

William H. Dorsey, Jr.

A PROFESSIONAL CORPORATION
ARBITRATOR
ROOM 111, 621 S.W. MORRISON ST.
PORTLAND, OREGON 97205
(503) 222-3556

In the Matter of the Arbitration between:)	
)	
OREGON PUBLIC EMPLOYEES UNION, LOCAL 503,)	ALLEGED UNFAIR
SEIU, SALEM, OREGON, (Representing the)	SUSPENSION AND
Grievant, Terry L. Andrews),)	DISCHARGE
)	
The Union,)	
)	
and)	
)	
STATE HIGHWAY DIVISION, DEPARTMENT OF)	
TRANSPORTATION, EXECUTIVE DEPARTMENT,)	
STATE OF OREGON, PORTLAND, OREGON,)	
)	
The Employer.)	

<u>Date and Place of Hearing:</u>	January 12, 1982; Portland, Oregon.
<u>Representing the Union:</u>	F. Peter DeLuca, of Attorneys OPEU, Local 503, SEIU Salem, Oregon.
<u>Representing the Employer:</u>	William F. Hoelscher, Esq. Assistant Attorney General Department of Justice, State of OR Salem, Oregon.

ARBITRATOR'S DECISION AND AWARD

FIRST: At the hearing, the parties agreed orally that this case is properly before the Arbitrator for a decision on the merits under the provisions of Subsection (a) of Section 2 of Article 20, Discipline and Discharge, of their 1981-1983 Collective Bargaining Agreement (page 25 of Joint Exhibit I).

SECOND: The Arbitrator has framed the issues before him for a decision on the merits in this case as follows:

Issue 1: Was the initial suspension of the grievant, without pay, effective October 9, 1981,

pending pre-dismissal process, and was his ultimate discharge, effective November 16, 1981, for "just cause, as that term is normally interpreted by arbitrators in public and private labor relations, including prior merit system precedents"?

Issue 2: If not, what would an appropriate remedy, under all of the facts and circumstances of this case?

THIRD: The Arbitrator's answers to the issues before him for a decision on the merits in this case are:

Answer to Issue 1: YES, the October 9, 1981 suspension without pay, pending pre-dismissal process, and the discharge of the grievant, effective November 16, 1981, were both for "just cause, as that term is normally interpreted by arbitrators in public and private labor relations, including prior merit system precedents."

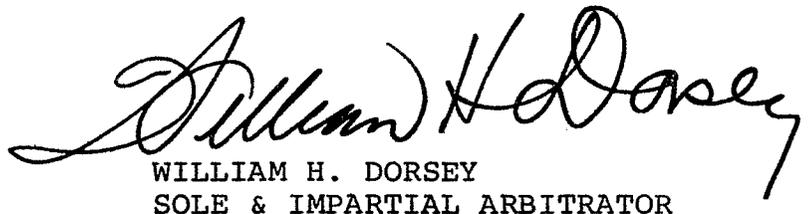
Answer to Issue 2: This issue has automatically been disposed of by the Arbitrator's affirmative answer to Issue 1, above.

FOURTH: Because of the express language of Section 7 of Article 21.3, Grievance and Arbitration Procedure (ODOT Coalition) ("The Arbitrator's fees and expenses shall be equally shared by the parties"; page 34 of Joint Exhibit I), the Arbitrator's statement shows an equal assessment on each party of his fees and costs advanced in this case.

A W A R D

The Union's November 24, 1981 written appeal to final and binding arbitration on behalf of the grievant, Terry L. Andrews, (Document 2 to Joint Collective Exhibit II) is hereby denied.

DATED at PORTLAND, OREGON, this 26th day of January, 1982.


WILLIAM H. DORSEY
SOLE & IMPARTIAL ARBITRATOR

WHD:jk

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<u>Representing the Employer:</u>	William F. Hoelscher, Esq. Assistant Attorney General Department of Justice, State of OR Salem, Oregon.

ARBITRATOR'S OPINION

ISSUES

The Arbitrator has framed the issues before him for a decision on the merits in this case as follows:

Issue 1: Was the initial suspension of the grievant, without pay, effective October 9, 1981, pending pre-dismissal process, and was his ultimate discharge, effective November 16, 1981, for "just cause, as that term is normally interpreted by arbitrators in public and private labor relations, including prior merit system precedents"?

Issue 2: If not, what would an appropriate remedy, under all of the facts and circumstances of this case?

FACTS

Introduction

There are four crucial facts in dispute in this case. The first concerns the grievant's knowledge of whether certain castings which he found on the Employer's property and appropriated to his own use, were stolen. The three others each concern the grievant's intent when he admittedly took these castings to his own home in the late summer of 1981.

When the Employer initially suspended the grievant, without pay, effective October 9, 1981, pending the pre-dismissal process (Document 1 to Joint Collective Exhibit II) and when it ultimately discharged him, effective November 16, 1981 (see the Attachment to Document 2 to Joint Collective Exhibit II), it alleged that the grievant "had reason to know or believe the castings were stolen property" (page 1 of Document 1 to Joint Collective Exhibit II). The grievant denies that he knew, or had reason to believe, that the castings were stolen at the time he found them on the Employer's property, at the time he transported them to his residence in his private vehicle, and on September 15, 1981 when he appeared at Kenton Aluminum and Brass Works, Incorporated, in Portland, Oregon, with these castings and admittedly inquired about their worth.

Both when the Employer initially suspended the grievant and when it ultimately discharged him, it alleged that:

"Your actions constitute utilization of a state vehicle for private purpose; removing materials from state property without authority; converting the materials to your own use; and attempting to profit from the sale of property not belonging to you, property removed from state premises without authority,

property taken home by you without authority, and property which you knew or should have suspected was stolen property." (Page 2 of Document 1 to Joint Collective Exhibit II.)

The grievant denies that he had any intention of using a State vehicle for private purposes when he found the brass castings on the Employer's stockpile site adjacent to Macadam Aluminum & Bronze Co. in North Portland and transported them across the street to the North Portland Highway Maintenance Station in a State truck. The grievant also denies that he had any intention of converting these castings to his own use when he removed them from the North Portland Highway Maintenance Station in his private vehicle. Finally, the grievant denies that he had any intention of selling these castings to Kenton Aluminum & Brass Works on September 15, 1981. Instead, the grievant asserts that he was only trying to find out whether these castings had more than a nominal value.

Background Facts

At the time of his suspension and discharge, the grievant was a Highway Maintenance Worker III in the Employer's North Portland Maintenance Section. He had been employed in this position for approximately three years, after having been transferred by the Employer to Portland from North Bend on or about October 23, 1978. On August 1, 1981, the grievant had completed his tenth year as an employee of the Employer.

Prior to the grievant's initial suspension and ultimate discharge in the early fall of 1981, he had never been disciplined by the Employer. In fact, on his last Annual Report of

Performance Appraisal as a Highway Maintenance Worker II at the Employer's North Bend Maintenance Section, his appraisal rating was "1" ("Makes superior contribution in many areas, as described; page 2 of Union's Exhibit 4) and his first, and final service Report of Performance Appraisal as a Highway Maintenance Worker III in the Employer's North Portland Maintenance Section was a "2" rating ("Achieves performance requirements, exceeding some, as described;" page 2 of Union's Exhibit 3). Moreover, on April 24, 1979, he had been given a written commendation by the same District Engineer, Mr M. D. Payne, who recommended his initial suspension and ultimate discharge after the incidents giving rise to this case. See Union's Exhibit 2.

Finally, on his last Annual Report of Performance Appraisal for the period May 1980 through April 1981, the grievant had also been given a "2" rating. See page 2 of Union's Exhibit 1.

Accordingly, the parties agree that the grievant was, in effect, a model employee, until the unfortunate incidents in the late summer and early fall of 1981 which led to his suspension and discharge.

Facts Giving Rise to the Grievant's Suspension and Discharge

On September 15, 1981, the grievant appeared at Kenton Aluminum & Brass Works, Inc. in North Portland with approximately 820 pounds of brass castings which had a value of \$2,542 at \$3.10 per pound. Although the grievant and several of his fellow employees who were witnesses in this case asserted that in their opinion the amount of brass castings found by him and removed from the Employer's property amounted to far less than 820 pounds,

nevertheless the Arbitrator, on the basis of the preponderance of the evidence, hereby finds, as a specific finding of fact, that when the grievant appeared at Kenton Aluminum & Brass Works on September 15, 1981 with the brass castings in question, their approximate weight was 820 pounds.

The owner and general manager of Kenton Aluminum & Brass Works testified by telephone that the grievant attempted to sell these brass castings to him. The grievant denies this and instead insists that he was only trying to find out whether these castings had more than a nominal value. Moreover, the grievant asserts that if he had found out that these castings had had more than a nominal value, it was his intention at the time to immediately return them to the Employer's North Portland Maintenance Section, as he should have done originally, in accordance with Section 2.135 of Chapter 2, Personal Habits, of the Employer's Personnel Maintenance Manual (Employer's Exhibit 9) in order that they might be returned to their proper owner.

The owner of Kenton Aluminum & Brass, however, testified that when the grievant appeared in his establishment on September 15, 1981, he immediately recognized the brass castings as stolen property belonging to Macadam Aluminum & Bronze Co. He further testified that he "stalled" the grievant while he had one of his employees attempt to reach the owner of Macadam Aluminum & Bronze and alert him that there was a person attempting to sell his stolen property there at that time and until the owner actually arrived and reclaimed his stolen property. The parties and the grievant agree that the owner of Macadam Aluminum & Bronze

arrived at Kenton Aluminum & Brass Works at approximately the same time as did the police, on September 15, 1981. The parties and the grievant also agree that the grievant immediately denied that he had stolen the castings and volunteered that he had "found" them during the last full week of August, 1981, along "Swift Highway", some distance from the North Portland Maintenance Section headquarters of the Employer.

The grievant admits that this story of where he found the castings was false, and that he had previously told this same story to two fellow employees, Edward J. Miller and Ronald F. Eyestone, a week or ten days earlier, and that later he told this same story to his supervisor, Mr. A. H. Meyer, and to the District Maintenance Engineer, Mr. M. D. Payne, when first questioned by them on or about September 18, 1981.

Finally, the grievant admits that it was not until on or about September 22, 1981 that he told Messrs. Meyer and Payne the truth about where he found these castings -- on the Employer's own stockpile site adjacent to Macadam Aluminum & Bronze Co., across the road from the Employer's North Portland Highway Maintenance Section headquarters. Above all, the grievant admits that he did not tell the truth about where he found these castings either to his employer or to the police until after he had consulted with his attorney and until after the companion with whom he found the castings, Mr. Tim Lewis, told him that he, Mr. Lewis, had told Messrs. Meyer and Payne on September 21, 1981 the truth about where he and the grievant had found these castings.

On October 9, 1981, after he had completed his investigation

of the matter, the District Engineer, Mr. M. D. Payne, spoke separately with the grievant and Mr. Lewis. He informed each of them, separately, that he had the choice of voluntarily resigning or being suspended without pay, pending the pre-dismissal process. The parties and the grievant agree that Mr. Lewis chose to voluntarily resign while the grievant chose to face the pre-dismissal process.

The parties and the grievant also agree that the grievant was given a written notice dated October 14, 1981 which confirmed his October 9, 1981 suspension without pay (Document 1 to Joint Collective Exhibit II); that he was afforded an opportunity to refute the written charges against him and to present any mitigating circumstances to the Employer's Labor Relations Manager for DOT, Mr. Jerry Croft, on October 26, 1981; and that by a written notice dated November 16, 1981 (see Attachment to Document 2 to Joint Collective Exhibit I), the grievant was notified in writing of his discharge.

Finally, the parties agree that the Union's appeal of the grievant's discharge was timely (Document 2 to Joint Collective Exhibit II) and that, purely for the purposes of this case, the Employer has waived any question of timeliness about the Union's appeal to arbitration of the grievant's October 9, 1981 suspension without pay (see Document 3 to Joint Collective Exhibit II).

ARGUMENTS OF THE PARTIES

Position and Arguments of the Employer

The basic position of the Employer is twofold:

First, it had "just cause,, as that term is normally

interpreted by arbitrators in public and private labor relations" to initially suspend and ultimately discharge the grievant for his conduct in deliberately taking castings from the State's own stockpile site in North Portland, without permission and in violation of the Employer's known and published rules (Employer's Exhibit 9), and in attempting to sell this property, which he knew or should have known was stolen property.

Second, as ultimately found by the Employment Relations Board, on remand by the Oregon Court of Appeals in the case of Jack F. Thompson v. Secretary of State, (ERB Case Nos 243 and 244; ERB Order of July 16, 1975 adopting OPINION and ORDER of the Court of Appeals, 19 Or. App. 74, 526 P. 2d, 621 (1974)), the Employer had a right to dismiss the grievant where the Employer was of the opinion that as a consequence of the grievant's misconduct in this case, "the relationship of confidence and trust which the Employer might reasonably require" of the grievant had been destroyed. Thus the Employer had "just cause" to discharge the grievant, as that term was interpreted in "prior merit system precedents."

In support of these basic propositions, counsel for the Employer argues:

First, the grievant lied, not once but on four separate occasions, when he described separately to his two fellow employees, to the police, and then to his superiors and the police, where he found the castings in question. Moreover, the grievant's explanation at the hearing that he lied to the police initially because he did not wish to have his Employer involved

in the incident makes no sense, in view of the fact that the grievant previously concocted the same story on two separate occasions, for his two fellow employees, Miller and Eyestone. Finally, the grievant admitted that he only told the truth about where he found the castings after Mr. Tim Lewis, his fellow conspirator, had already come forward and told their superiors the truth about where they had actually found the castings.

Accordingly, the grievant's denial of any knowledge that the castings were stolen and, above all, his denial of any intention to convert the property to his own use and to sell it, is simply not credible.

Second, moreover, the grievant's story that if he had found out, on September 15, 1981, that the castings had more than nominal value, it was his intention to immediately return them to the North Portland Maintenance Section headquarters for their ultimate return to their rightful owner, makes absolutely no sense. The grievant admits that his fellow employee, Ronald F. Eyestone, had told him at the grievant's residence on the Saturday before Labor Day of 1981, that in Mr. Eyestone's opinion the castings were "stolen property" because many of them had a number stamped on them.

Third, accordingly, the Employer's essential charge in this case, to wit, that the grievant deliberately used a State vehicle to transport the castings from one part of the Employer's property to another, with the intent to appropriate the property for his own use, and in direct violation of the oral and written policies of the Employer, and that in fact the grievant attempted to sell

the property in question even though he knew it was stolen property, has been proven by the Employer by the preponderance of the evidence in this case.

Fourth, the grievant's deliberate removal from the Employer's premises of property known by him to be stolen, with the intent to convert it to his own use, and the grievant's actual attempt to sell the stolen property on September 15, 1981, constituted misconduct on the grievant's part which certainly was "malfeasance" and which rendered the grievant unfit to render further effective service for the Employer. Above all, this misconduct of the grievant gave the Employer "just cause" both for the grievant's original October 9, 1981 suspension and his ultimate discharge effective November 16, 1981.

Fifth, finally, the grievant was well aware of the fact that the Employer had both an oral and written policy concerning the obligation of its employees to turn in to their superiors any property found by them on or near the Employer's "rights of way." The grievant deliberately violated this oral and written policy. In doing so he breached the trust and confidence which the Employer placed in him. In addition, he caused the Employer to breach the trust and confidence which the public places in it that any property found by employees of the State Highway Division along the Employer's "rights of way" will be turned in by these employees and may be claimed by the rightful owners.

Moreover, the property found by the grievant and Mr. Tim Lewis was not only just along the Employer's "right of way" (which indeed it was) but was actually on the Employer's own

stockpile site, behind a fence with a locked gate. In spite of the fact that the grievant and Mr. Lewis found this property on the Employer's stockpile area, the grievant deliberately used a State truck to assist him and Mr. Lewis in appropriating this property to their own use. The Thompson case clearly justifies the discharge of the grievant since, as testified to without contradiction by District Engineer Payne, the grievant's superior, the Employer can no longer place any trust and confidence in the honesty and integrity of the grievant.

Position and Arguments of the Union

The basic position of the Union in this case is also twofold:

First, the grievant admittedly violated an oral, and perhaps a written policy, of the Employer. However, this policy, in the past, has often been more honored in the breach than in the observance. The Employer acknowledges that it discharged the grievant for his violation of this policy. Moreover, the Employer's counsel at the hearing freely acknowledged that the Employer is not charging the grievant with theft. Accordingly, the Employer did not have "just cause, as that term is normally interpreted by arbitrators in public and private labor relations" to discharge the grievant.

Second, as clearly spelled out in the Union's written appeal to final and binding arbitration dated November 24, 1981:

"This disciplinary action taken by the Department of Transportation against Mr. Andrews fails to properly consider the practices of the agency in prior similar situations and the intentions of the Grievant upon removing the castings. In acting as it has, the Department of Transportation has violated the just cause

provision of Article 20, Section 1." (Arbitrator's emphasis; Document 2 to Joint Collective Exhibit II.)

In support of this statement, Union counsel refers to the Employment Relations Board Case No. 1143 involving Melville Mitchell and the Highway Division, in which the Board confirmed a 30-day suspension of Mr. Melville L. Mitchell who, along with his co-worker, Mr. Frank P. Kaiser (who also received a 30-day disciplinary suspension), had deliberately appropriated to his own use and benefit and for the benefit of the City of Troutdale, OR, crushed rock belonging to the Employer. In addition, Union counsel referred the Arbitrator to the written reprimand given to Mr. John T. Hager, who intentionally removed an outdoor advertising sign belonging to a third party, without permission, from the maintenance yard of the Employer in Beaverton, Oregon, and on his own returned it to its rightful owner.

Union counsel argues that obviously these cases prove that the discharge of the grievant was discriminatory and therefore without just cause.

In support of these basic propositions, Union counsel argues:

First, the grievant's only offense or misconduct, in effect, was that he violated an oral policy of the Employer which may have been published in its Personnel Maintenance Manual (Employer's Exhibit 9) but which was never seen by the grievant. The Employer's counsel admits that the Employer did not fire the grievant for theft of the Employer's property or the property of Macadam Aluminum & Bronze Co., or of anybody else. Accordingly, discharge is obviously too severe a penalty for the grievant's misconduct. Therefore the grievant should be reinstated, without a loss of

seniority, back pay, or fringe benefits, to the first day of his suspension without pay on October 9, 1981.

Second, the grievant did not intend to offer for sale, nor did he in fact offer for sale, the brass castings which he found at the State's stockpile site adjacent to Macadam Aluminum & Bronze Co. He only intended, on September 15, 1981, to find out what the brass castings were which he and Mr. Lewis had found and to learn how much they were worth.

His testimony that if they had turned out to have more than a nominal value he was going to turn them in to his supervisor, as he admittedly should have done in the first place, is entirely credible. Accordingly, the basic charge of the Employer (to wit, that the grievant intended to profit from the sale of property not belonging to him) has not been proven by the Employer. Thus the Employer did not have just cause to discharge the grievant.

Third, not only did the grievant have no idea that the castings which he found were stolen property but, above all, he had no idea that the site where he found them, which was admittedly on the Employer's property and highway right-of-way, was adjacent to Macadam Aluminum & Bronze Co. As a matter of fact, the grievant's supervisor, Mr. A. H. Meyer, admitted that he too had no idea that Macadam Aluminum & Bronze was across the road from the North Portland Maintenance Section headquarters. Thus again the Employer failed to prove an essential element of its October 14, 1981 charge against the grievant (to wit, that the grievant knew or should have suspected that the castings were stolen). Thus

the Employer did not have just cause to discharge the grievant.

Fourth, in any event the grievant did not find anything like 820 pounds of brass castings which had a value of \$2,542 at \$3.10 per pound. The grievant testified that although he was not sure of the exact weight of the brass castings which he and Mr. Lewis found, nevertheless in no event had they found 820 pounds. The Employer's witnesses and the grievant's fellow employees, Messrs. Edward J. Miller and Ronald F. Eyestone, also testified that in their opinion the brass castings which the grievant showed them in the back of his green pick-up truck came nowhere near weighing 820 pounds. Accordingly, the Employer has failed to prove an essential element of its October 14, 1981 suspension letter, with again the result that the Employer did not have just cause to discharge the grievant.

Fifth, finally, the Mitchell and Kaiser suspensions of 30 days (ERB Case No. 1143) definitely prove that as recently as July 17, 1980, the Employer only suspended for 30 days two employees who deliberately appropriated for their own use property which they knew belonged to the Employer. Likewise, the John T. Hager case shows that as recently as April 16, 1980 the Employer only issued a written reprimand to an employee who deliberately and without permission, and in violation of the Employer's stated policy, took an outdoor advertising sign belonging to a third party from the Employer's maintenance yard in Beaverton, Oregon, and, strictly on his own, returned it to its rightful owner.

These three cases indicate very clearly that the discharge of the grievant was excessive and discriminatory. Two employees

who were guilty of much more heinous conduct than that of the grievant were not discharged but instead received 30-day disciplinary suspensions. A third employee who, like the grievant, violated the Employer's stated policy on taking property from the Employer's facilities, received only a reprimand. Accordingly, under the just cause standard for discipline and discharge, the discharge of the grievant must be upset by the Arbitrator on the grounds that it is excessive and discriminatory.

ARBITRATOR'S DISCUSSION

Introduction

The Arbitrator has already stated his specific finding of fact that approximately 820 pounds of brass castings, which had a value of \$2,542 at \$3.10 per pound, were taken by the grievant on September 15, 1981 to Kenton Aluminum & Brass Works in North Portland. The Arbitrator notes here that he has made this specific finding of fact on the credible testimony of Mr. Richard Keangas, the production manager of Macadam Aluminum & Bronze Co., who testified that he personally observed metal castings weighing 820 pounds being returned by his employer, and the owner of Macadam Aluminum & Brass, to his company on September 15, 1981, after his employer had received a telephone call from Kenton Aluminum & Brass Works, informing him that someone was there trying to sell Macadam's stolen castings. See also Employer's Exhibits 1-5. Accordingly, this leaves us with the four critical facts in dispute on which the Arbitrator must now note his specific findings of fact.

Arbitrator's Specific Findings of Fact

On the basis of the preponderance of the evidence in the record before him in this case, the Arbitrator hereby finds, as specific findings of fact, the following:

First, the grievant knew, or should have known, that the castings which he deliberately appropriated for his own use after finding them on the Employer's stockpile site adjacent to Macadam Aluminum & Bronze Co. in North Portland, were stolen property. One, many of the castings which he found and appropriated to his own use were clearly stamped with a number. Two, his fellow employee, Ronald F. Eyestone, specifically told the grievant, at the grievant's residence on the Saturday before Labor Day in 1981, that in his opinion these numbers on many of these castings indicated that the castings had been stolen. Three, Mr. Eyestone and the grievant's other fellow employee, Edward J. Miller, although indicating that they did not know exactly what the castings were, did indicate, in effect, to the grievant that they were probably other than mere scrap. Certainly they did not indicate to the grievant that these castings were "pot metal" or say anything which would have supported the grievant's alleged conclusion that these castings were "pot metal." Four, the very extent of the poundage (i.e., 820 pounds) of the grievant's "find" and the location where he found it (on the Employer's stockpile site adjacent to Macadam Aluminum & Bronze Co.) should have alerted the grievant to the fact that these items were neither scrap nor "pot metal" nor material which had spilled from a truck on the freeway onramp above the Employer's

stockpile site.

Second, when the grievant used the Employer's truck to transport the castings which he and Mr. Tim Lewis had found on the stockpile site across the road to the North Portland Highway Maintenance Section, the grievant did so with the express intent of appropriating these castings to his own use, in spite of the fact that he knew, and admitted that he knew, that according to the Employer's policy he should have turned in this found property.

Third, when the grievant deliberately removed these castings in the back of his green pick-up truck from the North Portland Highway Maintenance Station of the Employer, he did so with the intent to appropriate this property (which he knew was probably stolen) to his own use and he also did so with the knowledge that he was violating the express oral and written rules of his Employer.

Fourth, on September 15, 1981 when the grievant appeared at Kenton Aluminum & Brass Works with approximately 820 pounds of brass castings which had a value of \$2,542 at \$3.10 per pound, he did so with the intent to sell this property which he knew, or should have known, was stolen property, and to profit from the sale of this property. In addition and in fact, at Kenton Aluminum & Brass Works on September 15, 1981, the grievant attempted to sell this property which he had appropriated to his own use.

Fifth, accordingly, in the late summer of 1981 the grievant was indeed guilty of "malfeasance, misconduct and unfitness to render effective service", just as charged in the Employer's

October 14, 1981 suspension letter (Document 1 to Joint Collective Exhibit II), and in its discharge letter of November 16, 1981 (Attachment to Document 2 to Joint Collective Exhibit II).

Sixth, this malfeasance and misconduct of the grievant was a breach of the trust and confidence which his Employer had placed in him. In addition, this malfeasance and misconduct of the grievant led the Employer, unknowingly and unwittingly, to be in violation of its trust with the public in general and with its neighbor in North Portland, Macadam Aluminum & Bronze Co. This violation of the Employer's trust and confidence in the grievant indeed made the grievant unfit to render effective service for the Employer in the future.

Accordingly, the Arbitrator hereby finds, as the ultimate finding of fact and conclusion of law in this case, that the grievant was indeed first suspended and then discharged by the Employer "for just cause, as that term is normally interpreted by arbitrators in public and private labor arbitrations, including prior merit system precedents" and was, therefore, in strict accordance with the requirements of Section 1 of Article 20, Discipline and Discharge, of the 1981-1983 Collective Bargaining Agreement of the parties (page 25 of Joint Exhibit I).

Arbitrator's Reasoning

The grievant's testimony in this case was simply not credible. First, as pointed out by the Employer's counsel, the grievant deliberately lied, not once but four times, when he told each of two fellow employees, then the police, and then his superiors and the police, where he and Mr. Lewis found the brass castings.

This deliberate fabrication, from the beginning, has cast a doubt on the grievant's veracity. Second, the grievant's explanation at the hearing of why he originally lied to the police about where he found the castings, is indeed entirely unbelievable, in view of the fact that a week or ten days before he had already told, separately, two of his fellow employees, this same lie. Third, the grievant's explanation of his original lie to the police on September 15, 1981 becomes even more unreasonable when we consider that the grievant then deliberately lied to his immediate superior, A. H. Meyer, and to District Engineer Payne, when he was first confronted by his superiors about what had happened. Accordingly, the Arbitrator was unable to believe the grievant's protestation that he did not even suspect that the property which he and Mr. Lewis found was stolen property.

In addition, the grievant's protestations that he always intended to return the property to his supervisor and ultimately to its rightful owner if he discovered that it had more than a nominal value, is simply not credible. Above all, these protestations are not believable in light of the fact that the grievant's fellow employee, Mr. Ronald F. Eyestone, informed the grievant on the Saturday before Labor Day of 1981 that he, Mr. Eyestone, suspected that the castings were stolen. In spite of this warning, the grievant did nothing to attempt to return the stolen property to its rightful owner. Instead he tried to sell it on September 15, 1981. All of this has led the Arbitrator to conclude that the grievant's claim that at no time did he ever intend to "appropriate" the property in question for his own use nor ever

intend to sell it, was untrue.

The grievant's entire lack of credibility has likewise convinced the Arbitrator that the grievant knew, and knew well, both the oral instructions of his superiors and the published rule of the Employer (Employer's Exhibit 9) about what he as an employee of the State Highway Division was to do if he found articles on the rights-of-way of the State of Oregon. Moreover, it did not take any published or unpublished rule of the Employer to inform the grievant that he had no right to appropriate for his own use any property which he found on the Employer's stockpile site adjacent to the Macadam Aluminum & Bronze Co.

All of the above have led the Arbitrator inevitably to the conclusion that the basic charge of the Employer against the grievant, and the stated reason for his suspension and discharge -- that the grievant deliberately removed property which he knew to be stolen, or which he should have known was stolen, from the Employer's stockpile site and then from its North Portland Highway Maintenance Station, with the intent to profit from the sale of this property -- has been proven by the preponderance of the evidence by the Employer. This misconduct of the grievant was obviously "job-related"; was serious; and therefore constituted just cause both for his suspension and his ultimate discharge.

The Heart of the Matter

Counsel for the Union is correct in his central proposition that the Union's November 24, 1980 written appeal to final and binding arbitration went to the heart of the matter in its contention that the grievant's discharge was not in accordance with

"the practices of the agency in prior similar situations." In fact, the crucial question in this case is whether the discharge of the grievant was discriminatory, in light of the Melville Mitchell and Frank P. Kaiser 30-day suspensions when they were guilty of appropriating property which they knew belonged to the Employer in July, 1980, and in view of the John T. Hager written warning, when Mr. Hager was guilty of removing property from the Employer's maintenance yard, without permission, in April, 1980.

This brings us to the question of whether the offenses of the grievant were different in kind and in degree from those of Messrs. Mitchell, Kaiser and Hager. The Arbitrator has reluctantly concluded that the multiple offenses of the grievant were indeed different from the offenses committed by Messrs. Hager, Mitchell and Kaiser, for the following reasons:

First, in the April 16, 1980 written warning to Mr. John T. Hager, Mr. William W. Geibel, District 2-A Engineer, Beaverton, Oregon, made it clear that the Employer had reason to believe that Mr. Hager had returned the advertising sign in question to its rightful owner after he had removed it from the Employer's maintenance yard, without permission. Thus in that case Mr. Hager was not guilty of deliberately appropriating to his own use property which belonged to another. The grievant in this case was guilty of deliberately appropriating to his own use property which he knew, or should have known, was stolen.

Second, although there is no question that Messrs. Melville Mitchell and Frank P. Kaiser deliberately misappropriated the property of the Employer located at the Northeast Portland Section

yard, nevertheless these gentlemen did not misappropriate this property for their own use in order to profit therefrom. Instead, using a truck belonging to the Employer, they hauled crushed rock which they had misappropriated from the Employer to the location of the Harlow House Museum in the City of Troutdale, Oregon, in order to improve the parking lot at that museum. Of course, the action of Messrs. Mitchell and Kaiser was improper. As a matter of fact, they were guilty of "misconduct and misfeasance" and their 30-day suspensions were indeed justified.

The question remains, however, whether the offense of Messrs. Mitchell and Kaiser was the same as that of the grievant. The Arbitrator has already found that the grievant knew, or should have known, the property which he and Mr. Lewis found on the Employer's stockpile site, was stolen property. The Arbitrator has likewise found that the grievant deliberately and with the intent to deprive its rightful owner of this property, removed it from the Employer's stockpile site to its North Portland Maintenance Section yard in a State truck, transferred it to his own pickup truck, and took it to his own residence. The grievant did this not only with the intent of misappropriating the property to his own use but with the intent to sell it for his own profit. In addition, on September 15, 1981, the grievant actually attempted to sell this property to Kenton Aluminum & Brass Works, Inc. The property in question, which was misappropriated by the grievant deliberately and with the intent to profit therefrom, was approximately 820 pounds of brass castings which had a value of \$2,542 at \$3.10 per pound. Irrespective

of how improper the conduct of Messrs. Mitchell and Kaiser was in July, 1980, neither of them misappropriated the property of the Employer with deliberate intent to profit from the sale thereof.

Accordingly, the Arbitrator hereby specifically finds that the offenses of the grievant were different in kind, and in degree, from the offenses of Messrs. Mitchell and Kaiser, and that therefore the discharge of the grievant was not discriminatory, under the just cause standard for discipline and discharge, and under the Jack F. Thompson ERB case.

CONCLUSION

The Arbitrator's answers to the issues before him for a decision on the merits in this case are:

Answer to Issue 1: YES, the October 9, 1981 suspension without pay, pending pre-dismissal process, and the discharge of the grievant, effective November 16, 1981, were both for "just cause, as that term is normally interpreted by arbitrators in public and private labor relations, including prior merit system precedents."

Answer to Issue 2: This issue has automatically been disposed of by the Arbitrator's affirmative answer to Issue 1, above.

Because of the express language of Section 7 of Article 21.3, Grievance and Arbitration Procedure (ODOT Coalition) ("The Arbitrator's fees and expenses shall be equally shared by the parties"; page 34 of Joint Exhibit I), the Arbitrator's statement shows an equal assessment on each party of his fees and costs advanced in this case.

DATED at PORTLAND, OREGON, this 26th day of January, 1982.


WILLIAM H. DORSEY
SOLE & IMPARTIAL ARBITRATOR

N.B. This OPINION of the Arbitrator accompanies, but is not made a part of, his DECISION AND AWARD in this case. This OPINION sets forth, for the information and guidance of the parties, the Arbitrator's reasoning in this matter.



WHD

WHD:jk