

C-19737

REGULAR ARBITRATION PANEL

***** GRIEVANT
 * In the Matter of Arbitration Between * Robert Galgan
 *
 * UNITED STATES POSTAL SERVICE * POST OFFICE
 * * Hampton Bays, NY
 * and *
 * * CASE NO.:
 * NATIONAL ASSOCIATION OF * USPS#A94N-4A-D 99030423
 * LETTER CARRIERS, AFL-CIO * GTS:#23183

BEFORE: Thomas J. DiLauro, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Mary McGee, Advocate

For the Union: Rick Hubert, Advocate / Branch 6000-NALC

PLACE OF HEARING: Hauppauge, NY

DATE OF HEARING: June 30, 1999

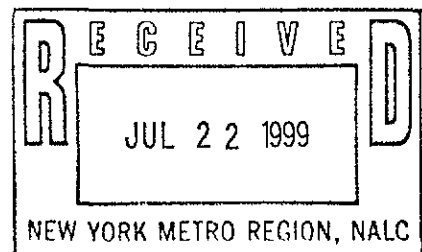
AWARD:

The grievance is sustained in part, denied in part. The Postal Service is directed to reinstate the grievant to his former position as a full time letter carrier T-6 at the Hampton Bays, NY post office, without back pay, benefits or seniority, predicated upon meeting all of the following conditions no later than October 1, 1999: 1.) Receipt of a valid New York state driver's license with full driving privileges without any conditions, with documented verification provided to the Postal Service; 2.) Completion of another thirty (30) day in-house residential alcohol rehabilitation program, with verification provided to the Postal Service. Attendance at such program shall be at the grievant's sole expense; 3.) Continued enrollment in Treatment Alternatives to Street Crime (TASC), Alternatives, Alcoholics Anonymous and EAP at the grievant's sole expense, with verification provided to the Postal Service. If any of the above conditions are not met by October 1, 1999, this reinstatement is to be converted to a termination. Finally, should the grievant meet all of the aforementioned conditions by October 1, 1999 and should there be further occurrences whereby his New York state driver's license without conditions is suspended, the Postal Service can take disciplinary action including termination.

DATE OF AWARD: JUL 1 3 1999



 Thomas J. DiLauro



BACKGROUND:

The grievant, Robert Galgan, was employed as a full time letter carrier T-6 at the Hampton Bays, NY post office. In August, 1997, the grievant was arrested for driving while intoxicated (DWI). As a result of this arrest, the grievant's driver's license was suspended, but was later reinstated with conditional driving privileges which allowed him to drive to and from work and to drive as part of his work related duties. In January, 1998, the grievant was again arrested for DWI, and as a result his driver's license was revoked. The grievant later obtained a hardship driver's license which restricted his driving privileges to the extent that he was precluded from driving to and from work and driving as part of his work related duties. In June, 1998, the grievant was once again arrested for DWI.

Per notice dated September 21, 1998, the grievant was advised that he was being removed from service pursuant to the charges of failing to maintain a valid state driver's license, and failure to demonstrate and maintain a safe driving record. Following unsuccessful settlement negotiations between the parties, the grievant was placed on emergency off-duty status per notice dated October 26, 1998, and was ultimately removed from service.

A grievance was filed by the Union protesting the Postal Service's action stating that the Postal Service had acted without just cause when it removed the grievant from service. This grievance was filed at Step 1 of the grievance procedure where it was initially denied. The grievance was then appealed to the various steps of the grievance procedure without resolution, and was thereafter timely appealed to arbitration.

This arbitrator was selected by the parties to render a final and binding decision regarding this grievance. To that end, a hearing was held on June 30, 1999 at which time the parties

presented testimony, exhibits and argument in support of their respective positions. The hearing was declared closed upon the conclusion of the parties' oral closing arguments.

ISSUE:

Did the Postal Service violate the terms of the Collective Bargaining Agreement between the parties by removing the grievant from service? If so, what shall be the remedy?

CONTRACT PROVISIONS:

ARTICLE 3 - MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

- A. To direct employees of the Employer in the performance of official duties;
- B. To . . . transfer, assign, and retain employees in positions within the Postal Service, and to suspend, demote, discharge, or take other disciplinary action against such employees;
- C. To maintain the efficiency of the operations entrusted to it;
- D. To determine the methods, means, and personnel by which such operations are to be conducted;

...

ARTICLE 16 - DISCIPLINE PROCEDURE

Section 1. Principles

In the administration of the 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, 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.

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. . . .

...

ARTICLE 29 - LIMITATION ON REVOCATION OF DRIVING PRIVILEGES

An employee's driving privileges may be revoked or suspended when the on-duty record shows that the employee is an unsafe driver.

Elements of an employee's on-duty record which may be used to determine whether the employee is an unsafe driver include but are not limited to, traffic law violations, accidents or failure to meet required physical or operation standards.

. . . When a revocation, suspension, or reissuance of an employee's driving privileges is under consideration, only the on-duty record will be considered in making a final determination. An employee's driving privileges will be automatically revoked or suspended concurrently with any revocation or suspension of [the] State driver's license and restored upon reinstatement. Every reasonable effort will be made to reassign such employee to non-driving duties in the employee's craft or in other crafts. In the event such revocation or suspension of the State driver's license is with the condition that the employee may operate a vehicle for employment purposes, the employee's driving privileges will not be automatically revoked. When revocation or suspension of an employee's driving privileges is under consideration based on the on-duty record, such conditional revocation or suspension of the state driver's license may be considered in making a final determination.

...

An employee must inform the supervisor immediately of the revocation or suspension of such employee's State driver's license.

EMPLOYEE & LABOR RELATIONS MANUAL

864.3 Fitness for Duty

864.31 A fitness-for-duty examination is required in determining whether an employee is able to perform the duties of the position because of medical reasons, i.e., disability, occupational/nonoccupational injury, or illness.

...

864.4 Return to Duty After Extended Illness or Injury

864.41 Employees returning to duty after 21 days or more of absence due to illness or serious injury require medical certification. Employees must submit medical evidence of their ability to return to work, with or without limitations. A medical officer or contract physician evaluates the medical report and makes a medical assessment to assist management in employee placement to jobs where they can perform effectively and safely.

EMPLOYEE HANDBOOK M-41

811 Vehicle Regulations

811.1 Responsibility of Carrier

811.11 Be sure you are qualified to drive the vehicle assigned to you; maintain a valid state driver's license.

811.12 Advise your immediate manager of suspension or revocation of your state license.

HANDBOOK EL-303, DOCUMENT Q2300h, November 30, 1987

BARGAINING UNIT QUALIFICATION STANDARD

CITY OR SPECIAL CARRIER - LEVEL 5

Additional Provisions:

...

4. For positions requiring driving, applicants must have a valid state driver's license, and demonstrate and maintain a safe driving record. ...

STD POSITION DESCRIPTION, March 3, 1992
CARRIER (CITY OR SPECIAL), PS-05

Functional Purpose

Delivers and collects mail on foot or by vehicle . . .

POSTAL SERVICE POSITION:

The Postal Service contends that it possessed sufficient just cause to remove the grievant from service for his failure to maintain a valid state driver's license and failure to demonstrate and maintain a safe driving record, and that the instant grievance should therefore be denied in its entirety.

The Postal Service maintains that the grievant as a letter carrier was required to maintain a valid state driver's license in order to perform his work duties. Although the grievant's driver's license had been suspended and later reinstated, it was ultimately revoked for an indefinite period of duration following his third DWI arrest in June, 1998. Thus, the grievant was rendered incapable of performing his letter carrier duties given the revocation of his driving privileges.

The Postal Service confirms that it initially assigned the grievant to perform non-driving duties per its obligation to do so under Article 29 of the Collective Bargaining Agreement. However, too little non-driving work was available to sustain the grievant as a full time employee. Further, the grievant did not possess the requisite skills needed to transfer into a clerk craft position. In this regard, the Postal Service notes that Article 29 does not require it to make "every" effort to secure in-craft or out-of-craft work under such circumstances, but merely a "reasonable" effort.

The Postal Service asserts that the grievant failed to demonstrate and maintain a safe driving record given his three DWI arrests within the period of one year. Although each of these arrests was made while the grievant was off-duty, such driving record suggests that the grievant posed a real risk of being an unsafe driver while on-duty. Further, the grievant failed to provide the Postal Service with sufficient information regarding the status of said arrests when asked by management to do so.

The Postal Service acknowledges that the grievant is an alcoholic who has sought treatment through EAP as well as private and court ordered rehabilitation programs. However, the grievant's long and continuous pattern of alcohol related problems at Hampton Bays and other post offices, in addition to his recent rash of DWI arrests, indicates that his efforts at rehabilitation have not been sufficiently successful to justify his continued employment as a mounted letter carrier.

The Postal Service observes that the grievant was previously warned of his requirements to maintain a valid driver's license and to demonstrate and maintain a safe driving record. He was also made aware that any failure on his part to adhere to these requirements would result in disciplinary action, up to and including removal from service. Nonetheless, he accrued three DWI arrests within a one year period, resulting in the permanent revocation of his driver's license by the state. Thus, the grievant should have been aware that his continued failure to demonstrate and maintain a safe driving record and his ultimate failure to maintain a valid driver's license would result in his removal from service.

The Postal Service's witness, Harry Kline, testified that he is employed by the Postal Service as the Supervisor Customer Service at the Hampton Bays, NY post office, and that he has been employed by the Postal Service for a total of eleven years. Mr. Kline was the grievant's supervisor

for two years.

Mr. Kline affirmed that the grievant lost his driver's license due to three DWI arrests. The grievant's first DWI arrest occurred in August, 1997. On the date of that arrest, the grievant failed to report for work. On the following day, the grievant reported for work and informed Mr. Kline that he had been arrested. In January, 1998, the grievant's second DWI arrest occurred, a fact which Mr. Kline first learned from one of the grievant's fellow letter carriers. In June, 1998, the grievant's third DWI arrest occurred. As with his first arrest, the grievant informed Mr. Kline of his second and third arrests.

Mr. Kline stated that as a result of the grievant's first DWI arrest, his driver's license was suspended. In November, 1997, the grievant obtained a conditional driver's license which allowed him to drive to and from work and to drive as part of his work related duties. As a result of the grievant's second DWI arrest, his driver's license was revoked. Thereafter, the grievant obtained a hardship driver's license of indefinite duration which only allowed him to drive his mother to the doctor, etc., but did not allow him to drive to and from work or as part of his work related duties. As of the time of the grievant's third DWI arrest, his license was revoked and remains so to this day.

Mr. Kline explained that as a letter carrier, the grievant was required to maintain a valid driver's license and to demonstrate and maintain a safe driving record. The valid driver's license requirement is included in both the Postal Service's qualifications for city letter carriers and the letter carrier's handbook. Mr. Kline believed that the grievant failed to meet these requirements given his three DWI arrests and resulting revocation of his driver's license. Even though each of the grievant's DWI arrests had occurred while he was off-duty, Mr. Kline noted that such arrests and unsafe driving practices could expose the Postal Service to liability.

Mr. Kline recalled that the grievant was not disciplined following his first DWI arrest given management's belief that the incident had been an isolated one, and given the grievant's claim that he was seeking help for his alcoholism. Thus, instead of disciplining him, management referred the grievant to EAP. Similarly, the grievant was not disciplined following his second DWI arrest, and was instead referred to receive thirty days of rehabilitative treatment. In this regard, Mr. Kline conferred with the Union and helped the grievant get immediately admitted to Seafield, a rehabilitative treatment center.

Following his receipt of this treatment, the grievant returned to work, whereupon Mr. Kline allowed him to case mail and to use annual sick leave to make up the time during the day in which he did not work. At that time, the DWI charges against the grievant had yet to be resolved. However, by June, 1998, Mr. Kline realized that the grievant was not attempting to correct the problems with his driving record.

Mr. Kline then checked the grievant's driving abstracts which reflected the fact that his driver's license had been suspended and later revoked. The grievant had provided no information to Mr. Kline concerning the status of his driver's license, and Mr. Kline believed that the revocation of said license was not temporary.

Mr. Kline noted that following his third DWI arrest, the grievant was ordered by the court to undergo thirty days of inpatient treatment. On August 1, 1998, the grievant returned to work, but still failed to provide management with information regarding his driving status. Therefore, management conducted a pre-disciplinary interview into the matter which ultimately led to the grievant's removal from service.

Mr. Kline testified that at the Hampton Bays, NY post office, all routes are mounted as the post office serves a rural area, and thus there are no walking routes. Due in part to this lack of walking routes, management could not reasonably accommodate the grievant as it could not provide him with eight hours worth of casing and/or other non-driving duties. For example, the grievant was not trained as a clerk, and not enough clerk craft work existed to provide him with forty hours of work per week.

Mr. Kline observed that per Article 29 of the Agreement, management is not required to assign non-driving duties under such circumstances, but is instead merely required to make a reasonable effort to do so. According to Mr. Kline, management advised the grievant that it could not reasonably accommodate him in this manner, and further advised him that failure on his part to maintain a valid driver's license could result in discipline. Mr. Kline himself advised the grievant of this risk of discipline on or about the time of the grievant's second DWI arrest. At no time did the grievant grieve management's inability to accommodate him.

Mr. Kline confirmed that he was aware that the grievant had been going through a divorce. He further confirmed that from August 1997 through August, 1998, the grievant was never involved in an accident while operating a Postal Service vehicle.

The Postal Service's witness, Carmine Plucino, testified that from September, 1997 through December, 1998, he was employed by the Postal Service as the Officer In Charge (i.e., the acting Postmaster) at the Hampton Bays, NY post office in Postmaster Robert Hill's absence.

Mr. Plucino stated that in June, 1998, he learned that the grievant had again been arrested for DWI. At the time, the grievant had told him that the arrest concerned a non-alcohol related offense, namely driving without a license. However, the grievant's statement was not true, a fact

which Mr. Plucino learned after having received and reviewed the grievant's driving abstracts and having seen an article in a local newspaper reporting the grievant's arrest.

A few days later, the grievant told Mr. Plucino that he had been order to enter a substance abuse rehabilitation program for thirty days, and that the disposition of his January, 1998 and June, 1998 arrests would not be settled until after his thirty day rehabilitation period. Once the grievant had completed his rehabilitation, he returned to work. Upon his return, the grievant was assigned to case mail and to take leave for the balance of each work day.

On August 31, 1998, Mr. Plucino requested a meeting with the grievant and a Union shop steward regarding the disposition of the grievant's three DWI arrests. At that meeting, the grievant stated that sentencing for his January, 1998 and June, 1998 arrests would occur in late October, 1998. He also stated that he wanted to continue to perform his non-driving duties at the post office; however, Mr. Plucino informed him that this would not be possible. Also at that meeting, the Union shop steward indicated that the Union was working on transferring the grievant to the clerk craft. This transfer did not occur, however, as no vacancies in the clerk craft existed.

Mr. Plucino testified that he could not have unilaterally assigned the grievant to a part time flex (FTF) clerk position. Further, the grievant did not possess sufficient training to perform such clerk craft duties. Mr. Plucino conceded that at the time, a casual employee worked at the post office in the morning unloading trucks, etc. However, given the overlap in morning work hours, the grievant could not have cased mail and performed such casual work at the same time. Overall, Mr. Plucino believed that management made a reasonable effort per Article 29 of the Agreement to accommodate the grievant by assigning him non-driving work.

Sometime prior to the grievant's third DWI arrest, Mr. Plucino had informed him that management could not permanently provide him with non-driving duties, and that he could be disciplined or lose his job if he did not clear up his problems concerning the DWI arrests, his driver's license, etc. Eventually, the grievant provided Mr. Plucino with a court document referring to the disposition of his August, 1997 arrest; however, the content of this document was vague.

Mr. Plucino conceded that he never sent the grievant to take a fitness-for-duty or return-to-duty exam. He did, however, notify EAP when the grievant was in rehabilitation following his January, 1998 arrest.

According to Mr. Plucino, the grievant was removed from service for failing to maintain a valid driver's license, not for being arrested three times for DWI. At the instant hearing, the parties stipulated that at Step 1 of the grievance procedure, Mr. Plucino met with the Union to discuss the grievant's placement on emergency off-duty status.

The Postal Service's witness, Fran Iannoni, testified that she is employed by the Postal Service at the Hampton Bays, NY post office as a Human Resource Specialist.

Ms. Iannoni was called to testify regarding the grievant's driving abstracts indicating that his driver's license had been indefinitely revoked and not merely suspended. However, at the instant hearing, the Union objected to the submission of Ms. Iannoni's testimony in that regard, whereupon the parties each agreed to respectively submit the following exhibits concerning the present status of the grievant's driver's license:

Union Exhibit U-2: County Court document indicating that the grievant's driver's license has been suspended for one year.

Postal Service Exhibit M-4: Abstract from state DMV indicating that the grievant's driver's license has been indefinitely suspended.

The Postal Service's final witness, Robert Hill, testified that he is employed by the Postal Service at the Hampton Bays, NY post office as its Postmaster, a position he has held for the past ten years. Mr. Hill has been employed by the Postal Service for a total of thirty-eight years.

Mr. Hill offered rebuttal testimony concerning the settlement of a grievance on January 4, 1999 concerning an October, 1998 incident wherein the grievant was allegedly found to be intoxicated while on-duty and was ultimately placed on emergency off-duty status. The issue of this grievance was whether the Postal Service had a duty to take the grievant to a doctor at the time of the incident. Regarding this issue, Mr. Hill believed that the grievant should have been taken to a doctor. However, Mr. Hill did not intend via the settlement of said grievance to preclude any mention in the future of the grievant's placement on emergency off-duty status.

In conclusion, the Postal Service notes that the grievant's misconduct was violative of its Standards of Conduct, and detrimental to its business operations, particularly its efforts to provide efficient mail delivery service. Thus, given that the grievant failed to maintain a valid state driver's license and failed to demonstrate and maintain a safe driving record, the Postal Service argues that it possessed sufficient just cause to remove the grievant from service, and that the grievance should be denied in its entirety.

UNION POSITION:

The Union maintains that the Postal Service lacked sufficient just cause when it removed the grievant from service, and that the instant grievance should therefore be sustained in its

entirety.

The Union asserts that the grievant was employed by the Postal Service for twenty-one years. In 1996, he was involved in a bitter divorce, at which time he began to abuse alcohol. This alcohol abuse resulted in his off-duty DWI arrests and the suspension and eventual revocation of his driver's license

The Union notes, however, that the grievant properly advised the Postal Service of the suspension and ultimate revocation of his driver's license, and provided it with sufficient information concerning his DWI arrests. He also willingly accepted and performed non-driving duties at the post office during such periods when his work related driving privileges had been revoked. However, the Postal Service never sought casual work for the grievant at the post office or any non-driving work for him at other post offices as it was required to do under Article 29 of the Collective Bargaining Agreement.

The Union observes that the grievant has sought and received rehabilitation in a number of programs for his alcohol abuse problem, and is doing well in these programs. Upon completion of one such program within the next few months, the grievant will be eligible to have his driver's license reinstated. Nonetheless, the Postal Service acted to hinder and ignore the grievant's efforts to recover from his acknowledged alcohol abuse problem by failing to refer him to EAP (or, at the very least, offering written evidence as to when it allegedly referred him to EAP), and by failing to administer a fitness-for-duty exam as required under the ELMs.

The Union argues that the Postal Service improperly considered the grievant's off-duty driving record when assessing his ability to demonstrate and maintain a safe driving record, whereas Article 29 of the Agreement requires that only an employee's on-duty driving record be

considered to determine whether such employee is a safe driver. Further, the grievant was issued no progressive discipline for his alleged infractions, but was instead removed from service in a punitive rather than corrective manner.

The Union's witness, the grievant Robert Galgan, testified that he has been employed by the Postal Service as a letter carrier for twenty-one years. He first worked at the Manhattan, NY post office for ten years, then worked at the Center Ridge, NY post office for six years, then worked at the Hampton Bays, NY post office for five years through the date of his removal from service.

The grievant acknowledged that he is a recovering alcoholic, and asserted that his alcoholism had been brought on as the result of a difficult divorce. Since the date of his removal from service, the grievant has worked as a house painter.

The grievant admitted that following his first DWI arrest in August, 1997, he returned to work delivering mail with a conditional driver's license. Following his second DWI arrest in January, 1998, the grievant again returned to work, and informed management that he had been arrested. However, his driver's license had by this time been revoked. Between January and June, 1998, the grievant met with EAP once every few weeks.

Following his third DWI arrest in June, 1998, the grievant completed a rehabilitation program at Seafield. Upon his release from Seafield, the grievant discontinued his use of alcohol, and enrolled in two programs where he has been monitored for alcohol use. One of these programs, Treatment Alternatives to Street Crime (TASC), is a one year court ordered program which currently monitors the grievant via urine tests. The other program, Alternatives, currently monitors the grievant via breathalyzer tests. The grievant has maintained strict attendance at these two programs. Also following his third DWI arrest, the grievant went to the Long Island

Rehabilitation Center (LIRC) for treatment, and began attending Alcoholics Anonymous meetings.

The grievant recalled that he had never been involved in any on-the-job vehicular accident. He affirmed that prior to his first DWI arrest, he had maintained a valid and clear driver's license.

On cross examination, the grievant initially stated that he had no alcohol related problems while on-duty, but later confirmed that he had in fact had such problems. For example, in 1987, he was charged by the Postal Service with allegedly being under the influence of an intoxicant while on-duty. Also, while working at the Center Ridge, NY post office, he would occasionally use alcohol while on-duty, and went into rehabilitation at that time to address his alcohol problem.

The grievant then initially stated that he has not had a drink of alcohol since June, 1998. However, he admitted that on October 24, 1998, a customer complained that he appeared to be intoxicated while on-duty, whereupon the Postal Service placed him on emergency off-duty status. According to the grievant, at the time of this incident he was under the influence of prescription medication and had not been drinking alcohol. While on-duty, he suddenly felt dizzy and eventually passed out, whereupon another letter carrier finished his delivery route.¹

The grievant also initially stated that he had no problem with illegal drugs. However, on cross examination, he admitted that in 1982, the Postal Service charged him with allegedly buying illegal drugs while in uniform. He also conceded that he has used illegal drugs in the past, but added that he no longer uses drugs.

¹The Union objected to the Postal Service's reference to this incident, noting that no medical documentation was ever produced proving that the grievant was intoxicated as alleged, and that the matter itself was ultimately settled by the parties.

The grievant explained that reinstatement of his presently revoked driver's license is dependent upon his completion of the one year TASC program.

In summary, the Union maintains that the Postal Service's removal of the grievant from service was unreasonable under the circumstances, and that the grievance should therefore be sustained in its entirety. The Union demands that the Postal Service reinstate the grievant to his former position as a letter carrier T-6 with full back pay and benefits, and otherwise make the grievant whole.

OPINION:

The parties are commended for the well prepared and presented cases in support of their respective positions.

The issue in the instant case is whether the Postal Service properly removed the grievant from service for just cause. In particular, the question arises as to whether the Postal Service permissibly removed the grievant from service pursuant to his alleged failure to maintain a valid state driver's license and failure to demonstrate and maintain a safe driving record as a result of his three off-duty DWI arrests which occurred between August, 1997 and June, 1998.

"Discharge is recognized to be the extreme industrial penalty since the employee's job, seniority and other contractual benefits, and reputation are at stake." Elkouri and Elkouri, How Arbitration Works 905 (Goggin and Volz eds., BNA, 5th ed. 1997) (cites omitted). In discharge cases, the burden of proof rests on the employer to show that the discharge was in fact for "just cause." The employer must meet this burden of proof by showing that it possessed "just cause" to impose the disciplinary action upon the employee. See, Hussman Refrigerator Co., 68 LA 565,

569-570 (Mansfield, 1977).

As noted by Arbitrator Burton B. Turkus:

In applying the test of "just cause" the arbitrator is generally required to determine two factors: (a) has the commission of the misconduct, offense or dereliction of duty, upon which the discipline administered was grounded, been adequately established by the proof; and (b) if proven or admitted, the reasonableness of the disciplinary penalty imposed in the light of the nature, character and gravity thereof -- for as frequently as not the reasonableness of the penalty (as well as the actual commission of the misconduct itself) is questioned or challenged in arbitration.

Great Atlantic and Pacific Tea Co., 63-1 ARB ¶8027, 3090 (Turkus, 1962).

Concerning the quantum of proof required, "[i]n general, arbitrators . . . [use] the 'preponderance of the evidence' rule or some similar standard in deciding fact issues before them, including issues presented by ordinary discipline . . . cases." Kroger Co., 25 LA 906, 908 (Smith, 1955). However, "[a] higher standard of proof also has been invoked where the misconduct involves criminal conduct or 'moral turpitude.'" Fairweather, Practice and Procedure In Labor Arbitration 201 (Schoonhoven, ed., BNA, 3rd ed., 1991). "Because quantum of proof concerns the arbitrator's evaluative processes, rather than the parties' adversarial burdens, the determination and application of the quantum of proof is uniquely within the arbitrator's purview." Fairweather, at 196.

In the instant case, the Postal Service lacked sufficient just cause to remove the grievant from service given the lack of consistent evidence to support its assertion that the grievant's driver's license was permanently revoked by the state. However, this arbitrator finds that some lesser form of discipline is appropriate given the adverse effect that the grievant's conduct had on the Postal Service's business operations.

This arbitrator notes that the parties offered conflicting documentary evidence concerning the question as to when and if the grievant's driver's license would be reinstated. Therefore, as the Postal Service failed to meet its burden of proof regarding this issue, this arbitrator concurs with the Union's evidence that the grievant's license shall be reinstated upon his successful completion of the one year court ordered TASC rehabilitation program, which can reasonably be presumed to occur no later than October 1, 1999.

The Union argued that the grievant's driving record, i.e., his three DWI arrests, should not have been considered by the Postal Service to determine if he had maintained a safe driving record given that all three arrests occurred while the grievant was off-duty. On this narrow point, the Union is correct. However, because such DWI arrests resulted in the suspension and eventual revocation of the grievant's driver's license which thus impaired his ability to perform his duties as a mounted letter carrier, these arrests were properly considered by the Postal Service in its attempt to determine when and under what circumstances his driver's license had been suspended, reinstated, and ultimately revoked.

The Union further argued that the grievant had successfully sought and received rehabilitative treatment for his alcohol abuse problem. Concededly, the grievant has entered a number of rehabilitation programs for his problem; however, his credibility regarding the nature and extent of his problem was severely undermined upon cross examination. In particular, the grievant when testifying on cross examination did not readily admit to certain facts concerning his prior disciplinary record and alleged on-the-job alcohol related incidents until such facts were shown to be true by the Postal Service's advocate.

This arbitrator believes that the Postal Service made every reasonable effort to accommodate the grievant by providing him with non-driving duties which he was qualified to perform, and offered credible evidence indicating that unfortunately for the grievant, too little of such non-driving work existed for him to continuously perform on a full time basis. Yet, the Postal Service concluded that because of this dearth of non-driving work, the grievant needed to be removed from service given that his driver's license had been permanently revoked. However, as stated earlier, this arbitrator finds that the Postal Service's conclusion in this regard was not based on just cause given the lack of sufficient evidence concerning the alleged permanence of this revocation.

This arbitrator acknowledges that from an overall disciplinary standpoint, the grievant was for the most part an outstanding employee of long standing with the Postal Service. Nonetheless, the grievant has a serious substance abuse problem for which he continues to require rehabilitation. Due to this substance abuse problem, the state found it necessary to revoke his driver's license and its privileges after he had been arrested for alcohol related offenses no less than three times within a one year period. To allow his license to be revoked in this manner evidences the grievant's lack of diligence to prevent his substance abuse problem from impairing his ability to work as a mounted letter carrier, as well as the Postal Service's ability to efficiently carry out its operations.

Thus, as the grievant exhibited a significant lack of diligence in maintaining a New York state driver's license without conditions, and as such lack of diligence on the grievant's part adversely affected the Postal Service's ongoing efforts to deliver the mail in an efficient manner, this arbitrator finds that some form of discipline, albeit a lesser form of discipline than removal from service, is appropriate under the circumstances.

Where the agreement fails to deal with the matter, the right of an arbitrator to change or modify penalties found to be too improper or too severe is believed to be inherent in the arbitrator's power to settle the dispute in question and to issue discipline. See, e.g., Interstate Brands, 97 LA 675 (Ellmann, 1991); Fogel, Court Review of Discharge Arbitration Awards, 37 Arb. J. No. 2, p. 22 (1982). In the words of Arbitrator Fogel:

Where the contract contains only language that specifies the employer's broad right to discipline or discharge, the courts have long held that an arbitrator may judge whether the penalty assessed by management fits the behavior that is alleged to be cause for a penalty, as well as establish whether the alleged behavior in fact occurred. If the punishment is found to be excessive, the arbitrator can reduce it, thereby modifying the assessed penalty.

Fogel, Court Review of Discharge Arbitration Awards, 37 Arb. J. No. 2, p. 24 (1982). See also, Local 53 v. Sho-Me Power Corp., 114 LRRM 2177, 2179-2180 (CA 8, 1983).

Therefore, the instant grievance is hereby sustained in part and denied in part in accordance with the terms of the Award below.

Finally, this arbitrator finds the cases cited by the parties in support of their respective arguments to be factually distinguishable from the instant case and therefore non-dispositive.

In the case cited by the Union, Arbitrator Snow held that Article 29 of the Collective Bargaining Agreement requires the Postal Service "to make temporary cross-craft assignments in order to provide work for carriers whose occupational driver's license been suspended or revoked." Case No. 194N-41-D 96027608, at pg. 23. However, in that case the grievant "declined an offer to transfer to the Clerk or Mail Handler craft" and was thereafter removed from service for declining said offer. Id., at pg. 4. Further, the Union (NALC) in that case contended that "sufficient nondriving duties [were] available in the Letter Carrier craft to permit the grievant's continued employment." Id. In addition, the Postal Service in that case argued that the assignment of cross-

craft duties to the grievant would have violated its obligations under a separate contract with the American Postal Worker's Union.

In contrast, although Article 29 certainly remains applicable, the Postal Service in the instant case demonstrated that it made every reasonable effort to assign clerk craft work to the grievant, work which the grievant willingly accepted, but that too little of such work was available to support the grievant as a full time employee. Also, the Postal Service did not assert that its decision to remove the grievant from service was in any way motivated by any conflict between its contracts with different unions. Thus, in the instant case the Postal Service acted reasonably to fulfill its obligations to secure employment for the grievant under Article 29.

In the case cited by the Postal Service, Arbitrator McCaffree held that the grievant's removal from service was justified given the revocation of the grievant's driving privileges, and given the lack of cross-craft work available into which the grievant could otherwise have been transferred. However, the grievant in that case was a short term employee whose driving infractions had occurred while on-duty. Also, the grievant in that case had received progressive discipline in the form of a three day suspension prior to his removal from service. In addition, the grievant's driving privileges in that case were revoked solely by the Postal Service, not by any state governmental licensing entity.

In contrast, the grievant in the instant case was a long term employee whose driving infractions occurred while off-duty. Also, his driving privileges were revoked not solely by the Postal Service, but initially by the state of New York which revoked his state driver's license and presumably has the power to reinstate his license at a future time at its discretion. In addition, despite his DWI arrests, the Postal Service elected not to issue any form of progressive discipline to

the grievant prior to his removal from service.

In the instant case, instead of allowing the grievant to completely serve his court ordered rehabilitation in an effort to regain his full driving privileges, the Postal Service prematurely opted to remove him from service given its eventual realization that it could not provide him with non-driving duties on a full time basis and its unsubstantiated belief that his state driver's license had been permanently revoked. The Postal Service did not, however, remove him from service due to any prior unilateral revocation of his driving privileges on its own part. Therefore, even though the Postal Service properly decided it could no longer reasonably provide cross-craft work for the grievant pursuant to his ongoing loss of driving privileges, his removal from service in the instant case was somewhat excessive under the unique circumstances of this case.

AWARD:

The grievance is sustained in part, denied in part.


The Postal Service is directed to reinstate the grievant to his former position as a full time letter carrier T-6 at the Hampton Bays, NY post office, without back pay, benefits or seniority, predicated upon meeting all of the following conditions no later than October 1, 1999:

- 1.) Receipt of a valid New York state driver's license with full driving privileges without any conditions, with documented verification provided to the Postal Service;
- 2.) Completion of another thirty (30) day in-house residential alcohol rehabilitation program, with verification provided to the Postal Service. Attendance at such program shall be at the grievant's sole expense;

3.) Continued enrollment in Treatment Alternatives to Street Crime (TASC), Alternatives, Alcoholics Anonymous and EAP at the grievant's sole expense, with verification provided to the Postal Service.

If any of the above conditions are not met by October 1, 1999, this reinstatement is to be converted to a termination.

Finally, should the grievant meet all of the aforementioned conditions by October 1, 1999 and should there be further occurrences whereby his New York state driver's license without conditions is suspended, the Postal Service can take disciplinary action including termination.


THOMAS J. DILAURO
Arbitrator
JUL 19 1999