

C#10946

1421 P

REGULAR REGIONAL PANEL

In the Matter of Arbitration
between
UNITED STATES POSTAL SERVICE
(Employer, Service)

-and-

NATIONAL ASSOCIATION OF LETTER
CARRIERS, Branch 1100 (Union,
NALC).

GRIEVANT: J. Henry

POST OFFICE: Pomona, CA

CASE NUMBER:

Management: W7N-5P-D 29502

Union: GTS 017421

BEFORE ARBITRATOR:

Kenneth M. McCaffree
Hansville, Washington 98340

APPEARANCES FOR:

U.S. POSTAL SERVICE:

Virginia Malone
Labor Relations Representative
Alhambra Management Sectional
Center, USPS
15421 Gale Avenue
City of Industry, CA 91715-9401

NALC:

Charlie Miller
Vice President
Branch 1100, NALC
3636 Westminster Ave, Suite B
Santa Ana, CA 92703-1489

DATE OF HEARING:

May 30, 1991

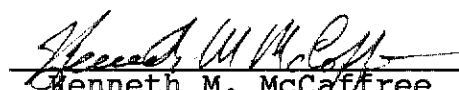
PLACE OF HEARING:

580 W. Monterey Avenue
Pomona, CA

AWARD: The Employer violated Article 16.7 of the Agreement when it placed the Grievant on an emergency suspension on September 14, 1990. Since the Removal of the Grievant became effective on December 7, 1990, the removal superseded and replaced the Grievant's Emergency Placement off-duty in a non-pay status on that date. Accordingly, the Employer is directed to make the Grievant whole with regard to lost wages and benefits only for the period from September 14, 1990 to December 7, 1990. The grievance was sustained in part and denied in part. See Arbitrator's Award.

DATE OF AWARD:

July 5, 1991


Kenneth M. McCaffree

OPINION, DECISION AND AWARDINTRODUCTION

These proceedings concerned the use of an emergency procedure to place the Grievant in an off-duty non-pay status on September 14, 1990, pursuant to Article 16.7 of the National Agreement. The notice to the Grievant explained the action as follows:

There is reason to believe that you have been involved in the sale and/or distribution of controlled substances and your retention in an active duty status maybe injurious to yourself or others (J 9).

On October 30, 1990, the Employer issued the Grievant a Notice of Removal, with removal effective on December 7, 1990. After some processing in the grievance procedure, this Notice of Removal was rescinded and records thereof were removed from the personnel record of the Grievant. The Grievant remained in a non-pay, non-duty status through January 4, 1991 (J 8; F S).¹

The Union and Grievant filed this grievance on the emergency suspension, and claimed that it was "not for just cause and is punitive rather than corrective in nature" in violation of Article 16.1. The Employer referred to Article 16.7 Emergency Procedure, and asserted that it had reasonable cause to suspend and hold the Grievant in a non-pay, non-duty status. When this grievance could not be resolved in earlier steps of the grievance procedure, this arbitration occurred (J 2, 3, 4, 5 and 6).

The parties affirmed that no issues of arbitrability existed. Accordingly, the arbitrator gave the parties full and equal opportunity to present testimony and evidence in support of their respective positions on the issues in dispute. Following an opening statement by the Employer and reservation of that right by the Union, the following witnesses testified under oath: John D. Marsh, Postal Inspector; Sam Mauldin, Postal Inspector; and John Massey, Superintendent of Postal Operations. The Grievant did not

¹FS represented Fact Stipulations of the parties.

testify, nor did the Union call other witnesses following a brief statement by the Union on its position in terms of evidence already presented and the fact stipulations. The arbitrator accepted the following exhibits.

- J - 1. National Agreement.
- 2. Request for Arbitration, dated 3-12-91.
- 3. Step 3 Grievance Decision Letter, dated 2-26-91.
- 4. Step 3 Grievance Appeal, dated 2-12-91.
- 5. Step 2 Grievance Decision Letter, dated 1-31-91.
- 6. Step 2 Grievance Appeal, dated 10-15-90.
- 7. Step 1 Grievance Summary, dated 9-29-90.
- 8. Notice of Removal, dated 10-30-90.
- 9. Emergency Placement in an Off-duty Status, dated 9-13-90.
- 10. Notice to Grievant to Hold Investigative Interview, dated 9-13-90, four pages.
- 11. Grievant's Handscript Statement, dated 9-14-90.
- Mgt- 12. Memo of Interview of Luther Leon Henry and his Affidavit, dated 9-14-90.
- 13. Investigative Memorandum by Postal Inspector Marsh, dated 8-27-90, five pages, plus 25 pages of Attachments.
- Un - 14. Ltr, Miller to Morten, dated 10-1-90, re Information Request.
- Mgt- 15. Handscript and Other Original Notes of Inspector Marsh, 11 pages.
- Un - 16. Levak Arbitration Decision, Case W4N-5N-D 40950, et. al. (E. Gifford, Grievant), dated 3-11-87.
- 17. Ltr, Miller to Marsh, dated 12-21-90.
- Mgt- 18. Handscript Notes of Inspector Mauldin.

After both Union and Employer affirmed that neither one had any additional witnesses, any additional documentary evidence, or other evidence or proofs, the arbitrator closed the hearing. Both parties made closing oral arguments on the evidence in support of their respective positions on the issues in dispute. The arbitrator tape recorded the proceedings to supplement his written notes and not as an official record of the arbitration.

ISSUE

Was the Emergency Placement of the Grievant in an off-duty non-pay status between September 14, 1990, and January 4, 1991, a violation of the National Agreement at Article 16.7? If so, what is a proper remedy?

APPLICABLE AGREEMENT PROVISIONS

ARTICLE 16 - GRIEVANCE PROCEDURE

Section 1. Statement of Principle

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 the Agreement, which could result in reinstatement and restitution, including back pay.

Section 7. Emergency Procedure

An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U. S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section maybe made the subject of a separate grievance.

FACT SUMMARY

Certain background and basic facts are contained in the Joint Stipulation, Attachment "A" hereto. In addition, during the hearing the parties agreed further that the Notice of Removal to

the Grievant, dated October 30, 1990, was rescinded by the Employer and any record thereof had been removed from the personnel record of J. Henry.

In the late Fall of 1989, the Service began an undercover investigation of drug possession, usage and sale among its workforce at the Pomona Post Office.² A confidential informant (CI) was established, and begun seeking sources of controlled substances. Some time in January and early February, the CI became acquainted with the Grievant. On February 9, 1990, the CI reported to the Postal Inspection Service that he had discussed narcotics, among other things, with the Grievant, who gave the CI his telephone number.³ The CI was looking for "some smoke," and after the Grievant asks what kind, the CI said cocaine. Although the Grievant allegedly denied knowledge of any sources, he offered to call a friend who might be able to obtain the narcotic for the CI. Subsequently, the Grievant did tell the CI how to reach his "friend," the Grievant's brother, who was at the Grievant's house. When the CI contacted the brother, Luther Leon Henry, the latter knew about the contact of the CI with the Grievant. After various delays and additional telephone messages, the CI took \$700 to the residence of the Grievant, counted it out and gave it to the Grievant's brother for one ounce of rock cocaine. The supplier was

²The following summary was taken from the Investigative Memorandum which reflected accurately the notes of Inspector Marsh (Mgt 13, 15). Because of alleged failure of the Service to provide all relevant information, the arbitrator inspected the files of Inspector Marsh and affirmed that relevant information had been supplied to the Union. In addition, the Service provided copies of the taped conversations between the various principals which had been authorized by the appropriate police authorities. These included recorded conversations on February 13, 14, and 27, 1990, the first and third between the Grievant and the CI. Transcriptions of these tapes were attached to Mgt 13, the Postal Inspection Investigative Memorandum.

³The confidential informant did not testify. Postal Inspector Marsh was the one to whom the CI reported, and only Inspector Marsh testified.

to deliver the narcotics to the Grievant's residence within an hour. The supplier failed to arrive and arrangements were made to make the pick up the following day. The CI did so while under the observation of two postal inspectors. The drugs were left in a perfume box in the mail box, where the CI obtained them. The Postal Inspector and the Postal Inspections Service National Crime Laboratory confirmed that the white powder in the small bag in the perfume box contained no controlled substance.

On February 27, 1990, the CI met the Grievant on the latter's route. The CI told the Grievant "that his brother had sold him some bad narcotics and he wanted him to get in touch with his supplier concerning that" (Mgt 13, p 5, item 27). The CI told the Grievant that he (CI) was going to contact the brother of the Grievant and the Grievant told the CI to "go over there and get in contact with him yourself." The Grievant "defended" his brother as one who "don't do that..." and "just got highly referred to somebody like you did." The Grievant made explicit that he didn't "know what conversation went on between you two...", the CI and the Grievant's brother. When the CI said he would contact the brother tonight or tomorrow, the Grievant said they were supposed to go out of town. The CI did attempt to reach the brother but was unsuccessful. Thereafter the CI discontinued discussing narcotics or attempting to obtain any additional narcotics from the Grievant or the Grievant's brother, even though the CI continued to work at Pomona until June 1990.

On the morning of September 14, 1990, the Postal Inspectors and police arrested five employees at the Pomona Post Office for drug related offenses. The Grievant was not arrested, although the Employer notified the Grievant of his Emergency Placement in an off-duty status, effective immediately, for reasons described in the first paragraph of this Opinion, Decision and Award (J 9). The Grievant signed for this letter at 10:05 a.m. At the same time he received notice of a scheduled Investigative Interview for September 25, 1990.

When taken by the Postal Inspectors, the Grievant refused to talk at all until proper Union representatives had been obtained. Although he acknowledged that he knew his brother was in jail, he asserted that didn't concern him. Upon advice of counsel, he said nothing more, whereupon he received the above two letters and was allowed to go (J 11).

On September 25, at the investigative interview, the Grievant had no statement to make, and stated "no comment." The Union representative and the Grievant asserted that the Grievant could show his innocence, but offered nothing because of a concern over possible criminal charges.

A Step one meeting regarding the grievance over the Grievant's emergency placement in an off-duty status occurred on September 25, 1990 (J 7). The Employer denied the grievance formally, on September 28 (J 6). The Union appealed the grievance to Step 2 (J 6). The Employer's response and Step 2 decision was dated January 31, 1991, (J 5). The grievance went unresolved in either Step 2 or 3, and the Union appealed the matter to this arbitration (J 2,3,4).

On October 29, 1990, the Service issued a Notice of Removal to the Grievant, with removal effective on December 7, 1990 (J 8). The Union grieved this action of the Employer, as well. In connection with the removal grievance, and, in part related to the instant grievance over the emergency placement of the Grievant on an off duty status, Union representatives interviewed Inspector Marsh and the CI on December 10, 1990. Three days later the Grievant was interviewed by a labor relations representative of the Employer. These interviews led to a resolution of the removal grievance, wherein the Grievant was reinstated and returned to a duty status on January 4, 1991, and any record of the removal notice was removed from his personnel record. The resolution of that grievance left the grievance on the September 14, 1990 emergency placement off-duty of the Grievant unresolved. The Union now seeks recovery of lost wages and benefits for the period September 14, 1990, through January 4, 1991, during which the

Grievant was off duty in a non pay status.

CONTENTIONS OF THE PARTIES

A. Employer

The Employer contended that it had the right to place the Grievant on an immediate suspension from duty in a non-pay status. It proceeded to make a full and complete investigation, and acted as quickly and efficiently as possible. The Grievant had his "day in court," and refused to make any comments, indicating a concern over criminal charges, the Employer asserted. Although asserting that he had evidence to show his innocence, the Grievant refused to disclose it. Thus the Employer decided that the Grievant should be removed, based on the available evidence. When the Grievant was given an immediate suspension under Article 16.7, the Employer knew the following facts, it argued: (1) Grievant told the CI he could arrange to get the CI some cocaine; (2) The Grievant told him it would cost \$350 for one-half ounce; (3) The CI contacted the Grievant's brother at the Grievant's house; (4) Money for the drugs was left at the Grievant's house where the drugs were picked up. According to the Employer, these facts were not disputed by the Grievant at the hearing, and urged the arbitrator to give the failure of the Grievant to testify an adverse inference. According to the Employer, it had a basis to discipline the Grievant.

Further, the Employer pointed out that it reinterviewed the Grievant on December 13, 1990. The results of that interview led to the resolution of the removal of the Grievant and his reinstatement. According to the Employer, the Grievant willfully withheld information from September 25, 1990, until December 13, 1990, that led to his restoration to duty.

The Employer maintained that it had a reasonable basis to place the Grievant off duty and use the emergency procedure. According to the Employer, National level Arbitrator Mittenthal stated that management must have a reasonable belief that the

Grievant engaged in misconduct. The Employer contended that the Grievant engaged in misconduct, and rested that contention on the unrefuted testimony of Inspector Marsh and Mr Massey. Both testified that the Grievant had knowingly sent the CI to his brother for the expressed purpose of obtaining cocaine. Clearly, according to the Employer, the Grievant had knowledge of an impending drug purchase and that he facilitated another postal employee's obtaining of cocaine. This was misconduct, and creates a basis for the Employer's placement of the Grievant off-duty. The continued off-duty status of the Grievant can only be "attributed to his uncooperativeness and obstinate refusal to communicate with management." The Employer cannot be held liable for a self-imposed absence from duty by the Grievant.

The Employer had a reasonable belief between September 14 and the middle of December that the Grievant had engaged in misconduct, and it is on this basis that the Employer believes no violation of the Agreement has occurred. The grievance should be denied.

B. Union

The Union pointed out that the issue was the emergency placement of the Grievant in an off-duty status, not the removal of the Grievant. According to the Union, this issue concerned the bases upon which the Employer took the emergency placement. The Employer failed to establish what emergency took place on September 14, 1990. This is not misconduct, but an emergency issue, the Union asserted. The Employer defined its activities as the right to immediately place an employee on an off-duty status if it believes the continued employment will be injurious to the interests of the Postal Service. According to the Union, the allegations that placed the Grievant off-duty occurred in February. There was no immediacy with regard to the actions taken by the Employer in September.

Further, the Union contended that the Employer had the burden to show that the Grievant was guilty, and the Grievant has no duty

to show that he was innocent. Nowhere in the Steps of the grievance procedure did the Employer raise the issue of the Grievant's responsibility to come forth with evidence. This is an argument raised today for the first item, and should be disallowed. Management, not the Grievant, has the burden to carry the proof of misconduct.

According to the Union, Mr Massey acknowledged that no emergency existed. The Grievant was not intoxicated, he had observed safety rules and regulations; he was not hand-cuffed and was released. What emergency existed on September 14? The Employer has been unable to establish that any emergency occurred. An emergency is a "Sudden, unexpected happening, unforeseen occurrence or condition," according to Black's Law Dictionary, the Union pointed out. Here management knew about this several days in advance of September 14, and Labor Relations was aware of it in February. Clearly, no emergency existed, the Union argued.

If misconduct occurred, the Employer has an obligation to apply the contract correctly, the Union stated. If the Employer should have proceeded under Article 16.6 that relates to criminal activity, that section provides expressly that vindication of the employee results in all back pay. If the Employer sought to apply the wrong section of the Agreement here, the employee or Union is not at fault, and the Employer must make the Grievant whole. The grievance should be sustained.

DISCUSSION

Article 16.7 provides for an emergency procedure in the conduct of disciplinary action. As Arbitrator Mittenthal pointed out, if misconduct occurred, the procedure relates to discipline, and the emergency placement of an employee in an off-duty non-pay status represents discipline and a suspension.⁴ He states:

⁴Richard Mittenthal, Arbitrator, Cases # H4N-3U-C 58637 and H4N-3A-C 59518, (J. Burch and J Ferrell, Grievants), dated August 3, 1990; p 7-8.

When Management places an employee on non-duty, non-pay status because of misconduct covered by Section 7, the employee has been disciplined.

The appropriateness of discipline under Section 16.7 rests upon two considerations, following Mittenthal. If misconduct is alleged, the discipline is subject to just cause principles. Second, however, Article 16.7 concerns only those matters covered therein, and not all misconduct is necessarily "covered by Section 7."

In the instant case, the Union and the Grievant make no direct argument regarding the validity of the allegations of the Employer, with regard to misconduct of the Grievant. The Union neither admitted nor denied these charges in this instance. The Employer asserted that it never acknowledged the innocence of the Grievant even though it agreed to reinstate the Grievant on January 4, 1991. At this hearing, the Employer contended that the emergency suspension was justified by the actions of the Grievant.

This arbitrator concluded that the Grievant's actions represented by his assistance to the CI in facilitating an anticipated purchase of cocaine constituted misconduct. The Grievant referred the CI to his brother for the expressed purpose of aiding the CI to find a source of supply of cocaine. I found no evidence to link the Grievant directly with the transaction between the CI and Luther Henry. At the same time this was a referral to assist someone in a known illegal act. The Employer had just cause to discipline the Grievant on the basis of the evidence before this

The "emergency procedure" is ... a recognition that situations do arise where supervision must act "immediately" in suspending an employee because of immediate risks or dangers which do not allow the more time consuming procedures of Section 4 and 5 (of Article 16). There Section 7 is a permissible variation from the conventional suspensions contemplated by the parties. But it is a suspension nevertheless, one which must be considered as an integral part of the Article 16 "discipline procedure." ...

arbitrator.

The crucial aspect of this grievance was whether the misconduct of the Grievant fell under the misconduct covered by Section 7. In this regard three sub-issues arose.

The first sub-issue concerned the meaning and application of that part of Section 7 that states "the employee shall remain on the rolls (non-pay status) until disposition of the case has been had" (Underlining added). Arbitrator Mittenthal separated cases of emergency suspension into misconduct cases and those not involving misconduct. In non-disciplinary cases, what the Employer may do to dispose of the case will vary with the nature of the problem and the circumstances of the situation. On the other hand, in misconduct situations, the Employer must reach some decision regarding the level of discipline appropriate to the misconduct. When that decision is reached and executed, the resulting discipline represents the disposition of the case by the Employer pursuant to Section 7.

In the instant case, the removal of the Grievant on December 7, 1990, ended the period of the emergency placement (suspension) off-duty in a non-pay status. By the Notice of Removal, and removal effective on December 7, 1990, the discipline of the Grievant became subject to Section 5 of Article 16 under conventional procedures and just cause. The Grievant received "an advance written notice of the charges against him" and, subject to the emergency procedures of Section 7, remained on the rolls for 30 days after the notice of removal. According to Section 5,

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.

Accordingly, the off-duty non-pay status of the Grievant between December 7, 1990, when removed from employment, to January 4, 1991, when the Grievant was reinstated to employment through the grievance-arbitration procedure, is not subject to Article 16.7

Emergency Procedure. The placement of the Grievant in an off-duty non-pay status between December 7, 1990, and January 4, 1991, was not a violation of Article 16.7. The removal of the Grievant superseded the Emergency Placement and suspension of the Grievant on September 14, 1990, and ended that emergency suspension on December 7, 1990.

The second sub-issue concerned whether the misconduct of the Grievant was covered by Section 7. Here the Employer alleged that the Grievant's role in the "sale and or distribution of controlled substances" provided reason to believe that his "retention in an active duty status may be injurious to yourself or others." This matter resolves to whether a nexus exists between (1) a referral of the CI to another by the Grievant for the known purpose of facilitating a purchase of cocaine and (2) retention of the Grievant "may be injurious to ... others."

The Grievant's misconduct was on the job and with regard to a fellow postal employee. While on his job, the Grievant talked with the CI regarding finding a supply of narcotics. In addition, the Grievant's assistance and referral of a fellow employee fall under the umbrella of likely harm or injury to others. Also, the nature of the Grievant's conduct was action contrary to public policy. On balance, I concluded that the misconduct of the Grievant was potentially covered by Section 7 of Article 16, and subject to the emergency procedure provided for therein.

The final aspect of whether the Grievant's conduct was covered by Section 7 goes to the meaning of "emergency" and the urgency of Employer action in the instant case. The Union argued that no emergency existed, that the Employer had known for a long time what the Grievant had done, and continued to keep the Grievant employed. Nothing occurred on September 14, or near there, that justified an "emergency." The Employer responded by contending that it needed only a "reasonable belief" or "reasonable cause" to act as it did in this case. According to the Employer, what the Grievant did provided a "reasonable cause" and allowed a "reasonable belief" of

guilt.

Even though I concluded above that the Grievant deserved discipline, I concluded here that the Employer applied the inappropriate section of Article 16 under the circumstances of this case. Section 7 provided for an emergency procedure. That procedure consists of the immediate suspension of an employee. I follow Arbitrator Mittenthal's characterization of this section when he stated;

The emergency procedure is... a recognition that situations do arise where supervision must act "immediately" in suspending an employee because of immediate risks or dangers that do not allow the more time consuming procedures of Section 4 and 5. (Underlings added.)

Knowledge of the misconduct by supervision is the key to the immediate action. Here, as the Union argued, the Employer knew about the conduct of the Grievant for sometime in advance of placement of the Grievant on an emergency suspension. The events for which the Grievant was suspended occurred six months earlier than the suspension. Although good reason existed for the Employer not to act until September when five other employees were taken in to custody for illegal activity, the Grievant represented the exception to the procedure for the others. The Grievant's case fell outside the provision of an emergency or immediately needed suspension. The nature of the accusations indicated an immediate cessation of any such action by the Grievant should he still have been involved, and in that sense represented no immediate danger to anyone. The reluctance of the Grievant to talk on September 25 at the investigative interview indicated no immediate threat. The Grievant was concerned regarding criminal charges, and not what he could or could not do on the job. The Employer's delay in acting on the Grievant's case presupposed a decision by the Employer that the Grievant could continue to work without danger to others.

Finally, the Employer learned only one fact in September that it did not know on March 1, 1990. This was the admission by Luther

Henry concerning the Grievant's assistance in referring CI to Luther Henry. This information was not used in the emergency suspension decision in as much as Mr Mauldin reached Pomona with that information after the Grievant had signed for the Notice of Emergency Placement off-duty. Further, aside from allowing the Grievant an opportunity to have his "day in court," the Employer knew everything on September 14 that it put in the Letter of Removal, and had known this information for over six weeks before issuing the Notice of Removal and ending the emergency suspension.

Thus, although a nexus existed between the misconduct of the Grievant and potential harm to others, as set forth in Section 7, the Employer had the obligation to act promptly when the knowledge of the misconduct was obtained. Where criminal charges were not made against the Grievant, the Employer had proper recourse to Section 4 or 5 for disciplinary action. The actions of the Employer belie any belief, not of guilt, but of a hazard, or immediate threat by the Grievant to himself or others as regards the interests of the Postal Service. Accordingly, I concluded that the Employer did violate Article 16.7 when it placed the Grievant under an emergency suspension on September 14, 1990.

DECISION AND AWARD

I studied the evidence produced at the hearing and the arguments of the parties in closing statements on that evidence in support of their respective positions on the issues in dispute. On this basis and that of the above rationale, discussion and conclusions, I decided that the Emergency Placement of the Grievant in an off-duty, non-pay status between September 14, 1990, and December 7, 1990, was a violation of Article 16.7 of the National Agreement. I decided also that the off-duty non-pay status of the Grievant between December 7, 1990, and January 4, 1991, was not an emergency placement of the Grievant in that status, and accordingly was not a violation of Article 16.7 of the Agreement. Thus the grievance was sustained in part for the Employer's violation of the

Section 16.7 as it applied to the period between September 14 and December 7, 1990.

The Employer stated that the Grievant was uncooperative and unwilling to offer any evidence at the investigative interview on September 25. Evidence later provided led to his reinstatement in January. Accordingly, the Employer contended that the Grievant should not be allowed to gain from his uncooperative behavior from any back pay after September 25, 1990. On the other hand, the Union argued that the employee did not need to prove his innocence. Further, the Union asserted that this contention of the Employer was raised for the first time in arbitration and should be disallowed as contrary to Article 15.

I concurred with the Union here. The Grievant must be given the opportunity to tell his story and explain his behavior, but the employee may or may not do so. In this case, the Grievant refused which was his right to do so. The Employer has the responsibility to make the decision on discipline, and does so on the basis of the evidence at hand. Clearly, the Employer had sufficient evidence to demonstrate that the suspension and the proposed removal charges were not flimsy. It followed the proper due process procedure to assure the Grievant of his procedural rights. In the case here, the Employer delayed for a month before issuing the removal, a period that could have been avoided had the Employer issued the removal promptly after the investigative interview. Nothing was contained in the Notice of Removal that was not known to the Employer on September 25, 1990.

Thus, I concluded that the Employer is obligated to compensate the Grievant for the period, September 14 to December 7, 1990, less any earnings of the Grievant during this period. The computation shall be made in accordance with the provisions of the Agreement, and applicable regulations and statutes.

Arbitrator's Award

On the basis of the above conclusions and decisions, I make this order and award.

1. The Emergency Placement of the Grievant in an off-duty, non-pay status between September 14, 1990, and December 7, 1990, was a violation of Article 16.7 of the Agreement. In this regard, the grievance was sustained.
2. The placement of the Grievant in an off-duty, non-pay status between December 7, 1990, and January 4, 1991, was not an emergency placement of the Grievant in an off-duty, non-pay status in violation of Article 16.7 of the Agreement. In this regard, the grievance was denied.
3. The Employer is directed, hereby, because of the violation of the Agreement in item 1 above, to reimburse the Grievant for lost wages and benefits for the period between September 14, 1990, and December 7, 1990, in accordance with the Agreement and/or applicable regulations or statutes.
4. The Employer is directed, hereby, to remove the letter to the Grievant on Emergency Placement in an Off-duty Status, dated September 13, 1990, from the official personnel records of the Grievant, and to replace it with a copy of this Opinion, Decision and Award.

Respectfully Submitted


Kenneth M. McCaffree

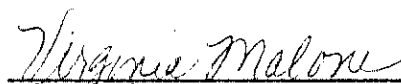
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ATTACHMENT "A"

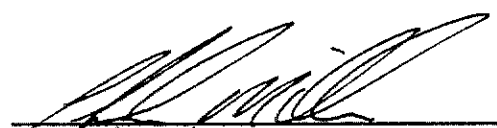
W7N-5P-D-29502
Henry, J. D.
May 30, 1991

JOINT STIPULATIONS

1. The grievant, James Darryl Henry, has been employed with the U. S. Postal Service since February 22, 1988, in the capacity of a letter carrier.
2. On September 14, 1990, the grievant was issued a notice by Superintendent John Massey placing him emergently off-duty, in a non-pay status.
3. On September 25, 1990, the grievant was interviewed by Superintendent John Massey and Virginia Malone, Labor Relations Representative at the Pomona Post Office.
4. On October 30, 1990, the grievant was issued a notice of removal to be effective December 7, 1990. This notice was signed by Superintendent John Massey and Postmaster Al Morten.
5. On December 10, 1990, Union representatives Charlie Miller and Jeanne Johnson interviewed Inspector John Marsh and Confidential Informant 23-357 at the Alhambra General Mail Facility.
6. On December 13, 1990, the grievant was interviewed by Virginia Malone, Labor Relations Representative at the Alhambra General Mail Facility.
7. On January 4, 1991, the grievant was instructed to return to duty. However, the grievant requested and was granted annual leave. He returned to duty on January 14, 1991. His return to duty resulted from the resolution of a Step 2 grievance involving the grievant's removal from the Postal Service.
8. The grievant was in a non-pay, non-duty status from September 14, 1990 through January 4, 1991.
9. The grievant had no prior disciplinary elements of record.



Virginia Malone
U. S. Postal Service



Charlie Miller
Nat'l. Assoc. of Letter Carriers