UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

HAYWARD FLEMING, Appellant, v. UNITED STATES POSTAL SERVICE Agency.	DOCKET NUMBER AT07528510197 DATE: February 28, 1986

BEFORE

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

OPINION AND ORDER

The Postal Service petitions for review of an initial decision which ordered cancellation of its removal action against appellant and substitution of a letter of reprimand.[1] For the reasons set forth in this opinion, the Postal Service's petition is GRANTED, under 5 U.S.C. § 7701(e)(1), and the initial decision is AFFIRMED in part and REVERSED in part. Appellant's removal is sustained.

Background

Appellant filed a timely appeal from his removal as Postal Service Clerk based on the charge of continued failure to be regular in attendance and absence without leave (AWOL).

1/ In its petition, the Postal Service requests an opportunity for oral argument. Because the issues have been thoroughly addressed and developed in the pleadings that request is DENIED.

In an initial decision issued February 27, 1985, a presiding official of the Board's Atlanta Regional Office found that part of the charges pertained to absences for which leave had been approved and, therefore, was not sustainable;[2/] and, that only one of the four remaining absences was proven to be AWOL. She further found that the Postal Service would not have removed appellant based on the single sustained charge of AWOL and determined that a letter of reprimand was the maximum reasonable penalty.[3/]

The Postal Service contends: 1) that, in the Postal Service, an adverse action may properly be based on use of approved leave pursuant to an arbitral interpretation of its collective bargaining agreement; 2) that the presiding official erred in refusing to sustain two of the charged AWOL incidents; and 3) that the presiding official improperly substituted her judgment for that of the Postal Service in assessing the appropriate penalty for the one sustained AWOL incident. Appellant opposed the Postal Service's petition.

ANALYSIS

Applicability of 5 U.S.C. Chapter 63 and 5 C.F.R. Part 630 to the United States Postal Service.

In Webb v. United States Postal Service, 9 MSPB 749 (1982), the Board held that an adverse action based on approved leave is ". . . precluded by the laws (5 U.S.C. Ch. 63) and regulations (5

2/ Of the thirty-nine absences cited in the Notice of Proposed Removal, leave had been approved for thirty-five. Tab 6; Initial Decision at 2.

3/ The presiding official further found that appellant's claims of handicap discrimination based on alcoholism and high blood pressure were without merit.

C.F.R. Part 630) that entitle an employee to use annual and sick leave within prescribed circumstances and limitations." Id. at 753. Further, the Board stated that to discipline an employee for use of approved leave is not for such cause as will promote the efficiency of the service. 5 U.S.C. § 7513(a).

The Postal Service correctly asserts that 5 U.S.C. Chapter 63, and 5 C.F.R. Part 630, are inapplicable to the Postal Service.

The term "employee" is defined in 5 U.S.C. § 2105(e):

> Except as otherwise provided by law, an employee of the United States Postal Service or of the Postal Rate Commission is deemed not an employee for purposes of this title.

In addition, in enacting the Postal Reorganization Act of 1970, Pub. L. No. 91-375, Congress did not include 5 U.S.C. Chapter 63 among those laws specifically applicable to the Postal Service.4/ Since 5 U.S.C. Chapter 63 is not made applicable to the Postal Service by 39 U.S.C. § 410, and because 5 U.S.C. § 2105(e) specifically excludes Postal Service employees from Chapter 63, we conclude that Postal Service employees have neither a statutory nor regulatory entitlement to use of annual or sick leave under those provisions. Accordingly, Webb is

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4/ 39 U.S.C. § 410(a) provides:

> § 410. Application of other laws
>
> (a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of Title 5, shall apply to the exercise of the power of the Postal Service.

MODIFIED to reflect our conclusion that 5 U.S.C. Chapter 63 and 5 C.F.R. Part 630 are inapplicable to the Postal Service.

Applicability of the 1979 National Arbitration Award

The Postal Service claims that a "national level arbitration decision" dated November 19, 1979, "affirmed the Postal Service's right to discipline employees for excessive absenteeism and failure to maintain a regular schedule, even when absences are ones for which leave has been approved." Postal Service Petition for Review (PFR) at 11-12. The referenced 1979 arbitration decision stated the issue as:

> Whether, under the 1975 or 1978 National Agreements, USPS may properly impose discipline upon employees for 'excessive absenteeism' or 'failure to maintain a regular schedule' even though the absences upon which the charges are based, are absences where
> (1) the employee was granted approved sick leave;
> (2) the employee was on continuation of pay due to a traumatic on-the-job injury; or
> (3) the employee was on OWCP approved workmen's compensation.[5/]

In conjunction with this claim, the Postal Service alleges, without supporting evidence, that certain provisions of the 1981 National Agreement[6/]

> regarding leave, grievance-arbitration procedures, and discipline were extended

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5/ Decision of Sylvester Garrett, Arb., Case No. NC-NAT-16.285, Issued November 19, 1979 (Attachment 2 to PFR), at 1. We do not agree that the issue presented herein is the same as that addressed by Arbitrator Garrett. Appellant's absence due to his failure to obtain reliable transportation is certainly distinguishable from the types of absences addressed in the 1979 arbitration.

6/ Attachment 1 to PFR, Agreement between United States Postal Service and American Postal Worker's Union, AFL-CIO, National Association of Letter Carriers, AFL-CIO, effective July 21, 1981, through July 21, 1984.

> until the successor agreement went into effect on December 24, 1984. (In any event, those provisions remain unchanged in the successor agreement).7/

[Emphasis added]

For the purpose of determining what applicability the 1979 arbitral decision may have to the instant removal, the above assertion is unavailing. Any reliance on the 1979 arbitration interpreting the 1975/78 National Agreements would have to be based on similarities between the 1975/78 National Agreements and the 1981 National Agreement. The Postal Service makes no allegation to this effect, nor does the record afford a proper basis for drawing this conclusion.8/

Assuming, *arguendo*, that both the issue and contractual language addressed in the 1979 arbitration are the same as that here presented, the question yet remains whether the succeeding 1981 National Agreement, *considered and interpreted as a whole*,9/ had and maintained the interpretation urged by the Postal

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7/ PFR at 10, fn. 8.

8/ In American Postal Workers Union Columbus Area Local v. United States Postal Service, Case C-2-80-33 (S.D. Ohio, May 16, 1983), aff'd on other grounds, 736 F.2d 318 (6th Cir. 1984), Robert M. Duncan, J., in an unpublished memorandum and order (unnumbered attachment to PFR), noted at 3 that "the parties agreed in their 1981-84 National Agreeement to those precise provisions concerning 'approved sick leave' which had been contained in the 1978-81 National Agreement." This is insufficient to conclude that the referenced 1979 arbitral decision was operative at the time of appellant's removal under a successor agreement. See discussion, *infra*.

9/ Elkouri and Elkouri, How Arbitration Works, 352-353 (4th ed., 1985). "It is said that the 'primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties . . . ' Similarly, 'Sections or portions cannot be isolated from the rest of the agreement and given construction independently of the purpose and agreement of the parties as evidenced by the entire document. * * * The meaning of each paragraph and sentence must be determined in relation to the contract as a whole.'"

Service. While the leave provisions considered by Arbitrator Garrett may have remained the same from one agreement to the next, the reasonable possibility exists that another provision may have been added, deleted, or modified during renegotiation to the effect that the interpretation or application permitted in 1979 was no longer operative in 1984. The record, however, does not contain the 1975/78 National Agreements interpreted in the 1979 arbitral decision and, therefore, we are unable to make this comparison.

Thus, the 1979 arbitral decision advanced by the Postal Service is not persuasive authority upon this record.

Unscheduled Absences as a Basis For Discipline

Assuming, *arguendo*, applicability of certain provisions of the 1981 National Agreement, we note that Article 16, "Discipline Procedure," provides, in part, that "[n]o employee may be disciplined or discharged except for just cause . . . ." Appellant was specifically notified in the proposal letter that the reasons for the removal included "unscheduled absences" in context with the charge of "continued failure to be regular in attendance and AWOL." Tab 6.

In addition to the foregoing contractual "just cause" standard, 5 U.S.C. § 7513(a) permits adverse action "only for

such cause as will promote the efficiency of the service."[10/] We find that both are met in this case.

We note particularly the Postal Service's consistent counseling of the employee regarding the gravity of his irregular attendance and the likelihood of discipline for continued infractions. Specifically, as early as 1976, appellant had been issued a letter of warning for unacceptable lateness. Tab 13-V. This was followed two months later, in January, 1977, by another letter of warning for AWOL, Tab 13-U, and a suspension later that month for unauthorized absence from his operation. Tab 13-S. In 1978, appellant received a letter of warning for unscheduled absences, Tab 13-G, and a suspension for being absent from his work assignment. Tab 13-P. In 1979, he was suspended again for AWOL. Tab 13-O. In 1980, he received a letter of warning for unscheduled absences, Tab 13-M, and a notice of proposed removal for absence from his work assignment; the Postal Service subsequently reduced the removal to a twenty-one day suspension. Tab 13-K. In January, 1982, the Postal Service again proposed to remove appellant for unscheduled absence and AWOL but reduced the

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10/ Fourteen years after passage of the Pendleton Act, which established a Civil Service Commission charged with promulgating Federal civil service rules and establishing competitive examinations, President McKinley ordered that "no removal shall be made from any position subject to comprehensive examination except for just cause and upon written charges." Exec. Order No. 101 (1897), reprinted in 18 U.S. Civil Service Commission Ann. Rep. 282 (1902). Subsequent orders defined "just causes" as those that would promote the "efficiency of the service," See, e.g., Exec. Order No. 173 (1902), reprinted in 19 U.S. Civil Service Commission Ann. Rep. 76 (1902) (defining "just cause" as "any cause, other than one merely political or religious, which will promote the efficiency of the service"). This standard was incorporated in the Lloyd La Follette Act of 1912. Act of Aug. 24, 1912, Ch. 389, § 6, 37 Stat. 539, 555 (codified as amended at 5 U.S.C. § 7513 (1982).

removal to a ten-day suspension. Tab 13-J. In August, 1982, appellant was again suspended for AWOL, Tab 13-I, and in December, 1982, another proposal to remove him for AWOL was reduced to a sixty-two day suspension. Tab 13-F. In 1983, appellant received two letters of warning for failing to report for scheduled overtime. Tab 13-G, 13-H.

Both the proposal and the decision to remove appellant emphasized the unscheduled nature of the numerous absences. Significantly, Postal Service Form 3971 (Request for, or notification of absence), Tab 13 D, E, requires the leave-approving official to indicate whether the approved absence is "scheduled" or "unscheduled." The employee is thus aware from the outset that unscheduled absences are considered different from scheduled absences. An employer faced with an unscheduled absence is doubly burdened; once for the loss of the employee's services and, again, for the loss of the opportunity to plan for the absence.

We therefore hold that while an employee may not be disciplined[11/] on the basis of approved leave, *per se*, it is yet permissible to predicate discipline on failure to follow leave-requesting procedures, provided the employee is clearly on notice of such requirements and of the likelihood of discipline for continued failure to comply. We emphasize the responsibility supervisors bear in this regard. The efficiency of the service

11/ We do not include in this concept those removal actions, non-disciplinary in nature in the sense they are neither punitive nor corrective, which stem from an employee's obvious physical or mental incapacity to perform. Reliance on approved leave in such actions is appropriate for the purpose of showing the employee's unavailability.

is not promoted when employees are led to believe, through leave approvals, that their attendance patterns are acceptable - only to discover later that the approved leave is used as a basis for subsequent discipline. Confronted with an unscheduled absence, a supervisor, concluding that discipline is appropriate, must mark the employee AWOL or, if leave is approved, must make clear to the employee that the failure to schedule the leave in advance is not being disregarded.12/

Here, the Postal Service properly removed appellant on the basis of the unscheduled nature of his thirty-five absences and the consequent deleterious effect on the efficiency of its operations in context with repeated and clear counseling regarding the probability of punishment for continued offenses.

AWOL Charges

The Postal Service also contended that even if appellant's removal could not be based on approved leave, the charges of AWOL were sufficient to warrant his removal, and that the presiding official erred in failing to sustain two of the three other AWOL charges. The Postal Service references Villela v. Department of the Air Force, 727 F.2d 1574 (Fed. Cir. 1983), which held an absence without leave of only four hours sufficient to justify a removal.

The two incidents of AWOL which the presiding official did not sustain, and which the Postal Service appealed, relate to appellant's tardiness due to automobile problems on December 21

12/ This can be be accomplished by annotating the leave request form to such effect or by adopting a form similar to Postal Service form 3971 (requiring checking of "scheduled" or "unscheduled" boxes).

and 30, 1983. She properly determined that the Postal Service was not required to excuse appellant's chronic personal transportation problems. However, since she found the Postal Service had inconsistently handled other similar incidents, the presiding official found that the Postal Service had failed to prove the propriety of denying appellant leave on the two occasions in question. We do not concur in this analysis regarding these latter two incidents. There was only one occasion, prior to the date of the first of these charges, when appellant's transportation-related tardiness had not resulted in AWOL. On that occasion, appellant had been required to document his absence to avoid AWOL. See Tab 13-D. Further, appellant was clearly on notice that the Postal Service considered his continued chronic tardiness due to automobile problems subject to discipline. See Tab 13-H.

The presiding official stated that the Postal Service had excused appellant's lateness due to automobile or taxi problems in January, May, and July, 1984, and concluded that this treatment was "inconsistent" with the prior charges of AWOL. However, Ms. Hall, the Leave Control Supervisor, testified that AWOL had been imposed on December 21 and 30, 1983, because she found appellant's explanations on those latter dates to be particularly inadequate. Ms. Hall testified that she had counseled appellant repeatedly regarding his attendance problems, and that her acceptance of some of his excuses had been an attempt to work with him towards rehabilitation. We find that appellant was properly charged with AWOL on those dates. The

Postal Service's attempt to rehabilitate appellant, by an exercise of leniency on occasion, should not result in a waiver of its right to discipline for conduct for which appellant had been previously disciplined and/or counseled. The charges of AWOL for December 21 and 30, 1983, are sustained.

PENALTY

The Board will review a penalty to determine whether it is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious or unreasonable. Douglas v. Veterans Administration, 5 MSPB 313 (1981). In making such determination, the Board must give due weight to management's primary discretion in maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within tolerable limits of reasonableness. Id. at 329. After noting that a penalty should be selected only after the relevant factors have been weighed, the Board held that the purpose of its review is to assure that management conscientiously considered the relevant factors and, in choosing the penalty, struck a responsible balance within the limits of reasonableness. Id. at 332, 333.

The most relevant factors in the instant case are the nature and seriousness of the offenses, the employee's past disciplinary record, the clarity with which appellant had been warned about the conduct in question, and mitigating circumstances surrounding the offenses.

The presiding official found that the Postal Service properly relied on appellant's past disciplinary record in deciding upon removal, but held that the removal could not be sustained because it was based on approved leave rather than AWOL. She noted that the Postal Service took no action at the times the AWOL occurred, and concluded that, had the subsequentl approved absences not occurred, appellant would not have been disciplined for the AWOL of December 21 and 30, 1983.

We find that, under the circumstances of this case, the Postal Service's delay in taking the removal action against appellant does not affect the reasonableness of its choice of penalty. Further, removal is within the limits of reasonableness, in view of the three sustained charges of AWOL and the unscheduled nature of the thirty-five charged absences.

CONCLUSION

Accordingly, the initial decision is AFFIRMED with respect to the one sustained incident of AWOL, and REVERSED with respect to the remaining two charges of AWOL, which are SUSTAINED; and appellant's removal is SUSTAINED.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant has the statutory right under 5 U.S.C. § 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision, with respect to claims of prohibited discrimination. The statute requires at 5 U.S.C. § 7702(b)(1) that such a

petition be filed with the EEOC within thirty (30) days after notice of this decision.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. § 2000e5(f) - (k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, costs, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judicial review, if the court has jurisdiction, of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ORDER was sent by certified mail this date to:

Joseph L. De Shields, Jr.
U.S. EEOC
P.O. Box 56342
Atlanta, Georgia 30343-0342

Hayward Fleming
4403 Pleasant Point Drive
Decatur, Georgia 30032

by regular mail service to:

Jimmy L. Fleming
U.S. Postal Service
Main Post Office
3900 Crown Road
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Merit Systems Protection Board
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by hand to:

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3/6/86
(Date)

Dick Chung for
Robert E. Taylor
Clerk of the Board

Washington, D.C.