

1992

Kelly Sorenson v. Kennecott-Utah Copper Corporation, a Delaware corporation : Reply Brief

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 920263

IN THE SUPREME COURT

STATE OF UTAH

KELLY SORENSON,

Plaintiff/Appellant,

vs.

KENNECOTT-UTAH COPPER
CORPORATION, a Delaware
corporation,

Defendant/Appellee.

PLAINTIFF/APPELLANT'S
REPLY BRIEF

Appellate Case No. 920263

Priority No. 15

Appeal from Order Of
The Third Judicial
District Court, Salt Lake
County, State of Utah.

Honorable Scott Daniels

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS

STATE OF UTAH

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CONSTITUTIONAL PROVISION

No Constitutional provision, statute, order, rule or regulation is pertinent to this Appeal.

ARGUMENT

I. THE 1973 GENERAL RULES OF CONDUCT CREATED A CONTRACT OF EMPLOYMENT WHICH WAS NEVER RESCINDED BY DEFENDANT.

A. The ambiguous language in Defendant's subsequent codes of conduct is incapable of revoking the 1973 General Rules of Conduct.

Contemporaneous with his hiring on March 31, 1974, Plaintiff was presented with and signed the Defendant's 1973 General Rules of Conduct. (Trans. p. 51) This policy document set forth the Defendant's procedure for enforcing company rules. It specifically guaranteed Plaintiff the right to prior written warning and/or suspension and hearing before being disciplined or discharged from employment. (Plaintiff's Ex. 1) The Defendant acknowledges that this policy was in effect until April 4, 1974, and therefore admits that Plaintiff was initially hired with protection from arbitrary discipline and discharge. (Defendant's Brief p. 5) Defendant maintains however, that later Codes of Conduct distributed from between 1974 to 1986, effected a unilateral revocation of the 1973 policy and rendered Plaintiff an employee at-will.

Despite the Trial Court's finding to the contrary, Plaintiff contends that the circumstances surrounding the

signing and explanation of the 1973 Rules clearly rebutted the presumption that he was hired at-will. Plaintiff specifically disputes that the 1973 Rules of Conduct were susceptible to unilateral revocation but alternatively takes the position that, even if revocation did occur, an implied contract of employment independently arose through Defendant's 15 year course of conduct of applying progressive discipline to him and other salary employees.

Relevant to the issue of whether the 1973 policy could be unilaterally rescinded, the following language is contained in Defendant's subsequent Codes of Conduct:

April 4, 1974 General Rules of Conduct state:

"These rules supersede those in effect prior to this date." (Defendant's Ex. 154)

April 5, 1977 General Rules of Conduct state:

"These rules supersede those in effect prior to this date." (Defendant's Ex. 155)

October 27, 1981 Rules of Conduct state:

"This notice supersedes all previous notices issued to employees regarding rules of conduct." (Defendant's Ex. 156)

October 26, 1986 General Code of Conduct states:

"All employees of the Utah Copper Division are expected to use sound and prudent judgment in their approach to all employment-related matters. This approach requires employees to appropriately apply their skills, knowledge and training with due respect for the rights and property of others to promote a safe, productive and harmonious work environment. Employees who do not conform to this general code will be subject to discipline."

"Violations of the general code of conduct include but are not limited to the following:

1. Failure to comply with established health and safety rules and regulations and operating procedures."
"This notice supersedes all previous notices issued to employees regarding conduct." (Defendant's Ex. 158)

If the above language is interpreted literally, the 1974, 1977 and 1981 Codes only address the supersession of Defendant's rules. None of the later Codes specifically retract the procedure for the enforcement of employee conduct contained in the 1973 Rules. It is therefore unclear, what policy, other than the rules themselves, Defendant has sought to supersede.

The language in the 1986 Code is no clearer. Though this notice purportedly "supersedes all other notices", it does not retract the application of progressive discipline historically applied to Plaintiff and other salary employees. Rather, it requires employees to appropriately implement their "skills, knowledge and training with due regard for the rights of others...to promote a productive and harmonious work place." It is reasonable to conclude that this language requires the appropriate utilization of skill, knowledge and training in applying progressive discipline consistent with the training received by Plaintiff. The Code goes on to state that failure to

follow this policy constitutes a clear violation of the rules.

- B. The procedure of progressive discipline contained in the 1973 General Rules of Conduct can not be revoked unilaterally.

Although not addressed by the Trial Court, it should be pointed out that the nature of the agreement reached by the parties in the 1973 Rules is in the form, and should be construed as an express, bilateral contract. The document was signed by both parties and in consideration for Plaintiff's future employment with the Defendant. The intent and meaning of the terms contained in the 1973 Rules were clearly explained to the Plaintiff by Defendant's agents, Charles Bird and Gene Bryant. (Trans. pp. 54, 57-58)

Defendant, on the other hand, has treated the promises contained in the 1973 Rules as unilateral expressions, capable of being unilaterally rescinded by later Codes of Conduct. Consistent with principles of contract interpretation however, such agreements can only be altered or changed bilaterally, through the process of offer and acceptance, additional consideration and mutual intent. Calimari and Perillo, The Law of Contracts, 2nd Ed. p. 757, West Pub. (1977).

A proper rescission or modification of the promises contained in the 1973 Rules would have therefore required Defendant to tender some new consideration and obtain Plaintiff's consent. *Id.* Because no such evidence exists which would support a valid abrogation or modification of the 1973 policy document, any rescission or claim that Plaintiff was converted to at-will status as the result of subsequent Codes should be disregarded.

Because the Trial Court refused to find that the 1973 Rules rebutted the presumption that Plaintiff was hired at-will, it never reached the issue of what legal effect should be given Defendant's later Codes.

In the absence of a specific finding, the Defendant has proceeded under the theory that, as a matter of law, the disciplinary provisions in the 1973 Rules were offered unilaterally, and that the "supersession" language contained in later Codes could therefore create unilateral modification of Plaintiff's employment status. (Defendant's Brief, p. 15-17) To adopt this premise, this Court would have to assign an implied meaning to the ambiguous language found in Defendant's subsequent Codes.

The legal argument advanced by Defendant, is contradicted by its failure to make changes in its ongoing management training communicated to Plaintiff and other salary employees. If it was Defendant's intent to have

its later Codes return Plaintiff to at-will status, it did nothing in its operations or practice to make this clear. The Defendant's "intent" with respect to eliminating the procedures contained in the 1973 Rules is therefore suspect because its practice of applying progressive discipline to Plaintiff and other salary employees continued unabated and unchanged.

When asked about the later Codes, Plaintiff credibly testified that he interpreted the supersession language to mean that the rules had changed but not that progressive discipline was to be abandoned. (Trans. pp. 167, 461) This belief was not unreasonable because it comported with Defendant's ongoing course of conduct. Plaintiff further testified that no one ever explained the intent and meaning surrounding the subsequent Codes nor did anyone require his signature on any code after the one signed at time of hiring. (Trans. pp. 167, 383, 454, 456, 459)

If this Court agrees that Plaintiff successfully rebutted the presumption of being hired at-will, it should also find that the intent and meaning surrounding the Defendant's later Codes of Conduct are ambiguous and do not otherwise rescind the policies contained in the 1973 Rules.

- C. Even if the provisions of the 1973 General Rules of Conduct were revoked, an implied-in-fact contract was independently created through Defendant's fifteen year course of conduct.

Even if this Court concludes that the specific policy in the 1973 Rules of Conduct was retracted by later Codes of Conduct, it does not mean that no implied contract existed in Plaintiff's employment. Contrary to Defendant's contention, it is Defendant's historical course of conduct which is principally relied upon as a manifestation of its intent to enter into an implied contract of employment.

The evidence presented at trial clearly established that an implied agreement was independently created through Defendant's communications and historical practice of applying progressive discipline to Plaintiff and other salary employees. This course of conduct however, can be viewed in differing ways.

Despite the promulgation of later Codes of Conduct, which perhaps caused revocation of the 1973 Rules, the Defendant's de facto policy should be treated as a subsequent guarantee of job security. See, e.g., Helsop v. Bank of Utah, 194 Utah Adv. Rep. 20 (Sept. 4, 1992). Defendant's conduct can therefore be viewed as independently giving rise to an implied-in-fact contract of employment based on its consistent application of progressive discipline to Plaintiff and others.

Alternatively, Defendant's course of conduct can also be interpreted as adding to and/or modifying the protections contained in the 1973 Rules of Conduct. This may more accurately describe the result of Defendant's conduct. Though Plaintiff testified that throughout his employment he believed he was entitled to progressive discipline, the exact terms of that procedure stem from the Defendant's actual practice in the smelter. (Trans. pp. 54,57-58, 110-111, 129-130, 140-144, 174-177, 536-537, 545, 547-548)

II. THIS COURT CANNOT AFFIRM THE TRIAL COURT'S DISMISSAL OF PLAINTIFF'S COMPLAINT ON THE ALTERNATIVE THEORY THAT DEFENDANT ACTED CONSISTENT WITH ITS POLICY OF PROGRESSIVE DISCIPLINE WHEN IT TERMINATED PLAINTIFF FROM HIS EMPLOYMENT.

Defendant asks this Court to sustain the Trial Court's dismissal of Plaintiff's Complaint on the alternative theory that even if progressive discipline existed as a term and condition of Plaintiff's employment, Defendant fulfilled its obligations by providing Plaintiff with notice of unsatisfactory job performance before discharging him on January 31, 1989. (Defendant's Brief, pp. 29-30)

To adopt this position, the Court of Appeals would have to find that (1) Plaintiff's performance was

deficient enough to warrant termination; and, (2) Defendant acted consistent with the terms of its implied promises of progressive discipline. Such a conclusion would necessarily rely on facts inconsistent with the Trial Court's finding that during his employment Plaintiff's overall performance was good. (Order and Judgment of Dismissal, para. 1(c))

A. Defendant's assertion that Plaintiff's performance was unsatisfactory and therefore justified him being terminated from employment, is contrary to the specific finding of the Trial Court.

The Trial Court specifically found that "despite some evidence to the contrary, Plaintiff's performance during his employment was good." (Order and Judgment of Dismissal Para. 1(c)) Indeed, a review of Plaintiff's work history indicates that he was basically a model employee. (Trans. pp. 180-186, Plaintiff's Ex. 3) Over a working career of 15 years, Plaintiff was never disciplined nor was his performance ever deemed unsatisfactory. (Trans. pp. 180-186, Plaintiff's Ex. 3) Plaintiff amply demonstrated his loyalty to his employer by deciding to continue working for Defendant during its shutdown in 1985-1986.

Defendant however, attempts to justify Plaintiff's discharge by inferring that his performance was

unsatisfactory, that he was given adequate notice of his deficiencies and was allowed a significant opportunity to correct his behavior prior to being terminated. This position is in direct conflict with the opinion of the lower court and unsupported by the record.

In an attempt to bolster their contention, Defendant has improperly cited testimony which was stricken as inadmissible by the Trial Court. Specifically, Defendant refers to testimony taken in the Stewart Smith deposition, i.e., while working in the Magna smelter, Plaintiff was "demoted two grades". (Defendant's Brief, pp. 4, 31) During his deposition, Plaintiff objected to this portion of Smith's testimony for lack of foundation. (Smith deposition, p. 21, lines 21-23, Plaintiff's Ex. 7)

At trial and during the videotape presentation of Smith's testimony, Plaintiff's counsel renewed its objection and asked that it be stricken. Counsel's objection was sustained and the testimony in Smith's deposition on page 21 lines 21-23 was stricken by the Trial Court. (Trans. p. 654)

Further, characterizing Plaintiff's transfer during the smelter's 1987 start up, as a "demotion of two grades", is a distortion of the facts because it implies that his reassignment was in some way disciplinary.

Prior to his so-called demotion and during Defendant's plant shutdown, Plaintiff was one of several key employees retained by Defendant as a "skeleton" crew in the smelter. (Trans. pp. 70-71) During this period, employees including Plaintiff, were called upon to perform non-traditional types of work. Plaintiff was assigned to "firewatch" and other non-supervisory duties. (Trans. p. 72) After Defendant commenced operations, employees were placed where needed. (Trans. pp. 72-73) Plaintiff's subsequent reassignment to Defendant's anode plant, without loss of salary, can therefore hardly be called a "demotion". Any suggestion to the contrary, places a negative connotation on an otherwise mundane event.

In its Brief, Defendant questions Plaintiff's candor with respect to his job performance by citing certain inconsistencies between the opinions of David George and Stewart Smith on one hand, and Plaintiff's and Gerald Hansen's opinion on the other. (Defendant's Brief, pp. 24-28) Defendant intimates that the discrepancy between the two views puts Plaintiff's credibility in issue. This proposition fails for two reasons.

First, the Trial Court found that during Plaintiff's employment, his performance was good. This finding was made by the lower Court after having observed Plaintiff on

the witness stand for two and a half days. It is therefore unlikely that the Court would have made such a finding had it doubted Plaintiff's credibility.

Second, with the exception of Stewart Smith, Plaintiff was never given the opportunity to cross examine any of Defendant's witnesses who were critical of Plaintiff's performance. Defendant's opinion, as to Plaintiff's job performance, is therefore more assertion than a position supported by all of the evidence.

B. Defendant failed to fulfill its obligation to Plaintiff under the terms of the implied contract of the parties.

If this Court affirms the Trial Court's finding that Plaintiff's performance was generally good, it must also find that Defendant's termination of Plaintiff was arbitrary and not otherwise justifiable under Defendant's policy of progressive discipline.

The policy of progressive discipline communicated to Plaintiff and utilized to discipline salary employees, incorporates forms of procedural as well as substantive industrial due process. The procedure is designed to be flexible and attempts to meet out discipline that is appropriate in relationship to the seriousness of the infraction. The goal is to have the punishment fit the crime.

Initial steps in Defendant's disciplinary scheme, such as verbal counseling and verbal and written warnings, are designed to put employees on clear and unequivocal notice that their performance is in one way or another unacceptable to their employer. (Trans. pp. 494-496)

As Plaintiff's witness, Gerald Hansen, stated at trial, the purpose of notifying employees of unacceptable performance is to correct, not punish, problem behavior. (Trans. pp. 494-495) Hansen testified that this policy was adopted because Defendant had a great deal of time and investment in its supervisory employees and wanted to avoid treating them arbitrarily. (Trans. p. 556)

The promises of job protection testified to by Plaintiff, Jerry Hansen and Tracy Johnson, describe not just a requirement of meaningful notice, but a plethora of rights, which include an opportunity to correct behavior, termination for cause, hearing and fair treatment. (Trans. pp. 141-146, 352-353, 594-599, 646) Prior to his discharge, Plaintiff received none of these protections. (Trans. pp. 352-353)

At trial, Defendant presented no evidence that proved that Plaintiff's performance was deficient or in any way justified termination. Neither did it introduce any evidence which would reflect that Plaintiff received

verbal or written warnings of the kind described by Plaintiff and Gerald Hansen. (Trans. pp. 141, 494) Additionally, there is no evidence in the record establishing that an implied agreement between the parties was limited to merely some notice before termination.

In its brief, Defendant nevertheless argues that if any implied contract existed between the parties, it required only that some form of notice be given Plaintiff prior to discharge. Defendant then suggests that it satisfied its obligation under the contract because Plaintiff received notice of unsatisfactory performance from two sources.

The first source alluded to was from smelter manager, Stewart Smith. Defendant submits that certain disputed statements made by Smith, contemporaneous with Plaintiff's transfer to the Bonneville concentrator and six months before his termination, constitutes "notice" as contemplated under the agreement of the parties. (Defendant's Brief, p. 31) Defendant characterizes Smith's alleged comments to Plaintiff, including, "this is a chance for you to redeem yourself" as an "unambiguous declaration" and "verbal counseling". (Trans. p. 32) If this was the case, it was certainly never communicated to Plaintiff that he was being progressively disciplined.

Moreover, Smith's comments do not conform to the type of meaningful notice and verbal counseling testified to by Plaintiff and Gerald Hansen. (Trans. pp. 141, 494) To assert otherwise is mere pretext. On cross examination, Smith himself admitted that there was a difference between the disciplinary step of verbal counseling and casual conversation. (Smith deposition, pp. 37-38)

Plaintiff received his last performance evaluation in October 1988. (Plaintiff's Ex. 3) The evaluation was conducted approximately three months after the alleged statements by Smith and three months before being terminated. Relevant to the evaluation, Plaintiff received a "G" (satisfactory) rating and was given a target date of March 31, 1989 to complete the task of improving plant appearance to acceptable levels. (Plaintiff's Ex. 3) Thereafter, and until his termination on January 31, 1989, Plaintiff was given no notice, meaningful or otherwise, that his performance was unsatisfactory or that his continued employment was at risk. (Trans. p. 352) Ironically, even if Smith's statements were made, there is every indication that Plaintiff's performance had improved based on his last evaluation. Finally, until trial, Defendant has never claimed that Plaintiff was terminated for any reason,

other than senior managers, Rod Davy and Bill Strickland's dissatisfaction with the appearance of the concentrator.

The second source of notice relied upon by Defendant ostensibly emanated from informal comments made by concentrator managers, Gary Jungenberg and Chris Robison. (Defendant's Brief, p. 32) Jungenberg purportedly satisfied Defendant's obligation for notice by "identifying problems in the concentrator". Robison allegedly provided notice several weeks before Plaintiff's discharge by telling him that "some people could lose their jobs." These statements are incapable of conveying notice as required under the implied agreement because they are too vague, they do not define particular performance problems and/or they are communicated so close to Plaintiff's termination that they do not provide him with a reasonable opportunity to correct behavior. Any reasonable interpretation of "notice", "fairness" or "verbal counseling" as required under the Defendant's policy of progressive discipline would exclude informal, undocumented and off-the-cuff comments to an employee as proper discipline. In actuality, and when placed in their appropriate context, Robison's statements appear to be little more than a product of the Defendant's rumor mill.

The testimony of Gerald Hansen established that the purpose of engaging in verbal counseling and providing notice was to provide the employee with a clear and unequivocal message that a particular aspect of their performance is lacking and that they needed to correct it by changing in specific ways. (Trans. p. 494) All of the statements by Smith, Jungenberg and Robison, even if true, do not satisfy this standard.

- C. Sufficient evidence exists in the record to establish that Plaintiff was entitled to progressive discipline prior to his termination from employment.

Defendant argues that a binding policy of progressive discipline did not exist because Plaintiff could only identify twelve specific instances of its application to other salary employees. (Defendant's Brief, pp. 18-21) This fact has no bearing on whether Plaintiff and Defendant entered into an implied contract of employment because under Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1002 (Utah 1991), the facts and circumstances must only cause Plaintiff to form a reasonably belief that the employer has made an offer of employment other than of at-will.

Moreover, Gerald Hansen testified that discipline of salary employees was not widely publicized because of the

possibility of undermining morale within the hourly ranks. (Trans. p. 556) Also, and as a practical matter, instances of discipline within Defendant's supervisory ranks would presumably be a rather infrequent occurrence. If the opposite were true, one would have to question the screening process utilized by Defendant's human resources department. Ordinarily, by the time one is made a supervisor, sufficient screening has been undergone to weed out most of those employees who may experience disciplinary problems.

In an effort to evade being bound by its implied promises made to Plaintiff, Defendant argues that he is at-will because of the way other employees were treated. The fact that other employees were treated differently and for whatever reason did not contest their treatment, is not probative of the issues. Employees, such as Stewart Smith, may have been hired under a totally different set of circumstances. Nowhere in the theory of implied contracts of employment is it required that where one employee is found to be subject to implied terms and conditions of his employer, ipso facto, all other must be subject to the same terms. The employer is under no obligation to modify at-will status for all employees just because it has entered into a modification with one.

Most employers do not voluntarily recognize implied-in-fact contracts of employment. By nature, they are a creature of judicial interpretation. Cases from which exceptions to the at-will doctrine have emerged, have been brought by employees who have been treated arbitrarily and as at-will by their employer. These employees have had to rely on the courts to determine whether the employer has surrendered at-will status.

Critical to the Court's inquiry here, is how Defendant's policy was communicated and applied and whether Plaintiff's supervisors allowed deviation from the practice of applying progressive discipline to him and other salary employees. These issues were answered in Plaintiff's favor and clearly rebutted the resumption that he was an employee subject to arbitrary discharge.

CONCLUSION

No effective recession of the progressive discipline procedure contained in Defendant's 1973 General Rules of Conduct occurred through the promugation of subsequent codes of Conduct. This was because, (1) when construed against the drafter, the language relied upon by Defendant is insufficiently clear to determine what was intended to

be superseded; and, (2) as an express bilateral agreement, the 1973 Rules were incapable on unilateral recession and could only be revoked through mutual consent and additional consideration.

Even if the 1973 General Rules of Conduct were revoked, an implied contract of employment entitling Plaintiff to progressive discipline prior to termination independently arose as a result of Defendant's fifteen year course of conduct. The long term affirmation and application of Defendant's de facto policy caused Plaintiff to reasonably believe he was protected from arbitrary discharge and otherwise rebutted the presumption that he was employed at-will.

The Appellate Court cannot sustain the Trial Court's dismissal of Plaintiff's Complaint on the alternative ground that the terms of the implied agreement between the parties merely necessitated some form of notice to Plaintiff prior to being terminated. Defendant's argument is fallacious because the Plaintiff's performance was found to be good during his employment and he was therefore undeserving of any discipline whatsoever. Moreover the terms of the agreement between the parties called for meaningful notice, a reasonable opportunity to correct behavior, discipline that fit the particular

offense, just cause, fairness and an opportunity to be heard. Plaintiff received none of these provisions prior to discharge and was therefore wrongfully terminated by the Defendant.

Plaintiff respectfully requests that this Court reinstate Plaintiff's case, hold that he has stated proper claims and remand with instructions to proceed with the evidence.

RELIEF SOUGHT

The Plaintiff respectfully requests that this Court reverse the District Court and reinstate the Plaintiff's Complaint in full. The Plaintiff respectfully requests that this Court remand with instructions to the District Court as follows:


1. Inasmuch as trial court judge, Scott Daniels, has left the bench, that a complete new trial be scheduled.

2. That Plaintiff has satisfied his burden of proof in establishing his employment as other than at-will and that an implied contract of employment existed between the parties which included, (1) meaningful notice prior to termination; (2) a reasonable opportunity to correct

behavior; (3) termination only for cause; (4) fairness; and, (5) hearing.

3. That after all evidence is deduced, the Trial Court determine whether the Defendant breached the agreement with Plaintiff and to what extent damages have been caused thereby.

DATED this 16th day of June, 1993.



REED C. DAVIS, COOK & DAVIS
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

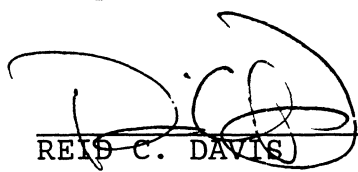
STATE OF UTAH)
 : ss.
County of Salt Lake)

REID C. DAVIS, being duly sworn, says:

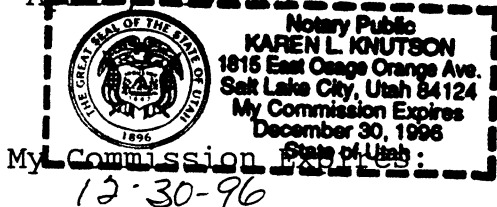
Reid C. Davis, of the law firm COOK & DAVIS,
attorney for Plaintiff/Appellant herein; served the
attached PLAINTIFF/APPELLANT'S REPLY BRIEF upon:

BARBARA POLICH
PARSONS, BEHLE & LATIMER
Attorneys for Defendant/Appellee
201 South Main Street, Suite 1800
Box 11898
S.L.C., Utah 84147-0898

by placing a true and correct copy thereof in an envelope
and depositing the same, sealed, with first-class postage
prepaid thereon, in the United States Mail at Salt Lake
City, Utah, on the 16 day of April, 1993.


REID C. DAVIS

Subscribed and sworn to before me this 16 day of
April, 1993



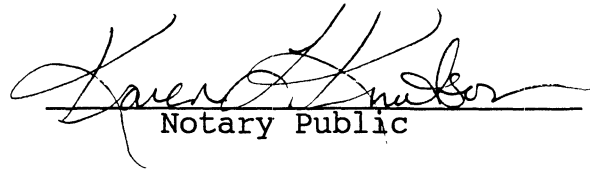

Notary Public

EXHIBIT 1

GENERAL RULES OF CONDUCT

KENNECOTT COPPER CORPORATION

UTAH COPPER DIVISION

July 1, 1973

TO: ALL UTAH SMELTER EMPLOYEES

SUBJECT: GENERAL RULES OF CONDUCT

FORWARD

All organizations require rules by which to operate efficiently. Without them, an individual in that organization would be unable to work effectively toward the organization's goals.

We expect you to observe those "common sense" rules of honesty, common decency, and general conduct always necessary when a large group is working together, so that the actions of one individual will not be detrimental to other employees, or to the company.

Listed below are the general rules of conduct that apply to all Kennecott personnel while on company operating property. These rules are not all-inclusive, but serve as a guide to good company citizenship.

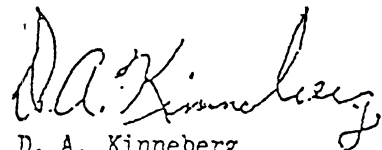
Violation of these rules is cause for either (1) written warning, or (2) suspension subject to hearing for discipline purposes. Such a hearing can result in penalty layoff or discharge, depending upon the seriousness of the offense.

1. Insubordination is prohibited.
2. Drinking or being under the influence of or possessing intoxicants is prohibited.
3. Sleeping during working hours is prohibited.
4. Fighting is prohibited.
5. Stealing or hiding of property, materials, or supplies of the company or of another employee with malicious intent is prohibited. Borrowing, without permission, is prohibited.
6. Leaving the job (work place) during working hours without supervisory permission is prohibited.
7. Distributing literature without permission is prohibited.
8. Violation of safety and operating rules is prohibited.
9. Personal weapons or firearms of any type are prohibited.

EXHIBIT

KS000569

10. Soliciting funds or money, without managerial authorization, is prohibited.
11. Interfering with the work of others is prohibited.
12. Taking pictures without management authorization is prohibited.
13. Destruction or defacing of company property or that of another employee by willful intent or neglect is prohibited.
14. Reading during working hours without permission is prohibited.
15. Gambling is prohibited.
16. Playing cards or other games during working hours is prohibited.
17. Falsification of records or reports is prohibited.
18. Horseplay is prohibited.
19. Loafing or malingering is prohibited.



D. A. Kinneberg
Smelter Plant Superintendent



KS000512

EXHIBIT 3

OVERALL ACCOMPLISHMENT RATING AND RESULTS

EMPLOYEE'S NAME K. M. Sorenson TITLE Anode General Foreman
DEPT. Smelter
SUPERVISOR'S NAME D. L. Mikich TITLE Hot Metals Superintendent

I. OVERALL ACCOMPLISHMENT RATING. Check the statement that best describes how well the individual accomplished his goals.

- ☐ "Outstanding" performance - exceeds expected goals accomplishment in practically every respect. Performance Category 5.
- ☒ "Above expected" performance - consistently exceeds expected goals accomplishment. Performance Category 4.
- ☐ "Expected" performance - competent goals accomplishment. Performance Category 3.
- ☐ "Below expected" performance - near average goals accomplishment; needs improvement. Performance Category 2.
- ☐ Significant goals accomplishment improvement required for retention in present position. Performance Category 1.
- ☐ Insufficient time for goals accomplishment review in present position.

II. OVERALL ACCOMPLISHMENT RESULTS. Specify significant accomplishments and/or inadequate performance results for regular and problem-solving, special project or improvement goals:

Safety Performance

Anode department experienced two lost time injuries in 1982 compared with two in 1980 and one in 1981. The lost time injury rate was 2.72 in 1982 compared with 2.77 in 1980 and 1.52 in 1981.

Supervisors held 100% of scheduled monthly safety meetings; 19 JSA's were reviewed.

Cost and Production

Anode costs were 5.8% below the Phase III budget (4.4% below 1981 actual), a savings of \$257,000. Cost per ton anodes produced was 99% of budget (\$36.485 vs \$36.884).

Anode manpower was reduced by 23 hourly (28 percent) and four supervisory (40 percent) employees through job combinations during the year. At the same time overtime rate was reduced 13% from 3.58% premium hours/total hours worked to 3.13% and absenteeism was reduced 2.2% from 5.75% to 5.65%.

Anode production was 9.3% below budget. Anodes produced per day was 7.4% below budget.

Anode casting reject rate was reduced 33% to 4.6% from 6.9% in 1981.

EXHIBIT

7

Reviewer

D L Mikich

1982

Exempt

Grade 16 and Below

Merit Increase Guide Chart

Performance Rating	Percent thru Range and Timing			Percent of Population
	1/3	2/3	3/3	
5	13.0 - 15.0 10 Months	12.0 - 14.0 11 Months	11.0 - 13.0 12 Months	10
4	11.0 - 13.0 11 Months	10.0 - 12.0 12 Months	9.0 - 11.0 13 Months	30
3	9.0 - 11.0 12 Months	8.0 - 10.0 13 Months	7.0 - 9.0 14 Months	50
2	6.0 - 8.0 16 Months	5.0 - 7.0 18 Months	-0-	8
1	-0-	-0-	-0-	2

Guide designed to produce a 10.1% increase in base salaries.

MANAGEMENT PERFORMANCE APPRAISAL
AMR 2

LAST NAME SORENSEN		INITIALS K. M.	EMPLOYEE ID. 42111	PRINT DATE 15 Feb. 88
ORGANIZATION UTAH COPPER	LOCATION SMELTER			UNIT
CURRENT JOB TITLE/CODE/GRADE ENGINEER SENIOR METALLURGICAL GRADE 17				DATE ON JOB
SUPERVISOR (PRINT NAME) D. B. GEORGE		SUPERVISOR (SIGNATURE)		DATE
REVIEWER (PRINT NAME) S. B. SMITH		REVIEWER (SIGNATURE)		DATE

INSTRUCTIONS FOR COMPLETING APPRAISAL

- Check preprinted ID information for accuracy. Report any error to Human Resources. Print your name and that of the reviewer in the appropriate space.
- Analyze prior twelve month performance by using the objectives for the position. In the absence of objectives, performance is evaluated against specific key responsibilities or components of the job. Compare expected performance with obtained results.
- Complete Parts 1 (only Sections A, B, C and D) and 2 using black pen. Sign the appraisal in designated space at the top of this page and at the bottom of Part 2 when complete.
- Review the appraisal with the next level of management. Obtain reviewer's comments in Part 1, Section E and in Part 2, Section C. Obtain their signature in designated space at the top of this page and at the bottom of Part 2.
- Discuss Part 1 with employee. Complete Sections F and G with the employee. Have the employee complete Section H and sign the appraisal.
- Return to Human Resources.

<u>RATING</u>	<u>DEFINITION</u>
E	Exceptional or outstanding performance which consistently exceeds all objectives of the position.
S	Superior performance which is consistently better than normally expected and produces results which exceed the objectives of the position.
G+	Good performance which consistently meets all normal objectives of the position and exceeds objectives in one or more major aspects of the work.
G	Good performance which meets the normal objectives of the position.
G-	Good performance which approaches what is normally expected in the position, but which requires improvement in one or more aspects of the work.
U	Unsatisfactory performance which does not consistently meet the normal objectives of the position.
P	Poor performance which seldom meets normal objectives of the position.
N	New on job but competent to date.

PART 1: SUPERVISOR'S APPRAISAL OF JOB PERFORMANCE

A. ACHIEVEMENT OF OBJECTIVES

In the absence of objectives, performance is evaluated against specific key responsibilities or components of the job.

OBJECTIVES SET FOR REVIEW YEAR (Including any key responsibilities not covered in objectives)	COMMENTS ON ACHIEVEMENT OF OBJECTIVES / KEY RESPONSIBILITIES	RATING
1. PROVIDE SUPPORT TO THE OPERATIONS DURING <u>SMELTER START-UP</u>	Successfully supervised the anode plant operations as acting general foreman.	G
2. SUPERVISE SMELTER <u>RENOVATION PROJECTS</u>	Supervised a number of renovation projects which were completed on-time and within budget.	G
3. PARTICIPATE ON THE <u>FRESH START TEAM</u>	Successfully participated on the Fresh Start Team.	G+

(Including any key responsibilities not covered in objectives)	COMMENTS ON ACHIEVEMENT OF OBJECTIVES / KEY RESPONSIBILITIES	RATING
3. LEAD THE START-UP EFFORT FOR THE <u>FILTER PLANT</u>	Has demonstrated good understanding of the filter plant system and is successfully coordinating start-up activities. Communications and planning for this job have improved recently but further improvement is required. Attention to detail and close follow-up of delegated responsibilities needs some improvement.	G
4. PROVIDE SPECIALIZED TECHNICAL SUPPORT TO <u>THE PLANT OPERATIONS</u>	Needs to improve technical breadth and demonstrate more initiative in identifying and acting on specific opportunities for improvement.	G-

SKILLS/ABILITIES		RATINGS					COMMENTS
		E	S	G	U	P	
SUPERVISORY	LEADERSHIP - Ability to develop in others the willingness and desire to work towards common objectives			X+			Good skills in line functions
	DEVELOPING PEOPLE - Ability to select, train, coach and appraise staff, set standards of performance and provide the motivation to encourage staff to grow in their jobs and accept greater responsibility			X			Good skills. Fresh Start was a good experience.
	DELEGATION - Effectiveness in delegating work by assigning responsibility to subordinates and establishing appropriate controls			X			Needs to improve follow-up when delegating.
INTERPERSONAL	COMMUNICATION - Effectiveness in both oral and written communications to insure clarity and comprehension				X		Needs to improve, recently shown good improvement.
	INTERPERSONAL SENSITIVITY - Ability to modify behavior in a sensitive manner in order to interact effectively with different people			X+			Particularly good with foremen and day pay.
	INFLUENCE/IMPACT - Ability to influence others' thinking or actions and gain commitment to ideas, plans or actions			X-			Communications limit his influence and impact.
CONCEPTUAL	JOB KNOWLEDGE - Demonstrated knowledge of required techniques, methods and technical skills and their effective application			X			Good knowledge of operations needs to expand technical base.
	JUDGMENT - Ability to analyze problems, recognize the priorities involved, then make sound conclusions and take effective action			X+			Generally good but would benefit from a more open, team approach.
	PLANNING AND ORGANIZING - Ability to organize and produce realistic plans for accomplishing objectives to meet work priorities			X			Skills could be improved.
PERSONAL	INITIATIVE - Effectiveness in making necessary decisions and taking appropriate action to achieve results			X-			Needs to improve and communicate actions.
	ADAPTABILITY - Ability to adapt to new or changing circumstances and ambiguous or pressured situations			X			Has worked successfully in a wide range of areas.
COSTS	PROFIT AND COST SENSITIVITY - Ability to assess business opportunities and risks, to identify and meet customer needs, and to generate and implement ideas that either maximize profits or minimize costs			X			
OTHER							

C. OVERALL PERFORMANCE APPRAISAL RATING

G-

Refer to page 2
for rating scale.

D. SUPERVISOR'S COMMENTS

The supervisor has the option to comment on the employee's overall performance.

Mr. Sorenson is an experienced, senior staff member with a good knowledge of the smelter operations. He needs to improve his communication skills and exercise greater initiative in planning and organizing work. Mr. Sorenson has demonstrated he is a capable supervisor in line jobs and he should be considered as a candidate for supervisory jobs in the company.

E. REVIEWER'S COMMENTS

The reviewer has the option to comment on parts A and B before signing the appraisal on page 1.

F. RECOMMENDATIONS FOR THE NEXT YEAR

The supervisor completes this with the employee to include objectives, training or development recommendations intended to address a developmental need identified in the appraisal.

DEVELOPMENT
The supervisor completes this section with the employee

	COMMENTS (Including timing and specific position(s))
(1) Line Management - Commercial	
(2) Line Management - Technical	
(3) Staff Specialist - Technical	
(4) Staff Specialist - Professional	
(5) Other - Identify	
GENERAL COMMENTS:	

H. VIEWS OF EMPLOYEE

The employee completes this section. If more space is required, attach an additional page.

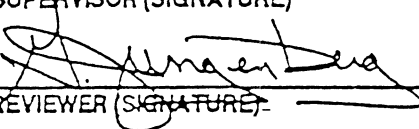
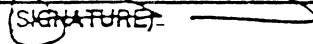
(1) MOBILITY: Indicate your willingness to relocate within BP America and BP world-wide.	
- MOBILITY	
(Please check where appropriate)	EXPLANATION
<input type="checkbox"/> NOT MOBILE	
<input type="checkbox"/> MOBILE WITHIN U.S.A.	
<input type="checkbox"/> NO LIMITATIONS INCLUDING INTERNATIONAL ASSIGNMENTS	
(2) EMPLOYEE CAREER INTEREST: Indicate your future career interests, e.g. type of position or specific job assignment desired.	
(3) EMPLOYEE REVIEW: Make any comments concerning the performance evaluation.	

I have reviewed this document and discussed the contents with my manager. My signature means that I have been advised of my performance status and does not necessarily imply that I agree with this evaluation.

Employee's Signature _____ Date _____

BP AMERICA
BP MINERALS AMERICA
MANAGEMENT PERFORMANCE APPRAISAL
AMR 2

PRIVATE

LAST NAME Sorenson, Kelly M.		INITIALS	EMPLOYEE ID. 42111	PRINT DATE 10-19-88
ORGANIZATION Utah Copper	LOCATION North Concentrator			UNIT
CURRENT JOB TITLE/CODE/GRADE Crushing and Grinding General Foreman Grade: 18				DATE ON JOB 07-22-88
SUPERVISOR (PRINT NAME) G. A. Jungenberg		SUPERVISOR (SIGNATURE) 		DATE 10-26-88
REVIEWER (PRINT NAME) R. J. Ramsey		REVIEWER (SIGNATURE) 		DATE

INSTRUCTIONS FOR COMPLETING APPRAISAL

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- Complete Parts 1 (only Sections A, B, C and D) and 2 using black pen. Sign the appraisal in designated space at the top of this page and at the bottom of Part 2 when complete.
- Review the appraisal with the next level of management. Obtain reviewer's comments in Part 1, Section E and in Part 2, Section C. Obtain their signature in designated space at the top of this page and at the bottom of Part 2.
- Discuss Part 1 with employee. Complete Sections F and G with the employee. Have the employee complete Section H and sign the appraisal.
- Return to Human Resources.

EXHIBIT

9

<u>RATING</u>	<u>DEFINITION</u>
E	Exceptional or outstanding performance which consistently exceeds all objectives of the position.
S	Superior performance which is consistently better than normally expected and produces results which exceed the objectives of the position.
G+	Good performance which consistently meets all normal objectives of the position and exceeds objectives in one or more major aspects of the work.
G	Good performance which meets the normal objectives of the position.
G-	Good performance which approaches what is normally expected in the position, but which requires improvement in one or more aspects of the work.
U	Unsatisfactory performance which does not consistently meet the normal objectives of the position.
P	Poor performance which seldom meets normal objectives of the position.
N	New on job but competent to date.

PART 1: SUPERVISOR'S APPRAISAL OF JOB PERFORMANCE

A. ACHIEVEMENT OF OBJECTIVES

In the absence of objectives, performance is evaluated against specific key responsibilities or components of the job.

<u>OBJECTIVES SET FOR REVIEW YEAR</u> (Including any key responsibilities not covered in objectives)	<u>COMMENTS ON ACHIEVEMENT OF OBJECTIVES / KEY RESPONSIBILITIES</u>			<u>RATING</u>
<u>SAFETY & HOUSEKEEPING</u>	<u>ACTUAL</u>	<u>PLAN</u>		
Lost Time Accidents Bonneville Operation	2	2		G
MSHA Citations Bonneville Operation	1 (non serious & substantial)			G-
Housekeeping	Has improved dramatically in the last quarter.			G+
<u>PRODUCTION</u>	<u>ACTUAL</u>	<u>PLAN</u>	<u>% PERFORMANCE</u>	G+
Throughput (TPD)	29,175	30,000	97.3	
Grind + 100 mesh (%)	21.7	24.0	110.0	
<u>COST</u>				
July/Sep \$/ton ore milled	1.12	1.32	117.9	S

A. ACHIEVEMENT OF OBJECTIVES (cont'd)

OBJECTIVES SET FOR REVIEW YEAR (Including any key responsibilities not covered in objectives)	COMMENTS ON ACHIEVEMENT OF OBJECTIVES / KEY RESPONSIBILITIES			RATING
<u>EFFECTIVE RUNNING TIME</u> Primary Crusher Standard Crusber Tertiary Crusher Rod Mills Ball Mills	<u>ACTUAL</u> 33.1 70.4 81.6 90.8 89.2	<u>PLAN</u> 50.0 76.0 81.0 92.0 92.0	<u>% PERFORMANCE</u> 66.2 92.6 100.7 98.7 97.0	G-
<u>OTHER</u> General	Kelly has made the transition to the concentrator and became a key figure in meeting the <u>safety and production needs</u> at Bonneville. He has shown a desire to improve housekeeping throughout the plant.			

B. MANAGERIAL SKILLS AND ABILITIES

If specific skills or abilities are relevant to the position, rate them below.

SKILLS/ABILITIES		RATINGS					COMMENTS
		E	S	G	U	P	
SUPERVISORY	LEADERSHIP - Ability to develop in others the willingness and desire to work towards common objectives			X			Has the respect of others to achieve a common goal.
	DEVELOPING PEOPLE - Ability to select, train, coach and appraise staff, set standards of performance and provide the motivation to encourage staff to grow in their jobs and accept greater responsibility			X			
	DELEGATION - Effectiveness in delegating work by assigning responsibility to subordinates and establishing appropriate controls			G+			Assigns tasks and jobs to subordinates as their ability permits.
INTERPERSONAL	COMMUNICATION - Effectiveness in both oral and written communications to insure clarity and comprehension			X			Has good skills in passing on and initiating directions to subordinates and superiors.
	INTERPERSONAL SENSITIVITY - Ability to modify behavior in a sensitive manner in order to interact effectively with different people			X			
	INFLUENCE/IMPACT - Ability to influence other's thinking or actions and gain commitment to ideas, plans or actions			X			
CONCEPTUAL	JOB KNOWLEDGE - Demonstrated knowledge of required techniques, methods and technical skills and their effective application			G-			Has only had a short exposure to current job. Expect to improve with time.
	JUDGMENT - Ability to analyze problems, recognize the priorities involved, then make sound conclusions and take effective action			G-			Should work on increasing job knowledge to gain confidence in decision making.
	PLANNING AND ORGANIZING - Ability to organize and produce realistic plans for accomplishing objectives to meet work priorities			X			Very good at planning and scheduling a job to complete in a minimum time.
PERSONAL	INITIATIVE - Effectiveness in making necessary decisions and taking appropriate action to achieve results			X			
	ADAPTABILITY - Ability to adapt to new or changing circumstances and ambiguous or pressured situations			X			Has had to move into a new position under adverse conditions.
COSTS	PROFIT AND COST SENSITIVITY - Ability to assess business opportunities and risks, to identify and meet customer needs, and to generate and implement ideas that either maximize profits or minimize costs			X			
OTHER							

EMPLOYEE NAME anson, Kelly M.

C. OVERALL PERFORMANCE APPRAISAL RATING

G

Refer to page 2
for rating scale.

D. SUPERVISOR'S COMMENTS

The supervisor has the option to comment on the employee's overall performance.

Kelly was transferred from the Smelter to the Bonneville concentrator in July of this year. He has had to learn the plant, its people and operation as well as adapt to a new operating environment. He has done well in all aspects. During this time extensive mechanical problems and operational difficulties existed, especially in July and early August. He has succeeded in managing his area and placing it on a course of improvement. The area of housekeeping has shown exceptional gains.

E. REVIEWER'S COMMENTS

The reviewer has the option to comment on parts A and B before signing the appraisal on page 1.

F. RECOMMENDATIONS FOR THE NEXT YEAR

The supervisor completes this with the employee to include objectives, training or development recommendations intended to address a developmental need identified in the appraisal.

The continuation of learning more about the operation of Bonneville is of prime concern. With increased job knowledge the ability to make better judgement decisions and therefore improved planning will follow.

The importance of cost reduction will be paramount in the future operation of the Bonneville concentrator.

G. RECOMMENDED FUTURE DEVELOPMENT

The supervisor completes this section with the employee

	COMMENTS [including timing and specific position(s)]
(1) Line Management - Commercial	
(2) Line Management - Technical	
(3) Staff Specialist - Technical	
(4) Staff Specialist - Professional	
(5) Other - Identify	
GENERAL COMMENTS:	

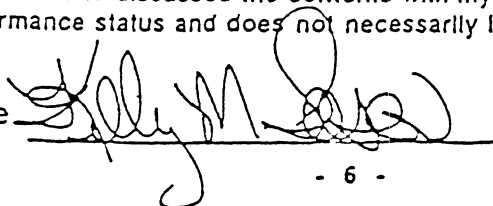
H. VIEWS OF EMPLOYEE

The employee completes this section. If more space is required, attach an additional page.

MOBILITY (Please check where appropriate)	EXPLANATION
<input type="checkbox"/> NOT MOBILE	
<input type="checkbox"/> MOBILE WITHIN U.S.A.	
<input checked="" type="checkbox"/> NO LIMITATIONS INCLUDING INTERNATIONAL ASSIGNMENTS	
(2) EMPLOYEE CAREER INTEREST: Indicate your future career interests, e.g. type of position or specific job assignment desired.	
(3) EMPLOYEE REVIEW: Make any comments concerning the performance evaluation.	

I have reviewed this document and discussed the contents with my manager. My signature means that I have been advised of my performance status and does not necessarily imply that I agree with this evaluation.

Employee's Signature



Date

10-26-88

1989 Goals - K. M. Sorenson

- Meet or exceed all 1989 safety and health and operating goals.
- Continue improvement in grinding to achieve a 21.0% + 100 mesh level at year end. (see)
- Finish plant cleanup by March 1989 and maintain a 90% standard throughout year.
- Install and optimize cyclone overflow box screens by May 1989.
- Continue plant painting program with expected completion of major operating areas by May 1989.
- Become familiar with Magna flotation operation to the extent that short term supervision would be possible. Complete a major part of this goal by June 1989.
- Analyze and implement what is required to place the tertiary crushers in automatic control by July 1989.
- Be prepared to fill in as acting plant superintendent during temporary vacancies.

PART 2: COMPLETED BY SUPERVISOR AND DISCUSSED WITH REVIEWER

DO NOT REVIEW WITH EMPLOYEE

A. ESTIMATE OF POTENTIAL

EMPLOYEE NAME Sorenson, Kelly M.

TIMING	GRADE OR GRADE RANGE THAT MAY BE ACHIEVABLE WITHIN TIME FRAMES	SPECIFIC POSITIONS TO WHICH EMPLOYEE IS PROMOTABLE
Now		
2 Years	22	North Concentrator Superintendent
5 Years		
Ultimate		
GENERAL COMMENTS: With experience and background could be considered for both smelter and in future, concentrator positions.		

B. SUCCESSION PLANNING

Indicate in order of preference those employees you think are qualified to move into this position.

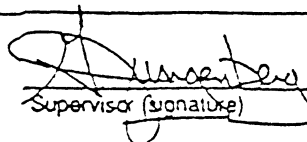
READINESS	NAME(S)	CURRENT TITLE (if available)
SHORT-RANGE (within 1 year)	O. F. Jensen	Flotation General Foreman
LONG-RANGE (within 2-5 years)	K. Y. Onstott D. D. Dea	Principle Metallurgical Eng. Maintenance General Foreman

C. REVIEWER'S COMMENTS

The reviewer has the option to comment on part 2 and to make recommendations for future development.

G. A. Jungenberg
 Supervisor (print name)

R. J. Ramsey
 Reviewer (print name)


 Supervisor (signature)

10-26-88
 Date

EXHIBIT 7

STEWART SMITH'S DEPOSITION

1 that assignment.

2 A. Poor performance.

3 Q. Was this a request from Mr. George for
4 removal?

5 A. Yes.

6 Q. What did Mr. George say to you, if you can
7 recall?

8 MR. DAVIS: Objection, foundation.

9 MR. LEE: Just go back a minute.

10 Q. Did Mr. George discuss with you the
11 performance of Mr. Sorenson?

12 A. Yes, he did.

13 Q. And as a result of that performance, did he
14 make a request to you?

15 A. Yes, he did.

16 Q. And what was his request?

17 A. To --

18 MR. DAVIS: Objection, foundation.

19 MR. LEE: Okay.

20 A. To have him removed from his department.

21 Q. BY MR. LEE: He didn't want him in his
22 department? *out*

23 A. No, he did not.

24 Q. Do you know if -- did Mr. Sorenson, after
25 that, continue to work in the smelter?