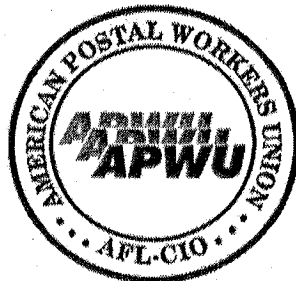


DEFENDING DISCIPLINE



IOWA 2010 Fall Seminar

October 2-3, 2010

Robert D. Kessler/Donald Foley/Dennis Taff
National Business Agents

511.23

511.23 Postal Employees

Postal employees:

- a. Request leave by completing Form 3971, *Request for or Notification of Absence*.
- b. Obtain approval of Form 3971 before taking leave — except in cases of emergencies.
- c. Avoid unnecessary forfeiture of annual leave.

511.3 Eligibility**511.31 Covered**

Covered by the leave program are:

- a. Full-time career employees.
- b. Part-time regular career employees.
- c. Part-time flexible career employees.
- d. To the extent provided in the NRLCA Agreement, temporary employees assigned to rural carrier duties.

Note: Transitional employees are not covered by the leave program, but do earn leave as specified in their union's national agreement.

511.32 Not Covered

Not covered by the leave program are:

- a. Postmaster relief/leave replacements, noncareer officers-in-charge, and other temporary employees except as described in 511.31d above.
- b. Casual employees.
- c. Individuals who work on a fee or contract basis, such as job cleaners.

511.4 Unscheduled Absence**511.41 Definition**

Unscheduled absences are any absences from work that are not requested and approved in advance.

511.42 Management Responsibilities

To control unscheduled absences, postal officials:

- a. Inform employees of leave regulations.
- b. Discuss attendance records with individual employees when warranted.
- c. Maintain and review Forms 3972, *Absence Analysis*, and Forms 3971.

511.43 Employee Responsibilities

Employees are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absences. In addition, employees must provide acceptable evidence for absences when required.



DEFENDING ABSENTEEISM DISCIPLINE

Arbitrators generally hold that there comes a time when, regardless of the reasons for absences, the usefulness of the employee has ended and the employer cannot be expected to continue the employee on the employment rolls. There are several arbitral standards to look for in defending discipline for absenteeism. If the majority of those standards are not present, any grievance challenging the discipline is severely weakened.

1) Has the employee shown an improvement since the last discipline?

This is a major consideration of many arbitrators. If no improvement can be shown, absent any mitigating or extenuating circumstances, the grievance is lost before you begin. If improvement is present, your chances are more favorable.

ARBITRATOR, JOHN F. CARAWAY - S8C-3A-D 12279

"Based upon the validity of the grievant's absences and some evidence, even though it is not substantial, of improvement in her work attendance, the Arbitrator believes that it would be unduly harsh and severe to remove the grievant."

ARBITRATOR, ALLAN DASH - E1C-2D-D 8735

"Grievant's attendance record subsequent to the July 1981, 'Grievance Resolution' was far better than his preceding record that led to his July 12, 1982, Notice of Removal."

ARBITRATOR, J. FRED HOLLY - S8C-3D-D 27885

"The data supports the Grievant's contentions that his attendance improved. In fact, over his last 14.5 months of work his average monthly absences were only one-half of what they had been in the 10.6 month period prior to the stipulations of September 24, 1979." (Settlement date of a previous discharge.)

"The Grievant's demonstrated improvement in his attendance record destroys any justification for his removal. Not only did he achieve the level of improvement required by the September 24, 1979, stipulation, he also achieved a sick leave balance and retained such a balance at the time of his removal."

ARBITRATOR, JAMES M. O'REILLY - C4C-4K-D 21011

"The warning was based upon a four month review period, while the suspension was based upon a nine month review period. During the four month period preceding the Letter of Warning he had approximately 181.5 absent hours, while during the next nine

months he had approximately 59.69 absent hours, which is a substantial improvement in his attendance record. Therefore, the arbitrator felt that further counseling and encouragement would seem to be the appropriate level to follow, in lieu of issuing a 7-day suspension.

ARBITRATOR, GEORGE E. LARNEY - C4C-4P-D 35983

"The arbitrator concurred with the Union's position in that if the employer attempts to justify imposing progressive discipline for attendance deficiencies based mainly on a comparative basis of performance improvement from one period of time to another, it can not ignore an interim period of perfect or near perfect attendance that occurred between the last date cited in one disciplinary action and the first date cited in the next disciplinary action, as it did in this instant case. The comparative figures demonstrated that the grievant did improve her attendance performance in the period subsequent to her receiving the Letter of Warning." Therefore, based upon the record, the arbitrator sustained the grievance.

2) MEDICAL EVIDENCE / EXTENUATING - MITIGATING CIRCUMSTANCES

ARBITRATOR, J. FRED HOLLY - S8C-3D-D 27885

"The record shows that the vast majority of his absences were documented by statements from physicians, and there is no claim or indication that he abused the sick leave program."

ARBITRATOR, JOHN F. CARAWAY - S8C-3A-D 16717

"There are mitigating circumstances in this case which the Arbitrator cannot ignore. This is an employee with seven years tenure. Up to approximately three years prior to her removal, the grievant was a dependable and reliable employee. A series of accidents and physical problems deteriorated her work attendance."

ARBITRATOR, PETER DILEONE - C8C-4M-D 5535

"In the judgement of this Arbitrator the grievant's absences and tardiness were for valid reasons in most cases. In most of the incidents, medical statements supported his absence; ear infection in one instance, teeth extractions in another instance, car break downs with garage receipts to support his absences in several other instances. With regard to the appropriateness of punishment for such absences, it would seem unduly harsh to hold that absences for such reasons deserve the severest penalty when in all these cases a proper report-off occurred."

ARBITRATOR, PATRICK HARDIN - S8C-3F-D 32241

"There is particularly strong justification for part of the absence for which he was discharged. He was hospitalized for treatment of alcoholism, the disease that has been causing his poor attendance. The National Agreement gives the Postal Service only a limited responsibility to aid employees who are suffering from alcoholism or other drug-related problems. Still, it seems inconsistent with the spirit of that responsibility -- however limited it may be -- to discharge an alcoholic employee based in part on his absence due to hospitalization for the treatment of his illness."

ARBITRATOR, GERALD COHEN - C4T-4M-D 19629

"While Grievant's supervisor was aware that he suffered from diabetes, he seemed to have been unconcerned with Grievant's resulting problems. Grievant was entitled to consideration on account of his diabetes. He did not receive the consideration that he should have been given."

ARBITRATOR, ROBERT FOSTER - S7C-3B-D 29170

"As bad as grievant's attendance record has been, the just cause standard as a condition to final removal action requires management to consider mitigating and extenuating circumstances before arriving at the prediction that grievant's unacceptable pattern is not likely to alter if she remains in the employment of the Postal Service. Arbitrator Alsher had it right in Case No. S7C-3D-D 27984 when he chastised the Employer who "rigidly and mechanistically relies on numbers, not reason(s) behind the numbers."

3) FAILURE TO CONSIDER REASONS FOR ABSENCES

ARBITRATOR, ERNEST E. MARLATT - S4C-3E-D 52589

"If mere attendance statistics were sufficient to justify the removal of a Postal employee, then management could save handsomely on manpower costs simply by programming a computer to issue a removal notice whenever an employee accrues a certain number of unscheduled absences. But that is precisely what Arbitrator Garrett said it cannot do. A Postal employee is not a statistic. He or she is a human being, with strengths and weaknesses like the rest of us. Indeed, Postal employees may have more weaknesses than the rest of us because it is the commendable policy of the Postal Service to provide employment to partially disabled veterans and other handicapped persons. It puts a very small burden on the Postal Service to expect it to determine why an employee has an attendance problem and what if anything can be done to correct the problem. It puts a very large burden on the employee to find other employment once having been removed for absenteeism. Just Cause requires the employer to lay out on the table before the arbitrator the applicable Garrett Factors, not simply a list of dates on

which the employee allegedly accrued unscheduled absences."

ARBITRATOR, ROBERT W. MCALLISTER - C1C-4H-D 26648

"The grievant was issued a Letter of Warning for attendance irregularities. In sustaining the grievance, the arbitrator stated that the establishment of proof in irregular attendance cases requires more than a statistical count of absences. The USPS failed to take into consideration or to make any allowance for the absences directly attributable to an on-the-job injury, which constituted a substantial number of the occurrences in the charge. Therefore, in view of the Service's basic misunderstanding of the facts involved, the arbitrator expunge the Letter of Warning."

ARBITRATOR, EDWIN H. BENN - C4C-4P-D 30829

"The arbitrator found that the Service had not met its burden of proof in demonstrating just cause for the disciplinary action taken against the grievant.

First, the Form 3971 for the January 9, 1987 absence shows that the absence was scheduled and was approved by the supervisor for a previously arranged doctor's appointment at least two weeks in advance, therefore, the January 9th date was erroneously charged as an unscheduled absence. Secondly, the supervisor admitted on the stand that he did not consider the reasons for the grievant's absence, although he usually considers that factor in determining whether or not disciplinary action of this type should be issued. Third, an examination of the Form 3972 showed that the grievant's record did not justify the action taken against her. And, fourth, contrary to the assertion of postal management, the grievant did make significant improvement from the date she had previously been issued a warning letter."

ARBITRATOR, ROBERT W. MCALLISTER - C4T-4M-D 38412

"I am left with management's straight statistical determination that the grievant had missed "too many days." This statistical tabulation to the exclusion of all other factors associated with the analysis of an employee's attendance record is subjective and arbitrary."

4) WAS THE EMPLOYEE FOREWARNED?

ARBITRATOR, ALBERT A. EPSTEIN - C4C-4D-D 14481

"The arbitrator, upon reviewing the testimony, evidence and arguments of the parties, found that the grievant was never warned or disciplined in any way about the use of approved sick leave and apparently was never warned that continued use of approved sick leave might lead to an absent record which would justify termination, even where the sick leave was approved. The arbitrator was impressed by this particular fact which,

in his opinion, justified the Union's position that termination was too severe a penalty under the circumstances of the instant case. Although the grievant did not have a good record and deserved some form of disciplinary action, her record, under the circumstances, does not call for or justify discharge."

The arbitrator then reinstated the grievant but without back pay.

ARBITRATOR, HARRY N. CASSELMAN - AC-C-9603D

"Even if Butwin's testimony is credited that Grievant did not report to him on April 1, 1976, or inform him in March that he was going to a Veteran's Hospital, I still find no evidence that Grievant was warned after his two week penalty that any further failure to attend as scheduled would result in discharge. Such a warning is part and parcel of corrective discipline.

If the purpose is to correct, warning of impending jeopardy is essential; if the purpose is simply to get rid of offenders, there is no way better calculated to do so than to fail to warn them. But such a course of conduct is the opposite of corrective discipline, and amounts to a calculated method of effectuating termination."

5) PROGRESSIVE DISCIPLINE

ARBITRATOR, MATTHEW W. JEWETT - ADS-772-D

"I cannot imagine Postal management being a party to a "Mexican Standoff." Either management is in control of the situation or it is not. In this case, it appears to have lost some control. Furthermore, it acted improperly in the extent of its suspension of the Grievant because part of that suspension was predicated on consideration of a letter of warning on March 14, 1978, which was subsequently reduced to an official counseling. As to its overall action, it acted properly."

ARBITRATOR, G. ALLAN DASH - AC-E-28, 291-D

"The Arbitrator would be quite disposed to sustain the Postal Service's discharge action in this case were it not for that portion of Agreement Article XVI which reads, "...a basic principle shall be that discipline should be corrective in nature, rather than punitive." The parties to the present Agreement have regularly utilized a corrective discipline system, in absentee cases, that is progressive in nature, advancing (with some variations) from counseling through written warnings, short-term and long-term layoffs and, finally, to discharge if all else fails."

6) LENGTH OF SERVICE

ARBITRATOR, WILLIAM HABER - AC-C-24-902 D

"An employee of three and a half decades ought to have some credit for a long term of tenure. The Arbitrator does not disagree with the Postal Service when it states in its brief that seniority does not provide immunity from discipline. Nevertheless, he is of the view that the mere fact of having worked for 34 years, of having been recognized as a competent person with supervisory skills, of having been used as a supervisor on a temporary basis, of not having used up all of his sick bank - all of these factors on the favorable side should simply not be set aside. Whether the grievant is eligible for the retirement benefits which are vested and whether he has, in fact, applied for retirement, as was reported, is not of special importance."

ARBITRATOR, A. HOWARD MEYERS - S4C-3W-D 24090

"Here there is agreement that Mrs. Williams was a good employee until the recent development of attendance problems. With eighteen years service her record shows, as the supervision concluded, she had provided acceptable performance; her unscheduled absences included only one AWOL. I have stated above that the testimony of Supervisor Crews is contradicted by his notation in the removal letter that grievant had informed him of family problems and related car problems. In my opinion she is a responsible person whose long seniority standing should have received more consideration and weight in these circumstances."

ARBITRATOR, ALLAN WEISENFELD - AC-N-19,355D

"Given the grievant's length of employment with the Service and the fact that she has regained her health, I believe she is entitled to another opportunity."

7) EXTENDED ABSENCE CONSIDERED "ONE INSTANCE"

ARBITRATOR, GERALD COHEN - C8C-4H-D 11676

"Many industrial absence-control programs, with which this arbitrator is familiar, would hold that Grievant's absences from April 21 to October 9 constituted only two absences, even though they totaled 81 days during that period of time. These absence-control programs define an absence as an absence occurring for one reason, regardless of the number of days involved, so long as the days of absence are consecutive. The theory behind this definition is that the person is only absent once because he or she had not returned to work to start a new work period."

8) ERRONEOUS CHARGES

ARBITRATOR, JOHN E. CLONEY - C1C-4H-D 32741

"In view of the lack of a discussion and in view of the fact that the grievant was charged with unscheduled absence for periods in which she had previously been granted leave, and charged with absence for period during which she had, in fact, not been absent. The grievance was sustained."

9) SICK LEAVE NOT EXHAUSTED

ARBITRATOR, ALAN WALT - C8C-4K-D 13252

"In those cases where an employee has not exhausted earned sick leave, however, it is necessary to carefully examine the particular facts of his or her case in determining whether there is a reasonable probability of regularity in attendance for the future. It must be remembered that accumulated sick leave is an "earned" benefit... . In view of the employer's right to require verification of employee illnesses, there must be a strong showing in support of removal establishing that an employee wh has not yet exhausted all earned sick leave offers little prospect of regular attendance in the future."

10) AUTOMATIC DISCIPLINE AT SET NUMBER OR %'s.

ARBITRATOR, ROBERT W. MCALLISTER - C0C-4D-D 139

"There is, however, a substantial distinction between chronic, excessive absenteeism and situations involving occasional and infrequent illness. Nelson explained to the Arbitrator that he had no responsibility to look at underlying reasons(s) for an absence 'if it is unscheduled.' According to Nelson, once an employee is deemed unscheduled, it will be used against the employee. It is evidence Nelson has described a "no fault" absenteeism policy which mandates discipline at set numbers of absences regardless of legitimacy. This is not the system promulgated by the United States Postal Service."

STEP 4

CASE BY CASE

***NO FIXED AMOUNT
OR PERCENTAGE***



UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260

January 5, 1981

Daniel B. Jordan, Esq.
Attorney at Law
American Postal Workers Union,
AFL-CIO
817 14th Street, NW
Washington, DC 20005

Re: E. Andrews
Washington, D. C.
ABNA-0840

Dear Mr. Jordan:

On November 14, 1980, we met to discuss the above-captioned grievance at the fourth step of our contractual grievance procedure with regard to disputes between the parties at the national level.

The matters presented by you, as well as the applicable contractual provisions, have been reviewed and given careful consideration.

At issue in this case is whether the Cleveland, Ohio post office has adopted and enforced a policy whereby employees using sick leave in excess of three percent of their scheduled hours will be disciplined.

During our discussion, several points of agreement were reached. They are:

1. The USPS and the APWU agree that discipline for failure to maintain a satisfactory attendance record or "excessive absenteeism" must be determined on a case-by-case basis in light of all the relevant evidence and circumstances.
2. The USPS and the APWU agree that any rule setting a fixed amount or percentage of sick leave usage after which an employee will be, as a matter of course, automatically disciplined is inconsistent with the National Agreement and applicable handbooks and manuals.

3. The USPS will introduce no new rules and policies regarding discipline for failure to maintain a satisfactory attendance record or "excessive absenteeism" that are inconsistent with the National Agreement and applicable handbooks and manuals.

The above constitutes our national position on such matters. We do not agree that a three percent policy as stated in your grievance has been implemented in the Cleveland, Ohio post office.

The Union bases its argument on several factors. First, they feel that the content of several internal management memos clearly indicates that a three percent rule was implemented. In my review of the said documents, I do not find such clarity. Further, the authors of the documents say they had no intention of establishing a three percent rule for individual attendance. Their concern was a three percent reduction in the sick leave usage for the entire office.

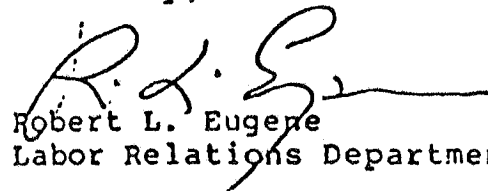
Second, the Union has presented affidavits from several employees who attest that they were told by their supervisors and/or in step one grievance proceedings that if they used more than three percent sick leave they would be disciplined. The supervisors referred to have all submitted statements stating that they did not tell employees that there was a three percent rule.

Third, the Union states that the number of disciplinary actions taken with regard to excessive sick leave usage substantially increased after the memos were written. Though numbers were quoted, no documentation was submitted. The Cleveland office has submitted substantial documentation that certainly indicates that if a three percent rule was the policy, it was not being enforced. The Cleveland staff surveyed the attendance records of over seventeen hundred employees. Over 559 employees in that number had used more than three percent of their sick leave during the period January 1980 to July 1980, but were not disciplined. These statistics certainly belie the existence of a three percent rule. Management acknowledges that there has been increased emphasis on attendance, but not based on a three percent rule.

Notwithstanding those listed items to which we can agree, it is our position that in light of the fact circumstances of this case, no policy to discipline employees who used more than three percent of their sick leave existed in the Cleveland post office.

It is further our opinion, that no definitive dispute exists between the parties concerning the contractual provisions for the administration of discipline with regard to failure to maintain satisfactory attendance.

Sincerely,



Robert L. Eugene
Labor Relations Department

DOCUMENTATION / INFORMATION

REQUIRED FOR PROCESSING

ABSENTEEISM GRIEVANCES

**DOCUMENTATION / INFORMATION REQUIRED FOR
PROCESSING ABSENTEEISM GRIEVANCE**

1. A copy of the issuing supervisor's request for disciplinary action.
2. Notice of charges.
3. Copy of any previous discipline charges cited as elements of past record.
4. Copy of grievance settlements and/or current status of any grievances filed in relation to any element of past record cited in disciplinary notice.
5. Absence analysis Form 3972 (including 30 day period following a removal notice).
6. 3971(s) for absences cited in charges.
7. Reasons for each absence.
8. Any medical documentation submitted to support absences.
9. Any existing local attendance guidelines / policies.
10. Copy of document with concurrence signature (if it exists).
11. 3972(s) of other employees under the same issuing supervisor's jurisdiction if disparate treatment argument is used.
12. Supervisors attendance / discipline record if relevant and cited as disparate argument.
13. Supervisor's 2608 (step one grievance summary).
14. Grievant's clock rings for any date a "discussion" took place if grievant denied a discussion was held (for PSDS offices).
15. Copy of your information request form.
16. Any offers of settlement at step 1 or step 2.
17. Memo of interview with supervisor that issued the discipline. Interview is to:
 - A. Determine "what actions were taken to improve attendance before requesting discipline."
 - B. Ask for dates, times of discussions, where held and what was discussed. (If they reference discussion in 'A' above.)

- C. Go over each absence and inquire if supervisor knows why grievant was off.
- D. Name of concurring official.

18. A STEWARD SUMMARY - telling us briefly what the case is about and what your arguments are.

19. Development and incorporation into the official grievance of all arguments including mitigating or extenuating circumstances, e.g.;

A. Due Process Arguments:

1. No pre-disciplinary interview (Pre-D) EL-921.
 2. No review / concurrence by higher level authority (Art. 16.8).
 3. Expunged, expired, or unadjudicated discipline cited as element of past record.
 4. No proper 10/30 day notice.
 5. Supervisor had no authority to settle.
 6. Failed to provide veteran's preference rights.
 7. Discipline was not progressive.
- B. Delay in issuing discipline, considerable time between last absence and issuance of discipline.
- C. No consideration to reasons for absences.
*Also, a set number or % which results in automatic discipline.
- D. Invalid or erroneous charges (not just "typo's")
- E. Number of absences or % of absenteeism within average for office.
- F. Disparate treatment (similar situated employees).
- G. Substantial improvement since last discussion / disciplinary action.
- H. Absences mostly related to same illness / injury.
*Legitimate/Bonafide illness supported by Med. Doc. which discipline cannot cure.
- I. Absences related to specific ailment / injury which is temporary in nature, e.g., broken bones, pregnancy, flu, etc.
* Long period of absences for surgery, etc., vs. short-term sporadic absences.
- J. Transportation problems of temporary nature.
- K. Absences caused by unusual circumstances beyond grievant's control.
- L. Job related injury absences (legitimate, not "alleged").
- M. FMLA absences (legitimate, not "alleged").
- N. Family problems, e.g., single parent, divorce proceedings, death of family member, sick child.
- O. Participation in EAP, AA, or other similar program.
- P. Scheduled absences / attempted scheduled absences.
- Q. No "pattern" of sick leave use - no evidence of abuse. Absences not connected to N/S days.
- R. No AWOL charges - All leave has been approved.
- S. Long periods of satisfactory attendance in employment history.
- T. Grievant on OTDL and/or volunteers for holidays.
- U. Employee has sick leave balance, using S.L. at a rate less than what is

earned.

V. No previous discipline for absenteeism (suspension, removal cases).

W. Part day absences (shows attempting to work even if sick).

X. Long-term employment (removal cases).

Y. Satisfactory / good work history, awards, commendations (removal cases).

Z. Attitude of employee toward job.

