C#08842

IN THE MATTER OF AN ARBITRATION	)	RE: Curtis Williams, W7N-5D-D-10075
Between	)	
UNITED STATES POSTAL SERVICE	)	AWARD OF THE ARBITRATOR
and	)	
NATIONAL ASSOCIATION OF LETTER CARRIERS	)	May 3, 1989

This matter came on for hearing before Arbitrator David Goodman on April 6, 1989 in Los Angeles, California. The United States Postal Service (hereinafter the "Employer") was represented by Joseph Green, Labor Relations Representative, and the National Association of Letter Carriers (hereinafter the "Union") was represented by Harold Powdrill, Treasurer of Angel City Branch 24. Although the parties were unable to stipulate that all steps in the grievance procedure had been complied with in a timely manner, they agreed that this matter was properly before the Arbitrator for a final and binding Award.

STIPULATED ISSUES

Is the grievance procedurally arbitrable? If so, was the removal issued for just cause? If not, what is the appropriate remedy?

STATEMENT OF CASE

On April 26, 1988 a "Notice of Charge-Removal" (Joint Exhibit 2(5), hereinafter the "Notice") was issued for AWOL on March 7 (8 hours), March 25 (8 hours) and April 18-22, 1988 (32 hours). Cited in support of the removal were the following prior disciplines: a letter of warning on November 25, 1986 for "Failure to Report as Scheduled"; a seven calendar-day suspension, effective December 14-20, 1987, for

"Failure to Report as Scheduled/AWOL"; and a fourteen calendar-day suspension, effective January 25-February 7, 1988, for "AWOL(No Call)." Grievant's seniority date with the Employer is January 11, 1971.

The Notice was Carrier Certified to Grievant's last reported address on May 19, 1988 and was not appealed to his immediate supervisor until June 14, 1988. The Union did not learn of the Notice until June 6; a Step 1 meeting was then held on June 9, and a denial of the grievance was issued on June 14. In the meantime, on June 9 a "Letter of Decision-Removal" was sent to this preference-eligible employee concluding that the Notice was supported by the evidence, and hence, the removal was justified (Joint Exhibit 2(8)).

POSITIONS OF THE PARTIES

Citing Article 15, Grievance-Arbitration Procedure, Section 2, Step 1:(a), the Employer argues that the grievance was filed in excess of fourteen calendar-days, and thus was untimely. It posits that this arbitrability issue was raised and preserved at each step of the grievance procedure; since it is evident that the grievance was not pursued within the required time limits, it is not arbitrable and should be dismissed. In further support, the Employer cites Section 666.7 of the Employee and Labor Relations Manual (hereinafter the "Manual"), which requires employees to keep the "installation head informed of their current mailing addresses ..." Grievant did not do so and should therefore suffer the consequences as the Postal Service met its responsibility of delivering the Notice to Grievant's "current mailing address."

Turning to the merits, Grievant was a full-time letter carrier assigned to the Pico Heights Station, a substation of the Los Angeles Postal Service. The Employer maintains that from March 7 to April 22, 1988 Grievant accumulated a total of 48 hours of unscheduled leave which was charged to AWOL. Equally significant, these AWOLs must be considered in light of the history of progressive discipline during the last two years of his employment, when Grievant received a letter of warning, a seven-day suspension and, less than 45 days later, a 14-day suspension. All were attendance-related, for failing to report for work and/or AWOL. Moreover, less than one month after serving the 14-day suspension, Grievant again incurred AWOLs, at which time the Postal Service was entitled to terminate Grievant's employment. For these reasons the Employer asks that the grievance be denied in its entirety and no relief be granted.

The Union first posits that the Notice was delivered to the residence of Grievant's mother. While Grievant does not live there, he will pick-up mail when his mother notifies him of its delivery. However, during this period of time Grievant's mother was out-of-town and Grievant did not receive the Notice until early June. As soon thereafter as the Union became aware of the Notice, which was on June 6, a Step 1 meeting was requested and held on June 9; after the grievance was denied it was appealed to Step 2. With regard to the Employer's reliance on Article 15, Section 2, Step 1:(a), the Union argues that it is misplaced. Simply, the required discussion with the employee's immediate supervisor must be held within fourteen days of the date "on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause" (emphasis

supplied). Since the Union can initiate the Step 1 meeting, and since Grievant did not reside at the place where the Notice was served, it would be patently unfair for the Arbitrator to find the grievance untimely and refuse to proceed to the merits.

As for the substantive issue, the Union first stipulates that Grievant was AWOL on March 7 and March 25, 1988. With regard to the AWOL charge for April 18-April 22, 1988, Grievant was physically unable to attend to his job. Asserting that the AWOL was held in abeyance pending appropriate substantiation, the Union argues that corrective rather than punitive discipline should have been the cornerstone of management's objective. That is, management should have placed this long-term employee on restricted sick leave rather than discharge him.

Last, the Union maintains that Grievant did submit appropriate documentation to substantiate his absences for April 18 - April 22 and says this substantiation should have put a stop to the pending removal. The Union therefore requests that the grievance be sustained and that Grievant be reinstated to his former position of employment with an appropriate remedy.

STATEMENT OF FACTS

Julia Medina, a 12-year employee, supervised Grievant at the Pico Substation during two six-month periods prior to initiating the Notice. She admitted having sought advice from the Labor Relations Department since Grievant's veteran status entitled him to certain options.

Recalling that Grievant had been counseled about irregular attendance on six or seven occasions, Medina testified that after a

few days or a few weeks Grievant would revert back to failing to report for work and continued AWOLs. Medina also recalled a conversation with Grievant at the time of the 14-day suspension wherein they discussed such matters as the importance of his being at work and on his route, the need for him to wear a clean and tidy uniform (which, she said, was always dirty), and the need to "get himself together" if he wanted to continue his employment.

In this regard, Grievant's attendance record (Joint Exhibit 2(16) Form 3972) illustrates just how dismal that record was from December 19, 1987 forward. It contains numerous AWOLs because of Grievant's failure to substantiate absences. Medina stated that on many occasions Grievant would not even bother to call in, that she would only discover his absence after his tour began, and that she would have to contact a ptf to cover his route. The upshot of this problem was an increase in required overtime and a number of complaints from postal customers.

Medina also testified that on many occasions Grievant came to work and asked for time off; Medina would allow it even though Grievant could not substantiate the need for it. Hence, she opined that although management had accorded him every benefit of the doubt and extended him every courtesy, Grievant's record did not improve. It should also be noted that Grievant was referred to the Employee Assistance Program, and while there is some dispute over his obligation to participate, it is clear that Grievant did not do so.

As for the April 18-April 22 AWOL, Grievant telephoned on April 18 to report that he was sick and unable to attend work. Medina acknowledged the call-in under "type of absence" and recorded Grievant

as sick from April 18 to April 21 (see Form 3971, Joint Exhibit 2(11e)). The asserted sickness was held in abeyance "pending substantiation"; when Grievant failed to document his absence it was converted to AWOL. Another Form 3971 shows that Grievant's absences were converted to AWOLs on April 29 "pending substantiation"; this was three days after the Notice was issued (Union Exhibit 1). Although Medina said that Grievant never returned to work thereafter, his 3972 reveals that Grievant reported for work on or about June 1 and remained employed until June 20, the effective date of his removal.

During cross-examination the Union submitted into evidence a medical report, dated April 2 from Kaiser Permanente which indicated Grievant was suffering from "bilateral shoulder tendonitis" and would be unable to return to work until June 1, 1988 (Union Exhibit 2). Medina did not recall ever seeing this document but agreed that, had it been submitted, such information would have been appropriate substantiation for Grievant's sick leave from April 18 through June 1. Although there was a good deal of discussion as to when the Postal Service received this substantiation, the weight of evidence suggests that it was provided at or shortly after the Step 2 meeting. Medina admitted she would not have requested removal if she had received this document on or before April 26.

DISCUSSION AND CONCLUSION

The grievance is arbitrable. In clear and plain language, Article 15, Section 2, Step 1:(a) requires discussion between the Grievant and his/her immediate supervisor "within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause." It is

unrefuted that a discussion with Grievant's immediate supervisor did occur within fourteen days after the Union first learned of the Notice on June 6. There is, then, no need to decide the more difficult question of whether Grievant should suffer the consequences of an untimely grievance because he failed to comply with the mandate in Section 666.7 of the Manual which requires the employee to keep management abreast of his current mailing address. The Union's timely response to the Notice requires a conclusion that the grievance is procedurally arbitrable, and accordingly, a determination of the merits is warranted.

To say the least, Grievant's AWOL record, along with his absentee record from December, 1987 onward, is among the worst this Arbitrator has ever reviewed. Medina's credible testimony shows the efforts management went to in trying to save this employee from termination. Yet this 17-year veteran did not respond. He failed to comply with the minimal expectations of regular attendance and avoided the required substantiation when absent from work. Under such circumstances, an employee's long record of employment is not an inpenetrable shield against discipline or even discharge.

Notwithstanding these observations, while it is undisputed that Grievant incurred AWOLs on March 7 and March 25, the Arbitrator is unable to conclude that the 32 hours of absence from April 18 through April 22 was properly treated as AWOL. In every respect, the documentation submitted from Kaiser Permanente complied with the mandates of the Manual. There was a specific diagnosis and an anticipated return date of June 1, 1988 when Grievant was "advised to return to work ..." (Union Exhibit 2). Granted, Grievant did work subsequent

to April 2, but this fact does not undermine the validity of that substantiation. The Grievant suffered from bilateral shoulder tendonitis as a consequence of an on-the-job injury, and could not work on those occasions when there was a flare-up of the condition. Apparently, that was the case from April 18 onward. It was not the case before then, and, hence, the presence of the April 2 date is not germane to the issues presented here. Accordingly, since only two of the three AWOLs have been sustained (totaling 16 hours) and since the April 18 - April 22 AWOLs -- the one that triggered the Notice -- cannot be sustained, there is an absence of just cause for Grievant's termination.

Quite aside from these observations, the Arbitrator would be remiss in his responsibility, and indeed, would proceed in callous disregard for the needs of the Postal Service, if Grievant were ordered immediately reinstated with full back pay. Foremost is the fact that Grievant was AWOL on March 7 and March 25, and therefore, a substantial portion of the charges against Grievant must be sustained. In addition, Grievant's overall record of AWOL and poor attendance shows that this employee is barely, and only barely, entitled to return to his job. Once again, the only fault in the Employer's case is its inability to show an AWOL from April 18 to April 22. Grievant will therefore not be awarded back pay.

More important, however, throughout this hearing and during discussions with Grievant, the Arbitrator could not avoid noting the appearance and demeanor of Grievant, who seemed to be under the influence of either a drug or alcohol. He was incoherent, his speech was slurred, and at one point he was unable to recall comments he had

made only moments before. It was apparent that this Grievant was not and may not yet be ready to return to work. While there is an absence of just cause for his removal, this Arbitrator will not require reinstatement until such time as Grievant is able to prove to the satisfaction of the personnel at the Employee Assistance Program that he is drug and/or alcohol free. Thus, a most unusual step, but one within the Arbitrator's authority to take, is required to remedy the situation.

Grievant's reinstatement will be conditioned upon satisfactory completion of a 90 calendar-day program through the offices of the Employee Assistance Program prior to his return to the Postal Service. At the Arbitrator's request, Maceo Haymon, EAP Coordinator, was called to the hearing and assured the Arbitrator, Grievant and Representatives for the Postal Service and the Union that Grievant could undertake a 90-day program and still work at his non-Postal Service job. Consistent with Grievant's desire, he was scheduled for his first appointment with Mr. Haymon on April 10 at 7:00 a.m. Thereafter, Mr. Haymon is to make periodic reports on Grievant's progress to Labor Relations Representative Joseph Green. Assuming Grievant completes his 90 calendar-day program with the EAP, he shall be reinstated to his former position of employment with his seniority fully restored. On the other hand, if Grievant fails to substantially comply with the EAP program, he will not be subject to reinstatement. Grievant alone must shoulder the consequences of his conduct; it is his decision to make. The Arbitrator will retain jurisdiction over this case in the event a controversy arises over Grievant's compliance or noncompliance with this Award.

POSTSCRIPT

Toward the completion of this Award, the undersigned was informed by Employer's Counsel, Joseph Green, that Grievant failed to keep his April 10 appointment with EAP Coordinator Maceo Haymon. The Arbitrator directed that Union Counsel Harold Powdrill be so advised and that Haymon write to Powdrill and Grievant advising that another appointment was scheduled for April 17. During a telephone conference call on April 20, the Arbitrator learned that Grievant failed to keep this appointment as well. In addition, Powdrill reported that he had contacted Grievant on April 19 and that Grievant intended to report to Haymon by April 20 about arrangements for a VA alcohol/drug program. When Grievant failed to do so, this conference call ensued. The undersigned determined that Grievant would be given until the close of business on April 24 to advise Haymon that he either had been admitted or was scheduled for admission to the VA program. If this did not occur, the Arbitrator would conclude that Grievant was responsible for failing and/or refusing to abide by his commitment and would be considered to have abandoned his job. On May 1, Joseph Green telephoned to report that Grievant had kept his April 24 appointment and was scheduled for admission to an in-house VA drug and alcohol rehabilitation program. The duration of the program is unknown to the Arbitrator but assuming Grievant successfully completes the program, the Union is to coordinate a meeting with Mr. Haymon and Grievant. If Mr. Haymon releases Grievant for his return to work, the grievance will be at an end. On the other hand, if Grievant is not released and if Grievant, the Union and Mr. Haymon are unable to agree on an appropriate post-rehabilitation program (or, for that matter if other

issues arise over Grievant's reinstatement) Mr. Green and Mr. Powdrill are to contact the undersigned for a resolution to their disagreements.

AWARD

The grievance is sustained subject to the conditions heretofore announced. The Arbitrator shall retain jurisdiction in the event a dispute arises over the implementation of this Award.

Respectfully submitted,

David Goodman, Arbitrator