Part II

Investigating and Documenting

Disciplinary Grievances

CHAPTER 28

THE ISSUE: LETTER OF WARNING / SUSPENSION/ REMOVAL - ATTENDANCE

THE DEFINITION

All employees are expected to maintain their assigned schedule and to make every effort to avoid unscheduled absences. In addition, employees must provide acceptable evidence for their absences when required. Although it is not part of ELM 510's leave regulations as incorporated by Article 10, management will also cite the ELM 666.81 requirement that employees "be regular in attendance."

THE ARGUMENT

All discipline must be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause. For minor infractions, such as attendance irregularities, management has a responsibility to discuss such matters with the employee before resorting to discipline. "Regular in attendance" is a vague and uncertain term. The employee deserves to be cautioned as to the expectations of management.

Although it is now routinely accepted by arbitrators that employees may be disciplined for excessive absenteeism, even where such absences have been approved by their supervisors, and even where due to legitimate emergencies or incapacitation, such discipline still is subject to all the tests of just cause and must be progressive or corrective instead of punitive. (See succeeding chapters for discussion of many of the just cause and procedural defenses.)

In addition to these procedural and/or just cause defenses, examine the merits carefully. Why was the grievant absent? Is there a pattern? Is there anything in the record to suggest a problem, such as chemical or alcohol dependency which isn't being discussed. Not only are these legitimate issues which must be raised with management, they are also legitimate issues which must be discussed with the grievant.

Many absences are legitimate and cannot be avoided. Be prepared to document our claims. Are they FMLA protected? Or should they have been, if properly documented? Perhaps the employee needs to be educated so as to protect himself from further discipline through appropriate documentation. While dependent care leave is also provided for in the Agreement it differs from FMLA in that it can be subject to discipline. Of course, some dependent care leave also qualifies for FMLA protection.

THE INTERVIEW

- How did you happen to issue this Letter of Warning to Tommy?
- Did someone suggest that it would be appropriate?
- When was the last time you discussed Tommy's attendance with him prior to issuing this LOW?
- Have you ever given Tommy an official job discussion on his attendance?
- What exactly does "just cause" mean to you?
- What does "regular in attendance" mean to you?
- How many absences would it take to "irregular in attendance"?
- When did you discuss your concept of "regular in attendance" with Tommy?
- For which of these absences that you have cited did Tommy submit medical documentation?
- Wouldn't it be more "corrective" to give Tommy another job discussion or maybe a Letter of Warning instead of suspending him for seven (7) days?
- Don't you think that losing a weeks pay is rather punitive?
- What do you think that Tommy could do, given his current medical condition, to satisfy your attendance expectations?
- Have you discussed these possibilities with him?
- Do you think there may be any other problems which may be the real reasons for Tommy's unacceptable attendance? What have you done to explore those possibilities?

These are just a few of the possible questions you can pose to the supervisor in investigating an attendance discipline. Let your imagination go and explore every avenue. Additionally, never forget that your interview of the grievant may be the most important of all. Why is he missing so much work? What does he indicate is the problem? What is the real problem? What can be done about it? Don't wait for the removal to begin to explore the real problems involved in attendance deficiency cases. Management is often reluctant to confront the employee and the employee is often satisfied to accept the suspension - thus getting more time off work rather than

deal with the causes of their absenteeism. If the steward doesn't force the employee to confront the real problem we'll just be back again in a short while defending the next progressive step of discipline.

THE DOCUMENTATION

- Discipline notice (and decision letter where applicable for MSPB eligible)
- All prior discipline notices cited as past elements
- Discipline proposal (if used)
- Grievant's statement
- Supervisor's interview
- PS Forms 3971
- PS Forms 3972 (current and for at least 2 prior years)
- PS Form 3956, medical unit slips
- Medical documentation
- Settlements and/or grievance files for all prior discipline
- Discussion date (supervisor's notes if possible)
- Request for information ("everything relied upon")
- Review grievant's OPF (any favorable awards/documents)
- FMLA documentation (if applicable)
- Documentation of any legitimate emergencies
- Supervisor's notes/records of investigation and day in court

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 10
- National Agreement, Article 19
- Employee & Labor Relations Manual, Parts 510, 512, & 513

CHAPTER 29

THE ISSUE: LETTER OF WARNING / SUSPENSION / REMOVAL - MISCONDUCT

THE DEFINITION

The Employee & Labor Relations Manual contains a Code of Conduct applicable to all postal employees. In addition, the Employer has any number of published or posted work rules with which the employees are expected to comply. Furthermore, certain types of misconduct, such as hitting the boss or theft are so commonly understood as being prohibited that they may result in discipline even without specific published work rules.

THE ARGUMENT

All discipline must be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause. Discipline for alleged misconduct is subject to all the tests of just cause and must be progressive or corrective instead of punitive. (See succeeding chapters for discussion of many of the just cause and procedural defenses.)

The first test is defending discipline for alleged misconduct must be: can the Employer prove that the alleged misconduct occurred? What evidence exists? What exculpatory evidence exists for our side? The very best defense still is the "I just didn't do it" defense. Interview all potential or alleged witnesses. Get statements whenever possible. Just because management already has gotten a statement doesn't mean you should fail to interview this witness. Maybe they forgot something or slanted their statement the way they thought management would want them to. What do they say now? Get the facts. All of the facts.

In any case never fail to also examine all of the elements of just cause and other procedural defenses available, as well.

THE INTERVIEW

- I see you issued this notice of removal to Susie TooGood. Why did you decide to do that?

- Why not a suspension or a letter of warning? Did anyone suggest that a removal

may be inappropriate?

- What exactly did you understand happened?
- On what did you rely in determining that?
- Who did you interview? What other witnesses do you understand might be possible?
- What documents did you have available?
- Did you complete this discipline proposal or did someone send it to you for your signature? What parts, if any, did you complete?
- What prior discipline record did you review before you decided to issue this discipline? Can you give me copies of each of those?
- What does just cause mean to you?
- Do you consider this discipline corrective or punitive and why?
- Who did you consult with before issuing this notice of removal?
- Wouldn't it be fair to say that once you received the Postal Inspector's Investigative Memorandum you knew that it was "expected" that Susie would be removed?
- Since you had the I.M. it really wasn't necessary to do any other investigation was it?
- Why didn't you call the employee in for a pre-disciplinary interview? Was there any explanation they could have given that could have changed the outcome?
- Are you aware of any other employees who have been charged with similar infractions?
- Isn't it true that several of them weren't removed?
- What do you understand was different in those cases?

There are any number of additional questions which the attentive steward will immediate identify as appropriate based upon the specific allegations of their case and potential issues which may be identified. Be sure to review the tests of just cause in Chapter 30 as well as the other affirmative procedural or due process defenses discussed below. Are any of them applicable in your case?

THE DOCUMENTATION

- Discipline Notice (and decision letter where applicable for MSPB eligible)
- Prior discipline notices cited as past elements
- Grievant's statement and/or interview
- Witness statements and/or interviews
- Supervisor's interview
- Posted or published work rule alleged to have been violated
- Any other applicable employee work rules
- Postal Inspector's Investigative Memorandum with all Exhibits
- All documents, records or exhibits being relied upon as evidence
- Settlements and/or grievance files for all cited past discipline
- Discipline proposal or request for discipline, if used
- Review grievant's OPF for commendations or awards
- Request for information ("everything relied upon")
- Supervisor's notes/records of investigation and day in court

THE AGREEMENT

- National Agreement, Article 16

CHAPTER 30

THE ISSUE: JUST CAUSE

THE DEFINITION

All discipline must meet the basic tests of Just Cause.

THE ARGUMENT

One of the most misunderstood concepts and requirements of our Collective Bargaining agreement is the Just Cause mandate under Article 16. Managers are often not held to proving they issued discipline for Just Cause. Arbitrators are often not held to issuing decisions which apply the standards of Just Cause. Grievances are often not investigated, processed, and presented in a method requiring management to meet the tests of Just Cause.

We begin where Just Cause first appears in our Collective Bargaining Agreement:

> "**ARTICLE 16** DISCIPLINE PROCEDURE
>
> Section 1. Principles
>
> In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of 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." (Emphasis added.)

The above quoted provision explains that Management must have just cause to issue discipline, but the provision does not explain what just cause is. In Collective Bargaining Agreements throughout the United States, ours may be unique in that we have a clear definition of what just

cause is. That definition is found in the **EL-921 Handbook, "Supervisor's Guide to Handling Grievances,"** under Article 19 of the Collective Bargaining Agreement:

> "Just Cause
>
> What is just cause? The definition of just cause varies from case to case, but arbitrators frequently divide the question of just cause into six sub-questions and often apply the following criteria to determine whether the action was for just cause. These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.
>
> Is there a rule?
>
> Is the rule a reasonable rule?
>
> Is the rule consistently and equitably enforced?
>
> Was a thorough investigation completed?
>
> Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee's past record?
>
> Was the disciplinary action taken in a timely manner?"

The best way to develop solid defenses vs. disciplinary actions is to specifically utilize the authority of Articles 17 and 31 for interviews in conjunction with the EL-921s Just Cause definition. The following is illustrative of that process:

EL-921 JUST CAUSE INTERVIEW QUESTIONS

1. Is there a rule?

- What is the rule?
- Is the rule posted in the Post Office?
- If yes, where is it posted?
- If yes, when was it posted?
- If yes, who posted it?

- If yes, were you present when it was posted?
- Was the rule relayed to the grievant by you?
- If yes, when?
- If yes, where?
- If yes, who else was present?
- Was the grievant informed of the rule when he/she was hired?
- If yes, were you present?
- If no, who told you?
- How do you know if you weren't there and no one told you?

2. **Is the rule a reasonable rule?**
   - How is this rule related to the job?
   - How is this rule related to safe operations?
   - What caused the creation of this rule?
   - When was the last updating of this rule?
   - When did you inform the grievant of this update?
   - Who informed the grievant of this update?
   - You don't know whether the grievant was informed of any update?

3. **Is the rule consistently and equitably enforced?** (see also, Chapter 37)
   - How many people have violated the rule?
   - How often is it violated?
   - How many employees have you disciplined for violating the rule?
   - When was the last violation of the rule of which you are aware?

- When did you last issue discipline for a violation of the rule?
- Have you done a comparison of other employees' records who violated the rule?
- Did you consider the grievant's violation in comparison to others?
- Why haven't other employees received the same degree of discipline for similar infractions?
- Why haven't you issued discipline to others for similar infractions?

4. Was a thorough investigation completed?

This question is covered in detail in Chapter 32.

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

- Others have not received so severe discipline have they?
- Isn't the grievant's record very similar to others under your supervision?
- Doesn't employee Doe have more absences than the grievant and yet no discipline?
- If other employees were all issued letters of warning for this particular infraction, why was the grievant suspended?
- Doesn't the grievant's record reflect no discipline?
- No employee has ever been fired for taking a break outside the building; why now a removal to the grievant?

6. Was the disciplinary action taken in a timely manner? (see also, Chapter 36)

- The last absence you cited in the removal was May 5, 1997. You issued the removal on July 15. Why the delay?
- What new information came into your possession between May 5 and July 15?
- When did you make the decision to remove the grievant?
- When did your investigation begin? End?

- When did you initiate the removal?
- How is a delay of 71 days timely?

The above illustrations are not intended to be complete lists of every question a steward should ask. Each case will differ and will require development of strategically different questions. In any event, no disciplinary grievance must ever be processed without a detailed interview of the managers issuing discipline. Both the issuing supervisor and reviewing and concurring higher level authority should be interviewed. **These interviews should take place before the Step 1 is discussed**.

When the steward composes the interview questions and compiles them in writing, prior to the interview, with adequate space for responses and extemporaneously asked questions, the interview questionnaire should be developed using the format discussed above. Questions for each test should be placed under the test on the form. This will better enable the steward to keep track of the context--and under what just cause test--each question is asked.

THE DOCUMENTATION

- Discipline notice
- Prior discipline notices cited as past elements
- Grievant's statement and/or interview
- Witness statements and/or interviews
- Supervisor's interview
- Posted or published work rule alleged to have been violated
- Any other applicable employee work rules
- Postal Inspector's Investigative Memorandum with all exhibits
- All documents, records or exhibits being relied upon as evidence
- Settlements and/or grievance files for all cited past discipline
- Discipline proposal or request for discipline, if used

- All available documentation as to other employees/supervisors who have been treated differently after similar infractions

THE AGREEMENT

- National Agreement, Article 16.1
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 31

THE ISSUE: PREDISCIPLINARY INTERVIEW

THE DEFINITION

The Pre-Disciplinary interview is the multi-element due process right of each employee to be:

1. Forewarned of the specific charge in the intended disciplinary action;
2. Forewarned of the degree and nature of the intended disciplinary action;
3. Presented with the alleged evidence the intended discipline is based upon; ***and***
4. Asked for his/her side of the story. This is the employee's "Day-in-Court".

THE ARGUMENT(s)

All the above is required before the disciplinary action is initiated. Management must conduct a pre-disciplinary interview; that is, forewarn the employee that discipline is being contemplated, what the discipline will be, the charge the discipline is based upon, the evidence supporting the intended discipline and ask the employee for his/her side of the story. Whether or not management utilizes a written request for discipline, the pre-disciplinary interview must be conducted prior to the initiation of any request for discipline. The request for discipline is the initiation of discipline.

Must the pre-disciplinary interview be done in person? No. Management may conduct a pre-disciplinary interview over the telephone or even through correspondence, informing the employee of the charge, nature, and degree of the intended discipline and soliciting the employee's side of the story. However, if there is no in person interview, we must then argue that the employee has not been presented with the employer's evidence.

A typical **pre-disciplinary interview** should be conducted as follows:

Manager: Mr. Doe, I am considering issuing you a Notice of Removal for "Failure to be Regular in Attendance." Your attendance record is as follows. This is your chance to respond to that intended action. I want any information you may have from your side of the story prior to making my final decision.

In this manner, management has forewarned the employee and solicited the employee's side of the story. If management conducts an "interview" with an employee immediately prior to issuing a disciplinary action, i.e., at the same meeting in which the employee receives the disciplinary notice, then that is not a pre-disciplinary interview. As the manager already has prepared the Notice, discipline has already been initiated. To hold otherwise is both illogical and unreasonable. Pleadings from management that they had not yet made a final decision on issuance are irrelevant as the pre-disciplinary interview must occur prior to initiation, not issuance.

THE PRE-DISCIPLINARY INTERVIEW
vs.
OFFICIAL DISCUSSIONS AND INVESTIGATIVE INTERVIEWS

Managers often attempt to misrepresent their obligations to a due process, pre-disciplinary interview by claiming that official discussions and/or investigative interviews are also pre-disciplinary interviews.

The following are distinctions between definitions: official discussions or investigative interviews and the pre-disciplinary interviews as discussed above.

OFFICIAL DISCUSSION

Under **Article 16.2** of the Collective Bargaining Agreement, management has the responsibility to discuss minor offenses with employees with the purpose being to correct whatever behavior/deficiency the employee has demonstrated:

> **"Article 16 DISCIPLINE PROCEDURE**
>
> **Section 2.** Discussion
>
> For minor offenses by an employee, management has a responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered discipline and are not grievable.

A proper **official discussion** goes as follows:

Manager: "Mr. Doe, this is an official discussion. The rule against being in the employee parking lot while on rest break is posted on the offices three bulletin boards. In addition, you were notified when hired of this prohibition. Last night, I had to call you into the Post Office from the parking lot while you were on your rest break. I am telling you that if this occurs again, I will be initiating disciplinary action against you.

If there is any problem I am unaware of or if I can assist you in any way to prevent this from happening again, please let me know now.

That is an "official discussion" which complies with the Collective Bargaining Agreement--provided it occurs in private between the supervisor and the employee. It is not disciplinary in nature nor is it a fact gathering exercise. It occurs after a minor offense by an employee not as a preemptive measure.

INVESTIGATIVE INTERVIEW

Unlike a discussion, an investigative interview is a fact gathering effort by management to investigate a situation prior to coming to any decision as to whether or not discipline should be initiated. Unlike a pre-disciplinary interview, the investigative interview does not forewarn an employee or solicit a response as to any intended discipline because the investigative interview occurs as part of management's fact gathering investigation. This is before any intent is established toward possible discipline.

An **investigative interview** goes as follows:

Manager: Mr. Doe, I have some questions concerning your presence in the parking lot last night.

- What time did you leave the building?
- What time did you return?
- For what purpose did you leave the building?
- What were you doing in the parking lot?

- Were you on rest break when you left the building?
- Who was with you?

This is an investigative interview--no forewarning or opportunity to respond to possible intended discipline.

BOTH AN INVESTIGATIVE INTERVIEW AND A PRE-DISCIPLINARY INTERVIEW? YES!

Management has an obligation to conduct a thorough, fair, and objective investigation prior to disciplining an employee. Investigative interviews, including an interview with a potential recipient of discipline, are essential elements of the aforementioned investigation process. The pre-disciplinary "day in court" forewarning and opportunity to respond follows the fact gathering investigation and is the last check and balance investigative step prior to initiation of discipline.

THE INTERVIEW

Crucial in establishing the fact that no pre-disciplinary interview was conducted is our own interview of the manager responsible for the initiation of the discipline. The following are illustrations of how such an interview may proceed:

- Did you initiate the discipline against Mr. Doe?
- When did you decide to initiate that discipline?
- Did you submit a written request for discipline?
- When?
- To whom?
- Between the last absence cited in the Notice of Removal and the date you submitted your written request for discipline, did you meet with employee Doe?
- Did you call employee Doe at home to discuss the possibility of discipline with him between the last absence you cited and your submission of the request for disciplinary action?
- Did you write to employee Doe regarding the possibility of discipline with him/her

between the last absence cited and your submission of the request for disciplinary action?

- Did you have contact with employee Doe regarding the possibility of discipline between the last absence cited and your submission of the request for discipline?

- The first contact you had with employee Doe regarding this removal for the charge you included was when you gave him the Notice of Removal?

In this manner, the steward establishes that no pre-disciplinary interview was conducted. Notice that at no time were overly obvious questions asked such as, "Did you conduct an investigation?", Did you conduct a pre-disciplinary interview?", "Aren't you required to conduct a pre-disciplinary interview?" Obvious questions will generate obvious responses which are, at best, other than useful ones, or worse harmful, for the steward's purpose. The steward must skillfully craft the questions so as to illicit responses supporting our arguments. The steward must orchestrate the interview through careful planning of the questions and in preparation for various responses.

For example, should the manager being interviewed answer that a pre-disciplinary interview has been conducted, then the steward must have detailed questions prepared to test the manager as to the veracity of that answer. Such questions may go as follows:

- During your interview, you told employee Doe the charge was going to be Failure to be Regular in Attendance?

- During the interview, you told employee Doe the discipline was going to be a Notice of Removal?

- During the interview, did employee Doe tell you anything regarding those absences?

- If so, what?

- During the interview, you went over the 3971s for absences cited with employee Doe?

- Did you receive any information from employee Doe regarding any of these absences during the interview?

- Where was the interview held?

- When was the interview held?

- Who else was present?

These questions will limit later deviations should arbitral testimony occur from the manager. If the manager does deviate, then serious credibility breaches will occur. In addition, the interview and eventual arbitral testimony of the grievant (and steward if one was present during the pre-disciplinary interview) can refute the testimony of the manager, even when the manager does meet with the employee in a pre-disciplinary setting. Should the manager not forewarn the employee of the detailed charge and the nature/degree of the discipline and solicit the employee's "side of the story", that exercise is not a pre-disciplinary interview.

The questions previously included are examples of suggested questions for stewards. Each steward must rely upon his/her own intuition, knowledge of particular fact circumstances, individual personalities, and history to develop questions which will best result in answers most useful in proving management violated its obligation to the pre-disciplinary interview as due process.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- Grievant's statement and/or interview
- Steward's statement and/or interview
- Supervisor's interview and/or statement

THE AGREEMENT

- National Agreement, Article 16.1
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 32

THE ISSUE: INVESTIGATION PRIOR TO DISCIPLINE

THE DEFINITION

Management must conduct a thorough, fair, and objective investigation prior to initiating disciplinary action.

THE ARGUMENT

One of the areas of Just Cause in which the Union is particularly successful is the failure of Management to meet its obligation to conduct a fair, thorough, and objective investigation prior to initiating discipline. Management must establish the facts not through presumption or assumption or reliance on other investigations. The supervisor who initiates discipline through a written request for discipline or drafts a disciplinary notice without such a request is the manager responsible for having investigated prior to the initiation.

Checking records, reviewing statements and documents, interviewing witnesses, reviewing video tapes or photographs, listening to audio recordings, these are all possible elements of a supervisor's investigation. Many times, a supervisor does a minimal--at best--review of the situation which may include almost no first-hand investigation. When this occurs, that supervisor has violated one of the most basic and important due process rights of an employee subject to discipline.

When management fails to uncover evidence and facts related to circumstances which result in discipline, they clearly fall short in their Just Cause obligation. However, the efforts management employs to attempt to uncover evidence and facts is extremely important to our Just Cause defense--no matter what those efforts would or would not have revealed.

Perhaps an employee is removed for sexual harassment of a customer. That removal is based upon a written letter received from the customer. In addition, the supervisor receives two letters from two other customers seemingly corroborating the first customer's letter. The supervisor fires the employee based upon the three letters. If the supervisor did not personally speak with those three customers whose letters he is relying upon to impose removal, then the investigation is inadequate and does not meet the Just Cause requirement. That supervisor had an obligation to contact and inquire. That is the "thorough investigation" obligation. It is not enough to simply read letters and rush to judgement. Perhaps discussion with the three customers would have fully supported the letters and the action. No matter, the failure to thoroughly establish the facts

renders the investigation less than what is necessary to prove Just Cause.

When arguing no Just Cause exists due to lack of a thorough, fair, and objective investigation, the steward must construct every avenue the supervisor could have, and reasonably should have, explored prior to initiating discipline. All the documents, records, video/audio tapes, witnesses, etc., that could have and should have been reviewed and interviewed prior to a decision must be listed by the steward in the context of a management obligation to leave no stone unturned in the investigation. This is the only way to establish the supervisor's investigation does not meet the requirements of Just Cause.

POSTAL INSPECTION SERVICE INVESTIGATIONS AS SUBSTITUTES FOR MANAGEMENT

Increasingly, arbitrators are supporting the Union contention that total reliance by management on the Postal Inspection Service Investigative Memorandum for investigative purposes--prior to discipline--falls short of management's investigatory obligations. Since the Postal Inspection Service is not permitted to recommend, request, initiate, or issue discipline, they cannot be a proper substitute for management. The EL-921, "Supervisor's Guide to Handling Grievances", specifically requires that management conduct the investigation. This is not to say that a Postal Inspection Service Investigative Memorandum cannot be an element of a management investigation--it can and often is. But it is to say that the Postal Inspection Service Investigative Memorandum cannot solely be the only element of investigation management substitutes for its own. Since management has the responsibility for discipline in the Collective Bargaining Agreement, it is management that must balance all of the facts, all of the evidence, and all existing mitigating factors in determining whether to initiate discipline and how severe it should be.

THE INTERVIEW

As previously stated, the steward must establish all the information which should have and could have been explored by the supervisor in management's investigation. Moreover, the higher level reviewing and concurring official also has an obligation to at least review what the supervisor investigated and concur in the result. Many of the example questions below can and should also be asked of the higher level reviewing and concurring official in that context: "Did Supervisor Jones contact Dr. Miles prior to initiating the Notice of Removal?", Did you ask Supervisor Jones whether or not he contacted Dr. Miles prior to initiating the Notice of Removal?" In this way, we are establishing what investigation the higher level reviewing and concurring official made as part of his required review.

Examples for the supervisor are as follows:

- Did you review the 3971s?

- You were aware the 3971s were not completed properly?
- You were aware the 3971s did not reflect scheduled/unscheduled?
- You were aware the 3971s were not signed by management?
- You were aware the 3971s were neither checked approved nor disapproved?
- You were aware the 3971s were designated FMLA?
- You were aware the 3972 listed disciplinary actions and official discussions on the form?
- You were aware each absence you cited in the removal notice was documented with a medical certificate?
- You were aware the past elements of discipline were not yet adjudicated?
- You were aware the past elements of discipline had been modified?
- You were aware the past elements of discipline had been expunged?
- You did not interview the Postal Medical Officer prior to initiating the Notice of Removal?
- You did not attempt to interview the Postal Medical Officer prior to initiating the Notice of Removal?
- You did not interview the grievant's personal physician prior to initiating the Notice of Removal?
- You did not call the grievant's personal physician to attempt an interview prior to initiating the Notice of Removal?
- You did not interview the customer who wrote the letter of complaint prior to issuing the Notice of Removal?
- You did not attempt to contact that customer prior to initiating the Notice of Removal?
- You did not attempt to contact any of the other customers prior to initiating the Notice of Removal?
- You did not review the video tape prior to initiating the Notice of Removal?

- You did not attempt to review the video tape prior to initiating the Notice of Removal?
- You did not review the audio tape prior to initiating the Notice of Removal?
- You did not attempt to review the audio tape prior to initiating the Notice of Removal?
- You did not interview the Postal Inspection Service prior to initiating the Notice of Removal?
- You did not contact the Postal Inspection Service to interview them prior to initiating the Notice of Removal?
- You did not interview the grievant prior to initiating the Notice of Removal?

The list can go on and on. We must establish not only that the investigation did not occur, but that no investigation was attempted. Many times only a small portion of the potential investigation may have been attempted or have occurred. It is still important to clearly establish what did not. And each question can and should be asked of the alleged reviewing and concurring official to determine whether that individual fulfilled the "check and balance" role.

Without the interview, the steward can expect - and the advocate will be faced with glowing accounts by supervisors and higher level managers of the thorough extent of their "investigation". While some of this testimony will be refuted, too many times that testimony stands because no interviews exist by the Union to establish the facts and prevent the management's recreation at arbitration.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- Grievant's statement and/or interview
- Steward's statement and/or interview
- Supervisor's interview and/or statement
- Witness interviews and statements

- Request for Information seeking "all information, interviews and documentation relied upon"
- Management's response
- Postal Inspector's Investigative Memorandum and exhibits

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 33

THE ISSUE: HIGHER LEVEL REVIEW AND CONCURRENCE

THE DEFINITION

All suspensions and removals proposed and issued by a manager must first be reviewed and concurred in by the installation head or that person's designee.

THE ARGUMENT

The installation head or designee of the installation head must review and concur in a proposed suspension or removal prior to the issuing manager's issuance of the action. This "review" must not be just a perfunctory glance and nod, but rather an actual review and investigation to ensure the conclusions the issuing manager is proposing are accurate. The reviewing official must also ensure the issuing manager has conducted an investigation which meets the requirements of the Just Cause process including a pre-disciplinary interview. If the reviewing official does nothing more than glance and nod with no questions, no checking, no effort to ensure accuracy and due process, then Article 16.8's requirements for higher level review and concurrence are violated--and the employee's due process rights are violated--regardless of the extent to which the initiating manager did meet due process and Just Cause requirements. The employee is not entitled to due process from just the initiating manager or the reviewing authority--the employee is entitled to due process from both and anything less violates the Just Cause benchmark.

Coupled with the above stated due process issue is the circumstance in which discipline is ordered or "recommended" from a higher level official down to a lower level manager for issuance. When this occurs--and independent authority to initiate or not initiate discipline is diminished or eliminated entirely--then true higher level review and concurrence as required by Article 16.8 cannot occur. The following is illustrative of this:

Level 20 Manager Smith "recommends" to Level 16 Manager Jones that employee Doe be issued a removal. Level 16 Manager Jones issues the removal after obtaining review and concurrence from Level 22 Postmaster Bing. Although the Level 22 Postmaster did review and concur, he did not review and concur in any action proposed by Level 16 Manager Jones. His review and concurrence was for an action initiated by another manager. Article 16.8 requires that in no case may a supervisor impose suspension or discharge unless the proposed disciplinary action has first been reviewed and concurred by the installation head or designee.

In the scenario described, the "supervisor" referred to did not initiate and impose the removal because a higher level manager "recommended" and thus initiated it. There was no actual "proposal" from Level 16 Manager Doe thus there can be no true review and concurrence for Level 16 Manager Jones' "action".

In other cases, the higher level manager, say a Level 21 postmaster or Level 20 labor relations specialist, will "recommend" removal to a Level 17 floor supervisor. Then the Level 17 floor supervisor seeks and obtains "review" and "concurrence" from the same individual who recommended or "advised" removal in the first place. Whenever a manager reviews and concurs in the action he or she initiated, the check and balance requirement of Article 16.8's review and concurrence is fatally damaged--along with an employee's due process rights.

THE INTERVIEW

Again, the interview is our key method of establishing the review and concurrence process was violated. When conducting our investigation, we can develop questions to pit the initiating manager's story against the alleged reviewing and concurring officials version of his/her role, participation and investigation. It is also important to note that most managers, including management arbitration advocates, will resist the concept that the reviewing and concurring authority must conduct more than a glance and nod at the proposed action.

Nevertheless, a reasonable reading of Article 16.8 clearly tells us that review is required. Review is defined in **Webster's Dictionary** as follows:

> **"1. To inspect; to make formal or official examination of the state of; 2. To notice critically."**

Now, the interview examples:

For *"Initiating"* Supervisor

- Did Postmaster Sims ask you who you interviewed prior to initiating the removal?
- Did Postmaster Sims ask you what your investigation consisted of prior to your initiating the removal?
- Prior to issuing the Notice of Removal did you speak to anyone in management about removing employee Thomas?

- Prior to issuing the Notice of Removal did you properly follow Postmaster Sims' instruction to initiate the removal?

- Were you required under the Collective Bargaining Agreement to follow the Postmaster's instructions and remove employee Thomas for theft? Drug use? (Best for this question to be utilized in serious offense situations in which the steward believes the lower level manager had little or nothing to do with the decision to issue.)

- Did you meet with anyone in management prior to issuing the Notice of Removal? (If the two managers did not meet then a true review and concurrence would have been more difficult.)

- What documents did Postmaster Sims review upon your presentation of the proposal for discipline?

- What documents did you present to Postmaster Sims for his review prior to your receiving concurrence?

- Who instructed you to seek concurrence from Manager Smith?

- Was that instruction in writing?

- Who designated Manager Smith as the Higher Level authority for you in this discipline?

- Was that designation in writing?

- Does Manager Smith always review and concur on discipline on tour 3 in the Anytown Post Office?

- Did you seek Higher Level concurrence prior to initiating your request for discipline?

- Did you seek Higher Level concurrence after you received the removal notice from labor relations? Personnel?

- How long did your meeting with Postmaster Sims take at which time the discipline was reviewed and concurred?

- Where did the review and concurrence meeting take place?

- Were you present when Postmaster Sims reviewed and concurred?
- Did you leave Postmaster Sims the removal for review and concurrence in his mail

receptacle?

- You don't know what his review consisted of do you?
- You don't know what information he reviewed do you?
- You don't know whether Postmaster Sims reviewed any information other than the disciplinary notice do you?
- As far as you know, Postmaster Sims only reviewed the disciplinary notice and nothing else?
- Did Postmaster Sims speak to employee Doe, who is being removed prior to concurring?
- What Level are you?
- What Level is the concurring official?

For Concurring Official:

- Who presented this removal to you for concurrence?
- Was it presented in person?
- What documents were presented with the removal notice?
- Was the proposal presented before the actual notice of removal was formulated?
- What documents did you review prior to concurring?
- Who did you speak with regarding the removal prior to concurring?
- Did you speak with employee Doe, who is being removed, prior to concurring?
- Didn't you think it important to speak with employee Doe prior to concurring?
- Did Supervisor Jones speak with employee Doe prior to concurring?
- Who did supervisor Jones speak with prior to initiating this discipline?
- Was a pre-disciplinary interview conducted by supervisor Jones before this action was initiated?

- Do you know whether or not supervisor Jones interviewed anyone prior to initiating this disciplinary action?
- Did you interview anyone prior to concurring with this disciplinary action?
- Did supervisor Jones provide you with any information when he sought review and concurrence from you?
- What information did supervisor Jones provide you with when he sought review and concurrence?
- Did you meet with supervisor Jones prior to concurring?
- Did you question supervisor Jones prior to concurring?
- Did you ask Supervisor Jones whether or not he had conducted a pre-disciplinary interview with employee Doe prior to initiating the removal?
- Did you ask supervisor Jones what documents were reviewed prior to his initiation of the removal?
- Did you ask supervisor Jones who he had interviewed or spoken to regarding employee Doe prior to initiating the removal?
- What information did supervisor Jones review before he initiated the discharge?
- Did you ask supervisor Jones what information he reviewed before he initiated discharge?

The questions asked of both the alleged initiating supervisor and alleged higher level authority will be very revealing and crucial to the establishment that proper review and concurrence does not exist. Many of the questions can be asked of both individuals and by changing elements within the questions serious breaches in credibility can be uncovered. Cross checking questions when dealing with these two major protagonists of the disciplinary process will almost certainly reveal differing answers which prove due process violations. Many of the questions will also be useful in arguing the lack of investigation issue.

Without the interviews--and this cannot be overemphasized--management will be able to patch up the violations and, at the arbitration, the true nature of the discipline's initiation, actual authority in issuance, and whether or not true review and concurrence occurred will be lost to the Union as due process arguments and violations.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline
- Supervisor's interview and/or statement
- Reviewing authority's interview and/or statement

THE AGREEMENT

- National Agreement, Article 16.8
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 34

THE ISSUE: AUTHORITY TO RESOLVE THE GRIEVANCE AT THE LOWEST POSSIBLE STEP

THE DEFINITION

A lower level manager discusses a disciplinary grievance at Step 1 or 2 after a higher level manager either issued the discipline or actually made the decision to issue. Simple reality says that he didn't have the authority to overrule his superior.

THE ARGUMENT

An offspring of the Higher Level Review and Concurrence due process issue is whether the manager discussing the resultant grievance for the discipline has actual authority to resolve the grievance. Often a lower level manager--possibly the issuing supervisor--meets at Step 1 of the Grievance/Arbitration process. That manager may have been instructed by the Tour MDO, Plant Manager, or Postmaster to issue the discipline. If so, then no reasonable expectation can exist that lower level manager has or will have true independent authority to resolve the grievance. It is not a reasonable expectation to believe a subordinate will overturn the decision of his boss.

Through interviews and investigation, it may be determined that the alleged higher level concurring official was the impetus behind the issuance of the discipline. While management may claim the lower level supervisor initiated and issued, the steward has ascertained that in reality the decision to initiate and issue was that of the higher level manager--not the lower level supervisor. Now the grievance is presented at Step 1 with the lower level supervisor. That manager cannot reasonably, or in any way in reality, be expected to possess the actual authority to resolve the case at Step 1. Such authority requires a measure of independence and that independence simply does not exist in the USPS management structure when the true decision comes from the top to a lower level.

Once a lower level manager without the authority by the Collective Bargaining Agreement discusses a grievance and inevitably issues a denial, the due process rights of the grievant and of the grievance--and of the Union--for full, fair, lowest possible step resolution are lost forever. This breach cannot be repaired. If independent authority does not exist, then it cannot be created.

The basic principle of Article 15 is commitment of the parties to lowest possible step resolution as stated in Article 15.4A. That principle cannot be achieved whenever higher level managers take actions and the charade of lower level managers discussing grievances occurs. This makes Step 1 or Step 2 a "sham."

THE INTERVIEW

Many of the same questions the steward uses in his investigation of the higher level review and concurrence issue will be revealing and pertinent to our argument that authority to resolve their grievance does not exist. There will even be instances in which lower level supervisors admit they have no authority because they "were ordered" or the decision "came from the top". The following examples will assist in eliciting beneficial responses:

- You did not initiate a request for discipline?
- You normally do initiate a request for discipline?
- The Notice of Removal was prepared by personnel/labor relations and presented to you for your signature?
- You knew nothing of this action prior to being presented with the prepared notice?
- You really don't know much about the circumstances leading to this action do you?
- What did you know prior to issuing the removal?
- What manager does know about the circumstances?
- This really came from up the chain of command?
- From who?
- You signed it because you are employee Doe's immediate supervisor?
- You will be meeting at Step 1 because you are employee Doe's immediate supervisor?
- What Level are you?
- What Level is the Postmaster? MDO? Plant Manager?

Questions for Step 1 Meeting (Not before)

- Can you resolve this?
- Could you resolve this if you wanted to?
- You can't really resolve this or attempt to resolve it because the Postmaster made

the decision?

- This removal really came from the Postmaster to you, isn't that correct?
- Since this wasn't your decision, you can't really seriously consider resolving it can you?
- They don't expect you to resolve this since it wasn't your decision?
- (Why are you) You are stuck with discussing this when the Postmaster made the decision?

With regard to this last group of questions, be careful to not tip your hand too much until you are actually discussing the grievance at the grievance meeting. If you do, you may see management change who is going to meet with you. Even if the Postmaster did issue the notice and is going to meet with you, it does not mean the real decision was made by the Postmaster. Often, and especially in cases involving the Postal Inspection Service, the decision comes from the district and/or labor relations or even through pressure from the Postal Inspection Service. The local Postmaster may still be willing to admit he had nothing to do with actually making the decision to issue the discipline and/or wanted no part in it.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- Supervisor's interview and/or statement
- Higher level authority's interview and/or statement
- Correspondence or records
- Step 1 discussion notes

THE AGREEMENT

- National Agreement, Article 15
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 35

THE ISSUE: DENIAL OF INFORMATION

THE DEFINITION

Management denies information to the Union which we deem relevant and necessary for determinating whether or not a violation exists or for grievance investigation/processing.

THE ARGUMENT

Whenever management denies information in the form of documentary evidence or witness access for interviews, our due process rights to conduct investigations in grievance processing are violated. In the course of an investigation to determine whether to file a grievance or for evidence gathering in support of a grievance, the Union has the right to access all relevant information. Often, management denies the Union access to documents, records, forms, witnesses, etc. This denial by management constitutes a very serious due process breach which prevents the best possible defense in a disciplinary case through full development of all defense arguments.

Under the Collective Bargaining Agreement, the Union has contractual rights to all relevant evidence including witnesses and management creates one of our most successful due process defenses when it denies us access to information. Should management deny information, then several arguments are born:

1. Negative Inference Created

The negative inference argument is best defined as a presumption that the evidence withheld by management would either prove the Union's case or seriously damage the employer's ability to meet its Just Cause burden of proof.

> **Example:** Management denies the Union access to the attendance records of the issuing supervisor and several craft employees in the course of the Union's investigation into an attendance-related removal.

The negative inference drawn is that examination of those attendance records for the supervisor and the craft employees would reveal disparate or unfair treatment to the grievant. The act of withholding by management casts shadow and doubt on the reasons for the withholding--that management does not want to let the facts be known as those facts will damage management's case. The Union must argue that the withheld information would have proven - if it had been

produced - precisely what the Union contended the information would have revealed.

2. Lowest Possible Step Resolution Fatally Damaged

Resolution of grievances at the lowest possible step is the cornerstone of the Grievance/Arbitration procedure. When management denies access to the Union of relevant information, then full development of all the facts, arguments, Collective Bargaining Agreement reliance, and defenses cannot be achieved. Without such full development and without everything being placed before the parties for discussion at the lowest possible step, there can, in actuality, be no real probability of lowest possible step resolution of a grievance.

Thus, Article 15.3's basic principle is violated and with it the due process right of both the grievant and grievance to benefit from the possibility of lowest possible step resolution.

3. Defenses Denied Development

Articles 15, 17, and 31 all provide the Union the ability to fully develop all the facts through evidence gathering to ensure every available argument and defense is set forth on behalf of the grievant. When management denies the Union access to relevant information, it prevents the Union from formulating and ultimately providing the best possible defense. Such denial violates the basic due process right of the Union to defend an employee against discipline and an employee's basic due process right to the best possible defense.

Management will often attempt to provide the Union information after a particular step in the Grievance/Arbitration procedure. Our position, whether we accept access to the tardy data or not, must be that the due process violation cannot be corrected as the lowest step for possible resolution is forever gone through the passage of time and the Collective Bargaining Agreement's time limits. Nor should we accept remands to a prior step for further discussion with the information to which we were originally denied access. Such a remand will negate our due process argument for denial of information.

Depending upon the case, a remand may be considered if it is coupled with an agreement to make the employee whole for the period through the remand date if loss to the employee has occurred. Such an agreement would have to be weighed versus the value of the due process argument and the harm the loss has had to the grievant.

In arbitration, we must argue that denial of evidence at any stage of the Grievance/Arbitration procedure precludes the presentation of that evidence at the arbitration hearing. Due to management violations of Article 15, 17, and 31, and management's denial of due process to the Union, grievance, and grievant, it would be wholly inappropriate and unfair for an arbitrator to even be exposed to denied information.

WHEN INFORMATION IS DENIED

When a request for access to information is denied, we must ensure that the "hook is set" through very deliberate action. That action includes:

1. **File an additional grievance citing Articles 15, 17, and 31 on the information denial.**

   In that grievance, request as a remedy:

   (1) The information be provided so long as such access is given prior to any grievance step meetings and,
   (2) Should the information not be provided prior to any grievance step meeting, that the original grievance be sustained.

   Although it can be argued an additional grievance is neither necessary nor reasonable under our Collective Bargaining Agreement, many arbitrators will ask the question and let management off the hook if the Union did not file the repetitive grievance.

2. **Correspond With Follow Up Request For Information**

   Follow the initial Request for Information with a personalized letter taking the Request for Information form to a more specialized level. In this manner, an arbitrator will notice the Union made a persistent, "second effort" to obtain the information. It is a good idea to submit at least two (2) correspondence in addition to the original Request for Information prior to the Step 2 meeting. At least one of the two should be to the immediate superior of the addressee to the original Request for Information. In this way, we can point out to the Arbitrator we were making every effort including affording a higher level manager the opportunity to rectify the lower level supervisor's failure.

3. **Include Denial of Information Reference in Disciplinary Grievance's Step 2 Appeal**

   Following the full disclosure commitment of the parties in Article 15 and our responsibility to present fully developed grievances at Step 2 (as far as possible), we must ensure that each bit of information we are denied access to during our attempted investigation is referenced as part of our contentions in our Step 2 appeal. We must cite the violations of Articles 15, 17, and 31 and argue the three major due process arguments: Negative inference, fatal damage to lowest possible step resolution and development of defenses denied.

Specifically citing the Articles' 15, 17, and 31 argument in our Step 2 appeal will prevent management from successfully arguing that the denial of information issue is a new argument and not proper for consideration by the Arbitrator. Remember, request all data you believe to be relevant. We then determine what we will use.

Management, when it denies any evidence, violates the Collective Bargaining Agreement and

creates very strong due process breaches. Many times, the arguments management creates by denying us information are far more beneficial to our defense than would be the information had it been obtained.

THE INTERVIEW

While most arguments on information denials will seem self-evident based upon review of management comments on the requests for information, coupled with a "denial" signature or initials, the interview is crucial when there is no such notation. Further, the interview can strengthen our case when management supports its denials through responses. Some examples are:

- You did deny the information?
- You have the information requested on the Request for Information in your possession?
- You relied on that information in issuing the removal?
- You interviewed Postal Inspector Arnold prior to issuing the Notice of Removal?
- You did not provide access to Postal Inspector Arnold to the Union?
- Doesn't Article 17.3 give the Union access to witnesses?
- Are you saying Postal Inspector Arnold is not relevant to the Union's grievance?
- What Collective Bargaining Agreement article did you rely upon in denying the Union access to Postal Inspector Arnold?

Denial of information is often a Catch-22 for management and our interview process enables management to really damage their defense of the denial. The interview also ensures management is prevented from presenting some innovative excuse for the denial at arbitration. We not only want proof of denial for our Step 2 appeal, but we want to cement management's reasons for denial. This will greatly enhance our pursuit of this due process violation.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used

- Request for information
- Management's denial of information
- All follow-up correspondence or requests
- Documentation/correspondence of appeal through NLRB Dispute Resolution Process in accordance with Memorandum of Understanding
- Any documentation which may show either the existence or relevance of the requested information
- Supervisor's interview or statement

THE AGREEMENT

- National Agreement, Article 15
- National Agreement, Article 17
- National Agreement, Article 31

CHAPTER 36

THE ISSUE: TIMELINESS OF DISCIPLINE

THE DEFINITION

The issuance of discipline must be reasonably timely in relation to the date of the alleged infraction or the date of the last absence cited.

THE ARGUMENT

While there is no defining line in our Collective Bargaining Agreement which states, "discipline must be issued within 30 days of the infraction or last absence cited," a general rule of reason applies that 30 days is the normal standard as the time frame for issuing discipline. This is not to say that discipline issued beyond 30 days will automatically be deemed procedurally defective by an arbitrator. But once disciplinary issuance goes beyond that 30 days, the Union's argument becomes increasingly stronger that the Just Cause test of timeliness is defective and violated.

THE INTERVIEW

Like the interview for "past elements not adjudicated" found in Chapter 40, the interview for timeliness of discipline will not be dispositive of fact circumstances so much as intent, involvement, and authority. We must try to uncover why a delay occurred, who was involved in the delay and whether the issuing supervisor actually had any say in causing or preventing the delay.

Examples are:

- When did you make the decision to initiate disciplinary action?
- When did you finish gathering all the facts which went into your determination to initiate disciplinary action?
- When did you last make contact with the Postal Inspection Service regarding Mr. Doe?
- When did you receive the Postal Inspection Service Investigative Memorandum?

- What information did the Postal Inspection Service Investigative Memorandum reveal to you other than what you already possessed prior to receiving the Investigative Memorandum?

- What caused the five week time period from Mr. Doe's last absence and your initiation of the request for discipline?

- You could have initiated this discipline sooner than you did?

- You were only told of the decision to remove two days before your issuance?

The interview in timeliness argument circumstances becomes valuable due to its ability to limit later revisions by management for untimely initiation and/or issuance of discipline. Again, questions on timeliness can reveal lack of involvement, intent, and authority of the issuing supervisor.

Like most people, many supervisors do not want to be blamed for that which they were not responsible. If a timeliness delay in conjunction with the Just Cause element is the subject of interview questions, it is probable a supervisor not responsible for the delay may reveal much helpful information on other aspects of the issuance of the discipline.

THE DOCUMENTATION

- Discipline notice

- Discipline proposal or request for discipline, if used

- Attendance records, correspondence, Investigative Memoranda, or other documents which establish time lines of management's becoming aware of alleged infraction

- Grievant's statement and/or interview

- Supervisor's interview and/or statement

- Steward's statement and/or interview

THE AGREEMENT

- National Agreement, Article 16

- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 37

THE ISSUE: DISPARATE TREATMENT

THE DEFINITION

Issuance of discipline in a manner which is different, and/or unfair, and/or inequitable.

THE ARGUMENT

Whenever the USPS administrates a disciplinary action, a critical facet of our investigation must be whether or not the grievant is being treated in a disparate or different manner than other employees. Should other employees, regardless of craft, have similar attendance records and/or similar progressive disciplinary histories, or have committed similar infractions, then such employees should have been subject to similar, if not the same, discipline as the grievant.

The standard also applies to supervisors--although the USPS will strenuously object to comparison of a craft employee to a manager. Notwithstanding any position taken by management that comparisons to supervisors and/or employees from other crafts is irrelevant, we must fully develop all comparisons to uncover evidence of disparate treatment. If we can establish our grievant is treated unfairly, with disparity, then we have established management has failed to meet one of the critical tests of Just Cause.

THE INTERVIEW

Either before our initial review of others' records and/or circumstances or after our review, the interview is valuable in establishing whether the supervisor issuing the discipline even checked others' records/circumstances (this again goes toward the supervisor's involvement and investigation), has any knowledge of disparity or rejected any evidence uncovered. Usually, an issuing supervisor will make no effort to ensure disparity does not exist. If the supervisor makes no effort, then the investigation is flawed. If the supervisor has no knowledge yet disparity exists, then the Just Cause test is not met. If the supervisor uncovered evidence of disparity and rejected it, we want to ensure the supervisor admits the same--and establish the test is not met. Some disparate treatment questions are as follows:

- Prior to issuing the discipline did you compare the grievant's attendance record to other employees?

- To other supervisors?
- To your own record?
- Are you aware of other employees having records similar to the grievant's? Worse?
- Are you aware of other supervisor's having records similar to the grievant's? Worse?
- Is your own record similar to the grievant's? Worse?
- You found records similar to the grievant's--were those employees also disciplined?
- You found records similar to the grievant's--were those supervisors also disciplined?
- You did not treat the grievant the same as other employees are treated under similar circumstances? With such records?

As previously stated, getting the supervisor's testimony through interviews at the earliest possible stage will enable us to limit editorial deviation of that same supervisor in arbitration.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- All documentation, grievance records, etc., regarding any other employees or supervisors who have been treated more favorably after committing similar infractions
- Requests for information for additional documentation
- Management's response
- Follow-up correspondence and/or grievances if information is denied
- Witness' statements and/or interviews

- Grievant's statement and/or interview
- Supervisor's interview and/or statement
- Steward's statement and/or interview

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 38

THE ISSUE: DOUBLE JEOPARDY/RES JUDICATA

THE DEFINITION

An employee is disciplined twice based upon the same fact circumstances. This is prohibited by the principle of **Double Jeopardy.**

An employee is disciplined again following resolution of grieved discipline for the same infraction/fact circumstances. This is prohibited by the principle of **Res Judicata.**

THE ARGUMENT

An employee may only receive discipline once for an infraction. Any time an employee is disciplined twice, that employee is subject to "double jeopardy". Black's Law Dictionary defines Double Jeopardy as:

> **"Double jeopardy.** Common-law and constitutional (Fifth Amendment) prohibition against a second prosecution after a first trial for the same offense. People v. Wheeler, 271 Cal.App. 205, 79 Cal.Rptr. 842, 845, 271 C.A.2d 205. The evil sought to be avoided is double trial and double conviction, not necessarily double punishment. --Breed et al. V. Jones, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed. 2d 346."

An employee receives a letter of warning for "Failure to be Regular in Attendance". A month later, the employee receives a seven day suspension for the same charge. In the suspension notice of the 11 absences cited, 8 were also cited in the prior letter of warning. The employee is being disciplined twice for what are essentially the same fact circumstances and instances of attendance irregularity. This violates the Double Jeopardy principle.

The principle of "Res Judicata" is also applicable in disciplinary instances in that once an employee receives discipline and the matter is resolved through resolution with the Union, the employee may not be disciplined again for the identical infraction/fact circumstance or record of absences. Black's Law Dictionary defines Res Judicata as:

> "Res Judicata. A matter of adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties

and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. Matchett v. Rose, 36 Ill.App.3d 638, 344 N.E.2d 770, 779."

An employee receives a letter of warning for "Failure to be Regular in Attendance." A grievance is filed and resolved reducing the Letter of Warning to an official discussion. A month later the employee receives another letter of warning citing the same absences along with additional occurrences. Resolution of the prior discipline bars management from disciplining the grievant for the previously cited record--this is the Res Judicata principle.

The principles of Double Jeopardy and Res Judicata often are interrelated and both should be cited when management issues discipline based upon that which was previously resolved and/or when management disciplines twice for the same infraction/fact circumstances.

THE INTERVIEW

As with many of our due process interviews, this interview under Double Jeopardy/Res Judicata will not so much establish the fact that Double Jeopardy/Res Judicata exists as establish the intent of the supervisor as well as his role, involvement and investigation:

- You issued Mr. Doe a fourteen day suspension one month ago citing the same absences you now have cited in this Notice of Removal?
- Were you aware you had cited these absences previously when you included them?
- You intended to discipline Mr. Doe twice for these absences?
- You did not intend to discipline him twice?
- You did not check the record carefully enough?
- You were given the Notice to sign and did not believe the record included previously disciplined absences?
- You believed because the suspension had been reduced to a letter of warning that Mr. Doe had not received enough punishment for the absences?
- You believed another discipline citing the same absences would better correct Mr. Doe's attendance irregularity?
- You rescinded and reissued this removal because the Union made you aware Mr. Doe was being disciplined again based upon absences for which he had already

received discipline?

- You knew the previous discipline was resolved with the Union, yet you issued further discipline based upon the same infraction?

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- Previous discipline notices
- Moving papers of previous discipline grievances
- Previous settlements and/or arbitration awards
- Grievant's statement and/or interview
- Supervisor's interview and/or statement
- Steward's statement and/or interview

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 39

THE ISSUE: DISPARATE ELEMENTS OF DISCIPLINE RELIED UPON FOR PROGRESSION

THE DEFINITION

When management relies upon elements of discipline--not of a like nature--to create a progressive disciplinary history against an employee.

THE ARGUMENT

An example of this issue is as follows: An employee has a letter of warning and a seven day suspension for "Failure to Meet the Attendance Requirements of the Position." Now the employee receives a fourteen day suspension for parking in a supervisor's parking space. A disciplinary history of attendance is in a category separate from instances of "misconduct" or "offenses". So too would be a disciplinary history for out of tolerance results due to a window clerk's overage/shortages. Neither the attendance nor the overages/shortages can reasonably be considered misconduct--or offenses--and these, at least, reasons for discipline must not be lumped with misconducts or offenses in any progressive disciplinary history.

THE INTERVIEW

The interview should be used to establish that the supervisor gave no consideration to the disparate nature of the past disciplinary record of the employee versus the current "offense" or record or occurrence. The interview should also draw the supervisor into a position where we are assisted in establishing the punitive intent of such coupling of disparate elements of record. Some examples are as follows:

- When you formulated the Notice of Removal, you included the past elements of discipline cited on page 2?
- And none of those elements of record were related to either Charges 1 or 2 in your Notice of Removal?
- Has Mr. Doe ever been disciplined in the past for an offense similar to Charges 1 or 2?

- You didn't consider any past elements of discipline related to Charges 1 or 2 did you?
- These charges--1 and 2--have no prior disciplinary history of a similar nature on which they were based?
- If these past elements were unrelated what role did they play in your disciplinary decision?
- If the grievant has never been disciplined for any infraction even remotely related to Charges 1 or 2, how can this removal for Charges 1 or 2 be considered progressive by you?

Through his interview, we are building the foundation for our disparate elements of record argument.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- All cited discipline notices
- Moving papers of grievances for cited discipline notices
- Grievant's statement and/or interview
- Supervisor's interview and/or statement
- Steward's statement and/or interview

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 40

THE ISSUE: PAST ELEMENTS OF DISCIPLINE NOT ADJUDICATED YET RELIED UPON IN SUBSEQUENT DISCIPLINE

THE DEFINITION

When management issues discipline and in that disciplinary notice it includes, as an employee's past record, elements of discipline which are still in the Grievance/Arbitration process and "live" pending adjudication.

THE ARGUMENT

Whenever management issues discipline and bases that action on elements of discipline record not yet finalized, management does so at its own peril. For example, management issues a fourteen day suspension for "Irregular Attendance" and for progressive disciplinary purposes, relies on two previously issued actions; a seven day suspension and a letter of warning. Both of these disciplines were also issued for irregular attendance, but neither has been adjudicated, that is, both were grieved, have not been resolved, and are waiting arbitration. Management, in relying on these non-adjudicated past elements of the grievant's record, is gambling that the disciplines will be upheld and not modified or overturned either through grievance resolution or in arbitration.

Should, for instance, the letter of warning be upheld in arbitration, but the seven day suspension be overturned, then management would have an employee with a fourteen day suspension pending discussion in the Grievance/Arbitration procedure, or pending arbitration, with only a letter of warning as a past element of progressive discipline. In that case, the Union is arguing that, at worst, the fourteen day suspension should be a seven and any discussion or resolution of the fourteen day should really be discussion or resolution of a seven day down to a lesser penalty.

At arbitration, the Union must address the fourteen day as a seven day and argue that the arbitrator must view, at the least, that the fourteen should be a seven and any reduction by the arbitrator should be from seven days down; not from fourteen days down.

In those instances in which, say, a removal is heard before an arbitrator prior to "live" past elements of lessor discipline being adjudicated, then the Union's argument is that the arbitrator must consider any "live", unadjudicated past elements of discipline in the removal notice as non-existent. The reasoning being that without knowing the final adjudication and with the challenge(s) to the elements of discipline being live, the employee may not suffer as if those elements were actually part of the employee's record. Although the employee has been issued

the discipline and although the employee has served the prescribed penalties of those actions, the propriety of the actions has not been determined. Our Collective Bargaining Agreement provides for deferment of the validity determination on all discipline until adjudication. Because of that deferment, management's reliance on unadjudicated discipline creates a due process argument in the grievant's favor that a record unadjudicated cannot be held against an employee in subsequent disciplines.

THE INTERVIEW

The Local Union's grievance records will tell the steward what elements of discipline have not yet been adjudicated. Questions concerning the past record will assist more in the areas of failure to investigate, lack of first hand knowledge, and involvement in issuance of the discipline.

Some examples are:

- You checked the employee's past record prior to issuing this discipline?
- Were all these past elements adjudicated?
- Were any of these past elements adjudicated?
- What was the final disposition of the (date) letter of warning? 7-day suspension? 14-day suspension?
- You don't know what the final disposition will be for the suspension dated _____?
- You included a past record of discipline which you are not sure will exist when this removal is heard in arbitration?
- You were aware when you included these past elements that they had not been adjudicated?

Again, interview questions will greatly assist in determining the true involvement of the issuing supervisor.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used

- All cited discipline notices
- Moving papers of grievances for cited discipline notices
- Grievant's statement and/or interview
- Supervisor's interview and/or statement
- Steward's statement and/or interview

THE AGREEMENT

- National Agreement, Article 15
- National Agreement, Article 16
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 41

THE ISSUE: MODIFIED PAST ELEMENTS OF DISCIPLINE MUST BE CITED IN MODIFIED STATE IN SUBSEQUENT DISCIPLINE

THE DEFINITION

The citation of modified disciplinary actions in their original form as elements of past record relied upon and included in subsequent discipline.

THE ARGUMENT

Management often cites past disciplinary actions as elements of record which were considered in taking a subsequent disciplinary action. In doing so, management cites a fourteen day suspension even though that fourteen day suspension was reduced to seven days previously. Another example would be management citing a "fourteen day suspension reduced to seven days" thereby including the modification of seven days and the original fourteen day.

A National Level Step 4 interpretive decision requires only management's inclusion of the modified discipline, not the original discipline. Inclusion of both or of only the original is a violation of the parties' mutual agreement in the Step 4 decision. Further, inclusion of the full discipline demonstrates punitive intent rather than a corrective attempt because management is attempting to justify its action through inclusion of more severe discipline when it does not exist. Should management claim it was unaware of the modification, then management admits it failed to conduct a thorough, objective, and fair investigation before initiating and issuing discipline. Based upon the Step 4, it must also be argued the disciplinary notice is fatally and procedurally defective and in violation of the Step 4.

THE INTERVIEW

Like the interview for "past elements not adjudicated", the interview here will reveal intent, involvement, and investigation on the part of the supervisor:

- You included this discipline record in the Notice of Removal?
- Prior to initiating and issuing this removal, did you check Mr. Doe's past

discipline record?

- Did you know Mr. Doe's fourteen day suspension had been reduced to seven days?
- You included it anyway? Why?
- When you checked Mr. Doe's past discipline record, how did you check it?
- With whom did you check?
- You considered the fourteen day suspension, is that correct?
- If you did not consider the fourteen day suspension, why did you include it?
- You relied in this Notice of Removal on past elements which were modified after their original issuance?
- You knew about the modification and still cited the original discipline?

Questions like these can be revealing and may trap the supervisor into responses which uncover lack of investigation, or involvement and/or punitive intent.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- All cited discipline notices
- Moving papers of grievances for cited discipline notices
- Settlements of previous discipline grievances
- Request for Information seeking management's copies of past discipline cited in discipline notice
- Management's response
- Grievant's statement and/or interview
- Supervisor's interview and/or statement

- Steward's statement and/or interview

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 42

THE ISSUE: OFF DUTY MISCONDUCT AND THE "NEXUS" REQUIREMENT

THE DEFINITION

Some nexus or connection between off-duty misconduct and postal employment must exist for Just Cause to be present when an employee is disciplined due to off-duty misconduct.

THE ARGUMENT

Generally, to establish nexus the record must establish that the misconduct is somehow materially job-related, i.e., that a substantive nexus exists between the employee's crime and the efficiency and interests of the Service. Such a nexus may be demonstrated through:

a: Evidence that the crime has materially impaired the employee's ability to work with his fellow employees.

b: Evidence that the crime has impaired the employee's ability to perform the basic functions to which he is assigned or is assignable.

c: Evidence that the employee's reinstatement would compromise public trust and confidence.

d. Evidence that the employee is a danger to the public or customers.

Additionally, the record must establish that the Service has fairly considered the seriousness of the specific misconduct in light of mitigating and extenuating circumstances.

The Union argument in an off-duty discipline case--usually a removal or indefinite suspension-crime case--is straightforward--that management had failed to prove any nexus or connection between an employee's off-duty conduct and that employee's Postal employment.

No matter what the employee has done off-duty, we must put forth our argument that the conduct has nothing whatsoever to do with the employee's employment. The charge could involve drug use, drug trafficking, violence, theft, or a multitude of other serious offenses. Regardless of the charge, unless there can be established a nexus between conduct away from the clock, the job and employment, our position is Just Cause cannot exist.

This is not to say that we will be successful in every defense using the nexus argument; we will not. Arbitrators often excuse themselves with decisions wrapped with "moral judgment" or "societal concerns". It is also evident that some Arbitrators will view increasingly serious offenses with less and less emphasis on the nexus principle. Despite these pitfalls, we must ensure that the due process nexus protection is pursued and developed to the fullest--in every case. We must ensure that our own personal opinions concerning particular offenses are never factors in our pursuit of the nexus argument.

Remember, provisions of the Collective Bargaining Agreement permit the hiring of individuals with criminal histories. Further, managers are not necessarily treated so summarily as are our own Union members when off-duty misconduct occurs.

Our jobs as stewards and arbitration advocates are to provide the best possible defense. The nexus argument is a major required element in providing that defense.

THE INTERVIEW

It is important to establish (1) that no nexus existed, and (2) that there was no reliance on a nexus by the issuing supervisor and concurring official when the case is being investigated at the earliest stages. Management advocates will invariably attempt to establish some post disciplinary nexus at arbitration--even though the issuing supervisor probably hadn't a clue as to what the nexus principle was--much less what nexus may have existed--when the discipline was initiated and issued. Even if a management advocate can produce newspaper article after newspaper article stating the disciplined employee's name, Post Office of employment, etc., at arbitration--if the issuing supervisor did not rely upon those articles, then there was no nexus when the discipline was initiated and issued. However, without clear establishment of what the supervisor relied upon and what reasoning was behind the decision to discipline--through the interview--then management will testify at the arbitration hearing all about the nexus that is then claimed to be the reason the action was initiated.

The interview is as important in a nexus case as it is in any element of due process and Just Cause. Some examples of the interview in a nexus case are as follows:

- Robert Green's conduct occurred off the clock?
- Robert Green's conduct occurred off the premises?
- Were you present when this alleged misconduct occurred?
- How did you find out about this misconduct?
- Did you read about Robert Green in the newspaper? What newspaper? When?

- Do you have these articles?
- Did you hear about Robert Green on the radio? What radio station? When?
- Do you have audio tapes of these reports?
- Did you see Robert Green on television? What television station? When?
- Do you have videotapes of these reports?
- Did you receive customer complaints about Robert Green's continued employment? From whom? Names? In writing? When?
- Do you have these written customer complaints?
- Did Robert Green make any arrangements for the sale (which occurred off the clock) while he was at work?
- What evidence do you have of such arrangements? Taped telephone calls? Taped conversations?
- You based this removal solely on Robert Green's behavior off the clock?
- What evidence did you rely upon connecting Robert Green's conduct to his postal job?

We must limit management's ability to justify a discipline after the fact through establishment of a post discipline nexus. In this regard, the interview may be our only tool.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- Postal Inspectors' Investigative Memorandum and exhibits
- Police reports
- Indictment and other court records
- Newspaper stories, tapes of radio or TV accounts

- Request for Information seeking all documentation or information relied upon by management
- Management's response
- Grievant's statement and/or interview
- Co-workers' statements and/or interviews
- Supervisor's interview and/or statement

THE AGREEMENT

- National Agreement, Article 16

CHAPTER 43

THE ISSUE: EMERGENCY SUSPENSION - PLACEMENT IN OFF-DUTY STATUS OUTSIDE REASONS IN ARTICLE 16.7

THE DEFINITION

Whenever management places an employee in Off-Duty Status utilizing the Emergency Procedure of Article 16.7 for a reason other than those specifically negotiated into Article 16.7 by the parties.

THE ARGUMENT

Management cannot, in accordance with Article 16.7 of the Collective Bargaining Agreement, properly place an employee on emergency off-duty status if such placement is for a reason other than one of those specifically included in Article 16.7. Examples of improper reasons for Emergency Placement in Off-Duty Status would be insubordination, conduct unbecoming an employee, failure to follow instructions, or no work performed.

Any reason for Emergency Placement in Off-Duty Status outside the six stated reasons included in Article 16.7 is a violation of the Collective Bargaining Agreement.

THE INTERVIEW

Clear establishment of the reasons for Emergency Placement in Off-Duty Status should come from the required written notice soon after the Emergency Placement. However, in instances in which the reasons as stated in that notice are not clear, the interview becomes the necessary tool to establish the crucial point that Emergency Placement was not imposed for an Article 16.7 reason:

- You placed Mr. Doe in off-duty status for insubordination?
- He refused to report to the window area?
- He refused your direct order?
- He threatened you?

- What did he say?
- Who else was present?
- He did not threaten you?
- Mr. Doe refused to perform any work?
- You placed him off-the-clock for that reason? Any other reasons?

It is important to close the door on management efforts to revise their reasons for Emergency Placement in Off-Duty Status which will occur at arbitration. If "Insubordination" is the stated reason in writing for the Emergency Placement in Off-Duty Status a management advocate will attempt to expand on that term to include "threat", "dangerous to self or others" or some reason under 16.7. Insubordination, in particular, can have varied slants in its meaning.

THE DOCUMENTATION

- Emergency placement notice
- Discipline proposal or request for discipline, if used
- Grievant's statement and/or interview
- Witness' statements and/or interviews
- Supervisor's interview and/or statement
- Postal Inspector's Investigative Memorandum and exhibits
- Threat Intervention Team reports

THE AGREEMENT

- National Agreement, Article 16.7
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 44

THE ISSUE: EMERGENCY SUSPENSION - PLACEMENT IN OFF-DUTY STATUS WITHOUT POST PLACEMENT WRITTEN NOTIFICATION

THE DEFINITION

Whenever management places an employee on off-duty status under Article 16.7, management is required to notify the employee in writing of the reasons and date of said placement within a reasonable period of time following the Emergency Placement in Off-Duty Status.

THE ARGUMENT

Arbitrator Mittenthal in a National Level arbitration case set forth the principle that management is required to issue a written notification to an employee following an Emergency placement in Off-Duty Status stating the reasons for the placement. Without this mandatory, written notice, management's placement is procedurally defective in that the emergency placement does not comply with Arbitrator Mittenthal's National Level award and since there is no written reason, a required reason as set forth in 16.7 cannot exist.

THE INTERVIEW

In this circumstance, our interview simply solidifies the violation of the National Award:

- You placed Mr. Doe off the clock on (date)?
- You did not send him a written notification of your reasons for this Emergency Placement in Off-Duty Status?
- Aren't you required to send him such a notice?

THE DOCUMENTATION

- Request for Information seeking copy of emergency placement notice and management's response

- Discipline proposal or request for discipline, if used
- Grievant's statement and/or interview
- Witness' statements and/or interviews
- Supervisor's interview and/or statement
- Postal Inspector's Investigative Memorandum and exhibits
- Threat Intervention Team Reports

THE AGREEMENT

- National Agreement, Article 16.7
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 45

THE ISSUE: EMERGENCY SUSPENSION - PLACEMENT IN OFF-DUTY STATUS AFTER TIME LAPSE BETWEEN INCIDENT AND ACTUAL PLACEMENT

THE DEFINITION

Whenever management invokes the Article 16.7 emergency procedure for Emergency Placement in Off-Duty Status, that placement, by definition, is to occur immediately--without delay.

THE ARGUMENT

Again, it was Arbitrator Mittenthal in a National Level award that defined the Article 16.7 Emergency Placement in Off-Duty Status as an immediate action which would occur without hesitation or delay. The usual purpose of the Emergency Procedure was for immediate diffusion of a possibly violent situation--as an emergency. Management, on the other hand, often misapplies the emergency procedure. An example would be:

Supervisor Jones witnesses a heated verbal altercation between two employees at 7:30 a.m. Jones then orders employee Smith to work in the box mail section and employee Doe to work distributing parcels. The two work stations are approximately 70 feet apart and separated by Letter Carrier cases. He further instructs the two employees to have no contact with one another. At 11 a.m. the Postmaster reports for duty, at which time Supervisor Jones relates what occurred at 7:30 a.m. After consultation, either the Postmaster or Supervisor places both employees off the clock through utilization of Article 16.7.

This is procedurally defective Emergency Placement in Off-Duty Status. The immediate dismissal intent of Article 16.7 is not in existence at 11:00 or 11:15 a.m. The Supervisor must have utilized 16.7 at the time the altercation occurred; not hours later.

Once a reasonable time period has elapsed, say an hour (although a shorter period could be argued), the suspension of employee(s) cannot properly fall under Article 16.7. Since other suspensions of, for example, seven or fourteen days must occur after ten day notification, any "emergency" suspension would be procedurally defective and in violation of Article 16 of the

Collective Bargaining Agreement.

THE INTERVIEW

Developing the reasoning behind delays in an Emergency Placement in Off-Duty Status will protect the Union and grievant against management conjured reasoning at a later time. Although time records will reflect when an employee was actually placed off duty, the time frame of the decision is crucial because slight delays such as trips to the lavatory, locker room, etc., may be used as management excuses for lack of immediacy. The interview is our excellent tool to nail down the facts:

- What time did the incident occur?
- Were you present during the incident?
- Did you witness the incident?
- Did you instruct the employees to separate work areas following the incident?
- You did not send them home when the incident occurred?
- How long after the incident did you send them home?
- What other information did you obtain between the time of the incident and the Emergency Placement in Off-Duty Status which affected your decision?
- What subsequent incident occurred after the first incident which affected your decision to place them in Emergency Off-Duty Status.
- At what time did you make the decision to place them in Emergency Off-Duty Status?
- Did the Postmaster tell you they should be placed in Emergency Off-Duty Status?
- Did the Postmaster agree that they should be placed in Emergency Off-Duty Status?
- Since you did not witness the incident, did you speak to each employee before the Emergency Placement in Off-Duty Status?
- Why didn't you immediately place them in Emergency Off-Duty Status?

Determining the reasoning and time frames for the incident, the delay and the decision will prove the difference between a successful due process argument and a failed one when the Emergency Placement in Off-Duty Status is not immediate.

THE DOCUMENTATION

- Emergency placement notice
- Discipline proposal or request for discipline, if used
- Grievant's statement and/or interview
- Witness' statements and/or interviews
- Supervisor's interview and/or statement
- Postal Inspector's Investigative Memorandum and exhibits
- Threat Intervention Team reports

THE AGREEMENT

- National Agreement, Article 16.7
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 46

THE ISSUE: 30-DAY ADVANCE NOTICE FOR REMOVAL

THE DEFINITION

The Collective Bargaining Agreement requires management to provide advance written notice of charges in removal instances and 30 days either on the job or on the clock prior to the removal taking effect. (In cases in which the employer has reasonable cause to believe guilt for a crime, the 30 day notice is not required.)

THE ARGUMENT

Often management fails to provide the required 30 days notice. As an example, management issues an employee a Notice of Removal for failure to meet the attendance requirements of the position or for "Insubordination". In the Notice issued on May 1, management states the employee will be removed on May 29. Or, the employee may be out on an Emergency Suspension and management provides a thirty day notice period but fails to return grievant to an "on the job or on the clock" status during this period. Management has failed to provide the required 30 day advance notice either on the job or on the clock. Management has violated Article 16.5 of the Collective Bargaining Agreement and issued a procedurally defective Notice of Removal.

THE INTERVIEW

Since the date of the Removal's issuance and its effective date will most likely not be in dispute, the interview again will focus most on the supervisor's involvement, role and knowledge of the removal provisions for which he is responsible. In the event there is a dispute as to the date of issuance, our questions should resolve this. Some examples are as follows:

- Your removal is dated May 1--did you issue it on May 1?
- If not, on what day did the grievant receive the Notice of Removal?
- Do you have proof of receipt by the grievant?
- Following the grievant's receipt he was not kept either on the job or on the clock

for 30 days? Why?

- Are you aware of the 30 day requirement?
- Did you include this effective date in the removal?
- Who did?
- Did you check the removal after you received it from the Postmaster? Labor Relations?
- The MDO? The Plant Manager?
- If this removal had been your decision you would have made sure the 30 day rule was properly followed?
- Who was responsible for not providing the 30 day notice?

As with all interviews provided in this Handbook, the steward's orchestration is the key to eliciting the most favorable responses.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- Supervisor's interview and/or statement
- Clock rings or time cards
- Grievant's statement and/or interview

THE AGREEMENT

- National Agreement, Article 16.5
- National Agreement, Article 19
- USPS Handbook, EL-921