

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

JAMES GREGORY HERRITT

Grievor

and

**TREASURY BOARD
(National Defence)**

Employer

Before: Rosemary Vondette Simpson, Board Member

For the Grievor: Evelyne Henry, Public Service Alliance of Canada

For the Employer: Harvey A. Newman, Counsel

Heard at Halifax, Nova Scotia,
July 30, 1996.

DECISION

Mr. James Gregory Herritt grieved against his discharge from the Department of National Defence. He held the position of Storesperson, Ration Supply Group, Willow Park, at CFB Halifax. Mr. Herritt commenced employment as a storesperson, GS-ST5-02T (term), on July 16, 1980. He was appointed to an indeterminate position as a storesperson, GS-ST5-03, on January 18, 1982 (Exhibit E-11). His letter of discharge from Rear Admiral G.L. Garnett dated October 26, 1995 reads as follows (Exhibit E-4):

As you are aware, based on Commander Olsen's letter to you dated 22 September 1995 you have been found culpable of misconduct and termination of your employment has been recommended. Commander Olsen's decision and recommendation are based on your involvement in the theft of foodstuffs which were the property of the Department of National Defence.

This is to advise you that this matter has been carefully reviewed and I have concluded that you have irreparably broken the bond of trust between employer and employee that is essential for you to continue as an employee of the Public Service of Canada. Therefore, in accordance with the authority delegated to me by the Deputy Minister of National Defence pursuant to Section 11.(2)(f) of the Financial Administration Act, you are hereby notified that your employment in the Public Service will be terminated effective 3 November 1995.

The indefinite suspension without pay previously imposed remains in effect until that date.

You are further advised that, in accordance with your collective agreement, you have the right to grieve my decision within 25 days from the date of receipt of this letter.

The Military Police Investigation Report (Exhibit E-6) prepared by Corporal E. Seymour contains the following version of events leading up to the arrest of Mr. Herritt:

...

2.(PB) At 2310 hrs, 10 Aug 95, an anonymous male telephoned the Main Desk of the Military Police Sect, CFB Halifax, NS, and related the following information:

- a. *there is a civilian male employed at the Ration Supply Depot, Bldg WL-26, Willow Park, CFB Halifax, who was stealing cases of food on a daily basis;*
- b. *this individual removes the food from the building at about the same time (approximately 1130 hrs) daily;*
- c. *the cases of food are placed in the trunk of this individual's personal vehicle, described only as a grey 1984-85 Mercury Topaz/Ford Tempo;*
- d. *the last time he observed this individual stealing rations was at about 1130 hrs, 10 Aug 95. At this time he observed him taking a large bag of flour and several cases of food;*
- e. *he would not provide this individual's name, however, physically described him as being approximately 5 feet 11 inches tall, weighing 180 lbs, short brown hair (non-military style), and between 33 - 35 years of age;*
- f. *he was reporting this to the Military Police as he personally felt that this individual had stolen enough food; and*
- g. *he repeatedly refused to provide his own identity.*

3.(PB) *At 0800 hrs, 11 Aug 95, I was apprised of the information as outlined in para 2 of this report. I was also informed by MCpl CASSWELL that surveillance would be established in the area of the Ration Supply Depot, Bldg WL-26, Willow Park, CFB Halifax.*

4.(PB) *At 0820 hrs, 11 Aug 95, accompanied by MCpl CASSWELL, I conducted a check of the parking lots in the vicinity of Bldg WL-26, Willow Park, CFB Halifax. During this check, we located a grey 1984 Ford Tempo, bearing NS licence CPF 168, parked immediately adjacent to the East side of Bldg WL-26. A subsequent CPIC check revealed the registered owner of this vehicle to be Ms DRAKE.*

5.(PB) *At 1050 hrs, 11 Aug 95, accompanied by MCpl CASSWELL, I established surveillance on the East side of Bldg WL-26, Willow Park. Cpl SPARKES subsequently established surveillance on the North side of this same location.*

6.(PB) *At 1117 hrs, 11 Aug 95, I observed a male individual (later identified as Mr HERRITT), matching the physical description of the individual identified in para 2 above, exit the open garage bay door located on the East side of Bldg WL-26, carrying some boxes. He proceeded to the rear*

of the grey Ford Tempo, opened the trunk and placed the boxes he was carrying into the trunk. He then re-entered Bldg WL-26 via the open bay door. During the time that I was observing the actions of this individual, MCpl CASSWELL was able to take several photographs.

7.(PB) At 1121 hrs, 11 Aug 95, I again observed Mr HERRITT exit the open bay door carrying several boxes. He proceeded to the rear of the Ford Tempo, opened the trunk and placed the boxes inside. Again MCpl CASSWELL was able to take several photographs of Mr HERRITT's actions.

8.(PB) At 1122 hrs, 11 Aug 95, I observed Mr HERRITT start up this vehicle and drive out of the parking lot in the direction of the North gate of Willow Park. At this point, I contacted Cpl SPARKES via radio, apprised him of the situation and requested that he attempt to stop this vehicle at the gate to Willow Park.

9.(PB) At 1123 hrs, 11 Aug 95, Cpl SPARKES stopped the Ford Tempo inside the Willow Park Compound by driving an unmarked Military Police vehicle, with the dash-mounted emergency light activated, in front of and cutting off of the subject veh. MCpl CASSWELL and I proceeded to the location where Cpl SPARKES had the subject veh stopped. As MCpl CASSWELL and I approached from the rear (South), the driver of the Ford Tempo drove around Cpl SPARKES' vehicle, exit (sic) the Willow Park Compound and proceeded North on Windsor Street, Halifax, NS. MCpl CASSWELL and I immediately followed this vehicle, driving an unmarked Military Police vehicle, with both the dash-mounted emergency light and four-way flashers activated.

10.(PB) At 1125 hrs, 11 Aug 95, MCpl CASSWELL radioed the Main Desk of the Military Police Sect and requested that Halifax Police Department (HPD) be contacted and their assistance requested, as it was apparent the driver of the Ford Tempo had no intentions of stopping.

11.(PB) At 1132 hrs, 11 Aug 95, with the assistance of two HPD motorcycle units, the Ford Tempo was stopped on Herring Cove Road, Halifax, NS. At this point MCpl CASSWELL and I approached the vehicle and requested the driver to step out, however, he blatantly refused to do so. The driver then made a sudden erratic motion and shoved his right hand into his pants. Based on these observations, MCpl CASSWELL and I drew our service pistols and placed them at our sides ordering the subject to place his hands on the steering wheel to which he complied. The Subject was ordered to exited (sic) his vehicle where he was placed under arrest, advised of his right to legal counsel and read a

standard police warning. The driver, now identified by his DND Civilian Identification Card as Mr HERRITT, was searched, placed in mechanical restraints (handcuffs) and placed in the rear of my unmarked Military Police vehicle.

12.(PB) At 1135 hrs, 11 Aug 95, MCpl CASSWELL conducted a cursory check of the Ford Tempo and nothing was found in the interior, however, the trunk contained a total of eleven boxes of various foodstuffs. MCpl CASSWELL then took photographs of the vehicle, including the contents of the trunk.

13.(PB) At 1138 hrs, 11 Aug 95, Cpl SPARKES arrived at my location where he commenced to conduct an inventory of all foodstuffs located in the trunk of the Ford Tempo. Upon completion of his inventory, these boxes were transferred to the trunk of Cpl SPARKES' vehicle.

14.(PB) At 1150 hrs, 11 Aug 95, LS GRAVEL arrived at my location with a marked Military Police patrol vehicle. At this point MR HERRITT was transferred to this vehicle and accompanied by LS GRAVEL I transported him to this MP Sect. Upon arrival at the MP Sect I again read MR HERRITT a standard police warning and advised him of his right to legal counsel. Mr HERRITT stated that he had understood what had been read to him and he indicated that he now wished to contact legal counsel. Mr HERRITT was then provided the opportunity to speak with counsel in private. After which Mr HERRITT declined to be interviewed on the advice of counsel.

15.(PB) At 1152 hrs, 11 Aug 95, ACE Towing Services, Halifax, NS, was contacted and attended the location on Herring Cove Road. The Ford Tempo was subsequently removed to their compound on Mitchell Street, Halifax, NS.

16.(PB) At 1220 hrs, 11 Aug 95, MCpl CASSWELL and Cpl SPARKES arrived at this MP Sect and transferred all boxes of foodstuffs from the trunk of the Ford Tempo to the Investigation Section. At this time, Cpl SPARKES conducted a detailed inventory, photographing each item and subsequently secured them in evidence lockers. A full description of all items seized is attached to this report as ANNEX A.

17.(PB) At 1330 hrs, 11 Aug 95, MCpl CASSWELL contacted Mr MARTIN, the local Crown Attorney, and apprised him of the incident involving the arrest of Mr HERRITT and explored the possibility of obtaining a search warrant for Mr HERRITT's residence. MCpl CASSWELL was informed that there was not enough evidence to substantiate the issuance of

a search warrant and Mr MARTIN recommended that Mr HERRITT be released on Appearance Notices, vice an Undertaking.

18.(PB) At 1410 hrs, 11 Aug 95, I released Mr HERRITT from custody by issuing him Appearance Notices, charging him with the following offenses:

- a. Theft Under \$5000. - contrary to Section 334(b)(i) of the Criminal Code of Canada (CCC);
- b. Possession of Property Obtained by Crime (Under \$5000.) - contrary to Section 355(b)(i) of the CCC;
- c. Breach of Probation - contrary to Section 740(1) of the CCC;
- d. Dangerous Driving - contrary to Section 249(2)(a) of the CCC;
- e. Drive While Licence Suspended - contrary to Regulation 6(1) of the Government Property Traffic Regulations (GPTR); and
- f. Failure to Obey the Directions of a Peace Officer - contrary to Regulation 6(1) of the GPTRs.

Mr HERRITT is to attend Halifax Provincial Court, 5250 Spring Garden Road, Halifax, NS, at 0900 hrs, 27 Sept 95, to answer to the aforementioned charges. He is also to attend the National Defence Identification Unit, Trailer 4, Provo Wallis Street, HMC Dockyard, CFB Halifax, at 0900 hrs, 30 Aug 95, for the purposes of the Identification of Criminals Act.

...

The items seized from Mr. Herritt's car are listed in an inventory which forms part of Exhibit E-6:

LIST OF SEIZED ITEMS FOR MCHX 310-154-95

<i>Stock code</i>	<i>Item</i>	<i>Quantity</i>	<i>Unit/Cost</i>	<i>Total Cost</i>
5337	12 X 500 ml bottles of Kraft Strawberry Jam	1 Box	\$3.12	\$ 37.44

<i>Stock code</i>	<i>Item</i>	<i>Quantity</i>	<i>Unit/Cost</i>	<i>Total Cost</i>
5359	12 X 500 ml bottles of Kraft Raspberry Jam	1 Box	\$3.39	\$ 40.68
5396	12 X 200g bottles of Hills Bros Instant, Coffee	1 Box	\$2.65	\$ 31.80
5400	12 X 150g bottles of Nescafe Decaf Instant, Coffee	1 Box	\$2.65	\$ 31.80
5410	24 X 250g cans of Fry's Cocoa	1 Box	\$2.62	\$ 62.88
5654	24 X 57 ml bottles of Tabasco Brand Pepper Sauce	1 Box	\$1.50	\$ 36.00
5656	24 X 285 ml bottles of Heinz Chili Sauce	1 Box	\$1.60	\$ 38.40
5639	12 X 440 ml bottles of Old Elpaso Taco Sauce	1 Box	\$2.40	\$ 28.80
5648	24 X 200 ml bottles of HP Meatsauce	1 Box	\$1.41	\$ 33.84
5649	12 X 250 ml bottles of Wong Wing Plum Meatsauce	1 Box	.97	\$ 11.64
5650	12 X 163 ml bottles of Heinz Worcestershire Sauce	1 Box	\$1.21	\$ 14.52
Total Cost:				\$367.80

Mr. David, Mr. Herritt's supervisor, testified for the employer. He has been a warehouse supervisor for 25 years. He reports to a Mr. Coffin, the Willow Park Supply Group supervisor, who in turn reports to the Base Supply Officer who at the time of the incident reported to Captain John Olsen. He stated that storepersons must work independently a great deal of the time and their positions are positions of trust.

He described Mr. Herritt as a good worker, in fact one of their better workers. He had to discuss excessive absenteeism with him in 1992 or 1993. He also became aware that Mr. Herritt was experiencing financial problems and had a drinking problem. He thought he was also a marijuana user. Mr. Herritt had to go to court a few times with regard to problems related to drinking and driving and driving while his license was suspended. He tried to help Mr. Herritt with these problems, even to the point of driving him around to his creditors on payday to make sure he did not fall behind on his payments.

He recommended to Mr. Herritt that he contact the Employee Assistance Program with regard to his drinking problem. He was not sure what happened after that but believed that Mr. Herritt had attended one appointment. He was unaware of Mr. Herritt's drug problem until after the incident out of which this grievance arises. After the incident, he felt betrayed, hurt, and that he could no longer trust Mr. Herritt. He felt that Mr. Herritt's actions had let him and the other employees down. Mr. Herritt's actions added a lot of pressure to their lives because their organization was under threat of being down-sized, but they had been granted a special trial period to demonstrate that it was financially viable to keep the Ration Supply Group. The theft had occurred in the midst of this trial period. Mr. David stated that the grievor has lost the trust of his co-workers because, at a time when they were fighting for their jobs and their livelihood, his actions placed them in a bad light.

Captain Olsen testified. In July 1995 he was the Base Supply Officer for Canadian Forces Base (CFB) Halifax. He had over 500 employees reporting to him and he dealt with millions of dollars in supplies.

There had been some question of closing down the Ration Supply Group and contracting out its function. It was given a trial period to show that its operation could be cost effective. The effect of the theft was devastating to the employees

because this had the effect of raising the overhead. The employees had to demonstrate cost efficiency or their jobs would be at stake.

With regard to the incident itself, Captain Olsen stated that he conducted a hearing on September 12, 1995 before deciding on the imposition of a penalty on Mr. Herritt. When Mr. Herritt was apprehended by the police, he fully admitted to the theft of foodstuffs on the day in question but claimed that his actions in taking the cartons of food were spontaneous. Before making his decision to discipline, Captain Olsen considered that Mr. Herritt had broken his bond of trust with the Department by committing theft, especially at a time when the rest of the Ration Supply Group were fighting for their jobs. He felt that in all probability Mr. Herritt had committed theft before. Although he examined the mitigating factors, he concluded that Mr. Herritt's rehabilitative potential was limited and that his employment should be terminated.

In cross-examination, Captain Olsen stated that prior to making his decision he had seen a letter dated August 29, 1995, from the Department of Health, Drug Dependency Division, Province of Nova Scotia, which indicated that Mr. Herritt was registered in a rehabilitation program (Exhibit G-2).

Captain Olsen agreed that he was aware of another major theft incident that had taken place in another branch of the Department at CFB Halifax, not within Base Supply. He indicated that he was aware that three employees who had committed the thefts had not been discharged and had received only suspensions as low as 20 days. These were major thefts of appliances, including refrigerators and stoves. Captain Olsen testified that these thefts were not parallel to the circumstances of the present case. In Mr. Herritt's case, it was a question of one employee deliberately deciding to steal whereas in the other cases there was mitigation because there was a question of alleged coercion.

Next to testify was Kevin Locke, a stationary engineer who holds a union position with the Union of National Defence Employees (UNDE). He is first vice-president and acting chief shop steward. He attended, as an observer, the hearing on September 12, 1995 with Captain Olsen. At this hearing, Ron Marsh, a union representative, had raised the question of addiction and the recovery process as it

related to Mr. Herritt. Addiction and its causes and effects on the individual were described in much detail. The witness stated that Captain Olsen seemed surprised at the evidence put forth. When he became aware of the magnitude of the grievor's problem, Captain Olsen seemed genuinely concerned and stated that he would do everything in his power to help Mr. Herritt.

Mr. Locke testified that he knew all three of the other employees who had received suspensions for theft. The three of them were foremen in positions of trust. They had signing authority to purchase tools, equipment, and other goods and supplies needed for their particular shops. These foremen supervise and are responsible for the trades people under them in each respective shop. The witness stated that he was aware of the facts as he participated in union-management discussions regarding their situation and in fact was the union representative for one of these employees.

The witness testified that Ron Marsh had made Captain Olsen aware of the cases of these three foremen who were involved in thefts of items of higher value (theft over \$1,000.) and had received 20-day suspensions.

In another case which occurred just after Mr. Herritt's, an employee in the general labour and trades classification was involved in the theft of a large amount of motor oil of approximately \$800. in value and some smaller items. Like Mr. Herritt, he was addicted to drugs and alcohol but he was given a 20-day suspension.

Mr. Herritt, the grievor, testified. His classification is GS-STS-03. He has had 15 years of service. Since August 11, 1995, the day of the theft, he has undergone counselling and participated in a treatment program for drug and alcohol abuse.

The grievor testified as to his progress over the past year and the fact that he has been successfully following a treatment program for his addictions. He has been able to follow this program despite a great deal of stress in his life. He has undergone personal bankruptcy in the past year and he has been able to assist his common-law wife through a difficult pregnancy and now with the care of their child. Mr. Herritt presented a letter from his physician, Dr. Howard S. Conter, dated February 2, 1996, to Ms. Sharon E. Cournoyer, his probation officer. It reads as follows (Exhibit G-7):

This letter concerns James Herritt in regards to his medical, physical and emotional status for a presentencing report. Over the past 6 to 9 months, Mr. Herritt has had a great deal of emotional and psychological stress. The stresses included a problem with substance abuse, particularly cocaine, and he had developed a cocaine dependency associated with that a change in behaviour which led to the need for funds to provide for that habit. Since that time, through psychotherapy with Dr. Gosse and myself, his family physician, he has stopped his use of cocaine, and has been clean for the past 3 to 4 months.

Also throughout that time he has gone through the pressures and strain of personal bankruptcy and also dealt with the pregnancy of his girlfriend. Through this time he has also dealt with the psychological consequences of being caught taking product from his work place.

Over all then, his problems have been three tiered:

- 1. Substance abuse*
- 2. Stress of his personal bankruptcy*
- 3. Further stress of his girlfriends (sic) pregnancy*

This has combined to cause a lot of psychological problems for James and has also caused physical problems, including gastrointestinal, particularly ulcer and reflux esophagitis along with fatigue and anxiety.

He has worked through most of this quite well over the past 6 months with the help of myself and Dr. Craig Gosse and it is certainly my opinion that with ongoing treatment, he will continue to improve and he will have to stay with his programs to prevent his return to narcotics and with that I feel that he should do quite well and he should be able to stay out of trouble.

If any further information is required, please feel free to contact my office. I do not at this time have access to any reports from Dr. Gosse.

The grievor also presented a letter from Doug Blundon, Community Health Worker, Nova Scotia Department of Health, Drug Dependency Services Division, dated July 25, 1996, which sets out his status at the time of the hearing (Exhibit G-9):

Further to our conversation this morning, Mr. Herritt initially contacted our office on August 17, 1995 seeking support and direction for his substance abuse problems. Mr. Herritt admitted that since the birth of his child in May he has had more time to focus on his recovery. Drug Dependency's Core

programs and NA meetings have been discussed and an attendance plan was agreed upon. Mr. Herritt has been advised to have a group attendance form signed for each group attended. Mr. Herritt attends Recovery Group on a regular basis and is continuing with his one on one counselling sessions with me.

Should you require further information concerning this matter please contact me at 424-5920.

Mr. Herritt testified that the theft of August 11, 1995 (to which he admitted) and the incidents following had served as a wake-up call for him regarding his addictions. Prior to this, he had been in denial. At the time of the theft, he was out of control, lying, cheating and stealing to finance his drug addiction. When he realized the extent of his problem, he resolved to improve his life. Having followed his program of treatment, he is healthier, eating better and getting exercise. He is “better as a person”, accepting his responsibilities and has a clear direction in life. He has four children ranging in age from four months to 17 years.

After his discharge from the Public Service, he appeared before Judge Beach in Halifax Provincial Court on May 27, 1996. He was placed on probation for a period of two years with conditions: that he report to his probation officer within 10 days of being sentenced and thereafter as required by the probation officer; that he perform 100 hours community service work; and that he accept assessment, counselling and treatment concerning alcohol and drug abuse. In addition, the judge ordered a return to court on October 16, 1996 so that she could receive an update on the progress of his addiction counselling (Exhibit G-4).

In cross-examination, the grievor reiterated his desire to tell the whole truth and admit all wrongdoing. Counsel for the employer reviewed with the witness the events of the theft on August 11, 1995. The grievor fully admitted to his involvement in all the events of that day and several times answered in the affirmative as to his desire to be fully honest now. When counsel for the employer referred to the information the police received from an anonymous informant and then put to the grievor the question: “You say that you wish to be totally honest and truthful now, but you still haven’t given us the whole truth because you have denied stealing prior to the theft on August 11; will you now admit that you were guilty of stealing from stores before?”, the grievor did not so admit.

In re-examination by his own representative, the grievor reiterated his remorse about the events of August 11, 1995 and admitted that during the course of his meetings with his psychologist there were many things that he had trouble facing over the past year. When asked point-blank why he would have such a problem in admitting to previous theft, the grievor was very emotional. He said he felt terrible that when he came to the hearing he wanted to face everything. He said he had a strong fear of getting in deeper, of making things worse and of incriminating himself further. He said he felt terrible that he could not face everything yet.

Ron Marsh, Storesman, Formation Supply, Ship Repairs, testified for the grievor. He is in his twenty-third year of service and has known the grievor for the past 10 or 11 years. He stated that he was an alcoholic who through personal experience, union training and liaison work with the Employee Assistance Program, has acquired knowledge of addictions, their effect on people and the means of coping with them.

The first step in the recovery process is honesty. One must first be able to admit the addiction and recognize that there are options. One's life can be changed.

He knows Greg Herritt and he sees a different person in him from a year ago. Even in the last six months there has been much progress. Greg Herritt is still suffering from some denial and is still not fully cognizant of the scope of his addiction. The loss of his job has left a big hole in his life and this relates to his self-esteem and self-worth.

Given that Greg Herritt is still in some denial, he suggested that the employer's need to be able to trust him could be satisfied by the imposition of conditions.

Arguments

For the Employer

There is no doubt that the grievor is guilty of serious misconduct. He let down his co-workers severely in engaging in theft from the stores at a time when the Ration Supply Group was undergoing a review of their cost effectiveness. He argued that the grievor, when given an opportunity, refused to admit to previous theft. In the light of this, his contrition rings hollow. He still cannot be trusted and the employer should

not have to assume the risk of accepting him back on the job. As for the three supervisors who received 20-day suspensions, they are not necessarily similar cases.

Counsel for the employer cited the Funnell (Board file 166-2-25162) and Barratt et al. (Board files 166-2-10643 et al.) cases.

For the Grievor

The grievor started his treatment program immediately after the incident of August 11, 1995 and before he was discharged. He has been able to remain clean over the past year even though he had a number of personal crises to cope with, including personal bankruptcy. Others in the Department with positions just as responsible as the position of Mr. Herritt and where the duty of trust was just as great received 20-day suspensions for theft instead of discharge.

The employer has a duty to accommodate an employee with a disability. In the light of the fact that Mr. Herritt had changed his lifestyle, was coping with addictions and was drug and alcohol free, Mrs. Henry suggested that it would be appropriate to substitute for discharge a reinstatement of Mr. Herritt with conditions.

Reasons for Decision

Alcoholism and drug addiction are generally considered to be illnesses. As such the employer bears some responsibility for assisting the employee in dealing with these illnesses through treatment and rehabilitation programs. Prior to the theft, the employer was alerted to the fact that Mr. Herritt was experiencing some financial and alcohol problems and was a probable user of marijuana and he was referred to the Employee Assistance Program. However, there was no real follow-up. The employer had no knowledge of his cocaine habit. However, prior to the discharge the employer was made aware of this addiction and the initial actions taken by Mr. Herritt to address his addiction problem.

Mr. Herritt has admitted to the theft of the goods with which he was charged. This theft from his employer was grave misconduct and deserving of a form of discipline which recognizes its gravity. I must consider also the concerns of the employer about the risks it would be running with a return of Mr. Herritt to the workplace.

It seems to me that a lengthy suspension without pay followed by reinstatement on conditions represents the best balancing of interests.

I believe the grievor has gone through a transformation in his life since the incidents in question. He has been following rehabilitation programs, working on his problems and keeping clean. He has brought his addictions to drug and alcohol under control. In every way, he is leading a healthier life and has learned the skills necessary to avoid future problems. I found the grievor to be credible.

It took a great deal of courage to admit that the events of August 11, 1995 made him realize he had hit the bottom. It was apparent to me that it was extremely painful for him to admit and review at the hearing the mess that his life had been in, including the lies, cheating and stealing.

The progress he has made in remaining clean for approximately a year and the responsibility he has accepted both for his life and for his common-law wife and infant attest to the fact that he has had to face painful truths about himself and has worked hard to change the direction of his life. In the light of these circumstances, it would seem that Mr. Herritt's future prognosis is reasonably hopeful.

After hearing his evidence, I accept that he is determined and resolved to make good if given a second chance to do so. He has admitted to all he was charged with. He had difficulty in admitting to more than that. We heard from his supervisor that Mr. Herritt had been a very capable employee. I believe that he could again become an asset to his workplace if he continues to follow his course of treatment and I believe that he has the skills and determination to do so.

A majority of arbitrators now widely accept that "a person cannot automatically be terminated from his employment because he has engaged in one or more acts of theft" (Canadian Labour Arbitration, Third Edition, by Messrs. Brown and Beatty at 7:3314). There have been many factors which arbitrators have considered in coming to the conclusion that the penalty of termination of employment of a person found to be guilty of theft should be modified to some period of suspension.

One of those factors listed in the above text is where the employer has not consistently applied its rules against theft in the past. In this case, the facts are that the Department awarded 20-day suspensions to three foremen who were involved in thefts of items valued at more than \$1,000. These tradesmen were in positions of trust at least equal to that of Mr. Herritt as a storesperson. Also, another employee classified as general labour and trades received a 20-day suspension for theft of motor oil valued at approximately \$800. In the light of the employer's willingness to consider individual circumstances in awarding penalties less than discharge in these cases, the employer in Mr. Herritt's case should have given more consideration than it did to his addiction problem and the fact that he had already started treatment.

At the time of the hearing Mr. Herritt had changed his lifestyle and had already embarked on a straight and narrow path. This, in addition to his improved sense of self-respect and his improved acceptance of responsibility for himself and others, enables me to conclude that if Mr. Herritt has continued on that path over the past several months he should now be at a point where he is able to resume his duties.

If within 30 days of the issuance of this decision Mr. Herritt is able to produce for his employer a statement from his physician or from some authority in the Department of Health, Drug Dependency Division, Province of Nova Scotia, to the effect that he has been and is following a program of rehabilitation, he is to be reinstated as soon as he is able to produce such evidence. If he is unable to produce this evidence within the time specified, his grievance will be denied.

The penalty to be substituted for the discharge is suspension without pay to the date of reinstatement.

For a year after his reinstatement the employer may require of him to show that he is continuing to follow a program of rehabilitation.

Although Mr. David alluded in his testimony to the fact that Mr. Herritt had lost the trust of his fellow employees, I note that none of these employees actually testified to this effect. In any case, I believe that his continued good behaviour will facilitate his reintegration into the workplace.

I shall remain seized of this matter should the parties have any difficulties in implementing this award.

**Rosemary Vondette Simpson,
Board Member**

OTTAWA, December 17, 1996.