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 In the Matter of Arbitration \*  
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 Between \* Case Number:  
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 Fraternal Order of Police-Ohio \* 33-00-(901129)-0020-03-02  
 Labor Council \*  
 \* Before:  
 and \*  
 \* Harry Graham  
 \*  
 The State of Ohio, Ohio \*  
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Appearances: For Fraternal Order of Police-Ohio Labor Council

Ellen Davies  
 Fraternal Order of Police-Ohio Labor Council  
 222 East Town St.  
 Columbus, OH. 43215

For Ohio Veterans Home:

Valerie Butler  
 Office of Collective Bargaining  
 65 East State St., 16th Floor  
 Columbus, OH. 43215

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on February 20, 1991 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were not filed in this dispute and the record was closed at the conclusion of oral argument.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Was the Grievant disciplined for just cause? If not, what shall the remedy be?

Background: There is no controversy over the events that give

rise to this proceeding. The Grievant, Steven Schenk, is employed as a police officer at the Ohio Veterans Home. He has seven years of service and to this incident no record of any discipline on his record.

On October 19, 1990 the Administrator of the Nursing Home, James Speer, sent a memo to employees informing them that lockers at the facility were to be reassigned. As part of that project the lockers were to be cleaned, repainted and fumigated. Employees were told to remove the contents of their lockers by November 5, 1990. Any locks found on lockers after that date would be cut off. The contents of lockers would be removed.

On the appointed day a team of employees was assembled to remove locks that had been left on the lockers. They were to inventory the contents and dispose of any items not of obvious value. The team included the Grievant, Dave Fortuna, a maintenance worker, Sam Linville, a Union Steward who was to represent the interest of employees and Linda Wagner, Director of Nursing at the Facility. Ms. Wagner was in charge of the team. The Grievant, Steven Schenk, was to provide security. Mr. Fortuna was the person who actually cut the locks off the lockers.

In due course the team cut the locks off lockers, inventoried the contents, determined what was valuable and what was worthless and concluded that their task was

completed. They were then to take the trash to the compactor room for disposal. Ms. Wagner left the team to make copies of her inventory report.

Upon arrival at the compactor room Messrs. Schenk, Linville and Fortuna came upon three additional lockers. One of these carried a label "Fishman" or "Fishtank." As the lock had not been removed it was cut. The contents of the locker were removed and thrown away.

Afterwards, Mr. Fortuna came to think that perhaps an error had occurred. Material that had been removed from the "Fishman" or "Fishtank" locker might have been valuable in Mr. Fortuna's opinion. He reported his belief to Ms. Wagner. He indicated that some material, artificial plants for aquariums, was still in its original wrapping. In addition, there was gravel for the tanks which had been thrown away.

Convinced that Mr. Schenk and his colleague, Mr. Linville, had thrown away property paid for with State funds discipline was administered. Mr. Schenk and Mr. Linville received 30 day suspensions. Only that of Mr. Schenk is before this arbitrator. Mr. Linville is represented by a different Union and his case is in the grievance procedure of those parties. Mr. Schenk filed a grievance protesting the suspension he received. That grievance was not resolved in the procedure of the parties and they agree it is properly before the Arbitrator for determination on its merits.

Position of the Employer: The State asserts the disciplinary suspension administered to Mr. Schenk meets the contractual test of just cause. Items of obvious value were thrown away. Mr. Schenk and his colleagues knew full well that a person, the Fishman, was employed on a contract basis to care for fish at the Veterans Home. The incumbent Fishman is the successor to another Fishman who had been a resident at the Home. It is known to all that supplies for the fish were stored in the locker. Mr. Schenk and his co-workers should have contacted Ms. Wagner before disposing of the material in the Fishman locker. That they did not do so opens them to discipline in the opinion of the State.

In the State's view it is inconceivable that Mr. Schenk did not know the material he discarded was valuable. It was purchased with State funds. It was the property of the State and was thrown away without permission. Mr. Schenk is a veteran of seven years of State service. He should know better than to dispose of State property without authorization. As he did so, discipline is warranted in this situation the State asserts.

Position of the Union: According to the Union the State must prove that wrongdoing occurred in this incident. It must then demonstrate that the penalty fits the crime. In the Union's view, it has done neither.

Testimony was received at the arbitration hearing from

Mr. Schenk and Mr. Linville to the effect that only "junk" was removed from the Fishman's locker. All items were covered with dust. A piece of lumber covered with green slime was thrown away. Other articles had obviously been used. Nothing of value was placed in the trash. Given that testimony there is no evidence of wrongdoing in this situation the Union insists.

Furthermore, there is no proof that the items disposed of were purchased with State funds. Nothing is on the record to indicate the State bought whatever was thrown away. There is no purchase order, no requisition, no inventory control record. There is nothing to indicate that anything other than junk was thrown away. As there is no proof of wrongdoing on the part of the Grievant, the Union insists that the discipline administered to him does not meet the test of just cause. It must be overturned according to the Union.

Discussion: In any disciplinary proceeding there must be a showing that the employee did the deed with which he is charged. The second test which must be met if the first test is satisfied must be that the penalty is appropriate to the offense.

Turning to the question of whether or not Mr. Schenk is guilty of destroying State property, it must be observed that no evidence whatsoever to that effect was introduced. The case against Mr. Schenk rests upon the unsupported testimony

of his co-worker, Fortuna. In Fortuna's opinion, the material disposed of by Schenk and Linville was the property of the State. No evidence to that effect was introduced at the hearing. Schenk and Linville testified that the material they consigned to the scrap heap was junk. It was covered with dust. Most, if not all, was in packages that had been opened. Even if it is accepted that much of the scrapped material was in good condition, there is absolutely no evidence to indicate that it was purchased with State funds. No purchase order or requisition to that effect was introduced by the State to support its contention. No record of any reimbursement being made to either of the Fishmen was proffered by the State to bolster its case. It would have been a simple matter for the State to call the incumbent Fishman to testify to the effect that the items thrown away by Messrs. Schenk and Linville were purchased by State dollars. That it did not is given great weight by this arbitrator. In addition, doubtless the prior Fishman, a former resident of the Veterans Home, could have been contacted to testify on behalf of the State. He was not called on the State's behalf. There is nothing on the record to indicate that any State dollars were expended to purchase whatever items were discarded. Testimony claiming that the items were valuable is unconvincing in the face of contrary testimony by the Grievant and his co-worker, Mr. Linville.

The testimony is so contradictory that it is impossible to conclude that items of value were discarded. As no evidence is on the record to indicate that supplies purchased by State funds were discarded it is impossible to conclude that any violation of disciplinary rules or accepted standards of behavior occurred in this situation.

Award: The grievance is SUSTAINED. All record of this event is to be expunged from the Grievant's record. He is to receive all pay and benefits he would have received but for this incident.

Signed and dated this 5<sup>th</sup> day of March, 1991 at South Russell, OH.

Harry Graham  
Harry Graham