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Thomas McDonald
Nanuet, New York
Branch 4593
RA-1434D-73
NBN4980D

Isaac L. White
Los Angeles, Ca.
APWU
AB-W-11

In the Matter of the Arbitration between

AMERICAN POSTAL WORKERS UNION, AFL-CIO

-and-

UNITED STATES POSTAL SERVICE

Case No. AB-W-11, 369-D, (Isaac L. White)

ARBITRATION

OPINION AND AWARDS

In the Matter of the Arbitration between

NATIONAL ASSOCIATION OF LETTER CARRIERS
AFL-CIO

-and-

UNITED STATES POSTAL SERVICE

Case No. NB-N-4980-D, (Thomas McDonald)

Before: Howard G. Gamser

Appearances:

In Case No. AB-W-11, 369-D (Isaac White, Grievant)

For the Grievant:- Jeanette J. Wright, Esq., and
Murtha, Cafferky, Powers & Jordan
by: Donald M. Murtha, brief amicus for the National Office, APWU and NALC

For the USPS:- Harvey Letter, Esq., Assoc. Gen'l Counsel

In Case No. NB-N-4980-D ((Thomas McDonald, Grievant)

For the Grievant:- Brent, Phillips, Dranoff & Davis, P.C.
by: Raymond G. Kruse, Esq.

For the USPS: - Stanley A. Mestel, Esq. Attorney

Background:

The procedural issue, relating to the arbitrability of Case No. AB-W-11, 369-D, wherein Isaac L. White is the grievant, was heard in Los Angeles, California on April 21, 1976. The procedural issue, relating to the arbitrability of Case No. NB-N-4980-D, wherein Thomas McDonald is the grievant, was heard in New York, N.Y. on May 13, 1976. Both cases appeared to present the identical issue for determination relating to the arbitrability of the grievance filed on behalf of each of these grievants by their respective labor organizations protesting their discharge as employees of the United States Postal Service.

In both cases, post-hearing briefs were filed on behalf of the grievant and the United States Postal Service. An amicus brief on behalf of the American Postal Workers Union National Office and the National Office of the National Association of Letter Carriers was also filed and duly considered.

There was no consideration, during either hearing, nor testimony nor other evidence received relating to the merits of these cases. In the Award below, the undersigned duly designated Arbitrator has not taken into consideration any aspect of the issue of whether the Employer had just or proper cause to discharge these grievants .

Statement of the Issue:

Although the Parties did not formally define the issue to be submitted to the Arbitrator, from the contentions raised and the arguments advanced, the matter in controversy can be defined for determination as follows:

> Did these employess, who are "preference eligibles" as that term is employed in Section 6 of Article XVI of the current collective bargaining agreement, waive their right to arbitrate, under Article XV of that same agreement, the issue of whether this Employer had the right to discharge them for just cause as provided for in Article XVI?

Statement of the Case:

There are no essential operative facts in either case that are in dispute.

The testimony and other evidence offered in Case No. AB-W-11, 369-D, wherein Isaac White is the grievant, established that White is a preference eligible as defined by the Veterans' Preference Act, 5 USC Sec. 2108. By letter dated June 24, 1975, the grievant was notified that the Service intended to remove him from his employment based upon a charge that he had falsified a Postal Service Form 3971, "Request for, or Notification of, Absence" which he had previously submitted to cover an absence from work.

By letter dated July 8th, Mr. White was further informed that the charge had been found to be sustained and that he was to be removed from his position as of July 28, 1975. In that letter of July 8th, Mr. White was notified of his right to appeal his discharge to the Federal Employee Appeals Authority of the Civil Service Commission. White was put on notice that his appeal to the Civil Service Commission had to be made not later than 15 days after July 28, 1975. He was also told to whom the appeal letter had to be sent and what information should accompany his appeal to the Commission. That letter of July 8th, went on to inform Mr. White as follows:

> "If you appeal to the Civil Service Commission, you thereby waive access to any procedures under the National Agreement beyond Step 2 B of the Grievance-Arbitration Procedures..."

Mr. White initiated a grievance under Article XV of the collective bargaining agreement which was denied in Step 1 on July 11, 1975. On July 25, 1975, his grievance was denied at Step 2A. On that same day, the Union appealed the decision to Step 2B.

On August 8, 1975, within the fifteen day period allowed to initiate an appeal under the Veterans' Preference Act, the Union, on Mr. White's behalf, filed an appeal of his discahrge with the Civil Service Commission. This application included a request for a hearing.

On September 2, 1975, Mr. White's grievance was denied at Step 2B of the National Agreement's grievance procedure. By letter dated September 10, 1975, the Civil Service Commission Appeals Officer informed the Union that a hearing would be held on Mr. White's adverse action appeal on October 20, 1975.

On September 17, 1975, the National President of the Union, requested arbitration of the dispute , as required by Section 3 of Article 15 of the National Agreement. By letter dated October 1, 1975, the National President of the APWU further advised the USPS that the Union was certifying the case to arbitration within the 15 days provided under Section 3 of Article XV. That same day, the President of the APWU also advised Mr. White's Local Union President that the National Union had invoked arbitration in this case. Thereafter, it appears that the Union orally postponed the scheduled appeal hearing which had been set for October 20th by the Commission.

On January 14, 1976, the Los Angeles Local of the APWU wrote to the Assistant Appeals Officer of the Commission and requested the withdrawl of White's appeal before the Commission. He concluded his letter by stating, "This request is due to the fact that it has been decided that Mr. White's case will go to arbitration in lieu of Civil Service appeal." The following day, October 15th, in a letter which must have crossed with the one referred to above in the mail, the Asssistant Appeals Officer of the Commission wrote to the Local Union and indicated that unless a written confirmation of the cancellation of the requested appeal was submitted she would have to "adjudicate the appeal on the basis of the record." In that same letter, the Appeals Officer confirmed that she had been "verbally informed...on several occasions...that you intend to cancel the appeal you filed on behalf of Mr. Isaac White." By letter dated January 20, 1976, the Civil Service Commission informed the Local Union that the written request for withdrawl of Mr. White's appeal was at hand. The letter concluded by stating, "we are cancelling the appeal and no further action will be taken on the matter." This letter was signed by the Chief Appeal Officer of the Commission.

On February 4, 1976, the USPS wrote to the National President of the Union as follows:

> "It has come to our attention that the grievant in the above-captioned case appealed his discharge to the Civil Service Commission. Copies of the relevant papers are enclosed.
>
> "Such action consituted a waiver of access to the arbitration procedure under Article XVI, Section 6."

This letter appears to have been prompted by a decision made by the parties to schedule this case for arbitration on February 17, 1976. The case was then reset for arbitration by letter dated March 2, 1976 to the undersigned and the parties, and the hearing, as stated above, was held on this procedural issue of arbitrability on April 21, 1976.

The testimony and other evidence offered in Case No. NB-N-4980-D, wherein Thomas McDonald is the grievant, established that McDonald was a preference eligible was defined in the Veterans' Preference Act. On March 7, 1975, he was given a letter of suspension and a notice of proposed removal. The proposed removal was based upon the allegation that he had thrown away deliverable mail.

A grievance was initiated in Step 1 on March 17, 1975, and it was denied that same day. That decision was appealed to Step 2A on March 31, 1975, and denied on April 3, 1975. The 2A decision was appealed to Step 2B, and it was heard on May 5, 1975. The Step 2B decision denying the grievance was issued May 9, 1975. The Union requested arbitration on May 27, 1975.

On or about April 7, 1975, this grievant filed an appeal with the Civil Service Commission under the Veterans' Preference Act. On April 11, 1975, the Employee Appeals Authority of the Civil Service Commission informed the Postmaster that the grievant's letter of appeal was dated April 4th, and the Local Postmaster was furnished with a copy and requested to furnish certain information regarding the disciplinary action that had been taken and related matters. The Commission followed up by sending the grievant a copy of the material which had been furnished by the Postmaster. He was given seven days to submit any additional material or to request a hearing. He was further advised that if nothing further was done, the record would be closed and a decision rendered by the Commission.

This letter referred to above was sent to McDonald from the Commission on April 23rd. On April 29th, McDonald replied that he had decided to appeal his case under the grievance and arbitration machinery provided in the Union agreement. He also stated:

> "However, if for any reason this arbitration procedure should not be granted I would like to keep my option open (underlining in original) to again request a hearing on (Suspension & Removal) before the Civil Service Commission."

Mr. McDonald added a postscript to his letter in which he stated, "Please do not (underlining again in the original) adjudicate my appeal at this time."

On May 2, 1975, the Commssion denied McDondald's request to hold the case open pending perfection of the appeal to arbitration, and requested that McDonald advise the Commission if he wished to withdraw his appeal. That letter concluded by stating: "If no response is received from you within the three day period, we will either adjudicate your appeal on the existing record or cancel the appeal for failure to proscecute."

On May 6th, McDonald wrote to the Commission as follows:

> "This letter is to inform you that I do hereby decline to have my hearing adjudicated by the Civil Service Commission. I prefer to go before an arbitrator under the National Agreement."

In response to this letter, the Commission wrote to the grievant, on May 13, 1975, in pertinent part, as follows:

> "We have interpreted your letter and the foregoing statements as meaning that you are withdrawing your appeal to this office of the action taken by the Postal Service to remove you. Unless you notify this office within 3 days of receipt of this letter that it was not your intention to withdraw your appeal, your appeal will be cancelled and no further action taken in respect to it."

On or about February 10, 1976, this case was scheduled to be heard by the undersigned as of March 5, 1976. On February 10, 1976, the USPS wrote to the National President of the NALC and indicated that Mr. McDonald's action in appealing his discharge to the Civil Service Commission "constituted a waiver of access to the arbitration procedure under Article XVI, Section 6." Subsequent thereto the arbitration hearing was rescheduled for May 13, 1976. The hearing was then so held and limited in scope to the issue of arbitrability raised by the Postal Service.

Contentions of the Parties:

Counsel for these grievants and the brief filed amicus all argued that the language of Section 6 of Article XVI of the National Agreement did not clearly establish that filing for an appeal hearing or adjudication before the Civil Service Commission constituted a waiver of access to the grievance-arbitration procedure. If the language of that provision, upon which the USPS relied, was read in the framework of the whole collective bargaining agreement, it would be apparent that the parties did not wish to create a situation where a Preference Eligible might for reasons beyond his control forfeit all right to have his discharge adjudicated either in arbitration or before the Commission. The mere act of requesting a hearing certainly does not constitute an appeal as the word is employed in the collective bargaining agreement. The grievants' spokesmen all contended that the entire process of an appeal, including the submission of a statement of position by the appellant, the submission of a statement by the appellee, a hearing if such is requested, and then a determination is required before it could be concluded that the grievants had perfected their right to appeal and thus waived any further proceeding in arbitration.

The Union spokesmen argued that election of remedies clauses are common devices in labor agreements to prevent resort to a multiplicity of forums and to prevent employees from having "two bites of the apple". Such clauses, argued the Unions, were not intended to require that a grievant elect the remedy before he was assured that a hearing in the forum which he elected would be provided or when the wrong choice could foreclose his opportunity to have the matter heard on the merits before any forum.

The Postal Service contended that the language of the Agreement was clear and unambiguous. Once the Preference Eligible chose to file an appeal with the Civil Service Commission that grievant was foreclosed from pursuing his grievance beyond Step 2B under the collective bargaining agreement. Permitting such an employee to file with the Commission and then to change his mind was in effect giving such an employee "two bites at the apple."

The USPS argued that the word "appeal" as used in the collective bargaining agreement provision under review did not mean receiving a final decision on an appeal nor having a formal hearing before an appellate body. The definition favored by the grievants, according to the USPS, would permit forum shopping and would put the Service to the trouble and expense of preparing for the possibility of two separate and distinct appeal hearings.

The Service pointed to the fact that there has been a long-standing practice of regarding the act of filing an appeal as a waiver of the right to go before an arbitrator as provided for in Article XV of the 1971 as well as 1973 Agreements. The Postal Service submitted a number of letters from the Labor Relations Department to the various unions representing Postal employees indicating that this was the force and effect of such an election. Prior to the determination requested in these two cases, no Postal Union has objected to this interpretation of the contractual language enforced by the USPS.

Opinion of the Arbitrator:

Section 6 of Article XVI reads as follows:

> "Section 6. Veterans' Preference. A preference eligible is not hereunder deprived of whatever rights of appeal he may have under the Veterans' Preference Act; however, if he appeals under the Veterans' Preference Act, he thereby waives access to any procedure under this Agreement beyond Step 2B of the grievance-arbitration procedure."

Just what rights of appeal is a preference eligible entitled to under the Veterans' Preference Act, 5 USC Section 2108? In Malone v. U. S. Postal Service, et al. 526 F.2d 1099, (6th Cir. 1975), the Court opined that the congressional authorization was for an ultimate appeal outside the review procedures provided by that veteran's superiors in the Postal Service to the Civil Service Commission. The Court went on to say at page 1103, "In the latter case the employee is entitled to a trial type hearing, which would afford increased procedural safeguards including the choice of counsel..." From a fuller reading of the Case as a whole, it is abundantly clear that the Court reasoned and concluded that a preference eligible was to be afforded stringent safeguards against adverse actions without being afforded the protection of a scrutiny and review of such actions by an independent and impartial authority.

HEADING: INTERPRETATION N/A ARTICLE XVI, SECTION 6. VETERANS' PREFERENCE.

While the Court did accept the election of use of the arbitration procedure as provided in the collective bargaining agreement as a substitute for the right of a Civil Service appeal provided in the Statute, the Court did so because when employing this other avenue of appeal or forum in which to have the adverse action adjudicated the preference eligible would have the protection of an evidentiary hearing albeit foregoing "some procedural safeguards associated with a trial type hearing and surrenders to the Union a large measure of control over the prosecution of his claim. In this congressional scheme, the employee has the opportunity to select the procedure best suited to his situation." (p.1103).

The Statute itself provides for an appeal as follows under 5 USC Section 7701, "The employee shall submit the appeal in writing within a reasonable time after receipt of notice of the adverse decision, and is entitled to appear personally or through a representative under regulations prescribed by the Commission. The Commission, after investigation and consideration of the evidence submitted shall submit its findings and recommendations to the administrative authority and shall send copies of the findings and recommendations to the appellant or his representative."

From a reading of the language in the 1971 Agreement, which provided for the same election but which did not permit a preference eligible to proceed up to Step 2B in the grievance procedure if he elected to pursue the Civil Service route, together with the language quoted above from the Agreement in effect when the grievance arose, it is apparent that the parties were in agreement that an employee was not to be given a twofold opportunity to establish his case and the employer would not be required to defend his action in two forums. In the language used in the later Agreement, the parties did agree that some attempt at informal resolution might be in order, up to Step 2B, before either party had to go to the additional trouble and expense of preparing to prosecute a formal appeal in either forum.

From the foregoing, the undersigned concludes that a preference eligible, by statute and by virtue of the terms of the collective bargaining agreement, has been afforded special and unique protection against an adverse action by his employer. The preference eligible does not stand in the same position as any other employee in that regard. The USPS argued that both White and McDonald, although initially entitled to an impartial review in either of the two forums available, had waived the right to any impartial review before either tribunal. The spokesmen for these grievants asserted that nothing which they had done on behalf of these grievants or that the grievants themselves had done indicated that they were waiving the right to a hearing protesting the employer's right to take adverse action against the grievants. (GRIEVANTS)

In White's case, he had been informed by the Postal Service on June 24, 1975, that the Postmaster proposed to remove him for allegedly falsifying an official report. By letter dated July 8, 1975, White was further informed that, upon investigation, the charge against him had been sustained and that he would be removed as of July 28, 1975. At that point, White initiated a grievance with the assistance of his Local Union. That grievance was processed through the preliminary steps of the grievance machinery and appealed to Step 2B on July 25, 1975. The Step 2B hearing was held on August 25, 1975.

In the meanwhile, White was also aware that he had the right, as a preference eligible, to appeal to the Civil Service Commission. He was informed on July 8th that he had 15 days after the adverse action was effective to file such an appeal or forfeit the right to do so. He was thus aware that he had to file that appeal within fifteen days after July 28, 1975. In this case, White had to either file with the Commission before he knew the outcome of the Step 2B appeal or lose the right to pursue that avenue of appeal. Under the time frame for filing for arbitration by the National Union President, White, as of August 8th, when the appeal to the Civil Service Commission had to be filed, not only did not know whether his Step 2B appeal would prove successful but he also did not know whether the National Union President would agree to certify his case for arbitration. It is apparent that prudence dictated that he file an appeal with the Civil Service Commission before the deadline had passed.

In McDonald's case the same thing is true. At the time he was notified his removal was to be effective, April 7, 1975, McDonald knew that he had to file with the Civil Service Commission within fifteen days thereafter or forfeit his right to a review by the Commission. As of April 7th, or as of April 22nd, fifteen days thereafter, McDonald did not know whether his Step 2B appeal would be successful, that hearing was not held until May5th and the adverse results known until May 9th, or whether, in the event that his appeal under Article XV of the Agreement would result in his reinstatement, the President of his Union would certify the case to arbitration. Here again, prudence dictated that he file with the Civil Service Commission to preserve his right to at least one possibility of an impartial review of the Postal Service's action.

In White's case, after the Local Union was assured that the National Union had certified his case to arbitration it notified the Civil Service Commission several times that White intended to cancel his appeal. On January 14th, the Local Union withdrew the appeal in writing. In McDonald's case, he wrote to the Civil Service Commission on April 25, 1975, that he had decided to appeal under the Agreement, but he specifically requested the right to continue his appeal before the Commission if his right to arbitration was not supported by a certification from the National Union. The Civil Service Commission replied that he had to make up his

mind within three (3) days if he wanted to go to arbitration or to pursue his Civil Service Appeal. Within the short time period provided, and even before his case was officially certified to arbitration by the National Union President, McDonald wrote to the Civil Service Commission and indicated that he was declining to proceed before the Commission and would employ the procedures available under the National Agreement.

It is abundantly clear from the documentary evidence in this record that both of these employees were placed in a position whereby the Service was insisting or the Civil Service Commission was insisting that they make a choice of forums at a time when neither of them was assured that they had a real choice. The question of whether the National Union President would permit their cases to go to arbitration or would drop their cases had not been determined. In White's case, he withdrew or cancelled his appeal after he had an assurance that his case had been certified for arbitration. In McDonald's case, he was required to make an election even before his case had been so certified.

In both cases the grievants unequivocally and in writing notified the Commission that they had elected to resort to arbitration to determine whether the Postal Service had just cause for their discharge. In both these cases that notification permitted the Commission to regard its responsibility review such action as at an end. That notification permitted to Postal Service to avoid the obligation of preparing to defend its actions in two separate tribunals. Both grievants had only "one bite at the apple" remaining. Forum shopping was avoided. Their statutory and other protection afforded under the collective bargaining agreement were fully delineated. Both grievants now had available to them just the rights provided under the collective bargaining agreement.

Parenthetically, it might be argued that these grievants were placed in a more advantageous position than other employees since they might preserve their right to an impartial review until they were sure that their cases would be certified by their National Union. Other employees had no assurance of an impartial review if their cases were not certified. However, this advantage afforded to preference eligibles is certainly consistent with the statutory scheme of providing them with twofold assurance of an impartial review of adverse actions.

White cancelled his appeal. McDonald declined to proceed with his appeal...In both cases the USPS had to defend its decision to discharge before an arbitrator if the cases were certified in timely fashion under the National Agreement. The cases were so certified. If the remedies available before each forum had been inconsistent with one another then there might be some color of right in the Service's contention that the mere filing with the Commission, like the filing of a complaint, consituted the appeal. However, as here, where either forum could only offer reinstatement, the filing need not be so regarded.

Of greater weight than such a legal consideration in the determination of this matter is the equitable argument usually raised against the imposition of a forfeiture. In effect forfeiture of the right to any third-party review of the Employer's adverse action is what the Postal Service is urging in these cases. The Postal Service has stated that these employees lost their right to arbitrate. The Civil Service Commission has made it clear that their files are closed and these employees have no appeal rights under the Statute any longer. Equity dictates that such a possibility be made crystal clear to the preference eligibles. The fact that an election to proceed before the Commission, at a time when they did not have any assurance another forum was to be made available, was to foreclose any right to employ that other forum and forego the Civil Service appeals procedure certainly is not that clear from the writing.

These two preference eligibles knew they had to make an election. They first indicated they would avail themselves of the statutory protection afforded under the Veterans' Preference Act. They later, before any proceedings were initiated and before any action had been taken on their appeal, decided to withdraw that choice and use the protection afforded to them as union members under the collective bargaining agreement. At that point they did make an election with all rights appertaining thereto. At that point, as the Civil Service Commission official pointed out, their respective appeals to that body were "cancelled and no further action taken with respect to it." This was in fact a waiver and it was so regarded. The initial determination to resort to the statutory procedures must be considered of having the same force and effect by inference only if one were to give the word "appeal" as used in the contract language the specific meaning that the Service attributes to it. For the reasons set forth above, the undersigned cannot find justification for so doing, and these grievances, insofar as they request that these grievants be permitted to put their cases before an arbitrator must be sustained.

AWARD

The grievance filed by the American Postal Workers Union on behalf of Isaac L. White in Case No. AB-W-11, 369-D is hereby sustained insofar as the contention of the Union regarding the arbitrability of his discharge case is concerned.

The grievance filed by the National Association of Letter Carriers on behalf of Thomas McDonald in Case No. NB-N-4980-D is hereby sustained insofar as the contention of the Union regarding the arbitrability of his discharge case is concerned.

It is directed that both cases proceed forthwith to arbitration on the merits.

Howard G. Gamser, Arbitrator, August 25, 1976

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In the Matter of the Arbitration

between

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL/CIO ("Union")

and

UNITED STATES POSTAL SERVICE ("Service").

Case No. NB-N-4980- T. McD., Nanuet, N.Y. ("Grievant")

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AWARD OF ARBITRATOR

The Undersigned Arbitrator, having been designated in accordance with the arbitration provisions of the applicable Agreement between the above-named parties, and having been duly sworn, and having duly heard the proofs, allegations and arguments of the Parties, AWARDS, as follows:

> The Service showed sufficient and just cause to discipline the grievant for the offense charged against him, but, in the special circumstances of this case, the measure of discipline meted out to the grievant is hereby commuted to a suspension without pay from the date of the grievant's removal from the Service payroll on or about March 7, 1975, until his reinstatement as hereinafter provided.
>
> The Service is hereby directed to offer to the grievant, promptly after receipt of this Award, reinstatement to his former position with the Service as a Part Time Flexible Letter Carrier.

DANIEL KORNBLUM, Arbitrator

Dated: October 26, 1976.

10/28/76 MISTREATMENT OF MAIL - 30
(DISCARDING DELIVERABLE CIRCS) NB-N-4980-D
Kornblum 10-26-76

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In the Matter of the Arbitration :

between :

NATIONAL ASSOCIATION OF LETTER CARRIERS, :
AFL/CIO ("Union") :

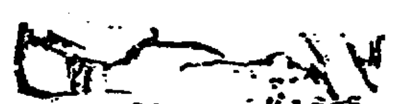
and :

UNITED STATES POSTAL SERVICE ("Service") :

Case No. NB-N-4980- T. McD., Nanuet, N.Y., :
("Grievant") :

- X

RA-1434D-73
Thomas McDonald
Nanuet, NY
NBN4980D



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OPINION AND AWARD OF ARBITRATOR

Appearances:

For Union and Grievant - RAYMOND G. KRUSE, Esq.
(Brent, Phillips, Dranoff & Davis, P.C.), attorney;

For Service - STANLEY MESTEL, Esq., attorney

DANIEL KORNBLUM, Arbitrator:

On March 7, 1975, the grievant was removed from the payroll of the Postal Service on the charge that he was observed "throwing away Third Class Mail in a trash receptacle in the rear of Pergament Paint Store on Monday, March 3, 1975 at approximately 11 A.M." The grievant had been employed by the Service for about seven years as a Part-Time Flexible Carrier assigned to its Nanuet, New York Post-Office since May, 1968. This employment was interrupted only by the grievant's interim period of duty with the United States Army from April, 1969 to January 1971, during which

time he had served overseas in the war in Vietnam.

The evidence on this record is undisputed that on the telltale morning of March 3, 1975, (1) a Letter Carrier in a 1/2 ton postal vehicle of the Service was seen discarding some material into a trash receptacle ("dumpster") located in the parking lot at the rear of the Pergament store in Nanuet, (2) that soon thereafter some 258 circulars or "flyers" advertising a local supermarket's sale scheduled to begin that morning were retrieved from the dumpster by the Service's witnesses to the event, and (3) that with several exceptions all of these circulars had affixed to them mailing tags directed to addressees situated on the mail route assigned to be served by the grievant that morning. As the very able and diligent counsel to the grievant acknowledged in his post-hearing brief:

> "The grievant does not make any contention that the witnesses Mettiga and Sims did not see some postman throw something into a dumpster around 11:00 a.m. on the morning in question, nor does the grievant attempt to refute that the several hundred flyers variously addressed for Normandy Village [a large residential housing complex admittedly located on the mail route to be serviced by the grievant that day] were found by Mettiga and the Postmaster in the dumpster."

The witnesses Mettiga and Sims referred to in the above quotation are two members of the public in no way subservient to or connected with the Service. On the morning in question they were employed by a local distributor of a brand name hearing aid whose place of business in Nanuet had a plateglass storefront

looking out on the parking lot to the rear of the Pergament store. (They testified in this case under subpoena requested by the Service.) The Postmaster referred to in the above quoted passage from the brief of counsel for the grievant, a veteran in the employ of the Service, was its witness in this case who recovered the bulk of the discarded circulars from the dumpster where, certainly, the advertiser who paid for their delivery did not intend that they should be reposited in the first place.

The evidentiary issue here stems from the grievant's unequivocal denial that he was the postman that morning who engaged in the offensive dumping act. On the contrary, the testimony of the grievant is that he did in fact make all his required mail deliveries, including all the circulars destined for the Normandy Village addressees, on his appointed rounds that day. But the arbitrator's very painstaking assessment of all the evidence on this record convinces him that the grievant's denial defies credulity, not only in light of each telling link in the chain of evidence adduced by the Service disproving this denial, but also, in unwitting part, by the grievant's own befriending witnesses.

We start out with the established and admitted fact that the 1/2 ton Service vehicle assigned to the grievant that morning was identified with the Service #421375 on its rear panel. The grievant himself testified that he never yielded control of that vehicle from the time he took it out on the route at about 10:28 A.M. that morning until he returned with it at about 3:40 P.M. later that

day. The witness Mettiga attested that this was the vehicle he spotted at or about 11:00 A.M. near the dumpster at the rear of the Pergament store into which the numerous circulars described were being jettisoned from the truck. According to the witness Sims, it was her co-worker, Mettiga, who not only then called her attention to what, to his surprise and dismay, he was seeing taking place at the rear of the Pergament store, but more significantly had caused her to write down the vehicle identification number when it was seen emerging from the parking lot to the street on which the hearing aid store was fronted. The scrap of paper on which this number was written by Sims was produced at the hearing and admitted into the record when, under oath and after intensive cross-examination, she held to her unhesitating assertion from the outset that this writing was her product and was then and there recorded by her when the event occurred that morning.

While counsel for the grievant vigorously challenges the credibility of salient aspects of the testimony of the witness Mettiga, it remains that not the slightest basis is revealed on this record to disbelieve the testimony of Sims. As merely a casual bystander on the scene, as indeed Mettiga was too, she had utterly no personal incentive or motivation to fabricate her testimony merely to assist in establishing these charges against the grievant. Nor for that matter was it shown that Mettiga, despite some seeming disparities in his pre-hearing statements, had any such invidious design. Neither Sims nor Mettiga ever said in

so many words that it was the grievant they saw behind the wheel of the Service truck that morning; the latter simply testified that the glimpse of the driver of the departing vehicle that he was able to get at the time revealed only that the man at the wheel was young, long haired and bearded. (It was not denied at the hearing that when the incident in dispute occurred the grievant sported a beard.)

The essence of the grievant's challenge to the testimony concerning the identification of the vehicle was that (1) the numbers were so small (about 1 1/2 inches in height), (2) the vehicle so positioned in the parking lot, and (3) the measured distance from where these numbers were said to have been seen by Mettiga, that it would have been virtually a physical impossibility for him to have read with his naked eye the series of 6 digits comprising the critical identification number. But without going into the conjectural niceties of this challenge, there was other testimony, this from witnesses produced by the grievant, which certainly placed the selfsame vehicle in the parking lot serving the Pergament store, among others, not very long after the approximate time it was said to have been seen and identified by Mettiga. These two witnesses, both friends of and former high school classmates of the grievant, testified that each happened to be in the parking lot at 11:30 A.M. that morning and each had separately exchanged brief greetings with the grievant when he was in the act of leaving the parked Service postal truck seemingly to

deliver some mail via the front entrance of the Pergament store. While this testimony indicates that this Service vehicle when then seen was parked on the lot to the distant side of the Pergament store and nowhere near the dumpster located behind that store, it is remarkable that this vehicle was parked on the rear lot to begin with. The regular carrier who daily services the mail route in question (Monday, March 3, 1975 was his day off), testified that in delivering the Pergament mail there is no point in parking the vehicle in the rear lot because there is ample parking space in front of the complex of stores of which Pergament's is a part.

Certain it is, too, that before reaching the Pergament store that morning the grievant had knowingly left the Post Office with bundles of the supermarket flyers for delivery on his route, mostly to the numerous addressees in Normandy Village. It will be remembered that almost all of the 258 odd flyers retrieved from the dumpster that morning were also addressed to Normandy Village residents. If then, as the grievant insists, he later that day delivered the flyers destined for Normandy Village it would seem then that there must have been an incredible and costly amount of mailing duplication of these addressed flyers, at least 258 in number, destined for the most part for delivery to residents of Normandy Village. It is difficult, without more, to hold here that the private mail service operation that contracted for the mail delivery of these flyers would indulge in such needless waste and duplication at its expense. Indeed the uncontradicted testimony

from the Postmaster of the Nanuet Post Office is that since learning of this incident that private mailing contractor has not seen fit to utilize the Nanuet Post Office for its third class mail jobs.

And while it is readily acknowledged by the Service that third class mail, as distinct from other classes, is not "accountable" mail it is also difficult to accept the assertion urged by grievant's counsel that for some unknown reason the 258 mail addressed circulars retrieved from the dumpster somehow never came into the "possession" of the Service to begin with. In this connection we are also reminded that grievant's counsel does not dispute that these circulars were dumped into the trash receptacle by some anonymous postman in the Service from one of its vehicles observed on the parking lot that morning. Why then would these 258 flyers, with but few exceptions admittedly addressed to stops on the grievant's route that day, have found their way that morning into some unidentified Service postal vehicle driven by some unknown postman other than the grievant, all necessarily operating out of the only Post Office conceivably involved in this case?

The arbitrator is persuaded beyond a reasonable doubt, on the basis of the entire record, that it was the grievant who committed the serious dereliction here charged to him and that the Service had ample and just cause to discipline him for it.

The Measure of Discipline

The offense involved in this case is undoubtedly a major one, well warranting removal of the proved offender from the employ

of the Service. The fact that the flyers that were jettisoned in this case were third class mail does not alter the gravity of the offense. As counsel for the Service observed in his post-hearing brief:

> "It is not entirely unusual for a carrier to throw away third class mail. Third class mail is sometimes called 'junk' mail. But mailers must pay to have it delivered. It isn't 'junk' to the mailer, to the Postal Service or to customers who may wish to know of the sale and use the coupons contained therein."

In the normal course, therefore, and given this type of offense the arbitrator would be ill-disposed and most reluctant to substitute his judgment for that of the Service as to the extent of the discipline to be imposed on the offender. Indeed counsel for the grievant in this case, advisedly and understandably in the nature of the contest on the merits here, never made a plea for a lesser measure of discipline in the event this charge against the grievant was upheld.

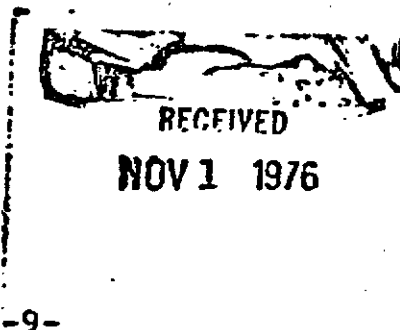
Nevertheless there were certain poignant human and humane considerations that emerged in the course of this hearing and which could not fail to impress the arbitrator. This offense was apparently the only one ever charged against the grievant during his tenure with the Service, there being no suggestion on this record to the contrary. Already the grievant has been off the Service payroll for over one and a half years. The grievant, a young veteran of our armed forces and the father of a three year old child, has ever since his removal been unable to obtain gainful

employment and his family has been sustained by means alone of public welfare assistance. Allowing for the dilemma in which the grievant was placed in defending himself in this case, he impressed the arbitrator as a straightforward young man, clean-cut in appearance and demeanor.

In all these circumstances the arbitrator is disposed to direct the Service to give the grievant one more chance to show that he can still be a reliable and dependable employee in its ranks. The accompanying award will, therefore, direct the Service to offer the grievant reinstatement without back pay. But the arbitrator wants it to be distinctly understood that in making such a dispensation in this case he by no means intends it as creating a precedent or pattern for like offenses or offenders that they too should be entitled to "one more chance"; it is designed solely and only as a sui generis disposition of the case at hand.

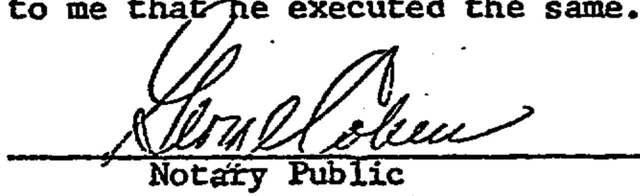
DANIEL KORNBLUM, Arbitrator

Dated: October 26, 1976.



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

On this 28 day of October, 1976, before me personally came and appeared DANIEL KORNBLUM, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.



Notary Public

GEORGE COHEN
Notary Public, State of New
No. 31-0532150
Qualified in New York County
Commission Expires March 30, 1977