

C# 0598:3

IN THE MATTER OF REGULAR ARBITRATION)
 BETWEEN)
 AMERICAN POSTAL WORKERS UNION)
 AND)
 UNITED STATES POSTAL SERVICE)
 (Case No. W8C-5D-D-12376))
 (Upham Indefinite Suspension))

ANALYSIS AND AWARD:
 Carlton J. Snow,
 Arbitrator

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from July 21, 1978 through July 20, 1981. A hearing occurred on April 29, 1981 in a conference room of the Vancouver Post Office in Vancouver, Washington. Mr. Max Morelock, Regional Labor Relations Representative, represented the United States Postal Service. Mr. Robert L. Tunstall, National Vice-President, represented the American Postal Workers Union.

The hearing proceeded in an orderly manner. There was a full opportunity to submit evidence, to examine and cross-examine the witnesses and to argue the matter. Advocates fully and fairly represented their respective parties. The arbitrator tape-recorded the proceeding as an extension of his personal notes.

The parties stipulated that the matter properly was before the arbitrator and that there were no issues of substantive or procedural arbitrability to resolve. The Employer submitted a brief at the commencement of the hearing, and the Union requested an opportunity to submit a posthearing brief. The hearing officially closed on receipt of it.

II. STATEMENT OF THE ISSUE

The parties did not reach a stipulation concerning a statement of the issue to be considered by the arbitrator and requested that he frame it. The issue before the arbitrator is as follows:

Did the Employer violate Article XVI, Section 4 of the collective bargaining agreement before the parties by placing the grievant on indefinite suspension as a result of his arrest and felony charges? If so, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

A. ARTICLE XVI - DISCIPLINE PROCEDURE

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

Section 3. Suspensions of More Than 30 Days or Discharge. 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/her 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 the 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 a 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 the case has been had either by settlement or through exhaustion of his Civil Service appeal. When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the Employer is not required to give the employee the full thirty (30) days' advance written notice in a discharge action, but shall give such lesser number of days advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

Section 4. Indefinite Suspension - Crime Situation.

A. The Employer may indefinitely suspend an employee in those cases where the Employer has reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed. In such cases, the Employer is not required to give the employee the full thirty (30) days advance notice of indefinite suspension, but shall give such lesser number of days of advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

B. The just cause of an indefinite suspension is grievable. The arbitrator shall have the authority to reinstate and make the employee whole for the entire period of the indefinite suspension.

C. If after further investigation or after resolution of the criminal charges against the employee, the Employer determines to return the employee to a pay status, the employee shall be entitled to back pay for the period that the indefinite suspension exceeded seventy (70) days, if the employee was otherwise available for duty, and without prejudice to any grievance filed under B. above.

D. The Employer may take action to discharge an employee during the period of an indefinite suspension whether or not the criminal charges have been resolved, and whether or not such charges have been resolved in favor of the employee. Such action must be for just cause, and is subject to the requirements of Section 3 of this Article.

IV. STATEMENT OF FACTS

A. A Domestic Dispute: This grievance challenges a decision of management to suspend the grievant indefinitely after his arrest and felony charges stemming from a domestic dispute. He has been a postal employe for almost eleven years with a previously unblemished record. His temporary incarceration and arraignment on felony charges resulted from an off-duty confrontation with his spouse. He contends that management lacked reasonable and just cause to act as it did.

The grievant is a distribution clerk in the Vancouver, Washington Post Office. He was on indefinite suspension from August 14, 1980 until November when management reinstated him at his regular post. On August 3, 1980, while on annual leave from duty, the grievant had become involved in a dispute with his wife. The confrontation occurred in a private dwelling located in Gresham, Oregon.

Although details of the dispute did not come into the record as evidence at the arbitration hearing, the Union delved into details of the confrontation in its posthearing brief. That material has not

affected the arbitrator's analysis of the case. During or after the dispute, the grievant's spouse called the police. Later that day the police arrested the grievant pursuant to a warrant, charging him with attempted murder, second degree assault, and burglary.

B. An Incarceration: On August 5 the grievant appeared for a recognizance hearing in the Multnomah County District Court. The police incarcerated the grievant until his arraignment on August 11, 1980. At arraignment, the judge reduced the grievant's bail from \$50,000 to no bail at all and released him on his own recognizance, pending a satisfactory evaluation by psychiatric examiners at Woodland Park Hospital.

The grievant spent the following three or four days in a psychiatric wing of the hospital. He requested and received sick leave from the post office for those days. The parties stipulated that the grievant was never absent from work without leave as a result of the dispute at issue in this grievance.

C. An Indefinite Suspension: On August 15, 1980, doctors at the facility released the grievant from the hospital, and he was available for work that day. Shortly before his release from Woodland Park on August 15, the postmaster and the personnel officer from the Vancouver post office personally served the grievant with a letter notifying him that he would be indefinitely suspended pending further investigation. The Employer stated as its reason for the "proposed action" the fact that the employe had been arraigned and bound over to the court on charges of attempted murder, second degree assault,

and burglary. The notice had been signed on behalf of Mr. Jack Eller, the grievant's immediate supervisor.

Documents submitted at the arbitration hearing in this matter indicated that Mr. Eller had initiated the grievant's suspension action. Supervisor Eller stated at the arbitration hearing that he first became aware of the incident on August 3 involving the grievant when a union steward discussed it with him on August 4, 1980. Mrs. Dianne Randall, shop steward and general president of the local APWI chapter, however, denied having had any such discussion with Mr. Eller on August 4. She testified without rebuttal that she was in Detroit, Michigan at a convention from July 26 through August 9, 1980. Mr. Eller suggested no other shop steward as his source of information concerning the incident.

Mr. Eller also testified at the arbitration hearing that on August 4 he and Postmaster McNeely discussed the incident and "some other matters" involving the grievant. There was no testimony or evidence submitted to the arbitrator concerning the nature of those "other matters." The grievant's work record of ten and one-half years as a postal employe revealed no discipline other than that imposed for the incident giving rise to this arbitration proceeding. The grievant, in fact, had a certificate of achievement in his personnel file which he had received during his employment by the post office in California. Supervisor Eller testified on cross-examination that he was unsure concerning the date of his discussion with the Postmaster about the grievant but that he was certain it had occurred after the grievant's arraignment and no later than August 12, 1980.

D. Basis of the Suspension:

Supervisor Eller

testified that; by the time of his discussion with the Postmaster, he had made his decision to suspend the grievant, knowing the grievant had been incarcerated. At that time Mr. Eller had no documents to support his conclusions and had undertaken no investigation of the matter.. He testified that:

The Postmaster was the one who conducted an investigation. I did not. I was the unit foreman. I went on the information I had.

The information he allegedly had available to him had been received from the shop steward, the Postmaster, and a newspaper clipping someone had shown him containing the grievant's name, arrest, and charges against him.

It is important to highlight the ambiguity in the facts placed before the arbitrator. The shop steward testified that she did not discuss the incident with Mr. Eller until her Step One meeting with him. She did not do so because she was in Detroit, Michigan. The Postmaster testified that he first learned of the incident from Mr. Eller, not vice versa.

On August 14, 1980, management issued the grievant a letter of suspension. At the time, Mr. Eller was on sick leave. The letter of suspension bore Mr. Eller's name but had been signed by Mr. Dennis Peterson

Before delivering the grievant's notice of suspension to him at the hospital on August 15, Postmaster McNeely reviewed the "proposed action."

The previous day, postal inspector Terry Wells had mailed Postmaster McNeely an "investigative memorandum" regarding charges against the grievant. Mr. R. Snyder, labor relations assistant in the Portland Post Office, had requested an investigation which resulted in the investigative memorandum. Mr. Snyder did not testify at the arbitration hearing.

E. A Postal Inspector's Report:

Inspector Wells'

report bore a date of August 14, 1980. It consisted of a synopsis of information taken from accusatory instruments against the grievant on file at the Multnomah County Courthouse. The inspector attached copies of the accusatory instruments to his report. They included (1) a complainant's information of felony; (2) an order to appear; (3) an order of continuance; (4) a motion for recognizance for bail reduction; (5) an "order and commitment" containing no other information except the case title, case numbers, and charges against the grievant; and (6) a record of the audio-cassette tape recording numbers pertaining to the recognizance hearing.

It is important to highlight that these documents are merely accusatory instruments. They were merely assertions that the grievant was guilty of some offense or misconduct. They were formal allegations that he had committed a crime. Those documents did not reflect any investigation or legal finding of probable cause. That is, the documents, themselves, did not provide evidence sufficiently strong to cause a reasonably prudent person in a court of law to believe that the party

charged is guilty of an offense with which he had been charged. They were accusatory only, and the finding of "probable cause for prosecution" was to be considered at a later hearing.

Inspector Wells did not discuss the grievant's case with police officials or the prosecutor. He did not attach a police report to his investigative memorandum. He merely summarized accusatory documents and mailed them to Postmaster McNeely. No representative of the Employer attended the grievant's arraignment. The Employer had no information regarding those proceedings other than their outcome.

The shop steward attended the grievant's arraignment on August 11. She testified at the arbitration hearing that the judge at the grievant's hearing indicated he ordered a psychiatric evaluation because it simply was something he had to do "to make sure everything was on the up and up" since he intended to release the grievant on his own recognizance.

P. Mr. Eller's Decision to Suspend: On August 19, 1980, the shop steward brought a Step One grievance in the matter. She met with Mr. Eller, and he denied the grievance. Shop Steward Randall testified it was her belief that it was during the Step One discussion when Mr. Eller first learned of the grievant's indefinite suspension. At the arbitration hearing, Mr. Eller made several statements about the basis of his decision to suspend the grievant indefinitely. He stated:

The employe was incarcerated. That's what I based my decision on.

I merely went upon the fact that the man was indeed incarcerated. He was on an annual leave, and he was in the slammer, in the can. And he further had been sent from the jail where he was being held to Woodland Park Memorial Hospital for psychiatric examination.

And based upon that, I felt there was reasonable cause to feel and to believe that the man could in fact be found guilty and possibly incarcerated for a given period of time. This was my reason.

The grievant had been booked on attempted murder. He was in jail. And there was the possibility that he could be convicted of a felony. My interpretation of Article 16 is what I based my decision on. (Emphasis added).

The Step One "grievance status form" offered the following reasons for denying the grievance:

Article XVI, Section 4 clearly states: The Employer may indefinitely suspend an employee in those cases where the Employer has reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed.

G. Documents on Which Management Relied:

On August 22,

1980, a Step Two discussion took place between Shop Steward Randall and Mr. Sontgerath, the Postmaster's Step Two designee. The shop steward testified at the arbitration hearing that she requested evidence substantiating charges against the grievant as well as a copy of the postal inspector's investigative report. Asked at the arbitration hearing if the steward, in fact, had requested such documents, Mr. Sontgerath responded, "Not to my knowledge." In any case, he produced no such documents. The shop steward's testimony regarding her request for such documentation is more credible. She had processed grievances in the past. She stated in her response of August 26 to the Step Two denial of the grievance that Mr. Sontgerath "showed the Union no proof of Grievant Upham's charges."

Both Supervisor Sontgerath and Shop Steward Randall had seen a newspaper clipping about the incident involving the grievant on August 3. The news article did not identify the grievant as a postal employe. There was no indication that it occupied a prominent place in the newspaper or that management received any inquiries from the public or members of the work force concerning the clipping. Mr. Sontgerath testified that he had never seen the inspector's report regarding the grievant. He stated that he had not discussed the case with Supervisor Eller and had discussed it with Postmaster McNeely only after rendering his decision. He based his decision to deny the grievance on the fact that the grievant had been arraigned in court.

Postmaster McNeely confirmed his denial of the Step Two grievance in a letter dated August 26. It stated:

The indefinite suspension of the grievant was given as a result of grievant's arraignment in Mulnomah County Circuit Court on August 12, 1980 for trial on charges of (1) attempted murder; (2) assault; and (3) burglary (breaking and entering). Our position is supported by Article XVI, Section 4 of the National Agreement as quoted in the Step One response. (See, Joint Exhibit No. 2(I)).

In November of 1980, Postmaster McNeely initiated a removal action against the grievant. Before removing the grievant from employment with the postal service, management had an obligation to end his indefinite suspension. In order to comply with notice requirements a labor relations assistant informed the grievant in a "letter of decision" on November 12, 1980 that his indefinite suspension would end on November 26,

1980. Subsequently, the Employer discontinued its removal action.

H. The Grievant's Court Trial:

Judge Ellis

of the Multnomah County Circuit Court heard the grievant's trial on November 6, 1980. He issued an amended judgment and probation order. It reflected that the grievant had been convicted on a guilty plea of assault in the third degree, a class "C" felony. Judge Ellis' order called for a suspended sentence, probation for five years, eight days of previously served jail time, restitution to the grievant's wife in the amount of \$375, and successful participation in any mental health and/or alcoholic counseling program at the discretion of the grievant's probation officer. The order provided that, on successful completion of probation, the matter would be declared a class "A" misdemeanor. The grievant testified without rebuttal that his probation officer had not required him to attend any counseling sessions.

On or about November 19 and 20, Shop Steward Randall met with Mr. Stroebel of the labor relations office in Portland to negotiate the grievant's return to the payroll. Pursuant to their discussion, management terminated the grievant's indefinite suspension effective November 20, 1980. The grievant returned to work. Management, however, refused to consider any backpay. The decision proceeded to arbitration.

V. POSITION OF THE PARTIES

A. The Employer:

It is the position of

the Employer that any decision in the case hinges on an interpretation

of Article XVI, Section 4 of the collective bargaining agreement between the parties. The Employer interprets the provision to mean that, when management can prove an employe has been charged with a crime for which a sentence of imprisonment can be imposed, the Employer has satisfied both the "reasonable cause to believe an employe is guilty" requirement of Section 4 as well as the "just cause to suspend" requirement. Management asserts that the Employer's failure to undertake an independent investigation in this case was reasonable because it had "very little opportunity to conduct an independent investigation without interfering with civil and criminal authorities who were in the process of developing their own case."

Management maintains that the language of Article XVI is unique to collective bargaining agreements in the federal sector. According to the Employer, the "high profile" position of postal employes and a special fiduciary relationship between the postal service and its employes are grounds to assume that an employe's arrest and serious charges will have an impact on the postal service. (See, Employer's Prehearing Brief, pages 4 and 6). The Postal Service asserts that "by recognition of the Service's right to suspend when reasonable cause is found under Article XVI, Section 4, the Agreement implicitly holds that this constitutes just cause under general provisions of Article XVI." (See, Employer's Prehearing Brief, page 6).

The Employer urges that its reasonable determination of an employe's guilt or innocence is not restricted by a finding of a court of law. In other words, management maintains that, even if the Employer returns an employe to pay status pursuant to an ultimate court finding of innocence, backpay is not appropriate for time spent on suspension unless at the time

of suspension the Employer lacked reasonable grounds to believe in the employe's guilt.

B. The Union:

The Union asserts

that there is a distinction in quantum of proof between "reasonable cause" and "just cause." It contends that the purpose of the "reasonable cause" language contained in Section 4 of Article XVI was to clarify the Employer's authorization to give less than a normal thirty day advance written notice of indefinite suspension. (See, Union's Posthearing Brief, page 21). The Union contends that "reasonable cause" must be understood only in terms of waiving the thirty day notice requirement of Section 3. According to the Union, "just cause...must be met before an independent suspension can be given." (See, Union's Posthearing Brief, page 22).

The Union maintains that management's investigation in the case was inadequate to establish "reasonable cause to believe" the grievant was guilty of a crime for which a sentence of imprisonment could be imposed. In addition, the Union emphasizes that management could not have received the postal inspector's investigative report before it issued its proposed indefinite suspension on August 15, 1980. Finally, the Union asserts that management did not have just cause to suspend the grievant because evidence submitted to the arbitrator failed to establish that the grievant's off-duty conduct adversely affected the post office.

VI. ANALYSIS

A. General Principles Governing Discipline for Off-Duty Criminal

Conduct:

At first glance, this case has an appearance of simplicity. There, however, is deception in that appearance. The case raises issues of substantial complexity and importance. An employer's right to suspend or discharge an employe for off-premises conduct unrelated to job duties is tied to readily discerning adverse effects of that conduct on the employer's business. Conjecture, speculation, or mere surmise concerning any adverse effect on the business is insufficient proof. (See, for example, Raytheon Company, 66 LA 677 (1976)). Arbitrators long have agreed that an employer has the burden of proving some legitimate reason for imposing restraints on an employe's private life. Arbitrators usually search for behavior by a grievant which has harmed an employer's reputation or operation. There also is an interest in knowing if the employe's off-premises conduct has made other workers fearful of working with the offender. Arbitrators seek information concerning any serious emotional instability a grievant guilty of off-duty misconduct might manifest on the job. These and a host of other factors have been considered by arbitrators to test the propriety of disciplining an employe for off-premises conduct.

Arbitrators customarily have utilized a two-step analysis to test the propriety of discipline imposed for off-duty criminal conduct. First, from a procedural standpoint, did the employer comply with due process rights of the grievant. Second, from a substantive viewpoint, was there evidence to show a sufficient relationship between an employe's conduct

and the employer's reputation or operation to justify a conclusion that the employer had been or might be adversely affected by the employe's alleged misconduct.

B. The Difference Between "Reasonable Cause to Believe" and "Just Cause to Suspend."

1. A Two-Step Procedure: Section 4 of Article XVI in the agreement between the parties provides for indefinite suspensions in situations involving crimes. According to terms set forth in the agreement, management has a right to suspend an employe for criminal conduct if it meets a two-step burden. First, at the time of suspension, the Employer must establish that it had "reasonable cause to believe" an employe engaged in conduct for which the law provides a penalty of imprisonment. Second, the Employer must determine that it has just cause to suspend the employe. According to the parties' collective bargaining agreement, the Employer cannot suspend an employe in circumstances involving crimes without satisfying the requirement of "reasonable cause to believe." Even if the Employer meets its burden of showing "reasonable cause," it, however, has not automatically met its burden of showing "just cause."

2. "Reasonable Cause to Believe:" No Presumption of Innocence:

In order for the Employer indefinitely to suspend an employe in situations involving crimes, it must have "reasonable cause to believe" the employe is guilty of a crime for which a sentence of imprisonment can be imposed. The issue is not whether the employe is guilty or

innocent. Article XVI, Section 4(A) expressly authorizes the Employer to disregard the common law presumption of innocence deeply imbedded in Anglo-American jurisprudence. The Employer may ignore the presumption of innocence if it has "reasonable cause to believe" an employe is guilty of a crime for which a sentence of imprisonment can be imposed. That is the agreement of the parties. The point is that management need not wait for a court of law to act. Its interest in an employe's alleged illegal conduct is different from that of society at large.

The Union contends, however, that Article XVI(4) merely clarifies the Employer's right to obtain a shorter than normal notice period to suspend employes indefinitely in response to alleged criminal activity. It is reasonable to conclude that the parties intended something more of the language in Article XVI(4)(A) than merely a notice requirement. Article XVI(4) clarifies the right of management to impose disciplinary action for criminal conduct before an employe has been convicted by a court of law. In other words, the Union's argument at lower stages of the grievance procedure, to the effect that the Employer had violated an employe's common law right to a presumption of innocence, was inappropriate.

In circumstances where an employe has not been convicted of a crime, Article 16(4)(A) permits management to substitute its "reasonable cause to believe" that an employe is guilty of criminal conduct. Management, on the other hand, contends that its burden of "reasonable belief" has been met when an employe merely is charged with a crime. (See, Employer's Posthearing Brief, page 4). This position is not consistent with notions of due process inherent in the agreement between the parties. Accusatory documents, standing alone which are based on one or more person's

accusations, are not sufficient to establish a reasonable belief in an employe's guilt. It is necessary for management to conduct an investigation in order to establish its "reasonable belief." Elements of that investigation will be discussed later in this report.

3. "Just Cause" to Suspend An Employe for Off-Premises Conduct:

The Employer accepts the notion that general provisions of Article XVI require discipline to be corrective in nature and also require "just cause" for all discipline applied in cases involving criminal conduct. Management contends, however, that "reasonable cause to believe" in an employe's guilt implicitly constitutes "just cause to suspend" the worker. Arbitrators of postal cases have disagreed concerning whether Article XVI(4) excuses the Employer from having to prove a discernable connection between its reputation or operation and the conduct of a suspended employe. In all cases cited by the Employer in this proceeding, however, it could be demonstrated that the employe's conduct in each case might adversely affect the postal service. Those cases will be analyzed momentarily.

A search of the literature has revealed no collective bargaining agreement or arbitration decision supporting discipline for off-premises conduct having no potential adverse affect on the employer. In all cases studied by the arbitrator upholding discipline for off-premises conduct, there has been found a discernable connection between an employe's conduct and the employer's operation or public image. A typical pattern is found in the Chemicals Inc. case. There an employer enacted a rule that "criminal conduct, indictment or arrest for a felony

will subject an employe to immediate suspension without pay." (See, 65 LA 760 (1975)). There followed, however, the following qualification:

In the administration of the rules set forth in this Part I, with respect to conduct occurring off company premises, it is the intent of the company to impose disciplinary measures only in situations which in its opinion adversely affect plant or office operations, or morale, or which interfere with discharge by the company of its duty to afford a safe place to work by its employees.

To establish "just cause to suspend," the Employer must do more than assert that "when an employe's conduct is such that he is arrested and charged with a crime of serious magnitude, it obviously will have some impact upon the postal service." (See, Employer's Prehearing Brief, page 6).

C. Reasonableness of the Employer's Belief in the Grievant's Guilt:

1. No Investigation: The labor agreement authorizes the Employer to indefinitely suspend an employe when management "has reasonable cause to believe" the employe is guilty of a crime for which imprisonment might result. On August 15, 1980, management implemented the grievant's suspension. At that time, the Employer had undertaken no independent investigation of events leading to the grievant's criminal charges. In fact, the postal service had no interest in details of the August 3 incident involving the grievant and his wife. The postal inspector's memorandum merely verified charges against the grievant by summarizing accusatory instruments obtained from the Multnomah County Circuit Court.

It is important to stress that the grievant had not been indicted by a grand jury. The documents management used included no police reports and contained no interviews with the grievant. Additionally, the Union argued that, since the postal inspector mailed his memorandum in Portland on August 14, 1980, the Postmaster could not even have received it before August 16, 1980. From evidence submitted at the arbitration hearing, it is not certain whether the Postmaster had the benefit of Inspector Wells' report before delivering his notice of indefinite suspension to the grievant on August 15. Whether or not he had the report, however, documents attached to that investigative memorandum were inadequate to establish "reasonable cause to believe" in the grievant's guilt.

At the arbitration hearing, the Employer submitted Mr. Well's investigative report and its attachments. One of the attachments was an "amended judgment and probation order" which had been entered in the grievant's court case after his trial on November 8, 1980. Obviously, that document was not available to management on or before the Employer's decision of August 14 to suspend the grievant. The point is that, in a case of indefinite suspension for criminal activity, even an ultimate court conviction does not excuse management from its obligation. Management's obligation is to be able to establish that it had a "reasonable cause to believe" the employe was guilty of the alleged charges at the time it placed him on indefinite suspension. The Employer is not permitted to reason backward from a court's later finding of guilt that management had a "reasonable cause to believe" in the employe's guilt at the time it imposed an indefinite suspension. "Reasonable belief"

had to exist at the moment of suspension.

2. Teachings of Case Law:

It is the position

of management that "all that is necessary to remove the grievant from employment is a formal complaint which could result in imprisonment."

(See, Employer's Prehearing Brief, page 10, Attachment 3). The arbitration case from which the Employer extracted such guidance contained only

dictum in support of its proposition. In the Haber opinion, the grievant

had been found guilty on a plea of nolo contendere. That occurred before the Postal Service suspended him. The court had suspended his

one year sentence, and the grievant had been placed on probation for two years. In that case, management was not compelled to argue that

the grievant had been suspended on the basis of formal charges alone.

By pleading nolo contendere, the grievant, in effect, made a quasi-confession of guilt and did so before management imposed its sanction.

(See, for example, United States v. Safeway Stores, Inc., 20 FRD 451).

It is important also to highlight that Arbitrator Haber overturned the grievant's discharge.

The extent to which management is obligated to investigate formal criminal charges before suspending an employe will vary according to circumstances in each case. At a minimum, the Employer should interview an employe or at least invite him or her to submit a written explanation of circumstances surrounding the grievant's arrest. An investigation should be directed both at management's burden of showing "reasonable cause to believe" as well as showing "just cause to suspend." Such an investigation should ascertain sufficient data to make a reasonable judgment concerning whether circumstances indicate that the Employer might be harmed by any off-premises conduct.

Positive Evidence of Guilt:

In the Hilliard case,

which management cited, the Postal Service interviewed the grievant and sent samples of her handwriting, along with four forged checks, to the postal service criminal laboratory. (See, Employer's Prehearing Brief, Attachment 1). After an analyst positively identified her as the writer of forged checks, postal inspectors again interviewed the grievant, along with the Secret Service. The day after her arrest for forgery, the Postal Service placed her on indefinite suspension. That particular case clearly is distinguishable from this dispute. In this particular instance, there was no effort at all made to interview the grievant or to gather positive evidence of his allegedly improper conduct.

Signed Statements:

In the case involving

termination of Messrs Nichols and White, the Postal Service relied on signed statements the grievants had given to police officers, admitting their theft and attempt to resell furniture taken from a vacant house. (See, Employer's Prehearing Brief, Attachment 2). Management there stressed that the case was "not based on a simple indictment." (See, Employer's Prehearing Brief, Attachment 2, page 4). Additionally, the Employer there invited the affected employes to submit a written explanation of their conduct.

The grievant in this particular case received no such opportunity. In the furniture theft case, the arbitrator concluded that "management did, on the basis of the arrest, more importantly on the basis of the signed statements of the police, have reasonable cause to believe an employe guilty of a crime for which a sentence of imprisonment can be imposed." (See, Employer's Prehearing Brief, Attachment 2, page 5, emphasis added). Management, of course, at the Vancouver facility had

no signed statements and no police reports on which to base its "reasonable cause to believe" that the grievant was guilty of a crime for which a sentence of imprisonment could be imposed.

A Need For Supporting Data: The Employer also quoted from the Bochenek case. (See, Employer's Prehearing Brief, Attachment 4). That case involved a domestic dispute as does this one. In that case, Arbitrator Rentfro discussed limits on the Employer's duty to investigate. He stated that "the agreement surely does not contemplate the donning of deerstalker hats and the carrying of magnifying glasses by Service investigators in their quest for reasonable cause." (See, Employer's Prehearing Brief, Attachment 4, page 8).

That case, however, clearly is distinguishable from this one. In the Bochenek case, a postal inspector visited the employe at his home. The inspector compiled copies of a police report, including eye-witness testimony, two newspaper articles, and an arrest record. Although the grievant in that case refused to discuss the matter on advice of counsel, he had received a chance to be heard. On the basis of those facts, the arbitrator in that case found management had "reasonable cause to believe." In this case, management lacked such supporting data for its decision to suspend the grievant.

In other cases cited by the Employer, "reasonable cause to believe" resulted from an employe's guilty plea or from an employe's sworn statement admitting guilt. (See, Employer's Prehearing Brief, Attachments 6 and 7). There, of course, were no sworn statements or guilty pleas from the grievant in this case on which management was able to base its decision to suspend the grievant indefinitely.

3. A Need For More Than Accusations:

After a diligent search, the arbitrator has been unable to find a case supporting management's "reasonable cause to believe" an employe to be guilty of a crime based on merely a bald record of arrest and arraignment. It cannot be denied that charges against the grievant in this case were serious. Those accusatory charges, however, were all that management had before it. For example, had management interviewed the grievant shortly after the incident or given him a chance to make a written statement, the Employer might have had "reasonable cause to believe" the grievant was guilty of some level of assault, although probably not of attempted murder. Presumably, when Mr. Eller and Postmaster McNeely decided to suspend the grievant, they knew he was about to be released on his own recognizance.

Management, however, did not interview the grievant. While it would be unreasonable and conceivably unwise to require the Employer to duplicate efforts of law enforcement agencies, management has an obligation to make a good faith effort to determine events and circumstances leading to an employe's arrest. The facts need only be such as would convince a grand jury to indict an individual, rather than facts needed to convince a jury to convict. The Employer, however, needs more than merely accusatory documents. Consequently, the Employer in this case did not have "reasonable cause to believe" the grievant was guilty of any crime.

D. "Reasonable Cause to Believe" Contrasted With "Just Cause to Suspend":

1. Off-Premise Conduct:

Even if the Employer

had demonstrated a "reasonable cause to believe" the grievant was guilty of an assault stemming from a domestic dispute, it did not necessarily have "just cause to suspend" the grievant. The Employer disciplined the grievant for conduct which occurred off the premises. Discipline for off-premise conduct customarily has required a showing of adverse effect or a substantial risk of adverse effect on the Employer.

Management did not assert in the case that the grievant's arrest had rendered him unable to work effectively or that other employes subsequently were reluctant to work with him. The Employer contended only that the grievant's active retention would have been inconsistent with a special fiduciary relationship existing between an employe and the Postal Service as well as inconsistent with the "high profile" position occupied by postal service employes in general. Management, however, did not show that the grievant's conduct in this particular case jeopardized either the employe's fiduciary relationship nor the highly visible position of postal service employes generally. The only public information concerning the incident came from a newspaper "clipping."

2. The News Article:

The newspaper

"clipping" on which management relied never was offered into evidence. Testimony of Mr. Eller established that the "clipping" reported only the grievant's name, arrest, and charges against him. There was no mention of the postal service. Such marginal newspaper coverage, especially with no reference to the postal service, cannot endanger the "high profile" position of postal service employes in the eyes of the public. The public had little or no knowledge of the incident.

3. "Just Cause" Tests of Off-Premise Conduct:

In

evaluating claims of harm to an employer's reputation, arbitrators

generally have rejected any "per se" distinction between standards to be applied to public as contrasted with private sector employes. It is not relevant to an employer's reputation that a grievant is a public employe if his or her duties do not involve public contact and if the public is unaware of a grievant's arrest. In all other arbitration cases cited by the Employer to support its decision in this particular grievance, criminal conduct at issue had a discernable adverse effect on the Employer

If the employe's job presents opportunities and temptations to engage in conduct similar to crimes he or she has committed off-premises, the "fiduciary relationship" is affected. If the conduct is likely to influence the public's image of the postal service, such conduct may affect the "high profile" position of postal employes. For example, the Hilliard and Behm cases involved distribution clerks who had been charged with signing checks illegally. (See, Employer's Prehearing Brief, Attachments 1 and 7). Even when a distribution clerk commits an off-premise crime, such as forgery or conspiracy to cash stolen payroll checks, the conduct arguably is job-related. Opportunities for distribution clerks to engage in such activity on the job are numerous. Consequently, it would be reasonable for an employer to remove an employe from such opportunities.

Two other cases cited by the Employer involved employes who had been discharged for committing property crimes. (See, Employer's Prehearing Brief, Attachments 2 and 5). The discharge of Messrs Nichols and White involved letter carriers who had signed statements admitting they had stolen and sold furniture from a vacant house. The removal of Mr. Nohren involved a distribution clerk who accepted a stolen television from

acquaintances after having helped them remove a quantity of television sets from a Sears truck. Whether or not off-premises conduct involving theft has a direct bearing on the fiduciary relationship between the Postal Service and its employes, postal employes are entrusted with valuables of the general public. Any conduct casting doubt on the employe's trustworthiness with the property of others may constitute just cause for discipline. It is important to highlight, however, that an assault stemming from a domestic dispute does not implicate the employment relationship in the same way.

The Employer also cited cases involving sexual misbehavior by letter carriers in support of management's decision in this particular case. (See, Employer's Prehearing Brief, Attachments 3 and 6). Sexual misbehavior by letter carriers must be distinguished from the grievant's misconduct. In the Fulton case, an arbitrator upheld the discharge of a letter carrier who had pleaded guilty to a charge of soliciting a minor for illegal purposes. Five and a half years earlier, the grievant in that case had been charged with indecent exposure to minors and pleaded guilty to lewdness. The arbitrator upheld his discharge. His off-premise conduct clearly violated his fiduciary commitment to the employer. The Clanton discharge case involved an employe who entered a nolo contendere plea to a charge of taking indecent liberties with a minor.

4. A Distinction Between Letter Carriers and Distribution

Clerks:

Such behavior on

the part of a letter carrier has a potential adverse effect on both the fiduciary relationship and "high profile" position of postal employes.

Letter carriers are different from distribution clerks. Letter carriers meet the public at their homes or at their business. By virtue of their uniforms, they receive the public's trust in a way not experienced by someone such as the grievant in this case who never dealt with the public. The Postal Service cannot risk having that trust abused. The grievant's dispute with his wife presented no such risk to the public. As a distribution clerk, he was not in a position to take advantage of a postal uniform.

Nor is it reasonable to compare engaging in a domestic dispute with sexual misconduct. In the Clanton case, moreover, the arbitrator reinstated the grievant, even though the "public image" of the employer had been tarnished. Circumstances learned after the grievant had been indefinitely suspended indicated that Mr. Clanton's behavior was not as serious as it first appeared. The arbitrator concluded in that case:

This arbitrator does not believe that an employee of considerable seniority should lose his job even when the employer is technically or legalistically proper in severing him; equity and justice is defeated by such action.

A case cited by the Employer which closely parallels this particular grievance is the Bochenek suspension. (See, Employer's Prehearing Brief, Attachment 4). The grievant in that case was a distribution clerk. He had been arrested and charged with assault involving a deadly weapon. He allegedly had shot his son in the midst of a family quarrel. The Employer had placed him on indefinite suspension for approximately one week before returning him to work without backpay. The county court had dismissed charges against the employe.

Mr. Bochenek's case is distinguishable from this particular grievance in several respects. The incident had gained notoriety through two newspaper articles. Mr. Bochenek had been charged with brandishing a gun, which reflects a different emotional attitude toward human life than does an assault without a gun. Both publicity and the grievant's alleged attitude in that case may have affected the employment relationship. In this particular case, there is no basis for concluding that the incident had become notorious as a result of newspaper coverage. Nor was there evidence that the grievant brandished a gun.

Arbitration awards cited by management in its brief did not acknowledge the necessity to establish any connection between the Employer and off-premises conduct. In those cases, however, the connection was evident from the facts. The facts in each case supported a strong argument for both "reasonable cause to believe" in the employe's guilt of a crime as well as "just cause to suspend" for off-premise conduct. There is no such connection in this particular case. If there was any reasonable connection between the grievant's domestic dispute and his job as a distribution clerk, it was too attenuated to constitute "just cause" to suspend the employe.

AWARD

Having carefully considered all evidence submitted by the parties in this matter, the arbitrator concludes that the Employer did not have "reasonable cause to believe an employe is guilty of a crime for which a sentence of imprisonment can be imposed." The Employer violated Article XVI, Section 4 of the agreement between the parties by placing the grievant on indefinite suspension. Although charges against the grievant were serious, an interview with him would have established reasonable cause to believe the employe was guilty of a lesser crime than those charged. Additionally, the Employer established no connection between the employe's off-premise conduct and legitimate Employer concerns which constituted "just cause" to discipline for off-premise conduct.

The grievant shall be made whole and awarded backpay for the period from August 16, 1980 through November 20, 1980. The arbitrator shall retain jurisdiction of this matter for a period of ninety days from the date of this report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Respectfully submitted,


Carlton J. Snow
Professor of Law

Date: 7-16-81