DISCIPLINE

Investigating and Defending Article 16 Grievances

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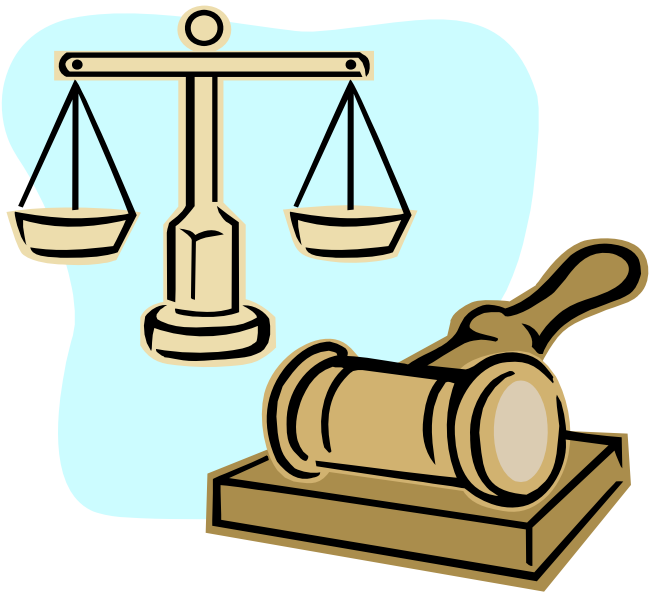

FORWARD

This is the sixth update or revision (seventh edition) of ***DISCIPLINE, Investigating and Defending Article 16 Grievance***s. The original product was developed in 1996; the first update was printed in December 1997; and the second became available in December 1999. The fourth edition was completed in November 2001. The fifth edition was put out in December 2003. The sixth edition was finalized in June 2006, just before the Philadelphia National Convention. This seventh edition is being completed in June 2007 for presentation this fall at the All-Craft Conference in Las Vegas, Nevada in cooperation with my good friend, National Maintenance Division Assistant Director Gary Kloepfer.

In putting together this product we have struggled to bring together as much information as possible into one source to suggest to Stewards and Officers possible defensive strategies in defending discipline cases. For many of us, this type of grievance is perhaps one of toughest things we do. There is often so very much on the line. Our member's job – what could be more important? And, far too often, at the same time a major portion of our membership is wondering "why is the Union defending Charlie" in the first place? But, we understand our role and we want to do our best. And against that backdrop this bit of assistance has been humbly prepared and offered.

This booklet was first published with the intent to be used for training in the four states of Minnesota, North Dakota, South Dakota and Wisconsin - the four states John Akey and I represented. With John's untimely passing on September 8, 2001, it seemed like a good idea to revisit this project and update it again as a small way for me to honor his memory. Thus, the fourth edition. As we prepared for the first ever Minnesota-Wisconsin "John Akey" Seminar, to be held in Rochester, Minnesota, October 2-3, 2003, it seemed like an appropriate time to update this work again. It is hard to work on this project without "remembering by buddy, John." When we began our tenure as NBA's together in 1995, John had a certain trepidation about handling discipline grievances or arbitrations. Over the next six (6) years, he attacked those cases with a fervor but grace that only John could accomplish and truly came to enjoy them. He really believed in defending his brothers and sisters, and more than once took on cases that raised our eyebrows and generated lively discussion within the office. We still miss you, John!

This package (as well as a companion PowerPoint presentation) has been well received and apparently was picked up by a few other Officers and spread outside our area. Over the years, we have had inquiries and comments from around the country and from other Unions as well. John and I certainly always appreciated that interest. If it helps somebody then we must be doing the right thing. And, if we can help a steward defend our members' rights against unjust discipline, what better way to honor John's memory? To those of you using all or part of these materials in your training endeavors - "thank you" for the compliment. John and I appreciate it.

For that reason, the seventh edition (and all future editions) of ***DISCIPLINE, Investigating and Defending Article 16 Grievance***s was and will be dedicated to John Akey, my partner and my friend. As noted, John particularly loved to handle discipline arbitrations. He had a special way of handling the grievants and relating to their difficulties. It is thus, very appropriate to continue to dedicate this work to his memory.

We have retained the original format. Several new sections added during the past few editions, *Weingarten Rights, Kalkines Warning, Paper Suspensions, Attendance Discipline, Just Cause, Steward Immunity, Probationary Removals, Management's Burden of Proof, But She Was Provoked,* and *Mitigating Factors,* have been added or further developed. Additionally, many, many new cites in the existing sections were added. We now have over 475 case cites linked to the 308 footnotes. We are always looking for good arbitration awards to cite and additional subjects to add in order to make this project even more useful and complete. Several of our Union brothers and sisters have forwarded cases for our use and we appreciate your assistance. Thank you to my good friend, NBA Steve Zamanakos, for his suggestion regarding a section of *Paper Suspensions* and to NBA Troy Rorman for his contributions of additional case cites regarding *Reliance on Evidence Gathered After the Fact.* If you have a suggestion; can send us a case or two; some constructive criticism; or, just a comment please do drop us a line. We would love to hear from you. More important, you can help make sure that the next edition, when it comes out, will be significantly better and even more useful. **Your help will be much appreciated** by us and, most importantly, by those who use this reference material in their work.

Almost all of the cases cited herein can be found in APWU Search. We realize that some cannot. However, please be assured that we have hard copies of every citation at our office. If you need a copy of something just drop us a line (or better yet, an e-mail) and we'll be happy to send it out. A special thank you to our good friend, Marty Barron, then President of the Greater Seattle Area Local, and now are fellow NBA, for introducing the concept of placing all of these cases on a CD-Rom so they would be available for your immediate review. If that is the version you are using we hope that you like the result. Special Kudos as well, are extended to Mike Morris, Assistant Clerk Craft Director, and Gary Kloepfer, Assistant Maintenance Craft Director, for their continued encouragement and assistance.

If you enjoyed this reference material we suggest you also obtain our other products, including ***Grievance Investigatio***n, a guide to investigating and documenting grievances at Step 1 and Step 2 and ***Know Your Right***s, a thoroughly documented review of APWU Stewards Rights under the Agreement. Until next time, just remember - ***Document! Document! Document!***

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DEDICATION

To my partner, my inspiration, and my friend
JOHN AKEY
NBA 1995-2001
[Missed…but never FORGOTTEN]

Table of Contents

The APWU/USPS National Agreement grants to the Employer the right to impose discipline for alleged misconduct. Every year, management takes disciplinary action of some sort (letters of warning/suspensions/removals) against thousands of APWU members. While we would never be so naive as to suggest that every disciplinary action is totally without merit, our function as APWU stewards and officers is to represent our members, not to judge them. Every APWU represented craft employee is entitled to a competent, thorough, and fair defense against management imposed discipline.

No one expects the APWU steward to be the second coming of F. Lee Bailey or Johnnie Cochran. What's more, it is not our job to "get the grievant off" after the Employer imposes discipline. But, if we want to effectively represent our membership we must become thoroughly familiar with the disciplinary process and with possible defensive strategies. It is our responsibility to provide each disciplined employee with the best available defense.

Article 16 of the Collective Bargaining Agreement, of course, spells out the specifics of the parties' disciplinary procedure. The purpose of this work is to familiarize the steward with just a few of the available defensive strategies. The purpose of this work, most certainly, is not to encourage any steward to needlessly appeal grievances to the next step of the procedure. Ultimately, the purpose of the grievance procedure is to resolve grievances. If, on the other hand, some idea within these pages can assist you in formulating an argument or defense which thereafter helps you settle your grievance in a manner favorable to your grievant, then you (and ultimately, this writer) have been successful!

The key to effective representation in discipline grievances is, and always will be, ***investigation and documentation*****!** Whether in development of the facts of the case, discovery of possible procedural deficiencies, or in determining the applicability of a possible defense or mitigating factor, investigation and documentation will still be the key and critical tools of an effective APWU steward. No amount of ingenuity, "book learning" or cleverness will ever replace those countless hours of nose-to-the-grindstone investigation and just plain "hard work." Effective and timely investigation, complete and thorough documentation, and finally, a detailed analysis and development of all potential arguments and defenses are the keys to effective representation in handling discipline grievances.

The "she didn't do it" defense is obviously almost always the most desirable and effective defense. Unfortunately, it isn't always available. On occasion, our grievant not only did it, but management can prove it. Just because the grievant may have committed the alleged misconduct, however, doesn't mean our job is completed. It just means that our assignment has become that much more challenging. Issues such as the level of proof, mitigating factors and procedural questions still may exist. It will be your task as a steward to identify and utilize those available defenses.

Basically, the possible defenses available to be argued may be categorized into one (1) of four (4) broad categories: (1) technical or procedural arguments unrelated to the merits of the case; (2) disputes regarding whether grievant's alleged misconduct, even if proven, would constitute a valid basis for discipline; (3) assertions that management cannot "prove" that grievant is guilty of the alleged misconduct; and, (4) claims that because of certain "mitigating factors" the discipline imposed is too harsh. In writing up a discipline grievance with multiple defenses, each defense should be prioritized and then stated and argued separately in order to present an arbitrator with the maximum number of "hooks" upon which to hang his hat.

Any discussion of possible defensive strategies in discipline grievances must inevitably begin with Article 16. Section 1 of that Article, for example spells out the basic principles of the parties' contractually established disciplinary 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 the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay. [emphasis added]

Article 16, Section 1 is important, first of all, because it establishes within the Agreement the irrevocable concept that all discipline must be issued for ***"just cause."*** This is not at all insignificant, since in many Collective Bargaining Agreements, just cause has been left to be established by arbitral principle rather than specific agreement. Second, Article 16 demands that all discipline be corrective rather than punitive. This principle is the foundation upon which the concept of progressive discipline is ultimately established.

JUST CAUSE

As we noted, all discipline must be for just cause. Any analysis of a disciplinary action must necessarily begin with this principle. But just what is ***"just cause"***?[1] To a certain extent "just cause" must remain undefined and even perhaps even indefinable because each case is unique and different from all other cases. However, while the definition of just cause may vary slightly from case to case, as a general rule there are certain basic elements of just cause widely recognized by virtually all arbitrators.[2] For years the parties struggled with the analysis of just cause in USPS Handbook EL 921,

[1]The Steward is not the only one who has struggled with this concept. See, for instance, Arbitrator Lawrence R. Loeb, Case No. C94V-1C-D 97083325, March 6, 1998, p. 18, where the supervisor acknowledged that "he was unable to define the concept of 'just cause.'"

[2]For instance, Arbitrator Jonathan Dworkin, in Case No. J94C-1J-D 96034056, September 3, 1996, in finding "just cause" for the removal of an "admitted thief" offered this discussion of "just cause" at p. 10 of his award:

> "'Just cause' is an amorphous term. There is no all-encompassing, universally, approved definition for it. As often as not, it is applied, case-by-case according to an arbitrator's sense of justice and, sometimes, his/her individual idea of workplace fairness. At the minimum, just cause requires an employer thoroughly and earnestly to consider all of the potentially mitigating factors surrounding an offense. The employer must consider the employee as well: Is s/he salvageable? Just cause, especially as defined by Article 16.1, requires this Employer to make all reasonable efforts to correct employees and allows it to discharge only those who are not correctible. It should be emphasized that except in rare situations, misconduct alone is not just cause for removal. Removal properly can occur only when justified by

Supervisor's Guide to Handling Grievances.[3] With the introduction of the Joint Contract Interpretation Manual (JCIM) the parties now have mutually agreed upon criteria for the application of "just cause" in Article 16.

> "Just cause" is a "term of art" created by labor arbitrators. It has no precise definition. It contains no rigid rules that apply in the same way in each case of discipline or discharge. However, arbitrators frequently divide the question of just cause into six sub-questions and often apply the following criteria to determine whether the action was for just cause.
>
> These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.
>
> - **Is There a Rule?**
>
> If so, was the employee aware of the rule? Was the employee forewarned of the disciplinary consequences for failure to follow the rule? It is not enough to say, "Well, everybody knows that rule," or "The rule was posted ten years ago." Management may have to prove that the employee should have known of the rule.
>
> Certain standards of conduct are normally expected in the industrial environment and it is assumed by arbitrators that employees should be aware of these standards.
>
> For example, an employee charged with intoxication on duty, fighting on duty, pilferage, sabotage, insubordination, etc., would generally assumed to have understood that these offenses are neither condoned nor acceptable, even though management may not have issued specific regulations to that effect.
>
> - **Is the Rule a Reasonable Rule?**
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> Work rules should be reasonable, based on the overall objective of safe and efficient work performance. Management's rules should be reasonably related to business efficiency, safe operation of our business, and the performance expected of the employee.
>
> - **Is the Rule Consistently and Equitably Enforced?**
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> A rule must be applied fairly and without discrimination. Consistent and equitable enforcement is a critical factor, and claiming failure in this regard is one of the union's most successful defenses.
>
> The Postal Service has been overturned or reversed in some cases because of not consistently and equitably

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weighing the misconduct against mitigating factors and the character of the employee."

[3]While the Postal Service calls USPS Handbook EL-921 a 'handbook,' and while it is included in USPS Publication 223's identified 'handbooks,' the Employer often contended at arbitration that it was not a recognized 'handbook' within the context of Article 19. Most notably, USPS Handbook EL-921 now contains this most interesting disclaimer:

> "The[se] guidelines are not necessarily requirements that must be strictly complied with or blindly followed, *and no employee rights are created when these guidelines are not followed*."

While the Employer would undoubtedly, if it could, superimpose just such a postscript upon the entire National Agreement, the simple fact is that "just cause" is guaranteed by Article 16, Section 1 of that Agreement and the EL-921, whether an Article 19 handbook or not, provided an exceptionally thoughtful analysis (an admission against interest if you will) of the Employer's own perception of that "just cause" guarantee. The fact that the Joint Contract Interpretation Manual carried forward the EL-921's "criteria" for just cause almost verbatim says what need to be said.

enforcing the rules.

Consistently overlooking employee infractions and then disciplining without warning is one issue. For example, if employees are consistently allowed to smoke in areas designated as *No Smoking* areas, it is not appropriate suddenly to start disciplining them for this violation.

In such a case, management may lose its right to discipline for that infraction, in effect, unless it first puts employees (and the union) on notice of its intent to enforce that regulation again. Singling out an employee for discipline is another issue. If several similarly situated employees commit the same offense, it is not equitable to discipline only one.

- **Was a Thorough Investigation Completed?**

Before administering the discipline, management should conduct an investigation to determine whether the employee committed the offense. The investigation should be thorough and objective.

The investigation should include the employee's "*day in court* privilege." The employee should know with reasonable detail what the charges are and should be given a reasonable opportunity to defend themselves *before* the discipline is initiated.

- **Was the Severity of the Discipline Reasonably Related to the Infraction Itself and in Line with that Usually Administered, as Well as to the Seriousness of the Employee's Past Record?**

The following is an example of what arbitrators may consider an inequitable discipline: If an installation consistently issues seven calendar day suspensions for a particular offense, it would be extremely difficult to justify why an employee with a past record similar to that of other disciplined employees was issued a fourteen day suspension for the same offense.

There is no precise definition of what establishes a good, fair, or bad record. Reasonable judgment must be used. An employee's record of previous offenses may never be used to establish guilt in a case you presently have under consideration, but it may be used to determine the appropriate disciplinary penalty.

- **Was the Disciplinary Action Taken in a Timely Manner?**

Disciplinary actions should be taken as promptly as possible after the offense has been committed.[4]

DOCUMENT!
DOCUMENT!

DOCUMENT!

For purposes of this discussion we will attempt to deal with each of the elements of just cause separately. Ultimately, it should of course be remembered that the burden is on the Employer to establish "just cause" and that if even one of these elements is missing or not proven an arbitrator could find the discipline to lack "just cause" and consequently to be in violation of the National Agreement. For that reason it is imperative that the steward include each of these individual elements in any grievance investigation involving discipline. We suggest that you develop a "checklist" format, and, of course, "***document, document, document***"!

[4] USPS/APWU Joint Contract Interpretation Manual (JCIM), November 2005.

PLAYING BY THE RULES

- **Is there a rule?**
- **Is the rule a reasonable rule?**

The Postal Service being the governmental institution that it is, the Employer can usually find a rule for everything. Our handbooks and manuals are filled with obscure, unenforceable (and, in fact, frequent non-enforced) rules. On the other hand, for many offenses, like drinking on the job, fighting, AWOL, theft, etc., every employee understands that these are prohibited.

Normally, the discipline notice should clearly state the specifics of the charge against the employee. This should include both the details of the misconduct alleged and also a notice as to the specific rule the Employer alleges has been violated. Generalized charges, such as asserting that an employee is "accident prone" are inappropriate[5]. If the alleged facts or rules are not clearly specified we would argue that the disciplinary notice does not adequately put the employee on notice as to what they have been accused of violating. The reason for this requirement is so that the employee (and the Union) may properly prepare a defense to the charge. For instance, as **Arbitrator Schedler** explained:

> "A 'charge' in a disciplinary matter has a similar meaning to an indictment in a criminal matter before a grand jury. Basically, a 'charge' is an accusation in writing that claims that the individual named therein has committed an act or been guilty of an omission, and such omission or act was a violation of shop rules or usual good behavior expected of an employee and punishable by discipline. A letter of charges is the foundation of going forward with discipline; and, in the absence of a clearly written charge, what is to be the just cause for the discipline. No discipline can be sustained without a charge. For the instant grievance the removal letter merely related in narrative style the events that the employer believed occurred on April 15, 1981. There was not a single sentence in the entire letter of removal that accused [grievant] of conduct contrary to the rules of the shop; therefore his discharge was without just cause." [6]

Even when a handbook citation has been included, did the supervisor make the employee aware of the rule? Are the handbooks available for all employees to read? Are the rules posted? Are the rules

[5] See, for instance, Arbitrator Thomas F. Levak, Case No. W1N-5D-D 3543, September 24, 1982.

[6] Arbitrator Edmund W. Schedler, Jr., Case No. S8N-3U-D 32986/34704, April 1, 1982, pp.8-9.

reasonable and appropriate for the work floor situation? Does the supervisor talk about such rules during service talks? Investigate and document. While this argument has little or no value where the alleged misconduct is so egregious (e.g., fighting, insubordination, theft) that any reasonable employee should have understood without being advised, the extent to which supervisors have communicated the existence of a rule to their employee is a valid concern. For instance, **Arbitrator Hardin** reasoned:

> "There remains the question whether [grievant's] surreptitious recording, though legal, nevertheless violated a Postal Service regulation of which [grievant] was, or should have been, aware. This question can be disposed of on the basis that, so far as this record shows, management never informed the grievant that the surreptitious recording of a conversation with a supervisor was forbidden. It suffices to recall that none of the grievant's supervisors knew any Postal Service rule on the subject. Indeed, the only prior incident of surreptitious recording ever referred to at the hearing was an incident that management had condoned. Thus, assuming that the E&LR Manual does forbid what [grievant] did, there is no evidence that he had ever been so instructed, or otherwise should have known. If the Postal Service wishes to punish its employees for lawful conduct, recording conversations in which they participate, then the Postal Service must take steps that will ensure that its employees are informed of the rule."[7]

Many of the Employer's rules are found in its voluminous handbooks and manuals. Can anyone reasonably expect that employees should be aware of those rules? Are employees given time on the clock to read and study the Employee & Labor Relations Manual or other handbooks? In reinstating an employee terminated for violating the USPS rules on outside employment while on sick leave, **Arbitrator Stallworth** reasoned:

> "The Postal Service argued that the Grievant received employee orientation training and that it is every employee's responsibility to make themselves aware of the ELM and its provisions. Under the 'reasonable person' rule, the Service argues that the Grievant knew or should have known the Postal Service regulations regarding sick leave and gainful employment outside work. The Union asserts that the ELM is so voluminous that an employee cannot be expected to know everything in it and that it was management's responsibility to at least advise the Grievant of the rule before imposing the ultimate penalty, i.e., removal. The Arbitrator must agree with the Union on this point.
>
> . . .
>
> "The record evidence in the instant grievance demonstrates to the Arbitrator's satisfaction that the Grievant was unaware of the Postal Service's sick leave rules when it came to gainful outside employment and that the Grievant did not intend to deceive the Service…"[8]

Where the Employer has been lax in enforcement of a rule, at the very least the intention to begin

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[7] Arbitrator Patrick Hardin, Case No. S1N-3W-D 5862/63, November 8, 1982, pp.5-6.

[8] Arbitrator Lamont E. Stallworth, Case No. I94C-1I-D 98016609, August 10, 1998, pp. 26-27. For a similar result, see Arbitrator George R. Shea, Jr., Case No. C00C-1C-D 05132381, May 22, 2006.

enforcement of that rule must be communicated to its employees. For instance, **Arbitrator Hauck** said:

> "Arbitrators frequently take the position that where management has winked at violations of rules, it should announce its intention to require observance of the rule before it hands out discipline. This is especially true where the rule applies to conduct that, unlike stealing or assaults on supervisors or co-workers, isn't *inherently objectionable*. Lax enforcement of rules may lead employees to reasonably believe that the conduct in question is sanctioned by management..."[9]

One area of discipline which particularly warrants a forewarning of the rules is attendance. While discipline can clearly be imposed for attendance infractions, the "regular in attendance" and "avoid[ance] of unscheduled absences" standards imposed by ELM are difficult, if not impossible, to explain and almost never consistently enforced. Each supervisor routinely imposes their own subjective standard. The employee has a right to be forewarned as to management's expectations. As Arbitrator **McAllister** noted:

> "…[T]he problem with Management's case is that it allowed the Grievant to pile up unscheduled absence upon unscheduled absence with firmly informing her she had reached a point of no return and that, thereafter, no more unscheduled absences would be tolerated. Just cause mandates that an employee be put on notice of Management's expectations…
>
> "<u>But for this failure to definitively forewarn the Grievant of the consequences of continued unscheduled absences, I would uphold the Grievant's discharge</u>…"[10] [emphasis added]

? **ELM 666.81**

Employees are required to be regular in attendance. **?**

For further discussion of the obligation to communicate rules and changes in the enforcement of those rules to employees who are to be affected, see the section entitled "*Disparity as a Defense*," immediately below.

[9] Arbitrator Vern E. Hauck, Case No. E94C-4E-D 96086461, May 18, 1998, p. 14.

[10] Arbitrator Robert W. McAllister, Case No. J94C-4J-D 96032077, September 23, 1996, pp. 11-12. It may be rather difficult to "prove" that the employee failed to make every effort to "avoid unscheduled absences." See, for instance, discussion of this element by Arbitrator Hamah King, Case No. G00T-4G-D 05101478, December 8, 2005, at pp. 16-17. For further discussion, of attendance and the applicability of progressive discipline and/or forewarning see sections below entitled "Progressive Discipline" and "Job Discussions."

DISPARITY AS A DEFENSE

- **Is the rule consistently and equitably enforced?**

It has been well recognized by arbitrators over the years that just cause requires that discipline under a given rule must be applied with a general sense of equity. As stated by Arbitrator Daugherty in the classic case of Enterprise Wire Co., the question to be examined is this:

> "[Has the employer] applied its rules, orders, and penalties evenhandedly and without discrimination to all employees.? ...[An answer of] 'no' warrants negation or modification of the discipline imposed."[11]

This is not to suggest that an employer may not treat employees who commit the same infraction differently because of their employment histories or other legitimate distinctions.[12] It also does not suggest that management may not resolve different grievances with different remedies.[13] Where there is no justification or explanation for a disparity in penalties for similarly situated employees, however, just cause may be lacking.[14] Once again, remember that the burden is on the Union to document the similarity of the incidents with disparate treatment.

"DISCIPLINE...MUST BE APPLIED WITH A GENERAL SENSE OF EQUITY"

The Postal Service will often seek to explain away disparity in treatment by pointing out that the employees worked in different facilities, for different supervisors, or were craft vs. non-bargaining unit

[11]Arbitrator Daugherty, Enterprise Wire Co., 46 LA 359 (1966),

[12]See, for instance, Arbitrator William Belshaw, Case No. C7T-4J-D 14352, July 28, 1989, explaining at pages 10-11:

> "'Disparity' is sometimes referred to as 'unequal of discriminatory treatment'. Basically, the principle is that employees committing the same type of misconduct must be disciplined in the same way *absent* reasonable variations in 'circumstances'. The term 'circumstances', of course, can relate to *event* circumstances—such as where a striking is unprovoked and/or vicious, as opposed to one which is not—or can involve *relational* aspects—such as where two employees may commit an *identical* offense, but one may have done it previously, with perhaps an earlier, lesser discipline. (In addition, some of the authorities say that it applies only to wrong-doings by more than one person which occur at the same *time*). All, virtually, concede that, in order to be determinative of propriety or its lack, the employer's disciplinary treatment mode must be both *established* and *regular*, and must be proven so."

[13]For a case where the arbitrator determined that both employees involved in an alleged altercation were entitled to similar remedies, however, see Arbitrator Jerry A. Fullmer, Case No. J98C-1J-D 00172956, June 6, 2001.

[14] Arbitrator Christopher E. Miles, Case No. C00C-4C-D 05008379, May 13, 2005.

employees. While obviously conceding that the more similarly situated two comparison employees are, the stronger the argument our Union does not agree with these artificial distinctions as usually raised by the Employer.

Arbitrator Drucker addressed the "different supervisor" argument in this manner:

> "The USPS responds only that the cited disciplinary decisions were not made by the supervisor or manager involved in this case and therefore cannot be used to establish a case of disparate treatment. The USPS offered no evidence of a need for stricter application of policy in the maintenance department and thus relies simply on the theory that each supervisor or each manager may apply his or her own chosen degree of discipline regardless of the manner in which comparable infractions have been handled by their colleagues relative to employees in the same facility but not in the same job description. The principle of equal treatment cannot be considered so narrowly. Otherwise, an employer can absolve itself of overall responsibility for fair application in a given worksite, allowing pockets of rigidity to exist alongside those of leniency, subjecting workers to a significant sense of inequity and uncertainty. Evenhandedness is required not just in the department but also in the facility."[15]

Similarly, **Arbitrator Cushman** rejected a USPS argument that to be similarly situated employees must 1) have worked for the same supervisor; 2) have performed the same job function; 3) have been on the same tour; and 4) have been disciplined during the same time period, saying:

> "In any event, in the view of this Arbitrator the...rationale that the disciplines compared must be made by the same supervisor on the same tour is unsound. Such a narrow limitation of Postal Service responsibility for dissimilar treatment of employees in the same facility is unrealistic...[and] incompatible with arbitral concepts of fairness as an element of just cause as well as the realities of industrial relations. Employer responsibility may not be so narrowly cabined."[16]

The Employer's contention that it is inappropriate to compare craft employees with non-bargaining employees is equally without merit.[17] Arbitrators have routinely and quite properly concluded that such comparisons are appropriate.[18] **Arbitrator Harvey**, for instance, while rejecting

[15]Arbitrator Jacquelin F. Drucker, Case No. C90T-1C-D 95034191, April 11, 1996, p. 27.

[16]Arbitrator Bernard Cushman, Case No. E0C-2P-D 5870, January 4, 1993, p. 25.

[17]See Arbitrator Carlton J. Snow, Case No. H7N-5C-C 12397, July 29, 1991, p. 22, noting that the Employer's position on this issue is not consistent with a 1991 decision of the National Labor Relations Board [301 N.L.R.B. 104 (February 14, 1991)]. See also, Arbitrator Arthur R. Porter, Jr., Case No. C4C-4U-D 33711, November 7, 1987; Arbitrator Josef P. Sirefman, Case No. N7C-1N-D 0027177, March 18, 1994; Arbitrator Mark L. Kahn, Case No. J90C-4J-D 95070296, March 18, 1996; Arbitrator Edwin H. Benn, Case No. I94C-1I-D 96034069, July 14, 1996.

[18] See, for instance, Arbitrator Arthur Porter, Case No. C4C-4U-D 33711, November 7, 1987, where the Arbitrator said at p. 4:

> "The Arbitrator holds that there is sufficient evidence to uphold the grievance on the basis of disparate treatment between a supervisor and an employee for activities that were much the same. Gambling and participating in gambling is an illegal activity and may warrant severe discipline. Two persons, however, cannot receive such different penalties for the same 'crime', particularly, when one is a supervisor and the other a 'supervised' employee."

the Employer's contention that in order to be "similarly situated" the employees had to work for the same supervisor or even within the same facility, noted quite properly that both craft and supervisory personnel are "subject to an organization-wide code of ethics" concluding:

> "After conducting independent research on this matter, I conclude that the weight of authority from all quarters is to the effect that such discipline is appropriately considered by the arbitrator in arriving at a finding of whether the employer had 'just cause' for removal. Decisions of the Federal Circuit Courts, the National Labor Relations Board, the Federal Labor Relations Authority and Arbitrators uniformly hold that such comparison of supervisor offenses and unit employee offenses is a proper part of the consideration of just cause."[19]

In addition to those situations where discipline has not been imposed equitably, the steward will occasionally discover scenarios where clearly written rules have heretofore been enforced only occasionally or, often not at all. A well intentioned manager discovers that the rule has not been enforced and decides to "make an example" out of an unsuspecting employee. If management routinely permits employees to violate a rule, it may not suddenly begin to impose discipline for infractions without first putting the employees on notice of its intention to begin enforcing the rule or stop tolerating the conduct. For example, see the discussion of **Arbitrator Eaton**, who said in a 1978 case:

"Any employer has an obligation to inform employees clearly, without equivocation, and without the possibility of misunderstanding, when rules which have been ignored are to be enforced. . ."

> "The core of this issue is the established pas practice a the Pittsburgh Post Office of sometimes disposing of deliverable third class mail, however contrary to postal regulations, and however illegal it may have been. The practice existed, and it is of crucial consideration in this dispute.
>
> "When such a practice is condoned it is simply not fair that one or two employees bear the brunt of the correct, necessary, and entirely justifiable determination of management to bring such a practice to a halt. An employer has the right to enforce reasonable regulations, and the postal service in particular has an obligation to see that the mail is delivered. That is the reason for its existence.
>
> "**Any employer has an obligation to inform employees clearly, without equivocation, and without the possibility of misunderstanding, when rules which have been ignored are to be enforced, and when wrongful practices which have been condoned are to cease**. While the postal service has endeavored to

[19]Arbitrator William K. Harvey, Case No. S7C-3S-D 39639, November 8, 1991, p. 24. See also, Arbitrator Thomas H. Vitaich, Case No. F90C-1F-D 95076494, May 17, 1996, at p. 6:

> "However, I do not agree that the Postal Service has a different yardstick for different departments; at least that position has never been presented to me in the form of evidence. I therefore reject that the punishment of Hurtado cannot be compared to those who used government funds for their own use - deliberately - no matter what the reason. I cannot accept the premise that employees, particularly supervisors, are not all measured by the same yardstick of fairness, justice, and equality."

show that it met these obligations in the present dispute, the proof falls short of making that showing."[20] [emphasis added}

The steward must not forget that "disparate treatment" is an affirmative defense. The Union bears the affirmative burden of proving that similarly situated employees have been treated differently. While documentary evidence is always preferable, it is not (and cannot be) the "be-all, end-all." Consider appropriate eyewitness testimony.[21]

PRE-DISCIPLINARY INTERVIEW AND INVESTIGATION

- **Was a thorough investigation completed?**

One critical and all too frequently omitted element of the "just cause" criteria is the conduct of a fair, thorough and objective investigation.[22] An adequate investigation requires a reasonable investigation of both inculpatory and exculpatory evidence.[23] Failure to conduct a proper investigation prior to issuing discipline[24] violates basic notions of procedural due process and can negate the

[20] Aribtrator William Eaton, Case No. NC-W 10132-D, May 25, 1978, p. 17.

[21] See, for instance, Arbitrator William F. Dolson, Case No. C1C-4A-D 31551, November 8, 1984, at p. 11:

> "It is not necessary, as claimed by the Postal Service, that the Union present documentary evidence that other employees were treated differently. The testimony of [Local President] James Malone was sufficient to establish disparate treatment."

[22]For instance, see Arbitrator Jerry Fullmer, Case No. C94C-4C-D 98029311, June 16, 1998, at p. 10,

> "It is is well established that 'just cause' requires an adequate investigation of the matter at hand before imposing discipline."

See also, Arbitrator Kenneth M. McCaffree, in Case No. F94N-4F-D 96029519, October 8, 1996, att pp. 20-21, found fault with an investigatory interview where the supervisor's questions were unnecessarily "accusatory in nature rather than designed to elicit the facts as seen by the Grievant."

Or, see Arbitrator Mark L. Kahn, Case No. J94C-1J-D 97093519, February 28, 1998, at p. 11, who found the pre-disciplinary interview to be "perfunctory and not conducted...so as to permit a thorough exploration of the circumstances..."

[23] Arbitrator Carl C. Bosland, Case No. E00C-4E-D 05025967, June 6, 2005, p. 12.

[24] See, for instance, Arbitrator Lawrence Roberts, Case No. K98C-4K-D 02073170, July 13, 2002, suggesting that the "just cause" requirement to conduct at least some investigation also applies to "indefinite suspensions."

discipline.[25] See, for instance, **Arbitrator Cushman** who said:

> "The concept of due process as applied to just cause is bottomed on a profound sense of fair play or just treatment enforced by law, a concept which has evolved through centuries of our constitutional history and that of England before us.. .In narrower terms in industrial relations due process is a requirement that before an employer imposes a penalty of discharge in all fairness he or she must make an informed judgment...Failure of management to make an objective, reasonable and comprehensible inquiry before assessing punishment has often been held to be a factor in an arbitrator's refusal to sustain discharge or discipline."[26]

Another thoughtful analysis of the pre-disciplinary investigation requirement was offered by **Arbitrator Jacobs,** who said:

> "[T]he Employer is under duty to make a reasonable independent investigation of any occurrence before taking disciplinary action, and its admitted failure to do so may void disciplinary action, especially if it results in the loss of evidence that might have been favorable to the Grievant. Therefore, it can be said that the just cause standard requires the Postal Service to show that the removal was imposed after an objective pre-disciplinary investigation resulting in proof of the Grievant's infraction of a clearly communicated and reasonable rule. The same standard further requires the Postal Service to demonstrate that the disciplinary consequences of the rule infraction were properly communicated to the Grievant, that the discipline was consistent with the National Agreement, the offense, and the Grievant's past employment record."[27]

Similarly, where the immediate supervisor acknowledged merely "signing" the notice of removal on instructions from others, without conducting any investigation or review of the allegations therein, **Arbitrator Goldstein** offered this sage counsel:

> "Quite another situation arises when the testimony of Supervisor Kaminski about his role as a mere signer of the Removal Letter is evaluated, I firmly believe. There is clearly a lack of a meaningful investigation and assessment on the part of the decision-maker, if all that happens is that that individual signs a letter drafted by Labor Relations, without verifying in any way the accuracy of the underlying data, I am persuaded.

[25]See, for instance, Arbitrator Lamont E. Stallworth, Case No. I94C-1I-D 97097282, April 20, 1998, pp. 25-26.

[26] Arbitrator Bernard Cushman, Case No. E0C-2P-D 5870/71, January 4, 1993, p. 23. See also, Arbitrator Fred Witney, Case No. C7C-4Q-D 28021, April 22, 1991, p. 28. Or, see Arbitrator Lamont E. Stallworth, Case No. C7C-4K-D 22390, June 20, 1990, p. 17:

> "The complete absence of a pre-removal investigation by management of the circumstances of the Grievant's absences is another, serious violation of due process… He did not conduct a 'thorough investigation' before issuing the removal notice to 'determine whether the employee committed the offense."

[27]Arbitrator Rose F. Jacobs, Case No. N7C-1Q-D 36708, April 10, 1992, pp. 12-13. Similarly, see Arbitrator Harvey A. Nathan, Case No. J90C-1J-D 95011565/15890, March 12, 1995, at p. 13:

> "Whether any of this would have made a difference in the ultimate decision is beside the point. We cannot go back and create the status quo ante. There is no way of knowing what the penalty would have been had all of the factors present in this case been taken into account. It is enough that there was a possibility that a thorough investigation would have yielded some consideration and some compassion for an employee struck with the misfortune that had just fallen on the grievant… [W]here the Service failed to investigate the facts…the possibility that there might be some mitigating factor cannot be discounted. The Union need not prove that if an investigation had been made the results would have been different. It is sufficient that there was at least a colorable defense on the part of grievant, that there might have been a different result."

. . .

> "…In other words, although I have ultimately found no merit to many of the arguments presented by the APWU, Supervisor Kaminski, by his own admission, did not in fact conduct an investigation but merely followed orders from the committee on accommodation or unnamed higher-ups, this record clearly demonstrates. Signing off on a Letter of Removal without ascertaining the accuracy of the factual assertions contained in that letter does not permit a fair opportunity for Grievant and the Union to have heard the facts of the case before the decision-maker – the first level Supervisor – issued the Removal Notice, this record shows."[28]

While the two terms are not synonymous and should not be confused, any appropriate, thorough and impartial pre-disciplinary investigation must, at the very least, include an investigatory interview and a pre-discipline hearing.[29] Employees have the right to know the charges against them, the action being considered, and to be given a chance to explain their side of the situation.[30] This is the employee's day in court. The day in court clearly is intended to be a meaningful[31] opportunity to defend oneself or, for that matter, beg for leniency.

Arbitrator Cushman, for instance, offered this analysis:

> "However, the critical issue here is one of due process. The Grievant testified that she was not given a pre-disciplinary interview prior to the issuance of the Letter of Warning. Manager Barrett...on rebuttal asserted that she held an 'investigatory interview' during the lunch period on May 9, 1995, prior to delivering the Letter of Warning to the Grievant some few hours later. She gave no specifics as to the content of the alleged investigatory interview. There was no testimony as to who said what to whom. Under the circumstances including my observations of the witnesses, I conclude that her bare assertion that an interview took place is not enough to prove that a meaningful interview with full opportunity to the Grievant to plead her case took place. There was therefore, a denial of due process. The Grievant

[28] Arbitrator Elliott H. Goldstein, Case No. J94T-1J-D 98017071, November 14, 2001, pp. 23-25.

[29] The grievant might well be interviewed as part of a meaningful investigation. That interview does not negate the employee's separate and distinct procedural entitlement to an "investigatory interview" or "day-in-court." See for instance, Arbitrator Hamah R. King, Case No. G98T-1G-D 01247275, January 30, 2002, where the grievant was confronted with Postal Inspector's IM and asked for his explanation before the supervisor than questioned other employees, at p. 15"

> "In spite of the efforts of the Postal Service to characterize the first meeting described above as a pre-discipline hearing, it obviously was not. It was clearly investigative. The pre-disciplinary meeting must be held after management has conducted its investigation and before it has made a final decision to impose discipline or what that discipline will be…"

[30] No less an authority than the United States Supreme Court has recognized this right. See, Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). See also, for instance, Arbitrator Carl C. Bosland, Case No. E00C-4E-D 05025967, June 6, 2005, pp. 10-11.

[31] See, for instance, Arbitrator William Levin, Case No. W90V-5D-D 15004, July 8, 1993, at p. 13:

> "But it was certainly a form of intimidation not consistent with a collective bargaining relationship for Winstead to bring together two other supervisors and to consider that this is the kind of setting which would permit Sweeney to tell 'his side of the story.'"

See, also, Arbitrator I. B. Helburn, Case No. H90C-1H-D 95037637, March 14, 1996.

should have been granted an opportunity to present her version of the events or a plea for the Postal Service to refrain from discipline."[32]

Arbitrator Marlatt also provided a very thoughtful discussion of the investigatory interview element of just cause:

Perhaps if the Postal Service is unwilling to listen to the views of arbitrators, it should at least defer to that six-hundred-pound gorilla known as the Supreme Court of the United States.

"However, there was one glaring deficiency in the supervisor's investigation, and that is the fact that her conversation with the Grievant could not remotely be categorized as a pre-disciplinary interview. For some reason, this same omission of a vital element of due process keeps cropping up, although arbitrators have been pointing it out to the Postal Service and setting discipline aside because of similar violations in case after case for fifteen years. Perhaps if the Postal Service is unwilling to listen to the views of arbitrators, it should at least defer to that six-hundred-pound gorilla known as the Supreme Court of the United States, which stated in the case of Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985):

> First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood [citations omitted]. While a fired worker might find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.
>
> 
>
> Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes [citations omitted]. Even where the facts are clear, the appropriateness or necessity of discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect. (Emphasis Supplied)

"The Court went on to say,

> The essential requirements of due process ... are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. ... The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity for him to present his side of the story.

"It is recognized, of course, that the above decision is specifically applicable only to preference-eligible Postal employees and that the Grievant in this case does not hold that status. However, the Postal Service has frequently applied or attempted to apply to all postal employees the "harmful error" standard used by the Merit Systems Protection Board in appeals from preference-eligible postal employees. Indeed, such a criterion was asserted by the Postal Service in its Step 3 answer to this grievance. If all employees are to be judged by the same standard of proof, then the Postal Service must accept the holding of the Supreme Court in Loudermill to the same degree that it relies on decisions of the MSPB. In this business, you have to take the bitter with the sweet.

[32]Arbitrator Bernard Cushman, Case No. MES91-247-D, December 24, 1996, p. 9. See also, Arbitrator Mark L. Kahn, Case No. J94T-1J-D 98096850, August 5, 1999.

"The same approach was taken by arbitrators long before the cited decision of the Supreme Court. In an early award in a letter carrier case, NCW-15975-D, Professor William E. Rentfro of the University of Colorado School of Law phrased it succinctly:

> When the decision is to impose a penalty as severe as discharge, care must be taken that all the relevant facts and evidence are considered. Discharge without a complete investigation or without affording the employee an opportunity to be heard falls short of minimum standards. ... A thorough investigation reduces the likelihood of impulsive and arbitrary decisions by management and permits a deliberate, informed judgment to prevail. By giving the Grievant an opportunity to present his side of the story and point out the mitigating factors raises the possibility that the employer would have been dissuaded from discharging him in the first place. The same evidence presented prior to decision may have a more important effect than when offered at the grievance level. This is so simply because it is human nature to stick to and defend a decision already made. This reluctance to reconsider even in the light of new information is more pronounced in labor-management relations because the employer had an additional institutional interest to "stand firm" and defend the authority of the supervisory personnel who made the decision to discharge.

"In a recent Southern Region case, S7C-3C-D 18102 (Memphis, TN, 1989), under very similar facts, Arbitrator Elvis Stephens set out three basic procedural rules which are applicable to to (sic) predisciplinary hearings:

1. This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he/she is being charged and to defend his/her behavior.

2. The Company's investigation must normally be made before its disciplinary decision be made. If the Company fails to do so, its failure may not normally be excused on the ground that the employee will get his/her day in court through the grievance procedure after the exaction of discipline. By that time there has usually been too much hardening of positions.

3. There may of course be circumstances under which management must react immediately to the employee's behavior. In such cases the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation, he/she will be restored to his/her job with full pay for time lost.

The Company's investigation must normally be made before its disciplinary decision be made. If the Company fails to do so, its failure may not normally be excused on the ground that the employee will get his/her day in court through the grievance procedure after the exaction of discipline.

"It is clear in the present case that the Postal Service wretchedly mishandled the incident with almost complete disregard for requirements of due process. The Grievant was never informed that removal action was under consideration. She was not, furnished a copy of the Investigative Memorandum--indeed, she was fired before the memorandum was even written. She was never afforded a predisciplinary hearing at which she could have requested Union representation."[33]

Similarly, **Arbitrator Stallworth**, of the Central Region panel said:

"The complete absence of a pre-removal investigation by management of the circumstances of the Grievant's absences is another, serious violation of due process. ... He did not conduct a "thorough

[33]Arbitrator Earnest Marlatt, Case No. S7C-3N-D 18403, January 9, 1990, pp. 8-12.

> investigation" before issuing the removal notice to "determine whether the employee committed the offense." (Joint Exhibit No. 7, Supervisor's Guide to Handling Grievances, p. 13). That is one of the six "basic considerations" that the Service states "the supervisor must use ***before*** initiating discipline." (Joint Exhibit No. 7, p. 11, original emphasis). He did not follow the procedure to "Let the employee explain the problem and listen! If given a chance, employees will explain their problem. Draw it out, if necessary, but get the whole story." (Joint Exhibit No. 7, p. 8). He did not interview the Grievant before issuing the removal to determine for which absences the Grievant had submitted documentation, to discuss possible mitigating circumstances or discuss her overall absence record. Indeed, the only investigation was conducted post discharge.
>
> "Again, the Arbitrator is of the firm opinion that if management had inquired into these circumstances, that it would (or should) have considered the **total situation** as mitigating circumstances as contemplated under the just cause requirements of Article 16 and the ELM and the Supervisor's manual. Management failed to do so, and thus, seriously violated the Grievant's due process rights under the contract."[34]

A Merit Systems Protection Board (MSPB) eligible employee by law must always be issued a Notice of Proposed Removal and given an opportunity to respond to a higher level authority in person or in writing before a Decision Letter (almost always rubber stamping the original proposal) can be issued.[35] This is an MSPB right, totally separate from, although protected by, the Collective Bargaining Agreement.[36] Management will often argue that this MSPB right to respond is an adequate substitute for the investigatory interview. Our Union strongly believes otherwise. **Arbitrator Drucker**, for instance said this:

> "The arbitrator rejects the sufficiency of the post-NOPR opportunity for two reasons. First, the issuance of the Notice of Proposed Removal is the grievable event under Article 15 of the National Agreement. (See Memorandum of Understanding Between the United States Postal Service and the American Postal Workers Union, dated July 31, 1991 and August 12, 1991.) Thus, once the NOPR has been issued and a grievance has been filed, any subsequent interactions occur under the auspices of the grievance mechanism and can no longer be considered pre-disciplinary. Second, as emphasized by the USPS, the actual decision to seek removal is made by the supervisor. The supervisor is the deciding officer, whose judgment, although subject to review, is central to the employee's future. It therefore is this person who must hear from the employee regarding discipline before a determination is made. Thus, this opportunity to reply to the NOPR did not present Grievant with the chance for a pre-disciplinary interview as contemplated by the principles of just cause and due process."[37]

[34]Arbitrator Lamont Stallworth, Case No. C7C-4K-D 22390, June 20, 1990, pp. 16-19. Similarly, see also, Arbitrator Linda Franklin, Case No. N7C-1N-D 15797, February 28, 1990; Arbitrator Elliot Goldstein, Case No. C1N-4J-D 13864, July 1, 1983; Arbitrator Bernard Cushman, Case No. E0C-2P-D 5870, January 4, 1993; Arbitrator Jerry Fullmer, Case No. C94C-1C-D 97038586, September 17, 1997; Arbitrator Mark L. Kahn, Case No J94C-4J-D 97119894, September 28, 1998; or, Arbitrator Mark L. Kahn, Case No. J94T-1J-D 98096850, August 5, 1999.

[35]Remember, it is the Notice of Proposed Removal, and not the Decision letter, which triggers the time limits in Article 15, Section 2. It is not necessary to file a second grievance when the Decision letter is received. The Notice of Proposed Removal also starts the 30 day notice period required in Article 15, Section 5. [See Memorandum of Understanding, dated 7/31/91 and 8/12/91. See, also, JCIM, Article 16.9, p. 7.]

[36] See, below, *MSPB Rights for Preference Eligibles*, at pp. 53-55, for further discussion on this contractual protection of MSPB rights for preference eligible employees.

[37]Arbitrator Jacquelin F. Drucker, Case No. C90T-1C-D 95034191, April 11, 1996, p. 24. Similarly, see Arbitrator Louis V. Baldovin, Jr., Case No. G90C-1G-D 95075476, August 21, 1996, pp. 2-7.

In many cases, the Employer will rely solely upon an investigation conducted by the Postal Inspection Service [or, more recently, the Office of the Inspector General (OIG)] and their resultant work product, the Investigative Memorandum. Even where the Inspection Service has already conducted an investigation, however, the supervisor's obligation to investigate as an element of "just cause" is not simply negated. While it is recognized that there are two (2) lines of arbitral authority on this issue,[38] the best-reasoned awards, as well as those most in harmony with the due process requirements of the Collective Bargaining Agreement, require the immediate supervisor to conduct at least some minimal type of independent investigation instead of merely relying upon the contents of an Investigative Memorandum prepared by the Postal Inspection Service or OIG.[39]

Arbitrator Gold, in her oft-cited award, analyzed the obligation of management to make at least some investigation independent of the Inspection Service most succinctly:

"Any Supervisor who relies solely on the findings of the Inspection Service does so at his or her own peril."

> "Any Supervisor who relies solely on the findings of the Inspection Service does so at his or her own peril. Postal Management has the responsibility of conducting a full investigation of any actions that may result in the assessment of discipline. An IS report is just one element or factor that must be weighed and it cannot be presumed to be accurate or true without independent analysis. Such an investigation should include an interview with the employee who is so charged, to obtain and weigh his or her side of the story."[40]

Citing with favor **Arbitrator Gold** and others, **Arbitrator Jedel**, concluded similarly:

"Management in this case is equally at fault for relying solely on the Inspection Service and its

[38]The parties, themselves, appear to have resolved this split, incorporating with the 1994 NA at p. 150, a MOU, on the subject which provides:

> "The parties further acknowledge the necessity of an independent review of the facts by management prior to the issuance of disciplinary action, emergency procedures, indefinite suspensions, enforced leave or administrative actions. Inspectors will not make recommendations, provide opinions, or attempt to influence management personnel regarding a particular disciplinary action, as defined above. Nothing in this document is meant to preclude or limit Postal Service management from reviewing Inspection Service documents in deciding to issue discipline."

[39]In addition to the awards cited herein, see also: Arbitrator Irwin J. Dean, Jr., Case No. E90C-2B-D 92034341, April 29, 1993; Arbitrator William Eaton, Case No. W7S-5D-D 3638, December 8, 1988; Arbitrator Carol Wittenberg, Case No. A90C-1A-D 93009216, July 17, 1994; Arbitrator George R. Shea, Jr., Case No. A90C-1A-D 94027875, March 28, 1995; Arbitrator Patricia S. Plant, Case No. H90C-4H-D 94036734, December 8, 1994; Arbitrator George T. Roumell, Jr., Case No. J90C-1J-D 95076789, June 11, 1996; Arbitrator George R. Shea, Jr., Case No. A94N-4A-D 96001437, June 26, 1996; Arbitrator Jacqueline F. Drucker, Case No. A94C-4A-D 97050845, et al, August 20, 1997; Arbitrator Elliott H. Goldstein, Case No. J98C-1J-D 99259023, January 30, 2001; Arbitrator Margo R. Newman, Case No. C98C-1C-D 00105522, June 18, 2001; Arbitrator Frances Asher Penn, Case No. J98C-4J-D 01008166, July 27, 2001; Arbitrator Margo R. Newman, Case No. C98C-4C-D 00191547, December 9, 2002. Each of these awards contains significant discussion of this requirement.

[40]Arbitrator Charlotte Gold, Case No. S7C-3D-D 38401, January 16, 1992, p. 6.

Investigative Memorandum...Typically, these cases also contained varying numbers of other citations by postal arbitrators which suggest a rather clear stream of decision making on this issue...

"None of these decisions question the value and importance of the work done by the Postal Inspectors, especially as it concerns possible violation of Postal laws and regulations, as well as external law. However, their work, and the Investigative Memoranda produced, cannot substitute for the independent inquiry of the decision-making managerial authority who, amongst other considerations, must separately decide whether or not the alleged offense occurred, whether there are any extenuating or mitigating circumstances, and whether contractual (as compared to legal) considerations and safeguards have been met."[41]

The previously cited, late **Arbitrator Marlatt**, in another much-cited award, expressed this principle as only **Arbitrator Marlatt** truly could:

"It is clear from these decisions that an investigation of a possible violation of Postal laws and regulations by the Inspection Service is not in any way an acceptable substitute for the immediate supervisor's own inquiry into the equities of the case. To a Postal Inspector, an employee with thirty years service and a dozen superior performance awards who steals a 22¢ stamp is simply a thief who has misappropriated Postal property. It is entirely proper for the Inspector to look at it this way. But the supervisor, in deciding whether to take corrective disciplinary action, must consider not only the offense but also all mitigating and extenuating circumstances and the likelihood that the employee can be rehabilitated into a productive and trustworthy member of the Postal team. It may be true that some supervisors lack the experience and mature judgment to reach a just and fair decision as to what should be done, but this fact does not mean that the supervisor may abdicate his or her own responsibility and pass the buck to the Inspection Service."[42]

"To a Postal Inspector, an employee with thirty years service and a dozen superior performance awards who steals a 22¢ stamp is simply a thief who has misappropriated Postal property."

Arbitrator Kelly interestingly concluded that the immediate supervisor's sitting in on the Inspection Service interview of the grievant did not satisfy the obligation to conduct an independent investigation:

"While arbitrators are not unanimous, there now appears to be a consensus of opinion that a supervisor cannot rely solely on an Investigative Memorandum in making his or her disciplinary decision. And, viewing Frey's 'investigation' in the context of the overall investigation by management, it is clear that her sitting in on the interview by the Postal Inspectors alone was not sufficient to justify the action taken"[43]

"…sitting in on the interview by the Postal Inspectors alone was not sufficient..."

Another interesting perspective of this issue is offered by **Arbitrator Remington**, where it was clear that the Postmaster conducted no meaningful independent investigation and relied instead upon an

[41]Arbitrator Michael Jay Jedel, Case No. S0C-3T-D 15396, July 21, 1994, pp. 19-20.

[42]Arbitrator Ernest E. Marlatt, Case No. S4C-3S-D 53003, September 18, 1987, pp. 8-9.

[43]Arbitrator Randall M. Kelly, Case No. A90C-4A-D 94016391, November 7, 1994, p. 9.

inaccurate Investigative Memorandum:

> "While there is nothing to prohibit a Postal Inspector from assuming the role of a prosecutor and attempting to build a persuasive case against an employee suspected of wrongdoing, the Employer may not rely solely on such a report and substitute the 'investigation' conducted by the Postal Inspector for its own investigation. This is so because the Employer's investigation is subject to just cause standards while the Postal Inspector is free to lead a 'hanging party' as Ireland clearly did here."[44]

WEINGARTEN RIGHTS

Any discussion of the employees' due process right to appropriate "investigatory interviews" or "pre-disciplinary interviews" would be incomplete without reference to the employee's "Weingarten rights," as well. An employee has a right to Union representation in any meeting with the employer which the employee reasonably believes might result in disciplinary action against that employee. This right of an employee to a steward in an investigatory interview situation was formulated by the United States Supreme Court[45] and is generally recognized by Arbitrators.[46]

In order to effect her Weingarten rights, the employee must: a) reasonably believe that discussions during the meeting might lead to discipline against the employee; and, b) request such representation.[47] This test is an objective one. As **Arbitrator Aaron** noted in a National level award:

> "The criterion for having a steward present is not…'what is in the mind of the Employee.' Rather, it is whether the employee reasonably believed that the discussion might lead to discipline. The test is objective, not subjective; and in this case, Simpson's concern was objectively unreasonable." [48]

[44] Arbitrator John Remington, Case No. I98C-4I-D 00113424, October 15, 2000, pp. 7-8.

[45] NLRB v. Weingarten, Inc., 420 U.S. 251, February 19. 1975.

[46] See, for instance, Arbitrator Carlton J. Snow, Case No. SM 85-044, January 22, 1988. See, also, Arbitrator Christopher E. Miles., Case No. H00C-4H-D 03125590, October 13, 2003, and Arbitrator M. David Vaughn, Case K00C-1K-D 03112078, September 27, 2003.

[47] Step 4 Decision, Case No. H4C-4K-C 11812, December 9, 1986.

[48] Arbitrator Benjamin Aaron, Case No. H1T-1E-C 6521, July 6, 1983, p. 8.

The National Labor Relations Board (NLRB) has extended the Weingarten rule to include a right for a pre-interview consultation between the steward and employee.[49] The Employer has no duty to bargain with the union representative during the investigatory interview. The steward may not obstruct the investigation.[50] However, it is also clear that the employer may not require the steward to remain passive during the interrogation.[51]

Where the employee's Weingarten rights are violated the appropriate remedy is to wipe out any evidence gained as the result of such interview. See, for instance, **Arbitrator Abernathy**, who said:

> "…[T]he Union contends that the appropriate remedy for this contract violation is to throw out any evidence gained from the interview and to not base any removal action on that evidence. In the arbitrator's view, this remedy is particularly appropriate in the present case because the formal charges against the grievant, as discussed earlier, were based entirely on the alleged admissions made by the grievant in the interview…In other words, the evidence to support the charges against the grievant was obtained in an interview in which the grievant's rights to Union representation were denied. It is difficult to imagine a more appropriate way to remedy this type of contract violation…"[52]

Weingarten rights are limited to investigatory interviews. Employees are not entitled to Union representation during an official job discussion, for example.[53] Similarly, employees are not entitled to the presence of a steward if the decision to issue discipline has already been made[54] or if they are merely called to the supervisor's office to receive a disciplinary action.[55] It is probably also important to note that the employee's right to the presence of a steward, when exercised, does not necessarily always include the right to a particular steward of the employee's choosing.[56] The Employer may, for instance,

[49] USPS v. APWU, East Bay Area Local, 303 NLRB 463, June 21, 1991.

[50] New Jersey Bell and Telephone Company and Local 827, IBEW, 308 NLRB 277, August 18, 1992.

[51] United States Postal Service and American Postal Workers Union, Local 232, AFL-CIO, 347 NLRB 89, August 11, 2006. See also, Joint Contract Interpretation Manual (JCIM), Article 17.4, p. 5; or see, Chief Postal Inspector Fletcher's letter dated May 24, 1982

[52] Arbitrator John H. Abernathy, Case No. W4T-5H-D 9329, August 7, 1986, p. 27. See, also, Arbitrator Harry R. Gudenberg, Case No. H98C-1H-D 01092580, April 5, 2002.

[53] Step 4 Decision, Case No. H1C-1J-C 23689, February 27, 1984; Step 4 Decision, Case No. H1C-3W-C 21550, August 24, 1983. See also, Arbitrator John F. Caraway, Case No. S1C-3Q-C 32854, November 21, 1984.

[54] See, for instance, Arbitrator Carlton J. Snow, Case No. SM 85-044, January 22, 1988.

[55] Step 4 Decision, Case No. H1C-3W-C 8243, October 14, 1982. See also, Joint Contract Interpretation Manual (JCIM), Article 17.4, p. 5.

[56] See, for instance, NLRB Office of the General Counsel Advice Memorandum, USPS and NALC, Cases 26-CA-20975 and 26-CB-4252, March 13, 2003.

provide an alternate steward when the regular steward is unavailable or on overtime.[57] On the other hand, the Employer may not bypass the steward designated by the Union and provide a steward of their own choosing.[58]

KALKINES WARNING

Any discussion of the investigatory interview and Weingarten rights would be incomplete without mention of this additional thorny problem. The Fifth Amendment to the United States Constitution protects all citizens from self-incrimination. On the other hand, Part 666.6 of the Employee & Labor Relations Manual[59] obligates all employees to "cooperate in any postal investigation." Under what circumstances may the employee, fearing criminal prosecution, invoke his 5th Amendment right to remain silent and when may the Employer require the employee to respond under threat of further discipline solely for the failure to "cooperate" in their investigation? The courts have given us significant guidance on this issue. In *Kalkines v. U.S.*, for instance, the Court of Claims explained:

> "In recent years the courts have given more precise content to the obligation of a public employee to answer his employer's work related questions where, as here, there is a substantial risk that the employee may be subject to prosecution for actions connected with the subject of management's inquiry. It is now settled that the individual cannot be discharged simply because he invokes his Fifth Amendment privilege against self-incrimination in refusing to respond…But a governmental employer is not wholly barred from insisting that relevant information be given it; the public servant can be removed for not replying *if he is adequately informed both that he is subject to discharge for not answering and that his replies (and their fruits) cannot be employed against him in a criminal case*."[60] [emphasis added]

Arbitrator Shea, in a 2006 decision provided a thorough analysis of this legal minefield in

[57] Arbitrator Carlton J. Snow, Case No. H4C-3W-C 28547, January 8, 1990.

[58] New Jersey Bell and Telephone Company and Local 827, IBEW, 308 NLRB 277, August 18, 1992.

[59] Employee & Labor Relations Manual, Part 666.6.

[60] *Kalkines v. U.S.*, 473 F.2d 1391, (U.S. Court of Claims), February 16, 1973, pp. 1392-93. See also, *Gardner v. Broderick*, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2nd 1082 (1968); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968); *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967); and *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 426 F.2d 619 (C.A.2, 1970).

overturning the removal of an employee for allegedly violating ELM 666.6 by failing to "cooperate in an investigation," saying:

> "In consideration of the provisions of Articles 3 and 16 of the Agreement, the Arbitrator determines that when the Service disciplines an employee for a violation of ELM Section 666.6, the just cause standard requires the Service to establish that it provided the employee with then notification required by the Garrity and Kalkines decisions. In the opinion of the Arbitrator, the absence of such proof in this matter, is fatal to the Service's claim that it had just cause to Remove the Grievant for a violation of ELM Section 666.6."[61]

The USPS Office of the Inspector General (OIG) has developed a specific "Kalkines Warning" Form which the employee may well be asked to sign. The well prepared steward should be familiar with this form which explains the employee's right and requires the employee to acknowledge their explanation.[62]

PROGRESSIVE DISCIPLINE

- **Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee's past record?**

Progressive discipline is usually considered to be a prerequisite to future disciplinary actions. Since Article 16, Section 1 requires discipline to be corrective and not punitive in nature, the alleged misconduct should be addressed through progressively more severe penalties.[63] While some types of

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[61] Arbitrator George R. Shea, Jr., Case No. C00C-1C-D 05132381, May 22, 2006, p. 12. See also, Arbitrator George R. Shea, Case No. C00C-1C-D 05164426, May 22, 2006. See, also, Arbitrator Clause Dawson Ames, Case No. F98N-4F-D 00254514, April 16, 2001, pp. 27-29.

[62] USPS Office of Inspector General, Kalines Warning: Administrative.

[63] See, for instance, USPS Handbook EL-921, **Supervisor's Guide to Handling Grievances**, which teaches at pp. 12-14.

> "The main purpose of any disciplinary action is to correct undesirable behavior on the part of an employee. All actions must be for *just cause* and, in the majority of cases, the action taken must be progressive and corrective.
>
> ...

infractions, such as theft, criminal activity, assault, etc., are considered to be of such a serious nature as to make permissible exception to the normal pattern of progression, Arbitrators usually pay particular attention to the progressive nature of discipline[64] which, under our Agreement, would include job discussions and letters of warning before resorting to suspensions and/or discharge.

The Employer may not, for instance, bypass its obligation for progressive or corrective discipline under Article 16.1, by issuing a blanket order mandating a specific level of discipline for specific activities. Where, for instance, the Employer mandated that "any violation of a safety rule or procedure will result in disciplinary action," **Arbitrator Hardin** determined that mandate to conflict with Article 16.1, saying:

> "The directive is inconsistent with Article 16, Section 1, which provides that 'discipline should be corrective in nature and not punitive.' The principle of progressive discipline requires that, in any instance where discipline is to be imposed, the least discipline that will be corrective must be imposed."[65]

Similarly troubling is the USPS alleged policy of "Zero Tolerance" for threats of violence. While the Union certainly applauds the Employer's desire (in fact, obligation) to provide us with a workplace free of threats or physical violence, the Employer often also asserts that all threats or physical violence (at least from bargaining unit employees) automatically must automatically result in discharge. In doing so, they violate Article 16, Section 1. Discharge is not automatically appropriate in every instance and a policy which mandates that result beginning with first such occurrence is punitive and not

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> "What happens if the employee's behavior does not improve [after a job discussion]? A second discussion may sometimes be advisable, or formal disciplinary action may be initiated through issuance of a letter of warning or suspension. Remember, your job is to handle disciplinary actions so they are corrective and not punitive.
>
> "In suspending an employee, use extreme caution in convincing yourself that the penalty is appropriate for the offense. Progressively longer suspensions may be in order to correct a situation. When these fail, discharge should be considered."

[64]For instance, see Arbitrator Edwin H. Benn, Case No. J94C-1J-D 96025555/42100, October 9, 1996, at p. 9:

> "Article 16.1 applies the principle that discipline 'should be corrective in nature'. Discipline is used as a corrective tool through the application of the principles of progressive discipline."

[65]Arbitrator Patrick Hardin, Case No. H94C-1H-C 96039596, September 12, 1997, pp. 8-9. On the question of mandatory discipline when an accident occurs, see Step 4 Decision, Case No. H95R-4H-C 96033543, August 28, 1996:

> "When safety rule violations occur, managers and supervisors have several alternative corrective measures at their disposal. Correction of safety rule violations, whether by discipline or other alternatives, should not be predicated on whether an accident happened but rather on a factual determination that improper conduct occurred. Any disciplinary action taken must be for just cause pursuant to the provisions of Article 16 of the National Agreement."

See also, Step 4 Decision, Case No. H91R-4C-C 96027479, January 3, 1997.

corrective in nature. For an excellent analysis, see **Arbitrator King,** who said:

> "The Arbitrator had trouble...in accepting the notion that 'zero tolerance' means that all prohibited acts subject to that policy, of whatever degree, and without regard to the circumstances, or the past history of the employee involved, justifies the imposition of a penalty of discharge.
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> "...[I]t is fully understood that the Employer would take all threats of violence seriously and would not abide any known incidents going unaddressed. On the other hand, given due deference to the realities of past incidents of violence, it still would be extremely harsh to permit a 'you-said-it-you-are-fired-no-questions-asked' attitude to prevail in every circumstance without any regard to the context in which the utterance was made or the probability of its being acted on.
>
> "A threat of violence is an extremely serious matter, but it must be viewed in context and it must be accorded the same disciplinary treatment as other violations of work rules**. Zero tolerance means that no reported violations of these work rules that are applicable to this type of proscribed conduct will go unattended. It means that no proven violation will go unsanctioned. It does not and cannot mean that every utterance by an employee directed towards a supervisor that can be construed, standing alone, as constituting a threat demands the imposition of a penalty of removal**."[66] [emphasis added]

"Zero tolerance…cannot mean that every utterance by an employee…that can be construed…as a threat demands the imposition of a penalty of removal."

At least one Court has determined that the "plain language" of the Joint Statement on Violence and Behavior in the Workplace prohibits the termination of an employee for a single act of violent or threatening behavior. In overturning the termination of a supervisor through an NALC arbitration award, the US District Court for the District of Maryland said:

> "There is no evidence and no finding by the Arbitrator that Hatten engaged in a continuing course of unacceptable conduct. The Arbitrator simply found that Hatten engaged in an offensive touching on this one occasion…Accordingly, the Arbitrator was limited to ordering USPS to not reward or promote Hatten. The Joint Statement expressly states that only those whose behavior 'continues' to violate the Joint Statement may be terminated. Repeated violations of the Joint Statement are required to justify an order of termination…"[67]

Some types of infractions are particularly susceptible to corrective or progressive discipline. For instance, see the discussion by **Arbitrator Cohen** in a 1982 award, where the grievant had been discharged for attendance without benefit of prior, progressive discipline:

[66] Arbitrator Otis H. King, Case No. G90C-1G-D 96018868 et. al., May 21, 1996, pp. 7-8 See also, Arbitrator John C. Fletcher, Case No. J98C-1J-D 01020907, April 23, 2001 or Arbitrator Philip W. Parkinson, Case No. C98T-1C-D 00229907/220092, February 26, 2001.

[67] United States Postal Service v. National Association of Letter Carriers, AFL-CIO, Civil No. CA-01-1447-JFM, January 7, 2002, pp. 7-8. Note that this decision was subsequently overturned by the 4th Circuit U.S. Court of Appeals, in No. 02-1159, November 5, 2002.

"Article 16, Section 1, of the National Agreement provides that discipline shall be corrective and not punitive. Numerous arbitrators have determined that, for discipline to be corrective, it must, wherever possible, be progressive. The rationale for this is that only a series of disciplinary actions can bring home to an employee the need to correct errant behavior.

"Of course, some employee misconduct is considered so unacceptable as to warrant immediate termination. The classic examples of this are theft or sabotage of employer property. The type of misconduct which is considered to be the most susceptible to correction by progressive discipline is probably that with which Grievant is charged; i.e., attendance problems."[68]

"The type of misconduct which is...the most susceptible to correction by progressive discipline is probably... attendance"

In a case where the grievant admitted inappropriately accessing the internet (including porn sites) using a USPS computer, **Arbitrator Fletcher** provided a thoughtful analysis of the appropriateness of the penalty of removal versus the benefits of progressive discipline, saying:

"Article 16.1, states that when administering discipline, 'a basic principle shall be that discipline should be corrective in nature, rather punitive.' Management is not excused from following this principle in cases where the unauthorized use of a computer involved visits to cites that are considered by some to be immoral and offensive…

"At the time of his removal Grievant had been employed by the Postal Service for approximately 16 years. Before that he had spent 11 years in military service. A single live element of discipline was on his record. It would seem from this, unauthorized use of a Postal Service computer for accessing the internet is misconduct that would be amenable to corrective discipline. That corrective discipline was not considered discipline was not considered flaws the process.

. . .

"The unauthorized access of the internet was correctable, and Grievant should have been placed on notice with progressive discipline that it would not be tolerated. Only after corrective discipline was attempted and the misconduct persisted, would removal be appropriate. The situation is not dissimilar to other types of correctable misconduct, perhaps something like an attendance deficiency…

"Accessing the internet with a Postal Service computer is not a situation where an employee is stealing from his stamp credit or Postal Service funds, it is not a case where an employee is stealing from the mail, it is not a cease where the employee is using the computer to alter payroll data for wrongful gain – offenses that subject the accused to removal without corrective or progressive discipline. Accessing the internet with a Postal Service computer is conduct that can be corrected with progressive discipline, and it is not site visited that would control the level of discipline to be imposed, but other elements that usually are followed in such determinations."[69]

[68] Arbitrator Gerald Cohen, Case No. C1C-4F-D 7305, December 23, 1982, p. 7. Similarly, where the grievant was removed for failing to ask a single requisite GIST question, Arbitrator Gilder, in Case No. E00C-4E-D 02232024, September 22, 2004, said at p. 4:

"The grievant's conduct on which the removal is based simply does not rise to the level of offence for which the result should be industrial equivalent of the death penalty."

[69] Arbitrator John C. Fletcher, Case No. J98C-4J-D 00136430, December 8, 2001, pp. 5-7.

A separate issue of progressive discipline occurs when the Employer utilizes prior discipline for one type of misconduct to justify a more severe discipline for some other type of alleged misconduct. There is no hard and fast rule which says that management must always "start over" in the progressive discipline chain. However, the Union should always question the progressiveness of any attempt to rely on discipline for distinctly different alleged misconduct. For example, **Arbitrator Martin** dealt with a case in which the Employer cited five different suspensions for attendance between 1979 and 1980 and three additional suspensions for improper "performance of clerical duties" between 1982 and 1983 as the basis for discharge for attendance in 1984. In reducing the removal to a 14 day suspension the arbitrator said:

> "It is incumbent upon the Postal Service to show that the grievant was failing to maintain a satisfactory attendance record. A review of her attendance for the year 1984 shows that the grievant was absent often enough and tardy, to warrant some discipline. To give an employee a four year pass on discipline or warnings about attendance, then discharge that employee after an absentee record similar to the one established by the grievant, is simply asking for a grievance to be allowed. I allow it. The entire concept of progressive discipline is to start warning an employee early enough in the game that he can identify his problems and eliminate them, without the Postal Service having to remove the employee. ...In 1984, her record justified, in fact, demanded, some discipline to let her know that her attendance was becoming irregular. Instead of the progressive discipline, contractually required to be corrective in nature, not punitive, the grievant was terminated from her employment."[70]

A MATTER OF TIME

- **Was the disciplinary action taken in a timely manner?**

The issue of timeliness is an element of just cause as well as being critical to the "corrective" rather than "punitive" nature of a particular discipline. Does any self-respecting parent wait several weeks before appropriately disciplining a misbehaving child? Not if they want to correct the child's behavior! In the workplace, timely discipline avoids unnecessary

[70]Arbitrator James P. Martin, Case No. C1C-4D-D 36420, August 22, 1985, pp. 7-8. For the reverse situation, where the arbitrator expressed some discomfort with the Employer's reliance on only prior attendance discipline, when removing an employee for an alleged altercation, see Arbitrator Patrick Hardin, Case No. S4M-3A-D 63529, December 12, 1988.

suspense and uncertainty and will permit basic fairness to the employee by assuring that all facts and possible defenses are still fresh on everyone's memory. As **Arbitrator Powell** so cogently stated in a 1988 case:

> "Discipline to be effective must be timely. According to the Collective Bargaining Agreement, it is supposed to be corrective not punitive. This was not timely, it reeks of procedural errors."[71]

Arbitrator McAllister offered similar sage counsel, saying:

> "The Postal Service instructs its supervisors to take disciplinary action 'as promptly as possible after the offense has been committed.' The lapse in time involved in this matter is totally unreasonable and at odds with the principles of just cause. Therefore, the grievant's removal cannot be upheld."[72]

A most thoughtful analysis of the "timeliness" requirement can be found in ***Discipline and Discharge in Arbitration***, Norman Brand, Editor, Washington, D.C.: Bureau for National Affairs, Inc., 1998, which proffers:

> "Employers must impose discipline within a reasonable time after learning of misconduct. When a dispute is investigated and action taken quickly, the positions of the parties are less likely to harden, thereby increasing the possibility that the matter can be resolved without the need for arbitration. An unreasonable delay subjects employees to suspense or uncertainty. It also deprives the union and the employee of an early opportunity to investigate, gather evidence, and prepare a defense. The passage of time may disadvantage the grievant if witnesses lose their recollections or become unavailable."[73]

There is no specific time in which discipline transcends from "timely" to "untimely." The question of timeliness can only be answered within the specifics of each individual set of fact circumstances. Where, for instance, an investigation is ongoing, a delay of several weeks, or even months, might still render the discipline timely. Where, on the other hand, management simply delays the investigation for several months, the discipline may be untimely.[74] Similarly, where management has completed their investigation, and simply delays imposing discipline without explanation, a delay of several weeks might well mean the action is untimely. For instance, where the delay involved 47 days, **Arbitrator Schedler** opined:

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[71]Arbitrator Walter H. Powell, Case No. E4C-2A-D 50528, December 8, 1988, p. 11.

[72]Arbitrator Robert W. McAllister, Case. No. C0C-4L-D 16172, March 15, 1993, p. 17.

[73] ***Discipline and Discharge in Arbitration***, Norman Brand, Editor, Washington, D.C.: Bureau for National Affairs, Inc., 1998, pp. 347-38.

[74]For instance, Arbitrator William E. Rentfro, Case No. AC-W-24658-D, February 14, 1979, at pp. 6-7, finding that "the passage of seven months before an investigation began" rendered the discipline untimely.

"In the usual grievance a delay in presenting charges can mean the loss of evidence to an aggrieved. Memories fade with the passage of time, witnesses become difficult to locate so as to reconstruct the events in question, a photograph of the scene taken weeks later may be inaccurate as to the conditions that prevailed on the date of occurrence. In my opinion a delay of 47 days in presenting a letter of charges is too long and I find that the Employer has violate (sic) Article 16 of the National Agreement by delaying the delivery of the letter of charges…[A] delay in presenting changes an employee's right to prepare to defend himself against the charges and that is where I disagree with the procedures the Employer followed."[75]

Where the employer waited nearly a year after receiving the Postal Inspection Service's Investigative Memorandum before issuing a Notice of Removal, **Arbitrator McAllister** opined:

"The definition of just cause is not uniform in Postal arbitrations. Notwithstanding the variances between cases, it is evident there is general agreement that a core group of criteria exists…Likewise, this Arbitrator is unaware of any objective inquiry into just cause which would not question the promptness of issuing discipline if raised. The concept of holding up action upon fully explored events is inherently unfair and deprives an employee and representative union the opportunity to comprehend and properly prepare a defense while the evidence is fresh. Herein, Management has provided no reasonable basis to support its over one year delay in imposing a second removal upon the Grievant nor did it support its action by citing any arbitral precedent. If, as it claims, Management may under the National Agreement unilaterally choose the moment to take disciplinary action, the just cause provision of the contract would be rendered meaningless. Herein, the Arbitrator is not encouraging Management to act before it has completed its investigation. But, as in this case, when completed, discipline must be rendered in a timely manner. This Arbitrator has been unable to find any contractual or arbitral authority which supports Management's view about the timing of discipline. Therefore, I find the prolonged delay in the issuance of the discipline before me removed an essential underpinning of just cause and requires me to rule against Management."[76]

In yet another instance, **Arbitrator Benn** addressed a situation where the Postal Inspection Service had delayed informing management of an infraction for some two and one-half years:

"Delay in the bringing of disciplinary action is a factor to be considered in determining the propriety of the disciplinary action. *See White Cloud Public Schools*, 72 LA 179, 183 (Kanner, 1979) [citations omitted]:

"Unreasonable delay...impugns the just cause standard in that due process is then not afforded to the employee"

Unreasonable delay...impugns the just cause standard in that due process is then not afforded to the employee. ...Arbitral law and practice have recognized an implied limitation may be recognized by an Arbitrator in respect to the time that the employer may take action. There is an implied limitation of a 'reasonable time' based upon all facts and circumstances of the case.

"Why was there such a long delay in taking action? No satisfactory explanation exists in this record. In closing arguments, the Service suggested that there was an ongoing investigation. However, there is no evidence of such an investigation and no witness made such a contention. Certainly, the Inspection Service must be permitted flexibility to conduct its investigations. But when such a long delay occurs from the point of discovery of potential misconduct until Management is notified and discipline is instituted, some kind of explanation is

[75]Arbitrator Edmund W. Schedler Jr., Case No. S1N-3W-D 2205, June 3, 1982, p. 9.

[76] Arbitrator Robert W. McAllister, Case No. C7C-4A-D 16592, April 17, 1990, pp. 13-14.

required. Yet, no such explanation came forward in this case."[77]

In finding a two month delay in imposing discipline for allegedly striking a co-worker, "intolerable," **Arbitrator Powell** said:

> "The question arises, how soon after an offense should punishment be applied. The general answer is that management may delay imposing a penalty for a reasonable time, but should have sufficient justification for the postponement. Excessive delay resembles double jeopardy. A threat of punishment or delay in punishment hanging over the employee's head, for months constitutes punishment in an of itself. In the eighteen months that it has taken this case to come to arbitration, every time grievant sought other employment, her potential employer was informed by the Post Office that she was suspended for misconduct until final adjudication. This is another form of penalty, not only removing her from the Postal Service, but making it difficult for her to get and hold another job. This is cruel and inhuman punishment."[78]

In yet another case, **Arbitrator Dobranski** had this to say about a month's delay:

> "The Postal Service urges that there is no statute of limitations in the agreement as to when a charge must be brought. That argument misses the point, however, which is that the grievant must be given a meaningful opportunity to respond to and defend against charges. In this case, given the nature of the offense – the failure to withdraw a piece of mail from the departure case – and the volume of mail normally handled by the grievant, the grievant did not have such an opportunity when he was not given any indication of the offense until almost one month later."[79]

Discussing a three (3) month delay in imposing discipline, **Arbitrator Walt** commented:

> "Furthermore, the three month delay in issuing the removal notice clearly was unconscionable under the facts of this case. While the Employer contends grievant had not provided it with his current address at the time the removal notice issued, the proofs establish that no other Notice of Removal issued prior to the May 6 document which grievant received on May 20. Management is under an obligation to impose discipline within a reasonable time following an alleged incident of misconduct – especially when, as in this case, it believes it is in possession of all relevant facts and does not intend to conduct any further investigation. The unexplained substantial delay in issuing the removal notice is a further reason to set aside the discharge."[80]

Finally, where the Employer conducted a six-month investigation into the grievant's behavior in allegedly threatening his supervisor during a dispute over work hours, **Arbitrator Krimsly** offered this

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[77]Arbitrator Edwin H. Benn, Case No. C0C-4P-D 604, March 22, 1992, pp. 13-14. See also, Arbitrator Carol Wittenberg, Case No. A90C-1A-D 93009216, July 17, 1994. Similarly, see Arbitrator Joseph F. Gentile, Case No. W1C-5D-D 9449, June 30, 1983 at p. 8:

> "The lapse of time between management's knowledge of the alleged conduct and its action may adversely affect the procedural due process considerations attendant to such cases and the appropriateness of the delayed action."

[78]Arbitrator Walter H. Powell, Case No. E7C-2A-D 14206, August 30, 1989, p. 9. See, also, for instance, Arbitrator Linda DiLeone Klein, Case No. C98V-1C-D 01253912, September 26, 2002, finding that a two (2) month delay before conducting a PDI and subsequent two (2) month delay, thereafter, before issuing discipline rendered the discipline "untimely" and in violation of the grievant's due process rights.

[79]Arbitrator Bernard Dobranski, Case No. C8N-4A-D 9831, September 2, 1980, p. 9.

discussion of the concept of timeliness:

> "It is a fundamental principle in law as well as contract arbitration that a party possessed of certain rights must not let them lie fallow, but must act upon them promptly. The agreement in this case gives management the right to discipline and/or discharge for just cause. The Postal Service took the position that grievant had on August 3, 1976, committed an offense which might be the subject of discipline. An investigation was begun which was not terminated until January 28, 1977….In the intervening six months, grievant continued on the job. While an employee has no need or right to expect to be kept advised on an investigation, unless a contract holds otherwise, he does have the right to expect that the result of the investigation or the charge under consideration will be promptly communicated. If he has committed an offense worth of punishment by his employer he must know it promptly after the wrongdoing. This is part of due process or fairness in the employment setting – an unsettled charge must not be kept pending unduly long. Insofar as the action of August 3, 1976, is grounds for discipline, the arbitrator concludes that for the Postal Service to have waited six months to finalize the offense into discipline is unreasonable and contrary to the degree of promptness which is an employee's due."[81]

As previously stated, there is no set standard as to what is timely. Obviously, if an investigation is ongoing, the Employer will have to wait until the completion of that investigation before issuing discipline. But there is simply no excuse for simply postponing discipline or just not getting around to it.[82] See, for instance, **Arbitrator Donald**, saying:

> "If this were a situation where an extensive investigation was necessary to establish that the employee in fact committed an offense, then there would be an acceptable reason for the delay by the Postal Service, which the Arbitrator would excuse…However, in the present case, the investigation by Mr. Kennedy was conducted and completed within the same day as the incident. No further investigation was conducted by the Postal Service. Managerial postponement, rather than investigation, was the cause of the holdup. Therefore, the Postal Service's delay in this case was unwarranted and contrary to established principles in labor relations and arbitration cases…" [83]

As a general rule, the Union would contend that any discipline over a week old is only getting more and more stale. Depending upon the fact circumstances, we might argue "untimeliness" for an even shorter delay and, and we might very well concede "timeliness" for a much longer delay. Again, get all the facts. Raise the issue. Get management's explanation for any delay.

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[80]Arbitrator Alan Walt, Case No. J94N-4J-D 97070587, March 11, 1998, pp. 9-10.

[81]Arbitrator Samuel Krimsly, Case No. NC-E- 8274D, January 18, 1978, pp. 6-7.

[82]Although finally concluding that, while inappropriate, the delay "did not invalidate the disciplinary penalty," Arbitrator Johathan Dworkin in Case No. J94C-1J-D 96034056, September 3, 1996, reviewed the timeliness requirement at pp. 8-9 of his award:

> "Six weeks was a long time. As the Union contends, managerial neglect rather than investigation was the cause. The Arbitrator agrees with the Union that unjustified postponement of a disciplinary penalty violates an employee's right to speedy justice. Also, it can violate an employee's right to adequate representation by retarding the Union's capacity to construct a defense."

[83] Arbitrator Carrie G. Donald, Case No. C00C-4C-D 03021626, February 7, 2003, p. 9.

This is probably as good a time as ever to mention a frequent problem in processing discipline grievances. While management occasionally deprives an employee of due process by being untimely with the issuance of discipline, a problem which probably occurs far more frequently is when the steward neglects to conduct a complete investigation in a timely manner. Just as management's untimeliness makes it more difficult to investigate and argue your grievance, a steward's procrastination has the same result. A witness' memory fades with time. Documents disappear. Those are facts of life. There is no substitute for the steward's "timely" investigation. There is no substitute for interviewing every witness promptly and taking good notes. Keep good notes of your Step 1 and Step 2 meeting. Memory fades. While your notes won't last forever, they should make it until the arbitration hearing.

Stewards' Checklist
√ Conduct Interviews
√ **Collect Documents**
√ **Take Notes**

JOB DISCUSSIONS

Job discussions, themselves, are not grievable. However, management does have an obligation to give job discussions, particularly for minor offenses. Article 16, Section 2 teaches:

> **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. ...

While the job discussion, itself, is not grievable, the question of whether the subject of a job discussion is appropriate for that forum may be grievable as a contractual matter.[84] The validity of any

[84] It is inappropriate, for instance, for the supervisor to include FMLA approved leave in job discussions on attendance. See, Arbitrator Charlotte Gold, Case No. H98C-1H-C 00139847, March 4, 2002. This award was subsequently upheld by the U.S. District Court, USPS v. APWU, AFL CIO, April 14, 2003.

alleged job discussion is also always an appropriate issue in any subsequently issued discipline. If the discussion was not conducted in private;[85] if the employee was not appropriately forewarned of the consequences of continuing his alleged misconduct; or if we dispute that a job discussion even took place; each of these issues can be raised in discussing the ultimate discipline. Any investigation of discipline should include investigation of the initial job discussion.

The obligation to give job discussions does not necessarily end the first time discipline is issued, either. This is particularly true in circumstances where the discipline is for a completely unrelated offense. Even more so, job discussions are always required when the alleged misconduct involves attendance.

Management will often attempt to play word games with the discussion language in Article 16 and in part 511.42 of the Employee and Labor Relations Manual. They sometimes admit that they did not give the employee an official discussion but insist that they did talk to the employee. "Talks" or "chats" do not satisfy management's obligation to "discuss" items in Article 16 or the ELM. And "discussion" is not made unnecessary by the issuance of prior discipline, certainly not for attendance discipline. Postal leave regulations clearly require discussions. Part 511.42 of the ELM states:

> **511.42 Management Responsibilities.** To control unscheduled absences, postal officials:
>
> b. Discuss attendance records with individual employees when warranted.

Prior discipline obviously cannot make attendance "discussions" unnecessary when Postal Regulations require them. These regulations don't say "talk" to employees. They say "discuss." The requirements for "discussions" are spelled out in Article 16. Discussions must be given for attendance ***when warranted***, and because each attendance record is different, that must be prior to discipline.

Arbitrator Stallworth, for instance, considered a Notice of Removal for Attendance issued to an employee with a disciplinary record including 1) Letter of Warning for Attendance; 2) 14 Day Suspension for Unacceptable Conduct; 3) Eight Day Suspension for Sleeping on Duty; 4) 14 Day

[85] Job discussions are intended to be private. No one else should be present; not another supervisor, and not the Union steward. An employee does not have a right to a steward during an official job discussion. (See, for instance, Step 4 Decision, Case No. H1C-3W-C 21550 and Step 4 Decision, Case No. H7R-4G-C 25961, January 31, 1991. However, the employee can request a steward after the discussion and should be advised to take notes of the discussion as provided for in Article 16.2. If the employee reasonably believes that discipline could result from the discussion, then the right to a steward exists. For further discussion of the employee's "Weingarten Rights" see above at page 19.

Suspension for Attendance; and 5) Notice of Removal reduced to a 14 Day Suspension for extending his lunch period. In sustaining the grievance, **Arbitrator Stallworth** pointedly discussed the Service's failure to officially discuss the grievant's attendance with him:

> "The Service's case is also flawed by the failure of Management to provide 'official meetings' with the Grievant regarding his absenteeism and tardiness. Prior to Ms. Pohlman's January 4, 1990 meeting in her office with the Grievant, his other supervisors had met with him in unofficial, informal discussions. ...Accordingly, the Service has not carried its burden of proof on this issue.
>
> "The contract provides that such informal discussions are neither disciplinary or warnings. (Joint Exhibit No. 1, Article 16, Section 2). As such, they did not adequately forewarn the Grievant, as required by progressive discipline. ...Even more important, neither the informal discussions, or the January 4, 1990 "official" discussion made unequivocally clear to the Grievant the consequences of his continued absenteeism and tardiness."[86]

REVIEW AND CONCURRENCE

One of Article 16's protections is the requirement that all disciplinary suspensions or removals must be proposed by a lower level official and then reviewed and concurred in by a higher level authority before imposition. Article 16, Section 8 requires:

> **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.

The language of Article 16, Section 8 clearly requires that <u>before</u> a supervisor imposes discipline it must first be reviewed and concurred in by the higher authority. It does not permit review and concurrence after the discipline is imposed.[87] As **Arbitrator Drucker** explained:

[86]Arbitrator Lamont E. Stallworth, C7C-4A-D 23584, June 27, 1990, pp. 18-19.

[87]Arbitrator John C. Fletcher, Case No. C0C-4B-D 15350, July 30, 1993, p. 11.

> "...The arbitrator therefore finds that the supervisor did not seek review and concurrence from the installation head or his designee and, in fact, may not have even known that it was required, before she issued the notice of removal.
>
> "With this finding, the Notice of Removal cannot stand. The requirements of Article 16, Section 8, are clear and unbending. This requirement is the one pre-removal step that acts as a check against the first-line supervisor's authority. It is the step that guards against the imposition of inappropriate discipline by a first-line supervisor who may lack experience with the concept of progressive discipline, may not be familiar with all relevant installation practices and policies, may lack an understanding of complex facts, or may even have inappropriate personal motivation. Transcending all such potential underlying principles, however, is the fact that this step is a clear requirement of the contract. Numerous arbitrators have recognized that the step of review and concurrence is an essential, contractual prerequisite to removal. Without it, the removal violates the very processes to which the parties have agreed in clear, unambiguous, and specific contractual language."[88]

The review and concurrence requirement is a clearly a mandatory element of the contract and failure to do so can be fatal to the discipline. **Arbitrator Zumas**, for instance, stated:

> "…[N]umerous Postal Service arbitrators...have concluded that the review/concurrence provisions of Article 16.8 of the National Agreement is an essential and fundamental ingredient of the grievance process between these parties; and that violation of these provisions are of sufficient gravity to warrant reversal of any disciplinary action on the grounds that the just cause standard was not met. (See Cases S4N-3A-D 37169; E1N-2B-D 15278; S4W-3T-D 46556; S8N-3F-D 9885; S8N-3W-D 28820; E1R-2F-D 8832; E1N-2U-D 7392; and E1N-2B-D 15278.)[89]

Similarly, **Arbitrator LaRue**, citing **Arbitrator Zumas**, expressed the same conclusion in even stronger terms:

> "To find that a violation of the review/concurrence provision of Article 16, Section 8 can be violated without consequence is to eviscerate the provision. The parties intended to guarantee independent review at each stage of the grievance procedure, it is not for the arbitrator to read that guarantee out of the contract."[90]

This concept of discipline being issued at the supervisory level and reviewed and concurred in by a higher level authority is by now well established. A higher level review and concurrence is required on all suspensions (including emergency procedures[91] and indefinite suspensions[92]) and removals. The

[88] Arbitrator Jacquelin F. Drucker, Case No. A94C-4A-D 98108118, April 8, 1999, p. 13.

[89] Arbitrator Nicholas H. Zumas, Case No. DR-31-88, March 20, 1989, p. 12. Similarly, see Arbitrator George R. Shea, Jr., Case No. B90N-4B-D 96069758, November 21, 1996; Arbitrator Claude D. Ames, Case No. F90N-4F-D 96005943, January 10, 1997; or, Arbitrator Edward E. Hales, Case No. F94N-4F-D 97113867, April 21, 1998.

[90] Arbitrator Homer C. La Rue, Case No. EASC 91-003D, March 19, 1994, p. 10.

[91] See, for instance, Arbitrator Lawrence Roberts, Case No. K00C-4K-D 0309217, July 2, 2003, at p.10:

requirement for "review and concurrence" is also violated often enough to warrant some serious investigation. There is no prohibition against the supervisor consulting with higher authorities. However, when this goes beyond "consultation," and deprives the supervisor of decision making authority, real problems occur[93]. See, for instance, **Arbitrator Loeb,** who noted:

> "More importantly, it cannot say that it followed the Contract when it removed the Grievant. Article 16, Section 8 of the National Agreement unequivocally provides that a supervisor is to issue discipline, but only after the decision has been concurred in by a higher level official. The scheme is designed to insure that before punishment ensues someone not directly involved with the employee will dispassionately review the facts of the case and reach an independent decision. It is the concurring official's responsibility, in other words to act as a brake on rash or ill conceived decisions. That scheme was breached in this case when the Grievant's supervisor sat down with his manager and together they made the decision to discharge the Grievant. That violated the contractual plan set out in Article 16, Section 8...
>
> "As indicated above, Article 16, Section 8 creates a two tiered disciplinary process designed to insure that some not directly involved with the employee will coolly and dispassionately make an independent judgment as to whether or not discipline should issue. That process is polluted and the scheme destroyed when the supervisor and the concurring official meet and jointly decide to issue the removal. At that point, it becomes difficult to determine who is actually issuing the removal and who is
>
> concurring in the decision. If it is the higher level official who is issuing the removal and the supervisor merely concurring in it because he lacks the ability or the resolve to challenge his supervisor's orders the Contract has been violated. Considering that the Grievant's supervisor had only been a supervisor for about five months at the time of the March 1997 accident, it is difficult for the undersigned to believe that he made the decision to discipline the Grievant without any input from his manager or that he could have stood up to the manager and recommended another course of action if the manager voiced his decision to discharge the Grievant."[94]

Or, for instance, see the comments of **Arbitrator Dworkin** in this 1984 case where a Rural Carrier was removed for alleged theft:

> "The Emergency Placement language of Section 7 cannot be segregated from the remainder of that same Article. And with Section 8 requiring a 'Review of Discipline' by a concurring official in any manner of discipline, the failure to do so in an Emergency Placement must be considered fatal to the Employer's case."

See also, Arbitrator Mark I. Lurie, Case No. H98C-1H-D 99188237, November 15, 1999; or, Arbitrator Ruben R. Armendariz, Case No. G00C-4G-D 02161914/69, August 25, 2002. For a contrary holding, see Arbitrator Hamah R. King, Case No. G98C-4G-D 02013878, April 22, 2002. However, note, that Arbitrator King still required that Review and Concurrence be accomplished "as soon as is reasonably possible after the emergency suspension is imposed."

[92] See, for instance, Arbitrator Lawrence Roberts, Case No. K98C-4K-D 02073170, July 13, 2002; and Arbitrator M. David Vaughn, Case No. C98C-4C-D 00080390/99064171. September 21, 2001. See, also, Arbitrator George R. Shea, Jr., Case No. C98C-4C-D 01221649, February 22, 2002, at p. 8:

> "Section 16.8 of the Agreement requires the Disciplining Supervisor to obtain a review and concurrence of the proposed discipline from his/her installation head or designee."

[93]See, for instance, Arbitrator Jonathan Dworkin, Case No. C4C-4U-D 20367, February 2, 1987; Arbitrator Elliott H. Goldstein, Case No. J98C-4J-D 99297210, January 31, 2001; Arbitrator Katherine J. Thomson, F00C-4F-D 03113565, June 13, 2004; or Arbitrator Linda DiLeone Klein, Case No. K00C-1K-D 05182189, June 28, 2006.

[94]Arbitrator Lawrence R. Loeb, Case No. C94V-1C-D 97083325, March 6,1998, pp. 20-21.

> "The decision to discharge grievant was not made at the local level; it was made by labor relations offices at the MSC. It is clear that the Postmaster exercised no independent judgment. When she signed the disciplinary notices, she was following instructions. The evidence does not even suggest that she had or believed she had authority to do anything contrary to MSC directions. She was told that grievant 'had to be removed,' and from then on the decision was no longer hers.
>
> "Article 16, Section 6 of the Agreement requires discipline to be proposed by lower-level supervision and concurred in by higher level authority. The requirement was omitted in this instance…
>
> . . .
>
> "This Arbitrator does not find fault with the Postal Service's contention regarding the propriety of labor relations personnel advising inexperienced supervisors in serious disciplinary matters. The Postal Service's desire to ensure uniformity of treatment by establishing a national policy for dealing with certain kinds of misconduct is reasonable. However, when higher-level authority does more than advise: when it takes over the decision-making role and eliminates the contractual responsibility of local Supervision – and then concurs in its own decision – a substantive due process violation occurs."[95]

We would suggest further that the burden is properly upon the Employer to establish that an appropriate review occurred.[96] Finally, no discussion of the "Review and Concurrence" requirements can be considered complete without at least recognizing the recent National Level Rural Letter Carriers Award by **Arbitrator Eischen**. While the NRLCA Agreement contains some minor differences from the APWU provision, the Arbitrator concluded that the NRLCA Agreement:

> "a) Is not violated if the lower level supervisor consults, discusses, communicates with or jointly confers with the higher reviewing authority before deciding to propose discipline;
>
> b) Is violated if there is a 'command decision' from higher authority to impose a suspension or discharge;
>
> c) Is violated if there is a joint decision by the initiating and review officials to impose a suspension or discharge;

[95]Arbitrator Johnathan Dworkin, Case No. C1R-4H-D 31648/31707, January 12, 1984, pp. 7-12. See also, Arbitrator Robert W. McAllister, Case No. C7V-4D-D 2621, January 20, 1992; Arbitrator Robert W. McAllister, Case No. I94C-1J-D 98053110, March 31, 1999. Or see, Arbitrator Marsha C. Kelliher, Case No. G00V-4G-D 02159071, February 6, 2003, where she concluded that the concurring official's active participation in the pre-disciplinary hearing and subsequent role as the Step 2 designee deprived the grievant of due process.

[96]See for instance, Arbitrator Lawrence R. Loeb, Case No. C90C-4C-D 93014414, March 9, 1994, who offers this thoughtful analysis at pp. 17-18:

> "Having adopted a procedure to protect members of the Bargaining Unit from ill-conceived, rash or capricious action, the Service is required to adhere to that procedure. It can no more ignore the obligations created by Article 16, Section 8, of the Agreement than can it ignore any other provision of the Contract. Further, it has the obligation to prove that the review occurred, just as it has the obligation to prove each and every other aspect of its claim that it had just cause to discipline or discharge an employee. The proof need not be elaborate. It can be nothing more than the signature of the concurring official, coupled with testimony establishing who that person is and where he stands in the chain of command. Such testimony creates a rebuttable presumption that the proposed disciplinary action was reviewed by some individual not directly involved with the original decision who calmly considered all of the factors involved in the case."

d) Is not violated if the higher level authority does not conduct an independent investigation and relies upon the record submitted by the supervisor when reviewing and concurring with the proposed discipline;

e) Is violated if there is a failure of either the initiating or reviewing official to make an independent substantive review of the evidence prior to the imposition of a suspension or discharge…"[97]

Arbitrator Eischen also concluded that:

"Proven violations of Article 16.6 as set forth in issues [(b), (c), or (e)] are fatal. Such substantive violation invalidate the disciplinary action and require a remedy of reinstatement with 'make whole' damages."[98]

A RUBBER STAMP OR AN INDEPENDENT REVIEW?

The exact extent of the review and concurrence requirement, on the other hand, is not expressly specified. The intent of this Article 16.8 requisite is clearly something more than a mere cursory review and certainly envisions "more than a rubber stamp approval."[99] While the reviewing authority may not be expected to conduct a complete "re-investigation," of the incident it is certainly anticipated that she will conduct a thorough review.[100] **Arbitrator Bentz**, for instance, offered this guidance:

[97] Arbitrator Dana Edward Eischen, Case No. E95R-4E-D 01027978, December 3, 2002, p. 25. This is admittedly a National Award under a different Union's National Agreement. As such, it may not be "binding" on a USPS/APWU arbitrator. However, it should carry significant weight. See, for instance, Arbitrator Thomas J. Erbs, Case No. J00V-1J-D 03222057, May 27, 2004. See also, Arbitrator Margo R. Newman, Case No. C98C-4C-D 01154873, March 31, 2003 and Arbitrator Fred D. Butler, Case No. F00C-4F-D 03033350, September 26, 2003. Or. Consider these thoughtful comments from Arbitrator Howell L. Lankford, Case No. E00C-4E-D 05147853, January 12, 2006 at pp. 8-9:

> "Area arbitrators are bound by National arbitration decisions. When the Nation arbitration decision in question arose under a different union's national agreement, although addressing identical contract language, then an area arbitrator might technically have room to wiggle out of that constraint. But the parties would not be well-served by evasion (particularly when, as here, the language at issue dates from the 1971-73 Joint Collective Bargaining Agreement to which APWU was a party). It is the proper function of an arbitrator, it seems to me, to read a clear contract or clear binding precedent to mean just what it says on its face…"

[98] Arbitrator Dana Edward Eischen, Case No. E95R-4E-D 01027978, December 3, 2002, p. 25.

[99] Arbitrator Edmund W. Schedler, Jr., Case No. S7C-3W-D 35349, September 13, 1991, p. 30.

[100] See, for instance, USPS Handbook EL-921, pp. 7-8, "Since the reviewing authority thoroughly reviewed the proposed discipline before it was initiated, that person will be a key source of information for management's Step 2 designee."

"Additionally, Mr. Davenport's review before his concurrence was practically non existent. So far as the record shows, his review amounted to nothing more than reviewing the statements of Mr. Robinson and Mr. Adkins. This is hardly any review. Mr. Davenport simply chose to accept the statement of Mr. Robinson at face value. He did this despite Mr. Robinson's reputation for his temper. To this arbitrator, given the facts of this case, a more thorough review was required."[101]

"[A] more thorough review was required"

Similarly, **Arbitrator LeWinter** makes it very clear that there must be a meaningful review:

"The requirement to 'review' does not mean that at each level of supervision a separate investigation of all the facts must be undertaken. The requirement is for an upper level supervisor to check the records, satisfy himself there is sufficient cause in the record for discipline to issue and that the level of disciplinary penalty is proper in accord with the record. ...The concurrence requirement is to 'review(ed)'. That is an affirmative act. Signature without that affirmative action would have no meaning. The obvious intent is form the reviewing official to have meaningful input in this level of discipline. ...Without a proper concurrence, the discipline must fall."[102]

HIGHER LEVEL REVIEW

Implicit in the review and concurrence criteria is the requirement that a supervisor (or a postmaster in a small office) make a recommendation or decision as to the imposition of discipline **before** referring the matter for concurrence of the higher authority.[103] The decision to impose discipline may not be unduly influenced by the higher level authority[104] nor may it be initiated by the higher

[101]Arbitrator Fallon W. Bentz, Case No. H90T-1H-D 93035625, November 6, 1993, pp. 11-12.

[102]Arbitrator William J. LeWinter, Case No. S1N-3W-D 4915, December 21, 1985, pp. 8-10.

[103]Arbitrator Nicholas H. Zumas, Case No. E1R-2F-D 8832, February 10, 1984, p. 5.

[104]See, for instance, Arbitrator Linda DiLeone Klein, Case No. C94C-4C-D 97116581/6354, October 15, 1998, at pp. 9-10:

"The 'fatal' procedural error occurred when the Postmaster exercised 'undue influence' and made the decision to place the grievant off-duty and later terminate his employment."

Similarly, see Arbitrator Lawrence R. Loeb. Case No. C94C-1C-D 98057121/22, February 1, 1999. For a slightly different but definitely related situation where the higher authorities bypassed the immediate supervisor because he was reluctant to initiate a removal, see Arbitrator Lawrence R. Loeb, Case No. C94C-4C-D 98021004 et. al., December 29, 1998.

Although Article 16, Section 7 does not specifically require review and concurrence before imposing an emergency suspension, undue higher level influence can also undermine that procedure because it negates Article 15. See Arbitrator Elliot H. Goldstein, Case No. J94T-1J-D 98010055, July 6, 1999.

authority and concurred in by the lower level supervisor.[105] **Arbitrator Loeb**, for instance, in directing the reinstatement of a discharged employee, said:

> "The Service, though, did have to follow its own procedures in discharging the Grievant. Actually, it is more appropriate to say that it had to follow the procedures the parties agreed to in the Contract. Those created a process almost the antithesis to what exists in almost every other business and industry where upper level management or the human resources department decides if any employee will be disciplined. The employee's supervisor may be the one to bring the matter to management's attention or his input may be solicited by management, but the decision lies outside the supervisor's control. In the Postal Service, the process is reversed. Discipline is to originate with the line supervisor. (The rule is not iron clad. There may be situations where it is appropriate for an MDO or someone else above a supervisor in the chain of command to issue discipline. Those are the exception, though, not the rule.) It is supposed to be the supervisor's idea and his alone. The impetus cannot come from above. Where it does, arbitrators, following the Contract, have routinely set the disciplinary action aside. It is on this point that the Union has anchored its defense of the Grievant.
>
> ***"[Discipline] is supposed to be the supervisor's idea and his alone. The impetus cannot come from above."***
>
> "...The process may be the reverse of what is normal in industry, but is the process which these parties chose to implement. Having selected this method of processing disciplinary actions the Service must follow it. Where, as here, it fails to do so the discipline must be set aside."[106]

Where it can be established that the decision to impose discipline originated at the higher level and the immediate supervisor only went along with that decision, this is a serious procedural deficiency generally found to be fatal to the disciplinary action. This procedural defect is only magnified when the same higher level authority signs the ultimate request for discipline as the reviewing and concurring authority. "The review of one's own decision is no review at all."[107]

"The review of one's own decision is no review at all."

[105]See, for instance, Arbitrator William J. LeWinter, Case No. S1N-3F-D 39496, August 13, 1985.

[106]Arbitrator Lawrence R. Loeb, Case No. C90C-1C-D 95075216, May 14, 1996, pp. 24-28.

[107]Arbitrator Wayne E. Howard, Case No. E7C-2N-D 38832, May 9, 1991, p. 9. Similarly, see Arbitrator Lawrence R. Loeb, Case No. C94C-1C-D 98057121, February 1, 1999; Arbitrator Michael E. Zobrak, Case No. C98T-4C-D 00077467, September 18, 2000; or, Arbitrator Carl C. Bosland, Case No. E00C-4E-D 05025967, June 6, 2005.

DESIGNATION OF REVIEW AUTHORITY

Article 16, Section 8 requires that the installation head **or designee** review and concur in all suspensions and removals. In most larger installations, the reviewing and concurring authority is a designee and not the installation head. Such designations of authority must be issued through official directives[108] and should ordinarily be made by position title rather than by name of the individual involved.[109] During the course of routine grievance investigation the Union should request copies of any such designations of authority.

At least one Regional Arbitrator has upheld the Union's position that designation of reviewing and concurring authority must be in writing and the Postal Service's failure to do so is fatal to its disciplinary action. **Arbitrator Zobrak** found:

> "The undersigned must find that the failure to issue a directive naming the Manager, Maintenance, as a designee of the installation head is fatal to the Postal Service's suspension of the Grievant. This finding is sufficient to require that the suspension be set aside and the Grievant be made whole for any lost wages and benefits. The failure to issue a directive naming the designee, by position, renders Wagner's concurrence as meaningless. Without a proper concurrence, the suspension cannot stand. Based on the finding that the suspension lacks the proper concurrence, it is not necessary to deal with the merits of the grievance."[110]

"[T]he failure to issue a directive naming the Manager, Maintenance, as a designee of the installation head is fatal to the Postal Service's suspension of the Grievant."

This may well have been the first time that this argument was successful in Regular Regional Arbitration.[111] In order to use this argument at arbitration, it must be raised at the lower steps of the grievance procedure.

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[108]Administrative Support Manual, Part 112.31. "All delegations of authority must be officially documented."

[109]Administrative Support Manual, Part 112.32. "Delegations of authority shall ordinarily be made by position title rather than by name of the individual involved. An officer or executive acting in the absence of a principal has the principal's full authority."

[110]Aribtrator Michael E. Zobrak, Case No. C90T-1C-D 93049598, July 29, 1994, p. 11.

[111]For the opposite point of view, see Arbitrator Harry R. Gudenberg, Case No. A90C-1A-D 94058370, July 17, 1995.

> "[T]his arbitrator has held 'that a better and appropriate procedure is to have the delegation in writing. However, it must be recognized that such is usually not the case in the annals of postal procedure.' I continue to hold to this position."

THE NOTICE REQUIREMENT

One of the procedural protections afforded bargaining unit employees under our National Agreement is the right to written notice before a suspension or removal can be imposed. Article 16, Section 4, for instance, provides:

> **Section 4. Suspensions 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 ten (10) calendar days during which ten-day period the employee shall remain on the job or on the clock (in pay status) at the option of the Employer. **However, if a timely grievance is initiated, the effective date of the suspension will be delayed until disposition of the grievance, either by settlement or an arbitrator's final and binding decision. The employee shall remain on the job or on the clock (in pay status) at the option of the Employer.** [Highlighted portion added in the 1998 Collective Bargaining Agreement.]

Similarly, Article 16, Section 5 states in part:

> **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…

These protections are not taken lightly. The employee is entitled to a written notice of the charges against him. He is entitled to a timely notice. And, he or she is entitled to a specific notification period. While some arbitrators have been willing to merely correct the violation of insufficient notice by directing payment for the notice period not provided, the better reasoned awards find these violations to be serious procedural errors.

In some rare instances the express language of Article 16.4 can result in what would appear to be a conflict. Where the Employer imposed a suspension after the ten (10) day notice requirement but before the fourteen (14) time limit for initiating a grievance, **Arbitrator Hoffman** said:

> "If anything were clear it is that the parties meant to make certain that a suspension would not be carried out until the resolution of the grievance. Any other interpretation would render the delay provision meaningless. The facts here demonstrate the illogicality of having two tests for timeliness. The Service used a time frame for the suspension that was two hours short of being 14 days. For whatever reasons the

> Union saw fit to file in that short time period that was after the suspension, but still within the 14 days contractual period. Management's interpretation forces an employee or the Union to file a grievance in less than 14 days where management imposes a suspension in this 11-14 day period. It cannot be seriously denied that an employee or the Union is entitled to the full 14 days to file…
>
> "By not recognizing that timely filing means a full 14 days, management placed its actions in peril for purposes of due process in suspending this grievant at his stage. It deprived him of a fundamental right under this agreement to not forfeit pay until the resolution of his grievance. It is an action that is significant enough to render the suspension void."[112]

Where the Postal Service delayed a Notice of Removal some forty-seven (47) days after the pre-disciplinary interview, and then mailed it to an invalid address with no evidence that it was ever delivered to the grievant, **Arbitrator Flanagan** said:

> "The minimal perquisites of *'due process'* are notice and a fair hearing before a tribunal empowered to decide the case within a reasonable period of time. In this case it is quite clear beyond any question that the grievant was not provided, within a reasonable period of time, a notice of the charges against him and conceivably the grievant may never been provided a notice of the charges. Accordingly, the Postal Service has failed to fulfill an essential component of the grievant's right to '*due process*' and thereby violated the basic principle of Article 16 of the National Agreement."[113]

For instance, where the Employer placed the grievant in an off duty/non pay status for repeatedly being out of his work area and the Employer acknowledged that this was not an appropriate Article 16.7, Emergency Procedure but insisted that it was not a disciplinary suspension either, **Arbitrator Berk**, finding that the placement of an employee in a "non-pay, non-duty status for this misconduct was discipline," said:

> "The record in this case establishes that the Grievant was never given written notice of the charges against him and never advised that he will be suspended following a ten (10) day notice period. As such, the Grievant was never afforded the procedural rights as required by the parties' National Agreement. The failure of the Postal Service to afford the Grievant the right to which he was entitled under the terms of the National Agreement is a violation of the Agreement and shall be remedied."[114]

Arbitrator Penn reviewed a fact situation where the grievant was issued a Notice of Removal. However, the Arbitrator determined that grievant did not actually receive the Notice of Removal until twenty-three days before it became effective. Discussing the thirty-day notice requirement, the Arbitrator said:

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[112] Arbitrator Robert B. Hoffman, Case No. H98C-1H-D 02043471, February 18, 2003, pp. 5-6. The parties attempted to resolve the question of when a suspension should actually be served with the Memorandum of Understanding dated June 10, 1999. In a unique twist on the Article 16.4 argument see Arbitrator Diane Dunham Massey, Case No. E00C-4E-D 05056036, December 20, 2005, where the arbitrator concluded that the USPS violated Article 16.4 when they delayed the start of grievant's suspension until 67 days after it was issued.

[113] Arbitrator Arthur J. Flanagan, Case No. A98C-1A-D 99184919/26, April 10, 2000, p. 7.

[114] Arbitrator Susan Berk, Case No. D90C-4D-D 93015971, September 8, 1994, p. 9.

> "The arbitrator finds that the language of Article 16, Section 5 speaks for itself unambiguously. Section 5 states that in the case 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.' The only exception states is for situations where there is reasonable cause to believe that an employee is guilty of a crime, but this is not a consideration here. Section 5 sets forth a 30 day period before discharge can be effected in all other instances, and the arbitrator must uphold the Agreement as written by the parties. Other arbitrators have also upheld the notice requirement in the Agreement in prior awards including Case Nos. C7C-4M-D 16505 and C1C-4J-D 142.
>
> "The arbitrator concludes that the Postal Service violated the National Agreement by not providing the grievant with 30 days notice as specified in Article 16, Section 5. Because of this violation, the question of whether there was just cause for the discharge will not be considered, regardless of the merits."[115]

Similarly, where management placed the grievant on Emergency Suspension, where he remained for some 94 days until his Notice of Removal became effective, **Arbitrator Kahn**, in overturning the Notice of Removal on procedural grounds, said:

> "The Employer now agrees that grievant should have been returned to pay status when his 14 day Emergency Suspension ended, and has stipulated that it will pay grievant for the period between then and his removal. I agree with the Union, however, that to thus make grievant whole for this period (about eighty days) does not cure the egregious violation. ...Management deprived grievant of thirty days 'on the job or on the clock' upon issuing its Notice of (Proposed) Removal in violation of Article 16, Section 5."[116]

The employee clearly must be given sufficient notice of the proposed discipline. The "notice" must also be meaningful. It must spell out the specific alleged misconduct and the work rules alleged to have been violated. (For a more detailed discussion on this requirement refer to the section entitled "*Playing by the Rules*," above.) Management is not permitted to change the nature of the alleged violation and/or the rules alleged to have been violated after the discipline is issued. **Arbitrator Snow**,

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[115]Arbitrator Frances Asher Penn, Case No. C7C-4M-D 20972, June 14, 1990, p. 6. Reaching a similar result was Arbitrator Carrie G. Donald, Case No. C00C-1C-D 02151301, May 6, 2003. See also, Arbitrator Gerald Cohen, Case No. C4V-4E-D 8648, April 2, 1986.

Or see, Arbitrator Gerald Cohen, Case No. C1C-4J-D 142, June 30, 1982, saying at p. 12:

> "Grievant admittedly did not receive his 30-day advance notice of termination. This clearly and explicitly constitutes a violation of the National Agreement. Any discharge resulting from such a violation cannot be considered for just cause, regardless of the merits of the discharge."

Unfortunately, all too many arbitrators have chosen to limit the impact of an Article 16.5 violation to the remedial phase. See, for instance, Arbitrator P. M. Williams, Case No. S4C-3W-D 11323, May 10, 1986; Arbitrator Arnold M. Zack, Case No. N1C-1N-D 37501, September 19, 1986; Arbitrator Joseph F. Gentile, Case No. W7C-5G-D 16132, December 26, 1989; Arbitrator Carlton J. Snow, Case No. W7C-5E-D 17410, October 8, 1990; Arbitrator Linda DiLeone Klein, Case No. C90C-4C-D 93032649, March 25, 1994; Arbitrator William H. Holley, Jr., Case No. H94C-1H-D 99019702, August 4, 1999; Arbitrator Carl C. Bosland, Case No. E00C-1E-D 04067372, June 26, 2004; or Arbitrator Jerry A. Fullmer, Case No. C00C-4C-D 04059142, October 4, 2004.

[116]Arbitrator Mark L. Kahn, Case No. J90C-1J-D 94048044, April 28, 1995, pp. 12-14. Similarly, see Arbitrator Joseph R. Cannavo, Jr., Case Nos. A90C-1A-D 96009353 et al, May 25, 1996.

for instance, explained:

> "Arbitrators long have taken the position that, when management cites a reason for removing an employee, this reason becomes the focus of any debate between the parties about the propriety of management's action. Conventional wisdom in arbitration is that a removal decision must stand or fall on the basis of reasons given at the time of the discharge. As one arbitrator has observed, 'it is manifestly unfair for the employer to change or expand the reasons for the discharge. The employer can discharge an employee only for the reasons stated in the original letter of discharge.'…"[117]

MANAGEMENT'S BURDEN OF PROOF

This is a defense which will be available in every discipline case in which you are a representative. Whenever Management issues discipline they have the *burden of proving* that the employee acted in such a manner as to provide cause for discipline. To meet that burden, management must produce evidence sufficient enough to convince an arbitrator[118] that the alleged misconduct actually occurred. The Union does not have to prove that the alleged misconduct did not occur. Instead, our responsibility is to identify and point out weakness in the Employer's evidence. That is not to suggest that we should simply waive our opportunity to submit evidence. If we can establish that the charged offense did not occur, then so much the better. Discussing that burden, for example, **Arbitrator Howard** commented:

> "[I]n industrial discipline, as in the criminal justice system, an employee is deemed to be innocent of charges against him until proved otherwise, and the burden of such proof lies with the employer in industrial discipline, as it does with the state under our criminal justice system."[119]

Before any discipline will be allowed management must prove that the employee actually

[117] Arbitrator Carlton J. Snow, Case No. W7C-5P-D 17141, January 7, 1991, p. 14.

[118] The evidence, itself, must be shared with the Union during the grievance procedure. See, for instance, Arbitrator G. Allan Dash, Jr., Case No. AB-E 1057D, May 17, 1974 (discussed in more detail below at *Procedural Due Process, Step 2*).

[119] Arbitrator Wayne E. Howard, Case No. E1N-2F-D 16429/17339, April 23, 1985, p. 5. Or, see Arbitrator Elliott H. Goldstein, Case No. C1N-4B-D 31325, March 11, 1985 at p. 16:

> "Under these facts, I certainly have not given any weight to the denials of wrongdoing of the Grievant. I do not find him 'innocent of wrongdoing.' On the charge of improperly imbibing on duty and/or being intoxicated on the job, I hold merely that Management at hearing completely failed to prove its case. That is, after all, the burden assumed by it in discipline and discharge cases under the contract." [emphasis added]

engaged in the alleged misconduct with which she is charged. The exact standard of proof required has been much debated by arbitrators. In discipline (as in most contract arbitrations) the moving party must prove their case by the greater weight of evidence or "preponderance of the evidence." In some discipline cases arbitrators demand "clear and convincing evidence"[120] or even "proof beyond a reasonable doubt."[121] This proof must be in the form of real evidence. Arguments, suppositions, allegations, assumptions, guesses, conjectures, or speculations are not evidence. Testimony of an eyewitness who has personal or direct knowledge is evidence. So are documents, photographs or fingerprints. The arbitrator's typical function in a discipline case is to weigh the evidence and to determine whether the evidence is sufficient to meet management's burden. The arbitrator must determine what weight or value to give hearsay or circumstantial evidence and where witnesses' testimony is contradictory, the arbitrator must evaluate credibility.[122] For example, see the comments of

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[120] See, for instance, Arbitrator Marshall J. Seidman, Case No. C1N-4K-D 6972, August 24, 1982, saying at p. 13:

> "If this case were to be decided upon the basis of a preponderance of the evidence, I would find Mr. Wood guilty. However, this is a discharge case, which is the capital punishment of the industrial world. Although I do not join those arbitrators who say therefore the Service must prove Woods' guilt beyond a reasonable doubt in order to prevail, I do say that the preponderance rule as applicable in the usual civil litigation is not applicable here because of the nature of the offense, as well as as the nature of the discipline. The offense is a crime under United States law and the discipline is discharge. Under such circumstances the proof must be more than a mere preponderance and less than beyond a reasonable doubt, which is normally stated as clear and convincing."

[121] See, for instance, Arbitrator Howard G. Gamser, Case No. AB-N 10855, June 12, 1976, saying at p.5:

> "In this case, a fifteen year veteran of the USPS, who apparently had an unblemished record before this case arose, and who had twenty years of honorable service in the Navy behind him as well, has been accused of criminal and morally reprehensible conduct. In such an instance, in the opinion of the undersigned, the 'beyond a reasonable doubt' standard must be met by the Employer. The grievant's reputation cannot be shattered by employing a lesser standard. The Employer cannot brand Karamanian as an ordinary thief in the eyes of his family, friends, and fellow employees by the submission of less proof than would establish his guilt beyond a reasonable doubt. The undersigned is of the opinion that the weight of arbitral authority supports this position. The social stigma attached to the employee justifies the higher burden of proof than that which might be required in some other case of a breach of industrial discipline."
>
> Or see, Arbitrator Wayne E. Howard, Case No. NC-E 3494-D, January 31, 1977, at p. 13:
>
> "From the above evidence, it cannot be concluded beyond a reasonable doubt that the grievant was guilty of the offenses with which he was charged. It is axiomatic that the burden of proof is on the Service to demonstrate that the grievant was guilty, and on the grievant to prove that he was innocent. It is equally well established that in offenses of a grave moral character, such as those in the instant matter, the quantum of proof must be correspondingly stronger."
>
> Similarly see, Arbitrator Thomas T. Roberts, Case No. AC-W 21167-D, May 31,1978; Arbitrator Walter H. Powell, Case No. E7C-2A-D 34888, June 20, 1991; Arbitrator Rose F. Jacobs, Case No. N7C-1R-D 39209, December 4, 1991

[122] Note the comments of Arbitrator Bernard Cushman, Case No. E4C-2E-D 45043, December 22, 1988 at p. 14:

> "Arbitrators have frequently held that the uncorroborated testimony of a single witness is insufficient in the face of the Grievant's denial to meet the employer's burden of proof."
>
> Similarly, see Arbitrator Bernard Cushman, Case No. E7C-2D-D 21726, March 14, 1990.

Arbitrator Snow, who said:

> "The best evidence that could have been presented as proof of management's statement of facts regarding July 10 was testimony from those individuals who were present when the events occurred. The Employer failed to present those witnesses, and the burden of going forward with such testimony cannot be shifted to the Union. The grievant denied any wrongdoing at 604 Sunset on July 10, and there was no credible evidence to rebut his version of the facts. By failing to prove the events of the precipitating incident, the Employer has failed to set forth justification for terminating grievant."[123]

For a similar analysis, see the comments of **Arbitrator Parkinson**:

> "The evidence presented by the Postal Service is circumstantial in nature, however it is noted that proof of guilt may be accomplished by the use of persuasive circumstantial evidence alone. This arbitrator requires that the evidence in support of disciplinary actions be clear and convincing. The burden of proof is, of course, upon the Postal Service.
>
> "There is no question that mail was discovered in a trash container on April 22, 1985, that the mail was addressed for the grievant's route and that she delivered the route that day. There are no witnesses who could establish that [the grievant] dumped the mail in the trash. There were also no witnesses who could establish that the grievant left the Postal Annex for her deliveries on the day with the recovered mail. More importantly, no motive was shown as to why [the grievant] would throw deliverable mail away, especially on her assigned route.
>
> "…[I]t is my determination that the Postal Service has failed to clearly and convincingly prove that [the grievant] improperly and unlawfully disposed of cancelled and deliverable mail."[124]

BUT SHE WAS PROVOKED

In limited circumstances we may be able to argue that while the grievant may have acted as charged, he or she was provoked into doing so by someone else. Where, for instance, the employee is charged with involvement in an altercation or with striking a supervisor, it might be helpful to be able to establish that he was "provoked" into doing so. Essentially, our argument is that the circumstances giving rise to grievant's alleged misconduct should be a mitigating factor in determining the penalty to be imposed. This is an affirmative defense and should be argued as at least a mitigating factor. If we

[123]Arbitrator Carlton J. Snow, Case No. W1N-5H-D 27023, February 13, 1985, pp. 15-16.

[124]Arbitrator Philip W. Parkinson, Case No. E4N-2D-D 2247/2324, November 22, 1985, pp. 11-13.

use this defense, the Union will have the "affirmative" *burden of proving* that the provocation occurred. For example, see **Arbitrator Williams**, who said:

> "There is no question from this record but that grievant engaged in a 'cuss-fight' with a customer. The question is: does the fact serve as just cause for removal, or do the circumstances here – some already discussed and some not – tend to mitigate such a harsh penalty? The undersigned is of the opinion they do. He will briefly explain why he reaches this conclusion lest someone think he does not agree that such a 'cuss-fight' is 'unsatisfactory performance – conduct unbecoming a Postal employee.' It is, there is no question about that. But it is to be quickly added, provocation is a consideration that necessarily comes within the concept of just cause, which is the test to be applied here."[125] [emphasis added]

"…provocation is a consideration that necessarily comes within the concept of just cause…"

MITIGATING FACTORS

Another group of factors might be termed the "mitigation defenses." With these arguments, the Union essentially argues that "even assuming that grievant is guilty of the misconduct alleged, when all relevant factors are considered, the penalty imposed is just too severe." Mitigation, is an affirmative defense, and arbitrators properly place the burden on the Union to prove the existence of mitigating factors.[126]

Mitigation should not be confused with simple leniency. [And the prepared steward should never forget that when all other defenses fail, sometimes the only effective tool left, is the well-prepared but impassioned "plea for mercy."] The mitigation defenses present a variety of factors which management should have considered when imposing discipline and which the arbitrator will consider –

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[125] Arbitrator P.M. Williams, Case No. S4N-3W-D 3658, October 29, 1985, pp. 10-11. Name calling, taunting, or racial slurs can be a mitigating factor when the recipient is charged with responding by engaging in an altercation. See, for instance, Arbitrator Sharon K. Imes, Case Nos.E00C-1E-D 04079039/04076120, August 2, 2004.

[126] See, for instance, Arbitrator Jonathan Dworkin, in Case No. C4C-4U-D 20367, February 2, 1987, saying at p. 20:

> "No offense, not even theft, automatically supports removal in every case. There is always the possibility of mitigation. But the burden is not on the Postal Service to prove lack of mitigating circumstances. When an employee has reasons for leniency in an otherwise dischargeable offense, it is the Union's obligation to prove them…"

even if management didn't. Leniency – simply asking for "another chance" – is totally within management's prerogative, and will normally not be considered by the arbitrator.

An employee with a long service history, for instance, deserves a more moderate response to an alleged transgression than does a relatively short-term employee. This defense is most effective when those long years of service have been relatively discipline-free. For example, **Arbitrator LeWinter** offered this analysis:

> "Grievant has served this Employer for over [e]ight years without any demonstrated disciplinary penalty. I have, in the past, referred to this as a 'bank of good will.' In such instances of long, good service, it must be recognized that a single violation, even a serious one may occur without an assumption that [there has been] the destruction of the trust necessary to the continued employment relationship. Indeed, years of good, faithful service have many times been used and accepted as substantive evidence of lack of just cause for discharge."[127]

Unintentional misconduct (e.g., negligence) is generally viewed as being less serious than intentional misconduct. Intent is an essential element of almost all charges of misconduct, and it is clear that it is management's burden to prove that the alleged acts were intentional. The element of "intent" is particularly important where the alleged charge includes dishonest or what otherwise be considered to be criminal behavior. As a sidebar, where the presence of intent becomes a factor, the employee's attitude, post discovery, may become a factor (e.g., is he repentant or engaging in denial?) For instance, see the discussion of **Arbitrator Gentile**:

> "The real question in the instant case thus reduces itself to this inquiry: Whether or not the Grievant's action on March 18, 1981, was a 'wilful' and 'intentional' act…?
>
> "After evaluating all of the evidence and the apparent candor of the Grievant when he testified, the Arbitrator reached the conclusion that the Grievant's act was that of 'carelessness' and 'gross negligence,' but not a 'wilful' and 'intentional' act to circumvent or thwart the fundamental purpose of his job. Those factors which strongly influenced this conclusion, in addition to the Grievant's apparent unblemished record with the Service and his own testimony which was given considerable weight, were these: (1) the subject mail was placed openly in the Station's waste hamper, a location which demonstrated no reasonable attempt by the Grievant to conceal in a clandestine manner the fact that mail was being discarded; (2) the mail was left in sequential order in a type of 'bundle' state which would further highlight its presence and support Grievant's 'fanning' statement; (2) the Grievant, when initially confronted with the mail in question did not attempt to conceal the fact that he was the responsible person, but that in his judgment, which was subsequently proven wrong, the mail was not deliverable, and (4) a goodly portion of the mail was in fact not deliverable…"[128]

[127] Arbitrator William J. LeWinter, Case No. E1N-2D-D 4628, January 25, 1983, p. 7.

[128] Arbitrator Joseph F. Gentile, Case No. W8N-5K-D 18048, November 10, 1981, p.5.

An interesting analysis of the "intent" requirement where the charge involves fraud was provided by **Arbitrator Foster**, who said:

> "[T]he essence of the dischargeable offense of falsification is the employees (sic) dishonesty that requires a finding of intentionally issuing a false statement, as distinguished from a reasonable mistake, in direct conflict with the necessary characteristic of a letter carrier that he must always be trustworthy. Thus, the critical question is not just whether the Grievant had in fact been fired, or forced to resign from a former job, but whether he misrepresented the known fact in order to be accepted for employment. In addressing this factual question, the employee must be presumed innocent with the Employer bearing the burden of rebuttal by clearly establishing fraudulent intent."[129]

Other possible mitigating factors which must be given consideration include (among others): the employee's state of mind, a handicapping condition, and alcoholism or chemical dependency for which the employee has sought treatment. Where, for instance, the Union argued that grievant was emotionally impaired and because of that impairment his alleged misconduct should be considered as "unintentional," **Arbitrator Levak** explained:

> "It is, of course, the burden of the Union to raise and prove mental illness as a defense in the form of mitigating circumstances. The burden is on the Union to demonstrate by a preponderance of the evidence that, even though the Grievant is guilty of the charged offenses, he should be resolved of responsibility to some degree as a result of the mental disorder.
>
> "The Service is not prohibited from disciplining an employee who is a threat to other employees or who cannot perform the duties of his job, regardless of the fact that the employee's malfeasance or nonfeasance is the result of a mental illness of disorder. The Arbitrator does not agree with those who say such discipline is a breach of the just cause clause. The Service is not under the obligation to retain an employee who suffers from a mental disorder at all costs. The Service has an obligation to operate efficiently, as well as the duty to protect the safety of its employees. On the other hand, when the Service chooses to discipline an employee who it knows suffers from a mental disorder, it does so at some risk. If the employee is a 'qualified handicapped individual' within the meaning of the Rehabilitation Act of 1973, the Service must be certain that it has reasonably accommodated the employee. The Service must also be prepared to face the contention that the discipline violates the employee's EEO rights. The instant case does not involve either of those pieces of legislation. However, the Service must also be prepared to confront proof by the Union that the following factors exist:
>
> (1) Proof that the medical disorder exists.
> (2) Proof that the alleged offense was the result of the medical disorder.
> (3) Proof through the best medical evidence that the employee is not a threat to other employees.
> (4) Proof that the disorder does not disable the employee from regularly performing his duties.
> (5) Proof through the best medical evidence that the employee's disorder is under control and that he ultimately will be rehabilitated.
> (6) Proof that management failed to properly consider the alleged offense in light of the employee's disorder."[130]

[129]Arbitrator Robert W. Foster, Case No. S8N-3W-D 27309/10, August 7, 1981, p.12.

[130]Arbitrator Thomas F. Levak, Case No. W1N-5L-D 11701, September 22, 1983, pp. 19-20.

Similarly, in another case, **Arbitrator Seidman** offered this thoughtful analysis of the mitigating factor of alcoholism:

> "What then are the factors which would allow an arbitrator to mitigate the offense committed by the alcoholic which led to his removal from the Postal Service in order that he be reinstated by the Postal Service. The decided cases rely on several factors; First, that the act was done while the grievant was an alcoholic and at the time the act was committed he was either drunk or under the influence of alcohol; Second that the Grievant's prior work record is either relatively clear of disciplinary action or that all, or most of the prior disciplinary actions occurred as the result of the grievant's alcoholism; Third, that the grievant is successfully participating in [EAP], and that participation has caused both his counselor and the officer in charge of the P.A.R. program to indicate that he is likely to a successful candidate for rehabilitation; and Fourth, that the grievant has had a substantial length of Service with the Post Office, generally for a period of at least 10 years, with the likelihood of reinstatement increasing if the period of service is 20 years or more."[131]

In yet another case along a very similar vein, **Arbitrator Eaton**, discussed the effects of grievant's use of a prescription medication:

> "The element which must give pause in this dispute is none of the above, but the evidence concerning the cortisone medication which the Grievant was taking for an indisputably serious skin condition. Odd thou it may seem to a layman, the testimony is uncontradicted that a side effect of the Depomedrol injection – which can last up to two weeks – can be serious personality aberrations. It is true that Dr. Jensen could not testify that the medication had been given, and that in some cases it can, and has, caused similar behavior.
>
> "Absent this consideration, removal would clearly be warranted. Its presence, however, taken together with the prior excellent record of the Grievant, does seem to indicate abnormal behavior which one would not expect to be repeated in the future."[132]

Or see, the explanation of **Arbitrator Howard**, where the argument was that grievant was impaired by alcohol and the corresponding relationship of that impairment to the element of intent:

> "While the Service emphasizes the seriousness of the charge of delaying the mail, clearly the seriousness of the charge rests upon the *intent and deliberation of the offender*. The record makes clear that as a result of overindulgence in alcohol, the grievant was not in full possession of his senses on the day of the incident and really was not aware of what he was doing. His conduct cannot be regarded as a *deliberate* and *intentional* delaying of the mail.[133]

[131]Arbitrator Marshall J. Seidman, Case No. C8N-4T-D 33242, February 22, 1982, pp. 7-8.

[132]Arbitrator William Eaton, Case No. W1N-5D-D 3044/2996, July 13, 1982, p.18.

[133]Arbitrator Wayne E. Howard, Case No. RA-866D-73, March 19, 1975, pp. 5-6.

MSPB RIGHTS FOR PREFERENCE ELIGIBLES

In addition to the ten (10) and thirty (30) day notice provisions of Sections 4 and 5 of Article 16, preference eligible employees are entitled to specific notice of their MSPB rights.[134] In a 1985 case, Cornelius vs. Nutt, 472 U.S. 648, the United States Supreme Court[135] established that a Federal employee has a right to appeal to the Merit Systems Protection Board and alternatively, to file a grievance under the contractual grievance/arbitration procedure. MSPB procedures require that a preference eligible employee receive first a Notice of Proposed Removal, an opportunity to meet with a higher level deciding official, and written decision from that authority. Additionally, the law requires that such protected employees receive appropriate notice of their MSPB appeal rights.

These MSPB appeal rights are specifically recognized in the National Agreement. Article 16, Section 9.A reminds:

> A. A preference eligible is not hereunder deprived of whatever rights of appeal such employee may have under the Veterans' Preference Act...

Where the Employer failed to issue a Notice of Proposed Removal and Decision Letter with grievant's MSPB rights, **Arbitrator Kelly** found that the grievant was "improperly (albeit inadvertently) denied his Veteran's Preference rights, thereby making the NOR procedurally defective."[136] Similarly, in a case where, although using a Proposed Removal and Letter of Decision format, the Employer failed to notify the grievant of his specific MSPB appeal rights, **Arbitrator Caraway** overturned a Notice of Removal, stating:

[134]Preference eligible employees generally acquire MSPB appeal rights to challenge removals and/or suspensions of 15 or more days after one years continuous service. While we generally think of preference eligibles as "veterans" in reality it is not quite that simple. For an excellent review of who does, and does not, have preference eligible status, see Part 241 of USPS Handbook EL-311.

[135]Cornelius vs. Nutt, 472 U.S. 648, 1985.

[136]Arbitrator Randall M. Kelly, Case No. A94C-1A-D 98117546, December 20, 1999, pp. 3-4.

> "The Postal Service is obligated to advise the employee who has been disciplined of his right of appeal to the Merit Systems Protection Board. The failure to advise the employee of this right of appeal nullifies any disciplinary action.
>
> "Review of the Notice of Proposed Removal and Notice of Decision shows that this right of appeal to the Merit Systems Protection Board was not stated in these documents...This was a serious error which requires the setting aside of the removal action."[137]

Even when being removed for the alleged violation of a Last Chance Agreement, an employee is nonetheless entitled to the full protection of her MSPB rights. Where the Employer failed to provide grievant with a Letter of Decision, **Arbitrator Thomas** concluded this was a significant error, saying:

> "The failure to provide the grievant with a letter of decision is not a trivial matter. It is sufficiently serious to vacate the underlying discharge. This is so because the employer's conduct ignores a legal requirement for the discharge of a preference eligible employee. The parties' collective bargaining agreement incorporates the rights granted to veterans—rights which cannot be ignored. Congress saw fit to provide procedural safeguards before the discharge of a preference eligible employee can be effectuated. In the United States Postal Service, 'preference eligible' rank-and-file employees are entitled to the benefit of these promulgated procedures."[138]

In a more recent award, **Arbitrator Kahn,** reviewed a fact situation where the grievant's Form 50 erroneously failed to record his preference eligible status and, as a result, he received none of his MSPB rights. The Arbitrator said:

> "By well-established practice, a preference-eligible employee is entitled to a Notice of *Proposed* Removal in which the employee is invited to provide information to the official who will subsequently issue a Letter of Decision as to whether the removal will in fact take place. In practice, it is in the Letter of Decision that the preference-eligible employee is notified of his/her entitlement to appeal to the MSPB. Grievant's final notice, as with all non-preference employees, was his NOR.
>
> "...I find, under all the circumstances, that grievant's intended removal should have been processed on the basis of a preference-eligible employee. And, like Arbitrator Caraway in Parks, I conclude that because of this egregious procedural error, in which the Employer stubbornly persisted even after prompt notice, just cause for grievant's removal did not exist."[139]

[137] Arbitrator John F. Caraway, Case No. S7C-3A-D 30219, November 15, 1991, pp. 8-9. See, also, Arbitrator Laurence M. Evans, Case No. K00C-4K-D 02231441, January 21, 2003; and Arbitrator I.B. Helburn, Case No. G00C-1G-D 06153688, September 12, 2006.

[138] Arbitrator Irene Donna Thomas, Case No. A00C-1A-D 04182424, April 8, 2005, p.14.

[139] Arbitrator Mark L. Kahn, Case No. J94C-1J-D 97034020/23, July 24, 1997, pp. 8-9.

EMERGENCY PLACEMENT

Article 16, Section 7, of the parties' National Agreement states in pertinent part:

> "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 Section 7, Emergency Procedure, provision is an express exception to the unequivocal Article 16 mandate otherwise requiring advance notice for all disciplinary suspensions. It may only be invoked in those limited circumstances necessitating "**immediate**" or "**emergency**" action. As National Panel **Arbitrator Mittenthal** noted in his 1990 Award:

"[Article 16.7] may only be invoked in those circumstances necessitating "immediate" or "emergency" action."

> "The critical factor, in my opinion, is that Management was given the right to place an employee 'immediately' on non-duty, non-pay status on the basis of certain happenings. An 'immediate...' action is one that occurs instantly, without any lapse of time. Nothing intervenes between the decision to act and the act itself. That is what the term 'immediately' suggests. ...The very purpose of a Section 7 'emergency procedure' is to permit an 'immediate...' response by Management."[140] [emphasis added]

Article 16, Section 7, emergency procedures were never intended to be invoked once the need for immediacy or emergency action dissipated. These procedures, with their exception to the Article 16 advance notice requirements were certainly never intended to be implemented several days or weeks after the fact. As Central Region **Arbitrator Fletcher** noted in overturning an emergency suspension in 1991:

> "At the time the emergency suspension was issued the triggering act was almost 24 hours old. Article 16, Section 7, provides that an employee may be immediately placed in an off duty status if retaining the employee on duty may be injurious to self or others. "Immediate" means just what it says, not some time later, not 24 hours later... "The Rule is a useful management tool, designed to remove from the work place certain employees under the conditions specified, when circumstances warrant such action. It is not to be

[140] Arbitrator Richard Mittenthal, Case Nos. H4N-3U-C 58637 and H4N-3A-C 59518, August 3, 1990, p. 11.

used frivolously, well after the triggering event has subsided, which seems to be the case here.[141] [emphasis added]

Similarly, as **Arbitrator Erbs** explained:

> "The provisions of the National Agreement covering the Information Systems/Accounting Service Center contains, in Article 16.6, an emergency procedure whereby an employee may be 'immediately placed on an off-duty status (without pay)' in certain specific situations 'where the employee may be injurious to self or others.' The intent behind such language is to remove the errant employee from the worksite so that a potentially dangerous situation can be avoided. However, nowhere in such Article can Management, in effect, merely create through words such an alleged emergency because it failed to take appropriate action at an earlier opportunity.
>
> "In the instant case there is no evidence whatsoever that any inappropriate conduct is even alleged for July 7 or the weeks leading to such date. If there is a valid reason to implement Article 16.6 it occurred many weeks prior to that date…Allowing infractions to occur months before and then belatedly arguing that they constitute an emergency is not an action authorized by Article 16.6. If there is an 'emergency' then some prompt action is required…"[142]

While the quantum of proof required to justify an emergency placement is necessarily diminished by the need for "immediacy" it is nonetheless clear that the action is still governed by the Article 16 necessity for "just cause." This includes the obligation to conduct an investigation. While this investigation may well occur after the emergency placement it nonetheless must occur. As **Arbitrator Cannavo** noted:

> "[T]he Postal Service properly placed the Grievant on an Emergency Placement. However, once done, the Postal Service then had an obligation to proceed and conduct an investigation to determine the facts that led to the Emergency Placement and determine what other action, if necessary, should be taken. In this regard, the Arbitrator finds that the Postal Service failed to meet its obligation. The record establishes that contrary to the testimony of the Services' witnesses, no investigation was conducted during the week immediately following the issuance of the Emergency Placement or anytime thereafter…
>
> "According to Arbitrator Mittenthal, at the very least, the lesser burden of establishing just cause in an Emergency Placement situation would have mandated the conducting of some sort of investigation to determine the facts that eventually led to the Emergency Placement and the subsequent removal action. None of this was done. Consequently, the Grievant was left on the street in an Emergency Placement status for almost seven (7) months before formal, and what this Arbitrator characterizes as unjustified, disciplinary action. From all of these facts, the Arbitrator finds that the basis upon which the Emergency Placement continued after the first day was not justified in fact, contract or law."[143]

[141] Arbitrator John C. Fletcher, Case No. C7C-4B-D 30718/31132, September 6. 1991, p. 16. See also, Arbitrator Jerry A. Fullmer, Case No. J98C-1J-D 99267333, November 7, 2001; Arbitrator Sharon K. Imes, Case Nos. E00C-1E-D 04079039/04076120, August 2, 2004; Arbitrator Robert B. Hoffman, Case No. H00T-1H-D 05171507, February 27, 2006; or Arbitrator Glynis F. Gilder, Case No. E00C-4E-D 05167982, June 19, 2006. Or, see another award by Arbitrator John C. Fletcher, Case No. I94C-4I-D97072255, March 27, 1998, at p. 10:

> "To be in harmony with Mittenthal's opinion on 'immediately' as it is used in Article 16.7, which he characterized as a 'critical factor,' delay should not have intervened between receipt of Kornfiends's report of the allegation and decision to place Tuttle on emergency suspension."

[142] Arbitrator Thomas J. Erbs, Case No. 798D-6Z-D 01142087, March 18, 2002, p. 18.

[143] Arbitrator Joseph S. Cannavo, Jr., Case No. A00C-4A-D 06031753, October 13, 2006, pp. 18-19.

Arbitrator Mittenthal made it clear that because of the emergency nature of an Article 16.7 suspension there is no obligation to provide an advance written notice to the suspended employee. However, this does not relieve the Employer of all "notice" responsibility. As **Arbitrator Mittenthal** said:

> "The fact that no 'advance written notice' is required does not mean that Management has no notice obligation whatever. The employee suspended pursuant to Section 7 has a right to grieve his suspension. He cannot effectively grieve unless he is formally made aware of the charge against him, the reason why Management has invoked Section 7. He surely is entitled to such notice within a reasonable period of time following the date of his displacement. To deny him such notice is to deny him his right under the grievance procedure to mount a credible challenge against Management's action.[144]

Similarly, **Regional Arbitrator Zumas** concluded:

> "It is clear that basic due process requires that an employee be apprised, through formal notice, the reasons why he or she is being placed in emergency non-pay status. As Arbitrator Mittenthal indicates, this notice giving the reasons for Management's action, must be made within a reasonable time after such action is taken.
>
> "It follows, therefore, that failure to give such notice as in this case, nullifies the action taken."[145]

The written notice must be meaningful. It should provide sufficient information so as to put the aggrieved employee on notice as to the specific nature of the alleged reasons for the emergency procedure. Where the written notice simply parroted Article 16.7's "injurious to self or others" without more, **Arbitrator Drucker** opined:

> "As the Union has pointed out, neither the original nor the corrected notice contained a statement or description of the conduct that is alleged to have given rise to the need for emergency placement. The notice merely reiterated the contractual concept upon which the Postal Service relies, which is that Grievant may have been injurious to self or others. This is a conclusory statement that does not fulfill the purpose of the required post-placement written notice. As indicated in Arbitrator Mittenthal's National Level Award, the written notice is necessary in view of the employee's right to grieve the placement and his or her concomitant need to know the basis for the action. Thus, the notice must set forth sufficient information about the situation to enable the employee to understand the conduct of which he is accused and which led the supervisor to invoke Section 7. This was not done in this case. It may be that Grievant was engaged in an effort to bait the Supervisor and could have surmised the reasons for the placement, but not employee should be left to guess the allegations against him. Grievant was entitled to a written statement of what Management contends he did that created this alleged potential for injury to himself or others."[146] [emphasis added]

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[144]Arbitrator Richard Mittenthal, Case No. H4N-3U-C 58637/H4N-3A-C 59518, August 3, 1990, p. 11.

[145]Arbitrator Nicholas H. Zumas, Case No. N7C-1F-C 29180, December 18, 1990, p. 6. See also, Arbitrator Christopher E. Miles, Case No. K94C-1K-D 97014537, August 13, 1997.

[146] Arbitrator Jacquelin F. Drucker, Case No. A00C-1A-D 04143247, January 8, 2005, p.7.

Such written notice must also be timely.[147] To be effective, such notice must also be meaningful. **Arbitrator Stephens**, for instance, determined that a letter informing the employee of his off-duty status and giving the reason as "unacceptable conduct" was not sufficient:

> "Such statement probably did not meet the requirement to provide the employee with sufficient precise charges in order to defend himself."[148]

Any reasonable reading of Article 16, Section 7 suggests that the emergency procedure provision is intended to be applied only to alleged on-duty misconduct.[149] It is also clear that in implementing this limited exception to Article 16's advance notice requirement the parties intended that it only be invoked in the specific and limited circumstances expressly identified in Section 7:

> "...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..."[150]

In order to establish the just cause of an emergency suspension the burden is clearly on the Employer to demonstrate that the reasons given for the action qualify within these limitations expressed by Article 16.7. **Arbitrator Cushman**, for example, said:

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[147] See for instance, Arbitrator Jerry A. Fullmer, Case No. C00C-4C-D 03133422, August 3, 2004, at p. 9, criticizing a nine (9) day delay in issuing the written notice.

[148]Arbitrator Elvis C. Stephens, Case No. S7C-3W-D 33139/32640, May 13, 1991, p. 5. Also, see Arbitrator Norman Bennett, Case No. G94C-1G-D 97060287, April 27, 1998, p. 1:

> "The written notice must provide reasonable notice as to the reason for the emergency placement.. .Further, the written Notice of Emergency Placement only refers to the Grievant's 'misconduct' but does not give any other information as to the conduct in question. That is not reasonable notice of the reasons..."

[149]See, for instance. Arbitrator Lawrence R. Loeb, Case No. C94T-1C-D 98007833/7834, June 15, 1998, at p. 28:

> "...[An] employee who commits an offense off duty cannot be placed on emergency suspension because Article 16, Section 7 does not apply to off duty conduct."

Similarly, see Arbitrator Thomas F. Levak, Case No. W1C-5D-D 27319/28985, February 7, 1985, p. 15:

> "...[T]he only 'Emergency Procedure' referred to in the National Agreement is that contained in Article 16, Section 7. That section permits the placement of an employee on emergency off-duty status only under certain specific circumstances, all involving on-the-job misconduct related to postal property or postal employees."

See also, Arbitrator Robert W. McAllister, Case No. C4C-4B-D 37415/37416, February 22, 1988; Arbitrator Lawrence Loeb, Case No. C98T-1C-D 99211946, September 24, 2000; Arbitrator John C. Fletcher, Case No. J98C-1J-D 01023840/01082399, April 18, 2002; and Arbitrator Margo R. Newman, Case No. J00C-1J-D 05152782, April 24, 2006.

[150] Article 16, Section 7.

"A remaining matter to resolve is whether the emergency suspension was for just cause. **Such suspensions are permitted under Article 16, Section 7, of the contract in specific situations, and it is the Postal Service's burden of persuasion to show that the situation in this case meets those addressed in that contract provision**. The Postal Service did not meet that burden. Scott testified that the reason for the emergency suspension was a concern over the reoccurrence of Grievant's misconduct. However, the record is clear that six months transpired between the events in question and the emergency suspension without that conduct being repeated, and that Scott had already removed the Grievant from any access to Postal Service funds on December 11. Under the circumstances of this case the emergency suspension was not for just cause."[151] [emphasis added]

Similarly, **Arbitrator Schedler** in a 1989 award expressed:

"Article 16 Section 7 contains a procedure for management to place an employee under an emergency suspension. This procedure allows management to immediately get an employee out of the shop and to place the employee on a non-pay status. **However, Section 7 cannot be imposed capriciously. There are, agreed upon, specific reasons for imposing Section 7**. Those reasons are intoxication, pilferage, failure to observe safety rules and regulations, or 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 herself or others. The Grievant was not intoxicated. She had not pilfered the mail. There had been no safety violations and no threat of damage to Postal property. There was no indication that there might be a loss of mail or funds and there was no indication that she might hurt herself or another individual. In my opinion, none of the reasons required by Section 7 were present. It is my conclusion that management violated Article 16 Section 7 in placing the Grievant in an off-duty non-pay status."[152] [emphasis added]

In a 1995 Award, **Arbitrator Loeb**, in concurring with **Arbitrators Ables** and **Zausner-Tener** that insubordination does not, in and of itself, fall within the scope of Article 16.7, offered this thoughtful analysis:

"In essence, their position amounts to reaffirmation of the old principle that to include one thing is to exclude all others. In practical terms, it means that since the parties agreed that the Service could place an employee on emergency off-duty status if there was an allegation of intoxication by either drugs or alcohol, pilferage or failure to observe safety rules or regulations or where retaining the employee may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to himself or others, they limited Management's right to use that remedy to those specific situations only. **Everything which falls outside the parameters of those categories cannot and does not afford Management a basis for placing an employee on emergency off-duty status**."[153] [emphasis added]

Similarly, **Arbitrator Cohen** addressed this concern in determining that an Emergency Suspension issued for "engaging in an altercation with another employee" did not properly qualify under

[151]Arbitrator Bernard Cushman, Case No. E7C-2U-D 40236/40353, September 6, 1991, pp. 18-19.

[152]Arbitrator Edmund W. Schedler, Case No. S7C-3W-D 11098/9670, February 17, 1989, pp. 12-13.

[153]Arbitrator Lawrence R. Loeb, Case No. C90C-1C-D 94058330, May 31, 1995, p. 13. See also, Arbitrator Edwin H. Benn, Case No. J94C-1J-D 96025555/42100, October 9, 1996, at p. 7:

"Conspicuously missing from Article 16.7 is any mention of failure to follow instructions as a basis from Management's implementing the emergency placement procedures in that section."

Article 16, Section 7. **Arbitrator Cohen** offered this analysis:

> "The Notice of Charges - Emergency Suspension which was issued to Grievant contains no charge setting forth any of the grounds of Article 16.7 which would warrant an emergency suspension. It does not allege that he pilfered, was intoxicated, failed to observe safety rules and regulations, or that he might be injurious to himself or others.
>
> ". . .Assault and/or battery on a postal employee might be a dischargeable infraction, but it is not listed in Article 16.7 as a ground for an emergency suspension.
>
> . . .
>
> "Fighting might be a cause for an emergency suspension if its was determined that the employee might be injurious to himself or others. Such a determination was not made here. . .
>
> "In view of the failure to place Grievant on suspension for one of the reasons set forth in Article 16.7, it is my conclusion that the emergency suspension which Grievant received was improper."[154]

While an "allegation" of intoxication, pilferage, or failure to observe safety rules may be sufficient to warrant emergency placement under Article 16.7 there must be at least some evidence that an employee "may" be dangerous to themselves or others.[155] This evidence must move beyond mere conjecture or speculation. As **Arbitrator Fullmer** explained:

> "As this arbitrator reads the guidance coming from the National Arbitration Panel in the Mittenthal decision, the 'Level of Proof Necessary' in a case such as this involves a balancing of two factors. Pointing toward a low level of proof is the fact that all that Section 7 requires is that the 'employee <u>may</u> be injurious to self or others.' (emphasis added [in original]) Given the several well publicized instances of tragic

[154]Arbitrator Gerald Cohen, Case No. C4C-4B-D 26336, April 10, 1987, pp. 6-7. See also, Arbitrator Jonathan Dworkin, Case No. J90C-1J-D 96014548/17277, December 24, 1996, at pp. 11-12:

> "Article 16.7 does not sanction Emergency Placement for every employee who commits misconduct. It does not grant that kind of knee-jerk authority to Supervision. The provision is narrower than that; it carefully circumscribes the conditions under which a supervisor may act. Unacceptable risk to the Employer is the central theme of the Section, and the language sets out some situations where such risk can be presumed..."

Similarly, see Arbitrator Margo R. Newman, Case No. C98C-4A-D 00095696, January 24, 2001, at p.10:

> "The language of Article 16.7 requires more than an allegation of an altercation to substantiate an emergency placement. It necessitates an additional showing that grievant failed to observe safety rules and injury to others may well occur if grievant is permitted to remain at work...<u>The zero tolerance policy cannot be used as a blanket justification for instituting the provisions of Article 16.7</u>..." [emphasis added]

Or, see Arbitrator Jerry A. Fullmer, Case No. J00C-1J-D 03212924, February 10, 2005, overturning an Emergency Placement for allegedly falsifying medical documentation with this comment:

> "…the claimed offenses of the Grievant were not ones which demanded the emergency remedy which is at the heart of the Section 16.7 provisions."

[155]Arbitrator Jerry A. Fullmer, Case No. C0C-1C-D 02215246, January 29, 2003.

> violence in postal facilities, the level of proof should not be unduly high, lest the advantage of getting potentially violent employees off the property be lost. Pointing toward a higher level of proof, is the fact that any employee may have the potential for injuring himself and others. To allow the Employer to place an employee off-duty without pay purely on the basis of conjecture or speculation will in effect allow the Employer to impose indeterminate suspensions without any evidence to support them…" [156]

Where the allegation includes mishandling of funds, the Employer must at least consider reassignment to a different area of responsibility, as an alternative to emergency placement, until the requisite just cause for discipline can be ascertained.[157] Similarly, where an acting supervisor (204-B) is accused of improperly disallowing employee work hours, thus creating a loss of trust, the Employer is required to consider returning the employee to the bargaining unit as an alternative to emergency placement.[158]

It also seems clear that, while a complete investigation and/or investigatory interview cannot always be expected in an "emergency" situation, at least some minimal investigation[159] must be anticipated in order to establish even the lesser standard of "just cause" envisioned by **Arbitrator Mittenthal**. For instance, **Arbitrator Goldstein** suggested:

> "I also believe that it is important to stress in this case, as I explained earlier, that some sort of meaningful investigation should have been undertaken in the current case. As I read the record, there was no investigation other than the acceptance of a report through the Postal Inspector to Labor Relations and then, through channels, to local Management, that Grievant had been arrested for sale of marijuana to an undercover Postal Inspector. I am not sure that an interview with Grievant would have been required to satisfy due process here, and certainly would not automatically mandate one in every Section 16.7 circumstance...
>
> . . .
>
> "Not in every case would a 'pre-disciplinary interview' be necessary when 16.7 comes into play, I reiterate, as I read Mittenthal's decision. However, in the instant case, not only was there no investigatory interview,

[156] Arbitrator Jerry A. Fullmer, Case No. C94C-1C-D 97006918, May 28, 1997, p. 11.

[157] See, for instance, Arbitrator Fred D. Butler, Case No. F00C-1F-D 04178971/214029, April 27, 2005, pp. 12-15.

[158] Arbitrator Margo R. Newman, Case No. C00C-1C-D 04144381, October 31, 2004.

[159] While minimal, this investigation must precede the emergency placement. See, for instance, Arbitrator Christopher E. Miles, Case No. H00C-4H-D 03209250, June 28, 2004; Arbitrator Barry J. Baroni, Case No. H90C-4H-C 94064667, February 14, 1995; or, Arbitrator Jerry A. Fullmer, Case No. C00C-4C-D 03133422, August 3, 2004, saying at p. 8:

> "Second, the 'investigation' aspect reveals a certain mis-understanding by Postmaster Fitzgibbon as to how Section 16.7 works. The official who makes the Emergency Placement is to make such investigation as he deems necessary before the Emergency Placement is made. Typically this burden is not onerous because the Emergency Placement is to be an emergency action and advance written notice is not required…Any investigation subsequent to the Emergency Placement is relevant to any subsequent disciplinary action taken against the Grievant…" [emphasis in original]

See, also, above sections on "Pre-Disciplinary Interview and Investigation" and "Review and Concurrence" for further discussion.

there was no investigation at all, except for the fact that Grievant's arrest was communicated through channels. I believe something more was required."[160]

Where the decision to place an employee on emergency placement is dictated by higher level managers, this too can become a legitimate issue. Article 16.8 dictates that ***"[i]n no case*** may a supervisor impose suspension…upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee."[161] [emphasis added] No exception for "emergency" suspensions was included. As **Arbitrator Newman** explained:

> "Article 16.8 is violated when the reviewing/concurring official 'commands' or 'dictates' the disciplinary action to the proposing official and in the absence of separate and independent supervisory review… This principle applies with equal force to the application of Article 16.7 as it does with other disciplinary actions taken under Article 16, and a de facto decision from above and concurrence from below constitutes a procedural defect requiring that the discipline be overturned."[162]

Similarly, **Arbitrator Klein** provided this analysis:

> "As it regards the notice of emergency placement in an off-duty status, the evidence establishes that the Postmaster took the action without first seeking review and concurrence with his decision. Although Article 16.7 allows for the 'immediate' placement off duty without pay where the allegation involves a loss of postal funds, the review and concurrence procedure outlined in Article 16.8 must nevertheless be followed. The emergency procedure may be implemented without a ten or thirty calendar day notice period, however, Management is not thereby relieved or exempt from the requirement to seek review and concurrence. Because the Postal Service violated Article 16.8 in the matter of issuance of the notice or emergency placement, said discipline must be rescinded and the grievant shall be made whole at the straight time rate for the entire period of suspension."[163]

Finally, it is legitimate to argue that, within the context of it's exception to the general 'notice requirement of Article 16, emergency placement must be of some limited or reasonable duration, necessitated by the fact circumstances of the situation. Where the Postal Inspectors took three to four weeks to write their report after completing their investigation, **Arbitrator Lankford** properly opined:

> "Finally, the Union argues that the emergency suspension lasted too long. On this issue, Management's response is terse: it took the Inspectors three to four weeks to get their investigatory report to the Postmaster. The record contains no hint or clue as to why it took the Inspector's three to four weeks. They had done a considerable amount of preliminary investigatory work; and they apparently had a video, the report of a test shopper, and the investigatory interview results including – as far as this record shows – Ms. Zandi's confession. The record suggests no excuse for a three to four week delay in the production of the

[160] Arbitrator Elliot H. Goldstein, Case No. J94T-1J-D 98010055, July 6, 1999, pp. 20-21. See also, Arbitrator Michael E. Zobrak, Case No. C98T-1C-D 00025549, October 23, 2000.

[161] For a more detailed discussion of the 'review and concurrence" requirement see pages 35-42, above.

[162] Arbitrator Margo R. Newman, Case No. J00C-1J-D 05067730, April 18, 2006, pp. 24-25.

[163] Arbitrator Linda DiLeone Klein, Case No. C90C-4C-D 93032649, March 25, 1994, p. 10. See also, Arbitrator Wayne E. Howard, Case No. E7C-2A-D 37105, August 15, 1991.

report that put those elements together. Emergency suspension is a draconian step, and arbitrator Mittenthal's National level award establishes that it is a disciplinary action. Part of the employer's just cause burden in any disciplinary action is to show that the degree of discipline – in this case, the duration of the emergency suspension – was not unreasonable. Without that requirement, emergency suspension would become an indefinite suspension of the employee's just cause rights, a sort of disciplinary black hole. The Service failed to carry that part of its burden in this case."[164]

INDEFINITE SUSPENSION - CRIME SITUATION

The other exception to the Article 16 requirement of advance notice is the Indefinite Suspension - Crime Situations. Article 16, Section 6 provides:

Section 6. Indefinite Suspension--Crime Situation

A. The Employer may indefinitely suspend an employee in those cases where the Employer has reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed. In such cases, the Employer is not required to give the employee the full thirty (30) days advance notice of indefinite suspension, but shall give such lesser number of days of 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.

B. The just cause of an indefinite suspension is grievable. The arbitrator shall have the authority to reinstate and make the employee whole for the entire period of the indefinite suspension.

Article 16, Section 6.A. clearly requires only that the Employer have "reasonable cause" to believe that the disciplined employee may be guilty of a crime punishable by imprisonment. On the other hand, Article 16, Section 6.B also clearly requires that such action still be for "just cause," as well. As **Arbitrator Snow** explained:

"According to terms set forth in the agreement, management has a right to suspend an employe for criminal conduct if it meets a two-step burden. First, at the time of suspension, the Employer must establish that it had 'reasonable cause to believe' an employee engaged in conduct for which the law provides a penalty of imprisonment. Second, the Employer must determine that it has just cause to suspend the employe. According to the parties' collective bargaining agreement, the Employer cannot suspend an employe in circumstances involving crimes without satisfying the requirement of 'reasonable cause to believe.' Even if the Employer meets its burden of showing 'reasonable cause,' it, however, has not automatically met its

[164] Arbitrator Howell L. Lankford, Case No. E00C-4E-D 06073357, November 14, 2006, p. 8.

burden of showing 'just cause.'"[165]

The question then becomes, just what is "reasonable cause to believe?" **Arbitrator Bernstein** provided this definition:

> "'Reasonable cause' is generally understood to be something less than conclusive proof, and is commonly defined as 'a state of facts as would lead a person of ordinary caution and prudence to believe or entertain an honest or strong suspicion that a thing is so.' Thus, it would seem to require nothing more than the existence of some evidence which, if believed, would be grounds for convicting the person involved."[166]

But just how much evidence is necessary? It seems fairly clear that even when an arrest has occurred, this alone does not establish the existence of reasonable cause. Arbitrators have generally found reasonable cause where an indictment has occurred.[167] However, arbitrators have also fairly consistently interpreted "reasonable cause" as imposing an affirmative duty or obligation upon the Employer to conduct some form of investigation of its own so as to verify the facts underlying the criminal charges.[168] As **Arbitrator Cohen** said:

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[165]Arbitrator Carlton J. Snow, Case No. W8C-5D-D 12376, July 16, 1981, p. 16., cited with favor by Arbitrator George T. Roumell, Jr., Case No. C1T-4A-D 17418, December 23, 1983, p. 8 and Arbitrator Joseph F. Gentile, Case No. W4N-5D-D 208, August 27, 1985.

[166]Arbitrator Neil W. Bernstein, Case No. C7M-4K-D 22948, September 21, 1990. p. 6.

[167]The Courts agree. See, for instance, Dunnington v. Dept. of Justice, U.S. Court of Appeals (Fed. Cir.), 92 FMSR 7002, February 27, 1992:

> "As the cases make clear, the mere fact of an arrest by the police is not, in and of itself, sufficient to provide reasonable cause under § 7513(b)(1). At the other extreme, a formal judicial determination made following a preliminary hearing or an indictment following an investigation and grand jury proceedings, would provide, absent special circumstances, more than enough evidence of possible misconduct to meet the threshold requirement of reasonable cause to suspend.
>
> "We are not prepared to conclude, however, that the issuance of an arrest warrant, presumably based on a finding of probable cause found by a magistrate, is the equivalent to more formal proceedings. ...Given the reality of the manner in which arrest warrants are often issued, it is incumbent upon the agency when an arrest warrant is a major part of the case to assure itself that the surrounding facts are sufficient to justify summary action by the agency."

However, for a differing viewpoint, see Arbitrator J. Earl Williams, Case No. S1C-3F-D 17681, July 12, 1983, who said at pages 9-10:

> "In the American system of jurisprudence, the person charged is considered innocent until proven guilty. It is completely contrary to this system to assume that, whenever a Grand Jury issues an original charge and/or indicts an individual, this is reasonable cause to believe he is guilty of a crime. Yet, that is apparently what was assumed in the subject case. The justification given was that the grievant was indicted for voluntary manslaughter. This is despite the fact that daily hundreds of persons charged with crimes, etc., are found to be not guilty. This does not mean that there cannot be reasonable cause to believe that an indicted person is guilty. It merely means that the indictment is not automatic 'reasonable cause.' There should be some independent investigation and a compilation of facts and arguments to support reasonable cause."

[168]See, for instance, Arbitrator Carlton J. Snow, Case No. W8C-5D-D 12376, July 16, 1981; Arbitrator George T. Roumell, Case No. C1T-4A-D 17418, December 23, 1983; Arbitrator Lawrence Roberts, Case No. K98C-4K-D 02073170, July 13, 2002; or Arbitrator Robert J. Mueller, Case No. J00T-1J-D 03162442, August 12, 2004. On the other hand, see Arbitrator Neil N. Bernstein, Case No. C7M-4K-D 22948, September 21, 1990, holding that statement given to Postal Inspectors was sufficient "additional" material.

"Grievant's indefinite suspension was based solely on the criminal charges placed against him, without any independent investigation. This has been held to be insufficient to provide reasonable cause to believe that Grievant was guilty of a crime for which a sentence of imprisonment could be imposed. The Postal Service must have more information in its possession than the mere institution of charges, particularly when those charges are instituted by warrant, and not by grand jury indictment."[169]

Arbitrator McAllister reached the same conclusion, stating:

"[I]n essence, these prior cases generally establish the arbitral principle that an arrest, standing alone and without any other inquiry, is insufficient to reasonably conclude an accused is guilty of the criminal charge involved."[170]

"[A]n arrest...alone does not establish the existence of reasonable cause."

Where the Employer relied upon an indictment but failed to seek out referenced documents mentioned therein, instead relying on the supervisor's alleged "gut feeling" that the employee would be incarcerated, **Arbitrator Suardi** reasoned

"In a proper case, Management's reliance on an indictment and associated police reports will 'clearly give rise to a reasonable belief that (an employee) committed (an) offense…' and that an indefinite suspension was appropriate…Contrary to the Union's view, 'an indictment for a serious crime' 'in itself' may at times justify an indefinite suspension…The problem here is that Deputy Barnes' Complaint and Affidavit incorporates his 'Arrest Narrative' by reference, but that document is nowhere to be found…Further, the photos and newspaper accounts from Madison County supply little more information about the events of April 2 than the accusation contained on the face of the Complaint.

. . .

"What emerges from the foregoing is that even though a decision maker like Mr. Pietig allowed

[169]Arbitrator Gerald Cohen, Case No. C8C-4A-D 3302, December 20, 1979, p. 6. Similarly, see also, Barresi et. al. v. U.S. Postal Service, 94 FMSR 5637, December 22, 1994, holding that even an arrest plus an arraignment was insufficient to establish reasonable cause:

"In sum, the deciding official relied on the arrests and arraignments of the appellants with investigating the underlying facts behind the arrests and arraignments. He further relied on news media reports without independent verification of their accuracy. *Dunnington II* requires that the agency take some affirmative action its own to satisfy itself that there was reasonable cause to believe that a crime was committed for which imprisonment could be imposed."

[170]Arbitrator Robert W. McAllister, Case No. C1C-4B-D 24067, March 6, 1984, p. 8. For the opposite viewpoint, see Arbitrator Charles E. Krider, Case No. J90T-1J-D 94013820, September 25, 1995, at page 7:

"Management need not conduct an investigation in order to demonstrate that the employee is in fact guilty of such a crime. That is a responsibility of the police and courts; postal officials need not reach a judgment on guilt before indefinitely suspending an employee under Article 16.6.A. All that is need[ed] is reasonable cause to believe and Management may rely on police and court documents in establishing reasonable cause. On the other hand, sole reliance on a newspaper report of an alleged crime by an employee most likely could not be the basis for issuing an indefinite suspension."

Or, see Arbitrator Dennis R. Nolan, Case No. S4N-3R-D 47206, July 9, 1987, who held at page 7:

"In this case,...the arrest provided 'reasonable cause to believe' even though there was no independent investigation by the Postal Service."

> considerable discretion in deciding whether an indefinite suspension is appropriate, conclusory statements about culpability and possible incarceration may not carry the day. True, there is no contractual or legal requirement for a separate, independent investigation by Management…Yet Management bears the risk when it takes incomplete documents at face value. In that situation, 'going beyond the mere fact of arrest and arraignment' may be the best way to discover 'reliable evidence' to prove the reasonable of a suspension."[171]

Similarly, **Arbitrator Cohen**, in 1982 found that an indefinite suspension lacked reasonable cause where the Postal Service had relied solely upon newspaper reports of the alleged crime without making an independent attempt to verify the facts:

> "I do not believe that a number of newspaper articles is sufficient evidence to justify an indefinite suspension. Newspaper articles are known to be written for purposes of sensationalism and shock value. They are seldom presented as balanced recitations of facts, and the facts presented are not always correct. Newspaper articles taken alone could never be considered sufficiently convincing to justify a statement that they constitute reasonable cause to believe the charges contained in them."[172]

In another case, **Arbitrator Sherman** agreed, saying:

> "[I]t is well established (in prior Postal Service arbitration awards) that Management can not satisfy this requirement, described in the contract as '...a reasonable cause to believe that the employee is guilty..." based upon an arrest alone or based upon a newspaper account of the incident. It is obvious that Management must do something more to ascertain whether the accused employee is guilty as charged."[173]

Arbitrator Feldman, in like manner, held that reasonable cause for an indefinite suspension did not exist where the Postal Service failed to conduct a proper investigation after having been informed by the employee's wife that the employee was in jail. The Postal Service conducted its meager "investigation" through a telephone conversation with the arresting police officer and by reviewing the employee's OPF. **Arbitrator Feldman** reasoned that this investigation was "faulty" because the grievant was not interviewed, no attempt was made to determine whether the alleged crime was

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[171] Arbitrator Mark W. Suardi, Case No. E98T-1E-D 01188564, February 12, 2003, pp. 9-12.

[172]Arbitrator Gerald Cohen, Case No. C1C-4G-D 1843, August 10, 1982, pp. 5-6. See, also, Arbitrator George R. Shea, Jr., Case No. C98C-4C-D 01221649, February 22, 2002. On the other hand, see Arbitrator Herbert L. Marx, Jr., Case No. N4C-1N-D 23910, November 12, 1987, who found that the Postal Service did have reasonable cause when acting on the basis of a newspaper report since:

> "As it turns out, the newspaper report was accurate in that an indictment did in fact occur."

[173]Arbitrator James Sherman, Case No. S1C-3Q-D 32524, June 15, 1984, p. 9. See also, *Berresi v. U.S. Postal Service,* 94 F.M.S.R. 5637, December 22, 1994, where the Merit Systems Protection Board reasoned:

> "...Although the news stories in this case did purport to quote local law enforcement officials and court pleadings, there is no evidence that the accuracy of these reports was verified by the agency. It would not place an undue burden upon agency officials to require them to do more than read a newspaper before deciding to indefinitely suspend an employee. Accordingly, we find that in making a reasonable cause determination, an agency cannot rely on media reports alone, without some form of independent verification."

committed while the employee was on or off duty, and there was no actual check of the records. In **Arbitrator Feldman's** words:

> "While a full investigation is not necessary at this time, there must be sufficient investigation so as to show that the grievant was not treated in a lackluster manner."[174]

Arbitrator Snow also addressed the obligation to interview the grievant:

> "The extent to which management is obligated to investigate formal criminal charges before suspending an employe will vary according to circumstances in each case. At a minimum, the Employer should interview an employe or at least invite him or her to submit a written explanation of circumstances surrounding the grievant's arrest. An investigation should be directed both at management's burden of showing 'reasonable cause to believe' as well as showing 'just cause to suspend.' Such an investigation should ascertain sufficient data to make a reasonable judgement concerning whether circumstances indicate that the Employer might be harmed by an off-premises conduct."[175]

Also on the question of interviewing the grievant, **Arbitrator Sherman** said:

> "In a case such as this, wherein the crime was committed off the Employer's premises and was unrelated to the Employer's business, can it be said that the Employer must undertake its own investigation? The Arbitrator does not believe it has such an obligation. However, in this Arbitrator's opinion, Management did have an obligation to confront the grievant with the information it had received, to enable him to explain, if he could, why Management's assumptions about his guilt were not well founded. To put it simply, such an important decision should not have been made without attempting to get both sides of the story..."[176]

It should also be clear that even a later conviction will not excuse the Employer's failure to conduct an adequate investigation at the time of suspension. As **Arbitrator Snow** explained:

> "[I]n a case of indefinite suspension for criminal activity, even an ultimate court conviction does not excuse management from it's obligation. Management's obligation is to be able to establish that it had a 'reasonable cause to believe' the employe was guilty of the alleged charges at the time it placed him on indefinite suspension. The Employer is not permitted to reason backward from a court's later finding of guilt that management had a 'reasonable cause to believe' in the employe's guilt at the time it imposed an indefinite suspension. 'Reasonable belief' had to exist at the time of suspension."[177]

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[174]Arbitrator Marvin J. Feldman, Case No. C8C-4B-C 13527, June 30, 1980, p. 14.

[175]Arbitrator Carlton J. Snow, Case No. W8C-5D-D 12376, July 16, 1981, p. 21.

[176]Arbitrator James Sherman, Case No. S1C-3Q-D 32524, June 15, 1984, p. 9. For a less stringent view, see Arbitrator I.B. Helburn, Case No. S0T-3E-D 12440, December 7, 1992, who reasoned at page 10:

> "The less stringent reasonable cause standard used in the context of Article 16.6 will not always require a pre-disciplinary interview before an indefinite suspension can be imposed. But,...where there is evidence in the employee's favor, that evidence cannot be dismissed out of hand. One of the ways of trying to reconcile conflicting bits of evidence is to interview the affected employee."

[177]Arbitrator Carlton J. Snow, Case No. W8C-5D-D 12376, July 16, 1981, pp. 20-21.

In addition to establishing the "reasonable cause to believe," the Employer still must pass muster on the establishment of "just cause" for the indefinite suspension. This means, at a minimum, that the Employer must show "nexus," as discussed more thoroughly below between the alleged crime and employment. As **Arbitrator Krider** explained:

> "Article 16.6.A. does not give the Postal Service the right to indefinitely suspend an employee for off duty conduct that has no actual or potential impact of any kind on the Postal Service. ...If there is no possible impact then an indefinite suspension would not be for just cause. Prior to the grievant's indefinite suspension there was no thought given to the impact on the Postal Service reputation, on other employees, or on the employee's ability to perform his work. The arbitrator's role is not to speculate of possible nexus but to review the nexus relied on by Management when it decided to suspend the grievant. In the absence of any articulated nexus I must find that there is not just cause for the grievant's indefinite suspension."[178]

Or, as **Arbitrator Fletcher**, so simply but eloquently stated:

> "Without adequate nexus the Service simply cannot place an employee on Indefinite Suspension."[179]

NEXUS - OFF DUTY MISCONDUCT

While the overwhelming majority of Postal Service discipline involves alleged on-duty misconduct, from time to time the Employer seeks to impose discipline based upon the circumstances of alleged off-duty misconduct. For the most part, these cases will involve an alleged crime situation and may also include issues involving Article 16, Section 6 concerning Indefinite Suspension.

It does not necessarily follow, however, that the Postal Service may impose discipline or invoke Article 16.6 every time it believes an off-duty crime situation exists.[180] The Employer may not simply assert that particular criminal activity is *per se* so repulsive as to require removal. In Bonet v. United States Postal Service, 661 F.2d 1071 (5th Cir. 1981) for instance, the Court overturned the removal of an

[178]Arbitrator Charles E. Krider, Case No. J90T-1J-D 94013820, September 25, 1995, pp. 8-9.

[179]Arbitrator John C. Fletcher, Case No. C0C-4Q-D 11991, March 17, 1993, p. 12.

[180]For instance, see Arbitrator Robert W. McAllister, Case No. J90C-4J-D 96002985/30701, July 26, 1996, at p. 17:

> "The final line is that the conviction of a crime is not grounds for automatic discharge."

See also Arbitrator Robert W. McAllister, Case No. C0C-4G-D 15424, May 5, 1993 and Arbitrator John C. Fletcher, Case No. J98C-1J-D 01082399/01023840, April 18, 2002.

employee charged with indecency with an eleven-year old child, saying:

> "Despite our reflective revulsion for the type of off-duty misconduct in question, whether resulting from a now-cured mental disability or not, the 1978 Act does not permit this court nor an employing agency to characterize off-duty conduct as so obnoxious as to show, *per se*, a nexus between it and the efficiency of the service. The 1978 Act prohibits the discharge of a federal employee for conduct tat does not adversely affect the performance of that employee or his co-employees."[181]

The Employer's action must still meet the test of just cause. Included in the elements of "just cause" is the requirement that there be a nexus or relationship between the alleged off-duty misconduct and the employee's position with the Postal Service.[182] **Arbitrator Garrett** discussed this relationship in his National level award:

> "It also seems apparent that some alleged crimes could have no material bearing on an employee's ability to perform his or her job without embarrassment to the Service or impairment of efficiency or safety. Yet, as the Service concedes, there must be a 'nexus' in any such case between the alleged crime and the employee's job with USPS. Whether such a 'nexus' exists also is an obvious question under the 'just cause' test."[183]

Similarly, **Arbitrator Cushman** proffered an excellent analysis of the nexus requirement:

> "The larger or must substantive question in this case involves the significance of the Grievant's off duty misconduct in his employment relationship with the Postal Service. That was the basis of his removal. The mere fact that the conduct in question occurred away from the workplace and outside of working hours does not foreclose managerial authority to impose discipline otherwise justified. An employer may properly be concerned when private actions of an employee compromise the employer in a meaningful way. On the other hand, management has no roving commission to act as the guardian or supervisor of the employee's private conduct. As Arbitrator Richard Bloch has said, 'Basic precepts of privacy require that, unless a demonstrable link can be established between off-duty activities and the employment relationship, the employee's private life, for better or for worse, remains his or her own.'...Arbitrator Ralph Seward has aptly stated that the off duty misconduct must have ' sufficient direct effect upon the efficient performance of Plant operations to be reasonably considered good cause for discipline' and that the employer 'must show that the effect of the incident upon working relationships within the Plant was so immediate and so upsetting as to justify the abnormal extension of its disciplinary authority.'...
>
> "The aforementioned principle is generally referred to as nexus and has been recognized by the Courts as well as arbitrators in both the private and public sectors. ...The Postal Service here failed to sustain its burden of proof showing a nexus between the Grievant's off duty misconduct and any direct adverse effect suffered by the Postal Service as a result thereof. ...Simply stated, the Postal Service presented insufficient probative or credible evidence that it was adversely affected in any demonstrable way by the Grievant's conduct."[184]

[181]Bonet v. U.S. Postal Service, 661 F.2d 1071, (5th Cir. 1981), p. 1077. See also, Arbitrator John C. Fletcher, I98T-1I-D 99315057, May 23, 2000 and Arbitrator Lawrence Loeb, Case No. C98T-1C-D 99211946, September 24, 2000.

[182]See, for instance, Arbitrator John C. Fletcher, Case No. C0C-4Q-D 11991, March 17, 1993, pp. 11-13.

[183]Arbitrator Sylvester Garrett, Case No. NC-NAT 8580, September 29, 1978, p. 32.

[184]Arbitrator Bernard Cushman, Case No. E7C-2A-D 6987, April 3, 1989, pp. 17-20. See also, Arbitrator J. Fred Holly, Case No. AC-S 17233-D, October 18, 1977.

Just as **Arbitrator Cushman** suggested, the Employer must bear the burden of proof in establishing the nexus between the alleged off duty misconduct and the employee's job.[185] Similarly, **Arbitrator Snow** agreed that the burden is on the Employer to prove some legitimate reason for imposing restraints on an employee's private life:

"[T]he Employer must bear the burden of proof in establishing the nexus between the alleged off duty misconduct and the employee's job."

> "An employer's right to suspend or discharge an employe for off-premises conduct unrelated to job duties is tied to readily discerning adverse effects of that conduct on the employer's business. Conjecture, speculation, or mere surmise concerning any adverse effect on the business is insufficient proof. Arbitrators long have agreed that an employer has the burden of proving some legitimate reason for imposing restraints on an employe's private life. Arbitrators usually search for behavior by a grievant which has harmed an employer's reputation or operation. There also is an interest in knowing if the employe's off-premises conduct has made other workers fearful or working with the offender. Arbitrators seek information concerning any serious emotional instability a grievant guilty of off-duty misconduct might manifest on the job. These and a host of other factors have been considered by arbitrators to test the propriety of disciplining an employe for off-premises conduct."[186]

Similarly, **Arbitrator Levak** adopted the following principles for resolution of an off-duty misconduct case:

> "1. The record must establish that the alleged criminal misconduct occurred.
>
> 2. The record must establish that the misconduct is somehow materially job-related, i.e., that a substantive nexus exists between the employee's crime and the efficiency and interests of the Service. Such a nexus may be demonstrated through:
>
> a. Evidence that the crime has materially impaired the employee's ability to work with his fellow employees.
>
> b. Evidence that the crime has impaired the employee's ability to perform the basic functions to which he is assigned or is assignable.
>
> c. Evidence that the employee's reinstatement would compromise public trust and confidence.
>
> d. Evidence that the employee is a danger to the public or customers.
>
> 3. The record must establish that the Service has fairly considered the seriousness of the specific misconduct in light of mitigating and extenuating circumstances."[187]

[185]See, for instance, Arbitrator Joseph S. Cannavo, Jr., Case No. A90C-4A-D 94019865, November 25, 1994, p. 3.

[186]Arbitrator Carlton J. Snow, Case No. W8C-5D-D 12376, July 16, 1981, p. 15.

[187]Arbitrator Thomas F. Levak, Case No. W1C-5D-D 27319, February 7, 1985, p. 17.

STEWARD IMMUNITY

A particularly difficult problem for the Union occurs when the employee receiving discipline is also a Union officer or steward. This action can affect the credibility of, not only that officer or steward, but of the Union as a whole. Steward's are, unfortunately, sometimes singled out for disparately harsh treatment because of their otherwise adversarial role as their co-workers' Union representative. The Union has a special responsibility to protect its own, and the members feel particularly vulnerable. If management can get away with doing that to a steward, what could they do to me? Besides, in this case the grievant is usually our close personal friend and comrade, which only logically increases the pressure we feel.

An even greater concern occurs, when management chooses to attempt to discipline a steward for actions occurring as part of their steward activity. The National Labor Relations Board (NLRB) recognizes a general principle of "steward immunity." The NLRB interprets Sections 7 and 8(a)(1) of the National Labor Relations Act to prohibit the Employer from disciplining a steward for allegedly disrespectful or abusive remarks made during a grievance meeting or bargaining session, distinguishing that conduct from what otherwise might be disciplinable "disrespect to a supervisor."

The Board applies the special immunity rule so as protect stewards from being prevented from carrying out their legal duty to represent the bargaining unit. Without the rule, stewards would be hesitant to speak freely. They would have to carefully choose every word they said to management or hold back from zealously presenting a grievance for fear of overstepping the line that in necessarily toes by ordinary employees.

As a general rule, "steward's immunity" takes effect when it is necessary for a steward to investigate or adjust a grievance or to investigate a specific problem to determine whether to file a grievance. A steward is generally protected against discipline when they raise their voice, use profanity, or other berating language while in the status of a steward. Both the location and subject of the

discussion are taken into consideration[188]. As noted by **Arbitrator McAllister**:

> "No Union representative has a right to disparage or belittle Management in general in front of other employees. There is, however, a substantial distinction between such abusive remarks and the situation presented herein. It is undisputed the Grievant was acting in his capacity as a steward when he made the remark which offended Green. The remark was made in private, and there is no evidence it could impact Green's managerial authority. When the totality of the circumstances involved are weighed, it is evident the remark was a rejoinder to Green's unilateral decision not to continue discussing the grievance. Like it or not, Green has no right to control how grievances are argued. Green and the Grievant were equals while discussing the grievances. The Grievant's remark was clearly insensitive and offensive to Green, but, nonetheless, in the context of what was happening, the remark also, albeit crude, put Green on notice he was not the arbiter of what could and could not be stated in a grievance meeting.
>
> "Intemperate, offensive, ill advised, insulting, unprofessional statements made in a grievance meeting do nothing to further effective labor/management relations. If, as implied in this case, gamesmanship is being employed rather than responsible representation, the big losers are the unit employees who look to Management for leadership and the Union to protect their rights."[189]

There is another aspect of "steward immunity" which is certainly worthy of discussion at this point. The National Labor Relations Board (NLRB) has held that it violates Section 8(a)(1) of the NLRA to compel a steward to answer questions about the substance of a grievance and/or her discussion with another employee regarding that grievance.[190] Similarly, see **Arbitrator Buckalew**'s award in which he barred evidence adduced as the result of such a coerced disclosure:

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[188] See, for instance, this discussion by Arbitrator Thomas F. Levak, in Case No. W7C-5T-D 9263, May 13, 1990, a p. 16:

> "During a closed grievance meeting or closed discussion to discuss union matters, the employer-employee relationship is temporarily suspended, and a steward possesses a special immunity. The parties meet as equals, and the steward is entitled to the same deference and latitude as his supervisor. The steward is permitted to discuss union business as though he were not an employee, and therefore has wide latitude as to what he may say or do. He may display a heightened temper, raise his voice, and even use profanity, even though such profanity would otherwise be deemed to be personally abusive…Such is the rule both when a union matter is being discussed at a formal, contractual grievance meeting or when it is being discussed informally during a one-on-one basis between the steward and his supervisor.
>
> "However, when a grievance or discussion is not closed, but is observable by other employees – whether in a grievance meeting or on the workroom floor – the steward does not have total immunity, and must not become personally abusive. A steward who directs profanity at a supervisor in front of other employees is not merely attempting to maintain employer-union parity, he is attempting to degrade and belittle the status of the supervisor, and thereby achieve superiority over him at the expense of the supervisor's status and reputation…"

[189] Arbitrator Robert W. McAllister, Case No. I94T-4I-D 97087025, December 8, 1997, pp. 13-14. See, also, Arbitrator Edwin H. Benn, Case No. E4V-2L-D 44409, September 23, 1987.

[190] In *Cook Paint and Varnish Company*, 258 NLRB 1230, September 30, 1981, the Board said a p.1232:

> "To allow (the employer) to compel the disclosure of this type of information under threat of discipline manifestly restrains employees in their willingness to candidly discuss matters with their chose statutory representative. Such actions…also inhibit stewards in obtaining needed information from employees since the steward knows that, upon demand by Respondent, he will be required to reveal the substance of his discussions or face disciplinary action himself. In short, Respondent's probe into the protected activities of Whitwell and Thompson has not only interfered with the protected activities of those two individuals but it has also cast a chilling effect over all of its employees and their stewards who seek to candidly communicate with each other over matters involving potential or actual discipline."

> "By requiring (steward) Vallen to disclose the substance of his discussion with Brown and to provide a written statement under threat of discipline, Peterson and McKenzie improperly interfered with Vallen's ability to represent Brown and in fact created a conflict of interest between Vallen and an employee he was obligated by contract and law to represent fairly and responsibly. It is clearly beyond the authority of the Arbitrator to decide if that interference amounts to a violation of labor law, however I am compelled under these circumstances to agree with the Union's motion and I rule that the evidence adduced as a result of the coerced disclosure may not be offered as evidence in this arbitration and should not have been considered by management in deciding to discipline Brown."[191]

ATTENDANCE DISCIPLINE

Perhaps no form of discipline is more prevalent nor more difficult to defend presently than discipline for attendance. Some employees just don't want to come to work. Others have legitimate illnesses, family problems, or other emergencies which affect their attendance. FMLA protects eligible employees who must care for family members with serious illnesses or suffer from such maladies themselves.[192] The Postal Service acknowledges that it may not discipline employees for using leave provided by OWCP.[193] Veterans are protected by Executive Order[194] from discipline for absences caused by their service connected disability.[195] Many other employees nonetheless find themselves, for sundry reasons, behind the attendance eight-ball. The propriety of discipline for excessive absenteeism

[191] Arbitrator Timothy J. Buckalew, Case No. B98C-4B-D 02058369, January 10, 2003, pp. 7-8.

[192] APWU/USPS Joint Contract Interpretation Manual (JCIM), Article 10, p. 14. See 29 C.F.R. §825.220. See also,Arbitrator Morris E. Davis, Case No. F94T-1F-D 99023424, February 8, 2000.

[193] Arbitrator Sylvester Garrett, Case No. NC-NAT 16285, November 19, 1979, at p. 6:

> "The Service denies at the outset that it ever seeks to discipline an employee for the 'use of leave provided by the Office of Workers Compensation Program."

See also, Arbitrator Edwin H. Benn, Case No. I90C-4I-D 96004142, March 13, 1996 and Arbitrator Joseph F. Gentile, Case No. W0C-5T-D 5353, July 12, 1993.

[194] Executive Order 5396 issued by President Hoover in 1930.

[195] Arbitrator Robert J. Mueller, Case No. J90T-1J-D 03157903/03188396, May 6, 2004. See also, Arbitrator Marsha C. Kelliher, Case No. G00C-1G-D 04093272, October 8, 2004; Arbitrator Randall M. Kelly, Case No. B98C-1B-D 99292364, February 16, 2001; Arbitrator Randall M. Kelly, Case No. B00T-1B-D 02195602, June 19, 2003; Step 4 Decision, Case No. S8C-3P-C 33859, November 24, 1981; Step 4 Decision, Case No. H1N-5K-D 154, March 3, 1982; and Step 4 Decision, H4N-4F-C 11641, October 28, 1988. See also, Employee & Labor Relations Manual, Parts 513.32 and 514.22. For further discussion of Executive Order 5396, see also, section below entitled "Last Chance Agreements."

must be determined on a case-by-basis after evaluating all relevant evidence pursuant to the so-called "Garrett Factors."[196] In the landmark case, NC-NAT-16285 (1979), **National Arbitrator Garrett** observed:

> "The presence or absence of 'just cause' [in attendance discipline] is a fact question which properly may be determined only after all factors in a case have been weighed carefully. The length of an employee's service, the type of job involved, the origin and nature of the claimed illness or illnesses, the types and frequency of all 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 may other factors…"[197]

Arbitrators have held that the just cause standard requires management to consider mitigating and extenuating circumstances before concluding that the employee's unacceptable attendance is not likely to improve if they are retained with the Postal Service.[198] The fact that the employee's absence was covered by earned and accrued annual and sick leave must be given appropriate consideration, although this does not preclude the Employer from ultimately concluding that the employee's attendance record is so erratic and undependable as to justify discipline to ensure that the work can be accomplished. As noted by **National Arbitrator Gamser**:

> "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 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 than an employee's attendance record provides just cause for disciplinary action, management must be prepared to substantiate the fact 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 or other physical incapacity. Management must give every consideration to the fact that there is a sick leave program and than 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…"[199] [emphasis added]

[196] Arbitrator Ernest E. Marlatt, Case No. S4C-3E-D 52589, February 24, 1989.

[197] Arbitrator Sylvester Garrett, Case No. NC-NAT 16285, November 19, 1979, p. 15. See also, Arbitrator William J. LeWinter, Case No. E1C-2B-D 7911, October 11, 1983; Arbitrator Carl C. Bosland, Case No. E00C-1E-D 04015789, September 21, 2004; Arbitrator Carl C. Bosland, Case No. E00C-1E-D 05112065, October 24, 2005; and Arbitrator Diane Dunham Massey, Case No. E00C-4E-D 06029506, November 5, 2006.

[198] Arbitrator Robert W. Foster, Case No. S7C-3B-D 29170, November 12, 1990.

[199] Arbitrator Howard G. Gamser, Case No. AC-N 14034, February 9, 1978, pp. 10-11.

Attendance statistics alone generally are insufficient to establish just cause to remove an employee. Instead of rigidly and mechanically relying upon numbers, management is required to explore the reasons for the absences which form the basis for the disciplinary action.[200] Even when not FMLA protected, serious conditions such as pregnancy, automobile accidents, or chemical dependency, must be given appropriate consideration.[201]

PROBATIONARY REMOVALS

Clearly, the Employer has an absolute right to terminate probationary employees. In ELM 365.32, the parties have set out the specific procedures by which such terminations may be accomplished. Under Article 12, where the Employer properly terminates a probationary employee in accordance with these procedures, neither the terminated employee, nor the Union, has access to the grievance procedure to challenge that action.[202] A more difficult question arises, however, when the Employer seeks to terminate a probationary employee but fails to do so within the parameters spelled out in ELM 365.32. While numerous Regional Arbitrators, had recognized that when this occurs, the terminated employee may not be denied access to the grievance procedure to challenge his/her removal **National Arbitrator Das** has now made it very clear that:

> "1. Article 12.1.A denies a probationary employee access to the grievance procedure to challenge his or her separation on the grounds of alleged noncompliance with the procedures in Section 365.32 of the ELM.
>
> "2. A dispute as to whether or not the Postal Service's action separating the employee occurred during his

[200] Arbitrator Seymour X. Alsher, Case Nos. S7C-3D-D 27984/28925, September 21, 1990. See also, Arbitrator Robert W. McAllister, Case No. C4T-4M-D 38412, May 13, 1988; Arbitrator J. Earl Williams, Case No. S4C-3E-D 57479, June 20, 1988; Arbitrator Robert W. Foster, Case No. S7C-3B-D 29170, November 12, 1990; Arbitrator Harvey A. Nathan, Case No. C0C-4D-C 417, December 5, 1991; and Arbitrator Carl C. Bosland, Case No. E00C-1E-D 05112065, October 24, 2005.

Management may not establish a numerical attendance standard, See Step 4 Decision, A8NA-0840, January 5, 1981. See also, JCIM Article 10, p. 3.

[201] Arbitrator Gerald Cohen, Case No. C1C-4B-D 10052, June 22, 1983.

[202] See National Awards by Arbitrator Nicholas H. Zumas, Case No. H1C-5L-C 25010, September 19, 1985; Arbitrator Nicholas H. Zumas, Case No. H1C-4C-C 27351/27352, September 23, 1985; and,. Arbitrator Shyam Das, Case No. Q98C-4Q-C 99251456, September 10, 2001.

or her probationary period is arbitrable because that is a precondition to the applicability of Article12.1.A."[203]

Where the employee was not served with written notice within the required time frames, Regional Arbitrators have regularly found the Employer's attempts at probationary separation to be ineffective, determined that the employee properly had access to the grievance procedure and, ultimately reinstated the affected employee. For instance, see **Arbitrator Caraway**, reviewing a situation where the employee was told verbally by his immediate Supervisor on November 7, 1979 (89th day) that he was being terminated and would receive documentation to that effect. The separation letter was signed by yet another supervisor and placed in the grievant's mailbox at his residence on November 8, 1979 at approximately 12:10 p.m. It was unclear whether the actual letter was left or only a notification slip for a certified mail piece. It was established that the grievant began tour at 2100 and ended tour at 5:30 a.m., meaning that his 90th day of probation ended at 5:30 a.m. on November 8, 1979. The Arbitrator commented:

"Section 365.325 of the Employee and Labor Relations Manual states that Supervisors may recommend the separation of a probationary employee. But the decision must' be vested in the official having authority to effect the separation. The evidence in the instant case shows that Supervisors Franklin and Burton advised Mr. Scherber of his separation on November 7, 1979. The highest ranking supervisor on the floor was Mr. Casaneuva. But Mr. Scherber' s request to see him was denied. No plausible explanation was given for the denial. Mr. Casaneuva's superior was Mr. Hyde, the Manager of Mail Processing. He did not make the decision to separate Mr. Scherber. ...The conclusion is that *the Postal Service violated Section 365.325 by failing to have the properly authorized official effect Mr. Scherber's separation.*

…

"Separating an employee from the Postal Service must be accomplished so as to comply with the applicable sections of the Employee and Labor Relations Manual. This was not done in the instant case."[204] [emphasis added]

Similarly, where the employee was orally terminated on about the 85th day of his probation and on the 92nd day, grievant received through the regular mail in a 'Penalty' envelope a letter without a postmark or without being sent accountable, informing him of his removal, **Arbitrator Stephens** concluded:

"This case raises questions concerning the concept of due process. Specifically we are concerned with the process of separating a probationary employee from the service. The contract only gives management the right to separate a probationary employee at any time during the probationary period. The contract does not

[203] Arbitrator Shyam Das, Case No. Q98C-4Q-C 99251456, September 10, 2001, p. 23.

[204] Arbitrator John F. Caraway, Case No. S8C-3W-D 10375/76, July 25, 1980, pp. 7-9.

specify what type of notification must be given to the employee, with the exception of an intention to separate because of a (scheme failure), at which time the employee must be given a seven days advance notice and allowed to try to qualify during that notice period.

"Since the contract is silent on the type of notification, one must use either common industrial relations practices, or policies and procedures set forth by management for the officials to follow. The union contends that the Employee and Labor Relations Manual contains specific requirements which must be met to effect the termination of a probationary employee. These in brief require that the supervisor recommend termination and the appointing official or officer with the power of removal to notify the probationary employee of his or her separation before the end of the probationary period... Therefore, it appears only reasonable to expect that management follow its own rules and procedures.

…

"There is a dispute as to what Mr. Bazonne told Mr. Alexander during the May31 meeting. It may be that Mr. Alexander was told that Mr. Bazonne was recommending his removal from the service. However, even assuming arguendo, that this occurred, this in itself would not be sufficient to satisfy the requirement set forth in the Employee and Labor Relations Manual. The form 1750 itself states that the supervisor s recommendation is only that--a recommendation. The manual states that *the actual decision must be made by an officer who has such authority. This is not unreasonable* and is often practiced even in the private sector. Therefore, the arbitrator believes that *this procedure must be followed to effect a separation of a probationary employee.*

…

"It appears from the evidence presented that the termination letter was not received until June 7. Since there was no postmark indicating when it was actually mailed, the arbitrator must conclude that the receipt of the notification did not meet the requirements of the Employee and Labor Relations Manual Section 365.327 which states that this notice must be given to the employee before the end of the probationary or trial period. *Since separation **is** so serious, the arbitrator believes that it is not unreasonable to require the Postal Service to comply with the strict requirements pertaining to this procedure for removal.*"[205] [emphasis added]

In still another case, the employee was advised on October 26th not to report for duty but was not advised orally or otherwise at that time that he was terminated. By letter dated November 3rd (90th day of probation) the grievant was notified that he was being terminated for having failed to meet the requirements of his position. The following day, November 4, 1983, grievant was sent a second letter amending the November 3, 1983 letter. Grievant did not receive these letters until November 15, 1983. Noting that nothing in Article 12, itself, requires written notification of the termination of a probationary employer, **Arbitrator Zumas** pointed, however, to ELM 365.326 and .327, saying:

"It is clear from the evidence of record that Grievant was not notified, in writing or otherwise, of his separation prior to the end of the probationary period as is required by Parts 365.326 and 327…"[206]

[205]Arbitrator Elvis C. Stephens, Case No. S8N-3W-D 19488, March 10, 1981, pp. 4-6. See also Arbitrator John F. Caraway, Case No. S8N-3W-D 31820, October 26, 1981, pp. 6-8.

[206]Arbitrator Nicholas H. Zumas. Case No. N1C-1E-D 27209, January 2, 1985, p. 4. For other cases with similar holdings, see, for instance, Arbitrator Bernard Cushman, Case No. E4C-2M-D 36879, October 16, 1987; Arbitrator John C. Fletcher, Case No. C0C-4G-D 2081, April 13, 1992; Arbitrator Edwin H. Benn, Case No. I90C-1I-D 94046281, December 15, 1994; Arbitrator Robert W. McAllister, Case No.

DISCIPLINE TRACKING

Earlier we discussed the necessity of progressive discipline. In most disciplinary letters the Employer will include a section on prior discipline which has been considered in determining the level of discipline imposed in this instance. Article 16, Section 10 provides the contractual guidelines for retention and consideration of prior discipline:

> **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.
>
> Upon the employee's written request, any disciplinary notice or decision letter will be removed from the employee's official personnel folder after two years if there has been no disciplinary action initiated against the employee in that two-year period.

It should be noted that whenever we reduce the "life" of a discipline during the grievance procedure we are actually modifying or shortening this Article 16.10 retention period. Once the disciplinary life has expired, neither the original discipline nor the settlement should be considered by management as part of imposing any subsequent discipline.[207]

"Request copies of each cited disciplinary action."

Not surprisingly, management is constantly making errors in the discipline they cite as having been considered in determining the appropriate level of discipline. The conscientious steward should carefully review each cited record. Request copies of each cited disciplinary action from the immediate supervisor. If these actions were "considered" then certainly the supervisor must have them available. Thoroughly review the Union's records for prior grievances and settlements involving each of the cited actions.

Has management, for instance, cited a Letter of Warning which was previously removed during

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I90C-4I-C 94001193, December 28, 1994.; and Arbitrator Claude D. Ames, F90N-4F-D 96005943, January 10, 1997.

[207]See Arbitrator Jerry A. Fullmer, Case No. C90C-1C-D 96006935, November 20, 1996.

the grievance procedure? Have they relied upon a seven day suspension which was actually reduced to a four day suspension? Is the supervisor still retaining copies of the original unmodified discipline letters? Each of these occurrences could be violation. In 1988 the parties agreed at Step 4:

> "1. All records of totally overturned disciplinary actions will be removed from the supervisor's personnel records as well as from the employee's Official Personnel Folder.
>
> 2. If a disciplinary action has been modified, the original action may be modified by pen and ink changes so as to obscure the original disciplinary action in the employee's Official Personnel Folder and supervisor's personnel records, or the original action may be deleted from the records and the discipline record reissued as modified.
>
> 3. In the past element listings in disciplinary actions, only the final action resulting from a modified disciplinary action will be included, except when modified is the result of a 'last chance' settlement, or if discipline is to be reduced to a lesser penalty after an intervening period of time and/or certain conditions are met."[208]

In reducing a Notice of Removal to a 14 day suspension, **Arbitrator Marx** discussed this requirement in a 1989 award:

> "It is well understood that the citation of past disciplinary elements has nothing to do with whether or not an employee is guilty of the charges in the current disciplinary action. The sole purpose of such citation is, of course, to help justify the severity of penalty for current charges. Thus, previous seven-day and 14-day suspensions may lay the proper foundation for the penalty of removal. especially where all the disciplinary action concerns the same type of offense. On the other hand, absence of past elements may well justify a more modest penalty for the same current charges.
>
> "The problem here is that the record clearly shows that both past elements as to suspensions were inaccurately cited. The November 1, 1984 seven-calendar-day suspension was reduced to a three-working-day suspension on December 4, 1985, as part of a pre-arbitration settlement between the Postal Service and the Union. The July 23, 1985 14-day suspension was reduced to a ten-day suspension on April 27, 1986 as the result of an arbitration award.
>
> "The Arbitrator must emphatically point out that the Postal Service is at grave fault in failing to adjust Bethke's records to reflect these changes. It is totally improper to continue to refer to originally imposed penalties when they have been modified. The affected employee is not only entitled to the agreed-upon or arbitrated penalty modification but also to be assured that records will be promptly adjusted to reflect such action."[209]

It is no defense for the Employer to argue that they cited the expunged discipline in good faith and just made an innocent error. The employee's due process rights have been violated whether the

[208]Step 4 Settlement, Case No. H7C-NA-21, H4C-5R-C 43882, August 17, 1988. See also, MOU, USPS/NRLCA, March 1, 1989.

[209]Arbitrator Herbert L. Marx, Jr., Case No. N4C-1J-D 21896, April 20, 1989, pp. 6-7. See also, Arbitrator Linda DiLeone Klein, Case No. J90C-1J-D 94013794, August 9, 1994; Arbitrator Patrick Hardin, Case No. S4M-3A-D 63529, December 12, 1988; Arbitrator J. Reese Johnston, Jr., Case No. S7C-3E-D 23204, February 19, 1990; Arbitrator Jerry A. Fullmer, Case No. J98C-1J-D 01172449, January 14, 2003; Arbitrator Frances Asher Penn, Case No. J98C-1J-D 02016548, January 24, 2003; or Arbitrator Jerry A. Fullmer, Case No. C00C-4C-D 05017281, April 26, 2005.

supervisor acted in bad faith or innocently. In reinstating an employee who had been removed **Arbitrator Howard** explained it this way:

> "It is unnecessary to determine whether the offense of the grievant standing alone would merit removal action, for the record is clear that from the outset the Service based its actions on the grievant's prior disciplinary record as much as on the incident of May 6, 1989…It is equally clear that the Service based its removal on invalid elements of the grievant's record, most particularly a prior removal which the parties agreed to expunge from his record, a prior letter of warning which the parties had agreed to expunge after one year but was belatedly cited by the Service, and a fourteen (14) day suspension reduced to four (4) days which was agreed to be removed in six (6) months under certain conditions, and which the Service failed to do.
>
> "While the Service argues that these elements were considered in good faith, the fact is that they were no less invalid because of such considerations, and employees could be equally injured under the Agreement by improper decisions made in good faith as improper decisions conceived in bad faith. Moreover, any consideration given to the good faith argument would set up a structure of incentives which would reward improper record keeping on the part of the Service…"[210]

Many times the supervisor will not cite an expired discipline in the disciplinary notice itself as having been relied upon. However, during the grievance procedure or MSPB process the issuing supervisor or Step 2 designee will bring it up as the basis why the grievant "should have known better" or for not settling a grievance. Such use is just as improper as actually citing it in the discipline itself.[211]

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[210] Arbitrator Wayne E. Howard, Case No. E7M-2A-D 24493, October 10, 1990, pp. 6-7.

[211] See, for instance, Arbitrator John C. Fletcher, Case No. I94C-4I-D 96041913, December 24, 1996, at pp. 10-11:

> "The final point to be addressed, and perhaps the most important point, concerns Management's consideration of Grievant's earlier discipline record. In this regard the decision letter is enlightening. It is the 'smoking gun' on Management's attitude in this matter. The first paragraph of Article 16, Section 10 provides:
>
> > The record of disciplinary action against an employee shall not be considered if there has been no disciplinary action initiated against the employee for a period of two years.
>
> "It is patently obvious that Management ignored the National Agreement and considered stale discipline when it decided to remove Grievant. The fourth paragraph of the decision letter...makes this conclusion inescapable. Grievant had no discipline since 1990, nearly six years before the date of the removal notice. The National Agreement clearly states that discipline over two years old cannot be relied upon if there is no subsequent discipline involved in the two year period. This clearly stated provision of the National Agreement was ignored. In this case, in its zeal to separate Grievant, for whatever their reason, Management relied on two earlier attendance deficiency disciplines and one 'conduct deficiency' discipline, whatever that may have been. Management's mind set to ignore the National Agreement is a fatal flaw, and requires that the discipline assessed by (sic) rescinded.
>
> "Article 16 says that the purpose of discipline is to be corrective. In hold that discipline assessed over two years earlier is old and stale discipline, the parties to the Agreement have obviously concluded that such stale discipline has been corrective, and that it has served its intended purpose, and had ought not be relied upon (considered) in future discipline situations. It is an affront to the entire process of corrective discipline, to say nothing of being at odds with the National Agreement, when, as here, Management ignores the proscriptions of Article 16 and considers (relies upon) stale discipline to support a removal action..."

See also, Arbitrator John C. Fletcher, Case No. J98C-4J-D 01119593, April 26, 2002; Arbitrator Edwin H. Benn, Case No. I98T-1I-D 00140079/00141361, January 28, 2001; Arbitrator William K. Harvey, Case No. S0C-3E-D 3641, April 20, 1992; Arbitrator George T. Sulzner, Case No. B94C-1B-D 98059698 et al, November 16, 1998; and Arbitrator Michael E. Zobrak,

Alternatively, and equally inappropriately, investigation will reveal that expunged or expired discipline was cited in a discipline proposal requesting review and concurrence.[212] Expired discipline can only be utilized as rebuttal or as impeachment.[213] This means that an employee who testifies that "I have never received discipline" could be impeached with copies of the expired discipline. For all other purposes, discipline letters which have been removed or rescinded should be treated as if they had never been initiated.[214]

Similarly, management will occasionally cite discipline which is still live in the grievance procedure. This, too, is improper. As National **Arbitrator Fasser** noted many years ago:

> "The Union is correct when it contends that the Postal Service improperly relied on a disciplinary action that was scheduled to be heard in Arbitration. Until that appeal is finally adjudicated, it has not standing in this proceeding."[215]

Since the **Fasser** award is a national decision[216] it is particularly compelling and it should be cited as controlling. Regional arbitrators concur. As **Arbitrator Levak** said in reaching the same

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Case No. E7C-2L-D 44052, November 15, 1991. .For another case, where the immediate supervisor referenced expunged discipline during Step 1 discussions and the Employer's deciding official in the MSPB decision process acknowledged having done so as well, see, Arbitrator Linda DiLeone Klein, Case No. E00C-1E-D 03202949, July 8, 2004. Or, see, Arbitrator John C. Fletcher, Case No. E00C-1E-D 04135836/04135869, December 9, 2004, where the immediate supervisor acknowledged at arbitration having considered not only expunged discipline, but also discipline which "had never actually been issued." For a contrary point of view, distinguishing between consideration of "prior discipline" and prior "conduct," see Arbitrator Jerry A. Fullmer, Case No. C00C-4C-D 04059142, October 4, 2004.

[212] Arbitrator Hamah R. King, G00T-4G-D 05101478, December 8, 2005.

[213]Step 4 Settlement, Case No. H4T-5D-D 15115, September 7, 1993.

[214]Step 4 Settlement, Case No. H4N-5G-D 7167, January 5, 1989. See also, Arbitrator Margo R. Newman, Case No. C7C-4M-D 31234, October 15, 1991, pp. 16-17:

> "Since the Penn arbitration award 'fully rescinded' the September 1989 Notice of Removal, such discipline may not be counted as 'initiated' against grievant for purposes of the 2 year provision of Article 16, Section 10. Since no discipline was technically initiated against grievant in the year period during which the Step 1 Settlement was effective, the Union's argument that the condition of 'no further discipline pending' has been met is meritorious, and requires removal of any reference to the February 1989 ten day suspension from grievant's records under the terms of such settlement. Once this accomplished, all prior discipline cited in the December 1990 Notice of Removal becomes 'stale' and may not be considered by management in imposing discipline under the terms of Article 16, Section 10."

[215]Arbitrator Paul J. Fasser, Jr., Case No. MC-S-0874-D, June 18, 1977, p. 7.

[216] See also, National Arbitrator Carlton J. Snow, in Case No. E94N-4E-D 96075418, April 19, 1999, where the issue was postponement of an arbitration hearing for a removal until adjudication of grievances on prior discipline, at p. 16:

> "That the parties have a past practice of giving unresolved grievances no standing in removal hearings fails to be dispositive in the case. Weight actually given evidence by an arbitrator says nothing at all about valid grounds for postponing a hearing. In fact, because an unresolved grievance can have no impact on a removal arbitration hearing, postponement becomes all the more important."

conclusion:

> "The principle established by Arbitrator Fasser could not be clearer. Until the adjudication of the Grievant's fourteen-day suspension, the Service's action had no standing in the proceeding before the Arbitrator."[217]

The Employer undoubtedly will point to the United States Supreme Court decision in USPS v. Gregory, 534 US 1 (2001) as authority for the propriety of citing non-adjudicated discipline. It should be noted, however, that the Court's decision was narrowly limited to the application of the *Civil Service Reform Act of 1978,* 5 U.S.C. 101 et seq., to appeals within the parameters of the Merit Systems Protection Board. The Court had no standing to address contractual issues since the appellant had waived access to the grievance procedure by appealing to MSPB. Justice Ginsburg addressed this fact in her concurring opinion, saying:

> "Gregory, moreover, elected to resort to the MSPB '[a]t the advice of her then-counsel.' …She could have asked her union to challenge her dismissal before an arbitrator. Had she and her union opted for arbitration rather than MSPB review of the dismissal, she might have fared better, it appears that a labor arbitrator, in determining the reasonableness of a penalty, would have accorded no weight to prior discipline grieved but not yet resolved by a completed arbitration…Gregory, having at her own option foregone arbitration proceedings, in which prior discipline could not weigh against her while grievances were underway, is not comfortably situated to complain that the procedure she elected employed a different rule."[218]

Arbitrator Peckler's analysis of USPS v. Gregory, is thorough but concise and directly on point. The Arbitrator dismissed the Employer's argument that the Supreme Court decision now permitted the Employer to rely upon non-adjudicated discipline, saying:

> "My close scrutiny of the decision convinces me that it is limited in scope and application to proceedings before the Merit Systems Protection Board. This decision and indeed the Civil Service Reform Act of 1978 as cited, provide for parallel proceedings *either* before the Board or in grievance arbitration. Notice is also taken that the Board utilizes a diminished quantum of proof of 'preponderance of the credible evidence,' when arbitrators consistently apply an enhanced burden in discharge cases. The MSPB may also 'reopen' a

[217] Arbitrator Thomas F. Levak, Case No. W8C-5D-D 4441, October 26, 1982, p. 13. See also, Arbitrator Gerald Cohen, Case No. C4C-4F-D 7801, January 24, 1986; Arbitrator Dennis R. Nolan, Case No. S4N-3A-D 37169, March 6, 1987; Arbitrator Daniel G. Collins, Case No. N4T-1A-D 29222, September 25, 1987; Arbitrator Bernard Cushman, Case No. E7C-2A-D 36112, September 6, 1991; Arbitrator Albert A. Epstein, Case No. C7M-4Q-D 20402, April 4, 1990; Arbitrator Joseph A. Sickles, Case No. D90N-4D-D 95076768, March 20, 1986; Arbitrator M. David Vaughn, Case K00C-1K-D 03112078, September 27, 2003, or, Arbitrator John Remington, Case No. I98C-4I-D 01070735, July 29, 2001, at p. 7:

> "The Employer's decision to reference a Seven-Day Suspension currently being contested in the grievance procedure is also troubling. Not only does including this disciplinary action in the Letter of Removal appear to violate the requirements of Arbitrator Fasser's National Level Award issued in 1977, but it also raises serious questions about the Employer's good faith commitment to resolve the grievance challenging this suspension through the grievance procedure."

[218] United States Postal Service v. Gregory, 534 U.S. 1 (2001), *Justice Ginsburg, concurring,* pp. 17-18.

case in the event that a favorable arbitral ruling on a prior element is achieved. Additional evidence for these propositions is also found in the concurring opinions of Justices Thomas and Ginsburg.

. . .

"Based upon the foregoing, a finding is made that the prior element related to the unadjudicated 14 day attendance-related suspension may not be considered in determining whether there was just cause for the instant removal…

. . .

"I agree with the Union, that because the prior elements were listed on the NOR, the Postal Service should be foreclosed from arguing that they are of no moment. As the drafter of the NOR, any irregularities therein should be strictly construed against Management. Parenthetically, I have previously ruled that the unadjudicated 14-day suspension was improperly cited. This alone provides a fatal impediment to the removal."[219]

However, some arbitrators will yield to the inclination to make their determination dependent on the result of the arbitration of those prior disciplinary actions. In one award, **Arbitrator Zobrak** considered a Notice of Removal which cited two previous suspensions which had both been grieved but not yet arbitrated at the time the removal was issued. These suspensions were subsequently reduced by other arbitrators. **Arbitrator Zobrak** said:

"In reaching a determination to remove the Grievant, the Postal Service considered elements of his record. Among those elements considered were two disciplinary actions which had been grieved, but which had not been heard in arbitration at the time of the instant hearing. The Parties agreed that the prior grievances had to be determined before finding could be made on the removal. Those two grievances were sent to arbitration by another arbitrator. He determined to reduce the seven (7) day suspension to three (3) days and the fourteen (14) day suspension to seven (7) days.

"Had the arbitrator denied the two grievances, there can be no doubt but that the Grievant's removal would have been sustained. When the arbitrator modified the discipline in the two prior disciplinary grievances, the elements which were considered in making the determination to remove the Grievant were altered. That modification brought about through the arbitrator's two awards, requires a review of the grounds used to justify the removal of the Grievant.

"...The use of progressive discipline, which is appropriate for attendance-related matters, should include a maximum suspension of fourteen (14) days before a removal can be justified. Since the prior fourteen (14) day suspension was not sustained in the most recent arbitration awards, the removal cannot stand."[220]

[219] Arbitrator Michael J. Pecklers, Case No. A98C-1A-D 00161781, July 27, 2002, pp. 6-16.

[220]Arbitrator Michael E. Zobrak, Case No. D90C-1D-D 94011067, November 21, 1994, pp. 9-11. Reaching similar results were Arbitrator Jerry A. Fullmer, Case No. C00C-4C-D 02067077, October 30, 2002; and Arbitrator Margo R. Newman, Case No. C00C-1C-D 03176770, November 19, 2004. See, also, for instance, Arbitrator Edwin H. Benn, Case No. J94C-4J-D 96070791, December 19, 1996, where the arbitrator made the award "contingent upon the outcome of the proceedings on the 14 day suspensions."

RELIANCE ON HEARSAY EVIDENCE

Always remembering that the burden of proving the just cause of an imposed discipline is on the Employer, we should carefully examine the quality of management's proffered evidence. Has the Employer supplied direct, eyewitness, or circumstantial evidence or is the Supervisor relying upon generally unreliable hearsay evidence? **Arbitrator Snow**, for instance, provides an excellent analysis of hearsay evidence:

> "Scrutiny of the facts in this case makes clear that the Employer relied strongly on hearsay evidence to establish just cause for the grievant's removal. The arbitrator received neither eyewitness or circumstantial evidence to established the grievant's alleged misconduct. Because the case can be understood on the basis of evidentiary principles, it is not necessary to address procedural violations allegedly committed by management.
>
> "What is hearsay? Hearsay evidence has been defined as 'testimony in courts, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein.' (See McCormack, Evidence, 582 (1972). Hearsay evidence is a statement made outside the arbitration hearing which is offered at the hearing to establish the truth of the assertion that it contains. The hearsay evidence rule exists because hearsay evidence prevents the great tester of evidence in the Anglo-American legal system from being used, namely, cross-examination cannot occur; and there has been a distrust in democratic countries of untested evidence. There generally is a desire to subject statements made outside the arbitration hearing room to cross-examination at the hearing in order to test a person's sincerity, perception, memory, and narration of the facts. One purpose of cross-examination would be to test whether or not the speaker had any incentive to fabricate.
>
> ***"As a general rule in arbitration, hearsay evidence has been suspect..."***
>
> "As a general rule in arbitration, hearsay evidence has been suspect. ...Arbitrators generally have found a reliance on hearsay evidence as being inconsistent with a fair hearing."[221]

In an earlier NALC award **Arbitrator Seidman** discussed the admissibility and weight of hearsay evidence with these thoughtful comments:

> "…The only evidence the Service offered was the Investigative Memorandum of the Postal Inspector which was hearsay itself, and the testimony of the Postal Inspector, which was double hearsay, since he had no personal knowledge of anything he testified to with respect to the finding of the third class mail in the dumpster since he merely repeated what he was told by another.

[221] Arbitrator Carlton J. Snow, Case No. W7C-5F-D 27273, September 26, 1991, pp. 16-17. See, also, Arbitrator Margo R. Newman, Case No. C98C-1C-D 01138226, February 2, 2003.

"While this hearsay upon hearsay is admissible, since the normal rules of evidence are not applicable in arbitration proceedings, nevertheless the fact and degree of hearsay must be considered in giving weight to the evidence and testimony that has been received…"[222]

Similarly, see **Arbitrator Cushman**, who offered this analysis of the weight of hearsay evidence:

"There is room under Article 16 Section 7 for the exercise of managerial prudence in the face of threats of violence. However, to act upon a hearsay report with no attempt to interview the employee who allegedly reported the statement is not to act prudently. Where it also turns out that there is no probative evidence that any such threat was made, the suspension may not stand.

"The conversion of the emergency suspension to a long term disciplinary suspension likewise may not stand. Indeed not one of the persons whose statements were contained in the Investigative Memorandum testified. Nor did Inspector Carroll who prepared the Investigative Memorandum testify. There was no significant probative evidence to support the long term suspension."[223]

RELIANCE ON EVIDENCE GATHERED AFTER THE DISCIPLINE

The Employer bears the burden of proof in all discipline grievances. In supporting their decision to impose discipline, management may only rely upon information at hand at the time the decision to impose discipline was reached. While an ongoing investigation may subsequently uncover more evidence or the original or additional charges, such evidence should not be considered since it was not available to (or considered by) the supervisor at the time he or she decided to issue discipline. This general arbitral principle has been reaffirmed by the U.S. Supreme Court[224] and many arbitrators.[225] **Arbitrator McAllister**, for instance, said:

"[M]anagement may only rely upon information at hand at the time the decision to impose discipline was reached..."

"The Union correctly objected to the use of evidence gathered after the Notice of Proposed Removal. As I stated at the hearing, if just cause exists, it must relate to the reasons supporting the decision to remove the

[222] Arbitrator Marshall J. Seidman, Case No. C1N-4K-D 6972, August 24, 1982, p. 10.

[223] Arbitrator Bernard Cushman, Case No. E0C-2C-D 5497, November 16, 1992, p. 11.

[224] Paperworkers v. Misco, Inc., 484 U.S. 29, December 1, 1987.

[225] See, for instance, *How Arbitration Works*, Elkouri & Elkouri (6th Edition), pp. 977-980, and *Fairweather's Practice and Procedure in Labor Arbitration*, (3rd Edition), pp. 259-262.

Grievant."[226]

Similarly, as explained by the highly regarded **Arbitrator Snow** in this 1990 decision:

> "Arbitrators long have followed a rule of reasonableness which requires that a removal decision be tested within the context of evidence available to management at the time it made its decision. As a general rule, subsequently discovered evidence that was available at the time of the removal decision cannot be used as the basis for justifying an earlier decision."[227]

Or, see these thoughts from the highly regarded **Arbitrator Cushman**, in a 1988 award, explaining:

> "At the outset, it should be stated that evidence as to the propriety of the emergency procedure and the removal must be confined to the evidence of matters which preceded such events. Arbitrators have held that discharge 'must stand or fall upon the reason given at the time of discharge.' …The facts considered by an employer at the time of discharge are the relevant considerations."[228]

Similarly, see **Arbitrator Hardin** in a 1994 case, explaining his rationale for excluding testimony of two witnesses who claimed to have heard the grievant "confessing" to elements of the alleged misconduct subsequent to the issuance of the discipline. The Arbitrator said:

> "There are two other reasons for excluding the evidence. First, neither of the items had been known to Mss. Waites and Wiedman when they decided to remove Ms. Meade and, therefore, could not possibly have been included among the bases for their decisions. Indeed, Kosakowski did not include in his IM any reference at all to the purported admission by Meade concerning the February 15 restaurant meal. Nor did he include any reference to the meal itself, even though it was the fourth of four charges run up by Geffner that day using the stolen card. The U.S. Supreme Court has approved the settled principle that in arbitration of discipline disputes, Management may not bolster the original reasons for its decision by additional reasons based on after-acquired evidence."[229] [emphasis added]

The Employer, likewise, may not rely upon additional charges discovered after the issuance of discipline. **Arbitrator Flectcher** explained this principle this way:

> "The notice or removal is what is before the Arbitrator. Under well established tenets of just cause our review is limited to the evidence on the elements of alleged misconduct dealt with in the notice or removal. We are not privileged to consider matters that are not dealt with in the removal notice as they are not evidence pertaining to the specific allegations triggering removal. We are not privileged to consider elements of alleged misconduct occurring before the removal notice was issued if they are not relied on in the notice. Also, we are not privileged to consider alleged elements of misconduct that occurred after the removal notice was issued, as they are not evidence pertaining to the allegations relied on for removal. While the notice of removal is not akin to a criminal bill of indictment, it

[226]Arbitrator Robert W. McAllister, Case No. C7C-4U-D 7840, March 29, 1989, p. 7. See also, Arbitrator Jerry A. Fullmer, Case No. C00C-1C-D 02215246, January 29, 2003, pp. 9-10.

[227] Arbitrator Carlton J. Snow, Case No. W7N-5D-D 18820, September 12, 1990, p. 16.

[228] Arbitrator Bernard Cushman, Case No. E4C-2E-D 45043 / 46876, December 22, 1988, pp. 15-16. See also, Arbitrator Bernard Cushman, Case No. E7C-2D-D 21267 / 21726, March 14, 1990, p. 18.

[229]Arbitrator Patrick Hardin, Case No. H90C-1H-D 94018630, December 30, 1994, pp. 21-22.

nonetheless is all that a charged employee is required to answer. Attempting to prove misconduct with allegations going beyond that what is contained in the notice or removal is a breach of due process."[230]

THE ENTRAPMENT DEFENSE

The entrapment defense is borrowed from the legal system and will usually be applicable where the accused has been charged with a criminal offense. It has most recently become a particularly popular defense where the Postal Inspection Service has used confidential informants to entice otherwise law abiding employees into drug sales. In arguing entrapment, the accused concedes the crime but maintains innocence because he or she was not predisposed to criminal activity but was rather entrapped into it. Generally, a guilty plea in court[231] will eliminate an entrapment defense in arbitration.

Arbitrator Loeb, for instance, in a case involving the sale of marijuana on Postal Service property, found the conduct of the confidential informant and the Inspection Service to be a violation of the grievant's constitutional rights as interpreted by the Supreme Court.

> "[The] Supreme Court in Jacobson v. United States, 112 Sup. Ct. 1535 (1992) reaffirmed the validity of the entrapment defense by holding that:
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> > 'In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce the commission of the crime so that the Government may prosecute. Sorrell, supra, at 442; Sherman, supra, at 372. Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government Agents. United States v. Whoie, 288 U.S. App. D.C. 261, 263-264, 925 F.2d 1481, 1483-1484 (1991).'
>
> "[The Government] would have to have a reasonable suspicion of criminal activity before it begins an investigation, not when it suggests the crime. In simple terms, the Jacobsen court appears to have prohibited the very type of random investigation the Inspection Service conducted at the Southern Maryland GMF. ...[T]here is something reprehensible about a government randomly testing its citizens, especially where the test is conducted by someone with years of sophistication and experience and whose

[230] Arbitrator John C. Fletcher, Case No. I98T-1I-D 99281025, March 24, 2001, pp. 27-28.

[231] While this is a general rule, where the "plea" occurs subsequent to the disciplinary action it may be barred as "after-acquired" evidence not relied upon at the time the original disciplinary action was undertaken. See "Reliance on Evidence Gathered After the Discipline" at pages 84-85, above.

livelihood depends upon the ability to deliver defendants for prosecution. ...

"Given the events in this case, the undersigned must conclude that the Service entrapped the Grievant. Therefore, it did not have just cause to discharge him. ...The Grievant is to be reinstated without loss of seniority or other benefits and is awarded back pay..."[232]

The burden is properly on the Employer to establish that the grievant intended or was predisposed to commit the crime involved. As **Arbitrator Cushman** explained:

"The central issue is whether there was entrapment of the Grievant by the Postal Service. In the leading case of Sorrells v. United States, 287 U.S. 435, the Court held that the entrapment defense centered upon the intent or predisposition of the accused to commit the crime. The general rule in federal courts may fairly be stated to be that when the criminal intent originates in the mind of the entrapping person and the accused is lured into the commission of the offense charged in order to prosecute him, no conviction may be had…The test, therefore, is subjective, namely, whether there was or was not a predisposition on the part of the grievant to commit the criminal act…The standard or proof in a proceeding of this kind is, in the opinion of the Arbitrator, one of clear and convincing evidence. The uncorroborated testimony of Stellato, an informant, standing alone, may fairly be said to be insufficient to meet this standard. Arbitrators have frequently held that the uncorroborated testimony of a single witness is insufficient in the face of the Grievant's denial to meet the employer's burden of proof…In short, the record does not show that the Grievant had a predisposition to engage in the delivery, sale or distribution of cocaine."[233]

DISCIPLINE REISSUED

The Employer clearly may not reimpose discipline after it has been either resolved or adjudicated through the grievance/arbitration procedure.[234] For instance, in a case where a different arbitrator had overturned a removal on procedural issues alone, **Arbitrator Wolf** rejected the Employer's argument that it was entitled to reissue the discipline and get a hearing on the merits of the charges, saying:

"In this case, management has failed to adhere to proper procedures, for which Arbitrator Miles prescribed a remedy. That remedy, which, while not contractual, could hardly have been more clearly articulated, was that the removal action was to be overturned, with the grievant being reinstated and made whole. Most importantly, Arbitrator Miles *sustained the grievance*. The Postal Service was not, either expressly or impliedly, given leave to reinstitute its removal action once it perceives the original due process flaws to have been 'cured.' This matter is finished. The penalty to be paid by the Postal Service is not merely the

[232]Arbitrator Lawrence R. Loeb, Case No. D90T-2D-D 93017986, February 16, 1994, pp. 10-17. See, Jacobson v. United States, 503 U.S. 540, 112 Sup. Ct. 1535, (1992). See also, Arbitrator Carl F. Stoltenberg, Case No. D90T-1D-D 93001963, November 4, 1994.

[233] Arbitrator Bernard Cushman, Case No. E4C-2E-D 45043 / 46876, December 22, 1988, pp. 13-14. See, Sorrells v. United States, 287 U.S. 435 (1932). See also, Arbitrator Bernard Cushman, Case No. E7C-2D-D 21267 / 21726, March 14, 1990.

[234]See, for instance, Arbitrator Nicholas H. Zumas, Case No. DR-31-88, March 20, 1989; or Arbitrator John C. Fletcher, Case No. I98C-1I-D 99195001, November 20, 1999.

payment of back pay, along with a fleeting reinstatement. Rather, the penalty is a waiver of its right forever to pursue the merits *of this particular grievance*."[235]

Where the Employer first removed an employee was issued a Notice of Removal for "Failure to Maintain Accurate Records" after a shortage of some $12,000 in uncollected fees was discovered, and, then after that action was reduced to a suspension at arbitration, both on the merits and on procedural grounds, the Employer issued a new Notice of Removal for "Misappropriation," **Arbitrator Danehy** explained:

> "Double jeopardy 'simply means that a person should not be penalized twice for the same offense.'…It is a due process consideration that has found its way into Arbitration despite the fact that it is a criminal law concept arising under the U.S. Constitution. The critical elements of a double jeopardy defense are that two punishments must be imposed for the same act of wrongdoing…The double jeopardy concept becomes relevant when the disciplinary action is final.
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> . . .
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> "The purpose of the doctrine of res judicata is to prevent the re-litigation of a claim that has been finally litigated in a previous proceeding involving the same parties. This doctrine does not automatically apply in Arbitration. Due to its preclusive effect, its application is limited to cases where the parties, issues and causes of action are identical. The prior decision must have been a final determination on the merits of the case…
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> . . .
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> "…The issuance of the Finston award bars the subsequent removal because the second removal is based on the same factual events. It was simply re-characterized. It involved the same parties and Finston made a judgment on the merits of the events that led to the Grievant's removal finding that discharged was too severe a penalty for failing to maintain proper records…"[236]

The more common occurrence, however, is for the Employer will attempt to correct procedural deficiencies raised by the Union during the Grievance procedure and reissue the discipline. The Service compares this action to what routinely occurs in the legal arena when a prosecuting attorney, becoming aware of a procedural defect in the indictment, withdraws it, cures the defect and reissues the indictment.

Not surprisingly, the Union views the matter in a somewhat different light. At a minimum, the

[235]Arbitrator Steven M. Wolf, Case No. D94C-1D-D 98031246, December 14, 1999, p. 4.

[236] Arbitrator Richard Danehy, Case No. E98C-4E-D 99247313, February 22, 2002, pp. 8-11. See also, Arbitrator J. Reese Johnston, Jr., Case No. H90N-4H-D 95000488, March 20, 1995; Arbitrator Irene Donna Thomas, Case No. A98C-4A-D 00093056/99257671, October 4, 2000; and, Arbitrator Rodney E. Dennis, Case No. H90C-4H-D 95009085, October 25, 1995.

Union sees itself caught on the horns of a dilemma by the Service's actions. On the one hand, the full disclosure requirement of Article 15 requires that the Union put forward all of its arguments and the evidence upon which it intends to rely in support of a grievant at Step 2 of the grievance procedure. If it does not, it risks having an arbitrator prohibit the introduction of the evidence and argument at arbitration. On the other hand, the Union is concerned about becoming a tool for management because the Service, after reviewing the Union's Step 2 arguments, could rescind the discipline, correct whatever procedural defects that may exist and then reissue it, effectively robbing the Union of its ability to represent its membership.

Review of arbitral precedent establishes that the Employer clearly may rescind any disciplinary action without penalty so long as it does so before a grievance has been filed.[237] The general rule among arbitrators[238], however, is that once the Service rescinds a disciplinary action based upon issues raised in the grievance procedure, it cannot subsequently issue a second discipline based upon the same set of facts which led it to move against the employee in the first place. While there is some disagreement among arbitrators as to whether *res judicata* or double jeopardy controls in such circumstances, they are in agreement as to the impact of the Service's actions. Citing double jeopardy for instance, was **Arbitrator Rimmel,** in declaring:

> "It is for the same alleged acts of misconduct premised upon the same factual circumstances that grievant was again told on 6 February 1990 he was to be fired. This is so even though the initial action had been rescinded, without reservation, by Management following the filing and processing of a grievance challenging that action. This clearly, is double jeopardy for Management was attempting to twice fire grievant for the same alleged act of misconduct. This just cannot be allowed to stand and does not support the finality of the grievance settlement objective established under the parties' agreement."[239]

Other arbitrators, on the other hand, take the position that rescission constitutes a resolution of the matter so that any further attempt by the Postal Service to issue discipline based upon the same facts

[237]See, for instance, Arbitrator Lawrence R. Loeb, Case No. C90C-1C-D 94017643, November 15, 1994; Arbitrator Thomas J. Erbs, Case No. J00V-1J-D 0322207, May 27, 2004; or Arbitrator Lawrence R. Loeb, Case No. C94C-4C-D 98021004 et al., December 29, 1998.

[238]For an excellent analysis and review of many of those awards, see Arbitrator Jacquelin F. Drucker, Case No. K98C-1K-D 99127361, May 12, 2000. There are some exceptions. See, for instance, Arbitrator Carl Stoltenberg, Case No. E7C-2P-D 30199, June 3, 1991. Or see, Arbitrator W. Gary Vause, Case No. H90V-1H-D 95063943, June 13, 1996, finding that while re-issuance of a Notice of Removal was "obviously unfair" it was not sufficient "standing alone [to] invalidate" the second Notice of Removal.

[239]Arbitrator James E. Rimmel, Case No. E7T-2P-D 28213, October 12, 1991. Even where the Employer did not rescind the original discipline but simply "modified" it to correct a procedural deficiency raised in the grievance procedure, Arbitrator Carrie G. Donald, Case No. C00C-1C-D 02151301, May 6, 2003, found this to be a serious violation. Where the Employer re-issued an Indefinite Suspension following a grievance settlement, see Arbitrator Gerald Cohen, Case No. C4C-4H-D 5831, February 21, 1986.

constitutes res judicata rather than double jeopardy.[240] There also appears yet a third school of thought, which avoids the philosophical debate between res judicata and double jeopardy. Instead, these arbitrators simply hold that the Service cannot reinstate a disciplinary action once it has rescinded it.[241] The common thread among all of these decisions is that the Employer may rescind and reissue a disciplinary action, but only so long as the parties are not actively involved in trying to resolve the issue through the grievance procedure. This prohibition will probably be effective only so long as the Union has clearly raised the specific procedural defect involved.

DOUBLE JEOPARDY

It is by now a well settled arbitral principle that an employee may not be disciplined twice for the same set of circumstances. This is what is known as "double jeopardy." As **Arbitrator Talmadge** expressed it:

> "It should be explicitly clear at the outset that once the Service assessed a penalty, it does not have the right in the absence of additional facts to increase the severity of the penalty. In a sense, the Grievant was placed in 'double jeopardy' by the Service."[242]

Arbitrator Klein, for instance, addressed a situation where a grievant was issued a Letter of Warning over a shortage and subsequently was issued a Notice of Removal for the same problem. Noting that there was a legitimate question as to whether or not the Letter of Warning had been rescinded, **Arbitrator Klein** said:

[240]See, for instance, Arbitrator Linda DiLeone Klein, Case No. E7C-2A-D 31987, January 23, 1992 and Arbitrator George E. Larney, Case No. C1C-4E-D 14581, December 19, 1984.

[241]See for instance, Arbitrator Lawrence R. Loeb, Case No. C90C-1C-D 94017643, November 15, 1994; or Arbitrator Jerry A. Fullmer, Case No. C90C-1C-D 95062279 et al, April 18, 1996. In an interesting twist of this theme, where the Employer rescinded a "verbal termination of a Transitional Employee after a grievance was filed and then issued a written Removal Notice based upon the same underlying facts, Arbitrator Christopher E. Miles, C00C-1C-D 04021788, June 23, 2005 at p. 15 found that action "unconscionable, unfair, inequitable, and contrary to the spirit and intent of the Agreement."

[242]Arbitrator Arthur Talmadge, Case No. N1C-1K-D 22266, June 27, 1984, p. 3. See also, Arbitrator Michael J. Pecklars, Case No. A98C-1A-D 01146858, June 18, 2002.

"Whether the Letter of Warning for being out of tolerance was rescinded or not, any further discipline for the same shortage is improper and unjust. If the Letter of Warning was not rescinded, then the grievant was disciplined twice for the same infraction. If the Letter of Warning was rescinded, the act of rescission resolved the matter."[243]

Arbitrator Snow provided an excellent analysis of double jeopardy while finding that it was inappropriate for a superior to impose discipline after the grievant's immediate supervisor had given him an official discussion for the same incident:

"The Union has argued that the Employer's contractual commitment to just cause has been violated as a result of exposing the grievant to double jeopardy. In other words, an incident occurred, a supervisor disciplined the grievant as a result of the incident, and there was every indication that this discipline ended the matter. There was no suggestion of a continuing investigation or that the matter would be reviewed for additional discipline. Yet, another manager later imposed discipline for the same incident.

"The principle of double jeopardy has taken deep root in arbitration as a part of just cause. The basic concept is that 'no person shall be twice vexed for and the same cause.' (See, ex parte Lange, 85 U.S. 163, 168 (1873)). A person has right not to be endangered by the same offense more than once. Virtually every state constitution or common-law tradition has recognized the principle of double jeopardy...

"Arbitrators have embraced underlying concepts of the principle of double jeopardy. While recognizing that an employer rightfully may evaluate prior incidents in order to determine an appropriate progressive sanction, once discipline has been imposed in a particular incident, it should not be increased, absent some justification. ...Arbitrators have believed it is unfair to lead an employe to think that a final sanction has been imposed only, later, to learn that the discipline has been increased, based on management's reflection that the original action was too lenient or otherwise inappropriate...

"Supervisor Nguyen issued a verbal warning to the parties to the conflict, and he thought that ended the matter. His supervisor concluded that the discipline was not sufficiently severe and increased the sanction. The totality of the facts in this case support a conclusion that the Employer, in fact, exposed the grievant to double jeopardy and violated his due process rights under the parties' collective bargaining agreement."[244]

While stopping short of saying that the Employer was always precluded from issuing more severe discipline after a job discussion was given for the alleged misconduct, **Arbitrator Fletcher** reached much the same conclusion as **Arbitrator Snow**, saying:

"It is recognized that Article 16, Section 2, discussions are not considered discipline and are not grievable, thus future discipline on any matters dealt with in an Article 16, Section 2 discussion would not technically satisfy the test of double jeopardy. However, the very purpose of Article 16, Section 2, formally making an employee aware of her obligations and responsibilities, is frustrated if subsequently the same items discussed are later relied upon to support a removal action.

"Article 16, Section 2 is designed to cover minor offenses. Management has a responsibility (by specific terms of the Agreement) to discuss such matters with the employee. If a matter is treated as a minor matter

[243]Arbitrator Linda DiLeone Klein, Case No. E7C-2A-D 31987, January 23, 1992, p. 5.

[244]Arbitrator Carlton J. Snow, Case No. W7C-5P-D 17141, January 7, 1991, pp. 19-20.

it had ought not be elevated to a serious matter warranting removal unless additional substantive facts support such a result. ...[N]othing substantively new to that available to the Postmaster at the time of his Article 16, Section 2 discussion was developed by the Inspection Service, except perhaps the production of illegible copies of the cashed money orders.

"The Arbitrator is reluctant to conclude that under the doctrine of double jeopardy, any time an Article 16, Section 2, discussion occurs, the Service is thereafter precluded from pursuing further disciplinary action on any of the subject matters discussed. However, in this case it must be concluded that the formal discussion the Postmaster had with the Grievant on March 9, 1992, foreclosed all future disciplinary action on the matters discussed..."[245]

While the Employer may not increase the severity of the penalty without risking double jeopardy, the supervisor is not necessarily precluded from unilaterally reducing the discipline previously imposed. **Arbitrator Stallworth** discussed this situation in his 1991 case:

"The Arbitrator notes, however, that this provision of the Agreement [Article 15, Section 2(c)], does not specifically prohibit management from reducing the penalty in the grievance procedure. Nor has the Union brought forth any other provision of Articles 15, 16 or any other provision of the Agreement which so limits management's authority.

"...[T]he Agreement contains no express limitation on the right to modify or reduce the penalty.

"The Arbitrator concludes further that the position which the Union is arguing contradicts the intent of the Parties in constructing their grievance procedure. The very purpose and essence of that procedure is to unearth facts which might persuade one side or the other to alter its position and thus, enhance the possibility of 'settlement.'

. . .

"The Arbitrator does not conclude that the Parties intended their Agreement to require the Service to either doggedly pursue a removal action which is subsequently discovered to be flawed, thereby racking up their liability, or to forfeit any right to institute corrective discipline, once an initial mistake has been made. The action of the Service tolled its potential liability, and was intended to serve a purpose that was corrective, not punitive. When an employer in good faith and with a reasonable basis elects to reduce a discipline -- motivated by the purpose to be corrective, rather than punitive -- this is within management's prerogative. ...Of course management's right is subject to the Union's right to grieve the reduced penalty, and argue that no penalty is appropriate."[246]

Since the Article 16, Section 7, Emergency Procedures are not necessarily considered to be a disciplinary suspension, the issuance of subsequent discipline after an Emergency Suspension has not generally resulted in the finding of double jeopardy. However, where the Employer had improperly attempted to place the grievant on an Emergency Placement under Article 16.7, and after determining

[245]Arbitrator John C. Fletcher, Case No. C0C-4M-D 12920, May 1, 1993, pp. 8-9.

[246]Arbitrator Lamont E. Stallworth, Case No. C7C-4B-D 32251, November 7, 1991, pp 11-12. Similarly, see Arbitrator Lamont E. Stallworth, Case No. C7C-4B-D 21976, June 6, 1990. See also, Arbitrator Joseph S. Cannavo, Jr., Case No. A98C-4A-D 992227879, January 23, 2000. On the other hand, see Arbitrator Carl C. Bosland, Case No. E00C-4E-C 06132811, January 10, 1997, finding that the unilateral reduction of a 14 day suspension to a 7 day suspension after the Step 2 meeting was a significant denial of due process.

that the conditions did not satisfy the Emergency Placement requirements, **Arbitrator Rice** concluded that what actually occurred was, in fact, a suspension and that a subsequent suspension then constituted double jeopardy:

> "Did the subsequent decision to suspend the grievant constitute double jeopardy? The arbitrator feels that it did and agrees with the concept as stated by Elkouri and Elkouri in Union Exhibit 2: 'Once discipline for a given offense has been imposed and accepted it cannot thereafter be increased.' To do so would mean that management would be punishing this employee twice for the same alleged misconduct. In this case the Agency knew that the grievant being taken off the clock for four hours was a form of punishment. And, although they subsequently paid him for this four hours of lost wages, it did not negate the fact that he had been previously punished. ...The imposition of the five day suspension, therefore, constituted double jeopardy."[247]

In another case, where the Employer immediately placed the grievant on suspension for fourteen (14) days for reckless driving but failed to indicate that this was an emergency suspension, **Arbitrator Rimmel** found:

> "Clearly, the afore-referenced notice of suspension is ambiguous, an ambiguity that under basic contract principles must be resolved against the draftsman; here, [the] General Supervisor of Vehicle Operations...As such, I believe that I can only rightly conclude that the 8 June 1990 disciplinary action was intended to be a suspension...Accordingly, I find that grievant has been, in fact, disciplined twice for the same alleged offense, an action, in the second instance, that just cannot be rightly allowed to stand."[248]

"[A]n employee may not be disciplined twice for the same set of circumstances..."

Similarly, where the Employer merely omitted the word "Emergency" from the "Emergency Suspension" notice, **Arbitrator Eaton** nonetheless found management's failure to correct the error to create a serious double jeopardy problem, although overturning the removal on other grounds:

> "The double jeopardy argument is a more serious one. In the facts of this dispute, management's version is probably true. Although the word 'emergency' was omitted from the 30-day suspension notice, the language is 'boilerplate' emergency suspension language. Nevertheless, when the error was discovered no attempt was made to rescind and reissue the letter of suspension.
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> "Although not determinative in the facts of this dispute, failure to proceed correctly in such a matter in other circumstances might well carry much greater weight."[249]

[247]Arbitrator Homer W. Rice, Case No. S4C-3D-D 19484, March 17, 1986, p. 5.

[248]Arbitrator James E. Rimmel, Case No. E7V-2U-D 35322, May 11, 1991, pp. 10-11. Similarly, see also, Arbitrator Janice S. Irvine, Case No. F94C-1F-D 96020922, November 4, 1997.

[249]Arbitrator William Eaton, Case No. W1C-5G-D 9333, May 31, 1983, p. 17.

PAPER SUSPENSIONS

Article 16.1 requires that discipline be "corrective in nature, rather than punitive." For APWU represented crafts,[250] this progressive discipline (refer to discussion at pp. 23-27, above) generally results in disciplinary measures escalating progressively from: a) discussions; to b) written warnings; to c) short and then longer term suspensions; and, d) finally to discharge. The number of warnings preceding suspension and the number and duration of suspensions prior to discharge may vary from situation of situation, from office to office, or from District to District. The general pattern, however, still prevails.

While nothing precludes the local parties from agreeing to do so either in settlement of specific grievances or through negotiations, the Employer may not unilaterally deviate from the normal disciplinary progression. A unilateral modification of the negotiated discipline process violates Section 8(a)5 of the National Labor Relations Act[251] as well as the Collective Bargaining Agreement's Article 5 prohibition on unilateral action. In a National Arbitration Award overturning three (3) locally implemented alternative discipline processes, **Arbitrator Zumas** explained:

> "These three new pilot programs alter this progressive pattern by utilizing special Letters of Warning or eliminating suspensions altogether. It is clear that these programs represent a substantial departure from the traditionally established order of progressive and corrective discipline under Article 16.
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> . . .
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> "Article 5, the Prohibition of Unilateral Action clause, provides that the Service 'will not take any actions altering wages, hours and other terms and conditions of employment.' It is well established that discipline procedure is a term

[250] The National Agreements of the other three (3) major Unions, NALC, NPMHU, and NRLCA all endorse "No Time Off" or paper suspensions.

[251] See, for instance, Electri-Flex Co. v. NLRB, 570 F.2d 1327 (7th Cir.) February, 14, 1978, where the Court of Appeals held:

> "…the institution of a new system of discipline is a significant change in working conditions, and thus one of the mandatory subjects of bargaining under the provisions of Section 8(d) of the Act, included within the phrase 'other terms and conditions of employment.'"

Similarly, see, also, NLRB and United Steelworkers of America, AFL-CIO v. Roll and Hold Warehouse and Distribution Corporation, 162 F.3rd 513 (7th Cir.) December 8, 1998.

and condition of employment, and the unilateral implementation of programs which alter such procedure is an action that affects the terms and conditions of employment in violation of Article 5."[252]

Perhaps because the National Agreements of the other three (3) major postal Union's permit "paper" or "no-time off" suspensions, the Employer more and more frequently attempts to unilaterally apply the same process to APWU represented employees. While **Arbitrator Mittenthal**[253] rejected the Union's claim to a blanket remedy of expunging all discipline issued under the alternative disciplinary "pilots" overturned by the **Zumas** decision, in individual situations that still should be the appropriate remedy. Arbitrator Massey, for instance, rejected the Employer's argument that the grievant had not been "harmed" but had, in fact, benefited from the issuance of a "paper" 14 day suspension, noting:

> "Yet, there is substantially more to be considered than the Grievant's position in evaluating whether a particular error is harmless. The Union's position must also be considered. Management's actions had a serious impact on the Union…Management simply chose to ignore the Union's wishes despite the fact that the Union had the right to bargain over and/or stop the local Pilot Program. The local Union ultimately had to go to its regional leadership to get Management's regional leadership to stop local Management from utilizing the Pilot Program. Management's actions in this case cannot be overlooked or diminished in importance. To forge ahead in complete disregard of the Union's position violates the very essence of the cooperative collective bargaining relationship. Due to the evidence of Management's intent, the discipline must be struck down as completely void."[254]

Similarly, where the Employer unilaterally reduced a Notice of Removal to a 14 day "paper suspension" in advance of the arbitration hearing, **Arbitrator Caraway** rescinded the suspension and removed it from all records, saying:

> "Article 5, Prohibition of Unilateral Action, prohibits the employer from taking 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 violates the terms and conditions of this Agreement--.'
>
> "The parties in Article 16 negotiated a Progressive Discipline Procedure. The Discipline begins with an Oral or Written Warning, and progresses to a Short and Long Suspension, and then to Discharge. What the Postal Service did in the instant case was a create a fourth Disciplinary Procedure, namely a 'Paper Suspension'. Taking such unilateral action by the Postal Service is clear violation of the Progressive Discipline set forth in Article 16.
>
> "Article 5, as cited, clearly prohibits the Postal service from taking unilateral action, which would vary, modify or conflict with the terms of the National Agreement. By creating a 'Paper Suspension' Discipline by unilateral action, as the Postal Service did in this case, was a violation of Article 5."[255]

[252] Arbitrator Nicholas H. Zumas, Case No. H1M-NA-C 99, May 11, 1987, pp. 17-19.

[253] Arbitrator Richard Mittenthal, Case No. H1C-NA-C 97, et al, February 3, 1989.

[254] Arbitrator Diane Dunham Massey, Case No. S7C-3R-D 16536, June 20, 1989, p. 11.

[255] Arbitrator John F. Caraway, Case No. zH90C-1H-D 86004045, June 11, 1996, pp. 5-6.

LAST CHANCE AGREEMENTS

A particularly troubling element of grievance processing is the advent of Last Chance Agreements. Such agreements generally are little more than a postponement of removal and we do not favor them. They should be avoided at all costs and only signed as a last resort. Like other necessary evils, however, sometimes the Last Chance Agreement cannot be avoided. When necessitated, extreme care should be utilized in reviewing or drafting such documents before signing.[256]

Almost inevitably, where a Last Chance Agreement exists, we will find ourselves defending the grievant for violation of its terms. Last Chance Agreements are generally upheld by arbitrators because they have proven to be effective tools in a progressive discipline chain. Arbitrators are reluctant to review the LCA and "just cause" is generally limited to determination whether the Last Chance Agreement was violated. Nonetheless, there are limits to these agreements. An employee is still entitled to basic due process[257] or contractual[258] protections. An obviously unjust removal cannot be legitimized by a Last Chance Agreement.[259] Last Chance Agreements cannot waive employee's rights under the

[256] For instance, National Level Arbitrator Stephen Briggs, in Case No. D98N-4D-D 00114765, January 15, 2002, found that even though all elements of grievant's discipline were removed from her record as the result of the time limitations of Article 16.10, the LCA, itself, was still citable, and enforceable, because the LCA was drafted to contain no time limitations.

[257] See, for instance, Arbitrator Mark L. Kahn, Case No. J94C-1J-D 97093519, February 28, 1998, at p.12:

> "Although a prior LCA may serve to modify 'just cause' benchmarks, it does not modify the employee's entitlement to due process."

Or, see Arbitrator Otis H. King, Case No. G98C-4G-D 00088316, October 13, 2000, at p. 8:

> "[T]he failure to have a proper pre-disciplinary hearing in a Last Chance Agreement discharge case is sufficient, standing alone, to overturn the termination of the Grievant."

[258] Where the USPS failed to give the employee 30 days notice when removing him for an alleged violation of a LCA, Arbitrator Michael J. Pecklers, Case No. B00C-4B-D 03071232, June 21, 2004, said at p. 40:

> "[T]he Postal Service violated Article 16.5 of the National Agreement by failing to afford Mr. Fleenor the full thirty (30) day notice period. A further finding is also required that this serves as a fatal flaw, mandating the Grievant's reinstatement."

[259] For a thought provoking discussion of this problem, see Arbitrator Jonathan Dworkin, C1N-4G-D 31619/31709, November 21, 1984 [in which he rejected as "repugnant" a Last Chance Agreement in which the grievant had agreed to lose some 110 pounds in only 2½ months.

law, such as FMLA rights[260] or Veterans rights.[261] Several Regional Arbitrators have correctly concluded that Last Chance Agreements are void and unenforceable unless signed by the local Union.[262] Nor can such agreements be enforced when they violate other express terms of the National Agreement.

For instance, the Employer will frequently attempt to include in the LCA a clause making a subsequent removal for violation of the Agreement exempt from the grievance procedure. Arbitrators generally find that such a clause violates Article 16 and Article 15 and cannot be enforced. See, for instance, **Arbitrator Levak**:

> "Second, an LCA that purports to waive the union's and the employee's right to grieve the employee's removal is, to that extent, unenforceable. The parties at the local level cannot write an LCA that totally extinguishes the right of an employee to grieve the propriety of his removal under Article 16."[263]

Similarly, see **Arbitrator Helburn**, who, noting that Article 30 prohibited Local Memorandums of Understanding from conflicting with the National Agreement, reasoned:

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[260] See Arbitrator Morris E. Davis, Case No. F94T-1F-D 99023424, February 8, 2000.

[261]Where grievant's absences were protected by Executive Order 5396 issued by President Hoover in 1930, Arbitrator Randall M. Kelly, Case No. B98C-1B-D 00004729, March 27, 2000, p.11, said:

> "Based on my analysis of the Executive Order, the federal laws involved, the National Agreement and the ELM, it is my conclusion that to sustain the removal of the Grievant for violation of the LCA would have the result of directing the Service to engage in unlawful conduct, i.e., discrimination against an employee for exercising his rights as a disabled veteran. In other words, it would violate public policy (as embodied in the Executive Order) to allow the Service to remove the Grievant for exercising those rights."

See also, Arbitrator Robert J. Mueller, Case No. J90T-1J-D 03157903/03188396, May 6, 2004; or Arbitrator Randall M. Kelly, Case No. B98C-1B-D 99292364, February 16, 2001. In another case dealing with enforcement of an "abeyance settlement," which for practical purposes appears to be little more than a LCA, the same Arbitrator Randall M. Kelly, Case No. B00T-1B-D 02195602, June 19, 2003, said at page 8:

> "The Grievant was a Veteran covered by the Hoover Act and Section 513.32 of the ELM. Accordingly, his absence of June 16 and 17 cannot be used as a basis for discipline against him. The document submitted shows that he was receiving treatment and should have been granted a 'special' leave of absence..."

For further discussion of the rights of disabled veterans to be protected from discipline under Executive Order 5396, see Step 4 Decision, Case No. S8C-3P-C 33859, November 24, 1981; Step 4 Decision, Case No. H1N-5K-D 154, March 3, 1982; and Step 4 Decision, H4N-4F-C 11641, October 28, 1988. See also, Employee & Labor Relations Manual, Parts 513.32 and 514.22.

[262]See, for instance, Arbitrator Alan Walt, J98C-1J-D 00175229, June 20, 2001. Similarly, see Arbitrator Ernest E. Marlatt, Case No. S4C-3R-D 42676 et al, June 12, 1987. Where the grievant (who was also a steward) signed the LCA for herself but the arbitrator questioned her ability to represent herself or the Union because of her mental state at the time, Arbitrator Margo R. Newman, Case No. C00C-4C-D 05071672, February 13, 2006, found a LCA unenforceable, but then inexplicably returned the original NOR to the grievance procedure for adjudication.

[263]Arbitrator Thomas F. Levak, Case No. W7C-5S-D 16792, February 27, 1990, p. 16. Reaching similar results are: Arbitrator Judith C. Bello, Case No. A90C-1A-D 94014663, September 29, 1994; Arbitrator Timothy J. Buckalew, Case No. B98C-1B-D 00045426, June 27, 2003; Arbitrator Otis H. King, Case No. G98C-4G-D 00088316, October 13, 2000; or, Arbitrator Michael J. Pecklers, Case No. B00C-4B-D 03071232, June 21, 2004. For a contrary position see Arbitrator William Eaton, W7C-5E-D 18199, September 6, 1990.

> "The parties themselves have thus established the guiding principle that no local agreement 'may be inconsistent with or vary the terms of the.. National Agreement.' This principle is equally applicable to the waiver provision of LCA. Honoring such a waiver provision negates the right found in Article 15 to grieve and arbitrate and the just cause provision of Article 16. Because waiver provisions are inconsistent with the terms of the National Agreement, they may be challenged at any time by the Union."[264]

In a discussion which has been characterized by other arbitrators as a "most thoughtful and scholarly discussion of the question of LCA grievance waivers,"[265] **Arbitrator Snow** offered this helpful analysis:

> "The question is whether or not a local agreement is able to waive rights of an employe which have been obtained for him or her through the National Agreement. What arbitrators who have confronted the sort of problem…have been asked to do is to balance negotiated grievance-due process protections against the preference in Article 15 for settlement agreements. In striking that balance, it is not necessary to give effect to Last Chance provisions waiving contractual rights in order to encourage settlement agreements. It does not necessarily follow that a reluctance to enforce the terms of Last Chance agreements automatically will undermine the process of achieving settlement agreements nor that it necessarily will hurt employees as well as the Union by discouraging management from entering into such agreements. What the agreements do is to convert bargaining unit members into employes at will…
>
> . . .
>
> "Whatever the relative value of Last Chance agreements which require an employe to waive contractual rights, it is clear that such broadly worded agreements violate the parties' National Agreement…"[266]

Another area in which far too many Last Chance Agreements violate the National Agreement occurs when they spell out specific attendance policies, most often in a numerical format. Laudable though the intent to notify the grievant of exactly what is "unacceptable" may be, such numerical standards conflict with the Agreement. Postal leave regulations as referenced in Article 10, Section 2 and articulated in ELM 511.43 require the employee "to maintain their assigned schedule and...make every effort to avoid unscheduled absences." ELM 666.81 requires that employees "be regular in attendance." No local attendance policy is permitted which violates or is in conflict with, Article 10 and/or ELM Subchapter 510. The parties, themselves, have specifically addressed this matter through a negotiated Memorandum of Understanding:

> "The parties agree that local attendance or leave instructions, guidelines or procedures that directly relate to wages, hours, or working conditions of employees covered by this Agreement, may not be inconsistent or

[264] Arbitrator I. B. Helburn, Case No. S0C-3W-D 17109, June 8. 1993, p. 10. See, also, Arbitrator I.B. Helburn, Case No. G94C-4G-D 98023222, May 11, 1998. Similarly, see Arbitrator Patricia S. Plant, Case No. C00C-4C-D 02093482, March 14, 2003.

[265] Arbitrator I.B. Helburn, Case No. G94C-4G-D 98023222, May 11, 1998, p. 9 Similarly, see Arbitrator Patricia S. Plant, Case No. C00C-4C-D 02093482, March 14, 2003.

[266] Arbitrator Carlton J. Snow, Case No. W7C-5E-D 17410, October 8, 1990, pp. 18-20.

in conflict with Article 10 or the Employee and Labor Relations Manual, Subchapter 510."

Even in a Last Chance Agreement, any attempt to numerically define "acceptable attendance," on anything other than a case-by-case basis and without consideration of the many other factors involved, on its face, violates the very concept of just cause; is in conflict with ELM 510 and the National Agreement; and, therefore renders the LCA unenforceable.

The Employer has expressly recognized this prohibition of attempts to numerically define "acceptable attendance." In a Step 4 decision, Mr. Robert L. Eugene, USPS Labor Relations Department, writing on behalf of the Employer, recognized "several points of agreement" between the United States Postal Service and the Union:

> "1. The USPS and the APWU agree that discipline for failure to maintain a satisfactory attendance record or 'excessive absenteeism' must be determined on a case-by-case basis in light of all the relevant evidence and circumstances.
>
> 2. The USFS and the APWU agree that <u>any rule setting a fixed amount or percentage or sick leave usage after which an employee will be, as a matter of course, automatically disciplined is inconsistent with the National Agreement</u> and applicable handbooks and manuals."[267] [emphasis added]

This conflict has been visited by several arbitrators. **Arbitrator McAllister**, for instance, very clearly pointed out:

> "Notwithstanding, the Arbitrator is very aware the 'Last Chance' agreement does not use language normally associated with attendance as found in Part 666.81 of the Employee and Labor Relations Manual, which requires employees to be regular in attendance. If local Management believed the phraseology used; namely, that the Grievant 'shall maintain satisfactory attendance as determined by Management established a new basis for judging the Grievant's attendance, it was a mistake. I couch my words conditionally since there is no probative evidence that the phraseology utilized was anything but an unfortunate choice of language. <u>However, it should be manifestly clear that local Management does not have the right to amend any terms or conditions of the National Agreement or the handbooks and manuals incorporated by reference through Article 19</u>. Thus, the applicable standard for attendance must be that set forth in the Employee and Labor Relations Manual or any other applicable handbook and manual."[268] [emphasis added]

Similarly, in an even more recent case, assessing a locally negotiated Last Chance Agreement which set an attendance standard at "2.5% unscheduled absences or...3 or more unscheduled absences during [subsequent three (3) month periods]," **Arbitrator Nathan**, cited the herein referenced 1981 Step 4 Decision in concluding:

[267] Step 4 Decision, A8NA-0840, January 5, 1981.

[268] Arbitrator Robert W. McAllister, Case No. C4T-4M-D 38412, May 13, 1988, p. 10.

"In the present case the parties at Step 2 agreed to a formula under which the grievant 'must not exceed 2.5% unscheduled absences or have three or more unscheduled absences' during any of eight consecutive three month periods. I find that the Postmaster and the steward were without authority to enter into such an agreement because the parties at the national level had agreed in 1981 that automatic discharge pursuant to a fixed formula was 'inconsistent with the National Agreement.'...

"The bottom line is that the parties cannot do locally what they have agreed not to do nationally. The last chance agreement involved in this case is void because the parties at the local level never had the authority to enter into it in the first place. It was simply beyond the Postmaster's authority to suggest, and for the steward to accept, a scheme which the parties at the national level have agreed is outside of their contract. The circumstance that this was a last chance agreement whereas the agreements just referred to involved policies or guidelines does not alter the result. An agreement which the parties have already stated violates the notion of just cause cannot gain a new validity because it is a last chance agreement. Local parties cannot redefine or rewrite the contract regardless of the reasons."[269] [emphasis added]

PROCEDURAL DUE PROCESS

Almost amazingly, an interesting phenomena which continues to be repeatedly confronted by the APWU steward is postal management's continuing insistence on committing procedural errors during the grievance procedure. While combating these errors can be frustrating and takes time, they can sometimes give us a needed defense in an otherwise difficult to impossible case. Article 15, Section 3.A teaches:

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

STEP ONE

In spite of this expectation, management continues (seemingly, particularly so since the 1992 reorganization) to attempt to frustrate the grievance process. For instance, how many times have you met with a Step 1 supervisor who admits that he or she just "doesn't have the authority" to resolve a

[269]Arbitrator Harvey A. Nathan, C0C-4K-D 14691, February 28, 1993, p. 18. See also, Arbitrator George T. Roumell, Jr., Case No. I94C-1I-D 97057826, December 8, 1997.

grievance because the matter has been previously decided at a higher level? When this happens, you can either give up out of frustration or use this admission to your advantage in defending the member.

The Contract could hardly be more clear. Article 15, Section 2, Step 1 of our National Agreement states:

> (a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause...
>
> (b) In any such discussion the supervisor shall have authority to settle the grievance. The steward or other Union representative shall have authority to settle or withdraw the grievance in whole or in part. No resolution reached as a result of such discussion shall be a precedent for any purpose.

Arbitrators have found that the immediate supervisor's admission that she doesn't have the authority to resolve a grievance at that level can be a fatal procedural error.[270] **Arbitrator Krider**, for instance, said:

> "The second procedural error is that Management's representative at Step 1, Jeff Moore, did not have authority to settle the grievance. ...Supervisor Moore was the Step 1 representative for Management but he told Mr. Campbell that he did not have authority to settle the grievance and that this is coming from someone in personnel. If Mr. Moore believed that he did not have authority to settle the grievance then the Step 1 meeting was a mere formality and there was no possibility of a settlement. The intent of the parties in Article 15 is that grievances should be settled at the lowest possible level and that to make this a possibility both parties are required to reveal all of the arguments and evidence and Management must be represented by someone who has the authority to settle the grievance. Simply going through the motions, as occurred in this instance, is not what is envisioned by Article 15.
>
> ***"[T]he immediate supervisor's admission that she doesn't have the authority to resolve a grievance at that level can be a fatal procedural error."***
>
> "My finding is that the grievant was denied his right to due process because Management's Step 1 representative did not have, or did not understand that he had, the authority to settle the grievance."[271]

Similarly, **Arbitrator Holly** addressed just such a violation of procedural due process when he said:

> "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

[270]See, for instance, Arbitrator Lawrence R. Loeb, Case No. C94V-1C-D 97083325, March 6, 1998; or Arbitrator I.B. Helburn, Case No. G00C-1G-D 06153688, September 12, 2006. Or, where the Arbitrator's determination that the Postmaster's "undue influence" caused the same result, see Arbitrator Linda DiLeone Klein, Case No. C94C-4C-D 97116581/6354, October 15, 1998.

[271]Arbitrator Charles E. Krider, Case No. J90C-1G-D 95043169, November 19, 1995, p. 8.

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 Section 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.

. . .

"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."[272] [emphasis added]

Similarly, **Arbitrator Zumas** noted:

"The Step Procedures outlined in Article 15 of the National Agreement are intended to provide an opportunity for the parties to resolve a dispute before proceeding to arbitration. A supervisor at Step 1 and Step 2 levels has the authority to resolve and settle the dispute after meeting with the Grievant and his Union representative. In the instant case, Postmaster Eberly was the Service Representative at Step 1 (in lieu of Supervisor Strohm who was absent.) Eberly's decisional authority to resolve the dispute at this stage was non-existent; it had been improperly usurped by E. Lynn Ervin, the E&LR Director at Lancaster. As such, the grievance procedure, during the various Steps, had become a sham.[273]

Arbitrator Cushman, citing **Arbitrator Zumas**, reached the same conclusion:

"There is a serious and harmful failure in this case on the part of the Postal Service to comply with the provisions of Article 15, Section 2, Step 1 of the grievance procedure. The uncontradicted testimony of Josephine Taylor, the Union Steward who handled the Step 1, was that Supervisor Thomas who was designated by Paluszek to handle the Step 1 refused to hear or discuss the grievance, stated that he had no authority to resolve it, denied it and initialed it to send it to Step 2...

"The Step 1 procedure in the instant case was a sham. See the decision of Arbitrator Zumas, in Case No. E1R-2F-D 8832 in which he stated that where the designee's decisional authority at Step 1 to resolve the dispute was non-existent the grievance procedure had become a sham and sustained the grievance concerning removal. Likewise here, the removal must be set aside.

"**The Step 1 violation is enough in itself to require setting aside the removal**."[274] [emphasis added]

[272]Arbitrator J. Fred Holly, Case No. S8N-3F-D 9885, May 20, 1980, pp. 6-7. See also, Arbitrator Robert W. Foster, Case No. S8N-3Q-D 35151/18, March 12, 1982; or Arbitrator William J. LeWinter, Case No. S4N-3P-D 19737, November 21, 11986.

[273]Arbitrator Nicholas H. Zumas, Case No. E1R-2F-D 8832, February 10, 1984, p. 5.

[274]Arbitrator Bernard Cushman, Case No. C90C-4C-D 93009256/93009254, June 27, 1994, pp. 24-25. See also, Arbitrator I.B. Helburn, Case No. G94N-4G-D 97045949, February 10, 1998 where the Station Manager acknowledged that the immediate supervisor lacked authority to settle.

Where discipline is initiated at a higher level, the immediate supervisor, as a practical matter, will often be powerless to resolve the grievance.[275] This violates Article 15. Reaching that result in a 1997 Mailhandler case, for instance, was **Arbitrator Imes**, who concluded as follows:

> "While the Service argues the Step 1 hearing constituted a fair and independent review of the issue, it is difficult to believe the grievance could have been granted or settled in whole or in part when the supervisor making the decision would be making a decision contrary to the action taken by his supervisor. Further, the fact that the Officer in Charge who initiated the action was the reviewing officer at Step 2 of the grievance procedure is an even more serious defect. Since the reviewing officer was also the one who made the decision, it is inconceivable that the Grievant's reason for his answer would have been given fair consideration or than any consideration would be given to whether the discipline imposed should be less."[276]

In a very similar vein, **Arbitrator Johnston** offered this analysis:

> "Under the facts in the case before me the Postmaster had requested the removal of the employee…After this action had been taken in the form of a Notice of Removal then at Step 1 the Union met with [grievant's] immediate supervisor. This supervisor, according to the Union, stated 'He knew nothing of the case.' This was put in written form by the Union and initialed by the supervisor. It is difficult for a supervisor who works for a Postmaster to have much discretion when the Postmaster has imposed discipline upon an employee. It becomes impossible in my judgement for the provisions of Article 15 quotes above to have any meaning when the immediate supervisor states at the Step 1 meeting that he knows nothing about the case. This, in my opinion, is a clear violation of one of the important rights granted to an employee by the National Agreement. The immediate supervisor, in order to properly perform his function as set out in Article 15, Section 2, Step 1 (B), is to thoroughly familiarize himself with the factual background of the case prior to the holding the first step meeting. The supervisor did not testify and therefore did not deny the allegations of the Union.
>
> "Since the Post Office through its immediate supervisor to the grievant failed to meet the requirements of Article 15 quoted above, I find that there was a failure of due process and therefore this denial eliminates the necessity to decide this case on its merits."[277]

A similar holding can be found in 1981 award by **Arbitrator Britton**, wherein he concluded:

> "As read by the Arbitrator, both Step 1(a) and (b) of Section 2 of Article XV entitled Grievance-Arbitration

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See also, Arbitrator Lawrence R. Loeb, Case No. C90C-4C-D 95057246/48, March 13, 1996, pp. 29-31 or Arbitrator Robert W. McAllister, Case No. J00C-1J-D 04096928, May 31, 2005. For a similar conclusion and detailed review of other awards so holding, see Arbitrator Patricia S. Plant, Case No. H94C-1H-D 96045942/23869, July 16, 1997.

[275]See for instance, Arbitrator Christopher E. Miles, C98T-1C-D 99276897, March 9, 2000. See also, Arbitrator James J. Odom, Jr. Case No. H98C-4H-D 00243135, January 31, 2002.

[276]Arbitrator Sharon K. Imes, Case No. I94M-4I-D 97048698, December 29, 1997, p.7.

[277]Arbitrator J. Reese Johnston, Jr., Case No. S7N-3W-D 38271, December 17, 1991, pp. 9-10.

Procedure, are couched in express mandatory language. Specifically, Step 1(a) requires that any employee who feels aggrieved 'must' discuss the grievance with his immediate supervisor within a designated time period. Step 1(b) provides in relevant part that in any such discussion '…the supervisor shall have authority to settle the grievance.'

"Proper compliance by management with these terms of the Agreement was, however, seemingly not achieved, for the record indicates that while the appropriate representatives met at Step 1, substantial doubt nevertheless exists as to the authority of the supervisor to settle the grievance. In this regard, the testimony demonstrates, as evidenced by the admission of the Postmaster under cross-examination, that he initiated the suspension, that the supervisor at Step 1 did not have the authority to settle the grievance without consulting him. This failure of management to comply with the prescribed language of Article XV, Section 2, Step 1(a) and (b) of the Agreement, which clearly bestows upon Grievant's supervisor the authority to settle the grievance, cannot properly be viewed as harmless error and non-prejudicial to the rights of the Grievant. To the contrary, in the considered judgement of the Arbitrator, this failure goes to the very heart of the grievance process in that the Grievant is thereby denied the contractual right to have his grievance considered independently and objectively at the outset of the grievance procedure by his supervisor who is generally most familiar with his work record. Any removal of the supervisor's authority to settle the grievance, it seems to the Arbitrator, is violative of the letter and spirit of the Agreement and renders the Step 1 procedure little more than a charade…"[278]

Yet another twist or procedural error by Management at Step 1 which can affect a disciplinary action occurs when someone other than the immediate supervisor is assigned to conduct the Step 1 hearing. See, for instance, **Arbitrator Helburn**, who said:

"The fatal flaw in Management's case involves the Step 1 hearing. Article 15 requires that the Step 1 be held with the grievant's immediate supervisor and that that individual be empowered to resolve the grievance. Williams testified that he was the grievant's immediate supervisor...Neither the Postal Service's Step 1 grievance summary nor anything else in the record indicates that Bassett was filling in for Williams when the Step 1 was held. The Step 1 should have been held with Wales, as he was acting for Williams.

"...The National Agreement requires that the Step 1 be held with the immediate supervisor and numerous arbitrators have held that failure to do so is a breech of the grievant's due process rights which requires a ruling in the grievant's favor. The award in the Union's favor below is solely because of this breech of the contract."[279]

STEP TWO

Management's Step 2 designee must also have the authority to settle a grievance. Although this is less often established[280] (or argued) than the lack of authority at Step 1, it is still important. Article

[278] Arbitrator Raymond L. Britton, Case No. S8N-3D-D 17652, March 25, 1981, pp. 10-11.

[279]Arbitrator I. B. Helburn, Case No. G94T-1G-D 97115056, May 7,1998, pp. 7-8 See also, Arbitrator Lawrence R. Loeb, Case No. C98C-1C-D 99157740/198891, February 7, 2000.

[280]For one case where the installation head's acknowledgment that he lacked authority to resolve a grievance became a fatal flaw, see

15, Section 2, Step 2 requires that management's Step 2 designee have the authority to resolve any grievance. When this is violated, the grievant's due process rights are impaired. For instance, **Arbitrator Johnston** offered this analysis:

> "But even more important, the Postmaster, Mr. Harris, who was the Step Two Management designee, in answer to the following question: 'Did you have the authority to reduce the discipline?' stated 'In my estimation, no.' This is a clear violation of the provisions of Article 15, Step One and Step Two, and particularly a violation of the Step Two requirements which are that the representatives of both parties must have the authority to settle the grievance at the second step.
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> "The testimony of both Mr. Bowles and Mr. Harris confirms the testimony of the two Union witnesses who testified that Mr. Harris told them that they would meet at the steps of the grievance but any reduction of the discipline was out of his hands. It is, therefore, apparent to me that Mr. Harris, the Postmaster, did not have the authority to settle the grievance at Step Two. This lack of authority runs contrary to the provisions of the National Agreement which says that the person hearing Step Two of the grievance shall have the authority to settle the grievance.
>
> "It has always been the position of this Arbitrator that if either the Management person, that is, the immediate supervisor at Step One, or the Postmaster or designated person to hear the Step Two does not have the authority to settle the grievance at either one of these two steps, that the due process rights of the employee have been severely violated and should result in the grievance being granted."[281]

If management designates the supervisor who issued the discipline to hear the grievance at Step 2, there is a legitimate basis for arguing that such person lacks real authority to resolve the grievance at the second step. For instance, **Arbitrator Loeb** proffered this very thoughtful analysis of the situation:

> "The Service has the right to designate who will meet with the Union at Step 2. It is not, however, an absolute right which is what Management is claim it is. If the language in Article 15, Section 2, which declares that the parties' representatives must have full authority to settle the grievance at Step 2, is to have any meaning then the Step 2 designee cannot be the same person who issued the discipline. It is simply impossible to believe that someone who supposedly conducted a thorough investigation prior to concluding that there were grounds to suspend or discharge an employee and that suspension or discharge was the appropriate penalty will, after meeting with the Union, turn around at Step 2 and declare to the world that he had been wrong all along. That is not going to happen. By permitting the Emmaus Postmaster to effectively pass judgment on his own decision the Service emasculated the portion of the Contract which demands that a Step 2 designee must have authority to settle a grievance…"[282]

A similar argument could be made where management designates the reviewing or concurring authority as the Step 2 designee. There are differing viewpoints on what effect this has on the grievant's

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Arbitrator Robert W. McAllister, Case No. J94T-4J-D 97039474/58699/75079, May 18, 1998.

[281]Arbitrator J. Reese Johnston, Jr., Case No. G94N-4G-D 97075419/62253, January 6, 1998, pp. 17-19. For a similar result in a contract grievance, see Arbitrator Devon Vrana, Case No. H90N-4H-C 94041909, July 29, 1996.

[282] Arbitrator Lawrence E. Loeb, Case No. C98C-4C-D 01264275, November 14, 2002, pp. 28-29.

right to due process. Some arbitrators suggest that this is a significant problem but not necessarily, by itself, a fatal flaw. See, for instance, **Arbitrator** Vause, saying:

> "The fact that Mr. Oliver served as both the second step designee and the concurring official is an especially important error in this case. The *Supervisor's Guide to Handling Grievances* (Handbookd EL921, August 1990) clearly contemplates in Part II, Section C, that the reviewing authority and the concurring official should be two different individuals…
>
> "It is not necessary for me to reach the sweeping conclusion that any discipline in violation of this handbook provision must be rescinded. However, the violation of this handbook provision does have special meaning in the instant case. If Management had complied with the above requirement in the *Supervisor's Guide*, the reviewing authority and the Step II designee would have been different individuals. This would have significantly increased the likelihood that Management's procedural errors would have been caught and resolved much earlier."[283]

Other arbitrators take the position that Management absolutely must not permit the concurring official to serve as a Step 2 designee and that doing so constitutes a fatal procedural error. For instance, **Arbitrator Duncan** explains:

> "The evidence in this case indicated that the reviewing authority and the Step 2 Designee were one and the same. However, the Supervisor's Guide to Handling Grievances indicates that these two respective roles should be different individuals…
>
> . . .
>
> "Based upon the testimony the provision contained in the guidelines was violated. Would it have made any difference had there been another Step 2 Designee? Based upon the evidence, probably not. However, the Grievant was denied that opportunity. The Supervisor's Guide to Handling Grievances seems to recognize the importance of the Step 2 Designee being totally neutral and having no prior connection with the grievance at hand. This not only gives the appearance of impartiality, but also provides the Grievant with an individual who has a designation of being one who has no preconceived opinions as to the charges or other matters previously considered in the case.
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> . . .
>
> "The bottom line is, would the fact that perhaps the outcome would be different had there been another individual handling the Step 2 meeting. Based upon the evidence presented it is highly unlikely. However, Grievant would at least have had the opportunity of having a reviewing official that was not a participant in the original charge. This is what due process is all about and this is what the Arbitrator believes the authors of the Supervisor's Guide to Handling Grievances intended."[284]

When management either refuses or fails to meet at Step 2, that too can be a procedural error. The burden of proof, of course, may well be on the Union to establish that the lack of a Step 2 meeting

[283] Arbitrator W. Gary Vause, Case No. H90V-1H-D 95063943, June 13, 1996, p. 13. See also, Arbitrator James J. Odom, Jr., Case No. G00T-4G-D 02171086, September 17, 2003.

[284] Arbitrator Jim K. Duncan, Case No. H98T-1H-D 01099511, March 27, 2002, pp. 5-7. See also, *Supervisor's Guide to Handling Grievances*, USPS Handbook EL-921, Part II, Section C.

was management's fault and not ours.[285] Similarly, management's failure to provide a grievance decision including detailed reasons for their denial can be a procedural violation. **Arbitrator Kahn**, for instance, said:

> "At no time during the processing of the removal grievance did Management satisfy its obligations under Article 16 (sic) to provide the Union with detailed reasons for its denial. Despite repeated requests by Steward Gwen Gayden, the Employer failed to schedule a Step 2 hearing, compelling Gayden to proceed directly to Step 3. Although the Step 2 and Step 3 appeals of grievant's removal raised a number of issues, the Employer's Step 3 denial dated 12-14-94 merely stated, in full:
>
> > The Grievant was involved in a fist fight with another employee. His actions were serious and warrant removal."[286]

Similarly, see **Arbitrator Williams**, who said:

> "It is undisputed that there was no Step 2 decision. To state that Article 15.3c entitles the Union to move on to Step 3 appeal in such cases, as it did, is insufficient. The Step 2 decision is to include detailed reasons for the denial. Also, 15.2, Step 2(g), allows the Union to file additions and corrections. Thus, the Union was further hampered in its Step 3 appeal, relying largely upon procedural violations of Management. In the Holly award, previously referenced, the arbitrator held that it was a serious violation when the Step 3 decision was not received, even though the representative knew what was said in the meeting. In many ways, a failure to render a Step 2 decision is a greater detriment. Nothing re the merits was possible in a Step 3 appeal, and the Step 3 decision did not even relate to the procedural objections. While no evidence was presented by the parties as to who presented the Step 3 grievance for the Union, whoever it was had to be severely hampered when he was deprived of Management's reasons for rejecting the grievance at Step 2, and the Union could not make additions and corrections."[287]

In yet another case, **Arbitrator Vrana** concluded that management's failure to provide written Step 2 decision in a timely manner was a serious violation of the grievant's due process rights:

> "The Postmaster's failure to timely issue a Step 2 decision made it progressively more difficult for the Union to present and prove its case. For example, the Postmaster failed to timely give the Union a detailed statement of his reason(s) for denying the grievance. As a result, when the Union appealed the case to Step 3, it was still unclear about Management's allegations against Grievant. Management's failure to communicate with the Union made it difficult for the Union to fashion a defense for Grievant. Further, by

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[285] For a contrary holding that the burden is on the Employer to establish that the proper procedures were followed, see Arbitrator Hamah, R. King, Case No. G98T-1G-D 01247275, January 30, 2002.

[286] Arbitrator Mark L. Kahn, Case No. J90C-4J-D 94048041 et. al., June 27, 1995, p. 12. See also, Arbitrator I. B. Helburn, Case No. G94C-4G-D 97110060, March 5, 1998; Arbitrator Mark L. Kahn, Case No J94C-4J-D 97119894, September 28, 1998; Arbitrator Margo R. Newman, Case No. C98C-4C-D 99104624, May 15, 2000; or, Arbitrator Irving N. Tranen, Case No. H00T-1H-D 02120125, October 25, 2002. However, for the opposite viewpoint, see Arbitrator Lawrence R. Loeb, Case No. C94C-4C-D 98021004 et al, December 29, 1998. Even then, on the other hand, Arbitrator Loeb acknowledged that management's failure to render a Step 2 decision could well create procedural difficulties for the Employer at the Arbitration hearing.

[287] Arbitrator J. Earl Williams, Case No. S4C-3W-D 51083, November 30, 1987, pp. 9-10.

failing to timely issue a written Step 2 decision, Management deprived the Union of its right to file complete additions and corrections under Article 15.2 Step 2(g). Moreover, without a Step 2 decision, it was difficult for the Step 3 official to prepare for and present the Union's case at Step 3.

"The Union was indisputably prejudiced by Management's failure to render a Step 2 decision. Accordingly, I conclude that Management also violated Article 15,2 Step 2(f) of the National Agreement."[288]

The failure to meet at Step 2 or provide a written Step 2 decision can be particularly problematic for management under the current grievance procedure which provides for discipline grievances to be appealed directly to arbitration from Step 2. See, for instance, Arbitrator **King**'s holding (despite his finding that grievant's infractions warranted discipline) that:

"The Postal Service committed serious procedural errors when it failed to conduct a Step 2 hearing or provide a response to the grievance. In the absence of a Step 3 meeting or a correction of the Step 2 failure at the Step 3 level, the Grievant's due process rights are violated. Further, the Postal Service did not present any arguments or evidence during the grievance procedure, and it is barred, by the provisions of Article 15, from presenting evidence at arbitration which were not previously presented during the grievance process."[289]

Article 15 also requires the parties to cooperate fully and to develop and share relevant information. Where the Employer's Step 2 designee fails to provide all information relied upon in disciplining the grievant, this too can be a serious procedural violation. **Arbitrator Dash** discussed this requirement:

"The testimony in the record clearly proves that the management representatives at the Step 2–A hearing did not make [the postal inspector's investigative summary] available to the Step 2 Union representative, whether or not he asked for it. While the record is contradictory as to whether such material was requested by the Union's Step 2-A representative, management has the burden to prove that it had 'just cause' for the grievant's discharge, and concomitant with that 'burden of proof' was the requirement that it made available to the Step 2-A Union representative all of the pertinent material it had in its possession upon which it based its discharge decision. This it simply did not do.

. . .

"It is quite obvious that the 'Grievance Procedure' provided for in Article XV, Section 2, for the settlement of discharge cases, cannot operate effectively if Local Postal management fails to make full disclosure to the Union representatives of the documentation upon which it has based its discharge action. It is not proper for management to wait until the arbitration hearing to provide the Union with such material, for to do so will substitute the arbitration process for the prior steps of the Grievance Procedure, and completely nullify their effectiveness."[290]

[288] Arbitrator Devon Vrana, Case No. G94N-4G-D 97030467, May 5, 1997, p.10.

[289] Arbitrator Hamah R. King, USPS Case No. G98C-4G-D 01247318/02018456, February 5, 2002, p.13.

[290] Arbitrator G. Allan Dash, Jr., Case No. AB-E 1057D, May 17, 1974, pp. 5-6.

Nor is management permitted to play games with the appropriate Step 2 designee. For instance, Article 15, Section 2, Step 2(a) requires that:

> In any associate post office of twenty (20) or less employees, the Employer shall designate an official outside of the installation as the Step 2 official, and shall so notify the Union Step 1 representative.

The converse of this, of course, can also be argued. In installations of more than twenty (20) employees, it should be inappropriate for management to deprive the installation head of her Step 2 decision making authority. **Arbitrator Kahn**, for instance, reasoned:

> "Article 15, Section 2(a) and (c), clearly intend, in my judgement, that, except at installations with 20 or fewer employees (Columbus is much larger), the installation head or his/her designee *shall* receive the Step 2 appeal, *will* conduct the Step 2 meeting, and '*shall* have authority to grant or settle the grievance in whole or in part.'...Accordingly, I find that the Step 2 meeting takeover by Singleton was usurpation of the authority and responsibility of the Columbus Post Office to hear and decide the grievance at that level."[291]

DENIAL OF REQUESTED INFORMATION

Yet another procedural deficiency which will frequently arise during the grievance procedure is the Employer's failure (or more often, refusal) to produce requested, relevant information. Although Article 17 guarantees the steward's right to review "documents, files and other records necessary for processing a grievance," while Article 31 recognizes the Employer's obligation to "make available [to] the Union all relevant information," and in spite of the Article 15 requirement that the parties' Step 2 representatives "cooperate fully" and "exchange copies of all relevant papers or documents," Management will nonetheless, all too frequently remain hesitant to share relevant information. Even, when finally forthcoming, management will often delay providing relevant information until shortly

[291]Arbitrator Mark L. Kahn, Case No. J94C-4J-D 97003629/6864, July 7, 1997, p. 12. On the other hand, although the APWU was not signatory, the recent Step 4 Settlement (I94N-4I-C 99008899, April 8, 1999) between the USPS and NALC on this subject is worthy of note:

> "We further agreed that there is no language in the National Agreement which prohibits designating a Step 2 representative outside an installation of more than 20 employees. In these situations, if the Step 2 meetings have been held in the installation, that practice will continue absent an agreement to the contrary."

before the arbitration hearing. **Arbitrator Willingham**, in a case dating back to 1972, discussed the Employer's obligation to share all information being relied upon to impose discipline:

> "Thus the principal is well supported that where a grievant may only be discharged for just cause where a series of grievance steps are provided before arbitration that an employee who is being discharged has a right to a good faith processing of the grievance including the right to examine the pertinent medical and other records upon which the employer is relying. In this case, apart from this general rule of law, the particular Agreement before the Arbitrator specifically provides in Article XVII, Section 3, send paragraph, that the steward may request and shall obtain access to review the documents, files and other records necessary for processing a grievance. The facts in this case demonstrate a contract violation through violation of employer's obligation to process the grievance in good faith.
>
> . . .
>
> "It is not a condition for the application of the law of disclosure that the Union demonstrate just how the information would have been used if received - the failure to produce is alone enough to void the discharge. If a grievant does not know what is in the mind of the employer, he cannot bring together the facts and representation needed to defend, disprove or to work out alternative dispositions."[292]

Arbitrator Buckalew provided this thoughtful analysis on the impact of the Employer's failure to provide requested information until after the Step 2 meeting and decision:

> "As a preliminary matter, I reject the Postal Service's argument that the failure to provide the requested relevant medical reports was not a significant error. The Union made a clear and unequivocal request for all reports and notes relied upon by Kopka in making the decision to remove Radzik. Dr. Caprio's report figured prominently in that decision but was withheld from the Union until after the Step 2 hearing. The contract and the JCIM clearly and unambiguously set out the Postal Service's obligation to provide relevant information necessary for enforcement, administration, or interpretation of the contract. The contract recognizes an affirmative commitment to provide 'all relevant information' needed to determine whether to file or continue the processing of a grievance. The response to the Union's legitimate request for all medical records relied upon in making the decision to discharge the grievant is at odds with the contract's clear language for the release of 'all relevant necessary' information. Any doubt about the required scope of disclosure is dispelled by the JCIM which explains that relevant information includes medical records necessary to investigate or process a grievance. Midura's failure to immediately supply the requested documents, including Dr. Celona's IME report, is simply inexplicable when viewed through the promises made in the contract and the clear explanation of that commitment contained in the JCIM. The unjustified demand that the Union obtain releases from Radzik for documents she had never seen amounts to nothing more than a simple denial of Sonos' requests and a plain violation of the contract.
>
> "The suggestion that supplying the documents after the Step 2 meeting and Step 2 decision renders the contract violation harmless is not persuasive. President Flattery objected promptly and directly to the reliance on the requested-but-not-provided documents and accurately identified the prejudice caused the grievant. Without the medical reports the Union and Radzik could not prepare for the Step II and were unable to respond to the Postal Service's position on Dr. Cerlona's report which in turn thwarted any chance or resolving the grievance prior to arbitration.
>
> "…The report was crucial, relevant and material to the initial disciplinary action and the Postal Service's justification for denying the grievance. Fidelity to the Agreement and the parties' understanding of the need for a level playing field to ensure a fair and equitable grievance procedure argue strongly for granting

[292]Arbitrator James J. Willingham, Case No. A-C 276, December 11, 1972, pp. 18-20.

the grievance."[293]

Similarly, see **Arbitrator Williams**, who said:

> "Article 31.2 requires that Management furnish to the Union information necessary to process a grievance. Article 15.2, Step 2, requires Management to furnish facts relied upon, and the parties are to exchange all relevant papers and documents. Thirteen days before the Step 2 meeting, the Union forwarded a request for information it felt necessary to process the grievance and for documents it felt to be relevant. None was furnished by Step 2. A second request (MX 6) was received one day after the Step 2 hearing. Thus, there is little doubt that the grievant's case presentation at Step 2 was hampered when the Union had not received copies of the grievant's medical restrictions, information as to any attempt that Management had made to provide work within the grievant's limitations, all information upon which the notice of removal was based, names of employees on light duty, etc."[294]

In yet another decision, finding that the failure of the Employer to provide requested relevant information until after the Step 2 discussion violated the Grievant's due process rights**, Arbitrator Penn** explained:

> "In this case the Arbitrator also finds that the Postal Service violated the Agreement between the parties by failing to provide the Union with the information it requested. Article 15.2 (Step 2) which states, 'The parties representatives shall cooperate fully in the effort to develop all relevant papers or documents in accordance with Article 31.' Article 31.3 (Information) states, 'The Employer will make available for inspection by the Union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of the 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…Requests for information relating to purely local matters should be submitted by the local Union representative to the installation head or his designee…'
>
> . . .
>
> "…Mr. Booker denied the grievance at Step 2 without giving the steward an opportunity to present a defense on behalf of the grievant based on the records she had asked for. The Union got none of the information requested until several days after the Step 2 hearing was held.
>
> "The arbitrator finds that the Postal Service violated the Agreement by refusing to provide the Union with the relevant information during the processing of the grievance. The Postal Service had the information. The Union had requested the information in the appropriate way and the request had been approved, yet the Postal Service refused to share it as required by the Agreement. The Union cannot represent an employee, if it does not have access to the information on which the decision to remove an employee was made."[295]

Where the Employer's failure to provide requested information until two (2) days after the

[293] Arbitrator Timothy J. Buckalew, Case No. B00C-1B-D 06009128, August 11, 2006, pp. 13-14.

[294] Arbitrator J. Earl Williams, Case No. S4C-3W-D 51083, November 30, 1987, pp. 8-9. See also, Arbitrator Carl F. Stoltenberg, Case No. E7C-2F-D 39941/41432, April 21, 1992, pp. 20-21; Arbitrator Mark L. Kahn, Case No. J90C-1J-D 94048041 et al, April 28, 1995, p. 14; Arbitrator Jonathan Dworkin, Case No. J90C-1J-D 96014548/17277, December 24, 1996, pp. 14-21; Arbitrator Randall M. Kelly, B00C-4B-D 06130297, August 10, 2006; or, Arbitrator Carl C. Bosland, Case No. E00C-4E-C 06132811; January 10, 2007.

[295] Arbitrator Frances Asher Penn, Case No. J98C-4J-D 01008166, July 27, 2001, pp. 5-6. Similarly, for a situation where the Employer failed to provide critical requested information, see yet another award by Arbitrator Frances Asher Penn, Case No. J00T-1J-D 03106997, July 28, 2004. See also, Arbitrator J. Earl Williams, Case No. S4C-3W-D 51083, November 30, 1987.

grievance was appealed to Step 2 was compounded by rendering an untimely Step 2 decision subsequent to the Union's appeal to arbitration **Arbitrator Pecklers** found that these Article 15 and 17 violations were sufficient to overturn a removal for violation of a LCA without consideration of the merits. The Arbitrator explained:

> "The Postal Service controls its own destiny in this regard. Therefore, it voluntarily opens the door to a collateral attach on its disciplinary action, when a cavalier response to document production is undertaken. Were this contractual transgression not enough, Management also failed to issue a Step 2 answer in the case. I recognize that this is in and of itself not an automatically fatal defect, as the Union may appeal to the next step. However, I specifically credit the Union's contention that Article 15.4 requires a good faith observance by the parties. Coupled with the Article 17 violation, I find that the Postal Service has failed to adhere to this obligation. Moreover, these actions eviscerate Management's espoused tremendous respect for the grievance/arbitration procedure, which it proffered at the hearing."[296]

The Union's Article 17.3 rights include the right to "interview…supervisors and witnesses." Frequently employees are reluctant to "get involved." Supervisors think they are just "too busy." Employees, particularly those hostile to the interests of the disciplined employee don't want to be interviewed. The Employer must cooperate with the Union to make relevant supervisors and witnesses available for interviews. **Arbitrator King** explained this requirement:

> "The obvious intent of the above provision [Article 17.3] is to require that Postal Service management, involved employees and witnesses cooperate with the Union both in arriving at a determination as to whether grounds for a grievance exist and in the preparation of the prosecution of its case once a positive determination is made. Both the Union and the Postal Service are bound by the terms of the Contract. Postal employees are agents of the Postal Service and as such they are also bound by the terms of the Contract. Consequently, the Postal Service has the authority and contractual responsibility to require that they cooperate as witnesses when the Union makes a proper request to management. Failure of the employee to cooperate is a violation of the Contract and should subject the refusing employee to discipline by management. To view the provisions of Article 17.3 otherwise would render useless, at the whim of the employee, that provision of the Contract which grants the Union the 'right to interview the aggrieved employee(s) supervisors and witnesses…' Further, when management fails to enforce the quoted provision of the Contract against an uncooperative employee, the grievance process becomes inefficient, the Union is hampered in the preparation of its case and, as in this case, the Grievant's due process rights may be denied.
>
> . . .
>
> "The failure of the Postal Service to require that Mrs. Levine cooperate with the Union by submitting to an interview violated the provisions of Article 17.3 of the National Agreement between the parties. It hampered the Union in the preparation of its case and resulted in the denial of due process to the Grievant. This action alone is sufficient to sustain this grievance."[297] [emphasis added]

[296] Arbitrator Michael J. Peckers, Case No. A00C-4A-D 05152470, April 12,2006, pp. 11-12.
[297] Arbitrator Hamah R. King, Case No. G00C-4G-D 02137143, November 6, 2002, pp. 15-16.

Article 15 obligates the Employer to share all relevant information relied upon at Step 2. However, the Union should never rest on that technical obligation and fail to officially request information it believes to exist. The failure to make such a request may well be considered "sitting on one's rights" by an arbitrator.[298]

Where the Employer failed to provide the Investigative Memorandum until after the Step 3 meeting and finally provided an unedited copy of the Postal Inspector's video tape shortly before the arbitration hearing, **Arbitrator Gregory** concluded:

> "Article 31.3 of the National Agreement requires that the Postal Service disclose all information relevant to the processing of a grievance. Article 15.2 Step 2(d) further requires that both parties 'exchange all relevant documents and papers in accordance with Article 31' at the Step 2 meeting. In this instance, the Union repeatedly asked for crucial evidence in the possession of the Postal Service but did not receive the Investigative Memorandum and the edited version of a video tape until after the Step 3 meeting and did not get a copy of the unedited version of the tape for purposes of comparison until the arbitration hearing. This is not a situation where there is a reasonable explanation as to why the Postal Service failed to comply with the National Agreement; it simply failed to honor its obligations under the contract. The Investigative Memorandum and video tape, in its edited and unedited forms, are ruled inadmissible."[299]

The Employer can be expected to be particularly reluctant to share information when the issue is disparate treatment. They will undoubtedly assert Privacy Act concerns in delaying providing comparative information. This will be particularly true when the comparison employee in a non-bargaining employee.[300] Where the Employer refuses to provide relevant comparative information, they do so at their peril. **Arbitrator Baldovin**, for instance, said:

> "While Arbitrators generally do not relish having to sustain a grievance where the evidence demonstrates that the employee engaged in the conduct for which he/she was discipline, where as here, the failure to supply the requested relevant information makes it impossible to determine whether or note Grievant was treated disparately. lam unable to conclude whether the Service, which has the burden to do so, had just cause to issue the 12 day suspension. Bullard must live with the fact tat it was his failure to supply the

[298] See, for instance, Arbitrator Fred D. Butler, Case F00C-1F-D 04178971/214029, April 27, 2005, pp. 12-13.

[299] Arbitrator Mary Volk Gregory, Case No. E00T-4E-D 04043651, November 24, 2004, p. 1. Similarly, holding that although the Employer was prohibited from introducing at the hearing documents requested by the Union but never provided, the error was not fatal to the discipline, itself, see, Arbitrator Michael E. Zobrak, Case No. C00C-4C-D 03054532, April 28, 2003.

[300] However, note Arbitrator Carlton J. Snow, Case No. H7N-5C-C 12397, July 29, 1991, p. 29:

> "Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer violated the parties' National Agreement when the Employer denied a Union request for information respecting the possible discipline of two supervisors from the grievant's post office, who are alleged by the Union to have engaged in specific misconduct both close in time to and similar to that charged against the grievant, so that the Union could compare the actual conduct and subsequent treatment of the grievant and the supervisors and/or potentially argue that the grievant's discharge was disparate and thus not for just cause."

See also: Arbitrator Elliott H. Goldstein, Case No. J98C-1J-D 99259023, January 30, 2001.

> information that brought about this result. Where, as here, due process — the basic notion of fairness is lacking because information that might have been helpful to Grievant's defense is improperly withheld the great body of arbitrators have set aside the discipline imposed. While there is always the possibility that had Bullard supplied the requested information he might have been able to adequately demonstrate that the type or degree of the written complaints made on Downtown Station window clerks were distinguishable, the fact remains that for purposes of this case, no one will ever know because he chose not to supply the information."[301]

Another area where the Employer frequently resists providing requested information is when the Postal Inspectors and criminal charges are also involved. The Employer will suggest that information cannot be provided to the Union because the information is part of the criminal proceedings. They raise this defense at their own jeopardy. As **Arbitrator Walt** noted:

> "The Employer's position regarding the release of information in the possession of the Postal Inspection Service is without contractual foundation, and no legal authority was advanced to support it. In an arbitration proceeding, the Postal Inspection Service cannot be separated from the United States Postal Service; its status is that of the 'Employer.' Secondly, once management imposes discipline, the Union is contractually entitled by virtue of Article 17.3 to '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.' Furthermore, Article 31.3 obligates management to 'make available for inspection by the Union all relevant information necessary for…the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or continue the processing of a grievance under this Agreement.' That obligation cannot be circumvented by the fact that documents which fall within the purview of the cited contractual provisions are in the possession of the Postal Inspection Service. When the Employer determines the need to impose discipline, it must comply with its obligations under the National Agreement. Relevant documents must be produced and if in the possession of the Inspection Service, they must be obtained for Union 'access' and 'inspection.'"[302]

Our Union's position is that not only are we entitled to receive such relevant information, we are entitled to receive it in a timely manner. **Arbitrator Kelly**, for instance, dealt with a 2 month delay in providing requested information on an Emergency Suspension:

> "I find that the Emergency Placement of the Grievant in Off-Duty status on September 1, 1993 must be overturned because of the failure of the Service to provide the Union with requested, relevant information in a timely manner.
>
> . . .
>
> "Despite the clear mandate of Articles 15 and 31, the Service did not make the tape or the Inspectors available to the Union until November 3--after the Step 2 meeting and after the Grievant's status had been changed by the issuance of the Notice of Removal on November 1.
>
> "The National Agreement and the cases submitted by the Union are clear. The Service is required to

[301] Arbitrator Louis V. Baldovin, Jr., Case No. H94C-4H-D 97015599, January 30, 1998, pp. 10-11. See, also, Arbitrator Debra Simmons Neveu, Case No. G98C-1G-D 99180095, November 26, 1999.

[302] Arbitrator Alan Walt, Case No. J98C-4J-D 00167707/00275913, April 10, 1992, pp. 12-13. See also, Step 4 Decision, Case No. H1C-4A-C 26986/7, August 2, 1984 or, Arbitrator M. David Vaughn, Case K00C-1K-D 03112078, September 27, 2003..

> provide relevant, properly requested information to the Union to allow it to process grievances. Article 31 requires this at any stages of the various processes delineated. Article 15 makes clear that the Step 2 hearing is the latest that the Service can provide this information. The Step 2 hearing was held on October 29 and the information was not provided until November 2. This was not timely and the grievance must, therefore, be granted."[303]

In a similar case, Arbitrator **Thomas** reviewed a situation where the Employer failed to provide the Postal Inspectors' Investigative Memorandum in response to the Union's request prior to issuing the Step 2 decision and discussed the impact of that failure on possible resolution at both Step 1 and at Step 2, saying:

> "The employer's failure to provide the union with the Postal Inspection Service Investigative Memorandum prior to the Step 1 grievance meeting severely prejudiced the union's position. This is so because it is undisputed that at Step 1, the employer made an offer to settle this matter…The union, not being in a position to review the evidence, rejected the employer's offer of settlement. That matter was compounded when, at Step 2, the employer's designee showed Mr. Rios the investigative memorandum but did not give it to him to read…Thus, Mr. Rios did not have the critical document in his possession, on behalf of the union, at the Step 2 meeting either. When he did receive the report…the Step 2 decision had already been reached. But for the employer's failure to provide the union with the requested information, it could have settled this matter in a manner satisfactory to Mr. Rivera rather than having the instant grievance denied. The employer's failure to provide the union with requested information improperly interfered with its role as bargaining representative and resulted in the letter of warning being issued to the Grievant without 'just cause'. A basic principle of 'just cause' holds that an employee is entitled to due process before disciplinary action is issued. If 'due process' means anything, it includes the right to an employee to have documents properly requested from the employer in order to prepare for grievance meetings." [304]

Failure to provide requested information in a timely manner also violates the National Labor Relations Act. See for instance, Shaw's Supermarkets, Inc. v. UFCWU, 339 NLRB 1, where the Board upheld the determination of the Administrative Judge that:

> "The issue then is whether the Act was violated by the dilatory manner in which…requested information was turned over. Once a good faith demand is made for relevant information, it must be made available promptly and in useful form. Even though an employer has not expressly refused to furnish the information, its failure to make diligent effort to obtain or to provide the information 'reasonably' promptly

[303] Arbitrator Randall M. Kelly, Case No. A90C-4A-D 94009758, November 7, 1994, pp. 4-6.

Where the USPS withheld information regarding three supervisors, whom the Union alleged were treated differently, for nearly three (3) years while it appealed an NLRB decision [USPS & APWU, 301 N.L.R.B. 104] that the information must be provided, Arbitrator Josef P. Sirefman, Case No. N7C-1N-D 002177, March 18, 1994, said at p. 12:

> "In such a circumstance the right of the Service must be weighed against the disadvantages it causes to a Grievant who has been removed and now must wait years in order to have a full hearing, including consideration of the disputed material. That the particular disparate treatment may or may not prove to be dispositive for an Arbitrator is not the point. The detriment to the Grievant because of the inordinately long delay before the material would become available for consideration as part of his defense against removal is. In my opinion, the delay in this particular case has been so long as to outweigh the Service's arguments on the merits. It outweighs any consideration of whether or not Grievant has been an ideal employee. It constitutes basic deprivation of due process and warrants retractions of the Removal Notice and reinstatement with back pay."

[304] Arbitrator Irene Donna Thomas, Case No. A98C-1A-D 02037171/012549, May 21, 2002, pp. 17-19.

may be equated with a flat refusal…"[305]

FAILURE TO PROVIDE AN INTERPRETER

The "Reasonable Accommodation for the Deaf and Hard of Hearing" Memorandum of Understanding obligates management to:

> "reasonably accommodate Deaf and Hard of Hearing employees ...who request assistance in communicating with or understanding others in work related situations, such as:
>
> a. During investigatory interviews which may lead to discipline, discussions with a supervisor on job performance or conduct, or presentation of a grievance."

The Memorandum of Understanding also notes that "reasonable accommodation must be approached on a highly individual, cases by case basis" and that the "individual's input must be considered" before a decision can be made regarding appropriate accommodation.

Failure to provide such accommodation is a denial of due process.[306] Our Deaf of Hard of Hearing members should be made aware of their right to request such accommodation. And where such accommodation is not provided, the denial of due process should be vigorously challenged in the grievance procedure. While it is not always required that a certified interpreter be provided, the individual employee's needs must always be considered. Generally, we should insist that qualified and certified interpreters be utilized. In a 1999 award, **Arbitrator Simmelkjaer**, discussed the failure to provide a qualified interpreter, saying:

> "Although the evidence indicates that supervisors who knew sign language and had some training in

[305] Shaw's Supermarkets, Inc. v. UFCWU, 339 NLRB 1, July 29, 2003, p. 5.

[306] Where the supervisor failed to provide an interpreter for the signing of a Last Chance Agreement, Arbitrator Joseph S. Cannavo, Jr., in Case No. A90C-1A-D 96013570, June 8, 1996, overturned a subsequent Removal, saying at pp. 16-17:

> "Thus, by failing to have the shop steward present for the explanation of the Last Chance Agreement (including discussion regarding the production of medical documentation not included in the Last Chance Agreement) and/or by failing to provide an interpreter, Management failed to exercise its obligation to reasonably accommodate the Grievant, a hearing impaired person. What is more, by failing to provide the Grievant with a reasonable accommodation, the supervisor deprived the Grievant of his due process right of notice of what was required of him during the one year probationary period provided for in the Last Chance Agreement."

> communicating with the deaf were present on May 1st, this level of competence cannot suffice when discipline is contemplated or critical information which could affect grievant's employment is involved. Whereas the sign language services of Ms. Keeling or Ms. Sheratt may have been sufficient for routine work-related communications, the gravity of grievant's refusal to work the flat sorter machine and, more importantly, the consequences of that refusal, had to be unequivocally communicated with the assistance of certified interpreters. It is conceivable that various nuances in the sign language process which only a certified interpreter could convey were essential for grievant to clearly understand her situation.
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> . . .
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> "In the Arbitrator's opinion, the Service's failure to provide grievant with a certified interpreter on May 1st constituted harmful procedural error in that it denied her procedural due process which includes notice and the opportunity to be heard.
>
> "This procedural error was compounded on May 22, 1998 when the NOR was issued, again without the availability of a certified interpreter. Clearly, grievant had a right to be apprised (sic) of the charges and to effectively present her position. Moreover, the issuance of the NOR without a predisciplinary hearing prevented grievant, through her Union representatives, from articulating her defense to the pending charges."[307]

The obligation to provide interpreters, by the way, is not limited to Deaf or Hard of Hearing employees. Other employees who experience language barriers are also entitled to such accommodation unless the Employer wants to risk a due process violation. **Arbitrator Snow**, for instance, dealt with a Chinese-American who was not provided with an interpreter during the investigatory interview. In reducing the Removal to a 14 day suspension, **Arbitrator Snow** found:

> "Management violated the grievant's right to due process by failing to make available to him an English-Chinese interpreter to assist the grievant during an investigation into this matter. ...To insure a fair investigation and hearing, it is necessary for an individual such as the grievant to be provided an interpreter capable of both informing him of the charges and also capable of translating into English the employe's version of those events. Failure to provide such an interpreter is tantamount to refusing a grievant an opportunity to defend himself. Not providing the grievant with a Chinese-English interpreter during relevant investigatory discussions...violated the grievant's right to due process in this particular case."[308]

[307] Arbitrator Robert T. Simmelkjaer, Case No. B94C-1B-D 9906988, September 24, 1999, p. 21.

[308] Arbitrator Carlton J. Snow, Case No. W1C-5G-D 4252, July 8, 1983, pp. 36-37.

CONCLUSION

Hopefully, by now, you have picked up one or two new ideas which will give you a renewed enthusiasm for approaching those difficult discipline cases for which there otherwise simply seems to be no possible defense. In any case, we want to leave you with this reminder. Always remember, the key to investigating and processing a discipline grievance is **DOCUMENT! DOCUMENT! DOCUMENT!** Union Solidarity, Forever!