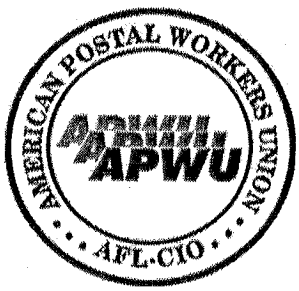
DEFENDING DISCIPLINE

The Notice of Charges



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DEFENDING DISCIPLINE

The notice of charges

When defending an employee that has received a disciplinary action the steward must begin—at the beginning—which is the notice of charges. Whether it is a Letter of Warning, which is in writing, a suspension of 14 days or less, or suspension of more than 14 days or discharge, the employee is entitled to know the infraction they are being charged with. Article 16 and the concept of "just cause" provide the basis for this entitlement.

Discipline rises or falls on the Notice of Charges. So begin by looking carefully at the charge and defend the employee against the specific charge. That defense can be through procedural due process arguments and challenges, arguments in relation to the "just cause" provisions of Article 16, or both.

Always begin by looking for due process violations. Many a guilty party has escaped punishment due to due process violations! Some of the obvious are:

- No pre-disciplinary interview
- No Higher level Review and Concurrence
- Supervisors lack of authority to settle
- Denial of Information to steward
- Refusal to allow steward to interview supervisor or witnesses
- Concurring Official as step 2 Designee
- Emergency Placement without follow-up written notice
- No 10/30 day advance notice
- OIG interference in process

"Just Cause" arguments

- Not Guilty
- No fair and impartial investigation
- Extenuating circumstances
- Mitigating circumstances
- Punitive rather than corrective discipline
- Excess penalty
- No forewarning
- Delay in issuing discipline
- Disparate treatment
- Rules not uniformly enforced
- False charges in notice

CHAPTER 2

THE ISSUE: PREDISCIPLINARY INTERVIEW

Including: Pre-Disciplinary Interview for Preference Eligible Employee, and Pre-Disciplinary Interview for Employee Discharged after a Last Chance Agreement.

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 that discipline is intended to 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. This would be a procedurally defective pre-disciplinary interview.

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, ie., 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 produced 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 proper due process, pre-disciplinary interview by claiming that (official) discussions and/or investigative interviews are also pre-disciplinary interviews.

The following are distinctions between the three:

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 office's 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.

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 COLLECTIVE BARGAINING AGREEMENT

Article 19's EL-921 Handbook, "Supervisor's Guide to Handling Grievances", defines Just Cause under the Collective Bargaining Agreement. Within that definition, management's obligation to conduct a pre-disciplinary interview exists as follows:

Was a thorough investigation completed?

Before administering the discipline, management must make an investigation to determine whether the employee committed the offense. Management must ensure that its investigation is thorough and objective.

This is the employee's day in court privilege. Employees have the right to know with reasonable detail what the charges are and to be given a reasonable opportunity to defend themselves before the discipline is initiated."

JOINT CONTRACT INTERPRETATION MANUAL - ARTICLE 16.1

JUST CAUSE PRINCIPLE

These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

Was a Thorough Investigation Completed?

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

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

CHAPTER 3

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" obligation. It is not enough to simply read letters and rush to judgement. Per-

haps 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.

OFFICE OF INSPECTOR GENERAL/POSTAL INSPECTION SERVICE INVESTIGATIONS AS SUBSTITUTES FOR MANAGEMENT

Increasingly, arbitrators are supporting the Union contention that total reliance by management on the Office of Inspector General/Postal Inspection Service Investigative Memorandum for investigative purposes--prior to discipline--falls short of management's investigatory obligations. Since the OIG/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 an OIG/Postal Inspection Service Investigative Memorandum cannot be an element of a management investigation--it can and often is. But it is to say that an OIG/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 decide whether all the facts and all the evidence and all existing mitigating factors result in a disciplinary decision and the degree of that decision.

THE COLLECTIVE BARGAINING AGREEMENT

Article 19's EL-921, "Supervisor's Guide to Handling Grievances", contains much useful language as to Management's investigatory obligations:

"Was a thorough investigation completed?

Before administering the discipline, management must make an investigation to determine whether the employee committed the offense. Management must ensure that its investigation is thorough and objective.

D. Disciplinary Arbitration

When conducting the investigation before disciplining an employee, the supervisor should gather all available and relevant evidence that will help to prove the case. This information is frequently available in the form of official records. For instance, if the charge involves tardiness, a copy of the employee's time card showing the arrival time might be introduced. On any attendance-related charge, Forms 3971, 3972, etc., would be relevant. When available, this type of documentation should accompany the supervisor's request for formal discipline.

We realize that documentary evidence is not always available. For example, if an employee fails to comply with the oral instructions of the supervisor, no written documentation of the offense is likely to be available. In an incident such as this, the supervisor should be able to explain clearly and corroborate in detail his or her version of the incident. If there were witnesses to the incident, the supervisor should record their names.

E. Investigation

As previously discussed, when an employee commits an offense which seems to warrant discipline, the supervisor must avoid rushing into a disciplinary action without first investigating. The need for an investigation to meet our just cause and proof requirements is self-evident. However, the employee's past record must also be checked before any disciplinary action is considered. This is obviously necessary if we are to abide by the principle of progressive discipline.

F. How Much Discipline

Items for consideration in assessing discipline include but are not limited to:

The nature and seriousness of the offense.

The past record of the employee; and/or other efforts to correct the employee's misconduct.

The circumstances surrounding the particular incident.

The amount of discipline normally issued for similar offenses under similar circumstances in the same installation.

The length of service.

The effect of the offense upon the employee's ability to perform at a satisfactory level.

The effect the offense had on the operation of the employee's work unit; for example, whether the offense made coverage at the overtime rate necessary, whether mail was delayed, etc."

CHAPTER 4

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 the initiating manager or the reviewing authority--the employee is entitled to due process from both and any less due process 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 Jones 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 COLLECTIVE BARGAINING AGREEMENT

Article 16.8 specifically requires higher level review and concurrence. The EL-921, "Supervisor's Guide to Handling Grievances", also refers to higher level review and concurrence. Together, these provisions are the basis for our arguments toward this check and balance due process safeguard. The provisions are as follows:

"ARTICLE 16 DISCIPLINE PROCEDURE

Section 8. Review of Discipline

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

In associate post offices of twenty (20) or less employees, or where there is no higher level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken."

Article 19's EL-921, - "Supervisor's Guide to Handling Grievances"

"Therefore, it is crucial that the supervisor not only take good notes during the Step 1 discussion, but also advise both the reviewing authority and the designee for Step 2 that a grievance has been filed. Since the reviewing authority thoroughly reviewed the proposed discipline before it was initiated, that person will be a key source of information for management's Step 2 designee. There must be a clear channel of communication between these two individuals.

D. Role of the Step 2 Designee

The reviewing authority looks at the proposed discipline before it is imposed and concurs with the proposed action, based on the facts supplied by the supervisor. ...

Except to check out new facts which may be presented at the Step 2 discussion, the Step 2 designee will not have to develop management's case if the reviewing authority and supervisor involved have done their homework."

JOINT CONTRACT INTERPRETATION MANUAL- ARTICLE 16.1

JUST CAUSE PRINCIPLE

These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

ARTICLE 16.8

CONCURRENCE

It is normally the responsibility of the immediate supervisor to initiate disciplinary action. Before a suspension or removal may be imposed, the discipline must be reviewed and concurred in by a manager who is higher level than the initiating or issuing supervisor. This act of review and concurrence must take place prior to the discipline being issued.

While there is no contractual requirement that there be a written record of concurrence, as a practical matter, it is best to establish a record of the concurrence (by the concurring official signing/dating the discipline or disciplinary proposal).

NATIONAL ARBITRATION CASE NO. E95R-4E-D 01027978 Arbitrator Eischen

Contrary to the position advanced by the Postal Service in this case, however, that process of review and concurrence contemplated by Article 16.6 is not a ministerial formality or a mere technical "laying on of hands" by the reviewing/concurring official. The requirement of a separate and independent second step of review and concurrence by the higher authority is not met by just a declaration of agreement with the first step supervisor's proposed disciplinary action. Compliance with Article 16.6 requires a substantive review of the mater by the higher authority in light of all the current information and the higher authority's concurrence with imposition of the disciplinary action proposed by the supervisor.

ISSUE NO. 1

Article 16.6 Review of Discipline of the Extension to the 1995-1999 USPS-NRLCA National Agreement:

b) Is violated if there is a "command decision" from higher authority to impose a suspension or discharge;

c) Is violated if there is a joint decision by the initiating and reviewing officials to impose a suspension or discharge;

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

ISSUE NO. 2

(a) Proven violations of Article 16.6 as set forth in Issues 1 (b), 1(c) or 1(e) are fatal. Such substantive violation invalidate the disciplinary action and require a remedy of reinstatement with "make-whole" damages.

CHAPTER 5

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

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.

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 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 can or will overturn the decision of a 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 of 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 required 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 COLLECTIVE BARGAINING AGREEMENT

Language in Article 15, Sections 2, and 4 are utilized in support of the Union's position whenever a manager does not possess the true authority to resolve a grievance at the lowest step:

ARTICLE 15 GRIEVANCE-ARBITRATION PROCEDURE

"**Section 2.** Grievance Procedure Steps

Step 1
(b) In any such discussion the supervisor shall have authority to settle the grievance.

Step 2
(c) The installation head or designee in Step 2 also shall have authority to grant or settle the grievance in whole or in part.

Section 4. Grievance Procedure - General

A. The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end."

ARTICLE 19's EL-921, - "Supervisor's Guide to Handling Grievances"

"It is the responsibility of local management to resolve as many grievances as possible at Step 1. When a grievance has merit, you should admit it and correct the situation. You are a manager--you must make decisions--don't pass the buck. Your decision on a grievance should be based on the facts of the situation and the provisions of the National Agreement. You should listen to the employee's or union's grievance and make sure of the facts."

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.

CHAPTER 7

THE ISSUE: NEXUS (CONNECTION) BETWEEN OFF-DUTY MISCONDUCT AND USPS EMPLOYMENT

THE DEFINITION

There must exist a nexus or connection between off duty misconduct and Postal employment for Just Cause to exist when an employee is disciplined due to off duty misconduct. Many arbitrators apply the following guidelines for demonstration of the nexus:

Arbitrator Robert W. McAllister ***Case No. C4C-4B-D 37415 & 37416***
Detroit, Michigan ***February 22, 1988*** ***Pages 11-12***

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

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

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

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

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

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

THE ARGUMENT

The Union argument in an off-duty discipline case--usually a removal or indefinite suspension-crime case--is straightforward--that management has 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 that 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 utilizing the nexus argument; we will not. Arbitrators often excuse themselves with decisions wrapped around "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 its 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 most often not 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 COLLECTIVE BARGAINING AGREEMENT

The USPS often utilizes language in Chapter 6 of the Employee and Labor Relations Manual in prosecution of off-duty conduct cases:

EMPLOYEE AND LABOR RELATIONS MANUAL

661.3 Standards of Conduct

c. Impeding Postal Service efficiency or economy.
f. Affecting adversely the confidence of the public in the integrity of the Postal Service.

661.53 Unacceptable Conduct

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

661.55 Illegal Drug Use

Illegal use of drugs may be grounds for removal from the Postal Service.

666.2 Behavior and Personal Habits

Employees are expected to conduct themselves during and outside of working hours in a manner which reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal personnel be honest, reliable, trustworthy, courteous, and of good character and reputation. Employees are expected to maintain satisfactory personal habits so as not to be obnoxious or offensive to other persons or to create unpleasant working conditions.

The text of the Collective Bargaining Agreement itself does not provide for a required nexus, however, in a National Level Arbitration Award, the USPS itself recognized the necessity of a nexus between USPS employment and off-duty misconduct for Just Cause to be achieved. That National level award is part of our Collective Bargaining Agreement:

Arbitrator Sylvester Garrett ***Case No. NC-NAT-8580***
National Award ***September 29, 1978*** ***Pages 31-32***

"Given these fundamental changes wrought through collective bargaining, obviously departing from traditional Civil Service policies and procedures, it is inconceivable that the sophisticated negotiators for the USPS in 1971 reasonably could have believed that the suspension of an employee because of alleged commission of a crime would not be subject to a full independent review in arbitration to determine whether the suspension was for "just cause" and whether remedial action, including back pay, might be appropriate. This conclusion seems unavoidable even under the language of the last sentence in Section 3, in itself, since it requires that there be "reasonable cause" to believe the employee "guilty" of the alleged crime. In any grievance involving "just cause" for suspension in a "crimes case" the presence or absence of "reasonable cause" to believe the employee guilty would be an unavoidable first question. It also seems apparent that some alleged crimes could have no material bearing on an employee's ability to perform his or her job without embarrassment to the Service or impairment of efficiency or safety. Yet, as the Service concedes, there must be a "nexus" in any such case between the alleged crime and the employee's job with USPS. Whether such a "nexus" exists also is an obvious question under the "just cause" test. (Emphasis Added)"

JOINT CONTRACT INTERPRETATION MANUAL – ARTICLE 16.6

INDEFINITE SUSPENSION – CRIME SITUATION

Just cause of an indefinite suspension is grievable and an arbitrator has the authority to reinstate and make whole.

An indefinite suspension is subject to review by an arbitrator to the same extent as any other suspensions, which is to determine whether "just cause" for the disciplinary action has been shown. Such a review involved considering at a minimum:

(2) whether such a relationship exists between the alleged crime and the employee's job in the Postal Service to warrant suspension.

CHAPTER 8

THE ISSUE: TIMELINESS OF DISCIPLINE

THE DEFINITION

That 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

The JCIM and EL921 state that discipline . . . . "should be taken as promptly as possible . . . . " This places a burden upon the USPS to prove why a delay was somehow justified. If an incident of misconduct occurs and the USPS waits 10 days to conduct a Pre-disciplinary Interview – while gathering no evidence during that 10 day period – and then waits another 10 days to initiate the discipline, that certainly appears to fail the JCIM and El-921 provisions. We must argue that discipline is untimely whenever the action is not "taken as promptly as possible." However, there is a school of arbitral thought which applies a general rule of 30 days as the normal standard for the disciplinary issuance time frame. Our CBA does not provide for 30 days and we must resist any application thereof. This is also not to say that discipline issued beyond 30 days will automatically be deemed procedurally defective by an arbitrator. But once disciplinary issuance goes beyond 30 days, the Union's argument becomes increasingly stronger that the Just Cause test of timeliness is defective and violated. Nevertheless, we must argue for the "as promptly as possible" standard.

Management Claims of Delay When Postal Inspection Service is Investigating

Delays in issuing discipline are sometimes blamed by management due to ongoing Postal Inspection Service/OIG investigation or "waiting for the Postal Inspection Service/OIG Investigative Memorandum".

While there may be some consideration given to such reasons from management by arbitrators, the Union must still pursue the timeliness issue. Often times, the Investigative Memorandum will reveal the OIG/Postal Inspection Service's investigation actually ended by a particular date--long before final presentation of the OIG/Postal Inspection Service Investigative Memorandum to Postal management. Other times, although the Postal Inspection Service/OIG and management claim an ongoing investigation was continuing, the facts will not support such a continuation or delay in management's issuance of discipline.

We do know that management relies heavily--sometimes 100%--on the OIG/Postal Inspection Service Investigative Memorandum (another due process issue found in Chapter 3) but there will be instances in which the Investigative Memorandum is only a small part of management's decision and issuance of discipline. In any event, a management claim of delay due to the OIG/Postal Inspection Service Investigative Memorandum receipt must not, in and of itself, deter our due process pursuit.

Review of the disciplinary notice, the fact circumstances, and the time lapse between the alleged infraction or last absence and disciplinary issuance will reveal whether or not a timeliness argument exists and how vigorously that due process argument should be pursued.

THE COLLECTIVE BARGAINING AGREEMENT

Under the Just Cause definition of Article 19's EL-921, the last element or test of just cause is found:

ARTICLE 19's EL-921, - "Supervisor's Guide to Handling Grievances"

"Was the disciplinary action taken in a timely manner?

Disciplinary actions should be taken as promptly as possible after the offense has been committed."

JOINT CONTRACT INTERPRETATION MANUAL - ARTICLE 16.1

JUST CAUSE PRINCIPLE

These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

Was the Disciplinary Action Taken in a Timely Manner?

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

THE INTERVIEW

Like the interview for "past elements not adjudicated" found in Chapter 13, 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.

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 administers a disciplinary action, a critical facet of our investigation must be whether or not the grievant is being treated in a disparate--different--manner than other employees and/or supervisors. Should other employees have--regardless of craft--similar attendance records and/or similar progressive disciplinary histories, or have committed similar infractions, then other 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 grievant 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, we have established management has failed to meet one of the critical tests of Just Cause.

THE COLLECTIVE BARGAINING AGREEMENT

While disparate treatment is not found in Article 16, it is found in Article 19s EL-921, "Supervisor's Guide to Handling Grievances":

> **"Is the rule consistently and equitably enforced?**
>
> If a rule is worthwhile, it is worth enforcing, but be sure that it is applied fairly and without discrimination.
>
> Consistent and equitable enforcement is a critical factor, and claiming failure in this regard is one of the union's most successful defenses. The Postal Service has been overturned or reversed in some cases because of not consistently and equitably enforcing the rules.

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

The following is an example of what arbitrators may consider an inequitable discipline: If an installation consistently issues 5-day suspensions for a particular offense, it would be extremely difficult to justify why an employee with a past record similar to that of other disciplined employees was issued a 30-day suspension for the same offense.

The Postal Service feels that unless a penalty is so far out of line with other penalties for similar offenses as to be discriminatory, the arbitrator should make no effort to equalize penalties. As a practical matter, however, arbitrators do not always share this view. Therefore, the Postal Service should be prepared to justify why a particular employee may have been issued a more severe discipline than others."

EMPLOYEE AND LABOR RELATIONS MANUAL

665.23 Discrimination

Employees acting in an official capacity must not directly or indirectly authorize, permit, or participate in any action, event, or course of conduct that subjects any person to discrimination, or results in any person being discriminated against on the basis of race, color, religion, sex, national origin, age (40+), physical or mental disability, marital or parental status, sexual orientation, or any other nonmerit factor, or that subjects any person to reprisal for prior involvement in EEO activity.

666 Prohibited Personnel Practices

666.1 Restrictions

666.11 Applicability of Restrictions

The following restrictions apply to any Postal Service employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to any employee, eligible, or applicant.

666.12 **Prohibited Discrimination**

The following provisions apply:

b. *Individual Status.* No person may be discriminated against because of race, color, religion, sex, age (40+), national origin, disability, reprisal based on protected activity, marital or parental status, or sexual orientation in connection with examination, appointment, reappointment, reinstatement, reemployment, promotion, transfer, de motion, removal, or retirement.

c. *Conduct That Does Not Adversely Impact Performance.* No person may be discriminated for or against on the basis of conduct that does not adversely impact that person's performance or the performance of others. In determining suitability or fitness of that per son, any conviction for any crime under the laws of any state, the District of Columbia, or of the United States may be taken into ac count.

673.22 **Prohibiting Discrimination and Harassment**

673.221 **Discrimination**

The Postal Service is committed to ensuring a workplace that is free of discrimination and to fostering a work climate in which ass employees may participate, contribute, and grow to their fullest potential.

JOINT CONTRACT INTERPRETATION MANUAL - ARTICLE 16.1

JUST CAUSE PRINCIPLE

These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

Is the rule Consistently and Equitably Enforced?

A rule must be applied fairly and without discrimination. Consistent and equitable enforcement is a critical factor, and claiming failure in this regard is one of the union's most successful defenses.

The Postal Service has been overturned or reversed in some cases because of not consistently and equitably enforcing the rules.

Consistently overlooking employee infractions and then disciplining without warning is one issue. For example, if employees are consistently allowed to smoke in

CHAPTER 10

THE ISSUE: HIGHER LEVEL CONCURRING OFFICIAL AS STEP 2 DESIGNEE

THE DEFINITION

Whenever the same manager--i.e., the Postmaster/Installation Head Designee--acts as the Article 16.8 Higher Level Reviewing and Concurring Official and the Grievance/Arbitration procedure's management designee at Step 2.

THE ARGUMENT

The EL-921, "Supervisor's Guide to Handling Grievances", provides for a division of duties between the Article 16.8 Higher Level Reviewing and Concurring Official and the Grievance/Arbitration procedure's Step 2 designee.

In this way, the grievant and grievance receive a more impartial review of the grievance at Step 2. It is not reasonable to expect that a manager who had reviewed, concurred and determined Just Cause existed in a notice of removal can then separate himself from that role to independently and objectively discuss the grievance at Step 2. Further, the real possibility of resolution from that Step 2 manager cannot be expected to exist. The EL-921 contemplated such a dilemma. Its intent provides for the separation of the Higher Level Reviewing and Concurring Official and Step 2 designee into two individuals so some semblance of impartiality may exist.

THE COLLECTIVE BARGAINING AGREEMENT

Article 16 DISCIPLINE PROCEDURE

"**Section 8** Review of Discipline

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

In associate post offices of twenty (20) or less employees, or where there is no higher level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken."

Article 15 Section 2 Step 2c

"The installation head or designee in Step 2 also shall have authority to grant or settle the grievance in whole or in part."

Article 19's EL-921, - "Supervisor's Guide to Handling Grievances"

"Therefore, it is crucial that the supervisor not only take good notes during the Step 1 discussion, but also advise both the reviewing authority and the designee for Step 2 that a grievance has been filed. Since the reviewing authority thoroughly reviewed the proposed discipline before it was initiated, that person will be a key source of information for management's Step 2 designee. There must be a clear channel of communication between these two individuals.

D. Role of the Step 2 Designee

The reviewing authority looks at the proposed discipline before it is imposed and concurs with the proposed action, based on the facts supplied by the supervisor. On the other hand, the Step 2 designee must look at both sides of the coin in an effort to resolve the grievance at the local level.

A situation may arise where the Step 2 designee finds the discipline either unwarranted or too severe, based on the facts and evidence presented at the Step 2 discussion. If so, the Step 2 designee should thoroughly discuss the case with the supervisor involved before rendering a decision. Step 2 designees must not handle grievances as though they were "rubber stamping" decisions that have already been made. Also, the Step 2 designee must not accept without question all statements of facts or opinions by other management personnel regarding the case, nor assume automatically that the statements of facts or opinions forwarded by the union or grievant are fabrications or highly biased. Statements of facts by either party should always be documented.

Except to check out new facts which may be presented at the Step 2 discussion, the Step 2 designee will not have to develop management's case if the reviewing authority and supervisor involved have done their homework. The primary responsibility of the Step 2 designee is to review the case to determine whether just cause exists for discipline and, if so, whether the degree of discipline is appropriate."

JOINT CONTRACT INTERPRETATION MANUAL - ARTICLE 16.1

JUST CAUSE PRINCIPLE

These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

ARTICLE 16.8

CONCURRENCE

It is normally the responsibility of the immediate supervisor to initiate disciplinary action. Before a suspension or removal may be imposed, the discipline must be reviewed and concurred in by a manager who is a higher level than the initiating or issuing supervisor. This act of review and concurrence must take place prior to the discipline being issued.

While there is no contractual requirement that there be a written record of concurrence, as a practical matter, it is best to establish a record of the concurrence (by the concurring official signing/dating the discipline or disciplinary proposal).

NATIONAL ARBITRATION CASE NO. E95R-4E-D 01027978 - Arbitrator Eischen

Contrary to the position advanced by the Postal Service in this case, however, that process of review and concurrence contemplated by Article 16.6 is not a ministerial formality or a mere technical "laying on of hands" by the reviewing/concurring official. The requirement of a separate and independent second step of review and concurrence by the higher authority is not met by just a declaration of agreement with the first step supervisor's proposed disciplinary action. Compliance with Article 16.6 requires a substantive review of the mater by the higher authority in light of all the current information and the higher authority's concurrence with imposition of the disciplinary action proposed by the supervisor.

ISSUE NO. 1

Article 16.6 Review of Discipline of the Extension to the 1995-1999 USPS-NRLCA National Agreement:

> b) Is violated if there is a "command decision" from higher authority to impose a suspension or discharge;
>
> c) Is violated if there is a joint decision by the initiating and reviewing officials to impose a suspension or discharge;
>
> e) Is violated if there is a failure of either the initiating or reviewing official to make an independent substantive review of the evidence prior to the imposition of a suspension or discharge;

ISSUE NO. 2

> (a) Proven violations of Article 16.6 as set forth in Issues 1(b), 1(c) or 1(e) are fatal. Such substantive violation invalidates the disciplinary action and requires a remedy of reinstatement with "make-whole" damages.

CHAPTER 12

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 "behavior". 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 behavioral offenses--and these, at least, reasons for discipline must not be lumped with misconducts or behavioral offenses in any progressive disciplinary history.

THE COLLECTIVE BARGAINING AGREEMENT

While there is no specific language requiring different disciplinary progressions based upon disciplinary category, the following language will support our position:

ARTICLE 16 DISCIPLINE PROCEDURE

"Section 10 Employee Discipline Records
The records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years."

ARTICLE 19's EL-921, - "Supervisor's Guide to Handling Grievances"

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

If minor offenses occur, discussion with the employee may be effective in correcting deficiencies. In such a case, let the employee know what the problem is. Be specific. Cite examples and let the employee know what is expected. You have a responsibility to encourage employees to correct their shortcomings. Let the employee talk--an interchange may be all that is needed. Follow up to make sure the discussion was effective. If the employee corrects the shortcomings after this discussion, let it be known that you appreciate the improvement.

What happens if the employee's behavior does not improve? A second discussion is sometimes advisable, or formal disciplinary action may be initiated through issuance of a letter of warning or suspension. Remember, your job is to handle disciplinary actions so they are corrective and not punitive.

In suspending an employee, use extreme caution in convincing yourself that the penalty is appropriate for the offense. Progressively longer suspensions may be in order to correct a situation. When these fail, discharge should be considered. Before you take such action, review thoroughly:

Is it for just cause?

Have we made attempts to correct the employee's behavior?

Have we taken prior progressive disciplinary action?

Is the decision based upon objectivity and not emotionalism?

E. Investigation

As previously discussed, when an employee commits an offense which seems to warrant discipline, the supervisor must avoid rushing into a disciplinary action without first investigating. The need for an investigation to meet our just cause and proof requirements is self-evident. However, the employee's past record must also be checked before any disciplinary action is considered. This is obviously necessary if we are to abide by the principle of progressive discipline.

F. Items for consideration in assessing discipline include but are not limited to:

The past record of the employee; and/or other efforts to correct the employee's misconduct."

CHAPTER 13

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" for adjudication.

THE ARGUMENT

Whenever management issues discipline and bases that action on elements of disciplinary 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 awaiting 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 em-

ployee may not suffer as if those elements were actually part of the employee's record. Although the employee has been issued the disciplines, the propriety of the actions has not been determined. Our Collective Bargaining Agreement does provide for deferment of the validity determination 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 COLLECTIVE BARGAINING AGREEMENT

While there is no specific language in the Collective Bargaining Agreement prohibiting management from including past elements not yet adjudicated in the Grievance/ Arbitration procedure, there is language regarding management's responsibility to investigate prior to issuing discipline. Steward investigations often will reveal the issuing manager has no clue as to whether elements of past record cited have or have not been adjudicated. When this occurs, the adjudication argument spills over into the lack of investigation argument.

The following Collective Bargaining Agreement provisions should prove useful when arguing lack of adjudication and consideration of those past elements:

ARTICLE 19's EL-921, - "Supervisor's Guide to Handling Grievances"

"E. Investigation

As previously discussed, when an employee commits an offense which seems to warrant discipline, the supervisor must avoid rushing into a disciplinary action without first investigating. The need for an investigation to meet our just cause and proof requirements is self-evident. However, the employee's past record must also be checked before any disciplinary action is considered. This is obviously necessary if we are to abide by the principle of progressive discipline.

F. How Much Discipline

Items for consideration in assessing discipline include but are not limited to:

The past record of the employee; and/or other efforts to correct the employee's misconduct."

CHAPTER 14

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 booster justification for 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 COLLECTIVE BARGAINING AGREEMENT

Article 15 provides for interpretation of our Collective Bargaining Agreement by the parties.

ARTICLE 15 GRIEVANCE-ARBITRATION PROCEDURE

"**Section 2** Grievance Procedure Steps

Step 3:

(e) If either party's representative maintains that the grievance involves an interpretive issue under the National Agreement, or some supplement thereto which may

be of general application, the Union representative shall be entitled to appeal an adverse decision to Step 4 (National level) of the grievance procedure.

Step 4:

(a) In any case properly appealed to this Step the parties shall meet at the National level promptly, but in no event later than thirty (30) days after filing such appeal in an attempt to resolve the grievance. ... The decision shall include an adequate explanation of the reasons therefor."

The National Level Step 4 Interpretive Decision for Case No. H7C-NA-C 21 dated August 17, 1988, states:

"This is in response to the issues you raised in your letter of December 18, 1987, and Step 4 grievance (H7C-NA-C 21, dated June 29, 1988) concerning the maintenance of employee disciplinary records, as well as the Step 4 grievance (H4C-5R-C 43882) challenging the management practice of including in past element listings of disciplinary actions the original action issued and the final action resulting from modification of the original action.

In full and final settlement of all disputes on these issues it is agreed that:

3. In the past element listings in disciplinary actions, only the final action resulting from a modified disciplinary action will be included, except when modification is the result of a "last chance" settlement, or if discipline is to be reduced to a lesser penalty after an intervening period of time and/or certain conditions are met."

JOINT CONTRACT INTERPRETATION MANUAL – ARTICLE 16.10

PAST ELEMENTS

In the past element listings in disciplinary actions, only the final action resulting from a modified disciplinary action will be included, except when modification is the result of a "last chance" settlement, or if discipline is to be reduced to a lesser penalty after an intervening period of time and/or certain conditions are met.

CHAPTER 15

THE ISSUE: 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, no work performed or violation of USPS standards of conduct.

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 COLLECTIVE BARGAINING AGREEMENT

ARTICLE 16 DISCIPLINE PROCEDURE

"Section 7. Emergency Procedure

An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee, the emergency action taken under this Section may be made the subject of a separate grievance."

CHAPTER 17

THE ISSUE: 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 volatile 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 a 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 more than ten or fifteen minutes (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 COLLECTIVE BARGAINING AGREEMENT

The definition of an emergency found in Article 3 of the Collective Bargaining Agreement supports our position that 16.7 cannot be properly imposed after a delay.

Article 3 MANAGEMENT RIGHTS

"... F. **Emergency Situations** ... i.e., an unforeseen circumstance or a combination of circumstances which calls for **immediate action** in a situation which is not expected to be of a recurring nature." (Emphasis and underscoring added.)

ARTICLE 16 DISCIPLINE PROCEDURE

"**Section 7. Emergency Procedure**

An employee may be **immediately** placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee, the emergency action taken under this Section may be made the subject of a separate grievance." (Emphasis and underscoring added.)

In addition to the above referenced language, there is the defining National Level decision of Arbitrator Mittenthal in Case No. H4N-3U-C 58637 & H4N-3A-C 59518;

Arbitrator Richard Mittenthal ***Case No. H4N-3U-C 58637 & H4N-3A-C 59518***
Dallas, Texas ***August 3, 1990*** ***Pages 10-11***

"When the "emergency procedure" in Section 7 is properly invoked, the employee is "immediately" placed on non-duty, non-pay status. He does not have a right to remain, for any period of time, "on the job or on the clock at the option of the Employer." He suffers an instant loss of pay.

... The critical factor, in my opinion, is that Management was given the right to place an employee "immediately" on non-duty, non-pay status on the basis of certain happenings. An "immediate..." action is one that occurs instantly, without any lapse of time. Nothing intervenes between the decision to act and the act itself. That is what the term "immediately" suggests."

CHAPTER 18

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 full 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. Management has failed to provide the required 30 day advance notice with 30 days either on the job or on the clock. Management has violated Article 16.5 of the Collective Bargaining Agreement and issued a procedurally defective and violative Notice of Removal.

There are also instances in which the employee is given the 30 days advance notice but the employee is neither kept on the job nor paid for the required 30 day period. This is also violative of Article 16.5 and the due process rights entitled under the Collective Bargaining Agreement. Often the USPS misapplies Article 16.7's Emergency Procedure and "continues" an Emergency Suspension into the Article 16.5 Notice period. This is in violation of Article 16.5 and the 30 day Notice requirement. When an employee is issued a Notice of Removal, any Emergency Suspension ends and the required 30 day Notice period begins.

THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 16 DISCIPLINE PROCEDURE

Section 5 Suspensions of More Than 14 Days or Discharge

In the case of suspensions of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days. When there is rea-

sonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the Employer is not required to give the employee the full thirty (30) days advance written notice in a discharge action, but shall give such lesser number of days advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

There is also a **National Level Step 4 Interpretive Decision** which clarifies when the 30 days notice requirement commences. The decision for **Case No. H4N-4A-D 30730** states:

"The issue in this grievance is whether the day of receipt of a notice of discipline should be included as part of the required minimum period of notice to the employee.

We further agreed that for purposes of computing the period of notice required in advance of the imposition of various disciplinary measures, such notice period shall be deemed to commence on the day following the date upon which the letter of notification is received by the employee."