



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

STEPHEN MELCHER

Grievor

and

TREASURY BOARD
(Solicitor General - Correctional Service)

Employer

Before: P. Chodos, Deputy Chairperson

For the Grievor: Barry Done, Public Service Alliance of Canada

For the Employer: Judith Begley, Counsel

Heard at Kingston, Ontario,
March 18 to 21, 1997.

DECISION

Stephen Melcher has been employed with the Correctional Service since 1983; prior to his suspension without pay effective July 5, 1996, and discharge effective August 26, 1996, he was working at Kingston Penitentiary as a Correctional Officer (CO-02); until then Mr. Melcher had a clean disciplinary record and good performance appraisals.

The reasons for Mr. Melcher's termination of employment are set out in detail in a letter dated August 26, 1996 (Exhibit E-10) from Mr. James Blackler, the Warden of Kingston Penitentiary. In this letter of discharge Mr. Blackler observed the following:

... I am satisfied that you committed an act of theft of government property ...

It is not only the act of stealing that has caused this break in trust. It is also your failure to admit that you committed a criminal act and accept responsibility for it. I am not convinced that you would not repeat such an offence, given the opportunity.

Much of the facts that are relevant to this matter are not in dispute. Mr. Melcher had been on leave for a period of two to three weeks when he received a call from his superiors at Kingston Penitentiary on the morning of July 5, 1996 asking him whether he would be prepared to work the morning shift that day, which runs from approximately 7:00 a.m. to 3:20 p.m. Mr. Melcher agreed to do so and arrived at the institution slightly after 7:00 a.m. He was assigned to work the 2-G control post. Normally one officer is assigned to this post; in addition, a second officer, who is known as a "float", would from time to time work this post as well as another post during the shift. Sometime that morning Mr. Melcher was asked by a Correctional Supervisor, Mr. Gord McKenzie-Crow whether he would be available to work the evening shift as well. According to Mr. Melcher, at approximately 10:00 a.m. Mr. McKenzie-Crow confirmed that Mr. Melcher would also be working the 3:00 p.m. to 11:00 p.m. shift. Mr. Melcher testified that at approximately 10:30 a.m. he called Mr. Bob Rankin, the welding shop instructor.

It was Mr. Melcher's recollection that he reminded Mr. Rankin about a conversation he had with him some three or four weeks earlier about having a trailer repaired; Mr. Melcher was in need of some metal braces and some welding wire for

this purpose. According to Mr. Melcher, Mr. Rankin told him: *"I'm in the shop now, come down."* Mr. Melcher stated that immediately after this conversation he requested the float, Mr. Paul Seed, to cover for him; he advised Mr. Seed that he was going to the welding shop and would be back momentarily. The welding shop is some distance from the 2-G post and Mr. Melcher was required to pass through several electronic doors and traverse a set of stairs as well as proceed down a long outside passageway to arrive at the welding shop. Mr. Melcher stated that a number of the Correctional staff would have been in a position to observe him going to and from the welding shop at this time.

Mr. Melcher stated that the welding shop is divided into two rooms; Mr. Rankin was in the first room with two inmates. Mr. Rankin showed Mr. Melcher some heavy gauge steel rails as well as aluminum door casings; Mr. Melcher said he told Mr. Rankin that he could not use this material; he then asked Mr. Rankin if he could get some welding wire from him. Mr. Melcher recalls pointing in the direction of the welder in the shop and asking for some wire from the welding machine. Mr. Rankin told him that the spool had to be mounted on a welding machine and, accordingly, he could not give him just a piece of wire but he would lend him an entire spool to mount on a machine. Mr. Melcher stated that Mr. Rankin then took him to a locked storage area which Mr. Rankin opened with a key; inside was a shelf which contained five boxes of material on their sides, stacked up. Mr. Rankin took the top box, opened it and looked inside; according to Mr. Melcher Mr. Rankin told him to take the box and bring back whatever he had left; Mr. Melcher replied that he was scheduled to come back to work on Monday, July 8th, and would bring it back on that day.

Mr. Melcher testified that he took the 30 pound box of welding wire back to his post. Mr. Melcher stated that Mr. Seed saw him arrive with the box; Mr. Seed looked inside the box and asked Mr. Melcher what it was. He told him that he had received it from Mr. Rankin, and that he was using the material to repair a trailer; according to Mr. Melcher, Mr. Seed jokingly asked if he could have some, to which Mr. Melcher replied that he had to return it.

At approximately 10:45 a.m. Mr. Melcher approached a Mr. Joe Rodrigues who was employed with a construction company to do some renovation work at the institution. Mr. Melcher asked Mr. Rodrigues if he could take the box of welding wire

to the parking lot when Mr. Rodrigues was leaving work and put it in Mr. Melcher's car for him. Mr. Melcher testified that the box was fairly heavy; he asked Mr. Rodrigues to take it out for him as he knew Mr. Rodrigues would be going that way and he could save Mr. Melcher the time and effort of delivering the box to his car. Mr. Rodrigues agreed to do so; at the end of his work day, he had a number of things to bring to his vehicle; accordingly, he asked a fellow construction worker, Mr. Guy Baillargeon, to take the box which Mr. Baillargeon agreed to do. Mr. Baillargeon drove his car up to Mr. Melcher's car, which he recognized from Mr. Melcher's description of it, and placed the box on the back seat. The two workers then went back into their own vehicles and left the institution (ref. Exhibits E-4, E-5 i.e. written statements taken from Messrs. Rodrigues and Baillargeon).

Mr. William Isaacs is the Institution Preventive Security Officer (IPSO) at Kingston Penitentiary. According to Mr. Isaacs he was advised at approximately 11:45 a.m. on July 5th that Mr. Melcher had arranged with Mr. Rodrigues to carry an item belonging to the institution through the sallyport and place it in his vehicle in the parking lot. (Mr. Isaacs did not identify the name of the informant; with the concurrence of the grievor's representative, it was agreed that it would not be necessary to provide the identity of the informant, as the facts which the informant might provide are not in dispute.). Mr. Isaacs then contacted a Correctional Officer named Mr. Goleimic who was responsible for acting as escort for the construction workers. He told Mr. Goleimic that Mr. Rodrigues might be leaving the institution through the sallyport with a 30 pound box of welding wire and if he was to observe him doing so to immediately inform Mr. Isaacs. At approximately 3:00 p.m. Mr. Goleimic advised Mr. Isaacs that Mr. Baillargeon had been seen carrying out the package in question to the main parking lot. With the assistance of another Correctional Officer Mr. Isaacs proceeded to look for Mr. Melcher's vehicle, which he then found, with the box of wire clearly visible on the back seat.

The Kingston City Police were notified, and a Constable Peter Lafontaine arrived at the Penitentiary parking lot. He was met there by Mr. Isaacs, Correctional Supervisor, Chris Tsatsakis, and Acting Deputy Warden, William Gladu. Constable Lafontaine was briefed by Mr. Isaacs; Mr. Tsatsakis then brought Mr. Melcher to the parking lot. When Mr. Melcher arrived, Constable Lafontaine advised him that he may have stolen property, which had been found in his car; he was cautioned and advised

of his right to legal counsel; as well, he was informed of his right to union representation. Mr. Melcher declined any representation. Mr. Melcher then asked if he could speak with Mr. Gladu and Mr. Isaacs in private; this was agreed to, at which point Mr. Melcher told them that he had a welding project to do at home and that the welding shop instructor, Mr. Rankin, knew about it and had given him the materials for the project. Mr. Melcher also told them that he had asked Mr. Rodrigues to bring the material out of the institution and place it in his car, as he was working overtime. Mr. Melcher then opened the car door and gave the materials to Mr. Isaacs who then placed it in his office. Mr. Melcher, Mr. Isaacs and Mr. Gladu went back inside the institution; Mr. Melcher was asked if he would prepare a written statement, to which he readily agreed. Prior to giving the written statement Mr. Melcher was again advised that he was entitled to legal counsel and to union representation. He again declined to have legal counsel or union representation present. Mr. Melcher was then informed that he was suspended without pay pending further investigation; he was then escorted outside the institution.

Later that evening Mr. Rankin was telephoned at his home and directed to return to the institution immediately. He stated that upon his arrival at the institution he was advised by Mr. Gladu that there was a serious problem about goods being removed from the institution and that he might be implicated in a theft; he was read his rights, was told that he could obtain union representation, and then was read Mr. Melcher's statement. He was then shown the box of welding wire in Mr. Isaacs' office; Mr. Rankin indicated that he did have this kind of material in his shop. They then proceeded to his shop and Mr. Rankin unlocked the store room where they found four identical boxes of welding wire; the lot number of the boxes in the storage area did not match the lot number on the box in Mr. Isaacs' office, but did match the spool which was on the welding machine. It was Mr. Rankin's recollection that he had ordered the material sometime in early spring. Mr. Rankin denied that he had given Mr. Melcher permission to take the box of welding wire.

According to Mr. Gladu's written statement (Exhibit E-6) Mr. Rankin was "very concerned about this and indicated that he did not want to lose his job as a result of this. He was very annoyed that Mr. Melcher said that he was involved in the occurrence." Mr. Gladu testified that Mr. Rankin appeared "very anxious". Mr. Gladu asked

Mr. Rankin to look for a Demand Issue Voucher against which he had ordered this material; Mr. Rankin searched his office but was unable to find the relevant voucher.

Mr. Gladu continued his questioning of Mr. Rankin. Mr. Gladu observed again at this point that Mr. Rankin appeared very anxious and that at approximately 10:00 p.m. he requested the presence of a union representative. Mr. Brian Adams, President of the Kingston Penitentiary Local, joined them and was briefed by Mr. Gladu. Mr. Rankin again indicated that he had no personal involvement in the incident.

In cross-examination Mr. Gladu described Mr. Melcher as being “*surprisingly cooperative*” at all times and “*forthcoming*”; he observed that Mr. Melcher seemed so nonchalant and relaxed that Mr. Gladu had asked him if he was aware what he had done wrong. He agreed that Mr. Rankin appeared more alarmed about this matter than Mr. Melcher.

In his cross-examination Mr. Rankin was asked about a statement he had made to Mr. Gladu concerning a sub-master key which would permit entry into, among other places, the storage area in the welding shop. According to Mr. Gladu’s statement Mr. Rankin told him that:

... there has been rumour for a very long time that a sub-master key was available to Correctional Staff which would allow them entry into numerous storage areas on the 3-11 and midnight shifts. Mr. Tsatsakis asked Mr. Rankin to provide detailed information regarding any personal knowledge that Mr. Rankin may have in this regard. Mr. Rankin responded by saying that he had no personal knowledge (emphasis added) but there were lots of rumours amongst the staff to this effect and that there were suspicions that staff would access the storage areas in the shops during the back shifts.

Mr. Rankin testified that he had found a sub-master key on the floor of his shop in March or April; he denied that he had said that he had “*no personal knowledge*” about this matter. He stated that he did not want to tell Mr. Gladu about it when he had been interviewed by him in respect of the investigation. He realized when he found the key that this was a serious matter; however he did not want to discuss it with anyone at that time until somebody came looking for it. He denied

that he had told Mr. Gladu that there were rumours of the existence of a sub-master key, notwithstanding that Mr. Gladu's statement indicates that he had made reference to this. Mr. Rankin agreed that he was very nervous and anxious at the interview; however, he stated that he was not concerned about losing his job as he was at an age where he *"doesn't give a damn about the job"*. He agreed that he did indicate to Mr. Gladu that he was concerned about losing his job; he made that observation because he concluded that anyone giving out materials might be dismissed. Mr. Rankin also stated that he and others in the shops *"always fixed things for staff members"* and that there was nothing wrong with it; however, in the back of his mind he *"thought that it probably shouldn't be done"*. He also thought it was *"O.K."* to give things of minimal value to staff, such as nuts or bolts. He would do welding work with approximately five cents' worth of welding wire for the staff and he recalled giving staff members old scrap locks. He was not aware of any rules concerning scrap although it would not surprise him to learn that there were such rules. He had never been told that he would need permission of management in order to dispose of scrap. He was also *"sure"* that staff had borrowed tools from time to time; he observed that the majority of Correctional staff have asked him to do some project or other. He stated as well that he felt management's actions towards Mr. Melcher were *"very cold hearted"* and should never have gone this far. He agreed that it would be necessary to take the whole spool of wire in order to use the wire with a welding machine; he estimates that the 30 pound spool of welding wire costs \$17.

Mr. Patrick Lavery is currently a unit manager at Kingston Penitentiary; he has been employed with the Correctional Service since 1977. He was directed by Warden Blackler to conduct *"a Fact Finding Investigation into the Theft of Government property from Kingston Penitentiary, by Correctional Officer II S. Melcher"*. In the course of his investigation Mr. Lavery interviewed a number of people, including Mr. Isaacs, Mr. Gladu, Mr. Rankin, the two construction workers, that is Mr. Rodrigues and Mr. Baillargeon, as well as Mr. Melcher on several occasions. On each of these occasions Mr. Melcher reiterated that he had taken the wire with the permission of Mr. Rankin. Mr. Baillargeon and Mr. Rodrigues essentially confirmed Mr. Melcher's version of their conversations with him. Mr. Rankin reiterated to Mr. Lavery that he had not given Mr. Melcher the wire; in response to Mr. Lavery's question, Mr. Rankin stated that he had no idea how Mr. Melcher had obtained the spool of wire. On a

second occasion, when interviewed by Mr. Lavery, Mr. Rankin stated that the whole incident was bothering him and he was considering retiring because of it, that he did not like what was happening to Mr. Melcher, that he was not changing his story but he regrets how Mr. Melcher's life was "*messed up over this*".

At Mr. Melcher's request, Mr. Lavery also interviewed Mr. Huehmer, a Carpentry Shop Instructor. Mr. Huehmer indicated that it was common practice in the institution to lend out materials and tools to staff. According to Mr. Lavery he told Mr. Huehmer that he was not authorized to lend anything without the Warden's permission and that this practice should cease.

Mr. Lavery acknowledged that he still does not know how Mr. Melcher obtained the spool of wire from the shop and that he does not know whether Mr. Rankin gave his permission or not. According to Mr. Lavery, since Mr. Melcher did not have written permission, he is guilty of theft. Mr. Lavery advised the Warden that Mr. Rankin had been giving away minor goods and that he advised him not to do this anymore. He did not suggest that either Mr. Rankin or others be investigated. Mr. Lavery stated that Mr. Huehmer told him that he had lent out tools and materials many times, and had documented it in a loan book (Exhibit G-2), which he showed to Mr. Lavery. It was Mr. Lavery who concluded that Mr. Melcher "*was involved in a criminal act ...*" and recommended in his report that Mr. Melcher's employment be terminated. Mr. Lavery also agreed with the other management witnesses that Mr. Melcher appeared to be cooperative and was responsive to questions put to him by Mr. Lavery in the course of his investigation.

A number of the management witnesses made reference to a Kingston Penitentiary Standing Order No. 571-4 dated July 30, 1992 (Exhibit E-7), which was in effect during the relevant period. Mr. Isaacs noted that in accordance with this Standing Order property can only be removed from the institution with the authorization from a Divisional Head or the Warden. According to Mr. Isaacs a staff member would need a memorandum identifying what was going out and would have to produce the signed approval. In the absence of such authorization the removal of property would be considered illegal and improper, and any officer not challenging such removal would be considered to have acted negligently. Mr. Gladu noted that no one can authorize giving away institutional property; any disused property, including

scrap would have to be sent to Crown Assets Disposal Corporation. Mr. Laverty acknowledged that paragraph 5(c) of Exhibit E-7 appears to prohibit the removal of any property from the institution for personal use.

Warden James Blackler also testified on behalf of the employer. Upon receiving Mr. Laverty's report and recommendation Mr. Blackler convened a disciplinary hearing on August 15; at that time he presented Mr. Melcher with Mr. Laverty's recommendations. Mr. Melcher had a copy of Mr. Laverty's report and had gone through it. According to Mr. Blackler, Mr. Melcher took exception to the reference to "stolen" property. Mr. Blackler stated that Mr. Melcher made no admission as to stealing property, nor was there any expression of remorse on his part. In his view, in the absence of these mitigating factors, he had no choice but to approve Mr. Laverty's recommendation that Mr. Melcher be discharged.

In cross-examination Mr. Blackler stated that any infraction of the Standing Order (Exhibit E-7) would have been investigated; however, nothing was brought to his attention. He does however recall that Mr. Laverty had told him that the borrowing of materials and equipment had been going on at the institution. He stated that he had only been at the institution for two months when this incident occurred; he had not been advised of any problems regarding theft until the Melcher matter. Mr. Blackler also stated that it did not matter to him whether Mr. Rankin had given his permission or not to remove the spool of wire, as he did not have the authority to do so. However, if he believed that Mr. Melcher had obtained Mr. Rankin's permission and consequently felt he had the authority, he would have regarded this as a mitigating circumstance.

Mr. Juergen Huehmer testified on behalf of the grievor; he is employed at Kingston Penitentiary as a Carpentry Instructor and has worked at the Institution since 1966. He began there as a Correctional Officer in 1971 and started working in the Carpentry Shop in 1981. He observed that he may have seen the Standing Order in question when he was a Correctional Officer; however, he is not generally familiar with it and had never received a copy in his capacity as an instructor. Mr. Huehmer testified that as far back as 1966 it was common practice among Kingston Penitentiary staff to borrow equipment and goods from the institution. In 1983 one of the other Carpentry Instructors, Mr. Haycock, began a loan book in the shop;

Mr. Huehmer maintained his own loan book (Exhibit G-2) which contains records of loans going back to 1973, and until October 11, 1996. He believes the practice of loaning tools and supplies is still going on today; he was never told by management that he could not loan out equipment. There were a number of occasions when he had borrowed tools and taken them through the main gate; guards would often see him do so without raising any objections. He noted that occasionally belt sanders would be loaned out and the belts would normally be used up or torn before the sander would be returned.

In cross-examination Mr. Huehmer indicated that he had known Mr. Melcher for approximately ten to twelve years; he did not consider him a friend, but merely a fellow worker. He agreed that a Standing Order should be obeyed; however, he stated the instructors do not receive copies of the orders and are often not aware of their contents. He recalled his conversation with Mr. Laverty during his investigation; he did not recall Mr. Laverty indicating that the practice of lending equipment should stop. He observed that in 1983 then Warden Graham had borrowed equipment; he acknowledged that the equipment may have been used for work within the institution. According to Exhibit G-2, in 1994 a total of twelve loans were made, of which five were possible personal loans. Similar situations prevailed in 1995 and 1996. Mr. Huehmer indicated that the only items entered in the book are tools, not materials. He stated that he has given out consumable materials of a minor nature such as screws and bolts.

Argument

Counsel for the employer submitted that this is a simple case of theft from the employer. The employer has an onus to establish: 1) that there is just cause for disciplinary action; 2) that the penalty of discharge was just and reasonable under the circumstances. Ms. Begley submitted that the civil burden of proof applies, that is, the employer must make out its case on the basis of the preponderance of evidence, although she acknowledged that when an act of theft is alleged it must be established by means of clear and cogent evidence.

Ms. Begley submitted that the grievor's own testimony provides a sufficient factual basis for a finding of theft; by his own admission he took the box of wire

which he admitted knowing was government property; he gave the box to construction workers to take to his car with the intention of consuming at least some of it. According to the Criminal Code even a temporary deprivation of property without a clear right constitutes theft. In this instance there was a profound breach of trust, and no mitigating circumstances, as Mr. Melcher did not appear to understand that he committed a breach of the rules. That is, there was a clear infraction of the Code of Discipline and unless the discipline is manifestly unjust it should not be interfered with. Given Mr. Melcher's failure to acknowledge his misconduct and the complete absence of remorse on his part management cannot have any confidence that Mr. Melcher would not commit similar acts again. In support of her submissions counsel referred to the following jurisprudence: Bisson (Board files 166-2-15706 and 15707); Laparé (Board file 166-18-22492) and Fauteux (Board file 166-2-26211).

The grievor's representative responded that the employer must justify that they had just cause to conclude there was theft in this case; he noted that the term "theft" was mentioned six times in the letter of discharge. Mr. Done also noted that within the civil standard of proof there is a requirement, where acts of criminality are alleged, to make out a case based on "clear and cogent evidence".

Mr. Done maintained that in order for there to be a theft there must be *mens rea*; if the grievor does not appreciate that what he was doing constitutes theft, then *mens rea* is not established. In this instance the behaviour of Mr. Melcher is inconsistent with the notion of theft; none of his behaviour was in any way surreptitious; everything he did was entirely in the open. Moreover, management has acknowledged that he was entirely cooperative throughout the investigation, and had not sought either counsel or union representation, even when asked on three occasions.

Mr. Done also submitted that the employer has a responsibility to ensure that employees know the rules; however, both Mr. Rankin and Mr. Huehmer testified that they did not know the content of the Standing Orders.

Mr. Done also argued that Mr. Melcher's testimony should be preferred over the evidence of Mr. Rankin, in particular given their differences in demeanour both as witnesses and throughout the investigation. Mr. Done maintained that Mr. Rankin

had been frightened into defending himself by falsely stating that he had not loaned Mr. Melcher the spool of wire.

Finally, the grievor's representative maintained that, in accordance with the principles set out in Canadian Labour Arbitration by Brown and Beatty Chapter 7-89 (Canada Law Book, 3rd ed.) there are a number of reasons in this instance why the ultimate penalty of discharge was not appropriate: 1) the goods in question were of nominal value; 2) the employee had a long and exemplary record of employment; 3) the employer's rules had not been consistently applied in the past; 4) the employer had overstated the allegations and taken an adversarial stance throughout the investigation.

Reasons for Decision

The issue in this case is whether the grievor had stolen property from Kingston Penitentiary on July 5, 1996, and if so, whether his conduct in its totality warranted discharge. The representatives of the parties are in agreement that, while the civil burden of proof is applicable, in view of the nature of the allegations and the fact that the ultimate penalty was imposed there is a requirement that the employer prove its case on the basis of clear and cogent evidence. I would add however, that in this instance the question as to the required standard of proof is virtually moot, since in my view the employer's case, based on any standard of proof, is wholly inadequate.

It is undisputed that for a period of two to three weeks prior to July 5, 1996 the grievor was away on leave; that is, he was not at the institution for an extended period prior to coming into work on July 5th at the request of management. This raises the following question: if Mr. Melcher was lying, and had obtained the 30 pound spool of wire surreptitiously on some other occasion without the approval or assistance of Mr. Rankin, when did he do so and where was it hidden? Two or three weeks is a long time to conceal a large item like a 30 pound box, particularly in a prison environment where extensive searches for contraband are regularly conducted. The employer offered no explanation whatsoever with respect to this aspect of the case; indeed, with the exception of vague suggestions that a sub-master key might be floating around the institution and might be in the possession of some unknown members of the staff, no explanation, let alone evidence, was proffered as to how Mr. Melcher could

have obtained the spool without Mr. Rankin's knowledge and assistance. In fact, the employer's own investigator, Mr. Lavery, noted in his report (Exhibit G-1) that "... *how Mr. Melcher gained the materials from the Welding Shop to have removed from the Prison remains unclear.*" Yet, Mr. Melcher provided a perfectly logical explanation as to the circumstances, an explanation which is in fact corroborated by other evidence. Firstly, there is the evidence of the construction workers that Mr. Melcher had asked them for assistance, and never led them to believe that the material did not belong to the institution (ref. p. 6 of Exhibit G-1, i.e. Mr. Lavery's report). Secondly, the material was placed in full view in the back seat of Mr. Melcher's car. Thirdly, Mr. Melcher did not make that request in any secretive or surreptitious way. Also, Mr. Melcher had indicated that Mr. Seed had seen him with the materials at the 2-G post and asked him about it. If this evidence is untrue, it was incumbent on the employer to have Mr. Seed testify to this effect; it did not do so. Finally, there is the comportment of Mr. Melcher throughout the investigation. Virtually every management witness acknowledged that Mr. Melcher was entirely cooperative, readily answered all questions, and appeared to be unfazed and calm when first confronted with the allegation that he had stolen this property. Mr. Melcher's testimony on the witness stand was equally forthright.

On the other hand, a number of management witnesses noted that Mr. Rankin appeared anxious and nervous; Mr. Rankin stated to the investigator that he was concerned about losing his job; yet, on the witness stand, while acknowledging that he did make this statement during the investigation, he observed that he was not really concerned about losing his job. In fact, there were a number of inconsistencies in Mr. Rankin's testimony. He testified that he found a key on the floor of his shop in March or April of 1996, yet he denied having any personal knowledge of this when questioned by Mr. Gladu during the investigation. He stated in his testimony that he did not want to tell anyone about the key until somebody went looking for it, notwithstanding that he realized at the time that this was an extremely serious matter. This is bizarre behaviour, to say the least, and raises serious doubts about Mr. Rankin's credibility, and in particular his statement that he did not authorize Mr. Melcher to take the spool of wire. Mr. Rankin also observed that he told Mr. Gladu that he was concerned about losing his job, because he feared that this would be the consequence of giving anyone materials from his shop. This establishes a clear

motive for lying, when initially confronted by management with the statement that he might be implicated in a theft. Indeed, the circumstances under which this matter was first brought to his attention make it entirely possible that Mr. Rankin may well have been frightened into denying any involvement; once having made this denial, he may have found himself in a hole from which he could not extricate himself.

In assessing credibility, it has long been recognized that the simple appearance of sincerity and credibility must be tempered with other factors. In the oft quoted judgment of Faryna v. Chorny, [1952] 2 D.L.R. 354 (B.C.C.A.) the following test for credibility was propounded:

(at page 357)

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. ...

It seems to me that Mr. Melcher's version of the events is considerably more consistent with the circumstances and the facts of this case than that of Mr. Rankin. Aside from the various facts noted above, there is also the evidence of Mr. Huehmer and Mr. Rankin himself that the lending of materials was, to put it mildly, a common practice at the institution (see also Exhibit G-2), a practice which Mr. Rankin admitted engaging in. Given this fact, no explanation was offered by the employer as to why Mr. Melcher would have surreptitiously, and without Mr. Rankin's knowledge, attempted to obtain the spool of welding wire. In the face of all these considerations, there is virtually no reason not to believe Mr. Melcher's story. In fact, if for a moment management was prepared to accept at least the possibility that Mr. Melcher was telling the truth, his insistence throughout the investigation and the disciplinary hearing that he did not engage in theft (and hence his absence of remorse) is entirely understandable.

Much has been made of the existence of Standing Order No. 571-1, which management insists, prohibits the removal from the institution of any material without proper authorization from management. In view of the fact that management took the position that Mr. Melcher was lying when he said Mr. Rankin had given him permission to take this material, and that management was relying on this conclusion in discharging him, the question of the application of the Standing Order in these circumstances is largely moot. In any event, there is considerable evidence that the Standing Order was honoured more in the breach than in the observance. Moreover, the evidence also suggests that local management was virtually indifferent to breaches of the Standing Order. Apparently, no disciplinary action was taken against either Mr. Rankin or Mr. Huehmer, notwithstanding their clear and repeated involvement in loaning material and equipment in contravention of the Standing Order, nor was action taken against others who were identified in Mr. Huehmer's loan book. The only logical conclusion is that such breaches were not taken seriously at the institution. That is, management by its actions or its lack of action in effect condoned the practice of staff taking institutional property for personal use. In such circumstances management can hardly be heard to fall back on the Standing Order as a basis for justifying disciplinary action, unless and until management clearly and unequivocally informs all employees that, notwithstanding past practice, the Standing Order will henceforth be strictly enforced.

In summary, on the balance of probabilities, I have concluded that Mr. Melcher has not committed the misconduct for which he was dismissed; accordingly, the grievance is upheld. The employer is directed to reinstate Mr. Melcher forthwith, and to compensate him for all lost wages and benefits. I will remain seized with this matter for a period of one month from the date of this decision in the event that the parties encounter difficulties in implementing this award.

**P. Chodos,
Deputy Chairperson.**

OTTAWA, April 18, 1997.