REGIONAL ARBITRATION PANEL

In the Matter of the Arbitration
between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

) GRIEVANT: Charles Clark
) POST OFFICE: Jacksonville, Florida
) USPS CASE NO: H94N-4H-D 96093462
) NALC CASE NO: 032041

BEFORE: Raymond L. Britton, Arbitrator

APPEARANCES:
For the U.S. Postal Service: Ron Midkiff
For the Union: Joseph M. George
Place of Hearing: U.S. Post Office
Date of Hearing: February 21, 1997

AWARD:

For the reasons given, the grievance is sustained and it is directed that the Grievant be reinstated and that he be made whole with back pay and all benefits to which he is entitled.

Date of Award: May 15, 1997

Raymond L. Britton

Matthew Hoke, Jr.
National Business Agent

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Region 9

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ISSUE

Was there just cause to issue a removal dated July 9, 1996?

HISTORY OF THE PROCEEDINGS

The parties failed to reach agreement on this matter, and it was submitted to arbitration for resolution. Pursuant to the contractual procedures of the parties, the undersigned was appointed as Arbitrator to hear and decide the matter in dispute.

At the commencement of the Hearing, it was stipulated by the parties that this matter was properly before the Arbitrator for decision and that all steps of the arbitration procedure had been followed and that the Arbitrator had the authority to render the decision in this matter. After the Hearing, it was agreed that the United States Postal Service (hereinafter referred to as “Employer”) and the National Association of Letter Carriers, AFL-CIO (hereinafter referred to as “Union”) would present oral closing arguments in support of their respective positions.

SUMMARY STATEMENT OF THE CASE

Charles Clark (hereinafter sometimes referred to as “Grievant”) is a City Letter Carrier at the Pottsburg Station of the Jacksonville, Florida Post Office. On July 9, 1996, Supervisor, Customer Services, V. L. Thompson issued to the Grievant a Notice of Removal that states in relevant part as follows (Joint Exhibit No. 2):

You are hereby notified that you will be removed from the Postal Service effective at the end of your tour on Friday, August 16, 1996.

This action is based on the following reason:

CHARGE NO. 1: FAILURE TO MAINTAIN A REGULAR WORK SCHEDULE - UNAUTHORIZED ABSENCE - AWOL

You are a relatively short term employee with an enter on duty date of January 26, 1991.

On June 22, 1996, you were scheduled for duty at 0800. You did not report until 0918. You did not “call in.” Your unauthorized absence was charged as 1.18 hours AWOL.

On May 7, 1996, you were scheduled for duty at 0750. You did not report at 0750. You did not “call in” until 0825. You did not report until 0925. Your unauthorized absence was charged as 1.75 hours AWOL.

On April 20, 1996, you were scheduled for duty at 0750. You did not report until 0850 and you did not “call in.” Your excuse that the line was busy at 7:45 was unacceptable. Your unauthorized absence was charged as 1.00 hour AWOL.

On March 9, 1996, you were scheduled for duty at 0730. You did not report at 0830. At 0900 you “called in.” You did not report for duty until 0922. Your unauthorized absence was charged as 1.72 hours AWOL.
When questioned concerning the absences of March 9, 1996, April 20, 1996 and May 7, 1996, you had no comment. When I asked you about the absence of June 22, 1996, you said that since your time changed to 1000 on Monday through Friday, you thought it was 1000 on Saturday until you saw your limited duty job offer on your dresser and realized you were late.

Your actions have been contrary to your duties and responsibilities as a postal employee, as well as Chapter 5 and parts 666.81 and 666.82 of the Employee and Labor Relations Manual, and Permanent Postings dated April 11, 1987. Work Rules and Attendance and Leave Control Policy.

In addition to the above, the following elements of your past record were considered in taking this action:

1. A 4-day suspension dated February 27, 1996, because of failure to maintain a regular work schedule - unauthorized absence - AWOL and failure to maintain a regular work schedule.

2. A 3 day suspension dated September 11, 1995, because of failure to maintain a regular work schedule - unauthorized absence - AWOL and failure to maintain a regular work schedule; and,

3. A letter of warning dated November 18, 1995, because of failure to maintain a regular work schedule.

You have the right to file a grievance under the Grievance/Arbitration procedure set forth in Article 15 of the National Agreement within 14 days of your receipt of this notice.

* * *

A grievance was filed protesting the Notice of Removal, and a Step 1 meeting held and decision rendered on July 25, 1996. Pursuant to Article 15 of the National Agreement, the grievance was appealed to Step 2 of the grievance procedure alleging a violation of, but not limited to, Articles 16, 35.1, 19.2, Arb Dec. C-6671, C-09767 dated 2/10/90, MSPB rights, and stating in relevant part as follows (Joint Exhibit No. 2):

On 07/11/96 Charlie Clark received Notice of Removal dated 07/09/96 for CHARGE NO. 1. FAILURE TO MAINTAIN A REGULAR WORK SCHEDULE-UNAUTHORIZED ABSENCE-AWOL. The union representative, Stacey Maples, filed a timely step one grievance on 07/25/96 with management’s representative, Vicki Thompson.

Stacey Maples argued Article 35 of the National Agreement, EMPLOYEE ASSISTANCE PROGRAM. Section I. programs. “... An employee’s voluntary participation in the EAP for assistance with alcohol and/or drug abuse will be considered favorably in disciplinary action procedures.” Management contends that they had referred the grievant to EAP in the past. This is true. The grievant was interviewed by an EAP representative. He explained that his wife had a drug problem which caused him to have custody of a minor daughter. The EAP representative concluded he had a street related problem due to raising a child alone. However the EAP representative made no further attempt to refer him for counseling or treatment. On or about 07/23/96 Mr. Clark voluntarily referred himself to the program for assistance.
Being a single parent with custody has made it difficult on occasions for Mr. Clark to get to work on time. He has sitter problems, particularly on the weekend. Assistance could have been given him from EAP. The union contends that this problem should be looked on favorably in this disciplinary case.

The union also contended that the elements of the past employees past records that management cited were improper in as much as the 7 day suspension was reduced to three (3) day. The fourteen (14) day suspension was reduced to a four (4) day suspension. The union position is that any suspensions of less than 5 days should be considered as a LOW and therefore is not progressive but rather punitive. Step 4 Decision C-09767 Regional Arbitrator Levak, February 10, 1990 (In part) Under 1974 SAPMG Policy (M-00582), there may be no suspensions of 1-4 days: management therefore acted improperly by reducing a 14 day suspension to the 2 days. The union contends that this removal is punitive and not for just cause (Article 16, Section 1) of the National Agreement.

The grievant contends management is violating Article 2 of the National Agreement. NON-DISCRIMINATION AND CIVIL RIGHTS. The grievant is a black male. He had been dating a white female, Carol Skaggs. Ms. Skaggs has also been issued a Notice of Removal, dated 04/23/96, for CHARGE NO. 1. FAILURE TO MAINTAIN A REGULAR WORK SCHEDULE-UNAUTHORIZED ABSENCE/AWOL. (Grievance #33-131-96D). Mr. Clark contends that management has terminated Ms. Skaggs and himself due to an inter-racial relationship.

The union also contends that management is retaliating against the grievant for an on the job injury. At the time of the grievant’s termination he was on limited duty. The grievant is unable to seek employment due to his disability suffered on the job and is currently under Doctor’s care. While management may be able to terminate an employee for just cause while disabled the union contends that until the grievant is recovered that management is obligated to continue his salary and medical care. The union contends that it would be improper to discontinue the grievant’s rights to disability income unless the grievant has recovered sufficiently enough to seek new employment.

ADDITIONS TO STEP ONE

The grievant served in the US Navy from 10/31/85 until 08/10/90. He was awarded a 10% disability. The union contends that management violated Article 16 Section 5. Suspension of more than 14 Days or Discharge. The grievant is entitled to provision of the Veterans Preference Act and entitled to be informed of his MSPB appeal rights as well as to have his "Proposed Removal" heard by the installation head within 10 days. The union contends that the removal notice is improper and violates the grievant’s legal rights.

The union further charges that management’s action in this case is a form of disparaging treatment in as much at least one other posted employee in the Jacksonville Post Office has been treated in a much more lenient manner than the grievant. Karen Shoemaker, was AWOL for 17 days. She was issued a LOW where the grievant in this case was issued a removal. The union contends that a 17 day absence is much more severe than several incidents of being late for work. This comparison supports the grievant’s position that he is being discriminated against due to his inter-racial relationship with a white female employee.
On August 9, 1996, a Step 2 meeting was held, and on that date J.M. Mills, Management Representative, in a memorandum to NALC Representative, Re: Step II grievance, stated in relevant part as follows (Joint Exhibit No. 2):

On Thursday, 08/09/96, we met to discuss the above captioned grievance at step 2 of the grievance procedures.

The union contends management violated Article 16.1 & 16.5, Article 35.1, Article 19.2, Arbitration Decision C-6671 and C-09767, and Article 2, MSPB rights.

The union cited a violation of Article 15 also. However, this violation was withdrawn at Step 2.

1. Article 35.1 was violated due to the Union felt EAP concluded Mr. Clark had stress related problems due to raising a child alone, however, they made no further attempt to refer him for counseling or treatment.

2. The Union contends that the elements of the employee's past records that management cited were improper in as much as the 7 day suspension was reduced to a 3 day and his 14 day suspension was reduced to a 4 day. The unions position is that any suspension of less than 5 days should be considered as a letter of warning. Step 4 decision C-09767 regional arbitrator Levak 2/10/96, there may be no suspensions of 1-4 days, therefore discipline issued is not progressive but rather punitive and not for just cause. A violation of article 16.1.

3. The union contends that management violated Article 2, Nondiscrimination and Civil Rights. The grievant is a black male. He had been dating a white female, Carol Skaggs of who has also been issued a removal notice, for failure to maintain a regular work schedule- unauthorized absence: AWOL. Mr. Clark contends that management has terminated Ms. Skaggs and himself due to an inter-racial relationship.

4. The union contends that management is retaliating against the grievant for an on the job injury. The union contends that it would be improper to discontinue the grievant’s right to disability income unless the grievant has recovered sufficiently enough to seek new employment.

5. The union contends that management violated article 16.5, the grievant served in the US Navy from 10/31/85 until 8/10/90 and was awarded a 10% disability. The grievant is entitled to provision of the veterans preference act and entitled to be informed of his MSPB appeal rights as well as to have his "proposed removal" heard by the installation head within 10 days. The union contends that the removal letter is improper and violates the grievant’s legal rights.

6. The union further charges management’s action in this case is a form of disparaging treatment in as much as at least one other postal employee in the Jacksonville Post Office has been treated in a much more lenient manner than the grievant. Karen Shoemaker was AWOL for 17 days and was issued a LOW. The union contends that a 17 day absence is much more severe than several incidents of being late for work.

After careful consideration of these factors and upon careful investigation, I have found the following information.
Management Contends:

1. The internal functions of the employee assistance program and the employee's treatment under the employee assistance program are not subject to the grievance-arbitration procedure. The employee assistance program is necessarily cloaked with the requirement of confidentiality. There is no violation of article 35.1.

2. A Step 4 decision C-09 1767 was cited, however upon my investigation, I was able to find and read, but not get a copy of the decision cited and it is not a Step 4 decision, but a regular arbitration award. Both arbitrators (Levak and Eaton) stated and I quote, "that reduction to a 4 days was unilaterally determined by the USPS, and was not a grievance settlement." In the case of Mr. Clark the suspension reductions were as a result of a grievance settlement and Eaton does go on to say if the reduction of less than 5 days is agreed upon as a grievance settlement then the ruling of reduction to a LOW does not apply. Therefore, there was no violation of the arbitration award, but support to our actions.

3. I spoke with the manager of the Pottsburg station and he has informed me that he nor his supervisors had no direct knowledge that Ms. Skoggs and Mr. Clark were dating. Progressive disciplinary actions was taken as per the national agreement on the employees for their failure to maintain a regular work schedule. There is no discrimination or violation of Article 2.

4. The status of pay because of an on the job injury can only be determined by the Department of Labor and is not subject to the grievance-arbitration procedure.

5. In reference to the employee's MSPB rights and proposed removal letter, an addendum letter is forth coming and the grievant will be afforded all his protections and rights as a veteran preference eligible.

6. There is no evidence that Karen Shoemaker is similarly situated and the contention of the union shows that she is the only other employee in the Jacksonville Post Office who was treated differently if in fact she was. This comparison does not support the unison case.

Based on the facts involved in this case, I must deny this grievance.

* * *

On August 9, 1996, V. L. Thompson, Supervisor, Customer Service in a memorandum to Charles E. Clark, Subject: Amendment to Notice of Removal dated July 9, 1996. Notice of Proposed Removal, stated in relevant part as follows (Joint Exhibit No. 2):

Paragraph 1 of the Notice of Removal dated July 9, 1996 is replaced by the following:

This is advance notice that it is proposed to remove you from the Postal Service no earlier than thirty (30) days from the date you receive this letter.

The following is added to page 2 in addition to the current wording:

You and/or your representative may review the material relied on to support the reasons for this notice at my office between the hours of 8:30 a.m. and 4 p.m., Monday through Friday. If you do not understand the reasons for this notice, contact me for further explanation.
You and/or your representative may answer this proposal within ten days from your receipt of this letter, either in person or in writing, or both, before Mr. Richard McKillop between the hours of 8:30 a.m. and 4 p.m., Monday through Friday. You must call and make an appointment with Mr. McKillop at (904) 359-2918. You may also furnish affidavits or other written material to Mr. McKillop within ten days from your receipt of this letter. You will be afforded a reasonable amount of official time for the above purpose if you are otherwise in a duty status. After the expiration of the 10-day time limit for reply, all the facts in the case, including any reply you submit, will be given full consideration before a decision is rendered. You will receive a written decision from Mr. McKillop.

* * *


The step II hearing on the above referenced case was held on Thursday 08/09/96. The Step II decision was received on 08/19/96.

Response to management's contentions:

1. In responding to the union's position in regards to the grievant having sought help under the EAP program management took the position that the employee's treatment under the program is not a subject for the grievance arbitration process. Article 35 of the National Agreement not only incorporates the EAP program into the National Agreement but also address how EAP should effect the discipline procedure. An employee's voluntary participation in the EAP for assistance with alcohol and/or drug abuse will be considered favorably in disciplinary action proceedings. Management's response completely ignores Article 35 and the fact that the employee has sought assistance through EAP to correct his attendance problem which is in large part due to the grievant having custody of a six year old daughter due to his former wife having a drug addition (sic) problem. The union contends that the position that management has taken on voluntary participation in the EAP program violates Article 16.1 of the national Agreement, "... a basic principle shall be that discipline should be corrective in nature, rather than punitive." The employee has taken steps through the EAP program that is corrective in the relations to the problem he has experienced that lead to the removal charge against him. To not recognize this action as steps to correct the problem and to look favorably upon this action in this disciplinary action against him makes the action punitive in nature.

2. Management claims that the station manager of the Pottsborg station was not aware that the grievant, a black male, was dating a white female that was also terminated. The grievant claims that it was a well known fact that he was involved in an inter-racial relationship.

3. At the step II of the grievance process the union was successful in convincing management that they had made serious procedural violations in the removal of the grievant in as much as he was denied his Veteran's Preference Rights and MSPB appeal rights. Management is now attempting to resolve this problem after the fact by making an amendment to the removal and affording the grievant his legal rights.

The union contends that management is subjecting the grievant to double jeopardy and is in essence removing the grievant twice for the same offense. The union contends that management essentially has abandoned its removal charge. It's apparent that management failed to do a
proper investigation prior to requesting discipline and that the concurring officer was non-existent. Evidence of this is that the request for discipline was never concurred by a higher official, see attached request for discipline. The union contends that management violated the provisions of Article 16 Section 8. Review of Discipline. In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been concurred in by the installation head or designee.

The review/concurrence provisions of Article 16.8 of the National Agreement is an essential and fundamental ingredient of the grievance process (Zumas in DR-31-88, March 20, 1989). The union contends that failure to fulfill the required action of Article 16.8 of the National Agreement management committed conduct prohibited by "the terms and provisions of this Agreement." The Service prejudiced the disciplined employee by this improper action. Had the request for discipline been afforded the opportunity to be reviewed in accordance with the National Agreement the installation head or his designee may well have agreed with the grievant's and the union's positions. Positions of having sought assistance through the EAP. The officer may well have and should have caught the fact that the employee is a veteran and have provided him with the necessary requirements afforded him by law.

The union contends that management has violated the employee's right to due process by not adhering to the following provisions of the MANAGEMENT OF DELIVERY SERVICE HANDBOOK M-39.

115 Discipline

115.1 Basic Principle

In the administration of discipline, a basic principal must be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause. The delivery manager must make every effort to correct the situation before resorting to disciplinary action.

115.2 Using People Effectively

   c. Let the employee explain his or her problem-listen! If given a chance, the employee will tell you the problem. Draw it out from the employee if needed, but get the whole story.

115.3 Obligation to Employees

When problems arise, managers must recognize that they have an obligation to their employees and to the Postal Service to look to themselves, as well as to the employee, to:

   a. Find out who, what, when, where, and why.

   b. Make absolutely sure you have all the facts.

   c. The manager has the responsibility to resolve as many problems as possible before they become grievances.

   d. If the employee's stand has merit, admit it and correct the situation.
You are the manager; you must make decisions; don’t pass the responsibility on to someone else.

Management’s step II designee is reluctant to admit the union’s case has merits and drop the removal. Instead the Service adopts an attitude of "We’ll keep trying until we get it right." The practical effect is the second removal or amendment, subjects the grievant to additional stress until "management gets it right." The grievant has been prejudiced after a complete case challenging the charges, facts, and handling had been presented by the Union at step I & II of the grievance process. The grievant has been prejudiced by this delay and suffered the stress of repeating the process because of the Service’s improprieties. A protest based on double jeopardy is appropriate.

* * *

On August 22, 1996, the grievance was appealed to Step 3 of the grievance procedure and a Step 3D meeting was held on October 3, 1996. On October 15, 1996, Roland McPhail, Labor Relations Representative in a memorandum to Mr. Matthew Rose, National Business Agent. Subject: Step 3 Grievance Decision. Stated in relevant part as follows (Joint Exhibit No. 2):

After considering all available evidence in the record and that offered by the union at the Step 3D hearing with Mr. Matthew Rose on October 3, 1996, it is my decision to DENY the grievance.

The grievant’s attendance record has been continuously irregular over a long period of time. Several prior corrective measures have been taken which were not successful in bringing about required improvement. The action taken was for just cause.

* * *

On October 21, 1996. Postmaster. Customer Services issued a Memorandum to Charles E. Clark. Subject: Letter of Decision which states in relevant part as follows (Joint Exhibit No. 2):

On July 11, 1996, Notice of Removal dated July 9, 1996, was issued to you and on August 15, 1996, amendment to Notice of Removal dated July 9, 1996 was delivered to your address of record.

I note you did not reply in writing or personally. I have given full consideration to the verbal response of Mr. J.T. Adams, N.A.L.C. representative, who replied on your behalf.

Mr. Adams stated that you had been referred to EAP by management because you had custody of a six-year-old child and your former wife was a drug addict. Mr. Adams felt that EAP had failed to follow-up and provide sufficient assistance. Mr. Adams further asserted your problem was tardiness, especially on Saturdays when you have a problem with the baby-sitter and obtaining day care. Mr. Adams asserted that the request for discipline was not concurred in. Mr. Adams stated that he would encourage you to sign a release so I could speak directly with the EAP counselor. The union feels the original notice did not give you your rights and this error was not corrected to Mr. Adams’ satisfaction as it was not rescinded and reissued. Mr. Adams did not provide the release form from you so I could speak directly with the EAP counselor. I find relative to Mr. Adams’ contentions about EAP, that it is your responsibility to cooperate. Management satisfied its burden by referring you to EAP.
During my discussion with Mr. Adams, I reviewed the yellow pages for day care facilities with Saturday hours and they were advertised as such. Labor Relations has on file the concurred request for discipline and if a copy had been requested by the union, this would have been provided. Further, the Labor Relations Department has assured me that we were procedurally correct in the way we issued our modification to the removal notice. I find that Mr. Adams' contention that it was not corrected to his satisfaction, does not mitigate sufficiently to militate against the penalty of removal.

I find the evidence of record supports the charges and the proposed action and that the proposed action was proper as issued and amended. I have considered your relatively short term of employment (enter on duty date of January 26, 1991) and find no mitigating factors sufficient to militate against the penalty of removal. I find your AWOL has a deleterious effect on the efficiency of the Postal Service and warrants your removal.

In rendering this decision, I have considered the elements of past record cited in the Notice of Removal dated July 9, 1996. It is my decision that you be removed effective Friday, November 8, 1996.

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As a preference eligible, you have a right to appeal this decision in writing to the Merit Systems Protection Board, 401 West Peachtree Street, NW, 10th Floor, Atlanta, Georgia 30308, within thirty (30) days from the effective date of this decision. If you appeal to the MSPB, your appeal should state whether you do or do not wish a hearing and you should furnish me a copy of your appeal.

Attached is a MSPB appeal form which you may complete. You should give reasons for contesting the action with any offer of proof and pertinent documents you are able to submit.

If you appeal this action to the MSPB, you will remain on the rolls, but in a nonpay, nonduty status after the effective date of this action, until disposition of your case has been reached either by settlement or through exhaustion of your administrative remedies.

If you appeal to the MSPB, you thereby waive access to any procedures under the National Agreement beyond Step 3 of the Grievance-Arbitration procedure. You have a right to file a MSPB appeal and a grievance on the same matter. However, if the MSPB issues a decision on the merits of your appeal, if a MSPB hearing begins, if the MSPB closes the record after you request a decision without a hearing, or if you settle the MSPB appeal you will be deemed to have waived access to arbitration. Further, if you have a MSPB appeal pending at the time the Union appeals your grievance to arbitration, or if you appeal to the MSPB after the grievance has been appealed to arbitration, you will be deemed to have waived access to arbitration.

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On October 22, 1996, the grievance was appealed to arbitration.
Provisions of the National Agreement effective August 19, 1995 to remain in full force and effect to and including 12 midnight November 20, 1998 (hereinafter referred to as “National Agreement”) (Joint Exhibit No. 1) considered pertinent to this dispute by the parties are as follows:

**ARTICLE 2**

**NON-DISCRIMINATION AND CIVIL RIGHTS**

**Section 1. Statement of Principle**

The Employer and the Unions agree that there shall be no discrimination by the Employer or the Unions against employees because of race, color, creed, religion, national origin, sex, age, or marital status.

In addition, consistent with the other provisions of this Agreement, there shall be no unlawful discrimination against handicapped employees, as provided in the Rehabilitation Act.

**Section 3. Grievances**

Grievances arising under this Article may be filed at Step 2 of the grievance procedure within fourteen (14) days of when the employee or the Union has first learned or may reasonably have been expected to have learned of the alleged discrimination, unless filed directly at the national level, in which case the provisions of this Agreement for initiating grievances at that level shall apply.

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**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 reinstatement, including back pay.

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**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.
Section 8. Review of Discipline

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

In associate posts of twenty (20) or less employees, or where there is no higher level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken.

Section 9. Veterans’ Preference

A preference eligible is not hereunder deprived of whatever rights of appeal such employee may have under the Veterans’ Preference Act; however, if the employee appeals under the Veterans’ Preference Act, the employee thereby waives access to any procedure under the Agreement beyond Step 3 of the grievance-arbitration procedure.

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ARTICLE 19
HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals, and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21 Timekeeper’s Instructions.

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least sixty (60) days prior to issuance. At the request of the Unions, the parties shall meet concerning such changes. If the Unions, after the meeting, believe the proposed changes violate the National Agreement (including this Article), they may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Unions upon issuance.

Article 19 shall apply in that those parts of all handbooks, manuals and published regulations of the Postal Service, which directly relate to wages, hours or working conditions shall apply to transitional employees only to the extent consistent with other rights and characteristics of transitional employees negotiated in this Agreement and otherwise as they apply to the supplemental work force. The Employer shall have the right to make changes to handbooks, manuals and published regulations as they relate to transitional employees pursuant to the same standards and procedures found in Article 19 of this Agreement.
ARTICLE 35
ALCOHOL AND DRUG RECOVERY PROGRAMS

Section 1. Programs

The Employer and the Unions express strong support for programs of self-help. The Employer shall pro-
vide and maintain a program which shall encompass the education, identification, referral, guidance and
follow-up of those employees afflicted by the disease of Alcoholism. . . .

* * *

Section 2. Joint Committee

* * *

Section 3. Pilot Program and Referrals

The Employer agrees to continue the pilot project regarding a self-help program to assist users of non-
hard core drugs.

* * *

POSITION OF THE PARTIES

The Position of the Employer

It is the position of the Employer that just cause exists for the Grievant’s removal. The Employer con-
tends that the Grievant was AWOL in that he reported late for duty on four (4) separate occasions during the pe-
riod March 9, 1996 to June 22, 1996, or on some 5.3% of the work days during this time frame. The Employer
contends that although the original suspensions were modified by being lessened, the removal was progressive as
the Grievant had been issued a letter of warning and two suspensions prior to his removal. Finally, the Employer
contends that no harmful error was committed as a result of the action taken by management nor was the Grievant
denied his rights as a veteran or subjected to disparate treatment.

The Position of the Union

The Union takes the position that the removal was not for just cause. The Union contends that as a vet-
eran, the Grievant has the right to have a proposed removal and the right to meet with the Postmaster prior to Step
I of the grievance procedure. The notice of termination letter, the Union maintains, should have been rescinded
and not merely amended and a proposed removal issued. Further, the Union contends that the Employer commit-
ted harmful error when it deprived the Grievant of his preferential rights under MSPB. The Union further con-
tends that the Grievant was denied due process as the discipline issued was not progressive inasmuch as the last
discipline the Grievant received was a four (4) day suspension and management bypassed the seven (7) day sus-
pension and the fourteen (14) day suspension and bypassed the proposed removal and went directly to termination.
The Union additionally contends that there was improper concurrence as it is the practice that the concurrence let-
ter be signed by the higher official. Finally, the Union maintains that the Grievant was subjected to disparate
treatment as another employee had seventeen (17) AWOL violations and only received a letter of warning.
OPINION

At the outset, it is necessary that the Arbitrator determine whether the action taken by the Employer in removing the Grievant was in compliance with the procedural requirements of the National Agreement.

As a veteran, the Grievant is entitled to the issuance of a proposed removal. Vickie Thompson, Supervisor, Customer Services, testified that she did not know that the Grievant was a veteran and that she issued the Grievant a termination rather than a proposed removal because he had progressive discipline from 1995 to 1996. While she knew that a veteran is entitled to certain benefits, she stated that she did not know if a veteran is entitled to a proposed removal. She also testified that she has never previously terminated a veteran. In endeavoring to correct the error, she testified that the amendment was made so that the Grievant would know what his benefits were and he was notified of his rights by certified mail.

While acknowledging that a proposed removal was not issued in a timely fashion, the Employer nevertheless contends that a proposed removal was issued on August 9, 1996, by V.L. Thompson which it contends takes care of this requirement. The Employer maintains that when management decided that the Grievant was a preferred veteran, it amended the charge which it already had in mind. According to the Employer, the Grievant was given notice perfecting his preference rights and he received all his rights and benefits as a military veteran and therefore no harmful error was committed. The Employer contends that the amended letter told the Grievant of his MSPB rights, and that the Grievant never denied he received the amended letter or denied that there was an MSPB letter or appeal forms. That the Grievant was given his veteran appeal rights, according to the Employer, is established by the documents contained in Joint Exhibit No. 2, namely, the Letter of Decision at page 17 and the amendment to the Notice of Removal at page 21.

The record discloses that on August 1, 1996, the Union under “Additions to Step 1” pointed out the Grievant’s service record in the Navy from October 31, 1985 to August 10, 1990, and contended that management violated Article 16, Section 5 of the National Agreement. The Union further stated therein that the Grievant was entitled to his rights under the Veterans’ Preference Act and the right to be informed of his MSPB appeal rights and that his “Proposed Removal” be heard by the installation head within ten (10) days. On August 9, 1996, after the Step 2 meeting held on that date, J.M. Mills in a memorandum to NALC Representative referenced the employee’s MSPB rights and proposed removal letter and stated that an addendum letter would be forthcoming and that the Grievant would be afforded all “his protections and rights as a veteran preference eligible.” On August 9, 1996, V. L. Thompson, Supervisor, Customer Service in a memorandum to Charles E. Clark, Subject: Amendment to Notice of Removal dated July 9, 1996, Notice of Proposed Removal, stated that it is proposed that the Grievant be removed from the Postal Service and that the Grievant or his representative may review the material relied on to support the reasons for the notice at his office and that the Grievant or his representative may answer the proposed removal within ten days from the receipt thereof. On October 21, 1996, Richard J. McKillop, Postmaster, Customer Services, issued a Letter of Decision that the Grievant be removed effective, Friday, November 8, 1996, and set forth the Grievant’s rights as a preference eligible and included as an attachment MSPB Regulations and MSPB Appeal Forms.

Although in his Letter of Decision, Mr. McKillop states that the Labor Relations Department had assured him that management was procedurally correct in the manner in which it issued its modification to the removal notice, the Arbitrator is respectfully required to disagree. The efforts of management to amend rather than rescind the Letter of Removal cannot reasonably be viewed as satisfying the requirement that management issue the Grievant a Notice of Proposed Removal. The memorandum of J.M. Mills dated August 9, 1996, merely referenced that an addendum letter would be forthcoming regarding the employee’s MSPB rights and proposed removal letter and that “the Grievant will be afforded all his protections and rights as a veteran preference eligible.” The memorandum from V. L. Thompson dated August 9, 1996, Subject: Amendment to Notice of Removal dated July 9, 1996, Notice of Proposed Removal, is wholly deficient in apprising the Grievant of his MSPB rights. This is so, in
that it only states that it is proposed that the Grievant be removed from the Postal Service and that the Grievant or his representative may review the material relied on to support the reasons for the notice at his office, and that the Grievant or his representative may answer the proposed removal within ten (10) days from the receipt thereof. In short, no information was provided to the Grievant regarding his substantive or procedural MSPB rights and no MSPB documentation furnished. While the Letter of Decision of Richard J. McKillop, Postmaster, Customer Services, dated October 21, 1996, sets forth the Grievant's rights as a preference eligible and included as an attachment thereto MSPB Regulations and MSPB Appeal Forms, this issuance is clearly after the fact and therefore cannot properly serve as a proper Letter of Proposed Removal. This belated inclusion in the Letter of Decision of the Grievant’s MSPB rights, in the considered judgment of the Arbitrator, deprives the Grievant of the timely procedural due process to which he is entitled.

The testimony of J.T. Adams, Executive Vice President of the Union, is that it was normal procedure to give notice to meet with the Postmaster within ten (10) days prior to Step 1. This is confirmed by the testimony of Mr. John Vogelpohl, Manager, Customer Services, who testified that the employee has the right to meet with the Postmaster within ten (10) days of receipt of the Letter of Proposed Removal to discuss his MSPB rights and that this is given to the employee prior to Step 1. Mr. Vogelpohl is shown to have further testified on cross-examination that the Postmaster can override the decision of the supervisor. Had the Grievant been afforded the opportunity to meet with the Postmaster within the ten (10) days and presented his position at that time with his representatives, the Postmaster, at this early stage of the investigation, could have disagreed with the assessment of a termination penalty. A timely issuance of the Letter of Proposed Removal to the Grievant would have allowed the Grievant to meet with the Postmaster and the latter consider whether mitigating circumstances existed that rendered termination unwarranted and modification of the discipline necessary.

As found herein, the Grievant is entitled to be informed of his MSPB appeal rights under the Veterans’ Preference Act in a timely manner and to have his “Proposed Removal” heard by the installation head within ten (10) days. The procedural error of the Employer of initially issuing a Notice of Removal rather than a proposed removal and failing to timely advise the Grievant of his MSPB rights and the right to meet with the Postmaster prior to Step 1 deprived the Grievant of the due process to which he is entitled and constitutes harmful error. Consequently, the removal letter was improper and violated Article 16 Section 5 of the National Agreement.

In view of the above findings, it is deemed by the Arbitrator to be unnecessary to this opinion that he further consider the additional procedural arguments as to whether there was concurrence, progressive discipline, double jeopardy or disparate treatment or address the substantive arguments on the merits of whether there was just cause for the Grievant’s removal dated July 9, 1996.