REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER
CARRIERS, AFL-CIO

BEFORE: I. B. Helburn ARBITRATOR

APPEARANCES:

For the U. S. Postal Service: R. Lee Harrison

For the Union: Gene Goodwin

Place of Hearing: Houston, TX

Date of Hearing: January 21, 1998

AWARD: The removal of the grievant was not for just cause. The grievance is sustained. The removal is null and void and all related documents must be expunged from the grievant’s file.

Date of Award: February 10, 1998
SOUTHERN REGION REGULAR ARBITRATION

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE
Houston, Texas

-and-

NATIONAL ASSOCIATION OF LETTER CARRIERS, Branch 283

APPEARANCES

For the Postal Service:

R. Lee Harrison; Labor Relations Specialist
Larry R. Moore; Supervisor
Denise Young; 204B
Brenda R. Crawford; Supervisor
Monica A. Middleton; Acting Manager

For the Union:

Gene Goodwin; Regional Administrative Assistant
Theophilus Groves; Chief Steward
Cornelius L. Curtis; Grievant

PERTINENT NATIONAL AGREEMENT PROVISION (JX-1)¹

ARTICLE 15
GRIEVANCE-ARBITRATION PROCEDURE

Section 2. Grievance Procedure—Steps

Step 1:

(b) In any such discussion the supervisor shall have authority to settle the grievance. The steward or other Union representative likewise shall have authority

¹ JX, MX and UX refer respectively to Joint, Management and Union Exhibits. The use of * * * denotes omitted language.
to settle or withdraw the grievance in whole or in part. No resolution reached as a result of such discussion shall be a precedent for any purpose.

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MODIFIED ARTICLE 16 -- DISCIPLINE PROCEDURE (MX-1)

Section 1. Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

Section 5. Removals

In the case of discipline involving discharge, the employee against whom disciplinary action is sought to be initiated shall be served with a written notice of the charges against the employee. The employee shall remain on the job or on the clock (in pay status) at the option of the Employer, for a period of thirty (30) days. In the event a grievance is filed within fourteen (14) days, the employee will not be removed but shall remain on the job or on the clock until disposition of the case through exhaustion of the grievance-arbitration procedure.

* * *

Section 11: Modification Provisions

A. For the purpose of this pilot, the parties agree not to raise the deferral of discipline as a defense in any arbitration proceedings under this test of modified Article 16 procedures. However, it is understood by all parties that the employee’s record, between the time the discipline is issued and the time the arbitration is heard, may be raised.

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BACKGROUND

Cornelius Curtis, the grievant, is a 15 year letter carrier working at the Julius Melcher Station. In late 1992 he was diagnosed with leukemia and thereafter with
Waldenstrom's macroglobulemia. Treatment involved chemotherapy and apparently about 18 months off the job. The latest related document in the record is dated March 29, 1995. Curtis is also an insulin-dependent diabetic, having been diagnosed in 1991. While the diabetes was originally managed with pills, the grievant testified that chemotherapy resulted in a need for injections as a way of managing the diabetes. The injections began in 1994 and in 1996 he was still having trouble with the dosage.

On October 12, 1996\(^2\), when Curtis was scheduled for a holiday schedule, he neither reported nor called in. He testified that what probably happened was that on October 12 he went into diabetic shock, which takes 2-3 hours to come out of. Under the circumstances, he did not think about calling. When he returned on October 15, Curtis told Larry Moore, his immediate supervisor, that he had been ill. Moore does not remember if he asked Curtis for documentation. The 3971 noted that the grievant had been sick but had not called in, and thus he was charged with AWOL. Curtis was not given a copy of the 3971 until the day before the arbitration hearing, when Supervisor Brenda Crawford give him a copy at the direction of R. Lee Harrison, the Postal Service advocate.

Curtis had had previous attendance problems, which resulted in a January 27, 1995 Letter of Warning, a March 27, 1995 14 day suspension and an October 29, 1996 14 day suspension, all for AWOL. The two suspensions are pending either an arbitration award or an arbitration hearing at this time.

On October 22, Curtis was given a pre-disciplinary hearing with steward Theo Groves in attendance. Curtis said that he had been "out of it" and did not remember anything about October 12. On October 29, the day the latest 14 day suspension was assessed, Moore proposed a removal. The disciplinary action request (DAR) submitted by the Postal Service at the hearing showed the concurring signature of Monica Middleton, Acting Manager, also dated October 29. A copy of the DAR submitted by the Union had no concurring signature. Moore testified that he gave Groves a copy of the DAR before Middleton had signed. Middleton testified that the additional writing on the DAR was hers.

\(^2\) Hereafter dates will be 1996 unless otherwise noted.
On November 8 Curtis was issued a Notice of Proposed Removal based on a charge of AWOL for the October 12 absence. The past elements noted above were included in the letter, as was a January 27, 1995 seven day suspension, which was mistakenly included as it had been reduced to the above-noted Letter of Warning. On March 21, 1997 a Letter of Decision was issued upholding the removal, which was to be effective a week later. On April 4, 1997 Curtis accepted modified Article 16 provisions, allowing him to work until final settlement of the grievance. Subsequently he has been charged with AWOL for January 2-5, 1998 and January 16, 1998.

The removal had been grieved on November 25, 1996 at Step 1. The grievance was denied by 204B Denise Young, then the grievant's immediate supervisor, as Moore had moved to another station. Young, who has never overturned a suspension or a removal at Step 1, testified that she was not told not to settle the grievance. Middleton did not recall telling Young not to settle, but when told on cross examination that Young had never overturned a suspension or a removal, Middleton replied, "How can she? She's a supervisor and I'm a manager." When asked on redirect about Young's ability to settle the grievance, Middleton noted that there might be a meeting of the minds between them, but that Young could not overturn the discipline on her own.

The grievance was appealed following Young's denial and denied again at Steps 2 and 3. The matter was then advanced to arbitration and assigned to the undersigned regional panel arbitrator. The grievance was heard in Houston, TX on January 21, 1998. Witnesses were sequestered, affirmed before testifying and cross examined. The grievant was present throughout and testified in his own behalf. Documentary as well as testimonial evidence was received. The parties summed up orally but agreed to hold the record open until February 6, 1998 for the submission of past awards. The Postal Service awards were received on February 6. The Union awards were received on February 9, 1998, the date the record was closed.

ISSUE

The stipulated issue is:

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2 Arbitrator's notes.
Was the removal of the grievant for just cause and if not what is the appropriate remedy?

POSTAL SERVICE POSITION

The Postal Service believes that the removal was for just cause and that the grievance should be denied for reasons noted below.

1. The Postal Service has met the elements of just cause. With 15 years of service and prior discipline for AWOL, Curtis knew the rules about calling in. These rules are reasonable and violation is cause for discipline. Curtis had been cautioned and suspended, thus he had been progressively disciplined. The latest offense was proven.

2. Moore was not obligated to combine the grievant’s last two AWOLs. Curtis got a break when he was given a second 14 day suspension rather than a removal.

3. Curtis was on restricted sick leave and needed to bring documentation for his absence. He did not deny saying that he was “out of it” on October 12, but he could have provided a complete explanation for the absence.

4. Concurrence with Moore’s request for removal did not have to be in writing, but Middleton explained why the Union’s copy of the DAR was not signed. Labor Relations would not have accepted a DAR without proper concurrence.

5. Management was aware of Curtis’ medical problems, but he wants the Postal Service to believe that medical problems have caused his recent absences. However, the 3971s show transportation, loss of electrical power and bunions as causes. Furthermore, 1994 documentation cannot be used to cover absences occurring in 1996 and thereafter. The grievant has not made every effort to avoid unscheduled absences.

6. The Union has claimed discrimination, but Curtis waived his EEO rights when he elected modified Article 16. Documents do not show discrimination. While Blacks at Julius Melcher Station have received more discipline than others, there are three times as many Blacks at the station than others.

7. Because Young never overturned discipline does not mean that she did no have the authority to do so. It is possible that Labor Relations did a good job so that the discipline was good.
8. Curtis has not improved. He was AWOL from January 2-5, 1998 and again on January 16, 1998. On January 16 he left the station after being told to stay. When he learned that there was no arbitration hearing, he did not return to the station. The grievant's testimony was not credible, as Crawford said that she heard Groves tell Curtis not to go.

9. Documents not listed on the appeal were improperly introduced and should have no bearing in this case. Also, the Union has used "procedural deficiency" as an umbrella to cover more specific charges made for the first time at the hearing. These charges should be disregarded.

10. No reason was given for people to lie about Curtis. Obviously he has been suspended for AWOL within the past five years. He received a pre-disciplinary hearing and his appeal rights were set forth in the Notice of Proposed Removal. Curtis has been accorded due process.

11. One national and 16 regional awards were submitted in support of various USPS contentions.

UNION POSITION

For reasons summarized below, the Union believes that the removal was not for just cause and that the grievance should be sustained and the removal purged from the record. However, if the removal is viewed as for just cause, the arbitrator is urged to delay issuance of the award pending final action on the two 14 day suspensions which preceded the removal.

1. Curtis was charged with AWOL, not with providing unacceptable evidence. Yet the charge stemmed from the Postal Service's failure to provide guidance as to acceptable documentation.

2. Curtis provided an explanation for his absence on October 12 when he told Moore that he had been ill. Moore did not ask for documentation. There is no evidence to show that the grievant was on restricted sick leave at the time.
3. The Postal Service did not provide corrective rather than punitive discipline. Curtis was removed for a one day absence when that could have been made a part of the 14 day suspension which was issued the day of the DAR for the removal.

4. Procedural error occurred when there was no concurrence for Moore’s DAR. Middleton never told the Union of the signed DAR. Information later was written on the DAR, but the Postal Service cannot correct procedural errors after the fact.

5. Young did not have the authority to resolve the grievance at Step 1. She testified that she had never overturned a suspension or a removal and Middleton testified that Young could not overturn discipline.

6. The documentation shows discriminatory discipline at Julius Melcher station. No white employees have been disciplined. Problems at the station account for the management shuffle there.

7. Rather than refer the grievant to the EAP as required, the Postal Service did all it could to get rid of him.

8. Crawford gave the disapproved 3971 for October 12 to Curtis the day before the arbitration hearing after being told to do so by Lee Harrison. Obviously she was coached.

9. The Union submitted nine awards in support of its various contentions.

DISCUSSION

The Union has raised two procedural issues, both of which are ripe for arbitral consideration having been mentioned in the Step 2 appeal. Both must be considered as threshold questions prior to consideration of the merits.

First, the Union claims that “the proposed removal was never concurred with by higher authorities” (JX-2, p. 9). While the Union’s allegation is understandable, based on the unsigned DAR mistakenly given to Groves by Moore, it is without substance. Moore testified credibly that he gave the DAR to Groves before Middleton added her concurring signature. Middleton testified credibly that she signed as the concurring official and that she was responsible for the additional writing which was not on Groves’ copy of the DAR.
The testimony of Moore and Middleton shows convincingly that Article 16.8 was complied with and that no procedural error is attached to the submission of the DAR.

Second, the Union claims that "the 204B had no authority to settle the grievance at Step 1" (JX-2, p. 8). Unlike some arbitrators, I am unwilling to make an assumption that every time discipline is initiated by other than the immediate supervisor, that supervisor has no authority to settle a Step 1 grievance. Conclusions must be based on more than simply assumptions. In this case, the conclusion that 204B Young did not have the authority to settle the grievance is based on very firm evidence. Young's testimony that she has never overturned a suspension or a removal raises questions about her authority to settle, but in and of itself is not sufficient evidence to support the Union. On the other hand, Middleton's very candid testimony is. When told that Young had never overturned a suspension or a removal, Middleton responded, "How can she? She's a supervisor and I'm a manager." The only reasonable interpretation of the response is that Middleton believed that nobody in a lower supervisory capacity could set aside discipline she had concurred with. If this testimony left room for doubt, no room was left after the redirect examination in which the Postal Service advocate tried to rehabilitate his witness. In so many words, Middleton said that it was possible that she and Young could agree on a resolution (there might be a meeting of the minds between them), but that Young could not overturn discipline on her own. Middleton testified as the Acting Station Manager. Given that testimony, it does not matter whether Young was or was not told not to settle the grievance. It is clear that she did not have the authority to do so.

Article 15.2 requires that both the supervisor and the steward or Union representative handling the Step 1 grievance have the authority to settle. The language has been negotiated in order to encourage settlement to the greatest extent possible. Where one or both representatives come to the grievance procedure without the authority to settle, the process is a sham. Furthermore, the failure of the Management representative to come to the Step 1 meeting with full authority to settle the grievance is a serious enough breach of the grievant's due process to require that the grievance be sustained on that basis alone without consideration of the merits. That is clear from the

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4 Arbitrator's notes.
awards of such experienced and well-respected postal arbitrators as Dennis R. Nolan in case no. S4N-3A-D 37169 (1987), Robert G. Williams in case no. S4N-3F-D 29534 (1986), J. Fred Holly in case no. S8N-3F-D 9885 (1980), J. Reese Johnston, Jr. in case no. H94N-4H-D 96060209 (1996) and others such as Nicholas H. Zumas and Jonathan Dworkin whose awards were referred to but not submitted.

The procedural error precludes consideration of the merits of the case. Thus no purpose would be served by commenting on either additional awards submitted by the Union or any of the awards submitted by the Postal Service.

AWARD

The removal of the grievant was not for just cause. The grievance is sustained. The removal is null and void and all related documents are to be expunged from the grievant's file.

I. B. Helburn, Arbitrator

Austin, Texas
February 10, 1998