C# 00908

UNITED STATES POSTAL SERVICE

AND

NATIONAL RURAL LETTER CARRIERS'
ASSOCIATION

RE: Case Nos. S4R-3Q-D 20845 and 21666
Suspension and Discharge of
Bernadine Benoit
Place of Hearing - Jennings, La.
Date of Hearing - July 29, 1986

APPEARANCES

FOR THE POSTAL SERVICE	Kathleen McCoy, Acting Supervisor of Employment and Services
FOR THE UNION	William B. Peer, Attorney
ARBITRATOR	John F. Caraway, selected by mutual agreement of the parties

On November 21, 1985 the Postal Service advised Ms. Benoit that she was suspended without pay indefinitely effective November 22, 1985. This action was the result of an interview by Ms. Benoit with the Postal Inspection Service. Subsequently under date of December 17, 1985 she was issued a Notice of Proposed Removal which stated as follows:

> "You are hereby notified that you will be removed from the Postal Service 24 hours after your receipt of this notice. There is reasonable cause to believe that you are guilty of a crime for which a sentence of imprisonment could be imposed. The reason for this action is:
>
> You are charged with mail theft, fabrication of fictitious addressees in order to receive rebates and using your employment for personal gain. Specifically, on November 20, 1985, at approximately 3:05 p.m., you were interviewed by Postal Inspectors J. J. Puchala, M. A. Mackert and S. T. Wilson. In this interview, you admitted, orally, that you had fabricated

names and adresses in order to receive rebates. An ongoing investigation was conducted by the Postal Inspection Service between November 1 and 20, 1985. The results of that investigation revealed:

1. On October 17, 1985, you deposited 13 rebate checks into your personal checking account. The checks totaled $39.75.

2. On October 22, 1985, you deposited 5 rebate checks into your personal checking account. The checks totaled $11.78.

3. On October 24, 1985, you deposited 12 rebate checks into your personal checking account which totaled $22.79.

4. On November 1, 1985, you deposited 8 rebate checks into your personal checking account, totaling $14.80.

You have violated the Code of Ethical Conduct contained in the ELM which reads:

"666.3f. Affecting adversely the confidence of the public in the integrity of the Postal Service.

668.27. Obstructing the Mail. The United States Code, Title 18, Section 1701, provides penalties for persons who knowingly and willfully obstruct or retard the mail. The statute does not afford employees immunity from arrest for violations of the law...

661.414. No employee, whether acting for personal benefit or not, will use, or appear to use either official position or information obtained as a result of employment to further any private interest, for self or any other person.""

A grievance was filed protesting both the emergency suspension as well as the removal of the grievant.

CONTRACT PROVISIONS INVOLVED

ARTICLE 16

DISCIPLINE PROCEDURE

"Section 6. Review of Discipline

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or the designee.

In associate post offices of twenty (2) or less employees, or where there is no higher level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken."

ISSUES

I. Did the Postal Service commit a procedural error which is fatal to its action of removal of the grievant?

II. If there is no procedural error, did the Postal Service have just cause to remove Ms. Benoit from its employment? If not, what is the appropriate remedy?

ARGUMENT

I. Procedural error

The Union contends that the Service committed a procedural error in violation of Article 16, Section 6. It points to the discrepancy between the testimony of Postmaster Latiolais and the immediate supervisor Ms. Hayes as to who made the decision to discharge the grievant. Mr. Latiolais testified that

he received the memorandum of the Postal Inspectors [Post Office Exhibit No. 1] and reviewed that with Ms. Hayes. They reached the decision that a crime had been committed. He then called Mr. Temple, Director of Employee and Labor Relations, to whom he reported for such advice and related the nature of the incident. Mr. Temple drafted the letter of December 17, 1985 which Ms. Hayes, as the grievant's immediate supervisor, signed.

The Union points to the conflict between the testimony of Postmaster Latiolas and Supervisor Hayes. The Postmaster stated that the normal compliment of employees exceeded twenty (20) employees, which would make the first paragraph of Article 16, Section 6 applicable. Postmaster Latiolais denied, however, that he was the deciding official on the removal.

The Union contends that the testimony of Supervisor Hayes conflicted with that of the Postmaster. She said that on an average day, the compliment at the Postal facility was under twenty (20) employees. She further stated that Mr. Latiolais made the decision to remove Ms. Benoit and Ms. Hayes agreed to that decision. Ms. Hayes did not initiate the removal nor did she talk to Employee and Labor Relations.

The Union contends that the Postal Service committed a procedural error by violating Article 16, Section 6 in that it did not obtain the required review and concurrence whether paragraph 1 or paragraph 2 of Section 6 applied.

The Postal Service maintains that Article 16, Section 6, first paragraph applies to this dispute. The Postmaster testified

that the office consists of more than twenty (20) employees. Hence, it was required that the immediate supervisor make the proposed removal decision. Ms. Hayes made that decision as is testified by the letter of December 17, 1985. Further, as the Installation Head, Postmaster Latiolais concurred in that decision. This complied with the requirements of Section 6. Insofar as the drafting of the Letter of Proposed Removal is concerned this is normal procedure for this drafting to be done by Employee and Labor Relations rather than the Jennings Postal facility because that facility simply does not have the clerical help to perform this task.

II. Merits

The Postal Service shows that there were over thirty (30) deposits made to the grievant's account with the American Bank. The Postal Service contends that the grievant deposited these checks to this account in the American Bank. She fabricated names and addresses in order to receive rebate checks. The addresses were routed to her for delivery on her assigned route which was Rural Route 1. Since the addressees were fictitious she simply retained those checks and deposited them to her personal bank account. This was in clear violation of Section 661.414 of the Employee and Labor Relations Manual which prohibits any employee acting in a manner to gain personal benefit from his or her employment relationship.

The Union argues that Ms. Benoit could have obtained these

rebate checks as disposed of waste. While undelivered mail would go into the throwback case they would ultimately be disposed of in the dumpster at the Postal facility, it would still be an offense for Ms. Benoit or anyone associated with her to remove the mail from the dumpster while on Postal property. The Postal Service maintains that such a procedure was highly unlikely because of the fact that Ms. Benoit had the addresses of these fictitious individuals on her Rural Route No. 1.

The Union maintains that report of the Postal Inspectors [Postal Service Exhibit No. 1] is only admitted into evidence by the Arbitrator on the minimal basis as a "business record" as an exception to the hearsay rules. The Postal Inspector who drafted that report, Mr. Wilson, did not testify at the arbitration hearing. The Postal Service relied upon the testimony of Postal Inspector Puchala. But Mr. Puchala admitted that he was only present in the investigation as an observer. Mr. Puchala testified that most of the investigation work was performed by Postal Inspector Wilson. He had not cross-checked the names against the actual route as listed on the Postal Investigative Memorandum. He further stated that pieces of bait mail were circulated on Ms. Benoit's on November 25, 1985. She handled these properly.

With regard to the checks, the Union points out that Mr. Puchala did not see the original checks nor did he know if Ms. Benoit had endorsed them for deposit. He could not negate that the checks had been deposited by some other person.

The Union argues that the Postal Service failed to prove how the refund checks got into Ms. Benoit's joint checking account. This account was a joint account which she and a Dusty Doucet maintained. The deposits could have been made legally insofar as the Postal Service is concerned. It did not offer evidence otherwise. The case of the Postal Service was based on assumption and nothing but assumption.

If the Postal Service alleges that it was Ms. Benoit who originated the fictitious names and addresses, its evidence failed to prove this vital element of the case. Further, the Postal Service did not rule out the fact that a substitute also worked on this particular route. Also, the Postal Service did not rule out the possibility that Dusty Doucet, the co-owner of the joint account, could have made the deposits.

Essentially, the Union's position is that the Postal Service failed to establish by the evidence that Ms. Benoit was guilty of the charge of mail theft, fabrication of fictitious addresses and using her Postal Service employment for personal gain. As a result, she should be reinstated to full employment and made whole for all lost wages. Further, the Postal Service should be assessed with all costs of this arbitration.

DECISION

The Union contends that the merits in this case should never be considered because of serious procedural deficiencies in the Post Office case. These deficiencies arise from a failure to

comply with the requirements of Article 16, Section 6.

Article 16, Section 6 provides the employee with "due process". It requires the immediate supervisor or in an installation of less than twenty (20) employees the Postmaster, make a recommendation as to the discipline action to be taken. Once this recommendation is made then it must be reviewed and concurred in by the installation head or his designee. The procedure thus, is a two-tier procedure. The first step is the initial decision by the immediate supervisor or Postmaster and the review and concurrence by higher authority. This assures the employee an objective and fair review of the case before the action of suspension or discharge is taken.

These principles have been recognized by a number of Arbitrators. In a decision by Arbitrator Zumas, [Case No. E1R-2F-D8832, decided February 10, 1984] a Rural Letter Carrier was removed. The local Postmaster, not knowing how to proceed, contacted the MSC. This office took over and made the decision to terminate the employee. Finding that the Post Office's action violated the National Agreement, Arbitrator Zumas stated:

> "Implicit in the language of Article (16(6) is the requirement that a supervisor (or a postmaster in a small installation) make a recommendation or decision as to the imposition of discipline before referring the matter for concurrence to higher authority. All such decisions, of course, are subject to review either within or outside the installation depending on the size of the facility. It follows that the decision to impose discipline or the nature of the discipline may not be

initiated, as in this particular case, outside the installation by higher authority. As outlined above, Eberly made no recommendation and no decision with respect to disciplining Grievant; he merely concurred in the termination decision after it came down from the Lancaster MSC. Failure to carry out his responsibility under the National Agreement rendered Eberly's issuance of the Notice of Removal a nullity."

To the same effect see the decision of Arbitrator Dworkin in Case Nos. C1R-4A-D 31648 and 31707 decided on January 12, 1985.

In a case in which the facts are analogous to the instant case, Arbitrator Howard reversed a discharge, Case No. E4R-2F-D 2136, decided November 14, 1985. In this case the Arbitrator found the Postmaster made the decision to remove the employee and also concurred in his own decision. Explaining his reasoning, the Arbitrator stated at page 7 of his decision:

"Secondly, the provisions of Article 16, Section 6 of the Agreement were clearly violated in the manner in which the discipline was assessed. The Notice of Removal was signed by Manager of Customer Services Donald C. Norman and concurred in by Postmaster George A. Fahey. (Joint Exhibit 3, Service Exhibit 7). Yet, the testimony of Postmaster Fahey makes clear that Manager Norman had nothing to do with the decision at all, and, in effect, Postmaster Fahey either concurred in his own decision orone from higher authority, rather than one from lower authority, as the provisions of Article 16, Section of the Agreement require. In either case, the grievant failed to receive an independent review of his removal as the language of Article 16, Section 6 requires. A subordinate manager as contrasted to a superior manager cannot be expected to accord the independence of review that the Agreement requires,

and obviously the review of one's own decision is no review at all. On these narrow grounds, the discharge of the grievant must be overturned."

Turning to the facts of this dispute, there was some conflict as to whether the first paragraph or the second paragraph of Section 6 applied. The second paragraph requires that the decision to recommend the suspension or discharge be made by the Postmaster at facilities where there are less than twenty (20) employees. The Postmaster stated that the facility had over twenty (20) employees but there were only nineteen (19) employees working on the date of the arbitration hearing. Ms. Hayes testified that the facility had twenty-six (26) to twenty-seven (27) employees being regulars, part-time flexibles and substitute employees. She further said that on an average day there would be under twenty (20) employees. Applying Section 6, the interpretation must be based upon the complement of the facility and not based on the average daily work force. Reasonable interpretation requires that it be based upon the number of employees assigned as the complement to a particular postal facility. Since the Jennings, Louisiana postal facility has regularly assigned over twenty (20) employees, the first paragraph of Section 6 applies.

This provision requires that the immediate supervisor recommend the disciplinary action to be taken. It then must be reviewed and concurred in by the installation head. In this case, Ms. Hayes was the immediate supervisor while Postmaster Latiolais

was the concurring official. The testimony of Ms. Hayes was that she did not initiate the removal. That decision was made by Mr. Latiolais. Ms. Hayes agreed to the decision. This is the reverse of what the first paragraph of Section 6 requires. The immediate supervisor must initiate the disciplinary action and the Postmaster must review and concur. Therefore, there was no independent review by higher authority as required by Article 16, Section 6. The Postmaster assumed the decision-making role thereby eliminating the immediate supervisor from her responsibility of recommending initially the disciplinary action. This was in violation of Article 16, Section 6.

Based upon arbitral precedent as discussed herein and the strong language of Article 16, Section 6, the Arbitrator finds that the grievant was not given "due process". The necessity of strictly following this procedure is demonstrated by the use of the phrase in Article 16, Section 6, "In no case". There were no exceptions intended to be made in following the initiating and concurrence process.

The Arbitrator, therefore, must sustain the grievance on procedural grounds. He is, therefore, precluded from considering the case on its merits.

AWARD

The Union grievance is sustained. The Postal Service shall immediately reinstate Ms. Benoit to full employment, restore all lost seniority and make her whole for all lost

wages. The Postal Service shall deduct any earnings received by Ms. Benoit from other employment. Pursuant to Article 15, Section 5A of the National Agreement, the Arbitrator's fees and expenses are assessed against the Postal Service.

John F. Caraway

IMPARTIAL ARBITRATOR

New Orleans, Louisiana

September 8, 1986

C# 00910

UNITED STATES POSTAL SERVICE

AND

NATIONAL RURAL LETTER CARRIERS' ASSOCIATION

RE: Case No. S4R-3W-D 16061
Removal of Robert S. Knox
Place of Hearing - Melbourne, Fl.
Date of Hearing - August 19, 1986

APPEARANCES

FOR THE POSTAL SERVICE	William G. Roberts, Jr., Labor Relations Assistant
FOR THE UNION	William B. Peer, General Counsel; Steven R. Smith, Director of Labor Relations
ARBITRATOR	John F. Caraway, selected by mutual agreement of the parties

By letter from the Postmaster, Mr. Scott, to Mr. Knox,. he was removed from the employment of the Postal Service effective September 6, 1985. The reason was his poor work performance. The Union filed a grievance protesting the removal. The Postal Service then raised a threshold defense of the non-arbitrability of the grievance. This issue will be discussed and decided first.

I. - The Grievance is Arbitrable

The facts show that Mr. Knox was a Rural Letter Carrier in Statesville, North Carolina with an initial service date of January 15, 1977. The grievant was in an automobile accident in March 1980 and received serious injuries. He was placed on leave without pay in May 1980. He applied for disability retirement in

March 1980 which was denied. He reapplied on June 21, 1981. On June 22, 1981 he was removed from the Postal Service. The grievance was filed on his behalf by the Union.

In this Case No. S8R-3P-C 34115, this Arbitrator decided the removal case of Mr. Knox at Statesville, North Carolina on May 8, 1984. The decision of this Arbitrator was that the Postal Service did not have just cause to remove Mr. Knox from its employment. The Postal Service was ordered to reinstate Mr. Knox to full employment. [Management Exhibit No. 2]

In implementing the award the Postal Service made the decision not to return Mr. Knox to his original position as a Rural Letter Carrier in Statesville, North Carolina. The reason was that his former position had been filled by bidding. Since his position had been filled, it was necessary that Mr. Knox be placed in a Rural Letter Carrier position which had been posted for bid, but no bids received. A settlement agreement was entered into by the Postal Service and the Union under date of December 21, 1984 wherein Mr. Knox would be placed on Route 18, Melbourne, Florida. By letter to the Postal Service Mr. Knox asked that his employment be deferred until June 22, 1985. Mr. Knox was on leave without pay from June 28 to July 15, 1985. Mr. Knox commenced carrying the route on the job training basis on July 15, 1985.

ARGUMENT

The Postal Service maintains that Mr. Knox was a new employee under Article 12, Section 1.A. As a result it was necessary that he satisfactorily complete a 90 calendar day probationary

period. Subsection D provides that when an employee is separated from the Postal Service and is rehired, he serves a new probationary period. The Postal Service argues that it had the right to terminate Mr. Knox within the 90-day probationary period because his work performance was unsatisfactory. Further, the Postal Service contends that the grievance is non-arbitrable because a probationary employee has no right to the grievance-arbitration procedure.

The Union contends that Mr. Knox was not a new employee. Mr. Knox was never separated from the Postal Service. He remained on the rolls of the Postal Service until his case had been decided at arbitration. Mr. Knox's employment was never terminated. Further, the Arbitrator reinstated Mr. Knox to full employment.

The Union argues that the Postal Service has never maintained in the discussions pertaining to the placement of Mr. Knox or in the settlement discussions that the grievant would be subject to a new probationary period. The burden of proof was upon the Postal Service to prove this which it did not do at this arbitration.

DECISION

Article 12, Section 1.A requires that a new employee satisfactorily complete a 90 calendar day probationary period. Subsection D requires employees separated from the Postal Service to serve a new probationary period. The issue as to the arbitrability of this grievance is whether Mr. Knox should be treated as a new employee,or alternatively,an employee who had been separated from

the Postal Service.

The facts demonstrate that Mr. Knox was terminated on June 22, 1981 but was reinstated by virtue of a decision of this Arbitrator on May 8, 1984. This arbitration decision had the effect of sustaining the continuous employment of the grievant from the date of his termination. The arbitration decision resulted in rescinding the action of the Postal Service in separating this employee from its employment. Hence, when Mr. Knox was assigned to the Melbourne, Florida Postal facility he was not a new employee. Nor was he an employee who had been separated from the Postal Service and subject to a new probationary period under Article 12, Section 1.D.

Further support of this conclusion is demonstrated by the language of Article 16, Section 4. This provision states that where an employee is discharged, that employee remains on the rolls of the Postal Service in a non-pay status until his case has been settled by settlement or through the grievance-arbitration procedure. Certainly, if the employee remains on the rolls of the Postal Service he has not been separated from his employment with the Postal Service.

In the discussions which ensued after the arbitration decision of May 8, 1984, the Postal Service never took the position that Mr. Knox would be required to undergo a new 90-day probationary period. Such a condition was not inserted in the settlement letter of December 21, 1984.

The conclusion is that the grievance is arbitrable.

II. The Postal Service did not have just cause to remove Mr. Knox

The Postal Service maintains that Mr. Knox's job performance was so deplorable that he simply could not be retained in its employ. Mr. Knox was carrying Route 18 which has a standard daily time of 7.05 hours. He commenced working the route on July 15, 1985. The Postal Service points to the Form 4240 which showed that from the very beginning Mr. Knox was requiring auxilliary assistance in the form of the Relief Carrier finishing out the route. Instead of the route being completed in the standard time it was taking about double that time. This persisted from July 15 through the month of August when Postmaster Scott made the decision to remove Mr. Knox. His removal was effective September 6, 1985. In the latter part of August he was taking 10 to 12 hours to complete the casing and delivery of Route 18. Mr. Knox had sufficient experience in handling the route that his work performance should have been reduced to standard or somewhat over standard. But to run 3 to 4 hours over standard was simply unacceptable.

The Postal Service introduced the testimony of Mr. Danahy who was assigned by the Postmaster to monitor Mr. Knox's work progress. Mr. Danahy testified that he observed Mr. Knox in his casing and delivery procedure. Mr. Knox was consistently taking twice the amount of standard time to do the route. This was clearly unacceptable. Mr. Danahy testified that the Postal Service received many complaints from customers as to the non-delivery of their mail or the improper delivery of their mail. Customers even threatened

to file a petition to remove Mr. Knox. Mr. Danahy pointed out that the normal casing time was 18 minutes per foot. Mr. Knox was taking 77 minutes per foot to case his mail.

Mr. Danahy described Mr. Knox's problems as follows. He lacked hand-eye coordination. He was unable to coordinate the particular piece of mail with the customer's address. On the street he was unable to decide which mail went to which delivery point. Further he could not remember his line of travel on Route 18.

Mr. Scott testified that he discussed the objectives of the Rural Carrier's job with the Post Office with Mr. Knox. He explained these objectives to him and gave him a copy of the objectives which were typed on the Employee's Probationary Period Evaluation Report. He went over these objectives in great detail with Mr. Knox. He had a meeting with Mr. Knox on July 25, 1985 and pointed out his deficiencies. He again met with Mr. Knox on August 20, 1985 and reiterated to Mr. Knox that his work was unsatisfactory. He advised him that unless there would be improvement he would be terminated as of September 9, 1985. Mr. Knox clearly understood his deficiencies yet was unable to correct them.

Mr. Scott pointed out that he received many customer complaints. There was a threat to circulate a petition to remove Mr. Knox. At the meeting on August 20, 1985 Mr. Scott told Mr. Knox that he was a complete disaster in his work performance. The Postal Service simply could not retain him in view of the

high degree of complaints which were coming from Route 18.

The Union introducted the testimony of Mr. Smith, Director of Labor Relations for the Union. He pointed out that a vast difference exists between carrying a route in North Carolina as compared to Melbourne, Florida. The North Carolina route was a Rural Route with the stops being spaced at greater intervals. The Melbourne route was classified as LH which meant that it was a very compact route with a heavy mail volume. Further the Melbourne route was a two bundle route compared to the one bundle system in North Carolina. This means that in North Carolina letters and flats are bundled together. In Melbourne the flats were separated from the letters and maintained in two separate bundles. This increased the workload upon the carrier as well as the responsibility to see that both letters and flats were delivered to the same customer.

Mr. Smith stated that he believed that it was much more difficult for Mr. Knox to learn the Melbourne system because of the differences. It is harder to unlearn a method of working such as the rural system in North Carolina with its one bundle as compared to the Melbourne procedure.

The Union makes a comparison between Mr. Knox and Mr. Mahoney who carried the route after Mr. Knox. Mr. Knox only had 45 days working Route 18. Mr. Mahoney, on the other hand, had 90 days and even then was exceeding standard one to two hours. The Union argues that Mr. Knox was not given an equally fair opportunity to demonstrate his ability to carry Route 18 as was

given to Mr. Mahoney.

Finally, the Union argues that the Postal Service violated the National Agreement by failing to have the first line supervisor make the decision to remove Mr. Knox. The decision to remove was made by Postmaster Scott. This violated the two tier process which requires the initial decision by the immediate supervisor plus a concurring decision by a Postal Service official higher in rank.

As a remedy the Union asks that Mr. Knox be returned to Statesville, North Carolina where he should have been originally returned when reinstated under the arbitration decision. In addition, the Union asks that all costs of the arbitration be borne by the Postal Service pursuant to Article 15, Section 5.A.

DECISION

Article 16, Section 6 requires that before discipline may be imposed upon an employee that the supervisor initiating the discipline secure the review and concurrence therein by the Installation Head or his designee. The immediate supervisor did not initiate the discipline in this case. The immediate supervisor was Supervisor Duncan who was on leave. Mr. Brandt was the next in line insofar as immediate supervision was concerned. He did not initiate or participate in the decision to remove. Neither did Mr. Danahy. The complete decision to remove was made solely and exclusively by Postmaster Scott. There was a clear violation of Article 16, Section 6. Undoubtedly

the Postal Service believed that this provision had no application because Mr. Knox, being a probationary employee, did not have the provisions of the collective bargaining Agreement, and specifically Article 16, Section 6. As the Arbitrator has already ruled, Mr. Knox was not a probationary employee. This being true the Postal Service was required to follow the provisions of Article 16, Section 6. Its failure to do so is fatal to this removal action.

There is some doubt in the Arbitrator's mind as to whether Mr. Knox was given a full opportunity to learn this Rural Carrier job. There were significant differences between his route in North Carolina and that in Melbourne, Florida. It must be realized that Mr. Knox did not carry a route from 1980 until July 15, 1985, a period of five years. Then the procedure used in North Carolina was considerably different from that followed in Melbourne, Florida.

That Mr. Knox may not have been given a full opportunity to demonstrate his ability to satisfactorily perform the work on Route 18 is shown by a comparison of his work record to that of Mr. Mahoney who succeeded to Route 18 after Mr. Knox was removed. Mr. Knox only worked the route from July 15 through August 31, 1985 a period of about 45 days. At the end of the 45 days he was about 4 to 5 hours over standard in casing and delivering the route. Mr. Mahoney worked Route 18 from January 18, 1986 to April 11, 1986 which were the 4240s filed into evidence. This constituted a period of approximately 90 days. At the end of the 90 days

Mr. Mahoney was one or two hours over standard. But the point is that Mr. Mahoney reduced his casing and delivery time to one to two hours over standard over a period of 90 days. There is a serious question as to whether Mr. Knox, if given an additional 45 days, could have achieved the same level of performance.

There is no question but that Postmaster Scott was highly upset with regard to the work performance of Mr. Knox. He had received numerous customer complaints about his work performance. There was a threat to circulate a petition to remove Mr. Knox. Undoubtedly, Postmaster Scott believed that since Mr. Knox was a probationary employee, he had the right to terminate him in a shorter period of time than he would have terminated a non-probationary employee. This constituted error on Postmaster Scott's part.

Turning to the remedy, the Arbitrator will reinstate Mr. Knox to full employment. The return must be to a rural carrier route at Melbourne, Florida or at some location which the Postal Service and Union may mutually agree. The Arbitrator denies the Union's request that Mr. Knox be returned to Statesville, North Carolina. By executing the settlement agreement of December 21, 1984, Mr. Knox waived any right to return to Statesville, North Carolina.

In this proceeding the Union has invoked Article 15, Section 5.A. as part of the desired remedy. This provision

provides that "--- being all costs, fees and expenses charged by an Arbitrator will be borneby the party whose position is not sustained by the Arbitrator. In those cases of compromise where neither party's position is clearly sustained, the Arbitrator shall be responsible for assessing costs on an equitable basis."

The Union's argument is that should its position as to arbitrability and the reinstatement of Mr. Knox be sustained by the Arbitrator, then all of the costs and fees should be borne by the Postal Service under Article 15, Section 5.A.

While the position of the Union was substantially sustained in this arbitration, it was not fully sustained in view of the rejection of the Union's sought after remedy that Mr. Knox be returned to the Statesville, North Carolina Postal Facility. Accordingly, the Arbitrator, pursuant to Article 15, Section 5.A. assesses the costs and fees on the basis of 90% to the Postal Service and 10% to the Union.

AWARD

I. The grievance is arbitrable.

II. The Postal Service did not have just cause to remove Mr. Knox.

The Postal Service shall reinstate Mr. Knox to the Melbourne, Florida facility or such other facility as the Postal Service and Union may agree.

The fees and expenses of this arbitration are born

90% by the Postal Service and 10% by the Union.

John F Caraway
IMPARTIAL ARBITRATOR

New Orleans, Louisiana

August 27, 1986

J. C. Frierson
Little Rock, Arkansas
S8N-3F-D-9885

C #01944

IN THE MATTER OF THE ARBITRATION BETWEEN:	
United States Postal Service	Opinion and Award
and	in
National Association of Letter Carriers AFL-CIO	S8N-3F-D-9885 J. C. Frierson Little Rock, Arkansas

The subject matter in dispute was referred to the undersigned Arbitrator for a final and binding award. A hearing was held on April 25, 1980, in Little Rock, Arkansas, at which time the parties were afforded full and equal opportunity to present evidence and argument. The hearing was declared closed on April 25, 1980.

APPEARANCES:

For the Employer:

Louie E. Shiver, Sectional Center Director, E & LR

For the Union:

Paul C. Davis, Regional Administrative Assistant

ISSUE:

The subject matter in dispute poses the following issue:

> Was the discharge of the Grievant for just cause, and if not, what shall the remedy be?

BACKGROUND:

The Grievant had been employed by the Postal Service in Little Rock for approximately four and one-half years as a Letter Carrier at the time of his discharge. On October 12, 1979 the Sectional Center Director of

Employee and Labor Relations issued to the Grievant a "Notice of Charges - Removal" which in pertinent part provided:

> This is notice that it is proposed to remove you from the Postal Service no earlier than 30 days after the expiration of your forthcoming suspension, which will begin on October 15, 1979 and end on October 28, 1979.
>
> The reasons for this proposed action are:
>
> Charge 1. You are charged with failure to meet the minimum requirements of your position. Since you were issued a Notice of Suspension for seven (7) calendar days on March 7, 1979, an analysis of your attendance record reveals that you have been unavailable for duty on the following occasions:

SICK LEAVE	LATE
03/08/79 (Thur.) 8 hrs. LWOP	04/05/79 - .04 hr.
03/10/79 (Sat.) 8 hrs. LWOP	04/30/79 - .36 hr.
03/22/79 (Thur.) 8 hrs. LWOP	05/09/79 - .04 hr.
04/09/79 (Mon.) 2 hrs. SL	05/10/79 - .30 hr.
04/24/79 (Tues.) 8 hrs. SL	09/12/79 - .04 hr.
04/25/79 (Wed.) 1 hr. SL/7 hrs. LWOP	10/01/79 - .74 hr.
05/03/79 (Thur.) 8 hrs. SL	
05/31/79 (Thur.) 8 hrs. SL	
07/10/79 (Tues.) 8 hrs. SL	
07/11/79 (Wed.) 8 hrs. LWOP	
08/07/79 (Tues.) 8 hrs. SL	
08/13/79 (Mon.) 8 hrs. SL	
08/14/79 (Tues.) 8 hrs. SL	
08/25/79 (Sat.) 8 hrs. LWOP	
08/27/79 (Mon.) 8 hrs. LWOP	
08/28/79 (Tues.) 8 hrs. LWOP	
08/29/79 (Wed.) 8 hrs. LWOP	
09/17/79 (Mon.) 8 hrs. SL	
09/18/79 (Tues.) 8 hrs. LWOP	
10/09/79 (Tues.) 8 hrs. SL	

> It is noted that the majority of your absences are unscheduled and that management received very little notice, causing adverse operational requirements, creating inefficiencies in productivity.

Charge 2. You are charged with violation of the Code of Ethical Conduct, (Part 651.6 of the Employee and Labor Relations Manual). On October 8, 1979 a garnishment was filed against the U. S. Postal Service on behalf of Montgomery Ward & Co., Incorporated, Case No. 77-3180, in the amount of $118.02, plus accrued court costs and interest. This garnishment has placed an undue administrative burden on the U. S. Postal Service. This is the sixth garnishment since you have been in our employ, and you have been personally warned that this type of action could result in further disciplinary action.

The following elements of your past record will be considered in determining the disciplinary action to be imposed if the charges are sustained:

You were issued a letter of warning on June 16, 1976 as a result of your failure to answer official correspondence.

You were suspended for a period of five (5) calendar days beginning on October 20, 1976 as a result of your failure to answer official correspondence.

On July 13, 1978 your supervisor held a discussion with you concerning your unsatisfactory attendance record.

On August 29, 1978 your supervisor held a discussion with you concerning your unsatisfactory attendance record.

You were issued a letter of warning on October 3, 1978 as a result of your unsatisfactory attendance record.

You were suspended for a period of seven (7) calendar days beginning on March 11, 1979 as a result of your being charged with violation of the Code of Ethical Conduct, resulting in garnishment of your wages, and for being unavailable for duty.

EMPLOYER CONTENTIONS:

The Employer contends that the Grievant had an unsatisfactory attendance record and had been the recipient of seven garnishments. In attempting to correct these deficiencies, the Employer had utilized progressive discipline but without success. A stage was reached in October 1979 where it

became apparent that corrective discipline was not working and that removal was necessary because of his excessive garnishments and his poor overall record. The removal for his deficiencies was justified because of the undue burden which they placed upon the Employer, and because corrective and progressive discipline had failed to correct the deficiencies.

The Employer responds to the Union charge that the removal action and subsequent grievance handling was procedurally defective by contending that any procedural defects which may have occurred were not fatally defective. This is true, says the Employer, because the Grievant was the recipient of full due process.

Finally, the Employer states that if attendance was the entire problem of the Grievant the case might have been handled differently. An examination of the entire record, however, shows that the Grievant could not conform to a structural type operation. Therefore, the only solution to the problem was removal.

UNION CONTENTIONS:

The Union contends that the Grievant's removal was absent just cause, and was both discriminatory and punitive. While the Union admits that the Grievant's attendance record is less than satisfactory it argues that the Employer failed to deal properly with the absenteeism. The excessive absences resulted from health problems which were known to the Employer. Yet, the Grievant was not required to undergo a fitness for duty examination and he was not placed on restricted sick leave.

With respect to the garnishments the Union insists that they do not provide a basis for discipline. The Union also stresses that they came about because of a divorce which created financial pressures which the Grievant found excessive for awhile. Moreover, other employees have received garnishments and have not been disciplined by the Employer.

The major thrust of the Union's position is that the Employer's handling of this matter contained procedural errors which the Union views as fatal to the Employer's position. The cited procedural flaws are:

1. The National Agreement provides that appealed grievances must be heard by a higher authority. Yet, in this case the Sectional Center Director of Employee and Labor Relations proposed the removal, signed and issued it, heard and decided the grievance at Step 2, and presented the Employer's case at the arbitration hearing.

2. The Notice of Removal was issued three days prior to the date on which the Grievant was scheduled to commence a 14 day period of suspension. The Union claims that in addition to being procedurally wrong, it violates any concept of progressive discipline.

3. Article XVI of the National Agreement provides that discussions cannot be cited in later disciplinary actions. In spite of this, the Notice of Removal refers to two discussions.

4. The Notice of Removal cited six incidents of tardiness despite the fact that three of them were for two minutes each and were clearly excepted under the five minute leeway rule.

DISCUSSION AND FINDINGS:

An Arbitrator is responsible for applying the parties' contract rules governing their own actions in according an employee due process. The parties to the National Agreement have agreed in Articles XV and XVI to certain rules regarding the administration of discipline and the processing of grievances. In the instant case the Union correctly insists that some of these agreed to rules of a procedural nature have not been observed by the Employer in the instant case.

The grievance procedure set forth in Article XV of the National Agreement provides that first step grievance discussions must be with the Grievant's immediate Supervisor, and "the Supervisor shall have authority to settle the grievance." In the instant case, the appropriate representatives met at Step 1, but a serious question arises regarding the Supervisor's authority to settle the grievance. Can one realistically assume that the Supervisor had authority to settle the grievance in this situation where the removal action had been initiated by the Sectional Center Director of Employee and Labor Relations? Obviously not, and the Step 1 procedure was no more than a charade.

The contractual provisions regarding Step 2 provide that on an appealed grievance "the installation head or designee will meet with the steward..." The clear intent of this provision is to assure that an authority higher than the Employer representative who initiated the action which gave rise to the grievance will be the Employer's hearing representative. This condition was not met since the Employer representative at

Step 2 was the same official who initiated the removal action; that is, the Sectional Center Director of Employee and Labor Relations. Hence, Step 2, like Step 1, was ineffective and meaningless and as a consequence the Grievant was deprived of procedural due process.

The Employer's case is further flawed by the fact that it is violative of that portion of Article XVI of the National Agreement which provides, "... such discussions may not be cited as an element of a prior adverse record in any subsequent disciplinary action against an employee, ..." The Notice of Removal cites two such discussions as elements of the Grievant's past record.

These procedural defects cannot be overlooked as being insignificant. They are of serious concern because they are in violation of both the letter and spirit of the National Agreement, and importantly they deprived the Grievant of his right to due process. In the absence of due process the grievance must be sustained without any consideration of its substantive merits. This means that the Grievant must be returned to his position as expeditiously as possible. Moreover, he is to be made whole in all respects except backpay. His claim for backpay is denied because he made no attempt to obtain employment and mitigate losses after his discharge.

AWARD:

The Arbitrator hereby Awards as follows:

> The discharge of the Grievant was without just cause. The Grievant shall be returned to his position as expeditiously as possible and be made whole in all respects except backpay.

Knoxville, Tennessee
May 20, 1980

J. Fred Holly, Arbitrator

J. Dworkin 1/12/84 Won
Art. 16 - Removal, Theft

USPS - NRLCA CONTRACTUAL GRIEVANCE PROCEEDINGS
CENTRAL REGION
ARBITRATION OPINION AND AWARD

O 4679 A,B

In The Matter of Arbitration
Between:

THE UNITED STATES POSTAL SERVICE
Lowry City, Missouri Station
Kansas City, Missouri MSC

-and-

NATIONAL RURAL LETTER CARRIERS' ASSOCIATION
Missouri RLCA

APWU AIRS #4654 & #4655

Case Nos. C1R-4H-D 31648
C1R-4H-D 31707
NRLCA Nos. MO-73/74-81-D

Decision Issued
January 12, 1985

APPEARANCES

FOR THE EMPLOYER

Williams E. Simmons	Labor Relations Executive
Mary C. Atchison	Postmaster, Lowry City, Mo.
Kenneth Hudgens	Postal Inspector

FOR THE UNION

David Jonathan Cohen	Attorney for the NRLCA
Harry L. Palmer	Missouri State Steward
David L. Engeman	Grievant

ISSUE: Article 16, Sections 1 and 6 -- Removal for theft; Claim Employer violated contractual due-process requirements.

Jonathan Dworkin, Regional Arbitrator
16828 Chagrin Boulevard
Shaker Heights, Ohio 44120

BACKGROUND OF DISPUTE

Grievant was a Rural Letter Carrier employed at the Lowry City Station of the Kansas City, Missouri Post Office. On February 7, 1984, he opened an undeliverable parcel containing a five-dollar bearer refund check from Standard Brands, Inc., and a fifty-cent piece. He cashed the check and kept the half dollar. What he did not know was that the parcel was "bait" which had been placed in the mail stream by the Postal Inspection Service. From time to time, test mailings of this kind are used to assess employee honesty and identify thieves. Test mail is generally misaddressed or otherwise undeliverable items which appear valuable. When Grievant failed to return the parcel to the post office for processing, the Inspection Service targeted him for further investigation. Two "live" tests were administered. In a "live" test, a suspect is placed under surveillance while s/he is handling test mail. Grievant passed both tests; he returned the undeliverable items to the post office without disturbing them.

The investigation ended in mid-April, 1984. The suspicion that Grievant took the test parcel from the mail stream on February 7 was confirmed when the five-dollar check was recovered. It had been negotiated and bore Grievant's endorsement. On April 13, while he was delivering mail, Grievant was arrested by a postal inspector. He was taken to the post office where he made a voluntary confession. He was cooperative and remorseful. His statement went beyond the matter at hand -- theft of mail; he also admitted to unauthorized curtailments. On several previous occasions,

he postponed delivering magazines in order to read them himself. Grievant's statement concluded with an expression of his willingness to make restitution for what he had stolen.

On April 13, the Inspection Service reported its findings to the Lowry City Postmaster. Upon the advice of a labor relations representative of the Kansas City Management Sectional Center (MSC), the Postmaster immediately placed Grievant on emergency suspension. On April 19, she mailed a Notice of Proposed Removal to the Employee citing both theft of mail and curtailments of magazines as the reasons for the action. On May 27, 1984, the MSC Postmaster issued a Letter of Decision stating that the removal would be effective on June 1.

Grievances were initiated challenging both the emergency suspension and the removal. They remained unresolved and the Union processed an appeal to arbitration. A hearing was convened in Clinton, Missouri on December 18, 1984. Throughout the preliminary levels of the grievance procedure, the Postal Service maintained that the grievances were untimely and should be dismissed on that account. However, the objection was waived at the outset of the hearing, and the Employer stipulated to the Arbitrator's authority to decide the case on its merits.

ISSUES

Article 16, Section 1 of the Agreement binds the Postal Service to certain principles in exercising its disciplinary authority. The Section requires that discipline be administered correctively, not punitively, and

provides that no employee may be disciplined or discharged without just cause. In any dispute of this kind, a paramount issue is whether the Employer's action conformed to the restrictions on Management Rights set forth in Article 16, Section 1. In this case, however, the Union introduced a procedural issue which must be resolved before the question of just cause may be addressed. The Union maintains that the manner in which the removal was imposed violated Grievant's negotiated rights to "due process." The argument centers on Article 16, Section 6 of the Agreement which provides:

> Section 6. Review of Discipline
>
> In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or the designee.
>
> In associate post offices of twenty (20) or less employees, or where there is no higher level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken.

The proposal to remove Grievant was signed by the Lowry City Postmaster and received the concurrence of the MSC Manager of Associate Office Services. The Lowry City Station has fewer than twenty employees, and the procedure ostensibly conformed to the second paragraph of Article 16, Section 6. However, the Union contends that the proposal did not in fact originate with the Postmaster -- that it was initiated by a higher-level authority who instructed the Postmaster to sign it. According to the Union,

the Postmaster merely followed the directive of her MSC superior when she executed the Notice. The Union regards this chain of events as violating substantive protections which Grievant was contractually entitled to receive. In the Union's view, Article 16, Section 6 was designed to create a buffer against the possibility of injudicious or excessive disciplinary penalties. It is contended that the provision requires that disciplinary proposals begin at the local level where Supervision is best acquainted with the record of an employee and best able to judge what would constitute a sufficiently corrective response to misconduct. Higher-level authority does not enter the picture until after local Supervision makes a disciplinary decision, and its function is limited to concurring or dissenting. The Union maintains that the manner in which Grievant's removal was issued bypassed the prescribed procedure and eliminated the negotiated buffer. It concludes for this reason alone the grievance should be sustained, notwithstanding the Postal Service's reliance upon what appears to have been ample just cause for the discharge.

The Postal Service contends that the Union's position is factually inaccurate. It concedes that the Lowry City Postmaster contacted the MSC for advice when first confronted with proof of Grievant's theft. It urges that she acted responsibly in doing so. She had no experience in dealing with employee misconduct of this magnitude and, according to the Postal Service, seeking input from labor-relations professionals at the MSC was a prudent thing for her to do. The Employer unqualifiedly denies, however, that the Postmaster acted under instructions, or that anyone other than she initiated the removal. Although the MSC admittedly drafted the Notice of

Proposed Removal for the Postmaster's signature, it is contended that the ultimate decision was hers, and she had authority to sign and issue the notice or impose a lesser penalty as she saw fit. According to the Postal Service, the Union's procedural argument should be dismissed because the initiation and concurrence attending this discharge were entirely consistent with the language and intent of Article 16, Section 6.

"DUE PROCESS:"
FACTS, ARGUMENTS AND CONCLUSIONS

The Postmaster learned of Grievant's misconduct on April 13 when the inspector in charge of the investigation presented her with a copy of the signed confession. Until then, she held Grievant in reasonably high regard and believed that he was a conscientious, trustworthy individual. Even when confronted with the facts, she was unaware of the gravity of the offense. She undoubtedly knew that discipline was warranted, but she did not realize that removal was a viable possibility. She had no meaningful understanding of the Postal Service's policy in matters such as this because she had never before been called upon to deal with a serious disciplinary event.

The Postmaster obviously was in need of guidance. The first counsel she received was gratuitous. The postal inspector who developed the case against Grievant told her the employee was guilty of a felony and he defined the word, "felony" for her. He told her Grievant's discipline would be a matter of policy and that she should contact the MSC for advice. The

Postmaster complied. She spoke with a labor relations officer of the MSC who informed her that the proper procedure was to verbally place Grievant on emergency suspension at once. According to the Postmaster's testimony, The MSC representative told her that Grievant "had to be discharged." When the conversation ended, it was understood that the MSC would prepare the formal notices of suspension and discharge and send them to the Postmaster for signature.

The Postmaster did as she was told. She instituted the emergency suspension on April 13 and, when the disciplinary letters arrived, she signed and delivered them to Grievant. The critical question to be resolved here is whether the Postmaster acted on her own volition after soliciting and considering advice, or whether she merely followed instructions from the MSC. The answer lies in the Postmaster's perception of her function and authority at the time, and in this regard her testimony was illuminating. When asked why she issued a removal against Grievant rather than selecting a more moderate form of discipline, her response was that the Employee committed a "felony offense." Notably, the Postmaster made no mention of reviewing Grievant's employment history, nor did she indicate that she paid any attention to the possibility of corrective discipline. The record contains no testimony that she herself weighed the interests of the Postal Service against retaining Grievant or that she considered any of the other factors which are recognized ingredients of a decision to remove an employee. In fact, the Postmaster admitted that for approximately a week following her conversation with the MSC officer, her sympathies were with Grievant and she felt that the discipline was too harsh. She reconsidered her feelings

after receiving the written disciplinary notices and, in her words, "I concurred with the decision."

From the Employer's point of view, the Postmaster's testimony was unfortunate. The comment that she concurred in the discipline was probably a misstatement brought about by pressures of the moment. The arbitration forum was unfamiliar to her, and cross-examination was a new experience. Certainly that single statement could not be the sole premise for a determination that the decision was not the Postmaster's. However, the record confirms that what she said was in concert with the facts. The decision to discharge Grievant was not made at the local level; it was made by labor relations officers at the MSC. It is clear that the Postmaster exercised no independent judgment. When she signed the disciplinary notices, she was following instructions. The evidence does not even suggest that she had or believed she had authority to do anything contrary to MSC directions. She was told that Grievant "had to be removed," and from then on the decision was no longer hers.

Article 16, Section 6 of the Agreement requires discipline to be proposed by lower-level Supervision and concurred in by higher-level authority. The requirement was omitted in this instance. The remaining question is whether this technical omission was fatal to the Postal Service's attempt to protect itself and the public against a thief. The Union argues that it bargained for a two-step procedure which includes both a lower-level proposal and higher-level concurrence before discipline may be imposed. It maintains that the Employer's failure to follow the contractual mandate breached Grievant's substantive due-process entitlement and nullified the discipline.

The Union submitted several prior arbitral decisions in support of its position. One was issued by Arbitrator J. Fred Holly in a dispute between the Metairie, Louisiana Post Office and the National Association of Letter Carriers (Case Nos. S8N-3D-D 30492 & 30493; Decision issued January 15, 1982). In that case, the Union alleged that several procedural defects including lack of concurrence called for overturning a discharge. Arbitrator Holly was not absolute in his statement that such defects are necessarily fatal to discipline. What he did say was that the parties do not have the right to bypass or ignore contractually prescribed procedures and that a grievance will be sustained on such grounds if contractual omissions prove prejudicial to an aggrieved employee.

A decision by Arbitrator Nicholas H. Zumas contains what is perhaps the clearest, least equivocal statement of the principle relied upon by the Union (Case No. E1R-2F-D 8832, Decision issued February 10, 1984). The dispute stemmed from the removal of a rural letter carrier in the Fleetwood, Pennsylvania Post Office. When postal customers accused the employee of sexual harassment, the local postmaster did not know how to proceed so he contacted the Lancaster Pennsylvania MSC. The MSC took over. It drafted a notice of removal and instructed the postmaster to issue it to the employee. Arbitrator Zumas' finding of facts highlighted the postmaster's lack of participation in the removal decision:

> [The local postmaster] testified that he made no decision or recommendation to terminate Grievant. His superiors at the Lancaster MSC did not, according to [the postmaster], ask him what he thought about the case, but he agreed later with their decision to terminate.

Arbitrator Zumas concentrated on Article 16, Section 6 of the Agreement which he held to be a guarantee of "due process" in discipline matters. He found that the employee's procedural rights were violated and that the breach nullified the removal. He reasoned:

> Implicit in the language of Article 16(6) is the requirement that a supervisor (or a postmaster in a small installation) make a recommendation or decision as to the imposition of discipline before referring the matter for concurrence to higher authority. * * * It follows that the decision to impose discipline or the nature of the discipline may not be initiated, as in this particular case, outside the installation by higher authority. As outlined above, [the postmaster] made no recommendation and no decision with respect to disciplining Grievant; he merely concurred in the termination decision after it came down from the Lancaster MSC. Failure to carry out his responsibility under the National Agreement rendered [the postmaster's] issuance of the Notice of Removal a nullity.

The Postal Service vigorously disagrees with Arbitrator Zumas' interpretation of Article 16, Section 6. It argues that misconduct as serious as Grievant's is amenable to a national disciplinary policy and should not be left to the kind of patchwork inconsistencies which would result if Supervision of small local stations were solely responsible for dealing with such problems. The Lowry City Post Office where Grievant was employed is one of the smallest in the country. Its workforce consists of the Postmaster and one rural letter carrier. The Postmaster was not adequately equipped to react properly when she learned of Grievant's violation, and it is argued that turning for guidance to MSC labor relations experts was entirely reasonable.

A decision by Arbitrator Marshall J. Seidman firmly supports this argument (Case No. C1R-4B-D 15005; Decision issued August 1, 1983). The case arose in the Coloma, Michigan Post Office, a tiny installation, and involved the discharge of a rural letter carrier who had been a postal employee for nineteen years. The ground for removal was theft of mail. During his ten years of service at Coloma, the local postmaster never had occasion to deal with serious disciplinary occurrences, and he was at a loss as to how to proceed. Moreover, he had known the employee for twenty years and, previous to the incident, had a high regard for what he believed was her integrity and honesty. He was emotionally unable to make a decision when the theft was first brought to his attention. His dilemma was described by Arbitrator Seidman as follows:

> Gearhart [the postmaster] was so shocked and surprised by the incident that he was unable to make a rational decision as to the disciplinary action to be taken against Stewart [the grievant] under the then existing circumstances. Because of his twenty year friendship with Stewart and her exemplary record in the Post Office Gearhart did not wish to make a decision which would adversely affect her employment unilaterally; didn't want to make a recommendation that she should be discharged; was willing to have her continue as a Postal employee; and was so emotionally involved that he was unable himself to make either a recommendation or a decision regarding discipline for Stewart.

Uncertainty led the postmaster to call a labor relations representative in the Kalamazoo, Michigan MSC for a recommendation. He was told that Postal Service policy called for removal and that an immediate emergency suspension was advisable. Following the conversation, the MSC drew up the

letter of charges and forwarded it to the postmaster for signature and service upon the employee. The postmaster followed the advice because, as determined by Arbitrator Seidman, he agreed with it.

Arbitrator Seidman held that the procedure did not violate Article 16, Section 6 of the Agreement. He concluded that removal essentially was the decision of the postmaster. His analysis of the facts leading to this conclusion was basic to his award denying the grievance. He noted:

> When the [Postal Inspection Service] report was received and discussed with the Sectional Center the doubt Gearhart earlier had felt, based on his long term personal relationship with Stewart which made his initial reaction primarily emotional rather than intellectual in character, the passage of time which gave the opportunity to reflect upon the circumstances, and the availability of the written Postal Inspectors report caused Gearhart to accept the recommendation of the Sectional Center that discharge was the appropriate penalty in such circumstances. Gearhart therefore signed the form prepared for him.
>
> The mere fact that the letter was drafted by Foster [the Sectional labor relations representative] and typed in the Sectional Center does not necessarily mean, as the Union contends, that it was Foster's decision rather than Gearhart's which resulted in the discharge of the grievant. Gearhart received the letter, reviewed it, and signed it because he agreed with its statements of fact and its conclusion. This did not mean that the decision was not his. Foster did not threaten him with disciplinary action if he changed the letter as submitted or if he declined to sign it on the ground either that its facts were incorrect or that its conclusion was inappropriate.

The Union maintains that the Seidman decision is erroneous. Based on its arguments, the Union appears to contend that conceptualization of and proposal for discipline must be entirely local Supervision's without any interference, assistance, or advice from higher level authority. Applying

the argument to this case would require a ruling that, once the Lowry City Postmaster discussed her problem with the MSC, Grievant could no longer be subjected to discipline for stealing mail. The Arbitrator does not agree. Moreover, he does not find the opinions of Arbitrators Zumas and Seidman irreconcilable. Both decisions implicitly hold that local Supervision is solely responsible for determining whether misconduct warrants discipline and, if so, how much discipline should be applied. The ruling in each case acknowledges this principle, and the differences in the awards are responsive to different findings of fact. Arbitrator Zumas found that the disciplinary decision was made by the Lancaster MSC without judgment or meaningful input by the Fleetwood Postmaster. Arbitrator Seidman held that, while the Coloma Postmaster sought and received advice from the Kalamazoo MSC, it was his own decision to propose the removal.

This Arbitrator does not find fault with the Postal Service's contention regarding the propriety of labor relations personnel advising inexperienced supervisors in serious disciplinary matters. The Postal Service's desire to ensure uniformity of treatment by establishing a national policy for dealing with certain kinds of misconduct is reasonable. However, when higher-level authority does more than advise: when it takes over the decision-making role and eliminates the contractual responsibility of local Supervision -- and then concurs in its own decision -- a substantive due-process violation occurs.

Such violation cannot be overlooked as a mere technicality. The negotiated bi-level disciplinary procedure provides a unique protection for employees. It cannot legitimately be disregarded, and the Employer's neg-

lect to follow it creates a breach of contractually established due process requirements of such importance as to require that the resulting discipline be overturned. The evidence in this case confirms that the decision to discharge Grievant was wholly made and concurred in by the MSC without any discretionary judgment by the Lowry City Postmaster. Under these circumstances, the Arbitrator finds that he has no alternative other than to sustain the grievance.

REMEDY

In a dispute substantially similar to this, Arbitrator J. Earl Williams held that the Postal Service's failure to follow Article 16, Section 6 required reinstating an employee (Case Nos. S8N-3W-D 28220, 29835, 29834 & 30217; Decision issued December 9, 1981). Arbitrator Williams expressed his own belief that checking with higher authority was "a positive act," but nevertheless concluded:

> Despite the strong feelings of the Arbitrator in this regard, he still is bound by the contract between the parties, and the inherent informality of the smaller post offices cannot be utilized as justification for due process violations.

Arbitrator Williams did not end his analysis at that point. He fashioned an award which was designed to correct the "imbalance" which, in his opinion, would result if the grievant were awarded lost wages. He ordered reinstatement without back pay on the following basis:

> Even though the absence of due process in certain vital aspects mandates the return of the grievant to the job, it does not follow automatically that back pay should be received. For example, there was no evil intent or malice aforethought on the part of Management. It is apparent that the Postmaster's feeling was that this was the only solution to what, admittedly, could be classified as a serious infraction. While this does not allow the Arbitrator to dismiss the lack of due process, when this intent to act in good faith is coupled with at least some contribution to the situation on the part of the grievant, equality of justice would not be served by back pay awards.
>
> In addition, the grievant must accept some responsibility for presenting mitigating factors or evidence that he is not guilty. He cannot sit back passively and, in effect, rely upon technical violations to resolve the grievance in his favor. Yet, this essentially is what happened in the subject case . . . .

Arbitrator Williams' concept of providing more perfect justice is inviting. The Employee is an admitted thief. Although the Union presented volumes of evidence and a mass of testimony designed to induce mitigation of the penalty, the presentation fell short of convincing the Arbitrator that Grievant did not earn his removal. Grievant's reinstatement will be premised entirely upon a procedural defect. Because of a technical omission (although not a trivial one), the Postal Service will be forced to retain an employee who violated the single most fundamental responsibility of a rural letter carrier. An individual who cared so little about his oath of office as to steal $5.50 will have to be entrusted with mail again.

It is distasteful to this Arbitrator to be compelled not only to reinstate Grievant, but also to require the Postal Service to pay him thousands of dollars in wages for time he did not work; for time that he was justifiably not permitted to work because he was a proven thief. The Williams deci-

sion, therefore, presents an extremely attractive alternative. The result of following it would be far more just and far more consistent with this Arbitrator's personal sense of morality. However, without intending to unduly criticize what Arbitrator Williams did, this Arbitrator finds that the "split" award was plainly erroneous because it exceeded universally recognized restrictions on arbitral jurisdiction. Arbitrators do not legitimately sit as independent judges of what is or is not ethical in industrial relations. The collective bargaining agreement which creates the office of an arbitrator confines the authority of that office. Arbitrators do not have the right to venture into considerations which are not contractual. This principle was unequivocally pronounced by the United States Supreme Court in the 1960 "Steelworkers Trilogy" in which it was held:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. United Steelworkers of America v Enterprise Wheel and Car Corp., 363 U.S. 593, 597 (1960)

The Court's statement has stood undisturbed as an arbitration guidepost for a quarter century. It must be followed in this case. This means, once it was determined that the discipline imposed on Grievant was contractually improper because it lacked substantive due process, the Arbitrator's power to explore the merits ended. Since a suspension would have

required the same adherence to Article 16, Section 6 as did the removal any penalty involving time off without pay would have been unsupportable unless the requisite procedures were followed. Therefore, even though an award of back wages will be manifestly unjust, that is the award which must be made.

AWARD

The grievance is sustained. The Postal Service is directed to reinstate Grievant's employment and restore his losses. In accordance with 15, Section 5A of the Agreement, the Arbitrator's fees and expenses are assessed against the Postal Service.

Decision Issued
January 12, 1984

Jonathan Dworkin, Arbitrator

REGULAR ARBITRATION PANEL

C# 06530

In The Matter of Arbitration Between:

UNITED STATES POSTAL SERVICE)
)
and)
)
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO)

Re: Opinion and Award
W. Cleveland
Knoxville, TN
S4N-3F-D 29534

APPEARANCES:

For the Service:

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Labor Relations Representative
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For the Union:

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I. BACKGROUND

This case arose under the current collective bargaining agreement. A grievance was filed on or about April 8, 1986 and duly processed to this arbitration under the Agreement. A hearing was held on September 11, 1986 in Knoxville, TN at which time the parties introduced their evidence, examined all witnesses and argued their respective positions. The issues presented at the hearing were:

(1) Whether the Service violated the Grievant's due process rights and, if so, what shall be the remedy and;

(2) Whether the Service removed the Grievant for just cause and, if not, what shall be the remedy.

The parties concluded the hearing with oral argument.

II. FINDINGS

On or about 1:15 P.M. on March 10, 1986, the Grievant's Station Manager received a telephone call from a lady at Sutter's Mill Apartments. She reported noticing bundles of Red Food advertising circulars along with East Towne Mall circulars in a dumpster next to one of the mail rooms at the apartments. The Station Manager went to the mailroom at these apartments and discovered the Red Food and East Towne Mall circulars in the dumpster next to the mailroom. Each of the circulars were part of a bundle and had individual addresses on the Grievant's route. The Station Manager collected the 306 circulars and learned that none of the residents served by this mail room received any Red Food or East Towne Mall circulars. Later the Station Manager saw the Grievant who had the only key and asked him to open the mailroom. He opened it and the Station Manager noticed no Red Food or East Towne Mall circulars were in any individual boxes. The Grievant locked the mailroom and proceeded on his route. The Station Manager also learned that the mailroom before the second mailroom was stuffed with Red Food And East Towne Mall circulars. Apartments on the route after the second mailroom did receive both circulars. In any event the Station Manager returned to his

branch and telephoned the Manager of Stations/Branches who said he would contact the Postal Inspectors about this matter. After receiving no word from the postal inspectors, the Station Manager decided to call a meeting and confront the Grievant on March 13, 1986.

In addition to the Station Manager and the Grievant, the NALC Steward and the Grievant's immediate Supervisor were present. The Station Manager conducted the meeting. The Grievant was asked why customers receiving mail from the second mailroom at the apartments had not received their advertising circulars. The Grievant denied knowing they failed to receive those circulars. He further denied knowing how these circulars got into the dumpster. The Station Manager faced with these denials accused the Grievant of being "coached well." At this point the Grievant's immediate Supervisor suggested ending the meeting and it was adjourned.

The Grievant's Supervisor and the Station Manager discussed disciplining the Grievant. The Station Manager proposed removing the Grievant and the Supervisor concurred. On March 24, 1986 a "Notice of Proposed Removal" charging the Grievant with "throwing away deliverable mail" was issued by the Grievant's immediate Supervisor. On April 25, 1986 a notice of removal was issued by the Acting Sectional Center Manager/Postmaster. The Grievance protesting the proposed removal was filed on April 9, 1986. At the Step 1 grievance meeting the Grievant's Supervisor was asked:

> Q. Do you have full authority to resolve this grievance including removing the proposed letter of removal?
>
> A. No.

According to the Supervisor at a later time, he thought the

Grievant was responsible so he had no inclination to change the removal discipline. Now, this Grievance has been processed to this arbitration.

III. POSITION OF PARTIES

Management contends the evidence is clear and convincing that the Grievant wrongfully threw away deliverable mail. On March 10, 1986 the advertising circulars addressed for the Grievant's route were delivered at the first mailroom and after the second mailroom. Three hundred and six advertising circulars were found on the 10th in a dumpster next to the second mailroom. These circulars were bundled and addressed to customers obtaining their mail from these mail boxes on the Grievant's route. This uncontroverted evidence is sufficient to sustain the charge against the Grievant. With respect to the Union's due process argument, management simply contends the Grievant's Supervisor was not inclined to modify the removal even if he did have the authority.

The Union, on the other hand, argues that the Grievant's due process rights have been violated. According to the Union the Grievant's Supervisor did not have the authority to settle the Step 1 grievance. This lack of authority constituted a violation of Article 15, Grievance-Arbitration Procedure, Section 2(b).

The Union resisted the charge against the Grievant on its merits. The investigation was shabby by an untrained Station Manager. The Inspection Service never conducted an investigation. Management simply has not met its burden of proof. Nobody saw the Grievant put any mail in the dumpster. All of the evidence is just circumstantial. It is not clear and convincing evidence.

IV. DISCUSSION

The threshold issue in this case is whether the Service violated the due process rights of the Grievant and, if so, what shall be the remedy. Article 15, Grievance-Arbitration Procedure, provides in Section 2(b) that:

> (b) In any such discussion (a Step 1 grievance meeting) the Supervisor shall have authority to settle the grievance. The Steward or other Union representative likewise shall have authority to settle or withdraw the grievance in whole or in part. No resolution reached as a result of such discussion shall be a precedent for any purpose.

This language is applicable to this case.

In this case the Station Manager discussed possible discipline with the Grievant's Supervisor. The Station Manager proposed removing the Grievant. His proposal was accepted by the Grievant's Supervisor. The proposed removal letter was sent over the Grievant's Supervisor's signature. The decision to remove was sent out over the Acting Sectional Manager/Postmaster signature. When first asked, the Grievant's Supervisor at the 1st Step meeting admitted he did not have the authority to revoke the proposed removal.

The parties in their infinite wisdom have negotiated a provision placing the initial authority and responsibility for administering discipline on an employee's Supervisor. In the same paragraph the Union agreed its Stewards would have the same authority to settle grievances. Apparently, the parties wanted all to know including Supervisors and Stewards that they should exercise their authority and settle cases at the first step of the grievance procedure. This contractual pronouncement encourages early settlement of

disputes by both parties, certainly an enviable purpose. At the same time management sought preliminary review of suspension or discharge discipline proposed by a Supervisor. Article 16, Section 8 provides:

> In no case may a Supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

This language requires a Supervisor to obtain concurrence from a higher authority before imposing suspension or discharge discipline.

The parties, however, said nothing about the remedy when a Supervisor or Steward was deprived of or failed to exercise such authority. For example, Article 15, Section 3(b), provides that the failure to meet a prescribed time limit in the grievance procedure constitutes a waiver of the grievance, while the failure of management to schedule a prescribed meeting simply moves the grievance to the next step under Article 15, Section 3(c). In the absence of such remedial language arbitrators are left to fashion suitable remedies.

Arbitrator J. Fred Holley, (Case Nos. S8N-3D 30492 and 30493, 1982) held that parties did not have the right to ignore contract procedures and a grievance could be sustained simply on this procedural charge. Arbitrator Nicholas H. Zumas, (Case No. E1R-2F-D 8832, 1984) held that a Grievant's "due process" rights were violated so a resulting removal was a nullity. Arbitrator Marshall J. Seidman, (Case No. CIR-4B-D 15005, 1983) supports this reasoning, but concluded in his case the Supervisor did propose and concur in the discipline recommended. Arbitrator Jonathan Dworkin, (Case Nos. CIR-4H-D 31648 and 31707, 1985), reviewed these prior cases and stated at p. 12:

> This Arbitrator does not find fault with the Postal Service's contention regarding the propriety of labor relations personnel advising inexperienced supervisors in serious disciplining matters. The Postal Service's desire to insure uniformity of treatment by establishing a national policy for dealing with certain kinds of misconduct is reasonable. However, when higher-level authority does more than advise: when it takes over the decision-making role and eliminates the contractual responsibility of local supervision - and then concurs in its own decision - a substantive due process violation occurs.

Arbitrator Dworkin then concluded the grievance must be sustained and the grievant reinstated with back pay. Before reaching this conclusion Arbitrator Dworkin reviewed the "split award" approach of Arbitrator J. Earl Williams, (Case Nos. S8N-3W-D 28220, 29835, 29834 and 30217, 1981), and rejected it on the grounds of the "Steelworkers Trilogy" cases confining arbitrators to the interpretation and application of the collective bargaining agreement, not dispensing their brand of industrial justice.

Arbitrators have long recognized that conditions precedent to arbitration must be met before a grievance is arbitrable. For example, time limits for each step in the grievance process must be met by the Union. A grievance must be reduced to writing and include certain information. If a Union and Grievant fail to comply with these formalities, their case is denied on procedural grounds when it is held not to be arbitrable. In other words, the Union and Grievant may lose a meritorious case simply because they did not follow the procedural conditions precedent to arbitration. The parties negotiate and adopt these procedures. Arbitrators will enforce them.

Traditionally, the Union is the active party moving a grievance through the applicable procedures. Management plays a passive role for the most part. Except for holding grievance meetings and supplying answers at each step, management traditionally has not been subject to procedural conditions precedent to arbitration. Faced with management's failure to hold prescribed grievance meetings or supply required answers, Arbitrators often overlooked these violations, simply requiring a Union to move to the next step in the grievance procedure. Management still was permitted to resist a grievance in arbitration despite failing to perform one or more of the grievance formalities adopted in the agreement. Such results deprive a Union and Grievant of the benefits of their bargain. Unions negotiate grievance formalities applicable to management to enhance the possibilities of settlement in the earlier stages of the grievance-arbitration process. A management who disregards these formalities deprives a Union of possible settlement opportunities. Such a management fails to comply with the conditions precedent to arbitration. They should be barred from presenting their case or asserting a defense in arbitration, just like a Union is barred from presenting its claim or defense in arbitration when it fails to meet time limits or other conditions precedent to arbitration.

In this case the collective bargaining agreement sets out quid pro quo grievance formalities. The Supervisor and Steward must have the authority to settle a grievance at Step 1 meetings. If the Steward does not have the authority to settle a Step 1 grievance, the Union has failed to satisfy one of the conditions precedent to arbitration. If the Supervisor does not have the authority to settle a Step 1 grievance, management has failed to satisfy one of

the conditions precedent to arbitration. In the event of a dispute regarding the authority of a Steward or Supervisor at Step 1, management has the burden of showing its Supervisor had the requisite authority, while the Union has the burden of proving its Steward had the required authority. The party failing to prove the authority of their representative would be barred from presenting their claim or defense in arbitration.

In this case management must prove by a preponderance of the evidence that its Supervisor had the authority to settle this case at Step 1. In the Step 1 meeting the Supervisor was asked if he had the authority to resolve this grievance and he answered, "no." Management's Station Manager testified he proposed the Grievant's removal and the Supervisor concurred. Under these circumstances the only inference is the Supervisor did not have the requisite authority. At the arbitration hearing management attempted to gloss over this fact by contending the Supervisor was not inclined to modify the discipline, but he had the necessary authority. This belated attempt to prove this condition precedent was ineffective. At the Step 1 meeting the Supervisor did not understand he had the necessary authority. As a result, Management is barred from proving its case in arbitration. The Grievance, therefore, must be sustained in its entirety.

The parties have adopted the language requiring settlement authority at the initial step of grievance procedures. They are encouraging Supervisors and Stewards to resolve grievances. They both risk having their representatives misunderstand their authority. They both risk the consequences of failing to communicate and train

first line representatives. Their language created these risks. Arbitrators are confined to interpreting and applying this language regardless of the merits of any grievance.

V. AWARD

The Grievance is hereby sustained in accordance with the opinion. The Grievant shall be reinstated with full seniority and back pay minus any unemployment compensation or earnings from other employment.

This the 7th day of October, 1986.

Robert G. Williams

Robert G. Williams

Charlotte, N.C.

C#07381

REGULAR REGIONAL ARBITRATION PANEL

N. A. L. C.

Arbitration between

UNITED STATES POSTAL SERVICE Montgomery, Alabama and NATIONAL ASSOCIATION OF LETTER CARRIERS	Opinion and Award pertaining to S4N-3D-D 37683 T. Jacobs/Discharge

ARBITRATOR: J. Earl Williams

HEARING

The hearing of the subject matter in arbitration was held at the Executive Offices of the Post Office in Montgomery, Alabama, on April 9, 1987. Briefs were filed by the parties in due course.

APPEARANCES

For Management: Roy D. Phillips
Manager, Labor Relations
Birmingham Division
United States Postal Service
Birmingham, Alabama 35203-9998

For the Union: Collier M. James
Regional Administrative Assistant
National Association of Letter Carriers
BNA Corporate Center
Building 200, Suite 311
Nashville, Tennessee 37217

BACKGROUND

A notice of proposed removal, dated August 18, 1986, signed by Acting Station Manager Melvin Lowe, was received by the grievant. In relevant part (JX 2), it stated the following:

> This is advance notice that it is proposed to remove you from the Postal Service no sooner than 30 days from the date of your receipt of this letter.
>
> This action is based on the following reasons:
>
> > There is reasonable cause to believe you have committed a crime for which a sentence of imprisonment may be imposed.
> >
> > Specifically, on November 6, 1985, a confidential informant contacted you at the South Station Post Office, telephone number 284-3811, and made arrangements to meet with you on your route that day to purchase marijuana. The confidential informant met you at a location near your route while you were in the performance of official duties as a city carrier in a U. S. Postal Service uniform and driving a U. S. Postal Service jeep, and you delivered 25.24 grams of marijuana for $75.00 cash. The substance purchased on November 6, 1985, was sent to the Postal Inspection Service Crime Laboratory, Washington, D.C. for examination. Laboratory analysis determined that the substance was marijuana and weighed 25.7 grams loose in the bag and 0.17 grams rolled into a cigarette for a total of 25.24 grams.
> >
> > On November 13, 1985, the confidential informant met with you at the same location near your route and purchased 20 Valium tablets from you for $40.00 cash. You were in the performance of official duties as a city carrier in your U. S. Postal Service uniform and were driving a U. S. Postal Service

jeep at the time of the transaction. Prior to meeting on November 13, 1985, the confidential informant contacted you at South Station Post Office, telephone number 284-3811, and dicussed the purchase with you. The substance purchased on November 13, 1985, was sent to the Postal Inspection Service Crime Laboratory, Washington, D.C. for examination. A tablet was analyzed and found to contain Diazepam. The markings and contents of the tablet were found to be consistent with the commercial product, Valium.

On November 22, 1985, the confidential informant met you while you were off duty and off Postal premises and made a purchase of 8.19 grams of marijuana from you for $15.00 cash. The substance purchased on November 22, 1985, was sent to the Postal Inspection Service Crime Laboratory, Washington, D. C. for examination. Laboratory analysis determined that the substance was marijuana and weighed 8.19 grams.

On December 2, 1985, the confidential informant met with you and delivered $200.00 cash to you to pay for the delivery of 2 grams of cocaine. On December 3, 1985, at approximately 7:34 a.m., the confidential informant met you in the lobby of the South Station Post Office, and the cocaine, contained in two aluminum foil packets, inside an envelope, was delivered to the confidential informant. You were on duty and in uniform at South Station at that time. The substance purchased on December 2, 1985, was sent to the Postal Inspection Service Crime Laboratory, Washington, D. C., for examination. Laboratory analysis revealed the presence of cocaine hydrochloride and mannitol in both of the individual packets. One packet was found to contain 0.97 grams with a 32% content of cocaine hydrochloride, and the second packet was found to contain

> 1.04 grams with a 30% content of cocaine hydrochloride.
>
> On August 13, 1986, the Grand Jury in the United States District Court for the Middle District of Alabama, Northern Division, Montgomery, Alabama, returned a 3-count indictment, No. 86-105-N, charging you with Possession with Intent to Distribute.
>
> Your actions cited above, in addition to being criminal activities, are also serious violations of the Employee and Labor Relations Manual, Part 661.53 and 661.55.

There being no resolution of the grievance, which was filed, it led to the subject arbitration.

ISSUE

Immediately prior to the start of the hearing, the parties agreed to the following statement of the issue:

> Did Management violate the Agreement, when it discharged the grievant? If so, what is the appropriate remedy?

LANGUAGE REFERENCED BY THE PARTIES

ARTICLE 15

GRIEVANCE-ARBITRATION PROCEDURE

* * *

Section 2. Grievance Procedure--Steps

Step 1:

* * *

(b) In any such discussion the supervisor shall have authority to settle the grievance. The

steward or other Union representative likewise shall have authority to settle or withdraw the grievance in whole or in part. No resolution reached as a result of such discussionn shall be a precedent for any purpose.

* * *

Step 2:

* **

(d) . . . The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31. . . .

* * *

Section 3. Grievance Procedure--General

(a) The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end.

ARTICLE 16

DISCIPLINE PROCEDURE

Section 1. Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules

and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

* * *

Section 5. Suspensions of More Than 14 Days or Discharge

. . . When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the Employer is not required to give the employee the full thirty (30) days advance written notice in a discharge action, but shall give such less number of days advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

* * *

Section 8. Review of Discipline

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

ARTICLE 17

REPRESENTATION

* * *

Section 3. Rights of Stewards

* * *

The steward, chief steward or other Union representative properly certified in accordance with Section 2 above may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary

for processing a grievance or determining if a grievance exists and shall have the right to interview the aggrieved employee(s), supervisors and witnesses during working hours. Such requests shall not be unreasonably denied.

EMPLOYEE & LABOR RELATIONS MANUAL
(JX 2)

661.5 Other Prohibited Conduct

* * *

.53 Unacceptable Conduct

No employee will engage in criminal, dishonest, notoriously disgraceful or immoral conduct, or other conduct prejudicial to the Postal Service. Conviction of a violation of any criminal statute may be grounds for disciplinary action by the Postal Service, in addition to any other penalty by or pursuant to statute.

* * *

.55 Illegal Drug Use

Illegal use of drugs may be grounds for removal from the Postal Service.

CONTENTIONS OF MANAGEMENT

Management indicated that there had been a 9-month investigation by Postal Inspectors at the Montgomery Post Office which resulted in six postal employees' being indicted by the Grand Jury with intent to distribute illegal drugs. All except the grievant pleaded guilty. They either received prison sentences or were placed on probation for a three year period. Even though the grievant was exonerated by the court, it took three trials before this came about. Also, the Postal Service

points out that the court is a different forum from an administrative disciplinary arbitration hearing. In addition, the hearing established that, in the court proceedings, the grievant admitted he had distributed at least one drug. He conducted such activities while in a postal vehicle, wearing a postal uniform, and on official duties. Thus, he violated an essential ingredient of the employee-employer relationship of reliability, trustworthiness and honesty to the public. Therefore, Management concludes that the grievant violated Article 16.1 of the Agreement and Sections 661.53 and 661.55 of the Employee and Labor Relations Manual.

While the grievant denied all the charges in the arbitration proceeding, the evidence made clear that he had perjured himself, and, as a result, his character is questionable. So, Management concludes that the Arbitrator should not believe the testimony of the grievant, when he denies such charges. Further, it does not believe that the Arbitrator should consider the charges of the Union to the effect that the confidential informant is not credible. This is a new issue raised by the Union for the first time in arbitration. Also, a Union witness testified that the APWU was aware of the identity of the confidential informant throughout the procedure in their grievances on the same issue. So, it feels that the NALC must have known also. Finally, it suggests that the confidential informant was the primary evidence in the courts; yet, five of

the six were determined to be guilty, apparently there being no problem with the credibility of the informant.

CONTENTIONS OF THE UNION

The Union prefaced its contentions on the merits of the issue with a number of procedural issues. First, it indicated that there was a violtion of the Agreement, because the immediate supervisor did not make the decision and had no authority to settle the grievance at Step 1. Ample evidence was presented by the members of the Union who attended Step 1, and, since Manangement decided not to call the immediate supervisor, Lowe, to testify, the testimony of the Union must stand. It is clear that all he knew was what was in the letter of charges and that he did not initiate the charges. The Union referenced arbitration awards, wherein, even if the supervisors in such cases had testified, if they were not familiar with the issues, and if they had not initiated and had no authority to resolve, the discipline was overturned.

A second procedural argument given by the Union relates to the first, in that it contends that, given the fact the initiation of the grievance and decisionmaking were done at a higher level, there was no way a proper review and concurrence had taken place. This, it says, is a violation of Article 16.8.

A third procedural violation claimed by the Union was that it was denied information, which it had requested. For

example, during the grievance procedure, it received only the letter of proposed removal. Tapes, which allegedly had been made of the grievant's conversations with the confidential informant, were not privileged information, but they were not received by the Union. In such cases, arbitrators have overturned the discipline.

A fourth contention was related closely to the third, in that the Union contends the opportunity to interview the informant was denied. This, it says, is despite the fact that the Postal Inspector had said the investigation was complete. So, there was no reason to deny an interview with the informant.

The fifth and sixth procedural violations contended by the Union are related to its charge that the grievant was not read his Miranda rights and was not given a chance to tell his side of the story. It references Arbitrator Stephens as an example of postal arbitrators' overturning similar cases under such circumstances.

The Union contends that the testimony of the Postal Inspector must be described as hearsay. He was not actively involved in the alleged drug sales. He either did not see the people allegedly involved or, if he did, he did not see any money exchanged. Consequently, most of his information was taken second-hand from the informant. Also, there is a conflict between his court testimony and the Grand Jury. So, the Union

has strong reservations in regard to the Postal Inspector's testimony.

The supervisor and the informant did not testify. Thus, the grievant was not able to face those who had accused him. This is a traditional right of Americans which was violated, and, under similar circumstances, it has been considered hearsay and the discipline overturned.

The Union presented a number of witnesses who challenged the character of the informant and concluded that he had zero credibility.

The final contention of the Union relates to disparate treatment. The Union indicated that a number of employees, who were found guilty of charges similar to those Management alleges the grievant is guilty of, are still employed by the Postal Service. In fact, it indicated that some, who were guilty of similar charges, had been employed after their court appearances.

DISCUSSION

The grievant was discharged based upon the belief of the Postal Service that the grievant had committed a crime for which a sentence of imprisonment may be imposed. The specific charges related to the alleged sale of controlled substances on three occasions, as is spelled out in detail on pages 2-4 above. Most arbitrators have agreed that the drug problem is a cancer upon

society. It seemingly gets worse instead of better. If we do not find a way to control the problem, or at least reduce it to manageable proportions, there is a more than remote possibility that it ultimately will destroy our economy, its productivity, and the way of life we have come to enjoy. There is no doubt that the majority of the population, whether in the work place or as private citizens, are concerned with the problem. There is no doubt that, if there is proof of the sale of controlled substances while in uniform, in a government vehicle and even on postal property, it generally is just cause for immediate discharge, regardless of the past record or length of service of the employee.

However, the problem for the Postal Service began when the grievant was exonerated, in that he was found "not guilty" of all three charges in the criminal court. Management correctly points out that the criminal court is a different forum and that it still has a right to terminate the grievant for "just cause" under the National Agreement. Thus, using a transcript of the grievant's testimony in one of the three trials required before the grievant was found to be totally innocent, it does appear that the grievant admitted at least to purchasing some Valium and giving it to the confidential informant. He maintained, however, that it was a gift to someone he thought was a friend. (MX 3, pp. 8, 27-9) Of course, other transcripts in other trials may have reflected a

different testimony, and the grievant did not admit to the gift at the arbitration hearing. However, this is only the beginning of the problem of supporting "just cause" for termination. For example, Arbitrator Willingham, in NB-C-5359-D, held that, when a grievant is acquitted of criminal charges and his termination is based upon the same events, evidence and witnesses, it does not meet "just cause" requirements. In NC-S-2971-D, the employee was charged with medical fraud as a result of a Department of Labor ruling. However, on appeal, the DOL ruling was reversed. Arbitrator Myers stated:

> Whatever the reasonableness of the Employer's decision to remove may have been as of April 27, 1976, the subsequent reversal of January 1977 does not warrant my finding now that the evidence can support the Employer's removal action beyond a serious doubt. (p. 7)

It should be noted that most arbitrators require a standard of "proof beyond a reasonable doubt" where criminal charges are involved. Or, as Arbitrator Marlatt stated in S4C-3W-D 43087, ". . . the exoneration of the accused employee in the Courts ordinarily removes any justification for continued disciplinary action." (p. 7) It is not impossible to reverse the decision in the arbitration forum as Arbitrator DiLeone did when he concluded, in a case referenced in CIN-4D-D 37460, that the grievant, in fact, had sold drugs. However, Arbitrator Goldstein, who referenced DiLeone's case, stated, "Yet the not guilty finding is admissible into evidence on the record at the

arbitration hearing and constitutes at least one detracting factor against Management's claim that its version of the facts must be credited." (p. 13) It was a strong detraction in his case, for he sustained the grievance fully.

Given the above, Management is faced with an almost insurmountable task. For example, as will become clear in the following discussion, Management, in the subject case, did not have as much evidence or as many witnesses as were present at the criminal trials. This is despite the fact that the charges, upon which the termination was based, are exactly the same as in the criminal trial. Thus, even if one gives full credit to the different forum argument, the fact that the grievant was found "not guilty" in the courts is a greater detracting factor than is usually the case. In addition, the Union raised a large number of procedural and due process questions. While the subject arbitrator often has expressed his displeasure with attempts to win arbitration cases by technical and procedural arguments, rather than the facts of the case, the Union was not basing it entirely on such in the subject case. Also, it is impossible to ignore the arguments, when there are such a large number of them, some of which may be flagrant violations of language contained in the contract or of due process standards. The discussion of such questions follows.

1. Right to Face an Accuser

The proof of the grievant's guilt was based largely upon alleged statements, which may have been written or oral, of the confidential informant to whom the grievant allegedly sold drugs. The Arbitrator assumed that the confidential informant (CI) testified at the trials of the grievant, although there was no specific evidence of same. However, in the arbitration, he received no written statements from the CI, and, unbelievably, the CI did not appear as a witness. Management lawyer Owen Fairweather, in his authorative book entitled Practice and Procedure in Labor Arbitration, indicated that many arbitrators summarily reject statements of an informer who does not appear at the hearing. Further, he states:

> Arbitrators have also declined to uphold disciplinary action based upon statements of an informer who does not testify. They hold that such statements are hearsay and lack probative value because the correctness of the statement cannot be tested by cross-examination. (p. 184)

A postal award of Arbitrator Schedler, S1N-3F-D-42521, falls under this standard. The arbitrator treated the testimony of postal inspectors, who repeated what the accusers had told them, as hearsay, for the accusers did not appear as witnesses. Moreover, he put in proper perspective the right to face an accuser by referencing in detail Amendment VI of the U. S. Constitution and concluding, "The Grievant's right to face his accuser is a constitutional right in criminal law and this

fundamental right is observed in the arbitration of disciplinary grievances." (p. 7) In the subject case, a postal inspector repeated charges allegedly made by the informant, and the Arbitrator must treat them as hearsay. However, the fundamental right of the grievant to face his accuser was violated. In most cases, this factor, standing alone, would be sufficient to overturn disciplinary action.

2. The Role of the Immediate Supervisor

The Union properly referenced Articles 15.2(b) and 16.8. Referring to 16.8, Arbitrator Zumas, in E1R-2F-D 8832, stated:

> Implicit in the language of [Article 16(8)] is the requirement that a supervisor (or a postmaster in a small installation) make a recommendation or decision as to the imposition of discipline before referring the matter for concurrence to higher authority. All such decisions, of course, are subject to review either within or outside the installation depending on the size of the facility. It follows that the decision to impose discipline or the nature of the discipline may not be initiated, as in this particular case, outside the installation by higher authority. (p. 4)

Arbitrator Holly, in many postal awards such as S8N-3D-D-34092, has made clear that there must be evidence of a formal request for discipline by the immediate supervisor and a concurrence by higher level authority. Thus, in the case referenced above, he held it to be a violation when there was not a written record, particularly of the concurrence. Arbitrator Sobel, in a prior case at the Montgomery Post Office, S4N-3D-D-33151, overturned a

discharge based upon fraud re medical conditions. While he did not believe the Postal Service proved the case on the merits, he was particularly thorough and caustic in regard to his conclusion re procedural violations. Among the violations, he concluded that there was no evidence that the immediate supervisor initiated the discipline; thus, it was impossible to meet the requirements of review and concur. Further, Arbitrator Holly, in S8N-3F-D-9885, and other arbitrators including this one, have pointed out that, when the supervisor does not initiate the disciplinary action, he is precluded from meeting the requirements of 15.2(b) which indicate that the supervisor will have the authority to settle the grievance at Step 1.

When one relates the facts in the subject case to the standards above, a number of violations are evident. For example, there was no evidence of any kind to suggest that the supervisor initiated the disciplinary action. The branch president, who assisted the steward at the Step 1 meeting, testified that the supervisor acknowledged he did not initiate the discipline. He allegedly just sat and listened and made no comments. Given this, it is not too surprising that the immediate supervisor did not appear as a witness. Given his absence, the Arbitrator must credit the testimony of the Union. Further, there was not even an attempt to prove that there was a review and concurrence. Perhaps more than most, this Arbitrator has noted the importance and even the necessity for E&LR

involvement in disciplinary matters. Some cases are far beyond the pale of knowledge of an immediate supervisor. Thus, it may be necessary for them to check with E&LR to determine what the standards, rules or regulations are in a particular case. They may even have the letter of proposed discipline written at the E&LR office. However, some independent judgment still must be made by the supervisor, who must determine the discipline, and it must be followed by a formal review and concurrence. If the supervisor in the subject case had appeared, there may have been some evidence to support such an approach in the subject case. However, without such testimony, the Union testimony will be credited. Thus, it follows that 15.2(b) also was violated, for the supervisor had no authority to resolve the grievance at Step 1. The above violations, standing alone, generally would be sufficient to overturn disciplinary action.

3. Denial of Requests for Information and Interviews

The Union appropriately referenced 15.2(d), wherein the parties must exchange all relevant facts, papers, documents, etc. Also, Section 17.3 indicates that the properly certified Union representative shall not be unreasonably denied access to documents, files and records necessary to process a grievance, and it includes the right to interview supervisors, employees and witnesses. The Union indicates that Management did not honor its request for information relevant to the case or to

interview the confidential informant. Management's reply was that the additions and corrections to Step 2 did not indicate that Management had failed to honor such requests. However, the primary basis for noting such an absence is when there is a dispute between the parties as to whether or not certain subjects were discussed at the meeting. Normally, it is not necessary to itemize every comment left out by Management in its Step 2 decision. This is especially the case when the arguments and contentions are extremely well known to the parties. In the subject case, a letter was forwarded to R. B. Geoghagan, who wrote the letter of decision, one day after his decision. It noted his letter stated that he had "thoroughly reviewed the case file and other evidence of record." (JX 2) Consequently, it requested an opportunity to review such evidence and any other relied upon. Management did not dispute Union testimony of the fact that there never was a reply of any kind to its letter. Further, there was Union testimony that, at both Steps 1 and 2, it requested information relevant to the case and an opportunity to interview the CI. Since Management representatives at Steps 1 and 2 did not appear as witnesses, the Arbitrator will credit the Union testimony. Thus, it is well-established that Management was aware of the Union requests throughout the grievance procedure.

Apparently what the Union was told throughout was that all Management had was the inspector's report, and this had

been given to the grievant. Management insisted throughout the grievance procedure that it did not know who the CI was, and it made no attempt to find out so that the Union could prepare its defense. Yet, by the time of the trials, Management was well-aware of who the informant was, and he could have been made available to the Union to interview before the arbitration hearing. However, as previously noted, he did not appear even as a Management witness. Further, in terms of relevant information, Management made no attempt to refute the grievant's testimony that he was told at the time of his termination that conversations between him and the CI were recorded on tape. During the grievance procedure, the station manager conceded that he had heard the tapes, but, as far as the Union was concerned, they were privileged information. Yet, it is clear that any investigation was over at that time. It is true that the Office of the U.S. Attorney often takes over evidence prior to a criminal trial. However, if Management is allowed to review some of the evidence, it becomes a contractual violation when the Union is not allowed the same opportunity. Finally, the trials were over and the grievant had been found not guilty. There was no suggestion that the U.S. Attorney's office was planning any kind of appeal. Thus, there was absolutely no reason for the tapes not to be made available to the Union prior to the hearing. Since they were not presented at the hearing, any reference to them to support the testimony of the postal

inspector would have to be disallowed. Given their absence, it is not surprising that there was no specific attempt to refute the grievant's testimony to the effect that the tapes contained general conversations. He stated that nothing was in them in regard to sale of drugs or money for drugs. In fact, he indicated that nothing on them identified any of the places where alleged meetings with the CI took place. In summary, it is clear that other contractual violations in the form of inability to interview the CI, to hear tapes, and perhaps to see other information on which the Management case allegedly was based, harmed the Union in the preparation and presentation of its case.

4. Miranda Rights and Chance to Tell Story

These rights are so well known that it should not be necessary to repeat them. However, the Union referenced S1N-3W-D 20459, in which Arbitrator Stephens clearly spelled out these rights. As Arbitrator Stephens pointed out, the Inspection Services is the equivalent of a police force. Thus, the Miranda warning before interrogation of a suspect and his rights as to waiver are fundamental with respect to the Fifth Amendment privilege against self-incrimination. In fact, the Postal Service has a Form 1067 to be used for this purpose. Also, as pointed out by Arbitrator Stephens, "One of the basic principles of due process is that employees are given a chance to tell their side of the story before a final decision is made

concerning discipline to be taken against them." (p. 7)

In the subject case, the postal inspector visited the grievant's home. It is clear that he was told he was guilty of selling drugs and that there was an attempt to get him to admit same and cooperate with the government in apprehending others. In fact, the grievant indicated that he was asked to plead guilty to a misdemeanor, resign and cooperate. Throughout, the grievant maintained his innocence. Thus, there is no doubt but that the grievant should have been read his Miranda rights before the discussion began. However, the inspector testified that he did not. Further, it is quite clear that no one, including the postal inspector or the station manager, who accompanied the inspector and told the grievant not to come back to work, ever gave the grievant an opportunity to present his side of the story. In Arbitrator Stephen's case, the grievant had admitted being involved in a drug sale. However, the arbitrator concluded that the violation of Miranda rights and the failure to give the grievant an opportunity to tell her side of the story were sufficient to overturn the discharge. Thus, it is more than sufficient when the grievant never has admitted to selling drugs and the criminal court has concluded that he was "not guilty."

SUMMARY

While most of the arbitrations referenced above overturned discharges when criminal-related charges were involved, based upon no more than two procedural or due process violations, it is clear that the seven to eight in the subject case are more than sufficient. Thus, it is not necessary to analyze the questions of disparate treatment or the credibility of the informant which were raised by the Union. While Management indicated that the Union had not raised the question of credibility of the CI before the hearing, it could not during the grievance procedure, for his identity was kept from the Union. It cannot be required to obtain such information on its own, and it cannot be assumed that it did, especially when the alleged source testifies that he did not reveal the identity of the CI to the Union. In short, if the analysis had been necessary, it would have added further weight to the Union case. This is particularly the case when one considers credibility in the context of the kind of drug investigation which has taken place. A brilliant dissertation on the topic was contained in S4C-3W-D 15880, an award of Arbitrator Marlatt. In summary, however, the violations discussed above are more than sufficient to overturn the discharge without any consideration of the merits.

As a footnote to the above, the Arbitrator should point out that it is very difficult for local Management to get a

handle on discipline, when it relates to investigations outside its orbit of influence or operation. Thus, there is a great deal of pressure on Management, from the immediate supervisor on up, to adhere to contractual procedures and due process rights. Unfortunately, local Management, seemingly more often than not, assumes that the existence of an investigative memo is all that is necessary to support any discipline assessed. The net result is that many disciplinary actions are overturned for such reasons as noted above. This is not the first time at the Montgomery Post Office. Also, for the record, it should be noted that the advocate for Management in the subject case is one of the top advocates in the Southern Region. However, he came into his position after the events had taken place and, in effect, inherited the problems, which had taken place. Thus, he very astutely concentrated on the merits of the case. It is evident to the Arbitrator that the absence of the CI, the Steps 1 and 2 discussants, and the station manager as witnesses, merely reflected his judgment that their presence would have only added proof to the charges made by the Union. Now that the advocate is on the job, the Arbitrator expects that the awareness of contractual procedures and due process rights will be greatly enhanced at the Montgomery Post Office, as well as throughout the District. I also would expect the District level to become more intimately involved in any investigations conducted by the Inspection Services. In short, the Arbitrator

is sure that the advocate will not be trapped by such inherited violations in the future. However, he was in the subject case. Thus, the Arbitrator must overturn the discharge.

AWARD

> Management violated the Agreement, as well as due process rights, when it terminated the grievant. He is to be offered reinstatement within five (5) work days of Management's receipt of this award. He will be made whole in terms of loss of pay, seniority and contractual benefits. However, in terms of pay, it is expected that all monies earned during the period of this termination will be deducted.

J. Earl Williams, Arbitrator

Houston, Texas

August 15, 1987

C#07860

REGULAR ARBITRATION

USPS-NALC

Southern Region

In the Matter of Arbitration	)	
Between	)	S4W-3T-D-46556
United States Postal Service	)	S4W-3T-D-46557
Amarillo, Texas;	)	GTS # 003912
and	)	GTS # 003913
Branch 1690	)	Donna Chapmon
National Association of Letter	)	(Grievant)
Carriers, AFL-CIO	)	Record Closed
	)	February 20, 1988

Before Irvin Sobel, Arbitrator of Record

Appearances:

For the United States Postal Service (Service, Employer)

L. Glenn Sides,

SCD/ Employee and Labor Relations,

Lubbock, Texas

For the National Association of Letter Carriers (NALC, Union)

George White,

Local Business Agent,

Irving, Texas

Preliminary Statement:

This hearing of the enumerated issues was held pursuant to Article 15 of the National Agreement between the two parties. On February 16, 1987 the Union filed a written grievance on behalf of Letter Carrier Donna Chapmon, alleging that the Employer violated the parties' collective bargaining agreement by issuing her on December 26, 1986, a Notice of Removal. The parties, unable to resolve the issues assigned the matter to final and binding arbitration. The hearing of the issues was conducted by the above cited arbitrator on February 17, 1988 at the Amarillo, Texas Main Post Office, pursuant to Article 15 of the National Agreement. At that hearing the parties were accorded full opportunity to present witnesses for direct and cross examination and introduce such other evidence and arguments they deemed pertinent to the issues under consideration. The parties by agreement merged the two enumerated matters into the following mutually stipulated issue. "Was the Removal of the grievant Donna Chapmon, for just cause? If not, what is the appropriate remedy?" At the hearing no issues of arbitrability, timeliness, or defect of form were raised. However, precedural violations which were deemed to be of sufficient gravity to completely disable the Employer's action were argued by the Union.

Findings of Fact:

The grievant had been employed by the Service as a City Carrier at Amarillo, Texas since September 1983. On December 26, 1986 she received a Notice of Proposed Removal, effective January 31, 1987 issued by Supervisor of Mails and Collections, Richard Nadeau. That

Notice stated in its relevant parts:

> You are hereby notified that you will be removed from the Postal Service effective January 31, 1987. The reason for this action is as follows:
>
> > You are charged with falsification of employement records. On August 2, 1983, you were processed for employment with the U.S. Postal Service in Amarillo, Tx. as a letter carrier. Part of this processing requires your completeion of PS Form 2485, Certificate of Medical Examination. You affixed your signature, certifying that to the best of your knowledge and belief, the information given by you was correct.
>
> As a result of an on-the-job injury of February 11, 1986, your medical application was reviewed. During this review it was discovered you had made the following false statements:
>
> > 1. PS Form 2485, Section E, Item 3, asks, "Have you ever been advised or had any operations, consulted or been treated by clinics, physicians, healers, or any other practitioners within the last five (5) years for other than minor illnesses?" You responded by checking the "No" block in the appropriate column. In June, 1983, you went to the District Clinic and saw several physicians in relationship to the on-the-job injury (neck and shoulder) injury you suffered while in the employment of the Quarter Horse Association. You were then referred to Dr. Finney who gave you an injection and placed you in a cervical disk halter. You saw him three or four times.
> >
> > You then went to Dr. Berg, who put you in the hospital and did a mylogram. This constitutes care other than a "minor illness".
> >
> > 2. PS Form 2485, Section E, Item 10, asks, "Have you ever had an X-Ray of chest, back, or extremity?" You responded by checking "No". In June of 1978 or 1979, you had back X-Rays ordered by Dr. Stevens due to an injury of your lower back.
> >
> > 3. PS Form 2485, Section E, continued, asks, "Have you had or do you now have any of the following: Frequent or severe headaches?" You checked "No". When working for the Quarter Horse Association in the microfilm camera department for approximately 1 1/2 years, you experienced neck pain and headaches. In June, 1983, you began treatment with the pysicians at the District Clinic for this ailment.

4. PS Form 2485, Section E, continued, asks, "Have you ever had or do you have now any of the following: Painful or "trick" shoulder?" You marked "No". While working for the Quarter Horse Association, you filed suit on them due to "neck and shoulder pain" caused by your duties in the microfilm department.

5. PS Form 2485, Section E, continued, asks, "Have you ever had or do you have now any of the following: Back injury or chronic back pain?" You marked "No". In 1978 or 1979,you suffered a lower back injury. Dr. Stevens did back X-Rays and diagnosed a possible back strain.

Having knowledge of your physical disorders and deliberately witholding this information from the U.S. Postal Service constitutes falsification of official employment records. In your attempt to withhold critical information relative to your physical condition, you denied the U.S. Postal Service the opportunity to evaluate your suitability relative to any possible employment opportunities. Had you been truthful in answering the questions on PS Form 2485, it is highly probable that the U.S. Postal Service would not have hired ;you due to your physical condisions that you knew of at that time and concealed from the U.S. Postal Service in order to gain employment.

The Union rather prolix and less than well organized statement, filed on January 8, 1987, argued:

Filing under Article 16 for Just Cause.
That this grievance is untimely because Management went back more than 2 years and that Management knew about Mrs. Chapmon's incident based on the letters addressed to Mr. Don Bloyd, then Postmaster in Amarillo dated 22 and 29 Apr. 1985 when Mr. Rawls had been requested to be a character witness on behalf of Mrs. Chapmon's job history. That Mrs. Donna Chapmon feels that she filled out PS Form 2485 to the best of her abilities, considering that what the Postal Service considered Major problems she only considered minor. For the information that was filled out in personnel in Amerillo, there were no nurse or doctor present to explain the categories to her. Dr. Lacy, on 18 Aug 1983 gave her a clean bill of health on her physical examination. She feels that she is being removed because she filed an OWCP case on 11 Feb 1986. Why did Management wait until Feb. '86 to review her records when Amarillo was notified on 22 Apr 85 by Stokes and Fields, Attorneys representing the AQHA? Charge 1 refers to "mylogram", there is no such word or procedure (test) exists. Charge 2 Minor Back Sprain, considered by employee as a very minor thing since all that happened was that she got hit in the back with a softball and it was only diagnosed as a sprain. Charge 3 She only had minor tests run to

find out the problem causing headaches and neck pains, the following was discovered,: Thoracic Outlet Syndrome (neck exit disorder). The disorder was due to her having an extra verterbrae (sic) in the neck area. Charge 4-The union cannot find anything in her recors (sic) of a shoulder problem or a minor back sprain. Not one question was falsely answered since all her injuries were considered minor by the employee. The grievance procedure allows to go back two years and the Postal Service opted to go back at least four. On 12/31/86, when Mr. George White went to personnel to check her folder, he did not find everything he needed, just prior to his leaving, Mr. J. Gore produced a brown manila envelope and stated that this may be part of what he was looking for. It contained several documents of which was a complete PS Form 2592 and a PS Form 2485. Only then was Mr. White allowed to review it.

On 1/2/87 Mr. White again went to personnel to review Mrs. Chapmon's folder and this time Mrs. Wilkie pulled out a brown manila envelope which again contained Mrs. Chapmon's 2485 and 2591 included was also 2 letters addressed to Mr. D. Bloyd Postmaster, Amarillo dated 22 and 29 Apr 85. The letters were from Stokes and Fields, Attorneys representing the Insurance Carrier for AQHA. It was known at this time that she had filed an OWCP claim filed against AQHA. The Union feels that her medical records should have been reviewed then since evidentallty (sic) some questions were raised, concerning her job application. No action was taken until Dec '86 and only as a result of the OWCP claim filed against the Postal Service in Feb. '86. This claim is completely different in all respects as to what she filed with AQHA and to the best of Mr. White's knowledge, he, duly appointed representative, that the OWCP claim against the Postal Service was controverted and she received nothing. Be it known that a formal Step 2 Discrimination Grievance has been filed as well as this grievance. We feel that she has been harassed and intimidated by Mr. Solomon and Mr. R. Rawls. Enclosed is a copy of her resignation which occured on 7/12/84. Her reasons for resigantion (sic) was harassment and intimidation by Mr. R. Rawls and he threatened to give her Letters of Warning for anything she did. We feel that this is an act of reprisal against Mrs. Chapmon due to the fact that after her resignation she wanted to be reinstated two hours later. The reinstatemned (sic) was denied. She was eventually reinstated on 10/15/84 after the grievance and EEO resolves. She has been continuously singled out and intimidated because she had to be hired back. As of 01/08/87, filing at step 1, allowing 13 days for investigation, Management has still not provided the grievance representative with all the copies of the information requested.

At the first step hearing and partially as a result thereof the Union introduced the following additional contentions and counter-charges which it claimed bore serious due process connotations.

These are:

The grievant was not accorded any pre-disciplinary hearing and at no time was allowed to state her version of the events; 2) The charges in the Notice of Proposed Removal was not only based solely upon superficial comparison of two documents; and 3) No further investigation beyond the facts of the documents was undertaken by the Employer.
Supervisor Nadeau in terms of his own statements, had no authority to settle the grievance.

The above arguments raised by the Union in its response to the aforecited Notice were heard and rejected at each Appeal Step by the Employer's representatives. At each level the Union raised the question of due process and argued that the Employer's conduct both before the issuance of the Notice and subsequently after the grievance was filed was so violative of the due process clauses of the National Agreement as to either destroy or severely disable the discipline. The arbitrator with concurrence of both parties, reserved decision on the procedural issues, and heard both the procedural and substantive aspects of the matter. Since the prcocedural issues were raised as threshold ones by the Union, this arbitrator will consider them prior to the substantive ones.

Arbitrator's Discussion:

Because the above quoted segments adequately state each party's contentions and those additional segments of their argumentation, which are relevant to the resolution of the grievance will be developed by the arbitrator in the body of his Opinion, only a brief summary of each parties' positions well be attempted by the undersigned.

The Union's Position:

The Union not only contended that the Employer's case was

devoid of any substantive foundation but also was so procedurally defective in a number of sensitive due process areas that the grievant's interests were substantially damaged. In its detailed defense, mainly based upon the grievant's detailed analysis of each of the five (5) Employer charges, the Union attempted to explain each of the alleged falsifications on her Form 2485 and attributed them either to misinformation furnished by the Employer's representatives, or narrow definitional technical errors that a high school graduate, such as the grievant, without specialized medical knowledge could easily make. In short, there was no intention to deceive. The grievant showed up to fill out her Form 2485 wearing a cervical neck brace, and it was duly noted on that form. Dr. Hill, the Regional Postal Service Medical Officer who reviewed the medical examination and the accompanying Form 2485 approved the grievant for full duty despite that brace.

Major Employer procedural breaches were cited by the Union. These are: 1) The Removal action took place nineteen (19) months after the Employer (Postmaster Donald Bloyd) was alerted to the possibility, if not probability of some discrepancies on the grievant's Form 2485, and six months after she filed her third OWCP request; 2) The grievant was neither accorded her right to a predisciplinary hearing, and the Employer's investigation both before and after its Removal notice was so perfunctory as to deprive the grievant of her right to give her side of the story; and 3) Supervisor Richard Nadeau's authority to settle the grievance at the first step had been effectively foreclosed by the manner in which

the Removal action had originated.

The Employer's Position:

The Employer argued that the contradictions between the grievant's statements on her Form 2485 and in her Deposition of 17 September, 1984 were so pronounced that it would be impossible for any reasonable person to reach any conclusion other than that she had wilfully falsified her pre-employment statement. Had she not done so she would not have been employed by the Service, and thus, her termination merely restores her to the same status she would have had had she not falsified her records.

The Union, as usual, when it has a weak substantive case reverts to claims of procedural error. If any procedural violations took place they were of a minor technical nature and if any harm were inflicted upon the grievant it was at best slight. In short, the minor procedural errors fell far short of meeting the Cornelius vs. Nutt criterion required to either mitigate or sustain a grievance on procedural grounds.

The Procedural Issues:

The key questions to be resolved are ; 1) Did any, or all, of the major due process breaches, attributed to the Employer take place?; and 2) What is the import, if any, of these alleged breaches, either singly or collecively, upon the disposition of the above grievance?

One major contention by the Union is that the Employer, through its highest ranking representative at the Amarillo Branch, not only had full knowledge of the possible falsification by the grievant of

its Form 2485 at least 19 months before it took action but also chose to disregard that possibility. Since no new evidence regarding the possible falsification was ever introduced after that matter was apparently closed, with no action taken, in September 1985, the Employer, therefore, waived its right to use that charge to later Remove the grievant.

On April 22, 1985 Postmaster Don Bloyd received a request from Attorney Daniel W. Burrows (Jt. Ex. #2,p. 30-31) representing the St. Paul Insurance Company in behalf of the Qarter Horse Association against whom the grievant had filed a Workmen's Compensation claim. That latter claim, which not only requested the appearance of her Supervisor Raymond Rawls, but also her employment application, (Form 2485), stated; "....her employment application, work habits, and physical complaints, could play an important role in our law suit." If that letter did not alert Postmaster Bloyd to the issue, Burrows' subsequent letter of April 29th should have. It stated not only that the case had been postponed until June 7, 1985 but also; "We anticipate being back in touch with your office, once we have a definite trial setting so that I (can) discuss the case with your personell director.....and in more detail with Mr. Raymond Rawls." (Jt. Ex. #2, p. 29). That also should have re-alerted Amarillo Personnel Director Betty F.Wilkie, who had been drawn into the matter by the Postmaster after he received the initial letter from Burrows.

That was the last missive from Attorney Burrows to Postmaster Bloyd. Sometime in December 1986 Ms. Sharla Conway Occupational Claims Officer at the Sectional Center in Lubbock, in the

process of her review of the grievant's file which she had requested from Ms. Wilkie, called Mr. Burrows about the matter. By return mail (addressed to Ms. Charlotte (sic) Conway) he stated (Jt. Ex. #2,p.25);

> ....."Please be advised that we did represent St. Paul Insurance Companies on a worker's compensation lawsuit filed by Ms. Chapmon for alleged on-the-job injuries she received while working for the American Quarter Horse Association. The claim of Ms. Chapmon was for back and neck injuries she received from repetitious work at a microfilm camera. The suit was titled Donna Sue Chapmon v. The St. Paul Insurance Companies in the 108th District Court for Potter County, Texas,'under Cause No. 64,637. The case was disposed of by settlement.
>
> A more detailed information can be obtained from the court file through the District Clerk of Potter County, Texas."

That settlement, and the existence of a Deposition filed in the District Court on September 20, 1985 was not unknown to both Postmaster Bloyd and Betty Wilkie, who had discussed its implications. On the basis of the aforecited settlment they apparently decided to file the matter and did not even request a copy of the grievant's deposition, even though the issue of its possible lack of conformity with her Form 2485 had been raised more than once. 1/ That deposition (Jt. Ex. #3) was never obtained from the Potter County Courthouse until after December 15,

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1/ Apparently although this is not germane to the instant grievance, the matter was settled favorably to Ms. Chapmon. The insurance company (Plaintiff) paid the court costs.

1986 when on the basis of Burrows' letter, Ms. Conway requested that Ms. Wilkie obtain it for her.

The impact of the issue raised by the above chronology has been widely discussed by arbitrators and a number of precedents, favorable and unfavorable to the Union's position can be cited. The Employer does not waive its rights to discipline (Remove) because it discovered the falsification of Form 2485 (Employment Application) after the grievant had satisfactorily completed his/her probation period and "was promoted" from part time to full time flexible status. (C-8N-4E-D-12578, Alan Walt). Other arbitrators too numerous to cite have sustained dismissals and denied grievances even when the falsification was discovered five or more years after the employee entered the Service and had an exemplary work record.

All these decisions have an element in common. The Service took prompt action after it had reason to believe falsification had taken place and through proper and timely investigation determined such had occurred.

However, in situations roughly analogous to this one, in which the Employer either had specific knowledge of falsification or had sufficient reason to believe it might have taken place, and still chose not to pursue the matter, arbitrators have either sustained grievances or mitigated them.

In a December 1985 case (W4Y-5L-D-2419 W. Eaton) the arbitrator mitigated a discharge stating " Plausible testimony concerning ..... the arrest and charges were known to his supervisors at the time. That means we are entitled to infer not only that the matter

was taken lightly by knowledgeable Postal Authorities at the time but that this Grievant did not intent (sic) to falsify his job application."

In a 1984 case involving Conduct Unbecoming a Postal Employee (Wm. F. Dolson C1C-4A-D-31551) the arbitrator in sustaining the grievance stated: "However, on June 1984, some six months after the grievant's arrest the Postal Service issued a Notice of Removal ..... The grievance is sustained since basically management knew in March that the grievant had been convicted of battery." At another point the arbitrator, in arguing absence of just cause, stated; "Based upon the above I find that by the time the Postal Service discharged the grievant, the charge it relied upon had become too stale to justify removal." The literature of arbitration so abounds with similar citations that repeating them would not only be gilding the lily but also it would unduly lengthen this already too wordy Opinion.

Supervisor Nadeau, the signatory to the Form 2608 (Disciplinary Action Request) by his own admission failed to accord the grievant the predisciplinary investigatory interview mandated by the National Agreement. No inference other than that an investigative interview is required before a Request for Discipline can be instituted can be drawn from Item 11 of that Form which states: "Employees version of what happened (from investigative interview held --------(date) by ---------- (signature). The Supervisor marked that item "Not Required." His argument that the divergences between her Form 2485 and the Deposition were so marked, and the blatant nature of the falsifications were so beyond doubt, that any explanation on her

part would be rationalistic in nature, is such a self-serving attempt to explain the inexplicable that no further comment on this arbitrator's part would add anything. Nadeau's attempt to either soften or modify his due process breach, by arguing that the matter came to his attention only on December 24th when he was heavily occupied in getting the final Christmas mail out, is equally without substance. He had enough time to go to Personnel on that day, ostensibly read the two documents and reach his conclusions, yet he did not have enough "time" to accord the grievant her due process rights, mandated by the Service's own requirements.

No investigation, beyond the already cited analysis and comparison of the two documents, one completed in August 1983 (Form 2485) and the other on September 20, 1984, ever took place. In short, the Employer had knowledge of all the evidence when Postmaster Bloyd, with the apparent concurrence of Betty Wilkie, decided not to pursue the matter further. No further investigation was ever undertaken even though normally when Removal is a possible outcome in a situation involving "false statements" the Postal Inspector, the entity most capable of investigating incidents of falsification and possible fraud, is called in to render a report before a decision to "go ahead" with a removal action is taken. This is standard operating procedure (S.O..P) especially in Service units such as the Lubbock one, in which a Postal Inspector's office is located. Ms. Conway monitored all the sequences leading to the Removal from that Office without calling in the P.I.'s office. No post Notice of Removal investigation by the Postal Inspector's office ever

took place and the grievant's "side of the story" was never presented in any form until the appeal procedure was instituted. Frankly there was such a "rush to judgement" based upon the "stale evidence," that the due process provisions of the grievance were disregarded.

According to a plethora of arbitral opinions, a few of which were cited by the Union, such failure to accord the grievant a proper pre-disciplinary investigatory hearing and/or failure to properly investigate, either simply, or in tandem, have constituted grounds for sustaining grievances on procedural grounds. Arbitrator William Renfro, in sustaining a grievance (AC-W-24/658 D-1979) stated;

> "Despite the inability of the Injunctions to produce any additional probative evidence, the Grievant's supervisor signed the February 14 letter of discharge. He did this without interviewing the grievant and in spite of his inability to recollect the Grievant's absences in June. It appears that he was overly anxious to accept as correct the conclusions (falsification of Form 3971S)....."
>
> Due process in discharge cases demands that the employee be given the opportunity to explain, if possible, the misconduct with which that person is charged. This explanation should be sought <u>before a decision is reached and positions are frozen</u>" (underlining by the arbitrator).

Arbitrator Thomas Levak in sustaining a grievance over the issue of <u>Removal for Providing False Information During Medical Examination,</u> (W4N-54-D-13432) stated;

> "In the instant case the Service failure to interview the Grievant prior to taking its action was clearly prejudicial. Had the Service interviewed the Grievant prior to issuing the Notice of Removal, it likely would have learned from her that she did not in fact suffer from chronic back pain in 1983. Perhaps more importantly, such an interview would have given the Grievant the opportunity to provide the Service with a written statement and medical records from Dr. Orcutt and from other physicians who have treated her. Had the Service had in its possession Dr. Orcutt's statement and medical records prior to issuing the Notice of Removal, it is inconceivable that the Grievant would have been charged with the facts set forth in that notice.

Thus, on a fact situation most analagous to this one Arbitrator Levak, ruled that not only had a violation of due process taken place but he also took cognizance of the Cornelius vs. Nutt criterion that it was highly damaging to the grievant.

A chronology of the events leading to the Notice of Proposed Removal is a requisite to establishing not only the role played by Supervisor Nadeau in that Removal, but also the extent of his authority to settle the grievance at the 1st Step Appeal level.

According to Ms. Sharla Conway the events leading to the grievant's removal were set in motion early in December by a "routine" examination of her files. Conway, in her capacity as SCD/OWCP Compensation Supervisor in Lubbock, gave special attention to those who had filed multiple OWCP claims. She routinely conducted such audits for all the Postal Service Units within her jurisdiction but because of the press of her other duties in 1986 she did so much later in that year than had been her normal practice. She asked the contituent Personnel Offices, in this case the one in Amarillo headed by Ms. Wilkie, for all personell records (including the Form 2485s of those, (including the grievant) who were on that multiple list.1/ When she received the Form 2485s and the record of the 1985

1/ Ms. Conway cited three claims as the basis for inclusion on the list. There is some question as to whether the grievant had made three claims, or two.

correspondence between Attorney Burrows and Postmaster Bloyd, she contacted the attorney about the matter and he replied, by letter of December 15, indicating that the Deposition regarding the grievant's claim against St. Paul Insurance, could be obtained in Amarillo at the Potter County Courthouse. She requested that Betty Wilkie secure the relevant court documentation and on approximately December 20th Ms. Wilkie transmitted the grievant's Deposition of September 20, 1984. She reviewed both documents (Form 2485 and the Deposition) and in comparing the two documentary statements made by the grievant found numerous discrepancies which she, in her second capacity as a Labor Relations Officer, deemed sufficiently serious to warrant disciplinary action. She sent the two documents back to Ms. Wilkie, and requested that the Amarillo Personnel Officer submit those documents to the appropriate Supervisory officer for review, and if found warranted disciplinary action. Supervisor Nadeau was contacted and the following is his narrative of the events leading to his decision to recommend Removal.

> On 12/24/86, I was informed by personnel that they had recently received some information pertaining to Mrs. Donna Chapmon that I was to review. The information was a deposition furnished to us by the Attorney (s) for the American Quarter Horse Assoc. After reviewing the deposition, I compared it to the pre-employment physical summary that Mrs. Chapmon had submitted to the postal service. There were many irregularities between the two and at that point I decided that she had falsified her pre-employment Medical summary. I then took the action necessary and requested that Mrs. Chapmon be removed. The letter of removal was then issued to her on 12/26/86.

While the statement seems straightforward, its omissions,

lacunae, and ambiguities are so noteworthy that the impression the Supervisor tried to create is virtually reversed. The image he tried to create both in the statement and in his direct testimony is that of a Supervisor who carefully reviewed the documentation provided, noted the tremendous inconsistencies between the grievant's two statements, independently determined that these inconsistencies were sufficiently pronounced to warrant removal, and as a consequence filled out a form 2608 listing the reasons for removal. Then, on the basis of his Request for Discipline the Lubbock office issued the Notice of Removal for his signature. It was sent back to him on the 26th, he signed it and gave it to the grievant.

Supervisor Nadeau did not state, but finally conceded on examination that the documents sent to him for comparison had the statements in both documents deemed contradictory highlighted and these were the only parts of the documents he had time to read, and only cursorily, because it was December the 24th. The documents supplied both the Union and the arbitrator were not highlighted and thus the documents supplied the latter were qualitatively different from those Nadeau employed to make his decision. The Form 2608 he submitted could not have been used as a basis for the Notice of Removal prepared by Ms. Conway, wearing her Labor Relations hat. On item 9 (Appendix) when asked "specifics/details of the situation (use data, times, locations, quotations, names and titles of all employees etc. Use attachments if appropriate," Nadeau stated; "On 08/02/83 Mrs. Chapmon falsified medical History portion of the pre-employment application. On 12/23/86 I reviewed Ms. Chapmon's Deposition having

been made aware of such deposition by our Support Service."

In short, the specifics designed to support the Charges in the Notice were never forthcoming and it is hard to relate anything in that 2608 (Appendix #1) to the detailed and specific charges in the Notice prepared by Ms. Conway. During cross examination when he was asked to cite the specific discrepancies between the two documents which he had noted during his scrutiny, Nadeau could not state even one. Instead he noted that there were "many many discrepancies." Of the many he was not able to cite one specifically despite the fact he stated he had read the Notice carefully before signing it and was in full accord with every statement made therein.

The date, (December 24) was reiterated by Supervisor Nadeau both in the statements noted above, and on direct and cross examination. It was the only date cited during the entire hearing until his closing rebuttal statements when Nadeau noted that the Form 2608 was signed, by him on December 23. Because that date was never cited before either by Nadeau or anyone else the earlier date must not only have been disregarded but also must be interpreted as a vain attempt to establish the legitimacy of the Notice of December 26th as having been written after the receipt of Nadeau's signed Form 2608 (Appendix I).

It would be impossible for the Disciplinary Request to have been signed on December 24th in Amarillo, and despite the Christmas holiday, arrive in time in Lubbock to serve as the basis for a detailed and specific Notice of Removal, and have that Notice sent back to Amarillo for signature by Nadeau, and delivery to the

grievant on December 26th. Given the fact that the Form 2608 signed by Nadeau cannot be related due to its in its total lack of specifics, to the highly detailed Notice, the only tenable explanation, given the time constraints already detailed, is that the document was prepared by Ms. Conway in her Labor Relations capacity somewhat before the 24th. Thus, after having received Nadeau's required signature on the Form 2608, she inserted the 26th date and sent the Notice back to the Supervisor for his signature. Supervisor Nadeau was fed the lines requisite to establishing him as the leading man in the drama, instead he failed to memorize them and revealed himself as a bit player.

Whether or not Supervisor Nadeau made the statement (ascribed to him by Union advocate White, who was also that entity's first step designee at the 1st Step Appeal) to the effect he could not settle the grievance is irrelevant. The Supervisor did not deny making that statement, instead he "didn't recall making it". He also contended that to have made it would have been totally at variance with all of previous behavior in similar situations.

The above chronology more than amply indicates that the decision to remove the grievant was made at the Sectional Center headquarters in Lubbock. It is quite apparent that Supervisor Nadeau despite his protestations to the contrary de-facto lacked the authority to settle the grievance at his level.

Two arbitral precedents both by Arbitrator Nick Zumas in analogous fact situation sustained grievances because the decision to discipline came down from a higher headquarters. In the decision

whose fact situation was the most analogous to this one (Case #E1R-2F-D 8832) Zumas stated;

> "Additionally, the Step Procedures in Article 15 of the National Agreement are intended to provide an opportunity for the parties to resolve a dispute before proceeding to arbitration. A supervisor at the Step 1 and Step 2 levels has the authority to resolve and settle the dispute after meeting with a Grievant and his Union representative. In this case, Murphy was the Step 1 representative and Booth was the Step 2 representative. Murphy's decisional authority to settle the dispute at this stage was non-existent; it had been improperly usurped by Booth and the Postmaster at the Richmond facility. As such, the grievance procedure, had become "a sham".*/
>
> It is clear from the foregoing that Grievant was denied basic due process rights which are essential to a just cause determination. Under the circumstances, there is no alternative but to sustain the grievance."

This arbitrator is also mindful of the arbitral principle, repeatedly cited by him as well as Elkhouri and Elkhouri, that unless the due process violations are unambiguously clear and are unequivocally shown to have inflicted grave harm upon the grievant, the arbitrator should decide the issue on its substantive merits. In short, if there is any doubt about the severity of the damage to the grievant's interests established arbitral practice would resolve these doubts in favor of hearing the case on its substantive merits.

In this instant grievance not one but three Employer gross violations of due process, each one of which unequivocally inflicted serious damage to the grievant's interests have been established. Each type of these due process violations has been deemed by arbitrators as unilateraly offering sufficient grounds for sustaining a grievance. Cumulatively their impact is so magnified that there is no margin of doubt as to the sustention of this grievance.

Award:

The grievance of Donna Chapmon is hereby sustained. The grievant shall be reinstated to her former position as expeditiously as possible after receipt of this Award. Expeditiously is defined as a period not to exceed one week, unless there is a reasonable explanation for the failure to comply, such as inability to contact Ms. Chapmon. The grievant will receive full back pay beginning on January 31, 1987, computed at her prevailing rate of pay on a forty hour per week basis, and without loss of seniority and benefits, including the Holiday and Vacation pay to which she would have been entitled had she not been improperly removed. The Service will be credited with all monies received by the grievant from earnings, Unemployment Insurance and/or Workmen's Compensation and such monies deducted from the amounts due the grievant. The grievant is required to supply a full affidavited statement of such monies received and final settlement of the amounts due the grievant will not be effectuated until such affidavit is received. The Notice of Removal shall be expunged from all of the grievant's personnel records.

April 8, 1988

This is a certified true copy of Arbitration Award

Irvin Sobel

Tallahassee, Florida

Irvin Sobel, Arbitrator

UNITED STATES POST OFFICE

AMARILLO, TEXAS 79120-9998

DATE: 12/23/86

OUR REF:

SUBJECT: Disciplinary Action Request

TO: Supt., Support Services

(23)

Appendix C P.

Please prepare disciplinary action in accordance with the information described below:

1. Name of Employee DONNA SUE CHAPMON (No Initials Please) SSN 465 21 0698

2. Position Title LETTER CARRIER FTR X PTF ____

3. Action Recommended:

LOW ____ Suspension ____

Removal ✓

*Complete Items 4 through 7 only if recommendation is for suspension or removal.

4. Previous actions taken to correct the employee in this matter.

N/A

5. Hours of work 40 6. Days off ROTATING

7. Leave planned next 30 days? NONE

8. Holiday work planned? NO

9. Specifics/details of the situation. (Use dates, times, locations, quotations, names and titles of all employees, etc. Use attachments, if appropriate.)

ON 08/02/83 MRS. CHAPMON FALSIFIED THE MEDICAL HISTORY PORTION OF THE PRE EMPLOYMENT APPLICATION. ON 12/23/86 I REVIEWED MRS. CHAPMONS DEPOSITION OF 09/17/84, HAVING BEEN MADE AWARE OF SUCH DEPOSITION BY OUR SUPPORT SERVICES

Disciplinary Action Request
Page 2
Date: 12/23/86

10. Specific rule or order violated (written rule? oral instructions? When given? By whom?)

39 USC 401.1001 P.S. FOR 2485 JULY 19

11. Employee's version of what happen (from investigative interview held _____ (Date) by _____ (Signature)).

NOT REQUIRED

12. Evidence/proof that employee is guilty (management records, witnesses, statements, etc.)

DEPOSITION DATED 09/17/84

13. Comparable incidents - other employees and description.

N/A

14. Employee record considered in making recommendation.

YES

15. Additional information/comments.

Supervisor's Signature — Dist Coll Supv. — 12/23/86
Supervisor's Title — Date

CONCURRENCE:

Comments:

Signature — General Supv. Dist Coll — 12-23-86
Title — Date

Signature — Title — Date

C # 08315

REGULAR REGIONAL ARBITRATION PANEL

In the Matter of Arbitration	GRIEVANT: G. POSTLEWAITE
between	POST OFFICE: Walla Walla, WA
UNITED STATES POSTAL SERVICE	CASE NO. W7N-5R-D-6601
and	GTS No. 3418
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	

BEFORE: JAMES T. BARKER, ARBITRATOR

APPEARANCES:

For the U. S. Postal Service: Julian Hunter

For the Union: Jim Edgeman

Place of Hearing : 128 N. Second Avenue, Walla Walla, WA

Date of Hearing : Agugust 16, 1988

AWARD: The grievance is sustained.

OPINION AND AWARD

The Issues

The parties agreed that the merits of this case give rise to the following issues:

> Did just cause exist, as required by Article 16, Section 6 of the National Agreement, for the notice of indefinite suspension issued the Grievant under date of March 8, 1988 as a result of being arrested on or about January 8, 1988 on charges of indecent liberties?
>
> If not, to what remedy is the Grievant entitled.

However, at the commencement of the hearing the Union interposed a motion seeking to bifurcate the hearing so as to permit separate and initial consideration of procedural bases for

sustaining the grievance without the necessity of taking evidence on the merits.

The motion to bifurcate was granted and evidence and testimony relating soley to the procedural motion was adduced, first by the Union and then in rebuttal by the Postal Service.

The Union posed the following issues in connection with its procedural motion. The Postal Service did not agree to the issues, but in granting the Union's motion to bifurcate, the Arbitrator permitted evidence to be taken on the questions:

> Did Management violate Article 16, Section 6 (sic) of the National Agreement, when the supervisor who signed the notice of indefinite suspension, did not in fact originate the idea or request the issuance of such?
>
> Did Management violate Article 16, Section 8 of the National Agreement, by not having a proper review and concurrence of the proposed notice of indefinite suspension before such was issued to the Grievant?
>
> Did Management violate Article 15, Section 2, Step 1 (b) of the National Agreement, when the supervisor who handled the grievance at Step 1 was not given the authority to settle the grievance?
>
> Did Management violate Article 15, Section 3. A of the National Agreement, by not acting in good faith observance by their respective representatives of the principles and procedures set forth in the National Agreement dealing with the grievance arbitration procedures.

To each of the above, the Union added the following:

> If so, is such action on the part of Management fatal to their position to the point where the grievance must be sustained automatically?

In addition, the Union interposed the following issue:

If the answer to any of the above questions is yes, to what remedy is the Grievant entitled?

After the parties had fully addressed the foregoing procedural questions through evidence, testimony and statements of position, the Arbitrator briefly considered the record made and took the matter under advisement for determination in a written Opinion and Award. He ruled that to conserve economic resources and to more efficiently utilize the time of the parties and potential witnesses, the hearing would proceed on the merits. A full record on the merits was thereafter developed.

It is concluded that the procedural motion has merit and the grievance is sustained on each ground advanced by the Union. The content of the Union's opening statement which is in evidence as Union Exhibit 1, suggests that the reference to Article 16, Section 6 in the first issue framed was inadvertent and intended to involve Section 8 instead.

Background Facts

The Walla Walla postal facility has approximately 65 employees. The grievant has been assigned to the facility since April 1987. Prior thereto he had been assigned in Spokane. At the time of the notice of indefinite suspension he had been in the employ of the Postal Service for approximately 11 years.

At relevant times in late January 1988 and early February, Victor Walker was serving as Acting Postmaster of the facility. A new Postmaster, Charles Rambo, was appointed on February 1 and reported to duty on February 8.

On March 9, 1988, the grievant received a Notice of Indefinite Suspension, dated March 8. The Notice was signed by Frank Lorello, Supervisor, Mails & Delivery.

The Notice advised the grievant "...it is proposed to indefinitely suspend you from the U. S. Postal Service effective no sooner than seven (7) calendar days from your receipt of this notice. There is reasonable cause to believe you have committed a crime for which a sentence of imprisonment may be imposed." The Notice went on to add: "You have been charged with a Class B Felony and have been scheduled to begin trial on April 18, 1988."

The record establishes that in January 1988 the grievant was arrested on charges of "indecent liberties". On the night of the arrest he called Supervisor Lorello to inform him that he would not be reporting for duty the following day, as scheduled. Thereafter, the grievant was jailed for two days and missed two scheduled work days. When he returned to work he spoke with Lorello and told Lorello of the nature of the charges against him. It is clear the Lorello understood the charges involved a possible felony offense. It is equally clear that the Acting Postmaster, Vicotor Walker, soon learned of the arrest and that it involved an alleged felony offense. The grievant spoke with Walker about this. The grievant had not entered a plea to the charged offense. He was permitted to continue his normal postal duties until he was placed on indefinite suspension on March 8.

Lorello testified that the grievant's arrest gave rise to a problem he had not previously confronted in his supervisory

career. He read the manuals and asked "several other people" what the precedent was in "this type of case" involving a possible felony. He spoke with Walker. Walker contacted the MSC and received input. He conveyed the MSC input to Lorello.

At approximately this juncture, Postmaster Rambo assumed his responsibilities at the Walla Walla facility. He conversed with Walker and Lorello concerning the status of the matter. Rambo expressed dissatisfaction with the way matters had been handled and told Lorello to act. Lorello asked, "Why me? A postal inspector initiated an investigation on February 18-19, at the request of the Postmaster and a report was issued on March 1.

The Notice of Suspension was prepared at the MSC and was on the letterhead of the Spokane Office. Lorello testified that when he received the Notice he read it, made no changes in it and signed it. Lorello presented the Notice to the grievant the next day during a lunch meeting at a restaurant with the grievant which he had arranged. He wanted to discuss the matter with the grievant away from the workroom floor. Lorello had been the grievant's supervisor in Walla Walla for approximatley 9 months; they had worked together in Spokane previously.

In presenting the Notice of Suspension to the grievant, Lorello stated that he did not want to do so but the matter was out of his hands. Lorello stated that the issuance of the Notice was not his idea but that he had been ordered to do so. The Notice had been prepared in Spokane. Lorello added that if it had been up to him the grievant could continue to work.

In testifying concerning the notice of suspension, Lorello conceded that initially it was not his idea to issue the suspension, and that he did not initiate the suspension. He speculated that Walker or Rambo could have asked Spokane how to proceed; Spokane had the format and the specialists; he could not remember whether he did or did not request the grievant be suspended indefinitely; he did not tell his superiors that he was going to issue a suspension, although Postmaster Rambo inquired on more than one ocassion what action he was going to take; he was waiting for the report of the inspector. He testified, however, that no one in management pressured him or dictated the result; that it was his decision "in the end."

The testimony of Victor Walker establishes that input and advise was solicited and received by the Walla Walla management from a point immediately following the grievant's arrest. The record testimony of Walker, Rambo and Lorello, and the evidence otherwise, establishes that this contact and input continued to the point of the issuance of the notice of suspension.

Soon after meeting with Lorello and receiving the notice of suspension, the grievant met with Branch President Kincheloe. During the meeting he told Kincheloe that Lorello had informed him that he, Lorello, had not wanted to "do this" but that he "had to". Kincheloe and Union Shop Steward Geissel also noted that the notice of suspension appeared to have originated in Spokane. They met with Postmaster Rambo to learn the current status of the matter and to explore means of minimizing the

impact upon the grievant. During the meeting, the Postmaster stated that the notice had been sent up to Spokane to have it typed and that the MSC made recommendations only. Postmaster Rambo stated that the decision to issue the suspension was made by Lorello and that he had concurred in that decision.

Immediately following this meeting Kincheloe and Giessel went to the work floor and spoke with Lorello. Kincheloe asked Lorello if he had issued the suspension. Kincheloe testified that Lorello replied that he had given the notice of suspension to the grievant but not by choice. According to Kincheloe, Lorello stated that he had been ordered to do so and expressed the opinion that the notice of suspension had originated at the MSC. Kincheloe testified that Lorello expressed the hope that this matter could be straightened out so the grievant could return to work. Geissel testified that Lorello appeared surprised when told that the Postmaster had said the suspension had been his decision. According to Geissel, Lorello stated that he he would have the grievant back "right now" if it were up to him. Lorello testified that he had no recollection of this conversation or of meeting with Kincheloe and Geissel, as described. He recalled having spoken to them separately several times concerning the grievant's situation.

On March 22, Geissel and Lorello met at Step 1. The grievant was present. During the Step 1, according to the testimony of Geissel and the grievant, the grievant asked Lorello how the suspension came to be issued. Lorello stated that he felt the

notice of suspension "came down from Spokane". Geissel testified that at no time during the Step 1 did Lorello state that he had proposed the suspension.

According to the testimony of Geissel and the grievant, Lorello stated during the Step 1 that he had no authority to settle the grievance.

Postmaster Rambo testified that Lorello had full authority to settle the grievance at Step 1 but that "on a thing like this" he would expect Lorello to consult with [him]. Rambo further testified that he had not told Lorello that he could not "take the letter [notice of suspension] back." Lorello testified that no one had told him that he could not settle at Step 1 and that as far as he knew he had authority to do so.

Analysis

The question to be decided in this case is whether the grievant was denied the procedural due process rights mandated by the National Agreement. It is concluded that he was denied those rights because the suspension which was imposed was not initiated by local authority and failed to receive proper review and concurrence, as required by Article 16, Section 8 of the National Agreement. It is further concluded that the Postal Service failed to comply with the mandate of Article 15 that the supervisor at Step 1 of the grievance process have authority to resolve the grievance.

Directly controlling in the instant matter are the provisions of Article 16, Section 8 and Article 15, Section 2(b) of the National Agreement.

Article 16, Section 6, which is tangentially involved due to the nature of the events giving rise to the issuance of the notice of indefinite suspension, provides that the Service may indefinitely suspend an employee in those cases where it has reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed. In substance, the language of the Section requires both preliminary and ongoing investigation and application of just cause principals to any indefinite suspension imposed.

Section 8. Review of Discipline provides:

> In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

* * *

The provisions of Article 15, Section 2(b) declares that in any Step 1 discussion the supervisor shall have authority to settle the grievance.

The Union contends and arbitral authority cited and submitted by the Union supports the concept that local supervision is soley responsibile for determining whether misconduct warrants discipline, and that when higher-level authority does more than advise by taking over the decision-making role and eliminating the contractual

responsibility of local supervision, a substantive due process violation occurs. See e.g.Opinion and Award of Arbitrator Jonathan Dworkin in Case Nos. C1R-4H-D 31648 etc.; Opinion and Award of Arbitrator Nicholas H. Zumas in E1R-2F-D 8832 and Opinion and Award of Arbitrator Edmund W. Schedler, Jr. in S1N 3W D 2205. As demonstrated by the two first-cited awards, these standards apply to disciplinary action arising under Article 16, Section 6. Although, in "crime situation" coming within the purview of Article 16, Section 6, the need for close consultation with, reliance upon the expertise and resources of, and input from the MSC becomes enhanced and perhaps more crucial than in more typical discipline, crime situations are neither atypical nor novel in the experience of the Postal Service, and the Postal Service has made no showing or contention here that the parties to the National Agreement intended to suspend the language of Article 16, Section 8 in dealing with Article 16, Section 6-type or variety of disciplinary determinations. The absence of such declaratory language in the provision alone is sufficient to dispose of the question.

Despite the gloss placed upon the matter by and through the testimony of Supervisor Lorrelo and Postmaster Rambo, the clear preponderance of the evidence established that Lorello's involvement was essentially that of a role player and mere conduit in the analytical and decisional process leading to the suspension of the grievant. He was a passive, reluctant and, to a large degree, apologetic cog in the process which was dominated

throughout by MSC personnel and procedural expertise. Involvement to accepting the bottom-line resolution of discipline determine appropriate by MCS authority, is not the type of participation demanded and required by Article 16, Section 8. Cf. Opinion and Award of Arbitrator Dennis R. Nolan, in Case No. S4N-3A-D 37169, at pages 5 and 6. That Lorello agreed with the decision to suspend when it came down to him in the form of the Notice of Suspension in which he made no changes, is hardly the equavilent of volitional, participatory determination by local supervision required by the National Agreement. Mere concurrence in the suspension decision made by MSC after it came down from the MSC is not sufficient under the Agreement. See Case No. E1R-2F-D 8832,, supra. By then the decision in which he had had no influence in shaping had been made for him. The nature and degree of discipline to be imposed had been dictated by the MCS. The failure of Supervisor Lorello to carry out his responsibility under Article 16, Section 8 rendered the Notice of Indefinite Suspension issued the grievant in the present case a nullity, and deprived him of procedural due process.

Moreover, the Union is correct in its further contention that Supervisor Lorello possessed no genuine authority at Step 1 to settle the grievance. Although never instructed in this regard, it is implausible to assume that Lorello was free to act in a manner inconsistent with the determination made by and imposed upon Lorello by the MSC. "Can one realistically assume that the supervisor had authority to settle the grievance in this

situation where the [indefinite suspension] action has been initiated by the Sectional Center Director of Employee and Labor Relations? Obviously not, and the Step 1 procedure was no more than a charade." See Opinion and Award issued by Arbitrator William J. LeWinter in Case No. S4N-3P-D 19737, at pages 17 and 18. See also Case No. E1N-2U-D 7392 decided by Arbitrator Nicholas H. Zumas.

It is concluded that in this case, like the two aforesaid, the Article 15 step grievance process fashioned by the parties was circumvented and rendered ineffective by the absence of genuine authority of the supervisor to settle the grievance at Step 1, and a denial of due process resulted.

AWARD

The grievance is sustained.

The Notice of Indefinite Suspension was not issued for just cause.

The Postal Service is directed to withdraw and rescind the Notice of Indefinte Suspension issued herein and dated March 8, 1988, and expunge from its personnel and other such like and related records all references thereto.

The grievant shall be reinstated with full back pay and benefits as of the date he was placed on a non-pay status.

The Arbitrator retains jurisdiction of this dispute for sixty (60) days in the event that any question should arise as to the interpretation or application of this Award.

James T. Barker
Arbitrator

September 12, 1988
Coronado, CAlifornia

C#08456-

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE and NATIONAL RURAL LETTER CARRIERS' ASSOCIATION	GRIEVANT: Thomas E. Milkey POST OFFICE: Saline, MI CASE NO: C4R-4B-D 35832 Arbitration File DD 88-3

BEFORE: William Belshaw, Arbitrator

APPEARANCES:

For the U. S. Postal Service: Ms. Zipporia Sloan

For the Union: William B. Peer, Esq.

Place of Hearing: 108 S. Adams, Ypsilanti, MI

Date of Hearing: April 12, 1988

AWARD: The removal of the grievant, Thomas Milkey, was not for just cause.
(Appropriate remedy provision)
(Reinstatement provision)
(Retainment of jurisdiction provision)

Date of Award: May 27, 1988

William Belshaw, Attorney-Arbitrator

D I R E C T D E S I G N A T I O N

BEFORE
WILLIAM BELSHAW,
ATTORNEY-ARBITRATOR

UNITED STATES POSTAL SERVICE	)	
	)	
AND	)	Case No. 4R-4B-D 35832
	)	Arbitration File DD 88-3
NATIONAL RURAL LETTER CARRIERS' ASSOCIATION	)	Grievant: Thomas E. Milkey
	)	

AWARD

Thomas E. Milkey, until a date on or about July 6, 1987, was a Regular Rural Carrier assigned to the Saline, Michigan, Post Office. Saline is a part of the Detroit, Michigan, Management Sectional Center. He was removed for allegedly-unsatisfactory personal habits, incident to also-alleged sexual harassment of female employees.

The somewhat-unusual presentation mode came in the hearing at Ypsilanti on April 12, 1988, which was followed by post-hearing remarks. There were no arbitrability contentions from either side.

APPEARANCES

The employer presenter was Mrs. Zipporia Sloan, Labor Relations Representative, from Detroit, Michigan. The union spokesperson was William B. Peer, Esq., from Washington, D.C.

FACTS

Generally speaking, the showings seemed to be that the grievant was a carrier, in various categories, since he came to the Service in 1981; his wife, perhaps irrelevantly, was also a carrier at Saline. Descriptions of Milkey suggested that he was an outgoing, "hands on" type of person, without substantial unusual interrelationships with fellow employees. Although documentation included suggestions that there *had* been unusual relationship incidents with three female employees, only one appeared and testified; she was Mrs. Catherine Fitzgerald.

Briefly, Mrs. Fitzgerald, shortly after hiring, talked to the Postmaster, Mr. Loren Heffington; this was shortly before her departure on Milkey's route the first day. With testimonial variations as to whether or not Milkey's name was mentioned, the tellings seemed to suggest Heffington told Fitzgerald about possible problems, and instructed her to advise him if any arose.

According to Fitzgerald, she drove and Milkey put mail in boxes the first day. On the second day, the grievant drove and she placed the mail. According to Fitzgerald, the grievant, at a particular stop, reached his right arm across her chest, toward the mail box, and rubbed the back of it against her. Ostensibly offended, she declined to ride with him the third day. Curiously, although these events took place in November, 1986, there was no mention of them by Fitzgerald to management until March, 1987.

Although there were substantial additional recitals, many of them related to alleged occurrences involving two other postal employees, Gloria Early and Laura Chizek. (Mrs. Early had previously been removed from the Postal Service, and did not testify; Mrs. Chizek apparently still resides in Kansas, but she, as well, did not testify). Their recitals as to supposed events involving them came in Employer Exhibit 1,

an inspector's memorandum.[1] (There was also evidence, initially received over objection and later rejected, as to an alleged second event involving Fitzgerald that supposedly occurred on May 23, 1987).

The union offered no proof. The net, for decisional consideration, was accordingly to be found in the testimonies of the inspector, a part-time supervisor, Mrs. Fitzgerald and the postmaster, as they related to Milkey's general posture and the alleged events of November, 1986, with Fitzgerald.

As usual, the factual recital is not intended to be complete.

ISSUES

The issues were typical. They were:

"Was the removal of the grievant, Thomas Milkey, for just cause?"

"If not, what is the appropriate remedy?"

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[1]Although the inspector's memorandum was received without objection, the condition suggested by union counsel was that it could not be received as proof of the truth of any allegations by non-present employees.

DOCUMENTARY REFERENCES AND POSITIONS OF THE PARTIES

Proceeding, of course, in accordance with the applicable agreement's Article 3, and relying also on Articles 16 and 19, the Service looked particularly to Part 661 of the Employee and Labor Relations Manual. A portion thereof required the maintenance of "satisfactory personal habits" which were not "obnoxious or offensive to other persons" and which did not "create unpleasant working conditions". The Service also noted the promulgation of a sexual harassment directive from the Postmaster General, issued in 1980 and re-emphasized as late as January, 1986. Picturing sexual harassment as a serious management problem, and extolling the rights of employees not to be confronted with such privacy violations, the Service pictured Milkey as a perennial offender.

The labor organization found an allegedly-severe procedural defect, relating to the contract's Article 16, Section 6; the decision to remove, it said, was made at an upper level, and without the necessary concurrence. Substantively, and despite its failure to produce its own case via the usual procedure, the union position was that the employer didn't and couldn't produce a *prima facie* case. Finally, if any remedy was involved, it urged a much-lower-quality discipline.

OPINION

The seriousness of this case, and, particularly, the significance of the issues involved in it, demanded a most-careful review, and, hopefully, an equally-careful articulation. It seemed that there were important lessons to be learned (or re-learned) by almost everyone.

As counsel for the labor organization correctly suggested, the submission involved both procedural and substantive aspects. Even though a review of *either* would here have been determinative, and justified the vacating of the specified discipline, the surplusage is justified by the complexity.

THE PROCEDURAL ASPECTS

Article 16, Section 6 of the applicable agreement specified "review of discipline", with an implicit method in its accomplishment. The command was for the disciplinary determination and imposition by a lower-level official and then the review and concurrence of that determination by some second supervision person, farther up the line. The obvious end was *care*, to fully implement the very-basic mandate for corrective discipline, hopefully for the benefit of both the Service and its constituents.

The requirement wasn't met; the proof was clear. The conclusion seemed to be that the *whole* decision was made at the high level, with lower-level supervision simply going along. The facts were established by the testimony of the Saline postmaster, Mr. Loren Heffington.

On March 5, 1987, after a prior telephone conversation, Heffington wrote a Postal Inspector at Detroit about a supposed sexual harassment problem. The information came to D. A. Mrowczynski, another Postal Inspector, and an investigation commenced. Following the (first) investigative memorandum, dated May 7, 1987, the Notice of Charges came, on May 29, 1987. After answers, it was followed by the Letter of Decision, on June 22, 1987. The *only* evidence relative to these events came from the employer witness, and the most-favorable view mandated by the non-proffer of union evidence still left the employer case desolate.

According to Heffington, the Notice of Removal was prepared in Detroit (H16); although that fact could have been purely technical, it wasn't. Heffington then said that *he* "had nothing to do with it" (H16).[2] In adroit cross-examination,

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[2]The letter and number references are simply an implementation of the neutral's policy of specifying by whom and where, in the official record, the testimony came. The letter reference is to the first initial of the last name of the speaker, and the number is to the page of the notes.

he went on and on. He told a union official later, he said, that the decision to remove was made by his "boss", John Talick, then the Director of Field Operations, Detroit (H16). (It was his opinion that the writing came from Zipporia Sloan, who was also the union presenter (H17)). Finally, he said that the Reviewing Authority, Dean Richards, Manager, Customer Services, Ann Arbor, "just read and signed", without ever having seen the file (H17). *There was no contrary evidence of any kind.*

The parties' agreement made such a procedure impermissible; the conclusion flows not only from the language but also from its earlier regard by some of the parties' other neutrals. In *Beverly Woods, S4R-3D-D 56046 (Caraway, 1988)*, another removal decision, the arbitrator found, was made by an upper-level Director of Field Operations. With that conclusion he correctly said:

> "A removal is procedurally defective where the higher level supervisor, in fact, makes the decision to discharge rather than the immediate supervisor. The action...would be in violation of Article 16, Section 6."

The conclusion followed an earlier, similar ruling. An even better articulation, with a string of precedents, came in

Iris E. Gordon, E4R-2J-D 40167 and E4R-2J-D 38742 (Zumas, 1987).[3]

There was, to be complete, an employer response to the union's claim of procedural defect; it was of no help. In post-hearing remarks, after first stating that claims about a non-initiation of charges by the postmaster were nowhere in the grievance chain, the employer representative *then* acknowledged that the problem *was* raised at Step II, on July 14, 1987. The supposedly-late urging, she said, was "a violation of the contract"; *assuming* it was, the effect, if any for here, would have been an impact on restitution if the suspension and/or the removal were to be vacated.

The end, certainly, despite any ascribing of fault, was a controlling violation of the disciplinary process' requirements.

THE SUBSTANTIVE ASPECTS

There should be a review of the basics, again because there are strong overtones in this case. There should also be such a review, more importantly, because the Service, early

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[3]The conclusion was: "An essential and critical element in the determination of whether any adverse action taken against an employee was for just cause is the determination of whether or not that employee was accorded procedural due process rights as spelled out in a collective bargaining agreement. Under the specific provisions of the agreement between these parties, the immediate supervisor must initiate, through recommendation or decision, the disciplinary process."

and late, took the position that the neutral could and should consider *all* the recitals in the first investigative memorandum, *some* of which were *not* admissible as evidence of offense-commission. The criteria can conveniently be followed by a consideration of what "evidence" *could* and *couldn't* be considered.

Since the primary non-proof area related to recitals by persons who did not appear and testify, the basic problem was one of hearsay evidence. That evidence, "...as classically defined, is the report of a statement (written or oral) made by a person who is not a witness in the proceeding and introduced to prove the truth of what is asserted."[4] That problem here was with the Patsy Early, John Grossman, Dale E. Rathfuss and Laura Chizek declarations that were a part of the initial investigative memorandum. As noted, the Service felt they *had* to be considered; the union consented to the admission of the report with the caveat that the recitals, although made, were not received as necessarily truthful records of what had been said. The entire matter was fully investigated and fully considered.

Although all arbitration-knowledgeable people have been made aware of some differences in evidentiary standards,

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[4]Wigmore, *Evidence*, Section 1361 (3rd Edition, 1940).

and, in some situations, with some neutrals, the equivocal "for what it is worth" doctrine, there is sharp division yet about both admissibility and acceptability of contents. A prominent work, by way of clarification, says:

> "Affidavits of individuals not attending the hearing and hence not subject to cross-examination are sometimes introduced as evidence in arbitrations and are often admitted subject to the same limitations that apply to all hearsay evidence. In disciplinary cases, however, arbitrators often rule that affidavits are inadmissible because they deprive one of the parties of the right to cross-examination in a situation where careful evaluation of evidence is important."[5]

With the duty of providing a fair, adequate hearing, the rule is--and should be--that without corroboration by "truth-tending circumstances in the environment in which it was uttered", the receipt, *if* it comes at all, should be *with* skepticism. (Others said, "If a witness can testify at a hearing and does not, his statements outside the hearing should be given no weight, indeed, should even be excluded if there appears to be no therapeutic, nonevidentiary reason to admit it.")[6]

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[5]Fairweather, *Practice and Procedure in Labor Arbitration*, The Bureau of National Affairs, Inc., Washington, D.C., 1983.

[6]Report of the West Coast Tripartite Committee, in *Problems of Proof in Arbitration*, Proceedings of the Nineteenth Annual Meeting, National Academy of Arbitrators, The Bureau of National Affairs, Inc., Washington, D.C., 1967.

The "business records" exception, urged by the Service, didn't change the picture at all. The exception, based on the theory that the circumstances of preparation assured the accuracy and reliability of the entries, did *not* bring with it the result that the memorandum was proof of the facts it contained, since the person making the memorandum did not *himself* have first hand knowledge. (The origin of the exception, after all, was only the law's desire to avoid disruption of business activity).[7]

What, then, could *not* have been considered as part of the employer's case? The obvious answer was the *substantial* additional, other-person recitals in the first investigative memorandum. The conclusion wiped out the consideration of the Patsy Early statement of April 4, 1987, the John Grossman statement of April 23, 1987, (which wasn't *for* the Service anyway, as to personal observations), the Dale E. Rathfuss statement of the same date, and the Laura Chizek statement of May 1,

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[7]Seidman, *The Law of Evidence in Indiana*, The Bobbs-Merrill Company, Inc., Indianapolis, IN, 1977, puts it this way: "While some of the cases and the federal business record statute appear on their face to permit the introduction of all such records, without exceptions, both the Indiana and federal courts have been careful to limit their admissibility to records made for the systematic conduct of the business *in its principal capacity* and *not* where the records were produced primarily for purposes related to the matters in issue between the parties in the litigation between them." (Emphases supplied).

1987.[8] Even though, certainly, it is gratuitous, there should be mention of what *could* have been the procedure, and what *might* have been the outcome.

By stipulations, Patsy Early had previously been removed and Laura Chizek (still a postal employee?) was residing in Kansas. Nothing was said as to the whereabouts or status of either Grossman or Rathfuss, although both, apparently, were at one time or another Saline people. There were never any reasons articulated or even suggested as to *why*, if their information was so important, it couldn't have been produced, in a *proper* fashion; overtones *could* have become facts.

On the other side of the coin, what, then, *could* have been considered as part of the employer's case, and *was*? What was the weight? Before specifics, there should be mention of evidentiary requirement postures. The basic one is the one regarding *prima facie*; fairly, that is the status of a case, presented by the party having the burden of proceeding, which is, via the proffered evidence, "sufficient in quality and quantity

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[8]Another *non*-available piece of "evidence", of course, was the second investigative memorandum, relating to another event that took place (supposedly) *before* the Notice of Removal, but was not referred to in it. The presumed determiner *had* notice, however (H17).

to warrant a ruling...in favor of the presenting party."[9] The availabilities included the Frederick W. Slocum statement of April 10, 1987, (because he was present and a witness), his testimony, when it came, the Catherine Fitzgerald statement and testimony, and, of course, the information from the postmaster.

To prove the "sexual harassment", there was the following:

(1) Prior to the first performance day, on which the grievant and Fitzgerald worked the latter's route, Fitzgerald and the postmaster had met, incident to her commencement of employment. Fitzgerald said that the postmaster told her he had spoken to the grievant once before about conduct (F13), but also said that it was unlikely that the grievant "would do anything". There was a warning from the postmaster, Fitzgerald said, about "no hanky-panky" (F8), which warning the postmaster could not recall (H16);

(2) On the second performance day, in November, 1986, Fitzgerald said that the grievant reached across her chest, toward a mail box, and rubbed her with the back of his arm (F8); she made no report of the incident, she said, because she "felt that she could handle it" (F8);

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[9]Hill, *Evidence in Arbitration*, The Bureau of National Affairs, Inc., Washington, D.C., 1980, p. 14. Another authority calls it "sufficient evidence to prove its contention".

(3) For some three months later, there were, Fitzgerald testified, a series of confrontations (F9), with her ostensible hearing of grievant complaints that suggested an attempt to get her discharged (F9). The grievant called her repeatedly, the woman said, about her performance failures (F9), although she then testified that these were *not* related to the prior "unwelcome" touching (F11);

(4) On March 1, 1987, Fitzgerald complained to the postmaster, giving as additional reasons for her delay her desire "not to make waves", plus the fact that she "had to work with him" (H15). The postmaster contemporaneously testified that Fitzgerald didn't mention any attempt to "get her" (H16). Fitzgerald, in the interim, had received no other touchings, and had seen none (F12);

(5) On March 5, 1987, there was the letter of the postmaster to Detroit--the first mention of the November "affair";

(6) On April 6, 1987, Slocum observed the grievant with his hand around Early (S5). The witness also said that he saw more-extensive touching at other times, describing the grievant as one always using his hands, and one who "always seemed to be touching people, ever since I knew him" (S7). "Was there an affectionate pat?" was the question; "very rarely" was the answer (S7).[10]

There was nothing more.

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[10]As to the April 6, 1987, event with Early, there was no mention of it until *after* the postal inspector took a statement, on April 10. Furthermore, Slocum told the postmaster about it, he said, because of *Early's* dislike for what occurred; he said that *he* wouldn't have mentioned the matter if *she* hadn't, suggesting plainly that *his* evaluation of what transpired was different (S7). "It wasn't serious enough", he said (S7).

For additional consideration, even if one were to *assume* that what was shown *was* worthy of *prima facie* status, there was a string of "ifs". The grievant was a good carrier (H18). He had received no prior relevant disciplines (Employer Exhibit 1, paragraph 11, p. 4). There had been no warnings given, and there had been no conversations about the supposedly-involved matters (S6). Slocum had received no complaints regarding the grievant's "touchings" in three years (S7). Finally, there was the postmaster's admission of "no other complaints" (H15).

THE CONCLUSIONS

"Sexual harassment", by federal definition, is the making of unwelcome sexual advances or requests, or other verbal or physical conduct of a sexual nature, provided "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive environment."[11] If those acts occurred in *this* situation--and they *might* have--the point, for decision, is that the Service, with the burdens of both proceeding and proof, might well have been able to do its jobs early and late, but didn't. Without sufficient procedural attention, in a

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[11] 29 CFR Section 1604.11(a)(3).

situation that *obviously* would end up being confrontational, without the presentation of either sufficient or sufficiently-believeable substantive evidence, in a submission that was *sure* to have extremely-difficult evidentiary considerations, and with, instead, the yield of postal inspection for additional proof(?), there was *no* real hope for a "favorable" outcome. (*Certainly*, the presentation mode of the labor organization was also a significant aspect).

But, for all that happened (or didn't), the final categorization should be that there was *some* believeable evidence that the actions of the grievant, with Fitzgerald and otherwise, *could* reasonably have been viewed by *some* persons involved as evidence of a sexual harassment predisposition. And so, should there be *any* discipline? Yes. The grievant and the Service can only be helped--*if* help is needed--by the interposition of a warning to Milkey that the alleged-but-here-unproved commission of acts of sexual harassment will not--*cannot*--be tolerated. The case, after all, did *suggest* the potential, which, if that was all there was, should have been *so* categorized and *so* dealt with. Perhaps it now has.

DECISION

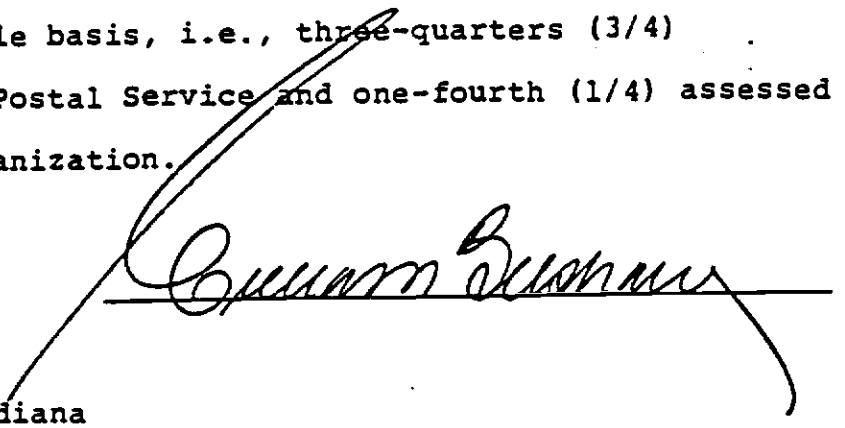
The removal of the grievant, Thomas Milkey, was not for just cause.

The appropriate remedy for the previous conduct of the grievant should be, and it hereby is, declared to be a Letter of Warning, which the Service should be, and it hereby is, directed to issue and serve upon the grievant forthwith. The employer, further, should be, and it hereby is, directed to reinstate the grievant forthwith, provided he makes application therefor within seven (7) days of the date of the within Decision, and reports for work.

Upon reinstatement, if it occurs, the employer should be, and it hereby is, directed to compensate the grievant appropriately for the period of time he would have performed between the date of removal and the date of reinstatement, less all compensation or payments he may have received from other sources (provided such offsets, if any, relate to the times he normally would have performed), and to make him whole in all other respects. The grievant should be, and he hereby is, directed to furnish the employer, on request, full information in these regards.

In accordance with the grant of jurisdiction of the parties, the arbitrator should, and he hereby does, elect to retain jurisdiction of this proceeding for a period of two (2) calendar months from the date hereof, to assist the parties, or either of them, in the implementation of this Award.

Pursuant to the mandate of the applicable agreement's Article 15, Section 5, Subsection A, relative to costs, the same should be, and they hereby are, allocated between the parties on an equitable basis, i.e., three-quarters (3/4) assessed against the Postal Service and one-fourth (1/4) assessed against the labor organization.



Dated at Highland, Indiana
May 27, 1988

WILLIAM BELSHAW
Attorney-Arbitrator
9007 Indianapolis Blvd.
Highland, Indiana 46322
Phone: (219)972-1600

C#08457

UNITED STATES POSTAL SERVICE

AND

NATIONAL RURAL LETTER
CARRIERS'ASSOCIATION

RE: S4R-3D-D 56046
Removal of Beverly Woods
Place of Hearing - Gardendale, AL
Date of Hearing - March 23, 1988

APPEARANCES

FOR THE POSTAL SERVICE	Ronald Drain, Labor Relations Representative
FOR THE UNION	William B. Peer, Attorney
ARBITRATOR	John F. Caraway, selected by mutual agreement of the parties

By date of May 6, 1987 Ms. Woods, a Rural Carrier Relief, was issued a Notice of Removal. It was signed by Postmaster Nunn. The notice read as follows:

> "A review of your work record indicates your past work attendance is unacceptable. Since December 20, 1986 to present date you have been unavailable 44 days.
>
> This action is taken due to repeated unavailability for work. (Sect. 30.2.L.2)
>
> This notice of removal becomes effective June 05, 1987."

There was introduced into the record documentary evidence which showed that the grievant had treatment for a number of medical problems during the time periods at issue. She was hospitalized from December 15, 1986 to December 24, 1986 for a pelvic infection. Surgery was performed. She returned to

work on December 29, 1986. She was then admitted to the hospital on January 22, 1987 and discharged on January 25. The medical problem was a pelvic infection. Ms. Woods was admitted to the hospital on February 25 and discharged on March 1, 1987. A hysterectomy was performed. She was required to remain off work for six (6) weeks. She returned to work on April 18, 1987. She was again admitted to the hospital on April 25 and discharged on May 2, 1987. The medical problem was hepatitis. She returned to work on May 12, 1987 and worked until her removal on June 5, 1987.

Mr. Moseley, who was a Window Distribution Clerk at the Gardendale facility at the time, testified that he acted as part-time Postmaster. He stated that Ms. Woods was absent on a frequent basis between December 1986 and May 1987. He stated that this was particularly acute because the office was understaffed at the time having only six (6) to seven (7) employees to cover five (5) regular routes and one (1) auxiliary route. Of the Regular Carriers Ms. Reed was on extended sick leave. At Gardendale there were four (4) Regular Carriers and three (3) RCRs. The authorized complement was five (5) Regular Carriers and six (6) RCRs or a total of eleven (11) employees. Thus, the station was about four (4) employees understaffed. Mr. Moseley stated that the auxiliary route involved about 35 hours per week. It was on a daily delivery basis. Ms. Woods being the senior RCR, she was assigned to that route. She also was the

substitute on Route No. 3 on Saturdays, sick days and annual leave days of the Regular Carrier.

Ms. Martin, the Regular Carrier on Route No. 3, stated that she had considerable problems with Ms. Woods at the time periods in question. Ms. Woods was not available because she was sick most of the time. Ms. Martin complained to Postmaster Nunn of these problems. Ms. Martin also testified that Ms. Woods did not perform her work satisfactorily at all times, making wrong deliveries and treating customers in a rude fashion.

Mr. Brose, Director of Field Operations, stated that he was in contact with Postmaster Nunn regarding Ms. Woods. Ms. Nunn stated that she wanted to discharge Ms. Woods because she was unavailable for work. Mr. Brose stated that he reviewed Ms. Woods' record and saw that she was repeatedly absent. There were no letters of warning issued to her but he had some evidence of repeated discussions by the Postmaster to Ms. Woods regarding her availability.

Ms. Reynolds, the Shop Steward, testified on behalf of the Union. She stated that she was a Regular Rural Carrier for some sixteen (16) years. She described the understaffing problems which the Gardendale station was having. She also had problems with Ms. Nunn who was loud and rude to her. This cause her to call Mr. Brose to complain about Ms. Nunn. Mr. Brose told her he was tired of the problems at the Gardendale station and he intended to fire Ms. Woods,

Buddy Reynolds and Irma Reed. He stated that he intended to also fire Postmaster Nunn.

Mr. Brown testified that he had received complaints with regard to the Gardendale office. Ms. Martin did call him with regard to Ms. Woods being unavailable for work. He talked to Mr. Brose. Mr. Brose said he intended to fire three (3) to four (4) employees which included Ms. Woods, Ms. Reed and Mr. Reynolds. He was also going to have Postmaster Nunn retire. This conversation occurred some two (2) to three (3) weeks before the Notice of Removal was issued to Ms. Woods.

Mr. Culpepper identified himself as the Area Steward. He testified that he talked to Mr. Brose on several occasions regarding the Gardendale situation. He stated that Mr. Brose told him that he was cleaning house and employees were going to be fired including Ms. Woods. Mr. Culpepper asked him about her sickness. Mr. Brose replied that he was tired of the whole situation and that Ms. Woods was a poor employee. Her employment was ended.

Ms. Woods stated that she had been employed by the Postal Service since October 1982 as an RCR. She was assigned Route No. 3 from 1982 to 1987 with the Regular Carrier Ms. Martin. She also worked the auxiliary route from late 1984 until her removal. She stated that because of these assignments she worked on a regular basis six (6) days per week. Ms. Woods related the medical problems which commenced on or about December 15, 1986 and ran through May 12 the date she was released to return to work.

Ms. Woods stated that on May 5, 1987 she received a call from Ms. Reynolds, the Shop Steward, stating that Mr. Brose had told her that Ms. Woods was going to be fired on May 6. Ms. Nunn called her on May 6 to get her address. Ms. Woods called Ms. Nunn to ask her why she needed the address. Ms. Nunn replied that she was going to receive something in the mail which Mr. Brose was having typed. She received her Notice of Removal on May 9. The last day she worked was June 5, 1987.

Ms. Woods testified that after she had received the Notice of Removal Postmaster Nunn telephoned her. Ms. Nunn told her that she was sorry that she had been fired and she had nothing to do with it.

Ms. Woods stated that she also telephoned Mr. Brose and asked him why he fired her. Mr. Brose said"I cleaned house and you were not available for work." He then denied that he had fired Ms. Woods. Ms. Woods stated that in her mind it was Mr. Brose who was responsible for her removal.

CONTRACT PROVISIONS INVOLVED

ARTICLE 16
DISCIPLINE PROCEDURE

"Section 6. Review of Discipline

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or the designee.

In associate post offices of twenty (2) or less employees, or where there is no higher level supervisor than the supervisor who

proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken."

ARTICLE 30
WORKING RULES FOR RURAL CARRIERS

"Section 2. Special Provisions for Substitutes, Auxiliary Rural Carriers, and Rural Carrier Relief Employees.

L. Discipline Procedure

1. Article 16, Discipline Procedure, shall apply to substitute rural carriers.

2. Article 16, except for Section 3 and the suspension provisions of Section 4, shall apply to rural carrier relief employees. The parties agree that suspensions are not applicable to RCR employment and that, in the event progressive discipline is appropriate, letters of warning shall be used in lieu of suspensions.

In addition to the provisions of Article 16, the following actions shall constitute just cause for removal of rural carrier relief employees: repeated unavailability for work, failure to maintain the regular schedule within reasonable limits, delay of mail, and failure to perform satisfactorily in the office."

ISSUE

Did the Postal Service have just cause to remove Ms. Woods from its employment?

ARGUMENT

The Postal Service maintains that it had just cause to remove Ms. Woods. The Postal Service is entitled to have

employees who are dependable in their attendance. The record in this case proves the unavailability of Ms. Woods. She had been unavailable for 44 occasions, specifically during the time period December 20, 1986 to May 12, 1987. While it is true that these absences are largely explained by medical problems, the employee has the obligation to have herself physically fit to perform her job duties. An employee who cannot come to work is of no value to the Postal Service.

The Postal Service show that Postmaster Nunn finally reached the end of the line with Ms. Woods and recommended her discharge to Mr. Brose. Mr. Brose carefully reviewed the grievant's record and concurred in the removal action. The Postal Service denies that it was Mr. Brose who made the decision to remove. That decision was initiated by Postmaster Nunn because of the unavailability of Ms. Woods. Unfortunately, Ms. Nunn could not be present at the arbitration hearing because her husband is terminally ill. But the evidence shows that it was Ms. Nunn's decision to remove the grievant and the basis of that decision.

The Union maintains that the Notice of Removal is procedurally defective. It was in violation of Article 16, Section 6 which requires that the supervisor initiate the removal action and that it be reviewed and concurred in by higher authority. The facts in the instant case show that it was Mr. Brose who made the decision to remove the grievant. The record is replete with statements by witnesses to the effect that it was Mr. Brose who ordered the firing of Ms. Woods as

well as Ms. Reed and Buddy Reynolds. Ms. Woods testified that Postmaster Nunn telephoned her and said that Postmaster Nunn had nothing to do with the removing of the grievant.

On the merits the Union maintains that the sole issue before the Arbitrator is the unavailability of Ms. Woods from around December 15, 1986 to May 12, 1987. References to her attendance record prior to the date must be completely ignored. The Postal Service did not cite any elements of the past records in the Letter of Removal. Likewise any attempts by the Postal Service to discredit the work performance of the grievant must be ignored because that is not a part of her removal letter.

The evidence shows that Ms. Woods worked regularly at her auxiliary job and as relief for Route No. 3 except for those time periods when she was in the hospital or recuperating. She was working six (6) days a week. The only reason Ms. Woods did not work on the days when she was absent was because she was physically unable to do so.

The reliance of the Postal Service of Article 30, Section 2.L.2, "Repeated Unavailability for Work" should be disregarded because Ms. Woods was not available for work only because she was medically unable to work. This provision only applies to an employee who is absent and has the power to control whether he or she is absent. This is certainly not the case with Ms. Woods.

The statements attributed to Mr. Brose that he was

tired of the problems at the Gardendale facility and that he was cleaning house was an attempt by the Postal Service to place the responsibility of its poor management upon the employees, and specifically Ms. Woods. The evidence showed that the Gardendale office was understaffed. Instead of having its full complement of eleven (11) employees the office was attempting to operate with seven (7) Regular and Relief Carriers which was four (4) short. This put an onerous burden upon the employees who were working regularly as shown by the fact that Ms. Woods worked a six (6) day workweek when she was physically able to do so.

DECISION

Article 16, Section 6 provides that the discharge of an emp cannot be consummated without its first being reviewed and concurred in by a higher level supervisor. The immediate supervisor initiates the discipline but a higher level supervisor must review and concur before the actual Notice of Removal is issued. This language means that the higher level supervisor is not the individual making the decision to discharge but he only acts in a review type capacity. A removal is procedurally defective where the higher level supervisor, in fact, makes the decision to discharge rather than the immediate supervisor. The action on the part of the higher level supervisor would be in violation of Article 16, Section 6.

A review of the facts in this case demonstrate that

it was Mr. Brose who initiated the removal of Ms. Woods. Shop Steward Reynolds, shortly prior to the issuance of the Removal Letter to Ms. Woods, telephoned Mr. Brose regarding a problem with Postmaster Nunn. In the course of their conversation, Mr. Brose stated that he was mad and upset concerning the Gardendale facility. He further said that he was going to fire Ms. Woods, Buddy Reynolds and Irma Reed. He was going to also fire Postmaster Nunn.

Mr. Brown, the Union's Regional Representative, testified that some two (2) to three (3) weeks prior to the issuance of the Woods'Notice of Removal he talked to Mr. Brose. Mr. Brose said he was going to fire three (3) to four (4) employees. There would be Ms. Woods, Irma Reed and Buddy Reynolds. He also advised Mr. Brown that he was going to have Postmaster Nunn retire.

Union witnesses further substantiated that it was Mr. Brose who made the decision to remove Ms. Woods. Mr. Culpepper, the Area Steward, stated that while going to a meeting with Mr. Brose, Mr. Brose said that he was cleaning house at Gardendale. He was going to fire Ms. Woods, Irma Reed and Buddy Reynolds. He further said that he was tired of the whole situation and Ms. Woods was being fired because she was a poor employee.

The testimony of Grievant Woods was particularly decisive of this point. She stated that Ms. Nunn called her and asked for her mailing address. She later asked Ms. Nunn why she

needed this. Ms. Nunn replied that Mr. Brose was having typed up something that you would receive in the mail. This shows that Mr. Brose was in control of the removal proceedings. Any doubt on this subject is ended by the further testimony of Ms. Woods that some two (2) to three (3) weeks after she received the Notice of Removal but prior to her actual severance from employment, Postmaster Nunn telephoned her. The Postmaster said that she was sorry that Ms. Woods was fired. She told Ms. Woods that she did not have anything to do with it.

The conclusion, therefore, must be that it was the higher level supervisor, Mr. Brose, who initiated the termination of Ms. Woods. His actions in connection with the removal far exceeded the simple review and concurrence. It was he who made the decision to remove and not Postmaster Nunn, the immediate supervisor.

This Arbitrator has enunciated this principle in other cases. In No. S4R-3Q-D 20845 & 21666 [September 8, 1986] this Arbitrator said at page 8:

"Article 16, Section 6 requires that before discipline may be imposed upon an employee that the supervisor initiating the discipline secure the review and concurrence therein by the Installation Head or his designee. The immediate supervisor did not initiate the discipline in this case. The immediate supervisor was Supervisor Duncan who was on leave. Mr. Brandt was the next in line insofar as immediate supervision was concerned. He did not initiate or participate in the decision to remove. Neither did Mr. Danahy. The complete decision to remove was made solely and exclusively by Postmaster Scott. There was a clear violation of Article 16, Section 6."

AWARD

The Union grievance is sustained. The Postal Service violated the National Agreement by removing Ms. Woods. The Postal Service shall immediately reinstate Ms. Woods to full employment, and restore all lost seniority and bidding rights. The Postal Service shall pay Ms. Woods full back wages which shall be based upon the wages she would have earned had she carried the Auxiliary route and/or substituted as RCR on Route No. 3 from June 5, 1987 to the date of her reinstatement.

The Postal Service shall pay Ms. Woods thos wages representing the difference between the required thirty (30) day removal notice period and the wages earned by her for this time period.

The Arbitrator shall retain jurisdiction of this case and implement the award if necessary.

Pursuant to Article 15, Section 5A of the National Agreement, the Arbitrator's fees and expenses are assessed against the Postal Service.

IMPARTIAL ARBITRATOR

New Orleans, Louisiana

April 6, 1988

C # 10639

REGIONAL ARBITRATION PANEL

In the Matter of the Arbitration	**GRIEVANT:**	B. Fenelon
between	**POST OFFICE:**	New Orleans LA
UNITED STATES POSTAL SERVICE	**USPS CASE NOS:**	S7N-3N-D 31329
and	**NALC CASE NOS:**	004295
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO		

BEFORE: **Raymond L. Britton,** *Arbitrator*

APPEARANCES:

For the U.S. Postal Service:	Mack Boyd, Jr.
For the Union:	Goerge Cooper
Place of Hearing:	U.S. Post Office
Date of Hearing:	December 7, 1990

AWARD:

For the reasons given, the grievance is sustained in full.

Date of Award: February 4, 1991

Raymond L. Britton

ISSUE

Whether there was just cause for the removal of the Grievant?

HISTORY OF THE PROCEEDINGS

The parties failed to reach agreement on this matter, and it was submitted to arbitration for resolution. Pursuant to the contractual procedures of the parties, the undersigned was appointed as Arbitrator to hear and decide the matter in dispute.

At the commencement of the Hearing, it was stipulated by the parties that this matter was properly before the Arbitrator for decision and that all steps of the arbitration procedure had been followed and that the Arbitrator had the authority to render the decision in this matter. After the Hearing, it was agreed that the parties would submit Post-Hearing briefs to the Arbitrator by placing such briefs in the mails not later than December 27, 1990. Both the Post-Hearing Brief filed by the United States Postal Service (hereinafter referred to as "Employer") and that filed by National Association of Letter Carriers, AFL-CIO (hereinafter referred to as "Union") were received by the Arbitrator on January 4, 1991.

SUMMARY STATEMENT OF THE CASE

Barbara A. Fenelon, (hereinafter sometimes referred to as "Grievant") was employed on January 30, 1988, as a Letter Carrier in New Orleans, Louisiana, and was assigned to the Algiers Post Office (Station A) as a Full-Time Letter Carrier. She was subsequently administratively reassigned to Bywater Station at her request.

On May 10, 1990, Peter D. Carriere, Area Manager Station & Branches, New Orleans, Louisiana, issued a memorandum to the Ms. Barbara Ann Fenelon, Subject: Notice of Removal which states in relevant part as follows (Joint Exhibit No. 2):

You are hereby notified that you will be removed from the Postal Service on June 11, 1990.

This action is based on the following reasons:

CHARGE: Failure To Follow Instructions And Continuing To Avoid Necessary Requirements For Return To Duty - AWOL

By arbitration decision dated February 24, 1990, you were returned to duty March 5, 1990. Upon your return to duty at 12:00 noon, on March 5, 1990, you stated you didn't know why you were working here (Station "A"), and you didn't trust anyone. When given an assignment you were uncooperative and not responsive to the instructions stating you didn't understand or remember anything. After being given repeated instructions by Mr. Arambide, Station Manager, you continued repeating you didn't know what he was talking about, you didn't trust anyone and wanted to go somewhere else. Approximately a half hour after your arrival (12:30 p.m.), you reported that you had hit your hand. You stated the accident was due to stress and you left work to seek medical attention.

By notice dated March 9, 1990, you were notified that you must submit medical certification to the Postal Medical Office that you can return to duty without hazard to yourself or others, and that you would be temporarily assigned to Bywater Station. You were directed to submit acceptable medical certification to substantiate your absence since March 5, 1990, within five (5) working days.

Effective March 23, 1990, you were placed on Administrative Leave pending your evaluation by Dr. Griffin, Tulane Medical Center on April 3, 1990. You refused to allow Dr. Griffin to examine you and requested to utilize a doctor of your choice. By notice dated April 4, 1990, your request was approved. You were advised that you would be carried in a leave without pay status pending your examination by your physician.

As of April 27, 1990, you had not submitted anything concerning an examination and evaluation by your choice of a physician. By notice dated April 27, 1990, you were again ordered to make the necessary arrangements for the required examination with a physician of your choice within five (5) working days.

You continued not following instructions and orders, and nor take the necessary steps for your return to duty. Accordingly, your time since April 4, 1990, has been charged to AWOL.

Part 666.51 of the Employee and Labor Relations Manual requires employees to obey the instructions of their supervisors.

In addition, the following elements of your past record have been taken into consideration in taking this action:

05/15/89 *264 Day Suspension - Disrupting Workroom Floor - Failure To Follow Instructions - Disrespect To A Supervisor - Striking A Supervisor With Carrier Satchel*

* * *

A grievance was thereafter filed and a Step 1 meeting held on May 24, 1990, and a Step 1 decision rendered on May 24, 1990. Pursuant to Article XV, the grievance was appealed to Step 2 of the grievance procedure on May 24, 1990, by Frederick Conley, Union President, alleging a violation of Article 16 and stating in relevant part as follows:

The Grievant, Barbara A. Fenelon, received written official notification that she was being removed from the Postal Service. The letter was dated May 10, 1990, and received Union May 22, 1990.

The Union initiated a Grievance in behalf of the Grievant, decision dated, February 24, 1990. The Grievance was sustained. The Grievant, subsequently returned to duty "per" the Decision. Upon her return to duty at Station A, problems began to arise, because of the confusing instructions issued by Mr. Arambide, Station Manager. The instructions generally issued by Manager Arambide were not generally understood by the Grievant.

The Grievant injured her hand. This injury was due to stress, and the Grievant left work to seek medical attention. The Postal Service requested that the Grievant submit medical certification to the Postal Service Medical Office. The Grievant did as requested, she did provide the required certification that did indicate that she could return to duty without hazard to herself or others. She also submitted certification to substantiate her absence since March 5, 1990.

The Grievant has provided Medical certification of all requests made of her, indicating that she is ready, willing and able to return to duty.

Union Contentions: Reasons For Grievance:

Union contends that the Charge of refusing to provide necessary medical certification and charge of AWOL is punitive, not corrective in nature. By submitting the necessary certification, the Grievant has demonstrated that she is ready, willing and able to return to duty. Union further contends that management has not concisely indicated to the Grievant exactly what is requested.

Corrective Action Requested: Union requests that the "Removal" of the Grievant, Barbara A. Fenelon, be expunged, and that the Grievant be immediately returned to duty, and that she be made whole for any time loss.

On August 20,1990, Bennie Raby Wallace, Labor Relations Representative (Field) in a memorandum to Mr. Frederick Conley, Subject: Step 2 Grievance Decision, stated in relevant part as follows (Joint Exhibit No. 2):

This is in reference to the above captioned grievance which was discussed with you on July 31, 1990. Time limits for processing were extended by mutual agreement.

In accordance with Article 15, Section 2, Step 2(f), all relevant facts as they pertain to this grievance have been carefully reviewed and thoroughly investigated.

The grievant alleged an on-job-injury and was sent to Tulane Medical to be evaluated by Dr. Griffin. The grievant failed to let Dr. Griffin examine her and requested a Doctor of her choice. Her request was granted, however she failed to submit acceptable medical certification. The grievant was informed that the information she submitted was not acceptable. The grievant was clearly aware of the instructions to submit acceptable medical certification. The medical certification was required to show that the grievant could return to duty without being hazardous to herself or others. Acceptable medical certification was not submitted by the grievant.

The grievance is denied.

* * *

On August 28, 1990, the grievance was appealed to Step 3 and on September 20, 1990, Richard R. Wiese, Labor Relations, in a memorandum to Mr. Ben Johnson, National Business Agent, Subject: Step 3 Grievance Decision stated in relevant part as follows (Joint Exhibit No. 2):

The subject case was discussed on September 13, 1990, with your representative, Mr. Collier James. After considering all available evidence in the record and that offered by the union at the Step 3D hearing, it is my decision to deny the grievance.

A review and discussion of the position of the parties was made concerning this grievance appeal. It is evident that the grievant has not provided the necessary acceptable documentation for the Postal Service to return her to duty, In view of the grievants failure to follow written and oral instructions on numerous occasions, the Service was correct in giving the employee AWOL since April 4, 1990. The past element cited, namely a 264 day "last chance" suspension, clearly did not correct

the grievants deficiencies concerning failing to follow instructions. Accordingly, the removal issued in this instance is progressive, corrective and fully justified based on the facts. Grievance denied.

On September 28, 1990, the grievance was appealed to arbitration.

Provisions of the Agreement entered into as of the 21st day of July 1987, by and between the Employer and the Union effective July 21, 1987 and to remain in full force and effect to and including 12 midnight November 20, 1990,(Joint Exhibit No. 1) considered pertinent to this dispute are as follows:

ARTICLE 3

MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

A. To direct employees of the Employer in the performance of official duties;

B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary actions against such employees;

C. To maintain the efficiency of the operations entrusted to it;

D. To determine the methods, means, and personnel by which such operations are to be conducted;

E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and

F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

ARTICLE 15

GRIEVANCE-ARBITRATION PROCEDURE

Step 1: (a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union representative. The Union may also initiate a grievance at Step 1 within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance. In such case the participation of an individual grievant is not required. A Step 1 Union grievance may involve a complaint affecting more than one employee in the office.

(b) In any such discussion the supervisor shall have the authority to settle the grievance. The steward or other Union representative likewise shall have the authority to settle or withdraw the grievance in whole or in part. No resolution reached as a result of such discussion shall be a precedent for any purpose.

Section 3. Grievance Procedure--General

(a) The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end.

Section 4. Arbitration

* * *

A. General Provisions

* * *

(6) All decisions of an arbitrator will be final and binding. All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator. . . .

* * *

ARTICLE 16

DISCIPLINE PROCEDURE

Section 1. Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

Section 5. Suspensions of More Than 14 Days or Discharge

In the case of suspensions of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days. Thereafter, the employee shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure. A preference eligible who chooses to appeal a suspension of more than fourteen (14) days or his discharge to the Merit Systems Protection Board (MSPB) rather

than through the grievance-arbitration procedure shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement or through exhaustion of his MSPB appeal. When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the Employer is not required to give the employee the full thirty (30) days advance written notice in a discharge action, but shall give such lesser number of days advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

Section 8. Review of Discipline

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

In associate post offices of twenty (20) or less employees, or where there is no higher level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken.

* * *

ARTICLE 19

HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals, and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21 Timekeeper's Instructions.

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least sixty (60) days prior to issuance. At the request of the Unions, the parties shall meet concerning such changes. If the Unions, after the meeting, believe the proposed changes violate the National Agreement (including this Article), they may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Unions upon issuance.

POSITION OF THE PARTIES

The Position of the Employer

It is the position of the Employer that the Grievant's misconduct was inconsistent with applicable rules and regulations under the provisions of the Agreement. The Employer contends that the severe disciplinary action imposed is justified because, by any standard, the Grievant should have known that

she has an obligation to follow the instructions of her managers. The Employer further contends that the excuses offered by the Grievant for not complying with the instructions of her managers are insufficient and unacceptable, and were it not for the Grievant's failure to follow instructions and her continuing avoidance of the requirements for return to duty, the removal action would not have been issued. Finally, the Employer contends that there are no mitigating circumstances that would justify a change in the penalty and that the discharge was not arbitrary or capricious but was issued for just cause in accordance with Article 16 of the Agreement.

The Position of the Union

The Union takes the position that the discipline imposed is procedurally defective and that just cause does not exist for the discharge of the Grievant as no misconduct, deliberate or otherwise, was committed by her. With respect to the merits, the Union contends that the Grievant did not refuse to comply with the requirements of management as she simply did not know what the requirements were. Her attempts to comply, the Union maintains, were never enough and could not have been enough since only the Employer and the doctor knew what was required and the Grievant was never informed except in a very general way. Finally, the Union contends that progressive discipline was not followed and is therefore excessive as there was no proof that on at least more than one occasion, the Grievant failed to follow the same type of instruction.

OPINION

Initially for determination by the Arbitrator in the resolution of this matter is the threshold question raised by the Union as to the procedural correctness of management's action in imposing the discipline in question. In this regard, the Union points out that Peter Carriere signed the Notice of Removal, and that he was not the Grievant's supervisor. The Union claims that Mr. Carriere, as Area Manager of Stations & Branches, does not have day to day workroom contact with craft employees and as a result is required to rely upon second hand reports and hearsay information from management personnel who are in day to day workroom floor contact with craft employes. The Union contends that the intent of Article 15, Section 2, Step 2(b) of the Agreement is frustrated when a level of authority higher than the immediate supervisor level imposes the discipline. Further, the Union maintains that it is unreasonable to expect an initial level supervisor to overturn the action of his superior, as this, in effect, negates the immediate supervisor's authority and therefore is violative of the Agreement. The Union maintains that it is apparent that Mr. Jenkins, the immediate supervisor of the Grievant, had not been involved at all in the decision to discipline the Grievant and that even if management is permitted to impose discipline at a level higher than the immediate supervisor, the higher level must still adhere to the requirements of imposing discipline properly which includes having the discipline reviewed and concurred with by an authority higher than the imposing official. Additionally, the Union contends that the discipline imposed is excessive and not progressive as the only element is a 264 day suspension suggested by arbitrator Foster and no such suspension was issued by the Employer.

As provided under Article 15, Section 2, Step 1(a) of the Agreement, the aggrieved employee is to discuss the grievance with his or her supervisor. The intent and purpose of this language is to enable the aggrieved employee to discuss the grievance with the member of management most familiar with the employee's daily conduct, i.e., the employee's immediate supervisor. The language of this provision is not permissive in nature, but is instead couched in express mandatory terms. Specifically, Step 1(a) requires that any employee who feels aggrieved "must" discuss the grievance with his or her immediate supervisor within a designated time period, and the immediate supervisor, in accordance with Step 1(b),

is given the authority to settle the grievance. Under Step 1(c), if no resolution is reached as a result of such discussion, a decision is to be rendered by the supervisor, and the date on which the decision is rendered is, at the request of the Union representative, to be confirmed by the supervisor initialling the standard grievance form used at Step 2. Here, however, this was not done. Rather, the record reveals that Mr. Carriere signed the Notice of Removal and the testimony of the Grievant's immediate supervisor, Harry K. Jenkins, Supervisor, Mails and Delivery, indicates that he had little, if any, involvement in the decision to discipline the Grievant. Indeed, notwithstanding the requirement under Step 1(c) that the immediate supervisor initial the Step 2 grievance form confirming the date on which the decision was rendered, the grievance form in the instant case, reflects that it was initialed by Area Manager Peter D. Carriere rather than the Grievant's immediate supervisor. The initialling of the Step 1 decision by Mr. Carriere, as Area Manager of Stations and Branches, rather than by the immediate supervisor, as prescribed under the Agreement, is indicative, it seems to the Arbitrator, that the initial level supervisor at Step 1 did not have the authority to settle the grievance. As the Agreement gives the immediate supervisor the authority to settle all grievances at the initial level, the preemption of this authority by higher level management is contrary to both the letter as well as the spirit of the Agreement.

The failure of management to comply with the procedural requirements of Article XV, Section 2, Step (a)(b) and (c) of the Agreement, as outlined above, cannot reasonably be considered as being nonprejudical to the rights of the Grievant. For the denial of her contractual right to discuss the grievance with her immediate supervisor, who is generally most familiar with her work performance and who is authorized to effectuate a settlement of the grievance, constitutes a lack of adherence to the fundamental principles of procedural due process.

In light of the above findings, it is deemed by the Arbitrator to be unnecessary to this opinion that he further consider whether the discipline imposed was progressive or excessive or otherwise procedurally flawed or whether as to the merits just cause exists for the Grievant's removal.

C # 11504
A+B

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration between
UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS AFL - CIO

GRIEVANT: Ellen Costarella

POST OFFICE: New Port Richey, Florida

Case No:
S7N-3W-D 38271
S7N-3W-C 38229
GTS NO. 014991

BEFORE: J. Reese Johnston, Jr., Arbitrator

APPEARANCES:

For the U.S. Postal Service:
Angela N. Ferguson
Labor Relations Representative
United States Postal Service
5201 W. Spruce Street
Tampa, Florida 34653-9998

For the Union:
Mr. Charles Windham
Regional Administrative Asst, NALC
P. O. Drawer 694800
Miami, Florida 33269-1800

Place of Hearing: Post Office, New Port Richey, Florida

Date of Hearing: October 23rd, 1991

Briefs received: November 25th, 1991

AWARD: Case No. S7N-3W-C 38229 is denied. As to Case No. S7N-3W-D 38271 the Notice of Removal given to the grievant, Ellen Costarella, is set aside and the Post Office is directed to make Ms. Costarella whole for any compensation that she may have lost due to her improper removal. At the time of her removal Ms. Costarella's personal physician had placed such restrictions on her working that she would not have been able to perform any work even on a limited duty or light duty basis. I must leave to the determination of the parties when Ms. Costarella had sufficiently recovered

according to her doctor and the Postal Service's doctor so that she could return to her customary 4 hours of duty per day. In the event the parties are unable to mutually resolve this question of compensation if any, that may be due to Ms. Costarella, I will retain jurisdiction of this case. If I have not heard from either party in writing within 30 days after the date of this opinion I will assume that the parties have mutually agreed in the carrying out of this award.

Date of Award: December 17th, 1991

Arbitrator

BACKGROUND

The first case S7N-3W-C 38229 is a contract case wherein the Union filed a grievance based on the actions of the Postal Service in its dealing with Ms. Costarella, both prior to and subsequent to her receiving a Notice of Removal dated February 28th, 1991 and effective April 1st, 1991. The second case S7N-3W-D 38271 is in regard to the Notice of Removal given to Mrs. Costarella.

By agreement both cases were tried together as the factual situation in the matter is entwined into both of the cases.

It is the Union's position that the Notice of Removal had a number of due process problems, which were detailed by the Union as follows: (1) there was no concurrence and review of the request for disciplinary action made by the Postmaster at the New Port Richey Post Office; (2) the Postal Service has failed to provide documents and other evidence in a timely manner thereby inhibiting the steward's investigation, this is in violation of Article 17.3; (3) the Union contends that the Weingarten principal was violated by the Postal Service when the

grievant was interviewed by the Postal Inspector in the Postmaster's office without the presence of Union representation and (4) the immediate Supervisor of the grievant did not have the authority to settle the grievance at Step 1.

In its grievance in the contract case the Union stated the facts as follows: "On 1/28/90 Postmaster Gregg Jackson, called Ellen Costarella at 8:50 a.m. asking her to come to the office for some CA-16 forms. After arriving Ms. Costarella was interviewed by a Postal Inspector and the Postmaster. No CA-16s were ever given to her. When done with interview both Postmaster and Inspector released Ms. Costarella, telling her she had nothing to worry about, that this was routine. Discipline resulted from interview and matter was referred to UMPS on 2/15/91."

The reasons for the grievance, according to the Union, are as follows: "Union contends that Management (Gregg Jackson) acted under false pretenses when asking the employee to come to the station to get some CA-16s. Both Stewards at the station were gone at the time and no representation was available to Ms. Costarella even if she

had requested it. The Union feels that Mr. Jackson disregarded due process, entrapped the employee into an interview and created a situation where representation was denied."

The corrective action requested by the Union is as follows: "Because the investigation was done improperly from the beginning any actions or evidence obtained through the 1/28/91 interview be dismissed and the employee not suffer any repercussions from said interrogation 1/28/91."

As a result of the referred to 1/28/91 interview and the assurance that it was a routine matter, Ms. Costarella gave written permission to the Postal Inspector to get her medical records from her doctor. It was partially on the basis of these medical records, plus a written statement from her doctor that Ms. Costarella was charged with violating her medical restrictions, unsatisfactory performance, and unacceptable conduct. As a basis for a subsequent Notice of Removal Letter given to Ms. Costarella.

DISCUSSION

I have reviewed my tapes of the testimony of the witnesses, examined the exhibits introduced by the parties and carefully read the excellent and thorough briefs filed by the representatives of the parties, including the cases cited in support of such briefs.

In this Arbitrator's opinion the most practical approach to a resolution of these two grievances is to first consider the matters raised by the Union regarding due process and violation of the National Agreement before considering the merits of the case.

I have examined the first contention by the Union that there was no concurrence or review of the request by the Postmaster for removal of the grievant and from the evidence it is my finding that although the copy of the request for disciplinary action that was given to the Union does not show the concurrence of the Supervisor over the Postmaster, that this came about because the Postmaster gave to the Union Steward a copy of his request for disciplinary action prior to the time that this request was reviewed by the Postmaster's Supervisor. I find that the request for

disciplinary action, to-wit: the removal of Ellen Costarella was reviewed by the Postmaster's Supervisor and the proposed removal concurred in by said Supervisor.

The Union raises as a second contention that the failure to provide documents to the Union in a timely manner inhibited the Steward's investigation and that this violated Section 17.3. Again I have reviewed my tapes of the testimony of the witnesses and it is my finding that there was no unseemly or deliberate or willful delay on the part of the Postal Service to furnish to the Union all appropriate documentation held by the Post Office. The principal component of this contention by the Union was the failure to receive a copy of the video tape made by the Postal Inspector's of the activities of Ms. Costarella while she was on medical restrictions to the extent that she was not permitted to perform any work.

It is my finding that as soon as the Postmaster received a copy of the video tape he provided access to the Union to make a copy of said tape.

As to the third contention that the Weingarten doctrine was violated and also that the employee was

entrapped I do not find to have any merit. Entrapment is a defense to a criminal action wherein the law enforcement people set up a trap for an individual by inducing him to commit a crime. That type of entrapment was not present in this case. As to the Weingarten doctrine I likewise find that it is not applicable because under the Weingarten doctrine the employee is entitled to Union representation if requested and the purpose of the meeting with Management is to impose discipline on that employee. The meeting of 1/28/91 was for the purpose of the Postal Inspector interviewing Ms. Costarella as part of his investigation of her activities while on total medical restrictions. No decision had been made at that time by the Postmaster to institute discipline against Mrs. Costarella.

As to the fourth contention that the immediate supervisor of Ms. Costarella did not have the authority to resolve the grievance at Step 1 as is provided for in Article 15, Section 2, Step 1 (B). The Contract is specific and states: "In any such discussion the Supervisor shall have authority to settle the grievance. The Steward or other Union representative likewise shall have the authority

to settle or withdraw the grievance in whole or in part."

Under the facts in the case before me the Postmaster had requested the removal of the employee, Ms. Costarella. After this action had been taken in the form of a Notice of Removal then at Step 1 the Union met with Ms. Costarella's immediate supervisor. This supervisor, according to the Union, stated, "He knew nothing of the case." This was put in written form by the Union and initialled by the supervisor. It is difficult for a supervisor who works for a Postmaster to have much discretion when the Postmaster has imposed discipline upon an employee. It becomes impossible in my judgment for the provisions of Article 15 quoted above to have any meaning when the immediate supervisor states at the Step 1 meeting that he knows nothing about the case. This, in my opinion, is a clear violation of one of the important rights granted to an employee by the National Agreement. The immediate supervisor, in order to properly perform his function as set out in Article 15, Section 2, Step 1 (B), is to thoroughly familiarize himself with the factual background of the case prior to holding the first step meeting. The supervisor

did not testify and therefore did not deny the allegations of the Union.

Since the Post Office through its immediate supervisor to the grievant failed to meet the requirements of Article 15 quoted above, I find that there was a failure of due process and therefore this denial eliminates the necessity to decide this case on its merits.

ARBITRATION AWARD

C#14209
A+B

In the Matter of

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

F90N 4F D 94064790
F90N 4F D 94064822
YVONNE MANNING
EMERGENCY SUSPENSION & REMOVAL

APPEARANCES

For the Service

Joe Harris | Alan DeVille | Koula Fuller

For the Union

Joan Hurst
Linda Giordano
Jerry Weinstein
Mac Turner
Yvonne Manning
Carloha Lewis
Janet Long

ARBITRATOR **EDWIN R RENDER**

By the terms of the contract between the **UNITED STATES POSTAL SERVICE** hereinafter referred to as the Service, and the **NATIONAL ASSOCIATION LETTER CARRIERS**, hereinafter referred to as the Union, there is provided a grievance procedure including arbitration. Accordingly, the parties selected **Edwin R Render, Seattle WA** as impartial arbitrator. A hearing was held in **Beverly Hills CA** on **November 28, 1994**. Equal opportunity was given the parties for the preparation and presentation of evidence, examination and cross examination of witnesses, and oral argument.

THE ISSUE

The issue in this case is whether the Service had just cause to impose an emergency suspension and a subsequent removal on the grievant and if not, what is the appropriate remedy?

THE FACTS

The grievant became an employee of the Service in late 1984 or early 1985. Prior to becoming employed by the Service, on May 29, 1982 the grievant was involved in an automobile accident which was not her fault. The grievant was seen by a Dr Chin on May 30, 1982. Apparently the grievant was not too seriously injured in this accident. She does not appear to have been hospitalized overnight. However, the following day, June 1, 1982, at the request of her attorney, the grievant saw Dr Pyne. Dr Pyne wrote the grievant's attorney, Mr Berman, a letter on August 10, 1982 which states:

> Please refer to the initial medical evaluation in which we stated that, in our opinion, the patient had, (1) cervical spine muscololigamentous strain,

(2) muscololigamentous strain of the right shoulder girdle, (3) contusion of the right upper arm, and (4) contusion of the let hip, (5) muscololigamentous strain of the upper thoracic spine. The patient was finally examined on 7-23-82 and at that time she had no complaints. On examination, there was no tenderness of the left hip on palpation and she was discharged to return if necessary. Because of the nature of her injuries, her prognosis remains guarded.

On July 22, 1982 Dr Pyne wrote the grievant's attorney a letter which states in part:

Initial diagnostic impression:

(1) cervical spine muscololigamentous sprain
(2) muscololigamentous sprain of the right shoulder girdle
(3) contusion of the right upper arm, and
(4) contusion of the let hip,
(5) muscololigamentous strain of the upper thoracic spine.

INITIAL TREATMENT PLAN:

Included physiotherapy four times weekly consisting of orthion table, diathermy and hot packs. X-rays were requested from Hawthorne Community Group. The patient was instructed to return in one week and her temporary total disability was extended by two weeks from June 7, 1982.

On June 9, 1982 she complained of soreness of her neck, back, left hip. She stated that whenever she shifted her position, she felt pains. On examination there was tenderness of the right upper arm on

> palpation and tenderness of the let hip on palpation. The therapy was continued. Her temporary total disability was continued for two weeks from June 21, 1982.
>
> On July 2, 1982 the patient was still having pains of her neck and upper back. She has pains of her left hip on waking up in the morning. On examination there was tenderness of the left hip oh palpation She was referred for orthopedic evaluation Her physiotherapy was continued three times weekly. She was instructed to return in two week.
>
> The patient is still undergoing therapy. We will write to you again at the end of her convalescence. Her prognosis is guarded.

The grievant's attorney sued the driver of the of the vehicle in the Torrence, California City Court. Apparently, the court referred the case to some form of court annexed arbitration. On September 3, 1984 the arbitrator entered a judgment or finding in the grievant's favor in the amount of $2500.

Meanwhile, in August 1984 (more than two years after the accident) the grievant was notified that she was being considered for a carrier position by the Postal Service. On August 22, 1984 the grievant filled out a "driving record" (form 2480). On this form she

indicated that she had been involved in an accident and that the other driver was at fault. She also indicated that she was expecting a monetary settlement.

On September 25, 1984 the grievant took a preemployment physical examination for the position of city carrier. During the course of filling out a form 2485 at the doctor's office, the grievant answered several questions incorrectly which the Service alleges constitute a fair basis for discharging her. In section E of form 2485, question 1 is: "Have you ever been refused employment or been unable to hold a job because of: (a) chemicals, dust, sunlight, etc. (b) inability to perform certain motions, (c) inability to assume certain positions, (d) other medical reasons." The grievant answered all of these questions "no". The remaining questions in section E are not limited by their terms to job related matters. For example, question 3 states: "Have you ever been advised or had any operations, consulted or been treated by clinics, physicians, healers, or other practitioners within the past five years for other than minor illnesses?" The grievant answered this question "no". Likewise question 8 is not by its terms related to employment. It states:

"Have you ever received compensation or cash settlement from an employer from insurance company, governmental or other organizations for injury or disease?" This question is circled on the Arbitrator's copy of joint exhibit 2, although no mention of it appears to have been made in the notice of removal. Question 10 of section E states: "Have you had x-ray of chest, back or extremity?" The grievant answered this question "no".

The second page of section E of the form 2485 contains the following question: "Have you ever had or do you now have any of the following?" The instructions indicate that the applicant is to respond a yes or no. Then follows a list of about 75 different ailments which range from "severe headaches" to "prostate or testicle infection or other condition" The grievant answered all of these questions in the negative that applied to her.

In the notice of removal the Service contends that the grievant responded falsely to the following conditions listed in the form 2485: "Stiffness of neck", "painful or 'trick' shoulder", and "back injury or

chronic back pain". It should be noted that the grievant was 20 years old at the time she filled out the form 2485.

The grievant appears to have had an uneventful career with the Service until 1988 when she was working as a carrier and someone hit a parked motorcycle with a car causing the motorcycle to fall on the grievant. She was pinned between it and another car. She sustained a knee injury in connection with this incident. While being treated for this injury by Dr Greenfield on April 22, 1988, the grievant told Dr Greenfield that she had been involved in an automobile accident in 1982 and had sustained a laceration to her left arm. Between 1988 and 1994 the grievant had a few other minor accidents. She never received any discipline that was brought to the Arbitrator's attention in connection with any of these accidents.

For reasons that were not disclosed at the hearing, the Service undertook an investigation of the grievant sometime in March 1994. On March 24, 1994 an investigator contacted the Beverly Hills Post Office requesting the grievant's personnel file. On April 11, 1994

labor relations specialist Etchepare wrote postmaster Fuller a letter which states:

> Attached for your consideration is the P.S.Form 2485 'Certificate of Medical Examination' on a Beverly Hills Letter Carrier Ms Yvonne Manning. Investigation of court and medical records indicate falsification by Ms Manning of her P.S.Form 2485.
>
> Specifically Section E of the for questions 5, 8, 10 and Section E entitled: 'Have you ever had or do you now have any of the following?'
>
> The following analysis of the falsification is for you review: however, an immediate interview of Ms. Manning is recommended, and is required prior to issuance of discipline for falsification.
>
> On September 25, 1984 Beverly Hills letter carrier Yvonne F. Manning completed a PS For 2485 'Certificate of Medical Examination'.
>
> Ms. Manning answered questions on the PS 2485 as follows:
>
> > Have you been advised or had any operations consulted or been treated by clinics physicians, healers or other practitioners within the past 5 years for other than minor illness?
>
> Her answer was "NO", although investigation reveals she was involved in a vehicle accident on May 29, 1982. She was treated by Dr. Chin of the Hawthorne Medical Group on May 30, 1982, for pains to her neck and upper back right shoulder and left hip. On June 1, 1982, Ms. Manning started treatment under Cuthbert Pyne MD of the Inglewood-Mancrester

> Muktu-Specialty Group for pains to her neck, upper back, across both shoulders, left hip and upper right arm. She was placed on temporary total disability for 18 working days.
>
> > Have you had x-ray of check, back or extremity?
>
> Her answer was "NO", though medical documentation reveals she was x-rayed at Hawthorne Community Medical Group the day after the accident.
>
> > Have you ever had or do you now have any of the following:
> >
> > Stiffness or neck
> > Painful shoulder
> > Back injury
>
> Her answer was "NO", to all of the above medical documentation reveals she received physiotherapy four times weekly consisting of orthion table diathermy and hot packs while she was disabled.
>
> Please confirm your receipt of this report by calling me at 310.983.3036. I am available if you require any clarification or guidance on this matter.

Mr Etchepare also sent postmaster Fuller most of the documents which have been referred to in his letter. Postmaster Fuller undertook an investigation or this entire matter based on the information furnished to her by Mr Etchepare. In addition to reviewing and analyzing the documentary evidence furnished by Mr Etchepare, Ms Fuller interviewed the grievant in the presence of

the local union president. During this interview the grievant said that she did not intend to falsify her employment application and that she misunderstood it, thinking that all of the questions in the questionnaire related to job related illnesses, injuries or physical conditions. The grievant also provided written statements of both interviews she had with postmaster Fuller. Postmaster Fuller thought that it was relatively clear that the grievant did not reveal her injuries truthfully in the form 2485. Based on her reading of the form 2485, she concluded that the questions were clear and unambiguous and could not find merit in the grievant's failure to respond truthfully based on what the grievant told her.

At some point postmaster Fuller turned the documents over to the grievant's immediate supervisor, Mr DeVille and told him about the discussion she had had with the grievant and informed him that it appeared that there were false statements on the form 2485 and asked him what he thought about it. Subsequently, Mr DeVille signed the emergency suspension and the notice of removal. However, it was clear from the testimony of everyone involved that he was not the author of these documents. It was also evident from

some of Mr DeVille's testimony that he had either serious reservations about or perhaps disagreed with the emergency suspension and discharge.

During the hearing postmaster Fuller explained in some detail why she believed that the grievant deliberately falsified form 2485. In addition to the clarity of the questions, Ms Fuller said the grievant had plenty of time to fill out the form and ask any questions about matters that she thought were ambiguous. Ms Fuller said that she gave the question of the grievant's intent careful consideration before reaching the conclusion to approve the removal.

Ms Fuller also testified that there are several reasons which justify discharge of an employee who falsifies his/her pre employment physical examination questionnaire. She made the point that when a preemployment physical is falsified, the Service does not obtain the employee it thought it was hiring but one with physical infirmities that are different from those disclosed in the form 2485. She said that this was unfair to other applicants who were not selected. In addition, she made the point that intentional falsification of any kind

of a document like this indicates a lack of trustworthiness. Employees of the Service, especially in a post office like Beverly Hills must have character that is above reproach. These carriers regularly handle mail that is extremely valuable for affluent customers of the Service. Finally, there was testimony about increased risks of liability flowing from these injuries that the Service had not anticipated.

It was quite clear from the testimony of personnel clerk Lewis, that Mr DeVille had very little to do with the suspension or removal other than signing it. He did not begin the investigation. He did not interview the grievant. He did not draft any of the documentation.

On June 30, 1994 the Service issued the grievant a notice of removal which states:

> TO: YVONNE MANNING
> BOX 5017
> GARDENA CA 90249-5017
>
> You are hereby notified that you will be removed from the Postal Service effective July 31, 1993. The reason for this action is as follows:
>
> CHARGE #1
> UNACCEPTABLE CONDUCT;
> FALSIFICATION OF PS FORM 2485

(CERTIFICATE OF MEDICAL EXAMINATION)

On September 25, 1984 you were required to complete a PS Form 2485 Certificate of Medical Examination and to undergo a physical examination as part of the preemployment process for postal for postal employment. You provided false responses to a number of questions and failed to disclose significant aspects of your medical history.

You gave the following responses concerning your medical history to the questions listed below:

QUESTIONS	YOUR RESPONSE
1. Have you ever been advised or had any operations, consulted or been treated by clinics physicians, healers, or other practitioners within the past 5 years for other than minor illness?	NO
2. Have you had X-rays of chest, back or extremity?	NO
3. Have you ever had or do you now have any of the following?	NO

A. Stiffness of neck: NO
B. Painful or trick shoulder: NO
C. Back injury or chronic back pain: NO

You signed the followed Certification on the PS Form 2485:

"I certify that all the information to be given by me in connection with this examination will be correct to the best of my knowledge and belief."

Subsequently to appointment to the United States Postal Service it was learned that on May 29, 1982, prior to Postal employment, you were involved in a vehicle accident which resulted in injuries and subsequent medical treatment. On August 22, 1984, prior to your employment with the Postal Service you were required to complete a PS Form 2480, Driving Record. In competing this form you were instructed to describe any motor vehicle accidents you have had within the last 5 years in which you were the driver. In response to those instructions, you stated, "I was broad sided by a Toyota; he ran the light at Compton Blvd and Van Ness; and he was drunk. (.2 was the level of intoxication) according to the police report. You also indicated, "Torrance Municipal Court will make a monetary settlement on August 30, 1984".

In addition, on August 21, 1993, the Postal Service ran a DMV printout which revealed your vehicle accident of May 29, 1982. The following information related to this vehicle accident was indicated in a document submitted by your attorney to the Superior Court and dated on June 25, 1984.

1) As a result of your vehicle accident, you sustained personal injuries, which included injuries to your upper back, right shoulder and left hip. On 05/29/82, 06/09/82 and 07/02/82, you complained of pains in your neck, upper back and right shoulder. You were treated for this pain with hot packs orthion table and diathermy.

However, in Part E of the Medical History in the question asking, "Have you ever had or do you now have any of the following":

A) Stiffness of neck
B) Painful or trick shoulder

C) Back injury or chronic back pain

Your response to all of the above items was "NO". None of these injuries were cited on your PS Form 2485.

1) As a result of your automobile accident of May 29, 1982, you were treated by Dr. Chin on May 30, 1992 for pains to your neck, upper back, right shoulder and left hip. On June 1, 1982, you started physiotherapy with Dr. Cuthbert Pyne, MD for pains in your neck, upper back, across both shoulders, your left hip and upper right arm.

However, in Section E, Question 3, when asked have you been advised or had any operations, consulted or been treated by clinics, physicians, healers, or other practitioners with the past 5 years for other than minor illness, you replied "NO".

2) Medical documentation indicates you had X-rays at Hawthorne Community Medical Group on June 1, 1982.

However, in Section E, Question 10, when asked have you ever had X-rays of chest, back or extremity, you replied "NO".

On March 9, 1988, while employed at the Beverly Hills Post Office, you filed a CA-1 Report of Traumatic Injury, in which you stated an employee was backing up in the employee parking lot and hit a parked motorcycle causing the motorcycle to fall on you. You were pinned between your car and the motorcycle. As a result of this injury, you required surgery on your knee.

On April 22, 1988, you were required to participate in a Special Orthopedic consultation with Dr. Jon B. Greenfield, MD. During this consultation, you admitted being involved in a vehicle accident in 1982 and sustaining a laceration to your left arm.

On May 24, 1994 and June 7, 1994, you were interviewed by Postmaster Koula Fuller in the presence of your representative, NALC President, Jerry Weinstein. I reviewed each of the questions above individually on the PS Form 2485 with you to confirm that you had answered them correctly. I also gave Mr. Weinstein a copy of a typed matrix showing each question and answer that you are charged with falsifying. In addition, I reviewed the Special Orthopedic Consultation document with you and questioned why you did not inform Dr. Greenfield of all the injuries you sustained as a result of your vehicle accident in 1982. Mr. Weinstein was given a copy of several documents which were part of the Postal Service investigation.

On both of the above occasions, you were given time to prepare a written response to the charge of falsification presented to you and your representative, Mr Weinstein.

In reviewing your responses, dated May 24, 1994 and June 7, 1994 you indicate the following:

- You stated, "I simply misunderstood the questions. Several of the questions pertained to work and previous employment data mislead me to believe that the entire application was work related."

- You stated, "regarding PS Form 2485 dated September 25, 1994, my understanding of the Certificate of Medical Examination was that it

pertained to work related injuries and inability to perform at work."

- You stated, "there was never the intent on my part to lie conceal or distort the truth in my nine years, starting February 16, 1985, as an employee my record proves that my integrity was not shaded."

- You stated, "I don't recall the conversation, but I'm sure it took place because it pertained to information only I could have disclosed to him."

- You stated, "my perception to the question was at this time what was the outcome of the accident".

- You stated, "there was no intent on my part to cover up or give half truths to the doctor".

This charge alone warrants your removal from the Postal Service. Section 661 of the Employee and Labor Relations Manual (ELM) covers the code of Ethical Conduct. That Code states, in pertinent part, that:

> "No employee will engage in criminal, dishonest, notorious disgraceful or immoral conduct prejudicial to the Postal Service."

ELM Section 661.12 further states in part that:

> "A violation of the Code may be cause for remedial or disciplinary action, including discharge."

Your actions as outlined in the charges above violate that code of Ethical Conduct. The seriousness of the

violation demands that discharge is the only appropriate remedy.

The falsification of a pre-employment form must result in removal from postal employment, when that form is a key determinator in the selection/qualification process. It is doubtful that you would have been given postal employment as a carrier if your true medial history had been presented. You failed to disclose this information at the time you completed your PS Form 2485 when you underwent a pre-employment physical examination on September 25, 1984.

Your claim that you answered all the questions on your PS Form 2485 truthfully, is not credible, as a review chronology indicates:

- In your letter dated May 24, 1994, you state, "I simply misunderstood the questions". "Several of the questions pertained to work and previous employment data mislead me to believe that the entire application was work related." You also state, "my understanding of the Certificate of Medical Examination was that it pertained to work related injuries and inability to perform at work."

However in Section E of the Medical History, it clearly states, "Please ask the DOCTOR or NURSE to explain any question you do not understand." Some of the questions on the PS Form 2485 do pertain to previous employment and are work related. However, the questions are very clear. Each question is an independent question, some of which specifically state, "Have you ever . . ."? You had an opportunity to ask questions if you were unsure of the nature of the questions on your PS Form 2485, and you failed to do so.

- In your letter dated May 24, 1994, you state, "there was never the intent on my part to lie, conceal or distort the truth in my nine years, starting February 16, 1985, and as an employee, my record proves that my integrity was not shaded". You also state, "I don't recall the conversation but I'm sure it took place because it pertained to information only I could have disclosed to him". You then state, "my perception to the question was at this time what was the outcome of the accident" and "there was no intent on my part to cover up or give half truths to the doctor".

However, when you reported your vehicle accident on Postal Service documents, you had a clear and present memory of the accident, the suit and the fact that a monetary settlement was forthcoming. However, you failed to disclose the injuries you sustained which may determine in part, the amount of the monetary settlement.

In addition, on April 22, 1988, during the Special Orthopedic Consultation with Dr Greenfield, you had a second opportunity to disclose all of the injuries you sustained as a result of your vehicle accident in 1982. You again failed to disclose the information.

Your statements, falsehoods and explanations for omitting key elements of your medial history from PS Form 2485 can lead to no other conclusion than falsification of PS Form 2485 in order to obtain employment. There is great harm done by this falsification in that you:

- Prohibited the United States Postal Service from having knowledge of your true medial history thereby preventing the Postal Service

from making a decision of employment based on a true record of that history;

- Exposed the United States Postal Service to a liability of which the Postal Service had no knowledge; and of which the basis was unknown.

- Put the United States Postal Service in a position of incurring a responsibility for which it had neither knowledge or had given consent; and

- Made it impossible for the Postal Service to have confidence or trust in the employment relationship as a result of you having violated that trust and confidence by demonstrating your dishonesty in falsifying official documents and deliberately concealing essential, specific information from the Postal Service which has a direct negative impact on the Postal Service itself.

Because of the serious nature of this charge, it is necessary to remove you to promote the efficiency of the Service as it is impossible to continue the employment relationship in the presence of such a breach of trust.

If this action is overturned on appeal, back pay will be allowed, unless otherwise specified in the appropriate award or decision, ONLY IF YOU HAVE MADE REASONABLE EFFORTS TO OBTAIN OTHER EMPLOYMENT DURING THE RELEVANT NON-WORK PERIOD. The extent of documentation necessary to support your back pay claim is explained in the ELM, Section 436. (copy attached)

You have the right to file a grievance under the Grievance/Arbitration procedure as set forth in Article 15, of the National Agreement within fourteen [14] days of your receipt of this notice.

POSITIONS OF THE PARTIES

Position of the Service

Initially the Service notes that an employee who falsifies his or her employment application violates **article 12** of the contract. This section of the contract clearly gives the Service the right to discharge an employee who falsifies an employment application. The Service notes that such conduct deprives the Service of its choice of employees as well as deprives other applicants for an employment an opportunity to be considered fairly. Furthermore, it reflects on the honesty of every employee in the Service.

The Service also contends that the grievant intentionally falsified the form 2485. At the time she filled out the form 2485 the accident was only two years in the past. It is inconceivable that she had forgotten that it happened or that she was injured. The Service notes that the grievant did not forget to mention the accident in

filling out her driving record form. The Service speculates that probably the reason she did this was she knew that this information could be verified. The Service contends that false statements about the accident may have had a bearing on her suitability as an employee.

The Service also argues that the questions that the grievant claimed that she misunderstood are very simple and straightforward. The Service notes that the grievant is an intelligent person who at the time had an associate degree and was pursuing further education. A person of the grievant's intelligence surely understood the questions. The Service also notes that the grievant answered five questions incorrectly. Postmaster Fuller gave undisputed testimony that she would have checked the grievant more carefully had she had access to this information. The Service also contends that trustworthiness of its employees is vital to the interests of the Service. It notes that its employees carry many valuable items and the Service simply cannot not tolerate dishonest letter carriers.

The Service also contends that the removal in this case was not a spur of the moment action. Postmaster Fuller gave this issue very careful thought before making the decision to terminate the grievant. The Service concedes that there were "many hands in the pie" prior to the issuance of discipline. However, the Service contends that the fact that several officials were involved in the investigation of this case does not detract from Mr DeVille's testimony that he believes discharge to be the appropriate remedy. The fact that Mr DeVille had reservations early on about the discharge irrelevant. As more facts became available, his opinion changed. Finally the Service contends that there are no mitigating circumstances in this case and that the Arbitrator should follow established precedent and uphold this discharge.

Position of the Union

The Union first contends that the Service violated the disciplinary procedures contained in the contract. At stations of the kind involved in this case the contract requires review and concurrence by a high ranking official and that discipline be imposed initially by a lower ranking supervisory official. **Article 15, section 2B**

of the contract gives the supervisor the right to settle the grievance. As applied to this case, since Mr DeVille the supervisor was the one who imposed discipline, he also had the power to settle the case by refusing to discharge the grievant. It is clear that he disagreed with the decision to remove the grievant.

The Union contends that the facts are fairly obvious that postmaster Fuller was the one who initiated the discipline. She investigated the matter to the extent that it was investigated in the Beverly Hills Post Office and she directed Mr DeVille to issue the emergency suspension and the removal letter. It was obvious from Mr DeVille's testimony that he did not investigate the matter. Furthermore, he was not even present when the grievant was interviewed on two occasions by postmaster Fuller. The contract and supervisors' manual are quite specific that an employee is entitled to present his side of the story to the discharging official before the decision to discharge has become final. The grievant was deprived of this opportunity in this case. According to the Union, in effect, what happened in this case was that the postmaster told Mr DeVille to fire the grievant. Mr DeVille followed her instructions.

Then the postmaster acted as the reviewing and concurring official. This is a clear violation of the contract. Moreover, the Service's own witnesses gave unrebutted testimony that Mr DeVille had very little if anything to do with the entire investigation and drafting of the letter of removal.

Turning to the merits, the Union contends that the Arbitrator could fire the grievant for making a mistake in answering the questions and being stupid. However, in order for there to be just cause for this discharge, the Service has the burden of proving that the grievant intentionally falsified her form 2485. This she did not do. From the very beginning of this incident, through two interviews and at the arbitration hearing, the grievant testified to what she thought at the time she filled out the form. The grievant now understands that she was mistaken. The fact that she was mistaken about how to answer the questions and that she answered them on a wrong assumption is not intentionally or wilful falsification of her form 2485.

That the grievant was being truthful in filling out form 2485 is borne out by the fact that she told the Service about the accident in filing out her drivers record. Had she wished to keep the Service from knowing about her driving record she would not have divulged the accident on her driving questionnaire. The Union also notes that the grievant has a good employment record. She has been tested for stealing from the mail and has never been found to have behaved wrongly in this regard. For these reasons, the Union requests that the grievance be sustained and that the grievant be reinstated with back pay.

DISCUSSION

Based on the provisions of the contract, the testimony given at the hearing, and the arguments of the representatives of the parties, the Arbitrator has concluded that there is not just cause for either the emergency suspension or the removal. For the reasons given in detail below, the grievance is sustained.

The Arbitrator thinks that the Service violated the spirit and intent of the contract by the method in which it proceeded with this discharge. The Arbitrator is not certain who made the decision to discharge the grievant. Because of the tone of the letter Mr Etchebare wrote Ms Fuller, it is possible that the real pressure to discharge the grievant came from the employee and labor relations staff. In any event it was made crystal clear during the hearing that Mr DeVille did not make the decision to discharge the grievant. His testimony on this point during the hearing was from the Service's point of view was very weak. If the Arbitrator were to conclude that he was the discharging official, the Arbitrator would have a difficult time reading around the contract provisions and the provisions in the supervisor's handbook for discipline which require supervisors to get the employee's side of the story before imposing discipline. Mr DeVille never did sit down and talk to the grievant even though a preponderance of the evidence established that he was at work on both days that the grievant was interviewed. Ms Lewis also made it quite clear that Mr DeVille was not the one who was, in effect, the discharging official. He did not write the notice of removal or the emergency suspension. He did not know all of the details that were

contained in these documents and he did not do the actual drafting of the letters. The testimony that he was upset about being asked to sign documents that he did not understand and that he did not know about is extremely telling on this point. Accordingly the Arbitrator must conclude that the procedural requirements contained in **articles 15** and **16** of the contract were not complied with in this case.

Turning to the merits of the case the Arbitrator thinks that there are several circumstances that raise serious questions about whether the grievant intentionally falsified her form 2485. First, the grievant was 20 years old at the time she filled out the form 2485. It is doubtful to the Arbitrator that she had wide experience in filling this kind of form and she should not be held to the same standard to which the advocate for the Service, the Union, the Arbitrator, or for that matter her own attorney in the accident case would be held in filling out documents of this sort.

A second problem that the Arbitrator has with the deliberate falsification argument is that I think the Service was misled by the

grievant's attorney and her treating physicians into thinking the grievant's back ailments were much worse than they really were. It must be borne in mind that all of the doctors' statements in the record were made by a physician to whom the grievant was sent by her attorney and they were obviously made for the purpose of the making the lawsuit as valuable in a monetary sense as was possible. During the hearing it became obvious that the grievant herself knew very little about the contents of these doctors' reports. If she read them she would probably have become frightened to learn how bad off her doctor was telling her attorney she was. The Service noted that the grievant was receiving physical therapy four days a week for a period of time. The record also discloses is that the total charge for the treatment given by the clinic was $100. Simply put, $100 does not buy very much medical attention these days. The doctor bills belie truly serious injuries. The point of all this is simply to say that the Arbitrator thinks that the grievant was not hurt very seriously in the car wreck and that the doctors and her attorneys were trying to make it appear that she was hurt worse than she really was so that they could obtain a more favorable settlement in

the lawsuit and that the grievant was not fully aware of what was happening.

Next, it should be noted that the grievant filled out the form 2485 more than two years after the accident. It is clear beyond any question that she answered question 3 inaccurately. She had been treated by a physician within the past five years within the meaning of question 3. One could argue that the injuries for which she was treated were "minor". In fairness to the Service the Arbitrator does not decide the case on this point. Even considering these injuries more than minor, it is quite another matter to say that she was willfully attempting to deceive the Service. She answered several questions wrong. It is interesting to note that Dr Pyne apparently never x-rayed the grievant and that the only x-ray of the grievant was one which may have been done by Dr Chin either the day of the accident or the day after the accident. In point of fact the only basis for saying that the grievant was x-rayed as far as this record is concerned, is the statement in Dr Pyne's report to the effect that Dr Chin did an x-ray. The Arbitrator was not able to locate anything signed by Dr Chin in the file.

Turning to the second page of section E of the form 2845, the Arbitrator must observe that this list of illnesses contains several human ailments that most of the people who fill out this form have had. The Arbitrator thinks that many applicants for employment answer some of those questions inaccurately. For example, everyone has had an infection at one time or another. Everyone has hoarseness at some time or the other. The grievant denied stiffness of the neck. Everyone has had a crick in their neck at some time. How one truthfully answers whether or not he or she has "frequent colds" is not a simple question. The Arbitrator could go on through the form listing several other items including the painful shoulder and the back pain to which the grievant responded "NO", demonstrating that these are ailments that most everyone has from time to time. On the "trick shoulder" question, it is possible that the grievant did answer this question correctly because nobody has said she had a "trick shoulder". In conclusion, when one considers the grievant's age and experience at the time she filled out the form 2485, the nature of the injuries she sustained in the accident, the length of time that elapsed between the date of the accident and the date she filled out the form 2485, and the nature of many of the questions asked,

it cannot fairly be said that the grievant deliberately falsified this form.

AWARD

The grievance is sustained.

20 January 1995

EDWIN R RENDER
Arbitrator

C-33521

In the Matter of the Arbitration	)	Grievant: Robert Guilmette
Between	)	Post Office: Manchester, NH
UNITED STATES POSTAL SERVICE	)	Case Number: B16N-4B-D 18190277
and	)	Union Number: 2018SOMAFV
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)	DRT # 14-430454
	)	

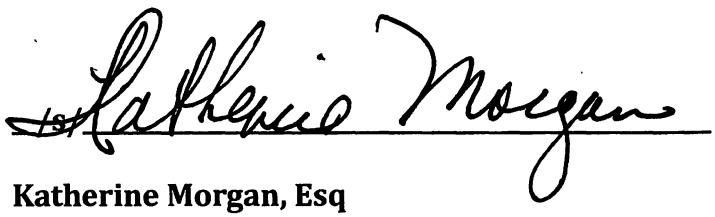
BEFORE: KATHERINE MORGAN, ESQ
Arbitrator

APPEARANCES:

For the U.S. Postal Service:	Victoria L. Broccoli, Labor Relations Specialist Holly Mellema, TA
For the Union:	Paul Boulanger, Advocate
Place of Hearing:	Boston, MA
Dates of Hearing:	August 8, 2018
Date of Award:	August 31, 2018
PANEL:	Regular, NE Region 14

AWARD SUMMARY

The grievance is sustained in its entirety. There was no just cause for the 14- Day Suspension issued March 27, 2018 to the Grievant, based on a procedural fatal flaw. The discipline shall be expunged from all records.



Katherine Morgan, Esq
Arbitrator
August 31, 2018

ISSUES

Management and the Union agreed to the issue statement as contained in the "Step B" Decision, as follows:

"Was the14- day suspension dated March 27, 2018 charging the Grievant with "Unacceptable Conduct" issued for just cause? If not, what is the appropriate remedy?

BACKGROUND

An Arbitration hearing was held on August 8, 2018, where both parties were present. The Grievant elected not to be present, but appeared as a witness. Joint evidence, as well as Management and Union exhibits, were received into evidence. Both parties presented witnesses who were sworn, and subject to numerous direct and cross- examinations. Management presented one witness, Postmaster Joshua Farrand, and the Union presented two witnesses, Grievant Robert Guilmette, and shop steward

Alex Fisher. Both parties made opening and Closing statements, and submitted supporting "Decisions and Awards."

The parties agreed that Management has the burden of presenting first, and of establishing its case by a preponderance of the evidence, in this discipline case.

By letter, dated March 27, 2018, the Grievant was issued a Notice of 14-day suspension signed by Joshua Farrand, Officer in Charge (OIC), Somersworth, NH Post Office, charging him with "Unacceptable Conduct."

More specifically he was charged with:

"On February 28, 2018 your conduct was unacceptable when you engaged in threatening and violent behavior in an attempt to provoke a physical confrontation. Specifically, you approached the Officer in Charge of the Somersworth Post Office and stood face to face in close proximity. At this time you stated: "come on, hit me, hit me" while pointing at your chin."

Violations alleged are: ELM 665.24, "Violent and/ or Threatening Behavior."

Elements of his past record considered in the issuance of the discipline wee cited as:

1) February 26, 2018: Seven- Day Suspension (Conduct and Failure to Follow Instructions)

2) September 5, 2017: LOW (Failure to Follow Instructions)

3) July 1, 2017: LOW (Conduct)

4) September 30, 2016: LOW (Failure to Follow Instructions)

The Union alleged procedural defects regarding improperly cited discipline in past elements, including the Seven Day Suspension and one LOW, and due process violations.

A. PROCEDURAL ISSUES

POSITION OF UNION

The Grievance should be sustained because Management improperly issued the disciplinary 14- Day Suspension for several procedural reasons. Firstly, OIC Farrand who issued the discipline was involved personally in the incident, and he was also the person who both investigated the incident, and chose the level of discipline to be issued. OIC Farrand also selected his own supervisor, Sean Dooley, who was accountable to him, and therefore could not be impartial, to meet at Step Informal A. In addition, Supervisor Sean Dooley engaged in "dereliction of duty" pertaining to the Grievant, which establishes his bias. Moreover, OIC Farrand never had a "Reviewing and Concurring" official for the discipline. These are serious and fatal flaws, which should render the grievance sustainable, without going to the merits. Management violated Articles 15 and 16 of the National Agreement (NA).
The grievance should be sustained in its entirety. The 14-Day suspension should be expunged from all records.

POSITION OF MANAGEMENT

The issuance of discipline was not flawed. According to Article 16.8 of the JCAM, the concurrence must come from the installation head, or his designee. There is no evidence in the record that the Union ever asked Management about the "Reviewing and Concurring" official. Management agrees that the NA provides that before a suspension or discharge is issued the proposed disciplinary action by the supervisor must have first been reviewed and concurred in by the installation head or designee. Also, the JCAM makes clear, regarding Article 16.8, that "while there is no contractual requirement that there be a written record of concurrence, management should be prepared to identify the manager who concurred with a disciplinary action so he/ she may be questioned if there is a concern that

appropriate concurrence did not take place." In this case, the Union never requested the identity of the concurring official.

There is no evidence that Supervisor Dooley was either impartial or unable to resolve the grievance at Informal Step A. Although OIC Farrand was "superior" in position to Supervisor Dooley, there is no evidence that OIC Farrand was still assigned to the Somersworth PO when the Informal A was held. Likewise, the Union has not proven that Supervisor Dooley was biased against the Grievant, even if he did admit his "dereliction of duties" regarding the Grievant, and receive a PDI. Postmaster Sherman met at the Formal A and there is no evidence that OIC Farrand is "superior" to him.

The past discipline of 7- Day Suspension was properly cited in the Notice because it was not finally adjudicated at the time of citation. Even if the LOW was wrongly cited it is a harmless error.

The procedural allegations should be dismissed, and the case should be heard on its merits.

OPINION AND DISCUSSION

The Union has raised a threshold issue of due process violations, which it contends would violate Articles 15 and 16 of the NA, and render the grievance sustainable without going to the merits.

The Union, therefore, has the burden of proof to establish that there were procedural defects in the issuance of the discipline, sufficient to warrant sustaining the grievance, without going to the merits of the case

The NA, Article 15.3 A states:

"The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in resolution of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end."

The NA, Article 16.8 states:

"In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee."

The NA, MOU Re Article 15 states:

"The parties mutually recognize that maintaining an efficient and effective Dispute Resolution Procedure (DRP) is dependent on consistently productive Step B Teams and contract compliance at all levels of both parties."

The NA, Article 16 states (in relevant part):

"Just cause is a term of art. . . These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

- Was a thorough investigation completed? Before administering the discipline, management must make an investigation to determine whether the employee committed the offense. Management must ensure that its investigation is thorough and objective. This is the employee's *day in court* privilege. Employees have the right to know with reasonable detail what the charges are and to be given a reasonable opportunity to defend themselves *before* the discipline is initiated."

The JCAM, in 16.8 states:

"Concurrence is a specific contract requirement to the issuance of a suspension or a discharge. It is normally the responsibility of the immediate supervisor to initiate disciplinary action. Before a

suspension or removal may be imposed, however, the discipline must be reviewed and concurred in by a manager who is a higher level than the initiating, or issuing supervisor. This act of review and concurrence must take place prior to the issuance of the discipline. While there is no contractual requirement that there be a written record of concurrence, management should be prepared to identify the manager who concurred with a disciplinary action so her/ she may be questioned if there is a concern that appropriate concurrence did not take place.

Union witness, Alexander Scott Fisher, shop steward, Somersworth NH PO, and Union Representative at both the Informal and Formal A steps, testified, under oath, that he had asked Postmaster (PM) Steve Sherman, at the Formal Step A meeting for information and documents showing "Review and Concurrence," and that PM Sherman had told him that there was no concurrence. No names or documents, regarding concurrence, according to witness Fisher, were ever provided to the Union. Management's only witness, OIC Farrand testified that he was never asked by the Union for the name of the concurring official. He stated at the arbitration hearing that the concurring official was POOM, Kathy Hayes. There are no documents in the record establishing that POOM Hayes was the concurring official; neither did POOM Hayes testify at the hearing.

Witness Fisher testified at the hearing that he had asked PM Sherman for information and documents regarding concurrence, but did not ask OIC Farrand. PM Sherman did not testify at the hearing, and there are no statements from him in the record regarding concurrence. Thus, there is no conflicting evidence regarding what PM Sherman told shop steward Fisher. There are no requirements in the NA specifying either at what step in the grievance procedure the request for the identity of the concurring official must be made by the Union, or to whom the request must be made. Therefore, the fact that

shop steward Fisher did not request the information from OIC Farrand is irrelevant because the evidence establishes that he did ask PM Sherman at Formal Step A.

The record shows that shop steward Fisher wrote in his notes for the Formal A meeting, that Management "failed to provide the Concurring Document from Farrand's manager or designee." Management agrees that the notes show that, but argues that Management has no obligation to create or produce written documents of concurrence.

The Undersigned Arbitrator finds that Union Witness Fisher's testimony that he asked for information and documents from PM Sherman at the Formal Step A is established by the evidence. His notes corroborate his testimony. Even though his notes refer to documents, and do not specifically request the name of the concurring official, it is clear from the notes that no name is mentioned for concurring official. The notes state only, " from Farrand's manager or designee." It is reasonable to conclude that since the steward mistakenly thought he was entitled to concurrence documents, he would have requested and then notated for follow-up the name of the concurring official had it been given to him by PM Sherman. Moreover, shop steward Fisher's testimony is credible because he was present at the Informal and Formal A steps, and gave direct testimony, which was not contradicted by any witness present at those meetings, since those witnesses were not called by Management.

Neither PM Sherman, nor POOM Hayes testified at the Arbitration hearing. Accordingly, shop steward Fisher's testimony that he asked PM Sherman at the Formal A meeting for the name of the concurring official and for the concurring documents, and that PM Sherman then told him there is no concurrence is therefore undisputed.

Based on the above, the Undersigned Arbitrator finds that the Union, through shop steward Fisher, requested of Management official PM Sherman, information regarding the concurring official and was

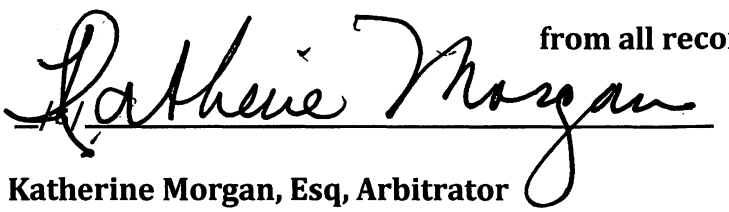
told by PM Sherman that there is no concurrence. No evidence has been adduced to contradict this, and there is evidence to support this, in the form of shop steward Fisher's Formal Step A written notes. While Management is not required to have a written document of concurrence, it is required, in the JCAM, to "identify" the manager, if asked. This failure by Management to provide the identity of the concurring official, or to have a concurrence constitutes a clear violation of NA Article 16.8, and the JCAM. Article 16.8 provides that "**In no case**" may suspension or discharge be imposed unless the proposed disciplinary action "**has first been reviewed and concurred in by the installation head or designee.**" The JCAM states that "**Concurrence is a specific contract requirement to the issuance of a suspension or discharge.**" "**Before a suspension or removal may be imposed, however, the discipline MUST** (emphasis added) **be reviewed and concurred in by a manager who is a higher level than the initiating, or issuing, supervisor.**"

The Undersigned Arbitrator finds that the Union established that it requested from Management the identity of the concurring official, and Management failed to provide it. The Arbitrator further finds that the burden of proof then shifted to Management to establish that there was a concurrence, and that the Union was informed of the identity of the concurring official, when it asked. Management failed to meet its burden. The Union has established, by a preponderance of the evidence that Management failed to have a concurrence, and/or to identify the concurring official. This violation constitutes a serious and fatal procedural flaw, rendering the grievance sustainable without going to the merits. The NA is clear that the concurrence is a requirement, which **must** be met before imposing a suspension or discharge. Likewise, is the providing of the identity of the concurring official, if asked, to the Union, a requirement. Therefore, Management, by its actions, violated Articles 15.3, and 16.8 of the NA.

The Undersigned Arbitrator, having found that the grievance is sustainable without further discussion or findings regarding the other procedural defects alleged, will, accordingly not discuss the other procedural allegations because they are now moot.

AWARD

The grievance is sustained in its entirety. There was no just cause for the 14- Day Suspension issued March 27, 2018 to the Grievant, based on a procedural fatal flaw. The discipline shall be expunged from all records.



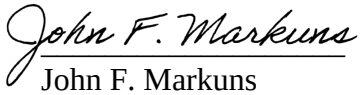
Katherine Morgan, Esq, Arbitrator
August 31, 2018

REGULAR ARBITRATION CORRECTED (CASE NO.)

In the Matter of the Arbitration	Grievant: Gregory Maul
Between	Case No. 19N-4B-D-23123547
UNITED STATES POSTAL SERVICE,	Installation: Gardiner Maine Post Office
and	DRT No.: 14-600003
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	
BEFORE ARBITRATOR:	John F. Markuns
APPEARANCES:	
For the U.S. Postal Service:	Amanda Hoffman, Labor Relations Specialist, ME-NH-VT District
For the Union:	Matthew G. Leger, NALC Local Business Agent, Region 14
Date of Hearing:	June 2, 2023
Place of Hearing:	258 Rodman Rd, Auburn, ME 04210
AWARD:	The grievance is sustained
Date of Award:	June 30, 2023
PANEL;	NALC Region 14/Atlantic Area Regular

Award Summary

The grievance is sustained. The Union established that at the time of the Notice of Removal (NOR), Gardiner was a Post Office of 20 or less employees. Management violated Article 16 Section 8 because the proposed disciplinary action was not first reviewed and concurred in by a higher authority outside the Gardiner Maine post office before the proposed disciplinary action was taken. The violation requires a return to the status quo ante and remedy of back pay and benefits without reinstatement to the letter carrier craft. The merits of the NOR were not addressed due to the contractual violation.



John F. Markuns
Arbitrator

INTRODUCTION

Full Time Regular City Carrier (Carrier) Gregory Maul (Grievant) has been employed by the Postal Service for over 24 years, 19 years as a Full Time Carrier. On January 13, 2023. he was issued a NOR based on a charge of Unacceptable Conduct stemming from events occurring on November 21, 2022. A grievance was initiated at Informal Step A on January 27, 2023. The grievance was not resolved at Formal Step A and a Step B decision declaring an impasse was issued on March 3, 2023. Arbitration was invoked and a hearing convened. The parties were afforded a full and fair opportunity to present evidence, to examine and cross-examine witnesses, and to present any and all arguments in support of their respective positions. Management with no objection from the Union was afforded an opportunity to file by email digital copies of certain arbitration awards as well as a copy of its closing statement. The record closed on June 5, 2023.

The parties submitted the following Joint (J) Exhibits: the Joint Grievance file which included the Step B decision and accompanying material (J-1); the National Agreement (J-2); and the JCAM (J-3). Management entered the following Management (M) exhibits: Regular Arbitration Award McDonough, L. 4B-19N-4B-D-22087764 (May 31, 2022) (M-1); an undated Notice of 14-day Suspension issued Grievant on or about March 12, 2021 (M-2); an NOR issued Grievant dated December 21, 2021 (M-3) and an All Employee Listing Report for the Gardiner Post Office for the week beginning January 1, 2023 (M-4). The Union entered one exhibit: a Google map showing the distance between the Gardiner and South Gardiner Post Offices (U-1).

Each party also offered additional Arbitral awards for consideration. Management submitted the following Regular awards: Cipola, J. E11N-4E-D 17565137 (Dec. 3, 2017); Braverman, T. C11N-4C-D15009638 (July 9, 2015); Chapdelaine, P. E11N-4E-D 15071012 (July 17, 2015); 19, 1993). Management also offered the following National Awards: Snow, C. B90N-4B-C 94027390 (Aug. 20, 1996); Mittenthal, R. H8N-5L-C 10418 (Sept. 21, 1981); Aaron, B. H8N-5B-C 17682 (Apr. 18, 1985); and Gamser, H. NB-S-5674 (Nov. 3, 1976).

The Union offered the following Regular Awards:: Behakel, R. G11N-4G-D 13329784 (Jan. 24, 2014); Durham, K. G11N-4G-D 13315076 (Jan. 18, 2014); Roberts, L. H06N-4H-D 09346279 (Feb. 16, 2010); Maclean, H. E11N-4E-D 1768 1670 (May 29, 2018); Braverman, T. C11N-4C-D-17604539 (June 25, 2018); and Jacobs, J. E16N-4E-D 19294598 (April 13, 2020).

Management presented as witnesses Postmaster Irene Wade, Postmaster Andrew

Baumann; and Supervisor of Customer Service Daniel Peters. The Union presented the Grievant and Carrier Mark Seitz, President NALC Branch 92.

ISSUES

The parties adopted the issue as framed by the Step B Team:

> Did Management violate Article 16 of the National Agreement when they issued a Notice of Removal to the Grievant on January 13, 2023 for Unacceptable Conduct for an incident which occurred on November 21, 2022? If so, what shall the appropriate remedy be?

RELEVANT NATIONALAGREEMENT, MOU AND JCAM PROVISIONS

ARTICLE 16 DISCIPLINE PROCEDURE

Section 1: Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

…..

Section 5. Suspensions of More Than 14 Days or Discharge

In the case of suspensions of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days. Thereafter, the employee shall remain on the rolls (non- pay status) until disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure. A preference eligible who chooses to appeal a suspension of more than fourteen (14) days or his/her discharge to the Merit Systems Protection Board (MSPB) rather than through the grievance-arbitration procedure shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement or through exhaustion of his/her MSPB appeal. When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the Employer is not required to give the employee the full thirty (30) days advance written notice in a discharge action, but shall give such lesser number of days

advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

….

Section 8. Review of Discipline

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action the supervisor has first been reviewed and concurred in by the installation head or designee.

In post offices of twenty (20) or less employees, or where there is no higher level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken

J-2.

….

MEMORANDUM OF UNDERSTANDING
BETWEEN THE
UNITED STATES POSTAL SERVICE
AND THE
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO
Re: Article 7, 12 and 13 - Cross Craft and Office Size

A. It is understood by the parties that in applying the provisions of Articles 7, 12 and 13 of this Agreement, cross craft assignments of employees, on both a temporary and permanent basis, shall continue as they were made among the six crafts under the 1978 National Agreement.

B. It is also agreed that where this Agreement makes reference to offices/facilities/installations with a certain number of employees or man years, that number shall include all categories of bargaining unit employees in the office/facility/installation who were covered by the 1978 National Agreement.
Date: August 19, 1995

J-2, p. 145.

JOINT CONTRACT ADMINISTRATION MANUAL MAR. 2022

Counting Employees or Work years. Paragraph B of the memorandum provides that only the crafts covered by the 1978 National Agreement—i.e., letter carrier, clerk, motor vehicle, maintenance, and mail handler—are counted when any Agreement provision refers to the number of employees or man years in an office, facility, or installation. In the 1998 National Agreement the term man year was changed to work year

….

J-3, page 7-16.

FACTUAL BACKGROUND AND EVIDENCE SUMMARY

As set forth in the NOR, Grievant was removed Supervisor of Customer Service Peters based on the following:

CHARGE: UNACCEPTABLE CONDUCT

Specifically, on November 21. 2022. you admittedly consumed intoxicating beverages while on the clock. You were scheduled for a PDI on December 1, 2022, to which you attended, however management believed, based on your behavior, that you may have been under the influence of alcohol when you arrived and therefore an additional PDI was scheduled and held on December 20, 2022, to allow you an additional opportunity to explain your actions. In your initial PDI on December 1, 2022, you were asked specifically if you had been drinking alcohol while on duty, delivering mail for the Postal Service on November 21, 2022, to which you replied "yes". You were asked if you purchased alcohol on Monday November 21, 2022, at Goggins IGA while on duty in uniform to which you replied "no", however when asked if the empty containers of alcohol observed in your satchel by law enforcement were the alcohol containers that you purchased at Goggins IGA while on duty you replied "yes". In your PDI on December 20, 2022, you were again asked if you had purchased alcohol on November 21, 2022, at Goggins IGA while on duty to which you then replied "yes". You were again asked if the empty alcohol containers observed by law enforcement in your satchel were the containers that you purchased at IGA to which you replied "Urn, yeah, I don't remember". Additionally, you were shown two surveillance videos at both PDI's of you at Goggins IGA making the purchase of alcohol and asked if that was you and what you were purchasing. In the first PDI you replied, I guess it was me, I didn't watch it". When asked if you would like to rewatch it, you stated "No, I couldn't see, I regularly purchase lunch stuff, waters, whatever". In your PD1 on December 20, 2022, you replied to the same question "That was me, I couldn't really see", however you admitted "I do remember picking up the alcohol that Monday."

> Your actions as described above are considered serious and in violation of the following provision of the Employee and Labor Relations Manual (ELM):
>
> 865.13 Discharge of Duties
> Employees are expected to discharge their assigned duties conscientiously and effectively.
>
> 665.15 Obedience to Orders
> Employees must obey the instructions of their supervisors. If an employee has reason to question the propriety of a supervisor's order, the individual must nevertheless carry out the order and may immediately file a protest in writing to the official in charge of the installation or may appeal through official channels.
>
> 665.16 Behavior and Personal Habits: Employees are expected to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal employees be honest, reliable, trustworthy, courteous, and of good character and reputation. The Federal Standards of Ethical Conduct referenced in 662.1 also contain regulations governing the off-duty behavior of postal employees. Employees must not engage in criminal, dishonest, notoriously disgraceful, immoral, or other conduct prejudicial to the Postal Service, Conviction for a violation of any criminal statute may be grounds for disciplinary action against an employee, including removal of the employee, in addition to any other penalty imposed pursuant to statute.
>
> 665.26 Intoxicating Beverages
> Except as provided below, employees must not drink beer, wine, or other intoxicating beverages while on duty; begin work or return to duty intoxicated; or drink intoxicating beverages in a public place while in uniform. Employees found to be violating this policy may be subject to disciplinary action.
>
> Be advised the following elements of your past record have been considered in deciding to take this action:
>
> March 12, 2021 14-day suspension
> December 27, 2021 6-month Suspension

J-1, pp. 83-85. There is no dispute that prior to issuance of the NOR, OIC Hardy, who at that time was assigned to the Gardiner Post Office, reviewed and concurred in its issuance.

The cited 14-day suspension was issued on March 12, 2021 based on damage to personal property resulting from Grievant's backing up in his assigned Metris van.

The cited six-month suspension reflected an earlier removal reduced to a six-month suspension by Arbitrator Lawrence McDonough (M-1). The original removal action was based

on the undisputed facts that he consumed alcohol during his tour of duty on November 30, 2021 and operated a Postal vehicle, The mitigation to a six-month suspension was premised on a "de facto consent decree" that Grievant must continue fulfilling the requirements set forth by a treatment program approved by the Parties' Employee Assistance Program (EAP) for his admitted alcohol/drug related problems during the two-year contractual life (per Article 16.10 of the CBA) of the suspension.

The NOR as set forth above did not cite an alleged violation of the conditions for participating in an approved EAP treatment program. Grievant testified about treatment he had been and currently was receiving. There are two letters in evidence documenting treatment. The first letter was dated December 14, 2022 signed by Brett Adell, LCSW, of BEWELLMYFRIEND, LLC stating:

> To Whom It May Concern,
>
> I am writing in regard to [Grievant]. I have been working with [Grievant] since January of 2022 in an outpatient mental health setting. [Grievant] is diagnosed with Major Depressive Disorder, Recurrent, Mild (F 33.0) and Adjustment Disorder with Mixed Anxiety and Depressed Mood (F 43.23). [Grievant] has participated regularly in treatment though August of 2022 and restarted treatment November of 2022. [Grievant] has attended treatment on a bi weekly basis with an increase to weekly treatment at the end of November of 2022. [Grievant] has worked on addressing his decision making, developing healthy coping skills and mood regulation. [Grievant] has acknowledged making several poor decisions leading to his current situation and reports being committed to improving his mental health and decision making skills.

J-1, P. 33. The second letter was dated February 7, 2023 confirming that Grievant entered treatment at Green Mountain Treatment Center in Effingham New Hampshire on December 31, 2022. The letter described the program as a progress-based 30-90 day program offering concrete, evidence based therapies for substance abuse and mental health issues. The program is both 12 Step-based and clinically licensed to treat individuals with substance abuse issue and re-occurring disorders. Id. p. 28.

Grievant testified that he was referred to Counselor Adell by his personal physician in July 2022 after first attempting to obtain treatment through Counselor Elizabeth Page who was recommended by EAP. Counselor Page was unable to accept new patients at that time. Grievant acknowledged that he stopped treatment in August 2022 and restarted again in November 2002. He also testified that had been undergoing treatment since late 2021 but did not say who was treating him.

He further testified that he entered treatment at the Green Mountain Center on December 31, 2022 and that he continued treatment there "a few weeks" after February 7, 2023 (the date of the letter), remaining in treatment there at the facility's request. He testified that he is now continuing treatment with Counselor Adell.

The Union did not dispute any of the facts set out in the NOR. There was a factual dispute about whether Grievant was under the influence of alcohol on December 1, 2022 at the time that the first Pre-disciplinary Interview (PDI) was conducted, Supervisor Peters and then-OIC Wade both testified that they smelled alcohol on Grievant and believed him to be intoxicated. Both admitted that they had neither training nor experience in determining whether someone was under the influence of alcohol. Mr. Seitz, Grievant's Union representative, testified that he did not believe that Grievant was under the influence at that time. Grievant denied taking a drink that day or consuming alcohol around that time but explained that he was "very emotional" that day. He also testified however, that the last time had taken a drink was December 5, 2022, commenting that "it's funny how you can remember a specific day."

Andrew Baumann, who became Gardiner Postmaster on January 23, and Union Representative Mark Seitz reached several stipulations at Formal Step A. Both testified and confirmed that these stipulations included the following: "The Gardiner Maine Post Office at the time of the removal had 20 or less employees, with the exception that Management believes that RMPO [Remote Managed Post Office] employees should count towards that number." Management submitted an All Employee list showing the names and categories of the employees employed at Gardiner Post Office during the first pay period of calendar year 2023. The list totaled 21. There was no dispute at hearing that the list included at least two supervisory employees, Messrs Hardy and Peters, as well as several rural carriers and one RMPO employee located at South Gardiner station

Of note, The Union's Step B contentions included the following in the requested remedy:

….

> 4. Lastly, due to so many issues, all parties agree (management, the union and the grievant) that if this case is found in favor of the union, that [Grievant] be offered and transferred to another craft within 25 miles of his home within 3 months of the final decision of this case [Grievant] should be given up to five offers, with the ability to choose the best fit. [Grievant] should not return to the Gardiner office as a city carrier, and all parties agree on this point.

J-1, p. 18.

MANAGEMENT'S POSITION

It is undisputed that Grievant was intoxicated while in the performance of his duties on November 21, 2022. Grievant while in the performance of duty purchased and consumed alcohol. Several bystanders witnessed Grievant in uniform, servicing mailboxes yelling, screaming, acting erratically and ultimately called to report this to the authorities.

Postal employees are entrusted with the processing and safe delivery of the U.S. Mail and the Service has reasonable rules prohibiting the possession and use of intoxicants while on duty. It is an egregious offense. There is no question that Grievant knew alcohol consumption at work would not be tolerated, but he willingly chose to do so despite the fact that only 6 months prior to this been given a second chance at continuing his career with the US Postal Service by Arbitrator McDonough.

The Union again came forward with the similar contention as they did before Arbitrator McDonough to paint the picture that Management did not consider that Grievant has been attending treatment and putting forth all efforts to rehabilitation. Grievant himself testified that he had not continued EAP due to EAP being inadequate. He further testified that he sought a counselor outside of EAP yet stopped treatment shortly after his return back to work at the end of July 2022. The testimony and the evidence presented only prove that while Grievant did avail himself of treatment for his alcoholism, it is not clear that his participation was entirely voluntary.

The letter from his medical provider clearly presents that Grievant's attendance in treatment revolved around his adverse action relating to his job. To argue that his participation in EAP or other treatment was not sufficiently considered where Grievant was again removed because he was again intoxicated, clearly attempts to turn the language of the EAP into a coat of armor.

Management and Grievant both testified Grievant had the same issues in the past and EAP was utilized previously; yet, here we are today. Management testified they gave favorable consideration to the fact Grievant was in treatment due to the incident that occurred on November 21, 2022. However, it is not a get out jail free card, in that discipline is automatically expunged or reduced.

The elements of just cause were met as the rules cited are undisputed, it is undisputed the rule is reasonable and that it is consistently and equitably enforced. The rule in this case is well-established and is one of the most basic requirements of employment. Grievant was well-informed of this rule, as Grievant has a history of this violation.

The rule regarding drinking alcoholic beverages while on duty is not only reasonable but is among the most basic obligations employees have to the agency as no employer can reasonably be expected to tolerate employees that drink alcoholic beverages while on duty. The rule is consistently and equitably enforced.

Management conducted a thorough investigation into the incident. Two PDI's were conducted due to the fact that Grievant showed up to the first one allegedly impaired. Management allowed him another opportunity to present his side of the story in the correct state of mind. This only benefitted the employee.

The severity of the discipline is appropriate in this case. Grievant had previously been issued a 14-Day Suspension for a Safety violation on March 21, 2021. Additionally, he had a 6-month suspension on his record from his previous incident which included him being intoxicated at work and driving a US Postal Vehicle.

The Union's only argument relating to Just Cause was the disciplinary action not being taken in a timely manner. Again, this is solely due to Grievant's further inability to refrain from consuming alcohol. Management testified to this today, and the evidence presented further shows that Grievant was not entirely coherent when Management presented him with questions in the first PDI. In the second PDI it was very clear that Grievant was able to respond honestly and did not present the conflicting responses that he did previously. Management testified that had they not suspected Grievant to be under the influence, there would not have been a delay in the issuance of this Notice of Removal.

Just cause existed for the issuance of the removal for Unacceptable Conduct; Management gave favorable consideration to the treatment he re-entered into in November 2022.

Additionally, the Union asserted today new argument regarding the issue relating to article 16.8. The Union steward Mr. Seitz testified to the fact that he and Management included rural employees and Management in that count. He explained their process of coming to that number which included writing the employees on a piece of notebook paper. Management proved today through the testimony and evidence that Jeremy Hardy was in fact the higher-level

management official in the Gardiner Post Office.

It is therefore respectfully requested that the grievance be denied and dismissed in its entirety.

UNION'S POSITION

The Postal Service has presented a case to end the career of a 24+ year letter carrier, based on their assertions that Grievant consumed alcohol on duty on November 21, 2022. Neither the Union nor Grievant has challenged the validity of the Service's claim in this regard. In fact, it was agreed to as an undisputed fact at Formal Step A. Grievant, throughout the grievance procedure, and here today has been forthright and remorseful. He knows what he did on that day was wrong. However, Grievant suffers from the disease of alcoholism, for which he is in treatment. This is by no means an acceptable excuse for drinking on the job, however the fact remains Grievant has been contrite and remorseful. Evidence in the case file, and presented to you today, substantiates, that Management has failed the just cause test, while violating due process for Grievant in two very serious aspects. First, the Union has shown that the NOR was issued untimely, and there was no legitimate reason to delay, past the initial PDI on December 1, 2022.

Management's claim of Grievant's insobriety on that day is not substantiated. Their claim that there were three national holidays during this time period contributing to the delay is laughable and without merit in justifying such a delay. If Grievant was under the influence on December 1, he still answered in the affirmative to the relevant facts. What more was to be gained by conducting another PDI while delaying the process? More importantly, the Union has shown that the review and concurrence issued by Mr. Hardy is a direct violation of Article 16.8 of the National Agreement. The Union has provided Arbitrator Eischen's National Level Award that delineates what is and isn't a violation of Article 16.8.

The Union has shown with evidence in the case file, direct testimony and cross examination, that the Gardiner ME Post Office had 20 or less employees at the time of the issuance of the NOR. The Union has also shown with direct testimony and cross examination that the review and concurrence came from Jeremy Hardy who at the time was the Postmaster/OIC of the Gardiner Post Office. Mr. Hardy may have been overseeing both the Gardiner and South Gardiner Post Offices during his detail but the fact remains they are two

distinct Post Offices with separate addresses and finance numbers. Even more so, the total employees in both offices are still 20 or less. When referencing the "RMPO" in the Formal Step A undisputed facts, Management's representative writes he "believes" the RMPO employee should be included in the count. However, just as their contention regarding Grievant's insobriety during the December 1 PDI, this is just a belief and it is done without substantiation. Management testified that they included rural carriers and EAS in the count which is a direct violation of Section 16.8.

This is a fatal flaw as eloquently stated by Arbitrator Eischen. The Union avers that this requires you to issue a ruling of sustained and reinstate the employee with a make whole remedy as ruled by Eischen. The Union provides Arbitrator Braverman's C-33412 case as well as Arbitrator Jacobs C-34652 case in support of the twenty or less employees contention made by the Union. The Union also provides Arbitrator Maclean's case C- 33344 and Arbitrator Robert's case C- 28654 in support of the Union's overall contention of violations of Article 16.8 as written by National Arbitrator Eischen. Management included Arbitrator Gely's ruling (beginning on page 86 of the case file) on a case involving alcoholism. The Union contends this case is not on point as it also included six instances of undelivered mail.

There is no evidence in the case at bar of Grievant's alcohol use contributing to the non-delivery of mail. Management also includes Arbitrator Braverman's ruling beginning on page 106 of the case file. The Union contends here as well that this case is not on point In that case Grievant had one year of career service with six in total. Grievant has 24 plus years of service. That case had a negative nexus to the service as there was reference made in publications. There is no such evidence of any such nexus in the instant case. Arbitrator Braverman does state on page 12 of that award; "The Arbitrator's jurisdiction is created by the agreement between the parties which requires that decisions be made upon considerations of just cause." Management included National Arbitrator Eischen's case C-23828, which supports the Union's position in the instant case more than they do Management's. Union President Seitz credibly testified that the parties agreed as an undisputed fact throughout the Formal A process that the Gardiner post office had less than 20 employees. It wasn't until the eleventh hour that Management added the RMPO caveat, and they then agreed that even if included, the total number of employees would be twenty. This still requires outside concurrence. At hearing, it was determined that improper employees were included in the count.

As Mr. Seitz states in his Formal A contentions on page 18; "It is unfortunate that some cases may be won on the merits of technicalities, but management has strict rules to follow for a reason, and they failed to follow them in this case..." The CBA is the controlling document, and the requirements of 16.8 are clear and unambiguous. Those requirements have also been interpreted by National Arbitrator Eischen in a clear manner, for Management and Regional Arbitrators to follow.

Grievant is a redeemable employee of the USPS. He is a long tenured employee with a family who relies on him for support. He has admitted his wrongdoing and has not run from it. Alcoholism is a disease. It is one that can be managed with the right support and mindset. It is one that affects millions of Americans every day. Grievant should not suffer the fatal blow of discharge due to the fatal flaws presented before you today.

The Union respectfully requests that this grievance be sustained in its entirety and that the Arbitrator grant a remedy that reinstates Grievant and provides a "make whole" provision. If you are unable to grant a remedy that returns Grievant to his City Carrier position, the Union asks that you consider modifying the remedy and allow Grievant to continue his employment with the Postal Service in another craft, perhaps within the maintenance or clerk craft, in an office within 25 miles of Grievant's residence as agreed to as best by the parties at Formal Step A.

The Union is also requesting that you retain jurisdiction over the instant case in order to interpret and enforce any questions that may arise as a result of your ruling.

FINDINGS AND DISCUSSION

The Arbitrator has reviewed the entire record including the numerous arbitral awards provided by both parties. The Arbitrator has considered the parties' respective arguments and offers the following.

The Arbitrator is generally of the view that where under a CBA, the employer may only discharge an employee for just cause, the burden of proof and persuasion is on the employer unless otherwise provided in the CBA, and the facts supporting its decision are generally to be established by the preponderance of credible evidence except in certain situations not applicable here.

In analyzing "just cause," perhaps the most widely recognized distillation of just cause principles has been the "seven tests" set out by Arbitrator Carroll Daugherty: (1) Did the

Employer give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct? (2) Was the employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business (3) Did the employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management? (4) Was the employer's investigation conducted fairly and objectively? (5) At the investigation, did the 'judge' obtain substantial evidence or proof that the employee was guilty as charged? (6) Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees? (7) Was the degree of discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the proven offense and (b) the record of the employee in his service with the employer? *See* Brand and Burren, Ch 2, I. A at pp. 33-34 (*citing Grief Bros. Cooperage Corp.* 42 LA 555, 558 (Daugherty, 1964).

Further, as aptly stated by Arbitrator Daugherty, albeit analogizing to a calculating tool from an earlier time, "[t]he answers to the questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing thereon. Frequently, of course, the facts are such that the guidelines cannot be applied with slide-rule precision." Id. (*quoting Grief* at 557). These principles of just cause are well recognized by the parties, are consistent with the National Agreement and the JCAM, and are incorporated in their disciplinary processes.

Before addressing the Union's just cause arguments, however, the Arbitrator must first take up its allegation of a fundamental due process violation stemming from Management's failure to adhere to the provisions of 16.8 of the CBA, specifically Management's failure to provide review and concurrence of the proposed disciplinary action by a higher authority outside the Gardiner Post Office before the proposed disciplinary action was taken. The Union's argument is grounded in its contention that Gardiner is a post office with 20 or less employees.

Paragraph B of the August 19, 1995 MOU appended to the CBA clearly states:

> It is also agreed that where this Agreement makes reference to offices/facilities/installations with a certain number of employees or man years, that number shall include all categories of bargaining unit employees in the office/facility/installation who were covered by the 1978 National Agreement.

J-2 p.145.

The Arbitrator has had little difficulty in concluding that Gardiner at the time of the removal was a post office of 20 employees or less. Gardiner's all-employee report for the relevant time period establishes that while there are 21 named employees listed, at least 2 employees, Messrs Peters and Hardy, are supervisory employees and not bargaining unit employees, bringing the count below 21. Several rural carriers on the list drop the count even further, because only letter carrier, clerk, motor vehicle, maintenance, and mail handler crafts are to be counted as the JCAM at page 7-16 makes clear. Under these circumstances, I need not address Management's contention that the RMPO employee assigned to South Gardiner should be included in the count.

Management argued that it remained in compliance with 16.8 because concurring official Hardy, who was then OIC, was at a higher level than Mr. Peters, the removing official. While Mr. Hardy was at a higher level, the fact remains that he was not assigned to a post office outside Gardiner at the time of the concurrence. In the Arbitrator's view, the term "or" in 16.8 alluding to where there is no higher level supervisor to review and concur is significant, indicating that lack of higher level supervision is just an additional situation requiring outside review and concurrence. In light of the foregoing, the Arbitrator concludes that a violation of 16.8 has occurred and that the grievance must be sustained on this basis.

The Union also raised two "just cause" arguments, one which is procedural in nature. Briefly addressing the procedural argument, i.e., whether the removal action was untimely due to the delay resulting from taking the second PDI, the Arbitrator finds no basis for concluding that Management erred by bringing Grievant back for a second PDI before taking any action. The Arbitrator credits the testimony of Management's witnesses that Grievant smelled of alcohol and that he appeared intoxicated to them.

I cannot credit Grievant's denial that he was not "under the influence" and his Union representative's observation that there was "no indication he was under the influence of alcohol." Grievant also testified that the last time he had had a drink was December 5, 2022 four days after the first PDI. Given Grievant's prior struggles with alcohol, as evidenced by the circumstances surrounding his prior six-month suspension as well as the incident on November 21, a mere ten days prior to the December 1 PDI, the Arbitrator finds it unlikely that Grievant was completely sober on December 1. The Arbitrator finds that Management acted reasonably, based on the limited information at hand, i.e., the first hand observations of the supervisors at the PDI, in

giving Grievant a second opportunity to explain himself. The Arbitrator also finds that the intervening holiday season, well recognized as the busiest time of the year for the Postal Service, most likely contributed to at least some of the delay in conducting the second PDI. In any event, the Arbitrator can find no evidence in this record that this delay adversely impacted Management's investigation or prejudiced Grievant in any way.

The Union has further argued that the stipulated facts do not support a charge of unacceptable conduct because Grievant's actions did not contribute to the nondelivery of mail. This contention goes directly to the merits of the removal action. The Arbitrator declines to directly address this argument because as discussed above, the NOR should not have been issued without review and concurrence by a higher authority outside the Gardiner post office.

There remains the question of how best Management's contractual violation is to be remedied under the particular circumstances of this case. Management's violation essentially has precluded the Arbitrator from directly addressing the merits of this action as the NOR was issued without a required and fundamental procedural step.

After careful consideration, the Arbitrator concludes that a status quo ante remedy is appropriate. The Postal Service must cancel the January 12, 2023 NOR removal and provide Grievant with back pay, interest and benefits consistent with the National Agreement and appendices, any local agreements, and applicable Postal Service policies and rules.

The Arbitrator declines, however, to return Grievant to his position as a City Carrier and is not including reinstatement to the carrier craft in the remedy. In this regard, the Arbitrator takes note in the Union's contentions that "all parties agree on this point."

The Arbitrator is very aware of the challenges faced by anyone suffering the disease of alcoholism. It appears that Grievant has recently taken some serious steps towards confronting these challenges by participating in a 30 - 90 day program designed to treat individuals with a substance abuse issue and co-occurring disorders. It further appears that he has continued outpatient treatment for his mental health issues, and hopefully his substance abuse issue as well. Nevertheless, consumption of alcohol while performing the duties of a letter carrier is not conduct that need be nor should be tolerated by the Service.

Finally, nothing in this award should be construed to preclude either a settlement (for example, as described in the Union's Formal Step A contentions) or a reinstituted removal or lesser action after review and concurrence by a higher authority outside the Gardiner post office.

REMEDY

The Postal Service must cancel the January 13, 2023 NOR removal and provide Grievant with back pay, interest and benefits through the date of this award consistent with the National Agreement and appendices, any local agreements, and applicable Postal Service policies and rules.The Arbitrator will retain jurisdiction for at least sixty days to resolve any questions that may arise over application and interpretation of this remedy.

AWARD

The grievance is sustained with the remedy as set forth above.

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Date: June 30, 2023

John F. Markuns

John F. Markuns
Arbitrator