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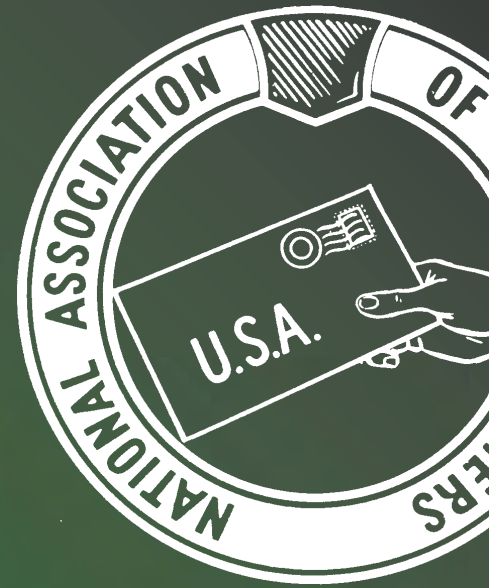
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# DEFENSES to DISCIPLINE

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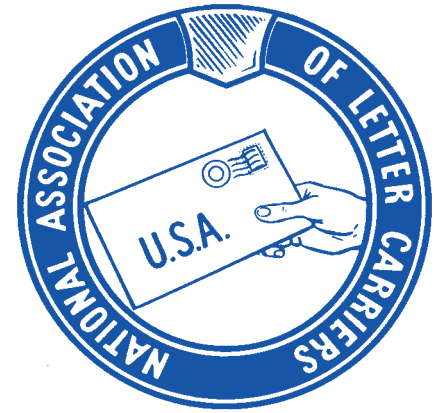
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## To All NALC Grievance Handlers

Job security is the most important employee guarantee in any collective bargaining agreement. Wages, benefits and work rules mean little without contract language to protect the right to stay employed.



Discipline is a grave threat to a letter carrier's job security. So the National Agreement restrains management's disciplinary powers, proclaiming in Article 16.1 that the employer may not discipline or discharge an employee unless it can show "just cause."

NALC spends a significant amount of its resources grieving discipline, arguing that management lacks the required "just cause." Discipline can accumulate in an employee's personnel file and lead to discharge, so NALC may grieve to challenge any level of discipline, from a letter of warning to discharge.

An NALC shop steward must research the facts and the contract before constructing an effective discipline grievance. Then he or she needs to articulate the correct arguments at the very earliest steps of the grievance procedure. To do these jobs well a shop steward requires deeper and more detailed information than either the National Agreement or the Joint Contract Administration Manual (JCAM) provide.

NALC created this guide to help union representatives find that in-depth information and put it to work challenging discipline. The guide summarizes more than 30 years of NALC experience with a comprehensive range of subjects related to discipline. It explains the key principles, contract language, national settlements and arbitration decisions that comprise our own "common law" of just cause and job security.

Sincerely and Fraternaly,

Fredric V. Rolando  
President  
National Association of Letter Carriers



# Defenses to Discipline

## Table of Contents

### Table of Contents

Introduction

Navigation Tools

### Chapter 1—Forms of Discipline

Introduction

Discussions

Letters of Warning

Suspensions 14 days or less

Suspensions of more than 14 days or discharge

Indefinite Suspensions

Emergency Suspensions

Transitional Employees

### Chapter 2—Defenses to Discipline

Just Cause

#### Section 1—Merits

Burden of proof

Evidence

#### Section 2—Management Responsibilities

A) Before Issuing Discipline

1) Investigate

2) Ordered by higher management

3) Review and Concurrence

4) Denial of “Weingarten” Rights

B) Concerning Discipline Issued

5) Not Progressive

6) Untimely Discipline

7) Improper Basis—No Rule Broken

8) Insufficient or Defective Charge

9) Improper Citation of Past Elements

10) Double Jeopardy

11) Failure to Give Grievance Rights

C) During Processing Grievance

12) Failure to Provide, Disclose Info

13) Lacked Authority to Settle

14) Failure to Meet or Issue Proper

Decision

#### Section 3—Mitigation

1) Improper Training

2) Disparate Treatment

3) Rule Unenforced

4) Long Service

5) Not Intentional

6) Emotionally Impaired

7) Drugs Alcohol Impaired

8) Grievant was provoked.

### Chapter 3—Steward’s Role

Introduction

Time limits

Investigation Rights

Information, Rights

Informal Step A

Formal Step A

Duty of Fair Representation

### Chapter 4—Special Topics

Election of Forums—MSPB Appeal Rights

Back Pay

Last Chance Agreements

Resignations

### Chapter 5—Arbitration

Use of Arbitration awards

Quantum of Proof

### Chapter 6—Reasons for Discipline

Accidents, in General

Accidents, Vehicle

Attendance

Performance Related Discipline

Failure to Meet Office Standards

Falsification Employment Application

Nexus—Off Duty Misconduct

Workers’ Compensation Fraud

### Appendix—Arbitrator Daugherty “Just Cause”

# Navigating around the publication

The written text of this publication is one-hundred and fifty pages. If necessary, it can be printed out, in whole or in part. However, it has been published as a DVD since its real value is that it contains imbedded hyperlinks to assist navigating around the document and to access more than 500 arbitration awards, national level settlements, court cases and NALC publications totaling over 10,000 pages. To navigate around the document itself, it is usually best to go to the Table of Contents at the top and simply left click on the section you are seeking.

The links in [green](#) will take you to another section of the document, for example: [Nexus](#).

The links in [blue](#) will take you to an external document in PDF format such as an Arbitration Award, National Level Settlement, or article in an NALC publication, for example: [C-23828](#) , [M-01444](#) or [NALC Arbitration Advocate](#).

Excerpts from the 2006-2011 National Agreement are indicated by gray shading.

Excerpts from the 2009 *Joint Contract Administration Manual (JCAM)* are indented and indicated by blue shading.

## Using the Adobe Acrobat Reader

This publication and all the linked documents are in Adobe Acrobat format. Using Adobe tools you can search the individual documents and “cut and paste” text for use in a word processing document.

Users should modify the Adobe tools found at the top of each page as it is displayed. For example the “next page,” “previous page,” “previous view,” “first page,” “last page,” “go to page,” “search,” and “block” tools can all be very helpful. **It is especially important** to have the “next page,” and “previous page,” commands. They will allow you to return to where you left off in this document after you have viewed an external PDF file such as an arbitration award. To add commands, go to the “customize toolbars” menu under “tools” at the top of each page. For additional help using PDF documents, consult the Adobe Reader's help files.

## Note to Readers

This publication is based on many previous NALC publications. It summarizes years of experience by NALC officers, National Business Agents, staff, arbitration advocates and grievance handlers. It will never be complete and we expect it to continue to grow and improve.

You can help us improve future editions by bringing any suggestions you have to the attention of the NALC Contract Administration Unit. The suggestions can be as simple as reporting typographical errors or broken hyperlinks. However, we would especially welcome your suggestions for additional arbitration awards to include, additional subjects to cover or sections that can be improved, clarified or expanded.

# Chapter 1—Forms of Discipline

Article 3, Section B of the National Agreement gives management the right “to suspend, demote, discharge, or take other disciplinary action against such employees.” This general right to issue discipline is subject to the more specific provisions of Article 16. Article 16, Section 1 establishes the principles of “just cause” and “progressive” discipline which are the subject of Chapter 2, below. This chapter reviews the provisions of Article 16, Sections 2–8 which establish the authorized forms of discipline.

Occasionally, local managers use unauthorized and prohibited methods to discipline employees. A commonly used unauthorized method is issuing “letters of concern,” “letters of instruction” and the like. They are typically used by supervisors in an attempt to establish a paper record as the basis of further discipline. The Postal Service has repeatedly agreed that all such “letters” are prohibited. See [M-00074](#), [M-00387](#), [M-00389](#), [M-00390](#), [M-00768](#), [M-00706](#) and [M-00912](#). If supervisors need to address minor performance problems or irregularities, Article 16 authorizes only two methods. They may hold a private, non-disciplinary “discussion” with an employee (see [Article 16, Section 2](#)) or they may issue official discipline in the form of a letter of warning, subject to challenge through the grievance/arbitration procedure (see [Article 16, Section 3](#)).

## 1) Discussions

Discussions, occasionally referred to as “official discussions” or “job discussions” are the subject of Article 16, Section 2 which provides the following:

**Article 16, Section 2. Discussion** For minor offenses by an employee, management has a responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered discipline and are not grievable. Following such discussions, there is no prohibition against the supervisor and/or the employee making a personal notation of the date and subject matter for their own personal record(s). However, no notation or other information pertaining to such discussion shall be included in the employee’s personnel folder. While such discussions may not be cited as an element of prior adverse record in any subsequent disciplinary action against an employee, they may be, where relevant and timely, relied upon to establish that employees have been made aware of their obligations and responsibilities.

The JCAM explains this section as Follows:

Although included in Article 16, a “discussion” is non-disciplinary and thus is *not* grievable. Discussions are conducted in private between a supervisor and an employee.

Both the supervisor and the employee may keep a record of the discussion for personal use, however these are not to be considered official Postal Service records. They may not be included in the employee’s personnel folder, nor may they be passed to another supervisor.

Discussions cannot be cited as elements of an employee’s past record in any future disciplinary action. Discussions may be used (when they are relevant and timely) only to establish, that an employee has been made aware of some particular obligation or responsibility.

**Discussions Not Grievable.** Although “discussions” are included in Article 16, they are not considered to be discipline and are not grievable. They are used for minor offences to make sure that employees are aware of their obligations and responsibilities. The contract specifically provides that discussions must be held in private between the employee and the supervisor. It is not appropriate to hold discussions on the workroom floor or anyplace where they can be overheard.

**Discussions Not Citable.** Discussions cannot be cited as past record items in any letter of charges in a future disciplinary action. They may be used (when they are relevant and timely) only to establish, via testimony of a supervisor, that an employee has been made aware of some particular obligation or responsibility.

Both the supervisor and the employee may keep a record of the discussion for personal use; however, the notations are not to be considered official Postal Service records. They may not be included in the employee’s personnel folder, nor may they be passed to another supervisor.

**No Union Representation.** Employees are not entitled to union representation during an official discussion. However, it is important not to confuse the “discussions” described in Article 16.2 with investigatory interviews. The purpose of an investigatory interview is to collect facts or to determine exactly what happened, not merely to make employees aware of their obligations and responsibilities. Employees are entitled to union representation during investigatory interviews when an employee reasonably believes that discipline could result from the interview. If an employee has any question about the exact nature of an interview or discussion, the best advice is simply to ask whether it could result in discipline. If the answer is yes, it is not an Article 16.2 “discussion” and the employee should immediately request union representation. See [Weingarten Rights](#).

## 2) Letters of Warning

### Article 16, Section 3. Letters of Warning

A letter of warning is a disciplinary notice in writing, identified as an official disciplinary letter of warning, which shall include an explanation of a deficiency or misconduct to be corrected.

The JCAM explains this provision as follows:

Letters of warning are official discipline and should be treated seriously. They may be cited as elements of prior discipline in subsequent disciplinary actions subject to the two year restriction discussed in Article 16.10 below. Arbitrator Fasser held in NB-E 5724, February 23, 1977 (C-02968) that a letter of warning which fails to advise the recipient of grievance appeal rights is procedurally deficient.

Stewards should make sure that letter carriers understand that letters of warning are a serious matter and should not be ignored or shrugged off. Copies of letters of warning are ordinarily placed in employees’ Official Personnel Files. If they are not for just cause, they should always be grieved. If management later cites an ungrieved letter of warning as an element of prior discipline in subsequent progressive discipline, it is too late to argue for the first time that it was not issued for just cause.

Sometimes the most fair and just way to settle a grievance concerning a letter of warning is to agree that it will be expunged from the grievant’s record in less than the two years provided for in Article 16.10 if there is no further misconduct. Any such settlement should specify the date on which it will be expunged. Otherwise there may be later disputes over, for example, whether it is to be expunged one year after the date of issuance or one year after the date of the grievance settlement.

### **3) Suspensions of 14 Days or Less**

#### **Article 16, Section 4. Suspensions of 14 Days or Less**

In the case of discipline involving suspensions of fourteen (14) days or less, the employee against whom disciplinary action is sought to be initiated shall be served with a written notice of the charges against the employee and shall be further informed that he/she will be suspended. A suspended employee will remain on duty during the term of the suspension with no loss of pay. These disciplinary actions shall, however, be considered to be of the same degree of seriousness and satisfy the same corrective steps in the pattern of progressive discipline as the time-off suspensions. Such suspensions are equivalent to time-off suspensions and may be cited as elements of past discipline in subsequent discipline in accordance with Article 16.10.

The JCAM explains this provision as follows:

Employees issued discipline involving suspensions of fourteen days or less will remain on duty during the term of the suspension with no loss of pay. These disciplinary actions are of the same degree of seriousness and satisfy the same requirements to be corrective progressive discipline as time-off suspensions. Such suspensions are equivalent to time-off suspensions and may be cited as elements of past record in subsequent discipline in accordance with Article 16.10.

Suspensions issued under the provisions of Article 16.4 must advise the recipient of grievance appeal rights.

The Postal Service has agreed that letters of warning must be used instead of suspensions of less than five work (not calendar) days. If suspensions of five days or more are reduced unilaterally, it must be to a letter of warning rather than to a suspension of four days or less. The only exception is in cases where a suspension of less than five days is the result of a grievance settlement. See USPS Letters [M-00582](#) and [M-01234](#).

### **4) Suspensions of More Than 14 Days or Discharge**

#### **Article 16, Section 5. Suspensions of More Than 14 Days or Discharge**

In the case of suspensions of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days. Thereafter, the employee shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure. A preference eligible who chooses to appeal a suspension of more than fourteen (14) days or his/her discharge to the Merit Systems Protection Board (MSPB) rather than through the grievance-arbitration procedure shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement or through exhaustion of his/her MSPB appeal. When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the Employer is not required to give the employee the full thirty (30) days advance written notice in a discharge action, but shall give such lesser number of days advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

The JCAM explains this section as follows:

Letter carriers must be given 30 days advance written notice prior to serving a suspension of more than 14 days or discharge. During the notice period they must remain either on the job or on-the clock at the option of the Postal Service. The only exceptions are for emergency or crime situations as provided for in Sections 6 and 7 below. Removals are also subject to the Dispute Resolution Process Memorandum reprinted on page 15-20 of the JCAM. It provides in relevant part:

Removal actions, subject to the thirty (30) day notification period in Article 16.5 of the National Agreement, will be deferred until after the Step B decision has been rendered, or fourteen (14) days after the appeal is received at Step B, whichever comes first, except for those removals involving allegations of crime, violence, or intoxication or cases where retaining the employee on duty may result in damage to postal property, loss of mails, or funds, or where the employee maybe injurious to self or others, pursuant to Article 16.6 and 16.7.

Thus, when an Article 16.5 removal action is deferred, the employee remains either on the job or on the clock until after the Step B decision has been rendered, or fourteen days after the appeal is received at Step B, whichever comes first. This is true even if it results in the employee remaining on the job or on the clock for longer than the thirty days provided for in Article 16, Section 5.

Issues concerning the MSPB appeal rights afforded preference eligible employees are discussed under Article 16.9 below.

The Article 16, Section 9 procedures applicable to certain preference eligible employees who have appeal rights to the Merit System Protection Board (MSPB) are discussed in Chapter 3, [Election of Forums](#), below.

## **5) Indefinite Suspensions Article 16, Section 6**

### **Article 16, Section 6. Indefinite Suspension - Crime Situation**

**A.** The Employer may indefinitely suspend an employee in those cases where the Employer has reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed. In such cases, the Employer is not required to give the employee the full thirty (30) days advance notice of indefinite suspension, but shall give such lesser number of days of advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

**B.** The just cause of an indefinite suspension is grievable. The arbitrator shall have the authority to reinstate and make the employee whole for the entire period of the indefinite suspension.

**C.** If after further investigation or after resolution of the criminal charges against the employee, the Employer determines to return the employee to a pay status, the employee shall be entitled to back pay for the period that the indefinite suspension exceeded seventy (70) days, if the employee was otherwise available for duty, and without prejudice to any grievance filed under B above.

**D.** The Employer may take action to discharge an employee during the period of an indefinite



suspension whether or not the criminal charges have been resolved, and whether or not such charges have been resolved in favor of the employee. Such action must be for just cause, and is subject to the requirements of Section 5 of this Article.

The JCAM explains these provisions as follows:

Article 16.6.B, which deals with indefinite suspensions in crime situations, provides the following:

- The full thirty-day notice is not required in such cases. (See also Article 16.5.)
- Just cause of an indefinite suspension is grievable. An arbitrator has the authority to reinstate and make whole. In NC-NAT 8580, September 29, 1978 (C-03216) National Arbitrator Garrett wrote that an indefinite suspension is:

“reviewable in arbitration to the same extent as any other suspension to determine whether ‘just cause’ for the disciplinary action has been shown. Such a review in arbitration necessarily involves considering at least (a) the presence or absence of ‘reasonable cause’ to believe the employee guilty of the crime alleged, and (b) whether such a relationship exists between the alleged crime and the employee’s job in the USPS to warrant suspension.”

- If the Postal Service returns an employee who was on an indefinite suspension to duty, the employee is automatically entitled to back pay for all but the first seventy days of pay. The indefinite suspension and entitlement to the first seventy days of pay still remains subject to the grievance provisions stated in Subsection (B).
- During an indefinite suspension, the Employer can take final action to remove the employee. Such removals must be for just cause and are subject to Article 16.5, like any other removal.

**Two Required Elements for Suspension.** Article 16.6.A permits the Postal Service to indefinitely suspend an employee it has “reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed.” However, Article 16.6.B further states that “the just cause of an indefinite suspension is Grievable.”

In the September 29, 1978 Decision C-03216, Arbitrator Sylvester Garrett wrote that an indefinite suspension is

....reviewable in arbitration to the same extent as any other suspension to determine whether “just cause” for the disciplinary action has been shown. Such a review in arbitration necessarily involves considering at least (a) the presence or absence of “reasonable cause” to believe the employee guilty of the crime alleged, and (b) whether such a relationship exists between the alleged crime and the employee’s job in the USPS to warrant suspension.

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It also seems apparent that some alleged crimes could have no material bearing on an employee’s ability to perform his or her job without embarrassment to the Service or impairment of efficiency or safety. Yet, as the Service concedes, there must be a “nexus” in any such case between the alleged crime and the employee’s job with USPS. Whether such a “nexus” exists also is an obvious question under the “just cause” test.

Arbitrator Garrett thus established that management must establish two separate elements to support an indefinite suspension, not only a showing that it has “reasonable cause to believe,” but also that there is a “**nexus**” between the alleged crime and the employee’s job as a letter carrier. He specifically wrote that any regional arbitration awards holding otherwise are simply wrong.

Given those circumstances there was no reasonable basis for the negotiators to have believed in 1971 that, under the last sentence of Section 3<sup>1</sup>, a good faith belief that an employee was guilty of an imprisonable offense in itself would constitute “just cause” for suspending the employee without pay, so as to bar any retroactive remedial action. Those Opinions of some Regional USPS Arbitrators in recent years which might be read to imply otherwise seem, to this extent, to be in error.

In [C-05983](#) Regional Arbitrator Carlton Snow<sup>2</sup> elaborated upon these two requirements as follows:

### **The Difference Between “Reasonable Cause to Believe” and “Just Cause to Suspend.”**

**1. A Two-Step Procedure:** Section 4 of Article 16 in the agreement between the parties provides for indefinite suspensions in situations involving crimes. According to terms set forth in the agreement, management has a right to suspend an employee for criminal conduct if it meets a two-step burden. First, at the time of suspension, the Employer must establish that it had “reasonable cause to believe” an employee engaged in conduct for which the law provides a penalty of imprisonment. Second, the Employer must determine that it has just cause to suspend the employee. According to the parties’ collective bargaining agreement, the Employer cannot suspend an employee in circumstances involving crimes without satisfying the requirement of “reasonable cause to believe.” Even if the Employer meets its burden of showing “reasonable cause,” it, however, has not automatically met its burden of showing “just cause.”

**Reasonable Cause to Believe.** In summary, in order to support an indefinite suspension, management must show both “reasonable cause to believe” and “just cause”—a connection or “**nexus**” between the alleged off duty misconduct and an employee’s job as a letter carrier.” The issue of Nexus is covered separately, below. The remainder of this section discusses the meaning of the phrase “reasonable cause to believe.”

In [C-05983](#), cited above, Regional Arbitrator Snow wrote the following concerning the phrase “reasonable cause to believe:”

**2. Reasonable Cause to Believe; No Presumption of Innocence:** In order for the Employer indefinitely to suspend an employee in situations involving crimes, it must have “reasonable cause to believe” the employee is guilty of a crime for which a sentence of imprisonment can be imposed. The issue is not whether the employee is guilty or innocent. Article XVI, Section 4(A) expressly authorizes the Employer to disregard the common law presumption of innocence deeply imbedded in Anglo-American jurisprudence. The Employer may ignore the presumption of innocence if it has “reasonable cause to believe” an employee is guilty of a crime for which a sentence of imprisonment can be imposed. That is the agreement of the parties. The point is that

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1. The 1978 National Agreement was renumbered and indefinite suspensions are now in Section 6.

2. Arbitrator Snow also served on the National Arbitration Panel. When citing cases by Arbitrator Snow always be scrupulously clear about whether it is a National or Regional level case

management need not wait for a court of law to act. Its interest in an employee's alleged illegal conduct is different from that of society at large.

The Union contends, however, that Article XVI (4) merely clarifies the Employer's right to obtain a shorter than normal notice period to suspend employees indefinitely in response to alleged criminal activity. It is reasonable to conclude that the parties intended something more of the language in Article 16.6 than merely a notice requirement. Article 16.6 clarifies the right of management to impose disciplinary action for criminal conduct before an employee has been convicted by a court of law. In other words, the Union's argument at lower stages of the grievance procedure, to the effect that the Employer had violated an employee's common law right to a presumption of innocence was inappropriate.

In circumstances where an employee has not been convicted of a crime, Article 16 permits management to substitute its "reasonable cause to believe" that an employee is guilty of criminal conduct. Management on the other hand, contends that its burden of "reasonable belief" has been met when an employee merely is charged with a crime. This position is not consistent with notions of due process inherent in the agreement between the parties. Accusatory documents, standing alone which are based on one or more person's accusations, are not sufficient to establish a reasonable belief in an employee's guilt. It is necessary for management to conduct an investigation in order to establish its "reasonable belief." Elements of that investigation will be discussed later in that report. (C-05983)

**Management's Duty to Investigate.** Most other arbitrator's have agreed with Arbitrator Snow who wrote in C-05983 that as a minimum, management's investigation should do two things. First, it should give the employee the right to explain or respond to the charges. Second, management should independently investigate and not rely solely upon press reports, arrest or accusations. Arbitrator Snow explained this obligation as follows:

The point is that, in a case of indefinite suspension for criminal activity, even an ultimate court conviction does not excuse management from its obligation. Management's obligation is to be able to establish that it had a "reasonable cause to believe" the employee was guilty of the alleged charges at the time it placed him on indefinite suspension. The Employer is not permitted to reason backward from a court's later finding of guilt that management had a "reasonable cause to believe" in the employee's guilt at the time it imposed an indefinite suspension. "Reasonable belief" had to exist at the moment of suspension.

After a diligent search, the arbitrator has been unable to find a case supporting management's "reasonable cause to believe" an employee to be guilty of a crime based merely on a bald record of arrest and arraignment. It cannot be denied that the charges against the grievant in this case were serious. Those accusatory charges, however, were all that management had before it. For example, had management interviewed the grievant shortly after the incident or given him a chance to make a written statement, the Employer might have had "reasonable cause to believe" the grievant guilty of some level of assault, although probably not of attempted murder. Presumably, when Mr. Eller and Postmaster McNeely decided to suspend the grievant, they knew he was about to be released on his own recognizance.

Management, however, did not interview the grievant. While it would be unreasonable and conceivably unwise to require the Employer to duplicate efforts of law enforcement agencies, management has an obligation to make a good faith effort to determine events and circumstances leading to an employee's arrest. The facts need only be such that would convince a grand jury to indict an individual, rather than the facts needed to convince a jury to convict. The employer, however, needs more than merely an accusatory document. Consequently the employer in this case did not have "reasonable cause to believe" the grievant was guilty of any crime. (C-05983)

Similarly, in C-01516, Regional Arbitrator Holly emphasized that the mere fact an employee had been arrested did not establish "reasonable cause to believe." He places the burden on the Postal Service to conduct a proper investigation. In the case before Arbitrator Holly, the Postal Service had information that would likely have led to a conclusion other than an arrested employee was guilty of a crime. Arbitrator Holly wrote

...Moreover, the Grievant identified seven alibi witnesses to both the Postmaster and the Postal Inspector, and none of these witnesses had been contacted by these Employer representatives. These facts indicate: (1) that initial disciplinary action was taken prior to the receipt of any investigatory reports, (2) that the investigation was cursory and incomplete, and (3) that when the initial action was taken neither the Supervisor nor the Postmaster had any factual basis or reasonable cause for concluding that the Grievant was guilty of a crime for which he might be imprisoned. All that they knew at the time was that the Grievant had been arrested. Such knowledge alone does not constitute a valid basis for the suspension. (C-01516)

**Back Pay** in indefinite suspension cases is governed by Article 16, Sections 6.B and C.

**16.6.B.** The just cause of an indefinite suspension is grievable. The arbitrator shall have the authority to reinstate and make the employee whole for the entire period of the indefinite suspension.

**16.6.C.** If after further investigation or after resolution of the criminal charges against the employee, the Employer determines to return the employee to a pay status, the employee shall be entitled to back pay for the period that the indefinite suspension exceeded seventy (70) days, if the employee was otherwise available for duty, and without prejudice to any grievance filed under B above.

These provisions provide that if the Postal Service returns an employee who was on an indefinite suspension to duty, the employee is automatically entitled to back pay for all but the first 70 days of pay if the employee was otherwise available for work. The indefinite suspension and entitlement to the first 70 days of pay still remains subject to the grievance provisions as stated in 16.6.B.

In C-22652 National Arbitration Nolan resolved a dispute concerning the application of the back pay provision of Article 16.6 C in the case of an employee returned to duty from an indefinite suspension by a Step B decision. In that case a regional arbitrator had previously ruled that the indefinite suspension was issued for just cause under Article 16, Section 6.B. However, the criminal charges against the employee were subsequently dropped. The Postal Service argued that since the employee was returned to work by a settlement between the parties, it was not the "employer" who returned the employee to duty and that therefore no back pay was required. Arbitrator Nolan rejected this argument as follows.

First, as noted above, Section 16.6.C is a compromise intended by the parties to allo-

cate risks for losses when neither is to blame. They chose to slice that pie without regard to relative fault; that suggests that the employee's limited entitlement to back pay is firm and fixed, and thus should not be affected by the precise method of reinstatement. The only requirement is that the determination to reinstate the Grievant has to be by "the Employer." The Postal Service argues that the quoted phrase covers only a completely unilateral, unpressured decision by Service. Neither the language of the provision nor the sketchy evidence about its negotiation nor the few subsequent awards interpreting that language lend any support to that claim.

"The Employer" can act in many different ways. Officials at many different levels may have authority to make reinstatement decisions. Any official making such a decision will necessarily be influenced by a variety of factors including the nature of the criminal charges, the evidence supporting them, the manner of their disposition, arguments and suggestions from the employee and the Union, the likelihood of a grievance if the Employer denies reinstatement, and the prospects for success if such a grievance goes to arbitration. No decision, in other words, is totally unilateral. Union pressure, actual or potential, is a normal part of the process. Moreover, any official's decision is subject to review in the Postal Service hierarchy and to reconsideration at any appropriate level. The Employer's determination can be totally willing or extremely reluctant, but the presence of external concerns and pressures will make the decision no less by the "Employer".

Whether management makes a reinstatement decision before or after a grievance is filed thus changes nothing. A decision to reinstate an employee made before a grievance is a decision by "the Employer," but so is a reinstatement decision made after. So most importantly, is a reinstatement decision explicitly made to resolve a grievance. A grievance settlement (at least one that does not purport to limit backpay under paragraph C.) is no less a decision by "the Employer" than any other properly authorized decision. (C-22652)

Back pay awards under the provisions of Article 16.6 are otherwise subject to the same regulations as other back pay cases. See [back pay](#).

## **Supporting Cases—Indefinite Suspensions**

[C-03216](#) National Arbitrator Garrett, September 29, 1978

[C-00220](#) Arbitrator Sherman, June 15, 1984

[C-01512](#) Arbitrator Fasser, September 2, 1977

[C-01516](#) Arbitrator Holly, March 6, 1978

[C-03905](#) Arbitrator Weisenfeld, November 17, 1983

[C-05003](#) Levak, February 15, 1985

[C-05424](#) Arbitrator McConnell, January 10, 1986

[C-05983](#) Arbitrator Carlton Snow, July 16, 1981

[C-08024](#) Arbitrator Rimmel, May 20, 1988

[C-10043](#) Arbitrator Williams, May 22, 1990

[C-10153](#) Arbitrator Levin, July 24, 1990

[C-10470](#) Arbitrator Goldstein, December 3, 1990

[C-12749](#) Arbitrator Dennis, February 8, 1993

[C-14959](#) Arbitrator Axon, November 27, 1995

## 6) Emergency Suspensions

### Article 16 Section 7. Emergency Procedure

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.

The JCAM explains this section as follows:

The purpose of Article 16, Section 7 is to allow the Postal Service to act “immediately” to place an employee in an off duty status in the specified “emergency” situations.

Written Notice. Management is not required to provide written notice prior to taking such emergency action. However, an employee placed on emergency off-duty status is entitled to written charges within a “reasonable period” of time. In [C-10146](#), August 3, 1990 National Arbitrator Richard Mittenthal wrote as follows:

The fact that no “advance written notice” is required does not mean that Management has no notice obligation whatever. The employee suspended pursuant to Section 7 has the right to grieve his suspension. He cannot effectively grieve unless he is formally made aware of the charge against him, the reason why Management has invoked Section 7. He surely is entitled to such notice within a reasonable period of time following the date of his displacement. To deny him such notice is to deny him his right under the grievance procedure to mount a credible challenge against Management’s action.

What Test Must Management Satisfy? Usually employees are placed on emergency non-duty status for alleged misconduct. However, the provisions of this section are broad enough to allow management to invoke the emergency procedures in situations that do not involve misconduct— for example if an employee does not recognize that he or she is having an adverse reaction to medication. The test that management must satisfy to justify actions taken under this Article 16.7 depends upon the nature of the “emergency.” In [H4N-3U-C 58637](#), August 3, 1990 ([C-10146](#)) National Arbitrator Mittenthal wrote as follows:

My response to this disagreement depends, in large part, upon how the Section 7 “emergency” action is characterized. If that action is discipline for alleged misconduct, then Management is subject to a “just cause” test. To quote from Section 1, “No employee may be disciplined...except for just cause.” If, on the other hand, that action is not prompted by misconduct and hence is not discipline, the “just cause” standard is not applicable. Management then need only show “reasonable cause” (or “reasonable belief”) a test which is easier to satisfy.

One important caveat should be noted. “Just cause” is not an absolute concept. Its impact, from the standpoint of the degree of proof required in a given case, can be somewhat elastic. For instance, arbitrators ordinarily use a “preponderance of the evidence” rule or some similar standard in deciding fact questions in a discipline dispute. Sometimes, however, a higher degree of proof is required where the alleged misconduct includes an element of moral turpitude or criminal intent. The point is that “just cause” can be calibrated differently on the basis of the nature of the alleged misconduct.

**Separate Grievances:** If, subsequent to an emergency suspension, management suspends the employee for more than thirty (30) days or discharges the employee, the emergency action taken under this section should be grieved separately from any later disciplinary action.

As a practical matter, NALC’s national business agents usually agree to schedule both an emergency suspension grievance and a grievance concerning related subsequent discipline for arbitration at the same time. However, this should not obscure the fact that arbitrators will consider the two grievances separately, using different standards as discussed below. In fact, it is very common for arbitrators to sustain an emergency suspension grievance and deny the related removal grievance, or the reverse. This underscores the importance of researching and arguing the merits of emergency suspension grievances separately from other related discipline.

**Immediate Action.** Article 16, Section 7 permits management to act “immediately” when emergency procedures are needed. However, the need for immediate action must be balanced with management’s contractual and legal requirements. In [C-10146](#), also cited less extensively in the JCAM, above, National Arbitrator Mittenenthal wrote:

The “emergency procedure” is, as those words indicate, a recognition that situations do arise where supervision must act “immediately” in suspending an employee because of immediate risks or dangers which do not allow for the more time-consuming procedures of Sections 4 and 5. Thus, Section 7 is a permissible variation from the conventional suspensions contemplated by the parties. But it is a suspension nonetheless, one which must be considered an integral part of the Article 16 “discipline procedure.”

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My response to this disagreement depends, in large part, upon how the Section 7 “emergency” action is characterized. If that action is discipline for alleged misconduct, then Management is subject to a “just cause” test. To quote from Section 1, “No employee may be disciplined...except for just cause.” If, on the other hand, that action is not prompted by misconduct and hence is not discipline, the “just cause” standard is not applicable. Management then need only show “reasonable cause” (or “reasonable belief”) a test which is easier to satisfy.

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**Written Notice.** Since management can place an employee on emergency suspension, no advance written notice is required. However, there is still a written notice requirement. In [C-10146](#) Arbitrator Mittenthal wrote:

The critical factor, in my opinion, is that Management was given the right to place an employee “immediately” on non-duty, non-pay status on the basis of certain happenings. An “immediate” action is one that occurs instantly, without any lapse of time. Nothing intervenes between the decision to act and the act itself. That is what the term “immediately” suggests. If Management were required to provide “advance written notice” of the displacement of an employee under Section 7, it would no longer have the right to respond “immediately.” The very purpose of a Section 7 “emergency procedure” is to permit an “immediate” response by Management. The language of Section 7, by necessary implication, means that no “advance written notice” can be required in a true Section 7 situation. The notice requirement in Section 4 or 5 has indeed been negated by Section 7. Hence, Management’s failure to provide such notice to [the grievant] was not a violation of Article 16.

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The fact that no “advance written notice” is required **does not mean that Management has no notice obligation whatever.** The employee suspended pursuant to Section 7 has the right to grieve his suspension. He cannot effectively grieve unless he is formally made aware of the charge against him, the reason why Management has invoked Section 7. He surely is entitled to such notice within a reasonable period of time following the date of his displacement. To deny him such notice is to deny him his right under the grievance procedure to mount a credible challenge against Management’s action. Indeed, Section 7 speaks of the employee remaining on non-duty, non-pay status “until disposition of the case has been had.” That “disposition” could hardly be possible without formal notice to the employee so that he has an opportunity to tell Management his side of the story. Fundamental fairness requires no less. ([C-10146](#))  
(*Emphasis added*)

Many regional arbitrators have held that even though written notice was provided, it was unreasonably late. For example, in [C-10028](#) Arbitrator Sobel held that management could not wait to issue the emergency suspension notice until the notice of removal was issued. In his decision, Arbitrator Sobel wrote:

The Service’s argument that the issuance of the Notice of Suspension had to coincide with the issuance of the Notice of Removal is untenable. Both actions are not only separately arbitrable but also have different standards of proof. In similar circumstances within this arbitrator’s experience the normal delay between the time the grievant was sent home, albeit on a non-pay status to await instructions and the receipt of such a Notice ranged from one to three days.

Mistakes and failure for administrative reasons to issue notices within a reasonable time do not provide adequate justification for delaying formal notification. Had this arbitrator acceded to the [Service’s] rationale for the delay, namely its desire to utilize the same evidence as that cited in the Notice of Removal, he would be permitting on interpretation of the LMRA which would allow the Employer to keep the grievant “dangling” and his status undefined up to thirty days while it made up its mind as to what charge, if any, it wanted to bring forth.



## Supporting Cases

[C-09593](#), Arbitrator Howard, October 27, 1989

[C-10028](#), Arbitrator Sobel, May 18, 1990

[C-10146](#), National Arbitrator Mittenthal, August 3, 1990

[C-10308](#), Arbitrator Sobel, August 15, 1990

**Concurrence:** Many managers believe that the need to act “immediately,” obviates the requirement to obtain concurrence (see Article 16.8, [Concurrence](#)). This is incorrect. The same principle that governs the advance notice requirement in emergency situations also governs the application of the Article 16.8 concurrence requirement. Although it may not always be possible to obtain concurrence before emergency action is taken, it still must be obtained.

## Supporting Cases

[C-04156](#), Arbitrator Goldstein, February 22, 1984

[C-05164](#), Arbitrator LeWinter, September 19, 1985

[C-10110](#), Arbitrator Searce, June 24, 1990

**What test must management satisfy?** Usually employees are placed on emergency non-duty status for alleged misconduct. However, the provisions of this section are broad enough to allow management to invoke the emergency procedures in situations that do not involve misconduct for example if an employee does not recognize that he or she is having an adverse reaction to medication. The test that management must satisfy to justify actions taken under this Section 7 depends upon the nature of the “emergency.” National Arbitrator Mittenthal wrote in [C-10146](#) as follows:

My response to this disagreement depends, in large part, upon how the Section 7 “emergency” action is characterized. If that action is discipline for alleged misconduct, Then Management is subject to a “just cause” test. To quote from Section 1, “No employee may be disciplined...except for just cause.” If, on the other hand, that action is not prompted by misconduct and hence is not discipline, the “just cause” standard is not applicable. Management then need only show “reasonable cause” (or “reasonable belief”) a test which is easier to satisfy.

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## Supporting Cases

[C-10146](#), National Arbitrator Mittenthal, August 3, 1990

[C-10364](#), Arbitrator Barker, October 30, 1990

**Investigation:** Often, emergency suspensions are the result of actions that require little investigation. Management often has direct knowledge of alleged misconduct. For example, if an employee directly

threatens his/her supervisor, or an employee engages in a physical altercation observed by management, management may immediately order the employee off the clock and places them in a non-pay, non-duty status. But not all situations are that simple.

In [C-05204](#) Arbitrator Rentfro grappled with a case concerning an employee who had allegedly threatened to kill a manager. The alleged threat was uttered to the employee's psychiatrist, who then reported the incident to Postal management. The employee was immediately placed in an emergency status. No investigation was undertaken by management. Arbitrator Rentfro states:

It is axiomatic that management personnel have the right to protect themselves from the fear of bodily harm stemming from bona fide threats of employees. However, before emergency suspension without pay or some other discipline is appropriate, there must be some evidence that the statement, as made, actually constituted a viable threat. There must also be consideration of any mitigating factors which may be involved. ([C-05204](#))

## Supporting Cases

[C-05204](#), Arbitrator Rentfro, October 1, 1985

[C-14497](#), Arbitrator Francis, May 20, 1995

[C-15516](#), Arbitrator Axon, June 22, 1996

**Charges That Do Not Meet Article 16.7 Criteria.** Management may act overzealously when alleged misconduct has occurred. For example, in [C-01974](#) Arbitrator Schedler held that management had misused the provisions of Article 16, Section 7\*. The case involved a letter carrier charged with deviating over one mile off of his route to eat lunch at his home. In coming to the conclusion that management had misinterpreted the emergency procedures, Arbitrator Schedler wrote:

In carefully reading over the provisions of Section 5, there is a continuous thread of reasoning for an emergency removal. That thread of reasoning is that an employee should not remain on the rolls if by his continual presence in the shop, he would negligently or deliberately damage the Postal Service, or, injure himself, or injure other people while on duty. That is the thread of reasoning for Section 5.

....Management maintained that an emergency suspension also applied to an employee who was a detriment to the Postal Service. I do not disagree with that because the word "detriment" means damage or injury; however, the damage or injury must be limited to the specific items listed in Section 5. ([C-01974](#))

In his decision, Arbitrator Schedler rescinded the emergency suspension and reduced the removal to a fourteen day suspension. Numerous other arbitrators have also held that emergency procedures can only be used when the alleged misconduct concerns the specific items listed in Article 16, Section 7.

## Supporting Cases

[C-01974](#), Arbitrator Schedler, June 7, 1981

[C-10146](#), National Arbitrator Mittenthal, August 3, 1990

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\* Note that at the time of the decision, the emergency provisions were contained in Article 16, Section 5.

C-10293, Arbitrator Howard, September 26, 1990  
C-10519, Arbitrator Hardin, December 26, 1990  
C-10585, Arbitrator Render, January 31, 1991  
C-10876, Arbitrator Sobel, June 4, 1991  
C-10883, Arbitrator Dennis, June 1, 1991  
C-17398, Arbitrator Erbs, September 30, 1997

## **Supporting Cases—Miscellaneous Issues.**

Other issues often arise in emergency suspension cases. Listed below are additional supporting cases sorted by subject.

### **Employees Actions Exacerbated by Management**

C-05138, Arbitrator Rentfro, September 3, 1985  
C-05242, Arbitrator Render, October 6, 1985  
C-05823, Arbitrator Levak, March 11, 1986

### **Employee Failed to Cooperate in Investigation**

C-10946, Arbitrator McCaffree, July 5, 1991

### **Lack of Evidence and/or Circumstantial Evidence**

C-01503, Arbitrator Fasser, July 1, 1977  
C-04812, Arbitrator LeWinter, March 28, 1985

### **Inadequate Charges**

C-06710, Arbitrator Williams, December 3, 1986

## **7) Transitional Employees**

The special rules governing the discipline of transitional employees are the subject of the following Article 16 Memorandum of Understanding.

**MEMORANDUM OF UNDERSTANDING  
BETWEEN THE  
UNITED STATES POSTAL SERVICE AND  
NATIONAL ASSOCIATION OF LETTER CARRIERS,  
AFL-CIO**

### **Re: Transitional Employees—Additional Provisions**

#### **ARTICLE 16**

Transitional employees may be separated at any time upon completion of their assignment or for lack of work. Such separation is not grievable except where the separation is pretextual.

Transitional employees may otherwise be removed for just cause and any such removal will be subject to the grievance-arbitration procedure, provided the employee has completed ninety (90) work days, or has been employed for 120 calendar days, whichever comes first. Further, in any such grievance, the concept of progressive discipline will not apply. The issue will be whether the employee is guilty of the charge against him or her. Where the employee is found guilty, the arbitrator shall not have the authority to modify the discharge. In the case of removal for cause, a transitional

employee shall be entitled to advance written notice of the charges against him/her in accordance with the provisions of Article 16 of the National Agreement.

Date: September 11, 2007

The JCAM provides the following explanation:

Article 16 does not restrict the union and management from agreeing to a lesser penalty during discussions at earlier steps of the grievance-arbitration procedure. However, it does provide that where the employee is found guilty of the charge against him or her, the arbitrator shall not have the authority to modify the discharge.

National Arbitrator Mittenthal held in G90N-4G-D 93040395, August, 18, 1994 (C-13837) that a Transitional Employee removed for cause is entitled to advance written notice of the charges against him/her and, in accordance with Article 16.5, is entitled to remain on the job or on the clock at the option of the employer during the notice period provided by Item 11 above.

In the Step 4 Settlement F90N-4F-D 94022367, January 4, 1995 (M-01202) the parties agreed that when an NALC transitional employee has completed a previous 359 day term of employment in the same office and in the same position, a termination for cause during the first ninety work days (or 120 calendar days, whichever comes first) of an immediately subsequent appointment is subject to the grievance-arbitration procedure.

The principle of progressive discipline does not apply to transitional employees. However, the Memorandum of Understanding establishes a two-part test that management must meet in order to justify the disciplinary removal of a transitional employee. 1) The TE must be “guilty of the charge against him or her,” and; 2) The removal must be “for just cause.”

## **Supporting Case**

TE Jason Perez did commit the act for which he was terminated, namely “use of a privately owned vehicle without authorization.” However, the Postal Service did not meet the standard of just cause as presented in the JCAM. While recognizing that the concept of progressive discipline does not apply in the case of discipline of TEs, the evidence does not show that: (1) the grievant was aware of the rule of not driving his POV to his route: (2) the grievant was not aware of the penalty for violating this rule: and (3) the rule was not consistently and uniformly applied across the Brooklyn installation. He shall be reinstated to his position and made whole for wages and benefits. C-27963 Arbitrator Frazer, December 18, 2008

# Chapter 2—Defenses to Discipline

## Just Cause

Every NALC shop steward learns that if management wants to discipline or discharge a carrier, it must have “just cause.” This is required by the second sentence of Article 16.1 of the National Agreement.

### 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.

The just cause requirement is extremely important because it guarantees job security for letter carriers. Unless there is just cause, a carrier has a right to keep his or her job. Furthermore, management **bears the burden of proving just cause** when it disciplines or discharges a carrier.

It is not possible to give a simple one sentence definition of “just cause.” It is a term that came from collective bargaining agreements. For decades, almost all labor contracts have required just cause for discipline or discharge. The labor arbitrators hearing discipline grievances under these contracts had to apply this language in deciding whether to uphold or reverse discipline. As they wrote thousands of arbitration awards over many years, they developed an approach for deciding whether an employer had shown that discipline or discharge was fair, or justified.

Carroll R. Daugherty was probably the first arbitrator to summarize this approach in an arbitration decision.<sup>3</sup> He expressed it as a series of questions or “tests.” If a disciplinary action passed each of the “[Seven Tests](#),” as he called them, then it was for just cause. If the discipline failed even one test then it was not for just cause. All labor arbitrators should be familiar with the “Seven Tests,” which have been quoted, argued and written about by uncounted advocates, arbitrators and scholars.

NALC and the Postal Service have agreed on the following working definition of just cause which is loosely based on Daugherty’s “Seven Tests.” It appears under section 16-1 of the JCAM.

### Just Cause Principle

The principle that any discipline must be for “just cause” establishes a standard that must apply to any discipline or discharge of an employee. Simply put, the “just cause” provision requires a fair and provable justification for discipline.

“Just cause” is a “term of art” created by labor arbitrators. It has no precise definition. It contains no rigid rules that apply in the same way in each case of discipline or discharge. However, arbitrators frequently divide the question of just cause into six sub-questions and often apply the following criteria to determine whether the action was for just cause. These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

<sup>3</sup> [Enterprise Wire Company and Enterprise Independent Union](#), Volume 46 Labor Relations Reports p.359 (1966).

- **Is there a rule?** If so, was the employee aware of the rule? Was the employee forewarned of the disciplinary consequences for failure to follow the rule? It is not enough to say, “Well, everybody knows that rule,” or, “We posted that rule 10 years ago.” You may have to prove that the employee should have known of the rule. Certain standards of conduct are normally expected in the industrial environment and it is assumed by arbitrators that employees should be aware of these standards. For example, an employee charged with intoxication on duty, fighting on duty, pilferage, sabotage, insubordination, etc., may be generally assumed to have understood that these offenses are neither condoned nor acceptable, even though management may not have issued specific regulations to that effect.

- **Is the rule a reasonable rule?** Management must make sure rules are reasonable, based on the overall objective of safe and efficient work performance. Management’s rules should be reasonably related to business efficiency, safe operation of our business, and the performance we might expect of the employee.

- **Is the rule consistently and equitably enforced?** A rule must be applied fairly and without discrimination. Consistent and equitable enforcement is a critical factor, and claiming failure in this regard is one of the union’s most successful defenses. The Postal Service has been overturned or reversed in some cases because of not consistently and equitably enforcing the rules. Consistently overlooking employee infractions and then disciplining without warning is one issue. If employees are consistently allowed to smoke in areas designated as No Smoking areas, it is not appropriate suddenly to start disciplining them for this violation. In such cases, management loses its right to discipline for that infraction, in effect, unless it first puts employees (and the unions) on notice of its intent to enforce that regulation again. Singling out employees for discipline is another issue. If several employees commit an offense, it is not equitable to discipline only one.

- **Was a thorough investigation completed?** Before administering the discipline, management must make an investigation to determine whether the employee committed the offense. Management must ensure that its investigation is thorough and objective. This is the employee’s day in court privilege. Employees have the right to know with reasonable detail what the charges are and to be given a reasonable opportunity to defend themselves before the discipline is initiated.

- **Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee’s past record?** The following is an example of what arbitrators may consider an inequitable discipline: If an installation consistently issues 5-day suspensions for a particular offense, it would be extremely difficult to justify why an employee with a past record similar to that of other disciplined employees was issued a 30-day suspension for the same offense. There is no precise definition of what establishes a good, fair, or bad record. Reasonable judgment must be used. An employee’s record of previous offenses may never be used to establish guilt in a case you presently have under consideration, but it may be used to determine the appropriate disciplinary penalty.
- **Was the disciplinary action taken in a timely manner?** Disciplinary actions should be taken as promptly as possible after the offense has been committed.

- **Corrective Rather than Punitive** The requirement that discipline be “corrective” rather than “punitive” is an essential element of the “just cause” principle. In short, it means that for most offenses management must issue discipline in a “progressive” fashion, issuing lesser

discipline (e.g., a letter of warning) for a first offense and a pattern of increasingly severe discipline for succeeding offenses (e.g., short suspension, long suspension, discharge). The basis of this principle of “corrective” or “progressive” discipline is that it is issued for the purpose of correcting or improving employee behavior and not as punishment or retribution.

There is even more to “just cause” under NALC’s National Agreement with the Postal Service. Contract language has added some specific requirements for discipline. For instance, Article 16, Section 8 requires higher management officials to “review and concur” before an employee is suspended or discharged. Article 16, Section 10 prohibits management from using expired discipline as a basis for further disciplinary action. In effect, these extra requirements have become part of “just cause” under our contract.

### **Different Types of Defenses to Discipline**

There are many arguments available to a shop steward who challenges a disciplinary action. This is so because there are so many different elements within the just cause standard. The various elements of just cause, and the arguments that management did not have just cause to issue discipline, can be divided into three main categories:

**1) Management improperly prepared or imposed the discipline or improperly processed the grievance.** Much of the “just cause” requirement focuses on how management goes about preparing to impose discipline and actually imposing the discipline. For instance, it must investigate the facts thoroughly before it decides whether to go ahead with discipline. This kind of argument is known as a “procedural” or “due process” challenge to discipline.

**2) Management failed to meet its burden of proof.** Management bears the burden of proving that the grievant acted as charged. Proof of misconduct is called “the merits” of a disciplinary grievance because it is the heart of the matter. If the union can show that management’s proof is weak or otherwise faulty, then there may not be just cause for the discipline.

**3) Management imposed discipline that is too harsh.** NALC often argues that the level of discipline imposed was too severe. For instance, NALC may cite “mitigating circumstances.” (To “mitigate” means to make less harsh or severe.) Or the union may argue that the discipline was punitive rather than corrective and progressive. Although the carrier may have acted as charged, we argue that management should have issued lesser discipline or none at all.

### **State Multiple Defenses Separately and Alternatively**

The NALC will often try more than one of the above categories in a single case and sometimes will use all of them. When multiple defenses are used they should be stated separately, and argued in the order in which they are presented above. Thus, the summary of argument of the grievance of a letter carrier with 32 years of service charged two months after the fact with discarding deliverable mail might be as follows:

**1) The discipline should be disallowed as untimely.**

**2) Even if the discipline was not untimely, the discipline should be disallowed because management failed to prove that grievant acted as charged.**

3) Even assuming that grievant acted as charged, the discipline imposed is too harsh given grievant's 32 years of discipline-free employment.

A series of arguments stated separately and alternatively ("even if", "even assuming"), as above, gives the arbitrator the maximum number of hooks upon which to hang his or her hat. Even if two of the arguments are to be found totally unmeritorious, prevailing on whichever remains means at least a partial win.

**The remainder of this chapter** is divided into three sections, one for each of the categories of defenses described above. For each of the defenses, there is a "Case Examples" section providing one or more quotes from arbitrations in which the defense was employed. Each defense also has a "Supporting Cases" section which lists additional cases in which the defense was employed, showing the NALC Computer Arbitration System "C" Number for each case, as well as the name of the arbitrator and the date of the decision.



# 1) Section One—Merits

**Disputes about the correctness or completeness of the facts used to justify the discipline.**

The Experienced NALC stewards and officers are familiar with the elements of **just cause**, the contract's due process requirements and the many defenses to discipline that can be used to defend letter carriers. Yet sometimes we can all lose sight of one truism that all experienced union advocates eventually learn—most discipline cases are decided by the facts. Section two of this chapter discusses in great detail the various technical and due process arguments available in disciplinary cases. To be sure, when these arguments are available they should be made. However, in the great majority of successful discipline cases arbitrators make their decision based on the merits of the case.

The defense that management failed to prove that the grievant acted as charged is available in every discipline case. This is so because whenever management issues discipline, it assumes the **burden of proving** that the grievant acted in such a way as to provide just cause for discipline. To meet this burden, management must come forward with probative evidence sufficient to convince the arbitrator that the misconduct with which the grievant has been charged actually occurred. Management's proof must be in the form of evidence. Arguments, assumptions, guesses, conjectures, allegations or speculations are not evidence. Testimony of a witness who has personal and direct knowledge is evidence, as may be photographs, fingerprints or documents.

The union does not bear a corresponding burden—it does not have to prove that the grievant did not act as charged. Instead, the union's job is to poke holes in the proofs offered by management. This is not to say that the union should waive its opportunity to present its side of the case. If the union can prove through its own presentation of evidence that the grievant did not act as charged, so much the better.

The arbitrator's primary function in a typical discipline case is to weigh the evidence, to determine whether the evidence is sufficient to conclude that management has met its burden of proof. In performing this function the arbitrator must decide the weight, if any, to be given hearsay or circumstantial evidence; and if witnesses have given testimony which is contradictory, the arbitrator must decide who's testimony is to be credited, and who's discounted. Arbitrators also must decide the amount or level of proof, or the **"quantum of proof"** needed to support the charge.

When preparing a defense to discipline on the merits, you should look at other discipline cases having the same charge. By doing so, you'll be able to identify the kinds of arguments and evidentiary problems that may be specific to a certain charge. For example, the fact patterns found in falsification of employment application cases are quite similar to each other, but are quite different from the fact patterns found in cases in which discarding deliverable mail is charged—and the methods used by arbitrators to resolve disputes of fact in the two kinds of cases is also quite different. Chapter six of this publication provides guidance on handling many of the more common disciplinary charges such as attendance, accidents and unauthorized overtime.

The awards by Arbitrator David Dilts in case [C-23961](#) and Arbitrator David Goodman in case [C-15714](#) are both striking examples of how a thorough independent investigation by the Union destroyed what would otherwise have been an open-and-shut management cases. Both are highly recommended reading.

## Definition of Burden of Proof

The phrase, *burden of proof*, is actually a combination of two different concepts that develop in a case. Stewards should keep them in the mind as they investigate and prepare their cases.

The first element is the **burden of persuasion**. This burden never shifts when the case is reviewed and is borne by the party initiating the action.

In contract cases the union has the ongoing burden of persuading the arbitrator that a contractual violation occurred. The reason this burden falls upon the union is that the National Agreement gives management the right to make many decisions affecting the wages, hours and conditions of employment of letter carriers. However, these rights are not absolute. Article 3 specifically states that these rights are “**subject to the provisions of this Agreement**” and must be “**consistent with applicable laws and regulations.**” The Article 15 Grievance Procedure describes the procedure by which the union may seek relief if they believe management has not lived up to the provisions of the agreement. Thus, as the party claiming a violation of the contract, the union has the affirmative burden of persuasion to establish the contract violation as fact.

Discipline cases are different. Because Article 16 states that, “*No employee may be disciplined or discharged except for just cause...*” management has contractually assumed the burden to prove there was just cause for any disciplinary or discharge action it takes against a Letter Carrier.

The second element of the burden of proof is sometimes known as the **burden of going forward with evidence**. This burden shifts throughout the hearing as each party meets the burden of proof relative to an argument to an argument or contention.

Arbitrator Hugh W Babb explained these concepts in this way

While the burden of proof remains on the party affirming (claiming) a fact in support of its case and does not change in any aspects of the cause, the weight of the evidence shifts from side to side as the hearing proceeds, according to the nature and strength of the proofs offered in support and denial of the main fact to be established. (29 LA 358, June 27, 1957)

Arbitrator James T. Dunne spoke to this issue as well as it relates to a disciplinary case saying:

“Burden of proof is both initial and ultimate. It remains initially with the company until it makes out a prima facie case. It rests ultimately with the company if proof of excuse is established by the union.”(51 LA 174, March 7, 1967).

### Prima Facie Case

A literal translation of the term prima facie would be “first face,” or as we would say in modern English, “on the face of it.” It means that, standing alone and un rebutted, the evidence presented by the moving party would warrant a conclusion which supports that party’s allegations.

In an arbitration hearing, the party bearing the burden of persuasion has the initial obligation to establish a prima facie case. If it fails to do so, the arbitrator may make a ruling that effectively ends the proceeding. However, if the moving party establishes a prima facie case, the burden of going forward with evidence shifts to the opposing party.

In a non-disciplinary case, the union must present sufficient evidence to establish there was a contractual provision limiting management's rights and that such a limitation was exceeded or not followed. If the union is able to do so, management must then produce evidence refuting the union's case or excusing its own actions.

In a disciplinary case, management has the initial obligation to go forward and establish that there was enough evidence in the record to support the conclusion there was just cause for the discipline. If they do so, the burden shifts to the union to prove management's contentions false or to provide justification for the employee's actions.

The conclusion to be drawn is that while one party will retain the obligation to persuade the arbitrator of their position as an underlying principle in any arbitration, once they have established a prima facie case, the burden shifts to the opposing side to rebut that case. If they fail to do so, the arbitrator will find for the moving party.

## **Types of Proof**

According to Black's Law Dictionary, the definition of proof is:

*The effect of evidence. The establishment of a fact by evidence. Any fact or circumstance which leads the mind to the affirmative or negative of any proposition. The conviction or persuasion of the mind of a judge or jury by the exhibition of evidence, of the reality of a fact alleged.*

*"Proof" is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.  
(emphasis added)*

Thus it is clear that proof is established by the production of evidence. Evidence is established in three ways: the oral testimony of witnesses and/or the production of documentary or physical evidence.

**Oral Testimony** is evidence which is given by word of mouth; the ordinary kind of evidence given by witnesses in court or arbitration hearings. There are several types of oral testimony:

**Eyewitness testimony** is the oral expression by a witness of about an event or act to which the witness was present in some manner. The witness recounts what he personally saw, heard, felt, or perceived. For example, an employee who witnessed an accident may be called to testify about what he saw.

**Expert Testimony** is the opinion of a person who possesses special skills or knowledge in some particular science, profession, or business which is not common to the average person and which is possessed by the expert by reason of special study or expertise. For example, although the expert witness did not see an accident occur, she may be called to express an opinion as to matters involved in the accident based upon her investigation and expertise.

**Documentary Evidence** is that which comes on some form of paper or other material substance and would include documents, forms, records, files, written statements, notes, photographs, charts, graphs, written policies and memoranda.

**Physical Evidence** includes any inanimate objects admissible for the purpose of proving a fact, such as a scanner, pieces of mail, a postal vehicle, or a visit to the location of an event.

## Types of Evidence

**Direct Evidence** is proof offered in the form of testimony from a witness who actually saw, heard or experienced the subject of interrogation. It is evidence, which if believed, proves existence of a fact without inference or presumption. That is, it establishes the existence of a fact without the intervention or assistance of the proof of any other fact.

This is the strongest form of evidence and unless specifically rebutted or not believed, will generally be accepted as fact.

**Circumstantial Evidence** is testimony that is not based on actual personal knowledge or observation of the facts in question, but of other facts from which deductions are drawn.

For example, a supervisor testifies that she saw a carrier place something in his coat pocket but did not actually see what it was. When the carrier's pocket is emptied a piece of registered mail is found. While the supervisor did not actually see the carrier put the mail in his coat pocket it is inferred that the carrier put the registered mail in his pocket.

Circumstantial evidence can be very persuasive unless a plausible alternative explanation can be made.

**Hearsay Evidence** is testimony of a statement made by someone else being offered as proof of the matter being stated. The general rule is that a witness may tell only what he or she personally observed through one of his or her own senses. A witness cannot tell what was learned from someone else second hand.

For example, testimony from Supervisor Jones that Frank Smith told her that he saw Carrier Bob put the letter in his pocket, would be direct testimony about what Smith told Jones and might be sufficient to prove that Smith uttered those words, but it could not be given much weight as proof that Carrier Bob put the letter in his pocket. In most cases, an arbitrator will probably not allow this kind of testimony if it was objected to by the opposing advocate.

Some forms of documentation can be considered hearsay. For example, an NCIC computer printout showing that a carrier had been convicted of a crime would be hearsay; as it is a record of a record, not the actual document itself. An authenticated copy of the actual court record showing the conviction would be direct evidence.

## Case Examples

### Burden of Proof: See also [Quantum of Proof](#)

In industrial discipline, as in the criminal justice system, an employee is deemed to be innocent of charges against him until proved otherwise, and the burden of such proof lies with the employer in industrial discipline, as it does with the state under our criminal justice system. ([C-04891](#))

Under these facts, I certainly have not given any weight to the denials of wrongdoing of the Grievant. I do not find him innocent of wrongdoing. On the charge of improperly imbibing on duty and/or being intoxicated on the job, I

hold merely that Management at hearing completely failed to prove its case. That is, after all, the burden assumed by it in discipline and discharge cases under the contract. (C-04711)

## Circumstantial Evidence

Evidence can be either direct or circumstantial. Direct evidence exists when a trier of fact must conclude only that the evidence is credible to establish the truth of asserted facts. An example of direct evidence would be testimony from a witness that he saw one person shoot another. A trier of fact would only have to conclude that the testimony of the witness was credible in order to reach a conclusion that the fact asserted, the shooting, was true.

Circumstantial evidence is different. It requires not only a conclusion about the credibility of testimony from a witness but also the use of inferences. Circumstantial evidence requires an arbitrator to infer that asserted facts are true in a way that is unnecessary when direct evidence is the basis of a decision. Circumstantial evidence that a witness saw a shooting would be testimony from the individual that he or she was near a place where the person had been shot, at a time when the person had been shot, and that the witness saw a particular person running away from the scene. In order for an arbitrator to reach a conclusion that the accused shot the person, it would be necessary to infer not only that testimony from the witness is credible but also that the presence and flight of the person seen leaving the scene established that the individual shot the victim.

The value of circumstantial evidence depends on the strength of the inference which can be drawn from established facts. If circumstantial evidence is ambiguous and permits several different inferences to be drawn, then the evidence is weak and generally will not establish the truth of the proposition for which it has been offered. The force of circumstantial evidence depends on its capability of removing other reasonable explanations except for the proposition it has been offered to support. Circumstantial evidence may be more reliable than direct evidence, but it is necessary for other reasonable explanations to be eliminated; and it should not leave legitimate questions unresolved. (C-10269, Arbitrator Snow)

The reality is that people who do wrong seek to avoid doing it in the sight of direct witnesses. If only direct eye witness testimony was acceptable to prove a case, and circumstantial evidence, as a matter of law, were insufficient, then very few wrong doers would ever be brought to justice. To the contrary, circumstantial evidence is every bit as valid as direct evidence and may be utilized by the Service to prove the wrong doing of the carrier. . . . The critical question, therefore, is not whether the evidence is circumstantial but whether the circumstantial evidence was sufficiently "clear and convincing" to establish guilt. (C-02913, Arbitrator Seidman)

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## Hearsay Evidence

The best evidence that could have been presented as proof of management's statement of facts regarding July 10 was testimony from those individuals who were present when the events occurred. The Employer failed to present those witnesses, and the burden of going forward with such testimony cannot now be shifted to the Union. The grievant denied any wrongdoing at 604 Sunset on July 10, and there was no credible evidence to rebut his version of the facts. By failing to prove the events of the precipitating incident, the Employer has failed to set forth justification for terminating the grievant. (C-04710)

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The Postal Service relies entirely upon written hearsay. The Arbitrator cannot recall any other instance among the more than 1,500 discharge and discipline cases he has heard where an employer attempted to prove its case through written statements. As the Union argues, hearsay evidence is notoriously unreliable. Hearsay is a statement or assertion that is made by someone other than a testifying witness which is offered in evidence to prove the truth of the matter asserted. Thus, hearsay may consist either of an oral statement supposedly made by an absent accuser to a testifying witness, or the written statement of an absent declarant. Hearsay is considered to be unreliable because it is not made under oath and since the declarant is not available for cross-examination to be tested for perception, memory, communication, veracity and bias. Thus, in the absence of some well understood statutory or common law exception, hearsay evidence, even informally admitted, will be either totally excluded from consideration, or will be given less weight than conflicting plausible direct or circumstantial evidence

Moreover, the Postal Service offered no explanation, including unavailability or unwillingness to testify, why it did not attempt to call any of those three declarants as witnesses. It is well-established that, at the very least, an arbitrator may draw an adverse inference from a party's failure to call a potential witness. (C-25100)

## Supporting Cases

C-01312, Arbitrator Eaton, September 23, 1982  
C-01345, Arbitrator Eaton, June 8, 1982  
C-01400, Arbitrator Epstein, July 25, 1980  
C-01432, Arbitrator Aaron, December 13, 1976  
C-23961, Arbitrator David Dilts, January 5, 2003  
C-02689, Arbitrator Schedler, December 20, 1985  
C-02913, Arbitrator Seidman, January 31, 1981  
C-03945, Arbitrator Bowles, November 7, 1983  
C-04710, Arbitrator Snow, February 13, 1985  
C-04711, Arbitrator Goldstein, March 11, 1985  
C-04771, Arbitrator Schedler, April 2, 1985  
C-04812, Arbitrator LeWinter, May 3, 1985  
C-04891, Arbitrator Howard, April 23, 1985  
C-04976, Arbitrator Williams, July 28, 1985  
C-05166, Arbitrator Goldstein, September 5, 1985  
C-05396, Arbitrator Parkinson, November 22, 1985  
C-10269, Arbitrator Snow, September 12, 1990  
C-14730, Arbitrator Snow, August 25, 1995  
C-15714, Arbitrator Goodman, August 7, 1996  
C-25100, Arbitrator Levak, March 10, 2005

## **Section Two—Management Action and Responsibilities**

**Allegations that management improperly prepared or imposed the discipline or that management improperly processed the grievance.**

Many of the elements of the “just cause” standard focus on how management goes about preparing to impose discipline and actually imposing the discipline. For instance, it must investigate the facts thoroughly before it decides whether to go ahead with discipline. This kind of argument is known as a “procedural” or “due process” challenge to discipline.

In addition, Article 15 requires management to do certain things while processing a grievance challenging discipline. For instance, management must give stewards paid time to process grievances, must provide relevant information to the union and must allow employees to exercise their “Weingarten rights.” These requirements do not always fit into a formal definition of “just cause.” Still, they are basic elements of fairness and arbitrators have refused to uphold discipline when management has ignored them.

This section is subdivided into the following three general categories:

**Section 2-A**—Management’s preparation and decision to impose discipline.

**Section 2-B**—Procedural disputes concerning the discipline issued.

**Section 2-C**—Management’s actions during processing of grievance.

# Section 2-A—Management preparation and decision to impose discipline

## Defense No. 1

**Management failed to properly investigate before imposing discipline.**

Before the decision to impose discipline is made, management must conduct a full, fair and impartial investigation, including giving the letter carrier an opportunity to respond to the charges. The JCAM describes this obligation as follows:

Article 16, Section 1. Principles. Before administering the discipline, management must make an investigation to determine whether the employee committed the offense. Management must ensure that its investigation is thorough and objective. This is the employee's day in court privilege. Employees have the right to know with reasonable detail what the charges are and to be given a reasonable opportunity to defend themselves before the discipline is initiated.

## Case Examples

It has been said that the real heart of procedural due process is not even a question of the employee's guilt or innocence; it is how the company goes about arriving at its decision. When the decision is to impose a penalty as severe as discharge, care must be taken that all the relevant facts and evidence are considered. Discharge without a complete investigation or without affording the employee an opportunity to be heard falls short of minimum standards.

The reasons why due process requires that an investigation be made into all the relevant facts and circumstances, including the employee's explanation, before disciplinary action is taken are several. If this is not done, the employer risks nondisclosure of essential elements of the case. A thorough investigation reduces the likelihood of impulsive and arbitrary decisions by management and permits deliberate, informed judgment to prevail. By giving the grievant an opportunity to present his side of the story and point out mitigating factors raises the possibility that the employer would have been dissuaded from discharging him in the first place. The same evidence presented prior to decision may have a more important effect than when offered at the grievance level. This is so simply because it is human nature to stick to and defend a decision already made. This reluctance to reconsider, even in the light of new information, is more pronounced in labor-management relations because the employer has an additional institutional interest to "stand firm" and defend the authority of the supervisory personnel who made the decision to discharge. (C-01030)

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Due process in discharge cases demands that the employee be given the opportunity to explain, if possible, the misconduct with which she is charged. This explanation should be sought before a decision is reached and positions are frozen. The only opportunity for explanation afforded the Grievant before the decision to discharge was an abortive interview with two Postal Inspectors, with whom she refused to speak.

Her reluctance to discuss the matter with the Inspectors is understandable. Suddenly faced with a reading of her Miranda rights by two strangers, she feared criminal prosecution for whatever it was she was being charged with. It is quite another thing for her supervisor or someone in labor relations to talk to her about it, point out the discrepancies found in the certificates previously accepted, and ask for any explanation she might have for the apparent alterations.

The Inspectors were doing their job. It was primarily aimed at garnering evidence to support the charge of submitting falsified medical certification. When they confirmed the charge to their own satisfaction, they tendered the case back to Postal Service supervision for final action. Supervision's function is different than that of the Inspection Service. At this point it became supervision's responsibility to confront Grievant in an effort to ascertain if she had any explanation for the altered certificates, especially in light of their initial acceptance some six months ear-



lier. This kind of investigation was not undertaken until after minds were made up and the Union served notice that it was grieving the discharge. (C-00036)

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The Service essentially argues that the Grievant was not prejudiced by its failure to interview the Grievant, and that, in any event, the Grievant had designated an agent to speak for him. The Arbitrator cannot agree. The vast majority of arbitrators take what might be called a “hard-line” approach to the matter, holding that an employee must be given a personal interview or hearing before any discipline is imposed, and that due process is not satisfied even if he gets a chance to tell his story through an agent or after he is discharged. The requirement is not merely a matter of a technicality, but serves to insure that an employee will not be discharged except on the basis of all the facts and with adequate cause. As noted above, “It is the process, not the result which is at issue.” (C-10412)

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Based upon the evidence adduced at the hearing, both oral and documentary, there is no indication that the supervisor conducted the necessary independent investigation of the facts surrounding the incident nor did she interview the Grievant to get his side of the story before imposing the discipline. The Notice of Removal does not reflect that this was an emergency removal. Therefore, there was ample time to investigate. (C-13521)

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Let’s be clear from the beginning of this discussion on tampering that management compromised its case by not only failing to conduct an investigation into this issue, but chose to ignore it entirely. In addition, there is a good deal of evidence to suggest that management was too quick to jump to a conclusion of guilt, and that it chose to ignore other explanations because of what appeared to be a very thorough investigation by postal inspectors. (C-15714)

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The just cause standard requires the employer to conduct an objective pre-discipline investigation including an interview of the disciplined employee. While the Service may rely on the Inspection Service to conduct that part of the pre-discipline investigation which is within the special expertise of the Inspection Service, the disciplining supervisor remains contractually responsible for the accuracy and completeness of the Inspector’s investigation and for conducting that part of the investigation specifically relating to the decision to discipline an employee. [T]he disciplining supervisor, did not interview the grievant prior to his issuance of the contested NOR. This failure deprived the grievant of the opportunity to provide the disciplining supervisor with any argument or evidence of mitigation which the grievant wished the supervisor to consider when making the determination to discipline and the determination regarding the severity of the imposed discipline. The Service’s failure to conduct a contractually proper pre-discipline investigation detracts from its contention that it had just cause to discipline the grievant. (C-15556)

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The Union advocate asked each of the Employer’s witnesses a number of specific questions about the accident including distances and whether or not either of the drivers were cited. The employer’s witnesses stated there were no measurements taken at the scene of the accident. Other questions could not be answered. Being unable to answer many of the questions about the accident, the testimony of the Employer’s witnesses cast a shadow of doubt as to whether or not a thorough investigation of the accident was conducted. (C-17353)

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In reviewing the “investigative interviews” of the two (2) Full-Time Carriers conducted by Hyatt, it reasonably suggests that Hyatt had determined that the Grievant had committed an offense before he had given her a chance to explain her version of the September 7, 1995 meeting. Therefore, after a careful review of the “investigative interviews,” it is found that Hyatt’s interview of the Grievant and Perry did not meet the standard required for a fair and objective investigation. (C-18316)

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In my considered opinion, the Grievant in this matter was clearly denied her due process rights. The record clearly shows that the Grievant was not offered or provided a Pre-Disciplinary Interview by the Agency. A Supervisor testified the Grievant did not receive a PDI. And with that being said, this procedural error alone is enough to sustain the instant grievance. A PDI is a mandated pre-requisite to any removal. I’m sure both Parties are well aware and versed regarding that requirement. This interview provides the Employee an opportunity to state their position to the Employer, prior to the issuing of a removal notice. The purpose of this interview is two-fold. First of all, the Employee is given the opportunity to state their case to the Employer. And, secondly, the Employer is provided the opportunity to reconsider the facts of the case prior to initiating removal action. It is very possible the information discovered at such an interview could very well offset removal action. (C-23720)

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The USPS did not do a thorough investigation. They failed to interview the only two witnesses who saw what happened. They took pictures of the CRY with the door open and the door was closed. The Postal Service violated the Grievant's due process rights and just cause. ([C-25192](#))

## Supporting Cases

[C-00036](#), Arbitrator Rentfro, February 14, 1979  
[C-00053](#), Arbitrator McAllister, June 10, 1983  
[C-01030](#), Arbitrator Rentfro, April 9, 1979  
[C-01405](#), Arbitrator DiLeone, June 23, 1981  
[C-05073](#), Arbitrator Gentile, August 27, 1985  
[C-05204](#), Arbitrator Rentfro, October 1, 1985  
[C-05424](#), Arbitrator McConnell, January 10, 1986  
[C-10412](#), Arbitrator Levak, November 18, 1990  
[C-13521](#), Arbitrator Jacobs, June 15, 1994  
[C-13895](#), Arbitrator Shea, September 6, 1994  
[C-15556](#), Arbitrator Shea, June 26, 1996  
[C-15714](#), Arbitrator Goodman, August 7, 1996  
[C-17353](#), Arbitrator Roberts, September 10, 1997  
[C-18316](#), Arbitrator Hales, May 12, 1998  
[C-23720](#), Arbitrator Roberts, October 2, 2002  
[C-24445](#), Arbitrator Britton, July 3, 2003  
[C-25192](#), Arbitrator Wolitz, May 5, 2004

## Defense No. 2

**Discipline was ordered by higher management, rather than by the grievant's immediate supervisor.**

The decision whether to impose discipline, and the decision as to the degree of discipline to be imposed, should be made by the letter carrier's immediate supervisor. While higher authority may advise, if asked, it is improper for officials above the immediate supervisor to initiate discipline or to override the immediate supervisor's recommendation as to extent of penalty.

A particularly straightforward and easy to prove form of this violation occurs if higher management issues so-called "blanket discipline" instructions. For example, in [C-16436](#), see below, the District Manager issued instructions that any violation of a safety rule or procedure must result in disciplinary action. See also the article on "Blanket Discipline" in the [Spring 1998 NALC Activist](#).

## Case Examples

The decision to discharge grievant was not made at the local level; it was made by labor relations officers at the MSC. It is clear that (grievant's immediate supervisor) exercised no independent judgment. When she signed the disciplinary notices, she was following instructions. The evidence does not even suggest that she had or believed she had authority to do anything contrary to MSC directions. She was told that the grievant "had to be removed," and from then on the decision was no longer hers.

The agreement requires discipline to be proposed by lower-level supervision and concurred in by higher-level authority. The requirement was omitted in this instance. ([C-04679](#))

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In the instant case [t]he station manager made no recommendation and no decision with respect to disciplining the Grievant; he merely concurred in the suspension decision after it came down from the main post office...As such the grievance procedure had become "a sham".

It is clear from the foregoing that the grievant was denied basic due process rights which are essential to a just cause determination. Under the circumstances, there is no alternative but to sustain the grievance. ([C-04282](#))

\*\*\*

As read by the Arbitrator, Article 16, Section 1 of the National Agreement states, in relevant part, that "No employee may be disciplined or discharged except for just cause such as, . . . failure to observe safety rules and regulations ." In the view of the Arbitrator, this language permits-but does not require-disciplinary action to be imposed for safety violations. By comparison, the District Directive states, in relevant part, that " . . . any violation of a safety rule or procedure will result in disciplinary action." This language clearly requires supervisors in the District to impose discipline, whether or not the supervisor believes that discipline is warranted under the facts of a particular situation. Thus notwithstanding the testimony of Manager Parker and the argument of the Employer to the contrary, the District Directive is a mandate, since it creates within the District a policy under which all safety violations result in disciplinary action, thereby effectively removing supervisory discretion. In short, as a result of the District Directive, when an employee violates a safety rule or procedure, a supervisor cannot simply "do nothing," but is rather required to impose discipline. It follows there from that a supervisor lacking such discretion at the decision-making stage also lacks the authority to resolve a Step 1 grievance filed to protest the discipline. Thus, the Arbitrator is required to conclude that the District Directive, by ordering discipline to be imposed for any safety violation, conflicts with the principles espoused in Article 16, Section I of the National Agreement, and thereby violates the fundamental right of an employee to a disciplinary determination unfettered by mandates from higher level authority.

As a result of the foregoing conclusion, the Arbitrator deems it unnecessary to the resolution of this matter that he further address the merits of whether the Grievant's conduct justified the imposition of any disciplinary action or the additional procedural arguments of the Union concerning disparate treatment. . . [A]s a result of this conclusion, the Grievant is to be made whole. ([C-16436](#))

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Obviously, the Employer in this case did not properly apply corrective progressive discipline to the Grievant for the incident on October 15, 1997. For that reason, in part, this Arbitrator concludes the removal action must be overturned.

More importantly, the other reason for reaching that conclusion is because of the influence exerted by Labor Relations staff on Supervisor Santos decision to issue the Grievant a Notice of Removal. Supervisor Santos admitted under cross-examination that when she contacted Labor Relations, she asked if she should issue a 14 working day suspension. According to Santos, Labor Relations advised her "to go for removal". In the opinion of this Arbitrator that type of recommendation from Labor Relations is totally inappropriate. Clearly, the function of appropriately disciplining employees lies with the immediate supervisor and the reviewing authority, that is, Installation Head or his/her designee rather than Labor Relations staff.

Thus, based upon the record and for the reasons set forth above, this Arbitrator concludes management did not have just cause to Issue the Grievant the November 18, 1997, Notice of Removal. (C-18938)

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The evidence in this case is undisputed that supervisor Aguilar's request for discipline went to Labor Relations as a 14-day suspension and came back from Labor Relations as a Notice of Removal. The testimony and the chain of e-mails establish the decision making process on the level of discipline to be imposed on Grievant Fernando was tainted by Labor Relations and manager Wilkins. I find that Labor Relations in this case went beyond the role to advise and assist local managers by placing supervisor Aguilar in a position that she had no choice but to discipline Grievant in the form of a removal. (C-26204)

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## Supporting Cases

C-00396, Arbitrator Howard, June 23, 1976  
C-00908, Arbitrator Caraway, September 8, 1986  
C-04282, Arbitrator Zumas, April 19, 1984  
C-04674, Arbitrator Zumas, February 8, 1985  
C-04679, Arbitrator Dworkin, January 12, 1985  
C-05250, Arbitrator Giles, November 12, 1985  
C-06012, Arbitrator Nolan, March 6, 1983  
C-06658, Arbitrator LeWinter, November 21, 1986  
C-09873, Arbitrator Rentfro, February 23, 1990  
C-11504, Arbitrator Johnston, December 17, 1991  
C-15025, Arbitrator Stephens, December 18, 1995  
C-16090, Arbitrator Shea, November 21, 1996  
C-16436, Arbitrator McGowan, January 31, 1997  
C-18667, Arbitrator Olson, September 9, 1998  
C-18938, Arbitrator Olson, November 25, 1998  
C-26204, Arbitrator Axon, October 4, 2005

## Defense No. 3.

### Higher management failed to review and concur.

While it is up to the immediate supervisor to initiate disciplinary action (see Defense No. 2, above), before a suspension or removal is imposed Article 16.8 requires that it be reviewed and concurred in by higher-level management.

#### Article 16, Section 8. Review of Discipline

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

In post offices of twenty (20) or less employees, or where there is no higher level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken.

The JCAM explains Article 16.8 as follows:

Concurrence is a specific contract requirement to the issuance of a suspension or a discharge. It is normally the responsibility of the immediate supervisor to initiate disciplinary action. Before a suspension or removal may be imposed, however, the discipline must be reviewed and concurred in by a manager who is a higher level than the initiating, or issuing, supervisor. This act of review and concurrence must take place prior to the issuance of the discipline. While there is no contractual requirement that there be a written record of concurrence, management should be prepared to identify the manager who concurred with a disciplinary action so he/she may be questioned if there is a concern that appropriate concurrence did not take place.

The December 3, 2002, award by NRLCA National Arbitrator Eichen in [C-23828](#), concerned Article 16, Section 6 of the NRLCA National Agreement. That provision is the same as Article 16.8 of the NALC agreement except that it contains a requirement that the concurrence must be in writing. Arbitrator Eichen's award provides the following:

**Issue No. 1.** Article 16.6 Review of Discipline of the Extension to the 1995-1999 USPS-NRLCA National Agreement:

- a) Is not violated if the lower level supervisor consults, discusses, communicates with or jointly confers with the higher reviewing authority before deciding to propose discipline;
- b) Is violated if there is a "command decision" from higher authority to impose a suspension or discharge;
- c) Is violated if there is a joint decision by the initiating and reviewing officials to impose a suspension or discharge;
- d) Is not violated if the higher level authority does not conduct an independent investigation and relies upon the record submitted by the supervisor when reviewing and concurring with the proposed discipline;

e) Is violated if there is a failure of either the initiating or reviewing official to make an independent substantive review of the evidence prior to the imposition of a suspension or discharge;

f) Is violated if there is no evidence of written review and concurrence prior to the imposition of a suspension or discharge.<sup>4</sup>

## Issue No. 2

(a) Proven violations of Article 16.6 as set forth in Issues 1 (b), 1(c) or 1(e) are fatal. Such substantive violation invalidates the disciplinary action and require a remedy of reinstatement with “make-whole” damages.

(b) Whether a violation of Article 16.6 as set forth in Issue 1(f) is fatal, invalidates the disciplinary action and requires a remedy of reinstatement with “make-whole” damages is for the area arbitrator to determine based on the facts and circumstances of the individual case. (C-23828)

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## Case Examples

Concurrence is a specific and formal contract requirement to the issuance of a suspension or a discharge. It must occur before the issuance of the discipline and not afterwards. The requirement is not met merely because a superior agrees with the discipline. It must be demonstrated that he was requested to concur, and that he reviewed the matter in light of all the current information at the time of concurrence, and that he gave his consent to the issuance of discipline. While the contract does not require a writing to accomplish this, it is the employer’s burden to demonstrate it occurred. (C-05164)

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Frankly, this Arbitrator was somewhat taken back by the testimony of Postmaster Baldus, who testified under oath that he had no idea of why the Grievant was absent from work. Taken at face value, this admission makes the Employer’s case untenable. Article 16, Section 8 of National Agreement states: **In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation hand or designee.** (Emphasis supplied). Obviously, if the Postmaster the individual charged with reviewing suspensions of his employees, had no idea why the Grievant was absent, this Arbitrator concludes he did not properly review the case prior to issuing the suspension. (C-16970)

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This case also has very serious substantive “review and concurrence” (i.e., procedural) problems. It is fatally flawed because the concurring/reviewing authority, namely, Station Manager Mark Jarrett, was also, de facto, the issuing supervisor. Acting Supervisor Customer Services Lori Kiemeyer was a pawn in this matter. She did not conduct her own investigation but essentially relied on statements and evidence collected by Manager Jarrett. Most telling in this regard is the fact that she failed to conduct her own interview of Grievant Tuggle prior to issuing the Notice of Removal. (C-24889)

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Finally, the record shows that the Postal Service engaged in procedural errors. These errors include the fact the supervisor did not make the decision to remove the Grievant on her own, but rather in concert with her manager. Article 16.8 was violated and breached when the supervisor sat down with her manager and together they made the decision to remove the Grievant. Article 16 .8 requires a two -tiered disciplinary process whereby someone not directly involved with Grievant will coolly and dispassionately make an independent judgment as to whether or not discipline should be issued . Further, it was Manager Norwood who was the concurring official, who met with Supervisor Sterrett and jointly they decided to issue the removal to the Grievant, thus establishing that it was the concurring official who issued the removal and the supervisor merely concurred in it because she was not going to challenge her supervisor’s order. Moreover, the supervisor admitted at hearing that her supervisor instructed her to prepare the request for removal. (C-23987)

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<sup>4</sup> The NALC National Agreement does not require that concurrence to be in writing.

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Article 16.8 requires that before discharge may be taken the proposed action must be reviewed and concurred in by the installation head or designee. The Agreement allows that in post offices of twenty (20) or less employees, or where there is no higher level supervisor than the supervisor who proposes to initiate the discharge, the proposed discipline must first be reviewed and concurred in by a higher authority outside such installation or post office before the action is to be taken. Arbitral authority on this issue has repeatedly held that the concurrence requirement in Article 16.8 is mandatory as a contractual right and one of due process. . . . Inasmuch as such a violation existed in this case, the Grievant's removal is procedurally defective and cannot be sustained. (C-23997)

## Supporting cases

C-00908, Arbitrator Caraway, September 8, 1986  
C-01477, Arbitrator Holly, February 15, 1982  
C-04156, Arbitrator Goldstein, February 22, 1984  
C-05164, Arbitrator LeWinter, September 19, 1985  
C-05685, Arbitrator LeWinter, January 27, 1986  
C-06679, Arbitrator Carson, November 24, 1986  
C-14481, Arbitrator Alsher, May 12, 1995  
C-16568, Arbitrator Ames, January 10, 1997  
C-16970, Arbitrator Olson, June 24, 1997  
C-17674, Arbitrator Johnston, December 22, 1997  
C-18208, Arbitrator Hales, April 12, 1998  
C-23828, NRLCA National Arbitrator Eichen, December 3, 2002  
C-23987, Arbitrator Irving, January 22, 2003  
C-23997, Arbitrator Eisenmenger, January 30, 2003  
C-24302, Arbitrator Axon, April 24, 2003  
C-24889, Arbitrator Deitsch, December 19, 2003

## Defense No. 4

### Denial of Representation (“Weingarten”) Rights.

Federal labor law, in what is known as the “Weingarten” rule gives employees the right to representation during **any investigatory interview which he or she reasonably believes may lead to discipline.** (*NLRB v. J. Weingarten, U.S. Supreme Court, 1975*) The Weingarten rule is discussed in the JCAM under Article 17.

The Weingarten rule applies only when the meeting is an *investigatory interview*—when management is searching for facts and trying to determine the employee’s guilt or decide whether or not to impose discipline. They do not apply when management calls in a carrier for the purpose of issuing disciplinary action—for example, handing the carrier a letter of warning.

An employee has Weingarten representation rights only where he or she *reasonably believes* that discipline could result from the investigatory interview. Whether or not an employee’s belief is “reasonable” depends on the circumstances of each case. Some cases are obvious, such as when a supervisor asks an employee whether he discarded deliverable mail. The steward cannot exercise Weingarten rights on the employee’s behalf. And unlike “Miranda rights (see below),” which involve criminal investigations, the employer is not required to inform the employee of the Weingarten right to representation.

Employees also have the right under Weingarten to a pre-interview consultation with a steward. Federal Courts have extended this right to pre-meeting consultations to cover Inspection Service interrogations. ([M-01092](#)), *U.S. Postal Service v. NLRB, D.C. Cir. 1992*). In a Weingarten interview the employee has the right to a steward’s **assistance**—not just a silent presence. The employer would violate the employee’s Weingarten rights if it refused to allow the representative to speak or tried to restrict the steward to the role of a passive observer.

Although ELM Section 666.6 requires all postal employees to cooperate with postal investigations, the carrier still has the right under Weingarten to have a steward present before answering questions in this situation. The carrier may respond that he or she will answer questions once a steward is provided.

**The Weingarten rule does not apply to some situations:** Article 16, Section 2 provides that “for minor offenses by an employee ... discussions ... shall be held in private between the employee and the supervisor. Such discussions are not discipline and are not grievable.” So an employee does not have Weingarten representation rights during an official discussion. See [C-03769](#), National Arbitrator Aaron, July 6, 1983.

Employees do not have the right to union representation during fitness-for-duty physical examinations.

It should be noted that Article 17, Section 3 also provides the following:

Article 17.3 If an employee requests a steward or Union representative to be present during the course of an interrogation by the Inspection Service, such request will be granted. All polygraph tests will continue to be on a voluntary basis.

This rule is generally less broad in scope than the Weingarten rule since it only applies “interrogation by the Inspection Service,” whereas the Weingarten rule applies to investigatory interviews by any su-



pervisor. Nevertheless, it should be cited in addition to the Weingarten rule whenever it is violated by management

**Miranda Warnings:** Almost everyone is familiar with “Miranda” warnings from watching television: “You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to have an attorney present before any questioning. If you cannot afford an attorney, one will be appointed to represent you before any questioning.”

Miranda warnings should not be confused with Weingarten rights. They derive from the landmark U.S. Supreme Court decision in *Miranda v Arizona*, 384 U.S. 436 (1966) which concerned constitutional rights prior to an interrogation in criminal cases.

It is critical for stewards to understand and recognize the difference between a normal investigatory interview, even when conducted by postal inspectors, and investigations that cross the threshold into criminal investigations. Postal inspectors or other law enforcement officials cross the threshold into a criminal investigation when they read employees their Miranda rights. Once the warning is given, anything the individual says can be used in a court of law to show criminal activity. Inspectors also enter the realm of a criminal investigation when they request that the employees sign *PS Form 1067, Warning and Waiver of Rights*. But stewards should always advise carriers not to sign PS Form 1067 because by signing, they waive their Miranda rights. If an employee does sign a PS Form 1067, anything the employee says from that point forward can be used against the employee in a court of law.

Stewards also should remember that **they are not attorneys** and thus cannot offer legal advice to employees facing potential criminal charges. To do so, could place you and your branch in a legally vulnerable position. So stewards immediately inform the employee that he or she may wish to seek legal advice should there be any possibility that the Postal Service will bring criminal charges against the employee. You should also instruct the carrier not to answer any questions postal inspectors ask and that the interrogation should be suspended until the employee has had an opportunity to consult with an attorney.

Remember that ELM Section 666.6 requires all postal employees to cooperate with postal investigations, so the Postal Service may take disciplinary action against employees when employees fail to cooperate with normal investigatory interviews that have not crossed the threshold into criminal investigations. Therefore stewards should be wary of advising employees subject merely to an investigatory interview to remain silent. If you are unsure whether the investigation is indeed a criminal investigation, contact other union officials for help.

## **Case Examples—Weingarten Rights**

The reason rights have been established under the Weingarten case or under 5U.S.C. §7114 are to protect any employees from stating or agreeing to something in an investigatory interview which could incriminate them and result in disciplinary action against them. Therefore, once union representation is requested and granted, all questioning should cease until such representation arrives.

The Postal Service’s reliance on statements allegedly made during the Postal Inspector’s interview with the grievant is the “evidence” the Postal Service points to as proving the grievant was guilty. The fact that such “evidence” has been found to be tainted due to the Postal Inspector’s questioning of the grievant when union representatives were not present makes the evidence producing the chain of circumstances pointing to guilt weak and inconclusive and no probability of fact may be inferred from the combined circumstances. Consequently, the grievance must be sustained. (C-15476)

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In the factual circumstances of this case, a valid request was made by the grievant to Sutton for representation by a steward during the course of the imminent investigatory meeting with the Postal Inspectors, which request was not granted... Accordingly, the grievant was denied fundamental procedural due process rights and the disciplinary action imposed was not for just cause. (C-10291)

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I conclude the interview of the grievant by management during the meeting on January 12, 1989 was investigatory and of the nature that it might reasonably result in discipline. The grievant requested Union representation during this interview and that request was denied by management. This request sufficed for the entire interview which included the questioning of the grievant regarding the vandalism incident, the inspection of the contents of her locker, and the questioning of her regarding the four pieces of mail discovered in her locker. Management, in denying the grievant's request for Union representation, violated her Weingarten rights, and therefore her removal was flawed.

Accordingly, I conclude that the Postal Service did not have just cause to remove the grievant. Recognizing, however, the gravity of the offense which the grievant committed, her reinstatement shall not include back pay. (C-09556)

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Here was a case that cried out for Removal; except that both the grievant's rights to due process and Union's rights of representation were trampled, not just stepped upon. To begin with, the Employer's entire case rested upon the efforts of the Postal Inspector's Investigative Memoranda, yet, he was unavailable for testimony.

In addition to the fact that all allegations regarding the altered document were hearsay; there were instances of "Weingarten" type abuse, as well. Aside from testimony of the Shop Steward and grievant, it was the testimony of the former Postmaster which convinced me that union representation in his office was far less than anticipated. The evidence was clear and convincing that the Union Steward was, in effect, prohibited from any form of representation during at least one disciplinary meeting before the then Post Master of grievant's facility.

In conclusion, Management did have reasonable basis to severely discipline this employee for her behavior generally, in regard to unsatisfactory conduct surrounding her request for injury related leave; including her action in delivering an altered document in support of that leave. The evidence in support of the charges was clear.

However, the handling of this matter was marked by serious procedural error; which like the grievant's judgment, cannot be condoned either. For that reason, the Removal must be converted to a long term suspension, without back pay. (C-20955)

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There was at the arbitration hearing a conflict between Postal Inspector Smith's version of what happened at these two meetings with Ms. McRae and Ms. McRae's version of what happened at those two meetings. However, a reading of paragraph 8 of the Investigative Memorandum shows that Ms. McRae was not permitted to have a Union representative present. She was accompanied by another Postal employee Rural Carrier Sue Alsop, but Ms. Alsop is not a Union official. Therefore, her due process rights, also known as the Weingarten rights, were improperly denied her by Postal Inspector Smith.

Having found that the Postal Service violated the Grievant ' s due process rights as set out above, it is incumbent on me due to this lack of procedural due process, that the disciplinary action taken by the Postal Service cannot be upheld. My AWARD will set out the action to be taken due to this failure of procedural due process.

Had the Postal Service not violated her due process rights to such an extent as to cause the reversal of their decision to discharge the Grievant, or in other words, had I reached the merits of this case, I would have sustained the Postal Service's action in terminating the employment of the Grievant. (C-24014)

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The Postal Service notes that the Service did not deny the right, but by an independent and separate entity, the United States Postal Inspectors. The United States Postal Inspectors are not under the jurisdiction of any authority of the United States Postal Service. As such, these inspectors were not "employers" as contemplated by the Weingarten requirements. Even if Weingarten required the United States Postal Service to permit Carrier Perkins to speak with his union representative, the United States Postal Inspectors were not.

The Arbitrator finds this distinction forced and inaccurate. While the Postal Inspectors are a separate entity, at the time of November 13, 2002 investigations, they were gathering information that could be potentially, and in fact was used in a discipline of the Grievant. They were standing in the shoes of the employer. As such, they must be

willing to follow all safeguards that would apply to the employer. Those safeguards included permitting the Grievant to meet privately with the union representative. The Postal Inspectors were clearly acting in part for the United States Postal Service. The information gathered was used by the United State Postal Service and other agencies. Because they were standing in the shoes of the Agency, they must follow the procedures employed by the Agency. The Postal Inspectors failed to do so in a critical respect. For that reason, the discipline cannot stand.

AWARD Because of the actions of the Postal Inspectors in the conduction of the investigation, the claim of procedural due process has sufficient merit to be sustained. Accordingly, the Arbitrator will sustain the grievance (C-24702).

## **Supporting Cases—Weingarten Rights**

[C-09556](#), Arbitrator Dolson, November 30, 1989

[C-10291](#), Arbitrator Barker, September 26, 1990

[C-14117](#), Arbitrator Shea, November 30, 1994

[C-15476](#), Arbitrator DiLauro, June 12, 1998

[C-20955](#), Arbitrator Goldstein, August 14, 2000

[C-24014](#), Arbitrator Johnston, January 31, 2003

[C-24702](#), Arbitrator Nixon, October 2, 2003

# Section 2-B—Procedural Disputes Concerning the Discipline Issued

## Defense No. 5

**Management failed to follow principles of progressive discipline.**

Article 16.1 requires that discipline be “corrective in nature, rather than punitive.” Almost all arbitrators have read this to mean that for most types of misconduct discipline must be “progressive.” However, management may skip minor forms of discipline for certain offenses which are normally dischargeable by themselves (e.g., theft of mail). When management fails to follow the progressive path, arbitrators will usually disallow or modify discipline.

Although Article 16.1 has always required that discipline be “progressive,” the specific term was first used in the 2001 National Agreement. Article 16.4, which concerns suspensions, now provides in relevant part that:

These disciplinary actions shall, however, be considered to be of the same degree of seriousness and satisfy the same corrective steps in the pattern of progressive discipline as the time-off suspensions.

The JCAM provides the following explanation of progressive discipline:

### **Corrective Rather than Punitive**

The requirement that discipline be “corrective” rather than “punitive” is an essential element of the “just cause” principle. In short, it means that for most offenses management must issue discipline in a “progressive” fashion, issuing lesser discipline (e.g., a letter of warning) for a first offense and a pattern of increasingly severe discipline for succeeding offenses (e.g., short suspension, long suspension, discharge). The basis of this principle of “corrective” or “progressive” discipline is that it is issued for the purpose of correcting or improving employee behavior and not as punishment or retribution.

## Case Examples

Grievant’s supervisor was asked if he had considered a lesser penalty. He replied that he had, and had decided against it on the ground that he felt it would “have no impact.”

The action of the supervisor in this regard is a violation of Article 16, Section 1, of the National Agreement. The first sentence of this Article states:

“In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive.”

It has been held many times by other arbitrators that, for discipline to be corrective, it must be progressive.

This directive from the National Agreement is mandatory. It is not discretionary. Management does not have a choice as to whether it will issue corrective discipline or not. It must attempt to make discipline corrective. Here, the Grievant’s supervisor decided for reasons which appeared to him to be valid that corrective discipline would be useless. He does not, however, have that discretion. He must attempt to issue corrective discipline even though he believes that it will be no use. (C-00557)

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The progression of discipline upon which the discharge was based does not properly conform to the principles of progressive discipline that would warrant a dismissal. Progressive discipline means that each succeeding disciplinary measure is of a more severe degree so that an employee may know precisely where they stand in the progression. If supervision decides to issue a lesser degree of discipline than the last, the progression then begins again at that point. The previous disciplinary elements [in this case] are letters of warning. Even though there are earlier suspensions, the later letters of warning must be followed by further suspension if discipline is to properly progress to dismissal. (C-01043)

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The Service's argument in this case is that the Grievant's attendance record simply was so terrible that she had to have understood that her job was in jeopardy. Such inference cannot be allowed because of the express mandate of Article 16 . Under that article, the Grievant is entitled to increasingly severe progressive notice that further offenses will subject her to removal. (C-09766)

## **Supporting Cases**

C-00060, Arbitrator Dash, May 18, 1979  
C-00557, Arbitrator Cohen, January 4, 1985  
C-00584, Arbitrator Levak, October 26, 1982  
C-01043, Arbitrator Levin, June 4, 1979  
C-01974, Arbitrator Schedler, June 7, 1981  
C-05902, Arbitrator Levak, April 7, 1986  
C-09766, Arbitrator Levak, February 11, 1990

## Defense No. 6

### Discipline was not timely issued.

When management discovers a letter carrier's misconduct, it must initiate discipline in a timely manner. The discussion of "just cause" in the JCAM states this rule as follows: "Disciplinary actions should be taken as promptly as possible after the offense has been committed." If management does not initiate discipline in a timely manner, it waives whatever rights it may have to impose discipline.

It is not clear exactly where the line is drawn between timely and untimely discipline. A letter of warning for a five -minute extension of a break issued several months after the event would obviously be untimely. However, a removal two weeks after mail was discarded might be found timely, particularly where management spent the two week period investigating to make certain that it had all the facts before it acted to impose discipline.

## Case Examples

"In the usual grievance a delay in presenting charges can mean the loss of evidence to the aggrieved. Memories fade with the passage of time; witnesses become difficult to locate so as to reconstruct the events in question, a photograph of the scene taken weeks later may be inaccurate as to the conditions that prevailed on the date of occurrence. In my opinion a delay of 47 days in presenting a letter of charges is too long and I find that the Employer has violated Article 16 of the National Agreement..." (C-01261)

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The Postal Service urges that there is no statute of limitations in the agreement as to when a charge must be brought. That argument misses the point, however, which is that the grievant must be given a meaningful opportunity to respond to and defend against the charges. In this case, given the nature of the offense—the failure to withdraw a piece of mail from the departure case—and the volume of mail normally handled by the grievant, the grievant did not have such an opportunity when he was not given any indication of the offense until almost one month later. (C-01458)

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It is a fundamental principle in law as well as contract arbitration that a party possessed of certain rights must not let them lie fallow, but must act upon them promptly. The agreement in this case gives management the right to discipline and/or discharge for just cause. The Postal Service took the position that grievant had on August 3, 1976, committed an offense which might be the subject of discipline. An investigation was begun which was not terminated until January 28, 1977....In the intervening six months, grievant continued on the job. While an employee has no need or right to expect to be kept advised of an investigation, unless a contract holds otherwise, he does have the right to expect that the result of the investigation or the charge under consideration will be promptly communicated. If he has committed an offense worthy of punishment by his employer he must know it promptly after the wrongdoing. This is part of due process or fairness in the employment setting—an unsettled charge must not be kept pending unduly long. Insofar as the action of August 3, 1976, is grounds for discipline, the arbitrator concludes that for the Postal Service to have waited six months to finalize the offense into discipline is unreasonable and contrary to the degree of promptness which is an employee's due. (C-01504)

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In particular, this Arbitrator is of the opinion that Charge No. 1 given by the Employer as a reason for the Grievant's suspension is clearly stale. As a rule, it is an essential aspect of industrial due process that discipline be administered promptly after the commission of the offense which prompted the discipline. Moreover, as in this case, such a delay in the imposition of discipline clearly leads an employee into a false sense of security that his conduct is acceptable to an employer. (C-16970)

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No one in management spoke to the grievant about the incident in the three month hiatus between the time of the incident and the Notice of Removal. There is no evidence that either supervisor found it difficult to work with the aggrieved after the initial incident. While his behavior was unacceptable the failure to make a thorough and timely investigation is inexcusable. Excess delay in imposing a penalty is contrary to our idea of justice and fairness. In this case the employee had no knowledge that any penalty was proposed or forthcoming. (C-17613)

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Furthermore, the three month delay in issuing the removal notice clearly was unconscionable under the facts of this case. While the Employer contends grievant had not provided it with his current address at the time the removal notice issued, the proofs establish that no other Notice of Removal issued prior to the May 6 document which grievant received on May 20. Management is under an obligation to impose discipline within a reasonable time following an alleged incident of misconduct - especially when, as in this case, it believes it is in possession of all relevant facts and does not intend to conduct any further investigation. The unexplained substantial delay in issuing the removal notice is a further reason to set aside the discharge. . . . For the foregoing reasons, both grievances will be granted. (C-18103)

## Supporting Cases

C-00033, Arbitrator McConnell, September 17, 1981  
C-00036, Arbitrator Rentfro, February 14, 1979  
C-00289, Arbitrator Kotin, April 20, 1982  
C-00516, Arbitrator Dolson, November 8, 1984  
C-01261, Arbitrator Schedler, June 3, 1982  
C-01458, Arbitrator Dobranski, September 2, 1982  
C-01504, Arbitrator Krimsly, January 18, 1978  
C-01516, Arbitrator Holly, March 6, 1978  
C-03607, Arbitrator Stephens, June 20, 1983  
C-03808, Arbitrator Gentile, June 30, 1983  
C-06647, Arbitrator Sobel, November 17, 1986  
C-07106, Arbitrator Howard, May 8, 1987  
C-15110, Arbitrator Jacobs, January 28, 1996  
C-16970, Arbitrator Olson, June 24, 1997  
C-17613, Arbitrator Powell, December 16, 1997  
C-18103, Arbitrator Walt, March 11, 1998

## Defense No. 7

### Disputes whether grievant's conduct, if proven, would constitute a proper basis for discipline

One of the fundamental principles of just cause is that discipline can only be issued for violating a valid rule. See JCAM, page 16.1. Sometimes management issues discipline for behavior which may not be properly characterized as misconduct, either because the behavior violates no rule, or because the rule is invalid. Of course, a rule need not be written to be a valid basis for discipline, sometimes the rule is understood or implied. There is no written rule against throwing mail at a supervisor in anger, but doing so would undoubtedly be a valid basis for discipline.

Although the opportunities to employ this defense are infrequent, it is the proper defense in certain recurring situations. For example, management sometimes disciplines employees simply for failure to meet the "18 and 8" casing standard. As discussed under "[failure to meet standards](#)," below, such a charge does not form a valid basis for the imposition of discipline

Similarly, letter carriers have been disciplined simply for being bitten by a dog. But being bitten by a dog is not misconduct, it is an occupational hazard. Absent proof that a specific rule that was violated, for example by failing to carry a satchel, such a charge would be an insufficient basis for discipline. See [accidents](#).

## Case Examples

[T]he Service has failed to charge the Grievant with a dischargeable offense. The reason given by the service for the removal of the Grievant is both void for vagueness and an obvious attempt to discharge the Grievant for being "accident-prone," a non-offense.

The Service may properly charge an employee with physical inability to perform assigned duties, with psychological disabilities to perform assigned duties or with specific acts of negligence or violations of established safety standards. However, the Service is not entitled to concoct a bastardized form of infraction in order to remove employees it considers to be accident-prone. (C-01311)

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If Grievant was in fact acting as a Steward on January 7, 1982, his personal abusiveness to [his supervisor] falls precisely into the zone for which the special immunity status was created; a closed grievance meeting or closed discussion to discuss Union matters. It is in this context, and this context alone, that the parties meet as equals. The Steward is entitled to the same deference and latitude as his or her supervisor. It is in this situation, away from the audience of other employees, where a steward may display a loss of temper or use profanity and still be protected from discipline. (C-01191)

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[T]he Employer cannot discipline an employee for absences which are legitimately caused by the physical incapacity of an employee up to at least the point where that employee exhausts his/her accumulated sick leave benefits. To hold otherwise would make it possible for the employer to say to an incapacitated employee, "although you have accumulated sick leave available, you cannot use it because to do so would make your attendance unsatisfactory." Certainly, such a conclusion is not in accord with either the intent or spirit of the negotiated Sick Leave benefits. (C-00599)

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[I]t is the arbitrator's considered opinion that to remove the grievant for absence caused by an injury suffered while on duty and one which he had no control over and from which he appears to have fully recovered, would be punitive in nature rather than corrective. (C-04024)

## Supporting Cases

[C-00599](#), Arbitrator Holly, August 2, 1978

[C-01191](#), Arbitrator Goldstein, July 6, 1982



C-01311, Arbitrator Levak, September 24, 1982  
C-04024, Arbitrator Parkinson, December 29, 1983  
C-04163, Arbitrator Larney, December 28, 1983  
C-24822, Arbitrator Duda, November 28, 2003

## Defense No. 8

### Insufficient or Defective Charge.

Article 16 requires that management give a letter carrier a written notice of charges when imposing a suspension or a discharge. Implicit in this requirement is that the notice of charges describes and explains the basis for the discipline with sufficient specificity that the letter carrier can make a defense.

### Case Examples

A “charge” in a disciplinary matter has a similar meaning to an indictment in a criminal matter before a grand jury. Basically, a “charge” is an accusation in writing that claims that the individual named therein has committed an act or been guilty by omission, and such act or omission was a violation of shop rules or usual good behavior expected of an employee and punishable by discipline. A letter of charges is the foundation of going forward with discipline...No discipline can be sustained without a charge. For the instant grievance the removal letter merely related in narrative style the events that the Employer believed occurred on April 15, 1981. There was not a single sentence in the entire letter of removal that accused [grievant] of conduct contrary to the rules of the shop; therefore his discharge was without just cause. (C-01233)

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Preliminarily, the Arbitrator deems it appropriate to restate the well-recognized principle that a discharge must stand or fall on the reasons given at the time the discharge is imposed. In the case at hand, the sole charge leveled against the Grievant in the Notice of Removal was that of filing a false accident or injury claim. The Service is bound by that notice.

The Grievant was not charged with violating E&LRM Sections 665.1 and 665.2.m ; neither was he charged with giving a false sworn statement to a Postal Inspector. The objection of the Union relative to those post- removal charges is well-taken, and 5 the Service’s belated allegations concerning them have been disregarded by the Arbitrator.

The Service had the opportunity to charge the Grievant with those offenses but did not do so. The Grievant had the right to expect that he would be defending only against the charge set forth in the Notice of Removal at the time he processed his grievance and at the time of the arbitration hearing. (C-05219)

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It is an essential element of industrial due process that a disciplined employee be clearly informed of the employer’s charges against him. A careful review of the charges contained in grievant’s Notice of Removal calls into question on what basis the grievant was removed. While the Service had clearly many bases for the grievant’s removal, it is difficult to determine on which charges it was effected. The Service, by “throwing the book” at the grievant in its Notice of Removal has included therein invalid charges, belated charges, and charges admitted by Service witnesses to be too picayune to support his removal. The result has been an action which is procedurally tainted. (C-07106)

### Supporting Cases

- C-01233, Arbitrator Schedler, April 1, 1982
- C-01311, Arbitrator Levak, September 24, 1982
- C-05219, Arbitrator Levak, November 25, 1985
- C-06710, Arbitrator Williams, December 3, 1986
- C-07106, Arbitrator Howard, May 8, 1987
- C-15515, Arbitrator Axon, June 8, 1996

## Defense No. 9—Improper citation of “past elements”

Management may attempt to improperly cite or rely upon past elements in support of disciplinary actions. Generally the improperly cited past elements fall into one of the following categories, each of which will be discussed separately below.

9.A Job discussions

9.B Expired discipline

9.C Expunged, settled or reduced discipline

9.D Unadjudicated discipline

### Defense 9 A

#### Improper citation of discussions

Article 16.2—Discussion specifically provides that “discussions may not be cited as an element of prior adverse record in any subsequent disciplinary action against an employee, they may be, where relevant and timely, relied upon to establish that employees have been made aware of their obligations and responsibilities.” When job discussions are improperly cited, arbitrators sometimes order the discipline rescinded or modified.

### Case Examples

The Employer’s case is further flawed by the fact that it is violative of that portion of Article 16 of the National Agreement which provides, “...such discussions may not be cited as an element of a prior adverse record in any subsequent disciplinary action against an employee.” The Notice of Removal cites two such discussions as elements of the Grievant’s past record.

These procedural defects cannot be overlooked as being insignificant. They are of serious concern because they are in violation of both the letter and spirit of the National Agreement, and importantly they deprived the Grievant of his right to due process. In the absence of due process the grievance must be sustained without any consideration of its substantive merits. (Arbitrator Holly, [C-01944](#))

### Supporting Cases

[C-01944](#), Arbitrator Holly, May 20, 1980

[C-01983](#), Arbitrator Holly, August 6, 1981

### Defense 9 B

#### Improper citation of expired discipline.

#### Article 16.10 Employee Discipline Records

The records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years.

Upon the employee’s written request, any disciplinary notice or decision letter will be removed from the employee’s official personnel folder after two years if there has been no disciplinary action initiated against the employee in that two-year period.

The JCAM explains this section as follows:

The purpose of Article 16.10 is to protect employees from having their past records considered when they have shown over a two-year period that they performed their job without incurring any further disciplinary action.

Additional information on the retention and disposal of discipline records may be found in Handbook AS-353 (see national prearbitration Q94N-4Q-C-96044119, March 2, 2004, M-01511).

The Step 4 settlement [M-00889](#), January 5, 1989, provides the following:

“A notice of discipline which is subsequently fully rescinded, whether by settlement, arbitration award, or independent management action, shall be deemed not to have been “initiated” for purposes of Article 16.10, and may not be cited or considered in any subsequent disciplinary action.”

The two year limitation on the citation of records of discipline begins when it is “initiated,” not when it is served. See, for example [C-09469](#), Regional Arbitrator Martin, who held that Management improperly considered as a “past element” a long-term suspension which was initiated more than two years earlier, but which ended less than two years before, the subject discipline. Issues concerning the application of Article 16.10 to last chance agreements are discussed separately under “[Last Chance Agreements](#),” below.

The limitation on the citation of expired discipline applies even if an employee has not exercised the right provided by Article 16.10 to have disciplinary notices or decisions removed from his/her official personnel folder after two years.

Union officials and arbitration advocates should be careful not to open the door to the admission of expired discipline. Many arbitrators will admit expired discipline into the record for the purpose of impeaching the credibility of witness or rebutting union arguments. For example, if a grievant testifies at an arbitration hearing that he has never been disciplined—when in fact prior discipline has merely “expired”, an arbitrator may well admit the expired discipline into the record for purpose of impeaching the grievant’s credibility.

## Supporting Cases

[C-09469](#), Arbitrator Martin, October 30, 1989.

[C-17750](#), Arbitrator Duda, November 13, 1997.

[C-24900](#), Arbitrator Sulzner, November 16, 1998.

## Defense 9 C

### Improper citation of expunged or reduced discipline.

Discipline that has been expunged by a grievance settlement or arbitration award may never be cited as a past element of discipline. In situations where discipline has been modified or reduced by a grievance settlement or arbitration award, only the record of the modified discipline may be cited as a prior element.

For example, management may not write in a disciplinary letter that a letter carrier was issued a fourteen day suspension, later reduced by a settlement to a letter of warning. In such a situation management may only write that the letter carrier was issued a letter of warning.

## Case Example

As historians are fond of pointing out, it is difficult enough to know what happened - what might have happened if things had been different is always a matter of conjecture. What did happen in this case is that management acted on a record of discipline in violation of its promise not to do so. What would have happened otherwise can, of course, be estimated with care but ultimately only estimated.

In this case, it seems clear there is some risk that [the grievant] has been disadvantaged by the improper consideration of an item of his past record. That risk, in turn, involves a threat to the integrity of the grievance resolution process. Both labor and management must have confidence that voluntary grievance resolutions will be respected and complied with. The violation of a settlement term, even when in all good faith, must be closely examined and very carefully justified. Otherwise, the parties will be inhibited in the settlement of their disputes. For all of these reasons I conclude that Postal Service management has not proved that Mr. Harris's consideration of the grievant's 1981 letter of warning was a harmless error. The grievance must be sustained. (C-03541)

## Supporting Cases

C-03541, Arbitrator Hardin, May 11, 1983.

C-04335, Arbitrator Hardin, June 7, 1984.

C-14470, Arbitrator McAllister, May 17, 1995.

## Defense 9 D

### Citation of unadjudicated discipline

Under the National Agreement, an arbitrator may not consider past discipline that has been grieved but not yet resolved or adjudicated. See C-03910, National Arbitrator Fasser. This does not mean that management may not cite unadjudicated discipline as a past element of discipline. It may do so, but at its own peril. If the cited discipline is later reduced or expunged, management may have a more difficult time demonstrating that any later discipline relying upon it as a prior element was progressive and issued for just cause.

Furthermore, if the later discipline reaches arbitration first, an arbitrator may not consider the prior unadjudicated discipline. This situation most often arises in removal cases since Article 15.4.B.4 requires that removals and suspensions of more than fourteen days receive scheduling priority. The JCAM explains this rule as follows:

The parties agree that arbitrators may not consider unadjudicated discipline cited in a disciplinary notice when determining the propriety of that disciplinary notice. When removal cases are scheduled for a hearing before the underlying discipline has been adjudicated, an arbitrator may grant a continuance of a hearing on the removal case pending resolution of the unadjudicated discipline (National Arbitrator Snow, E94N-4E-D 96075418, April 19, 1999 (C-19372)).

This contractual protection against arbitrators considering unadjudicated discipline does not apply to MSPB proceedings which have different procedural rules (United States Supreme Court *United States Postal Service v. Gregory*, 534 U.S. 1, 122 S. Ct. 431 (2001)). See [April, 2002 NALC Arbitration Advocate](#).

## Case Examples

The Union was correct when it contended that the Postal Service relied on a fourteen-day suspension that was scheduled to be heard by the DRT's Step B Team. The basic principle of the DRT Team is that a suspension is deferred upon the filing of a grievance until the DRT Step B Team rendered its decision. Until the fourteen-day suspension cited in the Grievant's past element had been finally adjudicated it had no standing as a cited element. (C-23987)

## Supporting Cases

C-03910, National Arbitrator Fasser, June 18, 1977

C-00584, Arbitrator Levak, October 26, 1982

C-04401, Arbitrator Williams, July 16, 1984

C-06907, Arbitrator Nolan, March 29, 1987

C-19372, National Arbitrator Snow, April 19, 1999

C-23987, Arbitrator Irving, January 22, 2003

# Defense No. 10

## Double Jeopardy

Management may not twice impose discipline for a single act of misconduct. Thus, to issue both a letter of warning and a seven-day suspension for the same roll-away accident would be improper.

It is not improperly subjecting a letter carrier to double jeopardy, however, when a removal is issued for the same misconduct for which an emergency suspension or an indefinite suspension has been issued (unless the employee was returned to work after the suspension). See [Emergency Suspensions](#), and [Indefinite Suspensions](#), above.

The subject of double jeopardy is also thoroughly discussed in Elkouri and Elkouri, *How Arbitration Works* which should also be consulted if necessary.

Complicated double jeopardy issues have arisen when the Postal Service reissues discipline that had been thrown out by an arbitrator because of procedural irregularities. Most arbitrators hearing grievances concerning reissued discipline have held that this constitutes impermissible double jeopardy because the first arbitration award was “final and binding.” However, in one case, approximately twenty years ago, the Postal Service was successful in getting the Federal Courts to vacate an arbitration award in such circumstances. See [847 F2d 775 United States Postal Service v. National Association of Letter Carriers](#). A thorough discussion and review of this issue can be found in [C-19077](#), [C-15996](#), [C-11190](#) and [C-15657](#))

## Case Examples

[B]y returning the grievant to work after the emergency suspension [USPS] 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.” (C-00095)

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Thus, the Service having assessed a specific penalty when the grievant was returned to work from his emergency suspension may not subsequently impose a second penalty for the very same offense. The increase in the penalty violates the grievant's due process rights, whether the violation be characterized as “double jeopardy” or “adding to the original penalty.” Two separate and distinct penalties for the same offense are highly improper, and on this narrow basis the subsequent penalty of the fourteen (14) day suspension must be overturned. (C-04890)

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In other words, the grievant was removed from service on the basis of a charge which, as noted previously, was fully and finally settled. A reading of that settlement makes it clear that the notice of removal was held in abeyance and was to be removed by September 1, 1993 if no similar incidents occurred. A similar incident would have to be conduct unbecoming a postal employee (striking another postal employee) and there is no evidence on the record to indicate that such occurrence took place. By application of “double jeopardy” concepts it has been held that once discipline for a given offense has been imposed and accepted it cannot thereafter be increased.

In summation, the Postal Service lacked just cause to discharge the grievant for the very basic reason that it removed him from service on the basis of a charge which had been discussed and resolved by the parties four months prior to the action taken by the Postal Service in August, 1993. Consequently, the grievance must be sustained. (C-13435)

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Arbitrator Howard “voided” the discipline assessed Grievant; he did not dismiss the case without prejudice to the Service's right to reinstitute the proceedings. The Service had no recourse, and could not proceed further. Even if this Arbitrator were to disagree with Arbitrator Howard's decision, which he does not, that decision involving the

interpretation of the identical contract provision, between the same Company and Union, must be upheld unless it were determined to be patently and egregiously erroneous. These parties, in their contract, agreed that awards would be final and binding. This concept, basic to the arbitral process, is a most compelling force. Under the circumstances of this dispute, every principle of common sense, policy, and labor relations demands that such decision not be disturbed. Based on the foregoing, this grievance must be sustained. (C-11190)

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The Service is reluctant to criticize Arbitrator Britton's failure to consider the entire case. Instead it adopts an attitude of "We'll keep trying until we get it right" The practical effect is the second removal was issued more than a year after the questioned conduct and after a complete case challenging the charges, facts and handling had been presented and decided. Grievant has been prejudiced by this delay and suffered the stress of repeating the process because of the Service's impropriety. A protest based on double-jeopardy is appropriate.

Under the circumstances of this case I find the Britton decision to be "final and binding" so as to bar the subject removal, which must be found to be without just cause If I did review the second removal de nova, there are serious questions raised by the Union as to whether the Service action in handling the second removal violated the requirements in Article 16. Deciding those significant complaints is unnecessary, because of the findings that the second removal violated both 15.6 and 16 .1 of the Labor Agreement. (C-15657)

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The U.S.P.S argued that since there was no ruling on the merits, the discipline can be reissued after the procedural flaw has been corrected. This also needs to be addressed. After full consideration of the entire record, I find that it supports a ruling that issuing the second notice exposed Grievant to double jeopardy. For this reason, the Arbitrator is compelled to sustain the grievance and order reinstatement with full back pay and benefits

However, it is appropriate to address, in some detail, the U.S.P.S position that because there was no ruling on the merits, the discipline can be reinstated after the procedural violation has been corrected. The way I read the Vrana award, I find nothing to tell me that it was not final and binding and pursuant to the contract. Article 15.4.A6 of Joint Exhibit 1 is clear and unambiguous:

All decisions of an Arbitrator will be final and binding. All decisions of Arbitrators shall be limited to the terms and provisions of the agreement and in no event may the terms and provisions of this agreement be altered, amended, or modified by an Arbitrator."

The Vrana award sustained the grievance and did not rule on the merits. I find nothing in the award to tell me the award was not final and binding. If the U.S.P.S. disagreed with the Vrana's award, there were two routes to follow. Reconvene the hearing with Arbitrator Vrana for further clarification. The records shows that this was proposed by the Union but the U.S.P.S. did not agree. The other was to file suit in federal court asking that the award be vacated. (C-19077)

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. (C-24198)

## Supporting Cases

C-00095, Arbitrator Howard, March 30, 1977  
C-00398, Arbitrator Gamser, November 11, 1976  
C-00541, Arbitrator DiLeone, December 27, 1984  
C-04890, Arbitrator Howard, April 23, 1985  
C-11190, Arbitrator Zumas, March 20, 1989  
C-13435, Arbitrator DiLauro, February 18, 1984  
C-14305, Arbitrator Johnston, March 20, 1995  
C-15657 Arbitrator Duda, June 25, 1996)  
C-15996, Arbitrator Johnston, October 31, 1996  
C-18777, Arbitrator Vrana, October 10, 1998



C-19077, Arbitrator Frost, December 31, 1998  
C-24198, Arbitrator Klein, April 20, 2003  
C-25043, Arbitrator Fletcher, May 1, 1993  
C-25044, Arbitrator O'Brien, October 24, 1994

## **Defense No 11**

### **Failure to give grievance rights**

All discipline issued under the provisions of Article 16 must advise the recipient of grievance appeal rights or it is procedurally deficient. See National Arbitrator Fasser, [C-02968](#).

The weight that arbitrators will attach to this procedural defect will ordinarily depend upon the consequences to the recipient of the discipline. For example, if an employee fails to grieve a letter of warning because he/she was not informed of and was unaware of appeal rights, an arbitrator will probably waive time limits for appeal. If, on the other hand, the employee was aware of his/her rights and filed a timely grievance, an arbitrator will probably not attach great significance to the procedural defect.

### **Supporting Case**

[C-02968](#), National Arbitrator Fasser, February 23, 1977

## Section 2-C—Management actions during processing of grievance

### Defense No. 12

Management refused to disclose or provide information to the Union (including claims that information was hidden).

Article 15.2 of the JCAM requires the parties to fully disclose all arguments and facts at the grievance levels prior to arbitration. The JCAM states on page 15-5:

The Postal Service is also required to furnish to the union, if requested, any documents or statements of witnesses as provided for in Article 17.3 and Article 31.3.

Article 31, Union-Management Cooperation, provides that the “Postal Service will make available to the union all relevant information necessary” for the processing of a grievance. The JCAM’s explanation of this rule states that “the union has a right to **any and all information** which the employer has relied upon to support its position in a grievance.” (JCAM page 31-2, emphasis added). When a case file management fails to provide requested information to the union, or hides relevant information, the union should be prepared to argue this violation of due process rights.

A full discussion of the Union’s right to information is found under [Information, Union’s Right To](#), in Chapter 3, below.

### Case Examples

The testimony in the record clearly proves that the management representative at the Step 2-A hearing did not make [the postal inspector’s investigative summary] available to the Step 2 Union representative, whether or not he asked for it. While the record is contradictory as to whether such material was requested by the Union’s Step 2-A representative, management has the burden to prove that it had “just cause” for the grievant’s discharge, and concomitant with that “burden of proof” was the requirement that it made available to the Step 2-A Union representative all of the pertinent material it had in its possession upon which it based its discharge decision. This it simply did not do. (C-00308)

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Disposition of this matter need not go beyond review of the procedural question raised by the Union. The requests for information initiated by the Union were neither a “fishing” expedition nor could it be construed as excessive. The documents would have been precisely on point with the incident in dispute. Whether the Union could have concluded that it had proper cause for disputing the Service’s actions or not is speculative at this point, but at least it would have had a fair opportunity to look at the matter from both vantage points - its and the Service’s .

Let there be no mistake about it, this is a punitive award which the arbitrator orders reluctantly and exceptionally - but with good cause . . . This arbitrator is loath to dispose of a dispute without fully addressing all aspects. In the instant case, however, I am satisfied that the specific circumstances compel a disposition of the grievance as sought by the Union on procedure without consideration of the merits. (C-05751)

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National Agreement Article 16 requires that removal be for just cause. The Arbitrator construes and interprets just cause to include the due process requirement that a removed grievant have the right, through the Union, to effectively examine and cross examine her accuser; that notes taken by a Service manager or by a Postal Inspector relative to a removal are crucial to such an effective examination; and, that the denial of those notes therefore denies a grievant her rights under Article 16. (C-07610)

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It is here concluded that the failure of the Service to provide the medical reports which formed the basis of the Emergency Suspension, and later, the Removal, forms a sufficient basis for sustaining the grievance. (C-08779)

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In light of the un rebutted testimony of the Union President that he never received the Memorandum, the Arbitrator is required to conclude that the Memorandum was not made available to the Union as is required under the grievance procedure.

As read by the Arbitrator, Article 15, Section 2, Step 2(d) requires the Employer to ... “. . . make a full and detailed statement of facts and contractual provisions relied upon . . . .” and to “. . . cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31.” In the matter at hand, it cannot be said with certainty that the Union was aware that the Postal Inspection Service had prepared an Investigative Memorandum with respect to the Grievant. Under this circumstance, the Union cannot reasonably have been expected to request a copy of the Memorandum, and it therefore seems to the Arbitrator that the Employer had an obligation to ensure that the Memorandum was made available to the Union so that the latter could adequately prepare its case. The inability of the Employer to rebut the Union President’s testimony through the presentation of probative evidence or credible testimony that the Memorandum was supplied to the Union requires that the Arbitrator find the case against the Grievant procedurally defective and, as a result, the removal lacking in just cause. This finding necessarily forecloses further consideration by the Arbitrator as to the merits of the Employer’s contentions that the Grievant submitted falsified medical documentation to cover unscheduled absences and, as a result, received pay fraudulently. (C-08919)

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It would be a mistake for the Employer to regard generally the Union’s information requests as noisome, that is, an arrogant intrusion into its private decision-making province. Nor may it necessarily be true that information disclosure is tantamount to losing a case if winning and not voluntary settlement is the goal. Within the grievance side of dispute resolution, information sharing is the bedrock of voluntary settlement. With it, the parties are enabled to evaluate the potential outcome of an arbitration of a matter. Within and as a result of this fluid process of information exchange and consequent evaluation and reevaluation, grievances may be voluntarily settled. Opportunity for voluntary settlement here was lacking. (C-18017)

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The Service argues that it did ultimately provide the information in question [postal inspector notes] and therefore, any violation was cured. For the reasons which follow, this argument is not persuasive. . By waiting until the second day of the hearing to provide the requested information, the Service prevented the union from making effective use of this information in the grievance procedure or at the hearing. Since the notes were central to the union’s efforts to defend [the grievant] against this charge and since the failure to provide the notes was a clear violation of Articles 17 and 31, I conclude that the only appropriate and meaningful remedy is to dismiss Charge 4 in its entirety. Any lesser remedy would allow the Service to rely on Charge 4 and would have the effect of rewarding the Service for its failure to provide necessary and relevant information which was central to a charge in a termination case. (C-24273)

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The issue of most concern to the Arbitrator in this case is the conduct by the Employer of failure to produce evidence. . .The union was not provided factual information upon which to investigate the case, in a sufficiently timely manner so as to exercise its appropriate representational role. That conduct was improper, prejudicial to grievant’s due process rights, and suggestive of evidentiary weaknesses in the case presented by the employer. (C-23831)

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The videotape needs little discussion. While it was shown at the investigative interview, the union was not given a copy then and later requests for a copy went unfulfilled. The National Agreement clearly requires both parties to make existing available evidence and argument during the grievance procedure and to jointly assemble the grievance file. When legitimate union requests for information have not been fulfilled and when the requested information is not in the joint file, the Postal Service should have no realistic hope of having the evidence admitted at arbitration. It does not matter whether the evidence was not forthcoming because of bad faith or simply administrative oversight. Either way, the National Agreement tells the arbitrator not to admit the disputed evidence if an objection is raised. (C-26138)

## Supporting Cases

C-00090, Arbitrator Willingham, December 11, 1972

C-00308, Arbitrator Dash, May 17, 1974

C-04273, Arbitrator Williams, May 2, 1984  
C-05751, Arbitrator Searce, February 12, 1986  
C-06658, Arbitrator LeWinter, November 21, 1986  
C-07610, Arbitrator Levak, November 3, 1987  
C-08779, Arbitrator Barker, April 3, 1989  
C-08919, Arbitrator Britton, April 10, 1989  
C-14131, Arbitrator Eaton, January 2, 1995  
C-18017, Arbitrator Bajork, February 20, 1998  
C-23831, Arbitrator Ames, October 25, 2002  
C-24273, Arbitrator Poole, May 10, 2003  
C-26138, Arbitrator Helburn, August 29, 2005

## Defense No. 13:

### Management's grievance representative lacked authority to settle the grievance.

Article 15 specifically confers upon management's grievance representative's full authority to resolve any grievance. Where it can be demonstrated that management's representative lacked authority, discipline has sometimes been overturned. (This defense is closely related to [Defense No. 3](#), above. Where higher management has initiated discipline, it is presumed that subordinate supervisors lack authority to settle.)

## Case Examples

Article 15.2 requires that both the supervisor and the steward or Union representative handling the Step 1 grievance have the authority to settle. The language has been negotiated in order to encourage settlement to the greatest extent possible. Where one or both representatives come to the grievance procedure without the authority to settle, the process is a sham. Furthermore, the failure of the Management representative to come to the Step 1 meeting with full authority to settle the grievance is a serious enough breach of the grievant's due process to require that the grievance be sustained on that basis alone without consideration of the merits. (C-17897)

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[B]oth Step 1(a) and (b) of Section 2 of Article XV entitled Grievance-Arbitration Procedure, are couched in express mandatory language. Specifically, Step 1(a) requires that any employee who feels aggrieved "must" discuss the grievance with his immediate supervisor within a designated time period. Step 1(b) provides in relevant part that in any such discussion "...the supervisor shall have authority to settle the grievance."

Proper compliance by management with these terms of the Agreement was, however, seemingly not achieved, for the record indicates that while the appropriate representatives met at Step 1, substantial doubt nevertheless exists as to the authority of the supervisor to settle the grievance. In this regard, the testimony demonstrates, as evidenced by the admission of the Postmaster under cross-examination, that he initiated the suspension, that the supervisor at Step 1 did not have the authority to settle the grievance without consulting him. This failure of management to comply with the prescribed language of Article XV, Section 2, Step 1(a) and (b) of the Agreement, which clearly bestows upon Grievant's supervisor the authority to settle the grievance, cannot properly be viewed as harmless error and non-prejudicial to the rights of the Grievant. To the contrary, in the considered judgment of the arbitrator, this failure goes to the very heart of the grievance process in that the Grievant is thereby denied the contractual right to have his grievance considered independently and objectively at the outset of the grievance procedure by his supervisor who is generally most familiar with his work record. Any removal of the supervisor's authority to settle the grievance, it seems to the Arbitrator, is violative of the letter and spirit of the Agreement and renders the Step 1 procedure little more than a charade. Accordingly, the Arbitrator finds the assertion by the Employer that the Grievant was not denied due process to be without persuasive merit. (C-01469)

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Central to the resolution of this dispute is consideration of the matter of whether Grievant was denied basic due process rights under the Agreement. After a review of the record, the Arbitrator is compelled to conclude that Grievant was in fact denied his basic due process rights that are explicit in the Agreement between the parties; and that this grievance must be sustained. Under the circumstances, there is no reason to consider the merits.

In the instant dispute, Murphy, the Northside station manager, made no recommendation and no decision with respect to disciplining Grievant; he merely concurred in the suspension decision after it came down from the main post office at Richmond.

A supervisor at the Step 1 and Step 2 levels has the authority to resolve and settle the dispute after meeting with a Grievant and his Union representative. In this case, Murphy was the Step 1 representative and Booth was the Step 2 representative. Murphy's decisional authority to settle the dispute at this stage was non-existent; it had been improperly usurped by Booth and the Postmaster at the Richmond facility. As such, the grievance procedure had become "a sham".

It is clear from the foregoing that Grievant was denied basic due process rights which are essential to a just cause determination. Under the circumstances, there is no alternative but to sustain the grievance. (C-04282)

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Young's testimony that she has never overturned a suspension or a removal raises questions about her authority to settle, but in and of itself is not sufficient evidence to support the Union. On the other hand, Middleton's very candid testimony is. When told that Young had never overturned a suspension or a removal, Middleton responded, "How can she? She's a supervisor and I'm a manager." The only reasonable interpretation of the response is that Middleton believed that nobody in a lower supervisory capacity could set aside discipline she had concurred with. If this testimony left room for doubt, no room was left after the redirect examination in which the Postal Service advocate tried to rehabilitate his witness. In so many words, Middleton said that it was possible that she and Young could agree on a resolution (there might be a meeting of the minds between them), but that Young could not overturn discipline on her own.

Article 15.2 requires that both the supervisor and the steward or Union representative handling the Step 1 grievance have the authority to settle. The language has been negotiated in order to encourage settlement to the greatest extent possible. Where one or both representatives come to the grievance procedure without the authority to settle, the process is a sham. Furthermore, the failure of the Management representative to come to the Step I meeting with full authority to settle the grievance is a serious enough breach of the grievant's due process to require that the grievance be sustained on that basis alone without consideration of the merits. (C-17897)

## **Supporting Cases**

[C-01469](#), Arbitrator Britton, March 25, 1981  
[C-01944](#), Arbitrator Holly, May 20, 1980  
[C-04282](#), Arbitrator Zumas, April 19, 1984  
[C-06530](#), Arbitrator Williams, October 17, 1986  
[C-14907](#), Arbitrator Barker, November 10, 1995  
[C-15668](#), Arbitrator Vrana, July 29, 1996  
[C-17067](#), Arbitrator Britton, July 18, 1997  
[C-17854](#), Arbitrator Johnston, January 6, 1998  
[C-17884](#), Arbitrator Helburn, January 30, 1998  
[C-17897](#), Arbitrator Helburn, February 10, 1998

# Defense No. 14

## Management failed to meet or failed to render a proper grievance decision.

Article 15 requires that management meet to discuss grievances and state certain information in its grievance decisions. Failure by management to meet or to state that information has sometimes resulted in the overturning of the contested discipline.

Although the revised provisions of Article 15 in the 2001 National Agreement make it more difficult for management not to comply with these requirements, problems still occur. For example, if management refuses to meet and discuss a grievance at Informal Step A, the union steward is deprived of an explanation of management's position which makes it more difficult for the union to present and prove its case.

## Case Examples

[T]he failure of the employer to provide the contractually required 3rd Step decision letter deprived the Union of the benefit of a detailed statement of the reasons for the denial. While it is evident that the Union's representative knew what the Employer's 3rd Step representative had said during the meeting, he was deprived of the final analysis of the Employer's representative's reasoning in reaching the decision. Hence, the grievance process was frustrated by these procedural errors and those frustrations operated to the detriment of the Grievant....As a consequence, the [Union's] motion is granted, and the case will not be considered on its merits. (C-01477)

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The parties to the National Agreement are bound to comply with its clear and unambiguous procedural provisions designed to insure that due process is accorded to employees charged with disciplinary offenses. Arbitrators are likewise bound to enforce these agreed-upon procedures and sustain grievances where the failure to do so prejudices the rights of the grievant. I am convinced that the failure in this case to provide the Union with the reasons for the decision at the third step was prejudicial to the Grievant and denied him due process. Accordingly, the procedural error forms a sufficient cause to sustain the grievance without consideration on its merits. (C-01833)

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The Postmaster's failure to timely issue a Step 2 decision made it progressively more difficult for the Union to present and prove its case. For example, the Postmaster failed to timely give the Union a detailed statement of his reason(s) for denying the grievance. As a result, when the Union appealed the case to Step 3, it was still unclear about Management's allegations against Grievant. Management's failure to communicate with the Union made it difficult for the Union to fashion a defense for Grievant. Further, by failing to timely issue a written Step 2 decision, Management deprived the Union of its right to file complete additions and corrections under Article 15.2 Step 2(g). Moreover, without a Step 2 decision, it was difficult for the Step 3 official to prepare for and present the Union's case at Step 3. The Union was indisputably prejudiced by Management's failure to render a Step 2 decision. Accordingly, I conclude that Management also violated Article 15.2 Step 2(f) of the National Agreement. (C-16747)

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As found herein, the Grievant is entitled to be informed of his MSPB appeal rights under the Veterans' Preference Act in a timely manner and to have his "Proposed Removal" heard by the installation head within ten (10) days. The procedural error of the Employer of initially issuing a Notice of Removal rather than a proposed removal and failing to timely advise the Grievant of his MSPB rights and the right to meet with the Postmaster prior to Step 1 deprived the Grievant of the due process to which he is entitled and constitutes harmful error. Consequently, the removal letter was improper and violated Article 16 Section of the National Agreement. In view of the above findings, it is deemed by the Arbitrator to be unnecessary to this opinion that he further consider the additional procedural arguments as to whether there was concurrence, progressive discipline, double jeopardy or disparate treatment or address the substantive arguments on the merits of whether there was just cause for the Grievant's removal. (C-16841)

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There is no evidence that other arrangements were considered in order to assure that the Grievant would have the opportunity to be present at the first step grievance meeting and her fundamental procedural rights preserved. That, as pointed out by the Employer, Rodriguez testified that he had the opportunity to meet with the Grievant off site regarding her grievance does not satisfactorily fulfill the requirements of a Step 1 meeting. Noteworthy, it seems to the Arbitrator, is the language in Article 15, Section 2 (a), which focuses on the required presence of the Grievant at the Step 1 meeting while the presence of the employee's steward or Union representative is left to the discretion of the employee.



Based on the above findings, it is deemed by the Arbitrator to be unnecessary to this opinion that he address the merits of this matter or that he further consider the procedural arguments of the Union with respect to the knowledge and authority of management's Step A Informal and Formal Designees to resolve this matter, whether an independent and objective investigation was conducted or whether the Grievant was apprised or made aware of the specific rule or regulation that she allegedly violated. (C-24445)

## **Supporting Cases**

C-01477, Arbitrator Holly, February 15, 1982  
C-01833, Arbitrator Foster, March 12, 1982  
C-06647, Arbitrator Sobel, November 17, 1986  
C-16747, Arbitrator Vrana, May 5, 1997  
C-16841, Arbitrator Britton, May 15, 1997  
C-24445, Arbitrator Britton, July 3, 2003

## Section Three—Mitigation

### Allegations that, Because of Mitigating Circumstances, the Discipline Imposed is too Harsh, or No Discipline was Warranted

The final group of defenses may be called the “mitigation” defenses. With them, the NALC in effect says that even assuming that the grievant’s behavior constitutes misconduct, when all relevant factors are considered the amount of discipline imposed is excessive.

“Mitigation” should not be confused with “leniency”. The mitigation defenses present a variety of factors which management should have considered when imposing discipline, and which an arbitrator will consider even if management didn’t. Leniency—simply asking for another chance—is within the exclusive province of management, and will not be considered by any arbitrator.

### Mitigation Defense No. 1

**Grievant may have acted improperly, but did so as a result of, lack of, or improper, training (including claims that the grievant “didn’t know it was wrong”).**

A letter carrier should not be disciplined for violating a rule of which he or she was not aware. It should be noted, however, that employees are presumed to know the major rules of the shop. This defense will not be useful where, for example, the grievant has assaulted a customer, or has intentionally discarded deliverable mail. The JCAM, at page 16-1, discusses this issue as follows:

Is there a rule? If so, was the employee aware of the rule? Was the employee forewarned of the disciplinary consequences for failure to follow the rule? It is not enough to say, “Well, everybody knows that rule,” or, “We posted that rule 10 years ago.” You may have to prove that the employee should have known of the rule. Certain standards of conduct are normally expected in the industrial environment and it is assumed by arbitrators that employees should be aware of these standards. For example, an employee charged with intoxication on duty, fighting on duty, pilferage, sabotage, insubordination, etc., may be generally assumed to have understood that these offenses are neither condoned nor acceptable, even though management may not have issued specific regulations to that effect.

### Case Examples

There remains the question whether [grievant’s] surreptitious recording, though legal, nevertheless violated a Postal Service regulation of which [grievant] was, or should have been, aware. This question can be disposed of on the basis that, so far as this record shows, management never informed the grievant that the surreptitious recording of a conversation with a supervisor was forbidden. It suffices to recall that none of the grievant’s supervisors knew of any Postal Service rule on the subject. Indeed, the only prior incident of surreptitious recording ever referred to at the hearing was an incident that management had condoned. Thus, assuming that the E&LR Manual does forbid what the [grievant] did, there is no evidence that he had ever been so instructed, or otherwise should have known. If the Postal Service wishes to punish its employees for lawful conduct, recording conversations in which they participate, then the Postal Service must take steps that will ensure that its employees are informed of the rule. (C-01438)

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In most cases I am unimpressed with arguments about lack of knowledge or training in familiar areas of job assignments. It must be noted in the instant case that the Employer argued it was not plausible (sic) that no supervisor explained to the Grievant his obligations while on jury duty. However, no supervisor who gave any instructions to the Grievant was brought forward and the Grievant’s testimony that the Postmaster’s order was not posted at the Branch was uncontroverted.

I recognize that an argument can be advanced that the Grievant should have known there were rules and regulations for jury duty (as there are for virtually every aspect of employment in the Postal Service) and the Grievant should or could have when he visited the Main Post Office sought out such rules to insure he was aware of his obligations. However, I do not feel the entire burden can be shifted to the Grievant and his failure to investigate what should have been communicated by supervision and therefore some question exists as to just what the Grievant can be reasonably held on notice as to his obligations. (C-01272)

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Grievant was, all circumstances considered, a quite unsophisticated employee in matters of this kind...He had never traveled for the Postal Service before. He had concededly received no formal training or instruction in the intricacies, such as they are, of filling out travel vouchers.

On this state of the record the Arbitrator concludes that the Postal Service itself is not without fault in the instant situation. Certainly, greater precaution should have been taken, especially in the case of a new and quite untutored employee, to insure that he be given some training or formal instruction to cope with his responsibilities in the matter of compensation for travel and the procedures incidental thereto. The Arbitrator, without condoning Grievant's conduct here, finds no basis for concluding that there was any conscious effort or intent by Grievant, to commit fraud on the Postal Service or to obtain illicit compensation. (C-00112)

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The Employer offered no evidence that, prior to February 10, 1993, the grievant knew that her method of discarding undeliverable mail ( which led to her jettisoning deliverable mail ) was improper. Documentary evidence from the apartment managers corroborated the grievant's assertion that she had been requested to discard undeliverable mail that had collected around the mail boxes.

Nor did the grievant's mode of operation reveal an inappropriate intent. She made no effort to hide her activities. The dumpster was in plain sight of the apartments. Throwing away thirty-six deliverable mailers would have saved the grievant little time. She actually delivered over 600 of them the same day. Additionally, she returned other undeliverable Home Base mailers to the postal facility that afternoon for reprocessing. (C-13458)

## Supporting Cases

C-00112, Arbitrator Cushman, November 8, 1979  
C-01272, Arbitrator Leventhal, June 16, 1982  
C-01438, Arbitrator Hardin, November 8, 1982  
C-01786, Arbitrator Eaton, March 11, 1981  
C-04563, Arbitrator Schedler, December 11, 1984  
C-13458, Arbitrator Snow, March 3, 1994  
C-16511, Arbitrator Olson, March 2, 1997  
C-16708, Arbitrator Britton, April 9, 1997

## Mitigation Defense No. 2

### Grievant was disparately treated.

Letter carriers who are similarly situated should receive the same discipline for the same misconduct. For example, if two letter carriers with no prior discipline extend their lunches by an hour, management might be able to justify giving each a letter of warning; in the same situation, management could not justify giving one a letter of warning, and firing the other. The JCAM, Article 16.1, provides the following explanation

Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee's past record? The following is an example of what arbitrators may consider an inequitable discipline: If an installation consistently issues 5-day suspensions for a particular offense, it would be extremely difficult to justify why an employee with a past record similar to that of other disciplined employees was issued a 30-day suspension for the same offense. There is no precise definition of what establishes a good, fair, or bad record. Reasonable judgment must be used. An employee's record of previous offenses may never be used to establish guilt in a case you presently have under consideration, but it may be used to determine the appropriate disciplinary penalty.

Disparate treatment is an affirmative defense where the Union must prove not only that other employees received a lesser penalty but also that they were similarly situated. Arbitrator Jonathan Dworkin's classic definition of disparate treatment has frequently been quoted by Postal Service arbitrators, for example in [C-18064](#), [C-19241](#) and [C-23229](#)

In order to prove disparate treatment, a union must confirm the existence of both sides of the equation. It is not enough that an employee was treated differently than others; it must also be established that the circumstances surrounding his / her offense were substantively like those of individuals who received more moderate penalties.\*

The subject of disparate treatment is also thoroughly discussed in Elkouri and Elkouri, *How Arbitration Works* which should also be consulted if necessary.

### Procedural Considerations:

1) Article 15, Section 2, Formal Step A (e) provides that:

Any resolution of a grievance in Formal Step A shall be in writing or shall be noted on the Joint Step A Grievance Form, **but shall not be a precedent for any purpose**, unless the parties specifically so agree or develop an agreement to dispose of future similar or related problems. If the grievance is resolved, a copy of the resolution will be sent to the steward and supervisor who initially were unable to resolve the grievance. (Emphasis added)

Management representatives may attempt to argue that the introduction of prior grievance settlements is barred by the above cited provision. The Union should argue that the settlements are being, not to establish a precedent, but rather **as evidence** to establish disparate treatment.

\* Genie Co ., 97 LA 542, 549 (Dworkin , 1991 ) cited in Elkouri and Elkouri, *How Arbitration Works*, fifth edition, Washington , D.C.: Bureau of National Affairs, Inc., pp. 934-36

2) In order to establish disparate treatment, it is often necessary to introduce the disciplinary records of prior similar cases. The Unions has a right to obtain and introduce such records, even if the employee or supervisor involved objects. See [Unions Right to Information](#), above.

## Case Examples

Union witnesses testified to eight specific cases of deviation in which no more than a letter of warning was assessed. Management witnesses questioned only one of them and corroborated most of them. Included was one instance of deviation to go to the bathroom. However, there was not even a formal discussion of the deviation. In another, there was an employee with a terrible record who deviated and was playing video games. Yet, his ultimate discipline was a letter of warning. In fact, Management witnesses agreed that no one ever before had been terminated for deviation. In general, postal arbitrators would overturn discipline if only one example of disparate treatment was proved (in fact, several were referenced by the Union). Thus, it is abundantly clear that the disparate treatment in the subject case, standing alone, would call for reinstating the grievant with full back pay. (C-04401)

\*\*\*

The parties herein are well aware of the general rule that disparate treatment—unequal discipline for similar misconduct—is not looked upon with favor by any arbitrator. Unequal discipline imposed, even by a well meaning but somewhat disorganized employer, will consistently be overturned as discriminatory when appealed to arbitration. (C-01760)

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While a difference in treatment between individuals does not necessarily prove disparate treatment, since individual circumstances can vary significantly, the Employer's explanation failed to develop an acceptable and credible rationale for its differentiation. (C-07013)

\*\*\*

The Union also argues convincingly that Grievant received disparate treatment. The Union established through unrebutted evidence at least one other employee, with a similar past record, received a thirty day suspension for a worse absentee record than Grievant. The Employer admitted the other employee was treated differently and offered no mitigating or aggravating circumstances to justify the disparate treatment. Moreover, there was unrebutted testimony that two other employees were not removed for similar records and conduct. Based on this record, the Employer did not impose discipline in a consistent manner for similar conduct. (C-16237)

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In review, this Arbitrator notes the Grievant was also treated in a disparate manner in her use of sick leave versus co-workers. During the period in dispute, the Grievant used a total of 88 hours of sick leave. On the other hand, some employees used more sick leave than the Grievant, however, the record indicates they received no discipline. For example, the record shows that Carrier W. utilized 480 hours of sick leave in just a few months, while Carrier F. used 320 hours of sick leave and Carrier O. 160 hours of sick leave. The general rule is that disparate treatment such as unequal treatment for similar conduct will not be tolerated by arbitrators. This Arbitrator without reservation supports that rule. (C-16970)

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It is axiomatic in arbitration proceedings that employees be assessed the same penalties for similar offenses. It is inconsistent and contradictory to remove Mr. Guy for the very same offense with which the Postal Service chose to ignore with regard to Mr. Rosser. Further mitigating against the penalty of removal in Mr. Guy's case is the fact that even if he had listed the reckless driving charge, this should not have been of sufficient severity to have barred his employment. (C-02354)

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The incidents described in the foregoing paragraph closely parallel the incident in this case. The Postal Service was unable to provide sufficient rebuttal evidence to show that there were any variations in the circumstances of the instant case and the two previous cases to depart from the consistent or uniform treatment applied in those two previous cases. (C-21062)

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This case is not a discrimination case that arises under Title VII of the Civil Rights Act. Instead, it is a discipline case that arises under the concept of "just cause" set forth in the Agreement. A generally-accepted principle of "just cause" is that there must be even treatment in discipline matters. That requires equitable (fair) treatment within an appropriate unit. The scope of the appropriate unit, e.g., whether the comparables are broader than an individual supervisor, must be decided on a case-by-case basis.

The evidence convinces that the Grievant and [W] were treated differently under same or similar circumstances. This precludes a finding that just cause exists for the removal of the Grievant. Accordingly, the grievance must be sustained. The Grievant shall be reinstated and made whole ([C-22258](#))

## **Supporting Cases**

[C-01047](#), Arbitrator Holly, March 30, 1979  
[C-01760](#), Arbitrator Rentfro, June 25, 1980  
[C-01920](#), Arbitrator Gentile, September 30, 1981  
[C-01945](#), Arbitrator Searce, June 23, 1980  
[C-02354](#), Arbitrator Caraway, July 5, 1978  
[C-02403](#), Arbitrator DiLeone, October 7, 1977  
[C-02801](#), Arbitrator Caraway, March 31, 1978  
[C-04401](#), Arbitrator Williams, July 16, 1984  
[C-04432](#), Arbitrator Williams, July 7, 1984  
[C-04518](#), Arbitrator Weisenfeld, December 21, 1984  
[C-05267](#), Arbitrator Seidman, November 4, 1985  
[C-07013](#), Arbitrator Sobel, April 18, 1987  
[C-16237](#), Arbitrator Hutt, December 31, 1996  
[C-16303](#), Arbitrator Abernathy, November 18, 1996  
[C-16970](#), Arbitrator Olson, June 24, 1997  
[C-17453](#), Arbitrator Duda, October 12, 1997  
[C-20174](#), Arbitrator Hales, November 19, 1999  
[C-21062](#), Arbitrator DeLauro, September 11, 2000  
[C-22258](#), Arbitrator Bennett, June 30, 2001  
[C-23229](#), Arbitrator Dilts, April 7, 2002

# Mitigation Defense No. 3

## Rule Grievant broke was otherwise unenforced.

If management routinely permits letter carriers to violate a rule, or routinely to follow a certain behavior, it may not suddenly impose discipline for violations without first announcing its intention to begin enforcing the rule, or to stop tolerating the behavior.

## Case Examples

The core of this issue is the established past practice at the Pittsburgh Post Office of sometimes disposing of deliverable third class mail, however, contrary to postal regulations, and however, illegal it may have been. That practice existed, and it is of crucial consideration in this dispute.

When such a practice is condoned it is simply not fair that one or two employees bear the entire brunt of the correct, necessary, and entirely justifiable determination of management to bring such a practice to a halt. An employer has the right to enforce reasonable regulations, and the postal service in particular has an obligation to see that the mail is delivered. That is the reason for its existence.

Any employer has an obligation to inform employees clearly, without equivocation, and without the possibility of misunderstanding, when rules which have been ignored are to be enforced, and when wrongful practices which have been condoned are to cease. While the postal service has endeavored to show that it met these obligations in the present dispute, the proof falls short of making that showing. (C-02803)

\*\*\*

It is a basic tenet of labor management relations that prior to the imposition of discipline, an employee must be aware that the employer considers his actions or conduct violative of the labor agreement or existing rules and regulations and he must know of the possibility that discipline may result. Where an employee believes his actions and conduct are justified and no indication has been given that persistence in that course of conduct can and probably will result in discipline, subsequently imposed sanctions must be set aside. (C-01455)

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In other words, the Supervision charged Grievant with technical violations of several general "rules" which were not effectively rules at the subject station and Grievant's route. That point is significant in relation to the Probation Agreement, but the Agreement itself must also be considered. When Grievant was brought back after the prior arbitration it was to give him an opportunity to show that he could work without the outbursts, insubordination, profanity and disrespect, which had occurred allegedly because of chemical problems within his body. Supervision was skeptical that he would succeed and some awaited an occasion to show that he had failed the opportunity. Actually, for more than a year after his return he performed with flying colors. He was polite, respectful and hard working. As noted, he tried to live within rules he knew were not being enforced against anyone else. The charges made against Grievant, which were used and relied on to support his discharge, were not regarded as significant at this station. Many people had violated the same "rules," but no one else was disciplined. The attempt to discharge Grievant for violation of effectively non-existent rules is arbitrary, capricious and unreasonable and not a proper application of the Probation Agreement. (C-17453)

## Supporting Cases

[C-01448](#), Arbitrator Dworkin, November 8, 1982

[C-01455](#), Arbitrator Walt, December 17, 1979

[C-01875](#), Arbitrator DiLeone, April 11, 1979

[C-02029](#), Arbitrator Warns, July 24, 1972

[C-02803](#), Arbitrator Eaton, May 25, 1978

[C-16426](#), Arbitrator King, January 15, 1997

[C-17453](#), Arbitrator Duda, October 12, 1997

# Mitigation Defense No. 4

**Grievant has long prior service, good prior record, or both.**

As a letter carrier works the job year after year, he or she establishes ever greater “property rights” to the job, and a letter carrier with many years of service deserves a more moderate response to a transgression than does a new hire. This defense is most effective when the years of service have been relatively discipline-free.

Arbitrator Gentile’s October 28, 1983 award in [C-03863](#) is quoted at length below. His explanation of this defense has been influential and is often referenced and adopted quoted by other arbitrators, for example in [C-14171](#) and [C-18933](#).

## Case Examples

[C-03863](#), Arbitrator Gentile, October 28, 1983

The “just cause” standard and “corrective, not punitive” standard are the guidelines which the parties have agreed to follow. Implicit in the administration of these standards to factual situations is a twofold approach: (1) has an alleged violation been proven by credible evidence and, if proven (2) has the degree of discipline which was administered met the “just cause” and “corrective, not punitive” tests.

A critical element in the application of the “just cause” standard after an offense is either proven by credible evidence or admitted to by the charged party is the consideration of any mitigating circumstances. All of the cited arbitral decisions acknowledge the presence of this element; however, arbitrators will vary as to the weight given to these circumstances. That is one of the main reasons why each case must be fully evaluated on its own. In the instant case, the Arbitrator found these facts to be persuasive as mitigating considerations:

- 1) The Grievant’s long period of service without prior discipline;
- 2) The Grievant’s open and candid attitude during the investigation;
- 3) The absence of any theft;
- 4) The Grievant’s apparent exemplary record in the performance of his duties;
- 5) The isolated nature of the offense in that it was not part of a pattern of improper behavior . . . ; and
- 6) The apparent arbitrary and non-corrective nature of the discipline, namely, the Grievant admitted he was wrong and the Service, almost in a perfunctory manner, summarily effected his removal.

Given these mitigating circumstances, the Arbitrator must find that “just cause” was not present for the extreme penalty of discharge in this case. The seriousness of the offense, however, does demand serious discipline. Thus, reinstatement without back pay is in keeping with the application of the “just cause” standard and the “corrective, not punitive” standard of Article 16. Given the Grievant’s record, this penalty will have the corrective effect intended. ([C-03863](#))

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Grievant has served this Employer for over [eight years without any demonstrated disciplinary penalty. I have, in the past, referred to this as a “bank of good will”. In such instances of long, good service, it must be recognized that a single violation, even a serious one may occur without an assumption that [there has been] the destruction of the trust necessary to the continued employment relationship. Indeed, years of good, faithful service have many times been used and accepted as substantive evidence of lack of just cause for discharge. ([C-03587](#))

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In assessing an appropriate penalty, it must be remembered that [the] grievant, a career employee [for eleven years] had no record of prior discipline when the events here under review transpired. It should not be quickly assumed that for an employee with significant seniority and a discipline-free record, corrective discipline cannot succeed in eliminating repetition of such conduct. The prescription of Article 16 is “that discipline should be corrective in nature, rather than punitive”. ([C-02287](#))



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Secondly, the thirty years of presumably exemplary service of the grievant should be considered in his behalf, notwithstanding the serious charges against the grievant. One incident, lasting no more than one hour or so should not result in the forfeiture of such long service, unless the acts of the grievant are so repugnant to the requirements of the Service, or to the safety of the public as to demand complete and instant severance of his employment. (C-06952)

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Even if the [local] manual had listed the right-of-way failure, that would cause a fatal defect in this case, because specifying a fixed penalty and barring consideration of mitigating factors makes the discipline to a punitive action, which, of course, is prohibited by the Agreement. Under the circumstances of this case, there should have been consideration of her continuous service and her record of long good service. None was given. We find, under these circumstances, that the seven-day suspension was punitive in violation of Article 16 Section 1, and was arbitrary and excessive given Grievant's service years and record. (C-16572)

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However, in recognizing the grievant's substantial tenure of 16 years coupled with the fact that she had never received any disciplinary actions and coupled with the "appearance" that this was probably an isolated act (given her positive record), and in having considered the arbitration awards cited by both parties, I found the Union's arguments persuasive to the effect that the disciplinary action constituted too severe a penalty under the facts and circumstances in this case. (C-17231)

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Arbitrator Le Winter [C-03587] refers to an employee's long, good service record as a "bank of goodwill" which should be addressed and which could serve to mitigate an assessed penalty.

The Gentile decision was also referenced by Arbitrator Carlton Snow in case No. E90N-4E-D94046953 [C-14171], cited by the Union in the instant case. Citing the Gentile case, arbitrator Snow aptly described six mitigating factors presented by Arbitrator Gentile as "an insightful discussion of mitigating considerations."

Using the Gentile factors, Arbitrator Snow concluded that it would be proper to reinstate the grievant who had 14 years of service and who had been charged with discarding deliverable mail. Finding lack of intent on the part of the grievant, the arbitrator judged the infraction to be a matter of simple negligence instead of willful destruction of mail. In addition, he found that the Employer had not adhered to the concept of just cause by failing to evaluate mitigating factors in selecting an appropriate sanction.

In sum, the Grievant committed a very grave error in judgment and one which, in my opinion, could, under different circumstances, cause the Employer to have extreme difficulty with showing faith, reliance and trust in the grievant's ability to fulfill his duties as a Letter Carrier. But the arbitrator finds there are enough mitigating factors in this case for him to find the penalty imposed to be excessive and therefore not for just cause. (C-18933)

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[T]he final factor which demonstrates Grievant is a good candidate for progressive discipline is his nineteen years of duty with the Postal Service. The record before this Arbitrator shows Grievant to be a good employee, free of discipline. As a nineteen-year employee, Grievant has built up substantial equity in the job which works in favor of reinstating this employee. [The grievant's] testimony at arbitration convinced this Arbitrator he fully understands that as a letter carrier his duty is to be honest and trustworthy. (C-20121)

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In this Arbitrator's considered opinion, Article 35, in conjunction with the grievant's 19 years of service are sufficient to require that he be given one final chance to remain sober and salvage his Postal career. Therefore, in this Arbitrator's considered opinion the grievant's removal must be ordered reduced to a long suspension. (C-25874)

## Supporting Cases

C-02287, Arbitrator Walt, September 14, 1979

C-02386, Arbitrator Seitz, November 12, 1979

C-02871, Arbitrator Walt, November 20, 1979

C-03587, Arbitrator LeWinter, May 3, 1983

C-03863, Arbitrator Gentile, October 28, 1983

C-04275, Arbitrator Bowles, April 25, 1984

C-04570, Arbitrator Epstein, December 11, 1984  
C-04694, Arbitrator Dash, February 21, 1985  
C-05970, Arbitrator Seidman, December 31, 1985  
C-06952, Arbitrator Howard, March 3, 1987  
C-14171, Regional Arbitrator Snow, January 12, 1995  
C-16572, Arbitrator Duda, March 12, 1997  
C-17231, Arbitrator Zigman, August 27, 1997  
C-18933, Arbitrator Parent, October 22, 1998  
C-20121, Arbitrator Axon, November 8, 1999  
C-25874, Arbitrator Dilts, April 15, 2005

# Mitigation Defense No. 5

## Grievant's misconduct was not intentional.

Unintentional misconduct (e.g., "negligence") is generally viewed as being less serious than intentional misconduct. Intent is an essential element of almost all charges of misconduct, and it is clear that it is management's burden to prove that the grievant's acts were intentional.

## Case Examples

The real question in the instant case thus reduces itself to this inquiry: Whether or not the Grievant's action on March 18, 1981, was a "willful" and "intentional" act?

After evaluating all of the evidence and the apparent candor of the Grievant when he testified, the Arbitrator reached the conclusion that the Grievant's act was that of "carelessness" and "gross negligence," but not a "willful" and "intentional" act to circumvent or thwart the fundamental purpose of his job. Those factors which strongly influenced this conclusion in addition to the Grievant's apparent unblemished record with the Service and his own testimony which was given considerable weight, were these (1) the subject mail was placed openly in the Station's waste hamper, a location which demonstrated no reasonable attempt by the Grievant to conceal in a clandestine manner the fact that mail was being discarded; (2) the mail was left in sequential order in a type of "bundle" state which would further highlight its presence and support the Grievant's "fanning" statement; (3) the Grievant, when initially confronted with the mail in question did not attempt to conceal the fact that he was the responsible person, but that in his judgment, which was subsequently proven wrong, the mail was not deliverable, and (4) a goodly portion of the mail was in fact not deliverable. (C-01721)

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[T]he essence of the dischargeable offense of falsification is the employees (sic) dishonesty that requires a finding of intentionally issuing a false statement, as distinguished from a reasonable mistake, in direct conflict with the necessary characteristic of a letter carrier that he must always be trustworthy. Thus, the critical question is not just whether the Grievant had in fact been fired, or forced to resign from a former job, but whether he misrepresented the known fact in order to be accepted for employment. In addressing this factual question, the employee must be presumed innocent with the Employer bearing the burden of rebuttal by clearly establishing fraudulent intent. (C-01988)

\*\*\*

One element of assault is an intent on the part of the aggressor to hit or strike the other. In this case, the testimony of the victim, or the object of the assault, clearly indicates that the aggressor has no intent to hit him with the letters. Therefore, the Service has not established that an assault occurred. Since there was no assault, it is the Arbitrator's opinion that the Grievant cannot be discharged. (C-03611)

\*\*\*

The Postal Service offered no showing to the record that they established that the Grievant willfully disobeyed his supervisor's instructions. However, inexcusable the Grievant's behavior may have been in the eyes of his supervisors, the evidence did not establish that the Grievant was acting in defiance of authority. The evidence did not support a conclusion that the Grievant's offense was willful. Again, the Arbitrator must point out that Webster Dictionary defines willful as "obstinately and often perversely self-willed" or done deliberately or intentionally.

Certainly the Grievant's act was poor judgement as opposed to self-willed. The evidence to the record did not establish that the Grievant's conduct was deliberately or intentionally rejecting authority. Consideration must be given to the fact that the Grievant did make an effort to get additional instructions from Mr. Maynes. Furthermore, it would have taken his supervisor only a moment to find out what the problem was that caused the Grievant to return before the instructed time without completing his deliveries. Here, the supervisor failed to adequately investigate the facts and circumstances regarding the Grievant's problem. In addition, the supervisor admits to ignoring the Grievant's request for further instructions. The supervisor's lack of response to the Grievant for additional instructions was much more about her emotions rather than her reasoned judgement. (C-23987)

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The Postal Service's case is inconclusive due to insufficient evidence to show deceit or a willful intent to defraud. The primary evidence of the surveillance video did not establish the proof needed to show misconduct by the Grievant as charged. . . The Arbitrator did not find that the purported violations of the Grievant's work restrictions measures against his everyday activities constituted that the Grievant has misrepresented his physical abilities

and made false statements during an official investigation. The Grievant simply followed his physician's prescribed course of treatment and returned to full duty when his physician was assured that he could do so without subjecting himself to further injury. (C-28016)

## **Supporting Cases**

C-01062, Arbitrator Howard, August 14, 1975  
C-01274, Arbitrator Goldstein, April 28, 1982  
C-01298, Arbitrator Leventhal, September 16, 1982  
C-01402, Arbitrator DiLeone, November 17, 1980  
C-01424, Arbitrator Jones, November 20, 1978  
C-01721, Arbitrator Gentile, November 10, 1981  
C-01988, Arbitrator Foster, August 7, 1981  
C-03611, Arbitrator Render, May 29, 1983  
C-06483, Arbitrator LeWinter, September 20, 1986  
C-13458, Arbitrator Snow, March 3, 1994  
C-16511, Arbitrator Olson, March 2, 1997  
C-15436, Arbitrator Dennis, May 24, 1996  
C-17676, Arbitrator Bankston, September 2, 1997  
C-18215, Arbitrator Hales, April 15, 1998  
C-23987, Arbitrator Irving, January 22, 2003  
C-28016, Arbitrator Irving May 25, 2007

# Mitigation Defense No. 6

## Grievant was emotionally impaired.

This is a sub-category of Mitigation Defense No. 5 above. Here it is argued that grievant was emotionally impaired, and because of that impairment the grievant's misconduct should be viewed as unintentional.

## Case Examples

In August of 1977, [grievant] labored under severe stress and emotional tension, a condition sufficiently aggravated to require medical treatment. Indeed, he was granted sick leave for that very reason on three of the days that separated his conduct on August 23 from that of August 29 and August 30, 1977. After eight years of satisfactory employment with the Postal Service during which he won the praise and affection of many of the patrons on Route 901, [grievant] suddenly inundated the waste hamper with deliverable third class mail. If it had been his desire to dispose of that mail in order to reduce his delivery time he would have done so away from Station O. There clearly exists a different explanation for his conduct.

The distraught emotional condition of the grievant at the time in question is corroborated by his doctor and the probation officer who saw him on the day of his arraignment in the United States District Court. True enough, [grievant] told the Postal Inspectors he had disposed of some third class mail without malice and in court he entered a plea of guilty to the charge of obstruction of mail. In doing so, however, he explained that his conduct was the result of being "tired and weary". More precisely, he was reacting to an overwhelming emotional burden and not intentionally violating either the mail processing procedures at Station O or statutory law. He stands guilty of no more than negligence and the appropriate sanction should therefore have been a substantial disciplinary suspension rather than discharge. (C-02362)

It is, of course, the burden of the Union to raise and prove mental illness as a defense in the form of mitigating circumstances. The burden is on the Union to demonstrate by a preponderance of the evidence that, even though the Grievant is guilty of the charged offenses, he should be relieved of responsibility to some degree as a result of the mental disorder.

The Service is not prohibited from disciplining an employee who is a threat to other employees or who cannot perform the duties of his job, regardless of the fact that the employee's malfeasance or nonfeasance is the result of a mental illness or disorder. The Arbitrator does not agree with those who say such discipline is a breach of the just cause clause. The Service is not under the obligation to retain an employee who suffers from a mental disorder at all costs. The service has an obligation to operate efficiently, as well as the duty to protect the safety of its employees. On the other hand, when the service chooses to discipline an employee who it knows suffers from a mental disorder, it does so at some risk. If the employee is a "qualified handicapped individual" within the meaning of the Rehabilitation Act of 1973, the Service must be certain that it has reasonably accommodated the employee. The Service must also be prepared to face the contention that the discipline violates the employee's E.E.O. rights. The instant case does not involve either of those pieces of legislation. However, the Service must also be prepared to confront proof by the Union that the following factors exist:

- (1) Proof that the medical disorder exists.
  - (2) Proof that the alleged offense was the result of the mental disorder.
  - (3) Proof through the best medical evidence that the employee is not a threat to other employees.
  - (4) Proof that the disorder does not disable the employee from regularly performing his duties.
  - (5) Proof through the best medical evidence that the employee's disorder is under control and that he ultimately will be rehabilitated.
  - (6) Proof that management failed to properly consider the alleged offense in light of the employee's disorder.
- (C-03805)

## Supporting Cases

C-00077, Arbitrator Cohen, February 22, 1982

C-00274, Arbitrator Williams, May 18, 1983

C-00295, Arbitrator Feldman, February 3, 1978  
C-00551, Arbitrator Dash, January 16, 1985  
C-01200, Arbitrator Seidman, July 16, 1982  
C-01365, Arbitrator Epstein, June 2, 1982  
C-01916, Arbitrator Walt, September 30, 1981  
C-01972, Arbitrator Levin, May 9, 1980  
C-02362, Arbitrator Roberts, November 7, 1978  
C-02375, Arbitrator Epstein, October 12, 1978  
C-02677, Arbitrator Goldstein, December 18, 1982  
C-03342, Arbitrator Dash, March 10, 1983  
C-03805, Arbitrator Levak, September 22, 1983  
C-04350, Arbitrator Gentile, June 30, 1984  
C-04913, Arbitrator Walsh, April 8, 1985  
C-05304, Arbitrator Carson, November 4, 1985  
C-15644, Arbitrator Johnston, July 24, 1996  
C-17324, Arbitrator Abernathy, September 16, 1997  
C-24636, Arbitrator Irving, September 25, 2003

## Mitigation Defense No. 7

**Grievant was impaired by drugs or alcohol (including claims that “alcoholism” was the cause of grievant’s misconduct).**

This is a sub category of Mitigation Defense No. 5 above. Here it is argued that grievant was impaired by drugs or alcohol, and because of that impairment grievant’s misconduct should be viewed as unintentional.

This defense is used frequently; only rarely, however, is it presented with the thoroughness of preparation required for a satisfactory result. If you determine that this defense may fit a case which you are preparing, carefully study the cases listed below, and make certain that you can match the elements essential for a win. If you can’t, you may be better off concentrating your efforts on other defenses.

This defense is strengthened by Article 35, Section 1 of the National Agreement (Employee Assistance Program) which states in relevant part:

An employee’s voluntary participation in the EAP\* for assistance with alcohol and/or drug abuse **will be considered favorably in disciplinary action proceedings.** (Emphasis added)

An extensive review of the Article 35 defense is found in the [January 2008 NALC Arbitration Advocate](#).

## Case Examples

What then are the factors which would allow an arbitrator to mitigate the offense committed by the alcoholic which led to his removal from the Postal Service to order that he be reinstated by the Postal Service? The decided cases rely on several factors; First, that the act was done while the grievant was an alcoholic and at the time the act was committed he was either drunk or under the influence of alcohol; Second, that the Grievant’s prior work record is either relatively clear of disciplinary action or that all, or most, of the prior disciplinary actions occurred as the result of the grievant’s alcoholism; Third, that the grievant is successfully participating in [PAR] and that participation has caused both his counselor and the officer in charge of the P.A.R. program to indicate that he is likely to be a successful candidate for rehabilitation; and Fourth, that the grievant has had a substantial length of Service with the Post Office, generally for a period of at least 10 years, with the likelihood of reinstatement increasing if the period of prior service is 20 years or more. (C-01928)

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The element which must give pause in this dispute is none of the above, but the evidence concerning the cortisone medication which the Grievant was taking for an indisputably serious skin condition. Odd though it may seem to a layman the testimony is uncontradicted that a side effect of the Depomedrol injection—which can last up to two weeks—can be serious personality aberrations. It is true that Dr. Jensen could not testify positively that the Depomedrol caused the Grievant’s actions. However, he could testify that the medication had been given, and that in some cases it can, and has, caused similar behavior.

Absent this consideration removal would clearly be warranted. Its presence, however, taken together with the prior excellent record of the Grievant, does seem to indicate abnormal behavior which one would not expect to be repeated in the future. (C-01237)

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Under these circumstances Article 35 of the Agreement requires that Grievant’s voluntary participation be favorably considered to mitigate against removal.

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\* Note that the USPS Program for Alcoholic Recovery or PAR, referenced in some arbitration awards was an earlier form of the current, and much broader, EAP program. PAR was focused primarily on alcohol abuse.

The Employer is concerned that returning Grievant to employment will cause employees to believe mishandling of mail is treated lightly. Returning Grievant to postal employment after his apparently successful rehabilitation need not involve such risk of misunderstanding. There can be strict controls which hopefully will insure he performs better than ever. As already pointed out there is no requirement that discharge must be imposed for every employee who violates mail security. Each case must stand on its own facts. When just cause is shown, removal is available provided it is consistent with the provisions in the Agreement. That was not true in this case. (C-14086)

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While the Service emphasizes the seriousness of the charge of delaying the mail, clearly the seriousness of the charge rests upon the intent and deliberation of the offender. The record makes clear that as a result of overindulgence in alcohol, the grievant was not in full possession of his senses on the day of the incident and really was not aware of what he was doing. His conduct cannot be regarded as a deliberate and intentional delaying of the mail. (C-02849)

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Arbitrators have given a grievant's participation in EAP weight as mitigative circumstances which is clearly authorized by Article 35 of the parties' 2001 National Agreement. Again, the egregiousness of the offense of being intoxicated while on the clock must be considered when applying Article 35, as well as the grievant's history of previous attempts to control his alcoholism. In this case, the grievant is participating in EAP and AA programs, having failed in at least one previous incident to control his alcoholism. Failure at the first attempt is not uncommon, and when that failure is two years in the past, without intervening failures, it cannot serve to preclude the application of this portion of Article 35 in this specific case.

In this Arbitrator's considered opinion, Article 35, in conjunction with the grievant's 19 years of service are sufficient to require that he be given one final chance to remain sober and salvage his Postal career. Therefore, in this Arbitrator's considered opinion the grievant's removal must be ordered reduced to a long suspension. (C-25874)

## Supporting Cases

C-00282, Arbitrator Zack, February 26, 1982  
C-00854, Arbitrator Dash, July 18, 1979  
C-01237, Arbitrator Eaton, July 13, 1982  
C-01340, Arbitrator Snow, January 23, 1982  
C-01565, Arbitrator Haber, July 30, 1976  
C-01820, Arbitrator Zumas, January 12, 1981  
C-01928, Arbitrator Seidman, February 22, 1982  
C-02368, Arbitrator Howard, June 21, 1978  
C-02371, Arbitrator Rentfro, January 27, 1979  
C-02372, Arbitrator Moberly, March 20, 1978  
C-02831, Arbitrator Dash, December 19, 1977  
C-02846, Arbitrator Aaron, May 19, 1975  
C-02849, Arbitrator Howard, March 19, 1975  
C-04024, Arbitrator Parkinson, December 29, 1983  
C-06375, Arbitrator Rentfro, July 23, 1986  
C-07057, Arbitrator Goldstein, April 16, 1987  
C-07126, Arbitrator Eaton, May 15, 1987  
C-12085, Arbitrator Taylor, June 11, 1992  
C-14086, Arbitrator Duda, December 14, 1994  
C-17945, Arbitrator Olson, January 31, 1998  
C-25874, Arbitrator Dilts, April 15, 2005  
C-27061, Arbitrator Ames, April 17, 2007



# Mitigation Defense No. 8

**Grievant may have acted as charged, but was provoked by another.**

This defense is one of the only possible defenses to some forms of misconduct, including assaults on supervisors, customers, or other employees. In this defense the union argues that even, if the grievant acted as charged, the conduct should be excused or the penalty mitigated because the conduct was provoked by another. This is an affirmative defense. This means that, if the union employs this defense, it bears the burden of proving that provocation occurred. Thus, for example, if a letter carrier punches a supervisor, the union must prove that the supervisor first attacked the letter carrier, and that the letter carrier was merely defending him or herself.

## Case Examples

There is no question from this record but that grievant engaged in a “cuss-fight” with a customer. The question is: does that fact serve as just cause for removal, or do the circumstances here—some already discussed and some not—tend to mitigate such a harsh penalty? The undersigned is of the opinion they do. He will briefly explain why he reaches this conclusion lest someone think he does not agree that such a “cuss-fight” is “unsatisfactory performance—conduct unbecoming a Postal employee. It is, there is no question about that. But it is to be quickly added, provocation is a consideration that necessarily comes within the concept of just cause, which is the test to be applied here. (C-05321)

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The evidence convincingly established that [the supervisor] well knew from his long relationship with the Grievant that he was not being threatened on May 30th and that the Grievant was no danger to himself or to others. It is apparent to the Arbitrator that [the supervisor] had learned to play the Grievant’s emotions as a musician plays a violin. Thus, not only did he provoke and cause the situation, he well knew that the Grievant’s reaction was neither threatening, abusive nor potentially injurious. (C-05873)

\*\*\*

The undersigned will not burden these sophisticated parties by giving them his understanding or definition of the “just cause” concept as was intended by them when they put it in the National Agreement. He knows they know what it means. He believes they will not disagree with him however when he finds, as he does, that just cause is not present when a 9 year employee, who has a good work record as a letter carrier and is serving as station steward, is removed from the Postal Service because he refuses to stand still and take from the supervisor public criticism of his official efforts as a steward, with the supervisor all the while standing less than 2 feet away, vigorously shaking a pencil in the steward’ face. This is not to also say that under such circumstances the steward is authorized to “come out fighting.” He is not and any trained steward or seasoned employee, and the grievant was both, knows this. It is to say, however, that if a supervisor acts improperly toward an employee by publicly criticizing him and also violates the employee’s right to be treated in a reasonable fashion, both such being found to have happened in this case, any subsequent overreaction on the part of the employee is subject to mitigation in direct proportion to the seriousness of the supervisor’s breach of accepted practice and policy. (C-04203)

## Supporting Cases

- C-04203, Arbitrator Williams, March 28, 1984
- C-04213, Arbitrator Williams, May 10, 1984
- C-04478, Arbitrator Williams, June 14, 1984
- C-04750, Arbitrator LeWinter, March 25, 1985
- C-05138, Arbitrator Rentfro, September 3, 1985
- C-05321, Arbitrator Williams, October 29, 1985
- C-05242, Arbitrator Render, October 6, 1985
- C-05873, Arbitrator Levak, March 11, 1986
- C-06717, Arbitrator Goldstein, December 8, 1986
- C-06782, Arbitrator Sobel, December 8, 1986
- C-17699, Arbitrator Erbs, November 13, 1997

# Chapter 3—Stewards Role

## Introduction

NALC has negotiated a strong, effective grievance/arbitration system culminating in binding arbitration. Our strong cadre of skilled, trained and dedicated professionals at the branch, Step B, regional and national levels is the envy of the labor movement.

The foundation of the entire system is our shop stewards. Almost every discipline grievance is investigated, developed and filed by a shop steward. NALC representatives at the higher steps of the grievance/arbitration procedure are dependent on their skill and dedication.

This chapter has been written primarily to assist shop stewards handling discipline cases. It is intended to supplement rather than replace other NALC training materials. Thus its emphasis is on investigating, preparing and filing disciplinary grievances at Informal Step A.

## Time Limits

Every step of the grievance/arbitration system has firm time limits. These time limits are absolute. Arbitrators do not have the authority and will not consider a clearly untimely grievance. However, arbitrators will generally find that there is a presumption of arbitrability and decide in favor of arbitrability in unclear or ambiguous cases. See Supporting Cases, below.

Stewards should make sure that the carriers they represent understand the importance of contacting the union immediately if they receive any discipline—including letters of warning. All letter carriers should understand that the time limits begin as soon they receive the discipline, not when they notify the union. They should also understand that if discipline, such as a letter of warning or no-time-off suspension, is not grieved when it is received, then it will not be possible to challenge it later if it is cited as a prior adverse element in subsequent discipline.

Article 15, Section 2 establishes a fourteen day time limit for filing a grievance at Informal Step A. Fourteen days means fourteen calendar days, not fourteen work days. For example: if a grievant receives a letter of warning, day 1 of the 14 days is the day after the letter of warning is received. This is true even if, for example, the fourteenth day falls on a Sunday. In that case Sunday would be the last day that a timely grievance could be filed. **It is never** a good idea to wait until the last day to file a grievance since errors in counting days or other problems can easily result in a grievance being untimely.

**Article 15. 2. Informal Step A (a)** Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. This constitutes the Informal Step A filing date.

The JCAM explains this Section as follows:

An employee or union representative must discuss the grievance with the employee's immediate supervisor within fourteen calendar days of when the grievant or the union first learned, or may reasonably have been expected to learn, of its cause. The date of this discussion is the Informal Step A filing date.

**Time Limits.** The fourteen days for filing a grievance at Informal Step A begin the day after the occurrence or the day after the grievant or the union may reasonably have been expected to have learned of the occurrence. For example: if a grievant receives a letter of warning, day one of the fourteen days is the day after the letter of warning is received.

**Continuing violations** are an exception to the general rule stated above. In H1N-5D-C 297, June 16, 1994 (C-13671), National Arbitrator Mittenthal explained the theory of continuing violations as follows:

Assume for the moment, consistent with the federal court rulings, that the Postal Service incorrectly calculated FLSA overtime for TCOLA recipients under the ELM. Each such error would have been a separate and distinct violation. We are not dealing here with a single, isolated occurrence. Management was involved in a continuing violation of the ELM. The affected employees (or NALC) could properly have grieved the violation on any day the miscalculation took place and such grievance would be timely provided it was submitted within the fourteen-day time limit set forth in Article 15. This is precisely the kind of case where a “continuing violation” theory seems applicable. To rule otherwise would allow an improper pay practice to be frozen forever into the ELM by the mere failure of some employee initially to challenge that practice within the relevant fourteen-day period.

## Supporting Cases—Presumption that grievance was timely

- [C-00005](#), Arbitrator Cohen, July 3, 1979
- [C-00009](#), Arbitrator Cohen, January 18, 1982
- [C-04494](#), Arbitrator Dworkin, October 24, 1984
- [C-05204](#), Arbitrator Rentfro, October 1, 1985
- [C-06464](#), Arbitrator Collins, September 5, 1986
- [C-08831](#), Arbitrator Nolan, May 17, 1989

**Extension of Time Limits.** The parties may, by mutual agreement, agree to extend the time limits for filing or processing a grievance. See JCAM page 15-2. It is not contractually required that such extensions be in writing. However, the Contract Administration Unit strongly recommends that any extensions of time limits be in writing and signed by both parties. All too often, disputes arise concerning oral extensions of time limits. Sometimes these misunderstandings arise because of legitimate misunderstandings about exactly what grievance was involved or how long the time limits were extended.

**Article 15.3.B.** The failure of the employee or the Union in Informal Step A, or the Union thereafter to meet the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the grievance. However, if the Employer fails to raise the issue of timeliness at Formal Step A, or at the step at which the employee or Union failed to meet the prescribed time limits, whichever is later, **such objection to the processing of the grievance is waived.** (Emphasis added)

The JCAM explains the waiver of time limits as follows:

This means that if management fails to raise the issue of timeliness, in writing, at Formal Step A, or at the step at which the employee or union failed to meet the prescribed time limits, whichever is later. It waives the right to raise the issue at a later time. Management’s obligations depend upon the step at which it asserts the grievance was untimely.

- If management asserts that a grievance is untimely filed at Informal Step A, it must raise the issue in the written Formal Step A decision (because Formal Step A is “later” than Informal Step A) or the objection is waived. It is not sufficient to assert orally during the Informal Step A meeting that a grievance is untimely.
- If management asserts that a grievance is untimely at Formal Step A or later, it must raise the objection in the written decision at the step at which the time limits were not met. (See JCAM page 15-10)

**15.3.C** Failure by the Employer to schedule a meeting or render a decision in any of the Steps of this procedure within the time herein provided (including mutually agreed to extension periods) shall be deemed to move the grievance to the next Step of the grievance-arbitration procedure.

The JCAM explains this Section as follows:

**Warning.** Article 15.3.C can easily be misunderstood. It does not mean that grievances are automatically appealed if management fails to issue a timely decision. Rather, if management fails to issue a timely decision (unless the parties mutually agree to an extension) the union must appeal the case to the next step within the prescribed time limits if it wishes to pursue the grievance. In cases where management fails to issue a timely decision, the time limits for appeal to the next step are counted from the the date management’s decision was due.

**Preference Eligible Employees (MSPB).** Under the MSPB procedures, preference eligible employees must first be issued a letter of proposed discipline and then a final decision letter after they have been given the opportunity to respond to the charges. This can raise issues about time limits which are discussed under [MSPB Appeal Rights](#), below.

## **Steward's Investigation Rights**

Article 17 of the National Agreement establishes the right of NALC stewards to be paid to investigate and process grievances on-the-clock. The pertinent sections of Article 17, Sections 3 and 4 of the National Agreement provide the following:

### **Article 17 Section 3. Rights of Stewards**

When it is necessary for a steward to leave his/her work area to investigate and adjust grievances or to investigate a specific problem to determine whether to file a grievance, the steward shall request permission from the immediate supervisor and such request shall not be unreasonably denied.

In the event the duties require the steward leave the work area and enter another area within the installation or post office, the steward must also receive permission from the supervisor from the other area he/she wishes to enter and such request shall not be unreasonably denied.

The steward, chief steward or other Union representative properly certified in accordance with Section 2 above may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance or determining if a grievance exists and shall have the right to interview the aggrieved employee(s), supervisors and witnesses during working hours. Such requests shall not be unreasonably denied.

While serving as a steward or chief steward, an employee may not be involuntarily transferred to another tour, to another station or branch of the particular post office or to another independent post office or installation unless there is no job for which the employee is qualified on such tour, or in such station or branch, or post office.

If an employee requests a steward or Union representative to be present during the course of an interrogation by the Inspection Service, such request will be granted. All polygraph tests will continue to be on a voluntary basis.

### **Article 17 Section 4. Payment of Stewards**

The Employer will authorize payment only under the following conditions:

- Grievances—Informal and Formal Step A: The aggrieved and one Union steward (only as permitted under the formula in Section 2.A) for time actually spent in grievance handling, including investigation and meetings with the Employer. The Employer will also compensate a steward for the time reasonably necessary to write a grievance. In addition, the Employer will compensate any witnesses for the time required to attend a Formal Step A meeting
- Meetings called by the Employer for information exchange and other conditions designated by the Employer concerning contract application.

Employer authorized payment as outlined above will be granted at the applicable straight time rate, providing the time spent is a part of the employee's or steward's (only as provided for under the formula in Section 2.A) regular work day.

The Postal Service will compensate the Union's primary Step B representatives at their appropriate rate of pay on a no loss, no gain basis. Activated back up Step B representatives will be compensated on the same basis for time actually spent as Step B representatives.

The JCAM explains these provisions as follows:

**Steward Rights.** Article 17.3 & 17.4 establish several steward rights:

- The right to investigate and adjust grievances and problems that may become grievances;
- The right to paid time to conduct those activities;
- The right to obtain management information;
- Superseniority concerning being involuntarily transferred;
- An employee's right to steward representation during an Inspection Service interrogation.

**Steward Rights—Activities Included.** A steward may conduct a broad range of activities on the clock related to the investigation and adjustment of grievances and of problems that may become grievances. These activities include the right to review relevant documents, files and records, as well as interviewing a potential grievant, supervisors and witnesses. Specific settlements and arbitration decisions have established that a steward has the right to do (among other things) the following:

- Complete grievance forms and write appeals on the clock (see below).
- Interview witnesses, including postal patrons who are off postal premises; National Arbitrator Aaron N8N-A-0219 November 10, 1980 (C-03219); Step 4, H1N-3U-C 13115, March 4, 1983 (M-01001); Step 4, H8N-4J-C 22660, May 15, 1981 (M-00164);
- Interview supervisors; Step 4, H7N-3Q-C 31599, May 20, 1991 (M-00988);
- Interview postal inspectors; Management Letter, March 10, 1981 (M-00225);
- Review relevant documents; Step 4, H4N-3W-C 27743, May 1, 1987 (M-00837);
- Review an employee's Official Personnel Folder when relevant; Step 4, NC-E 2263, August 18, 1976 (M-00104);
- Write the union statement of corrections and additions to the Formal Step A decision; Step 4, A8-S-0309, December 7, 1979 (M-01145).
- Interview Office of Inspector General [OIG] Agents.

A steward has the right to conduct all such activities on the clock (see below).

**Right to Steward Time on the Clock.** Although a steward must ask for supervisory permission to leave his or her work area or enter another one to pursue a grievance or

potential grievance, management cannot “unreasonably deny” requests for paid grievance-handling time.

Management may not determine in advance how much time a steward reasonably needs to investigate a grievance. National Arbitrator Garrett, MB-NAT-562/MB-NAT-936, January 19, 1977 (C-00427). Rather, the determination of how much time is considered reasonable is dependent on the issue involved and the amount of information needed for investigation purposes. (Step 4, NC-S-2655, October 20, 1976, M-00671).

Steward time to discuss a grievance may not be denied solely because a steward is in overtime status (Prearbitration Settlement, W4N-5C-C 41287, September 13, 1988, M-00857). It is the responsibility of the union and management to decide mutually when the steward will be allowed, subject to business conditions, an opportunity to investigate and adjust grievances. (Step 4, N-S-2777, April 5, 1973, M-00332)

If management delays a steward from investigating a grievance, it should inform the steward of the reasons for the delay and when time will be available. Likewise, the steward has an obligation to request additional time and give the reasons why it is needed. (Step 4, NC-C 16045, November 22, 1978, M-00127)

An employee must be given reasonable time to consult with his or her steward, and such reasonable time may not be measured by a predetermined factor. (Step 4, H1C-3W-C 44345, May 9, 1985, M-00303)

Although Article 17.4 provides that the grievant and a steward shall be paid for time actually spent in grievance handling and meetings with management, there are no contractual provisions requiring the payment of travel time or expenses in connection with attendance at a Formal Step A meeting. (Step 4, N8-S-0330, June 18, 1980, M-00716) Nor does the National Agreement require the payment of a steward who accompanies an employee to a medical facility for a fitness-for-duty examination. (Step 4 Settlement, NC-N-12792, December 13, 1978, M-00647)

## Denial of Steward Time

The JCAM provides the following explanation of remedies for stewards improperly denied time.

The appropriate remedy in a case where management has unreasonably denied a steward time on the clock is an order or agreement to cease and desist, plus payment to the steward for the time spent processing the grievance off-the-clock which should have been paid time.

The merits of grievance concerning the denial of steward time are a separate matter from the merits of the grievance that a steward is denied time to investigate. Consequently, in cases where management improperly denies steward time, the steward should do two things.

First, the denial of steward time should be raised as another issue in the original grievance. It is important for the union representatives handling the grievance at higher steps to be aware of the issue.

Second, a separate grievance should be filed seeking a cease and desist order and payment to the steward at the appropriate rate (usually overtime) for the time spent processing the grievance off-the-clock.

Of course, grievances concerning the denial of steward time are contractual disputes where the union has the burden of proof. To help meet this burden, the Contract Administration Unit recommends that any grievances concerning this issue document the steward's attempts to obtain the necessary time and management's responses. It is also recommended that the grievance file contain detailed time records showing exactly when the steward worked off-the-clock and exactly what was being done.



## Union's Right to Information

See also, "[Management refused to disclose or provide information to the Union](#)" under defenses, above.

The Union's right to information is the subject of Article 31, Section 3 which provides the following:

### Article 31, Section 3. Information

The Employer will make available for inspection by the Union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information.

Requests for information relating to purely local matters should be submitted by the local Union representative to the installation head or designee. All other requests for information shall be directed by the National President of the Union to the Vice President, Labor Relations.

Nothing herein shall waive any rights the Union may have to obtain information under the National Labor Relations Act, as amended.

(The preceding Article, Article 31, shall apply to Transitional Employees.)

The JCAM explains Article 31 as follows:

**Information.** Article 31.3 provides that the Postal Service will make available to the union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of the Agreement, including information necessary to determine whether to file or to continue the processing of a grievance. It also recognizes the union's legal right to employer information under the National Labor Relations Act. Examples of the types of information covered by this provision include:

- attendance records
- payroll records
- documents in an employee's official personnel file
- medical records
- internal USPS instructions and memorandums
- disciplinary records, including supervisor's disciplinary records
- route inspection records
- patron complaints
- handbooks and manuals
- photographs
- reports and studies
- seniority lists
- overtime desired and work assignment lists
- bidding records
- wage and salary records

- training manuals
- Postal Inspection Service investigative memoranda (IM's)

To obtain employer information the union need only give a reasonable description of what it needs and make a reasonable claim that the information is needed to enforce or administer the contract. The union must have a reason for seeking the information—it cannot conduct a “fishing expedition” into Postal Service records.

Settlements and arbitration awards have addressed the union’s entitlement to information in certain specific areas. For example, the union has a right to any and all information which the employer has relied upon to support its position in a grievance. (Step 4, H1C-3U-C 6106, November 5, 1982, [M-00316](#)). Note that the union also has an obligation to provide the Postal Service with information it relies upon in a grievance. See Article 15 above. The union is also entitled to medical records necessary to investigate or process a grievance, even without an employee’s authorization, as provided for in the Administrative Support Manual (ASM) Appendix (USPS 120.090) and by Articles 17 and 31 of the National Agreement. Step 4, D78N-4D-C 91000498, January 14, 1994, ([M-01155](#)) Step 4, H7N-1P-C 2187, November 16, 1988, ([M-00881](#)).

If requests for copies are part of the information request, then USPS must provide the copies Step 4, H7N-5K-C 23406, May 21, 1992, ([M-01094](#)). A national pre-arbitration settlement established that if the union provides the Postal Service with a list of officers and stewards, the Postal Service must indicate which (if any) applied for a supervisory position within the previous two years. (National Prearbitration Settlement, H4C-3W-C 27068, February 13, 1990, [M-01150](#)) When the union is provided with information, for example medical records, it is subject to the same rules of confidentiality as the Postal Service.

The JCAM further provides under Article 17, Section 4 that:

**Steward Rights—Activities Included.** A steward may conduct a broad range of activities related to the investigation and adjustment of grievances and of problems that may become grievances. These activities include the right to review relevant documents, files and records, as well as interviewing a potential grievant, supervisors and witnesses. Specific settlements and arbitration decisions have established that a steward has the right to do (among other things) the following:

- Interview witnesses, including postal patrons who are off postal premises. [C-03219](#), National Arbitrator Aaron, November 10, 1980); [M-01001](#), Step 4, March 4, 1983; [M-00164](#), Step 4, May 15, 1981.
- Interview supervisors; Step 4, H7N-3Q-C 31599, May 20, 1991 ([M-00988](#));
- Interview postal inspectors; Management Letter, March 10, 1981 ([M-00225](#));
- Review relevant documents; Step 4, H4N-3W-C 27743, May 1, 1987 ([M-00837](#));
- Review an employee’s Official Personnel Folder when relevant; Step 4, NC-E 2263, August 18, 1976 ([M-00104](#));

Steward requests to review and obtain documents should state how the request is relevant to the handling of a grievance or potential grievance. Management should respond to questions and to requests for documents in a cooperative and timely manner. When a relevant request is made, management should provide for review and/or produce the requested documentation as soon as is reasonably possible.

A steward has a right to obtain supervisors' personal notes of discussions held with individual employees in accordance with Article 16.2 if the notes have been made part of the employee's Official Personnel Folder or if they are necessary to processing a grievance or determining whether a grievance exists. (See Mittenthal H8N-3W-C 20711, February 16, 1982, [C-03230](#); Step 4, NC-S 10618, October 8, 1978, [M-00106](#); Step 4, G90N-4G-C 93050025, February 23, 1994, [M-01190](#))

## **Supporting cases**

- [C-00090](#), Arbitrator Willingham, December 11, 1972
- [C-00308](#), Arbitrator Dash, May 17, 1974
- [C-04273](#), Arbitrator Williams, May 2, 1984
- [C-05751](#), Arbitrator Searce, February 12, 1986
- [C-06658](#), Arbitrator LeWinter, November 21, 1986
- [C-07610](#), Arbitrator Levak, November 3, 1987
- [C-08779](#), Arbitrator Barker, April 3, 1989
- [C-08919](#), Arbitrator Britton, April 10, 1989
- [C-14131](#), Arbitrator Eaton, January 2, 1995
- [C-18017](#), Arbitrator Bajork, February 20, 1998
- [C-23831](#), Arbitrator Ames, October 25, 2002
- [C-24273](#), Arbitrator Poole, May 10, 2003
- [C-26138](#), Arbitrator Helburn, August 29, 2005
- [C-26204](#), Arbitrator Axon, October 4, 2005

## Informal Step A

### Article 15, Section 2. Grievance Procedure—Steps

**Informal Step A (a)** Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. This constitutes the Informal Step A filing date. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union representative. During the meeting the parties are encouraged to jointly review all relevant documents to facilitate resolution of the dispute. The Union also may initiate a grievance at Informal Step A within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance. In such case the participation of an individual grievant is not required. An Informal Step A Union grievance may involve a complaint affecting more than one employee in the office.

The JCAM explains this Section as follows:

An employee or union representative must discuss the grievance with the employee's immediate supervisor within fourteen calendar days of when the grievant or the union first learned, or may reasonably have been expected to learn, of its cause. The date of this discussion is the Informal Step A filing date.

- If the union initiates a grievance on behalf of an individual, the individual grievant's participation in a Informal Step A meeting is neither required nor prohibited.
- If a letter carrier instead files his or her own grievance, management must give the steward or other union representative the opportunity to be present during any portion of the discussion which involves adjustment or settlement of the grievance (see the pre-arbitration settlement H7N-5R-C 26829, April 2, 1982 ([M-01065](#))).
- Should the grievance affect more than one employee in the office, the union may initiate a class grievance on behalf of all affected employees.

**Time Limits.** The fourteen days for filing a grievance at Informal Step A begin the day after the occurrence or the day after the grievant or the union may reasonably have been expected to have learned of the occurrence. For example: if a grievant receives a letter of warning, day one of the fourteen days is the day after the letter of warning is received.

A shop steward's duties begin as soon as he/she learns of a possible grievance. In fact, in the majority of cases most of the work will be done prior to the actual Informal Step A meeting. Every case is different, but the following general guidelines should be followed.

- Immediately advise the grievant of his/her Miranda and Weingarten rights and tell the grievant not discuss any aspect of the case or answer any management questions without your presence.
- Determine exactly when the grievant—not you—first learned of the proposed discipline so that there are not later problems with time limits. Remember, it is strongly advised that you not wait until the last day to have the Informal Step A meeting.
- Contact management immediately to arrange for adequate **investigative time**.

- Meet with the grievant privately to get his/her version of events and review the facts in the case. Probe deeply to identify all the weaknesses in the grievant's case or any inconsistencies in the grievant's story. It is important that you identify them yourself prior to the Informal Step a meeting so that you are not caught unprepared.
- Identify and interview any possible witnesses in the case, favorable or unfavorable.
- Review the grievant's work and disciplinary history.
- Obtain copies of all documentation and evidence that management plans to use to support its case so that they can be carefully studied prior to the Informal Step A meeting.
- If management has or relies upon an investigative memorandum, consider interviewing the Postal Inspector who prepared the memorandum.
- Carefully review Chapter 2, [Defenses to Discipline](#) to see if any of the defenses described are applicable to the case.
- If management fails to provide adequate investigative time or any information requested, file a separate grievance. The merits of a grievance concerning the denial of steward time or information are a separate matter from the merits of the grievance that a steward is denied time or information to investigate. Consequently, in cases such cases the steward should do two things.

First, the denial of steward time or information should be raised as another issue in the original grievance. It is important for the union representatives handling the grievance at higher steps to be aware of the issue.

Second, a separate grievance should be filed seeking a cease and desist order and payment to the steward at the appropriate rate (usually overtime) for the time spent processing the grievance off-the-clock. See [Investigation Rights](#) and [Information Rights](#). If a stewards is forced to investigate or process a grievance off-the-clock, he/she should keep careful records of exactly what work was done and when.

- Finally, seek advice from other union officials on anything you may have overlooked. You may also wish to seek advice on a just and reasonable basis to settle the grievance; for example, by reducing a suspension to a letter of warning or reducing the life of a letter of warning to six months.

**Informal Step A (b)** In any such discussion the supervisor shall have authority to resolve the grievance. The steward or other Union representative likewise shall have authority to resolve the grievance in whole or in part. The local parties are not prohibited from using the Joint Step A Grievance Form to memorialize a resolution reached at an Informal Step A Meeting. No resolution reached as a result of such discussion shall be a precedent for any purpose.

The JCAM explains this Section as follows:

During the Informal Step A discussion the supervisor and the steward (unless the grievant represents him/herself) have the authority to resolve the grievance. Both parties must use the JCAM as their guide to the contract. A resolution at this informal stage does not establish a precedent. While either representative may consult with higher levels of management or the union on an issue in dispute, this section establishes that the parties to the initial discussion of a grievance retain independent authority to settle the dispute.

Informal Step A is the fundamental step of our Grievance/Arbitration procedure. It is where the factual record is developed and the parties' arguments are first framed. In discipline cases much of the discussion focuses on the merits of the case, the specific facts involved and whether management had **just cause** to issue the discipline being grieved. However, there are other issues that should be carefully explored. The following guidelines should be used.

- Before discussing the merits of the grievance, ask the supervisor if he/she has full authority to resolve the grievance. If the supervisor does not answer affirmatively, document the supervisor's answer and include the lack of authority to settle as an argument in the written appeal to Formal Step A. See **Authority to Settle**.
- Remember that the contract requires that before a suspension or removal is imposed, the proposed disciplinary action must be reviewed and concurred in by the installation head or designee. See **Review and Concur**. Ask who the concurring official was and ask how and when the concurrence was obtained. If it was in writing or via email, get a copy. In some cases it may be advisable to interview the concurring official. In any such interview ask for the basis of the decision including what information was available examined before the decision was made. If there is any question about whether there was proper review and concurrence, take careful notes and include this procedural deficiency as an argument in the written appeal to Formal Step A.
- Make sure you have copies of any evidence management cites to support the decision to impose discipline. See **Right to Information**. Make sure you get complete copies of management's information. For example, if management relies upon surveillance tapes, make sure you have a complete copy of the tapes, not just the portion that management believes supports its position.
- The information management produces to support its position may trigger further information requests or require additional investigation. For example, if management produces a witness statement, it may be useful to interview the witness yourself. If management produces an investigative memorandum, it may be advisable to interview the Postal Inspector who wrote the memorandum.
- If management fails or refuses to produce any requested information or to answer any questions, include this as an argument in the written appeal to formal Step A. Also file a separate grievance on this issue. See **Failure to Provide, Disclose Information**.

**Informal Step A (c)** If no resolution is reached as a result of such discussion, the Union shall be entitled to file a written appeal to Formal Step A of the grievance procedure within seven (7) days of the date of the discussion. Such appeal shall be made by completing the Informal Step A portion of the Joint Step A Grievance Form. At the request of the Union, the supervisor shall print his/her name on the Joint Step A Grievance Form and initial, confirming the date of the discussion.

The JCAM explains this Section as follows:

If the parties are unable to resolve the grievance during the Informal Step A meeting the union may file a written appeal to Formal Step A within 7 calendar days after the meeting.

The time limits for filing a grievance at Informal Step A or appealing to Formal Step A may be extended by mutual agreement.

The steward appeals a grievance to Formal Step A by filling out the Informal Step A portion of the NALC-USPS Joint Step A Grievance Form (Form PS 8190) and sending it to the

installation head or designee along with all supporting documentation available at the time. When appealing a grievance to Formal Step A, day one is the day following the receipt of the supervisor's oral decision. In appealing any grievance beyond Informal Step A, a union representative has until the last day to mail the appeal. Thus, the appeal must be postmarked or signed as received on the seventh day following the Informal A decision (for example on the tenth if the decision is received on the third). To avoid problems union representatives should not wait until the last day.

Contractually, having the supervisor print his/her name on the Joint Step A Grievance Form and initial to confirm the date of the discussion is optional at the request of the steward. But always have the supervisor initial the form to avoid later disputes about timeliness.

## Formal Step A

**Formal Step A (a)** The Joint Step A Grievance Form appealing a grievance to Formal Step A shall be filed with the installation head or designee. In any associate post office of twenty (20) or less employees, the Employer shall designate an official outside of the installation as the Formal Step A official, and shall so notify the Union Formal Step A representative.

**Formal Step A (b)** Any grievance initiated at Formal Step A, pursuant to Article 2 or 14 of this Agreement, must be filed by submitting a Joint Step A Grievance Form directly with the installation head within 14 days of the date on which the Union or the employee first learned or may reasonably have been expected to have learned of its cause.

**Formal Step A (c)** The installation head or designee will meet with the steward or a Union representative as expeditiously as possible, but no later than seven (7) days following receipt of the Joint Step A Grievance Form unless the parties agree upon a later date. In all grievances at Formal Step A, the grievant shall be represented for all purposes by a steward or a Union representative who shall have authority to resolve the grievance as a result of discussions or compromise in this Step. The installation head or designee also shall have authority to resolve the grievance in whole or in part.

**Formal Step A (d)** At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Articles 17 and 31. The parties' representatives may mutually agree to jointly interview witnesses where desirable to assure full development of all facts and contentions. In addition, in cases involving discharge either party shall have the right to present no more than two witnesses. Such right shall not preclude the parties from jointly agreeing to interview additional witnesses as provided above.

The JCAM explains this Section as follows:

The Formal Step A meeting must be held between the installation head or designee and the branch president or designee as soon as possible but no later than seven calendar days after the installation head receives the Joint Step A Grievance Form (unless the parties agree to an extension). The parties' representatives at Formal Step A shall have the authority to settle or withdraw grievances in whole or in part. Both parties must work together to ensure that each grievance is fully developed.

The union representative at the Formal Step A meeting shall discuss fully the union's position, violation alleged, and corrective action requested. Moreover, the union is entitled to furnish written statements from witnesses or other individuals who have information pertaining to the grievance. Both parties are required to state in detail the facts and contract provisions relied upon to support their positions. The Postal Service is also required to furnish to the union, if requested, any documents or statements of witnesses as provided for in Article 17.3 and Article 31.3.

In non-discharge cases, the parties can mutually agree to jointly interview witnesses at the Formal Step A meeting. In discharge cases, either party can present two witnesses at that



meeting—with additional witnesses possible should the parties so mutually agree. As provided in Article 17.4, all witnesses present will be on the clock while traveling to and from the Formal Step A meeting and while in attendance at the Formal Step A meeting. The union determines whether the grievant's presence is necessary at the Formal Step A meeting (see H4N-1EC28034, May 22, 1987, [M-00790](#))

Witnesses are paid both for time traveling to and from the Formal Step A meeting and for time spent attending a Formal Step A meeting. Different rules apply for grievants and shop stewards. They are paid time spent at a Formal Step A meeting, but management is not required to pay them for travel time to and from a meeting. See Article 17, Section 4 and [M-00716](#).

**Formal Step A (e)** Any resolution of a grievance in Formal Step A shall be in writing or shall be noted on the Joint Step A Grievance Form, but shall not be a precedent for any purpose, unless the parties specifically so agree or develop an agreement to dispose of future similar or related problems. If the grievance is resolved, a copy of the resolution will be sent to the steward and supervisor who initially were unable to resolve the grievance.

**Formal Step A (f)** The Formal Step A decision is to be made and the Joint Step A Grievance Form completed the day of the meeting, unless the time frame is mutually extended. The Union may appeal an impasse to Step B within seven (7) days of the date of the decision.

The JCAM explains this Section as follows:

**Formal Step A Decision.** The parties must make the Formal Step A decision and complete the Joint Step A Grievance Form on the day of the meeting, unless they agree to extend the time limit. Copies of the completed form must be sent to the steward and supervisor who failed to resolve the dispute at Informal Step A. Resolutions and withdrawals at Step A do not establish a precedent unless the parties specifically agree otherwise. If the grievance is resolved, copies of the resolution must be sent to the steward and supervisor who discussed the grievance at Informal Step A.

**Appeal to Step B.** If the grievance is not resolved at Formal Step A, the union may appeal it to Step B within 7 calendar days of the Step A decision date (unless the parties agree to an extension of time for appeal).

**Formal Step A (g)** Additions and corrections to the Formal Step A record may be submitted by the Union with the Step B appeal letter within the time frame for initiating the Step B appeal with a copy to the management Formal Step A official. Any such statement must be included in the file as part of the grievance record in the case.

The JCAM explains this Section as follows:

**Additions and Corrections.** The union may submit written additions and corrections to the Formal Step A record with the Step B appeal within the time limit for filing an appeal to Step B. The filing of any corrections or additions does not extend the time limits for filing the appeal to Step B. At the same time, a copy of the additions and corrections must be sent to the management Formal Step A official. Management may respond by sending additional information to the Step B team which is directly related to the union's additions and corrections provided that it is received prior to the Step B decision. At the same time, a copy must be sent to the union Formal Step A representative. Any statement of additions and

corrections must be included in the file as part of the grievance record in the case. A steward is entitled to time on-the-clock to write the Union's statement of corrections and additions (See Step 4 Settlement A8-S-0309, December 7, 1979, [M-01145](#)).

## **Duty of Fair Representation**

NALC stewards and officers are required by federal labor law to represent all members of the letter carrier bargaining unit fairly and equally in all disputes arising under the National Agreement. This includes all discipline grievances.

If a carrier feels that the union has violated its duty, the carrier may file a duty of fair representation charge against the union. Stewards must make every effort to ensure that the union is protected against such charges by representing all carriers—members and non-members—equally and fairly

Note, however, that NALC is not required to offer nonmembers other member services the union provides outside of the contract, such as representation in worker's compensation cases.

**Letter carriers working as 204B's** remain members of the bargaining unit, even during those periods when they are receiving higher level pay. This means that NALC stewards should also represent them fairly and equally in all disputes arising under the National Agreement. Even if alleged misconduct that led to discipline occurred while a letter carrier was working as 204B's, NALC still has a duty to represent him/her.

204B's may have disputes or "grievances" with management concerning issues that do not arise under the National Agreement and in which NALC cannot represent them. For example, a 204B may believe that he should have been promoted to full-time supervisory status. However, shop stewards should be extremely cautious before determining that a 204B's complaint is not a grievance under the National Agreement. It is always advisable to check with other union officials before making this determination.

# Chapter 4—Special Topics

## Election of Forums—MSPB Appeal Rights

The Veterans' Preference Act guarantees "preference eligible" employees certain special rights concerning their job security. A preference eligible employee may file both a grievance and an MSPB appeal on a proposed removal or suspension of more than fourteen days. The rights of preference eligible employees to appeal certain adverse<sup>5</sup> actions to the MSPB or through the grievance arbitration procedure are the subject of Article 16, Section 9 which provides the following:

### 16.9 Section 9. Veterans' Preference

A preference eligible is not hereunder deprived of whatever rights of appeal are applicable under the Veterans' Preference Act. If the employee appeals under the Veterans' Preference Act, however, the time limits for appeal to arbitration and the normal contractual arbitration scheduling procedures are not to be delayed as a consequence of that appeal; if there is an MSPB appeal pending as of the date the arbitration is scheduled by the parties, the grievant waives access to the grievance-arbitration procedure beyond Step B.

The Joint Contract Administration Manual Provides the following explanation of Article 16.9

**MSPB Dual Filings.** The Veterans' Preference Act guarantees "preference eligible" employees certain special rights concerning their job security. (Federal law defines a "preference eligible" veteran at Title 5 United States Code Section 2108; see EL-312, Section 483). A preference eligible employee may file both a grievance and an MSPB appeal on a removal or suspension of more than fourteen days. However, Article 16.9 provides that an employee who exercises appeal rights under the Veterans' Preference Act waives access to arbitration when they have an MSPB appeal pending as of the date the grievance is scheduled for arbitrate on by the parties. The date of the arbitration scheduling letter is considered "the date the arbitration is scheduled by the parties" for the purposes of Article 16.9.

This language has been modified to reflect the parties' agreement that an employee should receive a hearing on the merits of an adverse action. It supercedes the 1988 Memorandum of Understanding on Article 16.9. While a preference eligible city letter carrier may appeal certain adverse actions to the MSPB, as well as file a grievance on the same action, the employee is not entitled to a hearing on the merits in both forums. This provision is designed to prevent the Postal Service from having to defend the same adverse action in an MSPB hearing as well as in an arbitration hearing. If a city letter carrier has an MSPB appeal pending on or after the date the arbitration scheduling letter is dated, the employee waives the right to arbitration.

The parties agree that the union will be permitted to reactivate an employee's previously waived right to an arbitration hearing if that employee's appeal to the MSPB did not result in a decision on the merits of the adverse action, or the employee withdraws the MSPB appeal prior to a decision on the merits being made. It is understood that this agreement does not preclude the parties from raising other procedural issues from the original arbitration appeal.

<sup>5</sup> The provisions of Article 16.9 apply to all "adverse actions," as defined by 5 USC §7512, otherwise appealable to the MSPB. This includes involuntary resignation or involuntary retirement, which have been defined as constructive removal, and enforced leave (in excess of 14 days) which has been defined as constructive suspension. See C-18158, National Arbitrator Das, November 12, 1997 and USPS Policy Memorandum M-01154.

Additionally, the Union is not precluded from raising as an issue in arbitration whether any Postal Service backpay liability should include the period between the time the right to arbitration was waived by the employee and the time the Union reactivated the arbitration appeal.

**EEO and EEO/MSPB Mixed Cases—Dual Filings.** Article 16.9 does not bar the arbitration of a grievance where a grievant has asserted the same claim in an Equal Employment Opportunity (EEO) complaint. Nor does it apply where a preference eligible grievant has appealed the same matter through the EEOC and then to the MSPB under the “mixed case” federal regulations. (National Arbitrator Snow, D90N-4D-D 95003945, January 1, 1997, [C-16650](#))

The Joint Contract Administration Manual Provides at page 16.6 the following explanation of the special procedures to handle disciplinary grievances files by preference eligible employees.

**Preference Eligible Employees.** Grievances concerning proposed removal actions which are subject to the thirty day notification period in Article 16.5 will be held at Formal Step A of the grievance procedure until the decision letter is issued.

Consistent with the Dispute Resolution Process Memorandum, the employee will remain on the job or on the clock until after the Step B decision has been rendered or 14 days after the appeal is received at Step B, except for emergency or crime situations as provided for in Articles 16.6 and 16.7.

The union does not file a separate grievance on the decision letter. Rather, the union may make additions to the file based on the decision letter at either Step A or Step B. This does not preclude any arguments by management regarding the relevance of the additions.

Grievances concerning proposed removal actions which are not subject to the thirty day notification period in Article 16.5 are not held at the Formal A step pending receipt of the decision letter. Rather, the union may later add the decision letter to the proposed removal grievance. This does not preclude any arguments by management regarding the relevance of the additions.

### **Proposed Discipline v. Decision Letter**

As noted above, under the MSPB procedures, preference eligible employees must first be issued a letter of proposed discipline and then a final decision letter after they have been given the opportunity to respond to the charges. A grievance should be filed at the time a preference eligible employee receives a Letter of Proposed Discipline. It is not necessary to file a separate grievance concerning the Decision Letter.

The American Postal Workers Union (APWU) has agreed in a national level settlement ([M-01137](#)) that for employees in the APWU bargaining units, the time limits of Article 15, Section 2 run from the proposed discipline notice, not from the decision letter. NALC was not party to that settlement and has a different bargaining history concerning this issue (See [M-00939](#)). It is NALC’s position that, for letter carriers, a grievance filed within fourteen days of receipt of the decision letter is timely.

Although arbitrators have ruled both for and against NALC’s position on this issue, NALC believes Regional Arbitrator Britton ruled correctly in finding that the APWU/USPS memo did not apply in an

NALC case, and that a grievance filed protesting a letter of decision was arbitrable. See [C-12205](#), July 17, 1992.

However, the Postal Service's position concerning this issue is currently unsettled and NALC's position has never been tested at national level arbitration. Unless this issue is resolved, **stewards should never wait until receipt of the decision letter to file a grievance**. No one would want his/her grievance to become a national level test case.

## Supporting Cases—Proposed Discipline v Decision Letter

[C-12205](#), Arbitrator Britton, July 17, 1992.

[C-20825](#), Arbitrator Duda, June 11, 2000

[C-22909](#), Arbitrator McGown, December 24, 2001

[C-24356](#), Arbitrator Reeves, June 8, 2003

NALC **does not** represent letter carriers in MSPB proceedings. Furthermore, letter carriers considering the appeal of an adverse action to the MSPB should be aware that many of the procedural protections provided by the National Agreement do not apply to MSPB proceeding. For example:

- **Expired Discipline.** Article 16, Section 10 provides that the records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years. This contractual protection does not apply to MSPB proceeding. In fact, the Postal Service routinely relies upon discipline that cannot be considered in the grievance/arbitration procedure when defending adverse actions in MSPB cases.
- **Unadjudicated Discipline.** Under the National Agreement, an arbitrator may not consider past discipline that has been grieved but not yet resolved or adjudicated. See JCAM Article 16 and [C-03910](#), National Arbitrator Fasser, June 18, 1977. This contractual protection does not apply to MSPB proceedings which have different procedural rules (United States Supreme Court *United States Postal Service v. Gregory*, 534 U.S. 1, 122 S. Ct. 431 (2001)).

## Case Examples

As found herein, the Grievant is entitled to be informed of his MSPB appeal rights under the Veterans' Preference Act in a timely manner and to have his "Proposed Removal" heard by the installation head within ten (10) days. The procedural error of the Employer of initially issuing a Notice of Removal rather than a proposed removal and failing to timely advise the Grievant of his MSPB rights and the right to meet with the Postmaster prior to Step 1 deprived the Grievant of the due process to which he is entitled and constitutes harmful error. Consequently, the removal letter was improper and violated Article 16 Section 5 of the National Agreement. In view of the above findings, it is deemed by the Arbitrator to be unnecessary to this opinion that he further consider the additional procedural arguments as to whether there was concurrence, progressive discipline, double jeopardy or disparate treatment or address the substantive arguments on the merits of whether there was just cause for the Grievant's removal. ([C-16841](#))

## Supporting Cases

[C-16841](#), Arbitrator Britton, May 15, 1997

[C-16650](#), National Arbitrator Snow, January 1, 1997

## Back Pay

Article 16, Section 1 provides that, if discipline is overturned in the grievance-arbitration procedure, the remedies that may be provided to the aggrieved employee include “reinstatement and restitution, including back pay.” This is what is often referred to as providing a “make whole” remedy.

If union and management representatives settle a discipline grievance, the extent of remedies for improper discipline is determined as part of the settlement. If a case is pursued to arbitration, the arbitrator states the remedy in the award. Note that Article 16.6, which governs **indefinite suspensions** provides for special rules in certain back pay situations

The implementing regulations concerning back pay are found in ELM Section 436 which should be carefully reviewed whenever issues concerning back pay and make whole remedies arise. The ELM defines an employee’s entitlement to be made whole as follows:

### **ELM 436.1 Corrective Entitlement**

An employee or former employee is entitled to receive back pay for the period during which an unjustified or unwarranted personnel action was in effect that terminated or reduced the basic **compensation, allowances, differentials, and employment benefits** that the employee normally would have earned during the period.

For purposes of entitlement to employment benefits, the employee is considered as having rendered service for the period during which the unjustified or unwarranted personnel action was in effect. (Emphasis added).

This entitlement includes not only basic wages, but also any overtime, pay differentials or other benefits the employee would have earned. ELM 436.41 specifically provides that:

### **ELM 436.41**

a. The local official must provide a tabulation of the number and type of pay hours with which the employee should have been credited during the back pay period, including any annual or holiday leave taken as follows:

(1) Overtime hours and/or night differential, as applicable, are determined by averaging the number of hours that other employees of the office with the same employment status were assigned during the back pay period.

(2) If the claim is for a part-time flexible employee, tabulation must be provided that shows the number and type of pay hours the employee experienced for a full 13 pay periods prior to the separation or suspension. If the back pay period is less than 1 full pay period, only a 6-pay-period tabulation is required.

The January 24, 2002 prearbitration settlement [M-01454](#) makes clear that back pay calculations for unwarranted personnel actions including not only compensation but also other allowances. That case confirmed that uniform allowances must be included in remedy calculations in accordance with ELM 935.23.

**Interest on back pay** is paid at the Federal Judgment Rate in accordance with ELM 436.7 which implements the following Memorandum of Understanding

**MEMORANDUM OF UNDERSTANDING  
BETWEEN THE  
UNITED STATES POSTAL SERVICE AND  
THE JOINT BARGAINING COMMITTEE**

**Re: Interest on Back Pay**

Where an arbitration award specifies that an employee is entitled to back pay in a case involving disciplinary suspension or removal, the Employer shall pay interest on such back pay at the Federal Judgment Rate. This shall apply to cases heard in arbitration after the effective date of the 1990 Agreement.

**Responsibility to mitigate damages.** Employees on indefinite suspension or on leave-without-pay pending resolution of removal actions have a certain responsibilities to attempt to “mitigate” (make less severe, lessen, moderate) damages. The applicable rules are found in ELM Section 436.42 Shop stewards should be familiar with these ELM provisions and be prepared to advise affected letter carriers concerning their responsibilities. These ELM provisions were modified by the April 19, 1990 prearbitration settlement [M-00966](#)) to make them less burdensome. They provide in Section 434.42e that:

**ELM 436.42e**

Where the original action resulted in separation or indefinite suspension and no outside employment was obtained for all or any part of the back pay period, the employee must furnish the following:

- (1) If the back pay period is 45 days or less, the employee is not required to certify or to provide documentation in support of efforts to secure other employment during this period.
- (2) If the back pay period is more than 45 days and does not exceed 6 months, the employee must provide a statement certifying the reasons why outside employment was not obtained for all parts of the back pay period that exceed the first 45 days.
- (3) If the back pay period is more than 6 months, the employee must provide documentation in support of efforts to secure other employment for all parts of the back pay period that exceed the first 45 days.

Remember to consult the actual ELM regulations whenever situations arise where they may be applicable. They contain specific guidance on back pay procedures and documentation requirements

Arbitration advocates should be aware that in light of certain court decisions, the Postal Service may want to raise issues concerning the mitigation of damages during an arbitration hearing. Advocates should be prepared to address this issue if it is raised.

**Duty to Warn.** The Postal Service has an affirmative obligation to notify affected employees of their responsibility to attempt to mitigate damages. April 27, 1989 Prearbitration Settlement [M-00953](#) provides that “notice of the employee’s duty and responsibility under Section 436 of the ELM to mitigate damages will be included in letters of removal and letters of indefinite suspension beginning July 15, 1989. If the Postal Service fails to comply with this requirement, the union should oppose any attempt to limit back pay.



**Prompt Payment Required.** All grievance settlements or arbitration awards providing for a monetary remedy should be promptly paid. However, the following Memorandum of Understanding applies only to those back pay claims covered by ELM Section 436.

**MEMORANDUM OF UNDERSTANDING  
BETWEEN THE  
UNITED STATES POSTAL SERVICE  
AND THE  
National Association of Letter Carriers, AFL-CIO**

**Re: Article 15—ELM 436—Back Pay**

The following applies solely to back pay claims covered by Section 436 of the Employee and Labor Relations Manual (ELM):

A pay adjustment required by a grievance settlement or arbitration decision will be completed promptly upon receipt of the documentation required by ELM part 436.4 Documents in Support of Claim. An employee not paid within sixty (60) days of submission of the required documentation will receive an advance, if requested by the employee, equivalent to seventy (70) percent of the approved adjustment. If a disagreement exists over the amount due, the advance will be set at seventy (70) percent of the sum not in dispute.

Date: April 25, 2002

**Disputes concerning back pay.** Disputes concerning back pay, including disputes over delays or the application of the back pay provisions ELM 436, are grievable matters. Branches may file separate grievances concerning these issues.

## Last Chance Agreements

The JCAM provides the following:

Last Chance Agreements (LCA) are not “records of disciplinary action.” LCAs are not covered by the provisions of Article 16.10. If an LCA contains a reference to a disciplinary record that exceeds the limitation in Article 16.10, the following instruction from Arbitrator Briggs in Case No. D98N-4D-D 00114765, January 15, 2002 ([C-22941](#)) is to be followed: LCAs “...can logically be divided into disciplinary and administrative categories, and only those elements falling into the former category are subject to the Article 16.10 time restriction.”

The role of NALC stewards is to take every action necessary to protect the jobs of the letter carriers they represent. Stewards may encounter situations where the only way to accomplish this is to negotiate a last-chance-agreement (LCA). Sometime even a letter carrier being removed admits that management’s action has some justification. These are typically cases in which a carrier’s misconduct has not been corrected by previous disciplinary actions; often, such cases involve substance abuse by the carrier in question. In such cases the best way for an NALC representative to save the carrier’s job may be to acknowledge the misconduct and work to negotiate a last-chance-agreement that offers the carrier an alternative to “capital punishment”— that is, to removal. Accepted and signed by all parties, the last-chance agreement is usually a statement of certain conditions that the employee must fulfill in order to retain his or her job.

For example, consider the case of a letter carrier being removed after receiving progressive discipline for excessive absences, up to and including 14-day suspensions. The carrier’s attendance record has not improved, but the carrier finally admits that he has a substance abuse problem. The NALC steward and postal management might work with the carrier to craft an LCA that states that the carrier will enter an appropriate treatment program and also maintain a satisfactory attendance record.

Such agreements can, given the right circumstances, motivate employees to turn their lives around, overcoming problems that may threaten not only their jobs but also their relationships and even their lives. The role of the NALC steward in negotiating the LCA is that of counselor and helper, working with the employee to help achieve a solution to a problem that may have no other solution. A last-chance-agreement should be carefully constructed, in writing, with clear reasonable terms and a definite termination date. It should be signed by a properly authorized management representative, the union representative and the grievant, all of whom must fully understand all of its terms and the obligations it creates.

**Duration of LCA’s.** The Union should never agree to last chance agreements that do not have a clearly specified termination date. One important reason for this is that Last Chance Agreements are not “records of disciplinary action” covered by the provisions of Article 16.10. Thus they are not by covered by the Article 16.10’s prohibition against consideration of records of disciplinary action “if there has been no disciplinary action initiated against the employee for a period of two years.” See [C-22941](#), National Arbitrator Briggs, January 15, 2002. In that case, which concerned an LCA containing internal references to discipline which were covered by Article 16.10, Arbitrator Briggs provided the following instruction:

[LCAs] can logically be divided into disciplinary and administrative categories, and only those elements falling into the former category are subject to the § 16.10 time restriction”

The Arbitrator finds nothing which would prevent the parties from redacting from a last chance agreement the specific portions which do constitute an inappropriate untimely record of disciplinary action. Last chance agreements such as the one under consideration here have many elements and the contractual inappropriateness of one of those elements under § 16.10 does not automatically render the remainder of them null and void. (C-22941)

Regional Arbitrator Gary Axon wrote:

The Arbitrator notes the last chance agreement Grievant signed has no firm date by which it would terminate. Last chance agreements without a termination date are not favored. Arbitrators generally hold that a last chance agreement must be limited to a reasonable period of time. (C-11112)

NALC's Contract Administration Unit recommends that LCAs expressly expire two years or less from the initiation date of the discipline being resolved. For example, if the Postal Service issued a letter of removal dated July 1, and subsequent meetings with the employee and union representative resulted in an LCA being instituted in place of the removal, the time that the LCA should run should begin on July 1. To avoid any later disputes about an LCA's termination date, the exact date should be specified; for example June 30, 2004.

**Specific reasonable performance requirements.** If an LCA is to be effective, it must meet certain standards. It must clearly specify what is expected of the employee. Arbitrators have overturned discharges for violation of LCAs because the arbitrators believed that the LCA itself was improperly constructed or administered. A regional arbitration award by Carlton J. Snow (C-09746) sets forth clear guidelines for LCAs. In that case, the grievant was discharged, management stated, because of her irregular attendance, unscheduled absences and incomplete tours. The grievant's record, reproduced in the award, was intolerable, in the arbitrator's own words. However, Arbitrator Snow overturned the discharge and returned the grievant to work because he determined that management had acted inconsistently and conveyed an ambiguous message to the grievant. The record showed that the grievant had apparently agreed to two LCAs one written and one oral. Testimony at the hearing about the nature of these LCAs revealed conflicting beliefs about what the LCAs meant and how they were applied. In his award, Arbitrator Snow wrote:

Last-chance reinstatements can provide management with an effective tool for attempting to salvage a recalcitrant employee. By conditioning reinstatement on attaining satisfactory goals, the Employer has an opportunity to monitor an employee's progress with precision, and it is reasonable for management to conclude that, if an employee will not respond when a Damocles sword hangs above his or her head, the individual will not respond in more normal circumstances. Hence, removal probably would be justified.

If, however, a last chance agreement is to be used, **it must be used properly. It must be closely monitored.** By not enforcing a last chance agreement, management lulls an employee into a false sense of security. If management does not follow through with its stated intent, an employee is led to believe that he or she only thought a sword hung above the individual's head but that management really intends to continue its lenient policies. (Emphasis added)

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The terms of the agreement must be clear and unmistakable. The agreement needs to incorporate specific performance requirements. There must be objective proof that the

terms have been communicated by management to the employee. It is the duty of management, not the union, to explain these terms to the employee. (C-09746)

Because management did not adhere to these requirements, in Snow's view, the grievant may have known that an LCA had been fashioned, but had no clear understanding of the precise meaning of that agreement. Further, management continued to offer the grievant additional last chances beyond the limits stated in the LCA. Therefore, he found her discharge on the grounds of violating the LCA was improper.

**Alleged "Waiver" of Appeal Rights.** By signing an LCA, carriers do not give up grievance appeal rights. A number of arbitration decisions address an argument raised by management, that because the employee signed an LCA, the employee waived his or her rights to any further appeals, including the grievance-arbitration process or appeals to the Equal Employment Opportunity Commission or the Merit Systems Protection Board. However, most arbitrators have held that it is not possible for employees to waive their rights to the grievance-arbitration process regardless of what language may exist in LCAs. For example, Arbitrator Edwin R. Render (C-14949) notes that the LCA in that case contained a sentence stating, "In the event that the removal is reissued, [the grievant] agrees to forego any appeal/complaint of the removal action in any form." In response to that language Render wrote the following:

The arbitrator thinks that it would be inappropriate to apply the above-quoted language according to its literal terms. Surely the Service does not and could not argue that if the grievant were blatantly discharged for reasons of race, sex, national origin or union activity that this language would preclude any remedy whatsoever. There are cases holding that notwithstanding such an agreement, an individual can litigate constitutional and statutory rights and that some of these rights cannot be waived even with the consent of the union. Moreover, there is arbitral authority for the proposition that notwithstanding such a provision in a last chance agreement, an arbitrator has the authority to determine whether the terms of the agreement are violated. (Emphasis added)

Arbitrator Render's ruling stems from many previous cases, including a 1982 decision by Gerald Cohen (C-00239), in which Arbitrator Cohen writes,

Obviously, [the grievant's] agreement not to grieve is unenforceable because the National Agreement gives her the right to grieve. Similarly, a provision in an agreement setting forth what constitutes just cause for dismissal is also unenforceable, because the final decision as to what constitutes just cause for discharge must be left to an arbitrator.

In a 1990 regional arbitration decision by Carl B. Lange III (C-10000), the arbitrator also addressed management's claim that the grievant's discharge was not arbitrable because the grievant waived appeal rights by signing an LCA. Arbitrator Lange wrote:

If the Service's position in that regard were to be upheld, the Service would then become **judge, jury and executioner**. Since the "Last Chance Agreement" was worked out through the grievance procedure, the parties should have understood that final adjudication of whether there had been a violation of the Last Chance Agreement would take place in arbitration. (Emphasis added).

Regional Arbitrator Linda Klein ([C-10846](#)) similarly stated:

The agreement not to grieve an action in the future is unenforceable for the reason that it ignores the right to grieve as set forth in the National Agreement. The local parties do not have the authority to amend this contractual provision or to require a grievant to bypass rights granted through collective bargaining at the national level.

As a final note on the waiving of rights in LCAs, NALC representatives should note that the union can never waive an employee's rights to appeal to the EEOC or MSPB. Only the employee can waive those rights.

**Just Cause still applies.** Arbitrators have consistently held that last LCA's do not waive the "just cause" provisions of Article 16, Section 1. Each removal under an LCA must be examined on a case-by-case basis, with all extenuating circumstances taken into account. Of course, an arbitrator may well find that violation of the terms of an LCA constitutes just cause for removal. However, this does not change the fact that it is still the arbitrator's job to determine whether just cause exists. For example, in [C-10846](#) Arbitrator Klein wrote:

An agreement dictating that certain behavior automatically constitutes just cause for removal is likewise unenforceable. The grievance-arbitration procedure allows for other managers or an arbitrator to be involved in the decision-making process as it relates to the determination of just cause. Despite the existence of a last chance agreement, the grievant is entitled to a review of the facts which occurred subsequent to said agreement for the purpose of determining the existence of just cause and the appropriateness of the penalty.

Regional Arbitrator Gerald Cohen ([C-00239](#)), in supporting the grievant's right to arbitration despite signing an LCA waiver, sets a standard for determining just cause in cases involving LCAs. The evidence which revealed that the grievant had incurred absences after signing an LCA that required "perfect attendance" from the grievant for a period of 120 days. Arbitrator Cohen reviewed the circumstances surrounding each absence or tardy, and concluded:

Were it not for the last chance settlement involved here, every absence that the Grievant had in the period in question would have been accepted as reasonable, and the Grievant would not have been criticized for them.

To impose on the Grievant the requirement of perfection at the risk of discharge is to require her to live up to a standard which is almost impossible to keep, and which neither the National Agreement nor the Handbooks and Manuals require. Therefore, her discharge was not for just cause. ([C-00239](#))

Similarly, Arbitrator Roberts wrote that:

The Service suggests their only burden in this case is to show a violation of the Last Chance Agreement. I disagree with that assertion. A Last Chance Agreement, in and of itself, does not negate the just cause requirement found in Article 16.1. ([C-16475](#))

Arbitrator Axon, writing in [C-11112](#), also addressed the specific circumstances leading to management's discharge of an employee who had signed an LCA. The carrier, who had signed an LCA with no specified termination date, had gone 14 months without violating any terms of the LCA, which re-

quired that he call into his supervisor if he anticipated being unable to finish his route by 5 p.m. Management claimed that the grievant's discharge was proper because the grievant had failed to make such a call at the appropriate time. Also, management claimed that a week later, the grievant had returned to the office with a tray of undelivered mail and had not reported that fact to management. This alleged act triggered the removal of the grievant.

In addressing these reasons for discharge, Arbitrator Axon noted that although the first reason for discharge, not calling in, would have been sufficient under the terms of the LCA, management did not act at that time to discharge the grievant. Rather, management acted at the time of the second instance, returning with a tray of undelivered mail. Arbitrator Axon concluded that management did not consider the first instance, not calling in, as a removable offense. However, by relying on the second instance of returning undelivered mail, management failed to meet the standard of just cause because, as the union demonstrated at the hearing, other carriers had returned undelivered mail and had not been discharged. Also, the grievant had no history of returning undelivered mail; the problem addressed by the LCA was failing to notify his supervisor if unable to complete delivery by 5 p.m. Arbitrator Axon concluded, "In sum, the charges on which Postal Service relied to remove this Grievant do not rise to the level for which summary discharge is justified."

## **Supporting Cases**

- [C-00239](#), Regional Arbitrator Gerald Cohen, July 19, 1982
- [C-09746](#), Regional Arbitrator Carlton J. Snow, June 28, 1989
- [C-10000](#), Regional Arbitrator Carl B. Lange, April 20, 1990
- [C-10846](#), Regional Arbitrator Linda Klein, May 6, 1991
- [C-11112](#), Regional Arbitrator Gary Axon, August 9, 1991
- [C-14949](#), Regional Arbitrator Edwin R. Render, November 23, 1995
- [C-16475](#), Arbitrator Roberts, March 1, 1997
- [C-22941](#), National Arbitrator Briggs, January 15, 2002
- [C-24190](#), Regional Arbitrator Fraser, April 14, 2003

# Resignations

Sometimes management does have just cause to remove a letter carrier. Even when it becomes clear after a careful investigation that there is no possibility of saving a letter carrier's job, the union can still provide useful assistance and advice.

Letter carriers in such situations always have the option of resigning and leaving their postal careers with a clean record. As difficult as this decision may be, it at least allows letter carriers to leave and move on without the added burden of a record of separation from the Postal Service.

The regulations concerning resignations in Issue 17 of the *Employee and Labor Relations Manual (ELM)* provide the following:

## **365.2 Separations—Voluntary**

### **365.21 Resignation**

#### **365.211 Definition of Resignation**

*Resignation* is a separation at the employee's discretion. Resignations must be accepted and are binding once submitted. However, employees may be permitted to withdraw their resignation request provided the request to withdraw is made before close of business on the effective date of the resignation.

#### **365.212 To Avoid Separation for Cause**

If an employee submits a resignation after having been notified, either orally or in writing, that an adverse action has been proposed for removal, change to lower grade, or suspensions for reasons furnished him or her, the resignation **must be accepted**. A resignation **must also be accepted** if an employee receives a written notice of decision to separate the employee for reasons given in a notice of decision.

(Emphasis added)

A voluntary resignation can be to an employee's advantage because of the Privacy Act regulations found in Handbook AS 353 *Guide to Privacy, the Freedom of Information Act, and Records Management*. Section 5.2.b.2 of the AS 353 flatly prohibits the Postal Service from telling a prospective employer anything other than the simple fact that the employee resigned. It provides the following:

**5.2.b.2. Release of Employee Records for Credit or Job References.** Public information about a current or former employee may be given to prospective employers, or to credit bureaus, banks, federal credit unions, and other commercial firms from which an employee is seeking credit. For former employees, prospective employers may also be given the date and reason for an employee's separation from the Postal Service, but the reason for separation **must be limited to one of the following terms: retired, resigned, or separated**. Other terms or variations of these terms (e.g., retired—disability) **may not be used**. If a credit firm or prospective employer requests more information, it must submit a release form **signed by the individual**. (*emphasis added*).

# Chapter 5—Arbitration

This chapter is directed primarily towards NALC's arbitration advocates. Our arbitration advocates are specialists and most of them have received advanced training at NALC headquarters. Nevertheless, this chapter contains information that may be useful to NALC grievance handlers at all levels and provide valuable insight in how to best handle a specific grievance and formulate the strongest possible arguments.

This chapter is not intended to be a complete guide to arbitration. NALC has other publications and training materials for that purpose. Rather, it addresses primarily issues that are specific to the arbitration of discipline cases.

## Use of Arbitration Awards

NALC grievance handlers and arbitration advocates use arbitration awards from the *NALC Arbitration DVDs* for two primary purposes; to discover arguments that have been successful in past similar cases and; to introduce them at the appropriate stage of the grievance/arbitration procedure for their persuasive or precedential value.

**Finding and Studying Awards:** The over 27,000 awards on the *NALC Arbitration DVDs* are a rich source of information about issues and arguments to use in handling discipline cases. This publication already contains many of the most significant case citations, but sometime further research is helpful.

All the cases in the NALC arbitration system have been assigned "subject codes" by NALC headquarters. Doing a simple subject search is usually to best place to begin arbitration research. However, a simple "subject" search will often find a very large number of cases. The following techniques can be used to narrow the search results.

- Narrow the search by looking for "key cases" only. Key cases are those that have been identified by NALC Headquarters as being of special significance.
- Rather than searching by "subject code," do a focused "text" search. This is done by searching all the arbitration awards for particular words or phrases. For example "falsification" and "unintentional." Text searches are a very powerful technique but can be time consuming and more difficult to use correctly.

Always make a point of reading arbitration awards by the arbitrator scheduled to hear a case. With luck, you may find an earlier case presenting similar issues. Even if you do not, it may provide valuable insight into the arbitrator's reasoning.

Avoid the common mistake of only looking at cases where the Union's position is fully sustained. Many cases that were clear victories for the Union are coded as "modified". For example, an arbitrator may find that there was not just cause for a removal and reduce it to a suspension. Cases that the union lost can also be instructive and help one avoid arguments that are unlikely to prevail.

**Introducing Awards:** NALC grievance handlers and arbitration advocates should avoid burdening the record with unnecessary or excessive awards. Arbitrators will never be impressed and are often antagonized by excessive awards. They will, however, charge time for reading them. Excessive arbi-



tration awards can also make the Union's case appear unclear and unfocused. In contrast, the judicious use of carefully selected arbitration awards can be an invaluable tool.

- Since National Level awards are final and dispositive of the issues they address, they are always appropriate when on point. Note, however, that many National Level Arbitration awards have been incorporated into the *Joint Contract Administration Manual (JCAM)*. If the national level party's explanation in the JCAM is sufficient, introduction of the actual award may be unnecessary. Regional arbitrators are bound by the party's joint explanation in the JCAM and may not seek to find their own interpretation.
- Regional arbitration awards are not precedents. They are used for their persuasive value. Do not choose awards simply because you like the final conclusion. Read them carefully to see if the arbitrator's reasoning is clear and convincing. The closer the fact pattern in an award is to the case you are handling, the more persuasive it will be. In selecting cases, also consider an arbitrator's reputation. Regional decisions by highly respected arbitrators such as Carleton Snow will usually be more persuasive decisions by arbitrator John Doe.
- When introducing awards in arbitration tell the arbitrator exactly why they are being introduced and the argument they support. When closing orally it is advisable to give the page number and read the pertinent section of the award(s). If a written brief is being used, quote the pertinent section in the brief and supply a copy of the entire award.

## **Quantum of Proof**

When arbitration advocates argue about how much proof is needed, they are debating the "quantum of proof," a notion derived from court proceedings. "Quantum," (plural "quanta") is Latin for "amount," so "quantum of proof" means the amount or level of proof required to prove one's case. Sometimes this is also called the "standard of proof" in a case. It is not easy to say just how much proof is enough. Must the arbitrator be 60 percent convinced? 80 percent? 99 percent? Although we usually employ numbers to describe amounts, such formulations do little to clarify the issue of proof. Instead, we use language to describe the different quanta or standards of proof. Over many years, judges, lawyers and arbitrators have developed some shared definitions, settling on three different standards of proof:

### **Preponderance of the evidence**

Preponderance of the evidence is the lowest or least strict standard of proof. In plain English, it roughly means "more likely than not." Preponderance of the evidence is the level of burden of persuasion typically employed in the civil procedure. It is also the standard most arbitrators will apply contract cases and minor discipline cases. It is defined in Black's Law Dictionary (7th Edition) as "the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than another."

### **Clear and Convincing Evidence**

Clear and convincing evidence is defined in Black's Law Dictionary (7th Edition) as "evidence indicating that the thing to be proved is highly probable or reasonably certain." The clear and convincing evidence standard is a heavier burden than the preponderance of the evidence standard but less than beyond a reasonable doubt. It is generally the strictest form of evidence required in arbitration. Many arbitrators apply this standard to removals and to contract cases where the remedy will be substantial.

## **Beyond a Reasonable Doubt**

Beyond a reasonable doubt is the standard used by courts in criminal cases. It is evidence by which the judge or jury is fully persuaded of a defendant's guilt "without any belief that there is a real possibility that a defendant is not guilty" (Black's). Some arbitrators require management to meet this standard in certain removal cases.

## **Applicability in Arbitration**

Arbitration proceedings are not courts and arbitrators are not judges. Consequently, arbitrators differ on how useful formal standards of proof are in arbitration. Some postal arbitrators, such as Clarence Deitsch, explicitly state the standard of proof they used to decide each case). (See Deitsch, [C-13274](#), [C-13319](#), [C-19755](#). Other postal arbitrators appear to reject attempts by advocates to argue that a particular quantum of proof is required. For example, Arbitrator Thomas DiLauro wrote in [C-19737](#):

Because quantum of proof concerns the arbitrator's evaluative processes, rather than the parties' adversarial burdens, the determination and application of the quantum of proof is uniquely within the arbitrator's purview.

Although it is not possible to state broad principles to which all postal arbitrators agree, many useful generalizations and arguments can, nevertheless, be found by studying the large body of available postal arbitration decisions.

## **Contract Cases**

Arbitrators are in general agreement the "preponderance of the evidence" is the appropriate standard of proof to be used in deciding contract cases where the Union has the burden of proof. This is the standard that courts use in civil cases involving the breach of a contract. For example, Arbitrator Clarence Deitsch wrote in [C-24800](#):

The quantum of proof customarily required in contract cases such as this for the NALC to meet its burden of proof is a "simple preponderance of the evidence." This standard will be used to resolve the instant contract dispute.

## **Discipline cases**

In discipline cases, unlike contract cases, there are disagreements among arbitrators concerning the appropriate standards of proof and how they should be applied. These disagreements tend to be particularly sharp in cases involving alleged criminal acts or moral turpitude.

The traditional position of the Postal Service is that in discipline grievances where management has the burden of proof, it must merely prove its case by the "preponderance of the evidence." The Postal Service often argues that, since such cases involve the Union trying to enforce terms of the contract—namely the "just cause provision," the standard of proof used by courts in ordinary civil disputes applies. While some arbitrators have accepted this argument; most have not. In [C-01190](#), Arbitrator Seidman discussed this issue and rejected the use of the "preponderance of the evidence" standard in serious discipline cases.

There is no arbitral consensus as to the burden of proof in such cases. A number of arbitrators say that the standard is the same, no matter what the nature of the case, that is, the usual civil standard, the preponderance of the evidence rule. Other arbitrators say that where the offense charged is a crime that the criminal standard of proof beyond a reasonable doubt is required to sustain a discharge. Most arbitrators, of which I am one, say that in such a case something more than a preponderance of the evidence

and less than proof beyond a reasonable doubt is required which is usually verbalized as clear and convincing evidence of the doing of the act charged. (C-01190)

In a thoughtful discussion of this issue in regional arbitration decision C-09365, Arbitrator Carlton Snow reaches essentially the same conclusion. His award warrants careful reading, not only because of his status and reputation, but also because it expresses what is probably the majority opinion among postal arbitrators.

There simply is not unanimity among labor arbitrators about the application of a “beyond a reasonable doubt” quantum of proof in cases allegedly involving the commission of a crime. Discharge for misappropriation is a serious matter, but it remains a civil matter. A case can be made for an application of a “preponderance of the evidence” standard in such circumstances. An arbitrator, of course, has no power to deny an individual his or her freedom of movement, as is the case in most criminal proceedings.

As a general rule, it is more appropriate to apply a “clear and convincing” standard of proof in an arbitration case involving an alleged violation of criminal law. It is appropriate to apply a higher standard of proof if an employer’s allegation involves a charge of moral turpitude, but the standard to be applied in an administrative proceeding such as labor arbitration is more appropriately “clear and convincing” proof. Such a higher standard recognizes the civil nature of an arbitration proceeding while also ensuring that the case against a grievant where there is an allegation with criminal overtones is sufficiently strong to justify the result. It is appropriate to apply a “beyond a reasonable doubt” standard in a criminal court proceeding because a person may be sent to jail, but it is equally appropriate in arbitration to recognize that a labor arbitrator’s decision has a considerably different impact, although a serious one, on a grievant’s life...

It is also important to stress the fact that a decision in a case of this sort cannot be resolved solely on the basis of rules about quanta of proof. These evidentiary rules have been developed for application in a more stylized forum, and they provide a source of guidance for decision-making in arbitration, but clearly are not dispositive. Such rules must be understood within the context of a collective bargaining relationship and established principles of discipline in the work force. As Professor Edgar Jones has observed, “the most useful way to think of the requisite quantum of proof is to think in terms of variable degrees of caution, so long as it is recognized that these degrees are metaphorical and not mathematical.” ...In other words, it is unwise and impractical to think of quanta of proof as setting forth a precise formula for resolving arbitration cases. Rather, standards of proof serve as a constant reminder to an arbitrator to remain cautious about the weight to be accorded evidence put forth by the parties and to think clearly about what proof is causing the arbitrator to sustain or reject an accusation against a worker. It is reasonable to believe that an arbitrator will be more cautious in the face of an allegation involving moral turpitude than one involving some other rule infraction. It is imprudent to wed oneself to a formulaic standard of proof for application in every case. Such an approach to decision making ignores the diversity of circumstances and soon causes the formula to become disconnected from a rational application to the facts so that the formula no longer describes the reality it is supposed to represent. (C-09365)

Other arbitration awards consistent with this position include: Arbitrator Axon C-11391 and C-11248, and Arbitrator Snow C-01789.

### **Proof Beyond a Reasonable Doubt.**

Almost all postal arbitrators reject the argument that the Postal Service can sustain a removal charge with a simple preponderance of the evidence. They differ, however, over exactly what higher standard of proof the Postal Service must meet in cases concerning alleged crimes or moral turpitude. The majority of arbitrators probably agree with arbitrator Snow's position, above, that the appropriate standard in such cases is "clear and convincing" proof.

Nevertheless, many arbitrators have held that the appropriate standard in such cases is proof "beyond a reasonable doubt." Arbitrator Howard Gamser's June 12, 1976 decision in [C-25512](#) was the first in a line of cases taking this position. Gamser's decision is particularly significant because, even though this was a non-interpretive case, he was at the time also serving as a member of the national arbitration panel.

The question then remains whether the USPS has sustained the burden in this proceeding of establishing that [the grievant] did indeed willfully convert to his own use monies that rightly belonged to the Postal Service... What quantum of proof must the Employer bring forth from this record? Shall the beyond a reasonable doubt standard that the US Magistrate required also be the standard in this Arbitration proceeding or shall some lesser degree of proof such as the clear and convincing evidence standard or the preponderance of evidence standard suffice? In this case, a fifteen year veteran of the USPS who apparently had an unblemished record before this case arose, and who had twenty years of honorable service in the Navy behind him as well, has been accused of criminal and morally reprehensible conduct. In such an instance, in the opinion of the undersigned, the "**beyond a reasonable doubt** standard" must be met by the Employer. The grievant's reputation cannot be shattered by employing a lesser standard. The Employer cannot brand [the grievant] as an ordinary thief in the eyes of his family, friends, fellow employees by the submission of less proof than would establish his guilt beyond a reasonable doubt. The undersigned is of the opinion that the weight of arbitral authority supports this position. The social stigma of attaching to the employee justifies the higher burden of proof than that which might be required in some other case of a breach of industrial discipline. (Emphasis added.) ([C-25512](#))

Other regional arbitration awards that support the position that the appropriate standard of proof in such cases is proof "beyond a reasonable doubt" include the following.

The Arbitrator agrees with the Union that, to sustain a discharge involving moral turpitude or an allegation of criminal intent, he should be presented with proof beyond a reasonable doubt that the discharged employee was guilty as charged. ([C-01220](#), Arbitrator Dash )

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The highest degree of proof namely, "proof beyond a reasonable doubt" is required as a matter of course in disciplinary cases where the employee is charged with an act of moral turpitude, such as : theft; assault; aberrant sexual practices; or, as in this case, illegal sale of drugs. The reason for the higher degree of proof requirement in such morally objectionable cases is that discharge for theft, etc involves a most unfavorable reflection on the moral character of the employee which is almost impossible to erase and which will seriously hamper if not a altogether prevent his/her getting a job elsewhere and will even hurt innocent family members. The employee is branded for life. The Employer, therefore, has a very heavy proof obligation in such cases and the Arbitrator believes that that heavy proof burden rests with the Employer in this case before him. ([C-07490](#) Arbitrator Purcell )

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This is the charge on which the Grievant must be tried, and the burden rests upon the Employer to prove beyond a reasonable doubt that the Grievant did tamper with the vehicle as charged. Proof beyond a reasonable doubt is the quantum of proof required when an employee is charged with criminal action. If the proof is inadequate to meet this test that settles the matter. In the absence of such a showing there would be no basis for considering other aspects of the case. (C-02007 Arbitrator Holly)

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While the burden of proof is always on Management in a discipline or discharge case, the quantum of proof required varies with the charge of Management. When the action an employee is accused of is of a kind recognized and punished by criminal law, the quantum generally required by arbitrators is “proof beyond a reasonable doubt.” (C-09250 Arbitrator J. Earl Williams)

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Theft is a crime of moral turpitude and it is conduct which burdens an employee for the rest of his/her employment career. Equally important, the label of “thief” carries with it a certain social stigma which will impact the employee’s feeling of net worth within the community and family environments. Perhaps these are some of the reasons why the highest standard of proof is required in these kinds of situations. It is a familiar refrain to say that all doubts must be resolved in favor of the accused in criminal proceedings, but its importance is not diminished at arbitration. (C-15714, Arbitrator Goodman)

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Contrary to the Postal Service’s claim that the proper quantum of proof is “a simple preponderance of evidence” for violations of rules and regulations, the workplace’s equivalent to capital punishment (i.e., employment termination) for offenses that are simultaneously rules violations and crimes in society (i.e., “fraudulent receipt of pay for time not worked”) requires “proof beyond a reasonable doubt.” It matters not that the employee is not charged with/prosecuted for criminal misconduct. It is sufficient that the employee simply be charged with/removed for conduct that simultaneously violates rules and regulations and is also a crime in society. Such action severely limits the employee’s future employability. That the Service recognized the inherent nature/cause for removal in the instant case is evident by its Advocate’s written statement at the outset of the arbitration hearing, namely, “The actions of the Grievant in this case are tantamount to theft.” Hence, “proof beyond a reasonable doubt” will be the standard of proof used to resolve the instant dispute. (C-20842, Arbitrator Deitsch. See also *Arbitrator Deitsch*, C-13319)

## **Advice to Advocates**

How does the concept of quantum of proof affect how the advocate should present and argue the case? Obviously, this is a difficult question and there are no clear-cut answers. Not only do arbitrators disagree as to what quantum of proof should be required in a particular case, but each individual arbitrator attaches his or her own definition and meaning to these concepts.

Simply stated, advocates should put forth the best possible case regardless of what quantum of proof they believe the arbitrator will apply in resolving the case. This does not mean, however, that advocates should not urge the quantum of proof that they feel should be applied to the case. Although an arbitrator may not agree with the legal principles urged by the advocate, the arbitrator may still be influenced by the party’s arguments that a higher quantum of proof should be required in a discipline case. At the very minimum, the advocate should remind the arbitrator to be cautious in discharge cases involving crimes or serious moral turpitude.

# Supporting Cases

## Background Cases

- C-01190, Arbitrator Seidman, July 30, 1982
- C-01789, Arbitrator Snow, November 13, 1981
- C-09365, Regional Arbitrator Carlton Snow, September 1, 1989
- C-11391, Arbitrator Axon, November 18, 1991
- C-11248, Arbitrator Axon, October 3, 1991
- C-19755, Arbitrator Deitsch, June 30, 1999
- C-19737, Arbitrator DiLauro, July 19, 1999

## Cases supporting “beyond a reasonable doubt”

- C-01220 , Arbitrator Dash, April 29, 1982
- C-02007, Arbitrator Holly, February 21, 1983
- C-07490, Arbitrator Purcell, October 1, 1987
- C-09250, Arbitrator J. Earl Williams, March 24, 1982
- C-13319, Arbitrator Deitsch, December 20, 1993
- C-20842, Arbitrator Deitsch, June 27, 2000
- C-25512, Arbitrator Howard Gamser, June 12, 1976
- C-15714, Arbitrator Goodman, August 7, 1996

# Chapter 6—Reasons for Discipline

## Accidents, In General

See also [Vehicle Accidents](#), below

Stuff happens. Employees have accidents. But simply having an accident is never, by itself, sufficient grounds for discipline. This is not just NALC's position; it is official Postal Service policy. Senior Assistant Postmaster General Carl Ulsacker wrote in [M-00744](#) that:

Accidents or compensation claims, even when in a manager's view excessive, are not in themselves an appropriate basis for discipline. What must be cited in any such disciplinary action are the actions of an employee in a specific situation which are violations of a Postal Service safety rule or regulation. ([M-00744](#))

See also [M-00486](#), [M-00743](#), [C-06871](#) and [C-07300](#)

Furthermore, platitudes and generalized "instructions" such as "walk safely" "drive safely" or "watch out for dogs" do not qualify as safety rules or regulations. See, for example [C-06871](#).

## National Level Settlements, USPS Policy Statements

The local notice can not alter, amend or in any way supersede the disciplinary standards for "at fault" vehicle accidents provided by the National Agreement and the Methods Handbook, Series M-52. . . . Any local vehicle accident control program may not deviate in its purpose from the M-52 and National Agreement. We are unaware of the existence of any disciplinary standards for "at fault" vehicle accidents, hence any discipline taken must meet the "just cause" provisions of Article XVI of the National Agreement. ([M-00267](#))

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In our opinion there is no contractual provision for the grievant or his steward to attend an internal management meeting, whether called an accident review board or any other name. However, such a committee should not make recommendations for discipline of individual employees. ([M-00408](#))

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This will reemphasize the need for careful attentions to situations in which disciplinary action for safety rule violation is considered. While Article XVI of the National Agreement clearly makes discipline for such a cause appropriate, we must be mindful of the requirements of the Federal Employees Compensation and our policies which prohibit taking action discouraging the reporting of an accident or filing a claim for compensable injury with the Office of Workers' Compensation Programs. ([M-00744](#))

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The issue in this grievance is whether district management is in violation of the National Agreement by issuing a local "Zero-Tolerance-Rollaway/Runaway Accidents" policy. . . .The parties are of mutual understanding that local accident policies, guidelines or procedures may not be inconsistent or in conflict with the National Agreement, hence discipline taken for such accidents must meet the "just cause" provisions of Article 16. ([M-01254](#))

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The parties agree that management has the right to articulate guidelines to its employees regarding their responsibility concerning issues relating to safety. However, the parties also mu-

tually agree that local accident policies, guidelines, or procedures may not be inconsistent or in conflict with the National Agreement. Discipline imposed for cited safety rule violations must meet the “just cause” provisions of Article 16 of the National Agreement. Further, administrative action with respect to safety violations must be consistent with Articles 14 and 29. (M-01289)

## Case Examples

[T]he Service has failed to charge the Grievant with a dischargeable offense. The reason given by the service for the removal of the Grievant is both void for vagueness and an obvious attempt to discharge the Grievant for being “accident-prone,” a non-offense.

The Service may properly charge an employee with physical inability to perform assigned duties, with psychological disabilities to perform assigned duties or with specific acts of negligence or violations of established safety standards. However, the Service is not entitled to concoct a bastardized form of infraction in order to remove employees it considers to be accident-prone. (C-01311)

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This automatic linkage of an accident with carelessness would imply that any employee who has an accident is subject to discipline without regard to proof of a violation of any specific safety regulation or practice. In fact, the danger of such an interpretation prompted Assistant Postmaster General Carl S. Ulsaker to write the following in 1980 to all “Regional Directors of E/LR”:

“What must be cited in any such disciplinary action (for Safety Rule Violations) are the actions of an employee in a specific situation which are violations of a Postal Service Rule or Regulation.”

In short, a platitudinous statement devoid of specific content was defined for purposes of establishing a bases for discipline as an “instruction” The apparent logical sequence is that the two falls-*ipso facto* were linked by the grievant’ s failure to watch where he was walking .

Generalized instructions which neither offer specific guides to conduct, nor even inform what specific actions are in violation of such regulations, cannot be used as proof of violation of an equally generalized regulation such as “Obey the instructions of your manager.” In short, a statement such as “watch where you are walking” even when delivered by a Supervisor do not , by this token, acquire that degree of specificity requisite to establishing them as “instructions “, as that term is understood . For instance, what does “watch where you are walking” mean specifically when you are also instructed to be simultaneously fingering mail? (C-06871)

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Nowhere does the Employer explain what the Grievant was expected to have done under the circumstances. Nor is there any reference in the notice of suspension to indicate what rule or regulation, if any, the Grievant violated. According to a statement made by Senior Assistant Postmaster General Carl C. Ulsaker in his memorandum to regional directors dated April 7, 1980, in a disciplinary action based upon a safety-related incident, “What must be cited . . . are the actions of an employee in a specific situation which are violations of a Postal Service safety rule or regulation” Seemingly, therefore, the procedure used by the Employer in this instance conflicts with the requirement that management state with specificity the rule or regulation that the employee failed to follow (C-07300)

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In brief, management cannot, after the fact, automatically declare that conduct is unsafe merely because injury has resulted there from. In the present instance, the Employer has failed to abide by the directive that requires a disciplinary notice to cite “. . . the actions of an employee in a specific situation which are violations of a postal service safety rule or regulation.” It is not the view of the Arbitrator that in order to be deemed unsafe, all unsafe actions of an employee are required to be spelled out in a rule or regulation, for such a task would be both impractical and unnecessary. However, under the facts presented in this matter, the Arbitrator finds that the charges against the Grievant are deficient as a result of the failure of management to show that the conduct with which the Grievant is charged is likely to result in injury to an employee who engages in such conduct. (C-08977)

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It is difficult if not impossible for the Arbitrator to feel that for a letter carrier to be bitten by a dog is a result of carelessness or negligence. To do so would be to leave out the fact that the dog was the aggressor in the affair.... (C-10307)

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However, given the transient nature of the events that occurred on those steps; the sense of urgency that the Grievant exhibited and the disruption of his normal routine that morning, the Arbitrator finds that the Grievant's failure to use the handrail was likely not a matter of willful non-adherence to the safety rule, but rather was a matter of his distraction by extraordinary matters, and of his obliviousness to the risk. The Arbitrator finds that the Grievant lacked the presence of mind to grab the handrail but that, in view of these extenuating circumstances, his failure was of insufficient materiality or willfulness to constitute just cause for discharge.

(C-24169)

## Vehicle Accidents

Vehicle accidents are particularly likely to result in discipline ordered by higher management in violation of the provisions of Article 16, Section 8. Many installations have had written or unwritten policies requiring the removal of employees involved in "at fault" vehicle accidents. See the discussion of this issue under [Ordered by higher management](#), above. See also [M-00267](#), [M-01254](#), [M-01289](#), [C-16436](#), [C-18938](#) and [C-26204](#). Remember that Union officials investigating such cases have broad investigatory and information rights. This includes copies of all correspondence and emails (see [C-26204](#)) concerning the proposed discipline.

Article 41.3.P provides that "The Employer shall promptly notify the local Union President of any job-related vehicle accidents involving city letter carriers." In [C-20980](#) a management failure to comply with this provision prevented the Union from conducting its own investigation. The arbitrator held that "this failure on the part of the Postal Service results in it not having just cause for the removal of the Grievant."

## Case Examples

Mr. Urban was faced with defending himself against a nebulous faceless Board that rendered a decision to suspend him without allowing him to be present or represented by a Union representative. The procedures followed by the Board were very nearly a "star chamber proceedings" and I find that the 14 day suspension was not for just cause

Discipline of an employee is solely a management function. A supervisor that disciplines an employee should do so after following sound management rules and, when a supervisor follows the recommendations of a board to impose discipline, the supervisor merely uses the recommendations as a shield against the hard realities of making an independent decision. I do not agree with such a practice. ([C-01261](#))

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The Union advocate asked each of the Employer's witnesses a number of specific questions about the accident including distances and whether or not either of the drivers were cited. The employer's witnesses stated there were no measurements taken at the scene of the accident. Other questions could not be answered. Being unable to answer many of the questions about the accident, the testimony of the Employer's witnesses cast a shadow of doubt as to whether or not a thorough investigation of the accident was conducted. ([C-17353](#))

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The effect of using the Grievant's past safety record in combination with the stated cause of action, a single event, is to shield from arbitral scrutiny the truth and accuracy of the Employer's claim that they also were "preventable" as to their final disposition. Any incidence of unfairness associated with the Employer's investigation of the December 18 accident however pales in significance to the flawed NOR. If the Employer's case against the Grievant is one of safety based on the Grievant's entire record, then it was incumbent on the Employer to have so charged. After all, past elements of Page 6 discipline are routinely included in the Employer's statement of charges. Because they are, the Employer must stand the burden of showing their contribution toward its decision for discipline or removal. I therefore hold that the Employer's charge against the Grievant is limited to exactly the December 18 accident which it claims was preventable. And, as a stand alone charge like the Union argues, the question is one of just cause for the removal the merits issue. ([C-20036](#))

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Based on all of the above, it is my finding that the Postal Service did not comply with the requirements of Article 41, Section 3.P, in that it did not promptly notify the Local Union President of the vehicle accident that the Griev-

ant , Julius Williams , was involved in on June 18, 1999. This failure to comply with the clear language of the above - cited Section 3.P of Article 41 is, in my opinion, under all the circumstances in this case, a material failure on the part of the Postal Service to give to the Grievant his due process rights. This failure on the part of the Postal Service results in it not having just cause for the removal of the Grievant (C-20980)

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The grievant was an employee with approximately 12 years of service when the accident occurred. No evidence was produced by the Postal Service to show that the grievant had ever been disciplined for working unsafely and that he, in any way, failed to follow all the rules and regulations, let alone demonstrate a “blatant disregard for rules and regulations.” There is no doubt that a rollaway/runaway accident is a serious matter in that it could result in injury and even death. However, the Postal Service cannot discriminate against an employee in assessing discipline in these types of cases unless it can show a variation in the circumstances. Having failed to do so in this case, the discipline of discharge was discriminatory. Accordingly, the Postal Service is directed to reduce the discipline of discharge to a seven-day suspension. (C-21062)

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Supervisor Branson additionally testified that although the fact that the Grievant put in 80 hours the previous week was an important factor, the Grievant had time between shifts. In this connection, Ms. Gamble testified that the Grievant got off at 4:30 on the day prior to the accident and the accident the next day was at 10:10, which is almost 17 hours between shifts. It seems to the Arbitrator, however, that even though the Grievant might have been off approximately 17 hours between shifts, it is at least questionable whether having worked at the level here described that this period of rest was sufficient to eliminate the Grievant's fatigue as a contributing factor to the accident. (C-21561)

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As a general principle, where the issue before an arbitrator is related to some science, profession or occupation beyond the competence of the average layman, an expert may be used; and where such an expert is utilized, deference ordinarily will be given to an expert opinion. In the instant case, the Union utilized an expert. Moreover, the individual who investigated the accident for management had no specific training in accident reconstruction and no substantial experience in that field or area. Therefore, the Arbitrator feels compelled to accept Heffuer's patently valid report as legitimate. (C-25100)

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The Arbitrator was particularly troubled by Manager Shields who apparently held that the damage incurred was the determinant to measure the appropriate discipline to impose. It must be pointed out it is not the amount of damages, but the amount of negligence on the Grievant's part that must be the foundation of the discipline to impose. (C-25994)

## Supporting cases

C-01261, Arbitrator Schedler, June 3, 1982  
C-01311, Arbitrator Levak, September 24, 1982  
C-06871, Arbitrator Sobel, March 7, 1987  
C-07300, Arbitrator Britton, July 20, 1987  
C-08977, Arbitrator Britton, March 12, 1988  
C-10307, Arbitrator Johnston, September 18 1990.  
C-17353, Arbitrator Roberts, September 10, 1997  
C-20036, Arbitrator Bajork, October 18, 1999  
C-20980, Arbitrator Johnston, August 14, 2000  
C-21062, Arbitrator DiLauro, September 11, 2000  
C-21561, Arbitrator Britton, December 30, 2000  
C-24169, Arbitrator Lurie, April 17, 2003  
C-25100, Arbitrator Levak, March 10, 2004  
C-25994, Arbitrator Irving, June 10, 2005  
C-26204, Arbitrator Axon, October 4, 2005

# Attendance Related Discipline

## Background

More discipline is issued for attendance than any other single issue. Defending some attendance cases can be tough. Many NALC members seem to believe that they can only be disciplined if it can be proven that they “abused” their leave. In fact, many arbitrators have held that an employee’s absences can be so serious and frequent that it renders the employee undependable and thus constitutes just cause for removal, even if the absences themselves were for valid and legitimate reasons.

The February 9, 1978 award [C-00727](#) by Arbitrator Howard Gamser, who also served on our National Arbitration, panel is sobering readings. (See also [C-09766](#)) Quoting NALC Arbitrator Cushman, he wrote:

This Arbitrator agrees with . . . many other arbitrators than an employer has a right to expect acceptable levels of attendance from its employees and that when such attendance is not had, discharge is appropriate despite the fact that the absence may be for valid and legitimate medical reasons.

This Arbitrator is sympathetic to employees “whose absenteeism is due to illness, and, therefore, to no fault of their own. Where, however, absenteeism due to illness results over a period of time in unacceptable levels of work attendance, an employer, under generally accepted principles recognized by many arbitrators, has a right to remove such an employee from employment. . . . The realities of economic survival and the demands of efficiency require that an employer be able to depend upon reasonable regularity of employee attendance in order to plan and perform his work schedule. Where reasonable standards of attendance cannot be met due to physical inability of the employee to meet such standards, termination by the employer is warranted.

In such a case the employee is not being “punished” because he is ill. He is simply being terminated for irregularity and undependability of attendance. Such situations are really not disciplinary in nature . . .  
([C-00727](#))

Another common misconception is that management may not cite “approved” sick leave as a basis for discipline. To be sure, this is true for “preference eligible” postal employees who appeal certain adverse actions to the Merit Systems Protection Board (formerly Civil Service Commission or CSC). See [Election of Forums](#), above. MSPB rules on attendance related discipline differ from those arising from the “just cause” provisions of the National Agreement. They prohibit consideration of absences on “approved” sick leave as a basis for discipline for absenteeism. National Arbitrator Sylvester Garrett addressed these differences as follows in his November 19, 1979 award [C-03231](#):

The following conclusions may be stated on the basis of the presentations in this National Level grievance:

1. Whether the USPS properly may impose discipline upon an employee for “excessive absenteeism ,” or “failure to maintain a regular schedule ,” when the absences on which the charges are based include absences on approved sick leave, must be determined on a case-by-case basis under the provisions of Article XVI;

2. Whether or not the USPS can establish just cause for the imposition of discipline, based wholly or in part upon absenteeism arising from absences on approved leave, is a question of fact to be determined in light of all relevant evidence in the given case;
3. The CSC policy statement is not of controlling significance in deciding a “just cause” issue under Article XVI, even though the grievant may be preference eligible;
4. The CSC policy statement is relevant in respect to a “just cause” issue under Article XVI, in a case involving absences on approved leave;
5. The weight to be given the CSC policy statement in evaluating a just cause issue under all of the evidence in any such case, lies in the discretion of the arbitrator.  
(C-03231)

**FMLA:** Employee rights in attendance cases were strengthened by the Family and Medical Leave Act (FMLA) which became effective on August 5, 1993. The act prohibits the Postal Service from relying upon FMLA protected leave as a basis for discipline. The Postal Service agreed in [M-01270](#) that:

In a disciplinary hearing involving just cause, the union may argue as an affirmative defense that management’s actions were inconsistent with the Family and Medical Leave Act.

Recent arbitration awards specifically addressing the FMLA in attendance related discipline include [C-16970](#) and [C-14107](#), see below. A complete explanation of the acts provisions can be found in the *NALC Guide to the Family and Medical Leave Act*. The application of the Act in discipline cases is also the subject of an article in the [February 1998 NALC Advocate](#).

### **Advice for handling attendance related cases**

As with any other case, always begin with scrutinizing management’s case on the merits and carefully checking all its assertions of fact. Pay particular attention to the following:

- Has management cited FMLA protected absences? See [M-01270](#), [C-16970](#) and [C-14107](#).
- Has management improperly cited “[past elements](#)”?
- Are all the dates and incidents cited by management factually correct? See [C-08386](#).
- Is the [discipline progressive](#)? Unlike cases involving theft or assault, attendance related problems are classic examples of where progressive discipline is required. See [C-09766](#).

Determine whether there are any mitigating factors.

- Is the discipline consistent with that issued in past similar cases, or was the grievant treated in a [disparate](#) manner? See [C-16237](#) and [C-16970](#).
- Was the length of the grievance [prior service](#) appropriately considered?
- Were the grievant’s attendance problems related to drug or alcohol abuse? If so, try to get the employee to seek EAP counseling and consider an [Article 35 defense](#). See [C-25874](#).

## Case Examples

[T]he Employer cannot discipline an employee for absences which are legitimately caused by the physical incapacity of an employee up to at least the point where that employee exhausts his/her accumulated sick leave benefits. To hold otherwise would make it possible for the employer to say to an incapacitated employee, "although you have accumulated sick leave available, you cannot use it because to do so would make your attendance unsatisfactory." Certainly, such a conclusion is not in accord with either the intent or spirit of the negotiated Sick Leave benefits. (C-00599)

\*\*\*

The grievant, however, received no notice that medically certificated absences would be counted against her. The grievant failed to receive notice that "too much" verified sick leave could cause her to be removed from the postal service. The point is that the failure to inform the grievant her excused absences could lead to her termination undermined management's contention that the grievant received adequate warning of the consequences of not reporting to work.

The grievant needed to know that her excused absences along with any instances of being AWOL would be used to show a pattern of irregular attendance. (C-02099)

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[I]t is the arbitrator's considered opinion that to remove the grievant for absence caused by an injury suffered while on duty and one which he had no control over and from which he appears to have fully recovered, would be punitive in nature rather than corrective. (C-04024)

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From the record evidence, the Arbitrator arrives at the following findings: (1) there is no evidentiary support for the Employer's espoused standard that in excess of three (3) occurrences of unscheduled absences within a six (6) month period is sanctioned by any construction of the language set forth in the Attendance Control Program Policy (Emp. Ex. 1B), nor that it is specifically sanctioned by any other policy, procedure or provision contained in handbooks or manuals or in the National Agreement (Jt. Ex. 1); (2) that if such a standard did exist, it cannot be blindly applied to every case uniformly as this would result in an uneven administration of justice; (3) that the reasons for the Grievant's absences must be accepted as legitimate as they were left uncontroverted by the Employer; (4) that absent any previous pattern of abuse, the subject number of absences cannot be construed as excessive; and (5) that according to the permanent posting delineating the proper way in which to fill out Form 3971, the Grievant cannot be found to have improperly executed this document on any of the subject occurrences of unscheduled absences. (C-04163)

\*\*\*

With respect to the citation of incorrect dates on the letters of warning cited in the removal notice, the Arbitrator finds the listing of incorrect dates by itself would not be sufficient to overturn the discharge. However, when coupled with the fact Management also considered as an element of past record a fourteen day suspension when in fact the suspension was seven days and the previously discussed improper reliance on two letters of warning, the errors can no longer be considered minor or harmless. The Arbitrator has no way of determining at this point , if Management had relied on factually correct information removal might not have been invoked. (C-08386)

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Returning to the crux of this case, the real problem with the Service's position is that it moved directly from a two working-day suspension to removal without imposing either an intervening seven-day suspension or an intervening fourteen-day suspension. Inexplicably, the Service also never placed the Grievant on restricted sick leave. The failure of the Service to impose and stick with the fourteen-day suspensions necessarily had the effect of failing to effectively convey to the Grievant the fact that the next series of infractions would result in her removal . Such conveyance and notice is the most important element of the progressive and corrective discipline standard.

It seems beyond dispute that moving from that disciplinary record directly to removal, and without either an intervening seven-day suspension or a fourteen - day suspension, violates the corrective/progressive mandate of Article 16. (C-09766)

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Because the Grievant ' s absence was protected leave under the provisions of the FMLA, the reliance upon that leave as the basis for her removal from the Postal Service was in violation of the Act, and is void, as a contravention of public policy and the laws of this Country. The citation of that leave was also a violation of Article 19 of the Agreement, inasmuch as the Act has been expressly endorsed by the Postal Service, and integrated into its handbooks and manuals (C-14107)

## Supporting cases

C-00599, Arbitrator Holly, August 2, 1978  
C-00727, Arbitrator Howard Gamser, February 9, 1978  
C-02099, Arbitrator Snow, May 12, 1983  
C-02818, Associate National Arbitrator Fasser, December 8, 1978  
C-03231, National Arbitrator Gamser, November 19, 1979  
C-04024, Arbitrator Parkinson, September 29, 1983  
C-04163, Arbitrator Larney, December 28, 1983  
C-08386, Arbitrator Axon, October 11, 1988  
C-09766, Arbitrator Levak, February 11, 1990  
C-14107, Arbitrator Lurie, November 27, 1994  
C-16970, Arbitrator Olson, June 24, 1997  
C-24636, Arbitrator Irving, September 25, 2003

## Performance Related Discipline

Management frequently issues discipline for performance related issues. This section deals with claims that a carrier is using too much street time. The specific charges may refer to “expansion of street time,” “unauthorized overtime,” inaccurately completing Form 3996, or “inadequate effort” etc. Charges that a carrier is using too much office time raise different issues and are addressed under [Failure to Meet Office Standards](#), below

Regional Carlton Arbitrator Snow’s November 7, 1985 decision in case [C-05343](#) provides a clear and influential exposition of the factors management should consider before issuing performance related discipline. It is suggested that NALC representatives handling performance related discipline carefully study his award. Note that in this case Arbitrator denied the grievance and upheld the removal. Arbitrator Snow’s criteria, in abbreviated form are:

- Are the standards of job performance on which the grievant was judged reasonable?
- Was the grievant clearly informed of the standards?
- Was the employee clearly informed that he or she was failing to meet those standards?
- Did the employer give the grievant assistance in an effort to improve his or her job performance?
- Did the employer clearly informed the grievant of the consequences of failing to improve his or her job performance?
- After such notice, did the employer provide sufficient time for the grievant to raise the his/her level of performance to an acceptable level?
- Were the grievant’s deficiencies due to increased age or physical disability?
- Were the grievant’s length of service and work record carefully considered?
- Was progressive discipline have been used by the employer prior to the discharge?

Also worth careful review is Arbitrator Levak’s, November 30, 1987 decision in case [C-07603](#). Arbitrator Levak explicitly used Arbitrator Snow’s above criteria in a case which he sustained in full.

Note that a recurring issue in cases of performance related discipline is management’s refusal to conduct a Special Route Inspection. Cases specifically addressing this issue include [C-08091](#), [C-05343](#), [C-07603](#) and [C-15387](#).

## National Level Settlements

In keeping with the principle of a fair day’s work for a fair day’s pay, it is understood that there is no set pace at which a carrier must walk and no street standard for walking. ([M-00304](#)) See also [M-01444](#).

\*\*\*

A review of the material submitted at the fourth step level indicates that the grievants did inform management of their inability to complete their routes in 8 hours. Further, it was demonstrated that they were ordered by management to complete the routes. Although there was no expressed authorization to complete the delivery of the mail on an overtime basis, the permission would be inherent in the authorization to continue delivery after notification that the grievants were unable to complete the routes. (M-00326)

\*\*\*

The information of record-presented in this case clearly establishes that the grievant's route was evaluated on the basis of the performance of another employee who was carrying the route at the time. It is also evidenced that the employee on whom the evaluation was based was substantially younger than the grievant. Additionally, available information presented subsequent to our Step 4 meeting indicates that the grievant is using-assistance 'both in the office and on the street, overtime, and curtailing mail on almost a daily basis. On the basis of the information presented, we concur that the grievant's route is not properly adjusted. To this extent, we find the grievance is sustained. (M-00398)

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Local management can properly request letter carrier employees to estimate their work load, to the best of their ability, when the employees request overtime or auxiliary assistance. The information obtained by the carrier's estimation is not intended to be used to discipline carriers or to set work standards. (M-00464)

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Reference volume alone, without additional evidence to substantiate wrongful expansion of street time, can not sustain a disciplinary action. (M-00600)

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Under Article 16, no employee may be disciplined except for just cause. In this instance, the parties agree that a one day count and inspection may not be used as the sole basis to establish a standard against which a carrier's performance may be measured for disciplinary purposes. (M-00829)

\*\*\*

The issue in these grievances is whether or not the Piece Count Recording System (PCRS), Projected Office Street Time (POST), or the Delivery Operations Information System (DOIS) violate the National Agreement. After reviewing this matter, we mutually agreed to settle these grievances as follows: Daily piece counts (PCRS) recorded in accordance with the above-referenced systems (POST or DOIS) will not constitute the sole basis for discipline. However, daily counts recorded in accordance with these procedures may be used by the parties in conjunction with other management records and procedures to support or refute any performance-related discipline. This does not change the principle that, pursuant to Section 242.332 of the M-39, **"No carrier shall be disciplined for failure to meet standards, except in cases of unsatisfactory effort which must be based on documented, unacceptable conduct that led to the carrier's failure to meet office standards."** Furthermore, the pre-arbitration settlement H1N-1N-D 31781, dated October 22, 1985, provides that "there is no set pace at which a carrier must walk and no street standard for walking." M-01444 (*emphasis added*)

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MSP does not set service standards, either in the office or on the street. With current technology, MSP records of time scans are not to be used as timecard data for pay purposes. MSP data may not constitute the sole basis for disciplinary action. However, it may be used by the parties in conjunction with other records to support or refute disciplinary action issued pursuant to Article 16 of the National Agreement. (M-01458)



## Arbitration Case Examples

After examining all the facets of this case, it becomes apparent that the supervisor based his actions primarily on the DUVRS tape. The initial decision to withhold the request for assistance was based on the DUVRS, the decision to •a run a street supervision followed in due course. The decision to issue discipline was, as indicated by the Employer's Step 2 decision, based upon the reference volume of mail figures on a linear basis. This is in direct contravention to the Employer's stated purpose of DUVRS . DUVRS is a proper management tool. If used for matters for which it is applicable, there is nothing wrong with it. Even if DUVRS points out a questionable area of carrier activity, management has the right to then follow through to determine if there is a disciplinable act being committed. (C-04547)

\*\*\*

The Service's failure to judge the grievant according to his own abilities and its failure to provide him with a special route inspection when he met the requirements of the M-39 are fatally defective to its case. The Service presented absolutely no direct evidence that during the days in question the Grievant was guilty of any improper work habits or of any time wasting habits.

Absent such evidence, Charge # 1 cannot stand. (C-05952)

\*\*\*

The Arbitrator agrees totally with the Union's argument that the Service has attempted to defend its action on a "chicken/egg" argument. For the Service's contention to be accepted, all it would have to do is institute disciplinary action - either before or after a special inspection request to avoid the mandate of Section 271 .g. In any event, it should be noted that at the time of the denial, the Service had no actual evidence that the Grievant's performance was unsatisfactory; and only that on some days he failed to complete his route within the allotted street time. (C-07603)

\*\*\*

It is not this writer's function to pass on the validity of the pending grievance regarding the special route inspection. But it is necessary to question management's continued imposition of discipline for expanded field time when that issue could have been determined with accuracy by means of a special route inspection

Under the particular facts of this case — grievant's repeated requests for a special route inspection based on an actual mail count rather than linear measurements and the Employer's continued issuance of discipline for the same infraction even after a grievance was submitted over the refusal to grant the special route inspection — it cannot be found that just cause existed for grievant's removal. For those same reasons, there is no basis for the imposition of a lesser penalty. (C-08091)

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The burden of proof is on Management. The Supervisor was responsible for approving or not approving auxiliary assistance. The Grievant made a good faith estimate of the help he needed. There is no evidence to the contrary. The Supervisor either checked himself or accepted the Grievant's estimate and provided predominantly office assistance. The Grievant was not on the overtime list seeking overtime. He says he called in and got permission. His Supervisor admits the call was made, but doesn't acknowledge he gave the Grievant permission. Why would the Grievant stay out on his route without permission to take the overtime? Why risk further discipline? The Supervisor had the burden of showing he instructed the Grievant not to work the overtime. He has not met that burden. The Supervisor may believe the Grievant was not being productive out on his route. The overtime, therefore, was needed to complete the route. If that was the case, the Supervisor had to show the Grievant was not being productive. He can not short cut field observation work by merely alleging the Grievant failed to accurately estimate his need for auxiliary assistance making more overtime necessary. In any event the Grievance must be sustained and the fourteen (14) day suspension deleted from the record. (C-08291)

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First, it seems to the Arbitrator that if a carrier is expected to make an *estimate*, then it is unreasonable for management to fault the carrier when the estimate proves not to be *accurate*. An estimate is, by definition, a rough calculation, while accurate means "having no errors." Thus, the two terms are, at least in the mind of this Arbitrator, somewhat incongruous.

Second, it is hard to comprehend how a carrier can be expected to make such an *accurate estimate* when the carrier is not permitted to see the DPS mail that forms part of the entire volume of mail that he will be expected to deliver. . . In a similar vein, it is noted that the Grievant's total available volume ranged from a low 9.25 (with 6 parcels) on June 24 to a high of 24.00 (with 26 parcels) on July 5. Nonetheless, the Arbitrator was presented with supervisory testimony suggesting that the number of parcels that a carrier has to deliver does not increase substantially the time required to complete the route. (C-18612)

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The Postal Service offered no showing to the record that they established that the Grievant willfully disobeyed his supervisor's instructions. However, inexcusable the Grievant's behavior may have been in the eyes of his supervisors, the evidence did not establish that the Grievant was acting in defiance of authority. The evidence did not support a conclusion that the Grievant's offense was willful. Again, the Arbitrator must point out that Webster Dictionary defines willful as "obstinately and often perversely self-willed" or done deliberately or intentionally.

Certainly the Grievant's act was poor judgement as opposed to self-willed. The evidence to the record did not establish that the Grievant's conduct was deliberately or intentionally rejecting authority. Consideration must be given to the fact that the Grievant did make an effort to get additional instructions from Mr. Maynes. Furthermore, it would have taken his supervisor only a moment to find out what the problem was that caused the Grievant to return before the instructed time without completing his deliveries. Here, the supervisor failed to adequately investigate the facts and circumstances regarding the Grievant's problem. In addition, the supervisor admits to ignoring the Grievant's request for further instructions. The supervisor's lack of response to the Grievant for additional instructions was much more about her emotions rather than her reasoned judgement. ([C-23987](#))

## Supporting cases

[C-01011](#), Arbitrator Cushman, March 19, 1979  
[C-01163](#), Arbitrator Holly, August 4, 1982  
[C-03616](#), Arbitrator Williams, June 17, 1983  
[C-04547](#), Arbitrator LeWinter, November 28, 1984  
[C-05343](#), Arbitrator Snow, November 7, 1985  
[C-05952](#), Arbitrator Levak, December 19, 1985  
[C-07603](#), Arbitrator Levak, November 30, 1987  
[C-08091](#), Arbitrator Walt, June 24, 1988  
[C-08291](#), Arbitrator R. Williams, September 2, 1988  
[C-10763](#), Arbitrator Marx, April 1, 1991  
[C-13521](#), Arbitrator Jacobs, June 15, 1994  
[C-15387](#), Arbitrator Gold, May 5, 1996  
[C-18612](#), Arbitrator McGowan, August 11, 1998  
[C-23987](#), Arbitrator Irving, January 22, 2003

## Failure to Meet Office Standards

Local managers may attempt to discipline employees for simple failure to meet the “18 and 8” casing standard. This is never just cause for discipline because NALC and USPS have jointly agreed that failure to meet that standard, by itself, is not disciplinable misconduct. Under the terms of a September 3, 1976 Memorandum of Understanding, the M-39 Handbook was modified to underscore this point. Section 242.332 now provides that:

No carrier shall be disciplined for failure to meet standards, except in cases of unsatisfactory effort which must be based on documented, unacceptable conduct that led to the carrier’s failure to meet standards.

This principle was further reinforced in the July 11, 1977 Step 4 Settlement [M-00386](#) which states:

Management may not charge or impose discipline upon a carrier merely for failing to meet the 18 and 8 casing standards. Any such charge is insufficient. Under the Memorandum of Understanding of September 3, 1976 [now M-39 § 242.332] the only proper charge for disciplining a carrier is “unsatisfactory effort.” Such a charge must be based on documented, unacceptable conduct which led to the carrier’s failure to meet the 18 and 8 criteria. In such circumstances, **management has the burden of proving** that the carrier was making an “unsatisfactory effort” to establish just cause for any discipline imposed (*emphasis added*).

Some managers seem to have the mistaken notion that the rules have been changed since the new programs such as DOIS are “computerized,” more “modern,” more “accurate,” or whatever. We all know that the quantitative data in the DOIS and Post programs are often wildly inaccurate and fail to take into account many of the most significant factors affecting office and street times. But this argument is usually pointless and unnecessary since, in fact, **the rules have not changed**. This understanding was confirmed in the July 30, 2001 national level settlement [M-01444](#) which provides the following:

The issue in these grievances is whether or not the Piece Count Recording System (PCRS), Projected Office Street Time (POST), or the Delivery Operations Information System (DOIS) violate the National Agreement. After reviewing this matter, we mutually agreed to settle these grievances as follows: Daily piece counts (PCRS) recorded in accordance with the above-referenced systems (POST or DOIS) will not constitute the sole basis for discipline. However, daily counts recorded in accordance with these procedures may be used by the parties in conjunction with other management records and procedures to support or refute any performance-related discipline. This does not change the principle that, pursuant to Section 242.332 of the M-39, **“No carrier shall be disciplined for failure to meet standards, except in cases of unsatisfactory effort which must be based on documented, unacceptable conduct that led to the carrier’s failure to meet office standards.”** (Emphasis added [M-01444](#))

Other national level settlements addressing related issues include:

MSP does not set service standards, either in the office or on the street. With current technology, MSP records of time scans are not to be used as timecard data for pay purposes. MSP data may not constitute the sole basis for disciplinary action. However, it may be used by the

parties in conjunction with other records to support or refute disciplinary action issued pursuant to Article 16 of the National Agreement. (M-01458)

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The Delivery Unit Volume Recording System is a management tool to estimate each carrier's daily workload. DWRS is not a precise measurement to determine whether standards are met. Accordingly, in city delivery units, daily volume estimation recorded in accordance with postal policy will not constitute the sole basis for disciplinary action for failure to meet minimum casing standards by an individual carrier discussions with letter carriers based upon DUVRS evaluations. (M-00364)

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The information of record-presented in this case clearly establishes that the grievant's route was evaluated on the basis of the performance of another employee who was carrying the route at the time. It is also evidenced that the employee on whom the evaluation was based was substantially younger than the grievant. Additionally, available information presented subsequent to our Step 4 meeting indicates that the grievant is using-assistance 'both in the office and on the street, overtime, and curtailing mail on almost a daily basis. On the basis of the information presented, we concur that the grievant's route is not properly adjusted. To this extent, we find the grievance is sustained. By copy of this letter, the postmaster is instructed to take immediate action to review the grievant's route as presently constituted, and take the necessary measures to assure that the route is adjusted to as nearly eight hours as possible. (M-00398)

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Under Article 16, no employee may be disciplined except for just cause. In this instance, the parties agree that a one day count and inspection may not be used as the sole basis to establish a standard against which a carrier's performance may be measured for disciplinary purposes. (M-00829)

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It is the position of the Postal Service that DUVRS provides the supervisor with an estimate of a letter carrier's normal daily workload and may be one of the factors considered by a supervisor when discussing a letter carrier's work performance. This does not mean that such a discussion will be of the type referred to in Article 16, Section 2, 1981 National Agreement. It can be merely a work-related exchange between the supervisor and the carrier with the DUVRS evaluation as a focus. DUVRS evaluations should not be the basis for a discussion concerning the letter carrier's efficiency held pursuant to Article 16, Section 2, since the efficiency of a letter carrier can more appropriately be determined by a mail count pursuant to 141.2, M-39 Handbook. (M-00498)

## Case Examples

It seems very clear from the aforesaid settlement agreement [M-39 §242.332] that [the grievant] could have been disciplined for failing to meet the casing standards only if it was shown that there was documented, unacceptable conduct that led to such failure. Here however, there was no such evidence. The fact that his supervisor may have repeatedly talked to him about his being the last to leave the office for his route, and that he may not have taken kindly to such criticism, does not constitute evidence of "documented, unacceptable conduct" that led to his failure to meet the casing standards. (C-08462)

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The Arbitrator finds then that there is no "documented, unacceptable conduct which led" directly to the grievant's failure to meet the 18 and 8 standard. The Postal Service argues, though, that the grievant had a long history of inefficiency. The Arbitrator does not believe, however, that the grievant's past record can be used to provide the evidence of "documented, unacceptable conduct" required by the 1977 settlement agreement, and the M-39 Handbook. In the first place, all of that prior conduct had already been the basis for disciplinary action and in itself could not again be so. Secondly, none of that prior conduct could reasonably be viewed as in any way leading to

the carrier's failure to meet the 18 and 8 criteria. On the contrary, the grievant's prior disciplinary record contained no offenses in any way related to casing of mail. Moreover, that prior record seems to indicate nothing more than what the Special Mail Counts demonstrated, viz. that the grievant through no fault of his own is not a worker who can meet minimum standards. However, in the case of the 18 and 8 casing standard, the parties have agreed that unculpable failure to meet that standard cannot constitute just cause for discipline. The Arbitrator, therefore, finds that the Service did not have just cause to remove [the grievant]. (C-08461)

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Finally, and perhaps most importantly, Postmaster Tolbert impermissibly based the suspension solely upon the Grievant's failure to meet numerical standards. This is but the latest skirmish in the long-running war over standards. No doubt it would be convenient for management to have a simple test to apply to employees suspected of loafing, and perhaps the 18 and 8 standard is a fair test. Whatever that standard's merits, the parties have agreed not to use it as the basis for discipline.

In 1975, in case NB-NAT-3233 [C-03237], national level arbitrator Sylvester Garrett ruled that, because management had unilaterally changed the meaning of the 18 and 8 standard by adjusting the size and configuration of carriers' cases, it could no longer use the standard for discipline. The parties implemented his award with a Step 4 settlement on July 11, 1977 (M-00386). That settlement prohibited discipline "merely for failing to meet" the 18 and 8 standard; instead, a supervisor had to charge an employee with "unsatisfactory effort" and to document that charge with specific incidents of unacceptable conduct. The Postal Service later embodied the same requirement in its Handbook M-39, Section 242.332. It is far too late now to ignore those agreements and rules, yet Postmaster Tolbert cited not a single specific flaw in the suspension letter he sent to the Grievant. If for no other reason, the discipline would have to be overturned because the Postmaster did not even comply with the Postal Service's own requirements for evaluating an employee's work. (C-07368)

## Supporting Cases

C-03237, National Arbitrator Sylvester Garrett, June 4, 1975

C-01482, Arbitrator Holly, March 9, 1981

C-07368, Arbitrator Nolan, September 3, 1987

C-08461, Arbitrator Collins, November 7, 1988

C-08462, Arbitrator Collins, November 7, 1988

# Falsification Employment Application

Article 12, Section 1.B of the National Agreement provides the following:

The parties recognize that the failure of the Employer to discover a falsification by an employee in the employment application prior to the expiration of the probationary period shall not bar the use of such falsification as a reason for discharge.

The Joint Contract Administration Manual (JCAM) explains this provision as follows:

Falsification of Employment Applications. This section provides that even if the Postal Service does not discover during the probationary period that an employee has falsified an employment application, the falsification may still be used as a reason for discharge. **However, this section does not change the provisions of Article 16.1 requiring that non-probationary employees may only be disciplined for “just cause.”** (Emphasis added)

Cases involving the deliberate falsification of employment applications (PS Form 2591) by withholding relevant information can be exceedingly difficult to defend. Arbitrators have denied, in whole or in part, over seventy-five percent of all NALC cases involving the falsification of employment applications. The January 7, 1974 decision by Arbitrator Richard Mittenthal, who went on to serve a long and distinguished career on our National Arbitration panel, exemplifies arbitrators reasoning in such cases: He wrote in [C-00642](#):

The Postal Service has a right to insist on truthful information from a job applicant. Without such information, it cannot evaluate the applicant’s fitness for employment. Falsification of a material fact, the effect of which is to induce the Postal Service to grant employment which would otherwise have been denied, is certainly “just cause” for discharge. It is a well-established principle in law and in generally accepted morals that a transaction induced by a deliberate and material false statement may be rescinded. This principle surely applies to the employment transaction, the act of hiring an employee.

Nevertheless, arbitrators do routinely sustain such grievances. Successful grievances usually involve the defense that there was no intent to deceive by the job applicant. Applicants can be legitimately confused about administrative, traffic or juvenile offenses or offenses that have supposedly been expunged (See [C-16524](#), [C-07218](#) below). In such cases they may give false technically answers without any intent to deceive. See also [Not Intentional](#), above.

## Case Examples

In my opinion, under the meaning of Article XII Section (B) the word “falsification” requires that; (1) an incorrect statement has been made on the application for employment; (2) the applicant knew the statement was incorrect; (3) and the applicant made the incorrect statement with the intention of hiding the information from the Employer. All 3 requirements must be present for falsification to take place; but, in opinion, none of the requirements took place in the instant grievance. ([C-00076](#))

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The issue in this case is whether [the grievant] was guilty of falsification of his application for employment, whether he made a deliberate and material false statement on his application form.

I find, accordingly, that [the grievant’s] failure to mention the January 1970 conviction in his February 1973 employment application was not a deliberate false statement on his part. He answered the question regarding offenses against the law in the affirmative. He then referred specifically to the “suspension of [his driver’s] license”

on February 1, 1973. He did not refer to the January 1970 conviction but his omission was obviously made in the belief, conscious or unconscious, that this conviction was no longer a part of his record. In this situation, it would be grossly unjust to rule that he willfully falsified his employment application. The proofs simply will not sustain such a position. (C-00642)

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The essence of the dischargeable offense of falsification is the employees (sic) dishonesty that requires a finding of intentionally issuing a false statement, as distinguished from a reasonable mistake, in direct conflict with the necessary characteristic of a letter carrier that he must always be trustworthy. Thus, the critical question is not just whether the Grievant had in fact been fired, or forced to resign from a former job, but whether he misrepresented the known fact in order to be accepted for employment. In addressing this factual question, the employee must be presumed innocent with the Employer bearing the burden of rebuttal by clearly establishing fraudulent intent. (C-01988)

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I do not mean to imply that the Employer is barred from using the application as grounds. I do believe, however, that the specific inclusion of the right during the probation period gives the Employer greater rights than it can expect later. Thus, the contract shows an intent, both as to the merits of the charge, and the review of discipline should an application charge be proven, that the Employer bears a greater burden following the probation period than during it.

It thereby follows that an employee who has, in the meantime, demonstrated himself to be a good employee must be given full credit for this fact in the arbitrator's determination. As the concept applies to this case, Mr.[Z] characterized grievant's quality as a "fine employee". This demonstrates above average quality and cannot be ignored. This is an example of the broad rights granted under Article 12.1.8 during the probationary and the "lesser" rights discussed above. It is now premature to remove or discipline grievant for private acts which have not been shown to affect Employer's reputation.

There can be no fraud so long as the grievant reasonably believed he had no duty to report. Fraud can only occur if the grievant knew or should have known that he had a duty to report the specific facts. (C-07218)

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Although the Employer's documents and testimony showed an incorrect answer to item #18 in the Grievant's application for employment, it did not establish that the answer was made with the intent to mislead or deceive the Employer. The Grievant convinced the arbitrator that she acted on advice, which may have been misunderstood or wrong, but acted in good faith without intentionally and deceitfully misleading the Employer or evidencing dishonesty

In contrast to the reasonableness of the Grievant's statements and explanations, I concluded the Employer failed to show, by the actions, statements, or other behavior of the Grievant, that she intentionally and willfully attempted to deceive the Employer in order to get employment with the Service. The grievance was sustained, and a remedy was in order. (C-08295)

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The point is that the grievant, in good faith, could have believed that his fine and suspended sentence did not amount to a "conviction." The arbitrator received no evidence to counter the grievant's version of events when he completed the employment application form for the Postal Service. Hence, there is no reason to find that his testimony is not credible, and doubts have been resolved in his favor. (C-09365)

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While there is no doubt that the information given by the Grievant is controverted by the information supplied by the State of Florida, there is considerable doubt that the Grievant deliberately and knowingly supplied the Service with false information concerning previous industrial injuries. Further, even if the Grievant had supplied the Service with misinformation without the intent to mislead the Service, if the actual facts were such as to render the Grievant unfit for the job, removal might have been justified. However that allegation was not made and therefore will not be considered. (C-16524)

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In many cases involving Article 12 falsification matters, there is a criminal act, that on its face is not something one could overlook, forget, or somehow not be aware that it should be reported on the Application Form in question 7a. However, as these matters go from the obvious criminal, to more administrative or traffic offenses it may not be clear and obvious that these are the offenses for which a criminal record is established.

This Arbitrator agrees that if Unacceptable Conduct is the charge then there is an obligation to show that there was intent to deceive for culpability to rise to the level of removal, if any reasonable doubt exists as to whether the

record shows a crime in the history of an applicant. Incorrect information without some basis upon which to determine it was offered to deceive cannot stand the test of just cause under the facts and circumstances found in this record of evidence. (C-26009)

## **Supporting Cases**

C-00076, Arbitrator Schedler, February 24, 1982  
C-00642, Arbitrator Richard Mittenthal, January 7, 1974.  
C-01988, Arbitrator Foster, August 7, 1981  
C-07218, Arbitrator LeWinter, June 20, 1987  
C-08295, Arbitrator McCaffree, August 22, 1988  
C-09365, Arbitrator Snow, September 1, 1989  
C-16524, Arbitrator Menzies, March 9, 1997  
C-19452, Arbitrator DiLauro, May 5, 1999  
C-26009, Arbitrator Dilts, June 17, 2005



## **Nexus—Discipline for off-duty misconduct**

Most discipline issued to letter carriers involves alleged work related misconduct. However, what letter carriers do off-duty, if it is serious enough, can also lead to discipline or even removal from the Postal Service. It is not always sufficient to argue that the employer's interest in an employee's behavior stops when the employee punches out. The reason that an employee's activities on his or her own time can result in discipline is found in the concept of "nexus."

The American Heritage Dictionary (2nd College ed., Houghton Mifflin Co. 1991) defines "nexus" as "a means of connection; link or tie." In labor relations, "nexus" refers to the logical connection between two things: (1) an employee's off-duty misconduct and, (2) any harm to the employer's ability to maintain, and protect its business.

If the employer can prove a strong nexus between an employee's off-duty misconduct and some harm to the operations or reputation of the business, then arbitrators will uphold employee discipline. In a case of discipline or discharge for such conduct, it is the NALC advocate's task to attack the alleged nexus, showing that any connection between private conduct and the employer's business is too weak to justify discipline.

Be aware that nexus issues usually arise when the off-duty misconduct is very serious—often criminal—in nature. Arrests for theft, drug crimes, sex crimes, violence or threats or driving while intoxicated are often involved in such cases. Although such severe misconduct is uncommon among letter carriers, shop stewards may encounter a case of off-duty misconduct, which will require an understanding of nexus.

Discipline for off-duty misconduct often arises in the context of Article 16.6, Indefinite Suspension—Crime Situation. Where a 16.6 suspension is challenged, the union must address whether the Postal Service had "reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed." and whether there was a nexus between the alleged misconduct and the employers business. There may be additional complications, often involving back pay issues, where charges are dropped or the suspended employee is acquitted at trial. These issues are discussed under Indefinite Suspensions, Article 16.6 above.

### **Nexus: The Basic Rule**

Arbitrator Louis C. Kesselman wrote a widely-quoted definition of the issue of nexus:

The Arbitrator finds no basis in the contract or in American industrial practice to justify a discharge for misconduct away from the place of work unless:

- 1) behavior harms Company's reputation or product
- 2) behavior renders employee unable to perform his duties or appear at work, in which case the discharge would be based upon inefficiency or excessive absenteeism
- 3) behavior leads to refusal, reluctance or inability of other employees to work with him. (W.E. Caldwell Co., 28 L.A. 343, 436- 7).

Various writers have improved somewhat on this original formula. Here is a more complete statement of the criteria which arbitrators usually consider in cases of discipline for off-duty misconduct:

- 1) Damage to the employer's business or reputation
- 2) The unsuitability of continued employment in light of the particular type of misconduct
- 3) Impact of the grievant's reinstatement on fellow employees (who refuse to work with or be exposed to danger from the offender)
- 4) Unavailability of the employee due to incarceration

Arbitrators generally hold that for the employer to prevail in arbitration, it needs to prove any one of the four possible elements of nexus; it need not prove all or even most of them.

Arbitrators often see the fourth category, unavailability due to incarceration, as a matter of absenteeism. When an employee is in jail the employer can rely on a simple case of absenteeism rather than working much harder to establish one of the other proofs for nexus. The first three criteria are often hotly disputed in arbitration, and worthy of some detailed discussion.

## **1) Damage to the Employer's Business or Reputation**

Discipline or discharge for off-duty misconduct is likely to be upheld:

- (a) Where management can link the employee's conduct to a significant loss of business, or
- (b) Where management can show that employer's reputation has been tarnished.

The Postal Service is such an enormous business that it seldom attempts to prove that a single employee's off-duty misconduct has led to a substantial loss of postal business. Management advocates usually focus instead on the issue of harm to the Postal Service's reputation. Generally, an employer can show damage to its reputation by producing evidence of notoriety, and by showing that an employee works in a "visible" position.

**Visibility** is an easy thing for management to prove when the grievant is a letter carrier. Because carriers have regular contact with the public, arbitrators tend to find that their positions are visible and thus sensitive to public attitudes.

Arbitration Carlton Snow discussed the concept of nexus in a regional APWU case involving the indefinite suspension of a distribution clerk who had been arrested for a domestic dispute and charged with attempted murder, second-degree assault and burglary ([C-05983](#), July 16, 1981). The clerk was released after several days of incarceration and eventually he was convicted of a class "C" felony and placed on probation.

In his award Arbitrator Snow drew a distinction between distribution clerks and letter carriers in "nexus" cases:

Such behavior on the part of a letter carrier has a potential adverse effect on both the fiduciary relationship and "high profile" position of postal employees. Letter carriers are different from distribution clerks. Letter carriers meet the public at their homes or at their business. By virtue of their uniforms, they receive the public's trust in a way not experienced by someone such as the grievant in this case who never dealt with the public. The Postal Service cannot risk having that trust abused.

NALC advocates should be ready to face arguments that serious off-duty misconduct is especially damaging to a letter carrier's ability to continue performing the job, for the reasons Snow stated. (In this particular case Arbitrator Snow found the Postal Service lacked just cause; he sustained the Union's grievance and made the employee whole.)

Arbitrator Snow's award also discussed the question of whether the Postal Service's status as a public employer gave it a stronger claim when establishing the connection an employee's off-duty misconduct and its effect upon customers or other employees. Snow concluded:

In evaluating claims of harm to an employer's reputation, arbitrators generally have rejected any "per se" distinction between standards to be applied to public as contrasted with private sector employees. It is not relevant to an employer's reputation that a grievant is a public employee if his or her duties do not involve public contact and if the public is unaware of a grievant's arrest.

**Notoriety.** Some off-duty incidents become well-known in the community ("notorious") and others remain obscure, known only to immediate participants. In some cases an employee's arrest, say, for drug possession, is reported in newspapers or in other widely-seen media such as local television newscasts. If media reports also connect the individual to the employer, the employer can argue that the grievant has cast an unfavorable light on the employer, damaging its reputation.

NALC advocates should insist that management supply specific proof of such harm to reputation. Union advocates often face a management case that is full of moral condemnation for the grievant's alleged acts, but which is completely devoid of proof that the employer has suffered actual damage to its reputation.

Management's task is to show that there was publicity about the incident, that more than a few people learned of the incident from the publicity, and that postal patrons felt that the employee's behavior damaged their faith in the Postal Service.

**Severity of harm to reputation.** The nature of the particular off-duty misconduct colors the entire case, of course. Take, for example, a case in which the misconduct involved a carrier's arrest on a misdemeanor count of possession of marijuana. Even if widespread publicity surrounded the incident, a union advocate could argue that the misconduct was so unconnected to the carrier's job duties that the employer's reputation was not damaged. In cases of more serious misconduct, management sometimes presents testimony or written statements from postal patrons, stating that they do not want the grievant to deliver their mail ever again. If possible union advocates can counter, presenting other patrons to testify that they have no objection the carrier's continued employment. This kind of evidence crosses into the second type of proof of nexus.

## **2. The unsuitability of continued employment in light of the particular type of misconduct.**

Sometimes the employer argues that given the nature of the misconduct, a letter carrier can no longer do the job.

**Theft.** When the misconduct involves the issue of theft while off-duty, the union has a difficult job to do. Most arbitrators believe strongly that off-duty theft has a powerful nexus because letter carriers are entrusted with the handling of important documents as well as valuable registered mail materials.

For that reason, arbitrators regularly uphold disciplinary actions taken by the Postal Service when theft is involved.

**Moral turpitude.** Other difficult cases tend to involve behavior viewed as immoral, such as sex crimes, drug dealing, and violence or threats of violence. Nobody approves of such behaviors, which lawyers like to call acts of “moral turpitude”—a truly juicy legalism.

Yet management must present more than mere moral outrage to an arbitrator. Some of these behaviors may be amenable to rehabilitation, and grievant may have sought treatment or taken other steps to correct the problem. Given appropriate mitigating factors and a lack of publicity, a union advocate may be able to argue credibly that although the conduct was bad, it was isolated and not likely to recur, and it did not necessarily impair the grievant’s ability to deliver the mail. See for example [C-08805](#).

When very serious moral misconduct is involved attitudes of patrons and fellow employees can be central to the case. As noted above, patrons are likely to complain if they learn that their letter carrier is a convicted drug dealer or sex criminal. Fellow employees’ attitudes can be important as well.

### **3. Impact of the grievant’s reinstatement on fellow employees (who refuse to work with or be exposed to danger from the offender)**

When a carrier is accused or convicted of a serious wrong, management may present the grievant’s fellow carriers as witnesses, offering testimony that they do not want to work with the grievant. This kind of testimony can be powerful, but it also may be vulnerable to attack in some cases.

First, an advocate can point out that the letter carrier’s job is essentially solitary, requiring little direct teamwork or collaboration among groups of employees. So it matters little what one carrier thinks about another.

It also may be that while certain employees have strong religious or moral objections to certain behaviors, other fellow workers are more tolerant or forgiving. Moreover, attitudes change over time; consider the long-term change in public attitudes toward pregnancy among single women, homosexuality and alcoholism. When management presents one fellow employee who testifies that he will not work with the grievant, the advocate should seek out others to offer contrary testimony.

### **Advice for Advocates**

Advocates facing nexus issues must keep in mind that the Postal Service has the burden of showing the nexus to the employer’s reputation or operations. The employer must overcome the general rule that what employee does on his or her own time is a private matter.

Management often makes certain mistakes in cases involving off-duty misconduct. First, it fails to conduct an independent investigation of the facts, instead relying entirely on either the police report or the Inspection Service’s Investigative Memorandum (IM). Second, management tries to pursue nexus arguments even where the employee has later been acquitted or had the charges dropped.

Third, management often fails in nexus cases to provide concrete evidence of harm to the employer’s reputation. A management advocate may make a broad and indignant claim that the grievant’s misconduct is a moral outrage—and then sloppily fail to provide even a single customer letter

disapproving of the carrier's conduct. In such cases the advocate should argue that nexus has not been proven, given that there is no proof of harm to the employer and no direct relationship between the misconduct and the carrier's suitability for employment.

**Wait for the court case.** It is sometimes the best strategy for the union to seek a postponement of the employee's arbitration case until the criminal trial concludes. (Often the employee's criminal attorney will insist upon a postponement.) In the case of an indefinite suspension or removal, waiting may not relieve the employee's financial difficulties, of course. However, the chances for success will be much greater if the employee has been acquitted or has pled guilty to a much lesser charge. If the employee is convicted and imprisoned, the union's work on the case is likely finished.

**Further research.** The supporting cases listed below are a good starting point when preparing cases concerning nexus. Arbitration advocates should know that the NALC Arbitration Search program has a subject category "Off-Duty Misconduct (Nexus)," which indexes numerous other cases in this area.

## Case Examples

The first case example, Regional Arbitrator Snow's, June 14, 1994, decision in [C-13713](#) is quoted at length because it provides one of the best and most influential explanations of "nexus" in Postal Service cases.

### B. The Element of Just Cause

It is not enough that an employer successfully establish the "reasonable cause" requirement. Discipline for off-duty conduct requires a showing of nexus. The concept of nexus in arbitration refers to the need for certain minimum links between the off-duty conduct and the workplace. One arbitrator explained the concept of nexus as follows:

While generally an employee's conduct away from the place of business is normally viewed as none of the employer's business, there is a significant exception where it is established that the employee's misconduct off the premises can have a detrimental effect on the employer's reputation or product, or where the off-duty conduct leads to a refusal, reluctance or inability of other employees to work with the employee involved. (See *Fairmont. General Hospital* , 58 LA 1293, 1295 (11972))

The Merit Systems Protection Board would ask. (1) Whether the employer is able to show that the off-duty conduct adversely affected an employee's or co-worker's job performance or trust and confidence in the employee's job performance and (2) whether the off-duty conduct interfered with or adversely affected the mission of the agency. (See, *Moten v. U. S. Postal Service* , 42 MSPR 282, 287 (1989)).

In a case of this sort, the Employer needs to prove that there is some identifiable adverse effect or potential for such effect on the employer's business which is linked to the employee's off-duty conduct. A mere assertion that public confidence will be affected is insufficient. In such cases, one arbitrator has concluded that the employer needs to prove that:

Reasonable cause [exists] to believe [that] the continued employment, pending adjudication, would impair the efficiency of the service or have a serious adverse impact on employee-employer relationships, or have the potential of harming public relations and/or confidence in the service, or similar undesirable consequences . In the instant case, the employer only states the conclusion that the grievant's continued employment would impair one or more of these factors. More is required *of the employer than this*. There must be a showing that such events are likely to transpire. (See, Case No. AC-S-17,233-D, emphasis added).

The late Dean of the Yale Law School, Harry Shulman, stated firmly many years ago that "What the employee does outside of the plant after working hours is normally no concern of the em-

ployer. - Consequently, speculation and conjecture concerning an adverse effect on the Employer's business constitute insufficient proof. (See, *Ford Motor Co.*, Opin. A-132 (1944)).

A number of factors have emerged from arbitral decisions which support a finding of nexus. Such factors include, but are not limited to:

- (1:) Whether an employee was on duty at the time of the alleged activity; or
- (2) Whether the employee was in uniform at the time of the alleged activity; or
- (3) Whether the activity created an unsafe work place; or
- (4) Whether the employee was rendered by the activity to be unsafe to work with; or
- (5) Whether the activity affected or has considerable potential to affect the reputation of an employer's business; or
- (6) Whether the activity 'affects the efficiency of the business or
- (7) Whether there were customers or co-workers who complained about the activity; or
- (8) Whether the activity attracted media attention, and, if so, the prominence of any such communication.

This case involved a drug related offense, but that fact alone failed to establish nexus. There needs to be a showing of an effect on efficiency, safety, or reputation. The newspaper article, standing alone, might be evidence of nexus, but it provided insufficient evidence to comply with the just cause standard. The newspaper article in the *Statesman Journal* mentioned the grievant by name and included his address. Moreover, the grievant lived on the postal route he delivered. The arbitrator, however, received not a scintilla of evidence that any postal patron was aware of the grievant's arrest or that any patron was aware of a connection between the grievant and the U. S. Postal Service.

Nor did the arbitrator receive evidence to show any effect of the grievant's arrest or of the newspaper article on the Employer's business. The news article did not mention the Employer. One might want to assume that the grievant's neighbors knew of his employment, but modern day anomie and lack of community make it impossible to assume such connections in the absence of at least a scintilla of evidence. What the arbitrator received was an assertion of nexus without more. In the absence of proof, the Employer did not have just cause to suspend the grievant indefinitely; and no such proof has been submitted to the arbitrator.

Drug abuse is an unwelcome aspect of modern day life. Drug use can cause injuries on and off the job, poor attendance at work, unsatisfactory job performance, theft, -and 18 safety hazards. A goal of a drug-free workplace merits strong support. Substance abuse must not be permitted to compromise the Employer's commitment to its patrons, nor to standards of excellence and institutional integrity.

At the same time, there is a deeply-rooted commitment to personal privacy in the United States, and an employer is presumed to have no legitimate interest in an employee's off-duty activities unless the conduct is linked to the workplace in some reasonable way. In this case, there was no basis for presuming a link to the workplace, and evidence submitted to the arbitrator provided no basis for determining that one existed when management indefinitely suspended the grievant. In the absence of such proof, the indefinite suspension can not be upheld. (C-13713)

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The fundamental question in this case is whether just cause exists for the discharge. In disciplining employees for off-duty misconduct the federal courts have repeatedly held that there must be some nexus between the off-duty misconduct and the employee's job performance before a discharge will be upheld for off-duty misconduct. (C-08805)

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It is generally recognized that to support discipline for off-duty misconduct, management should be prepared to show that the employee's conduct had a readily discernable, harmful effect on management operations. For example: Did the conduct render the employee unable to perform the job satisfactorily and/or lead other employees to refuse to work with the offender? Did the misconduct adversely affect operations by creating publicity that harms the employer's public image? Without a showing of some adverse effect on the organization, arbitrators typically rule against discipline imposed for off-duty and completely unrelated activities. In this case there has been no showing that the alleged incident negatively affected the employment relationship (except in the minds of management who, in this Arbitrator's opinion, overreacted and imposed discipline not called for). (C-08625)

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Arbitral guidelines require the employer to establish a nexus between the off-duty conduct and the business of the employer before just cause for discipline exists. The employer's right to discipline or discharge an employee for off-duty conduct depends upon the effect of the conduct on the work environment. Factors frequently cited by arbitrators to evaluate off-duty misconduct are:

- 1 . Injury or harm to the employer's reputation or product ;
- 2 . Conduct which renders the employee unable or unsuitable to perform the work for which the person is employed;
- 3 . Whether the conduct causes other employees to refuse to work with the offender
- 4 . Whether the conduct has an adverse effect on business operations. Elkouri and Elkouri, How Arbitration Works, 4th Edition (BNA) pp. 656-60.

The burden in this case is on the Postal Service to establish that Grievant's off -duty verbal confrontation with the [S] adversely impacted on the Postal Service's business. Proof of such adverse impact must be by relevant and material evidence. Unsupported allegations that the employee's off-duty conduct negatively impacts on the Postal Service's operations is insufficient. The nexus between the off-duty conduct and Postal Service's operations must be reasonable and discernible under the National Agreement and the ELM. (C-14115)

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It can be stated with considerable confidence that an overwhelming majority of arbitration decisions , as well as judicial case law, support this fundamental premise , namely, generally , there has been found a discernible connection between an employee' s conduct and an employer ' s operation or public image . The arbitrator remains convinced it is the better rule that, to establish "just cause to suspend," the employer must do more than assert "all that is required is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment could be imposed . . . In other words, the Employer must establish a nexus between the alleged misconduct and the workplace. (C-24258)

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While some arbitrators have reached the conclusion that in cases wherein any type of drug related conviction is involved, there is sufficient nexus between the criminal conduct and employment to warrant removal, this Arbitrator believes that each case must be examined on its own facts to determine whether such a relationship exists. Several factors unique to the circumstances of this case convince the Arbitrator here that there is an insufficient nexus between the Grievant's conduct and his employment to warrant removal.

[T]here was no evidence presented to demonstrate that the Grievant's arrest and guilty plea brought any notoriety upon the Employer. There was no evidence of any press coverage, and further no evidence that the Employer had received any information in the form of customer complaints or otherwise to indicate that the general public was aware of the incident or concerned by the Grievant's continued delivery of their mail . In fact, the Grievant worked for eleven months after his arrest, and for four months after his guilty plea without incident. There was no evidence presented at hearing which would demonstrate that the Employer's speculation of public distrust or harm is other than simply that; speculation. It is further clear that the Employer has failed to present evidence which would demonstrate that the Grievant's co-workers find

working with him objectionable. The only testimony presented on this point was presented by the Union which presented the testimony of a co-worker . . .who testified that the Grievant's conviction did not bother her. (C-26048)

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Grievant's private life is his own. Unless and until the Employer proves that his private life negatively invaded his employment, it has no right to discipline grievant for acts he may commit. (C-07218)

## **Supporting Cases**

C-05983, Regional Arbitrator Snow, July 16, 1981  
C-06197, Arbitrator Williams, May 17, 1986  
C-07218, Arbitrator LeWinter, June 20, 1987  
C-08805, Arbitrator Render, March 31, 1989  
C-13713, Regional Arbitrator Snow, June 14, 1994  
C-14115, Arbitrator Axon, December 3, 1994  
C-14497, Arbitrator Edna Francis, May 20, 1995  
C-16691, Arbitrator Rehmus, April 28, 1997  
C-18435, Arbitrator Gentile, June 29, 1998  
C-18956, Arbitrator Ames November 30, 1998  
C-08625, Arbitrator Rentfro, July 26, 1988.  
C-24258, Arbitrator Snow, November 30, 1991  
C-26048, Arbitrator Braverman, July 6, 2005



## Workers' Compensation Fraud

In recent years The Postal Service has aggressively sought to reduce its workers' compensation costs. For example, the Service has increased the use of videotaped surveillance of employees who file Workers' Compensation claims resulting in a dramatic increase in the number of removals issued to employees for alleged misrepresentation of their physical condition.

Certain elements are common to every grievance concerning a removal for compensation fraud. In every case, the grievant will be an employee with a diagnosed physical condition. Along with that will be his or her physical restrictions normally outlined on a Form CA-17. The charge in the removal typically involves an activity (or activities) that the employee engaged in while on disability from work. Finally, there will be management's evidence that purports to show the employee misrepresented his or her physical condition in order get time off work while receiving Workers' Compensation payments. Nevertheless, they require different arguments in arbitration due to varying factual circumstances.

### Failure to Provide Requested Information

Article 15.2 of the JCAM requires the parties to fully disclose all arguments and facts at the grievance levels prior to arbitration. The JCAM states on page 15-5:

The Postal Service is also required to furnish to the union, if requested, any documents or statements of witnesses as provided for in Article 17.3 and Article 31.3.

Article 31, Union-Management Cooperation, provides that the "Postal Service will make available to the union all relevant information necessary" for the processing of a grievance. When a case file indicates that management has failed to provide requested information to the union, an advocate should be prepared to argue this violation of due process rights.

In the August 29, 2005 decision [C-26138](#), Arbitrator Helburn excluded a surveillance videotape from evidence after management refused to provide it in response to union requests. In an award reinstating the grievant with full back pay, the arbitrator addressed the videotape evidence as follows:-

The videotape needs little discussion. While it was shown at the investigative interview, the union was not given a copy then and later requests for a copy went unfulfilled. The National Agreement clearly requires both parties to make existing available evidence and argument during the grievance procedure and to jointly assemble the grievance file. When legitimate union requests for information have not been fulfilled and when the requested information is not in the joint file, the Postal Service should have no realistic hope of having the evidence admitted at arbitration. It does not matter whether the evidence was not forthcoming because of bad faith or simply administrative oversight. Either way, the National Agreement tells the arbitrator not to admit the disputed evidence if an objection is raised.

Videotapes are not the only information that management sometimes fails or refuses to supply. In [C-24273](#) (May 10, 2003), Arbitrator Keith Poole issued a ruling regarding the Postal Service's refusal to supply copies of a postal inspector's notes to the union, despite the steward's request for them by certified mail. The Service ultimately provided the notes, but not until the second day of the arbitration hearing

The Service argues that it did ultimately provide the information in question and therefore, any violation was cured. For the reasons which follow, this argument is not per-

suasive. . By waiting until the second day of the hearing to provide the requested information, the Service prevented the union from making effective use of this information in the grievance procedure or at the hearing. Since the notes were central to the union's efforts to defend [the grievant] against this charge and since the failure to provide the notes was a clear violation of Articles 17 and 31, I conclude that the only appropriate and meaningful remedy is to dismiss Charge 4 in its entirety. Any lesser remedy would allow the Service to rely on Charge 4 and would have the effect of rewarding the Service for its failure to provide necessary and relevant information which was central to a charge in a termination case.

In [C-23831](#), the union had submitted requests for videotapes and the postal inspector's handwritten notes—requests that were both ignored. In his October 25, 2002 decision, Arbitrator Claude Ames rescinded the removal by ruling:

The issue of most concern to the Arbitrator in this case is the conduct by the Employer of failure to produce evidence. . . The union was not provided factual information upon which to investigate the case, in a sufficiently timely manner so as to exercise its appropriate representational role. That conduct was improper, prejudicial to grievant's due process rights, and suggestive of evidentiary weaknesses in the case presented by the employer.

### **The Meaning of Disability**

People often think in terms of a physical handicap when they think of the word "disability." However, the law defines "disability" differently in 20 CFR 10.5, where it states, "the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury."

So in workers' compensation, "disability" means an injured employee's reduced ability to earn wages—and not his or her ability to engage in off-work activities. This is significant because an outside observer, including an arbitrator, might make the assumption that "total disability" means an inability to do anything—whether at work or off work, when in fact, it means something else altogether in terms of OWCP

The purpose of the CA-17 is to identify an employee's ability to perform specific tasks while at work. The form itself is called the "Duty Status Report." The physician who fills out the form reads the "usual work requirements" on the left side (Side A) of the form, as filled out by the supervisor. The physician then fills in the right side of the form for each specific physical requirement, where the form asks: Is "employee able to perform regular work described on Side A?" In [C-25843](#), Arbitrator Herbert Marx observed the distinction between restrictions in the workplace vs. non-workplace in his March 24, 2005 decision:

In the literal sense, a "totally disabled" person is one who is incapable of virtually any activity, or certainly any work-related activity. The phrase, however, has a quite different specific meaning when utilized in relation to injury diagnosis, injury reporting, or compensation liability. The Arbitrator believes it entirely reasonable that the Postal Service is aware of these quite separate meanings. As cited by the union, this is definitively resolved in [20 CFR 10.400] . . . and states as follows: "b) Temporary total disability is defined as the inability to return to the position held at the time of injury or earn equivalent wages, or to perform other gainful employment, due to the work related injury. . ." It is obviously in the sense—and this sense only—that the physician and, later, the surgeon stated that [the grievant] was "totally disabled." They are expressing the medical judg-

ment that the injured employee should not be working. . . What the phrase is not intended to mean is that the employee is unable to continue some or most ordinary activities. . .” (C-25843)

In late 2003, a letter carrier injured his back while lifting mail. The Postal Service issued him a removal after videotaping him running various errands including visits to his physician’s office and picking up prescription medicine. Arbitrator Imhoff issued a September 2, 2003 decision in C-24605:

The fact that during the period after November 15, the grievant was seen going for a doctor’s appointment. . . picking up the prescription and x-rays and performing another errand does not mean that he was able to return to work. [The doctor] examined the grievant on November 12 and found that he still was unable to perform the duties of his job description as listed on the CA- 17. That did not mean that the doctor’s diagnosis was that the grievant was physically incapable of performing those activities, as the Postal Service suggested. It meant only that [the doctor] did not want him performing them at work.

Arbitrator Imhoff pointed to the physical restrictions on the CA-17 and applied them only to the duties required while working on the job. Imhoff did not apply those same restrictions to the grievant while at home or running errands.

The grievant was physically able to stand, sit, walk and twist his neck, but the doctor believed that doing so with the frequency required on the job could possibly do him harm. (C-24605)

Arbitrator Cohen took a similar position in C-25941 (April 28, 2005). The Postal Service in that case issued a removal after discovering that the grievant had played slot machines at casinos while off work on doctor’s orders. On the CA-17 the grievant’s physician had listed zero as the number of hours he could perform letter carrier duties.

Although the grievant’s doctor found that he was unable to perform any letter carrier duties, he never medically restricted his personal activities. . . Performing the duties of a letter carrier for 8 hours per day is a physically demanding task. The letter carrier is on his/her feet the majority of the day while constantly lifting or carrying mail. The grievant was not observed performing laborious tasks at his home or elsewhere. In fact, the grievant was only minimally observed driving and only once observed pacing while talking on his cell phone. Neither of such activities is equivalent to performing the duties of a letter carrier, or light duty, for 8 hours. Nor are visits to the casinos to play slot machines conclusive evidence that the grievant could perform light duty work. Because the grievant’s doctor did not restrict his outside activities, he obviously felt free to continue visiting the casinos while recuperating from the accident.

### **Lack of Evidence**

In the same case, Arbitrator Cohen rejected the Postal Service’s argument that the grievant must have misrepresented his physical restrictions to his physician. The Service provided no evidence to support that charge—just its assumption based on the videotape of the grievant engaged in off-work activities. To management, a videotape equals automatic evidence of misrepresentation. Arbitrator Cohen disagreed:

Although the employer implied that the grievant must have misled his doctor about his medical condition, the record is void of any evidence, other than pure speculation, that he did so.

Arbitrator Claude Ames also rejected a management attempt to prove misrepresentation solely through a videotape, in [C-23831](#) (October 5, 2002). Arbitrator Ames's decision made it clear that a videotape was insufficient to support such a charge.

There was no direct evidence that grievant told [the doctor] that he was unable to walk, sit, stand, drive, bend, twist, etc., for more than the work limits prescribed. . Evidence must exist in order to prove a contested issue. Here, without the testimony of [the doctor] as to what grievant actually said, the occurrence of his alleged misrepresentation has far less support by competent evidence. The circumstances and content of grievant's contacts with [the doctor] are necessary to identify the alleged misrepresentations with specificity. Concerning the claim that grievant misrepresented the severity of his injury, the only one who could support and corroborate that argument was [the doctor], and there was no testimony from him in this matter or any matter.

Managers made assumptions in another case as well. For example, Arbitrator Mark Lurie's decision in [C-24027](#) concerned an employee who suffered a dog bite and was taken off work by the attending physician. The doctor's notation on a CA-16 that the grievant was "totally disabled" was the Postal Service's only evidence that the grievant had misrepresented her condition to him. Arbitrator Lurie's February 8, 2003 decision discounted this evidence as insufficient to prove misrepresentation had taken place.

The Service's evidence that the grievant overstated her injuries to [the physician]. . . . consisted of [his] statement on the CA-16 that the grievant was totally disabled. This is not direct evidence but rather a logical inference. Direct evidence would have been [the physician's] statement to a postal inspector that the grievant had, in fact, overstated her injury. . . The grievant's activities exceeded her prescribed limitations and risked exacerbation of her purported condition. However, it is one thing to find that the grievant acted in derogation of her medical restrictions, and it is another thing to find that her doing so proved that the restrictions were obtained through deceit in the first instance. As the Arbitrator has already stated, the Service had the opportunity to investigate and prove deceit; it instead relied on inference. ([C-24027](#))

### **Lack of Intent**

Advocates should be ready to argue that the grievant's actions, even if proven, were not the result of any intent to commit fraud or misrepresent. The national parties address the issue of intent in the JCAM, under Article 16.1:

**Examples of Behavior.** Article 16.1 states several examples of misconduct which may constitute just cause for discipline. Some 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. The parties agree these behaviors are intended as examples only. Management must still meet the requisite burden of proof, e.g. prove that the behavior took place, that **it was intentional**, that the degree of discipline imposed was corrective rather than punitive, and so forth. (Emphasis added.)

Arbitrator Joseph Brock cited this paragraph in his November 2, 2004 award ([C-25557](#)). Brock reinstated an employee with full back pay in part because of management's failure to prove the grievant intended to deceive.

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"

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.

In another case Arbitrator Keith Poole pointed out that employees are not always familiar with OWCP forms. They may make mistakes that are not automatic evidence of intent to misrepresent. [C-24273](#), May 10, 2003.

To prove falsification, one must prove a party knowingly made a statement with the intention of deceiving. Falsification can be proven either by an admission or it can be inferred from the evidence . . . OWCP is a specialized area, and this was the first time [the grievant] filled out a CA-7 form. . . I conclude the Service has not met its burden of proving [the grievant] made a false statement because the Service has not shown the statement was made with the intention of deceiving.

### **Doctor's Orders**

An argument can also be made that an injured worker was merely following his or her doctor's orders. It is the physician who fills out the restrictions on the CA-17, not the employee. It is the physician who determines whether an employee is able to work or not and, if so, with what restrictions. Some arbitrators have ruled that an employee cannot be held accountable for physical restrictions that were determined by the attending physician. Here are three examples, with brief quotations:

In sum, when an employee is found physically unfit for duty by a physician, and the Postal Service believes otherwise, the Postal Service's argument is with the physician, not with the grievant. ([C-25843](#), Arbitrator Herbert Marx)

The important fact in this case is that the grievant was not released by his doctor to return to work in any capacity until November 29, 2004. The grievant was following the instructions of his treating doctor when he did not return to work. ([C-25941](#), Arbitrator Cohen)

He followed his physician's prescribed course of treatment and returned to work when his physician was assured that he could do so without subjecting himself to further injury. ([C-24605](#), Arbitrator Imhoff)

### **Supporting Cases**

[C-23831](#), Arbitrator Claude Ames, October 5, 2002  
[C-24027](#), Arbitrator Mark Lurie, February 8, 2003  
[C-24273](#), Arbitrator Keith Poole, May 10, 2003  
[C-24605](#), Arbitrator Imhoff, September 2, 2003  
[C-25557](#), Arbitrator Joseph Brock, November 2, 2004

C-25843, Arbitrator Herbert Marx, March 24, 2005

C-25941, Arbitrator Cohen, April 28, 2005

C-26138, Arbitrator Helburn, August 29, 2005

C-28016, Arbitrator Irving, May 25, 2007