Case Name:
Re British Columbia Systems Corp. and B.C.G.E.U.

IN THE MATTER OF an Arbitration
Between
British Columbia Systems Corporation, (the Corporation), and
British Columbia Government Employees’ Union, (the Union)
Grievances of Joanne Bilodeau and Janice Kerr

[1990] B.C.C.A.A.A. No. 40

19 C.L.A.S. 162

Award No. A-40/90

British Columbia
Collective Agreement Arbitration
Victoria, British Columbia

Panel: David H. Vickers (Single Arbitrator)

Award: February 23, 1990.

(53 paras.)

Appearances:
For the Corporation: Timothy G. Charron.
Representing the Union: Dawn A. Wattie.

AWARD

1 This dispute raises questions arising out of an alleged conflict of interest involving the Grievors. At the outset of the hearing, there appeared to be some difference as to whether certain action taken by the Corporation was disciplinary in its nature. At the end of the Hearing, both parties
agreed that it was and therefore, the issues before me as a Single Grievance Arbitrator, are as follows:

1. Have the Grievors given just and reasonable cause for some form of discipline by the Corporation?

2. If the answer to question 1 is yes, was the discipline of suspension imposed an excessive response in all of the circumstances of the case?

3. If the answer to question 2 is yes, what alternative measure should be substituted as just and equitable?

The parties agreed that this Board was properly constituted and had jurisdiction to hear the issues. The central questions in this arbitration relate to whether certain activities of the Grievors were in conflict with the Corporation's interests and, if so, the nature of the consequences to flow from such activities.

The Grievor Bilodeau is employed as an Analyst IV. In that position, she is, by contract between the Corporation and the Ministry of Transportation and Highways, engaged from day to day as Co-ordinator, Personnel Systems, Ministry of Transportation and Highways. The Ministry is a client of the Corporation. The Grievor Bilodeau, on behalf of the Corporation, carries out certain contractual obligations with the Ministry. She has reporting relationships within the Corporation's organization and within the Ministry of Transportation and Highways.

The Grievor Kerr is employed as a Technician III. In that position, she is, by contract between the Ministry of Transportation and Highways and the Corporation, engaged from day to day as a Security Administrator, Ministry of Transportation and Highways, Information Services Branch. She, too, has reporting relationships within the Corporation's organization and within the Ministry of Transportation and Highways.

The employment record of each of the Grievors, up to the date of the events which gave rise to this dispute, is entirely satisfactory.

On June 12, 1989, the Corporation underwent a reorganization. This is significant because of the apparent confusion around the issue of who the Grievors ought to have sought advice from when they decided to become involved in a bid with a private sector contractor. Prior to June 12, 1989, the Grievors were required to report to Norman Glassel who was then Vice-President, Client Services and Corporate Planning. After reorganization, Glassel took the position of Senior Vice-President, Client Services Division, and the Grievors were then required to report to Dr. Nancy Greer, Vice-President, Professional Services Division. Prior to reorganization, Greer held the position of Vice-President, Client Services and Human Resources. At that time, she and Glassel divided the Corporation's client base. After reorganization, Greer became responsible to ensure that services sold were delivered to all clients while Glassel was responsible for sales to all of the Corporation's clients.

In June of 1989, the Ministry of Solicitor General made a Request For Proposal (RFP) for the supply of an Operations Facilities Management Contract for the Motor Vehicle Branch's Wang, IBM, Mohawk Data Services and Microcomputer Architectures. Prior to the proposal being made
public, it was apparently common knowledge that an RFP would be made. Under a Section entitled "Facilities Management Administration", the following appears:

"The management structure of the successful bidder's project team is left to the discretion of the successful bidder....

The proposed members of the project team are to be bid as a package on a fixed price basis. Included will be the designation of the senior member of the team who will be committed to the project and will represent the successful bidder for the duration of the project.

Team substitution will only be permitted where prior mutual agreement between the ministry and the successful bidder is secured.

No person(s) may be included in this bid if there is the possibility of conflict of interest."

8 Just prior to the RFP, the Grievor Bilodeau had applied for the position of Manager of Operations, Motor Vehicle Branch. Such a position would have involved her in work encompassed by the RFP. She was advised the posting had been cancelled and an RFP would be issued. The Grievor Kerr was unaware of the RFP until after it had been issued.

9 The Grievor Bilodeau first heard of the RFP on June 6, 1989, when she was advised by Paul Morgan, President of Systron Products Ltd. ("Systron"), a firm engaged in the new development of computer systems. Systron is under contract to the Ministry of Solicitor General and pursuant to that contract, Morgan is engaged as a Project Manager, Ministry of Solicitor General. As Bilodeau, had Mohawk experience, Morgan enquired if she would be interested in doing work under the proposal. She replied that she would, provided she was not in a conflict situation.

10 Morgan then made inquiries of Robert Serviss who is currently Director of Systems, Medical Services Commission, Ministry of Health, but was then an employee of the Corporation engaged as Director of Client Services, Ministry of Solicitor General. From information he gained from Serviss, Morgan understood that the Grievors would not be in a conflict of interest if they were not placed in a position of evaluating or influencing the final outcome of the bid and provided they had declared their interest to be involved. He understood that Serviss had discussed this RFP with Glassel and at all material times, Glassel was aware of Systron's interest and the potential for involvement of the Grievors.

11 Morgan also learned that Serviss actually met with both Glassel and Greer and a decision had been taken that the Corporation would not become involved in a joint bid with Systron because the Corporation did not want to chance the loss of these particular employees, i.e., the Grievors, to Systron.

12 Serviss' view was that there was a conflict of interest where an employee was in a position to influence a bid or where an employee was in a competitive position or in a situation where he or she would be able to take part in an unfair advantage. As well, there was a duty to declare any intention to bid.
Serviss said he spoke to Glassel a number of times both before and after the pre-bid meeting. As well, he spoke to Greer about the RFP and the potential for involvement of the Grievors.

He also spoke to the Grievor Bilodeau. He told her of the possibility of a joint bid (Corporation and Systron). She expressed the view that she would prefer a Systron bid because any job at the Corporation would have to be posted and she, in turn, would have to apply and win the position.

Serviss had separate meetings with Glassel and Greer. He said Glassel advised him the President would not go along with a joint bid situation where Corporation employees were involved with a private sector employer. Greer told him that the Corporation did not want to be in a situation where employees would be taken away from one branch of government and placed in another.

I pause at this point in the narrative to note the Corporation's concerns as related by Morgan and Serviss. It is fair to ask how the loss of employees in a joint bid would be any different than the loss of employees in a bid by Systron alone, involving the same employees. In short, one is driven to conclude from the outset that the Corporation did not want to involve the Grievors in a bid which would in some way result in their loss of employment status with the Corporation or a removal from their ministerial duties.

A decision was made on June 16, 1989, after the corporate reorganization, that the Corporation would not become involved in a joint bid. Serviss says that both Greer and Glassel were aware the Grievors would continue to be involved, presumably in a Systron bid.

The Grievor Bilodeau confirms she told Serviss that she would prefer to be involved in any bid as a resource of Systron. He advised her he had spoken to Greer and Glassel and she understood an employee was free to leave the Corporation for any private sector employer and further, the Corporation would not enter into a joint bid with Systron if Systron were to bid her as their resource. She says she was unclear about the Corporation's conflict of interest policy and consequently made inquiries of Serviss. She understood there was no conflict of interest if she was not privy to information in her current position that would give her an unfair advantage. As well, she must not be in a position to evaluate bids. Finally, she must give notice of her intention to be involved in a bid.

The Grievor Kerr said she was unaware of any conflict of interest guidelines before this event occurred. She heard of the RFP from Morgan who said he would be seeking some clarification of the conflict of interest rules. She then spoke with Serviss and understood "everything was okay ..., there was no conflict of interest problem.

It is appropriate at this stage to review the Corporation policy on conflict of interest. Guidelines for conflict of interest have been included for a number of years in the Corporation's written Compendium of General Policy under the subject of Standards of Conduct. It applies to all employees and reads as follows:

"The Corporation recognizes the right of its employees both to be involved in activities as citizens of the community, and to pursue their private financial and social affairs. Nonetheless, all employees must prevent any conflict of interest from arising between their role as private citizens and their role and responsibilities as employees of the Corporation. Upon employment, an employee shall arrange his private affairs to prevent any conflict of interest from arising, and to avoid prefe-
rence toward any friend or relative, or toward any position, office, client affiliation, corporate property or resources to pursue personal interests.

Conflict of Interest situations include those:

- where an employee's private affairs or financial interests are, or appear to be in conflict with his duties, responsibilities and obligations;

- which could impair the employee's ability to act in the interest of the Corporation or, as applicable, a client of the Corporation;

- when an employee's actions would compromise or undermine the trust which clients or the public place in the Corporation.

Employees shall 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 duties, where such information is not generally available to the public, or

- any corporate transactions over which they can influence decisions (for example, investments, purchases, sales, contracts, grants, regulatory or discretionary approvals and appointments)."

21 That policy was amended during the period, November 1987 to April 1989, when the Corporation was undergoing a move by Government to sell off its assets and undertakings to the private sector. Nothing turns upon the amendments made during that period, in these proceedings. They were not operative when the dispute which gives rise to this grievance occurred.

22 In January, 1989, all employees received a Memorandum from the President of the Corporation, as follows:

"Questions from a number of employees recently have led me to conclude that a reminder of our policies regarding conflict of interest is called for.

As you are all aware, the Corporation has a general policy titled "Standards of Conduct" which sets forth the Corporation's expectations of its employees on a range of related issues, including conflict of interest. The full text of this policy can be accessed by typing "policy" on your profs main menu and reviewing section 2.

An infraction of any part of this policy can be grounds for dismissal. It is each employee's responsibility to ensure their conduct is in keeping with the standards defined in this policy. I would therefore urge that you review the policy if you have any doubt about your familiarity with and understanding of its content."
I would remind you, for example, that a situation such as allowing your name to stand as part of a contract bid being submitted by another employer to one of the Corporation’s current or potential public sector clients is viewed as conflict of interest. Obviously, submitting a bid yourself falls into the same category. If you are contemplating any such action you must come forward immediately to declare your intentions, before you have acted.

If you are unclear about any aspect of this policy and/or if a situation arises which causes you concern, I cannot stress too strongly the importance of seeking clarification from your divisional executive."

23 I return now to the events that gave rise to the discipline imposed. On June 23, 1989, both Grievors wrote a letter to Greer in precisely the same terms as follows:

"Please be advised, it is my intent to be identified as a staff resource in a response to RFP #81322 - Request for Proposal for Facilities Management Contract for the Ministry of Solicitor General.

It is my understanding that by declaring my intention, thus ensuring I am not involved in the evaluation process of this Request for Proposal, I am exonerating myself from the possibility of conflict of interest.

Should additional information be required, please do not hesitate to call."

24 I am entirely satisfied that at this point in time, both Grievors, having accepted what they had been told by Morgan and Serviss, felt they had complied with any corporate policies and thus, their involvement with the Systron bid did not place them in a conflict of interest. I say that because, in my opinion, the advice received was incomplete and, therefore, misleading. It was argued by the Corporation that the Grievors should not have relied upon the advice of Serviss. Rather, they should have gone directly to Greer. In this case, I reject that argument because of the particular working relationships of the parties and because Serviss told them he had consulted both Greer and Glassel. Certainly, both Grievors had an obligation to enquire of Greer but I do not believe this inquiry need be direct. No doubt, it would be in their interest to make the inquiry directly but, in the circumstances existing at this particular time, it is difficult for me to conclude that their inquiries, through Serviss, were inappropriate.

25 Greer received the notices from the Grievors late in the day on June 27. It was not until late the next day, after learning from Serviss the advice he had given to the Grievors, that Greer was able to speak with the Grievor Bilodeau. In the result, the Grievors met with Greer during the morning of June 29. She advised the Grievors they had received bad advice. She told them she would tear up their letters and forget what happened if they would withdraw their names from the Systron bid. If they would not accept her decision, she would go to the President for an interpretation of the policy. Both Grievors responded by saying that the letters would stand and asked that Greer seek an interpretation from the President.
26 Subsequently, Greer confirmed her opinion with the President. She also spoke to Morgan who had called her to advise that he had relied upon Serviss and felt, in the circumstances, her decision was both wrong and unfair.

27 Morgan says he met separately with both Glassel and Greer. Glassel's view was that while he was not entirely happy, he saw no problem proceeding in the manner proposed, i.e., with the Grievors remaining part of the Systron bid. He confirms that Greer was unequivocal. In her view, there was a conflict of interest and the names must be withdrawn.

28 Morgan was of the view he had two conflicting opinions. Thus, he went directly to the President for clarification. It appears that he met with the President on July 4 and shortly thereafter, received written confirmation. In part, the letter reads:

"I have satisfied myself that the employees have been treated fairly and equitable (sic) in this matter....

The Corporation has recognized that there were confusing signals passed on in this case by an individual not a member of the executive and not authorized to do so. This has been taken into consideration in this particular case and has resulted in the Corporation moderating the position it would normally have taken with its employees who are in violation of the Standards of Conduct policy."

29 On June 30, there was a further meeting involving Greer, the Grievors and Peter James, a Shop Steward. The Grievors were again advised that they were both in a conflict of interest and must either withdraw their names from the Systron bid or go on a leave of absence without pay. Both Grievors concluded they could not withdraw their names and refused to do so. Consequently, they both were delivered letters which read in part, as follows:

"Further to your letter of 23 June 1989 and our subsequent discussions on 28 and 29 June 1989, your request for a decision regarding the existence of a conflict of interest should you have your name stand in the response by another employer to the named RFP issued by the Ministry of Solicitor General has been taken forward to the President.

I am now in a position to formally advise you that this action on your part would constitute an unacceptable conflict of interest with the business interests of the Corporation. Should you decide to continue to have your name stand in this bid by another employer, our normal course of action is to proceed with immediate termination of your employment with us. In light of the fact that we have determined you were provided misleading advice by a member of BC Systems' management, we are prepared to continue your employment status with us. We will, however, be putting you on leave of absence without pay, effective immediately and to continue until such time as we receive from you your written statement that you have either withdrawn your involvement in the named proposal, or that the proposal has reached closure through its acceptance, rejection or withdrawal."

30 The RFP was subsequently withdrawn by the Ministry of Solicitor General and the Grievors returned to their employment after 10 days of "leave without pay". I believe the parties have prop-
erly treated this dispute as disciplinary in nature, involving a suspension without pay for a period of 10 days.

31 Serviss testified that both Glassel and Greer were aware, at all material times, about the potential for the Grievors to be involved, either in a joint bid on the RFP or a private sector bid on the RFP through Systron. After the issue arose in late June, he said Glassel acknowledged to him in a private conversation that he had been fully informed throughout.

32 Greer is categorical in her denial of any knowledge. She is clear that any hint of involvement of the Grievors in a private sector bid would have brought an immediate response from her that such activity was a clear conflict of interest. Glassel concedes he had several conversations with Serviss about the RFP. He says his interest was in the Corporation becoming involved in a joint bid. His recollection is that the conversations were limited to the possibility of a joint bid as he was concerned such a bid would mean both Grievors would be removed from their employment situations in the Ministry of transportation and Highways. He has no recollection of Serviss advising him that the Grievors would be involved in a private sector bid with Systron. He concedes, however, that such a conversation was "possible". After the issue arose, he has no recollection acknowledging to Serviss, in a private conversation, that he had been kept fully informed.

33 There is an important difference between the evidence of Greer and Glassel. I am left with no doubt that if Greer had felt at anytime the Grievors would be involved as a resource in a Systron bid, she would have voiced her disapproval and taken some action. I cannot reach the same conclusion with respect to Glassel. I accept what was said by both Morgan and Serviss and thus conclude that Glassel knew or ought to have known that Systron would bid this project using the Grievors as their resource.

34 In July, after all of the events had taken place, the Corporation issued another policy directive referring specifically to "a recent incident involving several employees" and the "need to once again draw the attention of all employees to their responsibility under these policies". The Memorandum clarifying the conflict of interest policy reaffirms the need to seek prior approval and continues to illustrate a number of examples of behaviour which would represent unacceptable conflicts of interest.

35 The Corporation argues that both Grievors had a duty to give faithful service to their employer. Apart from the general duty, there has been a breach of corporate policy. There was a clear conflict of interest. The Corporation recognized the advice received and the Grievors were given an opportunity to purge their indiscretion, i.e., withdraw their names or take time off. There is no punitive element to the discipline. It is more in the nature of non-culpable discipline. The fact that substitution of personnel is permitted by the RFP establishes that the Systron bid would have been altered after the closing date for receipt of bias, with the consent of the vendor. The RFP specifically raises the issue of conflict of interest and the Grievors had an obligation to confirm their conduct was in compliance with conflict of interest guidelines. In all of the circumstances, the Corporation had no choice and there is no room to impose alternative discipline.

36 The Union argues that the issue of whether there has been a conflict of interest must be considered in its historical context. The move to privatize the Corporation left employees with the sense that the private sector was the way of the future. Loyalties and ties of employees are to various Ministries of Government and yet, they remain bound to rules imposed by the Corporation. The rules are not clear. The fact that policy has required clarification on two occasions is proof of that
fact. The Facilities Management Administration Section of the RFP allows team substitution to a "successful bidder". No substitution of personnel is permitted until a bidder has been selected.

37 The Grievors did raise their concern about conflict of interest and relied on the advice of Serviss. For that, they cannot be faulted. To be a true conflict of interest, there must be direct competition. As there was none in this case, there are no grounds to impose discipline. If there was a conflict, it was entirely inadvertent and the suspensions, an excessive response. A letter of warning would have been more appropriate.

38 In Re Food Group Inc. and Retail, Wholesale, and Department Store Union, Local 1065 (1987), 30 L.A.C. (3d) 250 (Stanley), the Arbitrator discusses two approaches to this type of issue. In my opinion, such an approach is sound and I propose to follow it. I am satisfied there is a common law duty to provide faithful service or, put another way, a duty not to place individual interests in conflict with the interests of an employer.

39 The classic decision in the imposition of corporate rules is Re Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd. (1965), 16 L.A.C. 73 (Robinson), where, at page 85, the Arbitrator said:

"A rule unilaterally introduced by the company and not subsequently agreed to by the union, must satisfy the following requisites:

1. It must not be inconsistent with the collective agreement.
2. It must not be unreasonable.
3. It must be clear and unequivocal.
4. It must be brought to the attention of the employee affected before the company can act on it.
5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
6. Such rule should have been consistently enforced by the company from the time it was introduced."

40 I have no doubt there was much confusion on the part of the Grievors as to the Corporation's conflict of interests rules. But I am satisfied that they were all in writing; they were delivered to the Grievors; they were not inconsistent with the Collective Agreement; and they were not unreasonable. While on the face of the documents, they appear to me to be clear, there is equally no doubt that in this case, there was a great deal of confusion by several of the participants, including the Grievors. The Union is quite correct in pointing to two clarification Memoranda. In my opinion, the confusion has arisen from several factors, which I summarize as follows:

1. A failure of the Grievors to read and understand the written policy;
2. A failure of the persons upon whom they relied to read and understand the written policy;

3. A lack of adequate communication between the participants, namely Serviss (and through him, to the Grievors), Greer and Glassel. In that regard, I place no fault or blame. Communication is the art of both sending and receiving. In this case words spoken were not received or what was received was misinterpreted. I conclude that whatever was said left Serviss with the impression that the Grievors' activities were appropriate and he so advised them;

4. The period of time when the Corporation was available for private sector bids doubtless has left some confusion. Employees themselves were involved in designing bids to purchase the firm. Doubtless this period must have left many persons involved uncertain of where their future would lie, in the public or the private sector. It has also left some doubts about what constitutes a conflict of interest.

41 It is not necessary for the Corporation to rely on a breach of its rules to conclude that the Grievors placed themselves in a conflict of interest. It is sufficient to conclude that there has been a breach of the common law duty.

42 While I conclude that the Grievors were confused for a variety of reasons, there can be no doubt in my mind that they were set straight in the course of their first meeting with Greer on June 29. At that meeting and at the meeting the following day, the message was unequivocal. They understood the Corporation's view that continued participation in the Systron bid was an unacceptable conflict of interest. In my approach to the first issue, I do not ignore all of the events that occurred prior to June 29. They are all relevant. But the issue is whether there was a conflict of interest on June 29/30 when the disciplinary action was taken.

43 The Union has argued that there cannot be a conflict of interest here because the competition was indirect, i.e., through a third party, Systron. I do not accept the Union's argument that direct competition is essential. In my opinion, a conflict of interest might arise in any one of the following situations:

1. Where the interests of an employer are directly or indirectly affected or likely to be affected in some negative way by the private activities of an employee;

2. Where private activities of employees impair their ability to pursue the interests of their employer;

3. Where private activities of employees compromise the business interests of their employer;

4. Where private activities of employees leave them in a position of gain or potential gain at the expense of their employer;

5. Where employees use knowledge or information imparted to them for the purposes of pursuing their employer's interests to pursue their own private interests.
44 I do not consider the foregoing examples to be exhaustive. Many situations will turn upon their own facts but in the final analysis, I am satisfied that it makes no difference if the activities are directly or indirectly, i.e., through some third party, impacting upon an employer. Equally, it makes no difference if there is a loss or gain by either an employee or an employer. The conflict arises immediately upon engaging in the activity.

45 I have no difficulty in concluding that the Grievors' activities did place them in a position of conflict. I see conflict arising in the following situations:

1. Employees of the Corporation are pledged to client Ministries of Government by contract. It is not in the Corporation's best interest to have movement of these employees without some prior consultation with a client Ministry and where possible, client concurrence. There was no opportunity for the Corporation to consult its client Ministry in this case.

2. The KFP was a business opportunity for the Corporation. To allow an employee to compete with its employer for such an opportunity is to raise an obvious conflict. Doubtless, anyone is free to compete but not while he or she remains an employee.

3. It is in an employer's interest to maintain a steady work force. To allow employees to bid through private firms so as to avoid the seniority and bidding provisions of the Collective Agreement is contrary to the interests of an employer and incidentally, all of its employees and, in my view, likely to cause labour instability.

46 I find the Grievors' activities were in breach of their common law duty to act in good faith. They were also in breach of the Corporation's policy of which I am satisfied the Grievors were made aware, prior to the imposition of discipline. Because of the confusion surrounding these rules before and after June 30, I recommend that the Corporation embark upon a redraft and update so that they all appear on one piece of paper. Thereafter, a copy should be delivered to all Corporation employees.

47 In my opinion and for the reasons stated, the answer to the first question is in the affirmative.

48 I next consider the issue of the Corporation's response to this event. In this case, the Corporation recognized the difficulty of the situation for the Grievors. For historical reasons, there may have been some confusion; Serviss may have misunderstood what was said by Greer and Glassel or, indeed, there even may have been some inconsistency in that regard; and finally, the Grievors relied upon what they were told by Serviss. Thus, the Grievors were given an opportunity to withdraw from the Systron bid and face no punishment or leave their names stand and be placed on a "leave of absence". They chose to leave their names stand, conduct which the Corporation labels as wilful blindness.

49 The Union argues the Grievors they had no choice because only a successful bidder could substitute team personnel. I do not read the RFP in that way. Furthermore, the evidence does not support such a conclusion.
I believe the Systron bid could have been withdrawn at any time before acceptance. It may even have been resubmitted with a new team, excluding the Grievors. I acknowledge that once accepted, team substitution could only occur by mutual agreement. But, in my opinion, the Grievors were able to extricate themselves from the difficulty prior to the imposition of the penalty simply by requesting Systron to withdraw its bid. They elected to leave their names stand as a resource of this private sector Employer.

The Grievors actually acknowledge that they were in a conflict of interest situation. They just felt they could not withdraw from the Systron bid and, in my opinion, they were wrong in that regard. They chose to leave their names stand with a private bid rather than maintain their continued employment with the Corporation. If the private bid had succeeded, they would have gone to work for Systron.

In my opinion, they made the wrong choice. Up to the point in time where the situation was explained to them and they were given a choice, I would have no difficulty in saying that while their activities constituted a conflict a letter of warning would have been a sufficient penalty. But they made an election to remain in a position of conflict and I cannot see how the Corporation had any option but to impose the penalty it did.

Accordingly, I have concluded that the answer to the second question is in the negative and the grievances are dismissed.

DAVID H. VICKERS

February 23, 1990
Victoria, British Columbia