



Stewards & Investigatory Interviews: *Not Just a Silent Observer*

In prior issues of *Union Time*, we described the scope of an employee's right to union representation during investigatory interviews. Any time that management questions an employee to obtain information and the employee has a reasonable belief that discipline may result from what he or she says, the employee has a right to request the presence of a union representative — usually a union steward — before or during the interview. This is the so-called *Weingarten* right, named after the Supreme Court decision which held that an employee has a right, under Section 7 of the National Labor Relations Act, to have a knowledgeable union representative present whenever he or she is interviewed by a supervisor, Postal Inspector, OIG Investigator, or other management official, and the employee has reasonable cause to believe that discipline may result from that interview.

The question addressed in this article is the appropriate role to be played by the steward in a *Weingarten* interview. In some ways, the role of the steward is limited, but at the same time a steward's presence in such a meeting is a benefit that should be used to its full advantage.

The obvious benefit of having a steward present during an investigatory interview (whether in person or on the telephone) is that such representation allows for a more accurate investigation of the mail handler, and prevents that employee from speaking carelessly out of fear of discipline. The purpose of representation is to protect the union employee; therefore, it is important for stewards to understand the limits placed on their role in order to learn how to work around them to the employee's advantage.

Labor law does not entirely stipulate what a union representative can and cannot do in an investigatory interview, but there are some general rights a steward is entitled to exercise, as well as some boundaries he or she must respect.

And remember, if the Postal Service refuses to afford a steward all of the rights to which he or she is entitled during a *Weingarten* interview, that itself is a violation of the National Labor Relations Act.

One important issue that arises frequently is whether a steward can demand that he or she attend an investigatory interview when the steward has knowledge that such an interview is upcoming. In these situations, stewards can demand that they attend, even if the employee does not make the request him or herself. In such an instance, the employee can accept or decline the steward's presence, but the employer may not forbid the steward if the employee accepts.

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The Postal Service is not required to permit more than one representative in the interview, and can limit union representation to one properly certified steward who is available at the relevant time. But if two representatives are equally available, then the Postal Service has no right to decide which steward may serve as the *Weingarten* representative, for that decision is up to the union officials (unless the Postal Service can establish special circumstances that would warrant precluding one of the two stewards from serving as the representative). Should the issue ever arise, employers also are not permitted to ban off-duty employees from

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attending a *Weingarten* interview as a union representative, unless there is a clearly stated policy that has been disseminated to all employees stating that no off-duty employee, unionized or non-unionized, may enter the building for any purpose (the policy cannot be discriminatory against union business). Therefore, in the Postal Service, an off-duty steward may be requested to come in and serve as a *Weingarten* representative.

However, if there is another steward more readily available that can serve as the representative, management need not wait for the preferred steward to arrive.

Upon being requested to serve as a union representative during a *Weingarten* interview, the first action the steward should take is to request the subject matter under investigation. The steward is entitled to such information, for without such information the steward is not fully prepared to protect and aid the employee to the best of his or her ability. At the same time, the Postal Service is not obligated to hand over any documents or disclose any facts which may be used as evidence against the employee during the interview. Although the Postal Service is under no obligation to give up such information, there certainly is no reason not to request more information than is required from the employer, with the understanding that if management denies an overbroad request for information prior to the interview, then the steward would have to accept this refusal and proceed with the representation.

The next step after learning of the reason for investigation is to confer with the employee under investigation, *in private and before the meeting begins*. The employer is required to allow for time before the interview begins for the employee and union representative to meet independently. It is important to note, however, that if the interview was scheduled in advance, then sufficient time already may have been given to allow the employee and union representative to confer, and the employer need not postpone the interview if the

employee-steward meeting runs into interview time. It makes no difference whether the union representative or the employee under investigation makes the request for a private meeting; both requests must be granted.

A separate issue is presented by a request for a private meeting between the employee and the steward during the investigatory interview; in these circumstances, the employer has discretion whether or not to permit the employee and/or the steward to call a private meeting during the interview. Fortunately, the Postal Service already has exercised that

discretion in favor of mail handlers and stewards; as a result, the wallet-size card issued by the Postal Service — entitled “USPS Supervisor Responsibilities Under *Weingarten* When Interviewing an Employee Where Discipline Might Result” — specifies that “if either the steward or the employee requests, adequate time must be given to them to talk privately before (or during) the interview.”

This is an important expansion of *Weingarten* rights that should be utilized whenever necessary. At the same time, the steward must recognize that excessive use of this right could negatively impact the employee whom the steward represents. For example, if the steward makes a habit of calling for a private meeting after every difficult question or every few minutes, then the Postal Service might be able to claim that the steward is obstructing the interview process. Thus, this advantage should be used carefully, and perhaps only when strategically appropriate.

Once the interview begins, the role of the steward as “advisor” becomes much more constrained because of the presence of the employer’s representatives. Therefore, the private meeting before (and possibly during) the interview is the optimal time for advising the mail handler, and is best spent collecting the facts, learning of others who might be involved or have knowledge of the incident, putting together a list of potential questions that might be posed to the mail handler during the interview, and strategizing about the best possible ways to answer expected questions without circumventing them. Evading all questions often



is not a useful technique during the interview, especially if the employee's evasion could be converted into further discipline for refusing to cooperate with an investigation or could leave management with the impression of guilt. Therefore, stewards generally should advise against not answering questions, although different circumstances certainly could justify different advice. (One common but different circumstance that may be presented is a situation in which the questions and interview are investigating potentially criminal conduct. In these circumstances, the employee has additional rights under *Garrity* and *Kalkines*, both of which were fully addressed in an earlier edition — Volume I, Issue 1 — of this newsletter. In this situation, it may be appropriate for the steward to advise the mail handler not to answer the question, or at least to remain silent, until the employee has an opportunity to consult with an attorney.)

If the steward actually instructs the employee during the interview not to answer a question, and there are no possible criminal charges that would allow the employee not to incriminate him/herself, then the steward could be asked to leave the interview, or even disciplined if this behavior becomes repetitious. At the same time, the employee being investigated cannot be subject to discipline based on the steward's behavior. Thus, if the Postal Service threatens the mail handler with punishment if his or her steward behaves a certain way, that is a violation of the Act. If the mail handler, on the other hand, takes the steward's advice (however erroneous if may be) and refuses to answer appropriate questions, then management may decide to issue discipline for refusing to cooperate.

Although the steward is not permitted to tell the employee not to answer questions or not to cooperate with the interviewer, the steward is not required to remain a "silent observer" during the interview. Stewards are afforded the right to participate verbally during the interview process, and the Postal Service may not prohibit the steward from speaking to or looking at the employee during the interview. *Weingarten* rights are intended to allow for mutual aid and protection of employees who have reason to believe they are going to be disciplined. During investigatory interviews, therefore, a union representative should be present to help articulate what the employee may be too fearful to articulate himself or herself, to prevent the employee from potentially hostile behavior, and to prevent the employee

from disclosing too much information out of fear, thereby unintentionally or falsely incriminating himself or herself or others. The steward also is there to provide assistance and counsel to the employee, and may do so by suggesting how the employee might answer a question, or by requesting that the management representative clarify or rephrase a question. At the same time, the job of the management representative is to conduct an investigation, and the steward may not unreasonably interfere with that process.

Since both the employee and the employer have rights that must be acknowledged, there exists a fine line between advising the employee and obstructing the interview. The steward cannot turn the interview into a forum for an adversarial contest or for collective bargaining. The steward also does not usually have the right to object to repeated questions, although interjecting that a question already has been asked and answered is a common and accepted method of taking control of an interview. Nonetheless, repetitious questioning or phrasing the same question in different ways is considered a legitimate technique for investigatory interviews, and any attempt to prevent the employer from repeating questions could be perceived as a concerted effort to impede the employer's prerogative of conducting an interview.

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If the employer's questions are abusive, misleading, badgering, confusing, or harassing, then the steward has the right to object to those questions to protect the employee. However, the most practical approach to a question in dispute is to ask for clarification or rephrasing, as opposed to asserting an outright challenge or objection to the question, if only to avoid obstructing the basic purpose of the interview. As a practical matter, after a few questions are properly corrected or clarified by the steward, management will be less likely to continue asking inappropriate questions.



While the steward may offer suggestions to the employee as to how he or she might respond to a question, the management representative retains the power at all times to insist that he or she is only interested in what the employee under investigation has to say, and is not interested in what the steward has to say. At that point, the steward is under an obligation to let the employee speak. When the interview is over, the steward is then free to express his or her views and to provide his or her input, keeping in mind that the objective is not to bargain or debate, but rather to represent. This is a time to clarify anything the employee has said during the interview, as well as a chance to explain any extenuating factors which give explanation to the employee's conduct leading up to (or even during) the investigation.

The steward also may use this time to suggest other people who might be able to provide more information with regard to the issue under investigation; the steward should refrain, however, from making accusatory comments against others, especially other members of the mail handler bargaining unit.

In short, the purpose of *Weingarten* rights is to provide for a fair investigation of an employee's behavior by allowing a union representative to be present at an interview and an active participant in the interview process. The steward is much more than a silent observer. The law is not meant to give the employee any advantage over the employer, but rather to make the investigation fair for both parties. That said, it should be stressed that both the mail handler and the steward have rights that must be respected, without interfering in the employer's right to investigate employee misconduct.

The most important points to remember are that:

1. A steward may request to serve at a *Weingarten* interview if the steward is aware of an interview that is going to occur without union representation;
2. Time must be allotted both before and during the interview for the employee and steward to confer;
3. Stewards are allowed to speak during interviews, but generally may not tell the employee not to answer questions and may not obstruct the interview process;
4. Stewards can offer suggestions on how to answer a question and can object to questions that are abusive, misleading, badgering, confusing, or harassing;
5. After the interview, the steward may clarify or explain the employee's comments, may suggest additional witnesses or other avenues of investigation, and may suggest extenuating factors to explain the employee's conduct that is under investigation.

For further guidance, contact your CAD Representative and/or review Article 17 of the Contract Interpretation Manual.

Past Issues of *Union Time* are now available for your convenient reference on the Mail Handlers website by accessing **MAILS.**



Sammy Sez: Bereavement Leave

In last year's collective bargaining, the NPMHU and the Postal Service agreed to a new Memorandum of Understanding to govern Bereavement Leave. This was a long-sought objective of the NPMHU — indeed, if I recall correctly, in every round of National negotiations since 1993 the NPMHU has been seeking to obtain bereavement leave benefits for all mail handlers.

The new MOU specifically provides that “NPMHU represented employees may use a total of up to three workdays of annual leave, sick leave or leave without pay, to make arrangements necessitated by the death of a family member or attend the funeral of a family member.” For these purposes, a family member is defined as a (a) son or daughter — a biological or adopted child, stepchild, daughter-in-law or son-in-law; (b) a spouse; (c) a parent; (d) a sibling — brother, sister, brother-in-law or sister-in-law; or (e) a grandparent. These definitions are generally applied by local management in a literal fashion. For example, a mail handler can get bereavement leave for the passing of a son- or daughter-in-law or a brother- or sister-in-law, but not for a mother-in-law, a father-in-law, or a grandparent-in-law. In discussions with Postal Headquarters, some management representatives seem to be more sympathetic towards bereavement leave for parental in-laws, but nothing in writing has been issued on that subject.

Several other rules are set forth in the MOU as well. First, if sick leave is used to obtain paid bereavement leave, then the sick leave is charged to the employee's total allowance for sick leave for dependent care for the leave year, which currently is maxed out at eighty (80) hours per year. This does not mean that a mail handler cannot obtain bereavement leave beyond 80 hours in a year (if, for example, the employee suffers from four deaths in his or her family in that year), but only that other uses of sick leave for dependent care in that year may be limited. Second, authorization of leave for beyond three workdays, even for bereavement purposes, is subject to the conditions and requirements of

Article 10 of the National Agreement, Subsection 510 of the Employee and Labor Relations Manual and the applicable local memorandum of understanding provisions. So the three days of bereavement leave is a minimum allowance, and certainly could be extended pursuant to other leave regulations. Third, documentation to evidence the death of the employee's family member is required only when

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the supervisor deems documentation desirable for the protection of the interest of the Postal Service. In many circumstances, when the supervisor has no reason to believe that the interests of the Postal Service are at stake, the employee's request for bereavement leave should be approved without documentation.

I often am asked whether absences due to bereavement leave may be cited against mail handlers in discipline, or whether such absences are protected against discipline like absences protected under the Family and Medical Leave Act. The Postal Service holds the position that bereavement leave absences are not so protected, but as a practical matter absences legitimately taken for bereavement purposes should be insulated from discipline. If the employee is away from work on bereavement leave and is seen at a local hockey game, however, all bets are off.

I wish you and yours a happy holiday season.

Fraternally,

Sam D'Ambrosio

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"The great aim of education is not knowledge but action."

~ Herbert Spencer

A good Union representative is always learning, not only from his or her own experience, but also from the experiences of others.

All of our Union brothers and sisters depend on their Union representatives to present their grievances and arbitrations in an effective manner. And one way to keep alert to alternative approaches and strategies is to read the results — the wins and the losses — of actual arbitration decisions. Indeed, frequently the eventual outcome of an arbitration hinges on the quality of the grievance investigation and documentation that is initially completed by the Union steward.

Your best source to obtain copies of actual arbitration awards is the NPMHU's own web-based MAI LS system (Mail Handlers Arbitration Interactive Library Search System). If you have not done so already, sign up for your own username and password on the NPMHU webpage. MAI LS is fully searchable, and it is a valuable resource that every Union representative should be taking advantage of. Should you need more information about the MAI LS system, please feel free to contact the Contract Administration Department at NPMHU Headquarters in Washington, DC.

DISCLAIMER: *The arbitration awards described might be helpful to you; but remember, these are summaries only. You should review the complete decision before deciding whether and how a particular decision might help in the handling of a pending grievance or arbitration.*

National Labor Relations Board: Decision and Order – United States Postal Service and APWU, East Bay Area Local, Case 32-CA-10209(P) (NLRB Three Member Panel, 6/21/1991)

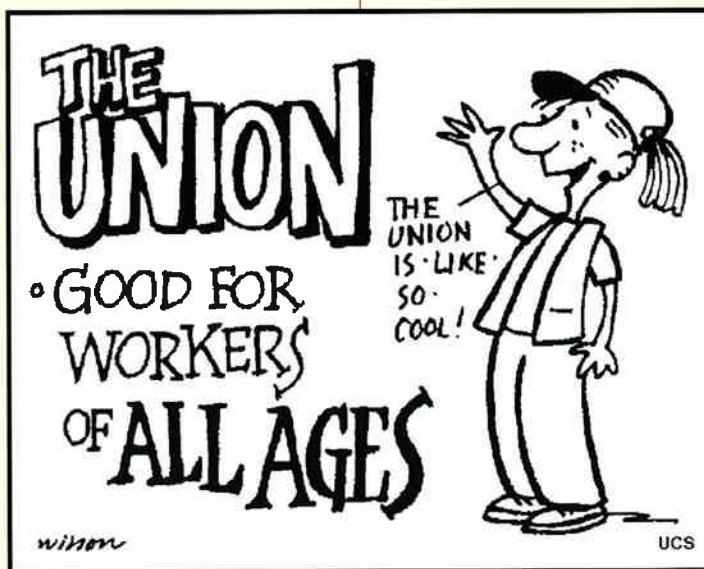
CASE NO.: 303 NLRB No. 75

BACKGROUND: Benjamin Salvador, who had been employed by Postal Service since 1977, was on March 9, 1989 employed at the Postal Service's Fremont, California main post office as a business reply clerk. One of his duties was to maintain business reply accounts, also known as postage due accounts, for approximately 200 customers who used

business reply mail. Each day Salvador credited to the customers' accounts the money received from them and debited to their accounts the dollar amount of their business reply mail received that day in the post office.

In March 1989, Salvador's supervisor, Albert Young, received a complaint from a company about its business reply mail account. On March 8, Young told Salvador that the

company complained that there were approximately five instances where improper dollar amounts were applied to its account. Salvador replied by stating he did not have sufficient time to process all of his customers' accounts, that he was only allotted one hour a day to do that part of his job, and that one company's account was very time-consuming because it required extra paperwork; he therefore told Young that he had been unable to finish balancing the complaining company's account, and further explained to Young that he had debited another customer's account so as to keep the complaining company's account in balance. Salvador, who had first begun work as a business reply clerk in February, told Young that



the person who trained him to do the job advised him that it was appropriate to do this. Young responded by stating he was not happy about the manner in which Salvador was doing his job and instructed him to correct his errors. Young gave no indication to Salvador that he was thinking of disciplining him; nor did he indicate to Salvador that he intended to refer the matter to the Postal Inspection Service.

After speaking to Salvador, Young contacted Postal Inspector Michael Cassidy, and met with him the next day to discuss Salvador's alleged misconduct. Young told him, "There was a potential for [Salvador] to be working in collusion, to be getting a kickback, a favor, monies, or whatever, from one of the firms as a result of charging another company for a different company's mailings. . . . [so] I thought there was a potential criminality."

On March 9, when Salvador returned to work from his lunch break, he was called to the scheme training room, a room 15 feet by 20 feet with a table and several chairs, where he was met by Postal Inspectors Cassidy and Barry who identified themselves and asked Salvador to be seated. Barry sat on his left and Cassidy on his right. Barry commenced to question Salvador about his personal history. In the meantime, Cassidy had placed on the table the account ledger used by Salvador to perform his job duties. At this point, Salvador asked "why am I here for?" Cassidy told him that the purpose of the interview concerned his job. Salvador asked that his union steward be present. Cassidy responded by stating that Salvador's union steward would only be present as a witness, and instructed Salvador not to look at or speak to the steward, and stated that the steward would be seated behind Salvador. Salvador did not respond and the interview was adjourned for approximately one hour until Salvador's union steward, Anne Rodriguez, who was on her lunch break at another location, was available.

Rodriguez was working at a branch office located several miles from the main post office. After receiving permission to leave her work station and finishing her lunch, Rodriguez left the branch station where she had been working and arrived at the main post office. She was promptly taken to the scheme training room by Salvador's supervisor. Young told Rodriguez that the employee being questioned by the postal inspectors was Salvador and explained to Rodriguez that the inspectors were questioning him about possible misappropriation or

embezzlement of funds. On entering the room, where Postal Inspectors Cassidy and Barry and employee Salvador were waiting, Young introduced Rodriguez to the postal inspectors, the inspectors introduced themselves to Rodriguez, and Young left. After the introductions, Cassidy informed Rodriguez that the reason she was present was Salvador had requested her presence and that the inspectors would now resume their interrogation of Salvador about postage due irregularities. Rodriguez responded by stating she wanted to speak to Salvador before the postal inspectors continued to question him. Cassidy answered "no," and when Rodriguez explained she was making her request in her capacity as Salvador's union steward and that his steward had the right to speak to him prior to "an investigation," Cassidy replied, "We are not investigating [Salvador], we are interviewing him." Rodriguez repeated that she wanted to speak to Salvador prior to the start of the interview and when Cassidy again refused, Rodriguez asked if he was denying the right of a union steward to speak to Salvador prior to his interrogation. Cassidy answered "yes," and then told Rodriguez, "you're to be seated over there," pointing to a chair located approximately two feet behind and to the left of the chair in which Salvador was seated, so that to look at Rodriguez, Salvador would have had to turn his head around.

During the interview which followed, Postal Inspector Cassidy questioned Salvador about the manner in which he kept his books of account for the customers' postage due mail, and asked why he had improperly debited another account rather than the complaining company's account. Salvador answered all of Cassidy's questions, and during the interview obeyed Cassidy's earlier instruction that he not look at or speak to his union steward; Salvador neither looked at nor spoke to Rodriguez because of Cassidy's instruction. Rodriguez, however, fully participated in the interview. Neither Inspector Cassidy nor Inspector Barry told her she was forbidden from speaking or otherwise participating in the interview, and on several occasions Rodriguez spoke up on Salvador's behalf. The postal inspectors listened to what she stated and after they understood the point she was making, interrupted and indicated they felt it was unnecessary for her to continue; Cassidy then resumed questioning Salvador. Also, even though Cassidy at the beginning of the interview instructed Rodriguez to be seated behind Salvador in a chair away from

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the table, whenever it became necessary for Rodriguez to inspect the ledger books maintained by Salvador which were on the table, Rodriguez stood up and walked to the table so she could better observe the particular section of the ledger book that Cassidy was talking about, and Cassidy did not object to her doing so. The meeting ended with Cassidy indicating that it appeared Salvador had not followed correct procedures and had engaged in certain conduct which made it appear as if he had been embezzling money or doing something of that nature. Cassidy stated he intended to submit a report to the Postmaster of the Fremont Post Office and suggested that Salvador submit a statement to Cassidy who would give the statement to the Postmaster. Salvador replied he would personally submit a statement to the Postmaster at a later date. Cassidy asked if Salvador was stating he did not intend to submit a statement, whereupon Rodriguez spoke up and informed Cassidy that Salvador was saying he would submit his statement to the Postmaster at a later date when he could collect his thoughts. This ended the interview, and Rodriguez left the room. After she left, the postal inspectors spoke to the Postmaster who then, the same day, spoke to Salvador and told him he was being placed on administrative leave pending further investigation.

ISSUE: The complaint alleges that, on March 9, 1989, the Postal Service violated Section 8(a)(1) of the National Labor Relations Act by refusing to allow a representative of the Union which represents employee Benjamin Salvador to consult with Salvador prior to an investigatory interview which Salvador had reasonable cause to believe would result in disciplinary action, and by refusing to allow Salvador's union representative to speak during the interview. The complaint further alleges that because of the Service's "prior related unfair labor practices" and because the unfair labor practices alleged herein were based upon the Service's "internal policies and guidelines to deny generally the types of requests set forth herein when made to the Postal Inspection Service," that to remedy the alleged unfair labor practices it should issue an order requiring the USPS, "on a nationwide basis, to cease and desist from the type of unfair labor practices alleged herein and to post appropriate notices."

ORDER: The NLRB adopted the recommended Order of the administrative law judge and found that the Postal Service had violated the NLRA by refusing to permit union representatives to consult with employees prior to investigatory interviews conducted by postal inspectors which the employees reasonably believe will result in disciplinary action and by refusing to permit employees to speak with union representatives prior to such interviews.

OF NOTE: The following discussion by the panel concisely states the law applicable to this case:

In *NLRB v. Weingarten*, 420 U.S. 251 (1975), the Supreme Court sustained the Board's position that Section 7 of the Act vests an employee with the right of union representation at an interview by his employer which the employee reasonably fears may result in the employee's discipline.



The Board has held that an employee's *Weingarten* right includes both the presence and the participation of the union representative; if the employer permits a union representative to attend an interview, but forbids the union representative to be anything more than a silent observer, the employer interferes with the employee's *Weingarten* right in violation of the Act. The Board has also held that an employee has a right under Section 7 of the Act to consult with his or her union representative before any interview to which a *Weingarten* right has attached. It makes no difference whether the request for prior consultation comes from the employee requesting union representation or from the union representative furnishing the representation requested.

The Board has rejected the argument that it is inappropriate to apply an employee's Section 7 right of prior consultation to a criminal investigation conducted by the Postal Service's postal inspectors (citing cases).

Removal: Inadequate Investigation (Arbitrator Michael McReynolds, 5/7/2007)

GRIEVANT: Individual (Austin, TX, P&DC)

CASE NO.: G00M-1G-D 06178187

BACKGROUND: The Grievant worked as a Mail Handler at the Austin, Texas P&DC from February 10, 2001 until July 29, 2006, when he was removed in the action forming the basis for this grievance.

On June 29, 2006, the Manager of Distribution Operations issued Grievant a Notice of Removal. In this notice, the MDO charged Grievant with Misconduct — Failure to Give a Full Day's Labor for a Full Day's Pay. Specifically, Grievant was charged with leaving the workroom floor on June 14, 2006, and remaining away from his assigned work area for more than two hours. According to the notice, the Grievant performed no work during that time; he was not authorized to leave his work area; and he remained on the clock for the period he was away from his work area. The notice cited an additional 14 occasions, as determined by records of door ring activity, between May 20 and June 9, 2006, when Grievant had been absent from his assigned work area. These periods ranged from 55 minutes to as much as 80 minutes at a time, also while he was still in pay status.

ISSUE: Whether the Postal Service had just cause to remove the Grievant from his position as a Mail Handler? If not, what shall be the remedy?

AWARD: The grievance was sustained. The Notice of Removal was rescinded and any record of it removed from the Grievant's file. The Postal Service will reinstate Grievant to his former Mail Handler position and make him whole.

OF NOTE: The Postal Service took the position that the Grievant repeatedly left his work area for extended periods of time without authorization. Grievant's conduct, according to the Postal Service, was inconsistent with the principle of a "fair day's work for a fair day's pay," as expressed in Article 34.1 of the National Agreement. Indeed, the Grievant admitted during the pre-disciplinary interview that he had gone outside to sleep in his vehicle. Because Grievant did not clock out during the periods he was away from his work area, Management argued that Grievant was effectively engaged in theft, in that he was stealing time from the Postal Service, and that he attempted to mislead postal officials in an effort to receive compensation to which he was not entitled. As to the Union's argument at Step 2, that Grievant had provided medical documentation to show that he was taking pain medication, Management argued that this documentation

did not provide an excuse for sleeping on duty. Based on Grievant's admission that he was sleeping when he was supposed to be on duty, Management asserted that removal was the appropriate penalty for his improper conduct. Finally, Management argued that Grievant's removal met all tests for due process, and that the action was for the good of the Service.

The Union argued that the principles of just cause require management to investigate incidents of possible misconduct in order to determine whether there are mitigating factors. In this case, the Union contended that the Postal Service failed to make a fair determination of the circumstances. The Union also argued that employees are to be corrected, not punished, and that Management made no attempt to correct Grievant's behavior before deciding to remove him. The Union noted that Grievant was on limited duty at the time because of a job-related injury, and he had made no effort to hide his actions. The Union asserted that if Grievant's supervisor had had a problem with Grievant, he would have taken corrective action long before the MDO initiated the removal in dispute. The Union conceded that Grievant should not have been sleeping at work, but stated that his supervisors had acquiesced in this pattern of misconduct. Further, the Union stated that Grievant provided a plausible explanation for his actions, and that Management should have explored the possibility of rehabilitation rather than simply removing Grievant. Such an approach by Management would have been even more appropriate, according to the Union, because of the extenuating circumstances that applied in Grievant's situation.

The arbitrator noted that if there are valid reasons for what appears to be misconduct on the part of an employee, and if an employer ignores those reasons when implementing disciplinary measures for the conduct in question, it follows that the employer cannot show that there was just cause for the discipline.

An argument in a grievance submission cannot be dismissed or ignored simply because it may be inartfully worded.

While there are many procedural parameters that parties must respect in the grievance-arbitration process, the very nature of the process is such that it is sufficient for the parties simply to convey the essence of their arguments or responses in a manner that is understandable to the other side. It is not always necessary to use a specific phrase or term of art as long as the fundamental meaning of the argument or position is clear. In this case, although the Union did not use the words "just cause" in its Step 1 or Step 2 submissions, there can be no mistake about the Union's position on the removal notice throughout the processing of the grievance.

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The arbitrator also pointed out that the Grievant did not contradict any of the MDO's testimony relating to his leaving the building or his statements at the pre-disciplinary interview. Grievant explained that he was in considerable pain after his knee surgery, and that the medication he was taking caused him to become extremely drowsy. In addition, Grievant stated that he had lost his temper during the pre-disciplinary interview because he believed that the MDO was fully aware of his personal circumstances but chose to ignore them. Thus, Grievant testified that the MDO knew about his injury; knew that Grievant had had knee surgery; and knew that Grievant was on limited duty. The MDO, according to Grievant, also had been involved with the investigation in the previous March, when Grievant had been accused of slashing tires. In addition, Grievant testified that he had tried to notify his supervisor before leaving the floor but had been unable to find him. On cross-examination, when Grievant was unable to remember several incidents, Grievant testified that he had almost no memory about the months of May, June, and July 2006 because of the effect of the medications he was taking during that time.

It is not disputed that sleeping on the job constitutes grounds for disciplinary action, including removal in appropriate circumstances. Just as employees owe their employers a fair day's work for a fair day's pay, however, disciplinary action must be based on the principle of just cause, and employers have a separate obligation to their employees, even those who may have engaged in misconduct. That is the case here. In the National Agreement the parties have specifically adopted the concepts of corrective discipline and just cause.

The initial problem in this case is that the inquiry into Grievant's actions on which the removal was based was by no means complete. Because Grievant's immediate supervisor was not consulted, there was no way to determine whether Grievant's recurring absences were authorized or condoned. Because the Grievant's offer and acceptance of a light/limited duty position was not examined, there could be no assessment of extenuating circumstances that might explain or excuse his actions. Although Grievant had the opportunity to present his side of the story at the pre-disciplinary interview, this opportunity was meaningless without some inquiry into the reasons he provided. This lack of a complete investigation effectively denied Grievant his contractual right to due process,

encompassed in the just cause provision of Article 16 of the National Agreement.

The absence of a thorough investigation had the further effect of denying Grievant the possibility of corrective or rehabilitative discipline. Grievant's un rebutted testimony makes it clear that the problems caused by his medication were generally known in the Rewrap section. It is extremely unlikely (although not impossible) that Grievant could have left the workroom floor as often as he did without attracting the attention of a responsible supervisor long before the night of June 14. In addition, Grievant testified that the other employees often asked how he was doing and expressed concern about his situation. Given Grievant's testimony — also un rebutted — that he could not remember much about what happened during the time he was taking the pain medication, their concern is not surprising.

As noted above, under most circumstances sleeping while on duty warrants discharge. Because Grievant admittedly was sleeping on duty, it cannot be said that his removal was in error. Nevertheless, in light of the shortcomings in the removal process, neither can it be said that a fully informed decisionmaker might not have exercised his discretion and decided not to discharge Grievant, notwithstanding his or her authority to do so. It must be concluded, therefore, that the Postal Service did not have just cause to remove Grievant.

Removal: Failure to Disclose Criminal Arrest and Felony Conviction (Arbitrator Sherrie Talmadge, 5/24/2007)

GRIEVANT: Individual (Westchester P&DC, NY)

CASE NO.: A00M-1A-D-07011971

BACKGROUND: The Grievant completed an employment application, PS Form 2591, on April 1, 2006. One question asked:

Have you ever been convicted of a crime or are you now under charges for any offense against the Law? You may omit (1) any charges that were dismissed or resulted in acquittal; (2) any conviction that has been set aside, vacated, annulled, expunged, or sealed; (3) any offense that was finally adjudicated in a juvenile court or juvenile delinquency proceeding; and (4) any charges that resulted only in a conviction of a non-criminal offense. All felony and misdemeanor convictions and all convictions in state and federal courts are criminal convictions and must be disclosed. Disclosure of such convictions is required even if you did not spend any time in jail and/or were not required to pay a fine.

The Grievant responded "no" to that question.

Section G of the Form 2591, entitled Certification, states as follows: I certify that all of the statements made in this application are true, complete, and correct to the best of my knowledge and belief and are in good faith. Section G continues to state the following: A false or dishonest answer to any question in the application may be grounds for not employing you or for dismissing you after you begin work, and may be punishable by fine or imprisonment. (US Code, Title 18, Sec. 1001). All information you give will be considered in reviewing your application and is subject to investigation.

The Grievant signed and dated the application form under the Section G Certification. Based on the information provided, the Service hired the Grievant on April 29, 2006.

As part of the usual background check on new employees, the Postal Service conducted a periodic criminal record check on the Grievant. The Postal Inspection Service was notified that the Grievant had a prior arrest in 1999 for Criminal Possession of Stolen Property (Felony), and on September 29, 2000 he was convicted (amended from Felony Grand Larceny, 5 years probation and \$155.00 surcharge which was paid on November 17, 2000).

The Grievant testified that he had been assured that his arrest and conviction for criminal possession of stolen property had been sealed and, therefore, he believed that he did not have to list it on the employment application.

ISSUE: Was there just cause for the issuance of the Notice of Removal to the Grievant? If not, what shall be the remedy?

AWARD: The Postal Service did not have just cause to issue the Notice of Removal. Management has not shown that the Grievant willfully falsified his employment forms when he omitted an earlier conviction that he mistakenly believed to have been sealed. He is to be reinstated, without back pay, but with full seniority and other benefits.

OF NOTE: The Union argued that the Service failed to prove that the Grievant falsified the employment application. The Grievant intended to do no harm. He committed a youthful indiscretion for which he has paid his debt to society, five years probation and a fine. The Grievant testified credibly that he fully understood that his past would come up in a background check. He thought that a background check would reveal a sealed/confidential case file. He is not a liar. The many glowing recommendations from USPS

supervisors attest to his good character and work ethic. He filled out the employment application to the best of his ability and truthfully answered the questions based on the facts as he understood them. Management did not have to fire the Grievant for a mistake. A number of arbitrators have held that to prove falsification the Service must prove that the applicant made the incorrect statement with the intention of hiding the information from the employer. The Grievant did not intend to hide information from the Service. The Union maintained that the Service's decision to discharge the Grievant solely on the basis of an alleged falsification of the employment application in the case of the Grievant, who was a good worker and an asset to the Postal Service, was arbitrary, capricious and outside the bounds of reasonableness.

An oft quoted standard for establishing "falsification" has been articulated by Arbitrator Shedler as follows:

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.

However, in this case the arbitrator was not persuaded that the Grievant willfully intended to provide an untrue response to the question whether he had been convicted of a felony. To prove the making of a fraudulent representation, it is usually necessary to show that the person made the statement with the intent to mislead. The Grievant credibly testified that he had been under the belief that his record had been sealed after completion of his probation. Pursuant to the second listed permissible omissions in the employment application which states "You may omit... (2) any conviction that has been set aside, vacated, annulled, expunged, or sealed," the Grievant omitted what he believed was his sealed conviction.

The Union provided a number of arbitration awards where the employee was found to have failed to provide required information, but not to have done so with intent to defraud. In many cases the remedy has been reinstatement with less than full back pay or with no back pay. As one arbitrator noted, although intent has not been shown, the employee is still responsible for not reporting the required information. This is a less grave offense than deliberate fraud or falsification, but still very serious.

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