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.

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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.

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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.

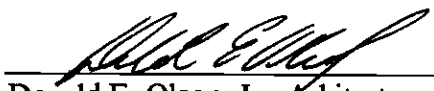
In review, this Arbitrator notes the Grievant was also treated in a disparate manner in her use of sick leave versus co-workers. During the period in dispute, the Grievant used a total of 88 hours of sick leave. On the other hand, some employees used more sick leave than the Grievant, however, the record 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