the Conflict of Interest Guidelines as they may apply to peculiar and specific types of employees. An examination of the C.A.T.C.A. agreement shows that no such limiting provision peculiar to air traffic controllers has been negotiated. For present purposes, whether or not MANOPS in itself would suffice to deter air traffic controllers from involving themselves in conflict of interest predicaments is not even a relevant question. Nor is the issue of whether Mr. Liske stood to derive any real advantage, financial

or otherwise, over his competitors by virtue of his position as an air traffic controller of any relevance. What is at issue is whether Mr. Liske, having regard to the Conflict of Interest Guidelines, was correctly found by the Deputy Minister to have been involved in an apparent conflict. In this regard, what is important is whether from an objective perspective Mr. Liske reasonably could have been perceived, notwithstanding no proof of actual gain, to have impaired his objectivity in the performance of his duties and responsibilities as an air traffic controller by virtue of his business interests. In McKendry (File 166-2-674) the then Chief Adjudicator succinctly established the test for the existence of an apparent conflict of interest (at p. 139):

...The essential requirements are that the public servant should serve only one master and should never place himself in a position where he could be even tempted to prefer his own interests or the interests of another over the interests of the public he is employed to serve. Those requirements constitute the rationale of the doctrine that he should avoid a position of apparent bias as well as actual bias, and that he should never place himself in a position where -- as Dean Manning puts it -- "(the) two interests clash, or appear to clash".

65. During the course of their argument, I asked counsel whether any precedent case existed in the Board's jurisdiction or the jurisprudence in the private sector relating to discipline arising out of an apparent conflict of interest. Counsel indicated that no case of direct application was found during the course of their review of the jurisprudence. Notwithstanding this dearth of precedent, I think it is an obvious principle that Conflict of Interest Guidelines, owing to their objective, are intended to be given a wide interpretation. This is especially the case when the integrity of the service provided by public servants to the public at large is what is being protected. This notion was expressed in Re Moll and Fisher et al. (1979) 23 O.R. (2d) 609. In that

case subsection 2(1) of the Municipal Conflict of Interest Act, 1972 (Ont.), c. 142, provided that a member of a Board of Education who has any pecuniary interest, direct or indirect, in any contract proposed that is reasonably likely to be affected by a decision of the Board shall disclose his interest and refrain from participating in the discussion or voting upon the contract. The appellants were members of the Board of Education of the City of Toronto and the contract before the Board was a proposed collective agreement with its secondary school teachers. The appellants' spouses were engaged as teachers of the Board in its elementary school system. The trial judge found a sufficient relationship between the collective agreements involving the Board's secondary school teachers and its primary school teachers to be satisfied that the appellants, in participating in the deliberations, were in breach of the Municipal Conflict of Interest Act. The Court, in rejecting the appeal, made some telling observations that are relevant to the instant proceedings (at p. 612, per Robins J.):

The obvious purpose of the Act is to prohibit members of councils and local boards from engaging in the decision-making process in respect to matters in which they have a personal economic interest. The scope of the Act is not limited by exception or proviso but applies to all situations in which the member has, or is deemed to have, any direct or indirect pecuniary interest. There is no need to find corruption on his part or actual loss on the part of the council or board. So long as the member fails to honour the standard of conduct prescribed by the statute, then, regardless of his good faith or the propriety of his motive, he is in contravention of the statute. And I should say at once, that in so far as this case is concerned there is no suggestion that the appellants acted out of any improper motive or lack of good faith.

This enactment, like all conflict-of-interest rules, is based on the moral

principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well-meaning men and women may be impaired when their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose. And the Act, by its broad proscription, enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interest may be in conflict with their public duty. The public's confidence in its elected representatives demands no less.

Legislation of this nature must, it is clear, be construed broadly and in a manner consistent with its purpose.

(Emphasis added)

66. The employer's representatives in the Air Transport Department are seen to exhibit some flexibility in their application and administration of the Conflict of Interest Guidelines. The evidence shows that some advantage to the employer as well as the air traffic controller would accrue should he engage in aviation related pursuits during his off-hours. Accordingly, so long as the air traffic controller's involvement in aviation did not impinge upon the "primary control zone" where air traffic control duties were performed, the employer permitted his involvement. It is crystal clear that the employer's policy is implicitly premised on the assumption that an air traffic controller's objectivity in servicing his competitors might be perceived to be impaired if he were permitted to engage in a like business in the control tower region where air traffic control duties are performed. In short, the prohibition applied by the Department preventing its air traffic controllers from performing duties in the primary control zone is based upon the assumption of an inherent, perceived conflict. Or, the application of the guidelines is anticipatory and designed to avoid the very complaints, real or perceived, that were launched by Mr. Rudi Bauer.

67. What seems to be relevant in assessing whether an employee is involved in an apparent conflict of interest is not so much what actually happened but what might have happened if the impugned activity was not proscribed. In my own review of the precedents, I happened upon an American case involving a perceived conflict of interest predicament that was decided by the Supreme Court. In United States v Mississippi Valley Generating Co. etc. (1961) [364 US 520] r L ed 2d, 268, an appeal was launched by the Government of the United States of the lower court finding that it was in breach of contract in cancelling a construction project for the building of an electricity power plant in Memphis, Tennessee. The defence advanced by the Government to the contractors' claim for damages was that the contract was vitiated by virtue of the conflict of interest of one of its negotiators specifically hired by the Government to represent its interests. The negotiator in question was an executive seconded without salary from a financial concern that stood potentially to participate in the financing of the project. The executive was retained to represent the Government's interests in negotiating the contract because of his particular expertise in this area. The evidence indicated that the negotiator himself did not gain any financial benefit directly or indirectly as a result of his position as negotiator. Nonetheless, the Supreme Court held that the contract was null and void because of the active participation on the Government's behalf of a negotiator who was also the executive of a financial concern that might conceivably have had an interest in the financing of the project. In discussing the test for determining an apparent conflict of interest, Mr. Justice Warren states (at p. 288):

The obvious purpose of the statute is to ensure honesty in the Government's business dealings by preventing federal agents who have interests adverse to those of the Government from advancing their own interests at the expense of the public welfare. United States v

*/364 US 549/

Chemical*Foundation, 272 US 1, 18, 71 L ed 131, 144, 47 S Ct 1. The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters, Matt. 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest. Consonant with this salutary moral purpose, Congress has drafted a statute which speaks in very comprehensive terms. Section 434 is not limited in its application Headnote 4 to those in the highest echelons of government service, or to those government agents who have only a direct financial interest in the business entities with which they negotiate on behalf of the Government, or to a narrow class of business transactions. Nor is the statute's scope restricted by numerous provisos and exceptions, as is true of many penal statutes.¹³ Rather, it applies, without exception, to "whoever" is "directly or indirectly interested in the pecuniary profits or contracts" of a business entity with which he transacts any business "as an officer or agent of the United States."

It is also significant, we think, that the statute does not specify as elements of the crime that there be Headnote 5 actual corruption or that there be any actual loss suffered by the Government as a result of the defendant's conflict of interest. This omission indicates that the statute establishes an objective standard of conduct,

13. See, e.g., 18 USC subsections 431-433; 15 USC subsections 1, 13 13c.

and that whenever a government agent fails to act in accordance with that standard, he is guilty of violating the statute, regardless of whether there is positive corruption.

The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the

*/364 US 550/

Government. To *this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It

Headnote 6 attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation.

(Emphasis added)

68. I am satisfied that there was nothing unreasonable or abject in the employer's application of the Conflict of Interest Guidelines preventing air traffic controllers from engaging in business activities in the "primary control zone" served by the control tower in which air traffic control services are performed. The uncontradicted evidence disclosed that Mr. Liske, in expanding his business interests into the Kamloops, Clearwater and Salmon Arms region, was in violation of the Conflict of Interest Guidelines. That is to say, the employer was quite proper in concluding that his objectivity might be impaired in that an apparent conflict between his outside activities and his duties as an air traffic controller existed. Accordingly, the employer's direction that he divest himself of his interests was both proper and reasonable. Moreover, the conclusion was arrived at following an extensive study of the circumstances by individuals trained and skilled in air traffic control services and who exhibited a sincere, deep-seated concern for the professional nature of the air traffic control service. In short, Mr. Bach's statement that he relied upon the advice of his experts in making his recommendations to his superior in Ottawa was well

founded. No evidence has been adduced to persuade me that the Deputy Minister's findings were unwarranted.

69. The issue of whether Mr. Rudi Bauer's complaints against Mr. Liske could be established in fact, in my view, is of no consequence. At best, those complaints served to affirm the correctness of the Department's policy in prohibiting air traffic controllers from pursuing business interests within the primary control zone. Mr. Bauer's complaints served a more relevant purpose. That is to say, they brought to the employer's attention that Mr. Liske had, without notifying his superiors, expanded the scope of K.F.S.' services into the primary control zone served by the Kamloops Tower. I need not repeat here the uncontradicted evidence of the extent and nature of the activities engaged in by Mr. Liske personally as an employee of other aviation concerns in the primary control zone. Suffice it to say that Mr. Liske was no longer operating a simple flying club confined to the City of Kelowna. Once the departmental investigation that was triggered by the allegations confirmed Mr. Liske's business activities, it was clear that he had not, as he was required to do, complied with the Conflict of Interest Policy Directive with respect to disclosure. In failing to comply with that directive, the employer, in my view, had sufficient cause to impose a disciplinary penalty.

70. The obligation imposed upon the public servant to make full and complete disclosure is essential to the employer making an informed decision as to whether a conflict of interest exists or is likely to exist. Whether the public servant thinks that no conflict of interest might exist is irrelevant to his duty to make disclosure. Mr. Liske clearly treated this requirement in an immature and obstinate manner. While K.F.S. was growing as a going concern both as a flying school and a general aviation carrier, no indication is made on the Conflict of Interest Declaration indicating its transformation. Indeed, as late as October 1977 when he was asked by Mr. Melvin to update his declaration, Mr. Liske is shown to be quite reticent with respect to the nature of his

holdings and the extent of his financial activities both as a businessman and a part-time employee. This adjudicator made some effort to emphasize the importance of disclosure in Ennis (File 166-2-8773). The facts are not germane to the circumstances in this case. Nevertheless, I said at p. 8:

13. The Public Servants Conflict of Interest Guidelines make it abundantly clear that not only must an employee be circumspect in the type of outside activities he engages in, particularly where he is liable to secure a financial gain, but he must consciously avoid activities that might appear to compromise his effectiveness as a public servant. Where there may exist the slightest doubt that such extra-curricular activities may appear to impair his effectiveness as an employee, the public servant is duty-bound to disclose his outside business interests to his superiors. Obviously, should such disclosure occur, the employer may in the exercise of its judgment direct the employee to divest himself of those interests and thereby cease to engage further in the impugned activity. In such circumstances, the employee may elect to resign his position as a public servant so that he may continue to participate in those private business interests. There is absolutely no question that when a public servant engages in outside activities that may be perceived to cast the slightest shadow upon his duties and responsibilities as an employee, a conflict of interest may reasonably be concluded to exist. In such instances, the onus rests upon the public servant to take sufficient and definite corrective action to remove any such conflict.

(Emphasis added)

71. In light of his failure to make disclosure, I do not find fault in the employer's directive ordering Mr. Liske to divest himself completely of his interests in K.F.S. and F.S.O. There was a suggestion made at the hearing that the appropriate action that the employer should have

followed in the circumstances was to direct that Mr. Liske confine his activities to Kelowna and that he be warned that a repetition of his company's expansion into the Kamloops region would then result in an order directing his total divestiture. This notion was advanced by Miss MacLean probably because Air Transport officials, in her view, had never made it clear to the bargaining agent, let alone Mr. Liske, what its policy was. Mr. Pottinger, for example, testified that it was not until these proceedings that he learned that the "primary control zone" measure was applied by the employer in determining whether an apparent conflict of interest might exist.

72. In dealing with this aspect of the case, I would be more inclined to find that counsel's argument had merit had the grievor made full disclosure of his business activities. Had the employer been aware of the breadth of the grievor's activities and then was prompted by the complaints of Mr. Bauer to direct his divestiture, then, I believe any discipline arising out of his failure to do so might have been considered without just cause. In that instance, the more reasonable directive would have been to compel his return to Kelowna. In short, the employer would be constrained from imposing discipline where the employee's obligation to disclose had been made and the employer had not seen fit to act upon the information until such time as a complaint was made. If that should have been the case, then the employer would have failed to act at its peril in not taking immediate and appropriate action. I might add, however, in this context, that Mr. Clifford did demonstrate the scrupulous extent to which departmental officials review the Conflict of Interest Declarations filed by air traffic controllers before giving them permission to engage in extra-curricular aviation activities. At all material times, had Mr. Liske made the necessary disclosures, I am quite confident that he would have been made aware of the employer's policy with respect to the limits of permissible activity.

73. Having concluded that Mr. Liske was properly found to have engaged in an apparent conflict of interest warranting the employer's directive to divest, the issue that must now be explored is whether compliance with that directive was made. I agree with Mr. Newman's submission that the employer's representatives are seen "to have bent over backward" in urging Mr. Liske to appreciate his predicament and to take the necessary steps to protect his job. They are seen to have cooperated with Mr. Liske and his counsel in providing information relevant to the Deputy Minister's finding and to have made themselves available to discuss the situation. The tactic adopted by counsel was to badger departmental personnel with accusations that they were unfair, biased and discriminatory in their treatment of Mr. Liske's predicament. In playing this strategy to the ultimate, the grievor succeeded in convincing the Deputy Minister to extend him the opportunity "to make his case anew". On April 12, 1979 a meeting to be chaired by Mr. Bach was arranged for this purpose. Notwithstanding the Deputy Minister's directive, Mr. Liske, while his case for reconsideration was pending, is seen, contrary to the employer's wishes, to be actively maintaining his involvement with K.F.S.

74. The initial comment that must be made is that the Deputy Minister, in my view, was under no obligation to conduct "a judicial inquiry" into the issue of whether Mr. Liske was involved in a conflict of interest. The Deputy Minister was obliged in fairness to make an informed decision based on information that was sound and compelling. The evidence indicates that both Mr. Melvin and Mr. Dyck were meticulous and fair in their efforts to get to the bottom of the problem. Indeed, they met with Mr. Liske in November 1977 and presented him with the situation as they perceived it to be. Mr. Liske did not contradict their principal concern pertaining to the expansion of K.F.S. into the geographic region encompassed by the Kamloops Control Tower. Recently in Martyr (Files 166-2-9346

to 9351), my colleague, Dr. Frankel, had occasion to discuss in some detail the question of whether the employer, in satisfying the requirement of "fairness" in arriving at a conclusion relevant to an employee's continued job security was required to act "judicially". In arriving at the conclusion that no such requirement was imposed, reference was made with approval to The Public Service Alliance of Canada and The Treasury Board (File 169-2-21). In that case the then Chief Adjudicator in the context of a demand that the Deputy Head hold a "hearing" at the final level of the grievance procedure prior to disposing of a grievance indicated (at p. 26):

As for the right to be heard by the Deputy Minister, there is a simple reason for which I must conclude that no such right is created by the agreement... The deputy head of a department or agency is a senior representative of one party to the difference or dispute, i.e. the employer. He is in no sense a judge or adjudicator, and I do not think it was ever contemplated by the legislation that he should conduct himself as such. The point is crucial, because if he were required to act as judge or adjudicator he could not properly delegate his decision-making function.

I note that counsel for Mr. Liske did not press this point at the hearing. I only mention it in passing in that Mr. Coates through his correspondence seemed to stress this alleged shortcoming in support of the allegation that his client had been treated unfairly. Of course, I am of the view that Mr. Liske, as the record indicates, was treated at all material times with some generosity by the employer in allowing him the opportunity to extricate himself from his predicament and to thereby retain his air traffic control position.

75. What has caused me much concern in these proceedings was the transparent nature of the disposition of K.F.S. to Graham Dolynuk. The disposition can at best be described from whatever the vantage point as a "non-arms length" transaction. The evidence shows Mr. Coates to have acted as counsel for both parties to the transaction. The Company Minute Book indicates what purports to be share certificates dated July 19, 1978 signed by Mr. Liske transferring the same to Mr. Dolynuk. Mr. Liske is seen to have resigned his position as executive officer of K.F.S. The manner in which these shares were evaluated at \$56,500.00 was never explained. Incidentally, neither Mr. Dolynuk nor Mr. Coates were called as witnesses to help provide an explanation. The terms of the disposition contemplated that Mr. Dolynuk was to assume a promissory note for what can only be described as a large amount of money without any immediate obligation to pay any part of principal or interest on the total indebtedness. No formal written agreement evidencing the terms of the transfer of the shares was entered into until July 18, 1979. That agreement was purposely backdated to read July 18, 1978. A shadow was cast on the very genuineness of the promissory note signed by Mr. Dolynuk when it was admitted that its original date (July 20, 1979) was changed to read July 20, 1978. Copies of documents, presumably the Company Minute Book, were filed with the Registrar of Companies, British Columbia. On the basis of the information given him, on October 6, 1978 the Assistant Deputy Registrar of Companies is seen to certify as fact what was represented by Mr. Liske to have occurred. Prior to the formal consummation of the alleged disposition to Mr. Dolynuk in July, 1979, Mr. Liske by affidavit dated November 1, 1978 affirmed in purported compliance with the Deputy Minister's directive, "that a sales agreement with respect to all my interests in Kelowna Fun Seekers Ltd. has been entered into."

76. On March 1, 1979 the Deputy Minister, owing to the representations of counsel and based on information advanced by counsel, decided to give

Mr. Liske an opportunity to present his case anew for the purpose of persuading the Department to change its opinion. Mr. Cloutier, as the grievor's affidavit indicated, was obviously operating under the assumption that Mr. Liske had taken genuine steps to dispose of his interests in K.F.S. In his letter, Mr. Cloutier warned the grievor that his original directive to divest still stood and, in the event he reaffirmed his decision, he would have to perfect the affidavit. In other words, Mr. Liske had succeeded through this sham transaction with Mr. Dolynuk to deceive departmental personnel into thinking that he had complied with the Deputy Minister's directive. In the meantime, he continued to manage and operate the company as if no directive had been made at all.

77. Mr. Liske admitted, perhaps unwittingly, that the paper disposition to Mr. Dolynuk was intended simply as an adroit manoeuvre. He submitted that at the time he was required by the Deputy Minister to divest himself of K.F.S., the market conditions were unpropitious for effecting a sale. Mr. Dolynuk was a convenient "straw man" for purposes of both delaying the necessity for compliance with the Deputy Minister's direction and deferring the necessity for making the sale until market conditions improved. Incidentally, I am not convinced that Mr. Liske, at any time, sought to effect the sale of K.F.S. But I am not necessarily obliged to arrive at that conclusion for purposes of determining whether Mr. Liske intended to obey the Deputy Minister's order. I am persuaded, however, that the disposition to Mr. Dolynuk was at best a "sham" transaction and ought to be seen as an empty disposition whose object was to avoid compliance with the Deputy Minister's directive.

78. Counsel made representation with respect to Mr. Liske's problem in finding an appropriate buyer for K.F.S. and the incidental difficulty of securing approval of a buyer by the appropriate air regulatory

agencies such as the C.T.C. As already indicated, I am not convinced that Mr. Liske ever did make an earnest effort to sell the enterprise on the open market as could have been demonstrated either by his placing advertisements in specialty publications or by recourse to other commonly accepted means of publicizing the sale of an aviation enterprise. Even so, if he was encountering difficulties, he certainly made no attempt to inform the employer's representatives of his predicament. It was not until the ultimatum of discharge was put to Mr. Liske in July 1979 that Mr. Pottinger sought to solicit Mr. English's help to forestall his termination because of purported difficulties encountered in selling the company. Had such difficulties in fact been encountered, and had the employer been advised of those difficulties, I am satisfied that a formula (such as an indefinite leave of absence) could have been worked out enabling Mr. Liske to comply on his own time with the Deputy Minister's directive. Or, had such concerns been expressed to the employer and the latter refused to take these difficulties into consideration, then I would have been suspicious of the reasonableness of the employer's decision to discipline. Mr. Liske, however, as indicated in the foregoing paragraph, had no immediate intention to sell and thereby divest himself of K.F.S.

79. I am also satisfied that the record shows that even following the meeting of April 12, 1979, when suspicions of the tactics adopted by Mr. Coates were first appreciated, the employer still sought to persuade the grievor to comply. When Mr. Coates failed to follow through on his undertaking to make written submissions in support of his client's cause, the employer's representatives for good reason lost their patience. Nevertheless, they are seen to make use of the disciplinary sanction as a lever to compel the grievor's compliance. At this juncture, it ought to be emphasized that the outstanding issue, from the employer's perspective, pertained to whether Mr. Liske had complied with the Deputy Minister's directive to submit an affidavit indicating that he was no longer connected in any way with Kelowna Fun Seekers Ltd. His previous

affidavit in November, 1978 already affirmed that he had disposed of the company. Mr. Liske, of course, could not honestly sign this affidavit for it would mean he could no longer be employed as "chief pilot and instructor" for K.F.S. As I understand the evidence, his removal as the chief pilot would render the company for purposes of carrying on its business an empty shell. The employer was compelled to resort to successive ten-day suspensions and a discharge ultimatum in order to convince Mr. Liske to file an appropriate affidavit. Notwithstanding the imposition of these penalties, the employer, at all times, is seen to give Mr. Liske the opportunity to avoid further disciplinary action should he comply with the terms of the directive. Finally on July 19, 1979, Mr. Liske ostensibly filed an appropriate affidavit as prescribed by the Deputy Minister. Unfortunately, he was one day beyond the ultimatum set for July 18, 1979 and was penalized by the imposition of a third ten-day suspension for this technical wrongdoing.

80. Following July 19, 1979, Mr. Liske continued to operate as the chief flying instructor and pilot for K.F.S. I do not rely upon the testimony of Ms. Davis or indeed the report of Mr. Barnes in order to arrive at this result. The admissions made by the grievor at the meeting of August 21, 1979 and by his counsel in the subsequent letter dated August 23, confirm this to be the case. Mr. Liske's letter to the Deputy Minister dated July 21, 1979 seeking the latter's approval as a part-time employee of K.F.S. represented an effort on his part to simply confirm what was already a fact. Indeed, the application in itself seemed to symbolize Mr. Liske's failure to understand and appreciate that he had been involved in an apparent conflict of interest and nothing less than his total divorce from the company would purge his wrongdoing.

81. I find that the employer had just cause for imposing the first two suspensions for the reasons given in the letters of suspension. I hold sincere reservations about the propriety of the third ten-day

suspension in that I find that the employer, for reasons that can be appreciated, was exhibiting more its frustration and impatience with Mr. Liske's procrastination than detached and dispassionate reason. Nonetheless, I do not propose to exercise my discretion to mitigate the third ten-day suspension for reasons that the employer would not have been aware at the time of the imposition of the penalty. Because I am satisfied, having regard to all the evidence that the affidavit representing that Mr. Liske was no longer connected "in any way" with K.F.S. was untrue, I am reluctant to interfere with the employer's decision to impose the third ten-day suspension. In other words, I am loathe to permit the grievor to benefit from a false representation.

82. I am satisfied that throughout this entire episode the grievor was given ample opportunity to correct the conflict of interest predicament that threatened his job security. Instead of extricating himself from that predicament, he blindly persisted in continuing his association with K.F.S. and at the same time lulling his superiors into the belief that he had divested in compliance with the Deputy Minister's order. I am of the view that Mr. Liske is seen to be the author of his own misfortune and notwithstanding the persuasiveness of Miss MacLean's advocacy, I have not had adduced before me any evidence to convince me to interfere with the employer's decision to effect his termination. I am accordingly satisfied that the indefinite suspension imposed upon the grievor followed by his discharge was for just cause. These references to adjudication are therefore denied.

83. I cannot leave this case without making some comment on the evidence that was adduced by the grievor's counsel following Mr. Liske's discharge and indeed while these proceedings were conducted. I refer particularly to the C.T.C. decision not to disallow the transfer of ownership from Mr. Liske to Mr. Dolynuk. I am of the firm view that

all this evidence serves to establish is that Government agencies, whether they be the C.T.C. or indeed the Registrar of Companies for the Province of British Columbia, are prepared to lend credence to representations made by the public as so indicated by their signatures. Business between Government agencies and the public at large could not be conducted otherwise. In short, Mr. Liske's capacity to extract from the C.T.C. its approval of the disposition to Mr. Dolynuk has not convinced me, however late the approval was in coming, that he intended at any material time prior to his discharge to effect a bona fide divestiture of his interests in K.F.S.

For the Board,

David H. Kates,
Deputy Chairman.

OTTAWA, March 13, 1981.