

REGULAR ARBITRATION

C-23831  
A+B

PACIFIC AREA

|                                |   |                                |
|--------------------------------|---|--------------------------------|
| In the Matter of Arbitration   | ) | CASE NOS.: F98N-4F-D 01200171; |
|                                | ) | F98N-4F-D 01198261             |
| Between                        | ) |                                |
|                                | ) | DRT NOS.: 60337; 60338         |
| NATIONAL ASSOCIATION OF LETTER | ) |                                |
| CARRIERS, AFL-CIO,             | ) | GRIEVANT: KENNETH KRAIG        |
|                                | ) |                                |
| Union,                         | ) | DATES OF HEARING: 7/10/02 and  |
|                                | ) | 8/26/02                        |
| -and-                          | ) |                                |
|                                | ) | DATE OF BRIEFS: 9/12/02        |
| UNITED STATES POSTAL SERVICE   | ) |                                |
| SANTA CLARITA, CALIFORNIA,     | ) | HEARING LOCATION:              |
|                                | ) | SANTA CLARITA, CALIFORNIA      |
|                                | ) |                                |
| Employer.                      | ) | ARBITRATOR'S                   |
|                                | ) | <u>DECISION AND AWARD</u>      |

BEFORE: CLAUDE DAWSON AMES, Arbitrator

APPEARANCES: For the Union:  
 Joan M. Hurst, Regional Administrative Assistant  
 3636 Westminster Avenue, #A  
 Santa Ana, CA 92703-1145

For the Employer:  
 Teresa L. Fleming, Labor Relations Specialist  
 Van Nuys District  
 28201 Franklin Parkway  
 Santa Clarita, CA 91383-9403

AWARD: The Employer had just cause to place Grievant on a Section 16.7 Emergency Suspension, but not to dismiss Grievant from employment., Grievant shall be reinstated subject to the conditions more fully set forth in the Award. The Union's grievance is sustained in part and denied in part.

DATED: **RECEIVED**

October 25, 2002

*Claude Dawson Ames*

CLAUDE DAWSON AMES, Arbitrator

NOV 26 2002

VICE PRESIDENT'S  
OFFICE  
NALC HEADQUARTERS

I.

INTRODUCTION

This arbitration proceeding arises pursuant to the parties' current Collective Bargaining Agreement (hereinafter the "CBA") between the UNITED STATES POSTAL SERVICE (hereinafter the "Employer", "Service" or "Management"), and THE NATIONAL ASSOCIATION OF LETTER CARRIERS AFL-CIO (hereinafter the "NALC" or the "Union"). Pacific Area panel member Claude Dawson Ames was selected as Arbitrator to hear the dispute. Pursuant to Article 15.2 of the CBA, the decision of the Arbitrator shall be final and binding. The arbitration hearings were held on July 10, and August 26, 2002 at the Santa Clarita Post Office. Teresa L. Fleming appeared on behalf of the Employer. Joan M. Hurst appeared on behalf of the Union.

The dispute before the Arbitrator involves the emergency placement on off-duty status and proposed termination of Kenneth Kraig (hereinafter "Kraig" or the "Grievant") from his employment with the Service. Grievant was working with medically imposed work restrictions/limitations on his physical activities due to a back injury. The Service placed Kraig on off-duty status without pay following video surveillance of Grievant while on vacation trips with his family surreptitiously provided by the Postal Inspection Service, and corroboration by Grievant's treating physician that the limited duty restrictions were no longer appropriate. Grievant was subsequently dismissed from employment for misrepresentation of , and failure to report a change in his physical/medical status. The Union disputes whether just cause existed for Kraig's emergency suspension and dismissal from employment.

The hearing proceeded in an orderly manner and the parties were afforded a full opportunity for the examination and cross-examination of witnesses, presentation of oral testimony and documentary evidence. All witnesses appearing for examination were duly sworn under oath by the Arbitrator. The parties agreed that the jointly consolidated matters were properly before the Arbitrator. There was no issue of substantive or procedural arbitrability. The parties elected to submit post-hearing briefs in lieu of oral closing arguments, which were received by the Arbitrator in a timely manner. The hearing was officially closed upon final receipt of the parties' post-hearing briefs.

## II.

### ISSUES PRESENTED

The issues presented to the Arbitrator and agreed upon between the parties are as follows:

- 1) Was placement of Grievant on emergency suspension on April 25, 2001, in violation of Section 16.7 of the CBA?  
If so, what is the appropriate remedy?
- 2) Was the Notice of Proposed Removal dated May 10, 2001, issued for just cause?  
If not, what is the appropriate remedy?

## III.

### RELEVANT CONTRACTUAL AND REGULATORY PROVISIONS

COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO and U.S. POSTAL SERVICE November 21, 1998-  
November 20, 2000

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

#### Section 5. Suspension of More Than 14 Days or Discharge

In the case of suspension 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 the disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure. A preference eligible who chooses to appeal a suspension of more than fourteen (14) days or his/her discharge to the Merit System Protection Board (MSPB) rather than through the grievance-arbitration procedure shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement or through exhaustion of his/her MSPB appeal. When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the Employer is not required to give the employee the full thirty (30) days advance written notice in a discharge action, but shall give such lesser number of days advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

#### Section 7. Emergency Procedure

An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action under this Section may be made the subject of a separate grievance.

### ARTICLE 17 - REPRESENTATION

#### Section 2. Appointment of Stewards

- A. The Union will certify to the Employer in writing a steward or stewards and alternates in accordance with the following general guidelines. Where more than one steward is appointed, one shall be designated chief steward. The selection and appointment of stewards or chief stewards is the sole and exclusive function of the Union. Stewards will be certified to represent employees in specific work location(s) on their tour; provided no more than one steward may be certified to represent employees in a particular work location(s). The number of stewards certified shall not exceed, but may be less than, the number provided by the formula hereinafter set forth.
- B. At an installation, the Union may designate in writing to the Employer one Union officer actively employed at that installation to act as a steward to investigate, present and adjust a

specific grievance or to investigate a specific problem to determine whether to file a grievance. The activities of such Union officer shall be in lieu of a steward designated under the formula in Section 2.A and shall be in accordance with Section 3. Payment, when applicable, shall be in accordance with Section 4.

### Section 3. Rights of Stewards

The steward, chief steward or other Union representative properly certified in accordance with Section 2 above may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance or determining if a grievance exists and shall have the right to interview the aggrieved employee(s), supervisors and witnesses during working hours. Such requests shall not be unreasonably denied.

## ARTICLE 31 - UNION-MANAGEMENT COOPERATION

### Section 3. Information

The Employer will make available for inspection by the Union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information.

Requests for information relating to purely local matters should be submitted by the local Union representative to the installation head or his designee. All other requests for information shall be directed by the National President of the Union to the Vice-President, Labor Relations.

Nothing herein shall waive any rights the Union may have to obtain information under the National Labor Relations Act, as amended.

(The preceding Article, Article 31, shall apply to Transitional Employees)

## IV.

### STATEMENT OF FACTS

Grievant Kenneth Kraig has been an employee of the Service since February 16, 1973 and at the time of the grievance he was a City Carrier at the Santa Clarita Post Office on limited duty of four hours per day. In February, 1984, Grievant sustained a work-related back injury requiring surgery, which kept him off work until 1988. Grievant was again off work from 1990 to July, 2000 due to a recurrence of the back injury which placed him on total disability. Grievant resumed a four

hour per day limited duty work schedule from July 17, 2000 until April 25, 2001, when he was placed on emergency suspension by the Service. Grievant has been under the care and treatment of his primary physician, Arthur I. Garfinkel (“Garfinkel”) since March 1984. Garfinkel approved Grievant’s return to work in July, 2000 on a limited duty basis, subject to restrictions included in an Office of Workers Compensation Program (“OCWP”) Work Capacity Evaluation Form No. 5, dated July 12, 2000. These restrictions/limitations were as follows: *Grievant is restricted to working 4 hours per day; no repetitive bending or stooping, no prolonged sitting (no more than 1 hour) or standing (no more than 2 hours), no balancing or prolonged walking (no more than 1 hour; Grievant can push, pull, and lift up to 10 lbs. for up to 4 hours; Grievant is restricted from reaching, squatting, kneeling and climbing; Grievant is restricted to twisting no more than 1 hour; Grievant can operate a vehicle for up to 1 hour; Grievant is to have a 15-minute break every 2 hours.*

In October 2000 and January 2001, Grievant took vacation trips with his family to the San Diego Zoo, Sea World and Disneyland. Grievant did not know that these trips had been provided by the Postal Inspection Service as part of an investigation (the “Investigation”), which included videotaped surveillance of his activities. An edited videotape<sup>1</sup> showing Grievant engaged in activities which (arguably and as admitted by Grievant) exceeded his then-current work restrictions, was shown to Garfinkel on March 22, 2001.

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<sup>1</sup> This thirty-nine minute videotape of Grievant, ostensibly showing his activities of October 11 and 12, 2000 and January 25, 2001, is referred to by the Union as the “edited” tape, and by the Employer as the “condensed” tape. This tape will be referred to hereinafter as the “Video”.

Following his review of the Video, Garfinkel concluded that Grievant had misrepresented his injury status and consequently modified his work restrictions retroactively to October 2000, with reduced limitations and increased work hours. The new work restrictions (*Grievant can lift ten pounds for eight hours a day, sit for three hours, stand and walk for six hours, simple grasping for eight hours and drive a vehicle for three hours*) and the allegation of Grievant's misrepresentation of symptoms were included in a sworn statement by Garfinkel dated April 4, 2001. The Postal Inspectors' investigation resulted in an Investigative Memorandum dated April 9, 2001. On April 25, 2001, Grievant was notified that he was placed on Emergency Suspension without pay commencing on April 26, 2001, based on the Investigative Memorandum, and subsequently notified of his proposed removal dated May 10, 2001.

V.

#### PROCEDURAL HISTORY

A fact-finding interview was conducted on May 1, 2001, and on May 11, 2001, Kraig received a Notice of Proposed Removal dated May 10, 2001. On June 5, 2001, Kraig was issued a "Letter of Decision" that he would be removed from the Postal Service effective June 12, 2001. The grievances (one for placement on emergency suspension and a second for the proposed removal from employment) were filed and a discussion had with the supervisor on May 30, 2001. Formal Step A Meetings were conducted on June 21, 2001 (for the emergency suspension) and June 28, 2001 (for the employment termination) wherein the grievances were not resolved. The grievances were then appealed to and received at Step B on July 3<sup>rd</sup> (suspension) and 10<sup>th</sup> (termination), 2001 and were determined to be at an impasse by a decision of the Van Nuys District Dispute Resolution Team ("DRT") dated July 11, 2001. The grievances were then appealed to arbitration.

VI.

POSITIONS OF THE PARTIES

Employer's Position:

The Employer advanced the following arguments in support of its position that just cause existed for the Emergency Suspension and termination:

1. Grievant misrepresented the extent of his injuries resulting in more in-depth work restrictions than he actually required. It is apparent from review of the Video that Grievant misrepresented his duty status. Grievant engaged in activities that violated the majority of his work restrictions on each of the dates on the Video. Grievant was either observed or videotaped driving in excess of one hour a day, walking in excess of one hour a day, standing in excess of two hours a day, lifting in excess of ten pounds, bending and climbing. In addition, it was apparent that he engaged in all these activities without any obvious distress or pain.
2. It is clear that Grievant engaged in unacceptable conduct when he misrepresented his duty status to Dr. Garfinkel and subsequently to the Postal Service. While Grievant did still have some residual restrictions from his surgeries, he was not as disabled as he presented himself. He therefore continued to receive a benefit he was not entitled to, namely continued compensation of four hours a day from OWCP when he was able to work for up to eight hours a day. Grievant himself admits that the intent on bringing him back to work was that he would return to four hours, then six, then eight.
3. Once Grievant's misrepresentation was brought to Management's attention, Grievant was placed on Emergency Suspension as it was rightfully believed that retaining him on duty may very well have resulted in further injury. This was a very real concern based on the violation of his



work restrictions and on the fact that he could have continued to do so and/or indicated a need for even more restrictions. The penalty of removal is not in excess of the seriousness of the infraction. Misrepresentation is a most egregious offense and warrants removal. The removal of employees is regularly upheld for misrepresentation and falsification.

Union's Position:

The Union advanced the following arguments in support of its position that the Emergency Suspension and termination of employment of Grievant were without just cause:

1. Grievant was placed on Emergency Suspension on April 25, 2001 based upon a Postal Inspectors' Memorandum dated April 9, 2001, which detailed conclusions from an investigation involving surveillance of Grievant from October 2000 and January 2001. Grievant continued to work for six months after the first surveillance videos were taken without harm to himself or to others. The provisions of Article 16., Section 7., are for "immediate" action by the Employer to safeguard either the mail, customers or employees. There was absolutely no "emergent" trigger for placing the Grievant on emergency leave because not only did the Service believe that he could do more work than he was doing, but it had Garfinkel "back date" new work hours for the Grievant to October 2000. The Union maintains that the Service improperly placed the Grievant on emergency leave in violation of Article 16.7 and requests that the action be removed from Grievant's records and that he be made whole.

2. Before administering the discipline, Management must make an investigation to determine whether the employee committed the offense. Since this investigation is the employee's "day in court", it must be thorough and objective, and should afford the employee a reasonable

opportunity to defend himself against the specifically detailed charges before the discipline is initiated. The Union's requests for surveillance videotapes and inspectors' handwritten notes, from the Postal Inspector's investigation, and the opportunities to interview beforehand and question Grievant's treating physician at the arbitration hearing, were denied or frustrated. The investigative interviews conducted by Management of both Garfinkel and Grievant were a sham in which Garfinkel was asked leading questions after misrepresentations about the "condensed" surveillance tapes by the inspectors, and Grievant was merely asked to respond to accusatory questions which had predetermined his guilt.

3. Management has the burden of proof of the existence of good cause for the suspension and firing of Grievant for misrepresentation, and the Investigation is the basis of those actions. To prove misrepresentation, the Service must prove that the Grievant willfully and with intent, pretended to Garfinkel to be more disabled than his medical condition showed. The Investigation does not constitute preponderant evidence of either violation of his work restrictions (with which he is not formally charged) or misrepresentation by Grievant of his duty status. Based on the fact that the Service has failed to prove by a preponderance of evidence that Grievant "misrepresented his duty status", the Union contends that just cause for his suspension and dismissal did not exist, and requests that its grievances be sustained.

## VII.

### DECISION

#### A. Emergency Suspension

This case involves the disciplinary Emergency Suspension and Removal from employment of the Grievant for “unacceptable conduct and misrepresentation of duty status” based on charges that he exaggerated the extent of his injuries to gain unwarranted workers compensation benefits by dishonestly failing to accurately report his improved physical condition. The Service argues that Grievant’s conduct shows an intent to deceive his Employer in order to prolong his limited duty work assignment and gain compensation to which he was not entitled. The misrepresentation that Grievant is charged with is actually a form of fraud. Where one party knows that the other is acting under a material mistake, and takes advantage of it without disclosing the truth of the matter, his silence may amount to fraud.<sup>2</sup> Indeed, fraud is a most egregious offense which merits severe discipline, because dishonesty for personal gain is reprehensible. Such intentional abuse of the truth should never go unpunished. As a consequence, not only the actual gravity of the alleged infraction committed, but the severity of the penalty demand the fullest substantive and procedural fairness in the necessary disciplinary investigation as well as clear and convincing evidence at arbitration. It is the Arbitrator’s job in this case to assess the disciplinary process and the discipline imposed to determine whether just cause existed for it.

This case is far from one of first impression. To the misfortune of a genuinely disabled employee working a limited duty assignment is added the intrigue of an undercover surveillance

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<sup>2</sup> Walsh on Equity, at page 509

investigation showing the subject in a healthier light than that perceived by his supervisors and treating physician. The Employer infers from its surveillance that the Grievant misrepresented his duty status to his doctor, to Management and to the OWCP, and, reasonably or not (or perhaps more accurately—with or without just cause), quickly acted to discipline him for the presumed misconduct.

Both parties submitted numerous arbitration decisions as case authority for their respective positions in the instant case. These arbitration decisions which were thoroughly reviewed, examine the relevant concerns in instances of Emergency Suspension followed by Removal from employment. As pointed out by Arbitrator Michael Jay Jedel (in USPS Case No. H98N-4H-D 01092533; NALC Case No. F01-067D):

It is clear that there is a solid body of arbitral case law supporting the position of the Postal Service that Emergency Suspension and ultimate Removal are justified where the evidence establishes that a grievant misrepresents the extent of his or her physical condition, often to gain unwarranted workers' compensation benefits. In several cases, the utilization of Inspection Service surveillance, corroborating reports, and testimony, has been found clearly sufficient to prove the charge.

(at page 9 of the Arbitrator's Decision)

However, unlike some of the proposed arbitral case authority submitted by the parties, Grievant in this case *did not*: 1) falsify documents; 2) work second jobs while collecting unwarranted compensation; 3) demonstrate fundamental dishonesty or a proven intent to deceive; 4) refuse limited duty work offers which were appropriate for his medically determined work capacity; or 5) engage in any flagrant or excessive violation of his existing work restrictions/limitations. The absence of any of these factors here, factually distinguishes this case from much of the preceding arbitral case law. The Arbitrator finds these prior decisions informative, and concurs with their respective analyses, if not their conclusions. Of particular relevance is the decision of Arbitrator

Richard Mittenthal (in Case Nos. H4N-3U-C 58637 and H4N-3A-C 59518; USPS Case No. 846777), which points out:

“Just cause” is not an absolute concept. Its impact, from the standpoint of the degree of proof required in a given case, can be somewhat elastic. For instance, arbitrators ordinarily use a “preponderance of the evidence” rule or some similar standard in deciding fact questions in a discipline dispute. Sometimes, however, a higher degree of proof is required where the alleged misconduct includes an element of moral turpitude or criminal intent. The point is that “just cause” can be calibrated differently on the basis of the nature of the alleged misconduct. By the same token, “just cause” may depend to some extent upon the nature of the particular disciplinary right being exercised. Section 7 grants Management a right to place an employee “immediately” on non-duty, non-pay status because of an “allegation” of certain misconduct (or because his retention “may” have certain harmful consequences). “Just cause” takes on a different cast in these circumstances. The level of proof required to justify this kind of “immediate...” action may be something less than would be required had Management suspended the employee under Section 4 or 5 where ten or thirty days’ advance written notice of the suspension is given. To rule otherwise, to rule that the same level of proof is necessary in all suspension situations, would as a practical matter diminish Management’s right to take “immediate...” action. No generalization by the arbitrator can provide a final resolution to this kind of problem. It should be apparent that the facts of a given case are a good deal more important than any generalization in determining whether “just cause” for discipline has been established.  
(at page 9 of the Arbitrator’s Decision)

It is a logical inference that Grievant would gain from failing to reveal an improvement in his physical/injury status that would make him capable of working more than the four hours per day limit, while being paid for a full eight hours of work. Indeed, it is this inference which is the strongest argument for the presumptive conclusion that Grievant availed himself of work restrictions/limitations that were no longer medically necessary, to unjustly enrich himself with four hours of pay per day for which he did not have to work. As compelling as that argument may be, it is premised upon the summary conclusion of an actor in the controversy (Garfinkel) who based his opinion on limited evidence and hearsay upon which he was never cross-examined.

The Arbitrator’s assessment of the available evidence (including several reviews of the video) is that Grievant was shown exceeding work restrictions, but not necessarily demonstrating

any culpable intent or effort to conceal an improved physical condition from the Employer. There was no direct evidence that Grievant told Garfinkel that he was unable to walk, sit, stand, drive, bend, twist, etc., for more than the work limits prescribed. Neither was there evidence that the recommended progressive increases in workday hours for Grievant were ever discussed, investigated or pursued by Garfinkel or the Service. The role of the treating physician and his opinion of Grievant's misrepresentation are central to the discipline by the Employer. Garfinkel's medical opinion in the Investigation included the non-medical conclusion that Grievant had misrepresented his physical condition or had been less than frank. Since the basis of the Employer's disciplinary action against Grievant was Garfinkel's accusation of misrepresentation, his absence from arbitration forces factual speculation about critical issues of the case, as to Grievant's representations about his own physical condition to Garfinkel. In the non-medical arena of adjudicative analysis, evidence must exist in order to prove a contested issue. Here, without the testimony of Garfinkel as to what Grievant actually said, the occurrence of his alleged misrepresentation has far less support by competent evidence. The circumstances and content of Grievant's contacts with Garfinkel are necessary to identify the alleged misrepresentations with specificity. Concerning the claim that Grievant misrepresented the severity of his injury, the only one who could support and corroborate that argument was Garfinkel, and there was no testimony from him in this matter or any matter. It was the perception of Investigators and Management however, and the video shown Garfinkel, which lead to the conclusion that Grievant did not show pain, discomfort, difficulty or distress in the performance of his vacation activities as the bases for his removal. Since Grievant has not been charged with or dismissed for exerting himself while on vacation. Although the extent to which the Video accurately portrays Grievant's actual medical condition is a question better left to medical expert opinion, the Arbitrator is called upon to evaluate that extent, and determine whether it constitutes a legitimate basis (i.e., just cause) for the discipline.

That determination cannot be made without knowledge of what was said by both Grievant, as representations of his physical condition, and by Garfinkel, as to work and non-work medical restrictions.

The Video, referred to as the “condensed” video by its proponent, showed presumably carefully selected excerpts of Grievant walking around amusement parks, exceeding quantitative time limits on work activities, and going on rides not recommended for persons with the kind of disabling back injuries from which he allegedly suffered, all with Grievant demonstrating no apparent pain or distress. The Arbitrator must presume that the Video is the Employer’s strongest evidence of Grievant’s wrongdoing (which immediately raises the question of just what the “condensation” of the Video actually involved.), and as such, it shows an individual arguably acting against medical advice with respect to work limitations and arguably imprudently in his apparent disregard for posted warnings. But not necessarily in ways atypical for a person with several fused vertebrae and a disabling back problem on a family vacation. Nothing in this Video conclusively showed Grievant engaged in any rigorous or strenuous activity, or any action shown to be prohibited outside of his employment. As the Union accurately argues, the Video also did not (and could not possibly) present the full extent (including rest, eating, etc.) of the vacation days’ activities. This case would be far less troubling had not the investigators represented to Garfinkel that footage of Grievant at rest had not been excluded from the Video. The leap from Grievant’s demonstrated, injudicious leisure activities to the presumption of intentional concealment, non-disclosure or misrepresentation of his physical capacity to work, is a step that must be firmly supported by the evidence record.

At the heart of the Employer’s case is the argument that Grievant’s employment with the Service is an implied agreement to live his entire life subject to the work restrictions of his job. This argument has some credible weight insofar as it is not unfair to impose an affirmative duty

upon a disabled worker to notify his employer of changes in his health status that would affect his work capability. Assuming that Grievant did, as the Employer argues, violate his work limitations while he was on vacation, does that prove that he misrepresented his duty status to Garfinkel? The evidence, that in response to a carefully edited depiction of Grievant moderately exerting himself at amusement parks, Garfinkel opined deception by Grievant, is less than convincing that Grievant did misrepresent his duty status. In the absence of evidence that he was prohibited from walking, driving, going on amusement park rides and participating in family recreation, there is very little to argue as misconduct by Grievant. If, as it appears, Garfinkel's applicable prohibition to Grievant was "...to avoid any and all strenuous activities", then there is no evidence of Grievant violating that restriction in the Video. Garfinkel may have thought differently, but we are not privy to his thought processes. Other than his sworn statement and modification of Grievant's work restrictions after being shown the Video by the investigators, Garfinkel shared only two additional pieces of information. In correspondence from his office manager to Grievant dated August 14, 2002, he states:

The restrictions and limitations listed on the July 17, 2000 Work Capacity Evaluation were in reference to a typical eight hour work day, not a twenty four hour day. He was never advised to be at bed rest when not when (sic) working. (Union Exhibit 3)

In correspondence signed by Garfinkel to Grievant dated September 9, 2002 he states:

Theresa Fleming of the U.S.P.S. Labor Relation Department, prior to the August 26, 2002 hearing, called this office and informed my staff that my attendance at the hearing was not mandatory.

This advice to a subpoenaed witness appears to have caused or contributed to his failure to appear at the arbitration hearing. Garfinkel's medical involvement in the Investigation was a primary basis for the accusations and charges resulting in Grievant's discharge. Even if the Arbitrator did not question the veracity, details, or surrounding circumstances, or other aspects of Garfield's written



opinion rendered in his sworn statement, the Grievant was clearly entitled to do so, and the Employer is contractually obliged to share the available information from the Investigation with the Union. Grievant was not afforded his right to interview, confront or cross-examine Garfinkel, and his representatives' efforts to subpoena the doctor were apparently hindered by the questionably ethical tactic of Management's advocate advising the witness that his appearance was not mandatory. Neither the Arbitrator or Grievant's representative was advised by Management's advocate of any prior contact with Garfinkel or advice given, regarding his failed scheduled appearance. The Arbitrator considers this tactic an improper interference within (if not obstruction of) the arbitration process, denying Grievant the right of cross-examination and his due process right to confront a crucial witness.

The proper application of and appropriate standard of proof in Emergency Suspensions under Section 16.7 of the CBA both require determinations of just cause. The plain language of Section 16.7 conveys the sense of "emergency" in which the immediate removal of the subject employee to prevent harm is intended. The nature of Emergency Suspensions being that expedient, immediate action is called for, the ground for such action, although defined as "just cause", is probably functionally more equivalent to "reasonable cause". The fact that "reasonableness" is so variable that it can range between suspicion and certainty given the particular case facts, is the "elasticity" described by Arbitrator Mittenthal. Clearly, the grounds for Emergency Suspensions are enumerated in Section 16.7. These are specifically, allegations of intoxication (drugs or alcohol), pilferage, failure to observe safety rules and regulations, potential damage to USPS property, loss of mail or funds, or potential injury to self or others. Management's stated rationale for Grievant's emergency suspension, of preventing harm or more serious injury, is not quite logical. If, as Management believed, Grievant was working less time and less strenuously than he was then, in fact, capable of doing, then there was no demonstrable danger to him or other safety risk in his continued work at the limited duty level. However, Arbitrator Keith Poole describes (in

USPS Case No. H98N-4H-D 00204757; GTS No. 50991) the operative rationale actually employed by the Service in the instant case:

Where an employee files a false workers' compensation claim, the employee is asking for compensation from the Agency to which he or she would otherwise not be entitled and at the same time is improperly depriving the Agency of his or her services, thereby forcing the Agency to pay someone else to do the work in question. Such a claim causes a loss of funds to the Agency and is the direct and immediate result of the employee's action. For these reasons, I believe that although Article 16, Section 7 must be construed narrowly, it does cover an allegation that an employee filed a false OWCP claim is covered because the immediate and direct result of the employee's action may result in a loss of funds to the Agency.  
(at page 4 of the Arbitrator's Decision)

The evidence of dishonest (or fraudulent) conduct by Grievant which the Service perceived from the Investigation was a legitimate ground upon which to base its Emergency Suspension. Under the analysis offered by Arbitrator Mittenthal, the "reasonable" belief that Grievant was acting deceitfully or fraudulently constitutes just cause for the immediate suspension. Accordingly, the Arbitrator finds that there was just cause for the Emergency Suspension of Grievant by the Service.

B. Removal

The Union's argument that the Employer's reliance on the Investigation constituted a failure by Management to conduct an independent investigation is rejected as without merit. Questions as to the adequacy of the fact finding in the case can be dismissed since it is unnecessary for Postal Management to conduct a completely separate and independent investigation when its own inspection agency has already done so. The Investigation conducted by the Postal Inspection investigators may suffice for the Postal Service, *if done reasonably and properly, and if made known to the Union and Grievant in sufficient time for them to process the information during their own investigation and preparation.* The requirement of fairness is satisfied so long as Grievant is given the full opportunity to tell his side of the story, not by duplication of the investigation

process. There is no basis in law, contract or equity which requires the Service to conduct two separate investigations of a suspected offense.

Likewise, the Arbitrator finds no merit in the Union's objection respecting the delay between commencement of the Investigation and Management's initiation of discipline against Grievant. The approximately six months of part-time, limited duty work performed by Grievant under the alleged and suspected overly-restrictive work limitations was completely consistent with Grievant's return-to-work plan of gradually increasing work days.

The Union's objections to the lack of thoroughness in the Investigation has merit however. Following the Emergency Suspension of Grievant, the Service had ample opportunity to conduct fitness for duty and/or work capacity evaluations to accurately assess his physical condition and make a proper determination of his duty status. The Service chose not to do this, but to rely on its "one picture is worth a thousand words"-approach, which, under the circumstances, may not have been a misrepresentation of things, but certainly not a full presentation. Had the Service been timely with its sharing of requested information and surveillance tapes with the Union, it might have precluded any legitimate objection of failure to disclose. The Union's claims of violation of Article 17, Section 3 and Article 31, Section 3 by the Service appear to be well-founded and those violations seem to have materially prejudiced the Grievant's rights at the arbitration hearing.

The determination of just cause for the Removal of Grievant involves a somewhat stricter standard of proof, as illustrated by Arbitrator Poole's comments later in his opinion cited above:

In this case, I am not called upon to diagnose the grievant's injuries or how they should be treated; rather, I am called upon to judge the extent of those injuries based on his videotaped activity.

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In making this determination I specifically note that the standard for "just cause" in an Article 16, Section 7 case is lower from the standard for Just cause" in an Article 16, Section 4 or 5 case and therefore, my conclusion in this case is not applicable to the grievant's removal case.  
(at page 6 of the Arbitrator's Decision)

The issue of most concern to the Arbitrator in this case is the conduct by the Employer of

failure to produce evidence and advising Garfinkel that his attendance at the arbitration hearing was either not mandatory or unnecessary after having been subpoenaed. The Union was not provided factual information upon which to investigate the case, in a sufficiently timely manner so as to exercise its appropriate representational role. That conduct was improper, prejudicial to Grievant's due process rights, and suggestive of evidentiary weaknesses in the case presented by the Employer. Postal arbitrators have universally found that the Employer's sharing of video tapes with the Union is essential in support of a removal decision in cases involving surveillance of an employee. In the Arbitrator's view, the question of Grievant's actual fitness for duty is one that should have been determined by proper medical examination as opposed to the prosecutory investigation employed by the Inspectors.

The Arbitrator does not discount the Service's legitimate concern for potential employee fraud, but the evidence available to the Arbitrator is far less than compelling that Grievant was a perpetrator of deliberate misrepresentation. The removal of an employee from employment for the reasons given in this case (i.e., misrepresentation and fraud), requires a stronger showing of misconduct and wrongful intent than that made by the Service. The case by the Service was inconclusive due to an insufficiency of evidence to show deceit or a willful intent to defraud by the Grievant. Since Grievant's Removal was based on the Investigation, that decision by the Service appears to have been based upon misplaced confidence in evidence which does not sustain its burden of proof to show misconduct involving dishonesty or fraud. The Video does not establish the kind of conduct from which one could conclude that Grievant was attempting to deceive and defraud the Employer. Quite simply, the Arbitrator cannot rely solely upon the purported violation of work restrictions while on vacation to define Grievant's physical condition, or to determine his

representations of his work capacity. Accordingly, for the reasons stated above, the Union's removal grievance is sustained.

AWARD

The Arbitrator finds that there was just cause for the Emergency Suspension of Grievant but insufficient evidence for his Removal. Accordingly, the Union's grievance of the Article 16.7 Emergency Suspension is denied. The Service was unable to establish by convincing evidence that the Grievant intentionally misrepresented his physical condition for the purposes of gaining benefits to which he was not otherwise entitled. The grievance of Kraig's Removal from employment is sustained. Grievant shall be reinstated to his position preceding the suspension, subject to the following conditions:

1. Grievant's Notice of Removal is hereby rescinded and shall be expunged from his personnel file.
2. Grievant is to be made whole for all lost wages, less compensation received during the period of termination, including interest at the recognized federal rate, from his date of termination to the date of his reinstatement.
3. Grievant shall immediately undergo such evaluations of his fitness for duty and work capacity as necessary and directed by the Service to determine an appropriate work assignment and restrictions. The Arbitrator shall retain jurisdiction over this matter for ninety (90) days to resolve any questions pertaining to this remedy and award. The Union's grievance is sustained in part and denied in part.

DATED: October 25, 2002

Respectfully submitted,

  
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CLAUDE DAWSON AMES, Arbitrator