In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

Before: Jonathan I. Klein, Arbitrator

Appearances:

For the Postal Service: Carolyn Turner
Labor Relations Specialist

For the Union: Joseph Henry
Union Advocate

Place of Hearing: Capitol Heights, Maryland

Date of Hearing: January 8, 2003

Date of Award: April 20, 2003

Relevant Contract Provisions: Articles 13, 16 and 19

Contract Year: 2001 - 2006

Type of Grievance: Discipline
AWARD SUMMARY

The grievance is sustained as follows. The Postal Service lacked just cause to issue the notice of removal to the grievant. Any sick leave utilized by the grievant for October 21, 2001, through December 10, 2001, shall be restored to her sick leave balance. The Postal Service shall comply with this Award within thirty (30) days from the date of issuance.

Jonathan I. Klein

APPEARANCES

For the Postal Service:

Carolyn Turner
Gwen Hawkins
Cameron Briggs
Melody Gaskins

Labor Relations Specialist
Customer Service Supervisor
Manager, River Terrace Post Office
Acting Area Customer Service Mgr.

For the National Association of Letter Carriers:

Joseph Henry
Kenneth Taylor
Robert Harnest
William Gunn
Louis Minor
Shareen Bowman
Harlisha Jones

Union Advocate
Vice-President, Branch 142
Exec. Vice-President, Branch 142
Steward
Steward
Letter Carrier
Grievant
ISSUE

The stipulated issue before the arbitrator is, as follows:

Did management have just cause to issue the grievant, Harlisha Jones, a notice of removal? If not, what shall be the remedy?

STATEMENT OF FACTS

The grievant, Harlisha Jones, is a letter carrier assigned to the River Terrace post office, and she has been employed by the Postal Service since 1995. On June 26, 2001, the grievant was issued a notice of removal as a result of her unsatisfactory attendance record. The Union filed a grievance to protest the alleged contractual violation by the Postal Service, and the parties subsequently resolved the grievance at Step B of the grievance procedure on August 17, 2001. (Joint Ex. 2, at 22 - 23). The Step B decision provides, in pertinent part, as follows: “The Dispute Resolution Team has resolved this grievance. The “Notice of Removal” for “Unsatisfactory Attendance” issued to the grievant will be held in abeyance for 1 year provided the grievant accepts and adheres to the conditions set forth in the attached Last Chance/Firm Choice Agreement.”

The “Last Chance/Firm Choice Agreement” entered into by the parties on August 27, 2001, provides, in pertinent part, as follows:

As a resolution of grievance K98N-4K-D01227242, the undersigned freely enters in this full and final settlement regarding the Notice of Removal dated June 26, 2001. The following constitutes a Last Chance/Firm Choice Agreement as reached by the Dispute Resolution Team and will be agreed to by the parties.
1. The Notice of Removal dated June 26, 2001 is hereby affirmed as just and proper.

2. The implementation of the removal will be held in abeyance for a period of one (1) year from the date of [the] Step B decision in order to give the grievant an opportunity to demonstrate compliance with all Postal Service rules and regulations and an opportunity to correct her unsatisfactory attendance provided the grievant meets the terms and conditions listed as follows.

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4. The grievant will maintain satisfactory attendance (including reporting for duty on time) and will not incur more than 3 unscheduled absences of any type, excluding AWOL (absent without leave) within any 6-month period during the one year abeyance period which begins when the grievant accepts the agreement. Any instance of AWOL will not be tolerated and will be considered sufficient grounds for removal. All absences due to illness must be documented with medical certification that clearly establishes that the grievant was incapacitated for duty for the entire period of the absence. Statements such as “under my care” or “received treatment” are not acceptable evidence of incapacitation. Additional information may be required for absences that may be protected by the provisions of the Family and Medical Leave Act (FMLA) in accordance with regulations. All absences charged, as Emergency Annual Leave (EAL) must be properly documented with evidence substantiating the emergency.

5. The terms of this agreement will remain in effect for a period of 18 months from the date of the grievant’s return to duty. The grievant’s failure to comply with any portion of this agreement during the 18 months, will be considered sufficient cause to issue the grievant a Notice of Removal based on her non-compliance with the term of this agreement.

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(Joint Ex. 2, at 24 - 25). (Italics in original).
On July 11, 2002, the grievant was involved in a physical altercation with another
employee in the workplace. As a result of the altercation, both the grievant and her co-worker
were placed in off-duty emergency placement status effective July 11, 2002, pursuant to Article
16.7 of the National Agreement. (Joint Ex. 2, at 30). The Union immediately filed a grievance
and the parties held a Step 1 meeting on July 11, 2002. (Joint Ex. 2, at 21). On July 24, 2002, the
parties resolved the grievance regarding the grievant's emergency placement, and the grievant
was returned to duty without backpay. (Joint Ex. 2, at 28).

On August 7, 2001, the Postal Service notified the grievant that a Pre-Disciplinary
Interview (PDI) regarding her attendance was scheduled for August 12, 2002. (Joint Ex. 2, at
103). The PDI was conducted as scheduled on August 12, 2002, at which time the grievant
indicated that stress had affected her attendance record. (Joint Ex. 2, at 104). On August 19,
2002, the Postal Service issued the grievant a notice of removal which provides, in part, as
follows:

You are hereby notified that you will be removed from the United
States Postal Service no sooner than thirty (30) days from the date
of your receipt of this letter.

Charge 1: Failure to Comply With Last Chance Agreement
On August 27, 2001, you entered into a Last Chance/Firm Choice
Agreement with, Management and your Union Representative.
You agreed to the conditions stated in the Last Chance/Firm
Choice Agreement. The Last Chance/Firm Choice Agreement item
1, states, “The implementation of the removal will be held in
abeyance for a period of one (1) year from the date of the Step B
decision in order to give the grievant an opportunity to demonstrate
compliance with all Postal Service rules and regulations and an
opportunity to correct her unsatisfactory attendance provided the grievant meets the terms and conditions listed as follows.” You failed to comply with the Postal Service’s rules and regulations when on July 11, 2002 you violated the Postal Service’s policy on Zero Tolerance. At approximately 10:00 a.m., I heard loud voices on the workroom floor. When I came out of the supervisor’s office I observed you and Ms. Stephanie Fields cursing and screaming at each other. You called her a “Bitch” and told her to get out of your face. While your fellow co-workers tried to separate you and Ms. Fields you attempted to kick Ms. Fields. You have been made aware of the Postal Service’s rule on Zero Tolerance.

Under the conditions stated in the Last Chance/Firm Choice Agreement you agreed to maintain a satisfactory attendance record. Item 4 of the agreement states in part, “The grievant will maintain satisfactory attendance (including reporting for duty on time) and will not incur more than 3 unscheduled absences of any type, excluding AWOL (absent without leave) within any 6-month period during the one year abeyance period which begins when the grievant accepts the agreement. Any instance of AWOL will not be tolerated and will be considered sufficient grounds for removal.” You failed to adhere to the terms of the agreement by not maintaining a satisfactory attendance record. Specifically, a review of your attendance record from September 25, 2001 through the present indicates that you have been absent from duty on the following occasions:

<table>
<thead>
<tr>
<th>Date Range</th>
<th>Reason</th>
<th>Hours</th>
</tr>
</thead>
<tbody>
<tr>
<td>06/03/02 thru 06/03/02</td>
<td>Unscheduled Emergency</td>
<td>6 Hours</td>
</tr>
<tr>
<td>06/03/02 thru 06/03/02</td>
<td>Annual Leave</td>
<td>30 Minutes</td>
</tr>
<tr>
<td>05/25/02 thru 05/25/02</td>
<td>Unscheduled Late</td>
<td>8 Hours</td>
</tr>
<tr>
<td>03/30/02 thru 04/02/02</td>
<td>AWOL</td>
<td>40 Hours</td>
</tr>
<tr>
<td>03/02/02 thru 03/02/02</td>
<td>Unscheduled Sick Leave</td>
<td>8 Hours</td>
</tr>
<tr>
<td>02/21/02 thru 02/21/02</td>
<td>Unscheduled Sick Leave</td>
<td>24 Hours, 30 Min.</td>
</tr>
<tr>
<td>01/18/02 thru 01/19/02</td>
<td>Unscheduled Sick Leave</td>
<td>16 Hours</td>
</tr>
<tr>
<td>01/07/02 thru [02]/07/02</td>
<td>Unscheduled Sick Leave</td>
<td>2 hours, 54 Min.</td>
</tr>
<tr>
<td>11/13/01 thru 11/14/01</td>
<td>Unscheduled Sick Leave</td>
<td>16 Hours</td>
</tr>
<tr>
<td>11/05/01 thru 11/07/01</td>
<td>Unscheduled Sick Leave</td>
<td>24 Hours</td>
</tr>
<tr>
<td>10/26/01 thru 10/26/01</td>
<td>Unscheduled Sick Leave</td>
<td>8 Hours</td>
</tr>
<tr>
<td>10/20/01 thru 10/20/01</td>
<td>Unscheduled Sick Leave</td>
<td>8 Hours</td>
</tr>
</tbody>
</table>
You failed to comply with the terms of the Last Chance/Firm Choice Agreement by not being regular in attendance and violating the Zero Tolerance Policy. You are therefore in violation of the Employee and Labor Relations Manual Part 511.43, which states, "Employees are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absence." You also violated section 666.2 of the Employee and Labor Relations Manual, which states, "Employees are expected to conduct themselves during and outside of working hours in a manner which reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal personnel be honest, reliable, trustworthy, courteous, and of good character and reputation. Employees are expected to maintain satisfactory personal habits so as not to be obnoxious or offensive to other persons or to create unpleasant working conditions."

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(Joint Ex. 2, at 11 - 12).

The Union filed a grievance to protest the grievant's removal from service, and the parties held a Step A meeting on August 25, 2002. (Joint Ex. 2, at 10). The grievance was subsequently denied at Step A, and the parties proceeded to Step B of the grievance procedure. On September 25, 2002, the Step B Dispute Resolution Team declared an impasse. (Joint Ex. 2, at 4 - 8). The Union requested that the parties proceed to arbitration on September 30, 2002 (Joint Ex. 2, at 3), and an arbitration hearing was subsequently held on January 8, 2003. At the hearing, both parties were afforded an opportunity to examine and cross-examine witnesses, and present documentary evidence in support of their respective positions. Both the Postal Service and the Union submitted post-hearing briefs and numerous arbitration awards on or before March 16, 2003.
At the arbitration hearing, customer service supervisor Gwen Hawkins discussed the duties and responsibilities of her position, and she acknowledged that she issued the grievant's notice of removal. (Joint Ex. 2, at 11 - 13). Hawkins testified that she reviewed all of the letter carriers' records when she returned to the River Terrace post office in January 2002, after a five-year absence from that location. She investigated the altercation between the grievant and a co-worker, and determined that the appropriate step was to issue a notice of removal to the grievant. Hawkins stated that she was present at the River Terrace post office when the altercation between the grievant and her co-worker occurred on July 11, 2002. According to Hawkins, the grievant and the other employee had to be physically separated. She described the altercation as a "loud commotion with name calling."

Hawkins confirmed that the issue of the grievant's attendance was included in the charges against her. Hawkins noted that the grievant's last chance agreement specifically provided that she must be regular in attendance and follow all Postal Service policies and procedures. She made the decision to issue a notice of removal to the grievant, and subsequently presented the removal package to area manager Briggs. According to Hawkins, she had discussed the issue of attendance with the grievant prior to issuing her the notice of removal. She acknowledged that the grievant's attendance was "not that bad," but she advised her to be careful because she had a last chance agreement. Hawkins then discussed the various absences which were cited in the grievant's notice of removal. (Joint Ex. 2, at 58, 65, 67, 70, 74, 79, 80, 82, 88, 90, 91). She confirmed that the grievant did not work on the dates which were cited in her notice of removal.
Hawkins stated that she conducted a pre-disciplinary interview on August 12, 2002, prior to issuing the grievant’s notice of removal. (Joint Ex. 2, at 104). At that time, the grievant presented no documents establishing any medical condition related to her alleged stress. The notice of removal subsequently issued to the grievant did not violate the National Agreement.

On cross-examination, Hawkins stated that she reviewed the grievant’s attendance record in late January or early February 2002. However, Hawkins admitted that she did not ask the grievant to explain her absences. She testified that leave requests are denied if she does not receive the “acceptable evidence.” However, Hawkins acknowledged that she “didn’t see anything wrong with the grievant’s medical documentation” for the dates of February 21 - 24, 2002. Hawkins stated that she provides employees with FMLA packets if they are off work for a specified number of days. She does not recall whether the grievant told her that she had a FMLA packet on file. Hawkins admitted that she was aware of the grievant’s responsibility for her sister prior to the pre-disciplinary interview held on August 12, 2002.

Hawkins acknowledged on redirect examination that the grievant provided several medical documents to management during the period in question. She also testified that the evidence submitted in support of the grievant’s sick leave request on February 20, 2002, was not acceptable. Hawkins confirmed that she recently provided the grievant with a FMLA packet, however, she does not know whether the grievant qualifies for such leave.

Melody Gaskins, the acting area customer service manager, testified that she received a telephone call regarding the grievant’s altercation with a co-worker on July 11, 2002, and she
represented the Postal Service at Formal Step A of the grievance procedure. Gaskins testified that she had a discussion with the grievant regarding her last chance agreement prior to transferring to the River Terrace post office, and she stated that the grievant had some unscheduled absences in the past. Gaskins acknowledged that the issue of “double jeopardy” was raised by the Union during the grievance procedure. She stated that steward Gunn was informed that the grievant’s emergency placement under Article 16.7 of the National Agreement was an administrative action, and further action would be taken in the future. According to Gaskins, the grievant was not subjected to “double jeopardy” when she was subsequently removed from service.

Gaskins acknowledged that the grievant was involved in an automobile accident on October 20, 2001. However, the grievant failed to call in on the aforementioned date, and she was properly charged with being AWOL. Gaskins stated that the grievant sustained an injury as a result of the motor vehicle accident, and she informed manager Briggs to make sure that the grievant received a light duty package. Gaskins admitted that the grievant was unable to obtain a light duty assignment for a period of time because the grievant was unable to “get in touch” with her. She further stated that it was the grievant’s responsibility to provide the necessary medical documentation to management in order to be assigned light duty work. Gaskins confirmed that she discussed the issue of light duty work with the grievant on November 13, 2001, and she received the necessary documentation from the medical unit regarding the grievant’s light duty
request on November 26, 2001. The grievant was subsequently placed on light duty from December 10 - 26, 2001.

Gaskins reiterated that she made the decision to return the grievant to work following her emergency placement. The issue of double jeopardy was not discussed at the meeting regarding the grievant’s Article 16.7 emergency placement. Gaskins further testified that the grievant violated the terms of her last chance agreement due to her numerous unscheduled absences and AWOLs. Additionally, the grievant’s altercation with a co-worker violated the Postal Service’s code of conduct.

On cross-examination, Gaskins confirmed that the injury sustained by the grievant on October 20, 2001, prevented her from fully performing her duties as a letter carrier. She stated that the grievant was not permitted to work from October 23 through December 10, 2001, based upon her physical restrictions. She confirmed that the grievant returned to duty as a letter carrier on December 10, 2001. Gaskins admitted that it is possible for a “surrogate” of an employee to call the post office and inform management that the employee in question is unable to work. According to Gaskins, supervisor McDonald informed police officer Harvell that the grievant was required to call management regarding her absence on October 20, 2001. Gaskins acknowledged that the grievant did not receive a light duty package until November 13, 2001, and she could not work a light duty assignment until the package was filed.

Gaskins further stated that the grievant should not have been charged with being absent between October 23 and November 26, 2001, because she would have qualified for FMLA leave.
during that period. She acknowledged that steward Gunn raised the issue of double jeopardy during the grievance procedure. However, Gaskins testified that she “took action” against the grievant as a result of her violation of the Zero Tolerance policy. She further stated that only Article 16.7 of the National Agreement was discussed at the time the grievant was returned to work from her emergency placement on July 24, 2002. Gaskins maintains that the implementation of Article 16.7 is an administrative action.

Shareen Bowman, a letter carrier since 1993, stated that she was present when the incident between the grievant and another co-worker occurred on July 11, 2002. She testified that the grievant initially walked away from the altercation, and there were no “blows” with the exception of the grievant’s hand hitting a mail tub. According to Bowman, there was a lot of “bumping” at the River Terrace post office due to absences and sick leave requests by letter carriers, and there was work available for the grievant to perform on a daily basis during the period in question. On cross-examination, Bowman reiterated that there was an exchange of words between the grievant and a co-worker on July 11, 2002, and the grievant directed the “B” word toward her co-worker during the altercation.

Louis Minor, a T-6 letter carrier and steward at the River Terrace post office, testified that the grievant attempted to return to work in a light duty status following her injury in mid-October 2001. However, the area manager did not conduct the necessary meeting with the grievant in a timely manner. According to Minor, it appeared that the area manager was attempting to avoid the grievant. The grievant did not come to work between October 20 and November 13, 2001,
because management would not permit her to perform light duty work without first meeting with the area manager. He stated that there was work available for the grievant to perform during the period in question.

Kenneth Taylor, a letter carrier for thirty-eight years and the local Union Vice-President, confirmed that he met with supervisor Gaskins in July 2002, regarding the grievant’s emergency placement. Taylor stated that the grievant’s emergency placement was resolved by returning her to duty without backpay. He believed that the case involving the grievant’s emergency placement was “over,” and supervisor Gaskins did not indicate that she would subsequently issue the grievant a notice of removal as a result of the July 11, 2002, incident. Taylor testified that he was not initially aware that the grievant was issued a notice of removal because he was off work from August until December 2002. According to Taylor, the Postal Service improperly cited the grievant’s emergency suspension in the notice of removal. Additionally, the notice of removal dated August 19, 2002, was issued after the terms of the grievant’s last chance agreement had expired. He stated that the last chance agreement provided that the discipline assessed would be held in abeyance for a period of one year from August 17, 2001, the date of the Step B decision.

On cross-examination, Taylor discussed several conflicts regarding the various dates set forth in the grievant’s last chance agreement. He also reiterated that the grievant’s emergency placement was resolved by returning her to duty without back pay. Taylor stated that there were no discussions regarding the grievant’s removal at the time she was returned to duty. He stated
that supervisor Gaskins did not discuss any further action against the grievant or the other employee involved in the altercation.

William Gunn, a shop steward and the formal Step A representative in the grievant’s case, stated that the grievant was subjected to double jeopardy because she had already been disciplined for alleged misconduct which was cited in her notice of removal. According to Gunn, the notice of removal was also issued to the grievant in an untimely manner. He stated that the grievant should have been discharged at the time of her emergency placement if she had violated the terms of her last chance agreement. Gunn further testified that management failed to inform the grievant of her rights under the FMLA. He also claimed that although the grievant attempted to obtain a light duty assignment during the period of October 20 through November 13, 2001, management failed to assign the grievant light duty until December 2001. Gunn asserted that the Postal Service improperly denied the grievant a light duty assignment.

According to Gunn, the grievant was also improperly charged with being AWOL on October 20, 2001, because a police officer telephoned the post office on that date regarding the grievant’s absence. Furthermore, he pointed out that several dates of absences cited in the grievant’s notice of removal contain typographical errors, and therefore, such dates should be removed from the charges against the grievant. Finally, Gunn maintained that the grievant should have been granted FMLA leave on the first four dates cited in her notice of removal, as well as during the period of March 30 through April 2, 2002.
On cross-examination, Gunn reiterated that the grievant’s notice of removal contained several typographical errors in regard to the dates upon which she was charged with being absent. He cannot recall whether supervisor Gaskins discussed the possibility of further disciplinary action against the grievant following her emergency placement. Gunn stated that both the grievant and the other letter carrier involved in the altercation on July 11, 2002, received the same “deal.” He testified on redirect examination that the grievant should have been charged with sixteen hours on February 21, 2002, rather than forty hours as stated in her notice of removal. Gunn asserted that the Union made management aware of its position during the grievance procedure that the grievant should have been granted FMLA leave. He confirmed that the grievant received the necessary light duty forms on November 13, 2001.

Robert Harnest, a letter carrier and the local Union Executive Vice-President, testified that he appealed the grievance to formal Step A and provided management with the Union’s additions and corrections. He stated that the grievant was unable to work between October 20 and November 1, 2001, because she was denied a light duty assignment by management. As such, it was improper for management to cite any dates during the aforementioned period in the grievant’s notice of removal. Harnest testified that Article 16.1 of the National Agreement provides for corrective discipline, and the discipline assessed the grievant in this case was punitive because she was punished for being absent on dates which she was denied light duty work. Additionally, the grievant had already received discipline for alleged misconduct which was cited in her notice of removal. According to Harnest, an emergency placement under
Section 16.7 of the National Agreement constitutes discipline if such action was taken due to an employee's misconduct. He stated that the grievant's emergency placement constituted discipline, rather than an emergency action.

The grievant testified that she was involved in an automobile accident on Saturday, October 20, 2001, and a police officer telephoned the post office on that date and advised management that she would be unable to attend work. On Monday, October 22, 2001, the grievant provided the Postal Service with medical documentation regarding her injury, and she requested a light duty package at that time. The grievant was informed by management that there were no light duty packages available, and she would have to wait. The grievant stated that she made daily attempts to obtain a light duty package, and she finally obtained a package from supervisor Gaskins on November 13, 2001. The Postal Service's medical department subsequently received the grievant's light duty forms on November 26, 2001, and Gaskins finally scheduled a meeting with the grievant on December 10, 2001, at which time she was granted a light duty assignment. The grievant testified that she was never informed of her rights under the FMLA during the period in question. She acknowledged that supervisor Gaskins provided an FMLA leave form to her approximately one week prior to the hearing.

The grievant was present during the meeting regarding her Article 16.7 emergency placement, and supervisor Gaskins did not mention that she would take further disciplinary action against her. The grievant stated that she was assigned to the Southwest station upon returning to duty following her emergency placement. According to the grievant, she re-injured
her arm and subsequently requested another light duty assignment. A grievance regarding the
aforementioned light duty request was filed by the Union, and the parties resolved the matter at
Step B of the grievance procedure. (Union Ex. 3). The grievant acknowledged that she attended
a pre-disciplinary interview on August 12, 2002, which was conducted by supervisor Hawkins.
The grievant stated that Hawkins was not aware that she was seeking a light duty assignment at
that time.

The grievant admitted on cross-examination that she engaged in a verbal altercation with
a co-worker on July 11, 2002. The grievant also claimed that most of the absences cited in her
notice of removal are incorrect, and should not have been included in the charges against her.
The grievant stated that she left early on January 7, 2002, in order to attend an appointment with
her physician. However, she was already scheduled to depart work early on that date because she
was assigned to light duty. The grievant further testified that she submitted medical
documentation to management regarding her absences on February 20 - 22, 2002. She stated that
she also submitted medical documentation for her absence on March 2, 2002. According to the
grievant, sick leave is not disapproved by management. The grievant acknowledged that she did
not recall being AWOL on May 25, 2002, however, management should have received a
telephone call from her doctor's office on that date. She also admitted that she utilized
emergency annual leave on June 3, 2001, and left work prior to the completion of her shift. The
grievant reiterated that she followed the proper procedures in order to obtain light duty work.
Finally, the grievant stated that she understood the terms and conditions of her last chance agreement.

**RELEVANT CONTRACT PROVISIONS AND POLICIES**

Article 19 of the National Agreement entitled “Handbooks and Manuals,” provides, in part, as follows:

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.

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Article 16 of the National Agreement entitled “Discipline Procedure,” provides, in pertinent part, as follows:

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Section 7. Emergency Placement

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

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Article 13 of the National Agreement entitled “Assignment of Ill or Injured Regular Workforce Employees” provides, in part, as follows:

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Section 2. Employee’s Request for Reassignment

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C. Installation heads shall show the greatest consideration for full-time regular or part-time flexible employees requiring light duty or other assignments, giving each request careful attention, and reassign such employees to the extent possible in the employee’s office. When a request is refused, the installation head shall notify the concerned employee in writing, stating the reasons for the inability to reassign the employee.

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The following sections contained in the Employee and Labor Relations Manual (ELM), are relevant to the instant grievance:

666.2 Employees are expected to conduct themselves during and outside of working hours in a manner which reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal personnel be honest, reliable, trustworthy, courteous, and of good character and reputation. Employees are expected to maintain satisfactory personal habits so as not to be
obnoxious or offensive to other persons or to create unpleasant working conditions.

511.43 Employees are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absences.

CONTENSIONS OF THE PARTIES

The Postal Service contends that it had just cause to issue the grievant a notice of removal as a result of her failure to comply with the terms of a last chance agreement dated August 27, 2001. The Postal Service claims that the grievant is “no stranger to discipline,” and it maintains that the grievant was involved in an incident with a co-worker on July 11, 2002, which violated the Zero Tolerance Policy. Additionally, the grievant failed to develop and maintain a satisfactory attendance record as required by the terms and conditions of her last chance agreement. During the period of October 20, 2001 through June 3, 2002, the grievant was absent from work on no less than twelve occasions.

The Postal Service acknowledges that the testimony presented at the arbitration hearing reveals that three of the grievant’s absences occurred during a period when her light duty request was not accommodated by management. However, the Postal Service points out that the grievant was also absent on nine other occasions. At the hearing, the grievant admitted that she was absent from duty on the various dates which were cited in her notice of removal. The Postal Service maintains that the grievant’s nine absences clearly exceeded the prescribed number of allowable absences set forth in her last chance agreement.
The Postal Service further asserts that the Union's allegations that the grievant's Zero Tolerance Policy violation should not have been cited in her notice of removal, that the grievant was improperly denied a light duty assignment, and that the grievant was denied both her due process rights and rights under the FMLA, are all "smoke screens." It points out that the grievant was well aware of the Zero Tolerance Policy prior to the issuance of her notice of removal. The Postal Service maintains that management effected the grievant's emergency placement in accordance with the terms set forth in Article 16.7 of the National Agreement after she was involved in a verbal altercation with a co-worker. There is no language contained in Article 16.7 which prohibits management from issuing discipline in addition to the emergency placement. The Postal Service argues that management never indicated to Union stewards Taylor and Gunn that there would be no further discipline for the grievant's violation of the Zero Tolerance Policy. The grievant was not subjected to "double jeopardy" as alleged by the Union.

In regards to the grievant's due process rights and alleged FMLA violation by management, the Postal Service asserts that the Union presented no testimony or supporting documentation which would render the disciplinary action at issue null and void. The Postal Service notes that the grievant's request for a light duty assignment was the subject of a separate grievance. The issue to be addressed in this case is whether or not the grievant violated the terms and conditions of her last chance agreement. The violation of the grievant's last chance agreement is the only charge cited in her notice of removal. The Postal Service contends that there is no question that the grievant violated her last chance agreement when she accumulated
more than three unscheduled absences in a six-month period. The grievant also violated the last chance agreement when she engaged in a verbal altercation with a co-worker on July 11, 2002.

The grievant was previously afforded leniency by management when her prior notice of removal was settled with a last chance agreement. The Postal Service asserts that the grievant was well aware of the terms and conditions of her last chance agreement. It contends that management did not violate the National Agreement when it issued the grievant a notice of removal as a result of her failure to comply with her last chance agreement. Accordingly, the Postal Service requests that the grievance be denied. Finally, the Postal Service points out that back pay is not a proper remedy in the event that a decision is rendered in favor of the Union because the grievant was not placed in a non-duty, non-pay status pending the outcome of this grievance.

The Union contends that the Postal Service did not have just cause to issue the grievant a notice of removal as a result of allegedly failing to comply with a last chance agreement dated August 27, 2001. It also argues that this case is rife with significant procedural due process violations. Specifically, the grievant was subjected to “double jeopardy” according to the Union.

The Union points out that the grievant was placed in an emergency suspension status effective July 11, 2002, as a result of a physical altercation with a co-worker on that date. On July 24, 2002, the parties resolved the emergency suspension disciplinary action and returned the grievant to duty with no back pay. The Union maintains that the emergency placement was clearly a disciplinary action, rather than an administrative action as alleged by the Postal Service.
because it was assessed due to the grievant’s alleged misconduct. However, the July 11, 2002 incident was also cited in the grievant’s notice of removal. The Union cited several arbitration awards in support of its position that the grievant’s emergency placement constituted discipline. The Union further asserts that it raised the issue of “double jeopardy” at Formal Step A of the grievance procedure.

The Union also contends that management presented an erroneous and faulty attendance record in the grievant’s notice of removal. It notes that the grievant was involved in an automobile accident on October 20, 2001, and she received emergency treatment for her injury at Howard University Hospital. According to the Union, police officer Harvell telephoned the River Terrace post office on the morning of October 20, 2001, and informed supervisor McDonald that the grievant was hospitalized as a result of the accident. As such, the Union asserts that the October 20, 2001, charge of AWOL was improper and must be stricken from the grievant’s record. According to the Union, police officer Harvell’s telephone call satisfied the criteria set forth in Section 513.332 of the ELM.

The Union maintains that the grievant’s rights under Article 13 of the National Agreement and the FMLA were violated when management improperly denied her FMLA leave and unreasonable delayed granting her a light duty assignment between October 26 and December 10, 2001, and March 30 and April 2, 2002. As such, the grievant’s absences during the aforementioned dates were improperly included in her notice of removal. The Union notes that following her accident, the grievant attempted on a daily basis to obtain the necessary forms
to request light duty work. However, management did not provide the grievant with the required forms until November 13, 2001, and her light duty assignment was not granted until December 10, 2001. According to the Union, the light duty request forms could have easily been presented to the grievant on October 21 or 22, 2001.

The Union further asserts that Gaskins testified on cross-examination that all of the grievant’s absences which occurred after her accident on October 20, 2001, and prior to December 10, 2001, were covered by the FMLA because the grievant was ill and she was provided with no light duty work. Therefore, such absences should not have been cited in her notice of removal. The Union points out that the grievant submitted medical documentation to management which evidenced that she received continuing medical treatment for her condition during the period at issue. However, management did not advise the grievant of her FMLA rights. The grievant was forced to utilize more than three days of leave on account of her medical condition as a result of being denied light duty work. The grievant’s due process rights were violated as a result of management’s failure to comply with Article 19 of the National Agreement and the provisions contained in the FMLA. The Union also contends that the grievant’s attendance record contains various errors and cannot be relied upon as an accurate account of the grievant’s attendance.

As indicated above, management violated Article 13 (2)(C) of the National Agreement when it failed to afford careful attention and the greatest consideration to the grievant’s request for light duty work. The Union asserts that the grievant would not have been forced to utilize her
sick leave if management had properly granted her light duty request. The Union further alleges that the notice of removal was issued to the grievant in an untimely manner. It notes that there was a delay of forty-one days from the date of the grievant’s altercation with a co-worker until the date upon which the notice of removal was issued.

For each of the aforementioned reasons, the Union requests that the grievance be sustained. The Union specifically requests that the notice of removal be rescinded and expunged from the grievant’s record, that the Postal Service restore any sick leave utilized by the grievant between October 21 and December 10, 2001, and that the record indicate that the grievant was on FMLA leave for the periods of February 21 - 24, 2002 and March 29 - April 5, 2002.

**OPINION AND ANALYSIS**

It is undisputed that the grievant engaged in a verbal altercation with a co-worker in the workplace on July 11, 2002. The record further reveals that the grievant and the other letter carrier involved in the incident had to be physical separated from each other. The grievant’s conduct clearly violated the Postal Service’s Zero Tolerance Policy and Section 666.2 of the ELM. As a result of the altercation, the grievant was placed in an off-duty emergency placement status pursuant to Article 16.7 of the National Agreement.

In this case, the arbitrator concludes that the grievant’s emergency placement under Article 16.7 of the National Agreement constituted discipline, rather than administrative action as suggested by the Postal Service because the grievant was placed in such status due to her
misconduct - - an altercation with a co-worker on July 11, 2002. The arbitrator’s decision is supported by the analysis and conclusion set forth in USPS -and- NALC, Case Nos. H4N-34-C 58636 and H4N-3A-C 59518, at 7 - 8 (1990) (Mittenthal, Arb.).

The record also establishes that the parties’ resolved the grievant’s emergency placement by returning the grievant to duty on July 24, 2002, without back pay. (Joint Ex. 2, at 28). However, the notice of removal subsequently issued by management to the grievant on August 19, 2002, cited the July 11 altercation, and the grievant’s violation of the Zero Tolerance Policy in support of her alleged failure to comply with the terms of her last chance agreement. Thus, in the Union’s view, the grievant was clearly subjected to being disciplined twice for the same offense.

Arbitrators have recognized the general application of the double jeopardy principle that once discipline for a particular violation or offense has been imposed, management cannot thereafter increase the discipline for the same violation or offense. See, USPS -and- NALC, Case No. AC-E-4890D (1977) (Howard, Arb.); USPS -and- NALC, Case Nos. EIN-2F-D 17340, EIN-2F-D 17341 (1985) (Howard, Arb.); USPS -and- NALC, Case No. D90N-4D-D-94005789 (1994) (DiLauro, Arb.). However, in the specific context of an emergency suspension pursuant to Article 16, Section 7, if the misconduct giving rise to the suspension is encompassed within one of the Section 7 categories, a suspension or removal in addition to the emergency placement is permissible if the test of just cause is satisfied. Section 7 expressly provides that “[i]f it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee,
the emergency action taken under this Section may be made the subject of a separate grievance.”

It does not follow, therefore, that whenever an employee is ultimately removed from service that approval of the preceding emergency placement necessarily triggers a finding of double jeopardy by punishing the grievant twice for the same offense.

The majority of decisions cited by the Union apply the double jeopardy defense in the context of discipline or discharge following suspensions other than an emergency placement. This case is most similar, however, to the circumstances addressed in Case No. AC-E-4890D (1977) (Howard, Arb.), where the employee who was given an emergency placement was returned to work, and the notice of removal did not issue until after the passage of more than another month during which the grievant continued to work. As noted by the arbitrator:

Moreover, the Service by returning the grievant to work after the emergency suspension implicitly mitigated the penalty to that encompassed by such suspension. Thus, the imposition of the discharge action, almost four weeks after the grievant returned to work, constituted a subsequent increase of or addition to the penalty for the same offense, an action which is violative of the due process rights of the grievant. Having implicitly set the penalty for the grievant’s offense, the Service may not subsequently add to that penalty, thus subjecting the grievant to a form of “double jeopardy.” Id. at 7-8.

In the instant case, the grievant worked almost another month before management issued her the notice of removal. In fact, the grievant continued to work right up to the date of hearing before the arbitrator – a situation even more mitigating than the one presented to Arbitrator Howard, above. The assessment of further discipline for the misconduct which resulted in the grievant’s emergency placement after her return to duty from such placement by a mutual
settlement violated the grievant’s due process rights and constitutes “double jeopardy.” Accordingly, the arbitrator concludes that the grievant’s violation of the Zero Tolerance Policy and Section 666.2 of the ELM was improperly cited in her notice of removal, and the discipline which was assessed the grievant is fatally flawed.

Furthermore, the arbitrator finds that the notice of removal issued to the grievant on August 19, 2002, improperly cited several dates upon which the grievant was absent from duty as a basis for her discharge. The record establishes that the grievant was involved in an automobile accident on October 20, 2001, and police officer Harvell telephoned the post office on that date and informed management that the grievant would be unable to report for duty because she was transported to the hospital in order to receive medical treatment. As stated by Arbitrator Britton in USPS-and-NALC, Case No. SIN-3U-C 4356, at 9 (1984) (Britton, Arb.), “a careful reading of the language of Part 513.332 of the Employee & Labor Relations Manual (Joint Ex. No. 3), however, convinces the Arbitrator that it was not the intent of the parties that employees personally be required to call to report the reason for their absence. . . the employee is only responsible for ensuring that notice is provided to the Employer.” As such, the arbitrator concludes that the grievant should not have been charged with being AWOL on October 20, 2001, because management was properly notified of her absence on that date in accordance with the language set forth in Section 513.332 of the ELM.

The record further reveals that following her automobile accident on October 20, 2001, the grievant made daily attempts to obtain the necessary forms to request light duty work.
However, management failed to provide such forms to the grievant in a timely manner, and as a result, she was not provided with a light duty assignment until December 10, 2001. The testimony presented at the arbitration hearing indicated that there was light duty work available for the grievant to perform during the period between the date of her injury and December 10, 2001. Based upon the evidence presented in this case, the arbitrator finds that management failed to afford the grievant’s light duty request the greatest consideration and careful attention which is required by Article 13 (2)(C) of the National Agreement, and the grievant should have been afforded light duty work during the aforementioned period. The grievant would not have been charged with unscheduled sick leave on October 26, November 5 - 7, and 13 - 14, 2001, if the Postal Service had properly and timely granted her request for light duty work. Accordingly, the arbitrator determines that the grievant’s notice of removal improperly cited her with being absent from duty on those dates.

The record also reveals that the grievant provided various medical documents to management regarding her physical condition and/or illnesses, and the dates of her medical treatments during the time frame at issue. (Joint Ex. 2, at 61 - 64, 66, 68, 71 - 73, 76, 77, 81, 83, 84, 87). The arbitrator notes that the grievant’s medical documentation dated March 29 and April 10, 2002, indicates that she may have been suffering from carpal tunnel syndrome. (Joint Ex. 2, at 83, 84). The grievant was provided with no FMLA forms by management at that time. Nevertheless, there was an absence of sufficient evidence establishing that all the predicate conditions for receiving FMLA qualifying leave would have been satisfied.
The evidence of record further reveals that the grievant had an asthma attack on May 25, 2002. At the arbitration hearing, the grievant asserted that her physician’s office contacted the post office on that date and notified management that she would be unable to report for duty. The documentation regarding the medical treatment which the grievant received on May 25, 2002, was subsequently provided to the Postal Service. (Joint Ex. 2, at 89). As such, the arbitrator determines that the grievant should not have been charged with being AWOL on May 25, 2002, under the facts and circumstances presented in this case. Accordingly, the grievant’s absence on that date was improperly cited in her notice of removal.

In sum, the arbitrator finds that the grievant’s attendance record contained in her notice of removal contains numerous dates which were improperly cited in support of the discipline assessed by the Postal Service. Such errors by management provide further support for the arbitrator’s decision that the notice of removal issued to the grievant on August 19, 2002, was fatally flawed. Accordingly, the arbitrator concludes that the Postal Service did not have just cause to issue the grievant a notice of removal for allegedly violating the terms and conditions of her last chance agreement. The arbitrator notes that the terms of the last chance agreement have expired, and therefore, the grievant is no longer mandated to work under the conditions set forth in such agreement. The grievance is sustained, as set forth in the Award.
AWARD

The grievance is sustained as follows. The Postal Service lacked just cause to issue the notice of removal to the grievant. Any sick leave utilized by the grievant for October 21, 2001, through December 10, 2001, shall be restored to her sick leave balance. The Postal Service shall comply with this Award within thirty (30) days from the date of issuance.


JONATHAN I. KLEIN, ARBITRATOR