

C#01944

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

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

APPEARANCES:

For the Employer:

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

For the Union:

Paul C. Davis, Regional Administrative Assistant

ISSUE:

The subject matter in dispute poses the following issue:

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

BACKGROUND:

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

Employee and Labor Relations issued to the Grievant a "Notice of Charges

- Removal" which in pertinent part provided:

This is notice that it is proposed to remove you from the Postal Service no earlier than 30 days after the expiration of your forthcoming suspension, which will begin on October 15, 1979 and end on October 28, 1979.

The reasons for this proposed action are:

Charge 1. You are charged with failure to meet the minimum requirements of your position. Since you were issued a Notice of Suspension for seven (7) calendar days on March 7, 1979, an analysis of your attendance record reveals that you have been unavailable for duty on the following occasions:

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

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

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

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

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

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

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

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

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

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

EMPLOYER CONTENTIONS:

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

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

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

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

#### UNION CONTENTIONS:

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

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

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

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

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

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

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

DISCUSSION AND FINDINGS:

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

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

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

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

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

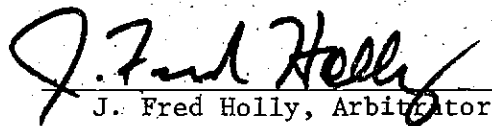
These procedural defects cannot be overlooked as being insignificant. They are of serious concern because they are in violation of both the letter and spirit of the National Agreement, and importantly they deprived the Grievant of his right to due process. In the absence of due process the grievance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

AWARD:

The Arbitrator hereby Awards as follows:

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

Knoxville, Tennessee  
May 20, 1980

  
J. Fred Holly, Arbitrator