DUE PROCESS

INTRODUCTION

EXAMPLE TIE-INS

ARBITRATOR'S VIEW OF PROCEDURAL ERRORS

SYNOPSES

INTRODUCTORY UPDATE

The term of due process has been utilized in arbitration since its inception. This procedural safeguard could be equated to an employee's bill of rights in the area of discipline. It stems from the 14th Amendment to the U.S. Constitution. As external law shifted to more conservative interpretations and applications in the area of harmful area, so did arbitration. Fatal or mitigating procedural errors had become less common in resolving disputes.

Therefore, it was interesting to note the swing back toward procedural protections for workers. There are still a few arbitrators that find ways to ignore the obvious, but by and large the vast majority require these protections. Management's failure to adhere to these protections is at their peril. Anytime you can demonstrate more than one example your case strengthens procedurally. Take the time to review along these lines first. Continue to spread the word on this contractual right.

Finally, you will note we have taken certain liberties with my examples. Surely some are not technical examples of due process, but all aid in knocking down discipline or forcing contractual compliance.

Example Tie-ins

Already Resolved

Synopses

Case Law

W-AB-5190-D	.....	Morris Myer	10/10/75
S4C-3W-C-8146	.....	Ernest Marlatt	7/13/87
DR-31-88	.....	Nicholas Zumas	3/20/89
H4C-3W-D-40195	.....	Carlton Snow	5/26/89
H4C-3W-C-28547	.....	Carlton Snow	1/8/90
H7C-3D-D-13422	.....	Carlton Snow	7/25/91
S7C-3R-C-29500	.....	John Caraway	8/2/91
C7C-4A-C-30452	.....	William Dolson	6/13/92
S7C-3B-C-34478	.....	Michael Jedel	6/20/92
W7C-5E-C-27191	.....	William Eaton	7/1/92
E0C-2F-C-2452	.....	Nicholas Zumas	1/21/93
E7C-2N-C-44880	.....	Christopher Miles	9/30/93
E0C-2F-C-10135/1292	.....	Michael Zobrak	8/4/94
Union Brief			5/20/94
E90C-4E-D-969569218/E90C-4E-D-969560556	.....	Harry MacLean	8/19/96

See also ..... Glossary of Legal Terms

Discipline Should Be Issued In Timely Manner

Synopses

Case Law

AC-W-24 658-D	.....	William Rentfro	2/14/79
C1C-4A-D-31551	.....	William Dolson	11/8/84
S4W-3T-D-46556/7	.....	Irvin Sobel	4/8/88
C7C-4A-D-16592	.....	Robert McAllister	4/17/90
C0C-4P-D-604/1210	.....	Edwin Benn	3/22/92
C0C-4L-D-16172	.....	Robert McAllister	3/15/93
A90C-1A-D-93009216	.....	Carol Wittenberg	7/17/94
A90C-1A-D-93009217	.....	Carol Wittenberg	7/17/94
A90C-1A-D-93009218	.....	Carol Wittenberg	7/17/94

Disparity

Synopses

Case Law

C8C-4P-D-28576	.....	Gerald Cohen	2/22/82
C7T-4J-D-14352/15015	.....	William Belshaw	7/28/89
C7C-4Q-D-28021	.....	Fred Witney	4/22/91

Meaningful Investigation

Synopses

Case Law

Penalized Employee Must Be Given Full Chance To Protest

Synopses

Case Law

Quantum of Proof

Synopses

Case Law

Review And Concurrence, Article 16.8

Synopses

Case Law

Union Must Be Given Full Opportunity To Prepare The Defense

Synopses

Case Law

Settled In Grievance Procedure

Synopses

Case Law

C0C-4U-C-34 & 39	.....	Charles E. Krider	5/14/93
92-3581	.....	May v USPS	6/14/93
W7C-5F-C-31485	.....	David Goodman	12/31/93
W7C-5F-C-28134	.....	Edwin Render	3/29/94

DUE PROCESS EXAMPLES
(Not prioritized)

Already resolved - stare decisis; res judicata; collateral estoppel.

* Concerted activity and protected status

Discipline should be issued in timely manner.

Disparity

Double Jeopardy

* Entrapment

Evidence after the fact.

Flawed grievance steps.

Formal charge which includes nature of misconduct. Subsequent charges are irrelevant.

Hearsay

Meaningful investigation

Penalized employee must be given full chance to give his/her side of the story.

Quantum of Proof (Not Due Process, offered for othre purposes)

Review and concurrence, Article 16.8.

Settled in grievance procedure.

* Steward Immunity

Union must be given full opportunity to prepare the defense. Includes withholding of information by management.

* Weingarten

For Synopses see listing with each example.

**Not included in synopses or example tie-ins*

ARBITRATOR'S VIEW OF PROCEDURAL ERRORS

1. FATAL/HARMFUL

2. MITIGATING

3. HARMLESS

SYNOPSES
ALREADY RESOLVED
STARE DECISIS, RES JUDICATA
AND COLLATERAL ESTOPPEL

Morris L. Myers **W-AB-5190-D** **October 10, 1975**

The employer argued as found guilty in Federal District Court the doctrine of res judicata should apply. Arbitrator set this doctrine aside as not applying in arbitration. As stated on pages 10 & 11, "With all due respect for a fellow arbitrator, this Arbitrator does not share the view expressed by Arbitrator Willingham. It is this Arbitrator's opinion that the judgement of the federal court would be dispositive of the issue of just cause for discharge only if the language of the Agreement specifically stated that conviction of the crime of theft of Employer property is deemed to constitute just cause for discharge. The Agreement does provide that, 'No employee may be disciplined or discharged except for just cause such as ...pilferage', but that does not equate, in the Arbitrator's opinion, with the Employer's position that the judgement of a court is binding upon the arbitrator. The Agreement also provides that when there is reasonable cause to believe an employee guilty of a crime for which a sentence of imprisonment can be imposed, the 30-day advance notice requirement shall not apply and the employee may be immediately removed from pay status. Clearly, Article XVI, Section 3, also provides that the employee then remains on the rolls in a non-pay status until disposition of the case by settlement with the Union or through the grievance-arbitration procedure. Indeed, it would be contrary to the elementary principles of industrial due process if the judgement of a court in a citizen-state matter could, without specific agreement between the parties, also be dispositive of the rights and liabilities of the parties to an employer-employee relationship. Insofar as this Arbitrator is aware, it is the general practice among arbitrators in determining whether or not there is just cause for discharge to consider a court conviction of an employee as only one factor. Also considered is whether the continued employment of the employee is likely to adversely affect the employer's business, whether fellow employees have shown reluctance to continue working with the grievant, whether the employer has received adverse publicity due to the arrest and conviction so as to jeopardize the employer's public image. Such factors were taken into consideration in each of the arbitration cases cited by the Employer, with the exception of the Willingham award, in determining whether there was just cause for the discharge of an employee who had been convicted of a crime.".

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Ernest E. Marlatt **S4C-3W-C-8146** **July 13, 1987**

Higher level dispute on lead clerk in registry room being level 6. Accepted earlier award by Williams as being res judicata.

Nicholas H. Zumas **DR-31-88** **March 20, 1989**

Issue went to Postal Service reissuing Removal Notice after first notice voided by an arbitrator for procedural defects. Service argued res judicata only applies where a determination has been made on the merits. Service offered legal cites in support of their arguments. Arbitrator stated his job was to abide by the CBA not the Courts. As earlier arbitrator had ruled, he was compelled to follow as awards final and binding.

Carlton J. Snow **H4C-3W-D-40195** **May 26, 1989**

Issue went to 16.9 dispute. In addressing concepts of stare decisis and res judicata he comments;

"The concepts of stare decisis and res judicata are concerned with the impact of decisions in one hearing on subsequent proceedings. Although not detailed in the parties' agreement, there was general consensus at the arbitration hearing that national arbitration awards are binding in
188 regional disputes. There was less agreement about the impact of a national award on a subsequent national arbitration proceeding. The issue is to what extent have the parties intended to establish a precedential arbitration system.

The concept of stare decisis is concerned with the doctrine of precedent. That is, the doctrine of precedent says like cases should follow the same principles and produce similar results. Such a system fosters stability and encourages reasonable consistency in decision making. If people know the rules, they can plan their activities accordingly, and decisions, then, carry the imprimatur of rationality instead of whimsicality.

The concept of res judicata is distinguishable from that of stare decisis. Res judicata teaches that a decision in one case is conclusive of all rights, questions, and facts in dispute between the parties in all other similar actions between the parties. Res judicata is narrower in scope than stare decisis. Res judicata covers not only issues of principle but also questions of fact. Stare decisis focuses more on broad principles and doctrines in a particular case. The important point is that the concept of stare decisis makes some general principles of a particular case a part of the interpretive context for understanding the parties' agreement.

The concepts of res judicata and stare decisis have never taken root

deeply in arbitration but may provide guidance in appropriate cases. It seems clear that the parties have intended to incorporate these concepts with respect to the impact of national awards on regional arbitration decisions. If it has been the intent of the parties to apply these principles at the national level, it would be inconsistent with their development in the common law. Courts have recognized that these concepts are not absolutely binding on decision makers of last resort and that courts of last resort have some flexibility in modifying precedents. Usually, however, they have done so only in extraordinary circumstances. The need ordinarily occurs only when it is necessary 'to remedy a continued injustice.' (See, McGregor v. Provident Trust Company, 162 So. 323 (1935))."

Carlton J. Snow **H4C-3W-C-28547** **January 8, 1990**

This national case went to a dispute on management providing an alternate steward to an employee when the regular steward was on overtime. Union argued Step 4's had already decided dispute. Arbitrator gave explanation of this term in denying argument based on lack of people. He states, "D. The Matter of Collateral Estoppel

> The concept of collateral estoppel or, as it is now called, issue preclusion, occasionally surfaces in arbitration. The basic idea is that, once a party has had an opportunity to resolve a matter definitively, there should be no further opportunity at a later time to engage in another dispute about the matter. Assuming the same parties who stood in an adversarial relationship to each other asserted a claim and had it resolved, the doctrine of collateral estoppel should prevent reassertion of the same claim at a later time. While the notion that a determination in one forum should prevent reassertion of a similar claim in another forum occasionally arises in arbitration, it customarily involves collateral civil proceedings and not the same arbitral system."

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Later he says, "It is logical to impose on the party asserting the benefit of the doctrine of issue preclusion the burden of introducing at least a preponderance of the evidence to show that the dispute in this case was the same as the dispute in a former proceeding. Since the Union has claimed that the issue presented already has been decided in prior Step 4 grievance settlements, the burden must be allocated to the Union to prove that claim. The Union has not carried its burden on this point.".

Carlton J. Snow **H7C-3D-D-13422** **July 25, 1991**

Issue went to 16.9 dispute. Arbitrator Snow made the following statements in this national level case relating to res judicata and stare

decisis;

"Although the legal doctrines of stare decisis and res judicata may provide some guidance in arbitration, there are limitations on their application. The arbitration system in this industry is split into national and regional panels, and it is believed that decisions of the national panel on issues of contract interpretation are binding on regional arbitrators."

"At the same time, arbitrators have been quick to recognize that a reasonable use of stare decisis and res judicata help the parties avoid relitigating every issue. As the eminent Harry Shulman, former Dean of the Yale Law School, has stated:

> Even in the absence of arbitration, the parties themselves seek to establish a form of stare decisis or precedent for their own guidance--by statements of policy, instructions, manuals of procedure, and the like. This is but a means of avoiding the pain of rethinking every recurring case from scratch, of securing uniformity of action among the many people of co-ordinate authority upon whom each of the parties must rely, of assuring adherence in their action to the policies established by their superiors, and of reducing or containing the possibilities of arbitrary or personal discretion.
>
> When the parties submit to arbitration in the system of [awards for the same company], they seek not merely resolution of the particular stalemate, but guidance for the future, at least for similar cases. They could hardly have a high opinion of the arbitrator's mind if it were a constantly changing mind. Adherence to prior decisions, except when departure is adequately explained, is one sign that the determinations are based on reason and are not merely random judgements. (See, Shulman, 68 Harv. L. Rev 999, 1020 (1955)).".

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John F. Caraway **S7C-3R-C-29500** **August 2, 1991**

Issue went to a Letter of Demand for a fixed credit shortage. Grieved and arbitrated. Arbitrator Greene ruled fatally flawed due to procedural error. Management reissued Letter of Demand and corrected flaw. Arbitrator ruled management barred from relitigating as Article 15.4A6 clear on decisions being final and binding. He further reasons, "The finality of an arbitration decision is a universally recognized principle. If a procedural error could be corrected and an arbitration case ignored, disputes would never be concluded. A procedural error would always be resorted to in an effort to avoid the impact of an unfavorable arbitration decision.

Consider the argument of the Postal Service if it were applied to the time limits under the grievance/arbitration procedure. Either party could claim the right to maintain that failure to adhere to time limits was a procedural error and could be cured by simply filing a new grievance or a new step decision or appeal, even though there is an unfavorable arbitration decision. The grievance/arbitration process would be completely thwarted. The time limits which are spelled out in Article 15 would have no meaning whatsoever, even though the parties expressly agreed to those time limits.

The Postal Service argues that under applicable law and arbitral decisions, a procedural error can be corrected unless it can be shown that the party was prejudiced by such a correction. Otherwise, it is deemed to be a 'harmless error'. But in the instant case Ms. Hinson was clearly prejudiced by the Postal Service's ignoring Arbitrator Greene's decision in filing a second Letter of Demand. While Arbitrator Greene absolved her of all liability for payment of the shortage, the second Letter of Demand resurrected that liability. There can be no doubt that Ms. Hinson was prejudiced by the Postal Service's correction of the technical error.

Case No. S4C-3F-C-27843 decided by Arbitrator Marlatt [June 30, 1988] has relevance to the instant case. In the cited case Arbitrator Foster had found that the security at a particular Post Office caused the grievant's shortage. Arbitrator Marlatt decided a case involving the same Post Office but a different Window Clerk. He held that he was bound by Arbitrator Foster's finding that there was inadequate security and this was the cause of the shortage. In refusing to decide the case on the merit, the Arbitrator stated:

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> 'The Postal Service is not entitled to a second bite of the apple, in the hope that it might persuade a different arbitrator to reach different conclusions from identical evidence.'"

William F. Dolson **C7C-4A-C-30452** **June 13, 1992**

The Postal Service firmly argued that the doctrine of res judicata applied, in that the grievants filed two separate grievances, one on July 19th, and one on July 30th, both which alleged the violation of Article 7. A settlement was reached on the grievances, which required the Postal Service to convert two part-time flexibles to full-time status.

Although the Postal Service argued res judicata, the arbitrator stated, that is a legal principle which evolved in the court system. "Whether principles developed in the court system are always equally applicable in arbitration is debatable." However, the arbitrator went on to state, "In any event, common sense dictates that when a party files a grievance

over an issue, a settlement of that issue by the same parties precludes a grievance over the exact same issue, where both the factual situation and the claimed contractual violation are the same as existed when the grievance was settled.".
In the instant grievance the facts of the situation were the same, and therefore, the grievance was denied.

Michael J. Jedel **S7C-3B-C-34478** **June 20, 1992**

Issue went to management reissuing a procedurally defective Letter of Demand. Accepted Caraway's reasoning versus Marlatt's. Believed arbitration award final and binding on initial Letter of Demand. As such not a matter of correcting flawed Letter, rather management attempting to overcome initial decision.

William Eaton **W7C-5E-C-27191** **July 1, 1992**

Issue went to dispute on higher level position. Management argued res judicata applied based on earlier decision by Axon on same dispute. Relying on Snow stated doctrine has application and denied grievance.

Nicholas H. Zumas **E0C-2F-C-2452** **January 21, 1993**

192 Zumas's finding was that the Letter of Demand before him was missing one word in the required text of an employee's appellant rights. He found that that missing word was a de minimis violation and therefore the Letter of Demand should stand.

Christopher E. Miles **E7C-2N-C-44880** **September 30, 1993**

On October 1, 1990, the grievant was called into the office by her supervisor and informed that there was no more light-duty work available to her even though, she had been on a light-duty assignment for a period of two years.
The Service, at the outset of the hearing and for the first time, alleged that the case was not properly before the arbitrator. It argued that the grievant had raised the same issue before an Administrative Law Judge in a Merit Systems Protection Board (MSPB) hearing concerning her removal from the Postal Service in 1992. At that time, the Service maintained that the grievant suggested that her denial of light-duty was the start of the Postal Service's plan to remove her from employment. Therefore, it advanced the position that the doctrine of collateral estoppel applied and it also relied upon the doctrine of res judicata as an absolute bar, in that the final judgement was rendered by a court of competent

jurisdiction on the merits of the issue.
The Union, however, asserted the issue to be decided was whether the Postal Service violated the Agreement when it discontinued the light-duty assignment of the grievant in October of 1990. It pointed out that the grievant was on permanent light duty for two years until she was called to the office by a supervisor and told that there was no more light-duty work available, period. The Union asserted that there was no evidence presented to show that every effort was made to find light-duty work for the grievant. It further contended that, based upon the language of the Agreement, the burden switches to the Postal Service to show what attempts were made, and that every effort was made to find such light-duty work.
The arbitrator dismissed the issues raised by the Postal Service concerning the arbitrability of the instant grievance. He stated, "Clearly, the record in this case reveals that the procedural issue raised by the Postal Service was not asserted until the arbitration hearing." Also felt MSPB not in a position to resolve contractual issues. The evidence supported the Union's position that the grievant, while she was on light duty from December 1988 through September 1990, was able to perform the work of her regular job, of Distribution Clerk, with one exception. "The only function that she could not perform was to pull heavy mail or 'swing' mail which was done for her by a Mail Handler or she was able to accomplish with only one hand." Management violated the provisions of Article 13, which require that the greatest consideration be given by the Service to make every effort to find light-duty work for employees. It, therefore, was incumbent upon the Postal Service pursuant to its affirmative duty or obligation to find work for the grievant.

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Michael E. Zobrak **E0C-2F-C-10135** **August 4, 1994**
E0C-2F-C-1292

Grievant was issued three Letters of Demand for separate audits. All three letters contained technical wording violations of the F-1 and ELM. In the first case Arbitrator Zumas found violation to be "de minimus" and denied the grievance. In the next two letters USPS argued res judicata and collateral estoppel. Arbitrator denied motion. Union has right to present its case as facts and arguments may be different. Arbitrator also attacks Zumas "de minimus" argument. Calls it a violation of Article 15.4.A.6 in that it changed language of CBA through Article 19.

Gallagher Brief **May 20, 1994**

The legal doctrine of res adjudicata and/or collateral estoppel applies to

Regular Regional Level Arbitration only after the case has been heard. Brief goes to Zobrak case E0C-2F-C-10135, August 4, 1994.

Harry N. MacLean **E90C-4E-D-969569218** **August 19, 1996**
E90C-4E-D-969560556

Emergency suspension and removal for receiving stolen goods off postal premises. Arbitrator applied doctrine of equitable estoppel, as grievant's attorney given assurance of job back if misdemeanor and probation. Sustained grievance.

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SYNOPSES
DISPARITY

Gerald Cohen **C8C-4P-D-28576** **February 22, 1982**

Disciplined for opening and examining the contents of two parcels and a flat. In addressing the argument that a coworker had been treated differently for similar conduct the Arbitrator said, "In order to prove disparate treatment, Grievant would have had to show that a general course of conduct was usually followed in such situations but which was departed from in his case. I do not believe that such was shown to be the case here. One instance of difference in treatment in a given situation is not evidence of disparate treatment. Disparate treatment is indicated by a course of conduct which an employee has a right to rely on, but which was departed from in his case and to his surprise. Differences in treatment can arise from different factual circumstances. Treatment becomes disparate only when a large number of at least generally similar factual situations are treated the same but the situation under consideration which is similar is treated differently. There was no such proof of that here. Therefore, the Grievant was not the subject of disparate treatment.". Emergency Suspension upheld. Removal reduced for different reasons.

William Belshaw **C7T-4J-D-14352** **July 28, 1989** 195
C7T-4J-D-15015

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

Removal for AWOL and submission of false information. The arbitrator stated: "Given Management's record of improperly discharging Union officers, and the other considerations, there is sufficient grounds to establish prima facie Employer anti-union animus...As a result, the Employer bears the burden to demonstrate it would have discharged Emmett even if he was not a Union officer.".

The arbitrator indicated that the evidence shows that eight employees, that were not Union officers, received eleven separate disciplinary actions. As was the grievant, they were charged with AWOL or other attendance related offenses. For the first offense, these employees received a Letter of Warning: suspension (not discharge) was imposed when they repeated these offenses. The record clearly indicated that Carbondale management used progressive discipline for the eight employees, but did not for the grievant.

In sustaining the grievance, the arbitrator stated: "Clearly, the Grievant was singled out for more harsh treatment because he was a Union officer. No other logical explanation is available to justify Management's inconsistent treatment. Why was the Grievant denied progressive discipline in contrast to other employees who were not Union officers? In the absence of any other explanation, the compelling answer should be obvious to all concerned.".

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Based on the record, the arbitrator found that the employer violated Section 8(A)(1) and (3) of the Labor Management Relations Act, discrimination against the grievant because he was a Union officer.

The evidence clearly did not support management's assumption that the grievant used false pretenses to obtain a temporary schedule change, and did not use a schedule change in an attempt to defraud the Postal Service.

The arbitrator reinstated the grievant to his job with full back pay and contractual rights. He reasoned although, the grievant was AWOL, as charged the employer, an admittedly serious offense, the other findings, particularly Carbondale Management's disparate treatment of the grievant and its violation of the Labor Management Relations Act, makes any other decision improper.

Robert W. McAllister **C7C-4J-D-26795** **May 29, 1991**

The grievant, along with two employees, was issued a Letter of Removal after being observed opening and removing contents of undeliverable mail. Although the Union argued that there was no evidence showing that management ever explained to employees in group meetings how mail of "no obvious value" was to be handled, the arbitrator stated, nevertheless, the grievant's testimony and statement witnessed by Inspector Hagfors established that she knew it was wrong to take items from undeliverable, Third Class Mail.

However, the area mail manager subsequently reinstated the carrier even though the evidence clearly showed that he had taken a package of Alpine Cigarettes from Employee Sell (one of the other employees who was issued removal charges) and also admitted taking a small black case which contained a pen, small knife and paper clips. However, the area mail manager indicated that he reinstated the carrier simply because "he (the carrier) happened to be there and wasn't involved in theft". Yet the area manager said he viewed the grievant's actions to be theft.

The evidence forced the arbitrator to conclude that taking items from waste mail is simply an intolerable situation which cannot be justified. However, he stated: "...management cannot treat employees differently because it exercises poor judgement and unreasonably waives the removal of one or three employees whose actions subjected each to immediate removal." Therefore, the arbitrator reluctantly reinstated the grievant, but without back pay. He further indicated that management did not have just cause to place the grievant on Emergency Suspension.

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Bernard Cushman **E0C-2P-D-5870** **January 4, 1993**
E0C-2P-D-5871

"There is more substance, however, in the Union's claim of procedural irregularities and denial of due process. The most serious of these claims is, in the Arbitrator's opinion, the failure of the Postal Service officials to interview the Grievant before the decision to remove and the failure of the Postal Service to permit an interview of the Inspectors involved in the investigation. The concept of due process as applied to just cause is bottomed on a profound sense of fair play or just treatment enforced by law, a concept which has evolved through centuries of our constitutional history and that of England before us. Joint Anti-fascist Refugee Committee McGrath, 391 US 123, 162-63 (1951). In narrower terms in industrial relations due process is a requirement that before an employer imposes the heavy penalty of discharge in all fairness he or she must make an informed judgement. The employer must afford the employee an opportunity to be heard before passing sentence because he or she

must know both sides of the story before he makes up his or her mind. This requirement is part of the employer's obligation to conduct a full and thorough investigation. Failure of management to make an objective, reasonable and comprehensible inquiry before assessing punishment has often been held to be a factor in an arbitrator's refusal to sustain discharge or discipline. Missouri Research Laboratories, 55 LA 197. See my decision in E4C-2K-D-32491 (Melvin Davis). Here no management official including the Inspection service interviewed the Grievant. There was therefore denial of due process. The tardiness of the Postal Service in furnishing information in accordance with the requirements of Article 15 and the failure to allow the Union to interview the Inspection Service aggravate the due process violation." Added to this, arbitrator found disparity. Made whole with no backpay. Issue went to Emergency Suspension and removal for selling drugs to Postal Inspection's Confidential Informant.

Kenneth M. McCaffree **W0C-5R-D-4575** **January 28, 1993**

Removal reduced to 60 day suspension. Felt key element in falsification missing although employee wrong. Also Employer erred in relying on prior elements still alive within the process. Finally the Arbitrator found disparity based on similar case which occurred at the approximate time of this case.

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SYNOPSES
DISCIPLINE SHOULD BE ISSUED IN A TIMELY MANNER

William E. Rentfro **AC-W-24 658-D** **February 14, 1979**

Arbitrator held the seven month delay before the investigation began to be untimely. Cites Seitz case AC-N-16540. Also felt management compounded error by not giving grievant an opportunity to explain her side of the story.

William F. Dolson **C1C-4A-D-31551** **November 8, 1984**

On June 19, 1984, some six months after the grievant's arrest, the Postal Service issued a Notice of Removal alleging that the grievant engaged in unfavorable conduct which was prejudicial to the Postal Service. The grievance was sustained, since basically management knew in March that the grievant had been convicted of battery. If the Service had any justification to discipline the grievant, it would have been at that time.

Irvin Sobel **S4W-3T-D-46556** **April 8, 1988**
S4W-3T-D-46557

Arbitrator ruled management was untimely in issuing discipline. Not wrong to delay until proof available, however wrong if prompt action not taken to that point. Further lack of an investigation and failure to get employee's side of the story wrong. As stated by the Arbitrator in page 14, "Frankly there was such a 'rush to judgement' based upon the 'stale evidence', that the due process provisions of the grievance were disregarded.". Finally, supervisor not in a position to resolve grievance. Therefore, totality of three Employer gross violations sufficient to sustain grievance on procedural grounds.

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Robert W. McAllister **C7C-4A-D-16592** **April 17, 1990**

Removal for threatening PI's and fighting with one. The Union argued that discipline must be administered in a timely fashion, however, in the instant case the Union emphasized that the Postal Service did not issue a notice of removal until a year after the incident. Furthermore, the Union charged management with holding back and waiting for the outcome of the prior removal which involved an alleged threat to the grievant's supervisor. The motivation, avers the Union, is retaliation. They further argued, that the timing and circumstances of the removal evidences the Postal Service's intent to undo the grievant's

reinstatement.
The arbitrator clearly indicated that management did not have just cause for the removal since it waited for one year after the offenses complained of were committed before issuing discipline. He reinstated the grievant on a last-chance basis and further stipulated that management would have just cause to remove if he did not remain discipline free for a period of 24 months commencing with the date of reinstatement.

Edwin H. Benn **C0C-4P-D-604** **March 22, 1992**
C0C-4P-D-1210

During an investigation over a shortage (which ultimately resulted in the Postmaster resigning) the grievant was interviewed and admitted that he had removed nondeliverable newspapers and magazines from the Postal Installation, and also cashed a coupon in 1988 which was mailed at the Bulk rate and which was undeliverable as addressed.
The arbitrator upheld management's placing the grievant on emergency suspension. However, although there was just cause for discipline, the arbitrator ruled that management did not have just cause to remove the grievant.
He stated: "This is a factually unique case. Grievant admittedly engaged in three areas of misconduct. Grievant took home undeliverable newspapers and magazines; he took a book of stamps without first
200 paying for it and then paid for it the next day; and finally, grievant took and cashed coupons from undeliverable mail. However, while at first blush such conduct amounts to dischargeable offenses, closer examination of the facts show that with respect to the newspapers and magazines, other employees took home undeliverable item with the knowledge of the former Postmaster and, indeed, the former Postmaster did the same. Although the most serious aspect of the alleged allegations concern the cashing of coupons. However, the evidence shows that the Inspection Service was aware of the action two and one half years before discipline was imposed and that by relying upon that evidence, the Service effectively discharged the grievant based upon very stale evidence.". Balanced against the admitted misconduct are the grievant's thirty years of unblemished service and the need to follow the tenets of progressive and corrective discipline.
The arbitrator reinstated the grievant, but, without back pay.

Robert W. McAllister **C0C-4L-D-16172** **March 15, 1993**

An employee's removal for fraud in making a claim for and receiving health benefits that the employee was ineligible to receive, was set aside. The grievant was listed as spouse on another employee's health

benefit registration though she had never been married to the individual. She subsequently received health benefits as a result of a hospitalization. However, the Postal Service did not issue a notice of removal until one year following the grievant's admission to inspectors that she was not married to the employee. The arbitrator ruled that management's failure to act upon information that formed the basis for the removal action for almost one year was "totally unreasonable and at odds with the principles of just cause.".

Carol Wittenberg **A90C-1A-D-93009216** **July 17, 1994**
A90C-1A-D-93009217
A90C-1A-D-93009218

The three employees were discharged for selling cocaine to confidential informants. The arbitrator ruled that the Postal Service violated the grievants' due process rights as a result of the nearly two to three year delay before notices of removal were issued to the grievants following alleged drug sale incidents. According to the arbitrator, "[s]uch a serious delay, in the absence of good cause, is fundamentally unfair, and violates the spirit and intent of the National Agreement.". In addition, Arbitrator Wittenberg held that the Service's failure to interview the grievants before removing them deprived them of their "right to basic due process". She noted that the investigative memoranda upon which the Service relied did not contain any statements by the grievants. "Therefore, the manager[s] who issued the removal[s] had no opportunity to review the Grievant's story either orally or in writing." 201

SYNOPSES
DOUBLE JEOPARDY

Gerald Cohen **C4C-4H-D-5831** **February 21, 1986**

Indefinate Suspension for criminal act. Arbitrator said, "I believe that the decision in this greivance should be based on the issue raised by the Union of the effect of filing another disciplinary action based on the identical set of circumstances which resulted in a previous disciplinary action that was grieved and settled. The Union has argued that it constitutes double jeopardy to rediscipline an employee for the exact same set of facts that had resulted in a prior discipline which was grieved and settled.
It should be noted that the concept of double jeopardy is entirely one of criminal law. However, the concept is used in civil matters involving employment, such as here, because people are familiar with the notion that it is basically unfair to bring the same charges twice. I agree with the Union. The Postal Service, having used Grievant's criminal charges to issue a disciplinary action, and then having settled that action, violates fundamental concepts of fairness by reinstating the charges shortly thereafter."

John J. Mikrut, Jr. **C4C-4Q-D-24549** **January 30, 1988**
C4C-4Q-D-24552

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Removal for failure to take a Fitness For Duty. Removal did not have supervisory signatures. Management cancelled and reissued 2nd Removal Notice. Union argued this was a fatal procedural error. Arbitrator disagreed. Felt no harm done, could still defend herself and have a hearing.

Arthur R. Porter, Jr. **C7R-4Q-D-12734** **April 8, 1989**

Management reissued Notice of Proposed Removal after earlier settlement. Management argued withdrawal of earlier notice was harmless error. Arbitrator ruled earlier settlement did not have without prejudice language in it. As such, settlement must remain a settlement. Reluctantly sustained grievance.

Harry J. Dworkin **C7R-4Q-17456** **April 25, 1990**

Removal for theft. Overturned based on double jeopardy as earlier removal identical and resolved at Step 2.

Lamont E. Stallworth **C7C-4B-D-21976** **June 6, 1990**

Removal unilaterally reduced by management to a 14 day suspension. The Arbitrator indicated that the double jeopardy concept generally only applies when the penalty for an infraction is later increased, not when it is decreased, as it was in the instant case. Clearly in the instant case the penalty against the grievant was decreased not increased, therefore, she was not harmed, but rather benefited from the change made by management, and therefore, her case does not fit into the traditional notions of double jeopardy.

Carlton J. Snow **W7C-5P-D-17141** **January 7, 1991**

Removal for fight. Based on double jeopardy made whole. He tells us on pages 19 and 20, "C. The Issue of Double Jeopardy

> The Union has argued that the Employer's contractual commitment to just cause has been violated as a result of exposing the grievant to double jeopardy. In other words, an incident occurred, a supervisor disciplined the grievant as a result of the incident, and there was every indication that this discipline ended the matter. There was no suggestion of a continuing investigation or that the matter would be reviewed for additional discipline. Yet, another
>
> 203 manager later imposed discipline for the same incident.
>
> The principle of double jeopardy has taken deep root in arbitration as a part of just cause. The basic concept is that 'no person shall be twice vexed for one and the same cause.' (See, ex parte Lange, 85 U.S. 163, 168 (1873)). A person has a right not to be endangered by the same offense more than once. Virtually every state constitution or common law tradition has recognized the principle of double jeopardy. (See, "Twice in Jeopardy," 75 Yale L.J. 262 (1965)).
>
> Arbitrators have embraced underlying concepts of the principle of double jeopardy. While recognizing that an employer rightfully might evaluate prior incidents in order to determine an appropriate progressive sanction, once discipline has been imposed in a particular incident, it should not be increased, absent some justification. (See, e.g., Durham Hosiery Mills, 24 LA 356 (1955)). Arbitrators have believed it is unfair to lead an employee to think that a final sanction has been imposed only, later to learn that the discipline has been increased, based on management's reflection that the original action was too lenient or

otherwise inappropriate. (See, e.g., High Life Packing Co., 41 LA 1083 (1963); Olin-Mathieson Chemical Corp., 35 LA 95 (1960); Ross Gear and Tool Co., 35 LA 293 (1960); and Vulcan Corp., 37 LA 112 (1961)).
Supervisor Nguyen issued a verbal warning to the parties to the conflict, and he thought that ended the matter. His supervisor concluded that the discipline was not sufficiently severe and increased the sanction. The totality of the facts in this case support a conclusion that the Employer, in fact, exposed the grievant to double jeopardy and violated his due process rights under the parties' collective bargaining agreement."

Claude D. Ames **W0C-5M-2427** **October 5, 1992**
W0C-5M-2428

The issue went to management issuing defective Letters of Demand. Arbitrator sustained grievance as procedurally flawed but set aside double jeopardy argument. He states, "The concept of double jeopardy is well established in the industrial work place. It arises often as a due process consideration in arbitration for its policy of protecting employees from being placed twice in jeopardy for the same offense. The concept of double jeopardy is deeply rooted in the American system of justice and is based on the well-settled principle that a person shall not be twice punished, or even exposed more than once to the risk of punishment for the same offense. However, the double jeopardy concept is held inapplicable where the preliminary action taken against an employee may not reasonably be considered as final. Moreover deferral of a penalty for legitimate reasons is a different situation than disciplining an employee twice for the same penalty.
In order to assert the defense of double jeopardy, the Union must show that Management has previously imposed a penalty upon grievants for their shortages. Double jeopardy applies only where Management, after previously imposing a penalty, attempts to do so again for the same reasons as originally stated. The concept of double jeopardy does not attach to an arbitral proceedings where Management has not either imposed a penalty or taken some disciplinary action to correct for the shortages."

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John C. Fletcher **C0C-4M-D-12920** **May 1, 1993**
C0C-4M-D-16271

Indefinite Suspension and Removal for allegedly using postal funds. Overturned based on procedure. Arbitrator begrudgedly found double

jeopardy as 16.2 discussion given for same thing. As facts same on subsequent discipline concluded due process violation.
The other procedural problem was relying solely on basis of PI's - I.M. Arbitrator believed some type of independent investigation required.

205

SYNOPSIS
EVIDENCE AFTER THE FACT

Robert W. McAllister **C7C-4U-D-7840** **March 29, 1989**

Arbitrator agreed evidence gathered after discipline issued not relevant. However, postal inspector's investigative memorandum sufficient to constitute a proper investigation. As stated on pages 7 and 8, "Clearly, in this removal, the Postal Service did rely solely upon the information supplied in the IM. The Union thinks this is violative of the principles of just cause since Management did not conduct an investigation independent from the IM. Normally, matters of alleged misconduct involve events directly relating to the working environment. Issues, such as irregular attendance, insubordination, poor work performance, fighting, etc., require a thorough and objective investigation by Management. However, some events are so self-evident that an investigation becomes a mere formality. In cases involving alleged drug transactions, the Postal Inspection Service frequently conducts undercover operations which may involve paid informants. This Arbitrator finds no basis to quarrel with local Management's decision to rely solely upon the results of such an operation so long as the evidence produced at the hearing supports Management's determination the employee acted as charged.". Arbitrator believes Articles 15 and 31 do not require discovery. Therefore making the confidential informant available but not requiring him to talk is acceptable.

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SYNOPSES
FORMAL CHARGE

J. Earl Williams **S8C-3W-D-21372** **December 4, 1981**
S8C-3W-D-21356

Arbitrator reasoned management had not proven charges. Went on to point out two due process concerns. The first dealt with a serious lack of investigation and obtaining the grievant's side of the story. The latter was management not setting forth in the grievance procedure the facts relied on to support their position, see pages 42 and 43.

Daniel G. Collins **NAT-1A-D-29222** **September 25, 1987**

Procedurally case mitigated as past elements of discipline still in grievance procedure. Therefore not considered and removal reduced.

SYNOPSES
FLAWED GRIEVANCE STEPS

J. Fred Holly **S8N-3D-D-34092/3** **February 15, 1982**

Arbitrator reasoned management committed several procedural errors which were viewed as fatal:

1) No review and concurrence,
2) Management withheld requested documents, and
3) Step 3 management answer lacked detailed reason for denial.

Robert W. Foster **S8W-3Q-D-35151** **March 12, 1982**
S1H-3Q-D-18

Arbitrator ruled management committed a fatal error when they issued a Step 3 decision which lacked a statement of reasons for denial. Also cites case by Holly.

Nicholas H. Zumas **E1R-2F-D-8832** **February 10, 1984**

Arbitrator stated management committed two fatal procedural errors:

1) Under Article 16.6(8) no review or concurrence as discipline issued by reviewing authority, and

2) Because of 1) Steps 1 and 2 at local a "sham".

William J. LeWinter **S1N-3F-D-39496** **August 13, 1985**
S1N-3F-D-42106

The above case relates to an indefinite suspension and discharge based upon seven counts of food stamp fraud and a Grand Jury indictment. The Arbitrator sustained the grievance and gives an in depth analysis of several other arbitrators' awards concerning due process. The Arbitrator's decision is based upon the fact that the immediate supervisor did not issue the discipline but the head of the facility. Extensive evaluation of the Step 1 proceedings.

J. Earl Williams **S4C-3W-D-51083** **November 30, 1987**

Although dispute on who issued discipline, this in and of itself not enough to procedurally overturn removal. However, management's failure to provide relevant information hampered union's representation

of grievant. Further, management failed to furnish a written Step 2 and this further hampered the union. Collectively these errors were serious enough to affect the due process rights of the grievant.

Robert W. McAllister **C7C-4A-D-31247** **May 28, 1991**

The Union bypassed Step 1 and appealed a discharge case directly to Step 2. Management argued Union limited to Article 2 arguments. The arbitrator in sustaining the grievance indicated, that the clear and unambiguous language of Article 15.2, Section 3, requires management to state its reasons for denying the Union's Step 3 appeal. Management at Step 3, instead of relying upon the reasons presented at Step 2, began the decision by stating, "...The removal was for just cause. The denial then addresses specific facts in support of that decision, including the Grievant's prior discipline record and the 'record of evidence'.". Therefore, it was unreasonable to expect the Union to make a decision on whether or not to appeal the Step 3 decision to arbitration without knowing management's reasons for denial. Therefore, the arbitrator ruled that the grievance was not limited to the provisions of Article 2, and the Union has the right to require management to establish that it had just cause for the Notice of Removal.

Robert W. McAllister **C7V-4D-D-26210/27098** **January 20, 1992**

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Management had just cause in placing the grievant in a non-pay status as a result of his selling a small quantity of marijuana to Inspector Walton on November 9, 1989.

The arbitrator indicated that the selling of drugs is inconsistent with, and contrary to the best interests of the Postal Service, and a dischargeable offense. However, he stated: "But for the unexpected and surprising testimony of Supervisor Tania Brown, this arbitrator would have upheld management's decision to remove the grievant from service notwithstanding his long and discipline free record."

Ms. Brown on cross-examination disavowed any responsibility for the grievant's removal. She stated, she did not investigate the incident, did not speak to the grievant, but rather, did what she was told to do. Moreover, Brown volunteered she did not have the right to resolve the grievance at Step 1. Back to work without backpay and demonstration drug and alcohol test passed.

Bernard Cushman **C90C-4C-D-93009256** **June 27, 1994**
C90C-4C-D-93009254

Arbitrator Cushman set aside an emergency suspension and removal because of a Step 1 designee's lack of decisional authority. The grievant was removed for failing to safeguard postal funds after an audit revealed a shortage of $4,707.91 in the grievant's accountability and 18 COD tags were found in the grievant's drawer. The arbitrator ruled initially that the emergency suspension lacked just cause since no support existed to prove that the grievant's retention could have resulted in loss of U.S. mail. In addition, an emergency suspension could not be based on a "failure to account for funds". The arbitrator held further that setting aside the removal was warranted because the Postal Service's step 1 designee refused to discuss the grievance and lacked authority to resolve it thereby rendering the procedure a "sham".

W. Gary Vanse **H90V-1H-D-95063943** **June 13, 1996**

Initial removal voided then reissued. Later management unilaterally reduced to a major suspension. Addressing one of the many procedural errors the Arbitrator found at page 13 the Employer had erred by allowed the reviewing authority to also be the Step 2 designee in disregard of the EL-921.

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SYNOPSIS
HEARSAY

Robert F. Condon **E4C-2A-D-51007** **August 15, 1988**

"Regardless of any of the foregoing facts and comments, what this case boils down to is a matter of credibility. The Postal Inspectors claim that one of them presented the Grievant with the found money order along with some stamped envelopes. The Grievant, in turn, claims that he did not return them to her. The Investigative Memorandum fails to state whether or not the Inspector pointed out to the Grievant that there was a money order in between the stamped envelopes. It stated 'The second Inspector, C.R. Smith, who was also in the Post Office, then picked up the envelopes, verified the money order was included, and returned them to Ms. Gaston, stating he had found them at the table. (emphasis added). There is no verification as to what them included. Was it just the envelopes or was it the envelopes and the money order? It is left to the imagination of the reader.

But, perhaps the most important short-coming of the Postal Inspector's presentation is the fact that they did not use the services of a corroborating witness. It is a case of the Inspector's word against that of the Grievant. How easy it would have been to have another person acting as the Inspector's wife, girl friend or male friend present to witness the transaction. If that were the case, this matter would have a foregone conclusion. However, since no such witness was available, I find it difficult to uphold the Suspension and Removal actions."

211

Carlton J. Snow **W7C-5F-D-27273** **September 26, 1991**

Removal for allegedly failing to cooperate in a postal investigation. Arbitrator overturned action as evidence basically hearsay. He opines, "Scrutiny of the facts in this case makes clear that the Employer relied strongly on hearsay evidence to establish just cause for the grievant's removal. The arbitrator received neither eyewitness nor even circumstantial evidence to establish the grievant's alleged misconduct. Because the case can be understood on the basis of evidentiary principles, it is not necessary to address procedural violations allegedly committed by management.

What is hearsay? Hearsay evidence has been defined as 'testimony in courts, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein.' (See, McCormack, Evidence, 582 (1972)). Hearsay evidence is a statement made outside the arbitration hearing which is offered at the hearing to establish the truth of the assertion that it

contains. The hearsay evidence rule exists because hearsay evidence prevents the great tester of evidence in the Anglo-American legal system from being used, namely, cross-examination cannot occur; and there has been a distrust in democratic countries of untested evidence. There generally is a desire to subject statements made outside the arbitration hearing room to cross-examination at the hearing in order to test a person's sincerity, perception, memory, and narration of the facts. One purpose of cross-examination would be to test whether or not the speaker had any incentive to fabricate.

As a general rule in arbitration, hearsay evidence has been suspect. (See, e.g., Weyerhaeuser Co., 85-1 ARB 8102 (1984); Bamberger's, 59 LA 879 (1972); Dayton Pepsi-cola Bottling Co., 75 LA 154 (1980); Akron General Medical Center, 77-2 ARB 8336 (1977); and Crestwood Hospitals, Inc., 86-1 ARB 8084 (1985)). Arbitrators generally have found a reliance on hearsay evidence as being inconsistent with a fair hearing. (See, Warner & Swasey Co., 65 LA 709 (1975)). The Employer has offered statements by a customer who never testified to prove facts at the core of management's decision to discharge the grievant.

The problem is more than an inability to cross-examine a witness. It is more than not being able to ask Ms. Walsh what she actually saw and said on the day of the incident. There is also the problem of whether or not she had any reason to lie. For example, even though she allegedly had had no prior contact with the grievant, might she have been a pathological liar? Moreover, how articulate a person was the customer, and did she adequately describe to the postal inspector what she intended to say? Of importance also is the fact that the customer has not given her statements under oath and in a setting where she could be observed by a neutral third party. What we have been left with is a recounting of her statements by Inspector Cruz whose veracity has not necessarily been called into question, but did the customer say what she intended to say to Inspector Cruz, or say to her what she would have said to the arbitrator?" 212

Bernard Cushman **E0C-2C-D-5497** **November 16, 1992**

"The Arbitrator is of the view that under the circumstances of this case the Union's contention has merit. The emergency suspension must therefore be set aside. There is room under Article 16 Section 7 for the exercise of managerial prudence in the fact of threats of violence. However, to act upon a hearsay report with no attempt to interview the employee who allegedly reported the statement is not to act prudently. Where it also turns out that there is no probative evidence that any such threat was made, the suspension may not stand.

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

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SYNOPSES
MEANINGFUL INVESTIGATION

Peter DiLeone **NC-C-13901-D** **September 12, 1979**

Suspension was not for just cause. Grievant charged with assault of sheriff. Service did not have reasonable cause to believe he was guilty of a crime at the time of suspension. No serious investigation; no confrontation of grievant; unverified, one-sided account of incident. The Arbitrator concluded that there was no basis for the suspension until after a week into the suspension when the investigation was performed and ordered backpay for the week prior.

Wayne E. Howard **E8C-2D-D-2392** **May 30, 1980**

Union argued management failed to properly investigate the incident leading to discipline. Arbitrator ruled management erred in their investigation, failed to confiscate available evidence and ignored requirements of Article 16.8.

J. Earl Williams **S8C-3W-D-21372** **December 4, 1981**
S8C-3W-D-21356

Arbitrator reasoned management had not proven charges. Went on to point out two due process concerns. The first dealt with a serious lack of investigation and obtaining the grievant's side of the story. The latter was management not setting forth in the grievance procedure the facts relied on to support their position, see pages 42 and 43.

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J. Earl Williams **S1C-3F-D-17681** **July 12, 1983**

Arbitrator ruled management erred in that the reviewing authority issued the discipline. Further, the lack of meaningful investigation seriously prejudiced management's case. As stated by the Arbitrator on page 13, "Based upon the above, the Arbitrator must conclude that the second indefinite suspension of the grievant was a gross miscarriage of justice. He cannot find a semblance of 'reasonable cause' to believe that the grievant is guilty of a crime. Management should have marshalled innumerable facts to the contrary.".

William Eaton **W7S-5D-D-3638** **December 8, 1988**

Arbitrator ruled management erred in solely relying on postal inspector's investigative memorandum. Due process requires a thorough

investigation by supervisor. This is especially true where investigative memorandum is incomplete. Cites Fogel award which also points out this keeps burden of proof from shifting to postal inspector who is not the agent for taking disciplinary action.

Dianne Dunham Massey **S7C-3A-D-9294** **February 7, 1989**

Arbitrator would address a variety of due process arguments and cites. She set aside most but viewed the failure of management to conduct a full and fair investigation to be damaging. This coupled with miscommunication led to a back to work award with no backpay.

John H. Abernathy **W7C-5G-D-3893** **February 22, 1989**

Union argued a wide variety of procedural errors including; failure to provide relevant information; failure to allow private interview with CI; entrapment; and although not argued, Weingarten was anticipated. The Arbitrator would conservatively reject each argument and applicable case law. Case includes a wide variety of cites which cut both ways. Bottom line, removal upheld.

Robert W. McAllister **C7C-4U-D-7840** **March 29, 1989**

215 Arbitrator agreed evidence gathered after discipline issued not relevant. However, postal inspector's investigative memorandum sufficient to constitute a proper investigation. As stated on pages 7 and 8, "Clearly, in this removal, the Postal Service did rely solely upon the information supplied in the IM. The Union thinks this is violative of the principles of just cause since Management did not conduct an investigation independent from the IM. Normally, matters of alleged misconduct involve events directly relating to the working environment. Issues, such as irregular attendance, insubordination, poor work performance, fighting, etc., require a thorough and objective investigation by Management. However, some events are so self-evident that an investigation becomes a mere formality. In cases involving alleged drug transactions, the Postal Inspection Service frequently conducts undercover operations which may involve paid informants. This Arbitrator finds no basis to quarrel with local Management's decision to rely solely upon the results of such an operation so long as the evidence produced at the hearing supports Management's determination the employee acted as charged.". Arbitrator believes Articles 15 and 31 do not require discovery. Therefore making the confidential informant available but not requiring him to talk is acceptable.

Margo R. Newman **C7T-4B-D-24850** **January 24, 1991**

Management did not have just cause to remove an employee with 25 year of service for allegedly threatening a supervisor.
The arbitrator stated: "...based upon the totally of circumstances surrounding the January 9 incidents in question, the Postal Service's failure to immediately react or pursue any type of investigation of the alleged threats, its failure to seek, obtain or present any corroboration concerning grievant's comments, and the history of 'bad blood' between grievant and supervisor Topp, I find that the Postal Service failed to meet its burden of proving that just cause exists for the removal of grievant.". She further indicated that inherent in the concept of just cause is a requirement that a full and fair investigation into the facts, and consideration of all circumstances prior to any disciplinary action being taken. She indicated that these elements were missing from the instant case.

Elliott H. Goldstein **C7C-4M-D-29237** **May 23, 1991**

Converted check taken from the mail to own use and was fired. Little dispute on the facts of the case. However, due process was a major factor. The reinstatement is based on a procedural defect since apparently there was not a fair and objective investigation prior to issuance of the discharge. Not only did the grievant's supervisor not receive an Investigative Memorandum, he also was not talked to by the postal inspectors, other than to have been told essentially that the grievant "admitted that she took the check and cashed it". He stated: "For him to propose removal on that basis, never having reviewed the investigation's results, is a clear violation of the Grievant's due process..."
He reinstated the grievant, but without back pay.

216

John C. Fletcher **C0C-4M-D-09549/12003** **February 13, 1992**

Removal for misappropriation of postal funds - COD scam. Overturned based on management failing to provide relevant information - PI's video tape and management failing to do their own investigation - rather they relied on PI's-I.M. Brief available.

Irwin J. Dean, Jr. **E0C-2L-D-3657** **May 26, 1992**

As a result of an arrest on March 24, 1991 charging the grievant specifically with possession of cocaine and carrying a concealed weapon, the Service issued the grievant a removal notice.

Although the original drug abuse charge was a fourth degree felony under Ohio law, the charge to which the grievant actually pleaded guilty to was a first-degree misdemeanor. The weapons concealment charge was dismissed, but the grievant pleaded guilty receiving a ninety day suspended sentence, a two year period of non-reporting probation and a $1,000.00 fine.

The arbitrator, while conceding that under certain circumstances a criminal conviction or use of drugs may warrant discharge, the Union observes that discharge is not an automatic penalty for one convicted of a crime.

After carefully considering all the evidence presented, the arbitrator sustained the grievance. He stated, "Although it cannot be disputed that the Grievant was convicted of a misdemeanor, it is apparent that the pre-disciplinary investigation which the Service conducted was completely inadequate. Apart from reciting the charge to which the Grievant plead (sic) guilty, it does not appear that responsible Service managerial personnel ever questioned the Grievant for his version of the pertinent events.".

As the Union pointed out, the grievant pleaded guilty to a misdemeanor on the advice of counsel and that there was no evidence whatsoever of adverse publicity arising from the incident. Moreover, the grievant had no prior disciplinary history and, in fact, had been commended for his exemplary attendance record and the suggestions he had made to
217 improve operations. They further pointed out that the grievant's immediate supervisor indicated that he did not initiate the disciplinary action but simply acceded to the wishes of his superiors, in removing the grievant.

The arbitrator sustained the grievance, with full back pay.

John C. Fletcher **C0C-4A-D-2189** **June 16, 1992**
C0C-4A-D-2725

Removal overturned based on several procedural errors. Lack of a meaningful investigation as supervisor relied solely on PI-IM. Did not talk to CI, grievant or immediate supervisors. Cites other case law for support; see page 9.

John C. Fletcher **C0C-4L-D-3562** **June 26, 1992**

Notwithstanding the fact that the grievant stood in open court in the state of Illinois and told the court that he was pleading guilty to the charge of Aggravated Criminal Sexual Abuse, Class 2, the evidence presented convinced the arbitrator that the facts did not support a conclusion that the grievant actually engaged in this conduct.

Although the arbitrator indicated that he could not ignore the result of the plea bargain, nevertheless, a plea of guilty does not automatically foreclose future employment with the Postal Service, as suggested by management. The arbitrator stated, "Instead, the Arbitrator subscribes to the notion that due process requirements of the Agreement obligate Management to thoroughly investigate the incident, interview the charged employee, weigh mitigating circumstances and then develop a suitable resolution, based upon accepted disciplinary precepts as well as contractual requirements.".

The arbitrator further concluded that the Service had not established an adequate nexus between the guilty plea and the abilities of the grievant to perform successfully, and his return to employment would have a potential adverse impact upon the Service or the community.

The arbitrator found another defect in the Service's case, that the individual proposing the removal action did not investigate the situation and failed to even attempt to discuss the situation with the grievant and allow him to have his "day in court".

Although the arbitrator was unwilling to embrace the notion that a fatal flaw exists and that discipline must be reversed if supervisors do not follow the recommendations of the Supervisor's Guide for Handling Grievances the arbitrator, nevertheless, stated that he subscribed to the well accepted standard in the Postal Service, and industry in general, that disciplinary actions must be preceded by an adequate investigation at which the employee is afforded an opportunity to explain his version of the matter. The undisputed facts in the record indicate that an adequate investigation was not provided, nor was the grievant given an opportunity to state his side of the story before the proposed removal was issued.

The arbitrator sustained the grievance.

218

Charles E. Krider **C7C-4L-D-30219** **October 14, 1992**
C7C-4L-D-31295

Management had just cause to place the grievant on an indefinite suspension since there was reasonable cause to believe that the grievant had committed a crime for which a sentence of imprisonment could be imposed.

However, management did not have just cause to remove the grievant based upon its failure to provide the grievant of due process.

The Postal Service contended that the grievant was adequately interviewed by the Postal Inspection Service and, therefore, an additional interview by the supervisor was not required. The arbitrator disagreed . He stated, "The supervisor must be satisfied that all appropriate

questions have been asked and the employee has been given a full opportunity to present his side. The supervisor must also be satisfied the Investigative Memorandum accurately relates the events from the employee's perspective. The Postal Inspector has no responsibility for determining just cause and there is no assurance that an Inspector will conduct a full interview that provides a basis for a just cause determination."

Carlton J. Snow **W7T-5M-D-23860** **November 25, 1992**

Issue went to an indefinite suspension for unacceptable conduct and falsification of his employment application. Arbitrator opined management erred in their investigation. PI's terminated interview on their own after Union steward arrival. Information could have been provided to offset alleged criminal activities.

David Goodman **W7C-5F-D-28551** **December 28, 1992**

Management withheld statements which led to removal. Allegedly accusatory yet failing to prove anything, management's reliance on them is wrong. Management also relied on discipline no longer a matter of record. Finally management did not share a copy of the contract doctor's findings with the Union. Citing the EL-921 and the need for management
219 to be "thorough and objective" Arbitrator concluded management's investigation fell short of the required standard. Interestingly disagrees with Snow's decision (W7C-5D-D-9387); which cites Loudermill.

John C. Fletcher **C0C-4M-D-12920** **May 1, 1993**
C0C-4M-D-16271

Indefinite Suspension and Removal for allegedly using postal funds. Overturned based on procedure. Arbitrator begrudgedly found double jeopardy as 16.2 discussion given for same thing. As facts same on subsequent discipline concluded due process violation.
The other procedural problem was relying solely on basis of PI's -I.M. Arbitrator believed some type of independent investigation required.

I. B. Helburn **S0C-3A-D-16735** **May 27, 1993**

Removal for insubordination. Set aside as case fraught with intertwined investigative and due process lapses. Arbitrator stated, "Lack of investigation and lack of due process alone are often reasons for overturning discipline, even where charges are proven. But in this instance, as in many, the lack of an investigation and the lack of due

process contribute to management's inability to prove the charges by even a preponderance of the evidence, let alone a higher standard.". It is clear management must talk to the grievant and do a meaningful investigation.

Michael Jay Jedel **S0C-3T-D-15396** **July 21, 1994**

Arbitrator sustains grievance based on management relying solely on PI-IM. Gives numerous cites which support the wrongness of this. Points out management must separately consider: guilt; extenuation or mitigation; and CBA considerations and safeguards. Issue went to removal for false claims.

Lamont E. Stallworth **C0C-4U-D-19152** **June 20, 1994**

Removal for threatening a co-worker. Arbitrator ruled management made a number of errors in area of proper and meaningful investigation. Relied in part on off-duty incident but did not investigate it. Delay in issuing removal (7 months) also hurt management's case. Sustained grievance.

Joseph S. Cannavo, Jr. **A90C-1A-D-93020676** **July 20, 1995**

Removal for overpayment and falsification of employment application, etc. Management relied solely on three PI-IM's. Therefore no pre-disciplinary interview or self determination by management. Grievance sustained. 220

Bennett S. Aisenberg **E90C-4E-D-96006429** **May 13, 1996**

Management removed employee based on violation of a conditional settlement agreement. Arbitrator gives good insight into due process (pages 8-10) which included the need to do a meaningful investigation and give the employee an opportunity to tell her side of the story. Arbitrator returned employee conditionally to work.

Harry N. MacLean **E90C-4E-D-95031477** **May 16, 1996**

Removal for falsification of records - Form 3971. Management rushed to discipline rather than conducting a full and fair investigation of the charge. Service relied on an overly narrow definition of illness. Grievance sustained.

SYNOPSES
PENALIZED EMPLOYEE MUST BE GIVEN FULL CHANCE TO PROTEST

US Supreme Court (Loudermill) **83-1362** **March 19, 1985**

Cited by advocates and arbitrators regarding due process requirement to afford charged employee with the right to respond to charges prior to removal. Court found employee had constitutional right to notice and opportunity to respond. Confusing and sometimes mis-applied cite. Suggest staying away from it.

William P. Murphy **61 LA 443** **September 14, 1973**

Telephone company was not justified in imposing five-day suspension on service technician who did not reveal until last step of grievance procedure his reason for not obeying directive of employer to work overtime at location 31 miles away, since (1) employer violated industrial due process by imposing penalty without first asking grievant his reason for his refusal, (2) grievant has been employed by employer for 15 years and has impeccable work record, and (3) grievant's refusal to perform required work is his first offense. Penalty is reduced to one day suspension.

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William E. Rentfro **AC-W-24 658-D** **February 14, 1979**

Arbitrator held the seven month delay before the investigation began to be untimely. Cites Seitz case AC-N-16540. Also felt management compounded error by not giving grievant an opportunity to explain her side of the story.

Peter DiLeone **NC-C-13901-D** **September 12, 1979**

Suspension was not for just cause. Grievant charged with assault of sheriff. Service did not have reasonable cause to believe he was guilty of a crime at the time of suspension. No serious investigation; no confrontation of grievant; unverified, one-sided account of incident. The Arbitrator concluded that there was no basis for the suspension until after a week into the suspension when the investigation was performed and ordered backpay for the week prior.

J. Earl Williams **S8C-3W-D-21372** **December 4, 1981**
S8C-3W-D-21356

Arbitrator reasoned management had not proven charges. Went on to point out two due process concerns. The first dealt with a serious lack of investigation and obtaining the grievant's side of the story. The latter was management not setting forth in the grievance procedure the facts relied on to support their position, see pages 42 and 43.

Carlton J. Snow **W1C-5G-D-4252** **July 8, 1983**

Grievant was charged with attempting to run down two workers in the parking lot with his auto. The Arbitrator sustained the grievance and gives a detailed evaluation concerning the rights of the individual to be allowed to prepare an adequate defense at all of the steps of the grievance procedure. The union claimed that the grievant had a language barrier and could not adequately represent himself without the presence of an interpreter at the various steps of the procedures.

Carlton J. Snow **W7C-5D-D-9387** **March 17, 1989**

Arbitrator gives insight into due process requirements on pages 21 - 24. Uses a 1985 Supreme Court Ruling, Loudermill, to offset right to respond
222 to charges. Although limiting in its scope, the language will undoubtedly come back to haunt us where employee's still in pay status when grievance initiated. See Goodman case W7C-5F-D-28551, 12/28/92, for counterpoint.

Jonathan S. Liebowitz **N7C-1T-D-3967** **April 6, 1989**

Union argued entrapment, Miranda, and grievant not being given an opportunity to tell his side of story. Arbitrator set aside each of these arguments with clear reasoning.

Lamont E. Stallworth **C7C-4D-D-28874** **February 15, 1991**

The grievant was issued a proposed Letter of Removal after it was determined that he falsified his employment application by failing to list his conviction for petty theft in 1972.
The Union's basis argument was that management violated the provisions of Article 16 of the Collective Bargaining Agreement by their failure to thoroughly investigate and discuss the matter with the grievant prior to issuing the Letter of Removal.
Although the arbitrator was convinced that the grievant was well aware

of his conviction and deliberately failed to list it on his employment application, he nevertheless stated: "The Undersigned Arbitrator has no hesitation in concluding that, but for the violation of the contractual due process provisions, the grievance would have been denied without hesitation. However, the Service's failure to comply with the Collective Bargaining Agreement was as plain as the Grievant's intentional falsification of his 1989 application."
The arbitrator modified the Removal reinstating the employee as a new probationary employee without seniority and without back pay.

Susan Berk **E0T-2J-D-641** **February 7, 1992**

The arbitrator stated: "While I find that the Postal Service did not conduct a model investigation because it failed to interview Taylor who possessed information as the Grievant's claim of injury, this failure alone does not provide a basis that the Postal Service's investigation was so flawed as to warrant a finding that the grievance should be sustained for this reason alone."
However, the arbitrator did find that "the Postal Service, by failing to interview the grievant in a timely manner, violated the [basic] tenents of fairness that affords an employee the opportunity to respond timely to allegations."
She pointed out, that although the Postal Service had in its possession facts relating to the grievant's claim in December, 1990 and apparently interviewed witnesses which it deemed material on January 11, 1991, they did not interview the grievant until April 19, 1991, over three months after it interviewed other witnesses. She found that the Postal Service's delay was unreasonable.
She sustained the grievance, with full back-pay plus interest.

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Harvey A. Nathan **C0T-4M-D-4270** **May 5, 1992**
C0T-4M-D-5424

Emergency Suspension and Removal for abusive language and threatening a supervisor. Due process requires interview of employee. Cites EL-921 and other case law. Sustains Emergency Suspension and changes Removal to 7 Day Suspension.

John C. Fletcher **C0C-4L-D-3562** **June 26, 1992**

Notwithstanding the fact that the grievant stood in open court in the state of Illinois and told the court that he was pleading guilty to the charge of Aggravated Criminal Sexual Abuse, Class 2, the evidence presented convinced the arbitrator that the facts did not support a

conclusion that the grievant actually engaged in this conduct.
Although the arbitrator indicated that he could not ignore the result of the plea bargain, nevertheless, a plea of guilty does not automatically foreclose future employment with the Postal Service, as suggested by management. The arbitrator stated, "Instead, the Arbitrator subscribes to the notion that due process requirements of the Agreement obligate Management to thoroughly investigate the incident, interview the charged employee, weigh mitigating circumstances and then develop a suitable resolution, based upon accepted disciplinary precepts as well as contractual requirements.".
The arbitrator further concluded that the Service had not established an adequate nexus between the guilty plea and the abilities of the grievant to perform successfully, and his return to employment would have a potential adverse impact upon the Service or the community.
The arbitrator found another defect in the Service's case, that the individual proposing the removal action did not investigate the situation and failed to even attempt to discuss the situation with the grievant and allow him to have his "day in court".
Although the arbitrator was unwilling to embrace the notion that a fatal flaw exists and that discipline must be reversed if supervisors do not follow the recommendations of the Supervisor's Guide for Handling Grievances the arbitrator, nevertheless, stated that he subscribed to the well accepted standard in the Postal Service, and industry in general,
224 that disciplinary actions must be preceded by an adequate investigation at which the employee is afforded an opportunity to explain his version of the matter. The undisputed facts in the record indicate that an adequate investigation was not provided, nor was the grievant given an opportunity to state his side of the story before the proposed removal was issued.
The arbitrator sustained the grievance.

Charles E. Krider **C7C-4L-D-30219** **October 14, 1992**
C7C-4L-D-31295

Management had just cause to place the grievant on an indefinite suspension since there was reasonable cause to believe that the grievant had committed a crime for which a sentence of imprisonment could be imposed.
However, management did not have just cause to remove the grievant based upon its failure to provide the grievant due process.
The Postal Service contended that the grievant was adequately interviewed by the Postal Inspection Service and, therefore, an additional interview by the supervisor was not required. The arbitrator disagreed. He stated, "The supervisor must be satisfied that all appropriate

questions have been asked and the employee has been given a full opportunity to present his side. The supervisor must also be satisfied the Investigative Memorandum accurately relates the events from the employee's perspective. The Postal Inspector has no responsibility for determining just cause and there is no assurance that an Inspector will conduct a full interview that provides a basis for a just cause determination."

Bernard Cushman **E0C-2P-D-5870** **January 4, 1993**
E0C-2P-D-5871

"There is more substance, however, in the Union's claim of procedural irregularities and denial of due process. The most serious of these claims is, in the Arbitrator's opinion, the failure of the Postal Service officials to interview the Grievant before the decision to remove and the failure of the Postal Service to permit an interview of the Inspectors involved in the investigation. The concept of due process as applied to just cause is bottomed on a profound sense of fair play or just treatment enforced by law, a concept which has evolved through centuries of our constitutional history and that of England before us. Joint Anti-fascist Refugee Committee McGrath, 391 US 123, 162-63 (1951). In narrower terms in industrial relations due process is a requirement that before an employer imposes the heavy penalty of discharge in all fairness he or she must make an informed judgement. The employer must afford the employee an opportunity to be heard before passing sentence because he or she must know both sides of the story before he makes up his or her mind. This requirement is part of the employer's obligation to conduct a full and thorough investigation. Failure of management to make an objective, reasonable and comprehensible inquiry before assessing punishment has often been held to be a factor in an arbitrator's refusal to sustain discharge or discipline. Missouri Research Laboratories, 55 LA 197. See my decision in E4C-2K-D-32491 (Melvin Davis). Here no management official including the Inspection service interviewed the Grievant. There was therefore denial of due process. The tardiness of the Postal Service in furnishing information in accordance with the requirements of Article 15 and the failure to allow the Union to interview the Inspection Service aggravate the due process violation." Added to this, arbitrator found disparity. Made whole with no backpay. Issue went to Emergency Suspension and removal for selling drugs to Postal Inspection's Confidential Informant.

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I. B. Helburn **S0C-3A-D-16735** **May 27, 1993**

Removal for insubordination. Set aside as case fraught with intertwined

investigative and due process lapses. Arbitrator stated, "Lack of investigation and lack of due process alone are often reasons for overturning discipline, even where charges are proven. But in this instance, as in many, the lack of an investigation and the lack of due process contribute to management's inability to prove the charges by even a preponderance of the evidence, let alone a higher standard.". It is clear management must talk to the grievant and do a meaningful investigation.

Ernest E. Marlatt **S7T-3T-D-19287** **May 13, 1994**

Emergency Suspension and Removal changed to a 70 day Indefinite Suspension. Reduction based on a variety of procedural issues. In lengthy reasoning he takes on the need to afford the grievant a predisciplinary hearing, "Arbitrators have consistently held that an essential element of due process is to allow the employee to tell his side of the story to the official who will make the decision whether or not to take removal action, in this case Mr. Vieth, the Superintendent of Maintenance. This applies the rule announced by the Supreme Court of the United States in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 53 L.W. 4306 (1985). That case specifically pertains only to employees who have a property right to continued employment, but an employee covered by the APWU National Agreement has the same right
226 to job security as a civil servant except that the Postal employee's right is conferred by contract rather than by law. National arbitrator Carlton J. Snow applied the rule to the Postal Service, stating 'It is clear that an individual deserves an opportunity to explain his or her action prior to the deprivation of a property interest in continued employment, such as the los of wages' SM-85-044 (San Mateo Data Center, CA, 1988).

It is true that the Grievant was allowed to give input to the Postmaster prior to the issuance of the Letter of Decision dated November 18, 1988. However, the Letter of Decision relates entirely to the employee's rights under the Civil Service Reform Act. It is not a part of the disciplinary process set out in the National Agreement and is not even grievable. The effective date of the Grievant's removal was October 21, 1988, some three weeks prior to the issuance of the Letter of Decision. Furthermore, the Postmaster had already reviewed and concurred in Mr. Vieth's recommendation for removal action; after that point, Mr. Vieth's hands were effectively tied.

The significance of a predisciplinary interview was emphasized by Arbitrator Peter Seitz in a frequently cited Mail Handler grievance N1M-1A-D-4810 (New York, NY 1987):

At the risk of some repetition, but because of its importance in the Postal Service dispute-resolution system, I have to make the following

observations: It seems to me wholly appropriate for a supervisor who has the responsibility (with a concurring signature of his superior) of determining whether a disciplinary suspension should be imposed or whether there is just cause for discharge, to be guided and influenced, in the judgmental process, by what facts were developed by a Postal Inspector in the latter's properly conducted interview with a grievant, including, of course, statements voluntarily signed by the grievant in the course of such interview. The Postal Inspector, however, does not have the responsibility of determining whether disciplinary action should be taken and in my experience, as important as the function of the Postal Inspectors may be and however professionally and competently Postal Inspectors may perform their assigned duties, it is the supervisor who should be satisfied that the facts are such to warrant disciplinary action. As careful and conscientious as Postal Inspectors may be, they do not always ask all of the questions which bear on the question of whether the judgement of a supervisor should be exercised on the side of disciplinary action. The supervisor....cannot, in my judgement, be fully satisfied that he is acting fairly and justly unless he interviews the grievant and gets his version of the events before taking action.

The Postal Service argues that the Grievant waived his right to a predisciplinary interview when he declined to be interrogated by the Postal Inspectors and demanded an attorney. This argument is not persuasive. It is true that Mr. Vieth, could not have ordered the Grievant to discuss the incident with him, and if an involuntary discussion had taken place, any admissions made by the Grievant would be inadmissible in a subsequent criminal trial. However, Mr. Vieth was still obligated under the requirement for just cause to offer an invitation to the Grievant to tell his side of the story. For all we know, the Grievant might have been able to offer such a convincing exculpatory explanation that he would be allowed to remain in his job, perhaps under some sort of 'Last Chance' agreement. As the Court commented in *Loudermill* [citations omitted]:

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Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decision make is likely to be before the termination takes place."

Carol Wittenberg — **A90C-1A-D-93009216, A90C-1A-D-93009217, A90C-1A-D-93009218** — **July 17, 1994**

The three employees were discharged for selling cocaine to confidential informants. The arbitrator ruled that the Postal Service violated the grievants' due process rights as a result of the nearly two to three year delay before notices of removal were issued to the grievants following alleged drug sale incidents. According to the arbitrator, "[s]uch a serious delay, in the absence of good cause, is fundamentally unfair, and violates the spirit and intent of the National Agreement.". In addition, Arbitrator Wittenberg held that the Service's failure to interview the grievants before removing them deprived them of their "right to basic due process". She noted that the investigative memoranda upon which the Service relied did not contain any statements by the grievants. "Therefore, the manager[s] who issued the removal[s] had no opportunity to review the Grievant's story either orally or in writing."

Linda DiLeone Klein — **J90C-1J-D-94013819** — **September 21, 1994**

Removed for insubordination overturned based primarily on management not giving the grievant a reasonable opportunity to be heard prior to the issuance of discipline.

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Bernard Cushman — **C90C-4C-D-93017832, C90C-4C-D-93017839** — **November 4, 1994**

Removal for engaging in a conspiracy to sell a controlled substance on postal property. Management relied on PI's - IM. Awarded limited backpay but not reinstatement as after the fact convicted of a state crime. However, admonishes management on repeatedly commiting due process errors with their disciplines. In this case they did not personally talk to grievant.

Randall M. Kelly — **B90C-4B-D-94038712** — **January 9, 1995**

Emergency suspension and removal based on missing bank deposit. Set aside based on faulty polygraph test, not giving employee a chance to tell his side of the story, and violating the grievant's Weingarten rights.

I.B. Helburn — **H90C-1H-D-95010783** — **May 11, 1995**

Removal for last chance agreement. Arbitrator set aside discharge based

on management's failure to conduct a pre-disciplinary interview.

Bennett S. Aisenberg **E90C-4E-D-96006429** **May 13, 1996**

Management removed employee based on violation of a conditional settlement agreement. Arbitrator gives good insight into due process (pages 8-10) which includes the need to do a meaningful investigation and give the employee an opportunity to tell her side of the story. Arbitrator returned employee conditionally to work.

SYNOPSES
QUANTUM OF PROOF

Howard Gamser **AB-N-10855** **June 12, 1976**

Removal for misappropriation of postal funds - using postage tapes for personal gain. In addressing standard of proof needed by management arbitrator said, "In this case, a fifteen year veteran of the USPS, who apparently had an unblemished record before this case arose, and who had twenty years of honorable service in the Navy behind him as well, has been accused of criminal and morally reprehensible conduct. In such an instance, in the opinion of the undersigned, the 'beyond a reasonable doubt' standard must be met by the Employer. The grievant's reputation cannot be shattered by employing a lesser standard. The Employer cannot brand Karamanion as an ordinary thief in the eyes of his family, friends, fellow employees by the submission of less proof than would establish his guilt beyond a reasonable doubt. The undersigned is of the opinion that the weight of arbitral authority supports this position. The social stigma attaching to the employee justifies the higher burden of proof than that which might be required in some other case of a breach of industrial discipline.". Grievance sustained and employee made whole.

Wayne E. Howard **NC-E-3494-D** **January 31, 1977**
NC-E-3495-D

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Removal for stealing a check from mailbox. Overturned based on quantum of proof. Stated, "From the above evidence, it cannot be concluded beyond a reasonable doubt that the grievant was guilty of the offenses with which he was charged. It is axiomatic that the burden of proof is on the Service to demonstrate that the grievant was guilty, and not on the grievant to prove that he was innocent. It is equally well-established that in offenses of a grave moral character, such as those in the instant matter, the quantum of proof must be correspondingly stronger. While the Service's investigation may have led to a reasonable suspicion of the guilt of the grievant, the evidence adduced simply does not meet the standard of proof required to support the charges against the grievant. The action of the Service was based on these charges, and it is on that basis that its action must be assessed.".

Thomas T. Roberts **AC-W-21,167-D** **May 31, 1978**

Removal for theft of mail. Guilty of poor judgement but not theft. Arbitrator felt, "The precedent of earlier arbitration awards rendered under the National Agreement firmly establishes the concept that when

the Postal Service accuses an employee of mishandling mail matter it must be prepared to assume that heavy burden of proof associated with allegations involving the commission of a statutory crime or an act or moral turpitude. In the light of that standard as well as the concepts set forth above, what disposition is proper in the present case?". Discipline reduced to 30 day suspension.

Walter H. Powell **E7C-2A-D-34888** **June 20, 1991**

Removal for misconduct. Arbitrator reasoned quoting another arbitrator, "Arbitrator Howard (E4T-2L-D-48,800) stated 'Where, as here, the charges against an employee involve questions of grave moral turpitude, such as stealing, fraud or falsification, the quantum of proof demanded by an arbitrator becomes much greater.' The Service must be able to prove conclusively that the grievant engaged in dishonest conduct." Made whole.

Rose R. Jacobs **N7C-1R-D-39209** **December 4, 1991**
N0C-1R-D-1037

Removal behind PI scam on postage dues. Management upheld in part - modified discipline. Stated, "It is obvious, no matter how the allegations against the Employee are worded, a crime accusation is implicit, and
231 whenever industrial discipline is premised upon allegations of criminal activity, the Employer bears a greater evidentiary burden. Some Arbitrators characterize the burden as requiring the proof 'to be beyond a reasonable doubt' -- others speak of 'clear and convincing evidence'. These standards are somewhat vague and difficult to define or apply. This Arbitrator does not believe that standards of proof which pertain in courts of law are particularly germane in arbitration. Nevertheless, the Grievant is entitled to demand that the case against him be sufficiently established, and, in view of the seriousness of the charge and the lifelong problems it will cause him if it is upheld, it is appropriate to accord Mr. Nowak the benefit of reasonable doubts. Therefore the question of whether or not the Postal Service's evidence dispels reasonable doubts and makes a believable case against Mr. Nowak is very much at issue.
Therefore, for all of the foregoing, in evaluating the evidence in this case to support a charge of stealing, the Arbitrator believes the evidence must prove the charge 'beyond a reasonable doubt'. This is the firmly established standard or principle adopted by the law of this society in criminal cases and means that reasonable persons looking at the evidence would be so sure of the fact of stealing that they would have no hesitancy in finding the person guilty of the act and would be morally

sure that the accused actually committed the act. Both arbitration and judicial proceedings are established and formalized methods of dispute settlement in our establishment. The effects of a finding of guilt in a charge of stealing in a judicial proceeding are generally in terms of fine, imprisonment or probation, or suspended sentence; the result is generally the loss of property or liberty. The effects in a finding of guilt in an arbitration proceeding are generally loss of a job or where the guilty person is penalized but kept on a job under probationary rules which restrict his/her liberty. There are multitudes of cases where arbitrators can, do and must find guilt as quickly as a court and with similar assurance. But when the criminal type case approaches a borderland of cross currents of conflicting evidence, the arbitrator becomes acutely aware of the responsibility which he/she is assuming toward the accused.

It is important however to note that the Arbitrator's responsibility is not only toward the accused, but also toward Management. A hasty arbitration award without the clear care required could have deep and most unprofitable effects upon the Employer in its labor relations because employees are members of a larger society, and, if the surface is scratched, one most probably would find that they expect that is right and fair, and, what is generally accepted by our society as right and fair in this type of case, requires the use of the highest standard of proof as heretofore stated.". Back to work without backpay for procedural reasons.

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George V. Eyraud, Jr. **S0C-3A-D-9758** **November 6, 1992**

Removal for misappropriation of postal funds. Arbitrator ruled laxity and inconsistency on check policy. Applied proof beyond reasonable doubt as case involved alleged criminal act. Made whole.

Lawrence R. Loeb **D90T-2D-D-93017986** **February 16, 1994**

Employee fired for selling drugs. Union raised defense of entrapment. Arbitrator agreed. Sets aside reasoning of Klein and develops history of term. Reads Jacobson v. United States as requiring proof beyond a reasonable doubt on defendent being disposed to commit the criminal act prior to first being approached by Government Agents.

SYNOPSES
REVIEW AND CONCURRENCE
ARTICLE 16.8

Wayne E. Howard **E8C-2D-D-2392** **May 30, 1980**

Union argued management failed to properly investigate the incident leading to discipline. Arbitrator ruled management erred in their investigation, failed to confiscate available evidence and ignored requirements of Article 16.8.

J. Fred Holly **S8N-3D-D-34092/3** **February 15, 1982**

Arbitrator reasoned management committed several procedural errors which were viewed as fatal:

1) No review and concurrence,
2) Management withheld requested documents, and
3) Step 3 management answer lacked detailed reason for denial.

J. Earl Williams **S1C-3F-D-17681** **July 12, 1983**

Arbitrator ruled management erred in that the reviewing authority issued the discipline. Further, the lack of meaningful investigation seriously prejudiced management's case. As stated by the Arbitrator on page 13, "Based upon the above, the Arbitrator must conclude that the second indefinite suspension of the grievant was a gross miscarriage of justice. He cannot find a semblance of 'reasonable cause' to believe that the grievant is guilty of a crime. Management should have marshalled innumerable facts to the contrary.". 233

James B. Giles **S1N-3W-D-26097** **December 7, 1983**
S1N-3W-D-26088

Arbitrator reasoned as immediate supervisor could have resolved at Step 1 but was by-passed by postmaster and two other supervisors a fait accompli was triggered. As such, due process violated and grievance sustained.

Nicholas H. Zumas **E1R-2F-D-8832** **February 10, 1984**

Arbitrator stated management committed two fatal procedural errors:

1) Under Article 16.6(8) no review or concurrence as discipline

issued by reviewing authority, and

2) Because of 1) Steps 1 and 2 at local a "sham".

William J. LeWinter **S1N-3F-D-39496** **August 13, 1985**
S1N-3F-D-42106

The above case relates to an indefinite suspension and discharge based upon seven counts of food stamp fraud and a Grand Jury indictment. The Arbitrator sustained the grievance and gives an in depth analysis of several other arbitrators' awards concerning due process. The Arbitrator's decision is based upon the fact that the immediate supervisor did not issue the discipline but the head of the facility. Extensive evaluation of the Step 1 proceedings.

Jonathan Dworkin **C4C-4U-D-20367** **February 2, 1987**

Arbitrator agreed 16.8 not followed and reluctantly returned a thief to work. Can not have just cause with this type of due process violation.

Elvis C. Stephens **S7C-3A-D-4339** **August 22, 1988**
S7C-3A-D-2079

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Employee's Weingarten rights were violated. Further, management did not conduct a proper investigation and there is doubt as to whether or not 16.8 requirements were met. Collectively enough to offset emergency suspension and removal.

Seymore X. Alsher **S4S-3Q-D-60451** **August 25, 1988**

Arbitrator sustained grievance on merits but set aside procedural arguments with the following reasoning; "With regard to the Union's charge of procedural flaws, the Union has furnished no probative evidence that Bailey's recommendation for removal was not reviewed by the designee of the installation head. Bailey is credible in her detailed description of how she handled the mechanics of the recommendation. The Employer may have the burden of proving just cause; the burden shifts to the Union, however, in proving that the Employer violated Article 16, Section 8. Accordingly, I conclude that the NR [Notice of Removal] is not invalidated on the grounds of failure to comply with Section 8, Article 16.

With regard to the errors on the NR itself, those errors were clearly clerical. Neither the Union nor Payton could have been misled by them.

The Employer waited too long to correct them. It would have been preferable if the Employer made the corrections without a reminder from the Union. The errors are nothing more than harmless errors which in no way impinged upon Payton's rights nor in any way interfered with her ability to process the grievance. The corrections were cosmetic, not substantive.".

Carlton J. Snow **W4C-5H-D-6715** **December 6, 1988**

Union argued five procedural violations. Although viewed as non-disciplinary removal partially corrected thirty day notice requirements. OWCP reporting problem ruled "de minimus". Article 16.8 argument rejected as removal for inability to perform duties of position and officials thoroughly aware of facts. Other two procedural issues were set aside as a misreading of Articles 13 and 30.

Wayne E. Howard **E7C-2B-D-9594** **January 18, 1989**
E7C-2B-D-10762

The Emergency Suspension and Removal reduced to a time served suspension based on failure of management to have an independent initiation and independent review by higher authority. PI's had used the lost money order scam.

William J. Downes **Postal Service Headquarters Memo** **February 1, 1989**

Reemphasized need for R & C based on Article 16.8 obligations.

Nicholas H. Zumas **DR-31-88** **March 20, 1989**

Union argued management erred in reissuing second Notice of Removal after first was set aside by arbitrator based on procedure. The doctrine of res judicata should apply.

The Employer argued, "IN support of its position, the Service quotes the Supreme Court in Montana v U.S., 440 U.S. 147 (1979) which held:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata is that a 'right, question or fact distinctly put at issue and directly determined by court of competent jurisdiction...cannot be disputed in a subsequent suit between the same parties or their privies...' Under res judicata, a final judgement on the merits bars further claims

by parties or their privies based on the same cause of action. Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.

The service also quotes a Seventh Court of Appeals case as follows:

A final judgement, however, will have full res judicata effect only if it is on the merits. [Citations omitted.] A dismissal other than one on the merits merely precludes relitigation of the issues decided.

In further support of its position, and on which it places greatest reliance, is United States Postal Service v. National Association of Letter Carriers, 847 F. 2d 775 (IIth Cir. 1988), where the Court of appeals vacated an arbitration award reinstating a Letter Carrier. While the Service concedes that this Arbitrator is not legally bound to follow the Court's decision, it argues that great weight and consideration should be given to that decision because the
236 facts and issue in that decision are virtually identical to the instant dispute.".

The Arbitrator reasoned, "After review of the record, it is this Arbitrator's finding that the issuance of the second Notice of Proposed Removal was improper under the circumstances, and that this grievance must be sustained.

It must be stated at the outset that even if it could be argued that the factual situations presented to the Court of Appeals and Arbitrator Howard were identical, this Arbitrator is not bound by the court's decision; he is bound, as will be shown below, by Arbitrator Howard's award.

It must be stated, parenthetically, that the rationale of the Court of Appeals in upholding the lower court is directly at odds with numerous Postal Service arbitrators who have concluded that the review/concurrence provisions of Article 16.8 of the National Agreement is an essential and fundamental ingredient of the grievance process between these parties; and that violation of these provisions are of

sufficient gravity to warrant reversal of any disciplinary action on the ground that the just cause standard was not met. (See Cases S4N-3A-D-37169; E1N-2B-D-15278; S4W-3T-D-46556; S8N-3F-D-9885; S8N-3W-D-28820; E1R-2F-D-8832; E1N-2U-D-7392; and E1N-2B-D-15278.)

This Arbitrator finds it difficult to conclude, as the Court of Appeals implied, that these awards (including the award that was the subject of the court case) were arbitrary or capricious, were not 'confined to interpretation and application of the collective bargaining agreement' or that these arbitrators dispensed their 'own brand of industrial justice'.

But the critical inquiry in this dispute is whether Arbitrator Howard's award is binding and should be given finality. In this Arbitrator's judgement, the answer to that question must be in the affirmative.

Arbitrator Howard 'voided' the discipline assessed Grievant; he did not dismiss the case without prejudice to the Service's right to reinstitute the proceedings. The Service had no recourse, and could not proceed further.

Even if this Arbitrator were to disagree with Arbitrator Howard's decision, which he does not, that decision involving the interpretation of the identical contract provision, between the same Company and Union, must be upheld unless it were determined to be patently and egregiously erroneous. These parties, in their contract, agreed that awards would be final and binding. This concept, basic to the arbitral process, is a most compelling force. Under the circumstances of this dispute, every principle of common sense, policy, and labor relations demands that such decision not be disturbed.". 237

Wayne E. Howard **E7C-2N-D-38832** **May 9, 1991**
E7C-2N-D-38836

The evidence clearly supported the Union's position that management violated the provisions of Article 16, Section 8 of the Agreement, when the superintendent immediately placed the grievant on Emergency Suspension for alleged theft. The language of Article 16, Section 8 requires that a supervisor must independently propose discipline, and such proposed discipline must be concurred in by the installation head, his designee, or in certain cases by higher level authority outside the

installation. The facts command a conclusion that this negotiated protection was not extended to the grievant. Therefore, the emergency suspension was not for just cause.

Although the superintendent charged the grievant with theft of Postal Funds and placed him on emergency suspension, the actual removal notice charged the grievant with conversion of Postal Funds for personal use. The arbitrator stated: "It is not unreasonable to assume that improper concurrence on the emergency suspension would carry over into the subsequent removal action. Moreover, having charged the grievant with the most serious of all charges, theft, in support of the emergency suspension, it is highly unlikely that the Service would regard the subsequent charge of conversion of postal funds to his own use, however euphemistically phrased, any less seriously. Thus, while not supported by the record, and overturned, the charge of theft tainted the subsequent charge of conversion.". As a result, the arbitrator reinstated the grievant, but without back pay.

Wayne E. Howard **E7C-2N-D-39214** **May 9, 1991**

The arbitrator in sustaining the grievance, stated: "It is beyond dispute that the Service violated Article 16, Section 5 of the Agreement when the grievant was not provided with advance written notice of the charges against him for a period of thirty (30) days... There was also substantial
238 evidence that the Service violated Article 16, Section 8 of the Agreement as well. Supervisor Miller testified that she did not make an independent assessment of the discipline to be accorded the grievant, but that the decision to remove the grievant was a group decision in which Tour Administrator Powell, the superior of both her and her reviewing authority, Acting General Supervisor Patrick Crone, concurred...Indeed, the copy of the supervisor's request for disciplinary action submitted as evidence, according to Supervisor Miller, was in the handwriting of Tour Administrator Powell, although she asserts that she wrote the original draft which was recopied by him.".

The arbitrator concluded that the central issue before him was to determine the extent that the procedural infirmities should impact on the assessed discipline. He stated: "Procedural infirmities may indeed require nullification of the discipline penalty, but such result is not mandated by the language of the Agreement, and in the last analysis depends on the particular facts and circumstances of the case.".

He ruled, however, that the removal was not for just cause and he directed the Service to make the grievant whole for all lost wages and benefits from the period of September 4, 1990 through October 23, 1990. In addition, the Service was directed to reinstate the grievant to the job of mail processor provided he can pass a re-examination of Mail

Handler Test 450.

James E. Rimmel — **E7C-2P-D-38674**, **E7C-2P-D-38673**, **E7C-2P-D-39925** — **February 2, 1992**

Removal for pilfering postal funds. Charges not proven and management failed to meet 16.8 obligations. Cites other case law. Finds obligation a prerequisite to discipline. Made whole.

I. B. Helburn — **S0C-3E-D-13607**, **S0C-3E-D-13617** — **March 22, 1993**

Removal for alleged theft of credit cards. Reviews harmful error case law offered by Postal Service. Then reasons, "Arbitrators tend to derive and apply principles based on the facts of their cases. So it is with principles relating to the impact of procedural errors. The above review of cases shows that the facts of the case at bar differ significantly from those which faced arbitrators ruling in cases which the Postal Service submitted. The factual differences make it inappropriate to apply those arbitrators' principles of harmful error to Habeel's case.

In this case, the violation of Article 16.8 is deemed serious enough to require the removal to be set aside. Habeel had been suspended on June 23. Three weeks later he was issued the proposed removal notice. Time was not of the essence. The proposal-concurrence process did not need to be shortcut in order protect the mails from further abuse by Habeel. Compliance with the National Agreement would not have compromised the sanctity of the mail.

But for the violation of Article 16.8 by the Postal Service, Habeel's removal would stand. His action was disgraceful. It is unfortunate that he must be returned. Certainly he is not deserving of back pay.". 239

Union Brief — **C7C-4U-D-10676**, **C7C-4U-D-11875** — **May 21, 1989**

Takes on procedural errors under due process. Most of the arguments go to Article 16.8 requirements. Also addresses need for heavier burden of proof.

SYNOPSES
UNION MUST BE GIVEN FULL OPPORTUNITY TO PREPARE THE DEFENSE

James J. Willingham **A-C-276** **December 11, 1972**

Arbitrator believed management had negated grievance process by withholding relevant information. Good case law cited by Union on pages 15 - 17. As stated by the Arbitrator, "It is clear that the above section provides the steward or chief steward with the contractual right to access to review all documents, files and other records necessary to process a grievance. This contractual right is not limited to a unilateral determination that a record or report is confidential or privileged. Inasmuch as Article I provides that representation of all employees in the bargaining unit is vested in the exclusive bargaining agent, it seems patent that the alleged privilege is non-existent because of the contractual status set forth in Article I.", and later, "The real question, of course is whether such denial did, in fact, result in the inability of the Union to properly prepare its grievance and properly process it. It appears to me that the lack of this essential information did result in the Union being unable to properly process this grievance. This grievance actually calls for medical evaluation and lacking the findings of the
240 examiner, it is basic that the Union was unable to properly evaluate or seek competent medical advice in processing the grievance.
Such violation did, in fact, negate any meaningful process of the grievance within the contractual steps provided in Article XV. Reference to Exhibit 13C clearly demonstrates this inability to evaluate and properly seek professional advice.".

J. Earl Williams **S8C-3W-D-21372** **December 4, 1981**
S8C-3W-D-21356

Arbitrator reasoned management had not proven charges. Went on to point out two due process concerns. The first dealt with a serious lack of investigation and obtaining the grievant's side of the story. The latter was management not setting forth in the grievance procedure the facts relied on to support their position, see pages 42 and 43.

J. Fred Holly **S8N-3D-D-34092/3** **February 15, 1982**

Arbitrator reasoned management committed several procedural errors which were viewed as fatal:

1) No review and concurrence,

2) Management withheld requested documents,

and

3) Step 3 management answer lacked detailed reason for denial.

Carlton J. Snow **W1C-5G-D-4252** **July 8, 1983**

Grievant was charged with attempting to run down two workers in the parking lot with his auto. The Arbitrator sustained the grievance and gives a detailed evaluation concerning the rights of the individual to be allowed to prepare an adequate defense at all of the steps of the grievance procedure. The union claimed that the grievant had a language barrier and could not adequately represent himself without the presence of an interpreter at the various steps of the procedures.

John F. Caraway **S1C-3Q-C-31919** June 27, 1984

The USPS instituted a policy dealing with procedures to be followed in the requesting and obtaining of documents necessary for the investigation and processing of grievances. The Arbitrator concluded that the USPS had violated Articles 17 and 31, in that the policy hindered the Union's investigation and processing of grievances, since requests for documents had to be made in writing and service officials could look over the shoulders of union officials as they reviewed documents.

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Bernard Cushman **E4T-2B-C-9176** **July 9, 1987**

"The Postal Service did not 'cooperate fully to develop all necessary facts' as contemplated by Article 15, Section 2, of the National Agreement. It is clear and the Arbitrator finds that the Postal Service seriously and prejudicially frustrated and undercut the grievance procedure.". As such the Arbitrator drew adverse inferences from management's failure to produce facts relating to the case and sustained an Article 8.5 violation.

J. Earl Williams **S4C-3W-D-51083** **November 30, 1987**

Although dispute on who issued discipline, this in and of itself not enough to procedurally overturn removal. However, management's failure to provide relevant information hampered union's representation of grievant. Further, management failed to furnish a written Step 2 and this further hampered the union. Collectively these errors were serious enough to affect the due process rights of the grievant.

Removal for falsification of employment application. The Union requested records of three supervisors who the Union believed had falsified records. Management refused. NLRB and Federal Court proceedings took three years. The Circuit Court of Appeals upheld an NLRB order to furnish the records. Arbitrator Sirefman sustained the grievance with back pay from September 25, 1989. He sustained the case due to an inordinate delay in supplying information.

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SYNOPSES
SETTLED IN GRIEVANCE PROCEDURE

U.S. COURT OF APPEALS **78-1192** **March 30, 1979**
FOURTH CIRCUIT

Mail handlers local sought court relief after repeated attempts to have management implement grievance resolutions failed. Court would not dismiss since further exhaustion of contractual remedies would have been ineffective. Reversed lower Court and remanded.

STEP 4 **H1C-3W-C-9224** **October 6, 1992**

Parties agreed Step 1 resolutions need not be in writing. Further agreed both parties are expected to honor all commitments made at Step 1.

GERALD COHEN **C8C-4B-C-18660** **March 31, 1981**

Arbitrator stated case not arbitrable as settled in grievance procedure. He tells us on page 6, "It is apparent that the parties had intended to resolve the grievance and thereby settle it. Whether the settlement is a good one, a bad one, or an indifferent one is beside the point. When settling a grievance, the parties are not required to make a 'good' settlement. The settlement is their business, and not an arbitrator's."

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CARLTON J. SNOW **8C-5K-D-12118** **June 16, 1981**

Arbitrator ruled the *Law of Mistake* was applicable to this case. Supervisor in signing settlement thought he was only acknowledging receipt of the letter for his fellow supervisor. Therefore the case is procedurally arbitrable.

PETER DiLEONE **C4C-4G-C-9576** **September 26, 1986**

What is interesting about this case is that it fits in with what the framers of the language had in mind when they agreed to the language of Article 15, Section 2, Step 1. In paragraph b the contracting parties gave authority to the supervisor to settle any grievance at that step. What is also significant, the framers at the same time must have been aware that errors could be made by supervisors in settling grievances in the early stages of a discussion of a grievance, otherwise the contracting parties would never have agreed to the very significant last sentence of said

paragraph which reads "...No resolution reached as a result of such discussion shall be a precedent for any purpose..." This obviously means that a Step 1 settlement disposes of that specific issue with the understanding that the resolution cannot be used as a precedent ever.

CARLTON J. SNOW **W1C-5D-C-25282** **November 17, 1987**

The dispute went to the enforceability of a Step 1 settlement. Arbitrator spends extensive time developing the case law from a legal arbitration prospective. On page 6 sets forth the Public Policy favoring settlements. Arbitrator found there was a settlement and issued enforcement language.

RAYMOND L. BRITTON **S4C-3W-C-56667** **March 29, 1988**

Arbitrator ruled that SPO had authority to resolve case at Step 1. As such, the Postal Service is bound by the settlement.

ARTHUR R. PORTER, JR. **C7R-4Q-D-12734** **April 8, 1989**

The settlement of the earlier grievances could have been without prejudice to reopening the matter. No such statement or inference could be drawn from the settlement. An issue that is settled must stay settled.
244 There might have been just cause to remove the grievant, if the proper contractual procedures had been followed; but, the settlement of September 19, 1988 was the final disposition of the dispute.

THOMAS J. ERBS **C4C-4L-C-31444** **July 18, 1990**

Management violated the provisions of the Agreement when they issued a Step 2 decision negating a Step 1 settlement which required the Postal Service to pay the grievants two (2) hours of straight-time pay for the time spent in a job interview.

The Postal service alleged that the Step 1 decision violated the terms of the National Agreement. Therefore, in the Step 2 decision, they advised the union that the Step 1 settlement was in direct conflict with management's position in Article 15 of the National Agreement.

The Union, however, argued that under the provisions of Article 15.2 Step 1, that the supervisor or the steward shall have full authority to settle the grievance.

The Arbitrator stated "Despite that authority granted tot he Supervisors

and Stewards, and even acknowledging the Labor Management notes presented which indicate that Supervisors have the right to settle grievances, the key issue in this case is whether such a Step 1 settlement can continue to bind the Postal Service.

The Postal Service argued that such a position, as espoused by the Union, would be catastrophic to the sanctity of the National Agreement. The Arbitrator indicated he could well understand the Service's concern and indicated that even the National Agreement must have had the same concern for the addressed it specifically in the last sentence of Article 15.2, Step 1(b), which sets forth a limiting condition on such settlement. That condition states; "No resolution reached as a result of such discussion shall be a precedent for any purpose".

Therefore, a supervisor, although having the right to settle a particular grievance, has no right to establish a precedent setting settlement which would be binding on any situation other than the particular situation addressed at the Step 1 discussion. Based on that philosophy, the Arbitrator ordered the Service to pay the grievants two (2) hours at the straight time rate, however, he denied the Union's argument that the Step 1 settlement is binding until changed by future negotiations.

NLRB **6-CA-20766 et al** **September 27, 1990**

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Union argued management failed to implement an agreement reached in a labor/management meeting concerning rescheduling maintenance department employees and subsequent actions. Administrative Law Judge agreed with extensive reasoning and ordered compliance.

EDWIN H. BENN **C7V-4Q-C-24944** **December 11, 1990**

Management violated the provisions of the Agreement by refusing to carry out a Step 2 settlement which provided the grievant with 312 hours of out-of-schedule pay.

After signing the settlement, local management was advised by the Ste. Louis Division that because the grievant was on leave during part of the time covered by the settlement, the Service could not pay the grievant for a total of 312 hours. As a result, rather than compensating the grievant for 312 hours of out-of-schedule pay - as called for in this settlement - the grievant was paid 189.50 hours of out-of-schedule pay, which represented the amount of time that he allegedly worked.

In sustaining the grievance, the Arbitrator noted that the parties did not

agree to settle the dispute upon the condition that the St. Louis office agreed with the settlement. There was no question that there was a meeting of the minds between the parties at Step 2 to compensate the grievant for 312 hours, and that agreement was reached with the full knowledge of the grievant's status. Under the provisions of Article 15, Section 2; "The installation head or designee in Step 2 also shall have authority to grant or settle the grievance in whole or part". Therefore, in accordance with the Agreement, the parties at the local level had the clear contractual authority under the Agreement to resolve the grievance.

He ordered the USPS to compensate the grievant an additional 122.50 hours of out-of-schedule premium pay.

ROBERT J. ABLES **E4C-2L-C-50674** **December 17, 1990**

Issue went to enforcement of a Step 3 settlement. Sustained grievance as a settlement agreement clear. Further indicated the integrity of process demands higher level management officials not undermine decisions of authorized field agents.

LAMONT E. STALLWORTH **C7C-4H-C-12609** **March 25, 1991**

246 Issue went to an ODIS work assignment dispute and implementation of a Step 3 settlement. Arbitrator found Step 3 binding on the parties and sustained the grievance, see pages 12 and 13. Good development of case law. Points out alleged unilateral mistakes not a basis to nullify settlement, see page 17.

LAMONT E. STALLWORTH **C7C-4H-C-16215** **March 25, 1991**

Arbitrator ruled management had agreed to a precedent setting Step 2 decision. Parties bound by it until changed by mutual agreement. Issue went to window clerk wearing apparel.

THOMAS LEVAK **W7C-5R-C-22893** **August 28, 1991**

The issues went to Article 37.3.F.11 and a pre-arb settlement. Arbitrator concluded Service failed to honor a binding pre-arbitration settlement agreement in violation of Article 15. Relies upon Snow and Stallworth. Also states Service made persuasive argument on the merits of the case but the settlement is binding.

ROBERT W. McALLISTER **C7C-4U-C-32066** **March 18, 1992**

Issue went to management failing to implement a Step 3 settlement. Management argued guidance from headquarters suggested they could not enter into this settlement. On page 8 states Service violated local and Step 3 agreements and therefore Article 15.

EDWIN H. BENN **C7C-4U-C-33742** **May 26, 1992**

Issue went to work assignment dispute and management not honoring a prior grievance resolution. Awarded additional compensation based on previous settlement. Different twist in that Service argued it was in compliance.

NICHOLAS DUDA **E7C-2L-C-42135** **July 15, 1992**

Issue went to management refusing to abide by a Step 1 settlement. Arbitrator ruled as legitimate offer made to settle, management bound by it. Settlement was not conditional upon written document.

JOHN C. FLETCHER **C7C-4M-C-17812** **July 21, 1992**

Meetings took place between MSC manager and union representatives where agreement was reached on various items. Management argued no commitments made. Accepted union testimony and initial implementation of agreement as clear proof of settlement agreement. Forced compliance.

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CHARLES E. KRIDER **C0C-4U-C-34 & 69** **May 14, 1993**

Found based on best evidence Step 2s and 3s precedent setting and prospective. However not clear on one point which he amended. Compliance ordered with clarification. Grievances denied based on clarification.

MAY v USPS **92-3581** **June 14, 1993**

U.S. Court of Appeals for the Federal Circuit case with cover sheet from postal headquarters. Essence of both, a grievance settlement is a binding settlement. Merits went to removal being reduced to twenty-one (21) day suspension at Step 2.

DAVID GOODMAN **W7C-5F-C-31485** **December 31, 1993**

Dispute went to local memo on one (1) hour advance notice for overtime. Arbitrator sustained the grievance and on page 16 cites Elkouri & Elkouri, then basically invoked the issue preclusion rule and sustained the grievance.

BARBARA BRIDGEWATER **W7C-5F-C-21983** **January 14, 1993**

Step 2 modified settlement and subsequent binding practice requires compliance on short term annual leave requests.

EDWIN RENDER **W7C-5F-C-28134** **March 29, 1994**

Local settlement on blood donor leave proper and enforceable. Service bound until parties agree otherwise.

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PART 5
DUE PROCESS
(AIRS NUMBERS ON CASE LAW CITES)

ALREADY RESOLVED				
AIRS NUMBER	**NATIONAL OR REGIONAL**	**ARBITRATOR**	**REGIONAL NUMBER**	**DATE OF DECISION**
		MYER	W-AB-5190-D	10/10/75
11969	REGIONAL	MARLATT	S4C-3W-C-8146	7/13/87
13592	REGIONAL	ZUMAS	DR-31-88	3/20/89
13997	NATIONAL	SNOW	H4C-3W-D-40195	5/26/89
15322	NATIONAL	SNOW	H4C-3W-C-28547	1/8/90
19927	NATIONAL	SNOW	H7C-3D-D-13422	7/25/91
19145	REGIONAL	CARAWAY	S7C-3R-C-29500	8/2/91
20408	REGIONAL	DOLSON	C7C-4A-C-30452	6/13/92
20575	REGIONAL	JEDEL	S7C-3B-C-34478	6/20/92
20673	REGIONAL	EATON	W7C-5E-C-27191	7/1/92
21205	REGIONAL	ZUMAS	E0C-2F-C-2452	1/21/93
22105	REGIONAL	MILES	E7C-2N-C-44880	9/30/93
23085/86	REGIONAL	ZOBRAK	E0C-2F-C-10135/1292	8/4/94
	REGIONAL	MACLEAN	E90C-4E-D-95069218/60556	8/19/96

DISCIPLINE SHOULD BE ISSUED IN TIMELY MANNER				
AIRS NUMBER	**NATIONAL OR REGIONAL**	**ARBITRATOR**	**REGIONAL NUMBER**	**DATE OF DECISION**
		RENTFRO	AC-W-24 658-D	2/14/79
4151	REGIONAL	DOLSON	C1C-4A-D-31551	11/8/84
	REGIONAL	SOBEL	S4W-3T-D-46556/7	4/8/88
16295	REGIONAL	McALLISTER	C7C-4A-D-16592	4/17/90
20019/20	REGIONAL	BENN	C0C-4P-D-604/1210	3/22/92
21441	REGIONAL	McALLISTER	C0C-4L-D-16172	3/15/93
23041	REGIONAL	WITTENBERG	A90C-1A-D-93009216	7/17/94
23043	REGIONAL	WITTENBERG	A90C-1A-D-93009217	7/17/94
23042	REGIONAL	WITTENBERG	A90C-1A-D-93009218	7/17/94

DISPARITY				
AIRS NUMBER	**NATIONAL OR REGIONAL**	**ARBITRATOR**	**REGIONAL NUMBER**	**DATE OF DECISION**
		COHEN	C8C-4P-D-28576	2/22/82
14550/51	REGIONAL	BELSHAW	C7T-4J-D-14352/15015	7/28/89
18456	REGIONAL	WITNEY	C7C-4Q-D-28021	4/22/91
18608	REGIONAL	McALLISTER	C7C-4J-D-26795	5/29/91
21234/35	REGIONAL	CUSHMAN	E0C-2P-D-5870/71	1/4/93
21674	REGIONAL	McCAFFREE	W0C-5R-D-4575	1/28/93

DOUBLE JEOPARDY				
AIRS NUMBER	**NATIONAL OR REGIONAL**	**ARBITRATOR**	**REGIONAL NUMBER**	**DATE OF DECISION**
7245	REGIONAL	COHEN	C4C-4H-D-5831	2/21/86
500097/98	REGIONAL	MIKRUT, JR.	C4C-4Q-D-24549 etal	1/30/88
		PORTER, JR.	C7R-4Q-D-12734	4/8/89
	REGIONAL	DWORKIN	C7R-4Q-17456	4/25/90
16337	REGIONAL	STALLWORTH	C7C-4B-D-21976	6/6/90
17812	REGIONAL	SNOW	W7C-5P-D-17141	1/7/91
21085/86	REGIONAL	AMES	W0C-5M-2427/28	10/5/92
21844/45	REGIONAL	FLETCHER	C0C-4M-D-12920/16291	5/1/93

EVIDENCE AFTER THE FACT				
AIRS NUMBER	**NATIONAL OR REGIONAL**	**ARBITRATOR**	**REGIONAL NUMBER**	**DATE OF DECISION**
13363	REGIONAL	McALLISTER	C7C-4U-D-7840	3/29/89

FLAWED GRIEVANCE STEPS				
AIRS NUMBER	**NATIONAL OR REGIONAL**	**ARBITRATOR**	**REGIONAL NUMBER**	**DATE OF DECISION**
2648/2649	REGIONAL	HOLLY	S8N-3D-D-34092/3	2/15/82
		FOSTER	S8W-3Q-D-35151 etal	3/12/82
4653	REGIONAL	ZUMAS	E1R-2F-D-8832	2/10/84
		LeWINTER	S1N-3F-D-39496 etal	8/13/85
	REGIONAL	WILLIAMS	S4C-3W-D-51083	11/30/87
18609	REGIONAL	McALLISTER	C7C-4A-D-31247	5/28/91
19740	REGIONAL	McALLISTER	C7V-4D-D-26210 etal	1/20/92
22872/73	REGIONAL	CUSHMAN	C90C-4C-D-93009256/54	6/27/94
25649	REGIONAL	VANSE	H90V-1H-D-95063943	6/13/96

FORMAL CHARGE WHICH INCLUDES NATURE OF MISCONDUCT SUBSEQUENT CHARGES ARE IRRELEVANT				
AIRS NUMBER	**NATIONAL OR REGIONAL**	**ARBITRATOR**	**REGIONAL NUMBER**	**DATE OF DECISION**
	REGIONAL	WILLIAMS	S8C-3W-D-21372/56	12/4/81
	NATIONAL	COLLINS	NAT-1A-D-29222	9/25/87

HEARSAY				
AIRS NUMBER	**NATIONAL OR REGIONAL**	**ARBITRATOR**	**REGIONAL NUMBER**	**DATE OF DECISION**
300235/36	REGIONAL	CONDON	E4C-2A-D-51007	8/15/88
19341	REGIONAL	SNOW	W7C-5F-D-27273	9/26/91
21107	REGIONAL	CUSHMAN	E0C-2C-D-5497	11/16/92

MEANINGFUL INVESTIGATION				
AIRS NUMBER	**NATIONAL OR REGIONAL**	**ARBITRATOR**	**REGIONAL NUMBER**	**DATE OF DECISION**
1954	REGIONAL	DiLEONE	NC-C-13901-D	9/12/79
2251	REGIONAL	HOWARD	E8C-2D-D-2392	5/30/80
	REGIONAL	WILLIAMS	S8C-3W-D-21372/56	12/4/81
1620	REGIONAL	WILLIAMS	S1C-3F-D-17681	7/12/83
600463	REGIONAL	EATON	W7S-5D-D-3638	12/8/88
13176	REGIONAL	MASSEY	S7C-3A-D-9294	2/7/89
13405	REGIONAL	ABERNATHY	W7C-5G-D-3893	2/22/89
13363	REGIONAL	McALLISTER	C7C-4U-D-7840	3/29/89
18021	REGIONAL	NEWMAN	C7T-4B-D-24850	1/24/91
18613	REGIONAL	GOLDSTEIN	C7C-4M-D-29237	5/23/91
	REGIONAL	FLETCHER	C0C-4M-D-09549/12003	2/13/92
20420	REGIONAL	DEAN, JR.	E0C-2L-D-3657	5/26/92
20452/53	REGIONAL	FLETCHER	COC-4A-D-2189/2725	6/16/92
20460	REGIONAL	FLETCHER	C0C-4L-D-3562	6/26/92
21072/73	REGIONAL	KRIDER	C7C-4L-D-30219/31295	10/14/92
21275	REGIONAL	SNOW	W7T-5M-D-23860	11/25/92
21423	REGIONAL	GOODMAN	W7C-5F-D-28551	12/28/92
21844/45	REGIONAL	FLETCHER	C0C-4M-D-12920/16271	5/1/93
21898	REGIONAL	HELBURN	S0C-3A-D-16735	5/27/93
22870/71	REGIONAL	STALLWORTH	C0C-4U-D-19152	6/20/94
23120	REGIONAL	JEDEL	S0C-3T-D-15396	7/21/94
24643	REGIONAL	CANNAVO, JR.	A90C-1A-D-93020676	7/20/95
25564	REGIONAL	AISENBERG	E90C-4E-D-96006429	5/13/96
25758	REGIONAL	MacLEAN	E90C-4E-D-95031477	5/16/96

PENALIZED EMPLOYEE MUST BE GIVEN FULL CHANCE TO PROTEST				
AIRS NUMBER	**NATIONAL OR REGIONAL**	**ARBITRATOR**	**REGIONAL NUMBER**	**DATE OF DECISION**
		RENTFRO	AC-W-24 658-D	2/14/79
1954	REGIONAL	DiLEONE	NC-C-13901-D	9/12/79
	REGIONAL	WILLIAMS	S8C-3W-D-21372/56	12/4/81
2991	REGIONAL	SNOW	W1C-5G-D-4252	7/8/83
13378	REGIONAL	SNOW	W7C-5D-D-9387	3/17/89
13810-13	REGIONAL	LIEBOWITZ	N7C-1T-D-3967	4/6/89
17995	REGIONAL	STALLWORTH	C7C-4D-D-28874	2/15/91
19884	REGIONAL	BERK	EOT-2J-D-641	2/7/92
20410	REGIONAL	NATHAN	C0T-4M-D-4270/5424	5/5/92
20460	REGIONAL	FLETCHER	C0C-4L-D-3562	6/26/92
21072/73	REGIONAL	KRIDER	C7C-4L-D-30219 etal	10/14/92
21234/35	REGIONAL	CUSHMAN	E0C-2P-D-5870/71	1/4/93
21898	REGIONAL	HELBURN	S0C-3A-D-16735	5/27/93
22903	REGIONAL	MARLATT	S7T-3T-D-19287	5/13/94
23041	REGIONAL	WITTENBERG	A90C-1A-D-93009216	7/17/94
23043	REGIONAL	WITTENBERG	A90C-1A-D-93009217	7/17/94
23042	REGIONAL	WITTENBERG	A90C-1A-D-93009218	7/17/94
23247	REGIONAL	KLEIN	J90C-1J-D-94013819	9/21/94
23474	REGIONAL	CUSHMAN	C90C-4C-D-93017832/39	11/4/94
23896	REGIONAL	KELLY	B90C-4B-D-94038712	1/9/95
24333	REGIONAL	HELBURN	H90C-1H-D-95010783	5/11/95
25564	REGIONAL	AISENBERG	E90C-4E-D-96006429	5/13/96

QUANTUM OF PROOF				
AIRS NUMBER	**NATIONAL OR REGIONAL**	**ARBITRATOR**	**REGIONAL NUMBER**	**DATE OF DECISION**
		GAMSER	AB-N-10855	6/12/76
		HOWARD	NC-E-3494/3495-D	1/31/77
		ROBERTS	AC-W-21,167-D	5/31/78
18889	REGIONAL	POWELL	E7C-2A-D-34888	6/20/91
19565/66	REGIONAL	JACOBS	N7C-1R-D-39209 etal	12/4/91
21049	REGIONAL	EYRAUD, JR.	S0C-3A-D-9758	11/6/92
		LOEB	D90T-2D-D-93017986	2/16/94