C#16568

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REGULAR ARBITRATION PANEL WESTERN REGION

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In the Matter of Arbitration) CASE NO: F90N-4F-D 96005943
Between) GTS NO: 32183
UNITED STATES POSTAL SERVICE, STOCKTON, CALIFORNIA))
And		DATE OF HEARING: 11/08/96
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO		HEARING LOCATION: STOCKTON, CALIFORNIA
		ARBITRATOR'S DECISION AND AWARD
BEFORE:	CLAUDE D. AMES, AF	BITRATOR
APPEARANCES:	<u>For the Employer</u> : Gerald Cager, Senior Labor Relations Specialist 3775 Industrial Boulevard West Sacramento, CA 95799 <u>For the Union:</u> James L. Stankovich, Third Vice President 89 Pioneer Way, #D Mountain View, CA 94041	
AWARD:	The Postal Service lacked just cause to issue a Notice of Termination during the Grievant's probation dated July 21, 1995. The Notice of Termination was procedurally defective in that it was issued after the effective date in which Grievant was separated from the rolls which was beyond the expiration of his ninety-day probationary period. The Grievant is reinstated to his new employment status as a PTF letter carrier and is entitled to all benefits and rights of seniority, including back pay, less any wages or compensation that he received during the period of termination. The Arbitrator shall retain jurisdiction over this matter for approximately ninety (90) until implementation of his award. The Union's grievance is sustained.	
DATE OF AWARD:	January 10, 1997	

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CLAUDE D. AMES, Arbitrator

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INTRODUCTION

This arbitration proceeding came on regularly for hearing pursuant to the 1990-1994 Collective Bargaining Agreement (hereinafter "CBA") between the parties, UNITED STATES POSTAL SERVICE (hereinafter "Employer" or "Agency") and NATIONAL ASSOCIATION OF LETTER CARRIERS, LOCAL BRANCH 213, STOCKTON (hereinafter "Union"). Western Regional Panel Member Claude D. Ames was selected to hear the above-referenced grievance. A hearing was held on November 8, 1996, in a conference room at the Postal Facility located at 3131 Arch Airport Road, Stockton, CA. Gerald Cager, Labor Relations Specialist, appeared on behalf of the United States Postal Service. James L. Stankovich, Third Vice President, represented John Toomey (hereinafter "Grievant") and the National Association of Letter Carriers.

In this case, the Union is appealing the Employer's Notice of Termination during probation of Grievant John Toomey on July 25, 1995. The Grievant was given a written Notice of Termination by his evaluating supervisor. The supervisor submitted his recommendation to higher authority on 7/14/95 to terminate Grievant, but failing to get a reply, the supervisor unilaterally issued Grievant a Notice of Removal himself. The Union maintains that the ELM is specific in that supervisors cannot perform this removal function. The Grievant did not receive a notice from an appointing official or officer with the power of removal until August 4, 1995. The Union maintains that this Notice of Removal was well beyond the end of the Grievant's probationary period (7/27/95) and entitles the Grievant to a just cause hearing under the Grievance-Arbitration procedure. The Employer contends that the Grievant was properly separated during his probationary period by the Postal Service. Article 12, Section 1, of the National Agreement states, "The Employer shall have the right to separate from its employ any

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probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto".

The arbitration hearing proceeded in an orderly manner and the parties were given a full and fair opportunity for the examination and cross-examination of witnesses, production of documents and arguments. All witnesses appearing for examination were duly sworn under oath by the Arbitrator. The parties elected to present oral closing arguments in lieu of written post-hearing briefs. The record remained open until December 2, 1996, for the submission of arbitrable decisions by the parties.

II.

STATEMENT OF ISSUES

The parties mutually stipulated that the issue for resolution before the Arbitrator is as follows:

Was the Notice of Termination during probation dated July 25, 1995, issued to the Grievant for just cause?

If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS AND REGULATIONS

ARTICLE 12 - PRINCIPLES OF SENIORITY, POSTING AND REASSIGNMENTS

Section 1. Probationary Period

A. The probationary period for a new employee shall be ninety (90) calendar days. The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto. If the Employer intends to separate an employee during the probationary period for scheme failure, the employee shall be given at least seven (7) days advance notice of such intent to separate the employee. If the employee qualifies on scheme within the notice period, the employee shall not be separate for a prior scheme failure.

ARTICLE 15 - GRIEVANCE-ARBITRATION PROCEDURE

Section 1. Definition

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Unions which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

Section 2. Grievance Procedure-Steps

Step 1:

(a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union representative. The Union also may initiate a grievance at Step 1 within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance. In such case the participation of an individual grievant is not required. A Step 1 Union grievance may involve a complaint affecting more than one employee in the office.

EMPLOYEE AND LABOR RELATIONS MANUAL (ELM)

365.11 - <u>Definition</u>. Separations or Personnel Actions that results in Employees' being removed from the Rolls of the Postal Service.

365.12 - Effective Date of Separation. The effective date of separation is the last day the employee is carried on the rolls. It is not changed by the fact that an employee is given a lump-sum payment for leave.

365.325 - <u>Who Initiates Action</u>. Supervisors may recommend separationdisqualification, but such recommendations must be referred for decision to the official having authority to take the action.

365.326 - <u>Procedure for Separating.</u> If an appointing official decides to terminate an employee who is serving a probationary period due to conditions arising prior to the appointment, or because work performance or conduct during this period fails to demonstrate fitness of qualification for continued postal employment, the employee's services are terminated by notifying the employee in writing why she or he is being terminated and the effective date of the action. The information in the notice regarding the termination must, at a minimum, consist of the appointing official's conclusions as to the inadequacies of performance or conduct.

365.327 - <u>Effective Date.</u> The effective date of separation by disqualification must be before the end of the probationary period but may not be retroactively effective. The notice of separation must be given to the employee before the end of a probationary or trial period.

PROCEDURAL HISTORY

On April 12, 1996, the Agency raised two procedural objections of non-arbitrability based on Grievant's alleged lack of standing as a probationary employee to pursue the matter under the Grievance-Arbitration procedure and timeliness. The Agency moved to bifurcate the procedural issues with the Union's consent. The Arbitrator conducted a bifurcated proceeding and addressed the following procedural issues:

- 1. Whether the grievance was procedurally non-arbitrable based upon the Grievant's removal during his probationary period; and
- 2. Whether the grievance was procedurally non-arbitrable based on timeliness.

On May 12, 1996, the Arbitrator issued his Decision and Award finding that the substantive matters were properly before him with the issues of timeliness and lack of standing not a bar to going forward under the parties' Grievance-Arbitration procedure. The matter was thereafter rescheduled for hearing on all remaining substantive issues which was held on November 8, 1996.

V.

STATEMENT OF FACTS

The Grievant, John Toomey, was hired as a PTF probationary employee on 4/29/95.

, The Grievant was never given a required 80-day (final) evaluation by his supervisor. However,

on 7/25/95, the Grievant's immediate supervisor Tim Pilcher issued the following Notice of

Termination during probation to the Grievant:

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You are hereby notified that you will be removed from the U.S. Postal Service effective upon receipt of this letter. The reason for your termination is:

UNSATISFACTORY PERFORMANCE

We have continued to receive customer complaints concerning your non-

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delivery of mail. Mail has been returned by you that should have been delivered as addressed. You have failed to come to work as scheduled which required your supervisor to come to work in order to ensure delivery of express. You have also displayed confrontational and disruptive behavior toward a customer.

Please make arrangements to return all postal property entrusted to your care. All monies due you will be sent to your address of record.

The Grievant's termination notice was both initiated and signed by Supervisor Pilcher after observing that Grievant's job performance was below standard and his inability to adequately case and deliver mail. The Grievant demonstrated an inability to deliver mail to long-term customers on his route and returned such mail as being undeliverable. These undelivered pieces of mail included customers' monthly checks. Pilcher stated that the Grievant was also involved in several customer altercations while on his route (G-3). On one occasion, the Grievant had words with the customer regarding a misdelivery at 430 Maple and 420 Concord Street. On another occasion, customers complained about Grievant spraying mace on their dog. According to the customer and Pilcher, when confronted, the Grievant became argumentative. Upon his return to the station, he appeared agitated with a volatile temper. Several of the postal employees who work with the Grievant complained about his volatile temper and observed him turn over a chair. According to the Grievant's testimony, he does not deny the fact that he has a temper, but attributes it to his frustration at being unable to deliver all of his mail. He denies that he is violent or has a temper which he cannot control. He further stated that since his release from the Navy, he has been working on keeping his emotions under check.

On July 14, 1995, Supervisor Pilcher issued the Grievant a Notice of Removal and further informed him that he did not have a right to appeal his probationary termination to arbitration under the parties' Grievance-Arbitration procedure. The Grievant failed to notify the Union of his termination until August 4, 1995. The Union thereafter filed a Notice of Appeal

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at Step 1 when it became aware of Grievant's termination with the Postal Service. The Union maintains that the Grievant's separation did not occur until after he was separated from the Agency's rolls on 8/2/95, well beyond his probationary period. The parties have now stipulated that the matter is properly before the Arbitrator on the substantive issue as set forth in the parties' Statement of Issues.

VI.

POSITION OF THE PARTIES

Employer's Position:

The Employer sets forth the following arguments in support of its termination of probationary employee John Toomey on 07/25/95:

1. A probationary employee is not entitled under the parties' National Agreement to a just cause hearing where the employee is terminated during his/her period of probation. Article 12, Section 1 (Probationary Period), specifically grants the Employer the sole right to separate from its employ any probationary employee at any time during the probationary period and those probationary employees shall not be permitted access to the grievance procedure and relation thereto.

2. As a probationary PFT employee, the Grievant was previously notified by his onthe-job instructor (OJI) and Supervisor Pilcher of his subpar performance. The Grievant could not adequately perform the job duties of a PTF letter carrier. On numerous occasions, the Grievant misdelivered well-established customer mail and would return the alleged undeliverable mail back to the Lodi Post Office when in fact customers had lived on the route at the same address for over thirty years. Several of these misdeliveries and undelivered pieces of mail included monthly checks. Customers would complain to the Postal Service regarding their undelivered checks and inquire as to the status of checks which prior to the

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Grievant delivering mail on their route, they routinely received on a monthly basis.

3. The Grievant demonstrated his inability to perform the duties of a PTF letter carrier during his probationary period. He further failed to be regular in his attendance and would often have unscheduled absences. This necessitated the Lodi Post Office to make arrangements for other carrier to carry his route in order to get the mail delivered. The Grievant was warned about his unscheduled absences but continued to be absence without prior notification. On one occasion, the Grievant returned to the post office in a volatile mood after having a confrontation with a customer and spraying the customer's dog with mace. The customer contacted the Postal Service and complained. Upon Grievant's return to the post office, he demonstrated a volatile temper which alarmed other employees. The Postal Service cannot condone such disruptive behavior and so advised the Grievant. Based on the Grievant's failure to adequately perform the duties of a PTF letter carrier, the Postal Service had just cause in issuing the Grievant a Notice of Termination during his period of probation on 07/25/95.

Union's Position:

The Union sets forth the following arguments in support of its position that the Agency lacked just cause to terminate Grievant John Toomey during his period of probation on the following grounds:

1. Termination of a probationary employee by the Agency can only occur prior to the expiration of the probationary period. Article 12, Section 1, of the parties' National Agreement limits Management's exclusive right of terminating an employee without cause only during a period of probation. The Agency's Notice of Removal was well beyond the Grievant's probationary period (07/27/95) and entitles the Grievant to a just cause hearing under the parties' Grievance and Arbitration procedure. Management did not follow its own rules and

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procedures in terminating the Grievant pursuant to Article 12.1 and the Notice of Termination is rendered procedurally defective requiring that Grievant be entitled to a grievance and arbitration hearing before he can be terminated from his PTF letter carrier position.

2. The Union filed its Step 1 grievance after it became aware of the Grievant's removal during his probationary period as informed by the Grievant's father. Article 15 provides for the Union to file a grievance at Step 1 within fourteen (14) days or when the Union first became aware of, or should have become aware of the grievance. The Union filed the grievance on August 4, 1995. The Agency improperly removed the Grievant after the expiration of his probationary period and informed the Grievant that he lacked the right to appeal his termination since his removal occurred during the period of probation. But for this incorrect misrepresentation, the Grievant would have timely notified the Union of his removal and a grievance would have been filed within the fourteen (14) day period as specified under Article 15, Section 1, of the Collective Bargaining Agreement.

3. Given the inadequate and defective discharge letter, the Agency had denied Grievant his right of due process and a form of double jeopardy has attached. The Union is requesting that the Agency's removal notice be rescinded as procedurally defective occurring beyond the period of probationary status. The Union is further requesting reinstatement to the Grievant's former position as a PTF letter carrier along with back pay and be made whole for all lost wages and benefits.

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DISCUSSION

The probationary period for a new employee seeking full employment status with the Postal Service is approximately ninety (90) calendar days. During this probationary period, the Union recognizes the right of Management to unilaterally determine whether or not a new employee shall pass a period of probation. The Union further recognizes the right of Management to terminate and permanently remove a new employee who does not demonstrate either the mental aptitude or other performance qualities deemed necessary and sufficient to become a productive postal employee. All of which are determined in the sole discretion of Management. Although the Agency has the exclusive right to terminate a new employee who has not completed his/her ninety (90) probationary period, there are certain notice (warning) provisions which are implemented to guard against any arbitrary and capriciousness on the part of Management. These notice provisions occur at the 30-day, 60day and 80-day probationary period in which each new employee is to receive an evaluation from his supervisor and on-the-job instructor as to their work performance. By having a supervisor and on-the-job instructor give such notice evaluations to the employee, a new employee is then put on notice as to areas in which they are deficient and/or need improvement. This is an opportunity for Management to designate additional instructional assistance in casing mail and/or route delivery training to a new employee. This is also a critical period for Management to fully evaluate whether or not the probationary employee will pass his/her period of probation and become a permanent employee with the Agency.

The Employer has the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure. However, pursuant to Article 12, Section 1, of

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the Agreement, if the Employer intends to separate a new employee, it must be done before the expiration of the new employee's ninety (90) probationary period. Otherwise, the termination is subject to review under the parties' Grievance and Arbitration procedure, requiring a just cause determination prior to removal. Article 16 (Discipline Procedure) sets forth the guiding principles agreed upon by the parties in implementing any form of discipline against employees, including new employees who have recently completed their probationary period. Under Article 16, a basic principle that shall be utilized in the discipline of any employee is that discipline should be corrective in nature, rather than punitive. Under this concept, the discipline imposed by the Agency against an employee not only must be proportionate to the infraction but also progressive. In light of the Grievant's Notice of Termination which occurred after the period of probation, the Agency comes forth with insufficient evidence to sustain his removal.

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There is no dispute that the Agency notified the Grievant on July 25, 1995, that he would be removed during his period of probation. However, the incontestable fact remains that Grievant was not officially separated from the Postal Service rolls, pursuant to the ELM, until 08/02/95, well after the expiration of his probationary period. The effective date of separation, as set forth in the ELM, is the last day in which the employee is carried on the Postal Service rolls. There is no dispute that August 2, 1995, was the official date listed in the Grievant's notification of personnel by the Postal Service as his effective date of separation. Section 365.327 (Effective Date) of the ELM clearly establishes the effective date of separation by disqualification must be before the end of the probationary period and may not be retroactively effective. In the instant case, any attempt by Management to retroactively apply the Grievant's termination to correspond with the last date that he was carried on the rolls not only is improper but procedurally defective. The effective date of separation also supersedes,

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at least in this instance, the notice of termination date of July 25, 1995, as having no basis or substance in which to independently terminate the Grievant's employment with the Postal Service. In order for the Grievant's termination to be effective during the period of probation, both the actual Notice of Termination and the effective date of separation must occur within the ninety (90) day period prior to completion of the probationary period by the new employee. In the absence of either one or both of these conditions failing to occur prior to the expiration of the probationary period, the Grievant is accorded and entitled under the parties' Collective Bargaining Agreement, a just cause hearing and the right of due process. Under the due process requirement as incorporated through the concept of just cause, the Agency is required to procedurally set forth its entire case and indicate that it has fully investigated the matter and given notice to the individual employee prior to the implementation of the discipline or removal action.

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In the instant case, the evidence is uncontroverted that Supervisor Pilcher was both the initiating and concurring official in the Grievant's removal, albeit during the period of termination. The ELM clearly requires that a concurring official, i.e., postmaster or installation head or designee, concur in any disciplinary or removal action taken against an employee by his/her immediate supervisor. There is no expressed or implied written exception to this ELM requirement simply because a probationary employee is nearing the expiration of the ninety (90) day probationary period, or a concurring official or designee is unavailable. The burden still rests with the postal official to independently concur with the actions taken by an employee's supervisor. The record fails to indicate that anyone other than Supervisor Pilcher both initiated and concurred in the action of Grievant's removal. Further, Supervisor Pilcher testified that his actions were the first in which he had been both the initiating and concurring official in a probationary employee's removal. Clearly, such actions were procedurally

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defective and a clear violation of the Grievant's due process under the Collective Bargaining Agreement. As a third party beneficiary to the parties' Collective Bargaining Agreement, the Postal Service's failure to comply with the requirements under the ELM in removing the Grievant from its employment rolls was improper. Accordingly, the Union's grievance is sustained.

AWARD

The Postal Service lacked just cause to issue a Notice of Termination during the Grievant's probation dated July 21, 1995. The Notice of Termination was procedurally defective in that it was issued after the effective date in which Grievant was separated from the rolls which was beyond the expiration of his ninety-day probationary period. The Grievant is reinstated to his new employment status as a PTF letter carrier and is entitled to all benefits and rights of seniority, including back pay, less any wages or compensation that he received during the period of termination. The Arbitrator shall retain jurisdiction over this matter for approximately ninety (90) until implementation of his award. The Union's grievance is sustained.

Dated: January 10, 1997

Lander D.

CLAUDE D. AMES, Arbitrator