THOMAS F. LEVAK 10/26/82 Won
Removal - AWOL - Lack of Acceptable Medical Cert.
Art. 19 - E&LR Manual & P-32

BEFORE THOMAS F. LEVAK, A

4441 (W8C-5D-D)
C# 00584

In the Matter of the Arbitration between:

U. S. POSTAL SERVICE

THE "SERVICE"

and

AMERICAN POSTAL WORKERS UNION, AFL-CIO, ON BEHALF OF E. LANGSETH, THE "GRIEVANT"

THE "UNION"

W8C-5D-D 4441

DISPUTE AND GRIEVANCE CONCERNING REMOVAL FOR AWOL

ARBITRATOR'S OPINION AND AWARD

This matter came for hearing before the Arbitrator at 9:30 a.m., July 9, 1982 at the offices of the Service, Auburn, Washington. The Service was represented by Labor Relations Representative Charles Tamburello, Jr. The Union was represented by National Vice President Robert L. Tunstall. The Grievant, Erma Langseth, appeared and gave testimony on her own behalf. The post-hearing brief of the Union was received on September 28, 1982. The post-hearing brief of the Service was received on October 1, 1982. On October 9, 1982, the Arbitrator received a letter from the Union relating to a Petition for Review filed with the State of Washington Employment Security Department by the Grievant. On October 18, 1982, the Arbitrator received a responsive letter from the Service. Based upon the evidence and the arguments of the parties, the Arbitrator decides and awards as follows.

I. THE CHARGE AND THE ISSUE.

The Grievant was removed from the Postal Service effective May 10, 1982. The notice of removal letter sets forth the charge against the Grievant as follows:

> Charge 1 - Absence Without Leave. On Tuesday March 30 and Wednesday, March 31, 1982 you were scheduled to report for duty at 12:30 AM. You failed to report as scheduled on either of these dates. Specifically, on Tuesday, March 30, 1982, when you had not reported for duty as scheduled, I called your home at 12:48 AM you informed me that you had undergone surgery on Monday, March 29 and had fallen asleep, not waking up

until my call to you. In reminded you of your responsibility to call in to report any unscheduled absence and instructed you to bring in acceptable medical documentation when you returned to work on Wednesday, March 31, 1982. You stated you would. On Wednesday, March 31, 1982 you failed to report your inability to report to work, despite my conversation with you the previous day.

When you returned to duty on April 1, 1982, you submitted unacceptable medical certification to cover your absence. I advised you on Tuesday, April 6, 1982 of this fact and provided you in writing with a list of what statements would be required for your physician to substantiate the absence. You provided me with additional documentation on Wednesday, April 7, 1982 from Dr. Topivale; however, this note did not comply in any way with the requirements I outlined to you on the previous day.

In view of your failure to call in and report your absence as required and your subsequent failure to submit acceptable medical evidence to substantiate your need for the absence, I charged the absences on March 30 & 31, 1982 to Absent Without Leave.

In addition, the following elements of your past record have been considered in arriving at this decision:

You were issued a letter of warning on July 30, 1981 for unsatisfactory attendance - tardiness.

You were suspended for seven calendar days for unsatisfactory attendance - tardiness, effective September 10, 1981.

You were suspended for fourteen calendar days for AWOL, effective January 29, 1982. (Jt. Ex. 2)

The stipulated written issue regarding the charge and removal is as follows:

> Did the U. S. Postal Service have just cause in accordance with Article 16 of the National Agreement for the issuance of the Removal Letter dated, April 8, 1982, to the grievant Erma Langseth? If not, what should be the appropriate remedy?

Prior to the arbitration hearing, a separate grievance was filed by the Union to protest the AWOL set forth in the above charge. At the commencement of the arbitration hearing, the parties incorporated that grievance into the instant case and specifically vested the Arbitrator with authority to determine and resolve that

grievance. Accordingly, the second issue to be resolved by the Arbitrator is as follows:

> Whether the Grievant was properly charged with AWOL? If not, what should be the appropriate remedy?

At the commencement of the arbitration hearing, the Arbitrator was further notified by the parties that the fourteen-day suspension cited as a past element in the letter of removal had been grieved and processed to arbitration, but that no decision had been rendered. The parties stipulated that no decision would be made by the Arbitrator until an arbitration decision had been rendered on the suspension.

II. FINDINGS OF FACT.

The Grievant was first employed by the Service in 1969 and served at the Minneapolis, Minnesota Service from that year until August 1979. During that period of time, the Grievant was never disciplined.

The Grievant transferred to the Auburn office of the Service in August 1979, and at the time of her removal, held the bid position of a Distribution Clerk on Tour 1 (12:30 a.m. to 9:00 a.m.), with rotating days off. The Grievant was elected Vice President of the Union in 1981, and assumed the presidency of her local in May 1981.

The Grievant filed grievances to protest the letter of warning of July 30, 1981 and the seven-calendar-day suspension effective September 10, 1981, both of which were referred to in the notice of removal. Both penalties were subsequently affirmed in arbitration.

The Union's grievance in protest of the fourteen-calendar-day suspension effective January 29, 1982, referred to in the notice of removal, was the subject of an arbitration hearing before arbitrator Edwin R. Render on August 2, 1982. Arbitrator Render rendered his written decision on August 16, 1982. The written decision sets forth the issue before him as whether the Service had just cause to issue the Grievant the fourteen-day-suspension for unsatisfactory attendance and if not, what is the appropriate remedy? Arbitrator Render ruled that the suspension was too severe and set it aside, but allowed the absence to remain recorded as an AWOL on the Grievant's record.

Arbitrator Render held that the Grievant had substantially complied with Section 512.412 of the E&LRM, and that her supervisor was unduly inflexible in refusing to award her emergency annual leave. While he did not specifically so state in his opinion and award, arbitrator Render's seems to infer that he allowed the AWOL to stand on her record because she was partially at fault. However, he did not expressly conclude that such fault existed and did specifically state in the award that the Grievant had no reason to believe that emergency annual leave would be denied her. Arbitrator Render's opinion and award is marked "Arbitrator's Exhibit A" and is attached hereto .

Turning to the facts involved in the removal, the Grievant had initially been examined by her physician, Dr. Hansa Topiwala on March 19, 1982, who administered a papsmear. The Grievant requested and was granted sick leave for that evening, workday of March 20.

On March 29, 1982 at about 2:30 p.m. the Grievant reported to Dr. Topiwala's office to receive the results of the testing. Dr. Topiwala informed her that before medication could be administered for her gynecological problems, dilatation and curettage (D And C) would have to be performed. He advised that the surgery be performed immediately in his office. The Grievant was not unfamiliar with the procedure, having undergone D And C's in the past. The Grievant agreed to the surgery,as she had a friend of her's, who was waiting in her car. The Grievant was sedated, the surgery was performed, and she remained in the doctor's office until approximately 4:30 to 5:00 p.m. for the effects to recede.

The Grievant's friend drove her home. When the Grievant arrived at her home approximately one-half hour later, she took a pain pill and fell asleep. As a result of the combined effects of the surgery and the pain pill, the Grievant slept through her reporting time at 12:30 a.m. At 12:46 a.m., the Grievant's supervisor, Jess Gasca, telephoned the Grievant and woke her up. The Grievant told Mr. Gasca that she was unable to work because of the surgery. Mr. Gasca told her that it was her responsibility to call in prior to her reporting time anytime that she would not be able to come to work. Because of the Grievant's prior attendance problem, Mr. Gasca suspected that she might not have been sick. He

therefore instructed her to bring in a medical certificate. The Grievant told him that she would bring it in at the start of her shift on March 31.

On March 31, the Grievant did not report to work and did not call in. At about 2:00 in the afternoon, the Grievant drove to a drugstore to have a prescription filled, but started to have abdominal pains and began to bleed. She went home and took another pain pill and laid down. The Grievant testified that she did not call in to work because she did not believe she was under an obligation to call in every day during a continued sickness.

April 1, 1982 was the Grievant's day off. She reported to work on April 2 and presented Mr. Gasca with the following medical ceritifcate:

16110 8th Ave. SW
Seattle, Wa. 98166
244-8786

Date: 4-1-82

Patient's Name Erma Langseth

Problem D&C- procedure

Request do not work from 3-30-32 to 4-1-32

or

Can return to work on 4-1-32

Part-time ____ hours/day for ____ days

Full-time ✓

Limitations and Remarks: ____

Signature: H. Topiwala

Hansa H. Topiwala, M.D., Inc., P.S.

Mr. Gasca advised the Grievant that the medical certificate did not comply with Section 513.364 of the E&LRM. He gave the Grievant a copy of Sections 513.364 and .365 and had her read them. Those Sections provide:

> .364 Medical Documentation or Other Acceptable Evidence. When employees are required to submit medical documentation pursuant to these regulations, such documentation should be furnished by the employee's attending physician or other attending practitioner. Such documentation should provide an explanation of the nature of the employee's illness or injury sufficient to indicate to management that the employee was (or will be) unable to perform his normal duties for the period of absence. Normally, medical statements such as "under my care" or "received treatment" are not acceptable evidence of incapacitation to perform duties. Supervisors may accept proof other than medical docu-

> mentation if they believe it supports approval of the sick leave application.
>
> .365 Failure to Furnish Required Documentation. If acceptable proof of incapacitation is not furnished, the absence may be charged to annual leave, LWOP, or AWOL.

Mr. Gasca also hand wrote the specific information that he wanted in a medical certificate, including the time and place of the D And C procedure, the time the Grievant left the office and a statement that the surgery was such that the Grievant could not perform her Postal duties. The hand-written requirement further demanded that the Grievant obtain a medical authorization from Dr. Topiwala so that the Service could directly obtain information from the doctor.

On April 6, 1982, the Grievant provided Mr. Gasca with the following medical certificate:

> TO WHOM IT MAY CONCERN:
>
> Erma Langseth was seen in the office on March 29,82. Before she could be treated for her gynecological problems it became necessary for her to have a D & C. In the interest of time and money I did this in the office under medication that caused her to be sedated. She was in the office approx. for 2 hours and I had advised her not to do heavy work for 48 hours. so as not to get complications from surgery. (Jt. Ex. 8)

The Grievant did not obtain a medical authorization from Dr. Topiwala for Mr. Gasca.

Because the Grievant did not fully comply with the instructions given her, Mr. Gasca held the Grievant to be AWOL for March 30 and 31. Mr. Gasca further concluded that under the circumstances of the case, and considering the Grievant's past record, removal was justified. Mr. Gasca testified at the arbitration hearing that the Grievant was in violation of E & L R M Section 666.82, which provides in part:

> In emergencies, the supervisor or proper official will be notified as soon as the inability to report for duty becomes apparent. Satisfactory evidence of the emergency must be furnished later.

He testified that the Grievant should have called in the first day of her absence as soon as she became aware that she would have to undergo surgery, or at least immediately after having the surgery.

He further testified that since she led him to believe that she would be reporting to work on March 31, she violated the Section by failing to call in on the second day when it became apparent to her that she would be staying home for another day. He further testified that the Grievant violated a local sick leave policy which provides in relevant part:

> 1. The employee must notify a supervisor of a need for leave. If the employee is unable to speak with a supervisor, they must leave a phone number where their supervisor is able to reach them.

Finally, Mr. Gasca testified that had the Grievant provided him with an acceptable medical certificate, he would have charged the Grievant with only eighteen minutes AWOL for the beginning of her shift on March 30, and would have allocated the remainder of her absence to sick leave. Moreover, he still would have discussed the failure to call in with his superiors, and was uncertain whether what type of discipline, if any, would have been issued. He conceded that had the Grievant called in prior to her shifts, she would have received sick leave and there would have been, "no problem."

Postmaster Ben Meservey also testified at the arbitration hearing. Mr. Meservey was also basically concerned with the Grievant's failure to call in. The fourteen-day-calendar suspension had involved a failure to call at the earliest possible time. At the time he approved the suspension he told the Grievant that she was, "leading to a separation unless she could change her habits." Mr. Meservey further testified that when he was attempting to determine whether the Grievant should be removed he discussed the procedure of a D And C with his wife since she had experienced the procedure. He testified that he considered the effects of the D And C on the Grievant but felt that under the facts of the case, she had no good excuse for failing to call in, particularly on the second day.

Some dispute existed at the arbitration hearing over the amount of "heavy work" that the Grievant performed on her shift. However, it was undisputed that the Grievant understood she could have called in and requested light work. However, the Grievant testified that it never occurred to her to make such a request since she did not feel well enough to perform any work at all.

III. SERVICE CONTENTIONS.

(i) During the two and one-half years that the Grievant has been an employee at the Auburn office, she has had continuing undisputed attendance problems, despite all efforts by management to correct her deficiencies, and she has demonstrated a total lack of concern, as well as wilfully failing to comply with the regulations of which she was aware.

(ii) The E&LRM fully provides that employees are expected to maintain their assigned schedules and that whenever an employee will be absent, he must notify the office as soon as possible. Further, the manual provides that employees may be required to submit acceptable evidence of incapacity to work in the form of a medical certificate, and if they do not do so they may be charged with AWOL, and disciplinary action may ensue.

(iii) The uncontested evidence is that the Grievant failed to follow the manual in several regards. She failed to report to work as scheduled and she failed to call in to her supervisor on two successive dates.

(iv) Even if she could have substantiated her inability to work, she failed to supply the required medical certification for those two dates. In addition, she failed to supply to specific information and authorization required in hand-written form by her supervisor. Her violation on the second day occurred even though her supervisor had reminded her on the previous day of her responsibility to call in and notify him of need for leave.

(v) When the Service does not have its scheduled complement of employees it is unable to meet the needs of the Service and the commitments of its patrons.

(vi) There are no mitigating circumstances in this case. The Grievant could called in either before or after her minor surgery; she could have called in at any time during the day; she could have called in any time during the next day. She obviously was not sleeping all day on the second day because she was filling a prescription and was downtown shopping.

(vii) The evidence further indicates that the Grievant has a history of oversleeping, as demonstrated by her letter of warning and seven-day suspension, both issued for tardiness. Because of those letters, the Grievant was fully aware of her need to call in

ahead of her scheduled reporting time to report any inability to come to work. Even if she had a problem with medication as she claimed, she could have set an alarm clock or made other arrangements.

(viii) The testimony of the Grievant lacks credibility in numerous regards. That fact is substantiated not only by her conflicting testimony at the arbitration hearing but by her testimony at her unemployment compensation hearing. Further, the petition for review with the Employment Security Subdivision of the State of Washington contains reasons which conflict with those given by her at the arbitration hearing.

(ix) The warning letter and seven-day suspension were affirmed in arbitration. Arbitrator Render's award sustained the fact that the Grievant committed the infraction charged in the suspension letter. The suspension was set aside only due to a misunderstanding by arbitrator Render regarding the nature of AWOL as an administrative act and not as a disciplinary action.

(x) Decisions of Postal arbitrators, including Syd Rose, sustain the right of the Service to terminate an employee who is guilty of continuous absenteeism or AWOL.

(xi) There has been no claim by the Union that the Service has applied its rules regarding absenteeism in an inconsistent manner. The only evidence is that the Service applied its policy of progressive discipline in a proper and consistent manner.

IV. UNION CONTENTIONS.

(i) The Service violated the Supervisor's Guide to Handling Grievances (P-32), by failing to conduct a thorough investigation prior to administering discipline. The reviewing authority, Postmaster Meservey, failed to interview the Grievant prior to affirming the removal. It is clear from the evidence that he based the removal on the facts of her previous infractions and not upon the alleged instant infraction.

(ii) In removing the Grievant, Management acted incorrectly in relying upon a discipline not yet adjudicated in arbitration. Arbitrator Paul Fasser, with approval by Impartial Chairman Sylvester Garrett has established the principle that the Service acts improperly when it relies upon disciplinary action that has been scheduled

to be heard in arbitration. Until an appeal in arbitration is finally adjudicated by an arbitrator, the disciplinary action has no standing in an arbitration. Further, the suspension was ultimately adjudicated in favor of the Grievant. Management stipulates that it follows progressive discipline; therefore, only a fourteen-day suspension would be proper in any event.

(iii) Because the fourteen-day suspension was purged from the Grievant's record, the action taken by the Service is not progressive, and is therefore punitive and not corrective.

(iv) The two medical certificates, when read together, meet the established requirements of the E&LRM. Also, it is important to note that the Grievant was not, and never has been, on the restricted sick leave list. Further, she possessed over three hundred hours of sick leave and had used only eight hours of sick leave in 1982. The stringent requirement of Supervisor Gasca under those circumstances was clearly unreasonable.

(v) One incident of AWOL should not automatically trigger the next step in discipline. Each AWOL should be judged on a case-by-case basis. In this case, the punitive action of Supervisor Gasca must be viewed as "overkill."

(vi) The Service's local policy for call-ins does not, contrary to testimony of Management, require a call-in for every day of sickness.

(vii) The Service acted unreasonably in expecting the Grievant to work after a D And C operation. The reactions of the Grievant were not uncommon to that of a great many women. Not only did Management fail to show an impact on the work force, it showed no concern for the welfare of the Grievant.

V. DISCUSSION, REASONING AND CONCLUSION.

The Arbitrator concludes that the Service has failed to establish by clear and convincing evidence that the removal of the Grievant was for just cause. Accordingly, the grievance is sustained. Under the circumstances of this case, the appropriate remedy is that the Grievant be reinstated to her former position without loss of seniority, but that back pay and fringe benefits shall be limited to the period of time commencing August 25, 1982 until the date of her reinstatement, less any outside earnings.

No interest is awarded. The following is the reasoning of the Arbitrator.

First, the Service has established that the Grievant is guilty of the charged offense. Perhaps more significantly, the Service has established that the Grievant has continuously displayed a cavalier and irresponsible attitude toward meeting the reporting and call-in requirements of the Service. Furthermore, the Service clearly established that the Grievant ignored the express instructions of her supervisor, both with regard to calling in and with obtaining medical information a medical authorization.

When the Grievant saw her doctor on March 30, 1982, she was well aware of the fact that she had received a previous warning, a seven-day suspension and a fourteen-day suspension, all related to absenteeism and AWOL. Further, she had been verbally warned by her Postmaster that her habits were leading up to a possible removal. Under such circumstances, an employee must be charged with the responsibility of taking special effort to ensure that he will comply with the attendance rules. An employee who does not take special care must be held to account for his cavalier and irresponsible attitude. Any employee who has been continually disciplined for attendance violations must take minimal efforts to ensure future compliance.

In this case, the Grievant failed to take any care at all. The Grievant was no stranger to D And C procedures, yet she did not contact the Service prior to undergoing the procedure. Neither did she contact the Service after the procedure and before she went to bed. Neither did she set the alarm or take any other action to ensure that she would awaken before her reporting time. Again, had the Grievant never been previously charged with tardiness or AWOL, perhaps the circumstances would forgive her actions. However, because of those prior infractions, she should have taken special steps.

When she was awakened by her supervisor, she told him that she would report to work on the next day and would bring a medical authorization. Mr. Gasca specifically reminded her of her obligation to call in if she would be unable to report to work. On the next day, the Grievant neither called in nor reported. She had absolutely no excuse for failing to do so. She led her supervisor to believe

that she would be reporting to work on March 31st and she was fully able to call in.

After she reported to work, Mr. Gasca read the manual requirements regarding a medical certificate to her. He told her that her certificate was incomplete and he hand wrote specific instructions to her and explained those instructions. The instructions were clear and unambiguous. The Grievant not only failed to comply with the instructions regarding the medical certificate, she failed to secure an authorization from her doctor that would have enabled Mr. Gasca to directly contact her doctor. Her failure to supply that medical authorization is critical to this case. Mr. Gasca could only have concluded that the Grievant had something to hide. Further, at the arbitration hearing, the Grievant never addressed her failure to provide that authorization and offered no explanation for her failure to do so.

Second, even though the Service has established the commission of the charged offense, the penalty imposed must be modified because of the Service's improper reliance upon the disciplinary action that was scheduled to be heard in arbitration. The Union is correct that the rule was established in the case of U.S.P.S. and N.P.O.M.H., W,N and GL, Grievance #MC-S0874-D, Grievant Linell Jeffries, Memphis, Tennessee, decided June 18, 1977 (Paul J. Fasser, Jr., Associate Impartial Chairman; approved Sylvester Garrett Impartial Chairman). A copy of that decision is attached to this Opinion and Award as "Arbitrator's Exhibit B." In the Jeffries case, the Service removed the grievant for offenses related to insubordination. The notice of charges noted that the Service relied upon a previous five-day suspension for conduct unbecoming a Postal employee. The union appealed the case to arbitration, and the case was still pending that the time the removal case was heard before Associate Impartial Chairman Fasser. Arbitrator Fasser noted that: (1) the National Agreement requires that discipline must be corrective in nature, rather than punitive; (2) that the Service improperly relied upon the five-day disciplinary suspension action because the action was scheduled to be heard in arbitration, and until that appeal was finally adjudicated, it had no standing; therefore, (3), under the principle of corrective discipline, the penalty of removal was too severe.

The principle established by arbitrator Fasser could not be clearer. Until the adjudication of the Grievant's fourteen-day suspension, the Service's action had no standing in the proceeding before the Arbitrator. It is clear that the practice at the Auburn office is that for minor offenses, such as absenteeism or AWOL, Auburn management follows the progressive discipline ladder of a warning letter, a seven-day suspension, a fourteen-day suspension, and only then removal. In the instant case, the fourteen-calendar-day suspension has been wiped off the record of the Grievant. Therefore, the removal must be set aside.

The Service would have the Arbitrator look behind the award of arbitrator Render. That the Arbitrator cannot do. Arbitrator Render expressly negated the disciplinary action imposed by the Service and left standing only the AWOL. Arbitrator Render's award must speak for itself. The Arbitrator has no right to look past the face of the award, and to do so would constitute serious misconduct.

Third, under ordinary circumstances, the Arbitrator would be inclined to modify the removal to a fourteen-day suspension to conform with the Auburn office's system of progressive discipline. However, under the circumstances of this case, the Arbitrator firmly believes he must limit the back pay remedy of the Grievant in order to convince her that she must take greater care to fulfill her responsibility to the Service. Contrary to what the Grievant apparently believes, the Service's attendance and call-in requirements are not onerous or overly strict; they are entirely reasonable. Were it not for the negation of the fourteen-day suspension, the Arbitrator would have upheld the removal of the Grievant.

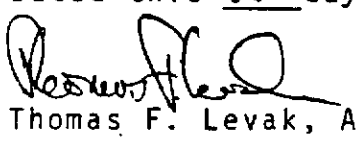
Finally, the Arbitrator wishes to memorialize the fact that he has not relied in any part upon the decision of administrative law judge David Wilson in the Grievant's unemployment compensation hearing. Arbitrators uniformly hold that those decisions involve statutory standards not normally applicable to arbitration cases, and are therefore not admissible in arbitration proceedings. While transcribed statements made in an unemployment compensation hearing may be admitted for impeachment purposes, decisions and petitions filed in regard thereto may not.

AWARD

(1) The Service did not have just cause in accordance with Article 16 of the National Agreement for the issuance of the removal letter dated April 8, 1982. The Grievant shall be immediately reinstated to her former position without loss of seniority. Back pay and fringe benefits shall be limited to the period of time commencing August 25, 1982 until the date of her reinstatement, less any outside earnings. No interest is awarded.

(2) The Grievant was properly charged with AWOL.

Dated this 26th day of October, 1982



Thomas F. Levak, Arbitrator