

C-24636

REGULAR ARBITRATION PANEL

In the Matter of Arbitration)
between)
UNITED STATES POSTAL SERVICE)
(hereinafter the "USPS"))
and)
NATIONAL ASSOCIATION OF)
LETTER CARRIERS, AFL-CIO)
(hereinafter the "NALC"))

Grievant: Liebl, K.
Post Office: Wichita, Kansas
Case No: E01N4E-D 03105987
NALC DRT No: 05-040165
Branch Griev. No: 04007

BEFORE: Janice S. Irving, Arbitrator
APPEARANCES BY:
For USPS: P. Coleen McMurphy
Labor Relations Specialist
7117 W. Harry St.
Wichita, KS 67276-9401
For NALC: Frank Crandell, LBA
St. Louis Region
2029 Woodland Parkway
St. Louis, MO 63146-4247
Place of Hearing: USPS
7117 West Harry St.
Wichita, KS 67276
Date of Hearing: August 19, 2003

AWARD: The grievance is sustained under the following conditions: IT IS ORDERED:

- 1. The Employer's Notice of Removal will be held in abeyance for 180 days to give the Grievant an opportunity to receive treatment so he will be able to perform his duty. The Employer does not yet have just cause for removal;
2. The Grievant is reinstated as a PTF employee with access to all his benefits, including the right to use his sick leave benefits, effective March 7, 2003;
3. The Grievant shall receive no back pay as he was on sick leave and not able to be gainfully employed.
4. A Fitness for Duty examination shall be required twenty-one (21) days prior to end of the 180-day abeyance period. If found fit he will return to duty, if not the Notice of Removal will be effective within five (5) calendar days.
The Union shall provide one hour of education to its Stewards on how to recognize and respond to persons with emotional disabilities.
The Employer shall provide one hour of education to Supervisors and Managers at the Wichita, Kansas Installation on how to recognize and respond to employees with emotional disabilities and acute posttraumatic stress disorder.
The Grievant shall present himself for a Fitness for Duty examination as scheduled. Grievant's failure to present himself and complete a FFD examination shall effectively reinstate the Notice of Removal within five calendar days; and
8. With parties' agreement, I will retain jurisdiction of this arbitration for 180 days, or until Grievant has successfully completed the FFD examination, whichever comes first, to provide immediate telephonic resolution of concerns that arise during the administration of this Award.

Date: SEPTEMBER 25, 2003
Compton, CA

Janice S. Irving
Janice S. Irving, Ph.D.

RECEIVED

NOV 02 2003

VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS

BACKGROUND

This arbitration proceeding was convened by the parties pursuant to Article 15, Section 4 of the National Agreement between the United States Postal Service and National Association of Letter Carriers, AFL-CIO. The grievance that led to this proceeding stem from Management issuing a Letter of Removal dated February 24, 2003 to the Grievant.

CHARGES(S): Failure to Maintain a Satisfactory Work Schedule

The record from the arbitration hearing comprises testimony from one (1) witness called by USPS; and two (2) witnesses called by the Union. In addition to witnesses, there were nineteen (19) exhibits entered.

The hearing officially closed August 26, 2003. The USPS submitted five (5) arbitration awards and the Union submitted five (5) arbitration awards.

I tape-recorded the hearing solely as an extension of my personal notes and not as an official record.

CONTRACT PROVISIONS

AGREEMENT

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

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:

- B. To hire, promote, 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.

Article 15: Grievance-Arbitration procedure

Section 1: Definition

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

Article 16: Discipline-Procedure

Section 1: Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and 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. This includes, but is not limited to, the Postal Service manual and the F-21, Timekeeper's Instructions.

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

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

EMPLOYEE AND LABOR RELATIONS MANUAL

511.2 Responsibilities

511.21 Postal Officials

Postal Officials:

- a. Administer the leave program.
- b. Inform employees of their leave balance.
- c. Approve or disapprove requests for leave.
- d. Record leave in accordance with handbook F-21, Time and Attendance, or handbook f-22, PSDS Time and Attendance.
- e. Control unscheduled absences (see 511.4).

511.4 Unscheduled Absence

511.41 Definition

Unscheduled absences are any absences from work that are not requested and approved in advance.

511.42 Management Responsibilities

To control unscheduled absences, postal officials:

- a. Inform employees of leave regulations.
- b. Discuss attendance records with individual employees when warranted.
- c. Maintain and review forms 3972, Absence analysis, and forms 3971.

511.43 Employees Responsibilities

Employees are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absences. In addition, employees must provide acceptable evidence when required.

513 Sick Leave

513.1 Purpose

Sick leave insures employees against loss of pay if they are incapacitated for the performance of duties because of illness, injury, pregnancy and confinement, and medical (including dental or optical) examination or treatment. A limited amount may also be used to provide for the medical needs of a family member. Nonbargaining unit employees, and bargaining unit employees if provided in their national agreements, are allowed to take up to 80 hours of their accrued sick leave per leave year to give care or otherwise attend to a family member (as defined in 515.2) with an illness, injury, or other condition that, if an employee had such a condition, would justify the use of sick leave. (See 515 for information about FMLA entitlement to be absent from work.)

513.33 Requests for Sick Leave

513.331 General

Except for unexpected illness or injury situations, sick leave must be requested on PS Form 3971 and approved in advance by the appropriate supervisor.

513.332 Unexpected Illness or Injury

An exception to the advance approval requirement is made for unexpected illness or injuries; however, in these situations the employee must notify appropriate postal authorities of their illness or injury and expected duration of absence as soon as possible. When sufficient information is provided to the supervisor to determine that the absence is to be covered by FMLA, the supervisor completes PS Form 3971 and mails it to the employee's address of record along with a Publication 71.

When the supervisor is not provided enough information in advance to determine whether or not the absence is covered by FMLA, the employee must submit a request for sick leave on PS Form 3971 and applicable medical or other certification upon returning to duty and explain the reason for the emergency to his or her supervisor. Employees may be required to submit acceptable evidence of incapacity to work as outlined in the provisions of 513.36, Documentation Requirements, or noted on the reverse of PS Form 3971 or Publication 71, as applicable.

The supervisor approves or disapproves the leave request. When the request is disapproved, the absence may be recorded as annual leave or, if appropriate, as LWOP or AWOL, at the discretion of the supervisor as outlined in 513.342.

513.34 PS Form 3971, Request for or Notification of Absence

513.341 General

Request for sick leave is made in writing, in duplicate, on PS Form 3971. If the absence is to care for a family member, this fact is to be noted in the Remarks section.

513.342 Approval or Disapproval

The supervisor is responsible for approving or disapproving requests for sick leave by signing PS Form 3971, a copy of which is given to the employee. If a supervisor does not approve a request for leave as submitted, the Disapproved block on the PS Form 3971 is checked and the reason(s) given in writing, in the space provided. When a request is disapproved, the granting of any alternate type of leave, if any, must be noted along with the reason for the disapproval. AWOL determinations must be similarly noted.

513.362 Over 3 Days

For absences in excess of 3 days, employees are required to submit documentation or other acceptable evidence of incapacity for work.

513.363 Extended Periods

Employees who are on sick leave for extended periods are required to submit at appropriate intervals, but not more frequently than once every 30 days, satisfactory evidence of continued incapacity for work or need to care for a family member unless some responsible supervisor has knowledge of the employee's continuing situation.

513.364 Medical Documentation or other Acceptable Evidence

When employees are required to submit medical documentation, such documentation should be furnished by the employee's attending physician or other attending practitioner who is performing within the scope of his or her practice. The documentation should provide an explanation of the nature of the employee's illness or injury sufficient to indicate to management that the employee was (or will be) unable to perform his or her normal duties for the period of absence. Normally, medical statements such as "under my care" or "received treatment" are not acceptable evidence of incapacitation to perform duties. Supervisors may accept substantiation other than medical documentation if they believe it supports approval of the sick leave request.

666.8 Attendance

666.81 Requirement for Attendance

Employees are required to be regular in attendance.

666.82 Absence without Permission

Employees failing to report for duty on scheduled days, including Saturdays, Sundays, and holidays, will be considered absent without leave except in actual emergencies which prevent obtaining permission in advance. In emergencies, the supervisor or proper official will be notified as soon as the inability to report for duty becomes apparent. Satisfactory evidence of the emergency must be furnished later. An employee who is absent without permission or fails to provide satisfactory evidence that an emergency existed will be placed in a nonpay status for the period of such absence. The absence will be reported to the appropriate authority.

666.86 Disciplinary Action

Postal officials will take appropriate disciplinary measures to correct violations of these requirements.

ISSUE

Did Management meet "Just Cause" with presenting the Grievant, Kenneth Liebl, with a Letter of Removal on March 07, 2003? If not, what shall the remedy be?

STIPULATIONS

- 1. In USPS Opening Statement strike the word proposed Notice of Removal.**
- 2. Grievant's physician stated that he could not release the Grievant to return to work at this time through March 7, 2003.**
- 3. No dispute that USPS promotes leaving accrued leave and sick leave on the book in case of sickness or serious illness.**

SUMMARY OF EVIDENCE

WANDA COPRIDGE

Ms. Copridge testified that she has been with the Postal Service for thirty-three (33) years and presently is the Manager of Customer Service, at North Station. Ms. Copridge stated that she supervised the Grievant for one day. She stated that the Grievant was assigned as a PTF City Carrier, completing his training, assigning him to North Station on May 28, 2002, and working under the supervision of Ms. Lori Hursch. The Grievant reported to work on May 30, 2002, going out on a walking route, becoming ill, leaving for the day, and did not return.

Ms. Copridge stated that she was aware that the Grievant was continually using his sick leave. She explained that while the Grievant was off work, the station was short-handed and she had to use overtime to cover the route.

Ms. Copridge testified that the Grievant's Family Medical Leave ran out and she became concerned about his extended illness and its overall impact on the efficiency of North Station. So, on January 21, 2003, she sent the Grievant a letter, informing him that his leave had run out and his absences were no longer protected. Ms. Copridge stated that the Grievant was sending in certified doctor's statement that did not provide a date as to when the Grievant might return to work. She explained that after she sent the Grievant the letter informing him his leave had run out, he came in to the office on January 27, 2003, to discuss the needed medical documentation. The Grievant again submitted another doctor's statement which still did not give a date for which the Grievant might be able to return to work. Ms.

Copridge stated that the Grievant told her during their meeting on January 27, 2003, that his doctor did not want him to work.

Ms. Copridge testified that during her meeting with the Grievant his leave was approved even after she had threatened not to sign any more leave. She explained that the doctor's statements that the Grievant turned in did not show any change in his medical condition. Ms. Copridge stated that the Grievant was never asked to get a second opinion, nor was he sent for a fitness-for-duty exam.

Ms. Copridge reviewed the doctor's statement which stated, "acute stress anxiety, generalize osteoarthritis". She accepted the Grievant's documentation at that time.

Ms. Copridge stated that the Grievant's past elements were a 6-day suspension that was reduced to a letter of warning which was issued while the Grievant was a Manager. She did not issue the Grievant a 14-day suspension because she did not believe that a 14-day suspension would prompt the Grievant to return to work. However, she testified that progressive discipline generally requires to first having a discussion, then a letter of warning, a 7-day suspension and a 14-day suspension, and if there is still no improvement she could then go to the removal. She stated that this was the procedure for progressive discipline and she was not aware if there was a process that would allow you to skip various steps during progressive discipline.

Ms. Copridge stated that when she sent the Grievant the letter she never informed him that further absences could result in his removal. She stated that on the Notice of Removal other disciplinary actions were mentioned, since the Grievant had previously had a 7-day suspension, a 14-day suspension would have been in order. Ms. Copridge testified that when

she talked to Labor Relations and then she decided to rule out the 14-day suspension because the Grievant was not at work and a 14-day suspension is generally a working suspension, so she went to the next level with the removal.

PATRICK HILL

Mr. Hill testified that he has been employed with the Post Office for 21 Years as a Carrier, has served as a Union Steward and is presently the Formal Step A representative. Mr. Hill stated that the Grievant was his supervisor at the downtown station for a while. Mr. Hill reviewed his signed statement for the Formal Step A, which addressed the issues that just cause did not exist, the discipline was untimely, nor was progressive discipline adhered to.

KENNETH LIEBL (GRIEVANT)

The Grievant stated that he has been with the Postal Service for 29 years serving in various positions including Postmaster, and is now employed as a PTF City Carrier. The Grievant testified that on May 30, 2002, he received approximately six hours of street time. At about 4:00 p.m. he realized he would not complete the route in time, so he called the station and talked to Ms. Copridge (his supervisor) asking for help with his route. Shortly, after he returned to the station he became ill, he sat down until he felt better and then drove home, but continued to feel ill. His son drove him to the hospital where tests were taken, and he was sent by ambulance to Westlake Emergency.

The next day he reported to his personal physician and she decided to admit him to the hospital, where a battery of test was taken and all the tests came back normal showing that nothing was wrong with his heart. Later, his

doctor diagnosed him as having an acute stress reaction even though the symptoms are similar to heart attack then, giving him a medical slip to be off work for two weeks and evaluating him on June 13, 2002. The Grievant stated that he did not have any Forms 3971, so his supervisor had to send him some and he sent her the documentation through the mail. The documentation stated that he was off due to acute stress disorder since May 31, 2002. Prior to the above-mentioned illness the stress symptoms that he had experienced were poor concentration, lost of appetite, and he could not sleep. The doctor eventually diagnosed him as posttraumatic stress disorder.

Since, May 30, 2002, the Grievant stated that he continued to request sick leaves on Form 3971, sometimes getting paid and sometimes not. He explained later that he received a letter from Wanda Copridge (his supervisor) on January 21, 2003, and met with her on January 27, 2003 and explained his medical status and asked what she needed from him. He stated that Ms. Copridge stated that she needed documentation with a time frame. The next day he explained that Ms. Copridge told him that the documentation he submitted was good and he would need to continue submitting it at regular intervals with a time frame and reason, so he continued to do that. The Grievant testified that he had no idea that he was going to be removed. He testified that he is not able to come back to work at this time and have followed all the regulations asked for.

The Grievant reviewed Exhibit 1, the letter from Ms. Copridge, including the last paragraph and was aware that corrective action could be taken. The Grievant stated that as a supervisor he has had to render corrective action and discipline and is aware that problems may exist from excessive absences. His job as supervisor offered challenges, but eventually was too much; he was not aware of the seriousness of his stress condition.

POSITIONS OF THE PARTIES

USPS

The Postal Service notes that the Grievant, was a Part-Time Flexible City Letter Carrier in the Wichita, Kansas Installation at the time of his removal. By letter dated February 24, 2003, the Grievant was removed for Failure to Maintain a Satisfactory Work Schedule. Issuance of the Notice of Removal prompted a grievance which proceeded throughout the negotiated steps of the National Agreement which includes the Dispute Resolution Process (DRT) and on to arbitration. The case is properly before the Arbitrator today.

On May 30, 2002, the Grievant worked only a part day and then claimed an on-the-job work aggravated CA2 incident and was off work full time from May 31, 2002, through the time of his removal notice. The Grievant's job claim of injury was denied by Office of Workers Compensation Program (OWCP) by letter dated January 16, 2003. The Grievant's request for reconsideration of acceptance of his claim was denied by letter dated May 12, 2003. The Grievant's request for Disability Retirement was denied by the Office of Personnel Management by letter dated February 10, 2002. Reconsideration of this request was denied by letter dated May 29, 2003. During the period of May 31, 2002, through August 26, 2002, the Grievant was granted 480 hours of Family Medical Leave and was provided a protected period of 12 weeks absence and was not issued corrective action for those absences.

On January 21, 2003, the Grievant was notified that his FMLA protection had run out on August 26, 2002, and since that time his absences had been approved as unscheduled.

Management contends that there was just cause for the issuance of the removal. The Grievant had received a Letter of Warning in lieu of a 7-day suspension. The Grievant was off long-term and gave no indication of reporting back to work. Management submitted testimony of the effects of the Grievant's long term and unknown absences and its impact on the efficiency of the service.

The Grievant is a 28-year employee who has testified that as of today he still is not able to return to work. Management cannot hire another individual to replace someone on sick leave. The federal law provides protective leave under FMLA up to 12 weeks and after 12 weeks the protection ends.

Once the facts and evidence of the case is presented the Postal Service respectfully requests that this grievance be denied in its entirety.

NALC

The Union contends that Management did not have "just cause" in issuing the Grievant a Letter of Removal. The Union has shown that Management's decision for removal is arbitrary and capricious, and borders on harassment and intimidation. Medical documentation was submitted stating that the Grievant was unable to come to work at all, therefore, unable to perform any light or limited duty work, and the doctor was unable to determine when the Grievant would be able to return to work.

The Union notes that the Grievant has 28 years of service with only three (3) days use of unscheduled sick leave. This is not failure to maintain a regular work schedule; the Grievant is ill and should be afforded the right to use his earned sick leave. The Union has shown that Management violated several sections of Article 16 of the National Agreement. Additionally, Management did not use progressive discipline, and the

discipline was untimely. The Union has further shown that Management violated Section 513 of the ELM which states: *Sick leave insures employees against loss of pay if they are incapacitated for the performance of duties because of illness, injury, pregnancy and confinement, and medical (including dental or optical) examination or treatment.*

The Union ask that this grievance be sustained and the Grievant made whole and receive back pay from the date administrative leave expired at straight time rate and at no more than 40 hours per week, receive all benefits lost and the removal be expunged from his record and any remedy seen fit. The Grievant has earned sick leave for 28 years. Although the Grievant is still under the doctor's care there is no indication that he can never come back. He has submitted documentation as required throughout his leave.

DISCUSSION

After reviewing the record, it is concluded that the Postal Service did not have just cause at this time to issue a Notice of Removal to the Grievant on February 24, 2003, for Failure to Maintain a Satisfactory Work Schedule. This conclusion is based upon a review of the evidence provided regarding the Grievant's failure to meet the obligations of his position which requires regular attendance.

In that instance the Arbitrator is not persuaded that the Postal Service made every effort to accommodate the Grievant, so he could make a safe return to work. Additionally, the Postal Service failed to apprise the Grievant on January 27, 2003, that further absence could result in his removal. It is not logical that the Postal Service was concerned about the Grievant's attendance and never issued him a fourteen-day suspension. This

would have been proper notice to get his attention that his attendance was a problem.

The fact that the Postal Service approved the Grievant as unscheduled leave for sickness up through March 7, 2003, demonstrates they knew the Grievant had a serious health condition, certified by a physician. Of greater concern, is that the Postal Service lack of proof, other than their own assertions, that the Grievant was not going to get better to return to work.

The Rehabilitation Act went into effect in 1973. The Grievant's absence due to sickness occurred after that time. It is concluded that the Grievant meets the requirement of a qualified person with an emotional disability. Consequently, the Postal Service failed to meet its obligation to the Grievant by not informing him that he was eligible for "reasonable accommodation" because the Postal Service was aware of the Rehabilitation Act and knew about the Grievant's serious health condition based upon medical documentation.

The Arbitrator must point out that this is a complex case because the Grievant is an employee who has been diagnosed as a person with an emotional disability. Most employees who suffer from an emotional disorder are able, with medications and a supportive environment to be productive workers.

However, there is no dispute that the Rehabilitation Act of 1973 was enacted to protect persons with emotional disabilities. The Act applies to ill federal sector employment such as the Grievant. The Rehabilitation Act defines "mental impairment" to include "any mental or psychological disorder, such as... emotional or mental illness." Examples of "emotional or mental illnesses" include major depression, bipolar disorder, anxiety disorders, schizophrenia, and other psychiatric impairments.

Essentially, the Rehabilitation Act protects the Grievant because he is a person with emotional disorders diagnosed as acute stress disorder.

Moreover, the Rehabilitation Act imposes an affirmative duty on the Employer to provide “reasonable accommodation” to an emotionally disabled employee as to enable him or her to perform the essential functions of their job.

The Employer’s duty to reasonably accommodate arises when: (a) an employee has a qualified disability such as acute stress disorder; (b) the employer knows of the disability, such as the supervisor knew about the reasons for the Grievant’s absence based on medical documentation; (c) the employee seeks accommodation such as extended sick leave; (d) the accommodation is necessary to enable the person to perform the essential functions of the job; and (e) the accommodation is reasonable, does not create undue hardship and does not pose genuine, direct health or safety risks. The Grievant meets requirement of having a qualified disability.

However, the Arbitrator is mindful that the Employer is sometimes faced with the difficult questions of determining when the employee has a “qualified disability,” when it “knows” of a worker’s disability, when the “duty to accommodate”, and how to properly accommodate individuals with emotional disabilities.

An emotional disorder constitutes a protected disability when the “impairment” is an emotional or psychological disorder. The pertinent question is whether the employee has a “qualified” impairment, or is he regarded as having a personality trait. A “qualified” impairment is an emotional disorder as opposed to a temporary or situational personality trait such as poor judgment, a quick temper or even irresponsible behavior.

An impairment, to constitute a “qualified” disability must substantially

limit a major life activity. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, walking, speaking, breathing, seeing, hearing, learning, and working. Significantly, the EEOC Guidelines on the Americans With Disabilities Act has added as “major life activities”:

- (1) thinking and concentrating, and
- (2) interacting with others.

A “qualified” individual with an emotional disability is one who can perform the essential functions of a position with or without reasonable accommodation. An employer “knows” when an employee has a mental impairment in two ways: (1) when the employee discloses his condition; and (2) when the employer has a reasonable belief, based on objective evidence, that an employee’s ability to perform essential function will be impaired by a medical condition, or when an employee will pose a direct threat due to a medical condition.

Moreover, under the Rehabilitation Act, the Postal Service must provide a “reasonable” accommodation to the known physical or mental limitations of an individual with an emotional disability unless it can show that the accommodation would impose an undue hardship, or pose a genuine, direct health or safety risk. (*Franklin v United States Postal Service*, 687 F.Supp.1214 (S.D. Ohio 1988)).

To request accommodation, an individual may use “plain English” and need not mention the Rehabilitation Act, ADA, or use the phrase “reasonable accommodation”.

Requests for accommodation need not be in writing. Employees may request accommodation in conversation or may use any other mode of communication. When the need for accommodation is not obvious, the employer may ask for documentation to prove the employee has a covered disability. A health professional may provide such documentation with

regard to psychiatric disabilities. An employer may require the employee to go to a health care professional for documentation of the disability and the need for an accommodation. Furthermore, courts have recognized leave as a reasonable accommodation if it is likely that, following treatment, the employee would be able to safely perform his/her former duties.

Here, the Grievant has been diagnosed by his personal physician with acute stress disorder, he is regarded as having a posttraumatic stress disorder. The Grievant actually is determined to have an emotional disability, he is perceived, and regarded as so, and therefore is a person with a qualified disability under the Rehabilitation Act. The Grievant is a "qualified" individual with a disability who can perform the essential functions of his position with or without reasonable accommodation. On May 30, 2002, the Grievant was displaying signs of a serious health condition, his supervisor allowed him to go to the street where he performed the functions of his position. Grievant, then, demonstrated that he could perform the essential functions of his position, even without an accommodation.

The Supervisor should have paid attention that Grievant was displaying unusual behavior on May 30, 2002. Since, the supervisor had supervised the Grievant that day, she failed to recognize the Grievant's unusual behavior, therefore she failed her obligation under the Rehabilitation Act and should have did more than let the Grievant go home. The Supervisor was obligated to notify Postal Mental Health professionals of the Grievant's need for assistance. On May 30, 2002, the Employer had objective evidence that Grievant's ability to perform the essential functions of his job was impaired by a medical condition of undetermined origin. Physical disabilities, such as broken legs, back disorder, etc., are fairly simple to

accommodate in the workplace, but there are special issues that arise with accommodating emotional disabled persons.

The Supervisor had a duty to involve herself in assisting Grievant to get proper medical treatment, just as she would if he had suffered a heart attack, or a diabetic reaction. The Supervisor had an obligation to discuss with Grievant and the Union, what, if any, assistance, or "reasonable accommodation" was required for the Grievant's safe return to the workplace before removing. The Employer's duty to attempt a reasonable accommodation takes precedence over its right to remove the Grievant.

Since, this Arbitrator has the discretion to draw upon her knowledge and experience to reach a fair resolution, she takes arbitral notice of the Grievant who is a person who has an emotional disorder.

Furthermore, the Supervisor issuing the Notice of Removal had only supervised the Grievant for one (1) day, and her conclusion was based primarily upon her own opinion and her interpretation of the medical documentation that the Grievant was not going to get better to return to work. If the medical documentation was not giving a clue as to when the Grievant would be able to return to work, she should have requested a fitness-for-duty. The Postal Service failed to make a showing of a reasonable probability that the Grievant would not be able to return to work which was based merely on the Supervisor's subjective evaluation only. The Supervisor failed to send the Grievant to the proper Postal Service Health Care Provider, so she could make an informed decision regarding when the Grievant would be able to return to work.

The Grievant was approved for FMLA from May 31, 2002 to August 26, 2002. However, on January 27, 2003, the Grievant was informed by his Supervisor that FMLA had run out as of August 26, 2002, he was being

approved as unscheduled, as of January 21, 2003, he would be on AWOL status. In response, the Grievant submitted a Form 3971 Request for Sick Leave and a physician's report dated January 28, 2003, and the sick leave was approved as scheduled up to March 7, 2003.

In order for the Postal Service to prove a failure to maintain a satisfactory work schedule charge, the Service must show that the Grievant was absent and either that his absences were not authorized or that his requests for leave were properly denied.

The Grievant provided satisfactory medical documentation for his illness and his Supervisor testified that all the absences were approved.

Nevertheless, it is not logical to conclude that the Employer must retain on his payroll employees whose attendance is irregular, who cannot be counted upon, for whatever reason, even if it is genuine illness. This position is, in the Arbitrator's opinion, untenable.

The Arbitrator is mindful that if an employee is not in a position to be regular in attendance, even if the absence is due to legitimate illness, the Employer is not barred from disciplining such an employee, even terminating him. That is to say that the discipline is not for sickness, but for absence. However, in this instant case the Employer must balance the rights of an emotionally ill employee against its right to discipline an employee who is not regular in attendance. It is possible to accommodate both interests.

Arbitration Awards submitted by both parties were carefully reviewed and considered, however, the awards were not on point for this instant case.

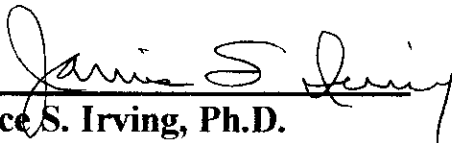
Therefore, the grievance is sustained under the following conditions:

AWARD

IT IS ORDERED:

1. The Employer's Notice of Removal will be held in abeyance for 180 days to give the Grievant an opportunity to receive treatment so he will be able to perform his duty. The Employer does not yet have just cause for removal;
2. The Grievant is reinstated as a PTF employee with access to all his benefits, including the right to use his sick leave benefits, effective March 7, 2003;
3. The Grievant shall receive no back pay as he was on sick leave and not able to be gainfully employed.
4. A Fitness for Duty examination shall be required twenty-one (21) days prior to end of the 180-day abeyance period. If found fit he will return to duty, if not the Notice of Removal will be effective within five (5) calendar days.
5. The Union shall provide one hour of education to its Stewards on how to recognize and respond to persons with emotional disabilities.
6. The Employer shall provide one hour of education to Supervisors and Managers at the Wichita, Kansas Installation on how to recognize and respond to employees with emotional disabilities and acute posttraumatic stress disorder;
7. The Grievant shall present himself for a Fitness for Duty examination as scheduled. Grievant's failure to present himself and complete a FFD examination shall effectively reinstate the Notice of Removal within five calendar days; and
8. With parties' agreement, I will retain jurisdiction of this arbitration for 180 days, or until Grievant has successfully completed the FFD examination, whichever comes first, to provide immediate telephonic resolution of concerns that arise during the administration of this Award.

Date: SEPTEMBER 25, 2003
Compton, CA



Janice S. Irving, Ph.D.