

IN THE MATTER OF: Two grievances of Michael Welfley dated November 10, 2004 alleging termination without just cause and failure to pay overtime rates, contrary to the provisions of the collective agreement.

BETWEEN:

**THE PROVINCE OF MANITOBA,
DEPARTMENT OF FAMILY SERVICES AND HOUSING
(WINNIPEG CHILD AND FAMILY SERVICES),**

Employer,

- and -

**THE CANADIAN UNION OF PUBLIC EMPLOYEES,
LOCAL 2153,**

Union.

AWARD

Appearances

- Nancy Carroll, Labour Relations Officer, Treasury Board Secretariat, for the Employer.
- Mark Kernaghan and Sheree Capar, National Representatives, with Elsie Edwards, Chief Shop Steward, for the Union.

Nature of the proceedings

The grievor Michael Welfley was a casual employee of Winnipeg Child and Family Services (“WCFS”) who worked in the emergency shelter system providing care to children in need of aid or protection. He commenced casual employment in March 2001 (Ex. 4) but had

worked for WCFS previously on a part-time basis. For 19 years, the grievor has also worked for the Government of Manitoba Department of Justice (“DOJ”), Manitoba Corrections, as a juvenile counselor in the Manitoba Youth Centre (“MYC”). The grievor’s last six years at MYC have been in full-time employment. The present case arose due to a Manitoba Corrections policy which the Employer said prohibits its employees from holding dual government employment totaling more than full-time hours.

After many years as an independent agency, WCFS became a branch of the Department of Family Services and Housing, Government of Manitoba, effective March 24, 2003. The grievor and other support workers remained as members of Canadian Union of Public Employees Local 2153 but, unlike other unionized WCFS employees represented by the Manitoba Government and General Employees Union (MGEU), CUPE members did not become civil servants (Ex. 4, 5). After March 2003, therefore, the grievor was a civil servant for purposes of his MYC job, *not* a civil servant for purposes of his WCFS job and a government employee for all purposes.

The Standards of Professional Conduct for Manitoba Corrections (Ex. 2) include the following provisions under the heading of “Conflict of Interest”:

If a full time employee, we do not work for any other provincial department within the Civil Service ...

Fatigue and conflicting demands are likely to affect performance and availability. The total hours of combined government work does not exceed the regular hours of equivalent full time work, unless specifically approved in advance by management. ...

For over a year after the WCFS transition to government branch status, no one noticed that there might be an issue with the grievor’s dual employment. Once his two jobs came to the attention of management in Manitoba Corrections, he was informed that he must choose,

based on the foregoing policy. Corrections management understood that the grievor made an election to continue working full time at MYC and informed management of WCFS accordingly. On November 3, 2004, WCFS wrote to the grievor (Ex. 11) terminating his employment in the following terms:

In a letter to you from Superintendent Darryl Rumsey, dated September 16, 2004, you were advised of the government policy with respect to the working of more than one full-time job in government.

...

We have been advised that you have decided to retain your full-time job with the Manitoba Youth Centre and therefore your employment with Winnipeg Child and Family Services Branch shall cease immediately.

Two grievances were filed by the Union on November 10, 2004 (Ex. 13, 14). The grievances were denied by the Employer (Ex. 16, 18) in January and February 2005. On January 12, 2006 I was appointed by the parties as sole arbitrator under the terms of the collective agreement. The hearing was held on April 13 and 27, 2006. At the outset, the parties affirmed my jurisdiction and appointment. It was agreed that, should the Union be successful, only a declaratory order should be granted in the first instance, with the question of remedy to be severed and jurisdiction retained to resolve compensation later if necessary.

The first grievance alleged termination without just cause contrary to the provisions of the collective agreement. While there was some suggestion during the hearing that the grievor had resigned his employment with WCFS (a notion rejected by the Union), in the end the main issue between the parties was distilled to the following: under the well established *KVP* principles, was the policy against dual employment enforceable against the grievor so as to permit the termination of his casual employment with WCFS? The Employer submitted that the *KVP* requirements were fully met and the Union argued the contrary.

In its second grievance, the Union claimed overtime pay back to March 24, 2003 on the basis

that, between his two jobs with a single employer, the grievor was working in excess of 80 hours bi-weekly. The Employer denied that it could be liable for overtime in circumstances where the employee failed to obtain approval to work extra hours. The Employer also insisted that its exposure could not extend more than 30 days prior to the filing of the grievance, based on the filing deadline in Article 21.07 of the collective agreement.

The grievor stated in his testimony that he also grieved under the MGEU agreement regarding the policy on dual employment, but no information was forthcoming during the hearing with respect to the status of that grievance.

The witnesses

The Employer called three witnesses.

- Darryl Rumsey (“Rumsey”) is the Superintendent of MYC, a youth correctional facility in Winnipeg which provides care, custody and programming for young offenders detained under the federal *Youth Criminal Justice Act*. He has held this position for nine years and previously served as Deputy Superintendent and in various other capacities within the juvenile justice system. He manages about 175 employees, all of whom are MGEU members employed under the Government Employees Master Agreement.
- Cecile Ross (“Ross”) is a Coordinator employed by WCFS Branch in the Emergency Placement Resources department (“EPR”, formerly known as EAPD, basically the shelter system). She has over 30 years of experience working in the child protection field and currently manages about 20 employees, including full time, part time and casuals. The grievor is one of the employees she supervises. She is responsible for

the scheduling of staff and the overall needs of the children placed in EPR facilities.

Alan Akister (“Akister”) is the Labour Relations and Compensation Coordinator with WCFS Branch, a position he has held since 2002. Previously he worked in human resources elsewhere in government and in the health care system.

The Union called only the grievor. He presently works full time as a juvenile counselor at MYC and indicated in his evidence that he wishes to regain his casual employment with WCFS.

The evidence

WCFS transition to government

The parties stipulated that the transition date for WCFS entry into government was March 24, 2003. On that date, the grievor was employed full time as a juvenile counselor at MYC and was also employed as a casual shelter worker with WCFS. Shortly before the transition, WCFS employees in the CUPE bargaining unit were given the following information (Ex. 5, February 4, 2003) in a memorandum from WCFS Interim Executive Director Linda Trigg:

NAME and STRUCTURE WITHIN GOVERNMENT

On transfer to government, WCFS will become a branch of the Community Service Delivery Division of the Department of Family Services and Housing. The branch will be called Winnipeg Child and Family Services. ...

The shelter initiative will continue in the EAPD Program. There will be some further changes as shelters are consolidated or closed due to zoning and licensing requirements.

EMPLOYEE TRANSFER to GOVERNMENT

Employees of the CUPE Local 2153 bargaining unit will be transferred to the Province of Manitoba effective March 24, 2003. This date has been selected to ensure that all employees are on a provincial payroll system by April 1, 2003 - the beginning of the 2003/04 fiscal year.

You will receive your last pay cheque from the Agency on Friday, March 28, 2003 for the pay period ending March 23, 2003. Your pay cheque for April 11, 2003 (pay period beginning March 24 and ending April 6) will be issued by the Province of Manitoba. There will be no change to the manner in which you submit your time sheets or receive your pay stubs.

We are advised that the Department of Family Services and Housing will recognize the existing collective agreement between WCFS and CUPE Local 2153 and will assume the employer responsibilities of the agreement. *Employees covered under this collective agreement unit will become employees of the Department of Family Services and Housing but will not become civil servants.*

If you have any questions, please route them through your coordinator and manager. (Emphasis added)

The grievor testified that he either received the above memo or read it after it was posted in a shelter where he was working. According to Akister, although it was originally intended that the CUPE unit would be moved onto the government payroll, as indicated above, ultimately these employees remained on the WCFS internal payroll system. As planned, CUPE members became employees of the provincial government but did not become civil servants.

The grievor received a letter on February 3, 2004 from the Director of Human Resources, Family Services and Housing, confirming his new status, as follows (Ex. 6):

Dear Mr. Welfley,

Further to the communication from Linda J. Trigg on February 4, 2003, I am pleased to confirm your transfer to the Department of Family Services and Housing effective March 24, 2003.

Your classification, salary, benefits, and all other provisions included in your current collective agreement remain in full force and effect. *Although you are now an employee of the Province of Manitoba, you are not a civil servant.* You remain on the Winnipeg Child and Family Services payroll system and your bi-weekly pay dates remain unchanged.

As an employee of the Province of Manitoba, you are subject to the Sexual Harassment Guidelines, and the Criminal Charges Policy. Copies are attached for your review. You are also subject to the enclosed Conflict of Interest Guidelines. Please review and then complete the acknowledgment at the end of this letter.

The enclosed Oath of Allegiance/Oath of Office document must be sworn before a Commissioner of Oaths. The Oath of Allegiance is optional; the Oath of Office is compulsory.

Please acknowledge this transfer to the Department of Family Services and Housing by signing below and returning the letter to the Human Resources representative at this unit meeting. Two copies of the letter are enclosed so that you can keep one for your files. ... (Emphasis added)

The grievor received this letter at a meeting convened by human resources personnel with shelter workers, probably on February 24, 2004. As requested, the grievor executed his Oath of Allegiance and Oath of Office. The grievor testified that he specifically noticed the point that he would not be a civil servant. He understood that “everything stays the same, I am not a civil servant.” He continued working his two jobs.

In his direct evidence, the grievor was certain that each of WCFS and Corrections knew that he was working for the other program. The shelter coordinator usually phoned him “at work”, *ie*, at MYC. Corrections people knew from casual conversation about his WCFS employment. Moreover, the grievor stated that periodically Rumsey sent all MYC employees an e-mail on the subject of potential conflict of interest. Going back to 2001, the grievor said he responded to Rumsey three times or more with information about his second

job at WCFS. In his evidence, Rumsey agreed that he made such requests sporadically but could not be sure if the grievor replied. Rumsey said he would have been told if the grievor had filed a conflict report. Management at MYC was aware, however, of several employees who were also working for WCFS or local group homes.

Under cross examination, the grievor qualified his evidence somewhat, saying that it may have been pre-transition when WCFS knew about his employment in Corrections. With respect to his conflict reports to Rumsey, he was unable to confirm that he filed such a report in the particular time period between March 24, 2003 and November 2004.

Policy and practice regarding dual employment and overtime

Evidence was adduced regarding policy and practice at both MYC and WCFS. For the Employer, Rumsey testified concerning the situation in Manitoba Corrections and Ross covered the circumstances at WCFS. In his evidence, the grievor also addressed policy and practice at both work sites.

Turning first to MYC and the role of juvenile counselors, Rumsey described the grievor's job as challenging. These employees are responsible for the daily security, supervision, care, counseling and case management of offenders in their unit. Typically staff deal with 20-25 youth but the count may range as high as 30 adolescents. The mandate is to help inmates change their behaviour while ensuring the safety and security of all youth and staff members.

Employer expectations for staff are outlined in a Manitoba Corrections document called "Standards of Professional Conduct" (Ex. 2, "the Standards", September 1999). Rumsey stated that all DOJ policies including the Standards are distributed across MYC program areas and are placed in a Policy & Procedure Binder in each area. There are approximately

75 policies in total and the Standards are kept at the very front of the binder. From time to time, staff may be referred to a particular policy depending on events which have arisen. These materials are also available on the Corrections website which is accessible from the workplace. All employees are expected to familiarize themselves with these policies on an ongoing basis.

The “Conflict of Interest” section of the Standards provides as follows (at p. 7-9):

We promptly report to the Superintendent or Area Director any situation, other employment activity or relationship that might affect our objectivity and impartiality, or ability to perform our duties. ...

We do not use or appear to use our position, or information obtained as a result of our position, for personal gain, advantage or influence.
...

We do not use government property or vehicles, or inmate labour or the services of another employee except as approved or intended. ...

If a full time employee, we do not work for any other provincial department within the Civil Service, and if a part time employee, we promptly declare to our employing authority any other employment within government.

Fatigue and conflicting demands are likely to affect performance and availability. *The total hours of combined government work does not exceed the regular hours of equivalent full time work, unless specifically approved in advance by management.* The duties of our part time job should not compromise our ability to do the other, including availability. (Emphasis added)

Rumsey testified that in his view, the intent of the provisions dealing with dual employment is to prohibit a full time government employee from holding another job with a second government organization. He listed several justifications for this policy. As stated in the document, employee performance can be adversely affected by fatigue. The MYC environment is potentially very dangerous and counselors must always remain alert. A

second job may cause fatigue and reduce an employee's awareness of what is going on in the unit. As well, scheduling can be complicated by a second job. And budgetary concerns related to overtime costs are also part of the rationale for the policy.

Rumsey agreed in cross examination that the prohibition did not apply to a second job outside government. However, if the employee's performance was affected, the policy could be invoked. He acknowledged that in the grievor's particular case, there was never any concern with respect to fatigue on the MYC job or availability for scheduling. The grievor was (and remains) a permanent full time employee and as such, he has a pre-determined schedule at MYC which is known well in advance. Rumsey was also pressed to concede that the grievor did not factually violate the prohibition against dual government employment, but he insisted that the grievor's second job with WCFS Branch did in fact contravene the policy.

In his understanding, the policy is designed to address the holding of two jobs in different areas of government. Rumsey declined to comment on whether the reference to another department "within the Civil Service" changes the result and he was not fully aware of the particulars of the WCFS transition.

If an employee became entitled to overtime rates as a result of his dual employment, this would impact on the approved MYC budget. Rumsey stated that he never received a request by the grievor to work ongoing hours in excess of the regular full time schedule. Corrections Manitoba requires any overtime to be authorized in advance. The grievor has, however, worked occasional overtime at MYC, "an average amount." Rumsey said that in a typical bi-weekly pay period, perhaps 7-10 staff at MYC might log overtime hours, in the range of about 8 hours each.

For his part, the grievor acknowledged seeing the policy on dual employment. In his understanding, the policy precludes working in another department within the Civil Service,

but shelter workers at WCFS were not part of the Civil Service. The grievor stated that no one from management ever told him that his work at WCFS would be regarded as work within the Civil Service. He specifically rejected the accusation that he has contravened the dual employment policy. He commented that this issue is in contention in the present grievance arbitration.

Moving next to practice and policy at WCFS, Ross testified that there are presently 43 shelters and casual employees are frequently used for coverage. Casuals submit an Availability Sheet (see Ex. 20) covering one week at a time, indicating which dates and hours they are prepared to accept. Ross is just one of about a dozen coordinators who manage the scheduling of shelter employees. During the 2003-2004 period, she was the grievor's coordinator and was aware at that time of his full time juvenile counselor job at MYC. However, Ross was not aware of DOJ employment policies and procedures. She often contacted the grievor at MYC to discuss scheduling his WCFS shifts.

In his testimony, the grievor confirmed this fact and said that he listed his MYC phone number for contact purposes. All the coordinators he dealt with called him at MYC. All his work for WCFS was arranged and assigned by coordinators, based on his Availability Sheets. The only exception was occasional emergency situations when he was called directly by an operator.

No evidence was adduced of a WCFS policy equivalent to the Corrections rule against dual employment . However, WCFS does have an overtime policy (Ex. 3) which requires advance approval before shelter staff incur overtime costs:

WINNIPEG CHILD AND FAMILY SERVICES
EMERGENCY ASSESSMENT/PLACEMENT DEPARTMENT
ACCEPTING ASSIGNMENTS RESULTING IN OVERTIME
November 1, 1999

Revised February 2001

Child Care Support Workers are not to accept overtime hours without prior authorization from their Coordinator. It is the Child Care Support Workers responsibility to inform the person doing the scheduling that they will be into overtime.

In the event that they cannot reach their Coordinator, they are to contact their Coordinator's partner and if he/she is not available, they are to then contact the Department Supervisor. Outside of regular office hours, contact the On-call dispatcher for emergency scheduling information @ 291-7815.

Overtime is any hours, which exceed 80 hours in a two-week pay period.

The employer is not obliged to approve and schedule overtime hours beyond an employee's regularly scheduled shift. The service needs of the client shall be the primary determining factor for scheduled overtime. The employer will primarily endeavour to use qualified hourly paid Child Care Support Workers.

Ross agreed in cross examination that many WCFS shelter workers are assigned overtime hours, including casual staff. Overtime is a regular occurrence due to a serious staff shortage. WCFS also uses purchased service to meet coverage needs. Ross stated that at times she has used such outside providers to cover 90% of hotel room placements.

Ross was never approached by the grievor after March 2003 on the subject of overtime. She had no access to the DOJ payroll system. As a result of the events in this case, of course, she did become aware of the Corrections rule against dual employment. Ross testified that in order to follow the WCFS overtime policy in the grievor's situation, she would have to coordinate with DOJ or get shift information directly from the grievor. She characterized this as "a very difficult task" because before assigning any casual shift, she would have to know the grievor's MYC hours and try to calculate whether overtime rates would be triggered. The shelter scheduling process is subject to extreme time pressures and there might not be an

opportunity to gather the necessary information before assigning the grievor's shifts.

Shelter staff record their hours on time sheets kept in the facility (Ex. 21) and fax them to head office for payroll purposes. The grievor stated that he receive two different pay cheques and they arrived in opposite weeks. WCFS paid one week behind with a Sunday night cutoff but the provincial government "autopay" system for his MYC job paid for the two weeks inclusive of payday.

Ross agreed that due to the WCFS transition into government, all the grievor's hours as a shelter worker (if he resumed employment) would have to be paid as overtime, given his regular full time job as a juvenile counselor. She would not confirm that overtime was owed retroactively to March 24, 2003,

The grievor's dual government employment becomes an issue

Akister testified that around June 2004, WCFS first learned that it had employees who were working in other government positions. The information came out during a grievance hearing when it was revealed that some WCFS staff were employed at MYC. An inquiry was made with DOJ to confirm the facts. Rumsey sent a group e-mail to all MYC employees on June 2, 2004 requiring that anyone working for WCFS advise as to their employment status and particulars. The grievor replied by e-mail that he was employed as a support worker with EAPD. "I work seldomly, perhaps a couple of times a month." (See Ex. 7) Rumsey said that a total of four MYC employees disclosed dual employment, including the grievor. Rumsey met individually with all of them. He advised them of the policy prohibiting dual employment and said they must make a choice between the two jobs. He indicated that there would be some sort of transition period allowed and promised to follow up in writing. Finally, he suggested the employees check with the Union regarding their

situation. Rumsey recalled that when he reviewed these matters with the grievor, the grievor expressed doubt about management's directions; however, the grievor thanked him and said he would indeed follow up with the Union.

Rumsey's written follow-up was sent to the grievor on September 16, 2004 (Ex. 8), in the following terms:

I had previously advised you of the Government Policy relating to the working of two jobs. Specifically, it states "*an employee who is employed on a full time basis by a department cannot have additional employment with the government on any basis. This includes part time, casual or seasonal and applies regardless of whether the two positions are within the same department or with different departments.*"

My understanding in speaking with you is that you were in fact working two government jobs.

I am advising you that if you are presently still working the two jobs, you must cease one immediately. The decision as to which single job you maintain will be yours.

If you have already complied with this direction, please ignore this memo.

Thank you for your anticipated co-operation. (Emphasis added)

A copy was also supplied to WCFS. Asked why there was such a long delay in issuing this memo to the grievor, Rumsey replied that it took time to coordinate with human resources and the summer period caused additional delay. In addition, management wanted to avoid creating any risk to vulnerable clients in WCFS by forcing staff to quit precipitously. Under cross examination, Rumsey agreed that the words in quotation marks in his memo did not perfectly reflect the wording of the policy contained in the Standards, but in his view, it was basically the same thing.

Rumsey testified that, to the best of his recollection, the grievor opted to remain working at MYC. At the same time, the grievor expressed the opinion that he ought to be allowed to continue with both jobs. At no time did the grievor produce a letter of resignation from WCFS.

The grievor also ceased filing Availability Sheets with his coordinator at WCFS in September 2004. He testified that in light of Rumsey's verbal order at their meeting in the summer, it would have been insubordinate for him to continue working at WCFS. But the grievor regarded this as a temporary interruption in his WCFS work while the situation was being resolved.

A few days after his September 16 memo, Rumsey received the following e-mail response from the grievor (Ex. 9, September 19, 2004):

I am in receipt of your letter of September 16th. It remains my contention that having been hired by a separate body that I have worked for two employers. In deference to your view that it is a single employer, I shall submit an overtime claim for all hours worked in excess of 80 hours bi-weekly during the course of my 9 year employment with Child and Family Services. The total amount of the claim is approximately \$45,000. Should the immediate payment of this sum provide hardship to the budget I would be happy to have it spread out over several pay periods. Thanks in advance for your anticipated co-operation.

In his evidence, the grievor explained this memo as making a point to the Employer - "you cannot have it both ways." If there is in fact only one employer, which prevents an employee from holding two jobs, then all hours over 80 per bi-weekly period must be overtime. Pressed in cross examination, the grievor said that he did not actually accept that there was a single employer.

Rumsey took no action on the overtime claim contained in this e-mail but did stay in contact with WCFS management. On November 2, 2004, Rumsey confirmed to Akister (Ex. 10) that the grievor had decided to retain his full time employment at MYC. Rumsey assumed that as a consequence, the grievor would be terminated by WCFS, as prescribed by the policy on dual government employment.

Rumsey stated that the grievor's employment with WCFS created no negative impact on the performance of his MYC duties. No discipline was imposed on the grievor for failure to report his dual employment. Asked how the situation could have continued so long without being noticed by management, Rumsey attributed the problem to the fact that there were two distinct payroll systems in use. No one picked it up.

Termination of the grievor

Akister issued a letter of termination to the grievor (Ex. 11, November 3, 2004) once Rumsey indicated that the grievor had decided to remain full time at MYC. In addition, the grievor had been seeking a written confirmation of his employment status with WCFS. Akister noted that the grievor was no longer actively working for WCFS by that point in time. The termination letter stated as follows:

In a letter to you from Superintendent Darryl Rumsey, dated September 16, 2004, you were advised of the government policy with respect to the working of more than one full-time job in government. You were previously advised verbally of this policy. In that you were working two jobs with government and in excess of one full-time job, you were also advised that you were required to immediately cease working on one of your jobs and the decision as to which job would be retained by you was your decision to make.

We have been advised that you have decided to retain your full-time job with the Manitoba Youth Centre and therefore your employment

with Winnipeg Child and Family Services Branch shall cease immediately.

Akister could not recall any conversation with the grievor prior to sending the termination letter. He confirmed in cross examination that he relied solely on the information he received from Rumsey regarding the grievor's full time employment status at MYC. There was no letter of resignation and the grievor never expressly conveyed to WCFS that he was resigning. This matched the grievor's evidence, which was that he had no intention to resign. In fact, it was his wish to continue working at WCFS.

However, Akister insisted that from the WCFS perspective, the grievor had opted to resign by choosing to stay full time in Corrections. In cross examination, Akister was taken through all the sub-clauses in Article 19 of the collective agreement (Termination of Employment) and agreed that none were applicable. This was not retirement, dismissal for cause, refusal to work, layoff or abandonment. In essence it was a resignation, he said. For that reason, the Employer did not apply Article 19.01(g) which requires two weeks notice or pay in lieu where an employee is terminated by the Employer.

Akister was clear in saying that the Employer was not relying on the fact that Availability Sheets had not been submitted for an extended period, which might have been construed as a basis for termination under Article 19.01(e).

The EI Record of Employment (Ex. 12) prepared by the Employer indicated "Quit" as the reason for interruption of earnings. Akister agreed that, with a single employer for both jobs, the grievor still had earnings, but he explained that the WCFS payroll system had to record the interruption for its own purposes. The grievor had been removed from the WCFS payroll.

Plans for devolution of EPR

During the course of the hearing, it was explained that the shelter system (formally known as EPR or Emergency Placement Resources) will soon be devolved to the Southern Aboriginal Authority as part of the Joint Intake and Response Unit (JIRU). Thus, employees of WCFS such as the grievor will once again resume their non-governmental status, similar to the situation prior to transition in March 2003. Akister stated that there have been a series of “go live” dates set for the devolution of JIRU to the Aboriginal Authority, the last being May 15, 2006. However, the date has been pushed back each time and is currently scheduled for the fall of 2006. Akister said that the plan for devolving JIRU emerged only after WCFS was rolled into government in 2003.

Final arguments

Argument of the Employer

For the Employer, Ms Carroll began by asserting that the onus of proof in both grievances lies upon the Union. Although the grievor’s employment with WCFS was terminated, it was not a disciplinary termination. The Employer established a rule against dual government employment and the grievor was in contravention of the rule by maintaining his two jobs. He was directed to choose between the two jobs in order to comply with the rule. Having chosen to retain his full time position at MYC, the grievor could not continue working for WCFS. The termination letter (Ex. 11) confirmed this fact by advising the grievor that his employment with WCFS would cease immediately. Therefore, the primary issue was whether or not the Employer’s unilaterally imposed rule against dual employment was enforceable. The Employer argued that on the principles set forth in *Re KVP Co. Ltd. and Lumber and Sawmill Workers’ Union, Local 2537*, (1965) 16 L.A.C. 73 (Robinson), the rule was enforceable and the termination grievance must be dismissed.

KVP requires the following when an employer introduces a rule unilaterally and without the subsequent agreement of the union. The rule (1) must not be inconsistent with the collective agreement, (2) must not be unreasonable, (3) must be clear and unequivocal, (4) must be brought to the employee's attention before being acted upon by the employer, and if discharge is imposed, the employee must have been notified that breach could result in his discharge, and (5) must have been consistently enforced from the date of introduction.

The Employer reviewed the relevant provisions of the WCFS/CUPE agreement and submitted that nothing therein is inconsistent with the rule against dual employment. Residual management rights are preserved by Article 4, assignment of hours of work is an Employer prerogative under Article 14.02, there is no guarantee of hours to casual shelter workers under Article 15.04 and the Employer retains the final determination of allocation of work under Article 15.06.

As to reasonableness, Rumsey's evidence provided both the operational and financial rationale for the rule. In addition, Ms Carroll argued that there would be a public perception of unfairness if one employee could hold more than one full time equivalent position with government. While there was no evidence adduced on this point, she asked that notice be taken of the significant interest in government employment and the likely perception of inequity if the rule was not enforced.

The Employer contended that the rule is clear and unequivocal as required by *KVP*. The phrase "any other provincial department within the Civil Service" applied to WCFS after transition since WCFS became a part of government and its employees joined the permanent government service workforce. The Employer submitted that the words "Civil Service" in the rule do not purport to have a technical or legal meaning. There is no reference to

legislative definitions. The intent of the rule is to include government in the general sense. Various employees of government are not civil servants but given the rationale for the rule, it can sensibly apply to such employees as well as actual civil servants.

The communication requirement under *KVP* was not in dispute, said the Employer, in that the grievor admitted to being aware of the Standards and the dual employment policy in particular. The evidence showed that employees were informed of the rule and were expected to keep themselves up to date on employment policies. The only question in the present case was the interpretation of the rule and whether this was an instance of a single employer. The grievor considered that he still had two employers after transition and denied that the rule applied to him, but that is a separate question.

Finally, the Employer argued that it has consistently enforced the rule notwithstanding some initial confusion due to dual payrolls and lack of management awareness that some employees were holding two jobs. The grievor suggested that he had reported his dual employment as part of his response on conflict of interest, but Ms Carroll noted that the timing of these reports by the grievor was unclear. It was not shown that the Employer had knowledge at the relevant time - after the WCFS transition. As soon as management learned that there was dual employment (in June 2004), action was taken and the rule was enforced consistently. No discipline was imposed on offending employees and a grace period was allowed to ease the transition for clients.

There was some suggestion that the grievor never conveyed an intention to continue at MYC but in fact he did maintain his full time position and hours as a juvenile counselor. He stopped submitting his sheets for WCFS shifts. On this basis, Rumsey reasonably concluded that the grievor had elected to keep his MYC job and WCFS was informed accordingly. The Employer submitted that in these circumstances, there was adequate consistency of

enforcement for *KVP* purposes.

The Employer argued that government units cannot operate in isolation in matters such as the present one. It was suggested that other public sector employers have similar policies and collective agreement extracts to this effect were filed from two regional health authorities in Manitoba.

The Employer also advanced an estoppel argument based on the fact that the grievor stopped submitting Availability Sheets and filed a request for overtime pay premised on having a single employer. This amounted to a representation, by both words and conduct, that the grievor accepted the rule. The Employer relied on the representation and is now faced with the detriment of a claim for retroactive overtime compensation in the second grievance.

With respect to the Union's second grievance for overtime pay, the Employer argued that on the evidence, there was never a request by the grievor (in either work place) for approval to work overtime hours. Both Corrections and WCFS had policies requiring advance approval. In this case, where the Employer was basically unaware of the dual employment, it would be unfair to impose financial liability.

In the alternative, the Employer relied on the 30-day limitation under Article 21.07 of the collective agreement. Since the grievor did not work after September 2004 and the grievance was filed in November 2004, there is no compensation due to the grievor in any event. It would be inequitable to extend the Employer's liability given the lack of knowledge and lack of approval for overtime expense.

Argument of the Union

In the Union's view, this was a case where the grievor was terminated without any proper basis in the collective agreement. In substance, the Employer has been claiming that the grievor resigned his position at WCFS due to the policy prohibiting dual employment. But the Union argued that resignation is an employee right; on the evidence, there was never a resignation by the grievor. Without proof of a subjective intention to resign, there can be no true resignation from employment. If an employer forces an employee to leave, this will be deemed to be a discharge. The Union cited *Re City of Hamilton and Canadian Union of Public Employees, Local 167*, (1970) 21 L.A.C. 427 (Hanrahan); *Re Chrysler Corporation of Canada (Windsor) and International Union of United Automobile, Aircraft & Agricultural Implement Workers of America (UAW-CIO)*, (1952) 4 L.A.C. 1291 (Cross) at p. 1293; *Re Canadian Gypsum Co. Ltd. and International Woodworkers of America*, (1968) 19 L.A.C. 341 (Weiler) at p. 343.

The Union submitted that the Employer failed to comply with the *KVP* requirements and should not be allowed to enforce the rule against dual employment in this case. While the Union conceded that there is no inconsistency with the terms of the collective agreement, it argued that the balance of the *KVP* principles were violated.

First, the rule is unreasonable. Fatigue was cited as the rationale for prohibiting a second job but there was no adequate foundation in the evidence to support this rationale. It was admitted that the grievor himself never displayed any fatigue problem on the job at MYC. Moreover, the rule made no sense because it applied only to other government employment but not concurrent employment outside the sphere of government. An employee's performance may equally be undermined by non-government work but the prohibition does not apply.

As for the financial justification, the evidence indicated that overtime was used extensively at

WCFS and occasionally at MYC. Incurring overtime is not a valid basis for barring dual employment, especially in an environment where there is a shortage of workers. The Union answered the “public concern” argument by pointing again to the labour shortage. WCFS is using outside purchased service to cover its shelters so there is little basis for public concern if government employees take on extra duties.

On these grounds, the Union said that the rule fails the reasonableness test.

Next, the rule is not clear and unequivocal. To begin with, said the Union, the rule is internally contradictory. One paragraph states an absolute ban (“If a full time employee, we do not work for any other provincial department within the Civil Service ...”) whereas the next paragraph opens the door (“unless specifically approved in advance by management”). Beyond that, the reference to the Civil Service is confusing. As an interpretive matter, the Union argued that the writer of the policy must have intended to distinguish between government generally and the Civil Service, in which case the policy does not even apply in the grievor’s particular case. For *KVP* purposes, however, the wording of the rule lacks clarity and fails the test.

The Union argued that the notification requirement was not met on the facts of this case. The Standards document was generally available to employees but when the issue was officially put to the grievor in writing by Rumsey (Ex. 8), the policy was misstated in a material way. Rumsey quoted words which were different than the actual policy and more importantly, he stated that dual employment is not permissible “on any basis”. In fact, the rule allows for extra work with the approval of management. Finally, the grievor was never clearly told that breach of the rule would lead to discharge, an additional requirement under *KVP*.

The Union disagreed that Employer enforcement of the rule has been consistent. The

evidence showed that some WCFS coordinators were well aware of the grievor's concurrent employment yet nothing was done. It is immaterial that Ross did not know (or find out) about the details of DOJ policies. The grievor was very open and honest about his two jobs and testified that each "employer" knew about the other. Even when management at WCFS formally learned about ongoing dual employment by several employees in June 2004, nothing happened for several months. The expressed rationale for the delay (transition to meet client needs) makes no sense because the grievor was a casual employee who could refuse work at any time and to whom the Employer owed no obligation to offer work.

As a last response to the Employer's *KVP* arguments, the Union pointed out that Corrections has a dual employment policy but WCFS does not, based on the evidence. The grievor was terminated by WCFS but was not shown to be in violation of any WCFS policy or rule.

In summary, the Union denied that the Employer has met the *KVP* test and urged that the termination be set aside.

Turning to the overtime claim, the Union emphasized that the Employer was aware of the grievor's dual employment and could not avoid liability now by denying any knowledge. The grievor's WCFS coordinators knew he was working at MYC and nevertheless assigned him additional hours as a casual shelter worker. Ross admitted in her evidence that this scenario creates an obligation for the Employer to pay overtime on all hours in excess of 80 hours bi-weekly. If that is true, then the liability must be extended to March 2003 when WCFS transition created a single employer.

To the extent necessary, the Union requested that relief be granted under section 121(2)(e) of the *Labour Relations Act* ("the Act") against the procedural or time limit requirements which might bar the full overtime claim retroactive to March 2003. The Union suggested that the

equities lie on its side. The Employer was aware of the dual employment and would suffer no prejudice if relief was granted. By contrast, the grievor was unaware that he was working for a single employer and was being underpaid for his overtime hours. He relied on the information given to him by WCFS management in 2003 and again in 2004 - he was not a civil servant. He believed in good faith that he had two employers. Thus, he had no reason to grieve the overtime issue back in 2003 and relief should be granted to allow his claim to be addressed. For the same reasons, the Employer's estoppel argument was without merit. The grievor always maintained his primary position that he was entitled to keep both his jobs, only one of which was in the Civil Service.

Nothing in the collective agreement specifies that overtime must be approved in advance. WCFS policy requires an employee to advise management that he will be incurring overtime but in this case, the grievor could not have realized this fact at the time. He was actually misled by the correspondence which emphasized his status outside the Civil Service. By comparison, the Employer should have known who was working for it and when there was dual employment. An employer ought to have knowledge of its own employees.

The Union attacked the WCFS overtime policy (Ex. 3) as being unreasonable under *KVP* and said it should not be upheld in this case. The policy does not speak to overtime generated by dual employment and staff were never advised that they would be denied overtime in such circumstances. The collective agreement requires that the overtime rate be paid and the WCFS policy should not trump the agreement.

Referring to the evidence concerning devolution of JIRU and EPR, the Union noted that the whole issue of dual employment is about to disappear. Once the shelters are taken over by a non-governmental body, the dual employment policy will cease to apply and the grievor will be free to resume his second job. The Union urged that these unique circumstances be taken

into account, given that this is a termination grievance. In particular, the Union asked that the grievor be reinstated with full compensation, that he be allowed to resume working with overtime pay for his hours in excess of 80 hours bi-weekly and that this arrangement be allowed to continue until JIRU is devolved to the Southern Aboriginal Agency.

Employer reply argument

The Employer maintained its position that the rule against dual employment satisfies all *KVP* requirements. It is not unreasonable that the prohibition applies only to concurrent government employment. The Employer undertook what it could with respect to the fatigue problem. But the policy is not silent on non-governmental work taken on by government employees: “We promptly report ... any situation, other employment activity or relationship that might affect our objectivity and impartiality, or ability to perform our duties.” This portion of the policy answers the Union’s criticism that the rule is inadequate and therefore unreasonable. As Rumsey stated, non-governmental dual work must be considered on a case-by-case basis.

The Employer denied that the reference to Civil Service is problematic in the rule. The Standards of Professional Conduct were written in plain language and not in technical terminology. “Civil Service” in the rule on dual employment can and should be read as simply meaning “government”. By contrast, when WCFS employees were given notification of their status following transition (Ex. 5, 6), a more technical approach was taken by necessity. It was essential to state with accuracy the rights and obligations of employees moving into government. Technically and legally, MGEU is the bargaining unit which represents civil servants employed by the government. The CUPE bargaining unit is comprised of non-civil servants, albeit they are also government employees.

As for consistency, the Employer reiterated that it acted to enforce the rule once it became aware of the facts. Rumsey was clear in telling the grievor he could not maintain both jobs. Until June 2004, neither management nor the Union realized what was happening, a fact which cuts both ways in the present case. The Union's attempt to recover overtime is undermined by the grievor's failure to request and receive advance approval, which was difficult to do until he realized there was an overtime issue due to the single employer.

The Employer also denied that there was any deficiency in providing notification of the rule, as argued by the Union. While Rumsey's September 2004 memo did not recite the policy in exact terms, the gist of the rule was made clear. None of the employees in question were being given permission to maintain their dual employment; they were instructed to cease, as was the grievor. Thus, Rumsey's omission of the discretionary authority to approve dual employment was immaterial under *KVP* in this case.

In reply to the Union argument that WCFS did not enact a mirror policy to the Corrections rule against dual employment, the Employer said that it was unnecessary to have two policies. The government is a single entity. The WCFS Branch is obliged to support the policies of government, which includes Corrections. The final letter written to the grievor by Akister (Ex. 11) was merely an administrative confirmation of the Corrections policy.

On the 30-day time limit for recovery of overtime, the Employer denied that relief was available under the Act as argued by the Union. The collective agreement grievance provisions only create a 30-day window for claims. There is no "breach" of time limits or procedural requirements in issue here. In any event, there is real prejudice to the Employer which would result from granting relief. The Employer in this case was unaware of the dual employment and was unable to take steps to limit its exposure to overtime wages.

Lastly, the Employer responded to the Union's argument and authorities on resignation. Ms Carroll clarified that the Employer has not suggested that the grievor willingly resigned from his WCFS position. It was an administrative effect of the policy against dual employment. He chose the MYC job, could not hold two jobs and was deemed or assumed to have given up the second employment.

Analysis and conclusions

Threshold issue

Most of the parties' final arguments were directed to the application of *KVP*, but the Union advanced one point which was a threshold issue. It was suggested that as written, the rule did not apply to the grievor's circumstances because his WCFS job was not work for a "provincial department within the Civil Service." WCFS was part of the Department of Family Services and Housing at the material time but the grievor's employment was not carried on within the Civil Service. If valid, this argument could be a complete answer to the termination. WCFS itself had no mirror policy precluding dual employment. If the DOJ policy was not factually applicable to the grievor, then there was no proper basis upon which the grievor could be forced to choose between his two jobs.

After careful review, I am unable to accept the Union's threshold argument. I hasten to observe that in considering this initial point, I am not answering the question under *KVP* as to the clarity of the rule. Rather I am construing the rule as best I can, despite any lack of clarity which may exist in the drafting, and declaring the legal effect of what the Employer has enacted. In my view, the language does present interpretive difficulties (see more below) but an overall meaning can be ascertained. For convenience, the pertinent parts of the policy are reproduced and marked as paragraphs "A" and "B":

“A”: If a full time employee, we do not work for any other provincial department within the Civil Service, and if a part time employee, we promptly declare to our employing authority any other employment within government.

“B”: Fatigue and conflicting demands are likely to affect performance and availability. The total hours of combined government work does not exceed the regular hours of equivalent full time work, unless specifically approved in advance by management. The duties of our part time job should not compromise our ability to do the other, including availability.

It is apparent that paragraph “A” contains an ambiguity due to the Civil Service reference. The first sentence of paragraph “A” might mean that dual government work, broadly speaking, is prohibited. This was the Employer’s reading. This sentence might also be read as a more narrow prohibition on dual employment within the Civil Service. This was the Union’s reading.

Paragraph “B” is more clear and concise, simply stating that the total hours of “combined government work” shall not exceed a regular 1.0 EFT position, unless approved by management. It is conceivable that paragraph “B” was intended to apply only to a combination of part-time jobs, but because both paragraphs address part-time employment, I have concluded that the rule should be understood as follows:

Neither full-time nor part-time government employees are permitted to hold concurrent government employment which results in combined hours exceeding regular full time hours, unless management considers and allows an exception.

Construed in this fashion, the rule is applicable on its face to the grievor. After transition, he undertook working hours which exceeded a 1.0 EFT position and he did not obtain approval

in advance from either management group to do so.

I appreciate the Union's point that all WCFS shifts assigned to the grievor were duly approved by a coordinator. As well, the grievor worked overtime at MYC on occasion and this too was duly approved. Nevertheless, no Employer representative on either side ever gave an informed consent to combined working hours exceeding 80 hours bi-weekly. Despite some awareness by individual WCFS coordinators and probably some MYC staff that the grievor held two jobs, there was no full disclosure to each management group of the grievor's hours and detailed working arrangement at each work site. I therefore conclude that the rule against dual employment applied to the grievor. As a result, it is necessary to consider the *KVP* test and determine whether the Employer is entitled to rely upon the rule in the particular circumstances of the present case.

Consistency with the collective agreement

The Union properly conceded that the rule is not inconsistent with the terms of the collective agreement.

Reasonableness of the rule

The Union argued that the rule was not shown to be reasonable but I find to the contrary. Both stated justifications - operational and financial - are adequate in the present context to support a rule limiting dual government employment of Corrections staff such as juvenile counselors. It is not necessary for the Employer to prove an actual detrimental impact on the grievor's work if the Employer reasonably apprehends that there could be such an effect in some cases. As for the cost of overtime, barring collective agreement language on the

subject, the Employer is entitled to manage its workforce and control its payroll costs in this fashion. I do not find it necessary to rule on the additional argument advanced by the Employer based on public perception of inequity in access to government employment opportunities.

Clarity and notification

Difficulties arise with the next two components of the *KVP* test - clarity and notification. Because these two aspects are logically related, I will consider them together. To meet the *KVP* test, the rule must be clear and unequivocal, and it must be brought to the attention of the affected employee before it is applied against him. Clarity should be assessed not only in the abstract but also in the context of the particular circumstances of the work situation and the employee in question.

I find that the rule against dual employment is not sufficiently clear and unequivocal, in this case, to meet the *KVP* standard. Neither did the grievor receive adequate notification that the rule would be applied.

At the time of WCFS transition, CUPE bargaining unit members became government employees but did not assume civil servant status. This was explained in communications from WCFS management and the departmental human resources director in 2003 and 2004 (Ex. 5, 6). The February 3, 2004 letter to the grievor (Ex. 6) made specific mention of certain policies which would now apply to the grievor “[a]s an employee of the Province of Manitoba” but it was not established that the grievor was notified of a dual employment policy. Given the fact that WCFS staff in CUPE were government employees without civil servant status, it reasonably follows that some rights and obligations attaching to civil servants would *not* apply to WCFS employees such as the grievor. It is not relevant here to

catalogue what all the differences might be, except to note that an employee in the grievor's shoes could reasonably assume that some rights and obligations held by other government employees would not attach to him because he did not become a civil servant.

This was precisely the conclusion reached by the grievor when he reviewed the Manitoba Corrections policy against dual employment. He testified that he believed it was inapplicable to him personally because he was not a civil servant. Nothing in the transition process at WCFS would have led the grievor to reach a different conclusion. In my view, it was incumbent upon WCFS management to ensure that the CUPE work force was properly informed about the nuances of their non-civil servant status, at least if it was intended to enforce a general rule such as the prohibition on dual employment which is in issue in the present case.

Turning to the specific wording of the rule, I have noted the Union's argument that in paragraph "A", "the Civil Service" must mean something other than just "government," since otherwise the use of the words "Civil Service" would be redundant. The policy does appear to be in plain language style, but if so, then a reference to not working "for any other provincial department" would have sufficed without adding the qualifier "within the Civil Service". The grievor could reasonably come to the conclusion, upon a review of paragraph "A", that he was not covered by the rule because the rule bans work for another department (*ie*, Family Services and Housing) when such work is "within the Civil Service." His work with WCFS was plainly not within the Civil Service.

It is important to remember that in conducting this analysis, I am not construing the words of the rule as if they were provisions of a collective agreement. Different principles apply to that exercise. The *KVP* requirements for clarity and notification are intended to ensure basic fairness to employees when faced with a rule imposed unilaterally by an employer and not

endorsed by the union. To be enforceable, such a rule must be clear and the employee must receive reasonable notification.

In sum, I have concluded that the rule is far from clear and unequivocal. Moreover, the manner in which the rule was brought to the grievor's attention failed the *KVP* test. While not determinative alone, the added fact that Rumsey misstated the rule (Ex. 8) in September 2004 while documenting his previous instruction to the grievor is an aggravating factor. Rumsey characterized the rule as being absolute whereas in reality some discretion was contemplated.

The Employer argued that this was irrelevant because the total prohibition was in fact being applied to all employees involved. But the *KVP* principles are all about fair process and it should have been open to the grievor to request individual consideration. Rumsey's misstatement precluded even the possibility of accommodating the grievor's desire to keep both jobs, on some basis which might be mutually acceptable. To uphold enforcement against the grievor in these circumstances would be unfair and unreasonable.

Consistent enforcement

With respect to the last *KVP* requirement, consistent enforcement since the adoption of the rule, again I have doubts. The grievor's dual employment commenced in March 2003 and there was no enforcement at all until, at the earliest, June of 2004. The Employer apparently did not realize, at a senior management level, that dual employment was ongoing, but at lower levels of administration, the grievor's dual jobs were well known. It is not a complete answer to say that Ross was not well versed in DOJ policies and therefore did not grasp the significance of the grievor's full time job at MYC. The Employer has some responsibility to know who its employees are and what work they are doing. In the present case, this was complicated by the WCFS transition and it would be unrealistic to deny the challenges faced

by WCFS management during that process. If this was the only *KVP* defect, it might not be enough to overturn the termination, but I find that it is at least one factor which militates in favour of the Union's position.

Estoppel

I am unable to accept the Employer's estoppel argument insofar as it was advanced as a defence to the termination grievance. Estoppel requires a clear and unequivocal representation which is relied upon to the detriment of the representee. Here a clear and unequivocal representation was lacking. The sequence of events in the present case, and the understandings of the participants, were too confused to found an estoppel. Moreover, the grievor's decision to stop submitting Availability Sheets was a proper response to his supervisor's order, not a representation that he agreed with the policy. I accept that the grievor intended to challenge Rumsey's stance and that the forbearance was temporary. As for the massive overtime claim referenced by the grievor (Ex. 9), this was more of an irreverent protest than a serious claim.

Conclusion regarding the *KVP* test

Based on all of the foregoing, I conclude that the Employer was not entitled to rely on the rule against dual government employment *vis a vis* the grievor. The grievor's termination was invalid.

The overtime grievance

With regard to the second grievance, I am not prepared to award overtime pay in the unique circumstances of this case.

The Employer did not appear to contest the fact that the grievor logged in excess of 80 hours bi-weekly for a single employer, which would normally trigger overtime. However, the grievor did not work at WCFS from September 2004 onward and no grievance was filed until November 10, 2004. Assuming without deciding that relief could be granted under section 121(2) of the Act to cure the timing problem and grant compensation retroactive to March 2003, I decline to do so in the exercise of my discretion.

At the material times, the grievor believed that he was in substance working for two employers and perceived no unfairness in receiving straight time pay. The Employer was not fully aware of the dual employment, and while I have indicated above that there is some responsibility to “know your workforce”, the circumstances here are insufficient to justify imposing liability on the Employer. The existence of dual payrolls was apparently the main reason why the grievor’s situation was not detected as a matter of course. Both DOJ and WCFS management responded reasonably expeditiously once they grasped the dual employment issue. On balance, it would not be just and equitable to grant relief.

Devolution of JIRU

While I can understand the Union’s point that employment in EPR may soon cease to be government employment, thereby eliminating the grievor’s dual employment problem, this contingency is not a factor which I can act upon as an arbitrator. Plans are plans, but no one can guarantee that the devolution of JIRU will proceed as projected. The present grievances must be determined based on the known facts.

Award and order

The termination grievance is allowed and it is declared that the grievor was entitled to continue in his employment with WCFS notwithstanding the letter of termination issued on November 3, 2004. Remedy was severed by agreement of the parties and I retain jurisdiction for that purpose.

The grievance has succeeded on the basis that the rule against dual employment failed the *KVP* test, and in particular, the requirements for clarity and reasonable notification. But the rule is not unreasonable; once it has been clarified and properly communicated to the grievor, there is no reason to hold that the rule cannot be enforced by the Employer. This award constitutes clarification and notification. The grievor is therefore entitled to compensation calculated for the period September 2004 to the present date.

If the grievor still wishes to hold employment with WCFS in addition to his MYC job, he must seek permission under the terms of the dual employment policy. The Employer must act fairly and reasonably in considering his request.

The overtime grievance is denied.

DATED at the City of Winnipeg this 24th day of July 2006.

ARNE PELTZ, Sole Arbitrator