Grievances In Arbitration

A REPORT BY:

JEFF KEHLERT

National Business Agent representing clerks in Your Region

Delaware, New Jersey, Pennsylvania
AMERICAN POSTAL WORKERS UNION, AFL-CIO

American Postal Workers Union, AFL-CIO

Memorandum

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From the Office of JEFF KEHLERT
National Business Agent
Clerk Division
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TO: Brothers and Sisters:

SUBJECT: GRIEVANCES IN ARBITRATION

Dear Brothers and Sisters:

Enclosed are several successful arbitration cases which I have presented that are excellent illustrations of the final process in our grievance procedure. Attached are copies of those decisions for your review. The issues include letters of demand issued for cashing of money orders; a letter of demand issued when the employee was called away during an audit; failure of the U.S.P.S. to post/revert a vacant position; insufficient scheme assignment training hours; the refusal of the Postal Service to award a position to the senior bidder; the improper awarding of a best qualified position; an indefinite suspension issued for assault upon a Postal employee; and an indefinite suspension and discharge issued on an indictment for theft by deception.

In particular, Arbitrator Stutz, in two cases, agreed with the Union's position that one form of valid identification was sufficient when cashing a money order. He ruled that the Domestic Mail Manual provisions were controlling—not those of the F-1 check cashing regulations—when window clerks cash money orders. Arbitrator Kasher sustained a case in which a window clerk cashed two Phillippine money orders with the erroneous authorization of his supervisor. The Arbitrator ruled the grievant had been diligent and that he was a completely honest and credible witness at the hearing. In another letter of demand case, Arbitrator Dennis sustained the grievance stating:

> **"the Postal Service did allow an audit to take place under conditions that did not afford the grievant the right to be present at all times while the audit was in progress. This is in violation of ... Section 377.32 of the F-1 Handbook ... and ... should not be allowed."**

In this case, the grievant, a T-6 Window Clerk, was called away several times while her accountability was audited. In a different contractual issue, Arbitrator Kasher found for the Union when Management neither reverted nor posted a vacant duty assignment. He found violations of Article 37, Sections 3.A.1. and 3.A.2. of our Collective Bargaining Agreement.

In a case involving insufficient training hours for scheme assignments, Arbitrator Rimmel provided excellent reasoning and language which will prove helpful in the future for like instances. On another issue, Arbitrator Zack found Management could not deny an employee a contractually bid position—and ordered out of schedule pay for the grievant. In an unusual win for the Union, Arbitrator Bernard Cushman ruled Management had improperly awarded a best qualified job to a letter carrier instead of to a clerk. The arbitrator found Management's action against the clerk to be so blatant and unfair he sustained the case and compounded the monetary award with interest on the back pay.

Arbitrator Arthur Talmadge rendered an excellent decision in an instance of indefinite suspension. His scholarly narrative of the issue, prior arbitral reference considered, and reasoning are worth noting and will add to the understanding of our Collective Bargaining Agreement's Indefinite Suspension procedure.

Lastly, in another case of Indefinite Suspension, with a subsequent discharge, Arbitrator Marx found just cause for the suspension; but awarded full back pay for the removal. Arbitrator Marx felt the U.S.P.S. had reasonable cause to believe guilt and that a nexus existed between the indictment and the grievant's position of public trust. As for the discharge, the arbitrator found the Postal Service errant in its determination to remove. He stated the U.S.P.S. should have returned the grievant to duty upon her entrance into a Pre-Trial Intervention Program.

I believe these cases will prove helpful in the preparation of grievances for like issues.

< < * * * > >

We are witnessing an ever-increasing number of removal actions issued by the United States Postal Service for scheme failure; both manual and MPLSM. I have included in this report a post-hearing brief I wrote and submitted on the issue of such a discharge. The arguments and arbitral reference included will again, I believe, prove helpful in the construction of grievances for scheme failure. (If you require the full text of the brief's addendums, please contact me and I will forward you copies.)

If you have any questions or comments regarding these materials or any other issues, I am available at (856) 427-0027 .

Yours in Unionism, I am

Jeff Kehlert
National Business Agent
Clerk Craft

JDK:svb
opeiu #2/afl-cio

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REGULAR ARBITRATION PANEL

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE and AMERICAN POSTAL WORKERS UNION	Grievant: L. Mykulak, R. Russo Post Office: Jersey City NJ Case No: N4C-IN-C 17805, N4C-IP-C 26111

Before Robert L. Stutz, Arbitrator

Appearances:

For US Postal Service:

Shirley A. Martin, Advocate

For Union:

Jeff Kehlert, National Business Agent

Date of Hearing: October 20, 1987

Place of Hearing: Jersey City, NJ

Award:

The Employer violated the collective bargaining Agreement when it issued Letters of Demand to the grievants for improperly cashing money orders. The Letters of Demand should be rescinded. If any monies have been paid by the grievants they should be reimbursed in full.

NOV 16 1987

N.E. REG. COORD. OFFICE

Date of Award: November 12, 1987

A hearing on this matter was held on October 20, 1987 at Jersey City, N.J. before the undersigned member of the regular panel of arbitrators for the Northeast Region. Appearing for the Postal Service was Shirley A. Martin, Advocate, and for the Union was Jeff Kehlert, National Business Agent.

The parties agreed at the hearing on the following statement of the issue:

> Did the Employer violate the collective bargaining Agreement when it issued Letters of Demand to the grievants for improperly cashing money orders? If so, what shall the remedy be?

The grievants in this case, Linda Mykulak and Raymond Russo, were both employed as Window Clerks by the Jersey City, N.J. post office. On April 9, 1984 Mykulak cashed a Postal Money Order for $350.00. On May 6, 1985 Russo cashed a Postal Money Order for $500.00. In each instance the Money Order Division, Postal Data Center, St. Louis, MO received and paid claims for wrongful payment of the subject money orders. Upon receiving this information about improper payment of the money orders, Letters of Demand were issued to the grievants by local management requiring them to replace the indebtedness in accordance with Section 563.11 of the Financial Handbook, F-1 and Article 28 of the National Agreement.

The position of the Postal service is that the grievants were responsible for the losses because they failed to obtain two forms of identification for the money order transactions as required by the procedure set forth in the Financial Handbook,

Section 332.62. According to the management, money orders are postal funds and should be treated the same as personal checks, as indicated in F-1, Section 333.

The Union response is that F-1, Section 332.62 describes the procedure for accepting personal checks and that the prescribed procedure for cashing domestic money orders is included in the Domestic Mail Manual (DMM), Section 941.37. That section requires only that the payee on a money order may be required to provide identification and lists drivers licenses among acceptable forms of identification. Since the money orders in question both include on the back the required signature of the payee and the payee's driver's license number, the Union argues that the grievants fulfilled their responsibilities and complied with the money order cashing regulations and should not be held responsible for the amounts assessed in the Letters of Demand.

Opinion

While there may be some ambiguity in the way the F-1 Manual refers to both personal checks and money orders in Chapter 3, Handling Postal Funds and Protecting Funds and Accountable Paper, a close reading fo the relevant sections shows that Section 332.62 deals explicitly with accepting personal checks and Section 333 deals with accepting other items, including money orders, both apparently in payment for postal charges and services. The cases at issue here do not involve the purchase of postal services. They deal only with cashing postal money

orders. It is the DMM, Section 941.37 which expressly prescribes the procedure to be followed in cashing postal money orders. Contrary to F-1, Section 332.62, the DMM makes no mention of two forms of identification and states that, if the payee is not personally known to the employee, "the payee will be required to provide identification." The section then lists normally acceptable forms of identification, including drivers permits. Both grievants required the persons cashing the money orders in question here to present identification in the form of drivers licenses, which is all that the DM requires.

It should be noted that the same general conclusion that only one form of identification is required by the DMM was reached by Arbitrator Robert M. Leventhal in Case No. WIC-5D-C 23245-23247, February 18, 1986.

Award

The Employer violated the collective bargaining Agreement when it issued Letters of Demand to the grievants for improperly cashing money orders. The Letters of Demand should be rescinded. If any monies have been paid by the grievants, they should be reimbursed in full.

Robert L. Stutz

USPS AND APWU REGULAR PANEL
CASE NO. E4C-2B-C 7502
ARBITRATION OPINION AND AWARD
RICHARD R. KASHER, ARBITRATOR
NOVEMBER 28, 1987

In the Matter of an Arbitration between

UNITED STATES POSTAL SERVICE

- and -

AMERICAN POSTAL WORKERS UNION, AFL-CIO

HEARING LOCATION: South Jersey, MSC
421 Benigno Boulevard
Bellmawr, NJ 08031-9998

HEARING DATE: November 19, 1987

APPEARANCES: For the Postal Service
Gerald T. Golden

For the APWU
Jeff Kehlert

NATURE OF DISPUTE: Letter of Demand - Hunsberger

Introduction

The United States Postal Service (hereinafter the "Employer" or the "Postal Service") and the American Postal Workers Union, AFL-CIO (hereinafter the "Union" or the "APWU") are parties to the 1984 National Agreement which contains provisions governing the arbitration of grievances involving wages, hours and conditions of employment.

A grievance in the above-captioned case was handled directly by the parties, and after exhausting the requisite steps in the appeal procedures, the matter was submitted to arbitration.

In accordance with the grievance and arbitration provisions contained in the collective bargaining agreement, the below-signed Arbitrator conducted an arbitration hearing on the above date and at the above location at which both the Postal Service and the APWU were represented.

Said Representatives were afforded a full opportunity to present all relevant evidence through the testimony of witnesses and in documentary proofs. Representatives were permitted to engage in a broad range of cross-examination and they presented points, contentions and arguments in support of their respective positions.

Background Facts

Mr. Thomas Bunsberger (hereinafter the "Grievant") was employed as a Window Clerk at the East Camden Post Office.

The Grievant, who had been employed as Window Clerk for nine (9) years, testified that on August 19, 1987 a male customer presented him with two (2) money orders that he thought were "U.S. Philippine" issue, and that he had "never seen these kind of money orders before". The Grievant further testified that the two (2) windows at the post office were busy that day, and, because he did not want to "hold up the line", he asked the customer to "step to the side" and that he took the money orders to the desk of his supervisor, Mr. John A. Ash, who was the Manager of the East Camden Branch.

The Grievant testified that he asked Manager Ash what he should do with the money orders, and that Mr. Ash, apparently after conferring with Central Accounting, came back to his window, after about five (5) minutes, and said "it was okay to cash the money orders". The Grievant had the customer provide two (2) items of identification, noted those items on the back of the money orders, and gave the customer $519.00 in U.S. currency for the money orders.

The face of the money orders indicated that they were drawn in the amounts of three hundred-forty six (346) and one hundred-seventy three (173) pesos. The back of the money orders stated, in part, "Domestic Money Orders may be paid at the designated Paying Post

Office or at any commercial saving or rural bank in the Philippines within one year from the last day of the month of issue and can be repaid at the issuing Office within the same period".

When the money orders were not honored, the Postal Service conferred with Manager Ash, who denied that he had given the Grievant permission to cash the money orders.

Thereafter, a letter of demand was issued to the Grievant pursuant to Article 28 of the National Agreement. The Postal Service sought $519.00, the value exchanged for the money orders, and $20.00, for the bank charges which had been assessed for processing the money orders.

The Union grieved the letters of demand, and, as noted above, failing resolution, the matter was submitted to arbitration. Mr. Ash, who has retired, did not testify at the arbitration hearing. Mr. George Dennison, who was the Manager of Customer Service at the East Camden Post Office at the time of the incident and who answered the Step 2 grievance, testified that he denied the grievance because (1) of the Window Clerk's financial responsibility, and (2) he believed Mr. Ash's statement that the Grievant did not have permission to cash the money orders.

The matter before the Arbitrator concerns the issue of whether the Postal Service violated the collective bargaining agreement by issuing the letters of demand to the Grievant.

Position of the Union

The Union acknowledges that it has the burden of proof in this case, and submits that it has met that burden.

The Union contends that the Grievant testified credibly regarding his receipt of authorization from his supervisor to cash the money orders. The Union submits that the Postal Service's failure to rebut this credible testimony requires that the grievance be sustained.

The Union concedes that cashing the money orders was an error. However, the Union argues that the Grievant absolved himself of blame; that it was Manager Ash who was responsible for the error; and, therefore, the letters of demand should not have been issued to the Grievant.

The Union submits that management's investigation of the incident was not thorough, and that the only reason management accepted Mr. Ash's version of the incident was based upon his supervisory status.

In conclusion, the Union submits that the Grievant was diligent and exercised reasonable care. The Union contends that the Grievant's version of the facts was offered forthrightly and honestly. Therefore, the Union argues that the Grievant did not violate Article 28 by his alleged failure to "exercise reasonable care", and requests that the grievance be sustained, and that the Postal Service be directed to rescind the two letters of demand.

Position of the Postal Service

The Postal Service points out that it made diligent efforts to have Mr. Ash attend the arbitration, but since Mr. Ash is no longer a postal employee, the Postal Service had no power to compel his appearance in face of his unwillingness to attend.

The Postal Service contends that it was the Grievant, and not his supervisor, who was responsible for following the specified procedures in the applicable manuals regarding the cashing of domestic and/or international money orders.

The Postal Service argues that employees cannot absolve themselves of their routine responsibilities merely by shifting the burden to their supervisors, in the manner that the Grievant alleges he did.

The Postal Service points out that Article 28 in the collective bargaining agreement requires employees to "exercise reasonable care", and contends that the Grievant did not. In support of this contention, the Postal Service points out that the face of the money orders clearly showed they were of Philippine origin; that they required payment in pesos and not dollars; and, that the instructions on the back of the money orders required that they be negotiated by a Philippine agency.

In conclusion, the Postal Service contends that the Grievant should be held accountable for improperly cashing the money orders, and, therefore, requests that the grievance be denied.

Findings and Opinion

As a foundation for our findings in this matter, this Arbitrator observes that the Grievant impressed us as a completely honest and credible witness.

He testified, without contradiction, that the Philippine money orders he received on the day in question represented only the third time, in his nine (9) year career, that he had had the responsibility to process "foreign money orders"; and that on the other two (2) occasions, where Canadian money orders were involved, he had sought the advice of his supervisors as to how the transactions should be handled.

The Grievant made no excuses for his lack of familiarity with the applicable manuals. He was candid in this respect, and we find that he was candid throughout the entirety of his testimony.

The Postal Service's position is severely undercut by the failure of Manager Ash to appear as a witness. While we appreciate the Postal Service's difficulty in compelling Ash to attend, his refusal raises the negative inference that his version of the facts would have been found wanting in credibility.

Certainly, Manager of Customer Service Dennison was entitled to believe Mr. Ash. However, absent any corroborating evidence to support Mr. Dennison's belief, and in the face of the Grievant's credible version of the facts, this Arbitrator must find that the Grievant asked Mr. Ash, his direct supervisor, how he should handle

the money orders, and that Mr. Ash told him that they could be cashed.

While we can appreciate the Postal Service's view that the Grievant could have and should have been more diligent, nevertheless, we do not find he failed to exercise reasonable care. He may have been less conversant with applicable manuals than required, however, he was diligent.

Article 28, Section 2 provides that an employee "shall not be financially liable for any loss, . . . unless the employee failed to exercise reasonable care". As we have concluded that the Grievant exercised reasonable care, we find that the letters of demand were improperly issued to him. Accordingly, the grievance will be sustained.

Award The grievance is sustained. The Postal Service is directed to rescind the letters of demand issued to the Grievant associated with the negotiation of the Philippine money orders, and make the Grievant whole in the event he has paid, or had deducted from his pay any monies allegedly due because of the money order transactions.

This Award was signed this 28th day of November, 1987 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

Richard R. Kasher, Arbitrator

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration between the UNITED STATES POSTAL SERVICE and American Postal Workers Union, AFL-CIO	Grievant: Barbara Baker Post Office: Elizabeth, NJ Case No: N4C-1N-C-4494

Before Rodney E. Dennis, Arbitrator

Appearances:

For US Postal Service:

Howard Wingard - Labor Relations Representative

For the Union:

Jeff Kehlert - National Business Agent

Date of Hearing: November 4, 1987

Place of Hearing: Elizabeth, New Jersey

Award: The Letter of Demand for $283.37 shall be rescinded. The request for administrative leave is denied.

Date of Award: November 25, 1987

BACKGROUND OF THE CASE

Barbara Baker, the Grievant, a long-term Postal employee, was the T-6 Clerk in charge in Elizabeth, New Jersey. She had the week of April 22 to April 26, 1985, approved as a vacation period. On Friday April 19, her flexible stamp stock credit was audited in anticipation of it being turned over to the Clerk who would act as the T-6 while the Grievant was on vacation. The audit taken on April 19 turned up a number of errors on the Grievant's PS Forms 3295 and a sizeable shortage. Postal authorities concluded that the stamp stock could not be turned over to another Clerk in the shape it was in and instructed the Grievant to report to work on Monday April 22, the first day of her approved vacation. She was to be present for another audit and to explain the numerous errors and discrepancies in the 3295 Forms. The Grievant reported as ordered and a second audit was performed. As a result of this audit, her account was found to be $283.37 short. She was issued a Letter of Demand for that amount. That letter reads as follows:

> This will serve to notify you of the U.S. Postal Service's intention to collect from you the sum of $283.37 for a shortage in your unit reserve stock of $70,749.93.
>
> Specifically, on April 22, 1985, as a result of an audit of your unit reserve stock, a shortage was found in the amount of $283.37.
>
> It was determined that you failed to exercise reasonable care in the performance of your duties. This determination is based upon my investigation and a review of the facts involved and is in accordance with Article 28 of the National Agreement.
>
> Payment shall be made in accordance with Article 28.4 of the National Agreement.

The Grievant was not satisfied that the audit had been properly performed or that she had failed to exercise reasonable care in the performance of her duties. She did not believe that she should be held responsible for the shortage of $283.37. A grievance was filed that was denied at each step and has resulted in this arbitration.

THE ISSUE

Was the Letter of Demand issued to the Grievant in the amount of $283.37 for just cause in accordance with the National Agreement? If not, what shall the remedy be?

POSITIONS OF THE PARTIES

The Union

The Union contends that the Letter of Demand should be withdrawn because the Grievant was not present throughout the full time that her credit was being counted on April 19 and on April 22, 1985. As a consequence, the Union claims that Section 377.32 of the Financial Handbook for the Post Offices was violated. That Section reads as follows:

> .32 An employee must be granted the opportunity to be present whenever his financial accountability is inventoried or audited and, if he is not available, to have a witness of his choice or steward present. In order to accomplish this, each employee assigned a stamp credit or other financial accountability should furnish the installation head two names, if possible, of postal employees (or shop steward) in order of precedence whom he chooses to witness the audit or inventory of his accountability whenever he is not available. Enter the names of the selected witnesses to Form 3977.

The Grievant testified that during the audit of her account, she was called on to do the preliminary checkouts of Window Clerks. She was also required to leave the audit to attend to other problems at the windows. Because she had to divide her attention between the audit and other tasks, she should not be required to cover the shortage in the account.

The Union also argues that the Grievant should not have been required to come into work on Monday, April 22, 1985, because it was the first day of her approved vacation. The Postal Service could have used a designated witness on the second day of the audit, as is allowed by Section 377.32 of the Financial Handbook.

The Postal Service

The Postal Service argues that the Grievant did not use reasonable care in the handling of her flexible credit. When her account was audited, it was discovered that a large number of daily stamp stock inventory sheets (PS Forms 3295) were incorrect or not kept up to date. It also argued that the account and account records were in such poor shape that it was necessary to spend two days on the audit.

It was necessary for the Grievant to return to work on Monday, April 22nd, because she was the only one who could explain the numerous errors in the records. The Post Office finally argues that the Grievant was not ordered by any Postal Supervisor to divide her attention between the audit and other duties. If this did happen, she could have

directed that the stamp stock be locked up and the audit discontinued while she was doing other things.

FINDINGS

The issue here is a very narrow one, one about which there was differing testimony by witnesses at the hearing. The Grievant testified that she had to divide her attention between the audit of her account and other duties that a T-6 is required to perform. Management witnesses testified that they did not order the Grievant to perform other duties, while the audit was in progress. If she did perform other duties, she could have directed that the audit stop and her account locked up while she was doing other things.

While the testimony of the parties differ somewhat on this main issue, I am persuaded that the Grievant did divide her attention between the audit of her account and other duties and that, on occasion, she was not present at the audit with undivided attention. It appears from the reading of the regulations that this is an unacceptable practice. The audit should not have continued while the Grievant was not involved in it or while she was not able to give it her undivided attention.

The argument that the Grievant should have directed that the audit stop and her credit be locked up while she attended to other

duties is not persuasive. Practically, this was not a realistic alternative. The Grievant's credit was large--$72,000. All concerned wanted to get the audit over with so that the account could be turned over to the Clerk who would work the T-6 position while the Grievant was on vacation. Neither am I persuaded that the Grievant should not have been called in to work on Monday, April 22nd, to help straighten out her account records.

In the final analysis, however, the Postal Service did allow an audit to take place under conditions that did not afford the Grievant the right to be present at all times while the audit was in progress. This is a violation of procedures, as stated in Section 377.32 of the Financial Handbook, and, as such, should not be allowed.

AWARD

The Letter of Demand for $283.37 shall be rescinded. The request for administrative leave is denied.

Rodney E. Dennis
Arbitrator

New York, New York
November 25, 1987

USPS AND APWU REGULAR PANEL
CASE NO. E4C-2B-C 4984
ARBITRATION OPINION AND AWARD
RICHARD R. KASHER, ARBITRATOR
NOVEMBER 28, 1987

In the Matter of an Arbitration between

UNITED STATES POSTAL SERVICE

- and -

AMERICAN POSTAL WORKERS UNION, AFL-CIO

HEARING LOCATION:	South Jersey, MSC 421 Benigno Boulevard Bellmawr, NJ 08031-9998
HEARING DATE:	November 19, 1987
APPEARANCES:	<u>For the Postal Service</u> Gerald T. Golden <u>For the APWU</u> Jeff Kehlert
NATURE OF DISPUTE:	Reemployment Rights v. Posting Rights

Introduction

The United States Postal Service (hereinafter the "Employer" or the "Postal Service") and the American Postal Workers Union, AFL-CIO (hereinafter the "Union" or the "APWU") are parties to the 1984 National Agreement which contains provisions governing the arbitration of grievances involving wages, hours and conditions of employment.

A grievance in the above-captioned case was handled directly by the parties, and after exhausting the requisite steps in the appeal procedures, the matter was submitted to arbitration.

In accordance with the grievance and arbitration provisions contained in the collective bargaining agreement, the below-signed Arbitrator conducted an arbitration hearing on the above date and at the above location at which both the Postal Service and the APWU were represented.

Said Representatives were afforded a full opportunity to present all relevant evidence through the testimony of witnesses and in documentary proofs. Representatives were permitted to engage in a broad range of cross-examination and they presented points, contentions and arguments in support of their respective positions.

Background Facts

Clerk Michael Del Pidio testified that he worked at the Camden Post Office for approximately seven (7) years, and that in 1985 he was working in the box section, primarily engaged in distributing mail to post office boxes and cases. He testified that he spent six (6) and sometimes as much as eight (8) hours a day performing the box distribution function, when, on April 20, 1985, he "bid off" this job to another assignment. Del Pidio testified, and there is no evidence in the record to contest his assertion, that his old job was neither posted nor reverted.

Ms. Myra Perry, Supervisor of Injury Compensation, testified that she received a referral dated June 29, 1984 from the United States Department of Labor's Office of Workers' Compensation. The Department of Labor concluded that Gregory T. Hayes, who had formerly worked as a Carrier Craft employee in the Camden Post Office, and who had been placed in disabled-retirement status effective November 30, 1976, was partially recovered and capable of being reemployed. The Department of Labor stated that "with proper placement this employee can perform work equal to that of any non-disabled employee", and recommended reemployment.

Ms. Perry communicated with the Postmaster of the Camden Post Office in which she directed that "You should find suitable work for Mr. Hayes, within his work restrictions, for eight hours a day".

Mr. Hayes was offered reemployed as a Window/Distribution

Clerk, with 6:00 a.m. to 3:30 p.m. duty hours and with Saturdays and Sundays as rest days. The assignment at the Camden Post Office became effective October 13, 1984. Mr. Bayes was assigned to perform the following duties: (1) distribute mail to post office boxes, (2) distribute mail to cases, (3) mark-up, (4) nixies, (5) administrative work, i.e., filing, etc. and (6) any other window/distribution clerk duties within physical limitations.

Mr. Laures Pressley, the Union's Chief Steward at the Camden Post Office, testified that the job which Mr. Del Pidio "bid off" in April of 1985 was neither reverted nor posted by the Postal Service. Mr. Pressley further testified that the grievance in this matter was not filed until several months after Mr. Del Pidio bid off the position because the Union wished to observe Mr. Bayes' performance of his job in order to determine if there was an eight (8) hour position involved, and if, in fact, Mr. Bayes was performing the duties of the position that Mr. Del Pidio held prior to bidding off.

In its grievance, the Union contended that Mr. Del Pidio's job should have been posted and that the unassigned regular clerks in the Camden Post Office should have been given the opportunity to bid on the assignment.

Although there is some dispute regarding the scope of the issue before the Arbitrator, the underlying question is whether the Postal Service violated the collective bargaining agreement by failing to post or revert the position held by Clerk Del Pidio, and, if so, what would be the appropriate remedy.

Position of the APWU

The Union argues that management has never directly responded to the issues in dispute.

The Union does not challenge management's reemployment of Mr. Hayes. However, the Union contends that the Postal Service cannot excuse its violation of the collective bargaining agreement by merely contending that it was fulfilling its joint commitment with the Department of Labor when it reemployed Mr. Hayes under the Workers Compensation Program.

The Union submits that Article 37 in the collective bargaining agreement clearly establishes the Postal Service's obligations regarding either posting or reversion of positions. The Union maintains that the Postal Service has presented no evidence to justify its failure to revert or to post the position in question.

The Union argues that its grievance was filed timely, and that the Postal Service failed to raise a timeliness objection during the handling of the grievance below; that the Postal Service failed to fully set out its reasons for the denial of the grievance; that prior decisions support the Union's position in this case; and, that the grievance should be sustained by requiring the Postal Service to post the position at the Camden Post Office and by reimbursing the successful bidder to the position with the out of schedule premium pay he/she would have received retroactive to fourteen (14) days prior to the date the grievance was filed.

Position of the Postal Service

The Postal Service does not deny that it has a responsibility to repost vacant assignments. However, the Postal Service contends that it did not view the issue, at Step 3 of the grievance procedure, as being a dispute regarding reposting. Rather, the Postal Service suggests that the dispute before the Arbitrator concerns the Union's apparent challenge to management's right to create a position for a partially recovered employee seeking reemployment.

The Postal Service argues that it reemployed Mr. Hayes in accordance with the Department of Labor's program for employees who have partially recovered from disability. In support of this argument, the Postal Service refers to a case decided by Arbitrator Benjamin Aaron regarding management's right to create positions for employees returning from disability status, and points out that the Union has not previously disputed the reemployment of individuals in circumstances similar to those that are present in the instant case.

Additionally, the Postal Service submits that the duties of Mr. Hayes' position differed significantly from the duties of the position held by Clerk Del Pidio. The Postal Service points out that Del Pidio's position required the performance of certain window duties and that incumbents of this position received in excess of one hundred and twenty (120) hours of training, while Mr. Hayes was not trained for nor did he perform any duties on the window. For these reasons, the Postal Service requests that the grievance be denied.

Findings and Opinion

This case is more complicated than it should be, since, as the Postal Service's advocate correctly pointed out, there is some lack of clarity concerning the nature of the issue that was joined below.

While this Arbitrator is persuaded that the crux of the Union's complaint centers upon Section 3 of Article 37 of the collective bargaining agreement, which addresses "Posting and Bidding", nevertheless, when the Union cited the contract articles that were allegedly violated and in dispute, it failed to specify Article 37. Although the Union did reference ten (10) other articles in the collective bargaining agreement, none of them, in this Arbitrator's opinion, are clearly as relevant as is Article 37, Section 3.

In spite of this failure, the grievance correspondence indicates that the Postal Service was given sufficient notice, when the grievance was first filed and during its presentation by the Union thereafter, that the failure to repost Del Pidio's position was the cause for complaint.

We would also note, however, that there was some confusion generated by the Union's apparent challenge to (1) overtime being generated on Mr. Hayes' position and (2) the improper "phasing out" of Mr. Del Pidio's position.

It may very well have been that because of this confusion the Postal Service's Step 3 answer only addressed the questions of (1) reemployment of employees who were injured on duty in accordance with

Section 546 of the Employee and Labor Relations Manual, and (2) the alleged "phasing out" of Del Pidio's position.

In reviewing the totality of the record and the cited authorities, we conclude that the Postal Service had the right under applicable law and regulation to "create" a position for Mr. Hayes, as it did in September 1984, and to reemploy Mr. Hayes in that position as it did effective October 13, 1984.

However, that does not resolve the issue in dispute. For while Mr. Hayes worked his position between the dates of October 13, 1984 and April 20, 1985, Clerk Del Pidio was working a regular eight (8) hour Window/Distribution Clerk position. As noted in the facts above, there is no dispute that when Del Pidio bid off his position, the position was neither reverted nor posted.

Article 37, Sections 3.A.1. and 3.A.2. establish, with reasonable clarity, that when Del Pidio's assignment was vacated, on or about April 20, 1985, the Postal Service was obligated to either post the position "within 21 days unless such vacant duty assignments are reverted" (Section 3.A.1.), or to give the local Union president an opportunity for input into the reversion decision, which decision must be made not later "than 21 days after it (the position) becomes vacant" (Section 3.A.2.).

Although it is conceivable that after Clerk Del Pidio bid off his assignment Mr. Hayes "picked up" some of Del Pidio's duties, in our opinion the issue involving Mr. Hayes is an unintentional "red

herring". The real issue is whether Del Pidio's assignment should have been reposted. We find that it should have been.

Accordingly, we will sustain the grievance by directing the Postal Service to post the position which Clerk Del Pidio bid off on or about April 20, 1985. Our decision to require this posting is not intended to adversely affect Mr. Hayes' entitlement to retain his position consistent with the September 1984 job description which established his duties and responsibilities.

It would be inequitable to assess a monetary penalty against the Postal Service in this case by awarding anyone with premium pay compensation, in view of the mutual misunderstanding regarding the nature of the dispute.

Award The grievance is sustained. The Postal Service is directed to post a position substantially identical to the one identified in the exhibits as "Job Bid #82-26".

This Award was signed this 28th day of November, 1987 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

Richard R. Kasher, Arbitrator

REGULAR ARBITRATION PANEL

IN THE MATTER OF THE ARBITRATION	GRIEVANTS:
between	M. WESOLOWSKI -E4C-2B-C 11008 W. EGAN - E4C-2B-C 11575 J. MALONEY - E4C-2E-C 40971 J. BRENNAN - E4C-2E-C 32715 W. VANCOSKY - E4C-2E-C 34280 K. GALLAGHER - E4C-2E-C 39107 M. SNYDER - E4C-2E-C 39112 H. KIRCHNER - E4C-2E-C 42573 J. DOUGHERTY - E4C-2E-C 43511 T. PERRELLA - E4C-2E-C 44283
UNITED STATES POSTAL SERVICE	
and	
AMERICAN POSTAL WORKERS UNION AFL-CIO	

POST OFFICE: GMF SCRANTON, PA.

BEFORE ARBITRATOR: JAMES E. RIMMEL

APPEARANCES:

FOR THE U.S. POSTAL SERVICE: LUKE SHERIDAN

FOR THE UNION: JEFF KEHLERT

PLACE OF HEARING: SCRANTON, PENNA.

DATE OF HEARING: 12 OCTOBER 1988

AWARD: The grievance is granted to the extent specified herein.

DATE OF AWARD: 8 DECEMBER 1988

James E. Rimmel

JAMES E. RIMMEL
ARBITRATOR

BACKGROUND

These grievances come from ten clerical employees at the Scranton, Pennsylvania location of the United States Postal Service, who claim that they were improperly denied the opportunity to receive certain scheme training after they were the successful bidders for posted positions at the Scranton location. The grievances which were filed between 19 April 1986 and 12 May 1987 allege violations of Article 15, Section 1 and Article 17, Section 3 of the National Agreement (Agreement) between the United States Postal Service (Service) and American Postal Workers Union AFL-CIO (Union). Violations are also alleged of the FLSA Publication 118 and the Postal Service's M-5 Handbook. As previously indicated, there were ten grievances filed by ten separate clerical employees during the period in question. Although the facts of the grievances may differ, the general theory behind each grievance is the same and a grievance which is representative of the ten is Grievance No. E4C-2E-C 34280 filed on 28 August 1986 by William M. Vancosky, said grievance reading as follows:

> On 18 August 1986 clerk VanCosky was notified he was senior bidder on position no. 382A (B-2 Scheme). His present job is B-1 (B-1 consists of Westside/Dunmore/Dickson City/Providence). (B-2 consists of Westside/Dunmore/Dickson City/Taylor Old Forge). B-1 has a scheme requirement of 51 hours. B-2 has a scheme requirement of 53 and 1/2 hours. This based on 16 items per hour in accordance with the M-5 Handbook. It has been the past practice

over the last (approximate) 5 years that anyone bidding from B-1 to B-2 or B-2 to B-1 was allowed all the time required for that particular scheme. When a new LSM operator is assigned to an LSM bid position or receives it as his first LSM bid position, he/she is "locked in" for 365 days. The operator is prohibited from bidding from B-1 to B-2 or B-2 to B-1 because of the lock in period. Management's reasoning is that these are different schemes and have denied employees from cross bidding because of the lock in. After the lock in has been served, Management contends that the sections of the schemes are interchangeable.

The Union's position is that the reasoning must be fair and equitable. If an operator is denied the right to bid during a lock in period because the schemes are "different" (B-1 - B-2) then the same should hold true whether the person is in or out of the lock in period. The Union feels that consistency in determining hours of study have not been met by management.

That the grievant be paid the difference of training hours that should have been allowed and that his pay be made whole at the appropriate rates of pay.

UNION POSITION

The Union argues that the preponderance of the evidence establishes that the Service violated the Agreement by promulgating unilateral policies to replace the clear contractual language negotiated by the parties. More specifically, it contends that the Service failed to afford ten senior bidders their contractually guaranteed right to receive training so as to become qualified for the schemes which they bid. In support of its

position, the Union argues that it was only in the 1987-90 National Agreement that the parties negotiated provisions which would have supported the position being taken by Management. However, the Union argues that this language was not present during the time that the various grievances were filed. This being the case, it alleges that the Service was without any authority whatsoever to fail to provide the scheme training for the employees in question when they bid the jobs for the various schemes.

The Union argues also that Article 19 of the Agreement makes the various handbooks a part of the Agreement and the local Post Office does not have the authority to make changes in such handbooks. When the handbook in question, namely M-5, is reviewed in its entirety, it becomes very apparent that the Postal Service has, in fact, violated these provisions, it argues. Specifically, the Union argues that Paragraph 432.1 of the M-5 Handbook requires the Service to provide scheme study time which, it notes, is to be calculated at the rate of one hour for every 16 items in the scheme. Continuing, the Union argues that it becomes very clear that under these provisions the Service was required to provide approximately 50 hours of training for grievants. Since the Service only provided approximately 12 hours of training for each grievant, it violated the applicable provision ot the M-5 Handbook, it argues.

The Union argues further that other provisions in the Agreement which mention scheme training do not separate such but

require that the training be done for the entire scheme. As such, the unilateral change of the Service in providing scheme training for various segments was improper and a violation of the Agreement, it argues.

Furthermore, the Union argues that its position is supported by the practice which has occurred whenever such training was provided at this location in the past. It argues also that it has been always the practice at this location, prior to the filing of the instant grievances, to provide complete scheme training whenever individuals would bid between the B-1 and B-2 schemes. In this regard, the Union provided evidence which it contends clearly shows that employees have been given this training in the past at the Scranton location.

Because of the alleged contractual violation, it is the position of the Union that in each case the Service should be required to provide overtime pay to the employees who were denied training. The Union argues that this remedy would be proper and that the ten grievants be granted the overtime pay which they were denied because of their receiving less than the required number of hours under the Labor Agreement.

SERVICE POSITION

The Service argues that the Union failed to show any contractual prohibition against the manner in which Management administered its scheme training when employees bid from B-1 to

B-2 or vice versa. It argues also that it is permitted, pursuant to the Management Rights Clause of the Agreement, to provide scheme training for B-1 and B-2 positions in the manner that it has in these particular cases. The Service continues by arguing that the scheme training program in question was implemented for sound business reasons and it is only common sense that if an employee is qualified on and working scheme B-1, then subsequently bids B-2, he/she should not be permitted to study overlapping sections. The Service contends that Paragraphs 666.1, 666.2, 666.3, 711.3, 711.12, and 711.13, of the ELM requires that Management operate efficiently. In these particular cases involving scheme training between B-1 and B-2, it would be totally improper for Management to provide the complete training as has been requested by the Union, it argues. Continuing, the Service argues that the Memorandum of Understanding found on page 200 of the 1984-87 Labor Agreement implies that scheme training need be only provided in instances where employees are not qualified. It argues also that in situations where an employee is qualified on a particular segment of a scheme, training need not be provided in such instance.

With respect to the past practice arguments raised by the Union, the Service argues that even though there may have been instances in the past when total scheme training was provided, enlightened Management corrected this procedure when it determined that it would not be necessary to train employees on entire schemes when they were already qualified on certain

segments of such. To provide the extra training would be unnecessary, inefficient and violative of the provisions of ELM which require Management to do things in a manner which is most cost effective, it argues.

Furthermore, the Service argues that in the event I find that the entire training period should have been provided, compensation is nonetheless inappropriate since the purpose of the training is to qualify an employee and not to provide a monetary gain for such. The Service contends that the only appropriate remedy would be to provide a testing and training opportunity should it be determined that the individuals involved are not qualified to perform the work on their particular schemes.

STIPULATED ISSUE

Did the Unites States Postal Service violate the collective bargaining agreement when it did not afford the full training hours per scheme assigned in the instances cited in the instant grievances? If so, what shall the remedy be?

RELEVANT CONTRACTUAL PROVISIONS

Handbook M-5 - August, 1980

432.1 Study Time

The total study time authorized to acquire the knowledge to qualify on an assigned or bid

scheme will depend upon the number of items in the scheme. The scheme study time will be calculated at the rate of one hour for every 16 items in the scheme. Increments of less than 16 items will be calculated at the rate of 4 minutes per item.

OPINION

The issue raised by the parties for determination in this case is very interesting and raises a number of questions pursuant to the collective bargaining agreement. At the outset, it is apparent that the parties have proffered numerous contractual arguments in support of their position. I have reviewed these matters in depth but have decided that none of these specific provisions themselves provide the necessary authority to resolve the instant disputes. Granted, these provisions do talk about schemes and the manner in which employees are trained, but with respect to the specific questions raised here, the citations do not provide the basis for making a decision. Furthermore, none of these particular Labor Agreement provisions are directly on point with the issue which has been stipulated to by the parties for determination.

Notwithstanding the foregoing, when the training guidelines are reviewed as specified in Handbook M-5, it becomes obvious that the parties have specified the manner in which study time is to be provided employees when they bid upon a particular scheme. Specifically, Paragraph 432.1 indicates that scheme

study time will be calculated at the rate of one hour for every 16 items that are present in a particular scheme. In the two schemes that are involved here, namely, the B-1 and B-2, it has been determined that there are 802 and 849 items in each respective scheme. This is not an issue between the parties nor is the specific provision of 432.1 of Handbook M-5. As such, the question to be determined is whether or not the Service properly administrated this provision in accordance with the dictates of the Labor Agreement.

In my opinion, Handbook M-5 is particularly relevant to the instant disputes as it specifies the manner in which scheme study time will be provided. It is obvious to me that following the language of provision 432.1 that considerably more hours than 12 need to be provided when an individual bids scheme B-1 or B-2. This would be the case unless there is some compelling contractual reason for not applying provision 432.1 of the applicable handbook. Now, I am very cognizant of the fact that the situations involving the B-1 and B-2 schemes constitute a hybrid but, unless there is some reason for not applying 432.1, I am required to follow the procedure which has been specified in that proviso.

When the evidence and testimony have been reviewed in this situation, it becomes obvious that the parties have administered the Agreement in a manner which has provided retraining of employees whenever they have bid from one position to another. The Postal Service witness most familiar with training clearly testified that once an employee leaves a position and becomes

qualified on a subsequent position, the Service no longer considers such employee qualified on his former position. This being the case, the Postal Service itself has administered the Agreement in a manner which provides for an employee to be retrained in every instance when he/she obtains a new position.

I recognize that there is an overlap in the case of the B-1 and B-2 schemes, and even though this seems unusual and inefficient, it appears that the Service has administered the Agreement in this manner, i.e., in providing full scheme training. Further evidence which supports the Union position is found in the documentation which was submitted relating to employees who have bid from B-1 to B-2 or vice versa and have received the full scheme training. Now, the Service argues that even though this may have occurred, it should not be construed as the accepted practice as enlightened Management has seen fit to change this procedure in accordance with its' managerial prerogatives found in the Labor Agreement. This may be the case, but in my opinion, it appears that during the relevant time period involved here, the parties have accepted full training as the contractually proper procedure to follow whenever an employee moved between the B-1 and B-2 schemes regardless of whether that employee had ever worked on segments of his/her new scheme before.

I recognize that Management is charged with the responsibility of administering the functions of the Service in a cost effective manner, but in doing so, it must live up to the terms

and conditions that it agreed to in the Labor Agreement and the documents which have been incorporated by reference as part of that Agreement. It is clear to me that the Service has applied the training in the manner suggested by the Union. Now, the parties have both argued that the new language which has been incorporated into the 1987-90 National Agreement is supportive of their respective positions. Here, the Service argues that the language clarifies the manner in which administration of scheme training occurred in these cases, while in turn the Union contends that the absence of such language in the prior Agreement clearly supports its position in these grievances. In my opinion, I believe that the position taken by the Union in this regard makes more sense. Simply stated, I believe that the absence of the language in the 1984-87 National Agreement leads to the conclusion that there was, in fact, no exception made in the scope of scheme training. That is, whenever scheme training was necessary, it was to be provided completely and not on a segment ties basis as has been suggested by the Service. This position would be more in line with the concept which has been accepted by the parties that once an employee left a particular job, that he/she would have to be requalified at a later date if, in fact, he/she returned to such position. I recognize that this type of training may not be the most efficient under the circumstances of the cases that are of issue in this dispute, however, I am limited by the terms and conditions of the Agreement and I cannot add language to such for the purpose of making something

more cost efficient if, in fact, there is no language present which would permit me to do so. Therefore, it is my conclusion that based upon the language found in Handbook M-5 and the manner in which the parties have administered such, the Service violated the collective bargaining agreement when it did not afford the full training hours in the instances cited here.

With respect to the issue of remedy, I do not believe that there is a need for the Service to provide back pay to the employees in the form of overtime payments. I recognize that the procedure has been for employees to receive their training on an overtime basis, however, in my opinion, the sole purpose of the training is to qualify employees for their particular assignments. I, therefore, hold that in the event any of the grievants named herein need to be provided additional training to fulfill the responsibilities of their assignments, that such training be provided in accordance with the study time requirements of provision 432.1 of Handbook M-5. Should it be determined that grievants do not need additional training and are fully qualified to perform their particular assignments, then such training need not be provided. To avoid further dispute in this regard, each grievant will be provided notice and a two week period to request the aforementioned training, said request to be in writing and submitted to each grievant's immediate supervisor.

AWARD

The grievance is granted to the extent specified herein.

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration between	( )	
UNITED STATES POSTAL SERVICE and	( )	GRIEVANT: J. Sexton POST OFFICE: APWU New New Brunswick, NJ **
AMERICAN POSTAL WORKERS UNION	( )	CASE NO. NIC-1N-C 41020

BEFORE: Arnold M. Zack, Esq.

APPEARANCES:

For the U.S. Postal Service: Hugo Gumbs, Manager Labor Relations

For the Union: Jeff Kehlert, Union Advocate

Place of Hearing: 100 Plainfield Avenue, Edison, NJ

Date of Hearing: June 9, 1988

AWARD: The Postal Service violated the Parties collective bargaining agreement when it refused to award Job 22 to Joseph Sexton. He shall be made whole for any earnings lost by having to work outside the hours which would otherwise have been his.

Date of Award: June 27, 1988

(Signature of Arbitrator)

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UNITED STATES POSTAL SERVICE * ARBITRATION OPINION & DECISION
NEW BRUNSWICK, NEW JERSEY * CASE NO. N1C-1N-C 41020
AND * J. SEXTON GRIEVANCE
AMERICAN POSTAL WORKERS UNION * DATE OF DECISION: JUNE 27, 1988

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On June 9, 1988 I held a hearing in Edison, New Jersey to arbitrate the following dispute. Hugo Gumbs represented the Postal Service. Jeff Kehlert represented the Union.

****

THE ISSUE

The parties agreed upon the issue to be decided as follows:

"Did the Postal Service violate the Parties' collective bargaining agreement when it refused to award Job # 22 to the Senior Bidder, Joseph Sexton? If so, what shall be the remedy?"

****

THE FACTS

In 1980-83 the Grievant, Joseph Sexton, was issued the following letters of Demand while working as a Window Clerk:

December 11, 1980	for $205.68
January 21, 1982	for $ 83.31
May 28, 1982	for $321.97
September 24, 1982	for $113.83
February 2, 1983	for $233.31

On February 10, 1983 he met with the representatives of the Inspection Service on the issue of shortages. That same day Sexton wrote to the then-Postmaster requesting removal from window duty because of the difficulty he was having there to assignment in

another capacity elsewhere in the facility. In his request he added:

> "The difficulties that I have experienced as of late has made it extremely difficult for me to perform my duties properly as a window clerk.

On February 16, 1983 Postmaster Gamache approved the reassignment to Distribution Clerk with the notation:

> "Of course you may bid for any vacanies that are posted within your craft."

On September 17, 1984 Job # 22 a position "Distribution Clerk Customer Services, 5:45 AM to 2:15PM Saturday and Sunday off days" was posted with duties listed:

> "Primary - New Brunswick Carrier Postage dues and Accountable Mail Distribution of accountable incoming mail . . .

On September 25, 1984 the job was awarded effective September 29, 1984 to Clerk Jacob Zabczyk, who has a seniority date of March 13, 1971. Sexton, with a seniority date of October 11, 1969 also bid for the position but was denied it..

Thereafter the present grievance was filed. The Step 2 answer by Ramon Bladwell MSC Employee/Labor Relations in denying the appeal read in part as follows:

> "The reason for this decision is that the bid was not awarded to J. Sexton on the basis that he previously relinquished a position with accountability responsibilities on the basis that he could not handle it.

> Mr.Sexton has several shortages on his record, and at the time of his resignation from the window position it was mutually agreed that to go away from the window would be in Mr.Sexton's best interest, to give him a position with accountability responsibilities would be contrary to our previous agreement."

In the December 21, 1984 third step denial of the grievance Dan Piccotti, Labor Relations Specialist, noted:

> "To place him into another position with financial responsibility at this time would prove counter productive and will again place the Grievant in financial peril. This decision is not meant to definately prohibit the Grievant from bidding for position with financial credibility but only provide the Grievant time to develop the necessary skills for these type positions."

In September 1986 Sexton was awarded a Tour 2 position with a 6:00AM to 2:30PM schedule Sunday and Monday off days.

****

CONTENTIONS OF THE UNION

The Union contends that the Employer's refusal to award Job 22 to Sexton violated his seniority rights and, in particular, Article 37 Section 2 A B, C and D of the Parties' agreement; and that it prevented him from working his contractually guaranteed schedule and forced him to work outside of, and in addition to his contractually guaranteed schedule in violation of Article 19 ELRM Sections 432.6 and 434.6. It claims the Grievant is entitled to be made whole for all lost guaranteed time wages at the straight time rate and the difference for the overtime hours he worked while being paid at

straight time for the period from September 29, 1984 to September 4, 1986.

Accordingly, it urges the grievance be sustained.

****

CONTENTIONS OF THE POSTAL SERVICE

The Postal Service contends that it dealt leniently with Mr. Sexton in permitting him move from a position of accountability in 1983; that that move was permitted as part of an oral understanding that he would remove himself from an accountability position to eliminate the temptations arising from his gambling proclivities; and that his bid for Job # 22 was contrary to that understanding. It asserts that any request for additional money is unreasonable, and not in the best interests of the Postal Serivce, particularly where, as here, the Grievant asked to be removed from a similar position in order to avoid his termination. The Postal Service therefore urges the grievance be denied.

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DISCUSSION

The evidence shows that Sexton and Zabczyk both bid for Job # 22, that Sexton has greater seniority than Zabczyk; and that based upon seniority the position should have been awarded to Sexton.

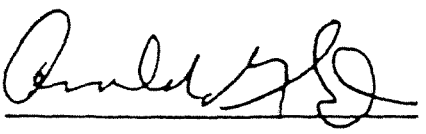
The Postal Service contends that the Grievant's tendency to Letters of Demand in the past and a reassignment away from a window clerk's position in February 1983 constituted an effective bar to his being granted the bid on Job 22 in September 1984. If there had been such an understanding or agreement that was to exist beyond the period from February 1983 to September 1984, in contravention of the Grievant's contractual seniority rights, it was incumbent on the Postal Service to prove the existence of such arrangement

particularly true if the surrender of contractual rights was to continue for an extended period. But the Postal Service failed to prove the existence of such agreement, let alone agreement on the duration of the bidding bar. Such a personal agreement, if shown, could be construed as a waiver of Sexton's right to invoke his contractual seniority rights. But in the absence of evidence of such commitment by Mr. Sexton, the conclusion must be that he was entitled to fill the Job 22 bid effective September 29, 1984, and be made whole for any earnings lost working outside the hours which would otherwise have been his.

****

AWARD

The Postal Service violated the Parties collective bargaining agreement when it refused to award Job 22 to Joseph Sexton. He shall be made whole for any earnings lost by having to work outside the hours which would otherwise have been his.



Arnold M. Zack
Arbitrator

BERNARD CUSHMAN
Arbitrator
9203 SUMMIT ROAD
SILVER SPRING, MD. 20910

Area Code 301
589-5647

October 29, 1988

Michael W. Dean
United States Postal Service
813 Market Street
Harrisburg, PA 17105

Jeff Kehlert
National Business Agent
American Postal Workers Union
P.O. Box 873
Mt. Laurel, NJ 08054

Re: USPS and APWU Case No. E4C-2F-C 4079
Paul Schonour

Gentlemen:

Enclosed please find a copy of my Opinion and Award in the above referenced case.

Sincerely yours,

Bernard Cushman

Bernard Cushman

BC:cb

Enclosures

Stephen W. Furgeson, General Manager

REGULAR ARBITRATION PANEL

In the Matter of Arbitration:	)	
UNITED STATES POSTAL SERVICE	)	Case No. E4C-2F-C 4079
and	)	Schonour Reading, Pennsylvania
AMERICAN POSTAL WORKERS UNION, AFL-CIO	)	

BEFORE: Bernard Cushman, Esq., Arbitrator

APPEARANCES:

For the Postal Service:
Michael W. Dean

For the Union:
Jeff Kehlert, National Business Agent

Place of Hearing: Reading, Pennsylvania

Date of Hearing: September 23, 1988

AWARD

The grievance is sustained. The Grievant shall be compensated at straight time at the training technician rate of pay for the earlier three and one-half (3 1/2) hours not overlapped between his new and old jobs for the period between the date upon which he would have commenced work in the training technician position if he had been awarded it until the date upon which he entered his new position plus interest. Interest shall be computed in accordance with the principles enunciated by the National Labor Relations Board in Florida Steel Corporation, 231 NLRB 651.

Dated: October 29, 1988

Bernard Cushman, Arbitrator

In the Matter of Arbitration:

UNITED STATES POSTAL SERVICE	)	Case No. E4C-2F-C 4079
	)	Schonour
and	)	Reading, Pennsylvania
	)	
AMERICAN POSTAL WORKERS UNION, AFL-CIO	)	

OPINION AND AWARD

ARBITRATOR: Bernard Cushman, Esq.

APPEARANCES:

For the Postal Service:
Michael W. Dean

For the Union:
Jeff Kehlert, National Business Agent

This case arose under the 1984 National Agreement. A hearing was held at Reading, Pennsylvania, on September 23, 1988. At the conclusion of the hearing each side submitted oral argument. Permission was granted to the Union to complete its record by filing arbitration decisions and an updated exhibit by October 4, 1988. The Union by letter dated October 4 filed two arbitration decisions and an updated copy of Union Exhibit 20. Permission was granted to the Postal Service to respond by October 15, 1988. At this writing no response has been received. The entire record, including the oral arguments, has been carefully considered by the Arbitrator.

THE ISSUE

The parties stipulated that the issue is:

Whether the Postal Service violated the collective bargaining agreement when it did not award the Training Technician-PEDC position to the Grievant, Paul Schonour, and if so, what shall the remedy be?

RELEVANT CONTRACTUAL PROVISIONS

Article 33, Promotions

Section 2. Craft Promotions
When an opportunity for promotion to a craft position exists in an installation, an announcement shall be posted on official bulletin boards soliciting applications from employees of the appropriate craft. Craft employees meeting the qualifications for the position shall be given first consideration. Qualifications shall include, but not be limited to, ability to perform the job, merit, experience, knowledge, and physical ability. Where there are qualified applicants, the best qualified applicant shall be selected; however, if there is no appreciable difference in the qualifications of the best of the qualified applicants and the Employer selects from among such applicants, seniority shall be the determining factor. Written examinations shall not be controlling determining qualifications. If no craft employee is selected for the promotion, the Employer will solicit applications from all other qualified employees within the installation.

Promotions to positions enumerated in the craft Articles of this Agreement shall be made in accordance with such Articles by selection of the senior qualified employee bidding for the position.

Employee & Labor Relations Manual

Sections 311.11, 311.12, 432.6, 433.2, 434.6, 436, 440, 668.111, 668.114.

P-11 Handbook

524.1, 524.4, 524.4g, 524.4h, 524.4i, 525.13, 525.2, 525.3

Handbook EL303

Appendix I, 152.2, 210

CONTENTIONS OF THE PARTIES

The Union contends that the position of Training Technician-PEDC posted April 2, 1985, was improperly awarded to Letter Carrier Rick Smith and that the position should have been awarded to the Grievant. The Union contends that the position of Training Technician-PEDC is a Clerk Craft position and that the posting of the position as a multi-craft position violated Article 33, Section 2, of the Agreement and the provisions of EL 303 which it claims identifies the position as a Clerk Craft position exclusively. The Union further contends that the grievance processing procedure in this case was fatally flawed because the Postal Service designees at Step 1 and Step 2 did not possess authority to settle the grievance. On the merits the Union says that the Postal Service acted arbitrarily, capriciously and in discriminatory fashion in selecting Letter Carrier Smith rather than the Grievant for the training technician position. The Union asserts that Postmaster Fletcher ordered Supervisor Coleman to change his original evaluation of the Grievant as the best qualified candidate. The Postmaster also influenced Supervisor Mazurkiewicz to change his original evaluation. According to the Union Postmaster, Fletcher was hostile toward the Grievant as demonstrated by the testimony of Coleman. The Union states that there was no honest evaluation of the merits of the Grievant's application. The Union further contends that the position primarily involved clerical duties and that the record shows that

the Grievant had overwhelmingly the better qualifications for the training technician position. The Union further contends that the conduct of the Postmaster and the alleged changing of the evaluations violated several provisions of the Employee and Labor Relations Manual, the P-11 Handbook, and the Handbook EL 303. The Union points with special emphasis to Section 668.114 of the ELM which prohibits deceitfully or willfully obstructing or improving the prospects of any person competing for a position by granting a preference or advantage not authorized by law, rule or regulation. As to the remedy, the Union contends that the Grievant should be compensated for all hours worked outside of the contractually required schedule he would have worked had he been awarded the Training Technician position.

The Postal Service contends that the determination to award the position to Letter Carrier Smith was proper, and that on the basis of the written evaluations made by Coleman and Mazurkiewicz, Smith was properly found as best qualified. The Postal Service further contends that the training technician position was properly posted as a multi-craft position. The Postal Service further contends that if the Arbitrator should find that the Grievant was improperly denied appointment to the position of training technician, the remedy of out-of-schedule pay is not permissible because the Grievant was not requested by management to work on a temporary basis a schedule outside of his schedule as an LSM Clerk. Therefore, the requirements for paying out-of-schedule premium in Section 434.6 of the ELM were not satisfied.

DISCUSSION, FINDINGS AND CONCLUSIONS

On April 2, 1985, the Postal Service posted a vacancy announcement for the position of Training Technician-PEDC, Level 6, with scheduled hours Monday through Friday from 12:00 noon to 9:00 p.m., including one hour for lunch. The announcement stated that the position would be filled by the best qualified applicant reqardless of craft. Paul Schonour, the Grievant, who was employed as a Clerk applied for the position. The position was awarded to another applicant, Letter Carrier Rick A. Smith. The grievance in this case grieved the failure of the Postal Service to appoint the Grievant Schonour to the position.

There was attached to the vacancy announcement the job description and qualifications requirements.

> FUNCTIONAL PURPOSE
> Provides technical support and serves as an instructor for craft employees in a particular area of specialization at a Postal Employee Development Center.
>
> PROFICIENCY REQUIREMENTS
> The applicant must have demonstrated to a sufficient degree the following skills, abilities, and knowledges to assure adequate performance in the position:
>
> B-4. Ability to work effectively with immediate supervision.
> B-6. Ability to use reference materials and manuals.
> B-10. Ability to maintain records and prepare reports.
> B-11. Ability to perform effectively under the pressures of the position.
> B-14. Ability to interpret instructions, specifications, etc.
> B-19. Ability to instruct.
> B-28. Knowledge of different relevant lines of work.

B-39. Ability to operate office machines such as calculators, adding machine, duplicating machine, or any other office equipment as appropriate to the position.
B-45. Ability to understand readily and comply with written and verbal instructions and give readily understandable information in verbal and written form.
B-46. Abiltiy to analyze, explain, and apply laws, regulations, rulings, and procedures pertinent to the work to be performed.
B-53. Ability to work with others.

EXPERIENCE REQUIREMENTS

1. The applicant must have three (3) years of practical and progressive general experience or training in a trade, craft, occupation, or subject appropriate to the position to be filled.
2. This experience must show evidence of sufficient knowledge and ability to demonstrate, explain, and instruct students in the use of tools, techniques, principles, or practices of the trade, craft, occupation, or subject. Evidence of this knowledge and ability may have been demonstrated by one or any combination of the following:
   a. Experience as a teacher or instructor.
   b. Satisfactory completion of a formal course or on-the-job training program in the basic principles and techniques of instruction which included supervised practice teaching.
   c. Performance of duties involving the supervision or on-the-job instruction of fellow workers in the use of tools, techniques, principles, or practices of a trade or craft, or other appropriate occupation or subject.
   d. Successful completion of a formal vocational training program for a trade or craft, or other appropriate occupation, in which the applicant demonstrated an unusual and marked aptitude for learning and applying the principles, practices, and techniques of the trade, craft, or occupation.
3. The required amount of experience will not in itself be accepted as proof of qualification. The applicant's record of experience and training must show the ability to perform the duties of the position.
4. Successful completion of study in a resident school above high school level, including vocational schools may be substituted for general experience at the rate of nine (9) months of experience for each academic year of education, up to a maximum of thirty-six (36) months.

ADDITIONAL PROVISIONS

1. Operator's permit - Before being appointed and permitted to drive a Government-owned vehicle as an employee, an applicant must possess a valid driver's license from the State in which living, or in which the Post Office for which applying is located. After being hired, the applicant must also be able to obtain the appropriate type of Government operator's permit.
2. Competitors must be able to present this State license at the time of appointment. Persons who do not have the license will not be appointed, but their names will be restored to the register. They may not again be certified to these positions until they have obtained the required driver's license.
3. Applicants must be physically able to perform efficiently the duties of the position. Vision of 20/40 (Snellen) in one eye and ability to read without strain printed material the size of typewritten characters are required, glasses permitted. Ability to distinguish bsic colors and shades is desirable. Ability to hear the conversational voice, hearing aid permitted, is required.
4. In order to effectively perform the duties of some clerk positions covered by this standard, a significant degree of typing skill is required. This level of typing skill is typically less than that necessary for a clerk-typist position. Applicants for such positions must demonstrate the ability to type 30 words a minute for 5 minutes with no more than two errors. This may be demonstrated by having passed a Postal Service typing test.

BASIC FUNCTION: Provides technical support and serves as an instructor for craft employees in a particular area of specialization at a Postal Employee Development Center.

DUTIES AND RESPONSIBILITIES:

A. Instructs craft employees in work methods, procedures, skill requirements, duties, and responsibilities of positions and work assignments.
B. As a classroom instructor:
    1. Applies accepted principles of learning to all instructor assignments.
    2. Provides for each trainee the full opportunity for understanding, participating in demonstrations, and contributing feedback to ensure that all necessary skills and knowledge have been acquired.
    3. Coordinates the development of training plans for classroom and on-the-job instruction.

4. Applies the most effective technique(s) of instruction to accomplish specific learning objectives.
5. Uses a variety of training devices and visual aids.
6. Informs employees of standards and criteria for evaluating satisfactory performance.
7. Maintains accurate training records in accordance with approved proceudres.

C. Occasionally performs other job related tasks in support of primary duties.

ORGANIZATION RELATIONSHIPS: Reports to manager, or supervisor, Postal Employee Development Center, or other designated supervisor.

Paul Schonour, the Grievant, has been employed by the Postal Service since April 1981. He was originally employed in the Clerk Craft and served in various clerical tasks but primarily as an LSM Operator and had an accuracy record in that position of 99.6 percent. He was in that position at the time that he applied for the training technician position. Sometime subsequent to the rejection of his bid for the training technician position, the Grievant entered the ranks of Postal Service management as a Commercial Account Representative in Customer Service in the Reading Post Office.

Prior to his application for the training technician position, the Grievant had an excellent record of work performance. He had been highly recommended for the Career Enhancement Program and for a position of Injury Compensation Specialist by Supervisor of Mails, Daniel Toomey and Tour Superintendent Dennis Lewis. The Grievant during this period made two suggestions for improving the processing of mail for which he received awards in one case of $520 and in the other of $300, which represented ten percent of

the estimated money saved by the Postal Service as a result of the incorporation of his suggestions. LSM Superintendent Toomey testified and I find that the Grievant was an excellent and top-rated employee.

The Grievant had served as an instructor for some years in the Air Force prior to coming to the Postal Service training military policemen and security personnel both on site and in the classroom in classes of about 30 persons. He also maintained records. From 1977 to 1980 the Grievant attended Shippensburg State College and later Pennsylvania State College from 1983 to 1985 on a part-time basis. He was 17 credits from receiving a degree in business administration, including accounting which was his major. After the vacancy announcement of April 2, 1985, the Grievant applied for the position. His application stated:

> I'm submitting my application for the position of Training Technician, PEDC, SP-2-621, PS-6.
>
> I feel I am a well qualified individual for all the duties and responsibilities this position requires. Although there are no schemes on this job I am well qualified on the methods and requirements since I am a clerk and would be able to assist with my personal knowledge of the training procedures. Also, my experience as an instructor in the U.S. Air Force would be most beneficial to all the items listed. As one of seven instructors, we were responsible for the training of 900 security security police on the base. This included classroom instruction as well as maintaining records.
>
> Under the Proficiency Requirements I feel I am well qualified in all those listed:
>
> B-4 As an instructor my classes were between 20-30 students for two week courses. Also, individual instruction was given in weapons handling, self-defense, and job related material.

B-6 Both in college and in the service I utilized appropriate reference materails for answers when needed.
B-10 When training was completed I was responsible for maintaining standards in all personnel trained by me.
B-11 I was constantly under pressure while training individuals of much higher ranks than myself and dealt with the situation without hindering my performance. As an LSM operator I am under pressure to key properly at all times and I have a record of 99.6% accuracy.
B-14 As a clerk I'm required to follow specified instructions everyday and my performance has been rated high on all my 991's by my supervisors.
B-10 As an instructor in the service I received ratings of 8's and 9's in all catagories from my superiors with a 9 being the highest rating.
B-28 With my vast experience in the service, college, and U.S. Postal Service I feel I can deal with any situation that might arise.
B-39 I can operate all machines listed as well as others. In addition, I have a good working knowledge with numbers and have a strong background of college accounting courses.
B-45/46 With the training I've done and the speech and writing courses I received in college I'm sure this would be most beneficial in helping individuals understand the information they need to know.
B-53 With my past experience of working in a professional manner with those of all ages, ranks, and backgrounds I feel I gained unique experience in apply tact, discipline, and teamwork which would be important in a training position as this. Also, the human relation courses I've attended would be a positive asset to this job.

As an LSM operator for four years I can honestly say I have received enough knowledge to handle this position in a professional manner. Not only will my past experience as an instructor and clerk be beneficial to the job, but with my college computer courses in Fortran programming and the Cobal language it will be easy for me to adopt to all new training procedures that arise pertaining to computer programming. I can receive documentation for all information given you from the U.S. Air Force and from my college transcripts from Shippensburg State and Penn State University. I also passed a typing test in the service and can type 30 words a minute with no difficulty.

I'm sure I can fill the position of Training Technician with no problem and I would be an asset to the training program and U.S. Postal Service. Reflecting upon the consistency shown in my career, military service, and education I feel I am well prepared and capable to fill this position.

The ultimately successful applicant Rick Smith's application stated:

> I wish to be considered for the Training Technician position. My qualifications are included herein and I feel I am fully capable of filling this position.
>
> I am a 1974 graduate of East Stroudsburg State College where I received a Bachelor of Science Degree in Education. Among my many studies include Methods of Teaching and Audio-Visual Techniques. I have experience as a substitute teacher for one year with Schuylkill Valley School District and my student teaching experience was done in the Wilson School District.
>
> I was employed for seven years in the banking field where I worked for American Bank and Hamilton Bank. Among my duties with these institutions I was employed as a computer terminal operator where I was required to use a typewriter keyboard. During this time I was typing approximately sixty words per minute. I also served as a credit card fraud investigator in which I spent a lot of time out in the field without immediate supervision. I also worked hand in hand with Postal Inspectors in this matter.
>
> I was also involved with loan collections where I served as a road adjustor, and subsequently area supervisor. As a road adjustor I was in contact with my supervisor only once or twice daily. As a supervisor, I had two or three road adjustors under my jurisdiction and had to make many of their decisions as well as my own.
>
> I also have worked part-time for several freight companies where my job was typing shipping orders.
>
> I have been a letter carrier for four years and have held a motor vehicle operator's license without violation for sixteen years.
>
> In closing, I feel I am well qualified and well suited for the job. My personality is such that I can get along well with others, work under my own supervision, and I take a great deal of pride in my work.

Smith did not testify. The record discloses as to his background and qualifications only that which is stated in his letter.

Subsequent to the filing of the letters, both the Grievant and Smith passed typing tests. Postmaster Martin Fletcher, the Postmaster at Reading, designated Michael Coleman, Superintendent of Support and Service, and John Mazurkiewicz, at the time Acting Manager of Mail Processing, to interview the Grievant and Smith. After the interviews, both Coleman and Mazurkiewicz submitted their separate evaluations of the applicants on Forms 1796. The validity and good faith of these evaluations is in dispute. On their face, however, Smith was rated superior by both Coleman and Mazurkiewicz. Coleman rated Smith as superior in seven categories and satisfactory in four. Mazurkiewicz rated Smith as superior in six categories and satisfactory in five. Coleman rated the Grievant as satisfactory in nine and potential in two. Mazurkiewicz rated the Grievant as satisfactory in ten and superior in one. The evaluations were submitted to Postmaster Fletcher who appointed Smith to the position.

At this point if there were no other evidence before the Arbitrator, the Postal Service's judgment as to the "best qualified" bidder would be entitled to a high degree of respect if it had made an honest judgment after a careful and studious evaluation of all of the factors under consideration. However, there is other evidence in the record which it is urged by the Union shows that the selection of Smith was unfair, discriminatory and arbitrary.

Michael Coleman was, at the times here relevant and still is, Superintendent, Support and Service. Coleman testified that he was the supervisor with regard to the Training Technician position and that position came under his basic jurisdiction. Coleman stated that he felt strongly that the Grievant was the best qualified applicant. According to Coleman, Postmaster Fletcher designated Mazurkiewicz and him to conduct an interview because Fletcher thought that an interview would change Coleman's views as to the Grievant's qualifications. Fletcher stated that the Grievant had a bad attitude and could not be trusted. Coleman testified further that, in fact, after the interview, the Grievant emerged as the better candidate and Coleman's evaluation of the Grievant on a Form 1796 so stated. Postmaster Fletcher upon seeing the evaluation which Coleman had prepared stated that with this evaluation the Union would win a grievance. Coleman testified further that he was called to Fletcher's office. At that time Fletcher had a piece of paper with Smith's and the Grievant's names on it and with a line through the Grievant's name which he presented to Coleman. Coleman stated that Fletcher required him to destroy his original evaluations of Smith and the Grievant and to make new ones. Coleman testified that he felt he had no choice but to follow Fletcher's desires. Coleman feared retribution from Postmaster Fletcher who, according to Coleman, had a history of downgrading or transferring supervisors who did not comply with his wishes whatever they might be.

Coleman stated that about 90 percent of the duties of the training technician involve instructions in clerk duties and scheme knowledge was important for that position. Smith, as a Letter Carrier, would not know the schemes. Postmaster Fletcher retired at the end of 1987. He did not testify. Coleman's testimony was uncontradicted. He was a straightforward and persuasive witness. I credit his testimony.

John Mazurkiewicz was the Acting Manager, Mail Processing, at the time of the events here relevant. He was the other supervisor appointed by Fletcher to interview and evaluate the applications for the training technician position. He stated that he participated in the interview of the Grievant. Mazurkiewicz also evaluated the Grievant and Smith. Mazurkiewicz was called as a witness by the Union. On direct examination he said he had no recollection as to whether Postmaster Fletcher told him what the determination should be or to redo his evaluation. He felt he exercised an independent judgment, but Fletcher did say "some things." Mazurkiewicz conceded that he had had a conversation with the Grievant within two months preceding the hearing in which the Grievant asked what had happened concerning the selection of the training technician and that he, Mazurkiewicz, had stated "something" like Fletcher did not want the Grievant to have the job. Fletcher also said something like the Grievant "can't be controlled." The Grievant testified that in this conversation, Mazurkiewicz had stated to him that Fletcher had told Mazurkiewicz

that by no means should he select the Grievant. Mazurkiewicz testified that the only information he considered was the information in the letters filed by the two applicants. On cross examination by the Postal Service he stated that he did not recall that he was coerced and stated further that he based his evaluation exclusively on the written applications. Mazurkiewicz was an evasive witness with a claimed poor recollection of the events. I do not credit his testimony as to Fletcher's lack of influence upon his evaluation of the Grievant.

The Arbitrator finds that Postmaster Fletcher ordered Superintendent Coleman to change his evaluation in order to preclude the selection of the Grievant and that Supervisor Mazurkiewicz was in fact improperly influenced by Fletcher in making his evaluations. The record indicates that Fletcher had a personal animus against the Grievant. This case presents a patent subversion of the integrity of the selection process. The collective bargaining contract and the implementing regulations contemplate a non-discriminatory and fair selection process. That obligation clearly was violated in the instant case. The selection of Smith was arbitrary and capricious.

In view of these findings it is unnecessary to determine whether the posting of the position as a multi-craft position violated Article 33, Section 2. Similarly, it is unnecessary to decide whether the Union's contention that the grievance procedure was fatally flawed because the Step 1 and Step 2 designees had no authority to resolve the grievance.

We turn then to the remedy. The Postal Service contends in effect that if the Arbitrator should find a violation of the agreement that there is no remedy. The Postal Service addresses the Union's contention that out-of-schedule premium should be paid by stating that out-of-schedule pay is unwarranted and that the contractual provisions of Article 8, Section 4B as implemented by the ELM 434.64 do not provide for the payment of out-of-schedule overtime under the circumstances presented in this case. The Postal Service asserts that there was no temporary schedule for which a Wednesday notice was required. The Arbitrator finds that the provisions of the ELM for out-of-schedule pay do not apply since management did not request that the Grievant work on a temporary schedule. However, the Grievant was wrongfully deprived of the opportunity to work a more desirable schedule than that of his LSM position. The Grievant's schedule as a Clerk was 3:30 p.m. to 12:00 midnight. The schedule of the Training Technician position was from 12:00 noon to 9:00 p.m. Moreover, the position of training technician would seem to have offered, as the Grievant testified, a better springboard for the pursuit of better positions in the future. As stated by Arbitrator McConnell in a similar situation in Case No. E4C-2D-C 10592, pay for time "not comprised within his old schedule is not unreasonable." The Grievant in this case should be compensated for the loss of more favorable hours of employment and the opportunity to use the Training Technician position as a springboard for career

advancement. The Grievant should be compensated at straight time for the three and one-half hours per scheduled day not overlapped between the hours of his old job and his new position and for the period between the date upon which he would have commenced work in the training technician position if it had been awarded to him until he entered upon a new position at a higher level within the Postal Service plus interest.

The Arbitrator has awarded interest in this case because he has found arbitrary and capricious conduct on the part of the Postal Service under the circumstances here presented. As this Arbitrator stated in Case No. E1C-2D-C 15148:

> This Arbitrator does not ordinarily award interest on back pay or monetary compensation. Here, however, there is a case of serous arbitrariness. In such a case the principles enunciated by National Arbitrator Benjamin Aaron in Case No. H1N-5-FD-2560 indicate that interest may properly be applied. Accordingly, the Arbitrator awards that the back pay shall include interest in general accordance with the principles enunciated by the National Labor Relations Board in Florida Steel Corporation, 231 NLRB 651.

Interest in this case shall likewise be paid in accordance with the principles enunciated by the National Labor Relations Board in Florida Steel Corporation, 231 NLRB 651.

AWARD

The grievance is sustained. The Grievant shall be compensated at straight time at the training technician rate of pay for the earlier three and one-half (3 1/2) hours not overlapped between his new and old jobs for the period between the date upon which he would have commenced work in the training technician position if he had been awarded it until the date upon which he entered his new position plus interest. Interest shall be computed in accordance with the principles enunciated by the National Labor Relations Board in Florida Steel Corporation, 231 NLRB 651.

Dated: October 29, 1988

Bernard Cushman, Arbitrator

Ido

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE and AMERICAN POSTAL WORKERS UNION	Grievant: VIRGILIA JACKSON Post Office: Hackensack, NJ Case No: N4C-1N-D26743

Before ARTHUR TALMADGE , Arbitrator

Appearances:

For US Postal Service
EILEEN CHILEK

For Union:
JEFF KEHLERT

Date of Hearing: October 28, 1987

Place of Hearing: Hackensack Post Office, South Hackensack, N.J.

Award:

The Postal Service did not have just cause for the indefinite suspension of the Grievant, VIRGILIA JACKSON. She shall be reimbursed for wages lost from the date of her indefinite suspension to the effective date of her restoration to duty, less earnings from outside employment.

Date of Award: November 30, 1987

Post hearing memorandum received November 17, 1987

Pursuant to the rules and procedures of the Collective Bargaining Agreement between the American Postal Workers Union (hereinafter the Union) and the United States Postal Service (hereinafter the Service), the undersigned was designated as Arbitrator to hear and render a final and binding Award concerning the following disputed issue:

> Did the Employer have just cause to indefinitely suspend the Grievant, VIRGILIA JACKSON, as per written notice dated August 4, 1986? If not, what shall the remedy be?

The parties were not able to settle the dispute and the matter was referred to arbitration.

BACKGROUND

In the Notice of Indefinite Suspension, the Service charged the Grievant as follows:

> You are hereby notified that you will be indefinitely suspended from the U.S. Postal Service . . . . There is reasonable cause to believe that you are guilty of a crime for which a sentence of imprisonment may be imposed.

The Service enlarged on the Grievant's dereliction:

> Charge #1--Assault upon a Postal Employee.
>
> On June 9, 1986, at approximately 20:45 hours, Distribution Clerk, Rebecca L. Kuhn, approached Tour Superintendent Joseph J. Spruill and informed him that she had been struck in the face with an ashtray while you were both in the employee swing room.

On June 10, Rebecca L. Kuhn filed a complaint against you with the South Hackensack Police Department, alleging you assaulted her about the face and nose with a glass ashtray. You are scheduled to appear in court on this matter on September 10, 1986.

The crucial elements in the scenario may be gleaned from the Postal Service Investigative Memorandum (dated June 26, 1986) which reads in part:

Basis for this investigation is a telephone report from Acting Tour Superintendent Joseph Spruill reporting the assault of Distribution Clerk Rebecca Kuhn by Distribution Clerk Virgilia Jackson on June 9, 1986.

On June 17, 1986, Clerk Rebecca Kuhn was interviewed concerning the incident. She reported in the attached sworn statement that she has had previous arguments with Clerk Jackson as a result of Kuhn's position as an Acting Supervisor. On June 9, 1986 Kuhn stated she was sitting in the cafeteria when Clerk Jackson approached her and "smashed" an ashtray into her face. Kuhn then got up and told Jackson, "You're going to court" and walked out of the cafeteria.

Clerk Kuhn reported she was injured as a result of the incident. She required medical treatment for a contusion of the bridge of her nose. She also missed four days of work as a result of the incident.

THE WITNESSES

Clerk Irene J. Lucksin and William Schletter, and Casual employees Kuriakose Alummoottil and Joseph Harison were all reportedly witnesses to the incident. All witnesses denied seeing the incident but heard the ashtray break on the ground.

According to William Schletter:

I did not witness an ashtray being thrown in anyone's face . . . .

According to Kuriakose Alummootil:

> I heard the noise of something hitting the floor. When I looked up, one lady had ashes on her face and had stood up from the table where she was seated. But I did not see anything. . . . .

GRIEVANT'S STATEMENT

A summary reply of the Grievant's position may be drawn from Statement given Postal Inspector (June 19, 1986), which reads in part:

> I, Virgilia C. Jackson, Distribution Clerk . . .
>
> On, June 9, 1986, at about 20:58 I was in the swing room . . . . I saw Rebecca Kuhn drop the ashtray on the floor and ashes on her face. . . . R. Kuhn then accused me of hitting her with an ashtray. I was shocked at her allegation because I never touched her. She planned the whole thing. She faked it . . . .
>
> I talked to Joe Spruill (Acting Tour Superintendent) and told him what happened. At around 21:17, J. Spruill . . . told me that I have to leave the premises for emergency suspension and come back the next day, June 10, 1986. I came to see John Korudon (Supervisor). He and Sandy Chase . . . gave me a Letter of Emergency Placement in off duty status without pay.
>
> . . . . . .
> . . . . . .
>
> Though I was looking at her, I have no idea that she got injured like they said. I have no idea how the ashes got in her face.
>
> I never lifted up the ashtray or hit her. I have no idea how the ashes got in her face.

I have no reason to do harm to anyone.
I have no reason to hit her . . . .

Emergency Placement in Off-Duty Status
and Its Resolution

The chronology of subsequent events reveal:

1. Notice of Emergency Placement, effective June 9, 1986. Grievant continues in this status until advised otherwise. The reason for this action is: Assault Upon a Postal Employee.

2. October 31, 1986 - Step 3 Grievance Settlement (dated December 18, 1986) between Labor Relations Representative, New Brunswick Division and the APWU National Business Agent as to the grievance re: Notice of Emergency Suspension of June 10, 1986. The understanding provided inter-alia:

> Upon full discussion and consideration of this matter, it is determined that this grievance is mutually resolved in that the period of the Emergency Suspension is hereby reduced to seven (7) calendar days. The Grievant is to be compensated for all lost wages and benefits for the period commencing the eighth calendar day of the suspension and continuing until the day before (approximately August 4, 1986) her placement in an indefinite suspension status.

-- June 9, 1986 - Notice of Emergency Suspension.
-- December 18, 1986 - Grievance (supra) Resolved.
-- August 4, 1986 - Notice of Indefinite Suspension.*
-- October 27, 1986 - Grievant returned to duty.

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*The Arbitrator remains with uncertainty as to why the Grievant was placed on "Indefinite Suspension" almost two months following the incident. One would also hope for further future clarification as to the continuum between Section 7 and Section 6 of Article 16 of the National Agreement.

Police and Judicial Proceedings

-- June 10, 1986--Municipal Court of South Hackensack, State of New Jersey issues summons to Virgilia Jackson (re: complaint of Rebecca Kuhn) to appear in Court, July 10, 1986 under charge, N.J.S.: 2C:12-1(a)(1).*

-- June 30, 1986--Virgilia Jackson signs complaint against Rebecca Kuhn under charge N.J.S.:2C:28-4b1 and 2C:28-3b.**

--October 22, 1986 (change of venue)--"Jackson case" heard before Honorable H. Chandless, Municipal Court, South Hackensack, N.J. Judge Chandless found Ms. Jackson not guilty.***

-- October 27, 1986--The Grievant is returned to duty.

PERTINENT PROVISIONS OF THE NATIONAL AGREEMENT

ARTICLE 16 - DISCIPLINE PROCEDURE

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...the Employee is immediately removed 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.

---

*The act of simple assault.

**Harrassment.

***The disposition of the "Kuhn Case" not made known to Arbitrator.

C. If after further investigation or after the resolution of the criminal charges against the employee, the employer determines to return the employee to a pay status, the employee shall be entitled to back pay for the period that the indefinite suspension period exceeded seventy (70) days, if the employee was otherwise available, and without prejudice to any grievance filed under (B) above.

POSITION OF THE SERVICE

The Service contended that in view of the serious nature of the charges it had the right to suspend the Grievant for the protection of the public and fellow employees. The Service had reason to believe that the Grievant, by throwing an ashtray at a fellow employee, had, in fact, assaulted a fellow employee. The Service said, "the employer may indefinitely suspend the 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."

It invoked the provision of Article 16 Section 6A, Indefinite Suspension--Crime Situation, only when it became known that "crime situation" existed as of August 4, 1986.

As to the 80 days suspension--the ten days in excess of the prescribed 70 days term of "indefinite suspension" delineated in Article 16 Section 6C, the Service in its post hearing memorandum (November 2, 1987) argued:

> The employer being cognizant that the grievant's court day was scheduled at the approximate expiration of the 70 days did not want to be precipitous and remove the grievant from the USPS absent final disposition of the criminal proceeding. Therefore, upon management being notified on 10/24/86 that the criminal proceedings against the grievant were dismissed, the Service took immediate action to return the grievant to work on 10/27/86.

The Service concluded:

> The employer has an affirmative obligation to maintain a safe work environment in order to protect its employees and the mails and to maintain the public trust in our mission.

POSITION OF THE UNION

It is the Union's position that the burden of proof lies with the Employer to prove just cause existed for "the indefinite suspension." The Union asserted that management must prove that it had reasonable cause to believe that the Grievant was guilty of the crime for which a sentence of imprisonment can be imposed as required by Article 16 Section 6A of the National Agreement. The Employer cannot meet the burden, for the Grievant was not arrested or indicted on any charge. The Employer has not produced a single shred of evidence to show reasonable cause for belief of guilt and imprisonment.

The Union contended that the Indefinite Suspension was procedurally defective for Postal Management in its haste "to punish" the Grievant did not obtain proper review and concurrence by higher authority in keeping with the terms of Article 16.8.

The Union argued that the Service failed to abide by notions of "due process" and "procedural propriety" in invoking the Indefinite Suspension thirty-five (35) days following the submission of the Investigative Memorandum

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*Article 16.8 while it requires concurrence, does not mandate written review. See, General Supervisor Sanford Chase's concurrence in his August 8, 1986 memorandum.

to Postal Management. It was June 26, 1986 that the Postal Inspectors provided management a status and conduct report of the Grievant. If management "had reasonable cause" to believe that the employee was guilty of a crime, that was effective that date, it should have called Section 6 of Article 6 into play. It did not. This "inaction" demonstrated that management was capricious and arbitrary.

Under the circumstances, the grievance should be upheld: 1. The Indefinite Suspension should be expunged from the record. 2. The Grievant should be made whole for all pay lost plus interest.

DISCUSSION AND OPINION

In seeking a determination, the Arbitrator will deal with those contentions of the parties needed to resolve the stipulated issue. The Arbitrator is mindful that altercations do not take place in a vacuum. In the given circumstances, the Arbitrator does not make a finding as to who was telling the truth; nor does the Arbitrator make any judgment as to who was the aggressor and who was the victim. The Arbitrator recognizes that the Court found the Grievant "not guilty." The Arbitrator limits his comments to the stipulated question: whether there was just cause for the indefinite suspension issued to the Grievant by the Notice of Indefinite Suspension of August 4, 1986.

The question of "Indefinite Suspension--Crime Situation" (Article 16 Section 6) appears to be an ever growing one as the Postal arbitration cases on the subject attest. The Arbitrator has carefully read the awards introduced and has given them careful consideration.

In Cases # N8C-1N-D13348 and N8C-1N-D13349 (1982), Arbitrator Herbert Marx stated:

> The parties to the Agreement drafted the first sentence of Article XVI Section 4 (1981 National Agreement)* with great specificity and the Arbitrator is required to adhere precisely to such unambiguous language. . . . Did this give the Postal Service "reasonable cause" that the two grievants were not only "guilty of crime" but also one for which "a sentence of imprisonment may be imposed"?

Arbitrator Marx noted that "the Postal Service like any other employer cannot be expected to make judgments which can be reserved for the courts." Nevertheless, on June 9 or June 10, 1986 (at the very latest June 25 or June 26), when the Inspectors submitted their memorandum to Hackensack Postal Management, management had full opportunity to know that charges were made under New Jersey Statutes, Code of Criminal Justice, Section 2C:12-1(a)(1) which states:

"Simple Assault

> (1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another. . . .
>
> Simple assault is a disorderly person offense."

. .

> New Jersey Statutes,
> Section 2C:1.4 Classes of Offenses
>
> b. An offense is a disorderly person offense if it is so designated in this code. . . . Disorderly persons offenses and petty person offenses are petty offenses and are not crimes within the meaning of the Constitution of this State. . . . Conviction of such offenses shall not give rise to any disability or legal disadvantage based on conviction of a crime. (Emphasis added.)

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*This is the same language of Article XVI Section 6 1984 Agreement.

Arbitrator Marx concluded, op. cit.,

> The Postal Service is required to show affirmatively that it had "reasonable cause" to connect the siphoning of gas from a private vehicle with a crime warranting imprisonment. The Arbitrator finds that the Postal Service made no showing. Under the specific language of Article XVI, Section 4 (1981)[Section 6 (1984)], there is no support for an indefinite suspension, and the Arbitrator will so find.*

Arbitrator William LeWinter, in Case #E1C-2B-D17289 (1985) held as to "reasonable cause". . . .

> The National Agreement does not provide for Indefinite Suspension for "an arrest" (in this instance there was no arrest, but a complaint). It provides for the suspension if the Employer has reasonable cause to believe Grievant is guilty. A reasonable belief (emphasis provided) in guilt can only arise if some investigation occurs. Without any knowledge of the facts, one cannot form any reasonable belief concerning the event. From the evidence presented. . . the discipline was issued solely on the knowledge the Grievant was arrested. Arrest is not evidence of reasonable belief of guilt.

He concluded:

> The matter must be determined prospectively, not retroactively.

Unfortunately, we were not advised by what process of deduction or evidentiary foundation Postal Management drew its conclusion.

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*Arbitrator Marx found the Service did not have just cause for the indefinite suspension; however, he held the Service had just cause for the removal.

All of the witnesses in the swing room when the incident took place denied seeing the incident.

All we were told was that the suspension was imposed because a co-worker filed a complaint against the Grievant alleging the assault. . . . This was the limited knowledge of the facts presented from which a "reasonable belief" was drawn. (See, Notice of Suspension)

There are many other cases to this effect including Case #S1C-3Q-D32524 (James Sherman, 1984).

> Did Management have a reasonable cause to believe that the Grievant was guilty of a crime which could result in his arrest? The Arbitrator finds that the question has no simple answer; it is well established (in prior Postal Service arbitration awards) that management must do something more to ascertain whether the accused is guilty as charged. . . .

The governing principle was stated clearly by Sylvester Garrett in Case #N1C-NAT-8580 (1978) in the Award he rendered as Inpartial Chairman re: Interpretation of Article XVI, Section 3, of the 1975 National Agreement, which for all purposes became Section 6 of the 1984 National Agreement.

The basic problem as fashioned by Arbitrator Garrett, is: when an employee has been suspended indefinitely because the USPS has reasonable cause to believe that the individual is guilty of a crime for which the criminal charge later is dropped or the employee is found not guilty; can the

employee upon reinstatement, properly be made whole for earnings lost during the period of suspension.*

Arbitrator Garrett remarked:

> In short the following general conclusions now seem warranted in respect to the determination of "just cause" in a "crime case" under Article XVI as negotiated in 1971.**
>
> 1. Every suspension effected under the last sentence of Article XVI, Section3 is reviewable in arbitration to the extent as any other suspension where "just cause" for the discipline action has been shown.
>
> 2. Such a review in arbitration necessarily involves considering at least the presence or absence of "reasonable cause" to believe the employee guilty of the crime alleged. . . .
>
> 3. The Arbitrator in any case, when the employee has been acquitted or the prosecution dropped also has discretion to award remedial back pay in whole or in part, if deemed reasonable under the facts of the given case.
>
> . . . . . .
>
> . . . . . .

In the distinguishable awards under the 1984 National Agreement when the Arbitrators upheld issuing the "Indefinite Suspension" and sustaining the penalties consequent to the "Indefinite Suspension," it was nonetheless commented by the Arbitrator, that if the Postal Service's belief was unfounded, unreasonable, or

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*Arbitrator Garrett noted "this is the first case since negotiation of Article XVI in which parties have made complete presentations concerning the authority of an Arbitrator to award remedial back pay to an employee suspended in a crime case and later found not guilty."

**See, similar (identical) language in successive National Agreements.

arbitrary, the Arbitrator will review the suspension (N1C-1N-D22579, Roukis, 1984). [It should be observed that the Grievant had been arrested for a serious crime. (emphasis supplied).]

In N1C-1J-D23913 (Levin, 1984), the Arbitrator noted that Article 16(6) . . . . is different from the disciplinary suspensions . . . the contract requires that the Postal Service only prove there was an arrest and the arrest could result in a prison sentence. The Arbitrator did call to our attention one significant differentiating factor . . . "Indeed, the record shows that M was found guilty of the charge and he was given a suspended prison sentence."

It is worth reporting Arbitrator Levin's conclusion: the Postal Service carried its burden of proving that "the Grievant was arrested for a crime that might result in imprisonment. . . . and the Arbitrator (in that circumstance) must find it (P.S.) acted for just cause. . . ."

The Arbitrator finds that the Postal Service did not carry the burden of proving that it had "reasonable cause" to believe that the Grievant was guilty of a crime for which imprisonment can be imposed because a co-worker filed a complaint against her (with the South Hackensack Police Department) alleging assault. Under the language of Article 16, Section 6, 1984 National Agreement, there is no support for an indefinite suspension, and the Arbitrator will so decide.

(INTEREST FOR BACK PAY) It cannot be denied that in general, it has not been the practice of Arbitrators to award "interest" as part of the traditional "make whole" package. When it has occurred, it has resulted because there was dilatory action by the employer. The Arbitrator had, then, concluded that some form of penalty in the form of "interest" was

due. In this case, the Arbitrator did not find that the Service had malevolently delayed or slowed the adjudicatory process. [It believed the Grievant was guilty of assaulting a fellow employee.]

The facts of this case did not reveal that the Service acted in bad faith in suspending the Grievant. The Arbitrator cannot conclude that allowing that the Service may have in measure acted erroneously that it did so vindictively.

The following Award is directed:

AWARD

The Postal Service did not have just cause for indefinite suspension of the Grievant, VIRGILIA JACKSON. She shall be reimbursed for wages lost from the date of her indefinite suspension to the effective date of her restoration to duty, less earnings from outside employment.

Arthur Talmadge

Arthur Talmadge, Arbitrator

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration .between UNITED STATES POSTAL SERVICE and AMERICAN POSTAL WORKERS UNION	Grievant:	Denise Demler
	Post Office:	New Brunswick, NJ
	Case No:	N4C-1N-D 23910 N4C-1N-D 33880

Before Herbert L. Marx, Jr. , Arbitrator

Appearances:

For US Postal Service
Lynn Goldstein, Labor Relations Assistant

For Union:
Jeff Kehlert, National Business Agent

Date of Hearing: October 14, 1987

Place of Hearing: Edison, NJ

Award: 1. The Indefinite Suspension of Denise Demler was for just cause but only for the first 70 calendar days of such suspension. She shall be made whole for lost straight-time pay commencing with the completion of 70 calendar days after July 25, 1986 until the effective date of her removal on March 20, 1987. In addition, Demler shall receive administrative leave pay for July 24, 1986, if such has not already been provided.

2. The removal of Denise Demler was not for just cause. She shall be promptly offered reinstatement to her previous position and shall be made whole for lost straight-time pay from March 20, 1987 to the date of offer of reinstatement.

Date of Award: November 12, 1987

O P I N I O N

The United States Postal Service and the American Postal Workers Union agreed that the issues to be resolved by the parties are as follows:

> Was the Indefinite Suspension of Denise Demler for just cause? If not, what shall be the remedy?
>
> Was the removal of Denise Demler for just cause? If not, what shall be the remedy?

On July 24, 1986, an article appeared in The Home News, a newspaper serving the community in which the Postal Station was located, reading as follows:

> An Edison woman, formerly employed at an Edison savings and loan, was indicted yesterday on charges of stealing $12,751 and funneling the money into her own savings account.
>
> The indictment charged 24-year-old Denise Demler of Woodbridge Avenue with theft by deception between last Aug. 15 and Nov. 7.
>
> Demler was then a teller at the Edison branch of the First Savings and Loan Association of Perth Amboy.
>
> A spokesman for the Middlesex County Prosecutor's Office said Demler's duties included processing checks. The spokesman said that on nine occasions she deposited checks to her own account.

On the same date the grievant, Clerk Denise Demler, received a Notice of Indefinite Suspension, which read in pertinent part as follows:

There is reasonable cause to believe that you are guilty of a crime for which a sentence of imprisonment can be imposed. The reason for this action is:

> Specifically, on Thursday, July 24, 1986, the daily edition of the Home News published an article wherein it identified you as having been indicted on July 23, 1986 by the Middlesex County Prosecutor's Office on charges of stealing $12,751 and funneling the money into your own savings account while you were employed at an Edison branch of the First Savings and Loan Association of Perth Amboy.

Some three months later, on October 24, 1986, the Postal Service requested the Postal Inspection Service to investigate the matter. More than another three months later, on February 3, 1987, the Inspection Service issued an Investigative Memorandum on the matter. Then, on February 13, 1987, the Postal Service issued a Notice of Removal to the grievant, which read in pertinent part as follows:

> You are hereby notified that you will be removed from the U.S. Postal Service on March 20, 1987. The reasons for this action are:
>
> Violations of USPS Code of Ethical Conduct
>
> Specifically, on Thursday, July 24, 1986, the daily edition of the Home News published an article wherein it identified you as having been indicted on July 23, 1986 by the Middlesex County Prosecutor's Office on charges of stealing $12,751 and funneling the money into your own savings account while you were employed at an Edison Branch of the First Savings and Loan Association of Perth Amboy.
>
> Information received indicates that you have been accepted into the Middlesex County Pre-Trial Intervention Program for a period of ninety (90) days.
>
> Part 661.3f of the Code states:
>
> Employees must avoid any action, whether or not specifically prohibited by this Code, which

might result in or create the appearance of:
...f. Affecting adversely the confidence of the public in the integrity of the Postal Service.

Part 661.53 states:

> No employee will engage in criminal, dishonest, notoriously disgraceful or immoral conduct, or other conduct prejudicial to the Postal Service. Conviction of a violation of any criminal statute may be grounds for disciplinary action by the Postal Service, in addition to any other penalty by or pursuant to statute.

In addition, Part 666.2 reads, in part:

> Employees are expected to conduct themselves during and outside of working hours in a manner which reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal personnel be honest, reliable, trustworthy, courteous and of good character and reputation.

Your conduct as stated above cannot be condoned or tolerated.

The grievance before the Arbitrator protests both the indefinite suspension as well as the removal. For ease of comprehension of the circumstances, it is preferable to review first the question of the grievant's removal.

The sole basis for the removal action appears to be the information related in the newspaper article, quoted above, combined with the fact that the grievant had been accepted into the Middlesex County Pre-Trial Intervention Program. The Postal Service determined this to be "conduct" which "cannot be condoned or tolerated".

There was no evidence of any investigation of the circumstances regarding Demler's alleged conduct (at least prior to

the initiation of the grievance procedure by the Union). There was no indication of any determination of guilt of the alleged acts, either by the Postal Service or by a court of law. There was no admission by the grievant as to guilt of the alleged act. Finally, there was no showing, either from the newspaper article or from Postal Service testimony, as to any public knowledge of the connection between Demler and her employment in the Postal Service.

No conclusion can be drawn other than that the Postal Service took its removal action based on the grievant's entrance into the Pre-Trial Intervention Program. Somehow, the Postal Service jumped to the conclusion that acceptance in the Program was, to some degree, a showing or admission of guilt. The Postal Inspector who testified stated his belief that the grievant's entry into the Program involved some kind of "probationary period" for 90 days (i.e., some admission of guilt which would be expunged or overlooked after a 90-day period). The Supervisor who signed the Notice of Removal testified that he believed Demler's entry into the Program was a "plea bargain", such as he was familiar with in his former capacity as a New York City Police Officer. The Postal Service presentation at the arbitration hearing showed no indication of any belief to the contrary.

The sum of it is that the Postal Service's conception of the Pre-Trial Intervention Program was entirely erroneous. Thus, to base Demler's removal on her participation in the Program provides no "just cause" foundation whatsoever.

An explanation of the nature of the Program was provided by testimony by E. Frank Doty, Esq., personal attorney for the

grievant. The Program is governed by New Jersey Statute 2C-43, 12-13 et. seq. and is, as stated by Doty, "designed to cover defendants accused of victimless crime with no previous criminal record and on a one-time offer".

Entry into the Program is obtained only with the consent of the prosecuting attorney. It provides for a period "not to exceed 6 months" (in Demler's case, only 90 days), after which (as one alternative) the indictment against the defendant may be dismissed.

Of pre-eminent significance is the fact that Doty advised the Postal Service by letter dated January 29, 1987 of Demler's acceptance in the Program. By Order of Dismissal by the New Jersey Superior Court, the indictment against Demler was dismissed with the notation, "Complaint dismissed -- matter adjusted on May 8, 1987".

Of further guidance are the "Guidelines for Operation" of the Program, which includes the following:

> GUIDELINE 4. Enrollment in PTI programs should be conditioned upon neither informal admission nor entry of a plea of guilt. Enrollment of defendants who maintain their innocence should be permitted unless the defendant's attitude would render pretrial intervention ineffective.

Thus, the matter has been settled with no resolution of guilt or innocence nor any prospect that such will be determined in the future. Clearly, the Postal Service's condemnation of Demler's "conduct" became without foundation whatsoever. The Postal Service has no independent means whatsoever to determine

the grievant's guilt or innocence of the action for which she was indicted.

A further comment is required, however. The Arbitrator fully accepts that off-the-job misconduct unrelated to Postal Service employment may in specific circumstances warrant the removal of an employee. The Postal Service submitted five instances of previous arbitrations upholding such action. All of these, however, concerned cases where the employee either admitted guilt or was convicted of criminal activity. For the reasons discussed above, this is obviously not the situation here under review. The cited examples are thus without relevance.

Since the removal was based solely on the newspaper report, and the Postal Service erroneously cited entry into the Pre-Trial Intervention Program as some mark against the grievant, the removal was not for just cause. It should be noted, finally, that at the arbitration hearing no contrary interpretation of the meaning of the Program was offered by the Postal Service, although opportunity to do so was provided by the Arbitrator.

* * * * *

There remains the question of whether or not there was just cause for the Indefinite Suspension of Demler. A review of the chronology shows the following:

July 24, 1986 -- Newspaper article appears, and grievant is immediately suspended.

October 24, 1986 -- Inspection Service investigation initially requested.

January 29, 1987 -- Postal Service notified by grievant's attorney of her placement in the Program.

February 3, 1987 -- Inspection Service completed an Investigative Memorandum.

February 13, 1987 -- Notice of Removal issued.

March 20, 1987 -- Notice of Removal becomes effective.

May 8, 1987 -- Complaint against Demler dismissed by court.

Article 16.6 of the National Agreement reads in part as follows:

> 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.
>
> C. If after further investigation or after resolution of the criminal charges against the employee, the Employer determines to return the employee to a pay status, the employee shall be entitled to back pay for the period that the indefinite suspension exceeded seventy (70) days, if the employee was otherwise available for duty, and without prejudice to any grievance filed under B. above . . . .

Article 16.6 reserves to the Postal Service the right to "indefinitely suspend" an employer in cases where the Postal Service has "reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed".

Many previous arbitration awards have determined that this is not an absolute right, since there must be a showing by the Postal Service that its belief as to the employee's guilt is "reasonable"; that is, based on evidence available directly to the Postal Service. A number of these awards were cited by the Union. Certain awards would also require some independent investigation by the Postal Service to justify an indefinite suspension. Others would further require (although the Agreement language does not so state) that some logical connection with the employee's work performance be shown (i.e., damage to the Postal Service's reputation in the eyes of the public, possible question as to the employee's work integrity).

In this instance, the Postal Service obviously acted on the newspaper report of an indictment (not merely an allegation or even simply an arrest) of a matter involving alleged fiscal impropriety. As it turns out, the newspaper report was accurate in that an indictment did in fact occur. The Arbitrator finds that, in these particular circumstances, the Postal Service did have "reasonable cause" at the time and that the type of offense might well place under suspicion the employee's work conduct in a position of public trust. Alleged mishandling of funds is certainly a clear warning signal in Postal Service employment.

This situation, nevertheless, drastically changed as time progressed. First, there is the question of why the Postal Service took as long as three months even to request an investigation by the Inspection Service. Second, it appears clear that the investigation was perfunctory, since it involved nothing more than confirmation that an indictment had occurred.

On January 27, 1987, however, the Postal Service was put on notice as to Demler's entry into the Pre-Trial Intervention Program. At this point, the Postal Service no longer had a basis to believe the grievant was "guilty of a crime", since it should have been (but apparently was not) obvious that the Program was designed specifically to avoid a finding of either guilt or innocence. At this point, there flatly was no ground whatsoever to continue Demler in indefinite suspension. At the latest, it should have ended then. This was already more than six months after the suspension began, and the Postal Service still had no independent basis for its "reasonable cause".

There is more, however. Article 16.6.C speaks to those situations where, after investigation or resolution of the charges, the Postal Service determines to return an employee to pay status. This is what the Postal Service should have done by January 29, 1987 at the latest. The remedy, therefore, will reflect what the consequences of such reinstatement would have been. As stated in Article 16.6.C, this involves payment of back pay for the period of suspension beyond 70 days.

As a final note, there was testimony that the grievant was placed on indefinite suspension at the beginning of her tour on July 24, 1986, despite the fact that the Notice of Indefinite Suspension dated the same day specified that the suspension would commence "no earlier than 24 hours from the time you receive this notice". This will also be addressed in the Award.

A W A R D

1. The Indefinite Suspension of Denise Demler was for just cause but only for the first 70 calendar days of such

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suspension. She shall be made whole for lost straight-time pay commencing with the completion of 70 calendar days after July 25, 1986 until the effective date of her removal on March 20, 1987. In addition, Demler shall receive administrative leave pay for July 24, 1986, if such has not already been provided.

2. The removal of Denise Demler was not for just cause. She shall be promptly offered reinstatement to her previous position and shall be made whole for lost straight-time pay from March 20, 1987 to the date of offer of reinstatement.

Herbert L. Marx, Jr.
HERBERT L. MARX, JR., Arbitrator

STATE OF NEW YORK:)
) ss.:
COUNTY OF NEW YORK:)

On this 12th day of November, 1987, before me personally came and appeared HERBERT L. MARX, JR., to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Eleanor C. Puleo
ELEANOR C. PULEO
NOTARY PUBLIC, State of New York
No. 31-4730237
Qualified in New York County
Commission Expires May 31, 1988

* * * * * *

§ IN THE MATTER OF THE ARBITRATION §

§ Between §

§ AMERICAN POSTAL WORKERS UNION §

§ And §

§ UNITED STATES POSTAL SERVICE §

* * * * * *

August 18, 1987

N4C-1P-D 26298 - Howard, Alana
Clifton, New Jersey

BRIEF SUBMITTED ON BEHALF OF THE
AMERICAN POSTAL WORKERS UNION, AFL-CIO

JEFF KEHLERT, NATIONAL BUSINESS AGENT

ARBITRATOR JOSHUA JAVITS

Mr. Arbitrator:

The issue before you is clear - **Was the discharge of Alana Howard for just cause and if not what shall the remedy be?** As the moving party, the United States Postal Service bears full responsibility to produce a solid preponderance of evidence to meet its required burden of proof resultant in meeting the test of just cause as defined in our Collective Bargaining Agreement. In this instant case the employer has fallen far short by failing to present any substantive evidence to meet its contractual burden.

DISCUSSION and ARGUMENT

Mr. Arbitrator, the Union vigorously challenges Management's assertion throughout the hearing that this was an "administrative discharge", which does not fall within the confines of the Article 16 Disciplinary Provisions in our Collective Bargaining Agreement. The following excerpts from Questions and Answers On Interim Publication 118 supports the Union position:

52. If we have assigned an employee a scheme requirement, provided the appropriate scheme study time and the employee fails to qualify, can we terminate that employee?	The employee may be terminated if just cause exists to do so. The total circumstances of each individual case must be reviewed to determine the appropriate action, and where circumstances warrant, removal action should be instituted. Such action should be cancelled if the employee qualifies on the scheme during the required notice period.

56. Do the provisions of Interim Publication 118 eliminate the programmed discipline procedure outlined in the M-5 Handbook for cases of scheme failure?	Yes. Interim Publication 118. rescinded Part 244 of the M-5 Handbook (Examination Failure). The provisions of the National Agreement, specifically, the necessity for just cause in cases of potential discipline remain. In each case, all of the factors normally referred to when contemplating discipline must be considered.
57. Is the United States Postal Service obligated to make an effort to reassign an employee prior to taking removal action for scheme failure?	There is no absolute obligation to attempt to reassignment before taking removal action. It depends upon the circumstances of each individual case in determining whether reassignment of termination would be appropriate.

As these provisions clearly enunciate, the controlling contractual language in a scheme failure discharge case, is the just cause requirement within the Article 16 Disciplinary Provisions. That clause states:

> In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

Further, Arbitrator Bernstein reinforces the Union position and refutes Management's convoluted contention in case # C8C-4E-D 35088 [1]

> "The Arbitrator holds that the proposed termination of the grievant in the present case does not comply with the policies of the Interim Publication 118 set forth above. These policies clearly provide that failure to qualify on a particular scheme is not by itself an automatic justification for termination in every case. On the contrary, the official Questions and Answers explicitly state that even an employee who has failed to qualify cannot be terminated unless the necessary "just cause" is present. To the Arbitrator, this statement means that the Service must examine the situation of every employee who failed his or her scheme to determine whether he can utilize that employee in some other assignment within his of her job classification, or any other classification for which the employee may be qualified. Termination is appropriate only where no suitable alternative employment is in fact available.

> The Arbitrator concludes that the Service made no showing in the case that it had no alternate assignment which it could have given the grievant."

Arbitrator Bernstein's last sentence is very revealing of Management's presentation in this instant case. The employer presented no evidence regarding any consideration given to possible reassignment of Ms. Howard. Why? Because there was no consideration given. The sole Management witness, Mr. D. Parisi, Manager Mail Processing, stated the following in his Step 2 decision letter. [2]

> "As for this - management's position is that it would be detrimental to the best interest of the Postal Service to award to the grievant another assignment while almost everything other keyers given the MPLSM Incoming Scheme Assignment have passe with minimal difficulty.
>
> This exception may lead some of the other flexi-keyers presently assigned to Tour 1 City Outgoing Secondary Scheme assignment to say - 'why bother to pass city machine scheme, I can then be reassigned back to Tour 3 as an Outgoing LSM Keyer.' "

Management's reason for not considering reassignment is clear. They were concerned about setting a precedent for reassignment in a scheme failure instance. Mr. Parisi's own testimony supports that position. While he refused to state "it would set precedent" he did not attempt to recant his Step 2 decision. He stood by it and offered no additional testimony with regard to consideration given. He testified that the consideration which was given was what impact not firing the grievant would have. No consideration of her indiviaual work record, employment history and available assignments was given. Further, in Management's Step 2 decision they neither refuted nor addressed the Union's contention that each case stands or falls on its own. Clearly Article 15 sections 2.b and 2.e prevail in the issuance of precedent setting.

ARTICLE 15 Grievance/Arbitration Procedure

Section 2 Step 1 (b)
In any such discussion the supervisor shall have the authority to settle the grievance. The steward or other Union representative likewise shall have the authority to settle or withdrawal the grievance in whole or in part. **No resolution reached as a result of such discussion shall be a precedent for any purpose.**

Section 2 Step 2 (e)
Any settlement or withdrawal of a grievance in Step 2 shall be in writing or shall be noted on the standard grievance form, **but shall not be precedent for any purpose**, unless the parties specifically so agree or develop an agreement to dispose of future similar of related problems.

Thus, at Step 1 and Step 2, Management's position robbed the grievant of her due process right for a fully fair evaluation/consideration within the grievance/arbitration procedure. Management, by its own position that settlement (reassignment instead of removal) would set precedent, did not review or afford any consideration to the grievant for reassignment, or the grievance for settlement in whole or in part, therefore violating Article 15 section 2(e).

Various arbitral decisions fully support the position that employees must at least receive consideration for reassignment, not removal.

Case # N4C-1A-D 3243 - Arbitrator Stutz [3]

"Under the Postal Service policy manual on schemes (Section 434.21), if an employee fails to qualify on an assigned scheme, the employee is at least entitled to consideration for reassignment."

Case # N4C-1M-D 8401 - Arbitrator Talmadge [4]

"I agree with the thinking of Arbitrator Stutz (N4C-1A-D3243, 1986) that 'if an employee fails to qualify on an assigned scheme, the employee is at least entitled to consideration for reassignment' "

Case # E4C-2D-D 31349 E4C-2D-D 31857 - Arbitrator [5]
31350 31858 Howard

"Notwithstanding these improprieties, the Service's reliance on the position that the Agreement supports the right of the Service to discharge for scheme failure, standing alone, without consideration of other relevant factors is misplaced.

The Service apparently relies on the decisions of Arbitrator Epstein in Case C1C-4E-D 23901 dated October 4, 1984 and of Arbitrator Levinthal in Case W1C-5K-D 14343 dated November 16, 1983. Two points may be made about those cases: first, that they have not been consistently followed, and, at most, represent only the fact that a lack of unanimity exists among regional arbitrators on this question and, secondly, the distinction drawn between the rights of employees disqualified on manual schemes as opposed to those disqualified on machine schemes has not been generally supported by other arbitrators.

In the mind of the arbitrator the preferred and more current view is that of Arbitrator Neil Bernstein in Case C8C-4E-D 35088 dated June 1, 1982, in which he stated, in relevant part:

> ... failure to qualify on a particular scheme is not by itself an automatic justification for termination in every case... the Service must examine the situation of every employee who failed his or her scheme to determine whether he can utilize that employee in some other assignment within his or her job classification or any other classification for which the employee may be qualified. Termination is appropriate only where no suitable alternative employment is in fact available.

This interpretation has been followed by Arbitrator Cohen in Case C4C-4E-D 11444, and by Arbitrator Zack in Case N1C-1J-D 39205. Moreover, interpretations which place upon the Service the obligation to evaluate employees who fail to qualify rather than automatically discharging them have been handed down by Arbitrator Dworkin in Cases C4C-4E-D 10727 and C4C-4F-D 10770, as well as Arbitrators Zumas in Case E1C-2D-D 19497 and Parkinson in Case E4C-2D-D 6515. In any event, the Service decided to apply discharge penalty automatically without evaluation of the grievants, an action tht has not received broad arbitral support. Other job opportunities were available at the time of the grievants' discharge."

In examination of the Schemes: Construction, Assignment, Training, and Proficiency section 434.2 "Failure to Qualify" [6] *states in part:*

> "If the allocated on-the-clock study time has been used and the employee fails to qualify on the assigned scheme, action should be taken consistent with the applicable provisions of the National Agreement to disqualify, reassign, or discharge the employee as circumstances warrant."

This language again clearly refers to the controlling disciplinary procedure of Article 16 as basis for possible discharge. Disqualification and reassignment are other possiblilties. Where other options such as these exist, and Management automatically chooses discharge, the basic principle of our Collective

Bargaining Agreement disciplinary process must prevail. The basic principle, that discipline should be corrective rather than punitive, was violated in that Management chose the harshest of penalties - discharge - rather than a lesser administrative or disciplinary action. A lesser action by its degree is more corrective than punitive. Without the aforementioned consideration of possible reassignment there was no corrective attempt by Management - only punitive intent.

Management's witness, Mr. Parisi did testify with regard to, "...retaining the grievant would hurt hiring ... placement of the employee on Tour 2 with weekend rest days would be a preferred assignment ... and people would fail purposely to get a preferred assignment." When cross-examined at this point, the Union pointed out that the grievant was not a regular, but a part-time-flexible. There was no obligation to place her in a position but rather her hours were always changeable, and she was only guaranteed four (4) hours work on any given scheduled day. Mr. Parisi testified he did not know Alana Howard was a part-time-flexible, but thought she was a regular. Thus, Mr. Parisi's testimony regarding "preferred assignments" is neither relevant nor factually correct to this discharge case.

Mr. Parisi further testified that "the grievant was not able to be utilized in any other capacity in October 1986." Yet, Management produced no evidence to substantiate this claim, nor did they produce any evidence that attempts were made to fit the grievant in - to work that minimum of four (4) hours per day with a minimum of one day per week. Management presented no evidence that part-time-flexible hours were reduced or impacted in any way. Again, Mr. Arbitrator, there was no evidence to meet the required burden.

Mr. Parisi testified there was going to be a reduction in personnel in the Clifton, New Jersey postal facility, and that it occurred in March 1987 - six (6) months following Ms. Howard's discharge. When cross-examined with regard to page 2 of United States Postal Service Exhibit #3 [7], Mr. Parisi admitted that of the original 14 part-time-flexibles, 30 regulars, and 5 supervisors slated for reassignment (excessing), only 19 regulars were actually excessed. No part-time-flexibles or supervisors were excessed. This is only 38% of the originally planned personnel reassigned.

Mr. Parisi also testified that the Clifton Post Office was not now becoming an IMF-Incoming Mail Facility, as he had stated in his Step 2 decision letter. [2]

> "No later that November 1987, this office will be an Incoming Mail Facility (IMF) for Clifton, Passaic, and Rutherford, NJ."

Thus, the other element of the Step 2 response which addressed the Union position of reassignment instead of discharge is without merit or fact circumstance.

The immediate supervisor, Mr. Green, was not present to testify on his issuance of the discharge, thus we do not know why he cited no contractual provision in the notice of removal. We also do not know if he felt he had authority to modify the discharge, or whether he was aware there were vacant assignments the grievant could have been assigned . The Postal Service offered no explanation for his failure to appear, seemingly feeling his presence was not necessary in such an automatic removal.

Clearly, the Union and yourself, Mr. Arbitrator, should have had several key questions answered, which only Mr. Green could answer, such as:

> Who did he discuss the discipline with?
>
> Who recommended the discipline?
>
> Was it automatic?

What other alternatives were considered?

What consideration was given for reassignment?

Did you have authority to settle the grievance?

Did you have authority to overturn the removal?

How was the discharge corrective?

Were other alternatives explored?

If so, the nature and extent of said exploration?

What provisions of the contract did you rely upon?

Did you receive concurrence?

Mr. Arbitrator, these and other questions to the issuing supervisor would have been most enlightening for full disclosure by Management. Clearly, the supervisor's exclusion seriously damages Management's ability to meet their required burden, with Management providing no evidence and testimony from Supervisor Green, they believe you are expected to assume the contract has been adhered to. We strongly argue that their burden requires them to present evidence to prove just cause.

The Union submits to you, Mr. Arbitrator that it is reasonalbe to believe the immediate supervisor, Mr. Green, had no authority to not issue the discharge. He had no authority to modify that discharge at Step 1. He did neither intiate nor produce the removal but rather signed and issued it without decision on his part. This belief is a result of Management's automatic "administrative discharge" theme throughout the hearing and "dangerous precedent" excuse at Step 2. The Union further believes that Management purposely excluded Mr. Green from testifying because truthful responses on his part would have given validity to the aforementioned Union contentions both at Step 2 and in this argument.

Insofar as many unanswered questions exist concerning Mr. Green's role in this case, the Union must point out it is unclear as to what role Mr. Parisi played in the presentation of Management's case. He had nothing to do with the discharge nor was he the

concurring official. An important point with regard to his testimony is that he did admit, during cross-examination, that in the Clifton Post Office, discharge was automatic for scheme failure.

Mr. Arbitrator, had this been a contract case with the Union as the moving party, bearing the full brunt of the requirement to meet our burden of proof, we would have failed miserably with so little evidence and non-credible testimony. Management must be held to the same standard. Without any presentation of evidence by the Union, Management's case fails on its own merit.

° ° ° ° ° ° °

While the burden of proof is not with the Union in this discharge case - we clearly presented substantive evidence to prove Management did not meet the test of just cause and violated several provisions of our Collective Bargaining Agreement.

The Union presented as expert witness, James Goretski, Clifton Local President, who testified forthrightly and credibly. Mr. Goretski testified that Management had failed to post eighteen (18) vacant positions at the Clifton Post Office. Fourteen (14) of those positions, the grievant was qualified for and able to work.[8] This testimony was unrefuted by Management. Mr. Goretski testified that while these jobs were vacant, the Clifton Post Office has suffered through extensive quantities of mandatory, involuntary overtime due to the shortage of workers. He described

week after week of ten hour days and non-scheduled day involuntary overtime. This also was unrefuted by Management. Mr. Goretski testified that the grievant was qualified for the majority of vacant positions and would have been particularly needed and helpful on Tour 1, the overnight shift. Mr. Goretski identified and explained a grievance which had been filed when the grievant had received notice rescinding her conversion to regular status.[9] He explained that had the grievant been a regular she would have been contractually required to bid on vacant duty assignments, but that when her promotion was rescinded that bidding privilege was denied her. This testimony also was unrefuted by Management. Mr. Goretski testified that in her status as a part-time-flexible, Management could utilize her on any tour, during any hours. He further testified that a document request form[10] was submitted in the course of Ms. Howard's discharge grievance processing. It requested copies of the "supervisors request for disciplinary action and postmaster or designee's concurrence." Mr. Goretski testified that neither were received by the Union. (Later Mr. Parisi stated he did not believe either existed on paper and that the concurrence had been oral.) This absence of the supervisor's request casts further doubt on Mr. Green's ability to make independent decisions.

Mr. Goretski testified that the grievant had not received scheme training within her first thirty (30) days as required by Article 30 Item 22 H of our Local Memorandum of Understanding.[11] Mr. Goretski also testified that the Clifton Post Office had not become an IMF - Incoming Mail Facility and that the incoming volume of Clifton City Mail was ever increasing. Lastly, Mr. Goretski testified he did not believe Ms. Howard's removal was contractually sound, as many positions and much more work existed for which she was qualified.

The testimony of President Goretski was unrefuted by Management.

The Union presented the grievant, Alana Howard, as a witness. Ms. Howard testified that she was a postal employee from March 16, 1985 to her effective date of removal, September 28, 1986. Ms. Howard testified she is married for ten years with two children. Ms. Howard explained tht in approximately May 1987 she met with Postmaster J. Gondola to talk with him about the possibility of her returning to duty. At that meeting, she explained she would be willing to withdraw her grievance if she would be permitted to return. She expressed willingness to transfer and work in another facility. Mr. Gondola then called Sylvia Lysak, Director Labor Relations, in the Hackensack MSC to inquire as to the possibility of reassignment of Ms. Howard. Mr. Gondola was told there were no available openings at that time. He was told there may be openings in the near future. As far as Ms. Howard knew, it was Mr. Gondola's intention to bring her back to duty. When questioned about the exam she took for Postal employment, Ms. Howard testified it was the Clerk/Carrier test, refuting Management's claim that she had taken only the Distribution Clerk Machine examination. Ms. Howard further testifed tht she had achieved a high score of 94% during her training, but that once issued the thirty day removal notice she never approached the required 98% passing grade. When questioned on this, Ms. Howard stated she became distraught and anxious and was not successful during the thirty day period. She further testified that her hours were changed and she was working an unfamiliar shift of 9pm to 5:30am. She stated that this change of tour was disruptive and added to her anxiety with regard to the qualification attempts.

Ms. Howard testified that she was a qualified outgoing MPLSM operator and a qualified manual city scheme sorter. She testified that she was still a part-time-flexible at the time of her discharge and had had a promotion rescinded by Management in August 1986 . Ms. Howard testified that she would willingly work in whatever postal facility she could. She stated she had volunteered to work the Tour 1 night shift - the least

preferential tour of duty in the Clifton Post Office. She testified she had taken a subsequent test for the 076 area for Postal Service employment. She emotionally testified that she had liked the Postal Service and wanted to again be a postal employee.

Alana Howard's forthright, clear, credible testimony was unrefuted by Management.

At the earliest stages of the grievance/arbitration process, the Union raised two basic issues:

1. The option of reassignment - not automatic removal.
2. Any settlement of a grievance in Step 2 shall not be a precedent for any purpose.

Those contentions have not changed and Management's singular theme response has not changed since the Step 2 - even though Management's position clearly violated and continues to violate articles of our Collective Bargaining Agreement.

Management did not afford any consideration toward reassignment of the grievant. Discharge was automatic because Management feared setting a precedent. The grievant was not afforded full opportunity for her grievance to be resolved at Steps 1 and 2, thus impugning her due process right under our grievance/arbitration procedure. Management did not consider the grievant's work record or employment history, nor were any adverse actions considered as part of the record in this removal decision.

The grievant is a part-time-flexible employee who is capable of performing the vast majority of work in the Clifton Post Office. She volunteered to work the overnight shift or to be transferred to the Hackensack MSC. Postmaster J. Gondola - the installation head - demonstrated his willingness to accomodate the grievant by contacting the MSC Labor Relations Director about possible reassignment. This clearly shows Management would afford reassignment outside the Clifton postal facility.

Again, this was probably because of the precedent argument, which is violative of Article 15 as previously cited.

Mr. Arbitrator, we are not discussing a probationary employee. Alana Howard is a career employee whose fate must be decided by application of all the contractual provisions of our Collective Bargaining Agreement. Article 16 - Disciplinary Procedure is the controlling provision in any removal action. Management must prove just cause through first, examination of all data, then through testimony and exhibits to meet its required burden. An automatic determination - a summary discharge - is outside the contractual parameters in this instant case. If the language in Schemes: Construction, Assignment, Training, and Proficiency section 434.2 "Failure to Qualify" [6] excluded "... disqualify, reassign, ..." then discharge would be the contractual requirement. They are not excluded and therefore, discharge is certainly not the contractual requirement. On the contrary, "action ... consistent with the applicable provisions of the National Agreement ..." requires Management to adhere to Article 16 section 1, Article 15, Article 19 and each pertinent passage of our Collective Bargaining Agreement.

The following is from EL 921 Supervisor's Guide to Handling Grievances B. Disciplinary Procedures: [12]

> "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."

The quantum of requirement is **must**, not may, nor should, not even shall, but **must**. Further it does not state some, or most, but ***all actions***. There are no exceptions.

Management in the early steps of the grievance procedure never took the position that work was not available for part-time-flexible, Alana Howard. Management never stated consideration for reassignment was given. Management did state a precedent would be "detrimental to the best interest of the Postal Service." This clearly violates Article 15 sections 2(b) and 2(e). The lack of consideration given to reassignment clearly violates Article 19 EL 434.2. The administrative automatic removal theme clearly violates Article 19 EL 434.2, Article 16.1 and EL 921 III B.

The arbitration decisions cited heretofore and included as addendums to this brief are the solid foundation of arbitral thought on this issue. Arbitrator Dworkin perhaps stated it best in his decision for Case # C4C-4E-D 10727 [13]

> "An underlying theme in most of the Union's cases is that automatic discharge violates the Postal Service's own explanation of the M-5 Handbook.
>
> The Cleveland policy is clearly more demanding and punitive than interim publications. No attempt is made under the policy to evaluate individual circumstances, work records, length of employment, or any of the other factors routinely included in evaluating just cause. In Arbitrator's judgement, Cleveland Management has attempted to substitute its policy for just cause; and by strictly enforcing the former, it has ignored the latter. The policy does not abolish the just cause requirement, it simply overlooks it. It may be that discharge is justified in almost every instance of failure to qualify; perhaps it is justified in every case. However, adherence to the just-cause principle requires investigation of individual factors. That is what the interim publications mandate and what Cleveland Management was obligated to follow. Mechanical discipline is always suspect and, where it is taken without an iota of regard for individual aspects, it becomes the very definition of "arbitrariness."
>
> There were a myriad of reasons for Management to reconsider the penalty. Grievant's employment background and her almost passing score were two of them. The Arbitrator does not necessarily mean that, having considered these factors, Management could not justifiably have discharged the Employee; but without any consideration of them whatsoever, the action was arbitrary. This, in and of itself, would be proper ground for sustaining the grievance."

Mr. Arbitrator, in this instant case, Management meted out automatic industrial capital punishment without applying the removal provisions of the Collective Bargaining Agreement. Management offered no evidence throughout its presentation to alter that simple fact.

The Union asks that you carefully review all the facts and in particular the presentation of Management's case with full cognizance of their burden of proof requirement. We request that you carefully review the enclosed arbitration decisions - solid, well constructed, carefully reflected decisions - and give them full weight in application to the instant case.

Mr. Arbitrator, the grievant successfully passed outgoing MPLSM training, manual scheme sorting, and achieved 94% of the required 98% on MPLSM incoming - and she has served a 366 day suspension as penalty for this contractually, unjustifiable removal.

The Union requests you to return Ms. Alana Howard to duty with full back pay and all benefits.

We must state, Mr. Arbitrator, that the Postal Service has shown nothing to indicate that the work was and is not available for her.

Alana Howard does not deserve industrial capital punishment . In her case, our contract does not permit it.

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* * * ADDENDUM INDEX * * *

* * * FURTHER ARBITRAL REFERENCE * * *

* * * ADDITIONAL INFORMATION * * *

REPORTS BY JEFF KEHLERT

American Postal Workers Union ✎ 10 Melrose Avenue ✎ Suite 210 ✎ Cherry Hill, NJ 08003 ✎ (856) 427-0027

The following reports are available, upon request, from my office:

1. **Sky's the Limit**
   Produced with former National Business Agent for the Maintenance Craft, Tim Romine. This report addresses our ability to obtain "restricted" forms of documentation necessary for enforcement of the Collective Bargaining Agreement with particular emphasis on medical records/information.

2. **Your Rights in Grievance Investigation and Processing**
   An alphabetical compilation of Step 4 Interpretive Decisions on shop stewards' rights and related subjects.

3. **More Rights in Grievance Investigation and Processing**
   A second volume of the Your Rights report including numerous Step 4 decisions.

4. **Grievances in Arbitration**
   A compilation of arbitration decisions on various subjects with a brief synopsis of the awards included.

5. **Vending Credit Shortages and Other Issues**
   A report on multiple subjects including the title subject, use of personal vehicles, Letters of Demand, etc.

6. **Letters of Demand - Due Process and Procedural Adherence**
   A history in contractual application of the due process and procedural requirements of the Employer in issuing Letters of Demand including numerous arbitration decision excerpts and the application of the principle of due process to discipline.

7. **Ranking Positions to a Higher Level**
   Utilization of Article 25 and Employee and Labor Relations Manual Part 230 to upgrade Bargaining Unit Positions to Higher Levels based upon work being performed. (With authoritative arbitral reference.)

8. **Winning Claims for Back Pay**
   Applying Part 436 of the Employee and Labor Relations Manual in conjunction with our Grievance Procedure to obtain denied pay and benefits, up to six years in the past.

9. **Letters of Demand -- Security and Reasonable Care**
   As Management corrects due process and procedural errors when issuing letters of demand, we must turn to other methods of prosecuting grievances for alleged debts. This report addresses F-1 and DMM regulations to enable us to prove security violations exist.

10. **Surviving the Postal Inspection Service**
    This report brings together the crucial information (Situations, Questions and Answers, National APWU Correspondence) necessary for employees and shop stewards on what rights must be utilized when Postal Inspectors come calling. Its goal is to enable Postal Workers to Survive and not lose their livelihood.

11. **Out-of-Schedule Compensation, Strategies for Winning Pay When our Collective Bargaining Agreement is Violated.**
    This report places into a readily accessible package the controlling Collective Bargaining Agreement provisions, arbitral reference, contractual interpretation and strategies necessary to pursue violations of the National Agreement in which out-of-schedule compensation would be an appropriate remedy.

12. **A Handbook: Defense vs. Discipline: Due Process and Just Cause in our Collective Bargaining Agreement**
    The arguments, Collective Bargaining Agreement references, investigative interviews, and arbitral authority brought together to provide the best possible defenses when discipline is issued.