C# 18158

National Arbitration Panel

In the Matter of Arbitration	)	
	)	
between	)	
	)	
United States Postal Service	)	Case No: H7C-3R-C 5691
	)	
and	)	
	)	
American Postal Workers Union	)	

Before: Shyam Das

Appearances:

For the Postal Service:	John W. Dockins, Esquire
For the Union:	C.J. "Cliff" Guffey

Place of Hearing:	Washington, D.C.
Date of Hearing:	April 24, 1997
Date of Award:	November 12, 1997
Relevant Contract Provisions:	Article 16.9
Contract Year:	1987-1990
Type of Grievance:	Contract Interpretation

Award Summary

The issue is whether Article 16.9 covers all actions that are otherwise appealable to the Merit Systems Protection Board by veteran preference eligible employees. The Postal Service contends that Article 16.9 contains no language limiting its application to discipline cases, and that contract history, past practice, and the overriding purpose of Article 16.9, support its position. The Union contends that Article

Award Summary (Cont'd)

16.9 applies only to discipline cases. It argues that contract history supports its position, and that there is no binding past practice of applying Article 16.9 to contract cases.

An earlier National Arbitration Award held that Article 16.9 does not apply to EEO claims, and it is unnecessary to determine whether Article 16.9 covers reduction in force actions that, in any case, are subject to a similar provision in F.3 of Article 6.

The other actions appealable to the MSPB by preference eligibles are "adverse actions" as defined in 5 USC §7512. The evidence supports a finding that since the present wording of Article 16.9 was agreed to in 1978, the parties through their actions have treated and considered Article 16.9 as covering all "adverse actions" not just discipline cases, and this is consistent with the purpose of Article 16.9.

Shyam Das, Arbitrator

As refined at the arbitration hearing, the issue to be resolved in this decision is: Whether or not Article 16.9 covers all actions that are otherwise appealable to the MSPB by veteran preference eligible employees?[1]

Article 16.9 of the July 21, 1987 - November 20, 1990 collective bargaining agreement ("Agreement"), in effect when the underlying grievance in this case arose, states:

> Section 9. Veterans' Preference
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> A preference eligible is not hereunder deprived of whatever rights of appeal such employee may have under the Veterans' Preference Act; however, if the employee appeals under the Veterans' Preference Act, the employee thereby waives access to any procedure under the Agreement beyond Step 3 of the grievance-arbitration procedure.

Pursuant to Federal statutes, "preference eligible" veterans, as defined in 38 USC Chapter 43, who are employed in the Postal Service are entitled to appeal "adverse actions" to the Merit Systems Protection Board ("MSPB"). 5 USC Chapter 75 and 39 USC §1005. Such adverse actions are defined in 5 USC §7512 as:

> (1) a removal;
> (2) a suspension for more than 14 days;
> (3) a reduction in grade;
> (4) a reduction in pay; and
> (5) a furlough of 30 days or less;

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[1]The issue actually is slightly less broad. In a National Arbitration decision, Case Nos. D90N-4D-D 95003945/95003961 (hereinafter Snow Award I), issued on April 24, 1997, Arbitrator Snow held in a case between the Postal Service and the NALC, in which the APWU was an intervenor, that the waiver provision in Article 16.9 does not apply in the case of a veteran preference eligible employee who appeals an EEO complaint to the MSPB. Thus, the issue in this case does not include EEO claims.

By Federal caselaw, the adverse actions listed in §7512 include involuntary resignation or involuntary retirement, which have been defined as constructive removal, and enforced leave (in excess of 14 days), which has been defined as constructive suspension. The focus under 5 USC §7512 essentially is on the "adverse" impact of the Employer's action on the affected employee, regardless of whether that action was in response to alleged misconduct.

Preference eligible veterans employed by the Postal Service also have the statutory right to appeal to the MSPB if demoted, separated or furloughed in excess of 30 days in a reduction in force ("RIF"). 5 USC 3502; 5 CFR 31. (Such actions are specifically excluded from the definition of adverse action in 5 USC §7512.)

In the present case, the Postal Service contends that the waiver provision in Article 16.9 of the Agreement applies to all appeals under the Veterans' Preference Act, that is, appeals by preference eligible employees of all adverse actions, as defined by Federal law, and appeals of RIF actions. The Union contends that the waiver in Article 16.9 applies only to appeals of those adverse actions which constitute "discipline" under the Agreement.

Enforced leave or involuntary placement in nonpay-nonduty status (in excess of 14 days) is an example of an adverse action that is not considered discipline under the Agreement. A preference eligible employee who is placed on enforced leave in excess of 14 days, for example, due to a medical condition, may appeal that adverse action to the MSPB as a constructive suspension. In a recent USPS/APWU National Arbitration case, Case No. D90T-4D-D 93009245 (hereinafter Snow Award II), the

Union maintained that enforced leave constituted discipline under Article 16.9 of the Agreement. Arbitrator Snow rejected that position, however, and held that enforced leave grievances: "shall be processed as contract cases and not considered 'discipline' under Article 16.9...." Consistent with the rationale in Arbitrator Snow's decision, the parties in the present case essentially have treated "discipline" cases as confined to those cases where Management has taken action against an employee for an alleged act of misconduct.

In March 1988 the Postal Service entered into identical Memoranda of Understanding with the National Association of Letter Carriers and the Mail Handlers Union which state in relevant part:

> I. As general principles, the parties agree that the purpose and intent of Article 16, Section 9 is:
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> A. To afford preference eligible employees, because of their status under the Veterans' Preference Act, a choice of forums in which to obtain a resolution on the merits of certain adverse employer actions set forth in Chapter 75 of Title 5, U.S. Code. (e.g., suspensions of more than 14 days, discharge), and
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> B. To prevent situations in which the Employer is required to defend the same adverse action before the MSPB and in the Grievance-Arbitration procedure.

The Union points out that the Postal Service's Step 4 decision in the present grievance states that "the proper interpretation" of Article 16.9 has been set forth in the Memoranda quoted above. On that basis, the Union objects to the

Employer changing its position at arbitration to include RIF action appeals within the scope of Article 16.9, since RIF actions are not set forth in 5 USC Chapter 75.

The parties are in agreement that Article 16.9 does not apply to appeals to the MSPB pursuant to 5 USC §8151 and 5 CFR 353 in so called "restoration to duty" cases. Under those Federal provisions, all Postal Service employees are provided certain rights to appeal to the MSPB in cases where they protest not being restored to duty following recovery from compensable injury. Such rights are not limited to preference eligible veterans and are not derived from the Veterans Preference Act referred to in Article 16.9.

The parties agree that the facts of the underlying grievance in this case are not relevant to the issue presented for decision at the National level. The Union asserts, however, that the grievance is a restoration to duty case. Accordingly, it contends that the grievance now should be returned to the Regional Arbitrator to resolve other issues since it is agreed that Article 16.9 does not apply in such cases. The Postal Service maintains that it is not entirely clear whether the appeal to the MSPB at issue in the underlying grievance was an appeal under the restoration to duty provisions or was an appeal of the Employer's action as an adverse action (enforced leave) under 5 USC Chapter 75.

Both parties rely on the history and evolution of the provision now found in Article 16.9 in support of their respective positions. Article 16 has been entitled "Discipline Procedure" since the first (1971-73) collective bargaining agreement. Appeals by preference eligible employees to the Civil Service Commission (the predecessor of the MSPB) were referred to

in Sections 3 and 6 of Article 16 in the 1971-73 Agreement, which read as follows:

> SECTION 3. In the case of suspensions of more than thirty (30) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days. Thereafter, the employee shall remain on the rolls (non-pay status) until disposition of his case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure. A preference eligible who chooses to appeal his suspension of more than thirty (30) days or his discharge to the Civil Service Commission rather than through the grievance-arbitration procedure shall remain on the rolls (non-pay status) until disposition of his case has been had either by settlement or through exhaustion of his Civil Service appeal. When there is reasonable cause to believe an employee guilty of a crime for which a sentence of imprisonment can be imposed, the advance notice requirement shall not apply and such an employee may be immediately removed from pay status.
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> (Emphasis added.)
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> * * *
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> SECTION 6. A preference eligible is not hereunder deprived of whatever rights of appeal he may have under the Veterans' Preference Act, but he must exercise his option before invoking the grievance procedure, and if he appeals under the Veterans' Preference Act, he thereby waives all redress under this Agreement.

In the 1973-75 Agreement the parties amended the grievance-arbitration procedure in Article 15 to establish a separate track beyond Step 2A for discipline/discharge

grievances. Such grievances went from Step 2A to Step 2B and then directly to arbitration. Contract grievances went from Step 2A to Steps 3 and 4 prior to arbitration. Article 16.6 was amended as follows (new language in bold face type):

> 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.**

There were no material changes in the 1975-78 Agreement. In the 1978-81 Agreement, however, the parties extensively revised the grievance-arbitration procedure in Article 15. The separate track for discipline/discharge grievances was eliminated. All grievances progressed from Step 2 to Step 3 prior to arbitration. Article 16.6 was renumbered Section 7 and was amended as follows (new language [changing the reference from Step 2A to Step 3] in boldface type):

> SECTION 7. Veterans' Preference. A preference eligible is not hereunder deprived of whatever rights of appeal such employee may have under the Veterans' Preference Act; however, if the employee appeals under the Veterans' Preference Act, the employee thereby waives access to any procedure under this Agreement beyond Step 3 of the grievance-arbitration procedure.

The "Veterans' Preference" provision, now found in Article 16.9 of the Agreement, has remained unchanged since the 1978-81 Agreement. The portion of Article 16.3 of the 1971-73 Agreement which refers to preference eligible employees, quoted earlier, has remained essentially unchanged except that this

section, now Article 16.5 and entitled "Suspensions of More Than 14 Days or Discharge", applies to discharge and suspensions of more than 14 (rather than 30) days and refers to appeals to the MSPB, the successor to the Civil Service Commission.

EMPLOYER POSITION

The Postal Service maintains that the language in Article 16.9 is crystal clear. The prohibition or waiver specified in Article 16.9 applies to "any procedure under the Agreement beyond Step 3" which includes appeals of contract cases. The Postal Service stresses that Article 16.9 does not state that the waiver therein is limited to discipline cases. Accordingly, it must be concluded that it applies to any case that may be appealed beyond Step 3. To limit its application to discipline cases would require the arbitrator to impermissibly change the language in the Agreement.

The Postal Service argues that the negotiating history of this provision supports its position. It points out that in the initial 1971-73 Agreement, the waiver provision in Article 16.6 was very broad and applied to "all redress under this Agreement". Obviously, it asserts, this applied to contract as well as discipline/discharge grievances. In the 1973-75 Agreement, this provision was changed to permit an employee who appealed an action under the Veterans' Preference Act to process a grievance through Step 2B. Since only discipline/discharge grievances were processed at Step 2B, the waiver contained in this provision under the 1973-75 Agreement only applied in those cases. In the 1978-81 Agreement, however, there were two significant changes. The grievance-arbitration procedure in Article 15 underwent major revision, including the elimination of

Step 2B and the separate track for discipline/discharge grievances. Under the new procedure both discipline and contract grievances were appealed from Step 2 to Step 3, prior to arbitration. The second change was in the Veterans' Preference provision in Article 16.7 where the reference to Step 2B was changed to Step 3. The Postal Service argues that this change signified that once again all grievances were to be covered by the prohibition or waiver in that provision, not just discipline/discharge grievances. Absent evidence to the contrary, and none was presented by the Union, no other conclusion can be reached. The provision now found in Article 16.9 has remained unchanged since that time.

The Postal Service contends that the waiver in Article 16.9 is triggered by an appeal under the Veterans' Preference Act, and it makes no difference what type of action is being appealed, which is subject to change and is determined not by the Agreement but by external law. The Agreement provides that, whatever the basis for the appeal, the waiver applies in the case of any appeal under the Veterans' Preference Act.

The Postal Service insists that the overriding purpose of Article 16.9, which has been recognized in National Arbitration decisions by Arbitrators Gamser, Case No. AB-W-11, 369-D and Case No. NB-N-4980-D (hereinafter Gamser Award) and Snow, Case No. H7C-3D-D 13422 (hereinafter Snow Award III), is to prevent the necessity for two hearings and to preclude the employee from having "two bites of the apple". The Postal Service maintains that this policy is equally applicable whether the action being appealed to the MSPB is disciplinary or contractual in nature under the Agreement.

The Postal Service also argues that past practice supports its position. It points out that this case is essentially about the small "niche" between those adverse actions which can be appealed to the MSPB under Federal law and the negotiated concept of discipline under the Agreement. The Postal Service cites five Regional Arbitration decisions in which it argued without objection from the Union (in one case the NALC) that the waiver provision in Article 16.9 applied in various nondisciplinary cases involving adverse actions appealable by preference eligible employees to the MSPB. Two cases involved administrative discharges (Case No. CBC-4E-D 20329 [1982] and Case No. S7C-3S-D-1088 [1988]), one case involved an involuntary resignation (Case No. WIC-SD-D-10984 [1982]), one case involved an unfit for duty action (Case No. N4N-1E-C 1483 [1985] NALC) and one case involved a reduction in grade (Case No. N4V-1M-C 12691 [1989]).[2] In some of these cases there was a question as to whether or not the employee's action under the Veterans' Preference Act constituted an "appeal" which triggered application of the waiver in Article 16.9, but in none of the cases did the Union argue that Article 16.9 was inapplicable because the actions being appealed were not disciplinary in nature.

The Postal Service stresses that the only case cited by the Union where it objected to the application of Article 16.9 in a nondiscipline case was a case heard and decided by Regional Arbitrator Helburn in 1997, Case No. H90C-4H-C 96003967 (hereinafter Helburn Award), well after the parties had joined issue in the present case. The Postal Service further argues

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[2]Three of these Regional Arbitration decisions were submitted as exhibits at the hearing. Two others (those decided in 1988 and 1989) were attached to the Postal Service's post-hearing brief.

that the decision by the Regional Arbitrator in that case that Article 16.9 was limited to discipline cases because that provision is included in the Article of the Agreement relating to discipline procedure clearly is not controlling on the interpretive issue presented in this National Arbitration case.

The Postal Service also asserts that it was logical for the parties to have originally placed the prohibition or waiver found in Article 16.9 in the article relating to discipline procedure since the majority of cases giving rise to appeals under the Veterans' Preference Act are disciplinary in nature. The Postal Service points out that this provision was placed in Article 16 in the original 1971-73 Agreement when the provision broadly applied to "all redress under this Agreement", which included both contract and discipline cases. When subsequent changes were made to this provision it was left in Article 16.

Furthermore, the Postal Service argues, Article 16 is not limited to discipline. It asserts that many other procedural and administrative items are contained in Article 16. The most obvious of these is the provision in Article 16.2 relating to "discussions", which by definition are not considered discipline and are not grievable. This section, the Postal Service states, could as logically have been placed in Article 15.1 which defines grievances. Article 16.7 dealing with emergency procedure covers both disciplinary and nondisciplinary situations. The Postal Service points out that by the Union's logic in this case an action taken by the Postal Service under Article 16.7 in a nondiscipline case would not be covered by the waiver provision in Article 16.9, which is illogical. Article 16 also is rife with nondisciplinary procedures and administrative requirements, for example the provision for disciplinary records in Article 16.10. In any event, asserts the Postal Service, the general

language used in the subject heading of Article 16 must give way to the specific language of Article 16.9, which contains no limitation restricting its application only to disciplinary cases.

UNION POSITION

The Union contends that Article 16.9 applies only to discharges and to suspensions in excess of 14 days which are appealed by preference eligible employees to the MSPB. It maintains that all other adverse actions defined in 5 USC §7512 which may be appealed to the MSPB are not covered by Article 16.9 because they are not discipline under the Agreement. The Union further asserts that at the hearing it was shown that Article 16.9 does not apply to nondisciplinary RIF action appeals to the MSPB by preference eligibles because Article 6 contains specific language regarding such appeals which mimics the provision in Article 16.9.[3]

The Union contends that contract history supports its position regarding the proper interpretation and application of Article 16.9. It points out that in the initial 1971-73 Agreement, Article 16.3 provided that a preference eligible employee who chose to appeal a suspension of more than 30 days or a discharge to the Civil Service Commission would remain on the rolls in non-pay status until the disposition of his case by settlement or exhaustion of his appeal to the Civil Service Commission. Section 6 of that same article then went on to

[3]As previously noted, the Union also objects to the Postal Service claiming Article 16.9 applies to RIF appeals because the Union considers that claim to be contrary to the position taken by the Postal Service at Step 4.

provide that a preference eligible employee was not "hereunder" deprived of appeal rights under the Veterans' Preference Act, but had to exercise an option before invoking the grievance procedure. If the employee appealed a discharge or suspension of more than 30 days under the Veterans' Preference Act, he waived "all redress under this Agreement".

In the 1973-75 Agreement the parties changed Article 15 to provide a separate grievance track to expedite discipline cases to arbitration, if necessary. Discipline cases went from Step 2A to Step 2B and then directly to arbitration. At the same time, Article 16.6 was changed to provide that an appeal under the Veterans' Preference Act waived access to "any procedure under this Agreement beyond Step 2B". Only discipline cases were processed at Step 2B. Moreover, the Union has cited a Postal Service training manual explaining the differences between the 1971-73 and 1973-75 Agreements, which states the following:

> The changed language in [Article 16,] Section 6 provides that a veteran who appeals his discharge (or suspension of thirty days or more) to the Civil Service Commission waives his right to arbitration under the National Agreement.

A similar explanation of this change in Article 16.6 is contained in a document setting forth the Union's interpretation of the contract changes made in 1973.

There were no material changes in the 1975-78 Agreement. In the 1978-81 Agreement, the grievance-arbitration procedure was extensively revised and the dual track eliminated. Thereafter, both contract and discipline cases were appealed from Step 2 to Step 3, prior to arbitration. According to the Union, this necessitated a "housekeeping change" in the Veterans'

Preference provision then found in Article 16.7. A reference to "Step 3" was simply substituted in the place of the prior reference to "Step 2B", which was eliminated as a step in the grievance procedure. The Union insists that there is no basis for the Postal Service's argument that this housekeeping change somehow broadened this waiver provision in the discipline procedure Article so that it applied to all cases which are appealed to Step 3, including contract cases. The material contractual language has not changed since that time.

The Union further argues that the March 1988 Memoranda of Understanding between the Postal Service and the NALC and the Mail Handlers Union actually supports the Union's position in this case. The Union points out that these Memoranda state that the purpose and intent of Article 16.9 is to provide preference eligible employees a choice of forums in which to obtain a resolution on the merits of "certain adverse employer actions set forth in Chapter 75 of Title 5, U.S. Code (e.g., suspensions of more than 14 days, discharge) ...." The Union argues that Article 16.9 applies only to certain adverse actions, namely those cited as examples in the Memoranda, which are solely disciplinary in nature under the Agreement. By listing as examples only disciplinary actions, the Union argues, the parties clearly intended to exclude nondisciplinary actions.

In response to the Postal Service's argument that equity should not permit an employee to have "two bites of the apple", the Union stresses that the Postal Service itself concedes that two bites are allowed in restoration to duty cases. The Union also points out that Arbitrator Snow recently held in a National Arbitration Award (Snow Award I) that a preference eligible employee with an EEO complaint is not barred from two bites of the apple in protesting an action by the Employer. The

Union agrees that in discipline cases Article 16.9 precludes an employee from having two bites of the apple, but insists that provision does not apply in other types of cases, and that the doctrine of presumptive arbitrability properly applies.

The Union also rejects the Postal Service's past practice argument. It stresses that at the hearing the Postal Service cited three arbitration cases from the early 1980s, from two of the five regions, in which the Postal Service took the position that Article 16.9 applied to nondisciplinary cases and the Union did not protest on that basis. The Union points out that it is unable to determine whether there are several or many instances when employees appealed both to the MSPB and through the grievance-arbitration procedure in nondiscipline cases where the Postal Service did not argue Article 16.9 applied. More importantly, the Union insists that the Postal Service has not proved an acceptance of the alleged practice on the part of the Union, and, therefore, has not established a binding past practice.

FINDINGS

Prior to the present arbitration, the parties arbitrated the following issue at the National level before Arbitrator Snow:

> Is enforced leave considered to be "discipline" under Article 16.9 of the parties' collective bargaining agreement?

Evidently, in that case the Union originally had argued in the underlying grievance, as it does here, that Article 16.9 did not apply to a grievance protesting enforced leave because that was

not discipline.[4] At National Arbitration, however, the Union took the position in that case that enforced leave was discipline, and, presumably on that basis, stipulated that the grievant in the underlying grievance, who had appealed the action to the MSPB as a preference eligible, did not have a right to obtain another hearing on the issue of enforced leave. As previously noted, the Union lost on the issue presented to Arbitrator Snow in that case (Snow Award II). The Union then proceeded to pursue the present case to arbitration in an effort to establish that Article 16.9 applies only to cases that involve actions which constitute discipline under the Agreement. The parties had agreed at the hearing before Arbitrator Snow that their positions in that case were without prejudice to their positions on the issue in this case.

The interpretive issue presented in this case has not previously been decided at the National Arbitration level. A Regional Arbitrator did issue a recent decision (Helburn Award) which ruled that Article 16.9 did not apply to contract grievances. That grievance was heard and decided at a time when the issue in the present case was pending arbitration at the National level. The Regional Arbitrator did not have the benefit of the extensive documentary evidence and full arguments presented in this National case, and, in any event, that Regional Arbitration ruling is not binding or controlling on the issue presented in this National Arbitration proceeding.

It is interesting to note, however, how different Regional and National Arbitrators have viewed the scope of Article 16.9, even if in some cases only in passing or in dicta.

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[4]The grievance in that case arose in 1992, more than two years after the issue in the present case was discussed at Step 4.

The four excerpts below are not cited as any kind of authority, but simply as reflecting the tension that exists between the wording of Article 16.9, which contains no limitation or even reference to discipline cases, and the location of that provision in an Article of the Agreement which is entitled "Discipline Procedure" and which otherwise deals, at least predominantly, with discipline or discipline-related topics. In the Regional Arbitration case cited above, which was decided on April 14, 1997, Arbitrator Helburn stated:

> Article 16 is titled "Discipline Procedure." It consists of 10 sections, nine of which are obviously related to discipline. The tenth, Section 16.9, is not explicitly restricted to only discipline cases. Yet, in the midst of the discipline article, without language explicitly broadening Section 16.9 beyond discipline, it cannot be read to apply to contract cases.

On the other hand, Arbitrator Walt much earlier stated in a Regional Arbitration case decided on August 25, 1981 (No. C8M-4F-C 4297):

> While the [provision in Section 16.9] is contained in the disciplinary article, its terms clearly are broad enough to extend to non-disciplinary grievances.

In a National Arbitration decision issued on August 3, 1990, Case Nos. H4N-3U-C 58637 and H4N-3A-C 59518 (hereinafter Mittenthal Award), Arbitrator Mittenthal described Article 16.9 as referring to:

> ... a "veteran's preference" in the choice of a forum for contesting discipline ....

In another National Arbitration decision (Snow Award I) issued on April 24, 1997 -- the date of the hearing in this case -- Arbitrator Snow cited the definition of an "adverse action" in 5 USC §7512, and then went on to state, without drawing any distinction between a discipline and a contract grievance:

> In a non-EEO situation, all employees receive only one chance for a full hearing on the merits concerning an adverse action. The Merit Systems Protection Board gives special consideration to "preference eligible" employes. An appeal, however, through this administrative process means that an employe waives rights to an arbitration hearing. The waiver constitutes a compromise between the special status of "preference eligible" employes and the impracticality of compelling the Employer to defend against two claims each in a different forum arising from the same event.

There is one significant point, however, on which there seems to be little or no dispute among the parties or arbitrators. Although the parties have disagreed as to the circumstances in which a preference eligible's exercise of rights under the Veterans' Preference Act constitutes an "appeal" so as to trigger the waiver in Article 16.9, and (at least recently) as to whether Article 16.9 extends to nondiscipline contract cases, the purpose of the waiver provision is relatively self-evident. As stated very early on by Arbitrator Gamser in a 1976 decision (Gamser Award) involving Article 16.6 of the 1973-75 Agreement (which both parties agree applied at that time only to discipline cases):

> ... 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.

Similarly in a more recent 1991 National Arbitration Award (Snow Award III), Arbitrator Snow (who quotes one of his own earlier decisions as a Regional Arbitrator) stated:

> At first blush, Article 16.9 of the National Agreement appears to place on an employe a straightforward burden of choice between two available forums. A knowledgeable employe must decide whether to appeal a qualifying adverse action by the Employer to the Merit Systems Protection Board or to seek redress through the grievance procedure in the parties' collective bargaining agreement. The provision in dispute merely precludes arbitration when an "appeal" has been made to the Merit Systems Protection Board. It is not difficult to recognize the purpose of Article 16.9 in the parties' agreement. As stated in another case:
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> > The purpose of Article 16.9 is to insure that an individual who qualifies for both procedures uses only one. The objective is to prevent anyone from utilizing both forums in an attempt to find a tribunal that for some reason might be more advantageous. (See, Case No. W1T-5B-Z 21378, emphasis added).

The 1988 Memoranda of Understanding between the Postal Service and the NALC and the Mail Handlers Union similarly state:

> I. As general principles, the parties agree that the purpose and intent of Article 16, Section 9 is:
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> A. To afford preference eligible employees, because of their status under the Veterans' Preference Act, a choice of forums in which to obtain a resolution on the merits of certain adverse employer actions set forth in Chapter 75 of Title 5, U.S. Code.

(e.g., suspensions of more than 14 days, discharge), and

B. To prevent situations in which the Employer is required to defend the same adverse action before the MSPB and in the Grievance-Arbitration procedure.

While the APWU is not a party to such a Memorandum of Understanding, and it vigorously argues that Article 16.9 only applies to discipline cases, it has not disputed that the general purpose of that waiver provision, when it applies, is to provide preference eligible employees a choice of forums, but only one bite of the apple.

For purposes of this decision it is unnecessary to determine whether Article 16.9 applies to appeals of RIF actions, which preference eligibles may appeal to the MSPB under a different set of Federal provisions than those applicable to the appeal of "adverse actions" defined in 5 USC §7512. Appeals of RIF actions clearly are covered by a basically similar waiver provision set forth in F.3 of Article 6 of the Agreement. There is no disagreement on that matter. Thus, without indicating any opinion on the merits of the Postal Service's position that Article 16.9 also applies to RIF appeals or the Union's procedural objection to the Postal Service taking that position at arbitration, this decision will focus on the issue of real significance in this case, which is whether Article 16.9 applies to all adverse actions as defined in 5 USC §7512 which can be appealed by preference eligibles to the MSPB under the Veterans' Preference Act or only those which constitute discipline under the Agreement.

There is no dispute that Article 16.9 applies to appeals of discharges and suspensions in excess of 14 days which

constitute discipline under the Agreement. The Union claims that is all it applies to. The Postal Service claims it applies also to appeals of all other adverse actions defined in 5 USC §7512, which are of two sorts: (1) actions which under Federal caselaw are treated as removals or suspensions (in excess of 14 days), although they are not considered discipline under the Agreement, the most numerically significant of which apparently are enforced leave cases; and (2) reductions in grade or pay, and furloughs of 30 days or less.[5]

Section 9 of Article 16 is entitled "Veterans' Preference". Focusing first only on the language of that section, it is certainly broad enough to cover the appeal of any adverse action by a preference eligible employee under the Veterans' Preference Act. It contains no words of limitation in this regard.

Most appeals under the Veterans' Preference Act evidently have involved discharges or suspensions in excess of 14 days (or at an earlier date 30 days). Thus, placement of this provision in Article 16 would be one logical choice even if it was not intended to be limited to discipline cases. There is at least one other provision in Article 16 which applies predominantly, but not exclusively to discipline cases. Arbitrator Mittenthal held in a National Arbitration Award (Mittenthal Award) that the Emergency Procedure in Article 16.7 can be invoked by Management in cases which do not involve employee misconduct, and that such action does not constitute discipline. Thus, the mere placement of the Veterans' Preference

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[5] 5 USC §7511 specifically defines "furlough" as being nondisciplinary in nature. Presumably, §7512 includes reductions in grade or pay whether or not they are disciplinary in nature.

provision in Article 16 does not necessarily preclude its application in nondiscipline as well as discipline cases.

The Union seeks to draw a parallel between the scope of Article 16.9 and the reference in Article 16.5 to preference eligibles who choose to appeal a discharge or suspension in excess of 14 days to the MSPB. I am not persuaded, however, that Article 16.5 is particularly relevant in defining the scope of the waiver provision in Article 16.9. Section 5 of Article 16 is entitled "Suspensions of More Than 14 Days or Discharge". It generally addresses all employees who are discharged or suspended for more than 14 days and states what happens to them pending final disposition of their cases. The reference to preference eligible employees who choose to appeal such actions to the MSPB, "rather than through the grievance-arbitration procedure", simply recognizes that the disposition of their cases will depend on the result of their appeals to the MSPB rather than through exhaustion of the grievance-arbitration procedure. It does not follow that the waiver provision in Article 16.9, which contains no limitation or even reference to employees who have been discharged or suspended in excess of 14 days should be restricted to appeals of those actions. The word "hereunder" in Article 16.9 refers to the collective bargaining agreement. It hardly could refer to Article 16.5, which only comes into play, in cases involving suspensions of more than 14 days or discharge, <u>after</u> a preference eligible exercises that employee's statutory right, recognized in Article 16.9, to appeal to the MSPB.

Both parties have placed considerable emphasis on the history and evolution of Article 16.9 since the first Agreement was entered into in 1971. There is no evidence other than the contract itself on which to decide whether the provision in Article 16.6 of the initial 1971-73 Agreement was or was not

limited to discipline cases. There is little reason to delve further into that question, however, since the Postal Service acknowledges that during the periods covered by the succeeding 1973-75 and 1975-78 Agreements this provision, as revised in 1973, applied only to discipline cases. The Postal Service concedes this limitation based on the wording of the revised provision which states that an appeal under the Veterans' Preference Act "waives access to any procedure under this Agreement beyond Step 2-B", and the fact that only discipline cases went to Step 2-B. The Union also presented extrinsic evidence that both parties viewed this provision, as amended in 1973, as applicable to discipline cases.

I also agree with the Union that the revision to Article 16.9 (then 16.7) made in 1978, when the parties changed the reference from Step 2B to Step 3, does not establish that the parties thereby agreed to broaden the scope of Article 16.9 beyond what it had been in the two preceding agreements. In 1978, the parties eliminated the dual grievance track and, under the new unified procedure, both discipline and contract cases went from Step 2 to Step 3, prior to arbitration. Without more evidence to support the Postal Service's position, this change and the corresponding revision in Article 16.9 does not provide a convincing basis on which to find the parties thereby agreed to expand the scope of the Veterans' Preference provision.

The change in 1978 was not insignificant, however. No longer did the wording of the Veterans' Preference section restrict its application to discipline cases. Thus, it is critical to determine whether in the period after this change the parties by their actions treated Article 16.9 as applicable to only discipline cases or to any adverse actions appealable to the MSPB by preference eligible employees.

The Postal Service has cited five Regional Arbitration cases, three from the early 1980's and two from the late 1980's, where it argued without Union objection that Article 16.9 applied in the arbitration of nondiscipline contract cases in which the Postal Service alleged the employee had appealed an adverse action to the MSPB. While the number of such cases is small, that is not surprising if the parties, as the Postal Service argues, jointly treated Article 16.9 as applicable to all adverse action appeal cases, because presumably the Union generally would only take such a case to arbitration where there was a dispute as to whether an "appeal" to the MSPB had occurred. The Union, on its part, has not been able to cite a single instance in which it argued that Article 16.9 was limited to discipline cases prior to its decision in 1990 to refer the underlying grievance in this case to Step 4. The Union also has not been able to cite any instance where the Postal Service did not object to arbitration of a contract grievance of a preference eligible employee who had appealed a nondisciplinary adverse action to the MSPB.

The Union argues that notwithstanding the evidence of cases where the Postal Service asserted the applicability of Article 16.9 in nondisciplinary cases without objection by the Union's Regional Arbitration representatives, the Union has not been shown to have accepted such a practice. On this score, I believe that the joint brief submitted to the MSPB by the Postal Service, the APWU (as amicus curiae) and the individual employee in the case of Stanley v. United States Postal Service (Union Exhibit 28) is illuminating. That case involved a preference eligible employee whose grade was reduced by the Postal Service. The employee filed a contract grievance protesting that nondisciplinary action which was settled at Step 3. The issue before the MSPB was whether the appeal he had filed with that Board was barred by a provision of Federal law applicable to

Federal government employees which precluded such employees from both appealing such an action to the MSPB and pursuing a grievance under a negotiated grievance procedure. In the joint brief, the Postal Service and the APWU successfully argued that this provision of Federal law did not apply to Postal Service employees. For present purposes, the following portions of that brief are particularly significant:

> As the Board is well aware, certain postal employees have access to the MSPB appeal procedures. This is a result of Congress' interest during postal reorganization in insuring that veterans retain all employment rights attendant on their status as veterans. Accordingly, Congress provided that preference eligible employees would retain their veterans' employment and retention preferences, and their right to appeal certain adverse actions to the MSPB....[Citations omitted.] Thus, while non-veterans can appeal adverse personnel decisions only in the grievance-arbitration forum, preference eligible postal employees have both MSPB appellate rights and grievance-arbitration rights....[Citations omitted.] These postal employees are subject to a requirement of election of forums for pursuit of appeals, but the requirement is a contractual one, not one established by the Civil Service Reform Act or any other statute.[3] Further, as it is a creature of
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> [3]Article 16, Section 9, of the National Agreement, provides that if "an employee appeals under the Veterans' Preference Act, the employee thereby waives access to any procedure under the Agreement beyond Step 3 of the grievance-arbitration procedure."
>
> contract, the election operates only to limit access to the contractually established grievance-arbitration procedures, not to the MSPB.
>
> * * *

... A preference eligible's rights to appeal to the MSPB and to file a grievance under the National Agreement are limited only by the National Agreement's prohibition against pursuit of the dispute to arbitration....

(Emphasis added.)

The brief in the Stanley case was joined in by the APWU at the National level, and the case involved an important issue. It is reasonable to conclude that the brief was drafted and reviewed with some care prior to its submission to the MSPB. The brief does not expressly state that Article 16.9 is applicable to both discipline and contract cases that are appealable as adverse actions. But, that seems clearly implicit in the broad references to the election of forums provision in Article 16.9, which is quoted without any direct or indirect indication that it applies only to appeals of those adverse actions which constitute discipline under the Agreement. If the Union and the Postal Service were in dispute on that issue, one can only assume that this would have been pointed out in the brief, particularly since the Stanley case involved a nondisciplinary action.[6] This joint brief, thus, confirms the Union's acquiescence in the practice which is reflected in the Regional Arbitration cases cited by the Postal Service.

That practice is consistent with the purpose and intent of Article 16.9 as agreed to in the 1988 Memoranda of Understanding between the Postal Service and the NALC and the Mail Handlers Union. Those Unions, who were parties to the same contract provision as the APWU, agreed with the Postal Service

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[6]As noted earlier, the grievance filed by the employee in the Stanley case was settled at Step 3, so that the waiver provision in Article 16.9 never came into play.

that the purpose of Article 16.9 is to afford preference eligible employees:

> A. ... a choice of forums in which to obtain a resolution on the merits of certain adverse employer actions set forth in Chapter 75 of Title 5, U.S. Code. (e.g., suspensions of more than 14 days, discharge), and
>
> B. To prevent situations in which the Employer is required to defend the same adverse action before the MSPB and in the Grievance-Arbitration procedure.

The APWU's argument in this case that the wording of this understanding between the Postal Service and the two other Unions shows that it applies only to discipline cases is not persuasive. The term "certain adverse employer actions" refers to the specific adverse actions set forth in 5 USC §7512.[7] I do not agree with the Union's argument that this language reflects an agreement that application of Article 16.9 is limited to only some of those statutorily defined adverse actions. The Union points out that the only examples cited in the Memoranda are discipline actions. That is true, but they are the most commonly appealed adverse actions. Moreover, if the Union was right in its claim that the parties to these Memoranda intended to limit application of Article 16.9 to adverse actions which constitute discipline under the Agreement, then the two actions which are expressly cited as examples would not be examples, they would be the only covered actions.

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[7]The joint brief in the Stanley case, previously quoted, similarly stated that in postal reorganization Congress provided that preference eligible Postal Service employees would retain "their right to appeal certain adverse actions to the MSPB". (Emphasis added.)

For these reasons, I conclude that prior to the issue being raised by the Union in the underlying grievance in this case, the parties through their actions over the span of at least several collective bargaining agreements, in which the language in Article 16.9 has remained unchanged, have treated and considered Article 16.9 as applicable to all adverse action appeals to the MSPB by preference eligible employees, not just those involving disciplinary cases.

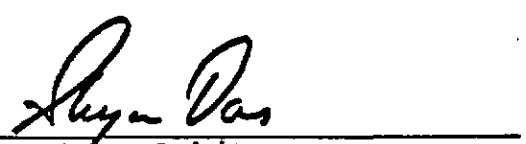
This is fully consistent with the purpose of Article 16.9. As a matter of policy or equity, the Union offers no cogent reason as to why the election of forums provision should apply only to those adverse actions defined in 5 USC §7512 which constitute discipline under the Agreement. Essentially, the Union's only argument on this score is that employees get two bites of the apple (an appeal to the MSPB and pursuit of their grievance to arbitration under the Agreement) in two other situations -- restoration to duty cases and EEO cases. Restoration to duty cases, however, do not involve rights of appeal under the Veterans' Preference Act, so clearly Article 16.9 cannot be applied to such appeals. Moreover, all employees, not just preference eligible employees, have an equal right to pursue both routes of appeal in such cases. The same is true with respect to EEO claims, which Arbitrator Snow held are not covered by Article 16.9 (Snow Award I). Indeed, a major part of his reasoning was that preference eligible employees otherwise would be disadvantaged because they would be precluded from having an administrative hearing on their claim without waiving access to the arbitration procedure under the Agreement, whereas non-preference eligible employees (not covered by the Veterans' Preference Act) would be able to pursue both avenues of appeal. Thus, neither of those two other situations cited by the Union is similar to the situation at issue in this case.

Application of Article 16.9 to all adverse action appeals by preference eligibles, not just those which involve discipline under the Agreement, is equitable and does not disadvantage preference eligible employees in comparison to others. Indeed, the opposite result would lead to an inequitable situation where preference eligible employees who are subject to a demotion or enforced leave would be entitled to pursue their appeals in two forums, obtaining two bites of the apple, whereas preference eligible employees who are issued a lengthy suspension or are discharged would not.

AWARD

Article 16.9 of the Agreement covers all adverse actions as defined in 5 USC §7512 which can be appealed by veteran preference eligible employees to the MSPB under the Veterans' Preference Act. As set forth in the above Findings, it is unnecessary to determine whether Article 16.9 also applies to reduction in force actions, which the parties agree are covered, in any case, by a similar provision in F.3 of Article 6 of the Agreement.

The underlying grievance should be returned to the Regional Arbitration level for further action consistent with this decision and the parties' stipulation that appeals to the MSPB in restoration to duty cases are not covered by Article 16.9.



Shyam Das, Arbitrator