C-24340

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	(	Grievant: Geraldo Padilla
between	)	Post Office: Soundview Station, Bx, NY
UNITED STATES POSTAL SERVICE	(	USPS Case No. AO1N-4A-D 03060326
and	)	APWU Case No. DR-3603-23D
NATIONAL ASSOCIATION OF LETTER	(	
CARRIERS, AFL-CIO	)	

BEFORE: Joseph A. Harris, Arbitrator

APPEARANCES:

For the U.S. Postal Service:	Pamela Smith-Watson
For the Union:	Patrick McNally
Place of Hearing:	Bronx P&DC
Date of Hearing:	May 7, 2003
Date of Award:	June 6, 2003
Relevant Contract Provisions:	ELM 511.43, 666.82
Contract Year:	2001-2006
Type of Grievance	Discipline

Award Summary:

The grievance is upheld. The Service will rescind the December 24, 2003 Notice of Removal.

Joseph A. Harris

Joseph A. Harris, Ph.D.
Arbitrator

STATEMENT OF ISSUE

Did management meet the requirement for just cause when it issued the Notice of Removal dated December 24, 2002 for being absent without official leave to the grievant? If not, what shall be the remedy?

EMPLOYEE/LABOR RELATIONS MANUAL

511.43 Employee Responsibilities

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

666.82 ABSENCE WITHOUT PERMISSION

Employees failing to report for duty on scheduled days, including Saturdays, Sundays, and holidays, will be considered absent without leave except in actual emergencies which prevent obtaining permission in advance . . . An employee who is absent without permission or fails to provide satisfactory evidence that an emergency existed will be placed in a nonpay status for the period of such absence. The absence will be reported to the appropriate authority.

FACTS AND BACKGROUND

Management issued a Notice of Removal (NOR) to the Grievant, Geraldo Padilla, on December 24, 2002. The NOR charges that the Grievant was absent without official leave (AWOL) on Saturday, December 7, 2002. The NOR states: "You did not report to work and you did not notify Soundview Station of your inability to report to work as scheduled."

The NOR notes, and the Union does not dispute, that the Service conducted a Pre-Disciplinary Interview (PDI) on December 11, 2002 with the Grievant and his union representative. The NOR reports the PDI as follows:

> Supv: On Saturday, December 07, 2002, you were scheduled to work. Why didn't you call Saturday, 12/11/2002? You did not report to work, at all!
> Employee: I fell into a depression. I have an alcohol and drug problem. I am in the program, as an outpatient. I will be starting the program, as an inpatient.
> Supv: Do you want to add anything else to this predisciplinary interview?
> Employee: No.

The NOR cites violation of three ELM Sections: 511.43 (Employee Responsibilities), 666.81 (Requirement for Attendance), and 666.82 (Absent Without Permission); it also cites violation of Handbook M-41, Section 112.22 (Diligence and Promptness).

The NOR also states that the Service considered four elements of the Grievant's past record in arriving at its decision to issue the NOW:

> 1 – Notice of Removal dated December 04, 2002 for delay of mail and unauthorized overtime.
> 2 – Notice of Fourteen (14) Days no time off suspension dated 08/08/ for being absent without official leave.
> 3 – Notice of Seven (7) Days no time off suspension dated 07/29/02 for being absent without official leave.
> 4 – Letter of Warning dated 06/27/02 for failure to be regular in attendance.

On January 13, 2003, the Service notified the Union that it was amending the Grievant's past elements as follows:

> 1 – Notice of Removal dated 9/21/02 for failure to be regular in attendance modified to 12 day no time off suspension; (NOTE BY ARBITRATOR: THIS WAS A NEW ELEMENT.)
> 2 – Ten (10) day suspension dated 8/8/02 for being absent without official leave; (NOTE FROM ARBITRATOR: THIS WAS REDUCED FROM 14 DAYS.)

On January 14, the parties held an "Informal Step A" meeting.

On January 17, at a Step B meeting about the NOR of December 4, 2003 for delay of mail and unauthorized overtime (see element #1 above of the past elements in the December 24, 2002 NOR), the Service modified the discipline to a fourteen (14) day suspension.

On January 29, 2003, the Parties held a "Formal Step A" meeting. At that meeting, the *three* corrected past elements were introduced. The appeal to Step B was received on February 10, 2003 by the parties' representatives. The Step B Team arrived at its impasse decision on February 20, 2003.

The Step B report lists the "prior discipline after appropriate corrections had been made," as follows:

1) 12-4-02 Notice of a 14-day no-time-served suspension -delay of mail/unauthorized overtime
2) 9-21-02 Notice of a 12-day no-time-served suspension – failure to be regular in attendance
3) 8-8-02 Notice of a 10-day no-time-served suspension – AWOL
4) 7-29-02 Notice of a 7-day no-time-served suspension – AWOL
5) 6-27-02 Letter of Warning – Failure to be Regular in Attendance

POSITIONS OF THE PARTIES

The Service

The Service agrees with the Union's contention that Management's first presentation of the Grievant's prior disciplinary was incorrect. However, the Service argues that no harm was done to the Grievant:

> There is no evidence in the case file that could support a case for harmful error...The Grievant's due process rights were not negatively affected by management's act of listing one prior element incorrectly [8-8-02]. Management was unaware of the modification of the ...[8-8-02] action that took place in another office. Nor could management have known what decision the Step B Team [for the 12-4-02 NOR case] would arrive at. (Step B Decision)

The Service contends that it met its burden of proof to establish that it had just cause to issue the NOR. The Grievant was AWOL on December 7, 2002. The Grievant knew the attendance rules and the consequences for violating them; Management conducted an investigation, including a proper PDI, before issuing the discipline; Management administered progressive discipline. The Service states that it made a typographical error in recording the PDI (see above); obviously, the Service meant to type "Saturday, December 07, 2002" rather than "Saturday, December 11, 2002," and the Grievant's answer shows that he was replying to a question about Saturday, December 7, 2002.

The Service contends that mitigating circumstances do not exist. First, the Grievant received multiple notifications from the Service that his behavior was unacceptable, but he did not improve his behavior. Thus, within eight months, he first received two oral warnings and then six disciplinary actions (including the NOR of December 24, 2002). Second, although he called in absent on November 26, 2002 and said he needed EAP and was not ready to return to work, he did not inform the Service he was in an "out-patient" program until his PDI on December 11 for his AWOL on December 7, 2002, and he did not enter an in-patient drug rehabilitation program until December 19. Third, after 26 days, he left the in-patient program against the medical advice of those who administer it. The Service concludes: "The road to recovery is a long one when dealing with substance abuse. There is no evidence in the case file to indicate that the Grievant has shown the desire to stay the course." (Step B Decision)

The Service stresses that although it supports the Employee Assistance Program, it notes that a "second chance" is not an automatic right that employees enjoy. The Service may give a

second chance "where an employee of long-standing and good record has suffered a temporary setback and his prior years of good service to the company warrant the extension of a "second chance." (Step B decision) However, the Service believes the Grievant does not deserve another chance, and, therefore, it proceeded with the NOR. It also notes that ELM 17.2 states:

> Although the employee's voluntary participation in EAP counseling for alcoholism or drug abuse should be given favorable consideration in disciplinary action, participation in EAP does not limit management's right to proceed with any contemplated disciplinary action for failure to meet acceptable standards... (871.32)

Based upon the above, the Service asks me to deny the grievance.

The Union

The Union contends there was not just cause for the NOR. It states that the charge of AWOL is without merit and procedurally defective. "The instant grievance raises two questions, whether there were any grounds for a disciplinary action for the Grievant for his action on 12/07/02 and second, if the penalty imposed by the employer was appropriate." (Step B Decision)

The Union points to Article 35.1 of the National Agreement: "An employee's voluntary participation in the EAP for assistance with alcohol and/or drug abuse will be considered favorably in disciplinary proceedings." The Union states that Management knew on November 26, 2002, from the call-in sheet, that the Grievant knew he "needs EAP." Similarly, on November 30, 2002, the call-in sheet states that the Grievant had "seen EAP" [Arbitrator: I think the call-in sheet states "seek EAP."] Therefore, before the Grievant was absent on December 7, Management knew that the Grievant had reached out for help from EAP. Finally, at the PDI on December 11, the Grievant said that he was in the in-patient program and would "be starting the program, as an inpatient." Based on this sequence of events, the Union states that Management violated Article 35.1 by issuing the NOR.

The Union also argues that the Service failed its procedural requirement to conduct a proper investigation, including a proper PDI. The Union argues that the accounting of the PDI shows that Management confused the issue (and the Grievant) by first telling him that he had been scheduled to work on "Saturday, December 07, 2002" and then asking him why he had not

called on "Saturday, 12/11/2002?" "By Management asking the wrong date at the PDI, meant the Grievant was unable to defend himself properly," states the Union. (Step B Decision)

The Union also claims that the Service failed to undertake "any more investigation thereafter to check the particulars of the Grievant's situation." (Step B Decision) Supervisor Lewis should have been pro-active regarding EAP, but she did not ask about the Grievant's participation in EAP nor encourage his participation. Instead, the Union claims, the Grievant took his own independent steps to deal with his drug problem.

The Union charges that Supervisor Lewis, who prepared the NOR and conducted the PDI, made other serious errors. Thus, she had obtained the case file from the Grievant's prior work location (Tremont Station) that included the past elements, including the pending August 8, 2002 discipline of 14-day suspension. However, the Union notes, she did not call Tremont to determine its final disposition. [10-day suspension – on January 13, 2003, Management informed the Union of this.]

The Union charges that Management made its decision to issue a NOR based on an incorrect listing of past infractions and, in doing so, violated the principles of progressive discipline.

Finally, the Union argues that firing an employee for being AWOL for one day is unjust.

The Union asks me to give the Grievant another chance to show that he can do his job. The Grievant explains that he left the in-patient program several days early in order to return to NYC and be back at work within the 30-day leave of absence he had been granted by Soundview Station Manager Bermudez. The Union states that the Grievant has been drug-clean since he entered the in-patient treatment program in December 2002.

Based on all of the above, the Union asks that I rescind the NOR.

ARBITRATOR'S DISCUSSION

In discipline cases, the Service carries the burden of proof. It must establish that it had just cause to issue its discipline. In general, this means that the Service must show that it ensured that the Grievant was informed of the rules (or regulations, etc.) he was accused of breaking and the consequences of such action; that the Grievant actually was guilty of such violation(s); that the Service conducted a proper investigation, including a PDI, before issuing the discipline; and that the discipline imposed was reasonable, according to the circumstances and in accord with the principle of progressive discipline.

If the Service establishes the above, it is then the Union's task to show that mitigating circumstances exist such that it is proper for the Arbitrator to lessen or overturn the discipline imposed by the Service.

In the instant case, it is clear that the Grievant knew the Service's rules regarding attendance and the penalties meted out for violating the rules. It is quite not so clear that he violated the attendance rules, but the Service met its burden of proof on this as well. The Service charged the Grievant with being AWOL on Saturday, December 7, 2002. He said he was too depressed in the AM to even make a phone call, but he claims that he called once during the PM to say he was ill -- but no one answered the phone. His tour was 8:00 AM until 4:30 PM. The only evidence available is the Soundview Station Call-In Sheet for November 26 through December 17, 2002. Of the 41 entries, 38 have the time of the phone call entered, and all these are between 6:00 AM and 10:00 AM. Two other entries are for Grievant Padilla for November 29 and December 7 – and these have "no call" as the entry. The fact that the call-in sheet has no entries after 10 AM makes me wonder whether anyone answered that telephone later on in the day. However, I credit the Service's argument that the Grievant did not try hard enough to reach the Soundview Station. Assuming the Grievant's version is accurate, the fact remains that he should have called more than once, perhaps using other telephone numbers, and he could have physically gone to the office. I conclude that he was AWOL.

The Union charges that the Service violated the Grievant's rights by confusing the Grievant during the PDI. I disagree. I believe that the Service made a typographical error when, in writing up the content of the PDI, it replaced December 7 with December 11.

However, the Service made several serious errors in its investigation, and I think they are quite damaging to the Grievant. First, Lewis ignored Article 35.1, which requires Management to consider favorably "an employee's voluntary participation in the EAP" in "disciplinary action proceedings." While it is true that ELM 17.2 (Sec. 871.32 Limits to Protection) provides that "participation in EAP does not shield an employee from discipline..." and such participation does not "limit management's right to proceed with any contemplated disciplinary action for failure to meet acceptable standards," the ELM provision does not negate Article 35.1. The NOR shows that Lewis, in the PDI, did not ask a single question about the Grievant's participation in the EAP, and nowhere in the NOR did she mention the EAP as a factor in her decision to issue the NOR.

Second, to justify her decision to issue a NOR, Lewis relied on two past elements that were still in the dispute resolution process. The first element, a NOR, had just been issued on December 4, 2002. The second element, a 14-day suspension dated August 8, 2002, was also in the dispute resolution process. Lewis testified that the "NOR comes progressively after the prior charges."

Based on the original past elements, Lewis may have thought it was a "no-brainer" to decide to issue a NOR. However, the issue is not so clear when the amended elements are considered. Another fact intrudes: the Service added another past element in its amended list of past elements during the dispute resolution process: a 12-day suspension issued on September 21, 2002. The Service does not have the right to bolster its case in this manner.

The Service contends that "there is no evidence in the case file that could support a case for harmful error" regarding the incorrect list of past elements. (Step B Decision) However, Supervisor Lewis' testimony and demeanor at the arbitration hearing make it clear to me that she handled her investigation and her decision in a mechanical manner. The fact is that she had no way of knowing that the two elements I have been discussing would be resolved, respectively, with 14-day and 10-day suspensions. Although the only discipline she knew was finalized was the 7-day suspension the Grievant received on July 29, 2002, she proceeded to order the NOR because it "comes progressively after the prior charges."

Lewis was asked, under cross-examination, "What is a proper investigation?" She replied: "A PDI." Yet, her PDI consisted of two questions! A proper investigation would have included, at least, questioning and investigation as to the Grievant's participation in EAP, as well as investigation into the status of prior charges. It cannot be ignored that a "charge" is not the same as a "conviction."

Of course, Management has to make decisions based on current information, so I do not fault Lewis for having made a decision. Additionally, Management had every right to act on a single AWOL (December 7), especially as it followed three other AWOL days during the brief six weeks that the Grievant had worked at the Soundview Station.

Without Management's encouragement, the Grievant participated in an outpatient program December 10-17, 2003. He was admitted to an in-patient rehabilitation program on December 19, 2002 and remained there until January 13, 2003, two days short of his 30-day rotation, according to the "Client Discharge Summary Form." He returned to work at the Post

Office and apparently has worked steadily since then. Surely, these are important mitigating EAP facts for Management to have considered during Step B.

In summary, the Grievant was AWOL as charged. However, Management violated the Grievant's rights by ignoring the Grievant's EAP rights, conducting a mechanical and abbreviated investigation, and relying on an incorrect list of past elements to determine its level of discipline. These are "harmful errors."

AWARD

The grievance is upheld. The Service will rescind the December 24, 2003 Notice of Removal.

May 6, 2003

Joseph A. Harris, Ph.D.
Arbitrator