C-25557

In the Matter of the Arbitration	( )	Grievant:
between	( )	Post Office: Northfield, NJ
UNITED STATES POTAL SERVICE	( )	USPS Case No.: C01N-4C-D04166662
and	( )	NALC Case No.: 22510
NATIONAL ASSOCIATION OF LETTER CARRIERS AFL-CIO	( )	

BEFORE: Joseph Brock, Sr.

APPEARANCES:

For the U.S. Postal Service: Gerald T. Goulden and Tamika Williams

For the Union: Raymond McDonald, Jr.

Place of Hearing: 5 Columbus Ave., Pleasantville, NJ 08232

Date of Hearing: October 6, 2004

Date of Award: November 2, 2004

Relevant Contract Provision: Article 16/ELM 660 Conduct

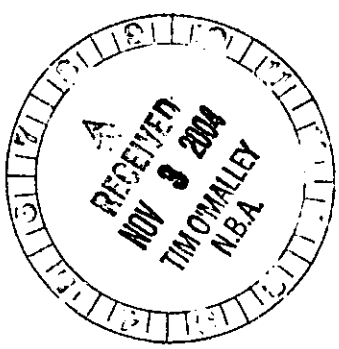
Contract Year: 2001-2006

Type of Grievance: Removal

Panel: Regular

Award: Grievance is sustained and grievant is to be reinstated to his position forthwith upon receipt of this award.

Arbitrator Joseph Brock, Sr. Date 11-02-04



Exhibits

Joint

J-1 – Collective Bargaining Agreement between the Parties dated 2001-2006

J-2 – Dispute Resolution Team Moving Papers

Cited Awards

Management

M-1 – Arbitrator, Michael Jay Jedel, USPS Case# H98N-4H-D01092533-
NALC# F01-0670

M-2 – Arbitrator, Charles H. Frost, USPS Case# H94N-4H-D97114767-
NALC#037811

Union

U-1 – Arbitrator, George R. Shea, Jr., USPS Case#A98N-4A-D02062629-NALC#12-038955

U-2 – Arbitrator, George R. Shea, Jr., USPS Case# A94N-4A-D96056664-NALC# not given

Witnesses

Management

Joseph Stock, USPS Postal Inspector
Dwight Hoop, Contract Fraud Analyst (Private)
Dean Smith, Postmaster, Somers Point, NJ
Richard Menta, Postmaster, Northfield, NJ

Union

Grievant

The hearing was conducted in accordance with Article 15 of the Collective Bargaining Agreement between the two parties. The Arbitrator utilized a voice recorder as a supplement to his notes. The hearing was opened at 9am and closed at 3:10pm.

Issue

Did Management have just cause for the Notice of Removal of for "Unacceptable Conduct" and if not, what is the remedy?

Background:

has been a letter carrier for 31 years. In August of 2000, slipped on a flight of steps and suffered an injury to his lower back. In July of 2002, while working limited duty, suffered a torn rotator cuff. On January 15th had surgery for the rotator cuff injury and was out of work for 4 months. returned to work on limited duty (6 hours per day). continued on limited duty. The Service discovered that was coaching a high school baseball team after he left work from his limited duty position. When the Service became aware that the coaching position was a paid position and was working during the hours he could have been performing "light duty," which he had rejected, he was given a "Notice of Intention to Remove" for his failure to complete section 3 of Form CA-7, which requests information regarding outside employment.

On June 18, 2004, was issued a Notice of Removal for Unacceptable Conduct. The "Letter" states in the relevant section:

You are hereby notified that you will be removed from the Postal Service effective 30 days from the date of this letter. The reasons for this action are:

CHARGE #1/Unacceptable Conduct

Specifically, on July 27, 2002, you filed Form CA-1, Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay/Compensation. Via this claim you stated that you suffered a work-related injury to your right shoulder. On March 18, 2004, you submitted medical documentation dated 3/16/04 from Atlantic Shore Orthopedic Associates, LLC. This documentation indicated you were fit for full duty. However, on March 22, 2004, another medical statement from the same practitioner was received indicating that you were again restricted to six hours work daily.

As a result of these new work hour limitations, you subsequently submitted Form CA-7, Claim for Compensation on five separate occasions during the period March 5, 2004 through April 30, 2004. Via these Forms CA-7, Section 2.a., you requested compensation due to your alleged work injury as follows:

Leave Without Pay	**2/21-3/5/04**	**9.96 hours**
Leave Without Pay	**3/6-3/19/04**	**14.02 hours**
Leave Without Pay	**3/20-4/2/04**	**18 hours**
Leave Without Pay	**4/3-4/16/04**	**18.10 hours**
Leave Without Pay	**4/17-4/30/04**	**16.35 hours**

Section 3 of each Form CA-7 required you to respond to the following questions: "Have you worked outside your federal job during the period(s) claimed in Section 2? (Include salaried, self-employed, commissioned, volunteer, etc). This question further requires you to identify the "Name and Address of Business," the "Dates Worked," and "Type of Work." On each of the above five referenced claims for compensation, you failed to provide any response to this question.

Section 7 of each Form CA-7 required you to sign and date said form certifying among other things, that the information you provided was "true and accurate."

On June 7, 2004, I was presented with a Postal Inspection Service Investigative Memorandum (IM) relative to your employment as head baseball coach with Holy Spirit High School and the above referenced claim of alleged work injury. The Memorandum included among other things, a copy of your signed employment contract as head baseball coach with Holy Spirit High School. This contract states that you were "hired" as head baseball coach and also states: "I understand that the salary for this period is $2,900." The contract also included a requirement that coaches "should be present at least ½ hour before practice starts." According to the Inspection Service interview with Holy Spirit Athletic director, Lee Westenberger, you were expected to report at 2:00 as practice began at 2:30. This was in conflict with your regular work schedule of 7:30am through 4:00pm.

After review of the above IM, it was my determination that you engaged in unacceptable conduct by failing to report the above work and income.

On June 16, 2004 a pre-disciplinary discussion was held between yourself, local NALC President Nelson Gaskill, and me, relative to the above matter. Also present was Dean Smith, Postmaster, Somers point, NJ.

During this pre-disciplinary interview, you admitted that you were the head baseball coach for Holy Spirit High School during the periods for which you claimed compensation. However, you stated you did not consider this activity to be work, but stated it was your "hobby." I find this explanation unacceptable, especially in consideration that the term "hired" was clearly stated in your contract as coach. I believe the word "hired" is generally accepted by reasonable people to indicate the performance of work. Therefore, it is reasonable that you should have indicated such in Section 3 of the above referenced CA-7 claim forms. You also stated that you considered the monies paid to you for this work as a "stipend" and not a salary. Given that fact that the word "stipend" is derived from the root word "salary," it is my opinion again, that a reasonable person would have indicated receipt of this salary in Section 3 of the above referenced CA-7 claim forms. Also, I note that the referenced IM included copies of Internal Revenue Service Form, 1099-MISC, for 2002 and 2003 for the above salary payment. Holy Spirit High School is required by law to provide you, as an employee, with a copy of this form, which includes tax-filing instructions. These instructions indicate that the income stated on Form 1099-MISC may be subject to "self-employment tax," referring to Section 3 of Form CA-7.

You also stated during the pre-disciplinary discussion that another reason you did not complete Section 3 of Form CA-7 is because you were advised only to complete Sections 1, 2 & 5 by the prior Postmaster, James Mazzone. I telephonically contacted Mr. Mazzone after our meeting. Mr. Mazzone stated you never requested any assistance in preparing Form CA-7, nor did he ever provide you with any instructions on proper completion of said form.

Based on the above, I have determined that you have committed serious violations of, but not limited to, the Employee and Labor Relations Manual, Section 661, Exhibit 661.21.3, .4, Sections 661.3.a & .c, 665.2.ee, and Sections 666.1 and 666.2. Your actions as stated above cannot and will not be tolerated!

The "Letter of Removal" was signed by Postmaster Richard Menta and the Post Office Operations Manager.

On June 29, 2004, filed a grievance requesting that the Notice of Removal be rescinded and he be made whole for all lost wages and benefits.

On August 13th, the Dispute Resolution Team voted to Impasse and on August 18th, the Union filed for arbitration. Thus the grievance before me.

Management Position

It is Management's position that knew exactly what he was doing when he failed to complete Section 3 regarding outside employment. Section 3 asks a simple question that requires a yes or no answer, "Have you worked outside your federal job during the period(s) claimed in Section 2?" (Include salaried, self-employed, commissioned, and volunteer, etc.) Furthermore, above the employee's signature on form CA-7 is the following statement: "I hereby make a claim for compensation because of the injury sustained by me while in the performance of my duty for the United States Postal Service. I certify that the information provided above is true and accurate to the best of my knowledge and belief. Any person who knowingly makes any false statement, misrepresentation, concealment of fact, or any other act of fraud, to obtain compensation as provided by the FECA, or who knowingly accepts compensation to which that person is not entitled is subject to civil or administrative remedies as well as felony criminal imprisonment, or both. In addition, a felony conviction will result in termination of all current and future FECA benefits.

committed multiple acts of poor conduct, which are outlined in the ELM. We believe could have been working the 2 additional hours each day on light duty and we would have accommodated him with anything short of bed rest. However, he opted to coach baseball instead. While was being paid by the Post Office for those 2 hours through OWCP he was also being paid for coaching.

Not only did engage in outside work activity, he failed to report this to OWCP which is a violation of the law. He did not do this just one time; he failed to report this income on 5 occasions. Section 3 of the claim form is crystal clear and must be filled out. used the USPS for personal gain and that is a serious violation of the Code of Conduct.

The rule states an employee must be honest trustworthy and loyal. was none of these. Common sense and his years of service should be considered in this case because he should have known what he had to do. The Union tries to blame Management. But Management has testified that never requested help to fill out the forms.

The Inspector testified that was supposed to be at practice at 2pm. However, at 2pm could have been working light duty at the Post Office. There is no question this was a clear attempt to defraud OWCP and the Post Office. Postmaster Menta testified that he had conversations with a prosecutor and cases of this type have a minimum monetary limit of $70,000, before prosecution, so charges could not be filed. The Postmaster also testified that he conducted a thorough investigation and via an internal Post Office web site, discovered that in almost every case of this type, the penalty was termination and in some cases, resulted in criminal prosecution.

In April requested sick time and was refused because of the needs of the Service. He took off anyway. Upon investigation Management discovered that he was not sick but was in fact coaching baseball. During his interview regarding his actions, admitted that he wasn't sick and claimed that everyone calls in sick occasionally when they need a day off. This is a demonstration of his dishonesty. , if he were honest, could have been performing "light duty" as contained in Article 13.4. If he could coach a high school baseball team, he could perform duties at the Post Office such as sweeping floors, answering phones, or watching the lobby. Supposedly he could not work according to his medical restrictions.

On June 7, 2004, Postmaster Menta was presented with a Postal Inspection Service Investigative Memorandum relative to 's employment as head coach for the Holy Spirit High School baseball team. This Memorandum included among other things, a copy of 's signed employment contract as head baseball coach with Holy Spirit High School. The contract stated that you were hired as head baseball coach and also states: I understand that the salary for this period is $2,900. The contract also included a requirement that coaches should be present at least ½ hour before practice starts. According to the Postal Inspection Service interview with Holy Spirit Athletic Director, Lee Westenberger; was expected to report at 2pm as practice began at 2:30pm. Athletic Director Westenberger further stated that has been employed as a baseball coach for approximately four years. 's regular work schedule prior to his injury was 7:30am through 4:00pm. The past four years has been working a modified work

schedule due to his injury; the hours are 7:00am through 1:30pm. The employee's regular work schedule would have been in conflict with his coaching position.

During the period the employee was being paid as a high school coach he was claiming compensation for the two hours he could not perform his regular duties as a letter carrier.

The USPS Formal A Representative states, "The grievant had no trouble working as head baseball coach, but was totally incapacitated for two hours of his eight hour shift. The grievant could throw a baseball for Holy Spirit High School, but couldn't answer a phone for the USPS during the same time of day!"

Carrier states that as head coach, his job was administrative. He oversaw the practices and the assistant coaches did the physical activity. Even if true, could have performed some light duty for the Post Office.

The employee has been filing U.S. Department of Labor Form CA-7, "Claim for Compensation" for the past 3 ½ years. The employee and the Union do not dispute the fact that has failed to respond to Section 3 of the CA-7 which pertains to outside employment during the period the employee is claiming compensation. However, the Union and the employee contend that 's failure to respond to this question was due to an error of omission and further contend that it was Management's responsibility to instruct the employee on the proper completion of the form. Management disputes this contention and has supplied statements from the former Postmaster that never asked Management to provide him guidance on the completion of the form nor did he ever ask them any questions about the form. Management further contends that had numerous conversations with injury compensation specialists and could have asked them any questions he may have had.

The instruction for completing Form CA-7 are attached to the form. The instructions are quite clear and under the heading of Employee they state: Employee (or person acting on the employee's behalf) – Complete Sections 1 through 7 as directed and submit the form to the Employee's Supervisor. Under the heading of Supervisor the instructions state: Supervisor (or

appropriate official in the employing agency) – Complete Sections 8 through 15 as directed and promptly forward the form to OWCP.

Management contends that the employee has seriously violated the Code of Ethics and the USPS Standards of Conduct when he failed to report his employment outside of the USPS on numerous occasions and should be removed from the Postal Service.

Union Position

It is the Union's contention that if Management at the Northfield, NJ installation had done a thorough investigation, as called for under the "just cause" provision contained in Article 16 of the National Agreement, they would realize that Carrier was stating the truth when he said that it was just an error of omission.

Management contends that he "never sought help in completing the forms" and "had no trouble understanding and completing those parts of the form that were critical to obtaining his OWCP compensation."

For Management to claim that, "he never sought help in completing the forms" is also erroneous and shows that Management failed to do a thorough investigation. They even ignored the statement from Carrier 's previous Postmaster that states, " himself often called injury compensation to include Shared Services, the Office of Worker's Compensation at Department of Labor which gave him information as to forms and what forms to file" and "as well as 's hiring a compensation attorney to assist him." Is this not seeking help?

In the file is a copy of a Step B Decision in Case No. C01N-4C-C03053403 (Union No. 25-10). The grievance was filed at the Informal A Step on December 27, 2002. The grievance was filed claiming that Management had violated the National Agreement by not processing Carrier 's CA-7's in a timely manner. In the B Team's Explanation we stated, "According to the file, 3 CA-7's were submitted to Shared Services...., and were not processed in a timely manner. After researching the problem with Shared Services, the Team found that the CA-7's Section 2 was improperly checked."

Carrier was filling out the form incorrectly and that in turn was causing him not to receive his checks in a timely manner. So for the Management to say that he, "had no trouble understanding and completing those parts of the form that were critical to obtaining his OWCP compensation," is incomprehensible.

Management makes an accusation but does not support it with any tangible evidence. They submit many CA-17's showing Carrier 's limitations. Why didn't they use the means at their disposal to find out if Carrier could stay the extra two hours and answer the phone? They accepted that he could only work six hours, gave him a job offer of same and now want to question why he couldn't answer the phone.

Instead, they relied solely on the Investigative Memorandum, which is the Investigator's perception of what his witnesses stated to him. Nowhere is there any written statements, or in Carrier 's contract, does it say that practice had to be at 2:30 which would require him to be there at 2:00 pm. The investigator states that, "Mr. Westenberger said the normal baseball practices begin immediately after school approximately 2:30pm.

Did the investigator ask if the school mandated the start time or was it left to the discretion of the head coach? Mr. Westenberger only stated, according to the investigator, that practice started at approximately 2:30pm.

Carrier states that because his limited duty job offer only had him working to 1:30pm he decided to move practice from the normal 4:00pm start to 2:30pm for the convenience of the students and the team. There is a statement from one of Carrier 's assistant coaches from 2000 & 2001 stating that practices were held at 4:00pm. Why didn't Management investigate this?

Carrier has thirty-one years of service. His previous Supervisor, Patricia Hudson, wrote that, "I am writing this letter to attest to the honesty and dedication of to his job and his family. I had been 's Supervisor for 17 years and always found to be above reproach in his dealings with myself as well and his peers."

His previous Postmaster wrote a statement to the type of individual Carrier was. How involved he was with the community and was always involved in sports. How his conversation was always about that involvement. The Postmaster goes on to state that, " was a professional looking letter carrier, he was always well groomed with a clean uniform, with a tie, looking as if he had stepped from the pages of the latest uniform catalog. His customers seemed to like him and many who would see him would call to him from the service window. Very few complaints were received about or his service" and "his peer carriers looked to him for advice and guidance."

It was well known the extent to which he was involved in sports. He was not trying to hide or defraud anyone. He had the coaching job before he was injured. There is a copy of a letter he wrote to OWCP because of questions by Management about his activities, from September of 2000 in which he states that, "I am a high school baseball coach. This is true – I am the head baseball coach at Holy Spirit High School in Absecon. This is an administrative job – I don't play – I don't even hit infield practice, my assistants do that. I only coach – no labor except mental strain. Why wasn't anything said or questions asked at that time instead of almost four years later?

Carrier was a coach for the love of doing it, not to fraudulently make more money and should not be disciplined, let alone fired, for an honest mistake. He changed the practice time for the kids, not himself. Carrier contends that he was told that the money he made would not affect what he received. He immediately filled out a CA-7 listing the income and sent it to OWCP. If the money earned affects what he should have been receiving, OWCP will make the necessary corrections.

Management has failed, as stated on page 16 of the JCAM, to prove that the behavior was intentional. Carrier should be returned to his job with no loss of pay or benefits and made whole in every way.

Discussion and Opinion

The relevant language urgent to this grievance is as follows:

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.

And from the Employees Labor Relations Manual, Section 661.3A:

Standard of Conduct

Employees must avoid any action, whether or not specifically prohibited by this code, which might result in or create the appearance of:

a. Using Postal Service office for private gain.
c. Impeding Postal Service efficiency and economy.

661.21

3. Give a full day's labor for a full day's pay; giving to the performance of duties earnest effort and best thought.

665.2

The following statutes and regulations are applicable to all employees in the Postal Service....and prescribes standards of ethical conduct for officers and employees of the Government.

Section ee.

Prohibition against the use of deceit in an examination or personal action in connection with government employment.

666 USPS Standards of Conduct

666.1 Discharge of Duties

Employees are expected to discharge their assigned duties conscientiously and effectively.

666.2 Behavior and Personal Habits

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.

Most of the facts in this case are not in dispute. The grievant was being paid for coaching a high school baseball team on many days that he was receiving workers compensation as a result of an injury. On 5 occasions during this period of time the grievant did fail to complete the claim for compensation. More importantly, the grievant failed to address Section 3 of the Claim Form, which states:

Have you worked outside your federal job during the period(s) claimed in Section 2? (Include salaried, self-employed, commission, volunteer, etc.)

In addition the Claim Form contains the following in Section 7:

I hereby make claim for compensation because of the injury sustained by me while in the performance of my duty for the United States. I certify that the information provided above is true and accurate to the best of my knowledge and belief.

Any person who knowingly makes any false statement, misrepresentation, concealment of fact, or any other act of fraud, to obtain compensation as provided by the FECA, or who knowingly accepts compensation to which that person is not entitled is subject to civil or administrative remedies as well as felony criminal prosecution and may, under appropriate criminal provisions, be punished by a fine or imprisonment, or both. In addition, a felony conviction will result in termination of all current and future FECA benefits.

Under this section is a line for the applicant's signature which he signed.

The question that is most urgent in this Removal is; did the grievant knowingly attempt to commit an act of fraud? In this instant grievance, that question has serious relevance given the fact that the grievant's livelihood was at stake and if the amount involved were a significant amount, the possibility of a criminal conviction loomed in the future.

The grievant in this case is an employee of 31 years. In those years the grievant has an unblemished record. This was stated on numerous occasions by the Union advocate and in the grievant's testimony. While the contract contains language prohibiting the use of past infractions to support Management's Removal decision to a 2-year period, in this case, it could have been admitted to impeach the grievant's claim that he was a good employee with an unblemished record. No such challenge to his record was put forth by Management.

Postmaster Menta stated that he did not find the grievant to be a stellar employee, despite the fact that he only supervised for a very short period of time. However, this opinion is contradicted in a letter from Postmaster James Mazzone, dated June 24, 2004, which reads:

> **I first met , while I was a supervisor in the Pleasantville Post Office. I came into the office as an officer in the NALC Branch to negotiate a local contract for the letter carriers there.**
>
> **We remet in January 1988, when I was named as Postmaster of Northfield, NJ. was Shop Steward for the Northfield Office and together we re-established Quality of Work Life/Employee Involvement in that office. We met weekly with our workteam and together presented the results of the meeting to the carrier workforce. continued as Shop Steward into 2003.**
>
> **was always involved in his community, he served on the Northfield Planning board for several years, was active in his church and very active coaching his three sons in sports year round. Whether it was baseball, football or basketball, was always involved in his conversations on the work floor centered around the previous days' games.**
>
> **His sports involvement prevented him from working overtime and he always insisted on working only eight hours.**
>
> **was a professional looking letter carrier; he was always well groomed with a clean uniform with tie looking as if he had stepped from the pages of the latest uniform catalog. His customers seemed to like him and many who would see him would holler to him from the service window. Very few complaints were received about or his service. Prior to his back injury in 2000, he was an important part of the Northfield Postal team and his peer carriers looked to him for advice and guidance. In August 2000, reported falling on his knee and injuring his knee. While the contract doctor's office was attempting to x-ray his knee he reported pain in his back he has not returned to full duty since that time and reported and additional injury to his shoulder while working his limited duty of six hours. Since 2000 has not worked in the Post Office for more than six hours per day due to his Doctor's restrictions.**

And one must give further consideration to this letter from the grievant's former supervisor, Patricia Hudson which reads:

> **To Whom It May Concern,**
>
> **My name is Patricia A. Hudson, former Supervisor of , and employee of the US Postal Service, Northfield, NJ.**
>
> **I am writing this letter to attest to the honesty and dedication of to his job and his family.**
>
> **I had been 's immediate supervisor for 17 years and always found <u>to be above reproach</u> in his dealing with myself as well as his peers.**
>
> **If you need verbal confirmation, please feel free to call me.** (Emphasis mine)

Management relied heavily on the assertion that the grievant was reporting for practice at 2pm and this served as his motivation to refuse light duty. In this argument, Management's inspection and investigation appears incomplete.

The Postal Inspector, Mr. Stock, testified that the principle of the school told him that practice started at 2:30pm and coaches must be there ½ hour before that. Mr. Stock also implied that these hours were contractual. There is nothing in the coaching contract that puts forth this provision. The grievant also testified that he had complete control to set his own practice hours and indeed had changed the practice to begin at 4pm, but following his injury resulting in limited duty he moved practice to 2:30pm.. In addition, a letter from Coach Michael J. Freund states that he set the practice hours for the school's Junior Varsity Team around his schedule because coaching is a part time position.

Mr. Freund states in part:

> **Practices are held inside the gymnasium at night due to the cold weather or on Coach 's schedule. After we split up squads, I practice on my time frame. I begin my practices at 2:45 for the kids and I arrive at 3:00. I can't arrive any sooner because I own my own business and can't usually get out any sooner. In conclusion we are full-time workers and part-time coaches. This is the reason we revolve our practices around our work schedules.** (Emphasis mine)

There is also a letter in the record from Mr. John P. Leon which states in part:

> **We had schedule changes approved by our respective supervisors that we could have practices and be able to attend the games. Games and practices are typically 4:00pm.** (Emphasis mine)

Regarding the implication the grievant could have; should have worked "light duty," I make no judgment. I have seen no substantial evidence that the grievant worked beyond his medical restrictions while coaching. Nor was medical documentation to support the Service's speculations presented in the record or testimony. The Union's argument that Management could have used the means at their disposal to determine if Carrier could have stayed to answer the phones is a valid contention, and also lends misgivings to the depth of the pre-discipline investigation.

The grievant also testified that his duties as a coach were limited to administrative. He stated he did not pitch batting practice, swing a bat or other activities connected to coaching. In response to

a question from Management regarding a news article that the "coach" had a catch with his young son, the grievant testified that he "threw a couple of balls underhanded to his son for the reporter." Absent hard evidence to the contrary, doubting such testimony would be presumptive at best.

While the Postmaster was not permitted to make inquiries regarding physical capabilities to s doctor, Mr. Stock, as a Postal Inspector probably could have. In any event, it is obvious to this Arbitrator that the Service did not exhaust the means at their disposal to determine the grievant's physical capabilities.

The grievant's action of calling in sick in April when he in fact was coaching a game, does not appear to have resulted in discipline but does demonstrate that the grievant was not straightforward at that time. No one can condone his action in that instance, but unfortunately the use of sick days to obtain personal time off has evolved into a common dilemma for employers and in many cases results in some form of written warning for a first offense. However, as demonstrated in the record, received no disciplinary action. Once again, I make no judgment, as this is not the issue before me. Management argues that this incident demonstrates that the grievant was dishonest on that occasion, and they are correct in that claim. Nevertheless, it is a protracted stretch from a fabricated sick-out to a fraudulent compensation claim.

Postmaster Menta stated that when considering the Removal, he researched the Post Office website to review other situations of this type. He testified that in most cases they resulted in Removal and many in prosecution. I do not have these cases before me in order to review. Therefore, I do not know if they would be comparable to this instant case. In cases involving possible criminal conduct or stigmatizing behavior, a higher burden of proof must be applied; typically, a "clear and convincing evidence" standard. This higher burden of proof is required where the alleged misconduct is of a kind recognized and punished by criminal law. In this instant case the "preponderance of evidence" and "clear and convincing evidence" is not forthcoming. Simply stated in these types of cases, the Arbitrator must be completely convinced that the employee is guilty. I am far from convinced.

In this instance, I believe the grievant committed a pronounced oversight and for a grievant with an outstanding 31-years record, this oversight should not be sufficient for Removal, let alone a criminal prosecution. It also is of concern to me that no one in Management or Shared Services uncovered the failure to complete the Forms, especially since most of the employees, including Management, were obviously aware that was coaching baseball.

Postmaster Menta also testified of a conversation with a prosecutor who declined to pursue the grievant's acts because the monetary gain was below the $70,000 level of criminal action.

In any event, given the circumstances in this case, I am not convinced that a criminal charge would be forthcoming, even if there was not a $70,000 minimum.

Furthermore, I find Management's argument of notoriety to be vague and elusive since no evidence or testimony of community notoriety is in the record. If, in fact, there was any notoriety, it clearly was de minimus.

Management has also argued that other carriers were upset and knew that the grievant was coaching baseball. I have no way of knowing if carriers were upset and I am not questioning the testimony of Mr. Menta. Upset or not, I find it is not relevant to the basic issue, i.e. was the grievant attempting to perpetrate a fraud?

The fact that other carriers were aware that was coaching in the afternoons is of little value because everyone knew was coaching baseball. He was very high profile in this venture and never tried to hide his baseball involvement.

Furthermore, Postmaster Mazzone in his letter states; "whether it was baseball, football, or basketball, was always involved and his conversation on the work floor centered around the previous day's games. His sports involvement prevented him from working overtime and he always insisted on working only 8 hours." This was not a secret. The grievant was dedicated to this activity.

The basic matter must come down to the intentions and character of the grievant. As to character, here is an employee who has received a glowing testimonial from 2 former managers; an employee whose honesty and character have been beyond reproach for 31 years.

Management insinuated that the employee is accident-prone and his injuries were preventable. There is no submission to substantiate this theory. This Arbitrator has no insight into this assertion and such a conclusion should depend on an accident review board. Nor do I make any judgment on the seriousness of the injuries to the grievant. The fact is the grievant has had at least 2 surgeries, one as recent as June 2004.

The allegation that the grievant attempted to manipulate his hours of work with the submission of a new doctor's report from Dr. Tucker to replace the return to work from Dr. Marcyzk, was credibly explained by the grievant; and also in the letter submitted by this doctor's office, which is very credible.

Concerning the question of intent; Intention as defined in Oxford American Dictionary is defined as: "a thing intended; an aim or purpose; the act of intending."

I do not believe failed to fill in Step 3 of the Claim Form with an intention to commit fraud. I draw this conclusion based on the following reasons:

- Thirty-one years service with no discipline; and a clean record for this period of time
- Impressive tributes from former supervisors
- Outstanding reputation and standing in the community
- The investigation leading to removal was incomplete
- The Removal was capricious and arbitrary

For these reasons, the grievant must be given the benefit of reasonable doubt.

As per common law of labor arbitration, an act of dishonesty is deemed a dischargeable offense only where an employee commits an intentional act aimed at gaining a benefit to which he would otherwise be unentitled. Intentional, again, is the key. Given the grievant's record, one must consider the question, would this grievant intentionally attempt to defraud his employer, the Federal Government, suffer the loss of his lifelong job and embarrass himself and his family, and his standing in the community? My instincts tell me-very unlikely.

Additionally, I do not believe Management gave consideration to Section 16 of the Joint Contract Administration Manual, which states, by agreement of the parties to the Collective Bargaining Agreement.

Examples of behavior. Article 16, Section 1 states several examples of misconduct which may constitute just cause for discipline. Some USPS managers have mistakenly believed that because these behaviors are specifically listed in the contract, any discipline of employees for such behaviors is "automatically" for just cause. However, almost all arbitrators have recognized that these behaviors are intended as examples and that, in any event, even if a particular type of misconduct constitutes just cause for some discipline, Management still must prove that the behavior took place, that it was intentional, that the degree of discipline imposed was corrective rather then punitive, and so forth. So, all of the usual rules of "just cause" apply to these specific examples of misconduct as well as to any other conduct for which Management issues discipline. (Emphasis added)

Considering all of the above, I do not believe Management considered the intent of the grievant. Strong consideration must be given to the fact that the grievant, in his perception, considered that the $2,900 was a stipend and he did not believe it was actual wages. No question, the grievant was wrong in this belief. It is wages, and the grievant will be compelled to reconcile this fact with the Service and Workmen's Compensation.

Reviewing the referenced arbitrations from Management, I find that while these awards are compatible with this proceeding, there is no question that the Removals for dishonesty and fraud were clearly validated and the intention to be deceitful was evident in those awards. For example, in Arbitrator Michael Jay Jedel's award (USPS#H98-4H-D01092533/NALC#F01-0670) the record states:

The Service conducted surveillance of the grievant on a number of occasions over the next 3 weeks and video taped him at various times. An edited surveillance video tape was provided to the treating physician and on November 21, 2000, he completed a revised CA-17, Duty Status Report, in which he indicated that the grievant should be returned to work full time.

I fully concur with both decisions. However, those cited conditions are not evident or so obvious in this instant grievance.

I do not believe the Service met the Just Cause Standard for Removal. I find there was no intention on the part of the grievant to defraud the Service or Worker's Compensation. If I was convinced that it was the grievant's intention, this grievance would, in no uncertain terms, be denied.

The last question to be resolved is the remedy. Given that the grievant was Removed, in general, for attempting to commit a fraudulent act, I find there is no in between remedy available. The grievant either committed the deed or he did not. I find the grievant did not, and therefore applying a lesser penalty would not be appropriate or within the authority vested to me by the parties.

Based on the findings and reasoning set forth in this Discussion and Opinion, the Arbitrator issues the following award:

Award:

1- Grievance is sustained and grievant is to be returned to his position forthwith.

2- Grievant is to be made whole for any loss of wages, less any wages earned from other employment during this period; and in conjunction with his doctor's release to return to work. All benefits and seniority are to be reinstalled to the grievant retroactive to the date of his Removal.

3 - This award is not intended to interfere with any actions, disputes or appeals between the Grievant and the OWCP.

4- I maintain jurisdiction for 45 days from this date of this award.

Arbitrator: Joseph Brock, Jr.

Date: 11-02-04