C#07490

REGULAR

ARBITRATION PANEL

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE and NATIONAL ASSOCIATION OF LETTER CARRIERS	Grievant: John Considine, Jr. Post Office: Newton Centre, Ma. Case No: N4N-IE-D 14323

Before Harry B. Purcell , Arbitrator

Appearances:

For US Postal Service — William T. Evans, Sr.
Manager, Labor Relations

For Union: — Carl Soderstrom, Trustee
NALC, Branch 34

OCT 13 1987

Date of Hearing: September 18, 1987

Place of Hearing: USPS, GMF, Boston, Ma.

Award: The discharge of John Considine was not for just cause. The grievance is sustained to the extent that the Grievant shall be promptly reinstated in his former job classification without loss of seniority but he shall not be entitled to any compensation lost by him due to the subject discharge.

Harry B. Purcell
Arbitrator

Date of Award: October 1, 1987

ARBITRATION PROCEEDING

REGULAR ARBITRATION PANEL

IN THE MATTER OF ARBITRATION - Between - UNITED STATES POSTAL SERVICE - And - NATIONAL ASSOCIATION OF LETTER CARRIERS CASE NO. N4N-IE-D 14323 GRIEVANT: John Considine (Discharge) POSTAL FACILITY: Newton Centre, Ma. HEARING LOCATION: GMF, Boston, Ma. HEARING DATE: September 18, 1987 DATE OF AWARD: October 1, 1987	AWARD OF THE ARBITRATOR

FOREWORD

The Parties to this Arbitration Proceeding are the U.S. Postal Service (hereinafter referred to as "Employer") and the National Association of Letter Carriers (hereinafter referred to as "Union"). A hearing was held in this matter at 10:00 A.M., September 18, 1987 at the U.S. Post Office, GMF, Boston, Mass., and was completed at approximately 1:20 p.m., on that same day. The Proceeding was not recorded by a court reporter. The oath was administered to all who were called to give testimony. The Parties, including the Grievant, agreed that they had been given full opportunity to present all of the testimony, evidence and proofs that the wished to offer in support of their respective positions. The Arbitrator is satisfied that all conditions essential to a full hearing and proper disposition of the matter placed before him have been met.

REPRESENTATIVES OF THE PARTIES

Appearing for the Employer

William T. Evans, Sr.,
Manager, Labor Relations

Appearing for the Union

Carl Soderstrom, Trustee
Branch 34, N.A.L.C. - AFL-CIO

THE ISSUE BEFORE THE ARBITRATOR

"Was the discharge of John Considine for just cause?
If not, what shall be the remedy?"

APPLICABLE CONTRACT PROVISIONS - (In Pertinent Part)

ARTICLE 16 - DISCIPLINE PROCEDURE

Section 1. Principles

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 5. Suspensions of More Than 14 Days or Discharge

In the case of suspensions of more than fourteen (14) 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 fourteen (14) days or his discharge to the Merit Systems Protection Board (MSPB) 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 MSPB 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.

BACKGROUND OF THE DISPUTE

John F. Considine, Jr., (hereinafter referred to as "Grievant") was a full time letter carrier assigned to the U.S. postal facility in Newton Centre, Ma. At the time of the subject incident (July 26, 1985) he held approximately six (6) years of seniority in his craft. On that date (7/26/85) shortly after he had completed his tour of duty at 2:30 p.m., the Grievant participated in an illegal drug transaction which involved three other off-duty postal employees: Hinckley; Davis; and Cahill. The transaction, specifically, was the sale of one (1) gram of cocaine by Hinckley to Cahill for the sum of one hundred dollars ($100.00). The Grievant's part in that misconduct appears, essentially, to have been owner and driver of the automobile in which the illegal transaction took place.

On August 29, 1985, following a determination by the Postal Inspection Crime Laboratory, Washington, D.C., that the substance in question was indeed "cocaine hydrochloride:, the Grievant was arrested pursuant to a warrant issued by the Newton District Court for: "Possession Class "B" (cocaine) with Intent to Distribute and Conspiracy to Violate Control Substance Laws."

On October 30, 1985 the Grievant was issued a "Notice of Proposal Removal" from the Employer.

On November 21, 1985 the Grievant was issued a "Letter of Decision" notifying him that the previously proprosed removal would be effectuated as of December 6, 1985.

On November 25, 1985 the Parties conducted a hearing in the matter at the first step of the grievance procedure with respect to the disciplinary action that was being taken by the Employer against the Grievant. All attempts by the Parties to reach a mutually satisfactory settlement of the dispute were unsuccessful.

On June 3, 1986 the Union formally requested that the matter be referred to arbitration.

On July 1 and 2, 1987 in Commonwealth [of Massachusetts] v. John Considine, the Grievant was the defendant in a jury waived trial on an indictment "alleging unlawful possession of Class B cocaine with intent to distribute." The presiding justice "found sufficient facts to warrant a finding of guilty on this indictment." However, the Court did not order incarceration of the Grievant but instead, "continued the case without a finding for two years. During the two year continuance, the defendant will be on probation, subject to the following probationary conditions:

1. 150 hours of Community Service
2. $500.00 Court costs, and
3. Display good citizenship

"If all conditions are met and there are not intervening criminal convictions the case will be dismissed at the end of the two year period. Indictment 85-3545, alleging conspiracy to violate the Controlled Substance Act, was filed without a change of plea." (See letter of 8/5/87 from Adrienne C. Lynch, Asst. District Attorney, Newton District Court).

Thus did the matter of the Employers' disciplining of the Grievant become the subject of this Arbitration Proceeding.

POSITION OF THE EMPLOYER

The Employer contends that it did have just cause to discharge the Grievant and it asks the Arbitrator to deny the grievance. It asserts that in May, 1985 John Davis, a letter carrier employed at the Newton Centre post office, presented himself to the Medical Unit professiong that he had drug problems and he identified the Newton Centre facility as the source of cocaine. Postal Inspector Edward Cahill was assigned to investigate the case and managed to persuade Davis to cooperate in a scam (entrapment exercise) the objective of which was to catch the alleged drug distributor, a postal employee named Fred Hinckley, in the act of making an illegal drug transaction.

As stated above, at about 2:35 p.m., July 26, 1985, the Grievant drove his car, with Hinckley as a passenger beside him, to a point in the central business area of Newton Centre directly across the street from a retail ice cream/luncheon establishment in which Davis and Inspector Cahill were waiting. Upon being signaled by the Grievant's automobile horn, Davis and Cahill exited the restaurant, crossed the street and promptly got into the rear seat of the car.

Cahill testified at the Arbitration hearing that Hinckley quickly asked: "What do you want?" To which Cahill responded: "You know what I want." When Hinckley asked: "A gram?" Cahill answered: "Yes." With that, Hinckley reached into his pant's pocket and passed a small glassine like envelope containing one gram of cocaine over his shoulder while Cahill passed $100 in cash to Hinckley. Cahill testified that while that exchange was taking place someone in the front seat of the car said: "Hey! Let's not do it here." Whereupon, the Grievant drove the car and circling the business block, returned to the starting point and dropped off Davis and Cahill.

The Employer stresses the seriousness of the Grievant's misconduct and the extraordinary financial costs it is forced to bear in its constant dealing with employee drug abuse, let alone the accompanying monetary losses and human suffering that a drug user, and/or seller, causes to be visited upon fellow employees, family members, as well as the public at large. It also underscores that it not only has just the right under the collective bargaining agreement to impose disciplinary action upon any employee who engages in such gross misconduct but has an obligation to do so under its responsibility to provide for the safety and welfare of its general workforce. The Employer also emphasized its need to be concerned with its image in the community and in that connection submitted (see Employer Exhibit No. 2) excerpts from a new release regarding a similar case of cocaine selling by a Boston postal employee (1985). In imposing, in that case, a jail sentence of 18 months the court stated "that because of the Postal Service's unique position in the community, the seriousness of the crime far outweighed any mitigating circumstances raised in Treska's [the defendant] defense." The court went on to say: "the postal service has not only a right but an obligation to eliminate narcotics traffic".... and "should continue to investigate employee involvement in narcotics".

The Employer asserts that the Grievant was fully aware of the fact that Davis had an alcohol problem and was a drug user. He also knew that Hinckley was a drug "pusher" or seller. It rejects the Union's suggestion that the Grievant was an innocent victim of circumstances he had no way of foreseeing. Therefore, the Arbitrator should uphold the Employer's discharging of the Grievant and deny his grievance.

POSITION OF THE UNION

The Union argues that the Employer did not have just cause to discharge the Grievant and insists that the such discipline was based wholly upon circumstantial evidence, attended by facts that the Arbitrator should deem mitigating.

The Grievant testified that on the day in question, July 26, 1985, Hinckley approached him and asked him if, when they were through work, he would help him find Davis. Hinckley explained that Davis had promised to pay some money that was owed to him. The Grievant agreed to give Hinckley the requested help. At the end of the workshift, 2:30 p.m., Hinckley approached the Grievant's car and inquired as to whether the Grievant had seen Davis.

The Grievant responded that Davis had just left the area. The Grievant then drove Hinckley to "Brighams" - the ice cream/luncheon establishment that is located only a minute or two from the post office. The Union concedes that the scenario and dialogue, beginning with Davis and Inspector Cahill's crossing the street and entering the Grievant's car and ending with their leaving the car after the ride around the business block, is essentially as the Employer has observed and Cahill has attested (see above).

The Union does claim, however, that the Grievant had no reason to suspect that, in providing Hinckley with a ride in his car, he was compromising his personal security and being made a co-conspirator in an illegal drug transaction, or, indeed, indulging himself any kind of misconduct. The Union also notes that neither the Employer, nor Cahill, has at any time suggested that the Grievant, throughout the incident upon which his discharge was based was ever "in possession of cocaine with intent to distribute".

The Union also charges that the Employer, in pursuing its objective of termination of the Grievant, refused (see Union exhibits Nos. 1 and 2) to allow Union representatives to interview Inspector Cahill during the grievance investigation process. Also, the evidence shows that the Employer was aware that its informant, Davis, had notified the Employer, and later so testified in court, that the Grievant was not involved in the subject drug transaction, but the Employer completely suppressed that helpful to the Grievant's case testimony.

The Union also calls the particular attention of the Arbitrator to the fact that the Grievant's six (6) year record of postal service employment is free of any prior misconduct or discipline.

The Union asks that the Arbitrator sustain the grievance and that, as remedy, the Grievant be reinstated in his former position and that he be compensated for all lost wages and other benefits that resulted from his unjust termination.

DISCUSSION AND FINDINGS

The Arbitrator is not persuaded that the Grievant came to the hearing room with hands as clean as the Union contends but the Arbitrator does conclude, on the basis of the quality and degree of the evidence and proofs presented to him, that while the Grievant's misconduct of July 26, 1985 was serious enough to warrant a major penalty, such as a lengthy suspension, his offense was not sufficiently grievous as to justify his being discharged.

It should be understood that the justice of an imposed discipline will stand, or fall, according to the evidence and proofs that the Employer had possession of at the time it decided upon the discipline. In this case, the Employer determined on, or about, August 29, 1985 that the Grievant's conduct on July 26, 1985 was illegal and warranted his being arrested. Exactly when the Employer concluded that the Grievant should be discharged cannot be determined from this hearing record. It is clear, however, that on October 30, 1985 the Employer notified the Grievant of its intention to discharge him and that on November 21, 1985 the Employer carried out that intention when it issued the formal "Letter of Decision". Arguably, "the time clock stopped running" on July 26, 1985, meaning that developments taking place after that date are immaterial to the question of whether or not the Employer had just cause to discharge, since it was what the Grievant did on July 26, 1985 that was the basis of the discharge action. But the "time clock" definitely stopped running on November 21, 1985 when the Employer notified the Grievant that his termination would be effective as of December 6, 1985. Consequently, in arriving at this Award the Arbitrator cannot give consideration to after the fact developments, such as, the disposition made by the court of the Grievant's case following his trial of July 1 and 2, 1987 although the Arbitrator will later make reference in this "Discussion" to some of the peculiarities attending that and other "after the fact" points.

Also important to be kept in mind is the matter of degree or quantum of proof required for a party having the proof burden (in this case the Employer) to be sustained on the Issue. The law distinguishes three basic degrees of proof in the following ascendancy: (1) preponderance of evidence; (2) clear and convincing proof; and (3) proof beyond a reasonable doubt. In cases of misconduct that is morally neutral e.g., poor workmanship; excessive tardiness; absenteeism, and so forth, arbitrators will generally consider the lesser degrees of proof (#1 and #2).to be appropriate to the particular issue before them. However, the highest degree of proof (#3) namely, "proof beyond a reasonable doubt" is required as a matter of course in disciplinary cases where the employee is charged with an act of moral turpitude, such as: theft; assault; aberant sexual practices; or, as in this case, illegal sale of drugs. The reason for the higher degree of proof requirement in such morally objectionable cases is that discharge for theft, etc., involves a most unfavorable reflection on the moral character of the employee which is almost impossible to erase and which will seriously hamper if not altogether prevent his/her getting a job elsewhere .... and will even hurt innocent family members. The employee is branded for life. The Employer, therefore, has a very heavy proof obligation in such cases and the Arbitrator believes that that heavy proof burden rests with the Employer in this case before him.

Has the Employer proved "beyond a reasonable doubt" that the Grievant was guilty of "unlawful possession of Class B cocaine with intent to distribute" and/for" conspiracy to violate the Controlled Substance Act"? On the basis of the evidence, testimony and proofs presented at the Arbitration Proceeding the Arbitrator is obliged to conclude that the answers to those questions must be in the negative. Indeed, on the basis of Inspector Cahill's own testimony, the Grievant did not have "possession" and there is nothing that suggests otherwise. In the automobile on July 26, 1985 when Cahill answered Hinckley: "You know what I want°" - Hinckley reached into his own clothing for the cocaine packet which he then passed directly to Cahill. There is no proof whatsoever that the Grievant was guilty of "possession" but quite the opposite. Moreover, while the courts disposition of the matter is immaterial to this Arbitration Proceeding, it is significant to note that the court chose not to find the Grievant "guilty of possession" but decided to continue the case <u>without a finding</u> for a period of two years after which the charges against the Grievant will be dismissed if the Grievant complies with the terms of the continuance.

With respect to the other question, namely, "Did the Grievant conspire to violate the Controlled Substance Act"? Here too, the quantity of hard proof essential to support an affirmative answer to the question has not been presented. To support the conspiracy allegation it would be necessary for the Employer to prove "beyond a reasonable doubt" that Hinckley's plan was to make an illegal drugsale. Only Hinckley and the Grievant know with certainty what Hinckley said when he approached the Grievant on the morning of July 26, 1985. The Grievant's testimony is that Hinckley only said that he needed a ride to contact Davis so he could collect some money that Davis owed to him. If that is all that Hinckley said to the Grievant, and to prove otherwise is beyond practical pursuit since there were no witnesses to the conversation, then the conspiracy, charge must fall and the Union's claim that the Grievant was unaware that he was going to participate in an illegal drug transaction is given support.

It is obvious from the unchallenged dialogue that took place between Hinckley and Cahill promptly upon Davis and Cahill's getting into the Grievant's car, that when Hinckley spoke to the Grievant earlier about helping him locate Davis, Hinckley was fully aware of what was about to go down because Hinckley had the Grievant drive directly from the post office to the Brighams eating place. Davis and Cahill understood what was about to happen because at the car horn signal they promptly left their waiting place and headed expectantly toward, and entered, the car.

It can be speculated that the Grievant too, had reason to know that Davis would be waiting at Brighams. But waiting with a drug buyer? No basis has been established for concluding that the Grievant should have, or could have, anticipated that development. Indeed, the Grievant's somewhat panicky reaction to the immediate exchanges between Hinckley and Cahill, first by protesting what was taking place where they were located, then by hastily driving away, supports the belief that the Grievant was surprised by what was happening. It is more than trivial irony that attended the Grievant's role in the scam that the Employer set up with the cooperation of informant Davis. The irony is that the Grievant was not the intended target of the scam. The testimony indicates that the target was Hinckley who the Employer had reason to believe was a seller of illegal drugs. The grief that came to the Grievant on that day of July 26, 1985 seems to have come to him quite accidentally since the testimony discloses nothing that would give the Employer reason to expect that it would be the Grievant who would be bringing Hinckley to Brighams. One might reasonably ask then: What did the Grievant do that warranted his being disciplined at all?

The answer to that question is - the Grievant exercised extremely poor judgment. The Grievant is not a dull person. He was well aware of the fact that Hinckley was a source of illegal drugs. He should have realized that he was placing his job security in jeopardy by letting himself be seen after working hours in close association with Hinckley. He should not have risked driving Hinckley anywhere but should have avoided him as he would a plaque. It should have occurred to the Grievant, knowing that Hinckley was not above dealing unlawfully in drugs, that he would be vulnerable to a charge of at least consorting with a known drug distributor, if not conspiring with one. In connection with that latter possibility it is noted that the court did not find the Grievant guilty of "conspiracy to violate the Controlled Substance Act" but rather, only placed that allegation "on file."

The second, and more critical, mistake made by the Grievant occurred in his car when he saw Hinckley and Cahill beginning to make a drug deal. At that moment, when there was no longer any doubt as to the illegality of what was happening, the Grievant should ordered Davis, Hinckley and Cahill out of his automobile and departed the scene. Had he done so, the Grievant would have avoided all culpable involvement. Instead of that he became a participant however unthinkingly or unintentionally. His exclamation against the action in the car, followed by his hurried driving around the block, was motivated not so much by a desire to divorce himself from involvement as a wanting to prevent the action from being witnessed.

The Arbitrator confesses to being not altogether satisfied with the unassailableness of his Award here. His uncertainty stems from a number of attending circumstances beyond his control. Foremost among those factors was the unusual situation at the hearing which saw both Parties calling only a single witness to give testimony. The Union called only the Grievant while the Employer called only Inspector Cahill. Since both the Grievant and Cahill had a personal interest in the outcome of the Arbitration Proceeding, it was to be expected that their testimony would serve their own self interest. Because the Grievant is not obliged to prove his innocence, whereas the Employer is obliged to prove his guilt, beyond a reasonable doubt, the absence of corroborating witnesses militated far more against the Employer's position then against the Union's. For example, in the "Notice of Proposed Removal", Director of Customer Services, William J. Grimes in justifying the removal action, makes several allegations that were either not corroborated by testimony at the hearing or were at variance with hearing testimony. Grimes wrote, as part of the basis for the discharge action, that the Grievant had been involved with "drug deals" at the Newtonville post office. At the arbitration hearing no testimony

whatsoever was given regarding the Newtonville facility. Grimes asserted that in the subject Newton Centre incident the Grievant was in his letter carriers uniform but at the hearing Inspector Cahill testified that he believed the Grievant was in civilian clothes - not his uniform. Grimes wrote that the subject drug and money exchange between Hinckley and Cahill took place after the Grievant drove away from the meeting place but at the hearing both the Grievant and Cahill testified that it took place before the Grievant hastily drove off. The difference in that testimony bears upon the degree of culpability of the Grievant. Added to those not insignificant flaws in the Employer's position are the facts that: (1) Davis made it known to the Employer that the Grievant was not a conspirator in the drug sale but the Employer disregarded that information; and (2) during the grievance procedure the Employer refused to allow the Union to interview Inspector Cahill because the Employer believed that: "In light of the fact that the criminal prosecutive features of this case remains pending, it is not deemed feasible to make Inspector Cahill available to the NALC for interview". (see Union Exhibit No. 1)

A most important supporting leg of the Employer's position is represented by the exhibit the Employer submitted which purports to be a "confession" of the Grievant of his involvement in the subject "drug sale". While the Arbitrator does not suggest that there is anything spurious about the "confession" presented to him, there are certain aspects attending it that raises legitimate questions as to what extent it should be allowed to influence the Arbitrator's decision here. For example: (1) The record does not disclose whether or not the Grievant had benefit of counsel when he gave the "confession"; (2) there is conflicting testimony regarding the number of "confessions" that were drafted, the Grievant claiming 3, Cahill claiming only 1; (3) the Grievant testified that Cahill dictated the "confession", Cahill testified that he did not; (4) the "confession" given to the Arbitrator by the Employer is not an original, nor is it a copy of the original; (5) the "confession" given to the Arbitrator is not signed by anyone but the place for signatures contains the typewritten symbol " /S/" indicating that it was signed by the Grievant and witnessed by postal inspectors Mastrangelo and Burns, neither of whom were called by the Employer to testify at the arbitration hearing; and (6) whatever was given to the court as a signed "confession" was suppressed by, and remains in custody of, the court.

The Grievant has paid dearly for his extremely poor judgement, in terms of financial loss; damage to his reputation; and, of course, in personal and family distress. Even so, the Arbitrator would not have hesitated in upholding the subject discharge, had the evidence led to the required degree of proof e.g., the proof of culpability the Employer clearly had with respect to Hinckley. Because few crimes are as reprehensible, and more deserving of severe punishment, than is the catering to drug addiction. In that connection, it should be recognized that the Employer, which is to say, the general public which ultimately bears the cost of the postal service operations, also pays a heavy price as a result of employee related drug problems. The grim facts are that the cost of drug abuse in the work place is staggering and it is reliably estimated that a drug-dependent worker costs his/her employer some $7000 in decreased productivity and absenteeism. About 8 to 14% of all workers have either a drug or alcohol dependency problems that adversely affects their work performance. The cost is many millions of dollars in Massachusetts - billions nation-wide, and the Employer is probably the largest employer in the U.S., excluding the federal government. Unquestionably, the Employer has both the right and the obligation to actively investigate and constrain drug use and distribution by its employees and to appropriately discipline up to, and including, the discharging of any employee found to be in clear violation of that authority.

It is emphasized that this modification by the Arbitrator of the subject discharge is not to be construed as a vindication of the Grievant's conduct. He should understand that his career in the postal service reached the brink of destruction. And he should be forewarned that, in all likelihood, he would not survive another arbitration hearing if he repeats the performance that brought him to this Proceeding.

AWARD

The discharge of John Considine was not for just cause. The grievance is sustained to the extent that the Grievant shall be promptly reinstated in his former job classification without loss of seniority but he shall not be entitled to any compensation lost by him due to the subject discharge.

Harry B. Purcell
Arbitrator

October 1, 1987