

Ref:

Preliminary Objection
Termination

**FINDINGS AND DECISION
IN A DISPUTE**
between

**THE FISHERIES AND MARINE INSTITUTE OF
MEMORIAL UNIVERSITY OF NEWFOUNDLAND**
(the Employer)
and

**NEWFOUNDLAND AND LABRADOR ASSOCIATION OF PUBLIC & PRIVATE
EMPLOYEES LOCAL 7405**
(the Union)

Grievor: Mr. Randy Snow

For the Union: Ms. Christina Kennedy & Ms. Amanda Galway, Presenters
Mr. Paul Brett, Advisor

Witnesses: Mr. Randy Snow, the Grievor
Mr. V. Puglisevich

For the Employer: Mr. Claude Horlick, Presenter
Mr. Robert Escott, Advisor

Witnesses: Mr. Robert Rutherford
Ms. Linda Gregory
Mr. Cody Garlie
Mr. Robert Escott

The Arbitrator: Dr. John A. Scott

The Preliminary Objection was heard in St. John's on May 27, 28, and 31, 2010.

Statement the January 12, 2010 Grievance (Consent #2): Violation of Article 28 (Discipline) and all other pertinent articles of the Collective Agreement.

The Requested Adjustment Full Redress; full retroactivity including but not limited to reinstatement and back pay.

Consent # 2

IN THE MATTER OF AN ARBITRATION HEARING HELD REGARDING THE GRIEVANCE OF Randal Snow PURSUANT TO THE MEMORIAL UNIVERSITY and NAPE LOCAL 7405 COLLECTIVE AGREEMENT

**AGREED STATEMENT OF FACTS
for
PRELIMINARY APPLICATION**

1. Randal Snow commenced employment at the Fisheries and Marine Institute of Memorial University of Newfoundland and Labrador ("Employer") on September 1, 1982.
2. Mr. Snow was initially hired as a temporary fulltime instructor. He became permanent fulltime in 1992.
3. On Friday, December 18, 2009, the Employer requested to meet with Mr. Snow to discuss a potential conflict of interest.
4. At the December 18, 2009 meeting, among other things, the Employer asked Mr. Snow if he was teaching "H2S Alive" for a company called "Petrell". Mr. Snow confirmed that he was. The Employer informed Mr. Snow that this was a violation of the Employer's Conflict of Interest guidelines and that it had serious consequences.
5. The parties met again on December 22, 2010. In light of Mr. Snow's length of service and the fact that he had never been disciplined by the Employer, the Employer provided Mr. Snow with the option to resign.
6. The Employer and the Union agreed to waive the 5-day time limit set out in Article 28.01(b) (see attached Exhibit "A"), in light of the Christmas holidays, and in order to give Mr. Snow sufficient time to decide how he wished to proceed.
7. Mr. Snow decided that he did not wish to resign.
8. The Employer and the Union met again on January 8, 2010, at which time the Employer terminated Mr. Snow's employment and provided him with a letter (see attached Exhibit "B").
9. On January 12, 2010, Mr. Snow filed a grievance in relation to the termination of his employment (see attached Exhibit "C").

Christina R. Kennedy
for the Union
Date: May 27/2010

Claude Horlick
for the Employer
Date:

THE PARTIES AGREED THAT:

- the Arbitrator was properly appointed and had authority to hear the case;
- the Arbitrator's notes of the evidence and argument as recorded in the final award will prevail in the event of conflict;
- parties likely to be affected by the outcome of the hearing have received notice and been informed of their right to appear and/or be represented;
- all matters pertaining to the grievance procedure and all time limits, whether statutory or arising from the collective agreement, were properly observed or are waived;
- there is a preliminary objection to be raised by the Union;
- all witnesses were to be excluded until all their testimony had been heard;
- issues of quantum, if any, would be considered separately and if the parties do not reach agreement within sixty (60) calendar days after publication of the Awards they will be referred to the Board, within the same sixty (60) calendar days, for resolution;
- the Board will remain seised of the matter for sixty (60) calendar days after publication of the awards to deal with matters of interpretation should they arise.

DOCUMENTS TAKEN INTO EVIDENCE:

- | | |
|---------|--|
| Consent | #1 Collective Agreement expiring August 31, 2012 |
| " | #2 Agreed Statement of facts with Jan 8, 2010 Dismissal & Jan 12 Grievance |
| " | #3 Grievance dated January 12, 2010 |
| RS | #1 Dec 15-16 e-mail exchange (Nicholas, Garlie, Snow) |
| " | #2 Grievor's check stub (Puglisevich Crews & Services Ltd) |
| LG | #1 Dec 15-18 e-mail exchange (Nicholas, Garlie, Gregory) |
| RR | #1 Mr. Rutherford's "Job Fact Sheet" |
| " | #2 <i>COPI Standard Practice for Training ...</i> |
| " | #3 <i>MI Conflict of Interest Guidelines</i> Effective February 6, 1989 |
| " | #4 June 29, 2009 Memo from Mr Glenn Blackwood to "All Employees" |
| " | #5 MUN Website "Conflict of Interest" |
| " | #5a June 20-25 e-mail exchange (Petrell, Newhook, Rutherford) |
| " | #6 June 20-24 e-mail forward (Newhook, Rutherford) |
| " | #7 <i>Enform</i> MOU with Private 3rd Party Training Provider |
| " | #8 Mr. Rutherford's Conflict of Interest Memo re Firefighters |
| " | #9 OSSC Course Fees 2009-2010 |
| " | #10 Petroleum Institute Training Service H ₂ S Alive Instructor Program |
| " | #11 MUN University Policies (website) |

COLLECTIVE AGREEMENT ARTICLES DIRECTLY CONSIDERED

Article 6 Arbitration

- 6.09 The parties and the employees bound by this Agreement shall comply with these provisions for final settlement of a grievance and they shall comply with the decisions of an Arbitration Board appointed in accordance with those provisions and do, or as the case may be, abstain from doing anything required by that decision.
- 6.12 An Arbitration Board may not alter, modify or amend any provision(s) of this Agreement but shall have the power to set aside a decision of the Employer and to modify a disciplinary measure imposed by the Employer.

- 6.13 Subject to Article 23, in cases of dismissal and suspension, the burden of proof shall rest with the Employer and the employee shall have recourse to the Grievance Procedure.
- 6.14 Either party may, within seven (7) days after receipt of the report of the Arbitration Board, request the Board to reconvene for the purpose of clarifying its decision.

Article 28 Discipline

- 28.01 (a) Subject to Clause 23.03, an employee may be reprimanded, suspended or dismissed, but only for just cause.
- (b) An employee who is reprimanded, suspended or dismissed shall receive written reasons for such discipline within five (5) days of the discipline. If such procedure is not followed, then the Employer's action shall be considered null and void.
- (c) Where an employee is required to attend a meeting scheduled with Employer representative(s) dealing with warnings, adverse reports, reprimands, suspension or dismissal, the employee shall be advised by the Employer that he/she has a right to be accompanied by a Union representative.
- 28.02 Subject to clause 23.03, all dismissals, suspensions and other disciplinary action shall be subject to the formal grievance procedure as outlined in Article 5 and Article 6.

THE UNION'S PRELIMINARY OBJECTION

FOR THE UNION, Ms. Kennedy moved a preliminary objection based on the Union's view that there was undue delay in imposing the discipline. While the Union recognises that the Collective Agreement does not have any specific provision for time limits governing imposition of discipline, as many other collective agreements do, there is a common law duty that does limit the Employer in this matter.

FOR THE EMPLOYER Mr. Horlick noted that motions based on undue delay are based on circumstances where the employer had significantly prior knowledge of what was happening. In December 2009, when the Grievor was terminated, the Employer had no prior knowledge of the sort the Union claims. It did not have knowledge prior to December 2009, and took swift action once the Christmas break, which was agreed to by the Union, was over.

EVIDENCE

THE FIRST UNION WITNESS was Mr. Randy Snow, the Grievor, who was questioned by Ms. Galway, for the Union. He testified that he had reviewed the agreed statement of facts entered by the Parties (Consent #2) and confirmed that it is accurate.

Mr. Snow testified that in the afternoon of December 18th the Employer had asked him to meet concerning his work at *Petrell*, a local safety training company, and conflict of interest.

"I was absolutely shocked that they wanted me to appear for any kind of question. I could not believe it at first... No, nothing similar in the 27 years of service. I was very, very surprised. If there was a problem. I'd expect some discussion.

Asked whether he was aware of the conflict of interest policy, Mr. Snow said:

It was even more devastating. Those present at the meeting were Mr. Escott, Mr. Mike Fowler, Mr. Greg Parsons and a Union representative. All had solemn looks... looking at possible conflict of interest... I could not understand when Mr. Rutherford was not there because he was the one I'd discussed it with before.

Asked to describe that earlier conversation as fully as possible, Mr. Snow testified that it had taken place approximately 18 months prior to the dismissal, or two years before the present. The conversation had occurred in the course of a teaching day at the *Off Shore Safety and Survival Centre* (OSSC) at Foxtrap.

As I was going down the corridor, Mr. Rutherford was coming up the other side of the corridor. He turned to me and asked: "Randy do you know anything about *Petrell*?" I said: "Yes, I've taught several H₂S Alive courses for them. They are a small safety training company." He said: "Oh, we should get a letter in place about that." That is the way he said it.

Asked what he understood the comment to mean at the time, Mr. Snow said:

My impression was, a letter about a mutual exchange of instructors - something that we had done in the past... Probably about ten years prior, we had an agreement with the College of the North Atlantic that, if the Seal Cove campus needed an instructor for the course, we at OSSC would provide one; and, if OSSC needed one, they would provide one. We did that, and we did have an exchange of courses. I went to the College of the North Atlantic and Ed Martin came to us - the H₂S Alive courses.

Asked about other such agreements between the Marine Institute and other entities, he said:

I don't know of any in place, but there were attempts. In 1992 Dave Blackmore and I went to Aberdeen to do some safety training courses with students. The interest was, if we had overload in courses they would take them, and *vice versa*. This was the basis of a letter of agreement. It did not take place because the Institute did not think we'd profit from it. There may have been others.

Mr. Snow's attention was directed to the conversation he had with Mr. Rutherford in the hall, and asked what he had done as a result of that conversation. He said:

I said OK and went to my office down the hallway... On the way back from my office I went into his office and said, "I'll be talking to *Petrell*, and I'll mention about the LOA." He said, "Yes, we need a letter in place."

Asked whether the conversation had alarmed him, Mr. Snow said, "It did not."

Asked whether the Employer ever informed him about a conflict of interest policy or whether he had ever received any information about it, Mr. Snow answered:

The first I knew was December 18th when it was read out in front of me... I spoke to the *Petrell* people several days later. They asked me to do a course for one student. All they really wanted was small courses for students unable to get the course anywhere else. I mentioned to Mr. Puglisevich that the Director of the OSSC was interested in having an LOA in place, and explained that this would be an exchange of instructors on an as needed basis.... He paused for a moment, and said he'd be interested in some sort of agreement.... I went home... It was several days later I went to the office to see if Mr. Rutherford was available. I wanted to mention to him what Mr. Puglisevich had said; but Mr. Rutherford was not available. And several days later, again, the same thing. I went to the office to see if he was available, and again he was not available.

Asked whether he had pursued the matter with Mr. Rutherford, Mr. Snow said:

No not really. It did not seem to be urgent... I spoke to him and Mr. Puglisevich, and that was it. I assumed that, if they pursued it and it worked out, I'd be out of income; and, basically, I did not want that. So I left it at that.

Asked whether Mr. Rutherford had followed up on the issue with him, Mr. Snow said, "No he did not." Asked whether, at that point, he had any problem working with *Petrell* without an agreement in place, Mr. Snow said:

No I did not. I did not think I was doing anything wrong. I'd not been told it was wrong.

Asked whether he believed it was wrong, Mr. Snow answered: "No I did not, in the first place."

Asked if the Employer might have learned of his work with *Petrell* from anyone else, he said:

Yes, one incident was with Mr. Cody Garlie, the Office Manager at OSSC. He received an email from a client requesting a copy of the H₂S Alive certificate... The student gets a temporary certificate at the end of class which is good for ninety days. The registration material is then forwarded to *Enform* in Calgary. – It is a non profit training agency funded by the petroleum industry, and they are the ones who facilitate the H₂S Alive courses. – The course itself is basic safety dealing with hydrogen sulfide dangers in the industry, and it's required to be renewed every three years. The students are anyone working in the petroleum industry: anywhere hydrogen sulfide is present. They come from all over the world. The email inquired about a student's temporary certificate and was asking for a copy of the *Enform* certificate. I'd only issued a temporary. The permanent one comes from Calgary. I had taught the student at *Petrell*... Cody Gravey sent

me a copy of the email asking if I knew about it. I was off that day. I checked at home, and the next day I went looking for him, and could not contact him. I went on to my teaching. I don't know why they would be looking for a copy of the *Enform* certificate from the Marine Institute. I contacted *Petrell*, and told them that the person was calling for a copy of the certificate. Later on that afternoon I did come across Cody in the office, and I said to him, about the email and the H₂S certificate. "I've taken care of that." And he said, "That's all I need to know."

Mr. Snow said that Mr. Garlie had not followed up on the issue with him or asked what the mixup was. Asked if there were any other incidences through which the Employer might have become aware of his work with *Petrell*, Mr. Snow said:

There were a couple of others. One of our *Petrell* students was a friend of Mr. Rutherford's. Some students in the class at the time recognized me as an Instructor at the OSSC where they had done other courses. I told them 'I'm doing this to fill in for a regular instructor on a temporary basis.' That was about a year ago, from today's date, six months before the termination. It was after the conversation with Mr. Rutherford. They recognized me. He came to me in a break and said he and Bob Rutherford were friends, and I said, "Good." ...I said to him, 'Don't mention this to him. I'd rather leave it in Robert's hands to deal with.' I was hoping that it would not get back to other management because it would start discussion about that letter, and they'd tell me to stop teaching at *Petrell*.

Asked whether, at that time, he thought that he was doing anything wrong, Mr. Snow said:

No I was not doing anything wrong in teaching the course; But perhaps, in their opinion, it was wrong for political reasons.... Another student at *Petrell* ... later started work with us at OSSC. She'd been there several months, and I asked her if she had mentioned to anyone else that I'd been teaching with *Petrell*. I asked her that for the same reason as before. I'd left the business in Mr. Rutherford's hands, and if it got to other managers they may stop the teaching and other instructors might get jealous of my teaching... That happens.

Asked what the student/colleague then said, Mr. Snow answered:

I don't know exactly. She was not concerned... It is quite possible that other students who had done courses at *Petrell* had said something. I don't know.

Asked whether he had told other instructors of his teaching at *Petrell*, Mr. Snow said, "Yes I have." Ms. Galway noted that it appears Mr. Snow was trying to conceal his employment at *Petrell*, and asked him why. Mr. Snow said:

Yes, the primary reason was that management might tell me to stop. I saw no reason to. I left it with a competent person to tell me to stop if necessary. He did not.

Asked what the teaching at Petrell meant to him, Mr. Snow answered: "It is income, not big but very beneficial... It helped pay the bills." Asked what he would have done if, at some point, the Employer had asked him to stop, Mr. Snow answered:

I'd have stopped. If there was an objection, I'd have to stop. I'd ask why, but if it was objectionable to them I'd have to stop.

ON CROSS EXAMINATION, Mr. Horlick asked Mr. Snow when the conversation with Mr. Cody Garlie had occurred. He answered:

Late November, possibly the first week of December 2009... At least three weeks before the summons to meet with the Employer.

Mr. Snow said he does not know the name of the student mentioned in the email, but identified the email which Mr. Garlie had sent him (RS #1), and noted: "It's not three weeks earlier. It's December 15th." Mr. Horlick asked whether a three day delay constitutes undue delay in Mr. Snow's view. Mr. Snow answered: "Is this the one you're terminating me on?"

Mr. Snow confirmed that Mr. Robert Escott instructed him to attend the meeting. "He said that it was "a possible conflict of interest issue re H₂S." He confirmed his earlier testimony that he was surprised and shocked. Asked what he had said to Mr. Escott, Mr. Snow answered:

I asked, "Can I be fired for this...?" His face was very severe. I was in a state of shock at that point.

Asked whether he had put it in the form of a question, Mr. Snow answered, "Yes, I believe so."

When it was pointed that Mr. Escott would testify that his response had been "I'm going to be fired, aren't I", and that, in fact, Mr. Snow had understood he'd been caught, he answered:

This was Friday afternoon. The expression on his face was not minor at all. I knew something very, very serious was up here.

Asked whether he had responded to Mr. Garlie's email that he received at his home, Mr. Snow answered: "I don't generally leave emails. I try to contact by phone." Asked whether he leaves messages, Mr. Snow answered, "Not normally. I prefer to communicate verbally. Some people only want to do emails."

Asked why he had simply told Mr Garlie, "I've taken care of it" and not explained that it was not a Marine Institute issue, Mr. Snow answered:

I told him 'the H₂S course at *Petrell* is taken care of.'

When asked what he would say if Mr. Garlie offers different testimony about that conversation, Mr. Snow answered: "He was very busy."

Mr. Snow said he does not recall a conversation with Ms. Linda Gregory. Asked what his testimony will likely be if she testifies that he had said he'd taught the course off-site, Mr. Snow answered: "I don't recall. I am not saying she did not say it." Asked whether he recalls her saying, "Jesus Randy, you could make some money at that!" Mr. Snow answered:

I remember some such conversation about 'you could make money. ' I said, 'You'd have to be hired.' ... I do not have the resources. That's what I was hitting at.

Mr. Horlick asked what he would say if Ms. Gregory testifies that Mr. Snow said: "I can't do that; I'm under contract at the Marine Institute." Mr. Snow answered, "I can't recall."

Mr. Horlick posed further questions about the responses he had given at the meeting to which he had been summoned on December 18. Mr. Snow said, "I was in shock. I expected Mr. Rutherford to be there to explain." Asked why he had never mentioned at that meeting that Mr. Rutherford knew about it, Mr. Snow said: "It did not come back to me at the time. It was only after that."

Asked whether the Employer had asked how he had come to be working at *Petrell*, Mr. Snow answered, "No, I don't believe so." Asked whether he had said that it "started as a favour for a friend", a student who could not get the course, and whether he could name the friend, Mr. Snow responded, "Actually it was a friend of a friend, Mr. Garland Wells, not a close friend." Asked where Mr. Wells is now, Mr. Snow answered:

I have no idea... These people needed courses at a particular date and the Marine Institute needs the courses for employment. I did, at one point, ask if it was possible to have courses with fewer students, and the Marine Institute would not do it. That way the people could be accommodated.

Asked whether it would not be better to have more students, Mr. Snow answered: "Yes, but I was not doing all the courses at the Marine Institute."

Asked whether, on December 18th, he had stated that he'd been working "for about a year" at *Petrell*, and whether that was truthful, Mr. Snow answered:

No. It goes back about five years. I'm not sure if I said a year... I was under stress... I was confused.

Asked whether he was confused about the difference between "one" and "five", he said, "I was

confused about everything." Mr. Snow was also questioned about his answer to a question about the number of courses he'd taught in the past year, Mr. Snow explained that, when the question had been put to him,

... I paused, and he said: "Is it one, five, ten, or twenty?" I answered, 'twenty'. I really don't know of all the courses.

Asked whether "twenty" was true, Mr. Snow said:

No. I don't know how many. I did not keep a record. I only said, 'twenty' because he gave me that option.

Asked whether it is possible that it was considerably more, Mr. Snow answered, "Yes."

Asked if he had been asked at the December 18 meeting if he knew of the University's Conflict of Interest guidelines, and he had answered: "No concept. It's for an outside agency, not Marine Institute." Mr. Snow answered: "I don't know. I could hardly recall my name. My recollection is quite vague." Asked about a Conflict of Interest memo from Mr. Blackmore, Mr. Snow said: "No, I have lost a number of emails. I have not received any emails from Mr. Blackmore." Asked whether he had ever seen Conflict of Interest guidelines, Mr. Snow said:

The only understanding I have of the principle of the conflict of interest relates to training materials produced by staff belonging to the Marine Institute.

Mr. Snow confirmed he had cleaned out his office after his termination. Asked whether he had left a file behind called "Conflict of Interest". Mr. Snow answered: "I'll tell you that it is not my file." Mr. Snow was presented with the file which includes a pay stub from *Petrell* in Mr. Snow's name. Mr. Snow denied that the writing on the file was in his handwriting. "No. This is an old file left by Mr. Meaney, as is seen from the cover." Asked how the pay stub would have got into the file, Mr. Snow answered:

Things got into the file along with other things... It could have been just dropped into the file. A lot of files were given me by Mr. Maidment.

Mr. Horlick noted that the Employer will call evidence that the Employer found the file with the pay stub in it. Mr. Snow responded that the file would have been there from Mr. Art Maidment, and confirmed that the new office is three years old, and has new furniture; but that the filing cabinet was from his

... old office ... When Mr. Arthur Maidment left, he left all the old files. It must have been in the filing cabinet. It could have been put there by another instructor.

When it was pointed out that Mr. Escott discovered the file after he had been terminated, Mr. Snow answered: "I don't recall putting it in my desk drawer." With respect to his evidence about the Marine Institute guidelines, Mr. Snow said: "I have never read them. I've never seen the need to do so at any time."

Mr. Snow confirmed that the training to teach the H₂S Alive course had been provided by the Marine Institute from *Enform*, and that he had received no training from *Petrell*. Asked if it is true, therefore, that *Petrell* gets the benefit of that free of charge, Mr. Snow answered, "Yes."

[The Arbitrator asked about the relevance about the line of questioning in so far as the specific issue concerns undue delay in discipline. Mr. Horlick pointed out that he is trying to establish the believability of the Grievor's testimony that he saw no reason to look at the conflict of interest guidelines. The questioning continued.]

Mr. Snow also confirmed that the Marine Institute had provided renewal of training on a tri-annual basis. 1992 was the first year, and each three years subsequently Mr. Snow returns to Edmonton for a one day renewal of certification. Mr. Snow also testified that if the Marine Institute had not provided for the renewal of certification "I would pay for it myself." Asked whether he had no concern about the Marine Institute's paying for these renewals, Mr. Snow answered: "They paid for it and they got the service out of it." Asked if he was not concerned that the Marine Institute had paid the bill and others were getting the benefit, Mr. Snow answered:

This caused no loss of benefit to the Marine Institute. I was teaching the course for the Marine Institute. I did not see the teaching of the course for *Petrell* would take anything from the Marine Institute.

Mr. Snow was asked about his testimony on direct concerning the agreement between the Marine Institute and the College of the North Atlantic. He was asked whether he distinguishes between *Petrell* and the College of the North Atlantic as public versus private sector institutions, and whether he does not recognize the competition. Mr. Snow answered:

We come from industry... I do not see any difference between public and private sectors in this respect.... I do not see any competition. The Marine Institute would not get these students as students... The Marine Institute would be sending excess students to them, but at the time it was not a benefit since that company did not have excess to share with the Marine Institute.

Asked whether the letter of agreement discussed with Mr. Rutherford was to be a two-way agreement with *Petrell*, Mr. Snow answered: "I saw *Petrell* and the Marine Institute could share the instructor as need be." Asked whether NAPE and the Marine Institute would allow that: Mr. Snow answered: "They do it all the time. They are doing it now."

Asked whether he had ever seen an agreement between *Enform* and *Petrell*, he answered: "It's a standard MOU; I assume as with the Marine Institute." Mr. Snow confirmed that, in the conversation in the corridor, Mr. Rutherford had referred to, "a letter in place." ... I remember "letter" not "MOU". Mr. Snow also confirmed that, in his conversation with Mr. Rutherford later that day, he referred to speaking to *Petrell* about an "LOA"

Yes, only a 'LOA', nothing further. I left the letter once I had done what I said I'd do: tell *Petrell*. I did not do followup. I'm not a manager.

Asked whether he had lied to Ms. Linda Gregory, Mr. Snow answered: "I did not want rumours and jealousy." Asked whether he believes that "politics" governs decisions made at the Marine Institute, Mr. Snow answered: "There have been instances, yes." Asked when he did remember the conversation with Mr. Rutherford, Mr. Snow answered:

That was about a week or so post my dismissal. It just came to me at home and I told the Union representative. It was a memory that flooded back.

Mr. Snow testified that he cannot recall the name of the student who declared himself to be a friend of Mr. Rutherford's. Asked how it had arisen in conversation, Mr. Snow said:

The reason was that another student had said that I was teaching at the Marine Institute. Then the other student said that he was a friend of Mr. Rutherford's.

Mr. Snow then explained the structure of the course and his management of the teaching and certification of students with *Enform*. He does the same at *Petrell*. Mr. Snow said that the fee charged by *Petrell* is somewhat lower than that charged by the Marine Institute.

Mr. Horlick also asked about the incidents that he had cited as possible occasions when the Employer could have learned of his work at *Petrell*. With respect to the former *Petrell* student who had become a colleague, Mr. Snow explained that he had asked her because he was aware that "rumours can get out of hand". He said: "I wanted to leave it to Mr. Rutherford... I was concerned about other Marine Institute managers." Asked whether he thinks that Mr. Rutherford, Mr. Garlie, Mr. Fowler and other employees of the Marine Institute have the Marine Institute's

interest at heart, Mr. Snow answered, "I think so, yes." Asked whether he is saying that their decisions are motivated by personal opinion, Mr. Snow answered:

Their decisions do not always make sense to me and to others. ... I was worried that they would tell me to stop.

Mr. Snow said he had never taught the H₂S Alive course anywhere other than *Petrell* and the Marine Institute, and reconfirmed that Mr. Rutherford had simply

... said, "we should get a letter in place about that..." I said I'd taught some H₂S courses with *Petrell*.

Asked whether Mr. Rutherford had heard that, Mr. Snow answered:

He may have, because he responded with reference to a letter of mutual exchange.

Mr. Snow agreed that in saying this he is drawing an inference. He also confirmed that at their second meeting he had said to Mr. Rutherford, "I'll talk to *Petrell*" and that he had responded, "yes we need a letter in place." Mr. Snow also confirmed that he had tried to see Mr. Rutherford twice after that, but had not left a message. "No, I was waiting for him to get to me."

Mr. Snow also said that when he had told Mr. Garlie he had taken care of the student's request for the certificate he had not indicated how exactly he had taken care of it.

ON REDIRECT EXAMINATION Mr. Snow testified about his emotional state at the meeting on December 18th. Physically he had been very agitated, nervous.

I think I even cried at one point. I left the meeting twice... I was overcome by the overall feeling of events. The managers had very serious looks on their faces, a serious Article read to me: twenty-seven years, never a hostile word spoken to management, no disagreement. I'd gone through a couple of very stressful days. The Marine Institute overloads the course, fifteen not twelve: stress on students and on instructors. I was on the edge, and it put me over the edge... After the second time I went out... the Union representative came out and told me not to go back in. They told me not to attend Monday's meeting.

Asked what his job means to him, Mr. Snow answered, "It's my life". He said that he would not ever do anything purposely to endanger that. Asked what his students mean to him, Mr. Snow said:

The first thing that I said when he said I was not to come back was that I wanted to be sure the registration was complete and that they could get their certificates.

Mr. Snow said he had not read the Conflict of Interest Policy since the termination.

Asked whether he can speak to the question of what it means to him, Mr. Snow answered:

When I was hired at the Marine Institute, the material you produce belongs to the Marine Institute, it's their material and not to be used elsewhere.

Asked who, in his view, is in "conflict" and what "interests" are at issue, Mr. Snow answered:

If I was taking a Marine Institute course and delivering it elsewhere, that would be conflict. Not this course. I have the certification, not the Marine Institute. It's not their course or materials.

Asked whether, now that he knows the Employer's views relating to conflict of interest, he sees things differently, Mr. Snow answered:

I still do not think so. I do not think they own it even though they paid for it. That's what we are here to determine.

THE SECOND UNION WITNESS was Mr. Val Puglisevich, Director of a small company that "provides HR services for those hiring people for the offshore in the oil and other related industries and providing safety training" through its company, *Petrell*. *Petrell* provides courses in a variety of different areas including H₂S Alive, but does not any longer offer that course. The clients include Husky Energy and some fisheries based industries. The principle focus is safety training.

The oil industry needs courses at all times of day for people arriving from overseas on late flights and needing to get to the job site in the morning. We are a 24/7/365 day operation.

Mr. Puglisevich testified that he came to know Mr. Snow through someone in the office.

Mr. Snow came in. At the time I did not know he was working with the Marine Institute... There was a conversation with Randy. Yes, he said he was full time instructor there... We did have someone who wanted to have H₂S after hours. If they don't offer it, I saw no conflict of interest.

Asked whether Mr. Snow had spoken about a possible agreement with the Marine Institute, Mr. Puglisevich answered: "I said, sure, I'm open to anything. They help us, we help them." He had not heard from the Marine Institute or from Randy Snow after that. "We just left it at that." Asked If he had followed up on the idea, he said: "No, I guess I felt they were so big they did not consider it."

Asked if he sees the Marine Institute as competition, Mr. Puglisevich said: "No, they are way too big... If Randy is not there we don't offer the course."

Asked to explain how the conversation about the sharing of services came about with Mr. Snow, and why Mr. Snow suggested it, Mr. Puglisevich said:

To be honest, I don't recall much. It was last year or the year before. We might be able to offer something to the Marine Institute that they don't have, and they don't have the students: a company that wants the full meal deal. We put the package to them and they do the big parts and we do the little bits. If it's agreed, that is a great idea. That would work for me... I guess it was a general conversation at the time.

Mr. Puglisevich again confirmed that in his view the Marine Institute is not competition.

They are huge. There is no safety company in the city that can compete with the Marine Institute. They are all trying to get a small bit of the pie.

ON CROSS EXAMINATION, Mr. Horlick asked why *Petrell* no longer offers the H₂S Alive course, Mr. Puglisevich answered:

We had one instructor doing day classes, but he's gone doing safety with the ship yard for the next 90 days; and, with the situation with Randy, we felt we'd not offer it now.

Asked whether the company has an agreement with *Enform*, Mr. Puglisevich said: "No, we have a certified instructor, and we order all our books *Enform*." Asked how many students *Petrell* has at any one time, he said:

The minimum number according to *Enform* is four, and the maximum number is twelve doing the eight hour version. Five hours is the minimum for the course in the evening with a maximum of four students.

Mr. Puglisevich confirmed that, "about three years ago when I first met him," Mr. Snow had told him he was working at the Marine Institute "I don't know why he would have told me that." He also confirmed that the Marine Institute does not do the course after hours. "A client told me that about three years ago." He also confirmed that:

Randy was talking about a package deal in collaboration between *Petrell* and the Marine Institute. If I remember, I thought it was me that brought it up as a idea: how to be sure the guys are safe. If the Marine Institute is doing things, we do not, and *vice versa*... The only time we talked (about the H₂S Alive course) was the night time courses. Randy did only night time... but I think that conversation... was not just related to H₂S Alive... He possibly spoke about sharing the H₂S Alive instruction... Randy said he could take it back to the Marine Institute to ask if there was any interest.

There was no redirect examination.

THE FIRST EMPLOYER WITNESS was Ms. Linda Gregory, the OSSC Registration Clerk.

Ms. Gregory identified LG #1 as an email forwarded to her by Mr. Coady. She explained that:

I register the students and handle the certificates. Randy deals with *Enform* so I do not deal with the final certification... He did all those. I forwarded the question to Randy... I checked through the system entirely, and got nothing so I'd go back to Randy for certificates, and I asked him for information... He was not around. The next day he came into the office. He said it was a certificate I did not have to do. It was a favour he had done outside. So then we chatted... I jokingly said, 'You could be doing this on the side, making a lot of money.' He said, 'No I can't do that.' And I said, 'Why not?' And he said, he could not 'because it was contract with Marine Institute and *Enform*, and he could not do it.' We were just chatting. I said, 'Do it when you retire.' He said, 'Ya, it's probably good to do in retirement.'

Asked whether he had ever mentioned *Petrell* or Mr. Puglisevich, or any other company, Ms. Gregory answered: "No, not that I recall." Asked whether she is certain that his answer was no because of the contract between the Marine Institute and *Enform*, Ms. Gregory answered:

"That is what he said that day. It's not anything to me."

Asked whether he had said that he had done it "as a favour to a friend", Ms. Gregory answered, "He just said 'a favour', not a friend."

ON CROSS EXAMINATION, Ms. Gregory was asked whether, in fact, she was joking in her conversation with Mr. Snow, or whether she had been serious in asking a real question. Ms. Gregory answered, "Sure I was joking... I just thought it was a great idea." Asked whether she had thought that it was wrong, Ms. Gregory answered:

No. My concern was the certificate. I did not know anything about the conflict of interest. I don't teach. I just wanted the certificate.

There was no redirect examination.

THE SECOND EMPLOYER WITNESS was Mr. Robert Rutherford, Director of the Offshore Safety and Survival Centre. He reports to the Head of the School for Maritime Studies. He described various management duties he holds in that and previous positions he has held both within the Institute and elsewhere. He also described various types of training the Centre offers to the oil, fishing and related industries, including to firefighters.

The H₂S Alive course is required by anyone in the industry that is involved in one way or another with gas, including those involved with sour wells. It's not a very

big part of what we do: 300 training hours, not 30,000 training hours. Essentially, all the off shore requires H₂S Alive training to go on site... It was an evolution of *Enform*... I started in 1996, became Director in 1999, and it's been part of our delivery for years. The "PITS" industry training service in Calgary joined with another group and became *Enform*. We deliver a training course developed and accredited by *Enform*. It's tied into the Canadian Association of Petroleum Industries.

Mr. Rutherford identified, as RR #1, a job fact sheet that covers his own position. He also identified (as RR#2) the Canada Offshore Petroleum Industries statement of "standard practice for the training and qualifications of offshore personnel" which

... sets out the general and minimum standards for all personnel and its been approved both by the CNOPB and the NSOPB. Towards the end of this document there is a statement (at section 3.1.4) of the course objectives relating to H₂S, hydrogen sulfide.

Mr. Rutherford also confirmed that he is familiar with the Marine Institute's Conflict of Interest guidelines, and described that policy as set out in an 1989 document (RR #3) published prior to the amalgamation with Memorial University. He also described the latest version of that policy as referenced in a memorandum from Mr. Blackwood, the Executive Director, (RR#4), on June 29, 2009 and as set out more precisely (in RR #5) as a web version of the Policy that came into effect in 2009. Mr. Rutherford confirmed that the memo from the Executive Director (RR #4) went to all employees at the Institute, and described the major difference between the earlier (1989) and the later (2009) versions of the policy. The key difference was in "setting up a process for how to deal with any problems concerning conflicts of interest." The new version was part of a new initiative between Memorial and the Marine Institute. Mr. Rutherford pointed to page 5 of RR#5 where certain examples of potential conflicts of interest relating to the Marine Institute are set out.

Asked what he would do if he became aware of an Instructor who was teaching courses elsewhere, he said:

I'd have to tell him to report it as a conflict of interest, if he is being paid by an outside industry to teach some course, yes.

Asked about the conversation with Mr. Snow in the corridor, Mr. Rutherford said,:

I recall interaction with Randy. In May, 2008 we were interested in an MOU with *Enform*. In June, 2008 we sent Randy to *Enform* for certification. On June 24,

2008 I got an email from Ron Newhook (RR #5a & RR#6) about *Petrell*, asking me if I knew anything about it. I responded the next day that I wasn't aware of them teaching H₂S Alive courses since *Petrell* had not been identified as a trainer of H₂S previously. Mr. Newhook was Director of (an organization that is now part of the Marine Institute)...Around that time I talked to Randy. He said that he was aware of it. I did not get any sense he was training for them. (emphasis in the original) ... I can't tell you exactly what was said.

Asked whether he had himself referred to a "letter of understanding", Mr. Rutherford said:

At some time, I think I said they should have an MOU. It's not a big area for us, but it was a big part of what he does; so I was telling him that he should know about *Petrell*... The message was that *Petrell* should have an MOU with *Enform*, as we had just had.

Asked whether he recalls Mr. Snow saying anything about his teaching at *Petrell*, Mr. Rutherford said: "I don't recall it, no." Asked what he would have said or done if he had heard Mr. Snow say that he was teaching for them, Mr. Rutherford said:

I would say to him he can't... or we'll do an agreement with *Petrell*.

Asked what the situation would be if Mr. Snow were teaching something the Marine Institute does not teach. Would that be of concern? Mr. Rutherford answered:

Possibly. But if it was based on something that we might get into then it would have to be. If he had said that, I would have said he'd need to declare it as a conflict of interest and have people review it, yes.

Mr. Rutherford identified (as RR #7) the Private Third Party Training Provider Memorandum of Understanding which the Marine Institute itself had completed on May 12, 2008 with *Enform*. He also pointed out that, according to RR #7, the class size is limited to 15 "because our facilities do not allow more. The duration of our course is eight hours."

Asked whether he has encountered any other conflict of interest situations, he said "Not often. I remember one: a recent hire who had been approached by his previous employer and they wanted to do stuff that we had no interest in. There was another from a volunteer firefighter. I did provide guidance to him, (in 2010), and copied it to the Director pending an answer, (RR #8). That answer has not yet been received. They wanted firefighter training for the volunteer fire department. There was no money involved and Mr. Blackwood agreed to it. It is a balancing act. We do have a community mandate.

. The Conflict of Interest committee, as far as he knows, has not yet begun its work.

Mr. Rutherford was again asked whether, in his conversations with Mr. Snow, he recalls

Mr. Snow saying that he was teaching at *Petrell*. Mr. Snow answered:

I did not get any understanding that he was in any current relationship with *Petrell*.

Asked whether he would have been concerned if he had received that impression, he said:

If it was in something we pay to keep certified I'd say yes. Five days... it's a couple of days training: not impressive... all expenses paid... salary and so on.

Asked what he would have done if he had determined that Mr. Snow was in a conflict of interest, Mr. Rutherford answered:

I guess it would depend on the scope. If it was one course, perhaps I'd say, 'Don't do it again.' It would have had to go to a conflict of interest committee, a bit of balance. It depends on the scope.

Asked whether he would have delegated the matter to a Manager, Mr. Rutherford said:

It is not something I can delegate. I'd have to go up to the Executive Director. The Executive Director is the person. Then it would have had to go to the President of the University, prior to 2009.

Asked when he had first learned that Mr. Snow was teaching H₂S Alive at *Petrell*, Mr. Rutherford answered: "In December of last year when Mr. Escott told me."

Mr. Rutherford also identified RR #9 as the list of 2009 course fees for the OSSC, and RR #10 as the prerequisites for an institutional certificate from *Enform* for teaching the course.

ON CROSS EXAMINATION from Ms. Galway, Mr. Rutherford confirmed that the Marine Institute operates:

...very much as a business. Yes, it is cost recovery as all industrial services do, and courses are consistent with the business structure, which includes knowing the competition... I think there are three people now teaching H₂S Alive in the province... Yes, the training is pretty specialized.

The Marine Institute offers the H₂S course "basically for client convenience" in view of the fact that

... it is a small part of the Institute's revenues...Yes we try to be a full service provider to key market clients. It is normally a required course. We offer it to people going offshore: not a big part of our revenue, but a consistent part.

Asked whether he was concerned about other companies recruiting his specialists, he said:

It's a normal concern, but most are long serving. We've lost a few over the years, but not many. The average is seven years, more up to ten years, and some go to

twenty and twenty-five years.

Mr. Rutherford also confirmed that he had not been aware of *Petrell* offering H₂S Alive prior to Mr. Newhook's email (PR #5a).

I was surprised because they were not listed as a provider prior to 2007. We had just gone through the MOU process to get that in place. But I did not focus much on *Enform* and H₂S courses. Randy Snow was looking after that.

Asked why he would expect Mr. Snow to be able to tell him about *Petrell* if he, himself, had not known about it. Mr. Rutherford answered: "I'd have expected him to tell me. He had just been to get certification." Asked if his surprise might have led him to follow up, and ask about *Petrell's* teaching, how long it had been going on, whom he had been teaching and where, Mr. Rutherford answered:

Yes, but my priorities govern me. I'd have expected Randy to keep me informed, to tell me. We were trying to train all the fishermen in the province. It was not on top of my agenda.

Asked whether, in his conversation with Mr. Snow in the hall, there had been any talk of the H₂S Alive course. Ms Galway pointed out that, in his direct testimony, he had quoted Mr. Snow as describing *Petrell* as "a small safety company". Mr. Rutherford answered:

I was really informing him in case he was not aware of it. These are professionals. They take ownership of what they do; and we let that happen, until we see that there is some reason for them not to own it... It was not high on priorities.

Asked if it had ever crossed his mind that he needed more information about *Petrell*, he said:

No. It's so small a part of our operation I'd have expected him to come to me. It's a small element that just ticks over for us, not in the centre of our operation.

Asked why he had spoken to Randy in the first place, and whether it had anything to do with his knowing that he was working at *Petrell*, or whether he had asked him about *Petrell* seeking to gauge his reaction, Mr. Rutherford answered: "No. I just asked him to share the information: sum and total event."

Mr. Rutherford confirmed that policy implementation is part of his duties at the Centre, "as it relates to our centre, yes". He also acknowledged that this requires he be familiar with the policy.

Yes. But we have OSSC key policies directly under my control, and Marine Institute policies under other peoples' control, including the Managers'. I am

aware of the ones that govern my day-to-day activities, and peripherally of the other policies... There are many policies at the Marine Institute and at MUN and they change regularly.

Mr. Rutherford testified he had not, initially, been familiar with the 2009 Conflict of Interest Policy but became familiar with it. "I read it, then filed it and knew where to get it if I needed it; but I didn't remember every word of it." Ms. Galway said she was trying to understand how someone in Mr. Rutherford's position could expect Mr. Snow, or others, to be aware of the policy sufficiently to deal with it in his circumstances. He said:

The duty is on the member. So if they felt they were in conflict of interest, they had this duty to report it to a Manager. It is the duty of the member – not me – to manage that policy.

Mr Rutherford confirmed that, while RR #11 is dated March 25, 2010, and is therefore post-termination, the specific Section #5 dealing with implementation is not new. He confirmed he deals with issues relating to the OSSC.

The Director of the School and the Executive Director are above me. It's not my role, but I did send out notices to employees on that. The employees must be aware of these.

He also confirmed that, when the 2009 conflict of interest policy came out, the Executive Director of the Marine Institute did ensure that all employees were made aware of it, and cited RR #4. Asked whether this was all that the Employer had done in this regard, Mr. Rutherford answered: "This is all that I am aware of: to advise of the changes, yes." Ms. Galway pointed out that Mr. Rutherford had testified that the onus is on employees to seek out and understand the policy, and if violated, it could lead to termination. But RR #4, the document from Mr. Blackwood, speaks of "encouraging" the employees to check the web site. Mr. Rutherford confirmed that the letter had gone out "via email, yes. We all have reliable emails."

Asked whether he would acknowledge that it is possible to work outside of the Marine Institute and not be in conflict of interest, Mr. Rutherford answered: "Oh certainly. If you were serving bar downtown." Asked if this means that he distinguishes kinds of work that people do in determining whether conflict exists, Mr. Rutherford answered:

Yes, that's appropriate. Outside working in the same capacity, however – as an Instructor for instance – would be a conflict of interest; but not if he were teaching driver training. We don't do that. The difference is something we do.

Asked if context determines the matter, Mr. Rutherford said: "Absolutely, absolutely." Asked whether he would agree that conflict of interest is relatively complex, Mr. Rutherford again said: "Yes. It's contextualized, so it's complex and an evaluation must be done."

Asked, therefore, why he would not want to educate the staff about these complexities, Mr. Rutherford answered:

In principle. But this policy is not set by me, but by the Marine Institute and by Memorial, and they should do the educating. I'd be fired myself if I went outside these policies.

Asked how people would know whether a conflict of interest policy existed prior to the new conflict of interest policy issued in 2009, he said:

They should know, generally, that conflict of interest is what it is. All you can do is send out memos to be familiar with conflict of interest and all other policies. It never was directly circulated to me, but I assume that it was communicated in 1989 when Randy was an Instructor.

Referring to RR#8, Mr. Rutherford's (2010 post-termination) Conflict of Interest Memo concerning firefighter training he was asked why someone would feel it necessary to have this explanation. Mr. Rutherford answered:

I don't know. I was asked by someone in this situation, but I put together a statement from me as the OSSC Director, and ran it up by Glen Blackwood. I did this, but it's not yet been reviewed. I sent it back to the employee, but told him to keep in mind that he could not be paid 'for what you're doing'.

Asked if a number of volunteer firefighters work for the institute, Mr. Rutherford said:

Yes..., but he just wanted clarification... because of heightened awareness of the new policy. He was doing due diligence.

Mr. Rutherford also said it "is a possibility" that it might have been because of this arbitration.

Asked whether it might not be reasonable for someone to believe it is OK, who see co-workers going outside and working outside and think that they can do the same thing without knowing about the pay or no pay implications, Mr. Rutherford answered:

It depends on the individual to declare conflicts of interest. I think it would be clear to anyone that to do exactly the same job is taking jobs away from NAPE members: taking away jobs that belong to NAPE members. That should be clear.

Mr. Rutherford confirmed that the approximate date of the meeting in the hall with Mr. Snow was clear in his "mind because of the issues and

... because of the email from Ron Newhook. Not the date exactly, but close to the date. But the details of the conversation in the hall are not clear in my mind, no... Mr. Horlick reminded me of the meeting, but its context was not obvious to me... It was a chance meeting in the hall; I did not seek Mr. Snow out.

Asked whether, during that conversation, he had referenced a 'letter', Mr. Rutherford answered:

No. What I referred to was... I was advised of a reference to MOU, but I did not say I did. I only said, if we did, it could have been the MOU... I do not recall reference to a 'letter'. All I did was inform him of *Petrell*, about the information from Ron Newhook.

Asked whether it was possible that, in view of his own busy schedule, Mr. Snow had said, "I worked at *Petrell*" and that he had dismissed it, Mr. Rutherford said"

'I worked there.'" That would not have triggered anything. This was only new to their field of teaching.

Asked about his responses to questions from Mr. Horlick on direct examination about what he would have done had he understood that Mr. Snow was teaching at *Petrell*, Mr. Rutherford said:

I would have asked him to stop, or get an MOU in place. If he'd come to me and said, 'I taught a couple of times at *Petrell*', I would say, 'Stop'. If he'd come and said, 'I've continually taught there for a year', I would have said, 'Stop', but there would have been discipline. If he said, 'I won't stop', then I would have said, we'll put in a contract to cover it and we will sell out own courses: fifteen people a course, that's \$3,000. We could have done the contract with Mr. Puglisevich.

Ms. Galway noted that termination was not one of the things that he thought he'd mention. Mr. Rutherford said: "I would only be able to say that it may involve discipline."

ON REDIRECT EXAMINATION Mr. Rutherford testified that the Marine Institute and the OSSC are linked to the MUN web site for news lines and updates and the like.

Yes, all aspects of MUN's website; all employees have accounts. There is also a distinct Marine Institute website and notice boards and electronic bulletin boards.

Mr. Rutherford also confirmed that there are contracts in place with other service providers.

There is a general price list, but we can look at cost savings. We are not providing service, so it is possible. If there is a potential for delivering courses to our clients to see if we can accommodate a potential client's needs.

Asked if he had heard Mr. Snow say, "I work for them" or "I teach courses for them", he said:

I don't remember. I can only tell you what I perceived. I have no recollection of having heard Mr. Snow say that... Yes, if I had heard that I would probably have had a followup.

Asked why his teaching at *Petrell* after hours or on weekends might be a conflict of interest in his view, Mr. Rutherford said:

It's a conflict because it's what you do inside to the outside: taking away people's work from NAPE people and NAPE employees. You are taking what the Marine Institute has provided you with, and using it for your own purposes.

Mr. Rutherford also confirmed that ...

at some time I think I said that they should have an MOU. It was not a big area for us, but is a big part of what he does. So I was telling him he should know about it, and the message was that *Petrell* should also have an MOU with *Enform* as we had just completed. It's not a very exact memory, but I do have a vague recollection of discussing the MOU.

Mr. Rutherford also said that he has no recollection of the second conversation in his own office that Mr. Snow testified about.

THE THIRD EMPLOYER WITNESS was Mr. Cody Garlie, Coordinator of Programs at OSSC, and a member of NAPE appearing under subpoena. Mr. Garlie testified that he deals with the day-to-day operation, providing delivery of courses to students, supervising registration and confirming certifications as needed. Mr. Garlie is familiar with the Conflict of Interest policy.

Yes I got the 2009 memo.... I briefly read through the policy as it applies to me, and I interpreted it as applying basically to faculty.

Nothing surprised him in the memo. Asked what he understands about instructors teaching outside the Marine Institute, Mr. Garlie said:

I always interpreted that as something the Marine Institute would not approve of. That view predates the issuance of the policy.

He was "not directly" involved in the issues leading up to the termination of Mr. Snow.

Mr. Garlie confirmed that the email (RS #1) had come to him from the United States, and he passed it along to Mr. Snow.

The situation arose from the company in the United States. When I received it we did have the student named as doing a course, but not the H₂S Alive course. Randy handled all the details and all the H₂S Alive stuff; so back and forth with the client in the US. It appeared that we did not deliver the course. That's why I handed it to Randy. I did run into Randy and he said he'd taken care of it. Then

there was an inquiry from management two days later and I asked, Are you talking about this email exchange, and then I learned about that...

Nothing else had been mentioned when Mr. Snow said he'd "taken care" of it: "No. It was just a comment in the hall." Asked if there had been anything further about this issue from Ms. Gregory, Mr. Garlie said:

Not on follow up, but I was going back and forth with Linda to back check my files, and she said Randy had talked with her.

Mr. Garlie had read the email (LG #1) after he had met Mr. Snow in the hall.

I did not question it. The statement about the course was taught outside of here I'd assume it was at some other Marine Institute facility.

Asked whether he had any concern about conflict of interest, Mr. Garlie said:

If I'd been aware of it, management would have known about it... It's not part of my job, no; but it's part of everybody's job.

ON CROSS EXAMINATION, Mr. Garlie testified he had spoken with Ms. Gregory about the email (RS #1). "We share a workspace. I would just yell out to her."

There was no redirect examination.

THE FOURTH EMPLOYER WITNESS was Mr. Robert Escott, Assistant Director of the OSSC, Operations and Administration. His responsibilities cover all aspects of the operation except those that are program related. (Mr. Craig Parsons handles the curriculum.) Mr. Escott described his involvement in the matter.

I met with Mr. Mike Fowler, Manager of HR. It had to be investigated, and I asked Randy to come in for an interview. I went to Foxtrap. He was teaching an H₂S Alive course that day. He's the only one to teach it. I did not want to interrupt the students. I advised him of the potential conflict of interest. He was required to attend a meeting on the main campus at about 4:30 or 5:00 in the afternoon. This was Friday. I told him that a representative from the Union would be there for him. His response was, "I'm going to be fired, aren't I."

Asked if he'd been aggressive in approaching Mr. Snow, and if Mr. Snow seemed upset, he said:

He was shocked. I was shocked. It's not something you do everyday... I probably appeared a bit nervous. Meeting with Mike alerted me to points I had to cover off. I was nervous, to put it bluntly. I wanted to be sure I covered everything off...The meeting was on December 18th at 4:30 or 5:00 at the main campus... Randy was asked how long he had worked at *Petrell* and he said that he didn't know. I said, 'Was it 5, 10, or 20 courses? And he grabbed 20. He also said, 'about a year'.

Mr. Escott also described a subsequent meeting on held on January 8th.

Randy wanted to make a statement. He never actually had an opportunity to express himself. He only had just answered questions. So he was given a few minutes. He said he was sorry, and he apologized. He said it was not about the money. His wife was sick. He said he was ashamed of what he had done. He knew he had done something wrong.

Asked whether he understood from this that Mr. Snow accepted he was in a conflict of interest, Mr. Escott said, "Yes. There is no need to apologize if he had done nothing wrong."

ON CROSS EXAMINATION by Ms. Galway, when asked whether he recalls Mr. Snow say he did not think he was in a conflict of interest, he answered: "It is possible, yes. I don't have notes."

Mr. Escott was asked whether, on going into the January 8th meeting, he was aware of the option to resign or be terminated that had been put to Mr. Snow at the December 22nd meeting, and whether he would agree it was reasonable that Mr. Snow would apologize in order to avoid termination. Mr. Escott said:

If you say so. But I would not apologize... It would come to a debate over if you thought it was wrong or I thought it was wrong.

There was no redirect examination.

ARGUMENT

FOR THE UNION, Ms. Kennedy said that the agreed statement of facts (Consent #1) is where we must start. The termination was for breach of Conflict of Interest Policy in relation to his teaching the H₂S Alive at *Petrell*. Mr. Snow admitted having taught the course. That is agreed between the Parties. The Union's objection is that the Employer was informed, in June of 2008, that he had been teaching the course at *Petrell*, and was aware that Mr. Snow was in breach of the conflict of interest policy of the Employer.

The jurisprudence in support of the objection is presented under three headings: 1) the standard of proof appropriate in such matters; 2) the issue of credibility; and 3) the overall principle that operates where undue delay in imposing discipline is at issue. In the instant Collective Agreement there are no time lines set out, but there is a common law provision governing these matters that the Arbitrator must consider. In effect, the delay constitutes a condonation of the employee's action. The employee feels secure in his action. That is precisely what began to happen in June of 2008. Having heard and understood that Mr. Snow was

teaching at *Petrell*, the Employer condoned that behaviour. Ms. Kennedy cited *NAPE v. Human Resources, Labour & Employment (Thomlyn Grievance)* 37 L.A.C. (4th) 266, Arbitrator Oakley 2005 at para 27 as follows:

Did the Employer violate time limits? Collective agreement language may address the issue of the time limit within which an employer is required to impose discipline. Arbitrators have also recognized as a matter of arbitral principle that a disciplinary penalty is required to be imposed without undue delay. A discussion of the reasons to prevent undue delay is set out in *Re University of Ottawa and International Union of Operating Engineers, Local 796-B* (1994)

Although the reported cases support the proposition that an employer cannot discipline an employee if it waits too long, one finds in the cases differing theories for explaining why dilatoriness should have that effect. According to one theory, if an employer delays imposing discipline for an unreasonably long period, the employer will be deemed to have condoned the employee's offence. See, in particular, the words of arbitrator Schiff in *Re North York (Borough)* [(1979) 20 L.A.C. (2d) 289] at p. 290:

Between December 20th and the date of the discharge some seven weeks elapsed. An employer may justly delay imposing discipline for a reasonable time after the event - perhaps for a few days - in order to reach a wise conclusion about the appropriate penalty. But delay beyond that, justifying the employee's conclusion that his conduct is condoned, bars levy of any penalty ... Here the delay after December 20th was much too long.

This case shows that a period of seven weeks was "much too long". In the instant matter, eighteen months had elapsed between June 2008 and December 2009. Mr. Snow testified that if he had been asked to stop he would have stopped. But he was not asked to stop. In the Union's submission, the Arbitrator should keep Mr. Rutherford's testimony in mind, that Mr. Snow was a reliable employee. It is entirely reasonable for the Arbitrator to draw the inference that he would, in fact, have stopped. It is important to bear in mind that in this instant matter we have an agreed statement of facts. The Parties agree, and the Grievor admits, that he taught at *Petrell*. It really is an issue of credibility. What happened in the hall in June of 2008 during the conversation between Mr. Rutherford and Mr. Snow? The Arbitrator should look at what has to be considered in terms of credibility as set out in *NAPE v. Eastern Health (Mr. George Parsons, Grievor)* Arbitrator Scott 2008 at pp 94 & 98, and apply those principles in the instant matter.

What is the evidence that the Employer was aware in 2008 of Mr. Snow's actions? We have Mr. Snow's testimony, corroborated by Mr. Puglisevich as well as by Mr. Rutherford as to the conversation event. And we have Mr. Rutherford's email, RR #5a.

It's worth noting why particularly RR#5a is crucial. There was no suggestion that Mr. Snow would have been aware of that email at any time. Mr. Snow, himself, estimated that it was 18 months to two years. The "18 month" time frame conforms exactly with Mr. Snow's memory of the conversation. The dating is accurate.

Mr. Snow testified that, at the December 18 meeting, he could not understand why Mr. Rutherford was not present because of the conversation he had had with Mr. Rutherford in June of 2008. Mr. Snow's account of the conversation is that, when Mr. Rutherford approached him, Mr. Snow had said, "Yes I have taught H₂S Alive courses for them." According to Mr. Snow, Mr. Rutherford replied, "We need to get a letter in place about that." Mr. Snow testified that what Mr. Rutherford referenced was a "letter", which Mr. Snow thought it was some kind of agreement between the Marine Institute and *Petrell* that would formalize Mr. Snow's teaching there as a Marine Institute employee, rather than in his private capacity.

Asked why he had thought that was what Mr. Rutherford meant, Mr. Snow answered that there had been a similar arrangement in the past with another company, and noted also more recent teaching arrangements for the H₂S Alive course. Mr. Snow testified that he had gone back to Mr. Rutherford and told him that he would talk to *Petrell* about that letter, and that he did follow up with Mr. Puglisevich a few days later, as confirmed by Mr. Puglisevich. Mr. Snow said he had gone back to Mr. Rutherford a couple of times, but had failed to meet with him.

Mr. Puglisevich testified he was, himself, somewhat interested. Mr. Snow was candid that he did not follow up with Mr. Rutherford. In his view, it was the Employer's responsibility and he did not want to lose the income from the *Petrell* teaching. Mr. Puglisevich's testimony corroborates Mr. Snow's. He recalled the conversation with Mr. Snow. He didn't remember the precise dates or exact details, but did talk about a "package" deal: "Something that would help fill the gaps" of the Marine Institute's program. He would be interested, and had done this with other companies as well. The phrase "package deal" resembles Mr. Rutherford's testimony. Mr. Rutherford also used the word "package". In principle, the idea was very similar.

Clearly the conversation did happen as Mr. Snow described it. The most crucial evidence confirming this is Mr. Rutherford's own testimony. Mr. Rutherford corroborates Mr. Snow's testimony, in the Union's view. The Arbitrator should note particularly RR#4, which is dated June 29, 2009, six months prior to Mr. Snow's termination and a year after the June 2008 hall conversation. Mr. Rutherford testified that Memorial was then instituting a new policy to replace the 1989 Marine Institute policy. Mr. Rutherford is not on any of the committees involved with that process, and testified repeatedly, that he "got this memo just like everyone else did. I'm treated like everyone else in respect of this policy." It is up to Mr. Snow to know whether he is in a conflict of interest or not, and whether there was a Conflict of Interest Policy or not.

The Arbitrator should note that Mr. Rutherford's testimony on direct examination varies from his testimony on cross and on redirect. In direct testimony, when he was asked whether he got a sense that Mr. Snow was teaching for *Petrell*, Mr. Rutherford answered, I can't tell you exactly what was said. On direct testimony, when asked if he had referred to an MOU, Mr. Rutherford said: "I think I said, at some point, that they should have an MOU... It is a big part of what Randy does." But in cross and redirect, Mr. Rutherford said that his recollection is not very clear. He acknowledges that it was maybe about an MOU with *Enform*, and it appears not to be a MOU between the Marine Institute and *Petrell* that is at issue, but between the Marine Institute and *Enform*. That does not make sense. Why would he be encouraging Mr. Snow to tell *Petrell* that *Petrell* had to get an MOU with *Enform*?

Perhaps the most important part of Mr. Rutherford's statement was in direct evidence and it was repeated on cross and in redirect. Mr. Horlick asked him twice what he would have said if Mr. Snow had told him, in the 2008 conversation, that he was teaching H₂S Alive. His answer is crucial because his spontaneous response was: "I would have done one of two things. I would have told him, 'You can't do that' or 'I would get an MOU in place between the Marine Institute and *Petrell*.' This confirms, absolutely, that Mr. Rutherford did know, and did nothing to pursue the matter further, thus allowing Mr. Snow to feel secure in his position.

Mr. Horlick asked the same hypothetical question a second time, and the second time Mr. Rutherford responded in precisely the same way, "You can't do that... I'd get him to get an MOU in place between the Marine Institute and *Petrell*," not between *Petrell* and *Enform*. It was this

second time, when Mr. Horlick suggested that he would get Mr. Snow to declare it as a conflict of interest, that Mr. Rutherford acknowledged he would have done so. From Mr. Rutherford's own testimony, however, the Arbitrator should infer that the conflict of interest procedures, which were new in 2009, were not on Mr. Rutherford's mind in 2008. More compelling, in the Union's submission, Mr. Rutherford's immediate response was not, 'I'd have pursued the conflict of interest aspect' but that 'I'd get a Marine Institute/Petrell contract in place.' That's precisely what happened during the hallway conversation in 2008, in the Union's view.

With reference to his firefighters memo (RR#8), Mr. Rutherford again confirmed what is going on when he said that he drafted this memo recently because of the heightened awareness of the New Conflict of Interest Policy. In the Union's view, RR#8 demonstrates a heightened awareness *after* June 2009, on the campus, and possibly as a result of this arbitration.

Mr. Rutherford's memory of these events must be adjudicated against the credibility test: the capacities, opportunities to perceive, recollect and communicate matters. Mr. Rutherford was insistent that he did not recall. He repeated on a number of occasions, "I have priorities and this is a small part of what we do." This also speaks to the lack of importance which Mr. Rutherford might have attached to the teaching involved.

Ms. Galway asked Mr. Rutherford about the hallway conversation, and was told that it was very "informal", a "passing in the hall", details "not clear in my mind". This has the utmost significance to the matter before this Arbitrator. Mr. Rutherford repeatedly insisted he was just trying to let the Grievor know that there was a company doing the H₂S Alive course.

Mr. Rutherford even acknowledged that Mr. Snow "could have possibly said he worked there." On cross examination Ms. Galway provided Mr. Rutherford three options based on the hypothesis that Mr. Snow had said, "Yes I taught there." Mr. Rutherford said "I would have told him, don't do it any more" and "If he did it for a little while there would be some discipline"; or, third, and very important: "If he was continuing to work there, then I would have talked about putting a contract in place with *Petrell*. I would have said, get them to get in touch with me." That is precisely and exactly what Randy Snow said Mr. Rutherford said. The Arbitrator should note that Mr. Rutherford had not heard Mr. Snow's testimony. Mr. Rutherford was an excluded witness during Mr. Snow's testimony.

It is crucially important to examine all Mr. Rutherford's statements. In summary, Mr. Rutherford's testimony is: "I can't remember precisely what was said, but I do remember vaguely talking about the MOU in context of *Enform* MOU." But why would they be talking about an MOU between *Enform* and *Petrell*, if they had not discussed any relationship between Mr. Snow and *Petrell*? It is clear that Mr. Snow was telling precisely and exactly the truth as to what had transpired. The only inference is that the focus of the conversation was that Mr. Snow had direct relations with *Petrell*.

Finally it should be noted that when Mr. Rutherford was asked, for the fourth time, what he would have instructed Mr. Snow to do in terms of filing a conflict of interest report he said it was one of the things he might have done, but more appropriately he'd see if there was a need for a contract between the Marine Institute and *Petrell*. The focus of Mr. Rutherford's testimony at this hearing is "stop" and "we can get a contract in place".

The Union submits, in view especially of Mr. Rutherford's testimony, that it is more probable than not that Mr. Snow did tell Mr. Rutherford, in June 2008, that he had worked at *Petrell*. Having been made aware of this outside work, the Employer knew that Mr. Snow was working outside. As evidenced in the Agreed Statement of Facts, Mr. Snow admitted it, as well, in 2009. The Employer then informed Mr. Snow that the teaching of the H₂S Alive was a violation of the policy.

The Union submits that the 18 months between June 2008 and December 2009 was undue delay in imposing discipline, and therefore the general arbitral principle must come into play. Undue delay invalidates the discipline because there is a prejudice to Mr. Snow insofar as he was led to understand the Employer had condoned it. Mr. Rutherford did not respond by telling Mr. Snow that he had to stop. He did not give Mr. Snow the opportunity to do so. He said, "Let's get a letter in place."

The Union requests that the termination of Mr. Snow be declared null and void. **FOR THE EMPLOYER**, Mr. Horlick described the Union's review of the evidence as a patch-work aimed at providing the Grievor's testimony a credibility that it lacks.

The Employer acknowledges that Mr. Rutherford's credibility is critical to the issue. He told the story as best he could recall it, which was in sharp contrast with Mr. Snow's entirely self-

serving testimony that included his admission of numerous lies he had told the Employer while he tried to conceal his longstanding employment at *Petrell*.

The Employer acknowledges that jurisprudence does address unreasonable delay. But the onus rests with the Union to prove that the Employer was aware of the Grievor's employment at *Petrell* long before the December 2009 / January 2010 time frame. There was no unreasonable delay, in the Employer's view, because the Employer acted promptly when it became aware of the Grievor's action.

By any standard the Union has not met that onus. On the balance of probabilities, the Union's argument that there was such knowledge of his teaching at *Petrell* is not believable. The question has to be asked, why would Mr. Rutherford ignore the fact that he was teaching at *Petrell*. If Mr. Rutherford did know about it, why did Mr. Snow not simply say so to his Manager before he was terminated. Mr. Rutherford could then just have said: "Sure ... Randy told me about that a year and a half ago!" That would be the logical thing for him to do.

Mr. Rutherford demonstrated his dedication to the OSSC. He has an obviously high regard for maintaining a high standard because of the business they're in, training for offshore safety. That is a critical area. We are all aware of it. Mr. Rutherford's testimony at this hearing is concerned about maintaining a high standard. The risk to lives is a daily fact they face.

Mr. Rutherford certainly did not lie to the Arbitrator, and did not deny something he knew, or something that Mr. Snow had told him. Mr. Rutherford would obviously not sit idly by and watch an employee whom he described in positive terms being terminated. But the Union asks the Arbitrator to believe that Mr. Rutherford simply watched Mr. Snow's career being snuffed out for some reason. But he did not know that Mr. Snow was teaching at *Petrell*.

Mr. Rutherford does remember the hallway conversation in June 2008, and he introduced the email about the *Petrell* teaching the H₂S Alive course. But it is clear from Mr. Snow's own testimony that he had been teaching that course at *Petrell* for a number of years, and had not notified anyone at the Marine Institute during that period. He claims he told Mr. Rutherford, but he had told no others at the Marine Institute, or anyone in authority, prior to that time. So Mr. Rutherford passes him in the corridor and says, 'You should see if they have the MOU with *Enform*, and are maintaining the standard required by the industry.' Then he was pulled off

course and started talking about a MOU between the Marine Institute and *Petrell*. But that never developed, simply because that was not what Mr. Rutherford was talking about.

Mr. Rutherford testified that he did remember Mr. Snow say that he knew the *Petrell* company, and he suggested Randy follow up. But he did not get the impression that Mr. Snow was in any type of relationship with *Petrell*. Mr. Snow, in fact, continues to be quiet about this, as he had for the previous three years. Then we are asked to believe that Mr. Snow suddenly speaks up and says, 'Ya, I work there.' If he was as nervous about revealing it to others, it is simply not credible to believe that he just blurted out to Mr. Rutherford that he is working there. Mr. Rutherford was simply saying to Mr. Snow, 'Please check into this; it's your department.'

The one thing Mr. Rutherford consistently denied was that he made any reference to a "letter". He was talking about an MOU. Mr. Rutherford was confused about the word "letter". Please keep in mind that he was not in the room to hear Mr. Snow's testimony. As the list of courses offered by the Marine Institute (RR #9) makes clear, Mr. Rutherford is correct when he says that H₂S Alive is not a big issue for the Institute, but it is a big part of what Mr. Snow does. That was why he asked Mr. Snow to check it out.

And he did say, incidentally, that they should have a MOU with *Enform* in place ... or it could have been a shared services agreement. That is precisely his testimony. He understands the need for high standards. Mr. Rutherford thinks he may have referenced the *Enform* MOU. He had just completed that process for the Marine Institute. He certainly does not remember the details. But we then are asked to believe Mr. Snow's version that he had taken the occasion to report what he had kept quiet about for three years, and for then for another half year afterwards. Mr. Snow's subsequent behaviour makes it even more clear. He deceived and lied to a number of Marine Institute personnel and has admitted to doing so. Mr. Rutherford said he did not hear Randy Snow say anything about teaching at *Petrell*. It is not conceivable that he would hear that and ignore it. The only evidence on the issue that ties in what Mr. Snow says he blurted out is Mr. Rutherford's supposed acknowledgement that "we get a letter in place about that." It is conceivable that Mr. Rutherford said an MOU, and later spoke of a letter.

But the Arbitrator must determine, *not* what Mr. Snow thought, but what Mr. Rutherford *knew*. That is the issue that must determine the Union's motion in this matter.

Mr. Rutherford said he did not know that Mr. Snow was teaching at *Petrell*, and admitted that he's not 100% sure of what was said. But the matter was handled by the Administrator of the school. Mr. Escott signed the dismissal. Mr. Rutherford talked about RR #5a to explain his involvement when the institution came to him for information. That document highlighted the occasion. That revealed the perceived potential for a conflict of interest. Mr. Rutherford wanted to be sure it was all covered off. Mr. Rutherford testified that if Mr. Snow had declared, we certainly would not be here today. Mr. Rutherford clearly supports the institution, which wants to give back to the community, but it does not condone teaching at a competitive institution.

So Mr. Rutherford is clear. He did not hear Mr. Snow say that he was teaching at *Petrell*. Even if Randy Snow did say it, Mr. Rutherford did not hear it. That's the end of the story.

But Mr. Rutherford's is not the only testimony. Ms. Gregory was subpoenaed to appear, and told about what had occurred three days before. (Mr. Snow tries to say that it was a month before. The Employer was concerned that he was trying to add that to the Union's claim for prior knowledge.) Ms. Gregory's account of the conversation she had with Mr. Snow was clear, precise, and entirely accurate. She said that he said, "I would not do that. I was under contract to the Marine Institute."

Ms. Gregory had no knowledge of *Petrell*, or of his concealing his connection with it. For Mr. Snow to argue that he had no understanding that he was in a conflict of interest is simply not credible. It is not believable that he would hide it from the rest of his colleagues because of "jealousy" or because management is supposed to operate on the basis of "politics", but then also believe that he blurted it out to Mr. Rutherford.

Why would Mr. Snow try to hide it from Ms. Gregory? Because he knew her integrity was above approach, and he was aware he was being caught red handed. She did not know of the conflict of interest implications. She understood conflict of interest in her own terms. For the Union to claim that Mr. Rutherford's testimony corroborates Mr. Snow's is to misconstrue the facts in the testimony. Ms. Gregory's testimony corroborates Mr. Rutherford's. Mr. Rutherford told it exactly like it was.

Mr. Puglisevich's testimony does not, in fact, support Mr. Snow's account either. Initially he did not know that Mr. Snow was an Instructor at the Marine Institute, and actually thought it

was he, and not Mr. Snow, who had initiated the discussion about the idea about a *Petrell*/Marine Institute joint services contract. The fact is, he had nothing to offer by way of a shared service with the Marine Institute. Mr. Snow refers to the "letter", but that does not explain why he did not pursue the matter. The evidence is that Mr. Puglisevich was interested in the Marine Institute, not the other way around.

In Mr. Horlick's view, the Arbitrator is, in fact, free to believe all the testimony. This may not be a standard credibility issue, at all. All the parties may be telling the truth. But the Arbitrator must determine what the effect of that truth is in the final analysis. If the Arbitrator chooses to believe Mr. Snow, we have evidence, at best, of a vague conversation. There is no evidence that goes to the question of Mr. Rutherford knowing that Mr. Snow taught at *Petrell*.

Mr. Garlie testified that Mr. Snow was vague and evasive about the missing certificate and the fact that it was "taken care of". Mr Garlie recognises that it is everybody's job to be aware of the conflict of interest issues. Conflict of interest is not difficult. It simply means not to put personal interests ahead of the Employer's interests. The Employer had an interest here. That is obvious to anyone. There is potential loss of revenue, and real employment development costs. Standards for the H₂S Alive course were implicated. The Marine Institute could have provided compressed courses, and so accommodate more students.

Mr. Snow is clear on two things: that the Marine Institute was aware that he worked at *Petrell*, and that he did not know that he was in a conflict of interest. But that is not borne out in his actions. It is clear from his response to being invited to the meeting: "I'm going to be fired, aren't I?" That is not consistent with his protest that he was unaware of a conflict of interest.

Mr. Snow chose to disguise his outside activities both in terms of their duration and the number of courses taught. He minimised his work. He acknowledged that he was nervous. But why? The reason was he knew he'd been caught. It is not credible to believe he was unaware of conflict of interest implications, and that he had actually informed Mr. Rutherford. There is no evidence to sustain the objection on what the Employer knew. On Mr. Snow's own testimony, he says he told Mr. Rutherford that he "taught" – past tense – several courses at *Petrell*.

Even if neither of two participants in that conversation are lying, it still does not show that the Employer "knew". It's even possible that Mr. Snow is not clear himself about what he

said. Saying and hearing are two different verbs. The only evidence is a vague reference to some "letter", and that does not cancel out Mr. Rutherford's adamant assertion that it was an MOU he was talking about. The evidence clearly establishes that Mr. Rutherford did not know Mr. Snow worked for Petrell, and that Mr. Snow was aware of potential conflict of interest, as his actions showed.

It is not surprising that one might mistrust the motives of colleagues. That is one reason why it is important to have a Conflict of Interest Policy in place. The practical implication is that one should clear everything, especially where is work being done within the field of employment. However there is no reason to give credence to Mr. Snow's view that managers are motivated by politics. And why was Mr. Rutherford different? Why blurt out a declaration to him?

The Arbitrator should look at the whole issue of the "letter". That is the only hint of confirmation from Mr. Rutherford, but it is not logical. Mr. Rutherford is supposed to have been asked Mr. Snow to go and negotiate an agreement on behalf of the Marine Institute that would take Mr. Snow's independent income away! It is obvious why he would not follow through. I don't think Mr. Rutherford would have expected Mr. Snow to negotiate himself out of a pay cheque. And the fact remains that it is ignored.

Mr. Snow, on the other hand is evasive. His response to evidence relating to the file that was found in his desk is significant, as is his insistence that he "does not do email", and that he has no concept of conflict of interest or realization of the obligation to reveal potential conflicts. None of this is believable. Mr. Snow is not believable.

The Union has not met its onus. Mr. Snow has not been able to show that the Employer knew that he worked at *Petrell*. On the balance of probabilities, the Employer's testimony is at least as believable as the Union's. But that is not enough for the Union's case to prevail. The Union has not tipped the balance. In fact, on the balance of probability, Mr. Rutherford's testimony is more credible as to what the Employer knew. The best that can be said of Mr. Snow's testimony is that it was self-serving and certainly does not constitute proof that the Employer knew he was working for *Petrell*. The Employer certainly acknowledges that the conversation in the hallway took place, but does not acknowledge that Mr. Rutherford heard Mr. Snow say that he was teaching there.

IN REBUTTAL ARGUMENT FOR THE UNION Ms. Kennedy agreed with Mr. Horlick that the Arbitrator is not here to determine what Mr. Snow thought but what Mr. Rutherford knew. That is key to this issue. In the Union's submission, it is more probable than not that Mr. Rutherford knew of the employment of Mr. Snow at Petrell.

The Union also agrees with Mr. Horlick's suggestion that it is quite possible that all witnesses are telling the truth. In the Union's view, all probably are telling the truth. The key, however is Mr. Rutherford's evidence. Careful analysis of that evidence shows that on four separate occasions he had the opportunity to state otherwise, but on each occasion his own characterization of what occurred wholly coincided with Mr. Snow's recollection. In light of that evidence, the Arbitrator should, in the Union's submission, declare the discipline null and void.

CONSIDERATIONS

The Union's objection claims that the Employer has unduly delayed imposing discipline on the Grievor, and thus created a false sense of security concerning the possibility of a violation of the Employer's Conflict of Interest Policy arising from his ongoing teaching at *Petrell*.

The evidence shows that in June of 2009, 18 months before discipline process commenced, there was a conversation between the Grievor and the Director of the Centre concerning *Petrell's* teaching of the H₂S Alive.

The Onus rests with the Union, as the Party making the objection, to establish on the balance of probabilities that (1) it is more probable than not that the Grievor did reveal his *Petrell* teaching to Mr. Rutherford during that conversation, and (2) that, therefore, the Employer's failure to take any action at or around that time renders the discipline it imposed 18 months later null and void.

Credibility: As both Parties tended to agree toward the end of their presentations, the matter before me does not turn out to be a standard credibility contest. Both Mr. Rutherford and Mr. Snow appeared to give credible accounts of an event in which they both participated. The issue before me is not, therefore, one of credibility but of determining whether the testimony actually reveals that the Employer was then made aware of the action for which the Grievor was later disciplined.

My review of the evidence leads me to conclude that the Grievor's own testimony does not, on its own, establish that any revelation he made to Mr. Rutherford about his teaching at *Petrell* was

clear or precise enough to make Mr. Rutherford, and the Employer, aware of the present, or intended future character of that involvement. On direct examination, Mr. Snow testified that he responded to Mr. Rutherford's enquiry about *Petrell* by saying: "Yes, I've taught several H₂S Alive courses for them." That statement, framed in the past tense, and in the context of the brief, informal conversation, does not itself establish that the Employer was made aware of a potential or actual violation of its Conflict of Interest Policy (in either its 1989 or June 2009 version).

But the Union made a strong argument that the Grievor's testimony does not stand or fall on its own. The Union argued that the Grievor's testimony was corroborated, both directly and implicitly, by the testimony of others, and particularly by Mr. Rutherford himself, who remembered the hallway conversation about *Petrell*, but not its details.

The Union pointed especially to Mr. Rutherford's testimony, on direct and on cross, when questioned about what he would likely have done *IF* Mr. Snow had made him aware of his continuing to teach the H₂S Alive course for *Petrell*. On the Union's analysis of his testimony, Mr. Rutherford consistently described himself as actually doing precisely what Mr. Snow testified he had done.

With respect, the Union's interpretation fails to note that, in responding to that question, Mr. Rutherford testified that he would have told the Grievor to "stop". That does not correspond with the Grievor's account of the conversation. It casts some doubt on the inference the Union invites me to draw about Mr. Rutherford as corroborating the Grievor's testimony.

Mr. Rutherford also insisted that he recalled no mention of a "letter", and that any document he would most likely have referred to was an MOU like the one the Marine Institute itself had just then concluded with *Enform*. I note that Mr. Rutherford did acknowledge the possibility of his referring to a joint service contract between the Marine Institute and *Petrell*, but actually recalls no reference to a "letter."

The Union suggested that it is, *prima facie*, unlikely that Mr. Rutherford would choose to ask the Grievor to pass on such a helpful recommendation about *Enform* accreditation. It is much more plausible, in the Union's view: 1) that he would ask the Grievor to communicate anything *only* if he had learned that the Grievor was in regular communication with *Petrell*; and 2) that he would more likely choose to communicate a cautionary message about the need to explore a

possible joint service agreement, than a helpful reminder about the need for *Enform* certification. However, whatever comparative degrees of plausibility may be involved, it remains a fact that Mr. Rutherford credibly denies actually having been made aware of the Grievor's continued teaching for *Petrell*.

I am not prepared to sustain the Union's objection. I accept the probability that witnesses are telling the truth. I have no doubt that, in June of 2009, Mr. Rutherford and Mr. Snow spoke about Mr. Snow's awareness of *Petrell's* offering the H₂S Alive course, in such a way that Mr. Rutherford asked Mr. Snow to convey a message to *Petrell* management. But Mr. Rutherford's and Mr. Snow's testimony concerning their recollections are too imprecise to permit other than unreliably speculative, hypothetically-based inferences to be drawn as to what exactly was said and what was heard and understood through that conversation. I note the Grievor's testimony when asked whether Mr. Rutherford had heard him say that "I'd taught some H₂S courses with *Petrell*". Mr. Snow said: "He may have, because he responded with reference to a letter of mutual exchange." This response is inconclusive and inferential. Thus, with respect, I do not find that the Union has "tipped the scales" and discharged its onus. Were I to sustain the Union's objection on the basis of the evidence and argument presented, I would go beyond what could be safely described as "more probable than not."

DECISION

In view of the foregoing considerations, I find that

THE UNION'S OBJECTION IS OVERRULED.

Respectfully submitted as the decision of the Arbitrator.

John A. Scott, Arbitrator

July 7, 2010