GAMSER
SUSTAINED

IN THE MATTER OF THE ARBITRATION BETWEEN

NATIONAL POST OFFICE MAIL HANDLERS, WATCHMEN, MESSENGERS AND GROUP LEADERS DIVISION OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

and

UNITED STATES POSTAL SERVICE

USPS CASE NO. M-NAT-12
(Dallas, Texas)
and
Hampton, Va. Case

King

OPINION AND AWARD

C 296

Appearances:

For the USPS - Harvey Letter, Esq.

For the Union - Jules Bernstein, Esq.

Background:

This proceeding arose out of two separate grievances filed under the current National Agreement to which the above-captioned parties are signatory. The first case arose in Dallas, Texas at the Terminal Annex Post Office. It was given a Case No. M-NAT-12 by the Postal Service. During the course of the processing of this grievance, the parties jointly advised the undersigned, by letter dated August 7, 1972, that the issue in dispute was set for hearing before him on September 27, 1972. In this joint submission to arbitration, signed by an authorized official for each of the respective parties, the issue was defined as follows:

> "The grievance concerns the interpretation of Article VX, Section 2, Step 4, as it was applied to the grievance of Mr. Arthur M. King, which was filed in his behalf on February 26, 1972, by Bernard T. Booty, Shop Steward, Terminal Annex Post Office, Dallas, Texas."

Approximatley one week prior to the date scheduled for the hearing, the undersigned was informed by telephone, by a representative of the Postal Service, that the matter was being withdrawn from arbitration. Thereafter, on September 21, 1972, I was advised, by letter from the Counsel for the International Union, that, "...the decision to withdraw the case from arbitration was unilaterally arrived at by the Postal Service without any consultation or agreement with the Mail Handlers Division and that no settlement of the underlying grievance has been reached."

On September 25, 1972, by letter from the Assistant General Counsel of the Labor Law Division of the Postal Service, the undersigned was further advised that, in addition to failing to notify the Union, formally of the Postal Service's intention to withdraw this case, through oversight, the Postal Service was of the opinion that there was no longer a matter pending for arbitration because the Postal Service then in-

tended to process the grievance involved to Step 4 of the grievance procedure. That letter concluded with the further statement that the Postal Service did not intend to appear at the previously scheduled arbitration "in the absence of a matter which is properly the subject of arbitration."

That letter from the Postal Service drew a further reply from Counsel for the International Union dated September 26, 1972. In that letter, the Union took the position that the Postal Service could not moot the case in controversy before the arbitrator by agreeing to process the original grievance to Step 4 of the grievance procedure outlined in the National Agreement. In support of that contention, the Union alleged that the Postal Service had not addressed itself to the issue before the arbitrator which was an interpretation of Article XV, Section 2, Step 4; by moving the pending grievance to Step 4 the Postal Service was not willing to concede as well that the Union's interpretation of the relevant provision was correct; and the Union claimed that there need not be an underlying case or controversy pending to authorize the Union to seek a national interpretation of the Agreement. The Union also pointed out that the delay in processing the original grievance in the manner demanded by the Union for some period of time did not take into account the impact of the delay upon the underlying grievance. Finally, the Union argued that, after having agreed on August 7, 1972 to proceed to arbitration, the Postal Service no longer had the right to unilaterally determine to withdraw the case.

By letter dated October 2, 1972, the arbitrator advised the parties that, on the basis of the correspondence reviewed above, he was of the opinion that the question of whether an issue has been mooted or is properly before the arbitrator is an arbitrable question. The arbitrator further pointed out in his letter:

> "As you can see from the outline of the conflicting contentions above, the issues which have been raised by the exchange of correspondence go to the heart of the Parties' understanding of how the grievance and arbitration procedure shall operate on a National level. How shall jointly submitted cases be withdrawn? Did the Parties contemplate that awards in the nature of declaratory judgments could be obtained from the National Arbitrators? If so, what role shall other participating Unions play in the adjudication of such matters? And there are other equally fundamental questions also raised."

The letter of October 2, 1972, partially quoted above, concluded by informing the Parties that, absent the receipt of a mutally signed withdrawal, a notice of hearing would issue. Not receiving such a withdrawal, a pre-hearing conference was convened by the arbitrator for the purpose of framing the issues to be submitted to arbitration.

On December 13, 1972, a meeting was held with the parties, after the arbitrator was advised by the Postal Service on November 9, 1972, that it was appearing specially and not conceding that there were

"...any contract issues to be submitted."

The other grievance arose at the Hampton, Virginia Post Office. It alleged a violation of Article VIII, Section 9 of the National Agreement in that the local officials had not granted the grievants reasonable wash-up time. On April 3, 1972, this grievance was denied at the local level. On April 11, 1972, the Local President requested of the National office of the Union that this case by-pass Step 3 and be appealed to Step 4. The National Office of the Post Office was advised of this request by the Local Union officials. The case was reviewed by the Parties at Step 4, and the grievance was initially denied on May 17, 1972. After correspondence regarding this state of affairs between the National offices of the Union and the Postal Service, the case was jointly submitted to the undersigned by letter dated August 25, 1972. The case was scheduled for hearing at Hampton, Virginia on October 24, 1972. By telegram dated October 20, 1972, the undersigned was advised that the grievance had been sustained and the hearing cancelled. This telegram was signed by the Regional Labor Counsel for the Postal Service.

This action by the Postal Service prompted a letter from the Counsel for the International Union dated October 30, 1972. In this letter, Counsel protested the unilaterally withdrawal from arbitration and alleged that this act was in itself a violation of the National Agreement. The International Union requested that judgment be entered against the Postal Service for refusing to honor its commitment to go to arbitration. Since, as the Union pointed out, this case had many similarities in the issue raised regarding unilateral withdrawal to the Dallas, Texas case, the Union requested that these matters be consolidated for hearing.

By letter dated November 3, 1972, the undersigned advised the Parties that, subsequent to writing on October 2, 1972, as set forth above, this second case in which the unilateral withdrawal of a case jointly submitted in writing to the arbitrator was brought to his attention, and the Union's contentions of a similiar nature were again raised. In this letter a specific time for a pre-hearing conference was set and the parties were put on notice that "...the issues raised by this dispute over case handling procedure can be framed for submission to arbitration." As set forth above, the Postal Service indicated that it would appear but maintained its position that, "...the grievances have been sustained. In such circumstances, there do not remain any contract issues for you to resolve as arbitrator."

Contentions:

From the outline of the posture of these cases set forth above, it can be seen that the Postal Service has taken the position that, in both cases, the grievances were sustained. That being the case, there were no issues remaining for the arbitrator to determine. The unilateral withdrawal of these cases from arbitration by the Postal Service thus served to effectively terminate the controversy and the jurisdiction of the arbitrator.

The Union has contended that, although the Postal Service contended there is nothing to arbitrate, the contentions of mootness or settlement are insufficient to deprive the arbitrator of jurisdiction.

OPINION:

At the outset, it should be noted that this proceeding arose from the filing of two grievances. The Dallas Texas Case (M-NAT-12) was filed when a supervisor allegedly refused to discuss a grievance. As the case was processed by the parties themselves, it was jointly submitted to arbitration at the National level as a dispute over the meaning and application of Article XV, Section 2, Step 4. During the processing of the grievance, it appears that the parties mutually recognized a difference in the interpretation and application of Article XV, Section 2, Step 4. This provision of the Agreement concerns itself with the processing of grievances, and the parties requested that the arbitrator determine whether the provision in question had been correctly implemented by the Union in the processing of the underlying grievance.

The Hampton, Virginia case was initiated apparently when supervision at a local Post Office refused to grant certain employees wash-up time or what the grievants considered adequate wash-up time as provided for in Article VIII, Section 9, of the National Agreement. This dispute over the proper implementation of a provision dealing with terms and conditions of employment was apparently properly processed through the preliminary stages of the grievance procedure outlined in the Agreement. It was jointly submitted to arbitration as an alleged violation of that provision.

The Postal Service has contended that both cases, prior to the date and time the arbitration hearing was to take place, satisfactorily resolved the underlying grievances. In the Dallas, Texas Case, the Postal Service has contended and submitted proof of an existing jointly signed document indicating that this case was disposed of by the Postal Service agreeing, "If a counseling record was made in this case, the record will be destroyed." In the opinion of the Postal Service, this disposition of the underlying grievance removes the existence of a viable grievance, and hence the issue of whether Article XV, Section 2, Step 4 was properly implemented, i.e., that there was a proper and appropriate by-pass of Step 3 of the Agreement, was no longer an appropriate issue to be determined by the arbitrator, although this issue and not the question of whether the grievant's file properly reflected proper disciplinary action was the issue that the parties mutually decided that the arbitrator was to decide.

In the Hampton, Virginia Case, it appears that the Postal Service did eventually grant the grievants the wash-up time which they were seeking. Although the Postal Service does not at hand a mutually signed document indicating that the grievants consider the grievance satisfactorily resolved, it has contended that these grievants "have not expressed dissatisfaction with the Employer's resolution of the underlying grievance." For that reason, in this case too, the Postal Service has contended it had a unilateral right to withdraw the case from arbitration, and there is no pending viable dispute before the arbitrator.

In short, in both cases, the Postal Service has contended that with what was alleged to be satisfactory resolutions of the underlying grievances, there were no arbitrable issues remaining for consideration.

The Union contends herein that, the issues of mootness and settlement may go to the merits of the Union's cases, the right to proceed to arbitration cannot be thwarted by an alleged adjustment of the condition or conditions which gave rise to the original grievance. Thus, the Union has argued that the jurisdiction of the arbitrator has not been withdrawn by virtue of these alleged settlements. In addition, the Union contended that the settlement of the Hampton, Virginia Case by granting wash-up time did not dispose of the question of whether such proposed settlement and action by the Postal Service took out of contention the question of an appropriate remedy for the alleged breach of the Agreement which might include the awarding of back-pay for the period of time that these grievants were deprived of proper wash-up time. The Union further contended in this regard that the issue of whether an appropriate request for such a remedy had been made and it was within the arbitrator's jurisdiction to consider such a proposed remedy was also an issue properly before the arbitrator for determination.

This arbitrator has before him two letters jointly signed by a National Officer of the Union and the Senior Assistant Postmaster General of the Employee and Labor Relations Group. The first, dated August 7, 1972, states that the parties are to bring before the arbitrator a grievance concerning Article XV, Section 2, Step 4, as it was applied to the grievance of a Mr. Arthur M. King. In attempting to withdraw this case from arbitration, the Postal Service informed the arbitrator and the Union that the Service agreed in that case it would not resist the Union's request to move the case to Step 4 of the grievance procedure outlined in the Agreement. The Postal Service did not contend or enter into any stipulation with the Union that its previous position, that the case could not be processed in the manner requested by the Union, was an improper interpretation and/or application of the Agreement. Subsequently, it appears that the original grievance was granted before or during further processing and the grievants file was cleansed of any unfavorable notation appearing therein.

The second jointly signed letter, dated August 25, 1972, stated that the parties desired to arbitrate a grievance alleging that the refusal to grant wash-up time violated the National Agreement. Subsequently, the arbitrator and the Union were advised that this grievance had been"sustained", and that the arbitration hearing was cancelled. Again, no jointly signed stipulation to this effect was furnished. There is no indication in the record thus far that the Union concurs that the grievance has been satisfactorily resolved in all its aspects and that no issue raised by this grievance remains for determination.

Based on the facts at hand, and as outlined above, the arbitrator cannot hold that the Postal Services'"settlement"of these cases removes the question of their arbitrability from his jurisdiction. The defenses raised by the Postal Service address both the merits ofthe Union's claim as well as procedural issues regarding the present viability of these grievances. Such matters in contention have been placed within the jurisdiction of the arbitrator by the mutually signed stipulation to submit these cases to arbitration. These facts do not suggest that the Union

is pursuing these matters for frivolous reasons or because it was piqued by the belated attempts made by the Postal Service to remove the cause of the original grievances which gave rise to these stipulations. The Union has established that what the Service has referred to as settled grievances have left matters of procedure as well as substance still in contention. These "settlements" do not treat fully with the scope of the jointly signed submissions to arbitration. The breadth of the grievance clause in this Agreement, Article XV, Section 1, nor the procedure thereunder culminating in arbitration, does not provide an inhibition on the right to arbitrate urged by the Service.

In concluding that the matters submitted to arbitration in the jointly-signed stipulations referred to above remain within the jurisdiction of the arbitrator, no conclusion is being drawn with regard to the substantive merits of these claims nor the viability of the suggested defense of the Postal Service. The conclusions regarding the arbitrability of these claims are clearly buttressed by the declarations of the Supreme Court in Wiley and Sons v. Livingston, 376 U.S.543 (1964) and more recently in Local 150 v. Flair Builders, Inc. 406 U.S.487. In both these cases, the Court held that procedural questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.

In this formative and transiitional period of the collective bargaining relationship between the Postal Service and the signatory Unions to the National Agreement, many of the issues raised in the processing of the cases under review herein remain to be resolved through mutual accomodation and through the refinement of the parties' grievance and arbitration procedure through collective bargaining based upon the experience they have gained in its implementation.

Pending this manner of resolution, it is necessary to find that the matters still remaining in contention are within the jurisdiction of the arbitrator and that such matters should be progressed for a hearing on the merits. Consequently, after a full review of the arguments presented, the undersigned awards as follows:

A W A R D

The issues placed in contention by the parties in the submissions to arbitration jointly signed on August 7 and August 25, 1972 are arbitrable. These cases shall be set for hearing, if possible, at a time and date mutually convenient to these parties. Absent an agreement on such time and date, taking into consideration the current collective bargaining negotiations, the undersigned shall establish same upon proper application.

Howard G. Gamser, Arbitrator

Washington, DC
May 4, 1973

C # 500

ARBITRATION PROCEEDINGS

Before

Linda DiLeone Klein

In the Matter Between:	Regular Regional Arbitration
U.S. POSTAL SERVICE Saginaw, Michigan	Case No. C1C-4B-C 13616
-and-	Grievance of Mary Smith
AMERICAN POSTAL WORKERS UNION	Heard: June 7, 1983

APPEARANCES

For the Employer:

Paul J. Sniadecki, Labor Relations Representative
D. Whiting, Supervisor of Mails

For the Union:

Alan S. Moore, Local President

*

LOCAL MEMORANDUM OF UNDERSTANDING

13. METHOD OF SELECTING EMPLOYEES TO WORK ON A HOLIDAY:

The method of selecting employees to work on a holiday in accordance with Article XI, Section 6 of the National Agreement shall be as follows:

. . .

C. Full-time regular employees who have VOLUNTEERED to work on their non-scheduled day. Note: Recourse to overtime desired list is not necessary or applicable.

ISSUE

Did the offer of an opportunity to work two hours of overtime on November 9, 1982 satisfy Management's obligation to

provide the make-up overtime opportunity to which the grievant was entitled as a result of being inadvertently passed over for an overtime assignment on October 2, 1982?

FACTS AND CONTENTIONS

There is no serious dispute surrounding the facts of this case. The grievant is a Full Time Letter Sorting Machine Clerk on Tour III. Her name was on the appropriate overtime desired list for the period extending from October 1 through December 31, 1982. When overtime assignments were being made by Management on October 2, 1982, the grievant was inadvertently passed over, despite the fact that her name was on the list. As a result of having made this error and in order to give the grievant an opportunity to make up the overtime, the grievant's Supervisor agreed to give her two hours of "make-up overtime" within sixty days.

On November 9, 1982, the grievant was offered an opportunity to work two hours of overtime at the end of her regularly scheduled workday. This was offered by Management to make up for the aforementioned oversight.

The grievant, however, turned down this offer and claimed that because the make-up opportunity was offered on a "designated" holiday, it was not a valid offer. The grievant claimed further that the Local Memorandum of Understanding specifically prohibits the use of the overtime desired list when assigning work on a holiday or designated holiday. When sixty days had elapsed

after the initial scheduling error had been committed by Management on October 2, 1982, the grievant initiated a grievance requesting payment for the two hours of overtime which she had missed.

The Union states that the offer of make-up overtime on November 9, 1982 came about as a result of the grievant being bypassed for an overtime assignment on October 2, 1982, even though she was on the overtime desired list. The Union contends that requiring the grievant to work the make-up overtime on a designated holiday, in effect, meant that Management had resorted to the use of the overtime desired list on a holiday which, claims the Union, is prohibited by Item 13.C of the Local Memorandum of Understanding.

Therefore, says the Union, the grievant properly refused the assignment. The Union maintains that Management had additional occasions to offer the make-up opportunity to the grievant, but it failed to do so; consequently, states the Union, she is now entitled to be paid for the time she would have worked had the opportunity been properly offered.

Management, however, contends that it fulfilled its obligation to the grievant in this case and that no violation of the National Agreement occurred.

The Postal Service acknowledges that the grievant was entitled to an opportunity to make-up two hours of overtime because she was inadvertently passed over for overtime on October 2, 1982; the make-up opportunity was offered on November 9,

1982, and this offer was all that was required of Management.

Management submits that the grievant erred when she claimed that November 9, 1982 was her designated holiday. Management insists that November 11, 1982 was her true holiday. The Employer further insists that the issue of the holiday is irrelevant in this matter. The Union is misinterpreting the significance of Item 13.C of the Local Memorandum, says Management. The "note" which is part of the Memorandum merely signifies that the overtime desired list will not be used during the initial holiday scheduling process, says Management; any employee wishing to be scheduled for a holiday must specifically sign up and volunteer to do so; an employee cannot rely upon a previous sign-up on the overtime desired list to insure being scheduled for the holiday, says Management. This item in no way refers to overtime assignments, adds the Postal Service.

The Employer asserts that it acted in good faith when it offered the grievant a make-up opportunity on November 9, 1982. The grievant was given her chance to make up a missed opportunity and this was all that she and her Supervisor agreed to; the only condition in their agreement was that the opportunity be offered within sixty days of October 2, 1982, and it was. The offer was made, but the grievant turned it down, says Management, and under such circumstances, she is not entitled to any payment,as demanded in the grievance.

OPINION

Setting aside for the moment a discussion on the merits of this case, the Arbitrator finds from the evidence that the Postal Service did not violate Item 13.C of the Local Memorandum of Understanding, as contended by the Union, when the grievant was offered a make-up overtime opportunity on November 9, 1982. A careful reading of Item 13 reveals that this provision refers to the method by which employees will be scheduled to work the holiday. Paragraph C is designed to inform employees that being on the overtime desired list is not sufficient if they want to work the holiday. Any employee desiring to work a holiday must specifically volunteer to do so over and above volunteering for overtime assignments.

Furthermore, item 13.C of the Local Memorandum has no application to the basic issue raised in this case.

What occurred here was the bypassing of the grievant when it was her turn to work the overtime on October 2, 1982. Following this incident, an understanding was reached between the grievant and her Supervisor whereby the grievant would be offered a two-hour make-up overtime opportunity within sixty days of October 2, 1982. When the opportunity to make up the overtime was made on November 9, 1982, it was an "offer" and nothing more. It did not change or minimize the obligation of Management to offer the make-up time until it was accepted by the grievant within the agreed upon time limits.

The Arbitrator has considered the facts of this case from another point of view. The Employer inadvertently erred on October 2, 1982 when it bypassed the grievant for an overtime assignment. Subsequently, the Supervisor made a commitment to the grievant to offer her a two-hour make-up overtime opportunity within sixty days. It is the Arbitrator's opinion that when this type of agreement is made in an effort to correct an inequity, it can be assumed that the possibility exists that the make-up opportunity may come at a time when it is not possible for the employee to accept the offer. Under these circumstances, the Employer cannot be absolved of the obligation incurred as a result of a managerial error simply because the employee was unable to work the offered overtime, or as in this case, because the grievant believed that November 9, 1982 was her designated holiday.

Management committed an error in assigning overtime on October 2, 1982, and it agreed to offer a make-up opportunity to rectify that error. Its obligation to the grievant does not diminish because the make-up opportunity was rejected on November 9, 1982. This refusal had no bearing on the Employer's original obligation to the grievant because an error was committed and because Management was bound by its agreement to rectify the error through a make-up opportunity within a sixty-day period.

In accordance with an agreement dated January 13, 1975 and signed by James Gildea and Francis Filbey, the grievant is entitled to be compensated for the missed opportunity because she

was on the overtime desired list in October, 1982, she had the necessary skills to perform the work, she was available to work, she was improperly passed over for overtime, and she was not given a similar make-up opportunity within the agreed upon time period.

AWARD

It is the award of the undersigned Arbitrator that the grievant shall be compensated for two hours at the overtime rate for the overtime missed on October 2, 1982.

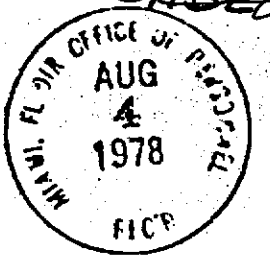
Linda DiLeone Klein
LINDA DiLEONE KLEIN

Dated this 5th day of August, 1983
at Cleveland, Cuyahoga County, Ohio.

UNSATISFACTORY ATTENDANCE (SICK LEAVE USE)

C#00599

-LOST-



IN THE MATTER OF THE ARBITRATION BETWEEN:	
United States Postal Service	Opinion and Award
and	in the
The American Postal Workers Union AFL-CIO	Pensacola Bryan Grievance AC S-23,404 D ACS 23404D

The subject matter in dispute was referred to the undersigned Arbitrator for a final and binding award. A hearing was held in Miami, Florida on June 7, 1978, at which time the parties were afforded full and equal opportunity to present evidence and argument. Following submission of post-hearing briefs by the parties, the record was declared closed.

APPEARANCES:

For the Employer:

Jeremy Lynch, Labor Relations Representative

For the Union:

John Wright, General President, Miami Area Local

ISSUE:

The subject grievance poses the following issue:

> Was the discharge of the Grievant proper under the current Labor Agreement, and if not, what shall the remedy be?

BACKGROUND:

Under the date of February 3, 1978, the Grievant was issued a notice that she would be discharged effective March 14, 1978. The reasons cited for discharge in the Notice of Removal were as follows:

> CHARGE NO. 1: You were issued a Notice of Removal dated June 20, 1977, for unsatisfactory attendance. At Step 2a of the grievance procedure this was mitigated to a ten (10) day suspension and it was further agreed that, "Further evidence of unsatisfactory attendance will result in the discharge of the grievant." Since your return from this ten (10) day suspension on August 25, 1977, you have been absent on five (5) separate occasions for a total of twelve (12) days citing illness as your reason. Further, you were charged one (1) hour AWOL on January 21, 1978, when you failed to provide a satisfactory excuse for failing to report as scheduled. Your untimed, undependable attendance can no longer be tolerated as it severely impairs the efficiency of Postal operations. You are charged with unsatisfactory attendance.
>
> The following elements of your past record have been considered in taking this action:
>
> You were issued a Notice of Removal on July 25, 1977, which was later reduced to a ten (10) day suspension, for unsatisfactory attendance; you were issued a seven (7) day suspension on January 17, 1977, for unsatisfactory attendance; you were issued a Letter of Warning on October 26, 1976, for unsatisfactory attendance; you were counseled on July 12, 1976, for failure to report as scheduled; and you were counseled on April 8, 1976, for unsatisfactory attendance.

At the hearing, evidence and testimony showed the five occasions of absence referenced in the notice of charges, and the Grievant's work schedule in relation to those absences, to be as follows: (1) Absence on Monday, September 27, 1977, not scheduled for work on Sunday, September 26, 1977 or Tuesday, September 28, 1977; (2) Absence on Saturday, November 12, 1977, Monday, November 14, 1977, and Wednesday,

November 16, 1977, not scheduled for work on Sunday, November 13, 1977, or Tuesday, November 15, 1977 (emergency annual leave granted to the Grievant for Thursday, November 17, 1977, and Friday, November 18, 1977, apparently were not considered as an absence by the Employer); (3) Absence on Saturday, November 26, 1977, and Monday, November 28, 1977, not scheduled for work on Sunday, November 27, 1977; (4) Absence on Thursday, December 22, 1977, and Friday, December 23, 1977, not scheduled for work on Sunday, December 24, 1977, or the holiday of Monday, December 25, 1977; absence of four days from Wednesday, January 11, 1978 to Saturday, January 14, 1978, not scheduled for work on Tuesday, January 10, 1978, or Sunday, January 15, 1978.

An examination of PS Forms 3971 submitted by the Grievant in connection with the five above-referenced absences indicate in the remarks section thereof the following comments concerning reasons for the absences: (1) Hay fever and allergy attack; (2) Taking medication; (3) Arm injury; (4) High blood pressure; (5) Diarrhea.

At the hearing, the Grievant testified with respect to absence period number (1) that she had reported for work on the date in question, but was requested by her Supervisor to go home due to an allergic reaction she suffered. With respect to absence period number (2), the Grievant testified she was taking medication for high blood pressure and was unable to work. With respect to absence period number (3) the Grievant testified she sustained an arm injury in a domestic dispute thereby requiring that she go to a hospital for treatment. The Grievant further

indicated documentation concerning the hospital visit with respect to this injury was submitted to the Employer. With respect to absence period number (4), the Grievant testified she reported to work but was requested by a nurse to leave work after a blood pressure test revealed she had extremely high blood pressure. The Grievant further indicated that with respect to absence period number (5), she was suffering from a minor kidney infection and had taken a prescription which resulted in her suffering diarrhea. The Grievant also testified her doctor recently reported she was currently in good health and able to work without interference of any of the above-referenced illnesses or injuries.

With respect to the AWOL charge resulting from a one-hour absence on January 21, 1978, which was also referenced in the notice of dismissal, the Grievant testified she was unaware of this charge until notification of her discharge. The Grievant further indicated the one-hour AWOL resulted when she was one hour late reporting to work on the date in question, and she had reported to supervision some time earlier in the evening that she anticipated a late arrival. Accordingly, she thought the late arrival was excused.

EMPLOYER CONTENTIONS:

The Employer contends discharge of the Grievant was for just cause. In support of this contention, the Employer argues that the Grievant's absenteeism rate during the five-month period prior to her discharge was

twelve percent, and that such a high absenteeism rate is clearly intolerable. In addition, the Employer emphasizes that progressive discipline imposed upon the Grievant had failed to correct the rate of absences, thus justifying discharge of the Grievant. Based on the foregoing and the record as a whole, the Employer requests that the grievance be denied.

UNION CONTENTIONS:

The Union contends that discharge of the Grievant was not for just cause. In support of this contention, the Union argues that the Grievant's absence for a total of twelve days during the five-month period preceding her discharge does not provide sufficient ground to discharge the Grievant. In this regard, the Union emphasizes the Grievant's absences during this period were all approved by the Grievant's Supervisor, each was for a sufficient reason to entitle the Grievant to sick leave under provisions of the Postal Manual, and that discipline concerning the absences should not have been imposed.

In addition, the Union argues that had the Grievant appealed her discharge through the U. S. Civil Service Commission, approval by the Employer of the absences as shown on PS Forms 3971 would have, according to a recent ruling by the Civil Service Commission, created a prima facia case that the absences were approved for all purposes. Thus, the Union argues that the Employer's failure to offer any evidence other than documentation concerning the dates of absenteeism by the Grievant would justify a finding by the Arbitrator that the discharge was not for just

cause. Based on the foregoing and the record as a whole, the Union requests that the grievance be sustained.

DISCUSSION AND FINDINGS:

The record clearly shows that the Grievant has a poor attendance record. Prior to her Notice of Removal she had received the following disciplinacy actions for the sole reason of unsatisfactory attendance: two (2) counselings (4/8/76 and 7/12/76); a letter of warning (10/26/76); a seven (7) day suspension on 1/7/77 and a ten (10) day suspension in 8/77 (a Step 2a reduction of a removal action instituted on 6/20/77). Significantly, this commutation of the proposed termination to a ten (10) day suspension included an agreement that, "(F)urther evidence of unsatisfactory attendance will result in the discharge of the grievant."

Subsequent to her return to work from the latter suspension (8/25/77) she was absent on five (5) occasions for a total of twelve (12) days, the absences falling in the period September 27, 1977 - January 14, 1978. In each instance of absence a Supervisor approved a Form 3971 authorizing Sick Leave pay for the Grievant. In addition to these absences, on January 21, 1978, she reported for work one hour late for duty and was charged for AWOL when she failed to provide a satisfactory excuse for failure to report as scheduled. Her absences, by periods, follow:

Period 1

Sunday, 9/26/77 - Not scheduled
Monday, 9/27/77 - Absent
Tuesday, 9/28/77 - Not scheduled

Period 2

Saturday, 11/12/77 - Absent
Sunday, 11/13/77 - Not scheduled
Monday, 11/14/77 - Absent
Tuesday, 11/15/77 - Not scheduled
Wednesday, 11/16/77 - Absent
Thursday, 11/17/77 - Emergency Annual Leave (not counted)
Friday, 11/18/77 - Emergency Annual Leave (not counted)

Period 3

Saturday, 11/26/77 - Absent
Sunday, 11/27/77 - Not scheduled
Monday, 11/28/77 - Absent

Period 4

Thursday, 12/22/77 - Absent
Friday, 12/23/77 - Absent
Saturday, 12/24/77 - Not scheduled
Sunday, 12/25/77 - Not scheduled

Period 5

Tuesday, 1/10/78 - Not scheduled
Wednesday, 1/11/78 - Absent
Thursday, 1/12/78 - Absent
Friday, 1/13/78 - Absent
Saturday, 1/14/78 - Absent
Sunday, 1/15/78 - Not scheduled

The Union raises the question of whether the Employer has just cause for the termination of an employee when reasonable attendance requirements cannot be met because of the physical inability of the employee to report for work as scheduled on a regular basis. This question has been disposed of frequently in Postal Service arbitration as indicated by the following quotation from page 12 of the Opinion and Award of Arbitrator Cushman in re. NC-S-8197-D (Lenny Puglisi):

> Indeed, other Arbitrators in Postal Service cases as well as this Arbitrator, have made it clear that at some point the employer must be able to terminate the services of an employee who is unable to work with an acceptable level of regularity, despite the fact that the employee's inability to work does in fact arise from illness. The same rule applies to absences caused by on the job injuries. See case number AB-S-6102-D, Vera D. Bugg (Arbitrator Holly), Pamela Allen (APWU and USPS, October 21, 1977, Arbitrator Meyers), Susan Smith, AC-S-12,796-D (Arbitrator Cushman). The realities of economic survival and the demands of efficiency require that an employer be able to depend upon reasonable regularity of employee attendance in order to plan and perform his work schedule. Where reasonable standards of work attendance cannot be met due to the physical inability of the employee, termination by the employer is warranted.

A second question raised by the Union relates to whether supervisory approval of a Form 3971 requesting Sick Leave constitutes approval of the absence so that such an absence cannot be counted in the employee's absentee record. This question is answered at page 9 of the Opinion and Award of Arbitrator Casselman in re. AC-C-10,295-D (Teri Jakovac), as follows:

> 2. The Union relies on approval of sick leave by signed approval of form 3971s. This is completely incorrect, these forms approve a sick leave pay status, but do not condone the underlying absence, or the cumulative extent of it. The Union's reliance on U-1 (The Fiscal Handbook Series F-1) and Article X, Section 4, is misplaced. /See Arbitration AB-S-6102-D, Bugg Case, Arbitrator Holly and Willingham Award AB-C-6818D (3/29/75)/.

Subsequently, Arbitrator Meyers (Pamela Allen) and Arbitrator Cushman (NC-S-8197-D), Lenny Puglisi) come to the same conclusion.

In this same regard, the Union urges the Arbitrator to adopt the decision of the United States Civil Service Commission in re. Decision Number A7752P80188 (Paul Stephens) wherein it was held:

> Use of any approved leave category to record an employee's absence on a time and attendance record is prima facie evidence that the leave was approved by the agency. The Commission's current policy concerning the use of absenteeism as a cause for adverse action is that, given an agency's authority to deny leave in any circumstances when it must have the services of an employee, an adverse action predicated on a record of approved leave does not meet the statutory requirement that the action be for such cause as will promote the efficiency of the service.

This Arbitrator cannot comply with this Union request because the decision referred to arose in a forum other than arbitration. A Postal Service Arbitrator's authority extends only to the interpretation and application of the National Agreement between these parties. On the other hand, a Civil Service Appeals officer's jurisdiction is not so narrowly limited. Moreover, the Arbitrator subscribes to and endorses that arbitration authority and precedent previously noted which holds that supervisory approval of a Form 3971 request for Sick Leave means only that an employee's absence will be processed for pay purposes. Hence, the absence remains on the employee's record.

A third question raised by the grievance relates to whether the Employer can terminate an employee for unsatisfactory attendance alone when all of the absences are recorded as Sick Leave and the total number of absences do not exceed the employee's accumulation of Sick Leave benefit hours. In the instant case every absence was covered and paid as sick leave. A reasonable conclusion is that the Employer cannot discipline an employee for absences which are legitimately caused by the physical incapacity of an employee up to at least the point where that employee exhausts his/her

accumulated Sick Leave benefits, other things being equal. To hold otherwise would make it possible for the Employer to say to an incapacited employee, "although you have accumulated Sick Leave available, you cannot use it because to do so would make your attendance unsatisfactory." Certainly, such a conclusion is not in accord with either the intent or spirit of the negotiated Sick Leave benefits.

This does not dispose of the instant case, however, because there is a serious question concerning the legitimacy of this Grievant's use of Sick Leave. As previously noted, the Grievant was on Sick Leave on five (5) occasions for a total of twelve (12) days between September 27, 1977 and January 14, 1978 (roughly 20 percent of her scheduled days). Significantly, four (4) of the incidents, covering eleven (11) days fell in the brief period of November 12, 1977 to January 14, 1978. Of greater importance, however, is the cold fact that she so used her Sick Leave during each of the five periods to extend a weekend, or a holiday period, or both. In fact, she so scheduled her absences that in the five periods she was able to use her twelve absences to get a total of five groups in which she obtained twenty-one (21) consecutive days off (Period 1, 3 consecutive days off; Period 2, 5 consecutive days off; Period 3, 3 consecutive days off; Period 4, 4 consecutive days off; and Period 5, 6 consecutive days off). With no better proof than she offered that her absences were caused by personal illness or injury as claimed, one cannot ignore the pattern which she had developed. A reasonable person can reach no conclusion other than that she abused her Sick Leave benefits and this action made her

attendance entirely unacceptable. This, in spite of the fact that it had been agreed when her earlier removal was rescinded that, "(F)urther evidence of unsatisfactory attendance will result in the discharge of the grievant." Obviously, she was fully informed and aware of her precarious position. Yet, her deliberate actions were such that they gave the Employer just cause for her removal.

AWARD:

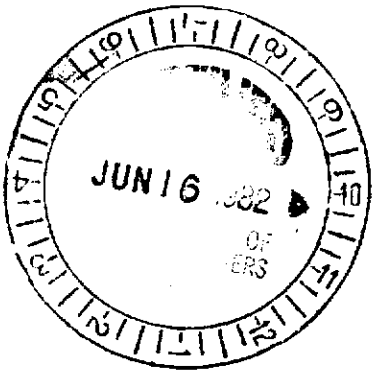
The Arbitrator hereby Awards as follows:

> The Employer had just cause for the discharge of the Grievant. The subject grievance is denied and dismissed.

Knoxville, Tennessee
August 2, 1978

J. Fred Holly, Arbitrator

cc:
2a File MIA 78-199-d
2b File
AA File-SCD/E&LR
Personnel-for nec. action to cut 50
ATAL
AGC
Mgr.Dist.
OAO-L.S. Goodman
SCM/EM
SCD/MP
Don Cowan
R/ Fleischmann
Tom Byerly



C#01270

IN THE MATTER OF THE ARBITRATION BETWEEN

NATIONAL ASSOCIATION OF LETTER CARRIERS (AFL-CIO)	:	GRIEVANT: RONALD DEAS Philadelphia, PA
and	:	
UNITED STATES POSTAL SERVICE	:	NO. E8N-2B-C-9742

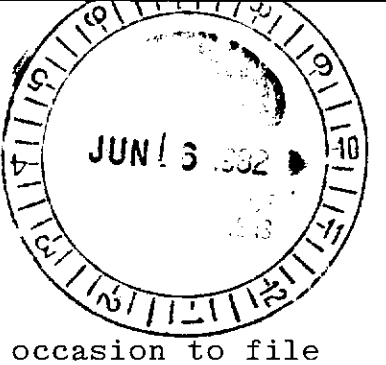
ARBITRATOR'S OPINION AND AWARD

Hearing was held at 30th Street, Philadelphia, Pa. on June 7, 1982.

Grievant filed a claim for $79.95 for damage to a coat in an occurrence on February 14, 1981 at 9th and Market Streets. His claim form, dated March 4, 1981, recites: "While closing truck door . . . sleeve of coat was caught in folding panel of door and torn."

Grievant testified that this was the third or fourth time he had worked on the type of truck here involved, that he was wearing a new parka-type coat, and that as he was closing the folding panel back door, his sleeve was caught and was ripped. He reported the incident at once to Mr. Moffa.

He left the coat at a tailor's for repair, and was later informed that the torn sleeve could not be sewn together and would require a large patch. He was not familiar with the

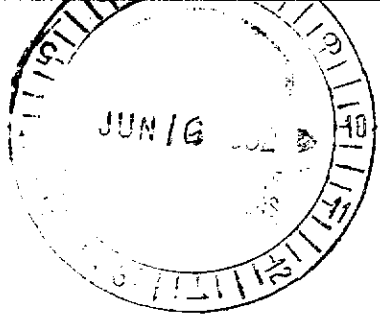


procedure for filing a claim and had never had occasion to file a claim of this type.

He first inquired if he would be allowed to wear the coat with a large patch and was told by Mr. Kearney that this was not allowed. Mr. Kearney referred him to the Union steward. After consulting the steward (from whom he learned that he could file a claim), he then was told by Mr. Kearney to file the claim at 9th Street. He sought out Mr. Moffa, and learned that Mr. Moffa did not have the appropriate claim form. It then took about a week to get the form and complete it.

Article XXVII provides that an Employee may file a claim within 14 days of the date of loss or damage to his personal property. The Employer denied the claim for the reason that it was not filed within 14 days. Grievant then obtained a note, dated March 24, 1981, signed by Mr. Moffa, explaining that the delay was caused by Grievant's effort to have the coat repaired and the problem of obtaining the claim form. The note was sent to Mr. Keenan.

It was Mr. Moffa's recollection that Grievant asked him for the claim form 1 or 2 days before March 4. Grievant said it was about a week before. However, Grievant had reported the damage promptly to Mr. Moffa. Grievant was not familiar with the claim procedure, nor were Mr. Moffa and Mr. Kearney knowledgable on the subject. Under the circumstances, the delay was satisfactorily explained, and Grievant should not be penalized for the fact that the filing was late by several days.



More difficult to resolve is the vigorous contention by the Employer's advocate that the damage was caused by Grievant's negligence. Article XXVII provides that the damage ". . . . must not have been caused in whole or in part by the negligent . . . act of the Employee". The advocate's argument is that Grievant's description of the occurrence raises the inference that he was negligent. Grievant had never before been involved in a similar occurrence. He had worked with this type of truck only 2 or 3 times before. Grievant's narrative does not indicate any lack of attentiveness. The Employer did not produce a witness to describe the door or its functioning in an effort to demonstrate lack of care on the part of the Employee. The Employer had denied the claim only on the ground of late filing.

After careful consideration, the Arbitrator concludes that negligence has not been shown. The Arbitrator awards as follows:

Grievance sustained. The Employer shall make appropriate financial adjustment.

Joseph M. Leib

JOSEPH M. LEIB, Arbitrator
June 14, 1982

2099 A

IN THE MATTER OF ARBITRATION)
)
BETWEEN)
)
AMERICAN POSTAL WORKERS UNION)
)
AND)
)
UNITED STATES POSTAL SERVICE)
(Case No. WIC 5D-D-7119))
(Cabanilla Grievance))

ANALYSIS AND AWARD
Carlton J. Snow
Arbitrator

I. INTRODUCTION

This matter came for a hearing pursuant to a collective bargaining agreement between the parties effective from July 21, 1981 to June 20, 1984. The hearing took place in a conference room of the Seattle, Washington Post Office located at 415 First Avenue, North. Mr. Max Morelock, Regional Labor Relations Representative, represented the United States Postal Service. Mr. Robert L. Tunstall, National Vice-president, represented the American Postal Workers Union.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine the witnesses and to argue the matter. All witnesses testified under oath. The arbitrator tape-recorded the proceeding as an extension of his personal notes. The advocates fully and fairly represented the respective parties.

The parties agreed that there were no substantive or procedural issues for the arbitrator to resolve and that the matter had properly been submitted to arbitration. The parties

authorized the arbitrator to retain jurisdiction for sixty (60) days after issuance of a report and award.

II. STATEMENT OF THE ISSUE

The parties agreed at the hearing that the issue before the arbitrator is as follows:

> Did the Employer have just cause for issuing the letter of removal to the grievant dated July 21, 1982? If not, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL 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 2. Discussion

For minor offenses by an employee, management has a responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered discipline and are not grievable. Following such discussions, there is no

prohibition against the supervisor and/or the employee making a personal notation of the date and subject matter for their own personal record(s). However, no notation or other information pertaining to such discussion shall be included in the employee's personnel folder. While such discussions may not be cited as an element of prior adverse record in any subsequent disciplinary action against an employee, they may be, where relevant and timely, relied upon to establish that employees have been made aware of their obligations and responsibilities.

Section 3. Letter of Warning

A letter of warning is a disciplinary notice in writing, identified as an official disciplinary letter of warning, which shall include an explanation of a deficiency or misconduct to be corrected.

Section 4. Suspension of 14 Days or Less

In the case of discipline involving suspensions of fourteen (14) days or less, the employee against whom disciplinary action is sought to be initiated shall be served with a written notice of the charges against the employee and shall be further informed that he/she will be suspended after two (2) working days during which two-day period the employee shall remain on the job or on the clock (in pay status) at the option of the Employer.

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.

Section 10. Employee Discipline Records

The records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years.

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.

IV. STATEMENT OF FACTS

In this case, the grievant has challenged management's right to discharge her for irregular attendance. At Step 2 of the grievance procedure, the acting union steward maintained that management had failed clearly to define the problem and had neglected to attempt to correct the grievant's alleged deficiencies by some means other than punishment. It is the belief of the Union that management's alleged failure to do so invalidated the grievant's discharge. At step 3, Mr. Hunter stated on behalf of management:

> Since December 27, 1981, the grievant has used 74.53 hours of unscheduled absences. This combined with her past record of two 7-day suspensions, one 14-day suspension, and three letters of warning in a period of one year and two months does not indicate a desirable employee. It is my opinion the grievant has been adequately warned of the consequences of not reporting to work. (See, Joint Exhibit No. 2(e)).

The grievant's date of hire by the Terminal Annex Post Office in Seattle was May, 1981. Management employed her in the clerk craft, and the grievant sorted mail both by machine and manually. The notice of removal on July 21, 1982 stated "irregular attendance" as the reason for the removal action. The notice listed the grievant's absences for 1982 as follows:

Date	Amount	Reason
Jan. 29, 1982	.67 hours	AWOL
Feb. 7, 1982	3 hours	SL
Feb. 17, 1982	5.0 hours	AWOL
Feb. 19, 1982	8 hours	SL
Feb. 20, 1982	8 hours	SL

Date	Amount	Reason
Feb. 21 1982	8 hours	SL
Feb. 22, 1982	8 hours	SL
Mar. 7, 1982	3 hours	SL
May 29, 1982	8 hours	SL
May 30, 1982	8 hours	SL
June 21, 1982	3 hours	SL
June 26, 1982	8 hours	SWOP
June 27	8 hours	SWOP
July 17, 1982	.36 hours	AWOL

(See, Joint Exhibit # 3(g)).

The Union has not disputed that these absences occurred. The absences were further detailed in 3971 Forms. The grievant explained her tardy of .67 hours on June 29, 1982 by stating that she had overslept. On February 17, 1982, the grievant was AWOL for .50 hours and gave no reason for her lateness. Her next AWOL occurred on July 17, 1982, and this incident precipitated her removal.

It is important to highlight the fact that all sick leave received by the grievant had management's approval. AWOL's, of course, received no such approval. There was no showing that the grievant had been forewarned concerning the potential impact of absences due to approved sick leave.

On May 7, 1982, management issued the grievant a restricted sick leave letter. The letter from the Tour I supervisor, Mr. Body, clearly established that the grievant must furnish a specific type of medical certificate on her return to duty

from any sick leave or be subject to a charge of AWOL. In his letter to the grievant, Mr. Body stated:

> If you wish to discuss with me any problems you may have, please feel free to do so. In addition, or if you would rather, I can make an appointment for you to talk to someone in the medical unit, PAR office, or in the Employee Relations Division. (See, Management's Exhibit No. 3).

The grievant did not avail herself of the offer of help. She did, however, provide management with proper medical certification for all sick leave taken subsequent to her receipt of the restricted sick leave letter. She did so until the occasion of July 17, 1982, when she was AWOL for .36 hours.

It must be emphasized that the grievant's attendance problems did not begin in 1982. On the contrary, she repeatedly had been warned concerning allegedly unsatisfactory attendance during 1981. Evidence of those warnings is as follows:

Aug. 13, 1981:

> The grievant's supervisor, D. Gruetzmacher, reported in an employee probation period evaluation that although the grievant was a good employee, she was having a problem with attendance. The supervisor stated that the grievant had been told she must improve her attendance. (See, Management's Exhibit No. 9).

Aug. 24, 1981:

> Management issued the grievant a letter of warning concerning her unsatisfactory attendance. She had been AWOL on August 23, 1981, and had failed to report her reason for being absent, even though on August 19, 1981, she properly had been notified to report to work on the day in question. (See Management's Exhibit No. 8).

Sept. 7, 1981:

Management notified the grievant of a seven-day suspension for unsatisfactory attendance. She had left work at 4:00 a.m. and still was not present when her tour ended. Additionally, she neglected to inform her supervisor of this absence. (See, Management's Exhibit No. 7).

Dec. 27, 1981:

The Employer notified the grievant of a fourteen day suspension for unsatisfactory attendance. This notice listed the following absences that occurred after the grievant's suspension of September 7. They are:

9-26-81	5.5	hours
10-11-81	8	hours
11-05-81	5	hours
11-11-81	4	hours
12-05-81	3	hours (AWOL)
12-26-81	8	hours (AWOL)

(See Management's Exhibit No 5).

Following her suspension of December, 1981 for irregular attendance, the grievant again was AWOL on January 20 and February 17, 1982, as well as absent due to sick leave on several occasions in February and once in March. On April 5, 1982, the grievant learned that her periodic step increase had been deferred due to her unsatisfactory attendance and unsafe practices. (See, Management's Exhibit No. 4).

At no point did the grievant ever protest the discipline imposed on her. Even when management gave her the two suspensions for unsatisfactory attendance, the grievant never challenged the Employer's decision. No challenge came until the grievance in this particular care.

The Employer also issued two letters of warning to the grievant for unsatisfactory work which did not relate to a problem with attendance. Those letters may be summarized as follows:

October 13, 1981:

> Supervisor Body documented the grievant's failure to observe safe practices while opening a door which resulted in an injury to the grievant's shoulder. The letter warned the grievant that future unsafe practices could result in further disciplinary action, including dismissal. (See, Management's Exhibit No. 6).

May 8, 1982:

> Supervisor Body issued an official letter of warning to the grievant for unsatisfactory work performance and noted her failure to key several letters which passed through the viewing area of the console. Her action led Supervisor Body to conclude that the grievant had been dozing. He noted that the same deficiency had been called to the grievant's attention on March 6, 1982. (See, Management's Exhibit No. 2).

The grievant did not challenge either of the letters of warning. The grievant offered no challenge to discipline for unsatisfactory attendance until she received the July 21, 1982 notice of removal, the focal point of this particular grievance.

V. POSITION OF THE PARTIES

A. The Employer;

The Employer asserts that the grievant's dismissal should be upheld. She had a poor attendance record and was also tardy. She had been counseled by her supervisor concerning a personal problem and rejected any offer of help. She had been duly warned verbally, by withholding her periodic step increase, as well as through disciplinary suspension. According to the Employer, management had made clear to her that the irregular attendance would not be tolerated. Despite a fourteen-day suspension for irregular attendance given the grievant on December 27, 1981, her attendance problem persisted into January, February, March, May, June and July of 1982. It is the position of management that the grievant failed to heed the warnings issued by her supervisors and that she clearly understood the consequences of continued irregular attendance.

Nor does the Employer believe the grievant's pregnancy must be counted as a mitigating factor. According to the Employer, several warnings concerning irregular attendance had been issued to the grievant before the beginning of her pregnancy. Additionally, management maintains that neither the grievant nor the Union informed the Employer before issuance of her removal that her pregnancy constituted a cause of her irregular attendance. It is the belief of the Employer that supervisors should evaluate an employe's past record in determining an appropriate disciplinary sanction. Consequently, the grievant's notice of removal properly made reference to

disciplinary action for poor work performance, according to the Employer. Finally, management maintains that the grievant's continued disregard for attendance rules following her receipt of the notice of removal clearly showed her lack of motivation toward correcting poor attendance performance.

B. The Union:

It is the position of the Union that the Employer lacked just cause for dismissing the grievant. According to the Union, a claim of unsatisfactory work performance should not have been a factor considered in the grievant's dismissal. That allegedly placed the grievant in double jeopardy due to the fact that she already had been denied a step increase in April, 1982 for unsafe practices. According to the Union the grievance must stand or fall solely on the basis of the charge of unsatisfactory attendance.

The Union has maintained that not until May 7, 1982, when management placed the grievant on restricted sick leave, did the grievant have to substantiate leave due to illness with medical certification. It is the belief of the Union that, since the grievant had a clear attendance record from March 8 until May 29, 1982, she in fact improved her attendance. Further, since her pregnancy allegedly was a factor by mid-May, 1982, it should be considered in evaluating absences occurring after May 29, 1982 through the time of the grievant's dismissal, according to the Union's theory of the case.

The Union strongly objected to any consideration of absences which accrued after the grievant received her notice of removal. The Union maintains that a reasonable person, already aware that her feeling of illness is due to pregnancy, cannot be expected to visit a doctor in order to receive certification concerning such "illness." Finally, it is the position of the Union that management failed clearly to indicate to the grievant the consequences of her irregular attendance.

VI. ANALYSIS

A. References to Other Discipline in the Notice of Removal:

Was it proper for management to refer in the Notice of Removal to discipline issued the grievant for problems other than those related to unsatisfactory attendance? The Union has contended that management should not have considered any unsatisfactory work performance by the grievant as a factor in her dismissal. It allegedly was improper to do so because the grievant already had been denied a step increase on April 5, 1982 for unsafe practices.

Management did not violate the collective bargaining agreement between the parties by its evaluation of the grievant's entire file. Article 16, Section 10 of the parties' agreement provides that records of a disciplinary action against an employe shall not be considered by management only if the employe's record has been clean for a period of two years.

The grievant in this case has been employed by the Seattle Post Office for only a little over one year. Consequently, it was proper for management to take into consideration her entire disciplinary record.

While management must not use the record of previous offenses, such as poor or unsafe work habits, to establish that an employe is guilty of unsatisfactory attendance, the Employer may take into account prior disciplinary action in an effort to help it determine an appropriate penalty. Even though the stated cause for the grievant's removal was "irregular attendance," there was nothing impermissible in the Employer's listing an aspect of the grievant's past work record which had nothing to do with her irregular attendance. The issue of the grievant's unsatisfactory work performance was neither the precipitating incident in this particular grievance nor a pivotal part of management's consideration. It was legitimate for the Employer to evaluate the grievant's entire record in determining the appropriate sanction for her violation of attendance regulations.

B. The Grievant's Attendance Record

Was the grievant's attendance, in fact, unsatisfactory? Section 511.43 of the Employee and Labor Relations Manual provides the following guidelines concerning absences:

> 511.3 Employee Responsibilities:
>
> Employees are expected to maintain their assigned schedule and must make every effort

> to avoid unscheduled absences. In addition, employees must provide acceptable evidence for absence when required.

In this regulation, management has made clear that malingering will not be permitted. The regulation is also straightforward about management's right to require that an employee provide proof of an acceptable reason for an absence from work. What the regulation does not indicate is how much absence from work, due to certificated, verified illness, constitutes unacceptable absence.

Arbitrators have routinely agreed with management that discipline is appropriate for unexcused absences. (See, for example, Celanese Corp. of America, 9 LA 143, and Ambach Industries, inc., 72 LA 347). An absence for which no good cause is established and for which no notice has been given obviously disrupts the work place, and appropriate measures are legitimate to discourage such activity.

Early in the grievant's employment history, she failed to report to work, even though she had been notified to do so. That occurred on August 24, 1981. She also failed to inform management that she would be absent. The Employer charged her with eight hours of being AWOL and issued her a written warning that a failure to report a reason for an absence would not be permitted.

Approximately two weeks later on September 7, 1981, management again charged the grievant with being AWOL. This particular unexcused absence occurred when the grievant left her work place three hours before the end of her tour of

duty and failed to inform her supervisor that she was departing. The Employer issued her a seven-day suspension for being AWOL on that date.

Approximately three and a half months later, on December 27, 1981, the grievant received a fourteen-day suspension for unsatisfactory attendance. Her absences, subsequent to the seven-day suspension she earlier had received, came as a part of the notice of suspension. In addition to sick leave accrued on four separate dates, management listed a charge of being AWOL on December 5 and December 26, 1981.

Following her fourteen-day suspension, the grievant's incidents of "unexcused" absences greatly diminished. On January 29, 1982, management charged the grievant with .67 hours of being AWOL. On February 17, management charged her with .50 hours of being AWOL. On July 17, 1982, management charged her with .36 hours of being AWOL. The point is this: although the grievant was late to work on three occasions following her fourteen-day suspension, each of those "tardies" kept her from the work place for less than an hour. Arbitrators customarily have treated tardiness as a less serious offense than an absence. (See, for example, Pacific Air Motive Corp., 28 LA 761, and Peerless Manufacturing Company, 73 LA 915). Tardiness standing alone cannot be considered as serious an offense as absence from work without a legitimate excuse.

Consequently, the question becomes whether it is reasonable to conclude that the grievant was guilty of unsatisfactory

attendance, given the fact that all her absences related to illness subsequent to the fourteen-day suspension were excused absences. They were excused both by medical certification and by the fact that management had been informed of the absences at the appropriate time. Some attention must also be given to the fact that the grievant's AWOL behavior pattern had lessened from unexcused leaves of several hours duration to several "tardies," each of which were less than an hour in duration.

The Employer's primary contention is that supervisors clearly warned the grievant her attendance record was unsatisfactory. She received those warnings through the progressive discipline issued to her for irregular attendance. Management has argued that the grievant, by her many absences subsequent to the fourteen-day suspension, indicated she is incapable of improving her unsatisfactory attendance record.

For obvious reasons, there is no clearcut work rule concerning how much sick leave will be considered "too much" sick leave. Evidence submitted by the parties established that the grievant accumulated over seventy hours of absences between January and July, 1982. In other words, during a seven month period, the grievant was away from the work place the equivalent of slightly more than a day a month.

There is no objective standard of an acceptable amount of sick leave at this particular facility. The general supervisor testified as follows:

> QUESTION: To your knowledge has there been any rule, as far as standards of sick leave, promulgated to the bargaining unit from management? Like a certain percentage?

ANSWER: We don't reduce it to a percentage.

Ms. Stephens, the grievant's tour supervisor, testified that one absence a month is a problem." She also stated that management's expectations concerning attendance have not been reduced to a specific number of hours.

The grievant's attendance, in fact, was unsatisfactory. Through warning letters and suspensions, management made it exceedingly clear to the grievant that her unexcused absences simply would not be permitted. Consequently, discipline is warranted for the three tardies accumulated by the grievant subsequent to her fourteen-day suspension for unsatisfactory attendance.

A primary problem confronted by the arbitrator in this case has been what to do about the grievant's absences in which she had "excused" sick leave. There are any number of cases in which arbitrators have concluded that management has a right to discharge employes for unsatisfactory attendance, even where the absences have been due to illness. (See, for example, Trans World Airline, Inc., 44 LA 280, and Cleveland Trencher Company, 48 LA 615). Customarily, one would expect a grievant to be placed on notice that "excused" sick leave would be counted against the worker as part of a pattern of unsatisfactory attendance. In this case, management has failed to place the grievant on notice that "excused" sick leave would be counted against her.

The Employer had the option to disprove the grievant's requests for sick leave. Management, in fact, approved each

and every request the grievant made for sick leave. Subsequent to her fourteen-day suspension, the grievant's approved sick leave taken between February 7 and June 21, 1982 all constituted paid sick leave. Although the grievant took sick leave without pay on June 26 and June 27, 1982, the Employer approved her absence.

It is recognized that Mr. Body testified he had talked with the grievant "numerous times" concerning her attendance problems. Specifically, on April 9, 1982, the grievant had requested light duty, and Mr. Body discussed a personal problem of the grievant which had led to her request. He even offered to help the grievant to contact outside agencies which could advise her concerning how to deal with the problem. The grievant failed to accept the offer of help. Mr. Body's offer of assistance was most commendable. There, however, was no showing at all that the grievant's personal problem had any bearing on her unsatisfactory attendance. The record shows only that on April 9, 1982, there was some connection between the grievant's personal problem and her request for light duty.

The point is that management failed to warn the grievant that her excused sick leave might be counted against her. For example, the restricted sick leave notice given the grievant on May 7, 1982 did not do so. (See, Employer's Exhibit No. 3). The notice informed the grievant that all absences must be supported by medical certification. The notice did not inform her that future illnesses would be counted against her

as reflecting a pattern of unsatisfactory attendance. The notice indicated only that future illnesses must be certified by medical personnel. Except for the .36 hours of tardiness on July 17, 1982, the grievant followed the instructions set forth in Mr. Body's letter of May 7. She presented medical certification for absences on May 29, May 30, June 21, June 26 and June 27, 1982. It would have been reasonable for the grievant to have concluded that medically certificated illnesses would not be counted against her in such a way as to lead to her discharge.

Not for a moment should it be concluded that management must retain employes whose claims of illness are false. Arbitrators long have recognized the right of management to remove such individuals. (See, for example, Socony Mobil Oil Company, Inc., 45 LA 1062, and Federal Services, Inc., 41 LA 1063.) In fact, management has an obligation to protect the resources of the employer from such false claims. Nor, as previously indicated, is management necessarily required to retain an employe whose health is so poor as to require excessive absences.

On the other hand, the Employer has a duty to make clear what conduct will cause an employe to be discharged. Since it is reasonable to expect that employes will on occasion be absent due to illness, sanctions to be imposed for such "excused" absences need to be reasonably clear. (See, for example, Stevens Shipping and Terminal Company, 70 LA 1066). If an employe is to be subject to discharge for excused absences,

reasonable notice of that fact is essential.

In this particular case, the Employer made it clear to the grievant by a warning letter and two suspensions that she must inform management before taking sick leave, that is, that AWOL behavior would not be permitted. After the grievant's fourteen day suspension, her AWOL behavior improved considerably. She no longer neglected to inform the post office of an intended absence, and the charges of being AWOL were essentially three "tardies," each less than an hour in duration.

The grievant also followed the Employer's instructions concerning the need for medical certification of each illness. Management made clear that false claims of illness would not be tolerated. The grievant, however, received no notice that medically certificated absences would be counted against her. The grievant failed to receive notice that "too much" verified sick leave could cause her to be removed from the postal service. The point is that the failure to inform the grievant her excused absences could lead to her termination undermined management's contention that the grievant received adequate warning of the consequences of not reporting to work. The grievant needed to know that her excused absences along with any instances of being AWOL would be used to show a pattern of irregular attendance.

C. An Appropriate Penalty

The arbitrator has pondered long the nature of an appropriate penalty in a case of this sort. On the one hand, the grievant is not a model employe. She has received a warning about dozing on the job. She continued to be tardy after having been duly warned by two suspensions against accumulating any more instances of being AWOL. Additionally, if there are medical or personal facts which might have militated against finding the grievant's attendance to be unsatisfactory, she has failed to make those facts known to the Employer.

For example, although the grievant became pregnant in mid-May 1982 (and the Union argued the pregnancy issue at Step 3 of the grievance procedure), there was no evidence that the grievant had made known her pregnancy or any related problems to the Union or to management before the issuance of the notice of removal. The grievant even conceded that she might not have made known the fact of her pregnancy until after she had received the notice of removal. Additionally, more than half of the absences charged against the grievant occurred before her pregnancy. In light of the fact that the grievant herself did not believe mentioning her pregnancy to the Union or to management was important, as well as the fact that most of her absences occurred before her pregnancy, it is reasonable to conclude that the pregnancy should not be considered a mitigating factor in determining an appropriate sanction in this case.

The grievant's record of attendance between the time she

received the notice of removal and the time of her actual removal left much to be desired. The grievant was marked AWOL on July 24, July 31, and August 7 for failing to provide medical certification. On August 23 she was absent and failed to call in for permission to obtain a leave of absence. (See, Management's Exhibit No. 15). While such conduct is not relevant to the merits of the case, it is highly pertinent in helping to fashion an appropriate sanction in the case.

On the one hand, the Employer failed to make clear to the grievant that excused absences would be counted against her and be used in a charge of irregular attendance. On the other hand, the grievant accumulated three "tardies" after repeated warnings and two suspensions as a result of poor attendance. Those facts support a conclusion that strong discipline is in order, although something short of discharge is appropriate. Nor can one lose sight of the grievant's rather casual attitude toward her attendance after having received the notice of removal. Even at the arbitration hearing the grievant failed to demonstrate an understanding of her need to attend work regularly. She testified that, if her job were restored to her, she would "try to be there " and would "try to be a good worker." Since management failed to give her warning that excused absences would be counted against her, discharge was too severe a penalty. But because of the grievant's record and attitude as reflected in evidence submitted at the hearing, strong discipline is appropriate.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer did not have just cause for issuing the July 21, 1982 letter of removal to the grievant. She shall be reinstated without any back pay, and this arbitration decision shall serve as a "last chance" warning to her. If the grievant is guilty of any instances of being AWOL or accumulates more than two tardies during her first year back at work, management may automatically discharge the grievant in its discretion.

The arbitrator shall retain jurisdiction of this matter for sixty days from the date of the report in order to resolve any problems resulting from the remedy in the award.

It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow

CARLTON J. SNOW
Professor of Law

Date: 5-12-83

IN THE MATTER OF ARBITRATION)
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BETWEEN)
)
AMERICAN POSTAL WORKERS UNION)
)
AND)
)
UNITED STATES POSTAL SERVICE)
(Case No. WIC 5D C 7118))
(Settlement Grievance))
(Cabinilla Grievance))

B 2099

Analysis and Award:
Carlton J. Snow,
Arbitrator

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from July 21, 1981 to July 20, 1984. The parties presented this dispute to the arbitrator at the conclusion of a companion case, Case No. WIC 5D D 7119, dealing with the grievant's removal from the Postal Service. Mr. Max Morelock Regional Labor Relations Representative, represented the Postal Service. Mr. Robert L. Tunstall, National Vice-president, represented the Postal Workers Union.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. The arbitrator tape-recorded the proceeding as an extension of his personal notes. All witnesses testified under oath. The advocates fully and fairly represented their respective parties.

There were no issues of substantive or procedural arbitrability to be resolved. The parties authorized the arbitrator to retain jurisdiction for sixty days after issuance of an award.

II. STATEMENT OF THE ISSUE

The parties agreed that the arbitrator should state the issue. It is as follows:

> Should the grievant receive backpay for a seven day suspension which was "purged" at Step 2 of the grievance procedure?

III. STATEMENT OF FACTS

Management notified the grievant on December 27, 1981 that she would be suspended for fourteen days beginning January 1, 1982. Supervisor Body issued the suspension to her as a result of the grievant's irregular attendance. She did not grieve the discipline. (See, Union's Exhibit No. 1).

On December 30, 1981, management notified the grievant that she would be suspended for a period of seven days, to begin on January 1, 1982. She had been disciplined for lifting a sack in an unsafe manner. Mr. Body also signed this notice of suspension. He included a statement to the effect that the seven day suspension would run concurrently

with the fourteen day suspension. He said:

> Your suspension will end on January 8, 1982, at 0750, however, you will not return to work until 2300 on January 15, 1982, when your suspension, received on December 27, 1981 ends. (See, Union's Exhibit No. 2).

The Union successfully grieved the seven day suspension for unsafe practices. The Employer's labor relations representative said in his letter to the Union after the second step of the grievance procedure had been conducted:

> The Union's arguments were taken into consideration. A check of the 2548 Training Record Card does not indicate any training in safety related activity. It is my opinion, therefore, that the manager failed in the just cause provisions. Therefore, the Grievant will be reimbursed seven days pay. (See, Union's Exhibit No. 3).

Management's representative at the second step of the grievance procedure testified that, at the time he rescinded the seven day suspension and ordered the grievant to be reimbursed seven days of pay, he did not know that she had served a fourteen days suspension which was not grieved and which had covered the same time period as the seven day suspension. He also testified that it is not normal practice for an employe to be placed on concurrent suspensions.

It is important to emphasize the fact that the seven day suspension at issue had been "purged" even before the second step procedure occurred. In short, the grievant's record, as of early February, no longer contained an "unsafe practice" sanction for the date in question. Additionally, since the grievant was serving an uncontested fourteen day suspension during the time she would have served the seven day suspension,

the seven days suspension, even if it had not been "purged," would not have involved a loss of pay. In other words, the grievant was not harmed by the seven day suspension. It was purged from her disciplinary record and did not cause her to lose pay.

IV. POSITION OF THE PARTIES

A. The Union:

The Union contends that the seven day suspension imposed on the grievant ran concurrently with the fourteen day suspension. The Union argues that, since the seven day suspension was purged, the grievant actually should have received a seven day and not a fourteen day suspension. It is also the position of the Union that, if the ruling is that the grievant served a seven rather than a fourteen day suspension, management's discipline in the case was not progressive; and the subsequent removal of the grievant should be reevaluated.

B. The Employer:

The Employer contends that there was no reliance on the seven day suspension at issue in this case when management dismissed the grievant. Consequently, the issue raised by the Union allegedly is irrelevant as it has no relationship

to the grievant's subsequent dismissal. According to the Employer, the issue of the grievant's seven day suspension was resolved at Step 2 and should be considered to have been closed at that time.

V. ANALYSIS

First, the seven day suspension imposed on the grievant was not cited by management in its removal case against her. There was no evidence showing that the seven day suspension which the Employer "purged" from the record had any impact on the grievant's dismissal. Second, the Union failed to be persuasive of the fact that the seven day rescinded suspension for an unsafe practice had any bearing on the uncontested fourteen day suspension for irregular attendance. Clearly, it was unusual for Supervisor Body to issue concurrent suspensions. But the issue before the arbitrator is not whether Mr. Body had a right to issue concurrent suspensions but whether the grievant is entitled to receive seven days of back pay as was "awarded" to her in management's decision at the second step of the grievance procedure.

The grievant has no right to the backpay. The award of seven days of back pay clearly had been based on a mistaken belief that the grievant had lost seven days of pay in serving a seven day suspension for an unsafe practice. It is clear that the grievant did not lose any pay at all as a result of

her alleged unsafe practice. Consequently, she is not entitled to any reimbursement. Her fourteen day suspension for irregular attendance was uncontested and properly served.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the grievant should not have received backpay for a seven day suspension which management "purged" at Step 2 of the grievance procedure.

It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow

CARLTON J. SNOW
Professor of Law

Date: 5-12-83

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IN THE MATTER OF ARBITRATION)
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BETWEEN)
)
AMERICAN POSTAL WORKERS UNION)
)
AND)
)
UNITED STATES POSTAL SERVICE)
(Case No. WIC 5D-D-7119))
(Cabanilla Grievance))

ANALYSIS AND AWARD
Carlton J. Snow
Arbitrator

I. INTRODUCTION

This matter came for a hearing pursuant to a collective bargaining agreement between the parties effective from July 21, 1981 to June 20, 1984. The hearing took place in a conference room of the Seattle, Washington Post Office located at 415 First Avenue, North. Mr. Max Morelock, Regional Labor Relations Representative, represented the United States Postal Service. Mr. Robert L. Tunstall, National Vice-president, represented the American Postal Workers Union.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine the witnesses and to argue the matter. All witnesses testified under oath. The arbitrator tape-recorded the proceeding as an extension of his personal notes. The advocates fully and fairly represented the respective parties.

The parties agreed that there were no substantive or procedural issues for the arbitrator to resolve and that the matter had properly been submitted to arbitration. The parties

authorized the arbitrator to retain jurisdiction for sixty (60) days after issuance of a report and award.

II. STATEMENT OF THE ISSUE

The parties agreed at the hearing that the issue before the arbitrator is as follows:

> Did the Employer have just cause for issuing the letter of removal to the grievant dated July 21, 1982? If not, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL 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 2. Discussion

For minor offenses by an employee, management has a responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered discipline and are not grievable. Following such discussions, there is no

prohibition against the supervisor and/or the employee making a personal notation of the date and subject matter for their own personal record(s). However, no notation or other information pertaining to such discussion shall be included in the employee's personnel folder. While such discussions may not be cited as an element of prior adverse record in any subsequent disciplinary action against an employee, they may be, where relevant and timely, relied upon to establish that employees have been made aware of their obligations and responsibilities.

Section 3. Letter of Warning

A letter of warning is a disciplinary notice in writing, identified as an official disciplinary letter of warning, which shall include an explanation of a deficiency or misconduct to be corrected.

Section 4. Suspension of 14 Days or Less

In the case of discipline involving suspensions of fourteen (14) days or less, the employee against whom disciplinary action is sought to be initiated shall be served with a written notice of the charges against the employee and shall be further informed that he/she will be suspended after two (2) working days during which two-day period the employee shall remain on the job or on the clock (in pay status) at the option of the Employer.

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.

Section 10. Employee Discipline Records

The records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years.

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.

IV. STATEMENT OF FACTS

In this case, the grievant has challenged management's right to discharge her for irregular attendance. At Step 2 of the grievance procedure, the acting union steward maintained that management had failed clearly to define the problem and had neglected to attempt to correct the grievant's alleged deficiencies by some means other than punishment. It is the belief of the Union that management's alleged failure to do so invalidated the grievant's discharge. At step 3, Mr. Hunter stated on behalf of management:

> Since December 27, 1981, the grievant has used 74.53 hours of unscheduled absences. This combined with her past record of two 7-day suspensions, one 14-day suspension, and three letters of warning in a period of one year and two months does not indicate a desirable employee. It is my opinion the grievant has been adequately warned of the consequences of not reporting to work. (See, Joint Exhibit No. 2(e)).

The grievant's date of hire by the Terminal Annex Post Office in Seattle was May, 1981. Management employed her in the clerk craft, and the grievant sorted mail both by machine and manually. The notice of removal on July 21, 1982 stated "irregular attendance" as the reason for the removal action. The notice listed the grievant's absences for 1982 as follows:

Date	Amount	Reason
Jan. 29, 1982	.67 hours	AWOL
Feb. 7, 1982	3 hours	SL
Feb. 17, 1982	5.0 hours	AWOL
Feb. 19, 1982	8 hours	SL
Feb. 20, 1982	8 hours	SL

Date	Amount	Reason
Feb. 21 1982	8 hours	SL
Feb. 22, 1982	8 hours	SL
Mar. 7, 1982	3 hours	SL
May 29, 1982	8 hours	SL
May 30, 1982	8 hours	SL
June 21, 1982	3 hours	SL
June 26, 1982	8 hours	SWOP
June 27	8 hours	SWOP
July 17, 1982	.36 hours	AWOL

(See, Joint Exhibit # 3(g)).

The Union has not disputed that these absences occurred. The absences were further detailed in 3971 Forms. The grievant explained her tardy of .67 hours on June 29, 1982 by stating that she had overslept. On February 17, 1982, the grievant was AWOL for .50 hours and gave no reason for her lateness. Her next AWOL occurred on July 17, 1982, and this incident precipitated her removal.

It is important to highlight the fact that all sick leave received by the grievant had management's approval. AWOL's, of course, received no such approval. There was no showing that the grievant had been forewarned concerning the potential impact of absences due to approved sick leave.

On May 7, 1982, management issued the grievant a restricted sick leave letter. The letter from the Tour I supervisor, Mr. Body, clearly established that the grievant must furnish a specific type of medical certificate on her return to duty

from any sick leave or be subject to a charge of AWOL. In his letter to the grievant, Mr. Body stated:

> If you wish to discuss with me any problems you may have, please feel free to do so. In addition, or if you would rather, I can make an appointment for you to talk to someone in the medical unit, PAR office, or in the Employee Relations Division. (See, Management's Exhibit No. 3).

The grievant did not avail herself of the offer of help. She did, however, provide management with proper medical certification for all sick leave taken subsequent to her receipt of the restricted sick leave letter. She did so until the occasion of July 17, 1982, when she was AWOL for .36 hours.

It must be emphasized that the grievant's attendance problems did not begin in 1982. On the contrary, she repeatedly had been warned concerning allegedly unsatisfactory attendance during 1981. Evidence of those warnings is as follows:

Aug. 13, 1981:

> The grievant's supervisor, D. Gruetzmacher, reported in an employee probation period evaluation that although the grievant was a good employee, she was having a problem with attendance. The supervisor stated that the grievant had been told she must improve her attendance. (See, Management's Exhibit No. 9).

Aug. 24, 1981:

> Management issued the grievant a letter of warning concerning her unsatisfactory attendance. She had been AWOL on August 23, 1981, and had failed to report her reason for being absent, even though on August 19, 1981, she properly had been notified to report to work on the day in question. (See Management's Exhibit No. 8).

Sept. 7, 1981:

Management notified the grievant of a seven-day suspension for unsatisfactory attendance. She had left work at 4:00 a.m. and still was not present when her tour ended. Additionally, she neglected to inform her supervisor of this absence. (See, Management's Exhibit No. 7).

Dec. 27, 1981:

The Employer notified the grievant of a fourteen day suspension for unsatisfactory attendance. This notice listed the following absences that occurred after the grievant's suspension of September 7. They are:

9-26-81	5.5	hours
10-11-81	8	hours
11-05-81	5	hours
11-11-81	4	hours
12-05-81	3	hours (AWOL)
12-26-81	8	hours (AWOL)

(See Management's Exhibit No 5).

Following her suspension of December, 1981 for irregular attendance, the grievant again was AWOL on January 20 and February 17, 1982, as well as absent due to sick leave on several occasions in February and once in March. On April 5, 1982, the grievant learned that her periodic step increase had been deferred due to her unsatisfactory attendance and unsafe practices. (See, Management's Exhibit No. 4).

At no point did the grievant ever protest the discipline imposed on her. Even when management gave her the two suspensions for unsatisfactory attendance, the grievant never challenged the Employer's decision. No challenge came until the grievance in this particular care.

The Employer also issued two letters of warning to the grievant for unsatisfactory work which did not relate to a problem with attendance. Those letters may be summarized as follows:

October 13, 1981:

> Supervisor Body documented the grievant's failure to observe safe practices while opening a door which resulted in an injury to the grievant's shoulder. The letter warned the grievant that future unsafe practices could result in further disciplinary action, including dismissal. (See, Management's Exhibit No. 6).

May 8, 1982:

> Supervisor Body issued an official letter of warning to the grievant for unsatisfactory work performance and noted her failure to key several letters which passed through the viewing area of the console. Her action led Supervisor Body to conclude that the grievant had been dozing. He noted that the same deficiency had been called to the grievant's attention on March 6, 1982. (See, Management's Exhibit No. 2).

The grievant did not challenge either of the letters of warning. The grievant offered no challenge to discipline for unsatisfactory attendance until she received the July 21, 1982 notice of removal, the focal point of this particular grievance.

V. POSITION OF THE PARTIES

A. The Employer;

The Employer asserts that the grievant's dismissal should be upheld. She had a poor attendance record and was also tardy. She had been counseled by her supervisor concerning a personal problem and rejected any offer of help. She had been duly warned verbally, by withholding her periodic step increase, as well as through disciplinary suspension. According to the Employer, management had made clear to her that the irregular attendance would not be tolerated. Despite a fourteen-day suspension for irregular attendance given the grievant on December 27, 1981, her attendance problem persisted into January, February, March, May, June and July of 1982. It is the position of management that the grievant failed to heed the warnings issued by her supervisors and that she clearly understood the consequences of continued irregular attendance.

Nor does the Employer believe the grievant's pregnancy must be counted as a mitigating factor. According to the Employer, several warnings concerning irregular attendance had been issued to the grievant before the beginning of her pregnancy. Additionally, management maintains that neither the grievant nor the Union informed the Employer before issuance of her removal that her pregnancy constituted a cause of her irregular attendance. It is the belief of the Employer that supervisors should evaluate an employe's past record in determining an appropriate disciplinary sanction. Consequently, the grievant's notice of removal properly made reference to

disciplinary action for poor work performance, according to the Employer. Finally, management maintains that the grievant's continued disregard for attendance rules following her receipt of the notice of removal clearly showed her lack of motivation toward correcting poor attendance performance.

B. The Union:

It is the position of the Union that the Employer lacked just cause for dismissing the grievant. According to the Union, a claim of unsatisfactory work performance should not have been a factor considered in the grievant's dismissal. That allegedly placed the grievant in double jeopardy due to the fact that she already had been denied a step increase in April, 1982 for unsafe practices. According to the Union the grievance must stand or fall solely on the basis of the charge of unsatisfactory attendance.

The Union has maintained that not until May 7, 1982, when management placed the grievant on restricted sick leave, did the grievant have to substantiate leave due to illness with medical certification. It is the belief of the Union that, since the grievant had a clear attendance record from March 8 until May 29, 1982, she in fact improved her attendance. Further, since her pregnancy allegedly was a factor by mid-May, 1982, it should be considered in evaluating absences occurring after May 29, 1982 through the time of the grievant's dismissal, according to the Union's theory of the case.

The Union strongly objected to any consideration of absences which accrued after the grievant received her notice of removal. The Union maintains that a reasonable person, already aware that her feeling of illness is due to pregnancy, cannot be expected to visit a doctor in order to receive certification concerning such "illness." Finally, it is the position of the Union that management failed clearly to indicate to the grievant the consequences of her irregular attendance.

VI. ANALYSIS

A. References to Other Discipline in the Notice of Removal:

Was it proper for management to refer in the Notice of Removal to discipline issued the grievant for problems other than those related to unsatisfactory attendance? The Union has contended that management should not have considered any unsatisfactory work performance by the grievant as a factor in her dismissal. It allegedly was improper to do so because the grievant already had been denied a step increase on April 5, 1982 for unsafe practices.

Management did not violate the collective bargaining agreement between the parties by its evaluation of the grievant's entire file. Article 16, Section 10 of the parties' agreement provides that records of a disciplinary action against an employe shall not be considered by management only if the employe's record has been clean for a period of two years.

The grievant in this case has been employed by the Seattle Post Office for only a little over one year. Consequently, it was proper for management to take into consideration her entire disciplinary record.

While management must not use the record of previous offenses, such as poor or unsafe work habits, to establish that an employe is guilty of unsatisfactory attendance, the Employer may take into account prior disciplinary action in an effort to help it determine an appropriate penalty. Even though the stated cause for the grievant's removal was "irregular attendance," there was nothing impermissible in the Employer's listing an aspect of the grievant's past work record which had nothing to do with her irregular attendance. The issue of the grievant's unsatisfactory work performance was neither the precipitating incident in this particular grievance nor a pivotal part of management's consideration. It was legitimate for the Employer to evaluate the grievant's entire record in determining the appropriate sanction for her violation of attendance regulations.

B. The Grievant's Attendance Record

Was the grievant's attendance, in fact, unsatisfactory? Section 511.43 of the Employee and Labor Relations Manual provides the following guidelines concerning absences:

> 511.3 Employee Responsibilities:
>
> Employees are expected to maintain their assigned schedule and must make every effort

> to avoid unscheduled absences. In addition, employees must provide acceptable evidence for absence when required.

In this regulation, management has made clear that malingering will not be permitted. The regulation is also straightforward about management's right to require that an employee provide proof of an acceptable reason for an absence from work. What the regulation does not indicate is how much absence from work, due to certificated, verified illness, constitutes unacceptable absence.

Arbitrators have routinely agreed with management that discipline is appropriate for unexcused absences. (See, for example, Celanese Corp. of America, 9 LA 143, and Ambach Industries, inc., 72 LA 347). An absence for which no good cause is established and for which no notice has been given obviously disrupts the work place, and appropriate measures are legitimate to discourage such activity.

Early in the grievant's employment history, she failed to report to work, even though she had been notified to do so. That occurred on August 24, 1981. She also failed to inform management that she would be absent. The Employer charged her with eight hours of being AWOL and issued her a written warning that a failure to report a reason for an absence would not be permitted.

Approximately two weeks later on September 7, 1981, management again charged the grievant with being AWOL. This particular unexcused absence occurred when the grievant left her work place three hours before the end of her tour of

duty and failed to inform her supervisor that she was departing. The Employer issued her a seven-day suspension for being AWOL on that date.

Approximately three and a half months later, on December 27, 1981, the grievant received a fourteen-day suspension for unsatisfactory attendance. Her absences, subsequent to the seven-day suspension she earlier had received, came as a part of the notice of suspension. In addition to sick leave accrued on four separate dates, management listed a charge of being AWOL on December 5 and December 26, 1981.

Following her fourteen-day suspension, the grievant's incidents of "unexcused" absences greatly diminished. On January 29, 1982, management charged the grievant with .67 hours of being AWOL. On February 17, management charged her with .50 hours of being AWOL. On July 17, 1982, management charged her with .36 hours of being AWOL. The point is this: although the grievant was late to work on three occasions following her fourteen-day suspension, each of those "tardies" kept her from the work place for less than an hour. Arbitrators customarily have treated tardiness as a less serious offense than an absence. (See, for example, Pacific Air Motive Corp., 28 LA 761, and Peerless Manufacturing Company, 73 LA 915). Tardiness standing alone cannot be considered as serious an offense as absence from work without a legitimate excuse.

Consequently, the question becomes whether it is reasonable to conclude that the grievant was guilty of unsatisfactory

attendance, given the fact that all her absences related to illness subsequent to the fourteen-day suspension were excused absences. They were excused both by medical certification and by the fact that management had been informed of the absences at the appropriate time. Some attention must also be given to the fact that the grievant's AWOL behavior pattern had lessened from unexcused leaves of several hours duration to several "tardies," each of which were less than an hour in duration.

The Employer's primary contention is that supervisors clearly warned the grievant her attendance record was unsatisfactory. She received those warnings through the progressive discipline issued to her for irregular attendance. Management has argued that the grievant, by her many absences subsequent to the fourteen-day suspension, indicated she is incapable of improving her unsatisfactory attendance record.

For obvious reasons, there is no clearcut work rule concerning how much sick leave will be considered "too much" sick leave. Evidence submitted by the parties established that the grievant accumulated over seventy hours of absences between January and July, 1982. In other words, during a seven month period, the grievant was away from the work place the equivalent of slightly more than a day a month.

There is no objective standard of an acceptable amount of sick leave at this particular facility. The general supervisor testified as follows:

> QUESTION: To your knowledge has there been any rule, as far as standards of sick leave, promulgated to the bargaining unit from management? Like a certain percentage?

ANSWER: We don't reduce it to a percentage.

Ms. Stephens, the grievant's tour supervisor, testified that one absence a month is a problem." She also stated that management's expectations concerning attendance have not been reduced to a specific number of hours.

The grievant's attendance, in fact, was unsatisfactory. Through warning letters and suspensions, management made it exceedingly clear to the grievant that her unexcused absences simply would not be permitted. Consequently, discipline is warranted for the three tardies accumulated by the grievant subsequent to her fourteen-day suspension for unsatisfactory attendance.

A primary problem confronted by the arbitrator in this case has been what to do about the grievant's absences in which she had "excused" sick leave. There are any number of cases in which arbitrators have concluded that management has a right to discharge employes for unsatisfactory attendance, even where the absences have been due to illness. (See, for example, Trans World Airline, Inc., 44 LA 280, and Cleveland Trencher Company, 48 LA 615). Customarily, one would expect a grievant to be placed on notice that "excused" sick leave would be counted against the worker as part of a pattern of unsatisfactory attendance. In this case, management has failed to place the grievant on notice that "excused" sick leave would be counted against her.

The Employer had the option to disprove the grievant's requests for sick leave. Management, in fact, approved each

and every request the grievant made for sick leave. Subsequent to her fourteen-day suspension, the grievant's approved sick leave taken between February 7 and June 21, 1982 all constituted paid sick leave. Although the grievant took sick leave without pay on June 26 and June 27, 1982, the Employer approved her absence.

It is recognized that Mr. Body testified he had talked with the grievant "numerous times" concerning her attendance problems. Specifically, on April 9, 1982, the grievant had requested light duty, and Mr. Body discussed a personal problem of the grievant which had led to her request. He even offered to help the grievant to contact outside agencies which could advise her concerning how to deal with the problem. The grievant failed to accept the offer of help. Mr. Body's offer of assistance was most commendable. There, however, was no showing at all that the grievant's personal problem had any bearing on her unsatisfactory attendance. The record shows only that on April 9, 1982, there was some connection between the grievant's personal problem and her request for light duty.

The point is that management failed to warn the grievant that her excused sick leave might be counted against her. For example, the restricted sick leave notice given the grievant on May 7, 1982 did not do so. (See, Employer's Exhibit No. 3). The notice informed the grievant that all absences must be supported by medical certification. The notice did not inform her that future illnesses would be counted against her

as reflecting a pattern of unsatisfactory attendance. The notice indicated only that future illnesses must be certified by medical personnel. Except for the .36 hours of tardiness on July 17, 1982, the grievant followed the instructions set forth in Mr. Body's letter of May 7. She presented medical certification for absences on May 29, May 30, June 21, June 26 and June 27, 1982. It would have been reasonable for the grievant to have concluded that medically certificated illnesses would not be counted against her in such a way as to lead to her discharge.

Not for a moment should it be concluded that management must retain employes whose claims of illness are false. Arbitrators long have recognized the right of management to remove such individuals. (See, for example, Socony Mobil Oil Company, Inc., 45 LA 1062, and Federal Services, Inc., 41 LA 1063.) In fact, management has an obligation to protect the resources of the employer from such false claims. Nor, as previously indicated, is management necessarily required to retain an employe whose health is so poor as to require excessive absences.

On the other hand, the Employer has a duty to make clear what conduct will cause an employe to be discharged. Since it is reasonable to expect that employes will on occasion be absent due to illness, sanctions to be imposed for such "excused" absences need to be reasonably clear. (See, for example, Stevens Shipping and Terminal Company, 70 LA 1066). If an employe is to be subject to discharge for excused absences,

reasonable notice of that fact is essential.

In this particular case, the Employer made it clear to the grievant by a warning letter and two suspensions that she must inform management before taking sick leave, that is, that AWOL behavior would not be permitted. After the grievant's fourteen day suspension, her AWOL behavior improved considerably. She no longer neglected to inform the post office of an intended absence, and the charges of being AWOL were essentially three "tardies," each less than an hour in duration.

The grievant also followed the Employer's instructions concerning the need for medical certification of each illness. Management made clear that false claims of illness would not be tolerated. The grievant, however, received no notice that medically certificated absences would be counted against her. The grievant failed to receive notice that "too much" verified sick leave could cause her to be removed from the postal service. The point is that the failure to inform the grievant her excused absences could lead to her termination undermined management's contention that the grievant received adequate warning of the consequences of not reporting to work. The grievant needed to know that her excused absences along with any instances of being AWOL would be used to show a pattern of irregular attendance.

C. An Appropriate Penalty

The arbitrator has pondered long the nature of an appropriate penalty in a case of this sort. On the one hand, the grievant is not a model employe. She has received a warning about dozing on the job. She continued to be tardy after having been duly warned by two suspensions against accumulating any more instances of being AWOL. Additionally, if there are medical or personal facts which might have militated against finding the grievant's attendance to be unsatisfactory, she has failed to make those facts known to the Employer.

For example, although the grievant became pregnant in mid-May 1982 (and the Union argued the pregnancy issue at Step 3 of the grievance procedure), there was no evidence that the grievant had made known her pregnancy or any related problems to the Union or to management before the issuance of the notice of removal. The grievant even conceded that she might not have made known the fact of her pregnancy until after she had received the notice of removal. Additionally, more than half of the absences charged against the grievant occurred before her pregnancy. In light of the fact that the grievant herself did not believe mentioning her pregnancy to the Union or to management was important, as well as the fact that most of her absences occurred before her pregnancy, it is reasonable to conclude that the pregnancy should not be considered a mitigating factor in determining an appropriate sanction in this case.

The grievant's record of attendance between the time she

received the notice of removal and the time of her actual removal left much to be desired. The grievant was marked AWOL on July 24, July 31, and August 7 for failing to provide medical certification. On August 23 she was absent and failed to call in for permission to obtain a leave of absence. (See, Management's Exhibit No. 15). While such conduct is not relevant to the merits of the case, it is highly pertinent in helping to fashion an appropriate sanction in the case.

On the one hand, the Employer failed to make clear to the grievant that excused absences would be counted against her and be used in a charge of irregular attendance. On the other hand, the grievant accumulated three "tardies" after repeated warnings and two suspensions as a result of poor attendance. Those facts support a conclusion that strong discipline is in order, although something short of discharge is appropriate. Nor can one lose sight of the grievant's rather casual attitude toward her attendance after having received the notice of removal. Even at the arbitration hearing the grievant failed to demonstrate an understanding of her need to attend work regularly. She testified that, if her job were restored to her, she would "try to be there " and would "try to be a good worker." Since management failed to give her warning that excused absences would be counted against her, discharge was too severe a penalty. But because of the grievant's record and attitude as reflected in evidence submitted at the hearing, strong discipline is appropriate.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer did not have just cause for issuing the July 21, 1982 letter of removal to the grievant. She shall be reinstated without any back pay, and this arbitration decision shall serve as a "last chance" warning to her. If the grievant is guilty of any instances of being AWOL or accumulates more than two tardies during her first year back at work, management may automatically discharge the grievant in its discretion.

The arbitrator shall retain jurisdiction of this matter for sixty days from the date of the report in order to resolve any problems resulting from the remedy in the award.

It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow

CARLTON J. SNOW
Professor of Law

Date: 5-12-83

IN THE MATTER OF ARBITRATION)
)
BETWEEN)
)
AMERICAN POSTAL WORKERS UNION)
)
AND)
)
UNITED STATES POSTAL SERVICE)
(Case No. WIC 5D C 7118))
(Settlement Grievance))
(Cabinilla Grievance))

B 2099

Analysis and Award:
Carlton J. Snow,
Arbitrator

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from July 21, 1981 to July 20, 1984. The parties presented this dispute to the arbitrator at the conclusion of a companion case, Case No. WIC 5D D 7119, dealing with the grievant's removal from the Postal Service. Mr. Max Morelock Regional Labor Relations Representative, represented the Postal Service. Mr. Robert L. Tunstall, National Vice-president, represented the Postal Workers Union.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. The arbitrator tape-recorded the proceeding as an extension of his personal notes. All witnesses testified under oath. The advocates fully and fairly represented their respective parties.

There were no issues of substantive or procedural arbitrability to be resolved. The parties authorized the arbitrator to retain jurisdiction for sixty days after issuance of an award.

II. STATEMENT OF THE ISSUE

The parties agreed that the arbitrator should state the issue. It is as follows:

> Should the grievant receive backpay for a seven day suspension which was "purged" at Step 2 of the grievance procedure?

III. STATEMENT OF FACTS

Management notified the grievant on December 27, 1981 that she would be suspended for fourteen days beginning January 1, 1982. Supervisor Body issued the suspension to her as a result of the grievant's irregular attendance. She did not grieve the discipline. (See, Union's Exhibit No. 1).

On December 30, 1981, management notified the grievant that she would be suspended for a period of seven days, to begin on January 1, 1982. She had been disciplined for lifting a sack in an unsafe manner. Mr. Body also signed this notice of suspension. He included a statement to the effect that the seven day suspension would run concurrently

with the fourteen day suspension. He said:

> Your suspension will end on January 8, 1982, at 0750, however, you will not return to work until 2300 on January 15, 1982, when your suspension, received on December 27, 1981 ends. (See, Union's Exhibit No. 2).

The Union successfully grieved the seven day suspension for unsafe practices. The Employer's labor relations representative said in his letter to the Union after the second step of the grievance procedure had been conducted:

> The Union's arguments were taken into consideration. A check of the 2548 Training Record Card does not indicate any training in safety related activity. It is my opinion, therefore, that the manager failed in the just cause provisions. Therefore, the Grievant will be reimbursed seven days pay. (See, Union's Exhibit No. 3).

Management's representative at the second step of the grievance procedure testified that, at the time he rescinded the seven day suspension and ordered the grievant to be reimbursed seven days of pay, he did not know that she had served a fourteen days suspension which was not grieved and which had covered the same time period as the seven day suspension. He also testified that it is not normal practice for an employe to be placed on concurrent suspensions.

It is important to emphasize the fact that the seven day suspension at issue had been "purged" even before the second step procedure occurred. In short, the grievant's record, as of early February, no longer contained an "unsafe practice" sanction for the date in question. Additionally, since the grievant was serving an uncontested fourteen day suspension during the time she would have served the seven day suspension,

the seven days suspension, even if it had not been "purged," would not have involved a loss of pay. In other words, the grievant was not harmed by the seven day suspension. It was purged from her disciplinary record and did not cause her to lose pay.

IV. POSITION OF THE PARTIES

A. The Union:

The Union contends that the seven day suspension imposed on the grievant ran concurrently with the fourteen day suspension. The Union argues that, since the seven day suspension was purged, the grievant actually should have received a seven day and not a fourteen day suspension. It is also the position of the Union that, if the ruling is that the grievant served a seven rather than a fourteen day suspension, management's discipline in the case was not progressive; and the subsequent removal of the grievant should be reevaluated.

B. The Employer:

The Employer contends that there was no reliance on the seven day suspension at issue in this case when management dismissed the grievant. Consequently, the issue raised by the Union allegedly is irrelevant as it has no relationship

to the grievant's subsequent dismissal. According to the Employer, the issue of the grievant's seven day suspension was resolved at Step 2 and should be considered to have been closed at that time.

V. ANALYSIS

First, the seven day suspension imposed on the grievant was not cited by management in its removal case against her. There was no evidence showing that the seven day suspension which the Employer "purged" from the record had any impact on the grievant's dismissal. Second, the Union failed to be persuasive of the fact that the seven day rescinded suspension for an unsafe practice had any bearing on the uncontested fourteen day suspension for irregular attendance. Clearly, it was unusual for Supervisor Body to issue concurrent suspensions. But the issue before the arbitrator is not whether Mr. Body had a right to issue concurrent suspensions but whether the grievant is entitled to receive seven days of back pay as was "awarded" to her in management's decision at the second step of the grievance procedure.

The grievant has no right to the backpay. The award of seven days of back pay clearly had been based on a mistaken belief that the grievant had lost seven days of pay in serving a seven day suspension for an unsafe practice. It is clear that the grievant did not lose any pay at all as a result of

her alleged unsafe practice. Consequently, she is not entitled to any reimbursement. Her fourteen day suspension for irregular attendance was uncontested and properly served.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the grievant should not have received backpay for a seven day suspension which management "purged" at Step 2 of the grievance procedure.

It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow

CARLTON J. SNOW
Professor of Law

Date: 5-12-83

C 3231

UNITED STATES POSTAL SERVICE	Case No. NC-NAT-16,285
and	ISSUED: November 19, 1979
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	

BACKGROUND

In this National Level grievance the NALC seeks a ruling on the following stated issues: 1

> "Whether, under the 1975 or 1978 National Agreements, USPS may properly impose discipline upon employees for 'excessive absenteeism' or 'failure to maintain a regular schedule' even though the absences upon which those charges are based, are instances where
> (1) the employee was granted approved sick leave;
> (2) the employee was on continuation of pay due to a traumatic on-the-job injury; or
> (3) the employee was on OWCP approved workmen's compensation."

This case represents the culmination of a basic disagreement between the parties which initially took form in an April 5, 1977 letter of the then NALC President, Joseph Vacca, 2

to the then Senior Assistant Postmaster General - Employee and Labor Relations, James Conway. The letter read--

> "It has come to my attention that Postal Service Management in the Central Region, Northeast Region and Southern Region has embarked upon a shockingly disgraceful program of 'absenteeism control' whereby they have taken the position that it is, under our National Agreement, permissible to discipline and even discharge employees for legitimate use of annually earned or accrued sick leave on the grounds that an employee who uses all such leave is not 'maintaining a regular work schedule.' Examples of this program are attached to this letter for your information and review.
>
> "NALC stringently disagrees that such programs are permissible under Articles III, X and XVI of our National Agreement and Federal Statutes guaranteeing postal employees the right to earned and accumulated sick leave. Therefore, I hereby request that you inform me whether or not Postal Service Management at the National level agrees with the interpretation of the National Agreement evidenced by the Central, Northeast, and Southern Region directives attached hereto.
>
> "Should you inform me that National Postal Management agrees with that interpretation of our contract, I shall be forced to conclude that there exists 'a dispute between

> "'the Union and the Employer as to the interpretation of (the National) Agreement' within the meaning of Article XV, Section 2, last paragraph, and initiate, hereby, a grievance at the National level over that dispute and request an immediate Step 4 discussion to attempt to resolve the same."

Vacca's letter enclosed copies of three USPS internal 3
Management directives which had come to the attention of the NALC. Two were of limited application only, being signed respectively by the Postmaster at Marblehead, Massachusetts and the Sectional Center Manager/Postmaster at Jacksonville, Florida. The third directive, however, applied throughout the Central Region, having been issued by the Regional Director for Employee and Labor Relations, David Charters, in a major effort to reduce excessive absenteeism in that Region.

An attempt to summarize the Charters memorandum here 4
might be misleading in depicting its essential nature. Its full text was:

> "POLICY ON ABSENTEEISM CONTROL
>
> "1.) In all cases of discipline regarding the absentee problem the charges to use is 'failure to maintain a regular work schedule.' This can be modified by adding terminology such as, absenteeism, tardiness, failure to report off and AWOL. This basis of this discipline is that an employee has a basic responsibility to the Postal Service to be at work. The failure to be at work for whatever reason may result in disciplinary action against an employee.

"'I wish to stress that the fact that an employee is sick and receives sick leave benefits, does not relieve that employee from this basic responsibility. If an employee is absent with such frequency, as to interfere with scheduling, productivity, etc., then that employee may be disciplined.'

"2.) It will be necessary for you to meet with your union representatives to make sure that the policy is understood by them. You should point out, for example, that we do not treat an employee who has been a good employee for 19 years then has a heart attack, the same way we treat an employee who has been trouble for a term of employment of three or four years. You should stress to the Unions that we will be fair and reasonable, but that we will enforce the proper discipline in absentee cases.

"3.) Establish a system wherein the employee may be warned and counseled, then a letter of warning, five or seven day suspension, ten or fourteen day suspension, discharged. While there is no nationally specified progression of discipline, it is my determination that the above meets the minimum requirement of the concept of progressive discipline. This shows an impartial person, such as an arbitrator, that we have taken certain steps to correct deficiencies, none of the lower steps have done their job and that we have had to take increasingly severe action in an effort to correct the problem.

"The concept of progressive discipline is a necessary and essential element in winning cases in arbitration.

"4.) While the Central Region, has set goals, the following are the objectives that you should keep in mind.

"First of all, an employee earns 13 days of sick leave a year. If an employee uses all his sick leave (13 days) that means he is off at least 5% of the time is wholly unsatisfactory to us nor does it allow the employee to build up any protection for himself in the future. Therefore, you should examine very closely any employee presently absent 5% or more of the time. I would imagine that these employees in all probability need immediate attention.

"The next category you should look at are those employees absent 3% or more of the time. If we can get our rate down to 3% with the problem employees, then our total employee rates will be very satisfactory and well under the goals set for you.

"5.) LWOP should be used sparingly. It appears to me that many times we grant LWOP that may be more properly charged to AWOL. Also, there is no requirment for the Postal Service to give LWOP for prime time vacation. If an employee uses all his annual leave prior to his vacation period, it is up to the Postmaster to look at the facts of the situation to determine whether or not to give the employee time off. You should notify the unions of this also.

"The use of LWOP by itself generally indicates some failure of an employee to maintain his work schedule. You should have your managers look at all employees using LWOP and determine why they are using it and if they are into the progressive disciplinary procedure as yet.

"In order to accomplish the necessary analysis and required control required by the Central Region, I will need a report on an Accounting Period basis consisting of the following:

'Total number of hours sick leave used in the MSC office and MSC by bargaining unit and by non-bargaining unit employees and number of employees using leave. I will need the same information in regard to LWOP. Further, include number of counselings, letters of warning, suspensions given for failure to maintain work schedule offenses within your MSC.'"

The Senior Assistant Postmaster General made no formal reply to the Vacca letter, but informal discussions between the parties took place over ensuing months. Late in 1977 the USPS gave all four of the Postal Worker Unions copies of revised leave provisions to be included in a proposed new Employee and Labor Relations Manual, as required under Article XIX of the 1975 National Agreement. The revised provisions were made effective early in 1978, pursuant to Article XIX, after the parties had been unable to agree upon a date when they might be discussed. Then the new leave provisions ultimately were considered in detail during the 1978 negotiations, 5

and in the end the Unions apparently had no disagreement with the language appearing in the new Manual, as revised, on the subject of "Leave," commencing with Part 510 in Chapter 5.

These provisions are silent, however, in respect to 6
the issues stated in the April 5, 1977 Vacca letter. It also was clear throughout the negotiations that the parties remained in disagreement on these matters, with the Union free to press them into arbitration if desired. On October 19, 1978 Vacca finally wrote Assistant Postmaster General, Labor Relations, James Gildea noting that there had been no formal reply to his April 5, 1977 letter and certifying the resultant dispute for hearing by the Impartial Chairman. On October 27, 1978 William Henry, of the Labor Relations Department, replied to the Vacca letter on behalf of Gildea. The concluding paragraph of Henry's letter read--

> "Employees reporting for duty as scheduled is critical to an effective and efficient operation. The responsibility for maintaining an acceptable attendance record rests with each and every employee. Regular attendance and entitlement to paid leave are two separate and distinct things. When an employee submits a request to use paid leave to cover an absence, the individual is simply claiming a benefit granted by the contract. While granting such a request may excuse the absence for pay purposes, it does not negate the fact of the absence or the fact that excessive absences impinge upon the effective and efficient operation of the Postal Service. In such circumstances, the employer can rightfully be expected to take the necessary corrective measures to assure that the efficiency of the Service is properly maintained."

Since the NALC found this statement of the USPS posi- 7
tion to be unsatisfactory, the matter ultimately proceeded to arbitration on January 9, 1979. Briefs thereafter were filed as of March 22, 1979.

The Presentations

1. NALC

Basically, the NALC holds that, under Article XVI of the National Agreement, there can be no "just cause" for any discipline based on an employee absence from work on some form of approved leave--whether it be sick leave, annual leave, leave without pay, or leave while recuperating from on-the-job injury. The imposition of discipline in any such situation would deprive employees of their right to enjoy leave benefits protected by Article X of the National Agreement, as well as under applicable Federal law. 8

Once sick leave has been approved, therefore, the USPS cannot thereafter complain that efficiency was impaired because of the employee's absence on such leave. In this respect, the NALC greatly stresses that, in early 1978, the Bureau of Policies and Standards of the U.S. Civil Service Commission issued a policy directive to the FEAA stating-- 9

> "Given an agency's authority to deny leave under many circumstances when it must have the services of an employee, an adverse action based on a record of approved leave is not for such cause as will promote the efficiency of the service."

The Civil Service Commission Policy, as thus stated, is controlling in respect to all USPS preference eligible veterans who elect to appeal the imposition of discipline under Civil Service procedures rather than under the grievance procedure established in the National Agreement. In the NALC view, 10

it is absurd to have two different disciplinary policies applicable to USPS employees working under the same Agreement, depending on whether or not an employee happens to be a preference eligible veteran. In its judgment, therefore, the USPS now should be required to embrace the CSC policy.

The NALC also emphasizes the obvious incongruity of trying to apply "corrective" discipline to discourage an employee from being injured or becoming ill. Under Article XVI all discipline must be corrective in nature, not punitive. In the case of employees on OWCP approved workmen's compensation (or continuation of pay status because of on-the-job injury), these are benefits to which employees are entitled by Federal law. The NALC concludes that the disputed USPS policies thus ignore the fact that, under Article III of the National Agreement, the USPS is obliged to honor all applicable laws. 11

2. The USPS

The Service denies at the outset that it ever seeks to discipline an employee for the "use of leave benefits provided by the Office of Workers Compensation Program." It also asserts that the NALC has failed to provide any example of discipline because an employee "was on continuation of pay due to a traumatic on-the-job injury." Thus in its view the only issue before the Impartial Chairman is-- 12

> "Does the Postal Service's discipline or discharge of employees for failing to maintain a regular work schedule in instances where the use of sick leave has been approved for such absences constitute a violation of the National Agreement?"

As to this stated issue, the Service relies on the proposition that: "It is a well established principal of arbitral labor law that excessive absenteeism, even though due to illness beyond the control of the employee, may result in disciplinary action, including termination of employment." Numerous quotations from arbitrator's opinions are provided in support of this basic USPS position. Of the greatest significance, for present purposes, are several dozen opinions by various USPS arbitrators including Gamser, Holly, Casselman, Cushman, Cohen, Di Leone, Larson, Epstein, Jensen, Moberly, Krimsley, Fasser, Myers, Rubin, Scearce, Seitz, Warns, and Willingham. 13

All of these opinions, in the USPS view, support the broad proposition--as stated by the Elkouri's, in "How Arbitration Works" (3rd Ed., 1973) at pages 545-546--to the effect that-- 14

> "The right to terminate the employees for excessive absences, even where they are due to illness, is generally recognized by arbitrators."

More pertinent language, for USPS purposes, appears in an Opinion by Arbitrator Cushman in Case AC-S-9936-D, involving the APWU (decided June 6, 1977). Cushman wrote:

> "The Union contends that it is improper for the employer to discharge an employee for absences caused by illness and which have been approved by management. The contention is without merit. This Arbitrator agrees with Arbitrator Warns and many other arbitrators that an employer has the right to expect acceptable levels of attendance from its employees and that when such attendance is not had, discharge is appropriate despite the fact that the absence may be for valid and legitimate medical reasons.

* * * * * *

"This Arbitrator is sympathetic to employees whose absenteeism is due to illness, and, therefore, to no fault of their own. Where, however, absenteeism due to illness results over a period of time in unacceptable levels of work attendance, an employer, under generally accepted principles recognized by many arbitrators, has a right to remove such an employee from employment. (USPS, /Vera D. Bugg/ AB-S-6-102-D.) The realities of economic survival and the demands of efficiency require that an employer be able to depend upon reasonable regularity of employee attendance in order to plan and perform his work schedule. Where reasonable standards of attendance cannot be met due to physical inability of the employee to meet such standards, termination by the employer is warranted. In such a case the employee is not being 'punished' because he is ill. He is simply being terminated for irregularity and undependability of attendance. Such situations are really not disciplinary in nature..."

(Underscoring added.)

In addition to relying on the cited opinions of numerous USPS arbitrators, the USPS suggests that the NALC now seeks to obtain, through arbitration, a concession which it failed to secure in the 1978 negotiations, when the parties had full opportunity to discuss the leave provisions in Chapter 5 of the new Employee and Labor Relations Manual. During the 1978 negotiations, indeed, the NALC specifically, but unsuccessfully, sought to prohibit the use of approved sick leave for disciplinary purposes. 15

Finally the Service deems the contrary Civil Service Commission policy on the issue to be irrelevant, stressing that the CSC "has no authority over adverse actions taken against postal employees who are not preference eligibles...." On this score, it quotes the following from a decision by Arbitrator Moberly: 16

> "Of course, this Arbitrator is bound by the collective bargaining agreement rather than the holdings of the Civil Service Commission. Under this agreement, as it has been interpreted in the past, the Postal Service is justified in removing employees under the circumstances here. No comment is made herein with respect to the rights of similarly-situated employees under other laws, rules or regulations. The Arbitrator is interpreting the collective bargaining agreement, and nothing more."

Finally, the Service urges that the policy announced by the CSC's Bureau of Policies and Standards is not necessarily the CSC's "final decision" on the matter, since not as yet been considered by the CSC Appeals Review Board.

FINDINGS

1. Scope of the Issue

17 The USPS brief sees no real issue here in respect to the imposition of discipline where an employee is absent (1) on continuation of pay due to a traumatic on-the-job injury, or (2) on OWCP - approved Workers Compensation. The USPS, says the brief, does not discipline employees for use of leave benefits provided by the Office of Workers Compensation Program (OWCP). The NALC has presented no evidence to the contrary. Nothing in the memoranda from the Central Region, Marblehead, or Jacksonville specifically states that discipline should be imposed on employees for absences on OWCP approved Workmen's Compensation or on continuation of pay due to traumatic on-the-job injury. Given the assurances embodied in the USPS brief, therefore, the present analysis is limited to considering whether the imposition of discipline because of absences on approved sick leave may involve violation of the National Agreement.

18 According to the NALC an employee's absence from work on approved sick leave never may provide a proper basis for discipline or termination of an employee's services. It believes this position to be supported fully by the Civil Service Commission policy, as quoted earlier.

19 The USPS apparently does not claim that all sick leave absences may provide a basis for discipline. It does hold, however, that where such absences result in failure to be "regular in attendance" this may subject the employee to disciplinary action. For this purpose, it holds the CSC policy statement to be irrelevant.

While it is difficult to deal meaningfully with such broad interpretive questions, in the absence of detailed facts in specific grievances to define an issue, this is not unusual in national level grievances. There are clear areas of disagreement and confusion in the present case, moreover, which seem susceptible to clarification through this Opinion. 20

2. Earlier Opinions by USPS Regional Arbitrators

It is instructive at the outset to analyze some of the major earlier decisions by Regional Arbitrators. The record includes two dozen Regional decisions as well as an advisory Opinion by National Level Arbitrator Howard Gamser. All but one of the Regional decisions are cited by the USPS to support the view that an employee may be disciplined for failure to maintain a regular work schedule because of absences on approved sick leave. 21

The most significant Regional case, for present purposes, was decided in the Southern Region December 17, 1975 by Fred Holly, a highly respected and eminently qualified arbitrator, in Case AB-S-6102-D (herein called the Bugg Case). There the grievant had a little over 3 years of service when discharged in late 1974. Within two months of being hired she had established an unsatisfactory attendance record, which was called to her attention by two separate supervisors. After five months of employment, she again was told to improve her attendance record. About a month later she was warned by letter that her attendance was unsatisfactory and was placed on restricted sick leave. Ultimately, she was sent to a USPS designated physician for an examination to determine her fitness for duty because of a continued poor attendance record. On February 18, 1974 the physician reported that she was able to perform her job from the medical standpoint. Three months 22

later she again was warned about continuing absenteeism. In September of 1974 an analysis of her attendance record over recent months was prepared. This resulted in the decision to discharge. During her last 7½ months of employment she had been absent more than one third of her scheduled hours. There is no suggestion in Holly's Opinion that the grievant was suffering from any single, identifiable illness which might have been responsible for all, or most, of her repeated absences from work.

A key paragraph in the Opinion in the Bugg case 23
reads--

> "Such an excessive rate of absenteeism has been consistently held to be unacceptable and a proper cause for termination. Employers have a right to expect acceptable levels of attendance from their employees, and when such attendance is not forthcoming termination is approved even though the absences may be for valid medical reasons. This principle is so well established in arbitration that it does not demand documentation here."
>
> (Underscoring added.)

On April 28, 1976 Arbitrator Howard Myers sustained 24
a discharge in Case NB-S-6079-D where an employee had been absent repetitively over a period starting at least as far back as 1972 and running into June of 1975. During the last 18 months of his employment he missed 15% of his scheduled shifts and frequently failed to provide any documentation or medical certificate to explain his absence. This Opinion concluded with the following dicta--

"It has been well established by arbitration decisions that when an employee becomes undependable as to adequate attendance, so as to impede operations, the employer may finally discharge, regardless of what reasons cause the undependability or unfitness.

The employer has no contractual obligation to retain an employee whose services are irregular or where absences are due to disability over a long period....Regardless of causes of continuing absences, a just cause for removal exists where reasonable corrective steps have not changed a deficient performance so as to meet the established standards."

(Underscoring added.)

The next significant Opinion was issued by Arbitrator Harry Casselman on April 7, 1977 in Case AC-C-10,295-D. There the grievant was reinstated without back pay. The Arbitrator's Opinion, included the following pertinent passages-- 25

"...there is nothing in Article X, Section 4, which states, or...implies, that absences due to sick leave, whether covered by sick leave, or beyond such coverage, cannot be used as a basis of discipline when combined with other absences, or as a basis of discharge for disability without fault standing by itself, where such disability to perform on an acceptable basis is fully established by medical evidence.

* * * * * *

"It should be obvious that Management is powerless to go behind a doctor's certification of illness, unless it has independant medical or other evidence to the contrary; even if the Union were correct, which I find they are not, that the approval of each instance of sick leave is not just an approval for pay purposes, which I find it is, but also an approval of the underlying leave, this does not mean that when an employee's overall absences based on sick leave and other leave makes his continued service untenable because of its effect on the organization...discipline cannot be assessed."

(Underscoring added.)

The Bugg case was cited by Arbitrator Bernard Cushman in a May 9, 1977 decision in Case AC-S-12,796-D. There Cushman sustained a discharge where the employee had an extremely poor attendance record. His Opinion included the following-- 26

"Under all the circumstances, the Arbitrator finds that some absences attributed by the grievant to other causes were due to the grievant's own internal problems rather than the lack of management affirmative action and that her absentee record could fairly be considered by management as it stood without any substantial discount for alleged causation somehow attributable to management. This Arbitrator holds that the absentee record of the grievant was excessive and was a proper cause for removal.

"The Union contends that it is improper for the employer to discharge an employee for absences caused by illness and which have been approved by management. The contention is without merit. This Arbitrator agrees with Arbitrator Warns and many other arbitrators that an employer has a right to expect acceptable levels of attendance from their employees and that when such attendance is not had, discharge is appropriate despite the fact that the absences may be for valid and legitimate medical reasons. Vera D. Bugg, AB-S-6102-D.

The Union also contends that in this case discipline was not corrective but punitive on the ground that it is not progressive discipline to proceed from a five-day suspension to a discharge. In a case of excessive absenteeism progressive discipline in the form of disciplinary suspensions is inappropriate if the absenteeism genuinely arises from a physical or medical problem."

(Underscoring added.)

On June 6, 1977 Arbitrator Cushman also decided Case AC-S-9,936-D, finding just cause for a "termination." The grievant there was a ZMT Operator who had only about two years of service when discharged in August of 1976. Within only 8 months of his hire he had been counselled for excessive absenteeism, and 2 months later was placed on restricted sick leave. Thereafter he received a letter of warning, a 5-day suspension, and a 14-day suspension because of his continuing absenteeism. He did not reply to the June 25, 1976 notice of proposed removal. Between March 27 and July 2, 1976 he was absent on 68.57% of his scheduled work days. All of his absences either 27

were on approved sick leave or approved leave without pay. After again citing the Bugg Opinion, Cushman wrote--

> "This Arbitrator is sympathetic to employees whose absenteeism is due to illness and, therefore, to no fault of their own. Where, however, absenteeism due to illness results over a period of time in unacceptable levels of work attendance, an employer, under generally accepted principles recognized by many arbitrators, has a right to remove such an employee from employment. The realities of economic survival and the demands of efficiency require that an employer be able to depend upon reasonable regularity of employee attendance in order to plan and perform his work schedule. Where reasonable standards of attendance cannot be met due to physical inability of the employee to meet such standards, termination by the employer is warranted. In such a case the employee is not being 'punished' because he is ill. He simply is being terminated for irregularity and undependability of attendance. Such situations are not really disciplinary in nature. And that is why this Arbitrator has stated in Case AC-S-12,796-D that in a case of excessive absenteeism if the absenteeism genuinely arises from a physical or medical problem discipline in the form of disciplinary suspensions is inappropriate."
>
> (Underscoring added.)

On September 27, 1977 Regional Arbitrator Peter Seitz 28
decided Case AC-N-16,605-D where a ZMT Operator with less than 4 years of service was discharged because of an attendance record found by the Arbitrator to be "deplorable and unfortunate," since she had worked only about 20% of her scheduled hours. The Seitz Opinion reflects a somewhat different approach from that developed in the Bugg Case and its progeny. It includes two particularly significant paragraphs:

> "The Service does not question the genuineness of the reasons given for all of these absences. It states that it has no information on which to do so. Under such circumstances, it must be assumed that the grievant was not 'at fault.' Accordingly, this is not a case in which discipline or discharge are appropriate for any wrongful conduct or behavior which breached her employment duties or the requirements of the collective agreement.
>
> Under such circumstances the case, necessarily, turns on the question whether the Service had grounds to terminate (not 'discharge') the grievant because it had reason to apprehend that, on the basis of the attendance record referred to, the grievant would not maintain a reasonable attendance record in the future. In other words, and in effect, the Service's position is that the absence record demonstrates that the grievant does not possess the physical qualifications to maintain a satisfactory attendance record in the future."
>
> (Underscoring added.)

A number of other Regional decisions were issued between September of 1977 and the hearing in the present case. All but one of these opinions included statements tending to support the present USPS position. Two of these opinions, however, dealt directly with the question of whether the CSC policy was relevant. They reached opposite conclusions. These decisions will be noted in more detail later. 29

There is, among the more recent cases, perhaps one other which merits specific mention here since it was presented by the NALC. Case NC-S-8197-D was decided by Arbitrator Cushman on February 4, 1978. Discharge for frequent and repetitive absenteeism was found proper. The Arbitrator commented-- 30

> "The Union argues, however, that all of the absences during the October 5, 1976 to April 22, 1977 period, the Charge 1 period, were stipulated to have been for approved sick leave, and therefore, may not properly be considered as a basis for removal. That argument is without merit. As stated above, this Arbitrator, in common with many other arbitrators, has held that an employer has a right to expect acceptable levels of attendance from employees and that where such attendance is not had, discharge is appropriate despite the fact that the absences may be for valid and legitimate medical reasons. As stated by Arbitrator Meyers in a recent case, USPS and APWU (Pamela Allen), approval of a sick leave slip means only that an employee's absence will be processed for pay purposes. A satisfactorily documented sick leave request affords no basis for supervisory disapproval, but the absences remain on the record."
>
> (Underscoring added.)

3. Significance of the Earlier Regional Opinions

The problem faced by the USPS in seeking to reduce absenteeism is not unique. A Central Region memorandum which accompanied the Charters Memorandum, quoted under Background above, nonetheless suggests that in recent years the USPS has faced a particularly serious problem of this sort. 31

Management properly may assume that most USPS employees are conscientious and not prone to abuse the sick leave program. Medical certificates understandably are not generally required to support every one or two day absence because of claimed illness. Even where medical certificates are required they may not be difficult to obtain, even by a malingerer. There is no practical way for the USPS to question their validity, moreover, except as other evidence may surface to reveal that a given employee has been malingering. 32

No doubt in light of these considerations National Level Arbitrator Gamser observed in Case AC-N-14,034 that excused sick leave cannot "be considered a grant of immunity." If USPS Management is to be able to hold absenteeism within reasonable limits over the long run, it may be important in individual cases to cite an employee's entire record of absences, including those on sick leave, in establishing proper cause for discipline. 33

Some of the problem envisioned by the NALC in the present case, moreover, may arise from unnecessarily broad generalizations embraced in some of the Regional opinions which imply that the application of discipline always will be proper when the USPS can show "excessive absences" from work. Indeed, the USPS brief quotes from the Elkouri text, "How Arbitration Works" (3rd Ed. 1973) at p. 545, a sentence to the effect that an employer has a "right" to terminate an employee for excessive 34

absences even when due to illness. Reliance on such broad and misleading generalizations may obscure the fundamental consideration that the true issue, under Article XVI of the National Agreement, is whether the employer has established "just cause" for the given discipline in the specific case. The presence or absence of "just cause" is a fact question which properly may be determined only after all relevant factors in a case have been weighed carefully. The length of the employee's service, the type of job involved, the origin and nature of the claimed illness or illnesses, the types and frequency of all of the employee's absences, the nature of the diagnosis, the medical history and prognosis, the type of medical documentation, the possible availability of other suitable USPS jobs or a disability pension, the employee's personal characteristics and overall record, the presence or absence of supervisory bias, the treatment of similarly situated employees, and many other factors all may be relevant in any given case.

In short, an arbitrator cannot properly uphold the 35
imposition of discipline under Article XVI, except after conscientious analysis of all relevant evidence in the specific case. This basic consideration seems to be reflected in the advisory Opinion of National Level Arbitrator Howard Gamser in Case AC-N-14,034, decided February 2, 1978. After quoting from a Regional Arbitrator's Opinion in Case AC-S-9,936-D, (and noting that other Regional opinions had included similar language) Gamser wrote these cautionary comments--

> "In addition, the undersigned is constrained to add the following comments. Of course properly documented and approved sick leave should not be used, in and of itself, in a manner adverse to an employee's interest. However, neither can excused sick leave be considered as a grant of immunity to an

"employee against the employer's right to receive regular and dependable attendance and to take steps necessary to insure the existence of a reliable workforce to do the work at hand.

When management states that an employee's attendance record provides just cause for disciplinary action, management must be prepared to substantiate the fact that this employee's attendance record supports the conclusion that the employee is incapable of providing regular and dependable attendance without corrective action being taken. Management cannot inhibit an employee in the exercise of his contractual right to employ sick leave in the manner contemplated to cover legitimate periods of absence due to illness of other physical incapacity. Management must give every consideration to the fact that there is a sick leave program and that an employee's absence has been covered by accrued and earned sick leave or projected sick leave. Having given this consideration appropriate weight, the employer may still decide that an attendance record so erratic and undependable due to physical incapacity to do the assigned work requires that action be taken to insure that the work is covered in an efficient and reliable manner."

Given the specific facts in most of the cases before them, it occasions no surprise that many Regional Arbitrators have indicated that repetitive, excessive absenteeism--even 36

including absences on approved sick leave--may provide "just cause" for discipline or discharge. Such extreme situations are not hard to find. The facts in the original Bugg case, as well as those before Arbitrators Cushman in Case AC-S-9,936-D and Seitz in Case AC-N-16,605-D serve to illustrate this point.

It follows that there is no basis in this record for an award which would bar the Service from seeking to apply discipline to combat serious, repetitive absenteeism by individual employees, even though absences on sick leave or approved leave without pay may be involved. The Marblehead, Jacksonville, and Central Region memoranda all seem to embody instructions in furtherance of such a basic policy. Even if such memoranda include statements or implications which appear unnecessarily broad or inaccurate, it is not the function of an Arbitrator to rewrite such internal Management instructions. Should an apparent abuse arise in any future instance, the issue of "just cause" in the given case may be determined through the filing of an individual grievance. 37

4. Relevance of Civil Service Commission Policy

Article XVI, Section 3 of the National Agreement recognizes that any USPS employee who is "preference eligible" may elect to appeal the imposition of discharge, or a suspension of more than 30 days, to the Civil Service Commission instead of filing a grievance claiming violation of Article XVI. This alternative, of course, is available only to those bargaining unit employees who happen to be preference eligible. All other employees covered by the National Agreement may seek redress for discharge, or suspension of more than 30 days, only through the grievance procedure. 38

Article XVI states that discipline must be corrective in nature, not punitive, and that it may be imposed only for "just cause." The basic Civil Service policy, in contrast, apparently is that discipline may be upheld whenever it is found to be "for such cause as will promote the efficiency of the service." 39

As already indicated, the Bureau of Policies and Standards of the Civil Service Commission recently issued a policy directive to the FEAA which would apply in any case where a USPS preference eligible employee had elected to appeal a discharge or suspension of more than 30 days to the CSC. While the full text of the policy statement is not in evidence, one joint exhibit reveals, that a principal sentence reads-- 40

> "Given an agency's authority to deny leave under many circumstances when it must have the services of an employee, an adverse action based on a record of approved leave is not for such cause as will promote the efficiency of the service."
>
> (Underscoring added.)

Another joint exhibit embodies a paragraph of the CSC policy statement reading-- 41

> "When an agency exercises its authority to approve leave the employee is released from his obligation to report for duty and his absence does not constitute a breach of the employer-employee relationship. As a result, an adverse action based on approved leave in

> "any amount is not normally a cause that will promote the efficiency of the service. Such an adverse action, then, should be reversed on appeal for failure to state a cause of action."
>
> (Underscoring added.)

Following implementation of this CSC pronouncement, the USPS advised all of its Regional Directors--Employee and Labor Relations: 42

> "In light of this new Commission policy, 'failure to meet position requirements' or 'undependability' based upon excessive approved absences should not be used as grounds for taking adverse actions against preference eligible employees, unless and until we are successful in reversing Commission policy through the vehicle of a motion for reopening on a 'test' case."
>
> (Underscoring added.)

The NALC reads the CSC policy statement to mean that the USPS is not entitled, under any circumstances, to impose discharge or a suspension of more than 30 days because of a preference eligible employee's absence on approved leave. In view of the above quoted portions of the policy statement this interpretation may be accepted as correct, for present purposes, in the absence of any evidence to the contrary. 43

The result is obviously incongruous. One policy applies in respect to preference eligible employees who appeal to the CSC and another governs all other bargaining unit employees and those preference eligible employees who file a grievance. The NALC argument that the new CSC policy should be applied to all employees thus has the superficial appeal of seeming to assure uniformity in the administration of discipline among all potentially involved employees. The fact is, however, that the special treatment accorded preference eligible employees is required under Section 1005-(a)-(2) of the Postal Reorganization Act and cannot be changed by the parties in collective bargaining. 44

Two Regional Arbitrators already have had an opportunity to consider whether the CSC policy statement should be embraced for purposes of applying the "just cause" test under Article XVI to employees who file grievances under Article XV rather than appealing to the CSC. The NALC was involved in both of these cases and both involved preference eligible employees. 45

In NC-S-14,301-D, decided September 25, 1978, Arbitrator Robert Moberly sustained a discharge where the employee had been absent from work frequently on approved sick leave, or on leave without pay. Moberly's Opinion noted the conflict between the CSC policy statement and the earlier rulings by Regional USPS arbitrators. He concluded that he was "bound by the collective bargaining agreement rather than the holdings of the Civil Service Commission," since--"The Arbitrator is interpreting the collective bargaining agreements, and nothing more." 46

A different view emerged in NC-C-5949-D, decided in December of 1978. There Arbitrator Peter Di Leone indicated that, but for the CSC policy directive, he would have sustained the discharge under review. He then wrote-- 47

> "Pursuant to Article III of the 1975 National Agreement this Arbitrator must view the action of the Employer in the light of applicable law and regulations. The Federal Ruling issued in accordance with the responsibilities Congress has imposed upon the Employer by law is such an applicable regulation governing the Employer's action here.
>
> Therefore, since Biggs' discharge was based on a record of approved leaves of absences from February 1, 1975, when he injured his knee, to December 7, 1975, when he was discharged, the action of the Employer must be set aside."

Neither of these Regional Cases represents a precedent for purposes of a National Level interpretive case. Indeed, it would be unfair to suggest that either arbitrator--in the absence of the detailed presentations in the present record--was in any position to develop an authoritative opinion on the subject. 48

In the absence of any helpful precedent it is pertinent to note that under Article XVI two fundamental considerations must control in every discipline case-- 49

(1) No discipline may be upheld unless shown to have been imposed for "just cause," and 50

(2) Whether "just cause" exists requires a fact determination on the basis of all relevant evidence in each individual case. 51

It follows that neither a Regional nor National Level Arbitrator may presume to enunciate or establish any broad general rule contemplating that the imposition of discipline 52

always will either be upheld, or be set aside, in any given category of case. Nor can the pronouncement of the CSC Bureau of Policies and Standards now be accorded such a status by this Arbitrator. To do so would be, in effect, to amend Article XVI.

On the other hand, it is not uncommon for arbitrators, 53
when faced with difficult "just cause" cases, to consider how other arbitrators or authorities have dealt with like problems. Many of the various Regional Arbitrators cited by the USPS in the present case have relied upon opinions expressed by arbitrators in other relationships. Some of the Regional Arbitrators also have relied upon the Elkouri generalization which has been quoted in the USPS brief.

In these circumstances there is no way that this Arbi- 54
trator now could characterize the CSC policy statement as "irrelevant" in respect to a just cause issue under Article XVI. In view of its applicability, in respect to preference eligible USPS employees, it obviously must be accorded at least the kind of consideration as has been accorded to generalizations of other arbitrators, or writers, outside of this bargaining relationship. Beyond that the precise weight or significance to be accorded the new CSC policy, in light of all of the evidence in any given case, should remain a matter of judgment on the part of the arbitrator to whom the case has been entrusted for decision.

Finally, perhaps, it should be observed that any 55
attempt to enunciate an inflexible rule for dealing with every "just cause" issue in a given type of case is a risky business, at best, in view of the multitude of variables which may be present in individual cases. Thus there can be no clear certainty that the present CSC policy statement will remain forever in its present form without any refinement, clarification, or modification.

Conclusions

The following conclusions may be stated on the basis of the presentations in this National Level grievance: 56

1. Whether the USPS properly may impose discipline upon an employee for "excessive absenteeism," or "failure to maintain a regular schedule," when the absences on which the charges are based include absences on approved sick leave, must be determined on a case-by-case basis under the provisions of Article XVI; 57

2. Whether or not the USPS can establish just cause for the imposition of discipline, based wholly or in part upon absenteeism arising from absences on approved leave, is a question of fact to be determined in light of all relevant evidence in the given case; 58

3. The CSC policy statement is not of controlling significance in deciding a "just cause" issue under Article XVI, even though the grievant may be preference eligible; 59

4. The CSC policy statement is relevant in respect to a "just cause" issue under Article XVI, in a case involving absences on approved leave; 60

5. The weight to be given the CSC policy statement, in evaluating a just cause issue under all of the evidence in any such case, lies in the discretion of the arbitrator. 61

AWARD

No formal Award is required in view of the nature of this case. It may be deemed to be closed on the basis of the foregoing opinion. 62

Sylvester Garrett,
Arbitrator

C# 04163 [redacted]

IN THE MATTER OF THE ARBITRATION

BETWEEN

UNITED STATES POSTAL SERVICE
BROOKFIELD, WISCONSIN

AND

NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO; BRANCH 4811

C1N-4J-D 10873

GRIEVANCE

LETTER OF WARNING
ISSUED TO
BRUCE ROBINSON

OPINION AND AWARD

The hearing in the above-captioned matter was held on January 25, 1983, at the Post Office located at 17345 Ybur Road, Brookfield, Wisconsin, before George E. Larney, serving as sole impartial Arbitrator pursuant to Article 15, Grievance - Arbitration Procedure, Section 15.4B, Regional Level Arbitration - Regular, of the National Collective Bargaining Agreement entered into by and between the United States Postal Service and the National Association of Letter Carriers, AFL-CIO, and the American Postal Workers Union, AFL-CIO (hereinafter referred to as the Agreement and designated as Joint Exhibit 1), effective July 21, 1981 through July 20, 1984. The Arbitrator acknowledges the instant issue is properly before him for resolution on the merits.

The case for the Postal Service (hereinafter referred to variously as the Service and Employer) was presented by Felix J. Jackson, Labor Relations Representative, located in offices at 345 West St. Paul Avenue, Milwaukee, Wisconsin. Others present on behalf of the Employer were: David R. Gramins, Supervisor Mails and Delivery; and Robert D. Medley, Officer-in-Charge, Brookfield.

The case for Branch 4811, National Association of Letter Carriers (hereinafter referred to as the Union) was presented by Barry Weiner, Regional Administrative Assistant, located in offices at 312 Central Avenue, S.E., Minneapolis, Minnesota. Others present on behalf of the Union were: William Goff, President, Branch 4811; Daniel Schaning, Union Steward; and Bruce M. Robinson, Grievant.

At the hearing the parties were afforded full opportunity to present oral and written evidence and argument, including

examination and cross-examination of the following witnesses who were sworn and who are listed in the order of their respective appearances:

FOR THE EMPLOYER	FOR THE UNION
David Gramins	Bruce Robinson William Goff

No formal transcript of the hearing was made. Both parties elected to make closing oral argument in place of filing post-hearing briefs. Accordingly, the Arbitrator considered the record in this case to be officially closed as of the conclusion of the hearing on date of January 25, 1983.

THE ISSUE

As stipulated to by the parties at the hearing, the issue before the Arbitrator is as follows:

> Whether or not the Letter of Warning dated September 15, 1982, issued to the Grievant, Bruce Robinson, for unsatisfactory attendance was for just cause, in accordance with Article 16 of the Agreement (Jt. Ex. 1)?
>
> If not, what shall be the proper remedy?

The following provisions of the Agreement (Jt. Ex. 1) are herein deemed to be relevant to the instant issue:

ARTICLE 15

GRIEVANCE - ARBITRATION PROCEDURE

Section 1. Definition

A grievance is defined as a dispute, difference, disagreement, or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not

limited to, the complaint of an employee or of the Unions which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

Section 2. Grievance Procedure - Steps

* * *

Step 3: (d) The Union may appeal an adverse decision directly to arbitration at the Regional level within twenty-one (21) days after the receipt of the Employer's Step 3 decision in accordance with the procedure hereinafter set forth; provided the Employer's Step 3 decision states that no interpretive issue under the National Agreement or some supplement thereto which may be of general application is involved in the case.

* * *

Section 4. Arbitration

A. General Provisions ...

* * *

... No grievance may be appealed to arbitration at the Regional level except when timely notice of appeal is given in writing to the appropriate Regional official of the Employer by the certified representative of the Union in the particular region.

B. Regional Level Arbitration - Regular

... Separate panels will be established for scheduling (a) removal cases and cases involving suspensions for more than 14 days, (b) for all cases referred to Expedited Arbitration, and (c) for all other cases appealed to arbitration at the Regional Level.

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:

* * *

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

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

ARTICLE 10

LEAVE

* * *

Section 5. Sick Leave

The Employer agrees to continue the administration of the present sick leave program, which shall include the following specific terms:

A. Credit employees with sick leave as earned.

B. Charge to annual leave or leave without pay (at employee's option) approved absence for which employee has insufficient sick leave.

C. Employee becoming ill while on annual leave may have leave charged to sick leave upon request.

D. Unit Charges for Sick Leave shall be minimum units of less than one (1) per hour.

E. For periods of absence of three (3) days or less, a supervisor may accept an employee's certification as reason for an absence.

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 2. Discussion

For minor offenses by an employee, management has a responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered discipline and are not grievable. Following such discussions, there is no prohibition against the supervisor and/or the employee making a personal notation of the date and subject matter for their own personal record(s). However, no notation of other information pertaining to such discussion shall be included in the employee's personnel folder. While such discussions may not be cited as an element of prior adverse record in any subsequent disciplinary action against an employee, they may be, where relevant and timely, relied upon to establish that employees have been made aware of their obligations and responsibilities.

Section 3. Letter of Warning

A letter of warning is a disciplinary notice in writing, identified as an official disciplinary letter of warning, which shall include an explanation of a deficiency or misconduct to be corrected.

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.

The following provisions of the Employee & Labor Relations Manual (Jt. Ex. 3) are also deemed to have relevance to the instant issue:

513.2 Accrual and Crediting

.21 Accrual Chart

a. Full-Time Employees	4 hours for each full biweekly pay period- i.e., 13 days (104 hours) per 26-period leave year.
*	* *

.22 Crediting

.221 General. Sick leave is credited at the end of each biweekly pay period in which it is earned. Sick leave (earned and unused) accumulates without limitation.

* * *

513.3 Authorizing Sick Leave

* * *

.32 Conditions for Authorization

a. Illness or Injury.	If employees are incapacitated for the performance of official duties.
*	* *

.33 Application for Sick Leave

.331 General

Except for unexpected illness/injury situations, sick leave must be requested on Form 3971 and approved in advance by the appropriate supervisor.

.332 Unexpected Illness/Injury

An exception to the advance approval requirement is made for unexpected illness/injuries; however, in these situations the employee must notify appropriate postal authorities as soon as possible as to their illness/injury and expected duration of absence. As soon as possible after return to duty, employees must submit a request for sick leave on Form 3971. Employees may be required to submit acceptable evidence of incapacity to work as outlined in the provisions of 513.36, Documentation Requirements. The supervisor approves or disapproves the leave request. When the request is disapproved, the absence may be recorded as annual leave, if appropriate, as LWOP, or AWOL, at the discretion of the supervisor as outlined in 513.342.

.34 Form 3971, Request for, or Notification of, Absence

.341 General. Application for sick leave is made in writing, in duplicate, on Form 3971, Request for, or Notification of, Absence.

.342 Approval/Disapproval. The supervisor is responsible for approving or disapproving applications for sick leave by signing the Form 3971, a copy of which is given to the employee. If a supervisor does not approve an application for leave as submitted, the Disapproved block on the Form 3971 is checked and the reasons given in writing in the space provided. When a request is disapproved, the granting of any alternate type of leave, if any, must be noted along with the reason for the disapproval. AWOL determinations must be similarly noted.

* * *

.36 Documentation Requirements

.361 3 Days or Less. For periods of absence of 3 days or less, supervisors may accept the employee's statement explaining the absence. Medical documentation or other acceptable evidence of incapacity for work is required only when the employee is on restricted sick leave (see 513.37) or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service.

.362 Over 3 Days. For absences in excess of 3 days, employees are required to submit medical documentation or other acceptable evidence of incapacity for work.

* * *

.37 Restricted Sick Leave

.371 Reasons for Restriction. Supervisors (or the official in charge of the installation) who have evidence indicating that an employee is abusing sick leave privileges may place an employee on the restricted sick leave list. In addition, employees may be placed on the restricted sick leave list after their sick leave use has been reviewed on an individual basis and the following actions have been taken:

a. Establishment of an absence file as outlined in Handbook F-21, Time and Attendance (part 973).

b. Review of the absence file by the immediate supervisor and by higher levels of management.

c. Review of the quarterly listings, furnished by the PDC, or LWOP and sick leave used by employees (No minimum sick leave balance is established below which the employee's sick leave record is automatically considered unsatisfactory.)

d. Supervisor's discussion of absence record with the employee.

e. Review of the subsequent quarterly listing. If listing indicates no improvement, the supervisor is to discuss the matter with the employee to include advice that if next listing shows no improvement, employee will be placed on restricted sick leave.

In addition, the following relevant portions of the local policy governing an Attendance Control Program is also deemed applicable to the instant issue:

> The following are the procedures which will be used in administering the Attendance Control Program. Unscheduled leave, whether due to illness or emergency, severely impairs the efficiency of Postal operations. Arbitrators have consistently held that no Employer is required to allow an employee to remain on the rolls who cannot maintain regular attendance, regardless of the reason for the absences from work.
>
> Your Attendance Control Supervisor will approve of disapprove all requests for leave. He will analyze your attendance record using the "frequency" system. A frequency is any absence from scheduled work and could include an absence of several days due to illness, an absence of several hours due to emergency, or an absence of several units due to disapproved tardiness. An accumulation of several frequencies in a limited time will cause your Supervisor to consider recommending appropriate disciplinary action, up to and including discharge.

PS Form 3971 must be prepared for all deviations from normal work schedules, such as annual leave, sick leave, leave without pay, court leave, military leave, all types of other leave and for tardiness of more than eight (8) units (5 minutes).

Form 3971 must be completed in its entirety, including number of hours requested, type of leave, Social Security number, starting and ending time of leave, and must, of course, be signed and dated by the Supervisor whether approved or disapproved.

* * *

SICK LEAVE

An employee must give notice of illness as soon as practicable so that the cause of his absence may be known at the earliest possible time. These sick calls should be made not later than thirty (30) minutes before scheduled reporting time, if possible, so that schedules can be adjusted as necessary.

The initial call for sick leave will cover one day only, except in the event the employee has been to a doctor or is hospitalized. Normally, employees must call in on each day of absence. He should give date of visit, nature of illness, and anticipated period of absence estimated by the doctor or date of next visit to the doctor. This information should be recorded, but not on Form 3971.

Application for sick leave on Form 3971 must be signed by an employee promptly upon return to duty. In the case of an extended absence, a medical certificate must be received by the Supervisor by the Friday of the week in which the leave was taken. Any absence properly chargeable to sick leave but which exceeds the amount accumulated and accrued to his credit at the time his application is submitted shall be charged against annual leave unless the employee asks to have it charged to leave without pay. If the employee has no annual to his credit, the excess may be charged to leave without pay. Leave without pay so charged cannot thereafter be converted into either sick or annual leave.

In those instances where medical certification is required for sick leave approval, the Data Site or the Station will not transmit leave until medical certification is received. If necessary, an adjustment will be made in the following pay period.

It should be remembered that excessive absenteeism due to illness could result in disciplinary action up to and including discharge. Approval of sick leave requests is for pay purposes only.

* * *

RESTRICTED SICK LEAVE

When it becomes apparent to an employee's Supervisor that abuse of the sick leave benefit is occurring, medical documentation may be required for each absence.

Your Supervisor will carefully consider each individual case before recommending disciplinary action, but the program will be administered fairly and consistently.

(Emp. Ex. 1B)

BACKGROUND

The Grievant, Bruce Robinson, commenced employment with the Service on date of November 3, 1979. On date of September 15, 1982, the Grievant was issued the subject Letter of Warning by his Supervisor, David Gramins. This Warning Letter reads in whole as follows:

UNITED STATES POST OFFICE

Our Ref: 200: E&LR: mz

Date: September 15, 1982

Subject: Letter of Warning

TO: Bruce M. Robinson — Name
388-60-7421 — Social Security Number

Carrier Technician — Position
Brookfield, Wisconsin — Post Office

CHARGE: This letter of warning is being issued for unsatisfactory attendance during the last five (5) months. You have been absent claiming illness on four (4) occasions during that time. They are: May 14 & 15, June 29, August 17, & September 9, 1982.

You must realize that such actions cannot be condoned. This official Letter of Warning is being issued in an attempt to correct your deficiency and a copy will be placed in your Official Personnel Folder. Any further deficiencies of a similar nature will result in more severe disciplinary action, including suspension or removal from the Postal Service.

In addition, be advised that this disciplinary action, which is being issued for unsatisfactory performance, will be considered in the evaluation for your next step increase.

If I may be of any assistance, please call on me; or you may consult with other supervisors and you will be assisted where possible.

Under the provisions of Article XV of the National Agreement, you have the right to file a grievance within 14 days of your receipt of this letter.

I acknowledge receipt of this Letter of Warning.

/s/ David R. Gramins
Supervisor

/s/ Bruce M. Robinson
Name

9-15-82
Date

cc: OPF
Supervisor
Labor Relations
File

(Jt. Ex. 2)

Gramins testified he has been the Grievant's supervisor for more than two (2) years. Gramins noted that on all four (4) occasions in question, the Grievant called in to notify of his absence prior to reporting for work. The Grievant testified that on date of September 2, 1982, just one week prior to incurring the fourth occurrence and fifth day of absence due to sickness, Gramins held a discussion with him regarding his attendance, wherein, Gramins apprised him that since May of 1982 to the present, the number of absences due to sickness was unsatisfactory and warned that any further occurrences would result in disciplinary action. Gramins related that this discussion was occasioned by his understanding from higher level management that there exists a standard, whereby, unscheduled absences in excess of three (3) occurrences in a six (6) month period is unacceptable and constitutes grounds for disciplinary action. 1/ Gramins testified that as a supervisor it is his

1/ Gramins explained his understanding derived from oral instructions received from officials at the Milwaukee Mail Service Center.

responsibility to audit absences for purposes of determining whether or not there have been any abuses. Gramins stated that as a rule he does not review an employee's personnel file in conjunction with his review of their absence analysis. In the instant case, Gramins asserted in making the determination as to whether or not to issue the subject Letter of Warning, he did take into account that between January 23, 1982 and May 13, 1982, the Grievant had not incurred any unscheduled absences due to illness. Gramins further acknowledged the fact that between January 23, 1982 and September 17, 1982, the last day of Pay Period 19, the Pay Period within which the Grievant incurred his fifth day of absence, there was a total of 165 working days. 2/ Gramins also acknowledged that he did not recall asking the Grievant what his reasons were for reporting off sick at the time he (Gramins) approved the leave on the 3971 Form. Gramins further stated that at the time he issued the subject Letter of Warning he did not know what the Grievant's sick leave balance was that he had accrued. 3/ Gramins also acknowledged that in reviewing the Grievant's Absence Analysis Form (Form 3972), there was no evidence to indicate the Grievant was not sick on the five (5) days in question.

In other testimony, Gramins stated that while he distributes a copy of the Attendance Control Program Policy (Jt. Ex. 3) to all

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2/ In his closing argument, Union Representative Barry Weiner explained the derivation of 165 working days within this period. Weiner noted there are 34 working weeks from the beginning of Pay Period 3 to the end of Pay Period 19 and that within this time span there are a total of five (5) holidays. Thus, multiplying 34 weeks times 5, the number of normal work days in the normal work week, yields a total of 170 work days. Next, subtracting out the five (5) holidays leaves a total of 165 working days (See Un. Ex. 1).

3/ According to Section 513.21 of the Employee & Labor Relations Manual reproduced elsewhere above, it is noted that Full-Time Employees accrue 4 hours of sick leave for each pay period.

employees he supervises, he had no direct knowledge whether the Grievant had been given a copy nor whether he has seen this document. 4/ Gramins noted however, that this Policy is permanently posted on the Facility's Bulletin Board now located in the area of the Postal Inspector Box Section. Gramins further noted the Bulletin Board has been in this location for about four (4) months, having been moved from the area by the time clock on the south wall of the main office where it had been since 1971. According to Gramins, the Bulletin Board had been moved because of relocation of Carrier cases. Gramins further acknowledged that whereas the Bulletin Board was unobstructed in its former location, carts have always been positioned in front of the Bulletin Board in its new location, thus impeding employees from getting near the board. 5/ Nevertheless, Gramins asserted, employees have the ability to read the Policy from the Bulletin Board and have the right to ask for a copy. Gramins testified that the Attendance Control Program Policy is a local policy of the Milwaukee Mail Service Center but that he is unaware this Policy cannot supercede provisions of the National Agreement (Jt. Ex. 1). However, Gramins acknowledged, even if he knew this to be the case, he would still follow the local Policy. Gramins testified he has no knowledge of restricted sick leave provisions and that at Brookfield, at least in the four (4) years he has been a supervisor, restricted sick leave has never been imposed. Finally, Gramins testified, that a document showing how to properly prepare and fill out a Form 3971 (Arb. Ex. 1), is also permanently posted on the Bulletin Board. 6/

The Grievant corroborated Gramins testimony on the point that Gramins never inquired of him the reasons for his absences. But as to these reasons, the Grievant related that on May 14 and 15, he had a bad

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4/ The Grievant testified that in his first year of employment his supervisor was Kenneth Plummer.

5/ The Arbitrator toured this location and observed first hand the Bulletin Board was indeed obstructed by the carts.

6/ This testimony was in connection with a sub-issue, wherein the Employer alleged the Grievant had not properly filled out Form 3971 for any of the absences in question.

cold, that on June 29, he had diarrhea, that on August 17, he had the flu, and that on September 9, he had a cold. The Grievant related that at the time he received the Letter of Warning, he had an accrued sick leave balance of 205 hours. The Grievant testified that he was never given a copy of the Attendance Control Program Policy (Emp. Ex. 1B) and although he glances at the Bulletin Board on occasion it is possible that he missed seeing this document. As to properly filling out Form 3971, the Grievant testified that in his three (3) years of employment with the Service, he has executed about seven (7) Form 3971s, and that he has never made an entry under the section titled "Remarks". The Grievant asserted in his testimony that none of his supervisors ever instructed him to fill in the "Remarks" section and that in all instances of submitting Form 3971, his supervisors approved the sick leave taken. The Grievant stated he was not aware of any regulations requiring him to fill in the "Remarks" section of Form 3971 when seeking approval for sick leave purposes. The Grievant also testified he has submitted Form 3971 for other than purposes of sick leave and that on these occasions as well he has never filled in any information under the "Remarks" section.

William Goff, President of Branch 4811, and employed as a Letter Carrier for seven (7) years, testified that when he first filed a Form 3971 for sick leave purposes, he did indicate the medical reasons for the leave under the "Remarks" section, but was instructed by Gramins not to enter this information as it was a violation of the Privacy Act as well as Postal Regulation to do so. Goff testified no one in management ever gave him a copy of the Attendance Control Program Policy (Emp. Ex. 1B), and while he has seen this document, no one ever apprised him that three (3) occurrences of unscheduled absences falling within a six (6) month period was considered to constitute unsatisfactory attendance. Goff related he has no knowledge of any other employee at the Facility having been disciplined for incurring in excess of three unscheduled absences within a period of six (6) months. In other testimony, Goff acknowledged it has been a practice at the Brookfield Facility to post such documents as the Attendance Control Program Policy.

The record evidence reveals the subject grievance was timely filed (September 28, 1982) and that the parties were unable to reach a mutually acceptable resolution of the matter in dispute. The grievance is therefore now before this Arbitrator for a final and binding determination.

CONTENTIONS

EMPLOYER'S POSITION:

The Employer submits there exists an established practice at the Brookfield Postal Facility wherein the occurrence of three (3) unscheduled absences within a six (6) month period warrants a job discussion and that any unscheduled absences in excess of this frequency within the same six (6) month period occasions the commencement of progressive discipline. In view of this established practice, the Employer argues the instant case before the Arbitrator is a clear cut one, in that the Grievant was given a job discussion after having incurred three (3) unscheduled absences over a three (3) month period, specifically between May 14, 1982 and August 17, 1982, and then given the subject Letter of Warning when he incurred a fourth unscheduled absence less than one month after the third occurrence and only one week following the job discussion. In that job discussion the Employer asserts, the Grievant was put on notice of his deficiency in attendance and was specifically warned that disciplinary measures would be imposed if he incurred any further unscheduled absences. The Employer argues that under the established practice at Brookfield, it is not constrained to wait the full six (6) months before imposing discipline where the frequency of unscheduled absences exceeding the standard occurs over a shorter span of time. The Employer argues that the subject Letter of Warning was corrective in nature and not punitive, in that the action alerted the Grievant his attendance was deficient and in turn that his job performance was unsatisfactory per the relevant provisions of the Agreement (Jt. Ex. 1).

The Employer asserts it does not contest its employees' right to sick leave, but maintains that where its use interferes with attendance, it becomes a problem. The Employer argues that under the Management Rights Clause of the Agreement (Jt. Ex. 1), it has the unrestricted right to impose discipline where warranted and that this right is also embodied in its policies, procedures and practices, and has been upheld in many previous arbitration awards. The Employer argues that, with respect to utilizing Restricted Sick Leave as a means of correcting attendance problems such as the one had by the Grievant, it is under no obligation to resort to the procedure of Restricted Sick Leave, but instead has the option to impose progressive discipline pursuant to Article 16 of the Agreement (Jt. Ex. 1), as a means of handling such a problem in a reasonable manner. The Employer asserts that since it guarantees its full-time employees forty (40) hours of employment

per week, it has a right to expect said employees to report to work when scheduled and to be regular in attendance. The Employer maintains that notwithstanding the absenteeism rates cited by the Union, the Union failed to specify what constitutes an unacceptable rate.

With regard to properly filling out Form 3971, the Employer argues that notwithstanding the Union's contention the proper procedure was unknown to the Grievant, the fact of the matter is the procedure is permanently posted on the Bulletin Board and therefore, ignorance of the procedure by the Grievant cannot be grounds for exempting him from his responsibilities.

In sum, the Employer maintains the Grievant was properly warned of his attendance deficiency prior to issuance of the Letter of Warning and that under all the prevailing circumstances, the Letter of Warning was warranted and constituted a proper quantum of discipline. Accordingly, the Employer requests the grievance be denied.

UNION'S POSITION:

The Union notes the Employer's heavy reliance on its Attendance Control Program Policy (Emp. Ex. 1B), as support for the disciplinary action imposed on the Grievant, yet, the Union asserts, this Policy does not explicitly set forth any attendance standard such as the one used by Gramins, specifically, that any occurrence of unscheduled leave in excess of three (3) within a six (6) month period is unacceptable and warrants the invocation of progressive discipline. In fact, the Union submits, there exists no documentary evidence in support of such a standard anywhere and in addition notes that Gramins himself could not recall the source from which he secured such a standard. Furthermore, even assuming arguendo an explicitly stated standard did exist, the Union argues application of such a standard cannot be utilized solely by itself but must be utilized taking into account many considerations such as those set forth by Arbitrator, Sylvester Garrett in Case No. NC-NAT-16, 285, (issued November 19, 1979). On this latter point, the Union argues that when Gramins issued the Grievant the subject Letter of Warning utilizing the alleged standard in question, Gramins did not take into consideration the Grievant's sick leave balance at the time, the reasons for his absences, his previous usage of sick leave, nor utilizing the option of Restricted Sick Leave to correct the alleged attendance deficiency. In fact, notes the Union, Gramins admitted in his testimony that he was not familiar

with Restricted Sick Leave provisions and that such provisions, according to his knowledge, had never been utilized at Brookfield. The Union asserts that the sole purpose of the Restricted Sick Leave procedure is to control and correct attendance problems.

In any event, neither restricted sick leave nor discipline was applicable here, argues the Union, because there was no discernible serious attendance problem that needed correction. The Union notes there was no evidence the Grievant was abusing his sick leave benefits and Gramins so testified he had no cause to suspect any such abuse was taking place. Further, the Union notes, there was no extant unusual pattern of absence incurred by the Grievant anytime prior to the unscheduled absences in question. Additionally, the Union submits, the Grievant's rate of absenteeism due to these unscheduled absences is very low. If the absenteeism rate were to be computed over the time period of five (5) months cited by the Employer, the rate, asserts the Union amounts to four (4) percent. However, if the unscheduled absences are considered over the greater time period between February and September, the rate then amounts to less than two and one-half (2-1/2) percent. Neither of these absenteeism rates, asserts the Union, is any cause for concern especially when compared against rates at other postal facilities as well as the national average.

In addition, argues the Union, employees of the Service earn as an entitlement, a total of thirteen (13) days of sick leave per year and any usage below this amount on an annual basis cannot be construed as excessive. In support of this argument the Union cites the arbitration case, Case AC-S-23, 404 D, rendered by Arbitrator, J. Fred Holly, wherein Holly stated the following:

> "A reasonable conclusion is that the Employer cannot discipline an employee for absences which are <u>legitimately</u> caused by the physical incapacity of an employee up to at least the point where that employee exhausts his/her accumulated Sick Leave benefits, other things being equal. To hold otherwise would make it possible for the Employer to say to an incapacitated employee, 'although you have accumulated Sick Leave available, you cannot use it because to do so would make your attendance unsatisfactory.' Certainly, such a conclusion is not in accord with either the intent or spirit of the negotiated Sick Leave benefits."

The Union notes that at the time the Grievant received the subject Letter of Warning he had accrued sick leave in the amount of 205 hours. This accumulation, the Union notes, was accrued by the Grievant in his brief period of employment of a little less than three (3) years. The Union notes that the very nature of a Letter Carrier's job exposes and subjects the Carrier to the various whims of the weather, ranging from very cold to very hot. Given this exposure, the Union asserts, it is understandable how a Carrier can fall victim to maladies directly related to the elements of nature such as colds and influenza. Thus, the reasons given by the Grievant for his unscheduled absences, left as uncontroverted by the Employer, submits the Union, should be viewed as credible ones, supporting the argument they were legitimate and cannot be construed to be abusive of his sick leave benefits.

Finally, the Union argues, the example posted on the Bulletin Board (Arb. Ex. 1), as to how to properly execute Form 3971, reflects there is no requirement for the employee to fill out any information under the section titled "Remarks". In noting the Grievant left this section blank, the Union asserts, it cannot be maintained by the Employer, the Grievant improperly executed the corresponding Form 3971s associated with the absences in question.

Based on the foregoing arguments, coupled with the Employer's own recognition the Grievant has been a good employee, that is, he does his job and has no previous record of discipline, the Union argues the subject Letter of Warning was not issued for just cause and thus requests the instant grievance be upheld and the Letter to be expunged from the Grievant's record.

OPINION

From the record evidence, the Arbitrator arrives at the following findings: (1) there is no evidentiary support for the Employer's espoused standard that in excess of three (3) occurrences of unscheduled absences within a six (6) month period is sanctioned by any construction of the language set forth in the Attendance Control Program Policy (Emp. Ex. 1B), nor that it is specifically sanctioned by any other policy, procedure or provision contained in handbooks or manuals or in the National Agreement (Jt. Ex. 1); (2) that if such a standard did exist, it cannot be blindly applied to every case uniformly as this would result in an uneven administration of justice; (3) that the reasons for the Grievant's absences must be accepted as legitimate as they were left uncontroverted by the Employer; (4) that absent any previous pattern of abuse, the subject number of absences cannot be construed as excessive; and (5) that according to the permanent posting delineating the proper way in which to fill out Form 3971, the Grievant cannot be found to have improperly executed this document on any of the subject occurrences of unscheduled absences.

With respect to point 1 above, it is clear from a thorough reading of the pertinent sections of the Attendance Control Program dated December 26, 1978 (Emp. Ex. 1B) that while Management has discretion to invoke disciplinary measures to correct for problems of excessive absenteeism, nonetheless, there is nothing in the language of this policy either establishing or setting forth a specific standard such as the one utilized by Supervisor Gramins. This policy merely states that, "excessive absenteeism due to illness could result in disciplinary action up to and including discharge." The Arbitrator construes this language as providing Management a great deal of flexibility in the application of the program in terms of its permitting an option to pursue or not to pursue disciplinary measures and allowing discretion in its judgment as to what constitutes excessive absenteeism. It appears to the Arbitrator that a rigid standard applied uniformly without consideration to unique facts and circumstances on a case by case basis, such as that invoked by Gramins, is the exact antithesis of what was intended by the Employer when it framed the above cited language.

However, absence of an explicit standard, the Arbitrator wishes to emphasize, does not, in any way diminish the Employer's right to impose discipline where warranted or its right to expect its employees to be regular in attendance. In elaboration of this latter point, the Arbitrator deems the key concepts to be, where discipline is warranted and regularity of attendance. The Arbitrator is persuaded from the evidence before him that in the instant case, no discipline was warranted as the evidence supports the Union's position there was no record of excessive absenteeism incurred by the Grievant. This finding is premised and underscored by the fact that the Grievant had accumulated 205 hours of sick leave in his nearly three (3) years of employment, indicating that over this period of time he had used approximatley 100 hours of sick leave, or on average, about 4 days per year. The Arbitrator notes this usage rate is only one-third (1/3) of the total number of sick days earned in one year. The Arbitrator further notes that at the time the Grievant had received the subject Letter of Warning, he had been absent a total of five (5) days due to sickness but in that same period of time had earned 9-1/2 days of sick leave for the year. Additionally, any in-depth review of the Grievant's Absence Analysis Form 3972 (Un. Ex. 1), indicates no discernible pattern of sick leave usage which can, in any way, support an allegation the Grievant was abusing his sick leave entitlement. The Arbitrator is well familiar with Form 3972 having reviewed many of them in connection with attendance and attendance-related grievances and based on his familiarity with other cases, the Arbitrator is persuaded Management's concern over the Grievant's record was at best premature. This supports finding number 2 above that blind administration of a standard can result in an uneven administration of justice, for in the Grievant's particular case he had a history of satisfactory attendance and was by Management's own assessment, a good employee. With no past history of attendance problems, the unsanctioned standard was applied in a vacuum, that is, without considering other pertinent factors heretofore identified, thus resulting in the Grievant receiving discipline to correct a problem which was virtually nonexistent.

As to the Union's argument the Employer in the instant case had an option to place the Grievant on Restricted Sick Leave rather than discipline him, the Arbitrator believes this action would have been inappropriate as Management according to its contentions, did not suspect the Grievant was abusing his sick leave benefits but rather was concerned with his regularity in attendance. With regard to the allegation the Grievant improperly

filled out Form 3971, the Arbitrator is persuaded by the record evidence that this issue is a red herring. The evidence, in particular Arbitrator Exhibit 1, specifically supports and verifies the Union's contention that employees are not required to provide information under the "Remarks" section of Form 3971 for it to be properly executed. In his review of copies of the Form 3971s submitted by the Grievant in connection with the subject absences (Emp. Ex. 2), the Arbitrator determines the Grievant complied with requirements set forth in Arbitrator Exhibit 1, and therefore, he properly executed said forms.

Based on the foregoing discussion, the Arbitrator finds the Employer did not have just cause under all the prevailing facts and circumstances to discipline the Grievant for his perceived deficiencies in attendance. Accordingly, the Arbitrator rules to sustain the instant grievance.

A W A R D

The Arbitrator rules that the Employer did not have just cause to issue the Letter of Warning dated September 15, 1982, to the Grievant, Bruce Robinson, for unsatisfactory attendance. Accordingly, the Arbitrator directs the Employer to rescind and expunge the Letter of Warning from the Grievant's personnel file.

Grievance Sustained.

GEORGE EDWARD LARNEY
Arbitrator

29 South LaSalle Street
Chicago, IL 60603
(312) 444-9565

December 28, 1983

C#09766

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

GRIEVANT: S. Cheshier

POST OFFICE: Los Angeles, CA.

CASE NO: W7N-5D-D 13615

BEFORE: Thomas F. Levak, ARBITRATOR

APPEARANCES:

For the U. S. Postal Service: Marian Taylor

For the Union: Harold Powdrill

Place of Hearing: Los Angeles, CA.

Date of the Hearing: February 2, 1990

AWARD: Removal of the Grievant was not for just cause. Just cause existed for a fourteen-day suspension. Grievant shall immediately be reinstated to her former position with full back pay and benefits, less fourteen calendar days (ten working days) Grievant shall provide the Service with an affidavit setting forth outside earnings since time of her removal to date.

Date of Award: February 10, 1990

Arbitrator

BEFORE THOMAS F. LEVAK, ARBITRATOR

REGULAR WESTERN REGIONAL PANEL

In the Matter of the Grievance Arbitration Between:

U. S. POSTAL SERVICE
THE "SERVICE"

(Los Angeles, CA.)

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO
THE "UNION"

(On behalf of S. Cheshier, the "Grievant")

W7N-5D-D 13615

GTS NO. 13473

DISPUTE AND GRIEVANCE CONCERNING REMOVAL FOR UNSATISFACTORY ATTENDANCE/AWOL

ARBITRATOR'S OPINION AND AWARD

This matter came for hearing before the Arbitrator at 9:00 a.m., February 2, 1990 at the Los Angeles, Californi GMF. The Union was represented by Harold Powdrill and the Service was represented by Marian Taylor. The Grievant, S. Cheshier, testified and appeared through the proceeding. The following witnesses were called by the parties:

Service Witness.

Ruth Cole, Manager, Rimpau Station

Union Witness.

Sylvia Cheshier, the Grievant

Testimony and evidence were received and the hearing was declared closed following oral closing argument. Based upon the evidence and the arguments of the parties, the Arbitrator decides and awards as follows.

OPINION

I. THE CHARGE AND THE ISSUE.

The January 5, 1989 Notice of Removal provides in relevant part:

> You are hereby notified that you will be removed from the Postal Service no earlier than thirty (30) days from the date you

receive this Notice. The reasons for this removal action are:

CHARGE 1 - Absence Without Official Leave (AWOL):

11/29/88	8 hours AWOL
12/15/88	8 hours AWOL No Call
12/28/88 thru 12/29/88	16 hours AWOL
1/3/89 thru 1/4/89	16 hours AWOL

CHARGE 2 -Unsatisfactory Attendance:

11/5/88 thru 11/18/88	80 hours Sick Leave
12/3/88 thru 12/5/88	16 hours Sick Leave
12/16/88 thru 12/23/88	48 hours Emergency Annual Leave

CHARGE 3 - Failure to Report as Scheduled: (0600)

DATE	ACTUAL REPORTING TIME
11/22/88	0620
11/23/88	0750
11/26/88	0845
11/30/88	0725
12/7/88	0640
12/8/88	0872
1/5/89	0884

Previous elements of your past record which were considered prior to taking this action are:

Fourteen (14) Calendar Day Suspension - Absence Without Official Leavel (AWOL) No Call / Unsatisfactory Attendance - Dated, November 8, 1988 - Reduced to Two (2) Working Days.

Fourteen (14) Calendar Day Suspension - Absence Without Official Level (AWOL) No Call/Unsatisfactory Attendance - Dated 9/15/88 Reduced to Two (2) Working Days

Seven (7) Calendar Day Suspension - Absence Without Official Leave (AWOL) No Call - Dated 2/10/88 - Reduced to One (1) Day

Official Letter of Warning - Absence Without Official Leave (AWOL) No Call - Dated 12/31/87

Official Letter of Warning - Absence Without Official Leave (AWOL) No Call - Dated 11/4/87

At the commencement of the arbitration hearing, the parties stipulated that the following issue is to be resolved by the Arbitrator:

> Whether the Notice of Removal was for just cause? If not, what is the appropriate remedy?

II. APPLICABLE ELRM AND POLICY PROVISIONS.

ELRM Subsection 511.4
ELRM Subsection 513.342
ELRM Subsection 666.8

> February 15, 1974
>
> MEMORANDUM FOR: Assistant Regional Postmasters General, Employee and Labor Relations
>
> SUBJECT: Letters of Warning
>
> By memorandum dated November 13, 1973, there was established as USPS policy the utilization of letters of warning in lieu of suspensions of less than five (5) days. This same policy is effective throughout the grievance process where consideration is being given to a reduction in discipline imposed. If a suspension of five (5) days or more is reduced administratively, the reduction should be to a letter of warning rather than a suspension of four (4) days or less, unless such short suspension constitutes an agreed upon settlement of the grievance.
>
> Please review your existing discipline cases to insure that this policy is operative and take the necessary corrective action where necessary to insure compliance.
>
> Sincerely,
>
> Darrell F. Brown.

III. FINDINGS OF FACT.

This case concerns the Rimpau Station of the Los Angeles, California office of the Service. The Grievant became employed by the Service in December 1986 and bid into the Rimpau Station as a letter carrier in mid-1988. At all times relevant, Ruth Cole has served as the Rimpau Station manager. The Grievant's

two immediate supervisors at the Rimpau Station, F. McClinton and C. Nicholson, were no longer on the rolls of the Service at the time of the arbitration hearing and therefore were not available to testify.

Previous Elements of Past Record Cited in the Notice of Removal.

The November 8, 1988 fourteen-day suspension, administratively reduced to a two working-day suspension, was grieved and subsequently heard in regular regional arbitration before Arbitrator James T. Barker on September 19, 1989. On October 23, 1989, Barker issued a written opinion and award holding that the fourteen-day suspension was not issued for just cause, but ratifying the administratively reduced suspension of two working days as an appropriate corrective disciplinary measure. That opinion and award is final and is not subject to collateral attack or review by this Arbitrator.

The fourteen-calendar-day suspension dated June 15, 1988 administratively reduced to two working days was grieved and was subsequently heard by the Arbitrator as a companion case to the instant removal case on February 2, 1990. By separate opinion and award, the Arbitrator concluded that under the terms of the above quoted February 15, 1974 policy letter, the maximum discipline that could be approved in that case is a letter of warning. Accordingly, the Arbitrator changed the two-day suspension to a warning letter.

The remaining previous elements of past record were not challenged by the Union.

IV. EVIDENCE RELATING TO THE CHARGES AGAINST THE GRIEVANT.

Cole prepared the Notice of Removal and testified that she conducted an independent investigation of the facts contained therein, which she testified were true and accurate. Her testimony was both credible and was unrebutted and unrefuted. Thus the truth of the charges was established by the Service.

Discussions and Counseling of the Grievant.

Cole's unrebutted and unrefuted testimony was that she held repeated discussions with the Grievant, as had her subordinate supervisors earlier held repeated discussions with her. She further testified that the Grievant's sole explanation for those absences was claimed illnesses of herself and her son for varying reasons and for reasons such as having slept in, and that the Grievant reported no chronic illness. She also testified that she repeatedly explained to the Grievant her responsibility to call in when tardy. She noted that the Grievant claimed that she had called in once when tardy but because her supervisor was nasty, she stopped calling in. Cole also noted that she referred the Grievant to EAP in an attempt to rectify the situation.

The Grievant was never placed on restricted sick leave.

V. SERVICE CONTENTIONS.

The Service has established that just cause existed for the Grievant's removal. The Grievant established a truly horrendous attendance record during her very short period of employment. She had a total of two hundred sixty-three hours unscheduled leave, which included sick leave, emergency leave and AWOL's. Further, she used up all of her one hundred-four hours per year of sick leave.

The Grievant was treated pursuant to principles of corrective discipline. Two fourteen-day suspensions, reduced to two-day suspensions, were issued prior to the Grievant's removal.

The validity of any of the Grievant's excuses is not an issue. It is well-established in both the private and public sectors that an employee who is guilty of excessive absenteeism may be discharged, even though some of the absences may be excused due to bona fide illness.

VI. UNION CONTENTIONS.

The Union has established both a lack of just cause and a lack of progressive discipline as required by Article 16.

The Grievant should not have been disciplined for using sick leave. It violates principles of just cause to discipline an employee for using sick leave, a contractually guaranteed benefit.

The February 15, 1974 policy of the Service was not followed. Had that policy been cited to Arbitrator Barker, the two-day suspension would have been reduced to a warning letter.

It was improper for the Service to cite the September 15, 1988 fourteen calendar-day suspension in the Notice of Removal since that suspension had been challenged through the grievance procedure.

VII. ARBITRATOR'S CONCLUSION.

The Arbitrator concludes that the Service has failed to establish by a preponderance of the evidence that the Grievant's removal was for just cause. Accordingly, the grievance will be sustained. The following is the reasoning of the Arbitrator.

This case turns on the contractually agreed upon requirement of Article 16 that discipline within the Service be progressive and corrective in nature. However, before dealing with that

point, the Arbitrator feels it is appropriate to comment on two secondary issues.

The first secondary issue concerns the propriety of citing a grievance challenged suspension as an element of past record. The Arbitrator has held in previous cases that there is nothing improper about so citing such a past element. In doing so, however, the Service simply assumes the risk that the grieved previous element will not be ratified in arbitration or will remain unresolved at the time the removal arbitration is heard. As will be discussed more below in detail, in the instant case that assumption of risk has worked to the detriment of the Service.

The second subsidiary issue concerns the propriety of basing discipline in part upon excused leave. It is well-established by Service arbitrators that the Service may support a charge of unsatisfactory attendance by citing excused leaves such as contractually guaranteed sick leave or EAL. The fact that such leaves are contractually guaranteed does not mitigate against the requirement of an employee to be regular in attendance.

Returning to the crux of this case, the real problem with the Service's position is that it moved directly from a two working-day suspension to removal without imposing either an intervening seven-day suspension or an intervening fourteen-day suspension. Inexplicably, the Service also never placed the Grievant on restricted sick leave. The failure of the Service to impose and stick with the fourteen-day suspensions necessarily had the effect of failing to effectively convey to the Grievant the fact that the next series of infractions would result in her removal. Such conveyance and notice is the most important element of the progressive and corrective discipline standard.

What the Service conveyed to the Grievant in this case was that she was guilty of no offense necessitating more than a two working-day suspension, and that a continuance of her record without improvement would lead only to a more lengthy suspension.

It must be stressed that the decision to reduce the two fourteen-day suspensions to two two-day suspensions were unilateral administrative decisions by the Service, and were not the product of grievance procedure compromise and settlement. Therefore, it must be conclusively presumed by the Arbitrator (as it must have been assumed by the Grievant) that the reduced level was considered to be the appropriate level of discipline given her entire record.

As above noted, when the Service proceeded to arbitration in this case without the propriety of the September 15, 1988 two-day suspension having been finally adjudicated, it proceeded at its own risk. In the companion case to this case, the Arbitrator held by separate opinion and award that under the terms of the February 15, 1974 policy letter, whenever suspensions of five days or more are reduced administratively, the suspension must be

to a letter of warning rather than a suspension of four days or less, unless the reduced suspension constitutes an agreed upon settlement of the grievance. It should also be noted that on October 23, 1989, Regular Regional Arbitrator James T. Barker issued an opinion and award holding that the November 8, 1988 fourteen calendar-day suspension was not issued for just cause, and he ratified only the two working-day reduced suspension as an appropriate corrective disciplinary measure. Thus, for purposes of this removal arbitration, the Grievant's pre-removal disciplinary record now reads as follows:

November 4, 1987	Warning Letter AWOL
December 31, 1987	Warning Letter AWOL
February 10, 1988	One-Day Suspension AWOL
September 15, 1988	Warning Letter AWOL/ Unsatisfactory Attendance
November 8, 1988	Two-Day Suspension AWOL/ Unsatisfactory Attendance

Therefore, we have here the case of an employee with a substantiated disciplinary record from November 1987 through November 1988 containing nothing more than three warning letters, a one-day suspension and a two-day suspension. (Indeed, if it were proper to review Barker's opinion and award, the November 8, 1988 two-day suspension would likely be modified to a warning letter.) It seems beyond dispute that moving from that disciplinary record directly to removal, and without either an intervening seven-day suspension or a fourteen-day suspension, violates the corrective/progressive mandate of Article 16.

The Arbitrator would further note that during the thirty days following the November 8, 1988 suspension, the Grievant amassed infractions sufficient to justify a seven-day or fourteen-day suspension. Similarly, in the following thirty days, a similar lengthy suspension could have been issued. Also, during the same sixty-day period of time, the Grievant could have been placed on restricted sick leave. Had such disciplinary action and adminstrative action been taken by the Service, the Grievant would have been placed on notice that her job truly was in jeopardy.

The Service's argument in this case is that the Grievant's attendance record simply was so terrible that she had to have understood that her job was in jeopardy. Such inference cannot be allowed because of the express mandate of Article 16. Under that article, the Grievant is entitled to increasingly severe progressive notice that further offenses will subject her to removal. Administrative reductions of fourteen-day suspensions to two-day suspensions can only lead an employee to believe both that the offense was not as serious as she was initially led to believe and that the next offense would lead to a penalty less severe than removal. Certainly, the dual reductions in the instant case msut be concluded to have had that effect.

Thus, under the facts of this case, the maximum penalty that

can been sustained is a fourteen calendar-day suspension. This Opinion and Award shall serve as notice to the Grievant that a lack of substantial improvement in her unsatisfactory attendance and/or AWOL record will subject her to removal.

AWARD

The removal of the Grievant was not for just cause. Just cause existed for a fourteen calendar-day suspension. The Grievant shall be immediately reinstated to her former position with full back pay and benefits, less fourteen (14) calendar days (ten (10) working days).

The Grievant shall provide the Service with an affidavit setting forth her outside earnings since the time of her removal to date. The Arbitrator retains jurisdiction of this case solely to resolve any dispute concerning the amount of back pay or benefits to the Grievant.

DATED this 14 day of February, 1990,

Thomas F. Levak, Arbitrator.

C#14107

REGULAR REGIONAL ARBITRATION PANEL

In the Matter of the Arbitration	)	
between	)	Grievant : Carol Wentworth
	)	Case No : H90N-4H-D94068273
UNITED STATES POSTAL SERVICE	)	GTS No : 023166
and	)	POST OFFICE : Miami, Florida
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)	

BEFORE : Mark I. Lurie, Arbitrator

APPEARANCES

For the U.S. Postal Service : Daniel Smith
For the Union : William Burroughs

Place of Hearing : United States Post Office G.M.F.
: Miami, Florida

Date of Hearing : November 8, 1994

AWARD

The grievance is sustained. The Grievant is to be reinstated and made whole of all wages and benefits.

November 27, 1994

Mark I. Lurie
Arbitrator

REGULAR REGIONAL ARBITRATION PANEL DECISION AND AWARD

In the Matter of the Arbitration	)	
between	)	Grievant : Carol Wentworth
	)	Case No : H90N-4H-D94068273
UNITED STATES POSTAL SERVICE	)	GTS No : 023166
and	)	POST OFFICE : Miami, Florida
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)	

BEFORE : Mark I. Lurie, Arbitrator

APPEARANCES

For the U.S. Postal Service : Daniel Smith
For the Union : William Burroughs

ISSUE

The issue, as stipulated by the parties, is whether the removal of the Grievant was for just cause and, if not, what the remedy should be.

FACTS

The Grievant, Carol Wentworth, was absent due to illness on the following dates, for which she used the types of leave indicated:

Date	Duration	Leave
February 15, 1994	2.02 hours	sick leave
February 25, 1994	8.00 hours	sick leave
March 19-29, 1994	64.00 hours	sick leave/LWOP

All of the dates between the Grievant's absences on February 15th and February 25th were either nonscheduled days, a holiday, or were claimed by the Grievant as annual leave. Her absence from March 19 to 29, 1994 was due to degenerative joint disease, for which the Grievant obtained treatment from a medical doctor. The Grievant telephoned her supervisor, Ms. Christina Norman, on Saturday, March 19th, and informed her that she had displaced her hip joint, and that she would be absent for a number of days. At the time, the Grievant did not request leave under the FAMILY AND MEDICAL LEAVE ACT OF 1993. (The Act will be discussed at length below.) That same day, Supervisor Norman completed and signed a Form 3971 - Request for or Notification of Absence - pertaining to the Grievant's absence. Supervisor Norman made no entry in the "Remarks" space on the Form 3971.

Upon returning to work on March 31, 1994 (or shortly after returning), the Grievant furnished a statement from her physician which stated that the Grievant was "unable to work from 3-19-94 to 3-31-94 DX: Degenerative Joint Disease." A second document from her doctor stated "Patient may return to work on 3-31-94 to 4-9-94 Work for Four Hrs and Full Duty pm 4-11-94."

The Grievant was issued a Notice of Removal dated April 29, 1994, for failure to be regular in attendance. The Notice cited 3 prior disciplinary elements, all for failure to be regular in attendance:

April 27, 1992	Letter of Warning
November 25, 1992	14-Day Suspension (also for AWOL)
November 16, 1993	14-Day Suspension

In the Step 2 Decision, Management noted that one of the contentions raised by the Union was that the Grievant had failed to request "family leave" because the Service had failed to publish or otherwise advise the Grievant of her rights under the FAMILY AND MEDICAL LEAVE ACT OF 1993, or of the formal procedures which she was required to follow in order to avail herself of the benefits of the Act.

The FAMILY AND MEDICAL LEAVE ACT OF 1993 (hereinafter referred to as the "FMLA", or the "Act") is federal legislation which took effect in August 1993. The FMLA requires employers of more than 50 persons, such as the Postal Service, to provide eligible employees[1] with up to 12 weeks of job-protected leave in any single leave year for certain family and medical reasons, including a "serious health condition"[2] which renders the employee unable to perform the functions of her position. In the case of the Postal Service, this job-protected leave can be taken in the form of the three traditional types of leave: annual leave, sick leave, or leave without pay. The rights and restrictions on the accrual and use of the traditional forms of leave has not changed by reason of the Act; the Act simply assures (among other things) that the employee will not lose her job or her benefits of employment if she uses up to 12 weeks of leave in any year for the qualifying purposes.[3] Upon returning from FMLA leave, an employee must

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1. To be qualified, an employee must have worked for the Service for at least 1 year, and have worked for 1,250 hours over the previous 12 months.

2. Part 515 of the Employee and Labor Relations Manual (the "ELM") was amended to comport with the FMLA. Part 515.2*d* defines a "serious health condition" as (among other things) an illness, impairment, or physical or mental condition that involves...
   "Any period of incapacity requiring absence from work or regular daily activities of more than 3 calendar days, that also involves continuing treatment by (or under the supervision of) a health care provider."

3. Part 515.42 of the ELM states
   "Absences approved under this section [the FMLA] are charged as annual leave, sick leave, or leave without pay, or a combination of these. Leave is charged consistent with current leave policies and applicable collective bargaining agreements. Approving officials should note 'FMLA' in the approval block of the Form 3971, Request for or Notification of Absence."
   [Underlining added]

generally be restored to her original (or equivalent) position, with equivalent pay, benefits and employment terms.[4] In this regard, the Act supplants the discretion which Management had previously been invested to discipline absences covered by the Act.[5]

Under Part 515.51 of the ELM, in order to claim job-protection leave under the FMLA, the employee is required to file a Form 3971, Request for or Notification of Absence, "as soon as practicable". If the Form 3971 is not submitted initially, timely verbal notification is allowed.[6]

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4. As described in a Postal Bulletin on the subject, entitled "YOUR RIGHTS under the FAMILY AND MEDICAL LEAVE ACT OF 1993",

> VI. Return to Duty
> At the end of your leave, you will be returned to the same position you held when the absence began (or a position equivalent to it), provided you are able to perform the functions of the position and would have held that position at the time you returned if you had not taken the time off.

5. In a letter to all Postal employees dated February, 1993, Postmaster Marvin Runyan stated, in part,
> "Managers in the Postal Service have had the authority to grant paid or unpaid leave for a variety of reasons, but this new bill formalizes what had been a discretionary policy regarding family leave situations. The Postal Service has supported the bill as good and sound legislation, and we will implement it vigorously."

6. Part 515.51 of the ELM states, in part
> "An employee must provide a Form 3971, *Request for or Notification of Absence*, together with documentation supporting the request... as soon as practicable. Ordinarily at least verbal notification should be given within 1 or 2 business days of when the need for leave becomes known to the employee. The employee will be provided with a notice detailing the specific expectations and obligations and consequences of a failure to meet these obligations. ..."

POSTAL SERVICE EMPLOYEES' ABSENCES UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993, QUESTIONS AND ANSWERS (Q&A)

Q. How do I apply for family leave?

A. Submit a form PS 3971, Request for or Notification of Absence, with the supporting documentation. Family leave is not a separate type of leave, so you apply for annual or sick leave or LWOP as appropriate the same as you have applied for leave before. Just as in the past, in emergency situations a phone call, telegram, etc. will suffice until it is possible for you to submit the necessary paperwork.

Memorandum dated June 22, 1994 from the Chief Field Counsel for the Law Department of the U.S.P.S. Mid-Atlantic Office, on the subject of "Questions and Answers on the Family and Medical Leave Act", (hereinafter, "***The Chief Counsel's Memorandum***").

Q. If an employee requests leave for a condition covered by FML, what information must the supervisor provide to the employee?

A. The approved PS 3971 with whether or not the leave will be considered FML noted..., any requirement for the employee to furnish additional medical certification, and a copy of Publication 71.

Family leave need not be expressly requested by the employee, either on the Form 3971 or verbally.[7] However, to obtain the protection of the FMLA, the employee must disclose the cause of her absence, and that cause must be one which Management reasonably concludes is covered by the FMLA. If Management does so conclude, then Management is obligated to treat the leave as FMLA leave.[8]

7. *POSTAL SERVICE EMPLOYEES' ABSENCES UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993, QUESTIONS AND ANSWERS (Q&A)*

Q. Do I have to request family leave if I need time off for a covered condition?

A. No, however, if you request leave without specifying that it is for a covered condition, the leave may be denied, consistent with collective bargaining agreements and policies.

The Chief Counsel's Memorandum

Q. If an employee is off with an illness... and does not request FML for the absence, is he entitled to [additional FML leave]?

A. The supervisor would have placed FMLA in the approval block of the PS 3971 whether the employee requested FMLA or not. ... [Underlining added]

Q. Must the employee state the leave is FML?

A. No, leave requested for a covered condition is part of the 12 workweeks provided by the FML policy. When an employee requests leave for a covered condition, the supervisor should note "FMLA" in the request form's approval block, and give the employee a copy of Publication 71.

8. *The Chief Counsel's Memorandum*

Q. Must the employee designate as FMLA leave, leave taken which qualifies as FML, but was not requested or designated as such by the employee, i.e... is the employer REQUIRED to tell the employee he or she should take the leave as FMLA?

A. ... When leave is requested for a covered condition, whether or not FML is specified by the employee, the supervisor should mark FMLA in the PS 3971 approval block and give the employee a copy of Publication 71.

Q. What can be done about employees annotating all requests for leave "FMLA" on PS Form 3971?

A. Whether or not the employee requests FML... makes little difference, it is up to the supervisor to determine if the leave qualifies or not, and to so note on the PS 3971. [Underlining added]

Once the employee makes it known that her absence pertains to a covered condition, Management is required to inform the employee that she may take the leave under the auspices of the FMLA, by furnishing the employee with a written notice of her rights and obligations under the Act.[9] (See also footnote 8, the first question and answer.) No such notation was made on the Grievant's Form 3971, and no such notice was issued to the Grievant. Supervisor Norman, who issued the Notice of Removal and who would have been the person to have furnished the Grievant with any such FMLA notice, testified that she was unfamiliar with the requirement to issue such a notice, and indeed was unaware of the existence of any such written form of notice.

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9. *POSTAL SERVICE EMPLOYEES' ABSENCES UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993, QUESTIONS AND ANSWERS (Q&A)*

Q. How will I know if the requested leave is chargeable against the 12 week entitlement under the Family and Medical Leave Act?

A. When you indicate the request is for one of the conditions covered by the Family and Medical Leave Act, you will be provided a notice of expectations and employee obligations. If the leave is approved as one of the covered conditions, the approving official will note "FMLA" in the approved block of the form 3971. [Underlining added]

The Chief Counsel's Memorandum

Q. If an employee requests leave for a condition covered by FML, what information must the supervisor provide to the employee?

A. The approved PS 3971 with whether or not the leave will be considered FML noted..., any requirement for the employee to furnish additional medical certification, and a copy of Publication 71.

To be protected leave under the FMLA, the employee must timely inform Management of her medical condition, and that condition must be one which Management reasonably concludes is a "serious health condition" covered by the Act. The Employee may not claim sick leave generally, and then subsequently reveal the nature of her condition, in the hope of obtaining retroactive coverage under the FMLA.[10]

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10. *The Chief Counsel's Memorandum*
Q. If an employee has simply applied for sick leave and then was diagnosed as having bronchitis and referred to another doctor, may the employee request to have the first one or two visits retroactively classified as FMLA leave?

A. Leave cannot be retroactively designated as FMLA leave after the leave is concluded.

RELEVANT PROVISIONS OF THE AGREEMENT

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. [ ]

THE UNION'S POSITION

Since all of the dates between the Grievant's absence on February 15th and her absence on February 25th were either nonscheduled days, a holiday, or were claimed by the Grievant as annual leave, her absence between those dates was uninterrupted, and constituted a single absence of 10-days' duration, rather than 2 separate events of absenteeism, as it was viewed by Management. Her absences were for genuine illnesses, and did not warrant her removal.

Management was required, under Part 515.9 of the ELM, to post a notice setting forth employees' rights and obligations under the FMLA:

> "**Family Leave Poster.** All postal facilities including stations and branches, are required to conspicuously display Poster 43, *Your Rights Under the Family and Medical Leave Act of 1993.* It must be posted, and remain posted, on bulletin boards where it can be seen readily by employees and applicants for employment."

The Postal Service failed to conspicuously display the document, with the result that the Grievant remained ignorant of her rights under the Act until after she had returned to work, and coincidentally learned of the enactment of the Act in reading a magazine (unrelated to the Postal Service). In fact, Management kept both the employees and their supervisors ignorant of their rights and responsibilities under the Act, as indicated by the fact that Supervisor Norman was unaware of her obligation to issue a written notice to employees claiming leave under the FMLA and, indeed, testified that she had never seen any such

notice. The Grievant's illness was one which was covered by the Act, and the issuance to her of the Notice of Removal was in violation thereof.

THE SERVICE'S POSITION

The Postal Service can not survive in a competitive environment if its employees are not regular in attendance. The Grievant was issued progressively more severe discipline for unsatisfactory attendance, but nonetheless failed to rehabilitate. Her unreliability contravened Parts 511 and 666 of the Employee and Labor Relations Manual:

> 511.43 Employees are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absences. In addition, employees must provide acceptable evidence for absences when required.
>
> 666.8 Attendance
> 666.81 Requirement for Attendance
> Employees are required to be regular in attendance.

These provisions of the ELM are incorporated into the National Agreement through Article 19.

Under Part 515.51 of the ELM (see above), the Grievant's leave from March 19-29 would have been protected by the FMLA only if she had expressly requested FMLA leave prospectively, i.e. before taking the leave for which FMLA protection was claimed. She did not do so and, in fact, she did not assert any FMLA rights prior to Step 2 of this grievance. Leave cannot be retroactively designated as FMLA-protected, after the leave is concluded. The Grievant's leave was therefore not protected by the FMLA. Furthermore, no evidence was presented to show that the Grievant met the criteria for qualifying for family leave.

The Union's claim that the Postal Service failed to post the FMLA bulletin and otherwise publicize employees' rights under the Act through March, 1994 is an affirmative defense, for which the Union had the burden of proof. The claim was not proven. The Grievant failed to timely

exercise FMLA rights she might have had with respect to her March 19-29 absence, and the Union has not shown that this failure was caused by any act or omission of the Service.

DECISION

The Service's contention that the Grievant failed to timely request FMLA is misguided. Under the FMLA, the Grievant was not required to request FMLA leave, but rather to timely advise her supervisor, Ms. Norman, of her medical condition. It was then the obligation of Supervisor Norman [1] to determine whether that condition was a "serious health condition" covered by the Act and, if so, [2] to note the fact on the Grievant's Form 3971, [3] to furnish the Grievant with written notification of her rights and responsibilities under the Act, and [4] to advise the Grievant as to any medical documentation that would be required. The Arbitrator finds that the Grievant did advise Supervisor Norman of her condition at the start of her leave on March 19, 1994; that, at the time, Supervisor Norman was unaware of the requirements imposed upon her by the Act; and that, consequently, Supervisor Norman failed to determine whether the Grievant's condition was covered under the Act.

The Arbitrator finds that the Grievant's condition was a "serious health condition" covered by the Act, inasmuch as it involved a physical impairment which required her absence from work for more than 3 days, and which involved continuing treatment by her physician. Supervisor Norman therefore violated the Act by failing to note "FMLA" on the Form 3971 she prepared for the Grievant, and by failing to furnish the Grievant with both written notice of her rights and obligations under the act, and any medical documentation which might be required of her.

Because the Grievant's absence was protected leave under the provisions of the FMLA, the reliance upon that leave as the basis for her removal from the Postal Service was in violation of the Act, and is void, as a contravention of public policy and the laws of this Country. The citation

of that leave was also a violation of Article 19 of the Agreement, inasmuch as the Act has been expressly endorsed by the Postal Service, and integrated into its handbooks and manuals.

In the past, this Arbitrator has often been called upon to determine whether an employee's attendance record has been just cause for his/her termination of employment. In those cases, I have judged Management's actions in the context of the impact of the employee's attendance upon the operational effectiveness of the Service, the discipline historically applied to other employees under like circumstances, the degree and frequency of the employee's recidivism and the duration of his/her absences, and mitigating circumstance, such as the employee's work record and length of service. Inasmuch as these cases have all involved fewer than 12 weeks absence in a 12-month period, it is clear that, in the future, for absences covered by the Act, these criteria will be irrelevant, replaced by [1] the absolute standard imposed by the Act, and [2] the factual questions of whether the employee's condition is covered by the Act, and whether the technical requirements of the Act have been complied with. As a national priority, family and medical leave, to the extent prescribed by the Act, has been given priority over the operational requirements of employers, including the Postal Service. As observed by Postmaster Runyan, and previously noted in this decision

> "Managers in the Postal Service have had the authority to grant paid or unpaid leave for a variety of reasons, but this new bill formalizes what had been a discretionary policy regarding family leave situations. The Postal Service has supported the bill as good and sound legislation, and we will implement it vigorously."

In the present case, the Service failed to adhere to the provisions of the Act, and the Grievant was wrongly denied the protection afforded by it. In view of this holding, the Union's arguments that the Grievant's leave on February 15th and 25 constituted a single absence, and that the Service violated Part 515.9 of the ELM by failing to post Poster 43 - *Your Rights Under the Family and Medical Leave Act of 1993* - are moot.

AWARD

The grievance is sustained. The Grievant is to be reinstated and made whole of all wages and benefits.

November 27, 1994

Mark I. Lurie
Arbitrator

C#16237

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

GRIEVANT: L. Davie

POST OFFICE: Sacramento

CASE NO: F94N-4F-D 96 073659

NALC: MO27-96D

BEFORE: Nancy Hutt, Arbitrator

APPEARANCES:

For the Postal Service: Robin George, Labor Relations Specialist, Sacramento, CA

For the Union: Alan J. Apfelbaum, Regional Administrative Asst., NALC, Santa Ana, CA

Place of Hearing: Sacramento, 3775 Industrial Blvd., West Sacramento, CA 95799

Date of Hearing: November 15, 1996

AWARD: The grievance is sustained. The Arbitrator concludes after review of the evidence the Employer did not have just cause to remove Grievant. Grievant shall be reinstated with full back pay and benefits, less thirty (30) work days, which represents a disciplinary suspension.

Date of Award: December 31, 1996

Nancy Hutt

STATEMENT Of THE CASE

This dispute involves a removal for irregular attendance. The parties agreed the matter is properly before the Arbitrator for resolution. At the arbitration hearing the Grievant was fully and fairly represented by the Union, was present throughout the hearing, and testified in her own behalf. Following presentation of the evidence by both parties, the matter was submitted to the Arbitrator upon oral argument at the close of the hearing, pending submission of several arbitration awards by the Union.

FACTS OF THE CASE

This case involves the removal of a letter carrier effective June 14, 1996, for irregular attendance. The Grievant was charged with the following absences:

January 2, 1996	.22 hours	Tardy *
February 22, 1996	.09 hours	Tardy *
February 26, 1996	8 hours	Emergency Annual Leave *
April 27, 1996	.15 hours	Tardy *
May 2, 1996	.15 hours	Tardy *

* In conjunction with scheduled day off. The Employer charged Grievant with a violation of Section 511.43 and Section 666.81 of the Employee and Labor Relations Manual which states employees are expected to maintain their assigned schedule and required to be regular in attendance.

The Notice listed elements of Grievant's past record which included:

December 15, 1994 Notice of Fourteen Calendar Day Suspension, Irregular Attendance (Parties agreed later reduced to ten day suspension)

August 15, 1994 Two Calendar Day Suspension, Irregular Attendance

February 16, 1994 Letter of Warning, Irregular Attendance

Essentially, there is no factual dispute as to the times as set forth in the Notice.

Grievant was charged with four incidents of tardy between January 2 and May 2, 1996. Grievant testified if an employee was .08 or less hours late, it was not considered a tardy whereas any time over .08 was considered a tardy. One incident was .09 hours tardy. Grievant testified she was involved in a car accident on February 26 and was never asked for documentation. The parties stipulated the 8 hours of emergency annual leave was granted by the Employer.

The Grievant testified that she was, until recently, a single parent with two children and no help. Sometimes in the morning she was delayed and felt frustrated. On the morning she was eight minutes late, May 2, Grievant did call in to inform her supervisor she would be late and asked if she would get in trouble. Out of frustration, Grievant commented perhaps she should not come to work knowing the consequences. Grievant acknowledged she had an

attendance problem.

Supervisor Common, who was promoted to her supervisory position the month prior to the issuance of the removal notice to Grievant, testified on May 2 Grievant called to inform the Service she would be late. Common stated that Grievant complained if she was going to get in trouble anyway she would not come in at all and enjoy the day off. This threw up a red flag to Common who went to review Grievant's past elements. Grievant was eight (8) minutes late that day and soon after her arrival, Commons met with Grievant and a Union Steward.

Common testified she told Grievant it was an investigatory interview that could result in discipline. Grievant testified she was never informed it was an investigatory interview, but that Common approached her and said I want to talk to you. The contemporaneous note prepared by Common indicated she asked Grievant for an explanation about her four tardies and one EAL and cautioned her about her attendance. Grievant explained that Commons made reference to her attendance, but never asked Grievant anything about her attendance in general.

On the same day Manager Sumpter approached Grievant and handed her a Form 3971 to sign. Grievant signed it. Soon after, the Manager approached again and handed Grievant a Form 3971 to which Grievant responded that she had just signed it. The Manager responded the first form signed was for January and the second form was for that day, May 2, 1996. Grievant was curious because it is

normal procedure to sign the form that day, but gave it no more thought until she received the removal notice.

Grievant testified she was on limited duty and felt as if the Employer was trying to get rid of her. As an example, Grievant testified she took a key home from work inadvertently and received a letter of warning. According to Grievant, and unrebutted, other employees had been called and told to return the key and were not disciplined for their action.

According to Supervisor Common, the generally accepted guideline at Metro Station is up to 10 unscheduled absences a year, but that it depends on the circumstances. Common affirmed that Grievant had three unscheduled absences the first quarter and two unscheduled absences the second quarter of 1996, which included the four tardies. When asked if Common took into consideration a car accident when reviewing Form 3971s, Common stated it depended on the record of the employee. Common was not in the unit at the time of Grievant's accident and had no knowledge concerning the circumstances. Common testified she did not consider the car accident regarding Grievant on February 26 when it was included in the removal notice. All in all, Common testified that Grievant had "very unsatisfactory attendance", and that progressive discipline had been applied.

The Manager of Customer Services, Sumpter, concurred with the removal of Grievant. He testified progressive discipline had been applied and she had not reached a satisfactory level of attendance.

The Manager stated he reviewed the 3971s, the 3972s back to 1993, and prior discipline, including the fact that Grievant was unable to comply with the agreement that had placed her fourteen day suspension in abeyance and then reissued. Sumpter agreed that another employee in the office had been treated differently than Grievant regarding his attendance difficulties and offered no explanation.

The Manager was questioned about why the write up of the original "investigatory interview" did not state so across the top of the document, while the copy provided the Union did. The Union suggested that the Employer doctored the document and the meeting was actually a discussion. The Union based this assertion on the fact that Commons checked off on the informal "Supervisor Worksheet for Discipline" that the employee was forewarned by discussion on May 2, 1996. There is no box for investigatory interview and Commons noted it was a work sheet only. The Manager responded that he just signified what it was across the top when he placed it in the discipline package, but it was stated in the body of the document that it was an investigatory interview. The body of the contemporaneous note supports the testimony of the Employer.

Shop Steward Tyree testified in early 1995 there was a stand-up talk on attendance wherein the carriers were notified if there were more than two absences per quarter that management would have a discussion with the offender. He had no memory of the Employer disciplining anyone who had no more than two in a quarter.

Although the Steward agreed that Grievant had not lived up to the agreement concerning her fourteen day suspension, he firmly believed the tardiness was simply not severe enough for removal. Moreover, through the testimony of Tyree, 3972s of a few other employees and the discipline imposed were compared to the record of Grievant. The Union demonstrated that an employee with a similar record received less discipline (for example, a thirty day suspension rather than removal for a worse record). The other documentary evidence raised questions as to how discipline was imposed.

POSITION OF POSTAL SERVICE

The Employer contends there was just cause to remove the Grievant based on her irregular attendance record. The Employer argues that reasonable corrective steps were taken to place Grievant on notice that the consequences of her irregular attendance may be removal. Essentially, the position of the Service is the only alternative was removal of the Grievant to promote the efficiency of the Postal Service.

POSITION OF THE UNION

The Union contends the record of Grievant does not rise to the level of just cause for removal and the discipline issued was not progressive nor corrective in violation of the Agreement. Rather, the Union believes the four tardies cited are a tardiness issue

which represents minor infractions and should not be confused with Grievant's past elements of absenteeism. The Union suggests the so called "Investigatory Interview" was actually a discussion and that Grievant was not provided due process. Finally, the Union contends that Grievant was treated disparately and the Employer jumped at the opportunity to remove her.

STIPULATED ISSUE

The parties stipulated at the hearing that the issue before the arbitrator is as follows:

Was the grievant removed for just cause? If not, what is the appropriate remedy?

DISCUSSION

The Arbitrator concludes the Employer failed to establish that the removal of the Grievant was for just cause. The imposed punishment of removal based on the documentary evidence and testimony of record was not corrective in nature and applied in a disparate manner. There was no dispute about Grievant's unscheduled absences and no doubt that Grievant must comply with the requirements of regular attendance to maintain her status as an employee of the Postal Service.

The Grievant was charged and removed for irregular attendance. The Grievant did not deny the incidents set forth in the notice concerning her tardies and emergency annual leave. Evidence put

forth by the Union and the Employer established that Grievant was indeed tardy four times for a total of .61 hours and was granted emergency annual leave for 8 hours. In fact, the Grievant admitted that she had an attendance problem which she was working to correct. The Grievant offered her personal home circumstances as an excuse for her delays in arriving work at her scheduled time. The personal situation of Grievant, although certainly understandable, is not a persuasive justification for irregular attendance.

The real crux of this grievance is the subject of corrective verses punitive discipline. The Employer maintained that Grievant's attendance was unacceptable and that all means to regulate her attendance had previously been attempted to no avail. The Union argues that Grievant's absences during the first two quarters do not rise to the ultimate and final action of removal. Article 16, Discipline Procedure, of the Agreement states the "basic principle shall be that discipline should be corrective in nature, rather than punitive." The record of progressive discipline speaks for itself: a letter of warning, followed by a seven day suspension, and finally a ten day suspension. Grievant's absentee record is not commendable and certainly she was aware of her steady progress towards removal if she did not clean up her work schedule and become a dependable employee. However, the record contains no information that Grievant was advised the next step was removal or that removal follows a ten day suspension after

4 tardies and one EAL considering the articulated office policy.

The penalty of removal was not a reasonable reaction to the cited offenses in the Notice of Removal considering the evidence presented during the hearing. First, there was unrebutted testimony the generally accepted unscheduled absences at Metro Station was 10 per year and\or two unscheduled absences each quarter. It was not logical or rational, even in view of the prior record of Grievant, for her to be on notice that removal was pending. It appears as if the Employer simply lost faith that Grievant could rehabilitate or at least be given the maximum chance to do so before the serious removal action was taken. In fact, it is unclear as to whether Grievant responded to prior discipline as her attendance record shows minimal improvement. However, based on the expectations and apparent rules of the station, removal was a rather severe step. The Employer was not persuasive that it had fulfilled the intent of Article 16 of imposing corrective discipline.

The Union also argues convincingly that Grievant received disparate treatment. The Union established through unrebutted evidence at least one other employee, with a similar past record, received a thirty day suspension for a worse absentee record than Grievant. The Employer admitted the other employee was treated differently and offered no mitigating or aggravating circumstances to justify the disparate treatment. Moreover, there was unrebutted testimony that two other employees were not removed for similar

records and conduct. Based on this record, the Employer did not impose discipline in a consistent manner for similar conduct. However, the long standing absentee issue surrounding the employment of Grievant is serious and does justify significant disciplinary action.

AWARD

The Arbitrator concludes after review of the evidence the Employer did not have just cause to remove Grievant. Grievant shall be reinstated with full back pay and benefits, less thirty (30) work days, which shall represents a disciplinary suspension.

Nancy Hitt

December 31, 1996

C #16970

REGULAR ARBITRATION AWARD

In the Matter of the Arbitration	**GRIEVANT: Nancy Vaughan**
between	**POST OFFICE: Lewiston, Idaho**
UNITED STATES POSTAL SERVICE	**CASE NO: E90N-4E-D95015396** **NALC CASE NO: CF-94-16**
and	
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	

BEFORE: Donald E. Olson, Jr.

APPEARANCES:

For the U.S. Postal Service: Mr. Mitchell J. Hicks, Senior Labor Relations Specialist

For the NALC: Mr. Paul L. Price, Regional Administrative Assistant Pacific Northwest Region

Place of Hearing: Lewiston, Idaho

Dates of Hearing: October 3, 1996 and March 27, 1997

AWARD: The grievance is sustained. The Employer shall rescind the Notice of Suspension issued to the Grievant on October 27, 1994, and purge copies of same from appropriate records, including the Grievant's personnel file. The Employer is directed to make the Grievant whole for any lost wages, plns interest at the Federal Judgment Rate.

Date of Award: June 24, 1997

Donald E. Olson, Jr., Arbitrator

OPINION OF THE ARBITRATOR

PROCEDURAL MATTERS

This matter was conducted in accordance with Article 15 - GRIEVANCE - ARBITRATION PROCEDURE of the parties collective bargaining agreement. A hearing was held before the undersigned in Lewiston, Idaho on October 3, 1996. The hearing commenced at 9:00 a.m. and ended at 4:15 p.m. At the conclusion of the hearing day the parties requested a continuance of the hearing. The second day of hearing reconvened on March 27, 1997, commencing at 9:00 a.m. and concluding at 2:55 p.m. All witnesses testified under oath as administered by the Arbitrator. Each party was given an opportunity to examine, cross examine all witnesses, as well as present evidence in support of their respective positions. Mr. Mitchell J. Hicks, Senior Labor Relations Specialist, represented the United States Postal Service, hereinafter referred to as "the Employer". Mr. Paul Price, Regional Administrative Assistant, Pacific Northwest Region, represented the National Association of Letter Carriers, AFL-CIO, hereinafter referred to as "the Union", and Ms. Nancy M. Vaughan, hereinafter referred to as "the Grievant". The parties introduced twenty-one (21) Joint Exhibits, all of which were received. The Union introduced eleven (11) exhibits, all of which were received and made a part the record. The Employer objected to Union Exhibits 2, 4, 5, 6, 7 and 11. The Arbitrator noted the Employer's objections. The Employer introduced four (4) Exhibits, all of which were received and made a part of the record. the Union objected to Employer Exhibit No. 4. The Arbitrator noted the Union's objection. The parties were unable to stipulate to the issue(s) to be determined by the Arbitrator in this dispute. However, the parties agreed the Arbitrator could frame the issue(s) to be determined. At the conclusion of the hearing the parties requested an opportunity to file post-hearing briefs. The Arbitrator received the Employer's brief on June 14, 1997, and the Union's brief on June 18, 1997, at which time the hearing record was closed. The Arbitrator promised to render his Opinion and

Award within thirty (30) calendar days after the record had been declared closed. This Opinion and Award will serve as the final binding Opinion and Award of this Arbitrator, regarding this matter.

ISSUE

The Arbitrator frames the issue(s) as follows:

"Did the Employer have just cause pursuant to the terms of the National Agreement to issue a Notice of Suspension to the Grievant on October 27, 1994? If not, what is an appropriate remedy?

RELEVANT PROVISIONS OF THE NATIONAL AGREEMENT

* * * *

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:

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

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

* * * *

ARTICLE 5
PROHIBITION OF UNILATERAL ACTION

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

* * * *

ARTICLE 13
ASSIGNMENT OF ILL OR INJURED REGULAR

WORKFORCE EMPLOYEES

Section 1. Introduction

B. The U.S. Postal Service and the Union recognizing their responsibility to aid and assist deserving full-time regular or part-time flexible employees who through illness or injury are unable to perform their regularly assigned duties, agree to the following provisions and conditions for reassignment to temporary or permanent light duty or other assignments. It will be the responsibility of each installation head to implement the provisions of this Agreement within the installation, after local negotiations.

* * * *

ARTICLE 15
GRIEVANCE-ARBITRATON PROCEDURE

Section 2. Grievance Procedure--Steps

Step 2:

(d) At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. 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. . . .

(g) If the Union representative believes that the facts or contentions set forth in the decision are incomplete or inaccurate, such representative should, within ten (10) days of receipt of the Step 2 decision, transmit to the Employer's representative a written statement setting forth corrections or additions deemed necessary by the Union. Any such statement must be included in the file as part of the grievance record in the case. . . .

(h) The Union may appeal an adverse Step 2 decision to Step 3. Any such appeal must be made within fifteen (15) days after receipt of the Employer's decision unless the parties' representatives agree to extend the time for appeal. Any appeal must include copies of (1) the standard grievance form, (2) the Employer's written Step 2 decision, and, if filed, (3) the Union corrections and additions to the Step 2 decision.

Step 3:

(b) The Grievant shall be represented at the Employer's Step 3 Level by a Union's Regional representative, or designee. The Step 3 meeting of the parties' representatives to discuss the grievance shall be held within fifteen (15) days after it has been appealed to Step 3. Each party's representative shall be responsible for making certain that all relevant facts and contentions have been developed and considered. The Union representative shall have authority to settle or withdraw the grievance in whole or in part. The Employer's representative likewise shall have authority to grant the grievance in whole or in part. In any case where the parties' representatives mutually conclude that relevant facts or contentions were not developed adequately in Step 2, they shall have authority to return the grievance to the Step 2 level for full development of all facts and further consideration at that level. . . .

(c) The employer's written Step 3 decision on the grievance shall be provided to the Union's Step 3 representative within fifteen (15) days after the parties have met in Step 3, unless the parties agree to extend the fifteen (15) day period. Such decision shall state the reasons for the decision in detail and shall include a statement of any additional facts and contentions not previously set forth in the record of the grievance as appealed from Step 2. . . .

Section 4. Arbitration

A. General Provisions

6. All decisions of the 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 by altered, amended, or modified by an arbitrator. . . .

* * * *

ARTICLE 16
DISCIPLINE PROCEDURE

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.

* * * *

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.

* * * *

BACKGROUND

The Grievant is employed as a Letter Carrier at the Lewiston, Idaho Post Office. She has been employed at that facility since October 10, 1987. On August 17, 1994 while in Spokane, Washington with a friend, she experience car trouble. They were unable to start the car. The Grievant was scheduled to report to work on August 17, 1994. The Grievant called the Employer between 2:00 a.m. and 2:30 a.m. to notify them of the problem with the car. Upon the Grievant's return to work the next day, management asked her to provide evidence that the car had been worked on. The Grievant indicated that she had no documentation to provide, since her friend fixed the car. On October 27, 1994, the Grievant received Notice of Suspension of 14 Days or Less from the Employer, which entailed a suspension of five (5) working days, beginning on November 7th at 0600 hours. The Grievant was instructed to return to work on November 14, 1994, at 0600 hours. There were two reasons given by the Employer for issuing the October 27, 1994 Notice of Suspension to the Grievant. She was charged with an Absence Without Official Leave (AWOL) for the absence from work on August 17, 1994. In addition, the Employer claimed in the second charge that she had excessive unscheduled absences for an extended period time. Prior to this notice being issued to the Grievant, the Employer had issued the Grievant a Letter of Warning for Irregular Attendance on December 30,

1993, as well as issuing the Grievant a two (2) Calendar Day Suspension for Irregular Attendance on February 17, 1994. A timely grievance was filed. A Step One meeting was held and the Employer denied the grievance on November 3, 1994. The Union appealed the grievance to Step 2 on November 11, 1994. The Employer denied the grievance on November 15, 1994, however did not furnish a written decision to the Union. The Union did not file a written statement of corrections or additions to the Employer's oral decision denying the grievance. On November 25, 1994, the Union appealed the grievance to Step 3. The Employer rendered a written decision to the Step 3 appeal on March 27, 1995. Once again, the Employer denied the grievance. The Union appealed the matter to arbitration on April lst. Arbitrator Walter Lawrence held a hearing on this matter on June 13, 1995. He decided to remand the grievance back to Step 3 of the grievance procedure in order for the parties to fully develop and further address the issues in dispute.
The parties advocates agreed with Arbitrator Lawrence's decision. At the arbitration hearing the Union raised the issue that the Employer may have violated the Family Medical Leave ACT (FMLA). Pursuant to the arbitrator's ruling the parties met on August 22, 1995 at Step 3. After the meeting had concluded, the Employer issued its Step 3 decision on September 8, 1995. The Employer denied the grievance. Once again, the Union appealed the grievance to arbitration on September 19, 1995 alleging the Employer violated Articles 16 and 19 of the National Agreement , as well as the Family Medical Leave Act.

POSITION OF THE PARTIES

POSITION OF THE EMPLOYER

First, the Employer maintains it did not violate the National Agreement when it issued a seven day suspension to the Grievant on October 27, 1994. In support of that contention, the Employer asserts the Grievant has been disciplined numerous times for attendance problems. Moreover, the Employer contends it issued progressive discipline to the Grievant in an effort to correct her behavior dealing with absenteeism, prior to issuing

the suspension on October 27, 1994. Furthermore, the Employer claims it acted properly, applied applicable law and regulation, prior to issuing the suspension to the Grievant. In addition, the Employer claims the Union has attempted to raise new arguments dealing with a violation of the Grievant's rights under the Family Medical Leave Act, as well as the Darrell Brown Memo, by asserting these arguments for the first time at the arbitration hearing. As such, the Employer avows that raising these new arguments at the arbitration hearing is violative of the terms set forth in Article 15, and should not be allowed or considered by the Arbitrator. Additionally, the Employer avers if the Arbitrator allows the Union's argument dealing with the FMLA to be considered, the Grievant never gave notice of her illness in "sufficient detail" as to make it evident that the requested leave was FMLA protected. Also, the Employer argues that the Grievant's medical condition did not meet the definition of "chronic serious health condition" as defined under the FMLA. Contrary to the Union's position, the Employer contends that supervision conducted a stand-up with employees to inform them of their rights under FMLA, and that FMLA postings were posted on appropriate bulletin boards for employees to observe. In summary, the Employer asserts it has shown that the Grievant acted as charged, and requests that the grievance be denied.

POSITION OF THE UNION

The Union claims the Employer did not have just cause to issue the Grievant seven (7) calendar day suspension on October 27, 1994. Moreover, the Union argues the Employer violated Articles 3, 5, and 19 of the National Agreement, when it issued the suspension to the Grievant, and violated the Family Medical Leave Act, as well as the Darrell Brown Memo. Additionally, the Union contends the Grievant was treated in a disparate manner by the Employer. Specifically, the Union asserts there were other employees who used more sick leave in a less amount of time then the Grievant, however none of these employees were disciplined. Furthermore, the Union avows the Grievant's due process rights were violated, by the Employer's improper investigation of the facts surrounding the

Grievant's absences from work. Also, the Union avers the Grievant was subjected to double jeopardy, in that she received an "official discussion" about the AWOL charge, which resolved the matter, but the same issue was again raised in the Notice of Suspension. Again, the Union claims the discipline received by the Grievant on October 27, 1994, was not meted out by the Employer in a timely manner. Further, the Union argues the Employer failed to demonstrate the Grievant was AWOL as charged in the Notice of Suspension. Last, the Union maintains the Employer in this case failed to follow its own rules and regulations regarding leave provisions, such as ELM 515 and 513. As such, the Grievant may not be disciplined. In summary, the Union requests the Notice of Suspension be rescinded, the Grievant be made whole and the Grievant be treated properly as a limited duty employee and afforded a position she can accomplish within her medical restrictions.

DISCUSSION

This Arbitrator has carefully reviewed the record, pertinent testimony, post-hearing briefs, and cited arbitration cases.

Initially, this Arbitrator concludes the Union's claim that the Employer violated the Darrell Brown Memo has no validity or merit in this case. Indeed, the moving papers of this case have no mention of a Darrell Brown Memo alleged violation. The Union may have raised a Darrell Brown Memo violation at the original arbitration hearing on June 13, 1994 before Arbitrator Lawrence, however, the moving papers do not indicate that there was any discussion of that contention after the case had been remanded back to Step 3. Moreover, there is no mention of a Darrell Brown Memo violation in the Union's Request For Arbitration on September 19, 1995. Therefore, this Arbitrator concludes this argument was not properly raised in accordance with the provisions set forth in Article 15, and as such will be given no consideration in deciding this case. However, the Employer's contention that the Family Medical Leave Act (FMLA) was not raised in the processing of this grievance, lacks merit. The parties including Arbitrator Lawrence

entered into an agreement on or about June 13, 1995, which states in pertinent part the following: **The undersigned mutually agree that the above-referenced grievance will be remanded to Step 3 of the grievance procedure in ORDER TO FULLY DEVELOP AND FURTHER ADDRESS THE ISSUES IN DISPUTE. It is further agreed that this grievance, if not resolved, will be relitigated. . . .** (Emphasis supplied). The evidence indicates the Union on June 13, 1995 had raised at least the FMLA argument in support of their position, and that Arbitrator Lawrence remanded the case back to Step 3 to give them an opportunity to fully develop their respective contentions, and address the issues in dispute. Indeed, that is exactly what the parties did. On August 22, 1995 the Union's National Business Agent, Jim Williams, met with the Employer's representative, Porter L. Kimmel. Without doubt, the Union in this meeting once again raised the FMLA argument in support of their position. In fact, the Employer's Step 3 decision rendered on September 8, 1995 clearly supports the Union contention that FMLA was raised. In that decision, Porter L. Kimmel states in pertinent part: . . .**It is the position of management that any alleged violation of the FMLA is not arbitrable. Further, even if it were ruled arbitrable, the union has failed to demonstrate sufficient number of the dates of unscheduled absences should be excused under FMLA. Grievance denied.** (Emphasis supplied). Furthermore, the Union's Request For Arbitration dated September 19, 1995 expressly stated that the contractual violations it relied upon were Article 16, 19 and the Family Medical Leave Act. As a matter of fact, National Arbitrator Mittenthal, in Case No. *N8-W-0406*, on pages 9-10 while addressing the validity of a new contention being raised by the Postal Service at the arbitration hearing, stated: **. . . .The difficulty here is the lateness of this argument. Article XV describes in great detail what is expected of the parties in the grievance procedure. The Postal Service's Step 2 decision must make a "full statement" of its understanding of . . .the contractual provisions involved. Its Step 3 decision must include "a statement of any additional . . .contentions not previously set forth. . ."**

Its reliance on this contract provision did not surface until the arbitration hearing itself. Under such circumstances, it would be inappropriate to consider this belated Article XIII claim. (Emphasis supplied). This Arbitrator supports Arbitrator Mittenthal's reasoning. In this case, for whatever reason the Employer failed to render a Step 2 written decision, which is explicitly required in processing a grievance under the terms of Article 15. However, it is quite clear as stated above, the Union properly raised the issue of a possible violation of the Family Medical Leave Act, and the parties had an opportunity to discuss same at their Step 3 meeting on August 22, 1995. The Employer merely took the position that the FMLA was not arbitrable. Certainly, in the opinion of this Arbitrator, the Employer's claim that the Union's contentions raised at Step 3 pertaining to a FMLA violation amount to "an ambush at arbitration" cannot be countenanced. By all means, in the opinion of this Arbitrator, not only can both parties to this Agreement utilize the grievance-arbitration procedure for alleged violations of its express provisions, but the Union can also avail itself of the grievance-arbitration procedure for alleged violations of applicable law. (See Article 3 and 5 of the National Agreement). However, with all of this said, this Arbitrator does not believe the FMLA has to be considered in order to adjudicate this matter, albeit the FMLA is arbitrable.

In essence, this Arbitrator must determine if the Employer had just cause to suspend the Grievant by letter dated October 27, 1994. In the opinion of this Arbitrator, the term "just cause" clearly implies some investigation, fact-finding and weighing of the circumstances, prior to taking disciplinary action against employees. Due process mandates that an Employer is obligated to investigate **all of the circumstances**, before reaching any decision to discipline employees, and to give an employee a fair opportunity to explain his or her side of the case.(Emphasis supplied)

Generally, as in this case, this Arbitrator must determine if the Grievant absenteeism was excessive. In determining if the Employer acted reasonably in disciplining the Grievant, this Arbitrator has given consideration to the length of, and time during which

the Grievant had an alleged poor attendance record, the reasons for the absences, if any, the nature of her job, the attendance records of other employees , and whether the Employer had a clear policy relating to absenteeism, which was known to all employees and which was applied fairly and consistently. Moreover, was the Grievant warned that disciplinary action could result if her attendance record failed to improve.

By the same token, as the Employer so correctly argues, if it is to survive as a business, it needs employees who will be regular in attendance and who will work, and stay at work, when they are supposed to. Clearly, that is not an unreasonable expectation in the opinion of this Arbitrator.

However, in this case the Employer did not treat the Grievant fairly. First, the Employer charged the Grievant with being AWOL on August 17, 1994. The record is clear the Grievant called supervision in the early hours of August 17, 1994 from Spokane, Washington to report car trouble. Shortly after her return to work she was asked by management to provide copies of repair bills. The Grievant explained her friend repaired her car, so she had no repair bills to provide. To this Arbitrator that appears to be a reasonable explanation for not having repair bills. Both Branch President Chris Fey and the Grievant indicated the Grievant received an official discussion from Mr. Akers regarding this matter, and the parties left Mr. Akers office with the understanding the issue was resolved. This Arbitrator finds that testimony to be plausible. If Mr. Akers really had decided shortly after August 17, 1994, that the Grievant absence was in fact an AWOL situation, he certainly had reason to issue another Notice of Suspension to the Grievant, for Irregular Attendance. Prior to August 17, 1994, the Grievant was absent on March 30, 1994, May 12, 1994, May 13, 1994, June 22, 1994 and four (4) days in June 1994. Nonetheless, the Employer for whatever reason waited until October 27, 1994 before issuing its Notice of Suspension to the Grievant. This Arbitrator is convinced that the Employer did indeed know why the Grievant was absent from work. For example, the record indicates in late February 1994 the Grievant was offered and she accepted a limited

duty job offer, which was later rescinded by the Employer in April 1994. However, even prior to that event taking place, the Employer was put on notice that the Grievant had suffered two ankle injuries while employed carrying mail. Without doubt, Article 10, Section 5.D pertaining to sick leave and usage of same, states: **For periods of absence of three (3) days or less, a supervisor may accept an employee's certification as reason for an absence.** This Arbitrator must assume the Employer requested certification from the Grievant for the absences between July 23 and July 28, 1994, since she received payment for those absences. These actions by the Employer, clearly indicate to this Arbitrator that the Employer was aware of the Grievant's serious medical condition, and the her work limitations. Equally important, this Arbitrator notes the Employer's own reference material dealing with the FMLA, charges supervisors with the responsibility for designating whether or not an absence is FMLA qualified and to give notice of the designation to employees, if such employees have a serious health condition, such as the Grievant had. There is no doubt in the opinion of this Arbitrator that management knew of the Grievant's serious health condition, however, blatantly disregarded their responsibility to notify the Grievant of her FMLA rights for qualified FMLA absences. Additionally, there was no evidence in the record that the Employer after being made aware of the Grievant's medical condition, required her to provide current certification from a health care provider that the FMLA definition of a serious health condition was met. These requirements are mandated by the Employer's own regulations. However, in the instant case, the Employer did not comply with its own regulations dealing with this issue.

In the same vein, this Arbitrator is of the opinion the Employer failed to properly investigate this matter prior to issuing the October 27, 1994 Notice of Suspension to the Grievant. Moreover, there was no investigative interview held with the Grievant prior to meting out the suspension. Frankly, this Arbitrator was somewhat taken back by the testimony of Postmaster Baldus, who testified under oath that he had no idea of why the

Grievant was absent from work. Taken at face value, this admission makes the Employer's case untenable. Article 16, Section 8 of National Agreement 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.** (Emphasis supplied). Obviously, if the Postmaster the individual charged with reviewing suspensions of his employees, had no idea why the Grievant was absent, this Arbitrator concludes he did not properly review the case prior to issuing the suspension.

In particular, this Arbitrator is of the opinion that Charge No. 1 given by the Employer as a reason for the Grievant's suspension is clearly stale. As a rule, it is an essential aspect of industrial due process that discipline be administered promptly after the commission of the offense which prompted the discipline. Moreover, as in this case, such a delay in the imposition of discipline clearly leads an employee into a false sense of security that his conduct is acceptable to an employer. Further, this Arbitrator was struck by the fact that albeit the Grievant was being charged with AWOL for August 17th absence, not one of the Form 3971's introduced at the hearing stated such a fact. Clearly, this is contrary to the Employer's own rules and regulations dealing with Form 3971s.

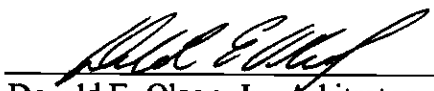
In review, this Arbitrator notes the Grievant was also treated in a disparate manner in her use of sick leave versus co-workers. During the period in dispute, the Grievant used a total of 88 hours of sick leave. On the other hand, some employees used more sick leave than the Grievant, however, the record indicates they received no discipline. For example, the record shows that Carrier Wiggens utilized 480 hours of sick leave in just a few months, while Carrier Fraker used 320 hours of sick leave and Carrier Olney used 160 hours of sick leave. The general rule is that disparate treatment such as unequal treatment for similar conduct will not be tolerated by arbitrators. This Arbitrator without reservation supports that rule.

Thus, based upon the record and for the reasons stated above, this Arbitrator concludes the Employer did not have just cause pursuant to the terms of the National Agreement to issue a Notice of Suspension to the Grievant on October 27, 1997.

AWARD

The grievance is sustained. The Employer shall rescind the Notice of Suspension issued to the Grievant on October 27, 1994, and purge copies of same from appropriate records, including the Grievant's personnel file. The Employer is directed to make the Grievant whole for any lost wages, plus interest at the Federal Judgment Rate.

Dated this 24th day of June, 1997
Tacoma, WA



Donald E. Olson, Jr., Arbitrator

C-25874

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

GRIEVANT: Steven Schaefer

POST OFFICE: Kansas City, Missouri

USPS CASE NO: E01N-4E-D 04196956
NALC CASE NO: 05-041470

BEFORE: David A. Dilts, Arbitrator

APPEARANCES:

For the U.S. Postal Service:	Nels Truelson
For the Union:	J. Mark Sims
Place of Hearing:	1700 Cleveland Ave., Kansas City, Missouri
Date of Hearing:	March 16, 2005
Date of Award:	April 15, 2005
Relevant Contract Provision:	Articles 16 and 35
Contract Year:	2001
Type of Grievance:	Removal

AWARD SUMMARY

There is no doubt that the grievant reported for work under the influence of alcohol, and that he is admitted alcoholic. Management clearly had the right, under Article 16 of the 2001 National Agreement to issue discipline for the grievant's misconduct. However, this Arbitrator does not agree that there are no mitigating circumstances in this matter. The grievant is a letter carrier of 19 years service, and has been, since this aggrieved action, been actively participating in EAP and Alcoholics Anonymous. Article 35 of the National Agreement binds the parties to "consider favorably in disciplinary action proceedings" the grievant's participation in EAP. Therefore, the grievant's removal is ordered reduced to a long suspension. He is ordered reinstated to his former position as a City Letter Carrier, without back pay or benefits, but without loss of seniority.

David A. Dilts, Arbitrator

ISSUE

The Step B Team framed the issue in this matter as:

Does Management have just cause to remove (the) employee?

BACKGROUND

The grievant, at the time of the aggrieved disciplinary action, was a City Letter Carrier assigned to the Waldo Carrier Annex in Kansas City, Missouri. At the time of his removal, the grievant had approximately nineteen years of service. Three prior disciplinary actions were live in August of 2004, one letter of warning and two seven calendar day suspensions. One of these prior disciplinary suspension was for being under the influence of alcohol when he reported to work.

The record shows that the grievant reported for work under the influence of alcohol on August 16, 2004. The grievant was given a Breathalyzer test for blood alcohol which showed that he was legally intoxicated (.135%). The grievant admits that he is an alcoholic.

At present, the record shows that the grievant is participating in Alcoholics Anonymous and that he sought assistance through the parties' EAP when this disciplinary action was taken against him.

The Union filed a timely grievance protesting the removal of this grievant which was denied. The parties at Step B of the grievance procedure declared this matter to be at impasse

and the parties stipulated that the present matter is properly before this Arbitrator pursuant to Article 16 of their 2001 National Agreement.

POSTAL SERVICE'S POSITION

The position of the Postal Service is that it had just cause to remove this grievant from his position as a City Letter Carrier. There is no dispute that the grievant was legally intoxicated, while on the clock, on August 16, 2004. There is also no dispute that this misconduct was clearly known to the grievant to be unacceptable conduct in violation of 661.54 of the Employee and Labor Relations Manual (and other regulations). There is also no dispute that the grievant had prior discipline in his record, including a seven calendar day suspension for being under the influence of alcohol.

A pre-disciplinary interview was conducted on August 31, 2004, during which the grievant indicated that he could handle a few beers, but could not drink hard liquor because his liver did not function properly. He went on to say that he would have to reserve his drinking for when he was on vacation. When challenged, the grievant then changed his position to say that he could not drink at all.

The Union has raised a couple of meritless defenses. The Union contends that progressive discipline was not followed in this matter and was therefore not corrective. In fact, the grievant was given a fourteen day suspension, which was subsequently reduced to seven days for having reported to work intoxicated. Further, reporting for work under the influence of alcohol is a very serious matter for which removal is appropriate for the first offense and does not

require progressive discipline to be corrective.

The Union also claimed the grievant did not know of his liver condition, and therefore did not intend to report for work drunk. Frankly, this Union contention is utterly without merit. The grievant simply could not have missed the fact that he was impaired by alcohol, and it was clear that he was seriously impaired by the blood alcohol levels he was experiencing on August 16, 2004.

Further, the Union argues that management failed to follow proper procedures in sending the grievant for a blood alcohol test on August 16, 2004. The fitness for duty procedures urged by the Union in this matter require a matter of days, not minutes to implement and are simply not applicable to matters where alcohol use is reasonably expected, as was the case in this matter. Management is confident that the Union's absurd contentions with respect to this matter will be dismissed by the arbitrator.

In assessing the propriety of a particular penalty, it has been held that an arbitrator's role is not to second-guess management's reasonable and good-faith attempts to arrive at the appropriate measure of discipline. Clearly the arbitrator should hesitate to set aside or reduce a penalty in the absence of a showing that the penalty was arbitrary, made in bad-faith, or clearly wrong. The Union has failed to show that management erred in any fashion in determining that removal was the appropriate penalty in this case. Therefore, this Union contention must also be dismissed.

Management has discharged its burden to prove with a preponderance of the credible evidence that the grievant committed the offenses for which he was removed. The record of evidence also clearly shows that there was no violation of any due process requirements and that

the penalty assessed in this matter was appropriate to the grievant's offense and record. Therefore, management respectfully requests that the arbitrator sustain the removal of this grievant as being for just cause, and to deny the Union's grievance in its entirety as being without merit.

UNION'S POSITION

Management has failed to show that it had just cause for the removal of this grievant. The record shows that the grievant's actions of August 16, 2004 lacked intent, and that management made several serious errors with respect to the grievant's contractually guaranteed due process rights. Management also failed to consider the 19 years of service the grievant had, and the other mitigating circumstances in this record.

The grievant in this case, as of August of 2004, was going through a difficult domestic division. He is the father of two children, of whom he has custody, and that their primary residence was with the grievant. Add to these difficulties the fact that the grievant is an alcoholic, and that he suffers from serious health problems associated with his alcoholism -- cirrhosis of the liver and Hepatitis C. It is within this context that the events of August 16, 2004 transpired.

The grievant reported for work, after having drank a few beers the day before, and was required to take a Breathalyzer test, in which it was determined that his blood alcohol level was .135%. It was not then known to the grievant that his cirrhosis and Hepatitis caused alcohol to not metabolize normally. He did not drink immediately before coming to work, or at work, but

rather the day before. A reasonable man would have believed that having drank in the afternoon of the day before reporting for work, that the alcohol would have metabolized and he would have been alright to work. There was simply no intent on the grievant's part to violate the rules proscribing intoxication at work or drinking.

Further, there is a particular process to be followed in requiring an employee to submit to a fitness for duty physical, and that process was not followed in this case. That failure to follow the proper process in determining the grievant's fitness for duty resulted in obtaining evidence subsequently used against this grievant that was improper.

Management also failed to follow progressive discipline in this case. Alcoholism is a disease, and as such, requires assistance from management in rehabilitating the employee. Article 35 of the parties' National Agreement makes clear that management is to give favorable consideration to any employee who voluntarily enters the EAP program in an attempt to salvage his Postal career, as this grievant did. Further, the grievant only had a seven calendar day suspension on his record, and management choose to skip the fourteen calendar day step and improperly proceed to the removal of this grievant. This removal therefore is not progressive and violates the parties' mutual understanding as expressed in Article 16 of their 2001 National Agreement.

Finally, management also cited prior discipline that has not yet been adjudicated in arriving at the decision to remove this grievant. This is improper, and the Arbitrator ought not consider that suspension in determining the propriety of this aggrieved removal.

The grievant is a recovering alcoholic. He has come to grips with the fact that he is saddled with this disease for a lifetime and is he working diligently to overcome this serious

handicap and maintain his sobriety. The Union submits his actions, while serious, do not rise to the level of removal considering the procedural errors made by management in this case and the clear mitigating circumstances that exist in this matter.

The Union respectfully requests that the Arbitrator sustain this grievance, and return him to his former bid position as a City Letter Carrier, and make him whole in every respect for this wrongful removal.

ARBITRATOR'S OPINION

The record in this matter shows that the grievant was, in fact, on the clock in the Waldo Carrier Annex in Kansas City on August 16, 2004 and was under the influence of alcohol. This fact is not disputed by the parties, and it is also not seriously disputed that the grievant was aware, or should have been aware, that such conduct was proscribed by the Employee and Labor Relations Manual, as cited in the Notice of Removal (Joint exhibit 3). In this Arbitrator's considered opinion, these undisputed facts demonstrate that there is just cause for disciplinary action against this grievant.

The only challenge offered by the Union was that there was no intent by the grievant to violate the ELM's proscription of being under the influence of alcohol while on the job. This Arbitrator rejects that argument – the grievant is an alcoholic, knew he was an alcoholic, and admits to having drank alcohol on the day before he was scheduled to work. Whether this is negligence or intent is irrelevant, it is sufficient that he reported to work under the influence for a finding of misconduct in this matter.

The controversy between these parties concerning the removal of this grievant focuses on several issues. The parties are at odds as to whether progressive discipline must be used in matters involving intoxication during working hours and on Postal property. The Union alleges that Management's requiring the grievant to submit to a Breathalyzer test was inconsistent with the proper process used in fitness for duty examinations. Finally, the Union claims that Management ignored the numerous mitigating circumstances which the Union alleges exist in this case. This Arbitrator will examine each of these issues, in turn, in the following paragraphs of this opinion.

Progressive Discipline

The Union argues that management is obliged to follow the Letter of Warning, Seven Day Suspension, Fourteen Day Suspension, and then Removal progression of discipline in this case. There is a lack of unanimity among arbitrators concerning whether discharge is the appropriate penalty for being under the influence of alcohol while on the job. The Postal Service provided several citations of cases where an employee was under the influence of alcohol while on duty and was discharged for the offense.[1] The reasoning in these cases is cogent, and specific to the facts in those cases.

In the case before Arbitrator McAllister, the grievant there had been forewarned that being under the influence of alcohol while on the job was regarded as a serious matter and would

[1] Arbitrator McAllister, *in re* Maidelich, J00R-4J-D 0212597; Arbitrator Dorshaw *in re* Woods, G00C-4G-D 02211588

likely result in termination should it happen again. This is similar to the history of the grievant presently before this Arbitrator, there are both prior warnings and discipline in this grievant's record.

As in the McAllister case, the grievant came to work while under the influence of alcohol, but unlike the McAllister case there is no clear evidence that this grievant had consumed alcohol while on duty or on Postal property. In fact, the facts in this matter are consistent with the grievant's claim that his alcohol consumption was on August 15, 2004. In any event, it is clear that arbitrators view, within context, that being under the influence of alcohol while on the job is a very serious matter, and for more egregious examples of this misconduct, discharge may result for the first offense, and clearly without necessarily following the normal progression of corrective discipline associated with less serious misconduct. However, it is clear that a progression of discipline for less egregious intoxication cases is often required by arbitrators.[2]

The Union's contentions that management must follow their proposed progression of discipline is not supported by a simple preponderance of evidence. This simple construction of Article 16 also puts to rest the Union's contention that all previous discipline, under these facts and circumstances, must be adjudicated before proceeding to removal for this offense. A removal for an egregious act does not require prior discipline, and without a showing of harm in the citation of such unadjudicated prior discipline, it cannot serve as a basis to overturn this removal.

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[2] See Elkouri and Elkouri, *How Arbitration Works, sixth edition.* Washington, D.C.: Bureau of National Affairs, Inc., 2003, pp. 777-78 for further discussion.

Fitness for Duty

The Union cites the procedures to be used in requiring an employee to submit to a fitness for duty examination. The process, as the Union correctly points out, requires the approval of Postal Authorities above the Annex's management. However, the management of the Waldo Carrier Annex has the responsibility to assure that employees are not intoxicated. To require the formalities required of a fitness for duty examination under reasonably normal circumstances, in this Arbitrator's considered opinion, is harsh and absurd; in addition, it would deny management the rights guaranteed under Article 3 of the National Agreement to maintain the efficiency (and safety) of operations.

For management to require that the grievant submit to a Breathalyzer test to ascertain whether he is legally intoxicated is not a violation of his contractual rights where there is reasonable cause to believe he may be intoxicated. In this case there was probable cause to suspect the grievant's intoxication. The grievant is expected to operate motor vehicles on the public thoroughfares, and as such, if stopped by law enforcement authorities would be required to submit to the same Breathalyzer test. In this case, the grievant was not required to do anything that would not have been reasonable to expect as a condition of operating a motor vehicle in the State of Missouri.

This Arbitrator finds no merit in the Union assertion that the grievant's contractual rights were somehow compromised by the manner in which he was required to submit to the subject Breathalyzer test.

Mitigating Circumstances

Article 35 of the parties' 2001 National Agreement states in pertinent part:

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An employee's voluntary participation in the EAP for assistance with alcohol and / or drug abuse will be considered favorably in disciplinary action proceedings.

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Arbitrators have given a grievant's participation in EAP weight as mitigative circumstances which is clearly authorized by Article 35 of the parties' 2001 National Agreement.[3] Again, the egregiousness of the offense of being intoxicated while on the clock must be considered when applying Article 35, as well as the grievant's history of previous attempts to control his alcoholism. In this case, the grievant is participating in EAP and AA programs, having failed in at least one previous incident to control his alcoholism. Failure at the first attempt is not uncommon, and when that failure is two years in the past, without intervening failures, it cannot serve to preclude the application of this portion of Article 35 in this specific case.

The grievant is also a long service employee. He has 19 years of service, albeit, with

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[3] Arbitrator Stidman, C8N-4T-D 332432, Arbitrator Zack, N8C-1L-D 22078 and this Arbitrator in C4N-4J-D 28090.

three prior live disciplinary actions. There is an element of a bank of good will which must be considered by such long service in these sorts of cases. In this particular case, the history of discipline clouds the issue of whether a bank of goodwill remains with a positive balance. However, given the nature of this particular offense, and the fact that he did not operate a motor vehicle on the clock, or for that matter any other exacerbating facts, the grievant's long service must be considered a mitigating circumstance.

In this Arbitrator's considered opinion, Article 35, in conjunction with the grievant's 19 years of service are sufficient to require that he be given one final chance to remain sober and salvage his Postal career. Therefore, in this Arbitrator's considered opinion the grievant's removal must be ordered reduced to a long suspension.

Remedy

The proper remedy in this case is that the grievant be reinstated to his bid position as a City Letter carrier in the Waldo Annex in Kansas City, Missouri. The grievant's reinstatement shall be without back pay or benefits, but without loss of seniority. The aggrieved removal is ordered reduced to a long suspension. The grievant is hereby forewarned that another incident of intoxication while on the job will result in his removal from the Postal Service.

29554

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration between The U.S. Postal Service and The National Association of Letter Carriers, AFL-CIO	Grievant: L. McCormack (Clark) Post Office: Roxbury Station, MA Case Number: B06N-4B-D 11156259 Union Number: 11118D4 DRT 14-198216

Before: Donald J. Barrett, Arbitrator

Appearances:

For the U.S. Postal Service: Michael R. DeMatteo, District Labor Relations Specialist

For the National Association of Letter Carriers: Brian Manning, Area Steward

Place of Hearing: Boston, MA GMF

Date of Hearing: August 12, 2011

Award: This grievance is sustained in part, and denied in part.

Date of Award: August 23, 2011

AWARD SUMMARY

The Service demonstrated that the grievant continually failed to be regular in attendance, and warranted discipline, however the Union demonstrated that a just cause provision was not adhered to, thus mitigating the penalty.

STATEMENT OF PROCEEDINGS

This matter was presented at a hearing on August 12, 2011 at the Boston, MA GMF, pursuant to the grievance-arbitration provisions of the 2006-2011 Collective Bargaining Agreement also known as the Agreement between the National Association of Letter Carriers, also known as the Union, and the U.S. Postal Service, also known as the Service.

The parties to this proceeding were provided a full, fair, and impartial opportunity to present their respective positions, to present witnesses, argument, and evidence. Each advocate was well prepared, articulate, and professional.

The Service called three witnesses on their behalf – Mr. Fernando Oliveira, Supervisor, Customer Services/Acting Manager, Ms. Le-Von Jean-Pierre, Supervisor, Customer Services, and Mr. Buddy Crosby, Manager, Customer Services at Roxbury, MA.

The Union presented Mr. Keith Meridith, Roxbury Station Steward, Mr. Michael Kidd, Area Steward, and the grievant, Ms. McCormack. (The arbitrator was informed that the grievant since married and now is known as Clark.)

At the request of the parties, all witnesses were duly sworn prior to presenting their testimony.

Each party presented oral Opening and Closing statements.

At the conclusion of this hearing, the Service provided the Arbitrator with four previously issued regular panel arbitration awards, all of which I have reviewed each thoroughly and shall offer comment where/when applicable during the discussion part of this award.

The parties submitted JOINT EXHIBITS consisting of the following:

J-1, the Agreement

J-2, Moving papers, consisting of Pages 1-183

The Service provided one exhibit:

S-1, ERMS Report dated August 9, 2011 for Pay Period 16, week 2 of 11.

The parties did not agree to any STIPULATED FACTS.

ISSUE AS FRAMED BY THE PARTIES

The parties agreed that the issue as stated by the Step B Team shall represent the same for this matter.

"Did Management have just cause pursuant to Article 16 to issue the Grievant a Notice of Removal on February 11, 2011 for Failure to Be Regular in Attendance? If not, what shall the remedy be?"

BACKGROUND

The grievant has been a letter carrier for approximately six years at the Roxbury, MA station. She was issued a Notice of Removal (NOR) dated February 11, 2011, and charged with "Failure To Be Regular In Attendance". The dates cited for her absences are October 4, 2010, November 16th and 17th, 2010, December 27th, 28th, and 29th, 2010, January 5th, and January 7th, 2011.

She was previously issued a "Letter of Warning" dated January 20, 2010, a 7 day suspension dated April 13, 2010, and a 14 day suspension dated June 9, 2010, all for "Failure To Be Regular In Attendance." (See J-2, Page 1 & 2)

The grievant claims that the Service did not have "just cause" to issue the subject removal notice, and used absences that were scheduled in advance, and/or covered by the Family Medical Leave Act (FMLA).

CONTRACT PROVISIONS CITED

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."

POSITION OF THE PARTIES IN THIS MATTER

U.S. POSTAL SERVICE

The Service maintains that it had just cause for the action taken toward the grievant. The Service offers that she has been placed on notice many times in the past, as evidenced by the prior discipline issued to her, as notated on the NOR.

The Service argues that all of the grievant's absences were unscheduled and that the approval was for "pay purposes", and states further that unscheduled absences are those which are not scheduled in advance, the previous week.

The Service contends that the November 16 & 17, 2010 dates cited were properly charged as unscheduled, just by the subject of such absence, and was properly changed from sick leave to emergency annual leave because the grievant was not entitled to "bereavement leave", as an uncle is not considered immediate family.

The Service further maintains that the December 27th, 28th and 29th, 2010 absences were not covered by the FMLA at the time of the action, and that even if they had been; the number of other absences still warrants her removal.

The Service states that all proper procedures were followed by the supervisor, and manager during the investigation and processing of this action, the grievant was given a fair and full opportunity to respond during a pre-disciplinary interview, and the grievant understood the reasons for the interview. The Service offers that the PS Form 3971's that were provided by the grievant were similar to that information generated by the ERMS report, and was taken into consideration by the responsible parties before issuing the NOR.

Finally, the Service argues that the grievant has had a continuing attendance problem, and despite many opportunities for improvement, she has failed to do so, and the removal notice is issued for just cause. The Service asks that the grievance be denied in its entirety.

THE NATIONAL ASSOCIATION OF LETTER CARRIERS

The Union maintains that only this notice should be considered, as all other discipline has been adjudicated.

The Union argues that there is no just cause to remove the grievant, and that the Service rushed to judgment in issuing such, with the supervisor having been at the station for a very short time before she conducted the pre-disciplinary interview with the grievant. Further, the supervisor did not have the original PS Form 3971's for the dates later cited and relied upon a computer generated form that differed from the original forms.

The Union states that the Service failed to consider these differences after the grievant herself provided originals to the supervisor, even though the forms demonstrated the absences were approved in advance, and some were pending an appeal to the FMLA, and therefore should not have been cited until such appeal was finalized.

The Union maintains further that the discipline issued was punitive in nature, and the result of a shoddy investigation. The Union cites the advance approval of the absences, the lost Form 3971, which are to be maintained for a two year period by the Service, the supervisors inability to settle the grievance and return the grievant, if she so desired, the dates later cited by the Service in the NOR were not discussed with the grievant during the PDI, and the fact that the grievant was not properly informed of the nature of the January 11, 2011 interview.

The Union also cites the supervisor's reliance on a local policy of "not more than three unscheduled absences in three months" as being in conflict with the ELM 510, which states that each attendance case should be judged independently and on its own merits.

The Union further argues that the supervisor who initiated the removal action lacked sufficient knowledge and information to proceed with such discipline, noting the lack of original PS Form 3971's, and her reliance upon attendance matters that preceded her at the Roxbury station.

The Union argues that the tests of "just cause" were not followed throughout the investigation, deliberations, and action taken, and therefore, this grievance should be sustained in favor of the grievant, and the removal overturned, and the grievant made whole.

DISCUSSION & OPINION OF THE ARBITRATION

There remains overwhelming arbitral, and legal precedent concerning an employer's rightful expectation that their employees be at work when scheduled to do so. The Service provided this Arbitrator with only four such cases, including one issued previously by myself, and no doubt they could have provided countless others. The first rule of employment is that the employee will come to work – absent that expectation no company can maintain any semblance of efficiency or order.

There is no dispute that the grievant was absent on the dates cited within the Notice of Removal. Further, there is no dispute that the Service has the burden to prove that just cause existed to issue this discipline, and that removal was the appropriate penalty.

The grievant, with almost six years of postal employment has a lengthy portfolio of absence related discipline during that relatively brief period. (See J-2, Pages 66-79) Given that history, including other absence related issues not considered in the NOR, I am left with no doubt that the grievant was aware of her rightful obligations to be regular in attendance.

The legitimacy of such absences is normally a consideration of mitigating circumstances when considering the penalty. The Union has argued that the unexpected death of the grievant's uncle caused two such absences cited in the NOR, November 16 & 17, 2010, and certainly such a hardship can induce an unscheduled absence just by the nature of such an unfortunate occurrence. However, if this unscheduled absence had been the exception instead of the rule, I would envision the Service proceeding differently. Any good will that should have been in existence appears to have been used up long ago.

The dates cited for December 27 through 29, 2010 have been presented as qualifying for protection under the Family Medical Leave Act after initially being denied in error. The Service argues that at the time of the NOR these dates was denied, and therefore subject to citation. Further, the Service offered testimony at hearing that even if the December dates had been protected, there remained sufficient absences to warrant the grievant's removal. Further, the Union argued that the Service was required to await the outcome of the grievant's appeal of these dates before the FMLA coordinator and knowing there was an appeal, should not have cited them. That would appear the more prudent course to take under the circumstances, particularly when one considers the apparent confusion that existed in the FMLA coordinator's office due to his retirement and replacement.

The earlier October date and January 5th date cited do not appear to offer much dispute, however the January 7th date cited is argued to be the cause of an unexpected snow storm that prevented the grievant from reporting for duty. There was considerable argument offered by the parties during the hearing as to the validity of this "snowstorm", how many others may/may not have been absent that day, and how it was settled. However, I would suspect, like the absence related to the death of the grievant's uncle, if this "snowstorm" absence had been an exception to a pattern of behavior previously established by the grievant, the Service may have viewed it differently, and certainly I would have.

There is no dispute that all employees experience unforeseen circumstances that impact their ability to schedule leave "in advance" that would allow the Service to make alternate arrangements to cover the employee's absence. The reasons for such are varied. The Union maintains that the grievant's absences were approved "in advance", and therefore, not unscheduled. I respectfully disagree. The question that a responsible entity must determine is how soon "in advance" an employee should seek to be absent from work so that such an absence does not negatively impact its operations and mission. I do not find it unreasonable to inform the employees that "scheduled" absences should be submitted by the close of business on the Tuesday preceding the request. That allows the supervisor the opportunity, if available, to cover such an absence. That appears to be the process, as testified at hearing, for the Roxbury station. Article 3, Management Rights of the Agreement provides that opportunity.

I find it creditable that absences such as occurred by the grievant were approved for "pay purposes", and did not absolve the grievant of her obligations to be regular in attendance.

The Union correctly argues that the elements of Just Cause, as stated in the Agreement, the Joint Contract Administration Manual (J-CAM), and other established tribunals must be proven by the Service in matters such as this. The J-CAM offers that this criterion is the "basic" considerations that a supervisor must employ prior to undertaking discipline.

Arbitrators frequently rely upon what is known and accepted as "The 7 Tests of Just Cause" that is also offered in the J-CAM. The Union argues that the 3rd test, "Did the Employer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate a rule or order of management."(See Just Cause, The Seven Tests, A.Koven & S. Smith, 2nd edition BNA, 1992) was violated by the Service. The Union argues that the Service failed to complete a thorough and objective investigation. I find, for the most part, that the Service did so.

First, did the Employer give forewarning of the possible consequences of her discipline? The previously issued discipline clearly outlines the possible outcome.

Was there a reasonable rule? As I stated earlier, there is well established precedent of an employer's right to expect the employee to be regular in attendance.

Did the employer, before issuing the discipline make an effort to discover if the employee did in fact violate a rule? The supervisor conducted a pre-disciplinary interview with the grievant and her representative on January 11, 2011. While there remains some dispute regarding the pre-set questions the supervisor asked of the grievant, I do not find the PDI to have been lacking in opportunities for the grievant, or her representative to provide input.

Was it a fair investigation? Here is where I find troubling examples that give pause to the penalty imposed. The supervisor admits that the Service "lost" the original PS Form 3971's for the dates cited in the NOR, and during the PDI, fills out new Form 3971's, and has the grievant sign them. The supervisor then uses the new forms as a basis for imposing the removal action. I find this to be inherently unfair. While her motives may have been well placed, and she appeared very credible and sincere during her testimony, recreating documents at the expense of the grievant, to use in discipline against the same grievant is unfair. The supervisor responsible originally for the approval/disapproval of these submissions left off important information, such as checking off scheduled/unscheduled boxes. In recreating this information and using it for these purposes it served to undermine the credibility of a fair investigation. (See J-2, Pages 119, 121, 123, 125 127, 128)

Further, it is undisputed by the parties that the Service is required to retain such forms for two years, likely for just such reasons.

Further, it appeared that the supervisor relied upon a "district policy", or policy credited to the ERMS procedure that called for discipline for three absences in three months. Such a "policy" would create a "Table of Penalties" which is not subscribed to in the Postal Service, and conflicts with the ELM attendance requirement provisions.

I have no doubt that the grievant was placed on notice of her obligation to be regular in attendance. The record bears this out. I am sympathetic to her illnesses and recent bad fortune, however in spite of such; the Service rightfully can expect employees to fulfill their first obligation in the employee-employer relationship – to come to work as scheduled.

That said, the Service, when imposing the equivalent of industrial death upon an employee must adhere to all contractual provisions, and the just cause provisions fully. In the removal of an employee, there are no second chances for the employee. Once it is imposed and upheld on appeal, that employee's life is altered permanently. Many times there is good reason for such action, and this Arbitrator has upheld such in the past. However, to rightfully and impartially uphold such a penalty, the great burden of the arbitrator is to insure that the penalty imposed is right and just. In the instant case, I do not find that to be so. While the grievant is clearly deserving of discipline for her absences, even excusing those purportedly FMLA covered, removal in the instant case cannot be sustained in light of the Service's unattained consummation of all of the just cause provisions.

The grievant should take note of her precarious position. She has accumulated a horrendous attendance record in a brief time despite many chances given her by the Service to improve. I dare say this will be her last. I doubt the Service will err again.

The previously issued decisions offered this Arbitrator by the Service advocate do uphold the requirement to be regular in attendance, even if the absence is due to a serious illness, injury or personal crisis. I agree with those decisions but find the instant case, for the reasons cited above to offer slight mitigating circumstances that warrant a lessor penalty.

AWARD

This grievance is denied in part. I find that discipline is warranted for the absences relied upon, even excusing those that may have been covered by FMLA.

The grievance is sustained in part. I find that the issuance of a removal, at this time, is excessive in light of the reasons cited above, and substitute such with a thirty (30) day suspension. The grievant shall be made whole in all other regards related to this only.

Respectfully Submitted,

Donald J. Barrett, Arbitrator

Date 4.23.11

C-36113

REGULAR ARBITRATION PANEL

In The Matter of)
United States Post Office)
and)
National Association of)
Letter Carriers (AFL-CIO))

Grievant: Scotty Khamdaraphone
Case No.: 4J 19N-4J-D 22413809
NALC No.: 5521-22-775
DRT No: 05-584272

Before: Arbitrator Earlene R. Baggett-Hayes, Esq.

Appearances:

For the U.S. Postal Service: Vanessa Freedle, Labor Relations Specialist KS/MO District

For the Union: Blake Rockers, Local Business Agent

Location of Hearing: Shawnee Mission, KS

Date of Hearing: February 24, 2023

Post-Hearing Briefs: March 17, 2023

Date Award Due: April 18, 2023

AWARD

Based on the foregoing, the Grievance is sustained.

The Grievant shall be returned to work. The 14-Day suspension that was reflected on his record prior to the current Notice of Removal (NOR) discipline shall remain on his record. That 14-Day suspension shall remain active and shall be tolled and extended to remain on his record for whatever remaining period he had left for it to remain on his record at the time of the current discipline, starting with his return to work date. The Grievant's NOR shall be rescinded and purged from his record. The Grievant shall be made whole for all lost wages and benefits, including missed overtime.

April 23, 2023

Earlene R. Baggett-Hayes, Esq., Arbitrator

BACKGROUND

Scotty Khamdaraphone (hereafter referred to as Khamdaraphone or "the Grievant") was hired as a City Carrier Assistant (CCA) on November 30, 2013, and was converted to a Career City Carrier on November 29, 2014. On September 1, 2022, the Grievant was issued a Notice of Removal (NOR) with a charge of Failure to Maintain a Regular Work Schedule. The Postal Service maintains that the Grievant has been provided multiple opportunities to correct his unacceptable attendance and has failed to do so. The Grievant had previously received a 7-Day Suspension and two 14-Day Suspensions. One of the 14-Day suspensions was a conversion from a prior NOR.

In response to the NOR contained in the present matter, The Union filed a grievance alleging violations of Articles 16, 35, and 19 via the M-39 section 115 of the National Agreement. The matter matriculated through the various steps of the grievance procedure and the parties failed to reach an agreement; therefore, it was submitted to arbitration for resolution. According to contractual procedures, the undersigned was appointed to hear and decide the matter in dispute. An in-person arbitration hearing was conducted on February 8, 2023. During the hearing, the parties were afforded full opportunity to present testimony and documentary evidence, and to put forth arguments for their respective positions. Both parties elected to submit written closing briefs, which were duly received and distributed. The record was closed upon receipt of the respective briefs.

ISSUE

Submitted by the Union:

Did management have just cause to issue the Grievant the Notice of Removal dated September 1, 2022, for the charge of failure to maintain a regular work schedule, and if not, what is the appropriate remedy?

Submitted by the Service:

Did management have just cause to issue the Grievant the Notice of Removal for Failure to Maintain a Regular Work Schedule, and if not, what is the appropriate remedy?

The Arbitrator finds that the issues are significantly similar and that the inclusion of the NOR date is inconsequential. Accordingly, the issue statement presented by the Postal Service is preferable and will be relied upon in this document.

RELEVANT CONTRACT AND OTHER PROVISIONS
(in relevant part)

Article 16

Section 1

PS Section 8
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.

Joint Contract Administration Manual (JCAM)

Page 16-2. "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."

Corrective Rather than Punitive: The basis of this principle of corrective or progressive discipline is that it is issued for the purpose of corrective or improving employee behavior and not as a punishment or retribution.

M-39, Section 115

PS ELM 511.43 "Employees are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absences. In addition, employees must provide acceptable evidence for absences when required."

PS ELM 665.41 "Employees are required to be in regular attendance.

POSITIONS OF THE PARTIES

Position of the Postal Service

The Postal Service complains of the Grievant's long history of unacceptable attendance, back to 2014, and reports a repeated pattern of unscheduled leave. This is offered in support of its claim that the Grievant has no propensity to be regular in attendance. Also, prior discipline made the Grievant keenly aware of the consequences of non-attendance. The Grievant has continued to incur unscheduled absences and has failed to demonstrate that he is trustworthy and can be a productive employee.

The Grievant received due process protections as he had the opportunity to put forth information during the investigative interview. The CBA does not require a set number of questions. All other tenets of just cause have been established.

The Grievant was removed consistent with progressive discipline options as his file contains a prior 7-Day suspension and two 14-Day suspensions. Faith and trust that the Grievant will be in regular attendance cannot be restored. Although suggested by the Union, Management is not required to consider a 30-day suspension or restricted sick leave. The Union is incorrect in its assertion, and unable to prove, that Customer Services Manager, Jacob Gunther, commanded that Ms. Dominguez issue discipline.

The grievance should be denied.

Position of the Union

The Postal Service must put forth clear and convincing evidence that the Grievant's removal meets the just cause standard. However, the Service failed to establish just cause prior to disciplining the Grievant. The Service denied the Grievant due process and failed to conduct a thorough and objective investigative interview. The investigative interview was inadequate because only three or four (3 or 4) questions were asked. The Service failed to ask any probative questions to determine the who, what, when, where, and why regarding the Grievant's unscheduled absences. Nor did the Service request medical documentation to support the Grievant's absence of August 8, 2022, once he mentioned it. The Grievant has received discipline in the past for failure to have regular attendance and as a result of his prior disciplinary record he has significantly

improved and has regularly presented for work. The absences for which the Grievant was disciplined are inappropriate as he took bereavement leave and actually worked on one of the charged dates. Also, the absences are significantly less than the number he has experienced in prior disciplinary actions. The assessed discipline is punitive in nature, particularly since the Grievant's attendance has drastically improved since his latest 14-day suspension. Accordingly, the Union insists that the Union's grievance must be sustained and the Notice of Removal (NOR) must be rescinded and purged from the Grievant's record. Additionally, the Grievant should be made whole for all lost wages and benefits, including missed overtime.

ANALYSIS

As this matter involves discipline, the Postal Service bears the burden of establishing just cause for the issuance of the discipline. Regarding the quantum of proof, in a discharge case such as this one, the Service's evidentiary responsibilities are rooted in the just cause tenets, which place high obligations on the Service to establish that each has been met. For this reason, this Arbitrator is satisfied that the preponderance of the evidence standard is reasonably applied.

First and foremost, this Arbitrator clearly understands the importance of regularity in employee attendance in order to arrange for work schedules and efficiency in customer service. Also, a lack of regular attendance significantly causes the Service to incur additional costs. Management rightfully asserts that it has the right to expect employees at a minimum to report for work and to do so on a regular basis. According to the Postal Service, in this instance, the Grievant had an overall unacceptable attendance record. The Service makes numerous references to the Grievant's history. The Service emphasizes that Mr. Khamdaraphona acquired 10 unscheduled absences during the 11 months between his being hired and later converted to regular. Based on the Arbitrator's reading of the record, that was many years ago. The Service preys upon the longstanding history of unacceptable attendance exhibited by the Grievant and reminds them that they are not confronted with just a singular episode in this matter. The specifics, however, were not presented. The Arbitrator is not inclined to rely on this information without proof, particularly since the burden rests with the Service. More importantly, the Arbitrator does not find the information on the Grievant's absences dating back to 2014 to be particularly relevant based on the current charges.

The Arbitrator looks to the Postal Service to prove that what it claims to have occurred did in fact occur. The Postal Service claims that the Grievant was irregular in attendance and provides as its support a list of unexcused dates including 7/05/22, 07/07,22, 7/11/22, 7/13/22, 8/8/22, 8/17/22, and 8/24/22. Testimony revealed that this information was inaccurate. In this regard, the Service did not establish that that which was claimed to have occurred is what occurred. Although the Service maintains that the actual charge of irregular attendance remains the same, even though there were corrections to be made to the proposed list, the Grievant nonetheless has failed to maintain regular attendance.

In an analysis of the just cause principles, the Arbitrator is required to interpret the tenets of just cause based on the evidence presented. The Arbitrator finds, and the facts do not dispute, that there are clear rules regarding the mandatory nature of regular attendance. Also, the case file does not reflect that there were issues raised over whether the rules were equitably enforced, or any claims of untimeliness. In the Arbitrator's view, the severity of the discipline, which was a removal, was reasonably related to the infraction itself, although that is not to say that the removal was necessarily appropriate. Further, in reviewing the just cause standards, no evidence was presented to challenge whether the discipline is in line with that usually administered. While the seriousness of the employee's past record was mentioned by the Service, as stated above, no specific information was provided other than to complain that the record had been a problem since over ten (10) years ago.

The Union contends that Management failed to conduct a thorough investigative interview regarding the alleged offense, which is another required consideration under the just cause analysis. During the investigative interview, there were three (3) questions, and another purported question, asked of the Grievant. The Union argues that during previous investigative interviews, the Service listed and asked specific questions, but failed to do so in the current matter. The Union views this as a flaw. The questions asked in the current matter are:

1. Do you understand? That the investigative interview could lead to discipline, and that cooperation is required. The Grievant responded "Yes."
2. Are you aware that you are required to be regular in attendance? The Grievant responded "Yes."
3. Do you have anything you would like to add to this investigation concerning your

unscheduled absences? The Grievant responded "8/8 – day after I had heat exhaustion."

The Union complains that the Service failed to ask sufficient follow-up questions. The record reflects that the Service advised Mr. Khamdaraphone that he had unscheduled absences and presented a list of the dates for his response(s). The Arbitrator is not deterred by the number of questions asked during the investigative interview. Nor does the CBA dictate that a certain number of questions must be asked. Nor is there a template of what must be specifically asked or exhausted. The Grievant acknowledged that during the investigative interview, the unscheduled absence dates were provided to him. According to the Service, he was asked about the dates (although testimony did not reveal that they were specifically "called out" as in previous cases) cited on the NOR and was given the opportunity to provide any relevant information. The testimony also reveals that the Grievant only stated that one of the absences, 8/8/22, was due to heat exhaustion, and provided no additional information regarding the others. The Arbitrator notes that the Grievant was specifically asked if there were anything else that he wanted to add. The Grievant's file was devoid of any indication of a heat-related illness. Nor was there any OWCP claim or request OCWP related to any heat exhaustion. As a consequence, the Arbitrator is convinced that the Grievant knew the dates for which he was being disciplined and had sufficient opportunity to provide additional information. Further, although the Grievant stated that he was caught off guard when he was called into the investigative interview meeting, he did not claim that he never learned of the meeting's purpose.

The Union references Arbitrator Lumbley (E16N-4E-d 20120368 (C-34784), which alluded to the decision in Case No. FO6N-4F-D 11040838/NALC No. 01-188086 (2011) addressing the [Employer's] need to "approach the Investigative Interview with an open mind." However, in the instant case, no evidence was convincingly placed on the record to establish that the Postal Service was predisposed in any way.

There are several quirks in this case that cause the Arbitrator to take pause. First, the Letter of Removal of 9/28/2022 had on its subject line "LOW" representing "Letter of Warning, and made references to "LOW" or "Letter of Warning" throughout the letter. The Service describes this as a "typo," but the Union challenges the Service's attention to detail which is required in a case rising to the level of removal.

Second, the evidence presented during the hearing established that the record was otherwise not exactly accurate. That same purported Letter of Removal reflected that the Grievant was charged with an absence on July 11; however, he worked 8.2 hours on that date. Additionally, the record did not reflect that the Grievant took bereavement leave due to the death of his grandmother on July 5 and July 7, although there was conflicting testimony over whether the Grievant provided funeral documentation before the Formal A meeting.

The Grievant's current disciplinary file contains three (3) pieces of discipline which include a 7-Day suspension and two (2) 14-Day suspensions. With the Grievant's most recent unscheduled absences, this certainly gives the Postal Service ammunition to strike while the iron was hot. The Arbitrator, however, questions whether the iron was actually hot because the record and other evidence upon which the Service relied was not totally reliable. The Arbitrator notes that under Bereavement Leave, the JCAM indicates that documentation evidencing the death of the employee's family member is required only when the supervisor deems documentation desirable for the protection of the interest of the Postal Service. Clearly, Bereavement days should not be counted as unscheduled leave. It went unchallenged that the Grievant provided the bereavement documentation. There was no evidence presented that the information was previously requested and the Grievant refused or failed to present it. Also, it was established that Mr. Kmadaraphone worked on 07/11/22, although reflected erroneously in the Letter of Removal. The record was not clear on whether he was penalized for any failure to work scheduled overtime on o7/11/22. NALC Formal A Representative, Ryan Dercher, testified that the Service was aware that the Grievant's absence dates had been improperly used against the Grievant. This contention was not proven, however, the burden is not on the Union in this matter. The Postal Service did not convincingly argue against it.

A third quirk, in this case, is the Postal Service openly concurs that there were dates cited on the NOR, but later determined that those "forgiven" dates were not necessary to prosecute the discipline. The Service acknowledges that some improper coding had taken place, but indicates that the discipline assessed was still supported by the Grievant's other absences and that the incidental typos do not alter the Grievant's actual failure to report for regular attendance.

If the Arbitrator were to subscribe to this argument, then the question becomes, "Because some of the listed dates may be retractable, at what point did the Postal Service determine that it was appropriate to issue the NOR?" For the Arbitrator, the answers to this inquiry would be a wild guess, particularly since the Service did not provide proofs to respond to this inquiry.

The Service clamors that there was no basis to conclude that the Grievant's attendance would improve. This Arbitrator sees it differently, particularly based on the Grievant's most recent record, which went unchallenged. That record reflects that there has been an improvement. Because the Grievant's attendance has improved, the Arbitrator will not assume that it will just get worse. If it does, however, both sides continue to have provisions to address it. The Arbitrator is inclined to focus on what has occurred more recently. But the employee is not off the hook.

The Arbitrator found Station Manager Mr. Gunther's testimony that missing one (1) day of work defeats the definition of being "in regular attendance" as not being probative. This testimony was confusing to the Arbitrator because if that is the case, few if any employees would be in regular attendance.

Fourth, returning to the just cause standards, the Arbitrator is reminded that embodied in another tenet is the requirement that the discipline be corrective, rather than punitive. The discipline must be assessed in a manner that is intended to improve the employee's behavior, rather than punish it. The Arbitrator is not persuaded that the Grievant is beyond rehabilitation based on his recent record. His attendance has significantly improved. As pointed out by the Union, he missed three (3) days within 51 days. This represents a notable improvement since the Grievant's prior 14-Day Suspension. Also, the Grievant indicated that he thought, and had been advised by his supervisor, that his attendance had improved. This was never abashed by the Service. Although the Service alluded to three (3) additional occurrences between the NOR and prior to Step B, the Arbitrator is not inclined to consider these accusations because they do not appear to be within the purported violation period and no additional information was provided.

The Arbitrator is inclined to distinguish the McDowell Arbitration (CT 18T-1C-D 19458174) matter proffered by the Service from the current case. In that case, the Service determined that further discipline would not have any corrective effect. As this Arbitrator sees it, removal does not have a corrective impact as the terminated employee no longer has the job. But if a corrective effect is apparent while the employee is still working, perhaps the ultimate goal of rehabilitating the employee has been reached. It is clear in the current case that the prior 14-Day suspension did have a corrective effect in that the Grievant's attendance record improved significantly. This fact lends itself to support the claim that there was a curative effect resulting from his prior suspension. Also, in the same case that the Postal Service cited as a comparable, the Grievant had a short work history. In the current case, the Grievant's longevity bodes in his favor. This Arbitrator is inclined to determine that the Service should have issued a lesser disciplinary action than removal if any at all.

Although it was alleged during the hearing, the Union did not establish through any contractual provision or other documents that the Postal Service was required to place the Grievant on a 30-day suspension before a removal. Nor did the Union prove that the Grievant was entitled to restricted sick leave. As the Service points out, the language in ELM 513 is optional, and not mandatory language.

Finally, Contrary to the Union's claim, no persuasive evidence was placed into evidence to convince the Arbitrator that the discipline was issued by a command decision rendered by the acting Manager, Jacob Gunther.

CONCLUSION

The Arbitrator fully recognizes the need to have employees at work and that the Service must be able to expect that employees will regularly appear for work. Irregular attendance is a grave issue and problem in the workplace. However, assessing discipline during a period of apparent improvement is not what the parties, the contract, or the progressive discipline process intended. Taking into consideration the Grievant's tenure with the Postal Service, his prior record, and his recent propensity to improve, in the Arbitrator's view, the discipline was overly harsh.

To the Arbitrator, it is certainly understandable that typos and/or other clerical errors may occur while preparing a Letter of Removal. But what the Service is contending is that even without considering those dates that may have otherwise been excusable, the Grievant's record was so

egregious that the NOR should still stand. The Arbitrator is not convinced. The accurate number of unexcused absences is less than what is reflected in the NOR. The Grievant's record reflects an improvement since his prior discipline. If the dates that were improperly considered as unexcused absences are converted to excused absences, or something else, this bolsters the Grievant's record with a more favorable appearance. Also, even though the Service indicates that the revised record would have been sufficient to support the Grievant' NOR, the Arbitrator does not know this to be factual and is not inclined to guess. Finally, although the Arbitrator does not find that the Grievant's due process rights were violated as the investigative interview was sufficiently conducted, the discipline that resulted from the process was overly harsh. Based on the totality of circumstances, the Arbitrator finds that the discipline was rooted in a punitive, rather than corrective, framework. Just cause was not established.

AWARD

Based on the foregoing, the Grievance is sustained.

The Grievant shall be returned to work. The 14-Day suspension that was reflected on his record before the current Notice of Removal (NOR) discipline shall remain on his record. That 14-Day suspension shall remain active and shall be tolled and extended to remain on his record for whatever remaining period he had left for it to remain on his record at the time of the current discipline, starting with his return to work date. The Grievant's NOR shall be rescinded and purged from his record. The Grievant shall be made whole for all lost wages and benefits, including missed overtime.

The Arbitrator retains jurisdiction of this matter for sixty days solely to respond to inquiries regarding the remedy.

April 23, 2023

/s/ Earlene Baggett-Hayes

Earlene Baggett-Hayes, Arbitrator