C#09766

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

GRIEVANT: S. Cheshier

POST OFFICE: Los Angeles, CA.

CASE NO: W7N-5D-D 13615

BEFORE: Thomas F. Levak, ARBITRATOR

APPEARANCES:

For the U. S. Postal Service: Marian Taylor

For the Union: Harold Powdrill

Place of Hearing: Los Angeles, CA.

Date of the Hearing: February 2, 1990

AWARD: Removal of the Grievant was not for just cause. Just cause existed for a fourteen-day suspension. Grievant shall immediately be reinstated to her former position with full back pay and benefits, less fourteen calendar days (ten working days) Grievant shall provide the Service with an affidavit setting forth outside earnings since time of her removal to date.

Date of Award: February 10, 1990

Arbitrator

BEFORE THOMAS F. LEVAK, ARBITRATOR

REGULAR WESTERN REGIONAL PANEL

In the Matter of the Grievance Arbitration Between:

U. S. POSTAL SERVICE
THE "SERVICE"

(Los Angeles, CA.)

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO
THE "UNION"

(On behalf of S. Cheshier, the "Grievant")

W7N-5D-D 13615

GTS NO. 13473

DISPUTE AND GRIEVANCE CONCERNING REMOVAL FOR UNSATISFACTORY ATTENDANCE/AWOL

ARBITRATOR'S OPINION AND AWARD

This matter came for hearing before the Arbitrator at 9:00 a.m., February 2, 1990 at the Los Angeles, Californi GMF. The Union was represented by Harold Powdrill and the Service was represented by Marian Taylor. The Grievant, S. Cheshier, testified and appeared through the proceeding. The following witnesses were called by the parties:

Service Witness.

Ruth Cole, Manager, Rimpau Station

Union Witness.

Sylvia Cheshier, the Grievant

Testimony and evidence were received and the hearing was declared closed following oral closing argument. Based upon the evidence and the arguments of the parties, the Arbitrator decides and awards as follows.

OPINION

I. THE CHARGE AND THE ISSUE.

The January 5, 1989 Notice of Removal provides in relevant part:

> You are hereby notified that you will be removed from the Postal Service no earlier than thirty (30) days from the date you

receive this Notice. The reasons for this removal action are:

CHARGE 1 - Absence Without Official Leave (AWOL):

11/29/88	8 hours AWOL
12/15/88	8 hours AWOL No Call
12/28/88 thru 12/29/88	16 hours AWOL
1/3/89 thru 1/4/89	16 hours AWOL

CHARGE 2 -Unsatisfactory Attendance:

11/5/88 thru 11/18/88	80 hours Sick Leave
12/3/88 thru 12/5/88	16 hours Sick Leave
12/16/88 thru 12/23/88	48 hours Emergency Annual Leave

CHARGE 3 - Failure to Report as Scheduled: (0600)

DATE	ACTUAL REPORTING TIME
11/22/88	0620
11/23/88	0750
11/26/88	0845
11/30/88	0725
12/7/88	0640
12/8/88	0872
1/5/89	0884

Previous elements of your past record which were considered prior to taking this action are:

Fourteen (14) Calendar Day Suspension - Absence Without Official Leavel (AWOL) No Call / Unsatisfactory Attendance - Dated, November 8, 1988 - Reduced to Two (2) Working Days.

Fourteen (14) Calendar Day Suspension - Absence Without Official Level (AWOL) No Call/Unsatisfactory Attendance - Dated 9/15/88 Reduced to Two (2) Working Days

Seven (7) Calendar Day Suspension - Absence Without Official Leave (AWOL) No Call - Dated 2/10/88 - Reduced to One (1) Day

Official Letter of Warning - Absence Without Official Leave (AWOL) No Call - Dated 12/31/87

Official Letter of Warning - Absence Without Official Leave (AWOL) No Call - Dated 11/4/87

At the commencement of the arbitration hearing, the parties stipulated that the following issue is to be resolved by the Arbitrator:

> Whether the Notice of Removal was for just cause? If not, what is the appropriate remedy?

II. APPLICABLE ELRM AND POLICY PROVISIONS.

ELRM Subsection 511.4
ELRM Subsection 513.342
ELRM Subsection 666.8

February 15, 1974

MEMORANDUM FOR: Assistant Regional Postmasters General, Employee and Labor Relations

SUBJECT: Letters of Warning

By memorandum dated November 13, 1973, there was established as USPS policy the utilization of letters of warning in lieu of suspensions of less than five (5) days. This same policy is effective throughout the grievance process where consideration is being given to a reduction in discipline imposed. If a suspension of five (5) days or more is reduced administratively, the reduction should be to a letter of warning rather than a suspension of four (4) days or less, unless such short suspension constitutes an agreed upon settlement of the grievance.

Please review your existing discipline cases to insure that this policy is operative and take the necessary corrective action where necessary to insure compliance.

Sincerely,

Darrell F. Brown.

III. FINDINGS OF FACT.

This case concerns the Rimpau Station of the Los Angeles, California office of the Service. The Grievant became employed by the Service in December 1986 and bid into the Rimpau Station as a letter carrier in mid-1988. At all times relevant, Ruth Cole has served as the Rimpau Station manager. The Grievant's

two immediate supervisors at the Rimpau Station, F. McClinton and C. Nicholson, were no longer on the rolls of the Service at the time of the arbitration hearing and therefore were not available to testify.

Previous Elements of Past Record Cited in the Notice of Removal.

The November 8, 1988 fourteen-day suspension, administratively reduced to a two working-day suspension, was grieved and subsequently heard in regular regional arbitration before Arbitrator James T. Barker on September 19, 1989. On October 23, 1989, Barker issued a written opinion and award holding that the fourteen-day suspension was not issued for just cause, but ratifying the administratively reduced suspension of two working days as an appropriate corrective disciplinary measure. That opinion and award is final and is not subject to collateral attack or review by this Arbitrator.

The fourteen-calendar-day suspension dated June 15, 1988 administratively reduced to two working days was grieved and was subsequently heard by the Arbitrator as a companion case to the instant removal case on February 2, 1990. By separate opinion and award, the Arbitrator concluded that under the terms of the above quoted February 15, 1974 policy letter, the maximum discipline that could be approved in that case is a letter of warning. Accordingly, the Arbitrator changed the two-day suspension to a warning letter.

The remaining previous elements of past record were not challenged by the Union.

IV. EVIDENCE RELATING TO THE CHARGES AGAINST THE GRIEVANT.

Cole prepared the Notice of Removal and testified that she conducted an independent investigation of the facts contained therein, which she testified were true and accurate. Her testimony was both credible and was unrebutted and unrefuted. Thus the truth of the charges was established by the Service.

Discussions and Counseling of the Grievant.

Cole's unrebutted and unrefuted testimony was that she held repeated discussions with the Grievant, as had her subordinate supervisors earlier held repeated discussions with her. She further testified that the Grievant's sole explanation for those absences was claimed illnesses of herself and her son for varying reasons and for reasons such as having slept in, and that the Grievant reported no chronic illness. She also testified that she repeatedly explained to the Grievant her responsibility to call in when tardy. She noted that the Grievant claimed that she had called in once when tardy but because her supervisor was nasty, she stopped calling in. Cole also noted that she referred the Grievant to EAP in an attempt to rectify the situation.

The Grievant was never placed on restricted sick leave.

V. SERVICE CONTENTIONS.

The Service has established that just cause existed for the Grievant's removal. The Grievant established a truly horrendous attendance record during her very short period of employment. She had a total of two hundred sixty-three hours unscheduled leave, which included sick leave, emergency leave and AWOL's. Further, she used up all of her one hundred-four hours per year of sick leave.

The Grievant was treated pursuant to principles of corrective discipline. Two fourteen-day suspensions, reduced to two-day suspensions, were issued prior to the Grievant's removal.

The validity of any of the Grievant's excuses is not an issue. It is well-established in both the private and public sectors that an employee who is guilty of excessive absenteeism may be discharged, even though some of the absences may be excused due to bona fide illness.

VI. UNION CONTENTIONS.

The Union has established both a lack of just cause and a lack of progressive discipline as required by Article 16.

The Grievant should not have been disciplined for using sick leave. It violates principles of just cause to discipline an employee for using sick leave, a contractually guaranteed benefit.

The February 15, 1974 policy of the Service was not followed. Had that policy been cited to Arbitrator Barker, the two-day suspension would have been reduced to a warning letter.

It was improper for the Service to cite the September 15, 1988 fourteen calendar-day suspension in the Notice of Removal since that suspension had been challenged through the grievance procedure.

VII. ARBITRATOR'S CONCLUSION.

The Arbitrator concludes that the Service has failed to establish by a preponderance of the evidence that the Grievant's removal was for just cause. Accordingly, the grievance will be sustained. The following is the reasoning of the Arbitrator.

This case turns on the contractually agreed upon requirement of Article 16 that discipline within the Service be progressive and corrective in nature. However, before dealing with that

point, the Arbitrator feels it is appropriate to comment on two secondary issues.

The first secondary issue concerns the propriety of citing a grievance challenged suspension as an element of past record. The Arbitrator has held in previous cases that there is nothing improper about so citing such a past element. In doing so, however, the Service simply assumes the risk that the grieved previous element will not be ratified in arbitration or will remain unresolved at the time the removal arbitration is heard. As will be discussed more below in detail, in the instant case that assumption of risk has worked to the detriment of the Service.

The second subsidiary issue concerns the propriety of basing discipline in part upon excused leave. It is well-established by Service arbitrators that the Service may support a charge of unsatisfactory attendance by citing excused leaves such as contractually guaranteed sick leave or EAL. The fact that such leaves are contractually guaranteed does not mitigate against the requirement of an employee to be regular in attendance.

Returning to the crux of this case, the real problem with the Service's position is that it moved directly from a two working-day suspension to removal without imposing either an intervening seven-day suspension or an intervening fourteen-day suspension. Inexplicably, the Service also never placed the Grievant on restricted sick leave. The failure of the Service to impose and stick with the fourteen-day suspensions necessarily had the effect of failing to effectively convey to the Grievant the fact that the next series of infractions would result in her removal. Such conveyance and notice is the most important element of the progressive and corrective discipline standard.

What the Service conveyed to the Grievant in this case was that she was guilty of no offense necessitating more than a two working-day suspension, and that a continuance of her record without improvement would lead only to a more lengthy suspension.

It must be stressed that the decision to reduce the two fourteen-day suspensions to two two-day suspensions were unilateral administrative decisions by the Service, and were not the product of grievance procedure compromise and settlement. Therefore, it must be conclusively presumed by the Arbitrator (as it must have been assumed by the Grievant) that the reduced level was considered to be the appropriate level of discipline given her entire record.

As above noted, when the Service proceeded to arbitration in this case without the propriety of the September 15, 1988 two-day suspension having been finally adjudicated, it proceeded at its own risk. In the companion case to this case, the Arbitrator held by separate opinion and award that under the terms of the February 15, 1974 policy letter, whenever suspensions of five days or more are reduced administratively, the suspension must be

to a letter of warning rather than a suspension of four days or less, unless the reduced suspension constitutes an agreed upon settlement of the grievance. It should also be noted that on October 23, 1989, Regular Regional Arbitrator James T. Barker issued an opinion and award holding that the November 8, 1988 fourteen calendar-day suspension was not issued for just cause, and he ratified only the two working-day reduced suspension as an appropriate corrective disciplinary measure. Thus, for purposes of this removal arbitration, the Grievant's pre-removal disciplinary record now reads as follows:

November 4, 1987	Warning Letter AWOL
December 31, 1987	Warning Letter AWOL
February 10, 1988	One-Day Suspension AWOL
September 15, 1988	Warning Letter AWOL/ Unsatisfactory Attendance
November 8, 1988	Two-Day Suspension AWOL/ Unsatisfactory Attendance

Therefore, we have here the case of an employee with a substantiated disciplinary record from November 1987 through November 1988 containing nothing more than three warning letters, a one-day suspension and a two-day suspension. (Indeed, if it were proper to review Barker's opinion and award, the November 8, 1988 two-day suspension would likely be modified to a warning letter.) It seems beyond dispute that moving from that disciplinary record directly to removal, and without either an intervening seven-day suspension or a fourteen-day suspension, violates the corrective/progressive mandate of Article 16.

The Arbitrator would further note that during the thirty days following the November 8, 1988 suspension, the Grievant amassed infractions sufficient to justify a seven-day or fourteen-day suspension. Similarly, in the following thirty days, a similar lengthy suspension could have been issued. Also, during the same sixty-day period of time, the Grievant could have been placed on restricted sick leave. Had such disciplinary action and adminstrative action been taken by the Service, the Grievant would have been placed on notice that her job truly was in jeopardy.

The Service's argument in this case is that the Grievant's attendance record simply was so terrible that she had to have understood that her job was in jeopardy. Such inference cannot be allowed because of the express mandate of Article 16. Under that article, the Grievant is entitled to increasingly severe progressive notice that further offenses will subject her to removal. Administrative reductions of fourteen-day suspensions to two-day suspensions can only lead an employee to believe both that the offense was not as serious as she was initially led to believe and that the next offense would lead to a penalty less severe than removal. Certainly, the dual reductions in the instant case msut be concluded to have had that effect.

Thus, under the facts of this case, the maximum penalty that

can been sustained is a fourteen calendar-day suspension. This Opinion and Award shall serve as notice to the Grievant that a lack of substantial improvement in her unsatisfactory attendance and/or AWOL record will subject her to removal.

AWARD

The removal of the Grievant was not for just cause. Just cause existed for a fourteen calendar-day suspension. The Grievant shall be immediately reinstated to her former position with full back pay and benefits, less fourteen (14) calendar days (ten (10) working days).

The Grievant shall provide the Service with an affidavit setting forth her outside earnings since the time of her removal to date. The Arbitrator retains jurisdiction of this case solely to resolve any dispute concerning the amount of back pay or benefits to the Grievant.

DATED this 14 day of February, 1990,

Thomas F. Levak, Arbitrator.