

DEFENSE
vs.
DISCIPLINE

DUE PROCESS AND JUST CAUSE
IN OUR
COLLECTIVE BARGAINING AGREEMENT
A STRATEGY BOOK

National Postal Mail Handlers Union

William H. Quinn
National President

Mark A. Gardner
Secretary-Treasurer

Hardy Williams
*Vice President
Central Region*


Samuel C. D'Ambrosio
*Vice President
Eastern Region*

John F. Hegarty
*Vice President
Northeastern Region*

James C. Terrell
*Vice President
Southern Region*

Efraim Daniel
*Vice President
Western Region*

November 1999

TO: All Local Union Officers and Shop Stewards
FROM: William H. Quinn, National President 
RE: Handbook on Discipline, Defenses, and Just Cause
Under the National Agreement

Attached is a handbook concerning the defenses that are available under the National Agreement when discipline is imposed on a mail handler or other postal employee.

In its original form, this handbook was produced by Brother Jeff Kehlert, a National Business Agent for the American Postal Workers Union, but our review of the document has made clear that it also would be an extremely valuable tool for all NPMHU representatives who find themselves defending mail handlers against discipline from postal managers. We therefore have produced the attached copy, and also have developed an enhanced training program that uses this handbook as a guide. That training is available to all Local Unions through the services of Eastern Regional Vice President Sam D'Ambrosio, the NPMHU National Shop Steward Trainer.

We encourage you to review this handbook, and to use it when representing mail handlers in the disciplinary process. In addition, there are three separate binders being sent to all Local Union officers, including all Administrative Vice Presidents, that include copies of the cases referred to in this main handbook. These additional handbooks should be available through your Local Union office or the union office in your facility.

Please do not hesitate to contact the National Office should you have any questions.



DEFENSE vs. DISCIPLINE: DUE PROCESS and JUST CAUSE IN OUR COLLECTIVE BARGAINING AGREEMENT A HANDBOOK

This Handbook my twelfth as a National Officer, is designed t o place into a single accessible package the strategies necessary for members, stewards officers, and arbitration advocates to provide the best possible defense when disciplinary actions are imposed Through the usage of the Just Cause definition, the interview, the Collective Bargaining Agreement and arbitral history, this Handbook is intended to promote thorough and well-reasoned grievance initiation, investigation, processing, and arbitration advocacy in disciplinary instances.

As procedures and due process increasingly replace arguments “on the merits”, we must turn to Just Cause as it is defined and as it should be applied by management, the arbitrators and, yes by stewards and advocates_ We win a far greater percentage of disciplinary cases based upon due process than we ever have in the past; but too many valuable and job-saving due process arguments arc never explored much less pursued. It is my hope that this Handbook will enable stewards and advocates to successfully pursue the arguments to better defend our members.

Following the introductory section covering Just Cause each chapter discusses in detail a particular due process subject, included are a definition and explanation of the issue, the Unions argument, the applicable Collective Bargaining Agreement provision s and/or National level arbitration mandates, the interview, and regional arbitral support.

Although some parts of this Handbook are directed more to the shop steward than to the arbitration advocate - and vice versa - all the information contained herein should provide everyone in our Union with a better understanding and ability to deal with the disciplinary process and the defenses necessary to protect the membership.

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ACKNOWLEDGEMENTS

My thanks to the following Union Leaders who have contributed to the advancement of Due Process strategies:

Paul Cirino	President, Lancaster Area Local APWU President, Pennsylvania State Postal Workers Union
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Lu-Ann Glaser	President, Keystone Area Local APWU Director, Publicity & Legislation New Jersey State Postal Workers Union
Bill Lewis	Executive Vice President, Trenton Metro Local APWU Director Research & Education New Jersey State Postal Workers Union
Leroy Moyer	Clerk Craft Director, Lehigh Valley Area Local APWU Past President, Pennsylvania State Postal Workers Union
Bob Pitchalonis	Clerk Craft Director, Pennsylvania State Postal Workers Union Past Clerk Craft Director, Philadelphia BMC Local APWU

THEY HAVE MADE THE DIFFERENCE.

I also thank the following National Business Agents who responded to my request for additional arbitral reference, some of which appears in this Handbook:

Steve Albanese	National Business Agent-Clerk Craft Boston Division.
John Kelly	National Business Agent-Clerk Craft Denver Division
Lyle Krueth	National Business Agent-Clerk Craft Minneapolis Division
Mike Morris	National Business Agent-Clerk Craft Memphis Division

DEDICATION

This Handbook is dedicated to my wife, Congetta. Without her enthusiasm, wisdom, intuition, and commitment to the cause, it would not have come into being.

APPENDIX

The following are supplemental decision(s) for the referenced chapter in this handbook:

CHAPTER 2: The Pre-Disciplinary Interview/Investigation

CHAPTER 3: Investigation Prior to Discipline's Initiation

Arbitrator Walt	CIM-4B-D 15886
Arbitrator Stallworth	C7C-4K-D 22390
Arbitrator Marlatt	S7C-3N-D 18403
Arbitrator Stallworth	C7C-4D-D 28874
Arbitrator Goldstein	CIN-4J-D 13864
Arbitrator Myers.....	AC-S-938 1-D/AC-S-9382-D
Arbitrator Witney	C7C-4Q-D 28021
Arbitrator Powell	E7T-2D-D 39611
Arbitrator Stutz	N4C-IN-D 2013
Arbitrator Powell	E7C-2A-D 34888
Arbitrator Nathan	COT-4M-D 4270/5424
Arbitrator Snow	W7T-SM-D 23860
Arbitrator Goldstein	C8N-4J-D 33941
Arbitrator Gold	A9OC-1A-D 93047139
Arbitrator Sobel	S4W-3T-D 46556
Arbitrator Shea	A9OC-1A-D 94027875
Arbitrator Drucker	C9OC-1C-D 95052932
Arbitrator McKissick	C9OC-4C-D 95042199
Arbitrator McAllister	COC-4L-D 16172
Arbitrator Fletcher	COC-4Q-D 11991
Arbitrator Marlatt	S4C-3S-D 53003153002

Pre-Disciplinary Interview for Employee discharged After a Last Chance Agreement

Arbitrator Drucker	C9OC-1C-D 95052932
Arbitrator Klein	C9OC-4D-D 95045998

Chapter 4: Higher Level Review and Concurrence

Chapter 5: Authority to Resolve the Grievance at the Lowest Possible Step

Arbitrator Dworkin	C1R-4H-D 31648/31707
Arbitrator Howard	E7C-2B-D 9594/10762
Arbitrator LeWinter	EIT-2D-D 15285
Arbitrator Johnston	S7C-3R-D 20373
Arbitrator Zumas	EIN-2U-D 7392
Arbitrator Howard	E7C-2A-D 36125
Arbitrator Howard	E7C-2A-D 37105138370
Arbitrator Howard	EOC-2D-D 4889
Arbitrator Helburn	SOC-3E-D 13607/13617
Arbitrator Weinstein	EOC-2D-D 6301/3858

Arbitrator Williams	S4C-3W-D 42907
Arbitrator Zobrak	C9OT-IC-D 93049598
Arbitrator Gudenberg	B9OC-4B-D 94059936
Arbitrator Sobel	S4W-3T-D 46556156557
Arbitrator Helburn	SOC-3F-D 1549
Arbitrator Loeb	C9OC-IC-D 95075216

Chapter 6: Denial of Information

Arbitrator Fletcher	COC-4M-D 09549112003
Arbitrator Duda	E7T-2A-D 27794
Arbitrator Duda	E7T-2H-D 44754144755
Arbitrator Dash	AB-E-1057-D
Arbitrator Wooters	92021065121226
Arbitrator Stoltenberg	E7C-2A-D 22714
Arbitrator Zack	N7M-1N-C 19075
Arbitrator Dash	E4C-2D-D 38278
Arbitrator Snow	H7N-5C-C 12397

Chapter 7: Nexus between off-duty misconduct and USPS Employment

Arbitrator Cushman	E7C-2A-D 35954
Arbitrator Nolan	S4N-3R-D 47206141225
Arbitrator Dworkin	CIN-4D-D 30942
Arbitrator Levak	W1C-5D-D 27319/28985
Arbitrator Williams	S1C-3F-D 17681
Arbitrator Stutz	N8N-IN-D 25812
Arbitrator Eaton	W8C-2G-D 594/AD-W-204-D
Arbitrator Walt	AC-C-24,630-D
Arbitrator DiLeone	NC-C-128579D
Arbitrator Cushman	AC-S-24,213-D
Arbitrator Holly	AB-S-6922
Arbitrator Myers	W-AB-5190
Arbitrator Liebowitz	N7T-IW-D 40294
Arbitrator Fletcher	COC-4Q-D 11991
Arbitrator Dobranski	C7C-4M-D 25102
Arbitrator Duda	EOT-2A-D 7505
Arbitrator Cannavo	A9OC-4A-D 94019865

Chapter 8: Timeliness of Discipline

Arbitrator Sobel	S4W-3T-D 46556146557
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Chapter 9: Disparate Treatment

Arbitrator Dean	E7C-2D-D 44714
Arbitrator Hardin	S4M-3E-D 42104, etal
Arbitrator Dolson	C7C-4G-D 2798

Chapter 11: Double Jeopardy/ Res Judicata

Arbitrator Larney	CIC-4E-D 14581
Arbitrator Rimmel	E7V-2U-D 35322
Arbitrator Zumas	DR-3 1-88
Arbitrator Tanner	C9OC-4C-D 95065355
Arbitrator DiLeone	C 1 C-4E-D 34608
Arbitrator Howard	ACE-4890D
Arbitrator Dworkin	C7R-4Q-D 17456
Arbitrator Porter	C7R-4Q-D 12734
Arbitrator Stoltenber	E7C-2P-D 30199
Arbitrator Jacobs	N7C-1Q-D 36708
Arbitrator Miles	4D-D 96031244/96031258

Chapter 13: Past Elements of Discipline not Adjudicated; yet Relied Upon in Subsequent Discipline

Arbitrator Cohen	C4C-4F-D 7801
Arbitrator Williams	SIN-EI-D 26601
Arbitrator Miles	EOC-2A-D 700016999

Chapter 18: 30 Day Advance Notice

Arbitrator Newman	C7C-4B-D 22389
Arbitrator Levin	NIC-1A-D 15466
Arbitrator Levin	NIC-1A-D 15455

REPORTS BY JEFF KEHLERT

The following reports are available, upon request, from my office:

1. **Sky's the Limit** Produced with former National Business Agent for the Maintenance Craft Tim Romine. This report addresses our ability to obtain "restricted" forms of documentation necessary for enforcement of the Collective Bargaining Agreement with particular emphasis on medical records/information.
2. **Your Rights in Grievance Investigation and Processing:** An alphabetical compilation of Step 4 Interpretive Decisions on shop stewards' rights and related subjects
3. **More Rights in Grievance Investigation and Processing:** A second volume of the Your Rights report including numerous Step 4 decisions.
4. **Grievances in Arbitration:** A compilation of arbitration decisions on various subjects with a brief synopsis of the awards included.
5. **Vending Credit Shortages and Other Issues:** A report on multiple subjects including the title subject, use of personal vehicles, Letters of Demand, etc.
6. **Letters of Demand - Due Process and Procedural Adherence:** A history of contractual application of the due process and procedural requirements of the Employer in issuing Letters of Demand including numerous arbitration decision excerpts and the application of the principle of due process to discipline.
7. **Ranking Positions to a Higher Level:** Utilization of Article 25 and Employee and Labor Relations Manual Part 230 to upgrade Bargaining Unit Positions to Higher Levels based upon working being performed (With authoritative arbitral reference.)
8. **Winning Claims for Back Pay:** Applying Part 436 of the Employee and Labor Relations Manual in conjunction with our Grievance Procedure to obtain denied pay and benefits, up to six years in the past.
9. **Letters of Demand--Security and Reasonable Care:** As Management corrects due process and procedural errors when issuing letters of demand, we must turn to other methods of prosecuting grievances for alleged debts. This report addresses F-1 and DMM regulations to enable us to prove security violations exists.
10. **Surviving the Postal Inspection Service:** This report brings together the crucial information (Situations, Questions and Answers, National APWU Correspondence) necessary for employees and shop stewards on what rights must be utilized when Postal Inspectors come calling. Its goal is to enable Postal Workers to Survive and not lose their livelihood.
11. **Out-of-Schedule Compensation, Strategies for Winning Pay When our Collective Bargaining Agreement is Violated:** This report places into a readily accessible package the controlling Collective Bargaining Agreement provisions, arbitral reference, contractual interpretation and strategies necessary to pursue violations of the National Agreement in which out-of-schedule compensation would be an appropriate remedy.
12. **A Handbook: Defense vs Discipline: Due Process and Just Cause in our Collective Bargaining Agreement:** The arguments, Collective Bargaining Agreement references, investigative interviews, and arbitral authority brought together to provide the best possible defenses when discipline is issued.

INTRODUCTION

Before we begin with the just cause discussion, a requirement in grievant processing must be emphasized. WE MUST RAISE OUR JUST CAUSE AND DUE PROCESS ISSUES AND ARGUMENTS IN SPECIFIC DETAIL NO LATER THAN IN THE WRITTEN STEP 2 APPEAL. Article 15 of the Collective Bargaining agreement states:

ARTICLE 15 GRIEVANCE-ARBITRATION PROCEDURE

Section 2. Grievance Procedure Steps

Step 1:(d) The Union shall be entitled to appeal an adverse decision to Step 2 of the grievance procedure within ten (10) days after receipt of the supervisor's decision. Such appeal shall be made by completing a standard grievance form developed by agreement of the parties, which shall include appropriate space for at least the following:

1. Detailed statement of facts;
2. Contentions of the grievant;
3. Particular contractual provisions involved; and
4. Remedy sought.

Step 2:(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 Article 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.

This is the "full disclosure" stage of our grievance/arbitration procedure.

We have a contractually required obligation to raise our issues and arguments in detail in our Step 2 appeal and at the Step 2 meeting. Should we fail to raise those arguments at Step 2, management will argue the Union failed to meet its obligation in pursuit of the grievance. Management will argue their due process rights to address the issues and arguments at the lowest possible step—and thus the possibility of lowest possible step resolution--are violated. Management will, in effect, turn the tables on us and pursue their own due process issues if we fail to fully raise our issues and arguments at Step 2. We must remember that in recent years, the Union has been highly successful in winning due process arguments within the grievance/arbitration procedure and at arbitration. Due process violations in disciplinary cases--such as the Pre-Disciplinary Interview--and in contract cases--such as lack of proper grievance appeal language in letters of demand--have resulted in a solid history of successful grievance processing. As we have pursued these due process violations to successful ends, management has increasingly sought and pursued due process issues against the Union. Their education in due process is directly related to our successes. For these reasons, we can expect management to raise every due process issue which presents itself and in particular our obligation to raise our issues and arguments in our Step 2 appeals.

Without a commitment and practice to full development of our arguments through thorough grievance investigation and processing, we will see many valuable Union due process issues and violations excluded by arbitrators and of no assistance to the defense of members in need.

CHAPTER 1

JUST CAUSE: One of the most misunderstood concepts and requirements of our Collective Bargaining agreement is the Just Cause mandate under Article 16. Managers are often not held to proving they issued discipline for Just Cause. Arbitrators are often not held to issuing decisions which apply the standards of Just Cause. Grievances are often not investigated, processed, and presented in a method requiring management to meet the tests of Just Cause.

We begin where Just Cause first appears in our Collective Bargaining Agreement:

ARTICLE 16 DISCIPLINE PROCEDURE

Section 1. Principles

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

The above quoted provision explains that Management must have just cause to issue discipline but the provision does not explain what just cause is. In collective Bargaining Agreements throughout the United States, ours may be unique in that we have a clear definition of what just cause is. That definition is found in the EL-921 Handbook, “Supervisor’s Guide to Handling Grievances”, under Article 19 of the Collective Bargaining Agreement:

➤ **Just Cause**

What is just cause? The definition of just cause varies from case to case, but 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.

- **Is there a rule?**
- **Is the rule a reasonable rule?**
- **Is the rule consistently and equitably enforced?**
- **Was a thorough investigation completed?**
- **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?**
- **Was the disciplinary action taken in a timely manner?**

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-2 1 Timekeeper’s Instructions.

The definition of Just Cause stated in the EL-921 is based upon the benchmark definition developed and first stated by Arbitrator Carroll R. Daugherty in the Grief Brothers Cooperage Corp. decision in 1964 and in a later decision, Enterprise Wire Company (1966). Arbitrator Daugherty stated:

Employee

Few if any union-management agreements contain a definition of “just cause.” Nevertheless, over the years the opinions of arbitrators in innumerable discipline cases have developed a sort of “common law” definition thereof. This definition consists of a set of guidelines or criteria that are to be applied to the facts of any one case, and said criteria are set forth below in the form of questions.

A no answer to any one or more of the following questions normally signifies that just and proper cause did not exist. In other words, such no means that the employer’s disciplinary decision contained one or more elements of arbitrary’ capricious, unreasonable, or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer.

The Questions

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

Note 1: Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of shop rules and of penalties for violation thereof.

Note 2: There must have been actual oral or written communication of the rules and penalties of the employee.

Note 3: A finding of lack of such communication does not in all cases require a no answer to question 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.

Note 4: Absent any contractual prohibition or restriction, the company has the right unilaterally to promulgate reasonable rules and give reasonable orders; and same need not have been negotiated with the union.

2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

Note: If an employee believes that said rule or order is unreasonable, he must nevertheless obey the same (in which case he may file a grievance thereover), unless he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his disobedience.

3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Note 1: This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

Note 2: The company's investigation must normally be made before its disciplinary decision is made. If the company fails to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time, there was usually been too much hardening of positions in a very real sense, the company is obligated to conduct itself like a trial court.

Note 3: There may, of course, be circumstances under which management must react immediately to the employee's behavior. In such cases, the normally proper action is to suspend the employee pending investigating, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation, he will be restored to his job with full pay for time lost.

Note 4: The company's investigation should include an inquiry into possible justification for the employee's alleged rule violation.

4. Was the company's investigation conducted fairly and objectively?

Note 1: At said investigation the management official may be both "prosecutor" and "judge", but he may not also be a witness against the employee.

Note 2: it is essential for some higher' detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

Note 3: In some disputes between an employee and a management person, there are not witnesses to an incident other than the two immediate participants. In such cases, it is particularly important that the management "judge" question the management participant rigorously and thoroughly, just as an actual third party would.

5. At the investigation' did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Note 1: It is not required that the evidence be conclusive or "beyond all reasonable doubt". But the evidence must be truly substantial and not flimsy.

Note 2: The management "judge" should actively search out witnesses and evidence, not just passively take what participants or "volunteer" witnesses tell him.

Note 3: When the testimony of opposing witnesses at the arbitration hearing is irreconcilably in conflict, an arbitrator seldom has any means for resolving the contradictions. His task is then to determine whether the management "judge" originally had reasonable grounds for believing the evidence presented to him by his own people.

6. Has the company applied its rules orders, and penalties even-handedly and without discrimination to all employees?

Note 1: A no answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

Note 2: If the company has been lax in enforcing its rules and orders and decides henceforth to apply them rigorously, the company may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

Note 1. A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past.

(There is no rule as to what number of previous offenses constitutes a "fair", or a "bad" record. Reasonable judgement thereon must be used.)

Note 2: An employee's record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he was properly been found guilty of the immediate offense.

Note 3: Given the same proven offenses for two or more employees, their respective records provide the only proper basis for "discriminating" among them in the administration of discipline for said offense. Thus, if employee A's record is significantly better than those of employees B, C, and D, the company may properly give A a lighter punishment that it gives the others for the same offense; and this does not constitute true discrimination.

Note 4: Suppose that the record of the arbitration hearing established firm yes answers to the first six questions. Suppose further that the proven offense of the accused employee was a serious one, such as drunkenness on the job; but the employee's record company had been previously unblemished over a long, continuous period of employment with the company. Should the company be held arbitrary and unreasonable if it decided to discharge such an employee? The answer depends of course on all the circumstances. But, as one of the country's oldest arbitration agencies, the National Railroad Adjustment Board, has pointed out repeatedly in innumerable decisions on discharge cases, leniency is the prerogative of the employer rather than of the arbitrator; and the latter is not supposed to substitute his judgement in the area for that of the company unless there is compelling evidence that the company abused its discretion. This is the rule, even though an arbitrator, if he had been the original "judge," might have imposed a lesser penalty.

Actually, the arbitrator may be said, in an important sense, to act as an appellate tribunal whose function is to discover whether the decision of the trial tribunal (the employer) was within the bounds of reasonableness above set forth. In general, the penalty of dismissal for a really serious first offense does not, in itself, warrant a finding of company unreasonableness.

From those questions of Just Cause (or "tests" as they have come to be termed) the EL-921 "Supervisor's Guide to Handling Grievances" provides our Collective Bargaining Agreement definition:

III . Discipline

C. Just Cause

- What is just cause? The definition of just cause varies from case to case, but 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.
- 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?
- Important: 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 maintain work rules by continually updating and reviewing them, and making sure that they are reasonable, based on the overall objective of safe and efficient work performance. Management's rules are reasonably related to business efficiency, safe operation of our business' and the performance we might expect of the employee' and this is known to the employee.

- Is the rule consistently and equitably enforced?

If a rule is worthwhile, it is worth enforcing, but be sure that it is 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 designed 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.

When the Postal Service maintains that certain conduct is serious enough to be grounds for discharge, it is unwise--as well as unfair--to make exceptions. If the Postal Service is to maintain consistency in its position that theft or destruction of deliverable mail is grounds for discharge even on a first offense, for example' then the otherwise good employee guilty of this offense, unlike the border-line or marginal employee, must be discharged.

- 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 judgement 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.

The Postal Service feels that unless a penalty is so far out of line with other penalties for similar offenses as to be discriminatory, the arbitrator should make no effort to equalize penalties. As a practical matter, however, arbitrators do not always share this view. Therefore, the Postal Service should be prepared to justify why a particular employee may have been issued a more severe discipline than others.

- Was the disciplinary action taken in a timely manner?

Disciplinary actions should be taken as promptly as possible after the offense has been committed. In order to lay the framework for defense against management contentions that just cause existed in a particular case, we must approach each disciplinary action by using EL-921 definition-based upon the seven tests of Arbitrator Daugherty – and addressing each element of that definition:

EL-921 JUST CAUSE ELEMENT

1. 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?

Important: It is not enough to say, “Well, everybody knows the 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,

If so, was the employee aware of the rule?

Was the employee forewarned of the disciplinary consequences for failure to follow the rule?

Important: It is not enough to say, “Well, everybody knows the 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.

2. Is the rule a reasonable rule?

Management must maintain work rules by continually updating and reviewing them, and making sure that they are reasonable, based on the overall objective of safe and efficient work performance. Management’s rules are reasonably related to business efficiency, safe operation of our business, and the performance we might expect of the employee, and this is known to the employee.

3. Is the rule consistently and equitably enforced?

If a rule is worthwhile, it is worth enforcing, but be sure that it is 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.

When the Postal Service maintains that certain conduct is serious enough to be grounds for discharge, it is unwise--as well as unfair--to make exceptions. If the Postal Service is to maintain consistency in its position that theft or destruction of deliverable mail is grounds for discharge even on a first offense, for example, then the otherwise good employee guilty of this offense, like the border-line or marginal employee, must be discharged.

4. 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.

5. 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 0-day suspension for the same offense.

There is no precise definition of what establishes a good, fair or bad record. Reasonable judgement 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.

The Postal Service feels that unless a penalty is so far out of line with other penalties for similar offenses as to be discriminatory, the arbitrator should make no effort to equalize penalties. As a practical matter, however, arbitrators do not always share this view. Therefore, the Postal Service should be prepared to justify why a particular employee may have been issued severe discipline than others.

6. Was the disciplinary action taken in a timely manner?

Disciplinary actions should be taken as promptly as possible after the offense has been committed.

ARBITRATOR DAUGHERTY "TEST"

1. Did the company give to the employee forewarning or foreknowledge of the possible or probably disciplinary consequences of the employee's conduct?

Note 1: Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of shop rules and of penalties for violation thereof.

Note 2: There must have been actual oral or written communication of the rules and penalties to the

employee.

Note 3: A finding of lack of such communication does not in all cases require a no answer to question

1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable,

Note 4: Absent any contractual prohibition or restriction, the company has the right unilaterally to promulgate reasonable rules and give reasonable orders; and same need not have been negotiated with the union.

2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

Note: If an employee believes that said rule or order is unreasonable, he must nevertheless obey same (in which case he may file a grievance thereover), unless he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for this disobedience.

3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Note 1: This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

Note 2: The company's investigation must normally be made before its disciplinary decision is made. If the company fails to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that

time, there has usually been too much hardening of positions. In a very real sense, the company is obligated to conduct itself like a trial court.

Note 3: There may, of course, be circumstances under which management must react immediately to the employee's behavior. In such cases, the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b), if the employee is found innocent after the investigation, he will be restored to his job with full pay for time lost.

Note 4: The company's investigation should include an inquiry into possible justification for the employee's alleged rule violation.

4. Was the company's investigation conducted fairly and objectively?

Note 1: At said investigation the management official may be both "prosecutor" and judge," but he may not also be a witness against the employee.

Note 2: It is essential for some higher detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

Note 3: In some disputes between an employee and a management person, there are not witnesses to an incident other than the two immediate participants. In such cases, it is particularly important that the management "judge" question the management participant rigorously and thoroughly, just as an actual third party would.

5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Note 1: It is not required that the evidence be conclusive or "beyond all reasonable doubt." But the evidence must be truly substantial and not flimsy.

Note 2: The management "judge" should actively search out witnesses and evidence' not just passively take what participants or "volunteer" witnesses tell him.

Note 3: When the testimony of opposing witnesses at the arbitration hearing is irreconcilably in conflict, an arbitrator seldom has any means for resolving the contradictions. His task is then to determine whether the management "judge" originally had reasonable grounds for believing the evidence presented to him by his own people.

6. Has the company applied its rules, orders, and penalties even-handedly and without discrimination to all employees?

Note 1: A no answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

Note 2: If the company has been lax in enforcing its rules and orders and decides henceforth to apply them rigorously, the company may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

Note 1: A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past. (There is no rule as to what number of previous offenses constitutes a "good," a "fair," or a "bad" record. Reasonable judgement thereon must be used.)

Note 2: An employee's record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense.

Note 3: Given the same proven offense for two or more employees, their respective records provide the only proper basis for "discriminating" among them in the administration of discipline for said offense. Thus, if employee A's record is significantly better than those of employees B, C, and D, the company may properly give A a lighter punishment than it

gives the others for the same offense; and this does not constitute true discrimination.

Note 4: Suppose that the record of the arbitration hearing established firm yes answers to the first six questions. Suppose further that the proven offense of the accused employee was a serious one, such as drunkenness on the job; but the employee's record had been previously unblemished over a long, continuous period of employment with the company. Should the company be held arbitrary and unreasonable if it decided to discharge such an employee? The answer depends of course on all the circumstances. But, as one of the country's oldest arbitration agencies, the National Railroad Adjustment Board, has pointed out repeatedly in innumerable decisions on discharge cases, leniency is the prerogative of the employer rather than of the arbitrator; and the latter is not supposed to substitute his judgement in this area for that of the company unless there is compelling evidence that the company abused its discretion. This is the rule, even though an arbitrator, if he had been the original "judge," might have imposed a lesser penalty. Actually, the arbitrator may be said, in an important sense, to act as an appellate tribunal whose function is to discover whether the decision of the trial tribunal (the employer) was within the bounds of reasonableness above set forth. In general, the penalty of dismissal for a really serious first offense does not, in itself, warrant a finding of company unreasonableness.

MANAGEMENT ARGUMENT THAT THE EL-921 IS NOT AN OFFICIAL HANDBOOK UNDER ARTICLE 19

The USPS often takes the position that the EL-921 is only a guide, not an official Article 19 Handbook. To refute such an argument, the Union relies upon the following:

1. Directives and Forms Catalogue Publication 223.

This USPS publication lists all the USPS Handbooks and manuals, including the EL-921. In addition, it includes two handbooks (the EL-401 and EL-501) which are not part of Article 19s Handbooks and Manuals.

In a binding Step 4 interpretive decision, HI C-NA-C 114 dated October 1, 1984, the USPS and APWU agreed the EL-401, “Supervisor’s Guide to Scheduling and Premium Pay”, was not an Article 19 Handbook or Manual:

The issue in this case is whether management was proper in the manner under which EL-401 (Supervisor’s Guide to Scheduling and Premium Pay) was issued.

In final resolution of this grievance we agreed on the following clarification of the purpose and intent of EL-401.

The EL-401 has no authority as a handbook or manual and should never be cited or referred to in any manner to support management’s position with regard to scheduling and premium pay for bargaining unit employees.

In a National level arbitration case, H8C-NA-C 61 dated December 27, 1982, Arbitrator Gamsler determined that the EL-501, “Supervisor’s Guide to Attendance Improvement”, was not an official Article 19 Handbook or Manual:

This case was brought on for arbitration by the APWU, in a grievance subject to disposition at the National Level challenging the force and effect which the Postal Service allegedly bestowed upon EL-501 publication entitled SUPERVISOR'S GUIDE TO ATTENDANCE IMPROVEMENT which was published in November of 1980.

1. The Employer shall promulgate an official document in which it clarifies the status of EL-501, making it clear that it is not to be regarded by management, the Unions, or employee covered by the National Agreement as a handbook having the force and effect of such a document issued pursuant to Article 19. Copies of such promulgation shall be furnished to the Unions concerned.

The parties through a Step 4 resolution and a National level arbitration decision have determined that both the EL-401 and EL-501 are not Handbooks or Manuals under Article 19. There is no such Step 4 decision or National Arbitration decision excluding the EL-921 from Article 19. Absent such authority and determination for the EL-921, and recognizing the EL-921's inclusion in the Directives and Forms Catalogue, the Union position is that the EL-921 is a binding Article 19 Handbook. When the USPS argues against the EL-921, we must put forth the catalogue, the Step 4, the National Award, and our Regional arbitral support.

The conjunction with the tests of just cause and the EL-921, the most important tool the Union has at its disposal--and one of the least utilized in developing thorough, well-reasoned defenses vs. discipline--is our ability under Article 17 and 31 of the Collective Bargaining Agreement to interview witnesses during the course of grievance investigations.

The Collective Bargaining Agreement states:

ARTICLE 17 REPRESENTATION

Section 3. Rights of Stewards

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. (Emphasis added)

ARTICLE 31 UNION-MANAGEMENT COOPERATION

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.

Utilizing our right to interview, the questions the shop steward must ask of management are crucial if success is to be achieved through the grievance-arbitration process. Too often, Union advocates are faced with presenting cases in Arbitration in which the Union has not developed defenses addressing the tests of Just Cause. Too often, Union advocates do not know prior to the hearing what management witnesses and managers themselves will testify to at the hearing. Union interviews done at the earliest steps--prior to Steps 1 or 2--will enable the union to address Just Cause as a structured requirement, not as a variable concept. Once interviews are conducted, the steward becomes a valuable witness for the Union and can, at an arbitration hearing, refute a manager's changed story and seriously cripple a manager's credibility.

The best way to develop solid defense vs. disciplinary actions is to specifically utilize the authority of Articles 17 and 31 for interviews in conjunction with the EL-921s Just Cause definition. The following is illustrative of that process:

EL-921 JUST CAUSE INTERVIEW QUESTIONS

1. Is there a rule?

- What is the rule?
- Is the rule posted in the Post Office?
- If yes, where is it posted?
- If yes, when was it posted?
- If yes, who posted it?
- If yes, were you present when it was posted?
- Was the rule related to the grievant by you?
- If yes, when?
- If yes, where?
- If yes, who else was present?
- Was the grievant informed of the rule when He/she was hired?
- If yes, were you present?
- If yes, who told you?
- How do you know if you weren't there and no one told you?

2. Is the rule a reasonable rule?

- How is this rule related to the job?
- How is this rule related to safe operation?
- What caused the creation of this rule?
- When was the last updating of this rule?
- When did you inform the grievant of this update?

- Who informed the grievant of this update?
- You don't know whether the grievant was informed of any update?

3. Is the rule consistently and equitably enforced?

- How many people have violated the rule?
- How often is it violated?
- How many employees have you disciplined for violating the rule?
- When was the last violation of the rule of which you are aware?
- When did you last issue discipline for a violation of the rule?
- Have you done a comparison of other employees' records who violated the rule?
- Did you consider the grievant's violation in comparison to others?
- Why haven't other employees received the same degree of discipline for similar infractions?
- Why haven't you issued discipline to others for similar infractions?

4. Was a thorough investigation completed?

- This question is covered in great detail in Chapters 2 and 3.

5. 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?

- Others have not received so severe discipline have they?
- Isn't the grievant's record very similar to other's under your supervision?
- Doesn't employee 'Doe have more absences than the grievant and yet no discipline?
- If other employees were all issued letters of warning for this particular infraction, why was the grievant suspended?
- Doesn't the grievant's past record reflect no discipline?
- No employee has ever been fired for taking a break outside the building; why now a removal to the grievant?

6. Was the disciplinary action taken in a timely manner?

- The last absence you cited in the removal was May 5, 1997. You issued the removal on July, 15. Why the delay?
- What new information came into your possession between May 5 and July 15?
- When did you make the decision to remove the grievant?
- When did your investigation begin? End?
- When did you initiate the removal?
- How is a delay of 71 days timely?

The above illustrations are not intended to be complete lists of every question a steward should ask. Each case will differ and will require development of strategically different questions. In any event, no disciplinary grievance must ever be processed without a detailed interview of the managers issuing discipline. When the steward composes the interview questions and compiles them in writing prior to the interview, with adequate space for responses and extemporaneously asked questions, the interview questionnaire should be developed using the format discussed above. Questions for each test should be placed under the test on the form. This will better enable the steward to keep track of the context--and under what just cause test--each question is asked. In our grievances, it is important that we structure our contentions so they address each "test" or element of Just Cause. Listing the individual tests from the EL-921 and how each test has been violated through due process will focus our arguments and create a further due process breach for management should management fail to address each "test" argument in its Step 2 grievance decision. We will argue that management is prevented from raising refutations at arbitration to our "test" arguments since they failed in their obligation to raise those refutations as per Article 15, Section 2, Steps 2d and f, at Step 2 of the

Grievance/Arbitration procedure. Those provisions are as follows:

Article 15 GRIEVANCE-ARBITRATION PROCEDURE

Section 2 Grievance Procedure Steps

Step 2 (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 Article 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.

Step 2(f) Where agreement is not reached the Employer's decision shall be furnished to the Union representative in writing, within ten (10) days after the Step 2 meeting unless the parties agree to extend the ten (10) day period. The decision shall include a full statement of the Employer's understanding of (1) all relevant facts, (2) the contractual provisions involved, and (3) the detailed reasons for denial of the grievance.

Specific structuring of Just Cause tests, interview questions and responses, and Union contentions/issues/arguments will move our disciplinary grievances from broad, general defenses to sharp, concrete due process issues.

The [next](#) chapters in this Handbook address those specific due process issues.

CHAPTER 2

THE ISSUE

THE PRE-DISCIPLINARY INTERVIEW

Including: Pre-Disciplinary Interview for Preference Eligible Employee, and Pre-Disciplinary Interview for Employee Discharged after a Last Chance Agreement.

THE DEFINITION

The Pre-Disciplinary interview is the multi-element due process right of each employee to be:

1. Forewarned of the specific charge in the intended disciplinary action;
2. Forewarned of the degree and nature of the intended disciplinary action; and
3. Asked for his/her side of the story. This is the employee's "Day-In-Court".

THE ARGUMENT

All the above is required before the disciplinary action is initiated. Management must conduct a pre-disciplinary interview; that is, forewarn the employee that discipline is being contemplated, what that discipline will be, the charge the discipline is based upon, and ask the employee for his/her side of the story. Whether or not management utilizes a written request for discipline, the pre-disciplinary interview must be conducted prior to the initiation of any request for discipline. The request for discipline is the initiation of discipline.

Must the pre-disciplinary interview be done in person? No. Management may conduct a pre-disciplinary interview over the telephone or even through correspondence, informing the employee of the charge, nature, and degree of the intended discipline and soliciting the employee's side of the story. A typical pre-disciplinary interview should be conducted as follows:

Manager: Mr. Doe, I am considering issuing you a Notice of Removal for "Failure to be Regular in Attendance." Your attendance record is as follows. This is your chance to respond to that intended action. I want any information you may have from your side of the story prior to making my final decision.

In this manner, management has forewarned the employee and solicited the employee's side of the story. If management conducts an "interview" with an employee immediately prior to issuing a disciplinary action, i.e., at the same meeting in which the employee receives the disciplinary notice, then **that is not a pre-disciplinary interview**. As the manager already has produced the Notice, discipline has already been **initiated**. To hold otherwise is both illogical and unreasonable. Pleadings from management that they had not yet made a final decision on **issuance** are irrelevant, as the pre-disciplinary interview must occur prior to **initiation**, not **issuance**.

THE PREDISCIPLINARY INTERVIEW vs. OFFICIAL DISCUSSIONS AND INVESTIGATIVE INTERVIEWS

Managers often attempt to misrepresent their obligations to a due process, pre-disciplinary interview by claiming that official discussions and/or investigative interviews are also pre-disciplinary interviews.

The following are distinctions between the three:

Official Discussion

Under Article 16.2 of the Collective Bargaining Agreement, management has the responsibility to discuss minor offenses with employees with the purpose being to correct whatever behavior/deficiency the employee has demonstrated:

Article 16 DISCIPLINE PROCEDURE

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.

A proper official discussion goes as follows:

Manager: Mr. Doe, this is an official discussion. The rule against being in the employee parking lot while on rest break is posted on the office's three bulletin boards. In addition, you were notified when hired of this prohibition. Last night, I had to call you into the Post Office from the parking lot while you were on your rest break. I am telling you that if this occurs again, I will be initiating disciplinary action against you.

If there is any problem I am unaware of or if I can assist you in any way to prevent this from happening again, please let me know now.

That is an official discussion which complies with the Collective Bargaining Agreement-- provided it occurs in private between the supervisor and the employee. It is not disciplinary in nature nor is it a fact gathering exercise. It occurs after a minor offense by an employee not as a preemptive measure.

Investigate Interview

Unlike a discussion, an investigative interview is a fact gathering effort by management to investigate a situation prior to coming to any decision as to whether or not discipline should be initiated. Unlike a pre-disciplinary interview, the investigative interview does not forewarn an employee or solicit a response as to any intended discipline because the investigative interview occurs as part of management's fact gathering investigation. This is before any intent is established toward possible discipline.

An investigative interview goes as follows:

Manager:

- Mr. Doe, have some questions concerning your presence in the parking lot last night.
- What time did you leave the building?
- What time did you return?
- For what purpose did not leave the building?
- What were you doing in the parking lot?
- Were you on rest break when you left the building?
- Who was with you?

This is an investigative interview--no forewarning or opportunity to respond to possible intended discipline.

An investigative interview and a pre-disciplinary interview? Yes! Management has an obligation to conduct a thorough, fair, and objective investigation prior to disciplining an employee. Investigative interviews, including an interview with a potential recipient of discipline, are essential elements of the aforementioned investigation process. The pre-disciplinary "day in court" forewarning and opportunity to respond follows the fact gathering investigation and is the last check and balance investigative step prior to initiation of discipline.

THE COLLECTIVE BARGAINING AGREEMENT

Article 19s EL-921 Handbook, “Supervisor’s Guide to Handling Grievances”, defines Just Cause under the Collective Bargaining Agreement. Within that definition, management’s obligation to conduct a pre-disciplinary interview exists as follows:

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 d a y 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.

THE INTERVIEW

Crucial in establishing the fact that no pre-disciplinary interview was conducted is our own interview of the manager responsible for the initiation of the discipline. The following are illustrations of how such an interview may proceed:

- Did you initiate the discipline against Mr. Doe?
- When did you decide to initiate that discipline?
- Did you submit a written request for discipline?
- When?
- To whom?
- Between the last absence cited in the Notice of Removal and the date you submitted your written request for discipline, did you meet with employee Doe?
- Did you call employee Doe at home to discuss the possibility of discipline with him/her between the last absence you cited and your submission of the request for disciplinary action?
- Did you write to employee Doe regarding the possibility of discipline with him/her between last absence cited and your submission of the request for disciplinary action?
- Did you have any contact with employee Doe regarding the possibility of discipline between the last absence cited and your submission of the request for discipline?

- This first contact you had with employee Doe regarding this removal for the charge you included was when you gave him the Notice of Removal?

In this manner, the steward establishes that no pre-disciplinary interview was conducted. Notice that at no time were overly obvious questions asked such as, “Did you conduct an investigation?” “Did you conduct a pre-disciplinary interview?” “Aren’t you required to conduct a pre-disciplinary interview?” Obvious questions will generate obvious responses, which are, at best, other than useful ones, or worse harmful, for the steward’s purpose. The steward must skillfully craft the questions so as to elicit responses supporting our arguments. The steward must orchestrate the interview through careful planning of the questions and in preparation for various responses.

For example, should the manager being interviewed answer that a pre-disciplinary interview has been conducted, then the steward must have detailed questions prepared to test the manager as to the veracity of the answer. Such questions may go as follows:

- ✓ **During your interview, you told employee Doe the charge was going to be Failure to be Regular in Attendance?**
- ✓ **During the interview, you told employee Doe the discipline was going to be a Notice of Removal?**
- ✓ **During the interview, did employee Doe tell you anything regarding those absences?**
- ✓ **If so, what?**
- ✓ **During the interview, you went over the 3971s for absences cited with employee Doe?**
- ✓ **Did you receive any information from employee Doe regarding any of these absences during the interview?**
- ✓ **Where was the interview held?**
- ✓ **When was the interview held?**
- ✓ **Who else was present?**

These questions will limit later deviations should arbitral testimony occur from the manager. If the manager does deviate, then serious credibility breaches will occur. In addition, the interview and eventual arbitral testimony of the grievant (and steward if one was present during the pre-disciplinary interview) can refute the testimony of the manager, even when the manager does meet with the employee in a pre-disciplinary setting. Should the manager not forewarn the employee of the detailed charge and the nature/degree of the discipline and solicit the employee’s “side of the story”, **that exercise is not a pre-disciplinary interview.**

The questions previously included are examples of suggested questions for stewards. Each steward must rely upon his/her own intuition, knowledge of particular fact circumstances, individual personalities, and history to develop questions which will best result in answers most useful in establishing management violated its obligation to the pre-disciplinary interview as due process.

THE U.S. SUPREME COURT

The United States Supreme Court has embraced the principle of the pre-disciplinary interview as required due process when an employee may be disciplined. In Case No. 470 U.S. 532, Justice White, spoke for the majority.

JUSTICE WHITE SUPREME COURT OF THE UNITED STATES 470 U.S. 532
CLEVELAND BOARD OF EDUCATION V. LOUDERMILL ET AL PAGES 9-10,12,13

THE ARBITRATORS

Arbitral authority is extensive and very useful in support of the APWU position that a pre-disciplinary interview is a mandatory requirement of due process in disciplinary instances. Many arbitrators now embrace the EL-921 and incorporate reference to the Handbook in their decisions. In many of the arbitration decisions cited below, but for the due process violation of no pre-disciplinary interview, the arbitrator would have upheld the discipline and denied the grievance. Those decisions are as follows:

ARBITRATOR CHRISTOPHER E. MILES CASE NO. E9OC-2E-D 92033059&92033062
SCRANTON' PENNSYLVANIA JULY 14, 1993 PAGES 21-23

ARBITRATOR JACQUELIN F. DRUCKER CASE NO. C9OC-1 C-D 95008265
PHILADELPHIA BMC, PENNSYLVANIA MARCH 8,1996 PAGE 16

ARBITRATOR JOSEPH S. CANNAVO, JR. CASE NO. A9OC-IA-D 95020409
HACKENSACK, NEW JERSEY JANUARY 17,1997 PAGES 16-20

ARBITRATOR IRWIN J. DEAN, JR. CASE NO. E9OC-2B-D 92034341& 92034343
EAST CAMDEN, NEW JERSEY APRIL 29, 1993 PAGES 16-19

THE ISSUE

PRE-DISCIPLINARY INTERVIEW FOR PREFERENCE ELIGIBLE EMPLOYEE

THE ARGUMENT

Under the umbrella of the pre-disciplinary interview due process requirement is the sub-issue of the pre-disciplinary interview for an employee who receives a Notice of Proposed Removal followed by a Letter of Decision. Under the Veterans' Preference Act, a Preference Eligible employee must be given a Notice of Proposed Removal including notification of the opportunity to respond to the final decision-maker within 10 days of the Notice of Proposed Removal. These due process requirements are often misinterpreted by management into a belief that because the preference eligible employees gets the chance to respond before the Letter of Decision there is not need for a pre-disciplinary interview. **This is absolutely incorrect.**

The preference eligible employee is afforded the same rights as all other employees insofar as the required pre-disciplinary interview is concerned. The supervisor who decides whether or not to initiate discipline must seek the employee's side of the story prior to initiation. Thereafter' through the MSPB process for preference eligible' there is yet another chance to respond following initiation and issuance.

THE ARBITRATORS

Should management fail to conduct a pre-disciplinary interview prior to initiation, the employee's due process rights are violated. Arbitrator Baldovin's explanation in Case No. G9OC-IG-D 95075476 said it best:

ARBITRATOR LOUIS V. BALDOVIN, JR. CASE NO. G9OC-IG-D 95075476
AMARILLO' TX AUGUST 21, 1996 PAGES 2-7

ARBITRATOR JACQUELIN F. DRUCKER CASE NO. C9OT-1C-D 95034191
LEHIGH VALLEY, PA APRIL 11, 1996 PAGES 23-25

THE ISSUE

PREDISCIPLINARY INTERVIEW FOR EMPLOYEE DISCHARGED AFTER LAST CHANCE AGREEMENT.

THE ARGUMENT

Most arbitrators support the position that once an employee is retained under a Last Chance Agreement that employee trades normal Just Cause protection against future discipline for that last and final opportunity to be an employee. Many arbitrators believe that trade-off would relieve management of its pre-disciplinary interview obligation. However, there are several arbitrators who have held that even removal following a last chance requires the basic due process of a pre-disciplinary interview. For that reason, we must advocate our due process argument that a last chance agreement **does not** negate the pre-disciplinary interview as a basic due process requirement.

THE ARBITRATORS

The arbitration decisions in our favor are as follows:

ARBITRATOR LINDA DILEONE KLEIN CASE NO. C9OC-IC-D 93036857
LANCASTER, PENNSYLVANIA FEBRUARY 11, 1994 PAGES 7-8

ARBITRATOR JACQUELIN F. DRUCKER CASE NO. C9OC-1 C-D 95017099
READING, PENNSYLVANIA MAY 17, 1996 PAGES 7-11

CHAPTER 3

THE ISSUE

INVESTIGATION PRIOR TO DISCIPLINE'S INITIATION

THE DEFINITION

Management must conduct a thorough, fair, and objective investigation prior to initiating disciplinary action.

THE ARGUMENT

One of the areas of Just Cause in which the Union is particularly successful is the failure of Management to meet its obligation to conduct a fair, thorough, and objective investigation prior to initiating discipline. Management must establish the facts not through presumption or assumption or reliance on other investigations. The supervisor who initiates discipline through a written request for discipline or drafts a disciplinary notice without such a request is the manager responsible for having investigated prior to the initiation.

Checking records, reviewing statements and documents, interviewing witnesses, viewing videotapes or photographs, listening to audio recordings, these are all possible elements of a supervisor's investigation. Many times, a supervisor does a minimal—at best—review of the situation, which may include almost no first-hand investigation. When this occurs, that supervisor has violated one of the most basic, and important, due process rights of an employee subject to discipline.

When management fails to uncover evidence and facts related to circumstances, which result in discipline, they clearly fall short in their Just Cause obligation. However, the efforts management employs to attempt to uncover evidence and facts is extremely important to our Just Cause defense--no matter what those efforts would or would not have revealed.

Perhaps an employee is removed for sexual harassment of a customer. That removal is based upon a written letter received from the customer. In addition, the supervisor receives two letters from two other customers seemingly corroborating the first customer's letter. The supervisor fires the employee based upon the three letters. If the supervisor did not personally speak with those three customers whose letters he is relying upon to impose removal, then the investigation is inadequate and does not meet the Just Cause requirement. That supervisor had an obligation to contact and inquire. That is the "thorough" obligation. It is not enough to simply read letters and rush to judgment. Perhaps discussion with the three customers would have fully supported

the letters and the action. No matter, the failure to thoroughly establish the facts renders the investigation less than what is necessary to prove Just Cause. When arguing no Just Cause exists due to lack of a thorough, fair and objective investigation, the steward must construct every avenue the supervisor could have, and reasonably should have, explored prior to initiating discipline. All the documents, records, video/ audio tapes, witnesses, etc., that could have and should have been reviewed and interviewed prior to a decision must be listed by the steward in the context of a management obligation to leave no stone unturned in the investigation. This is the only way to establish the supervisor's investigation does not meet the requirements of Just Cause.

POSTAL INSPECTION SERVICE INVESTIGATION AS SUBSTITUTES FOR MANAGEMENT

Increasingly, arbitrators are supporting the Union contention that total reliance by management on the Postal Inspection Service Investigative Memorandum for investigative purposes--prior to discipline--falls short of management's investigatory obligations. Since the Postal Inspection Service is not permitted to recommend, request, initiate, or issue discipline, they cannot be a proper substitute for management. The EL-921, "Supervisor's Guide to Handling Grievances", specifically requires that management conduct the investigation. This is not to say that a Postal Inspection Service Investigative Memorandum cannot be an element of a management investigation--it can and often is. But it is to say that the Postal Inspection Service Investigative Memorandum cannot solely be the only element of investigation management substitutes for its own. Since management has the responsibility for discipline in the Collective Bargaining Agreement, it is management that must decide whether all the facts and all the evidence and all existing mitigating factors result in a disciplinary decision and the degree of that decision.

THE COLLECTIVE BARGAINING AGREEMENT

Article 19's EL-921, 'Supervisor's Guide to Handling Grievances', contains language as to Management's investigatory obligations

- 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.

D. Disciplinary Arbitration

When conducting the investigation before disciplining an employee, the supervisor should gather all available and relevant evidence that will help to prove the case. This information is frequently available in the form of official records. For instance, if the charge involves tardiness, a copy of the employee's time card showing the arrival time might be introduced. On any attendance-related charge, Forms 3971, 3972, etc., would be

relevant. When available, this type of documentation should accompany the supervisor's request for formal discipline.

We realize that documentary evidence is not always available. For example, if an employee fails to comply with the oral instructions of the supervisor, no written documentation of the offense is likely to be available. In an incident such as this, the supervisor should be able to explain clearly and corroborate in detail his or her version of the incident. If there were witnesses to the incident, the supervisor should record their names.

E. Investigation

As previously discussed, when an employee commits an offense, which seems to warrant discipline, the supervisor must avoid rushing into a disciplinary action without first investigating. The need for an investigation to meet our just cause and proof requirements is self-evident. However, the employee's past record must also be checked before any disciplinary action is considered. This is obviously necessary if we are to abide by the principle of progressive discipline.

F. How Much Discipline

Items for consideration in assessing discipline include but are not limited to:

- The nature and seriousness of the offense.
- The past record of the employee and/or other efforts to correct the employee's misconduct.
- The circumstances surrounding the particular incident.
- The amount of discipline normally issued for similar offenses under similar circumstances in the same installation.
- The length of service.
- The effect of the offense upon the employee's ability to perform at a satisfactory level.
- The effect the offense had on the operation of the employee's work unit; for example, whether the offense made coverage at the overtime rate necessary, whether mail was delayed, etc.

THE INTERVIEW

As previously stated, the steward must establish all the information, which should have and could have been explored by the supervisor in management's investigation. Moreover, the higher level reviewing and concurring official also has an obligation to at least review what the supervisor investigated. Many of the question examples below can and should also be asked of the higher level reviewing and concurring official in that context: "Did Supervisor Jones contact Dr. Miles prior to initiating the Notice of Removal?" "Did you ask Supervisor Jones whether or not he contacted Dr. Miles prior to initiating the Notice of Removal?" In this way, we are establishing what investigation the higher level reviewing and concurring official made as part of his required review.

Examples for the supervisor are as follows:

- ✓ Did you review the 3971s
- ✓ You were aware the 3971s were not completed properly?
- ✓ You were aware the 3971s did not reflect schedule/unscheduled?
- ✓ You were aware the 3971s were not signed by management?
- ✓ You were aware the 3971s were neither checked approved nor disapproved?
- ✓ You were aware the 3971s were designated FMLA?
- ✓ You were aware the 3972 listed official discussions on the form?
- ✓ You were aware each absence you cited in the removal notice was documented with a medical certificate?
- ✓ You were aware the past elements of discipline were not yet adjudicated?
- ✓ You were aware the past elements of discipline had been modified?
- ✓ You were aware the past elements of discipline had been expunged?
- ✓ You did not attempt to interview the Postal Medical Officer prior to initiating the Notice of Removal?
- ✓ You did not interview the grievant's personal physician prior to initiating the Notice of Removal?
- ✓ You did not interview the grievant prior to initiating the Notice of Removal?
- ✓ You did not interview the grievant's personal physician prior to initiating the Notice of Removal?
- ✓ You did not interview the customer who wrote the letter of complaint prior to issuing the Notice of Removal?
- ✓ You did not attempt to contact that customer prior to initiating the Notice of Removal?
- ✓ You did not attempt to contact any of the other customers prior to initiating the Notice of Removal?
- ✓ You did not review the videotape prior to initiating the Notice of Removal?
- ✓ You did not attempt to review the videotape prior to initiating the Notice of Removal?
- ✓ You did not review the audiotape prior to initiating the Notice of Removal?
- ✓ You did not attempt to review the audiotape prior to initiating the Notice of Removal?
- ✓ You did not interview the Postal Inspection Service prior to initiating the Notice of Removal?

- ✓ You did not contact the Postal Inspection Service to interview them prior to initiating the Notice of Removal?

The list can go on and on. We must establish not only that the investigation did not occur, but also that no investigation was attempted. Many times only a small portion of the potential investigation may have been attempted or have occurred. It is still important to clearly establish what did not. And each question can and should be asked of the alleged reviewing and concurring official to determine whether that individual fulfilled the “check and balance” role.

Without the interview, the steward can expect - and the advocate will be faced with - glowing accounts by supervisors and higher-level managers of the thorough extent of their “investigation”. While some of this testimony will be refuted, too many times that testimony stands because no interviews exist by the Union to establish the facts and prevent management’s recreation at arbitration.

THE ARBITRATORS

Arbitral reference on management’s obligation to investigate and management’s reliance solely on the Postal Inspection Service Investigative Memorandum is extensive:

ARBITRATOR RANDALL M. KELLY CASE NO. A9OC-4A-D 94016391
ISLAND HEIGHTS, NEW JERSEY NOVEMBER 7, 1994 PAGE 7-14

ARBITRATOR ERNEST E. MARLATT CASE NO. S4C-3S-D 53003 & 53002
MIAMI, FLORIDA SEPTEMBER 18, 1987 PAGE 5-9

ARBITRATOR JOHN C. FLETCHER CASE COC-4M-D 09549 & 12003
FLINT, MICHIGAN FEBRUARY 13, 1992 PAGES 14-16

CHAPTER 4

THE ISSUE

HIGHER LEVEL REVIEW AND CONCURRENCE

THE DEFINITION

All suspensions and removals proposed and issued by a manager must first be reviewed and concurred in by the installation head or that person's designee.

THE ARGUMENT

The installation head or designee of the installation head must review and concur in a proposed suspension or removal prior to the issuing manager's issuance of the action. This "review" must not be just a perfunctory glance and nod, but rather an actual review and investigation to ensure the conclusions the issuing manager is proposing are accurate. The reviewing official must also ensure the issuing manager has conducted an investigation which meets the requirements of the Just Cause process including a pre-disciplinary interview. If the reviewing official does nothing more than glance and nod with no questions, no checking' no effort to ensure accuracy and due process, then Article 16.8's requirements for higher-level review and concurrence are violated--and the employee's due process rights are violated--regardless of the extent to which the initiating manager did meet due process and Just Cause requirements. The employee is not entitled to due process from the initiating manager or the reviewing authority—the employee is entitled to due process and any less due process violates the Just Cause benchmark.

Coupled with the above stated due process issue is the circumstance in which discipline is ordered or "recommended" from a higher level official down to a lower level manager for issuance. When this occurs--and independent authority to initiate or not initiate discipline is diminished or eliminated entirely--then true higher level review and concurrence as required by Article 16.8 cannot occur. The following is illustrative of this:

Level 20 Manager Smith "recommends" to Level 16 Manager Jones that employee Doe be issued a removal. Level 16 Manager Jones issues the removal after obtaining review and concurrence from Level 22 Postmaster Bing.

Although the Level 22 Postmaster did review and concur, he did not review and concur in any action proposed by Level 16 Manager Jones, His review and concurrence was for an action initiated by another manager. Article 16.8 requires that in no case may a supervisor impose suspension or discharge unless the proposed disciplinary action has first been reviewed and concurred by the installation head or designee.

In the scenario described, the "supervisor" referred to did not initiate and impose the removal because a higher-level manager "recommended" and thus initiated it.

There was no actual “proposal” from Level 16 Manager Jones thus there can be no true review and concurrence for Level 16 Manager Jones’ “action”.

In other cases, the higher-level manager, says a Level 21 postmaster or Level 20 labor relations’ specialist will “recommend” removal to a Level 17 floor supervisor. Then the Level 17 floor supervisor seeks and obtains “review” and “concurrence” from the same individual who recommended or “advised” removal in the first place. Whenever a manager reviews and concurs in the action he or she initiated’ the check and balance requirement of Article 16.8’s review and concurrence is fatally damaged--along with an employee’s due process rights.

THE COLLECTIVE BARGAINING AGREEMENT

Article 16.8 specifically requires higher-level review and concurrence. The EL-921 “Supervisor’s Guide to Handling Grievances” also refers to higher-level review and concurrence. Together’ these provisions are the basis for our arguments toward this check and balance due process safeguard. The provisions are as follows:

ARTICLE 16 DISCIPLINE PROCEDURE

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 associate post offices of twenty (20) or less employees or where there is no higher level supervisor than the supervisor who purposes 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.

Article 19’s EL-921 “Supervisor’s Guide to Handling Grievances”

Therefore, it is crucial that the supervisor not only take good notes during the Step 1 discussion, but also advise both the reviewing authority and the designee for Step 2 that a grievance has been filed. Since the reviewing authority thoroughly reviewed proposed discipline before it was initiated’ that person will be a key source of information for management’s Step 2 designee. There must be a clear channel of communication between these two individuals.

D. Role of the Step 2 Designee

The reviewing authority looks at the proposed discipline before it is imposed and concurs with the proposed action, based on the facts supplied by the supervisor.

Except to check out new facts which may be presented at the Step 2 discussion, the Step 2 designee will not have to develop management's case if the reviewing authority and supervisor involved have done their homework.

THE INTERVIEW

Again, the interview is our key method of establishing the review and concurrence process was violated. When conducting our investigation, we can develop questions to pit the "initiating" manager's story against the alleged reviewing and concurring official's version of his/her role, participation and investigation. It is also important to note that most managers, including management arbitration advocates, will resist the concept that the reviewing and concurring authority must conduct more than a glance and nod at the proposed action. Nevertheless, a reasonable reading of Article 16.8 clearly tells us that review is required. Review is defined in Webster's Dictionary as follows:

1. To inspect, to make formal or official examination of the state of;
2. To notice critically.

Now, the interview examples:

For Initiating Manager

- ✓ Did Postmaster Sims ask you who you interviewed prior to initiating the removal?
- ✓ Did Postmaster Sims ask you what your investigation consisted of prior to your initiating the removal?
- ✓ Prior to issuing the Notice of Removal did you speak to anyone in management about removing employee Thomas?
- ✓ Prior to issuing the Notice of Removal did you properly follow Postmaster Sims' instruction to initiate the removal?
- ✓ Were you required under the Collective Bargaining Agreement to follow the Postmaster's instructions and remove employee Thomas for theft? Drug use? (Best for this question to be utilized in serious offense situations in which the steward believes the lower level manager had little or nothing to do with the decision to issue.)
- ✓ Did you meet with anyone in management prior to issuing the Notice of Removal?
- ✓ (If the two managers did not meet then a true review and concurrence would have been more difficult.)
- ✓ What documents did Postmaster Sims review upon your presentation of the proposal for discipline?
- ✓ What documents did your present to Postmaster Sims for his review prior to your receiving concurrence?
- ✓ Who instructed you to seek concurrence from Manager Smith?
- ✓ Was that instruction in writing?
- ✓ Who designed Manager Smith as the Higher Level authority for you in this discipline?

- ✓ Was that designation in writing?
- ✓ Does Manager Smith always review and concur on discipline on tour 3 in the Anytown Postal Office?
- ✓ Did you seek Higher Level concurrence prior to initiating your request for discipline?
- ✓ Did you seek Higher Level concurrence after you received the removal notice from labor relations? Personnel?
- ✓ How long did your meeting with Postmaster Sims take at which time the discipline was reviewed and concurred?
- ✓ Where did the review and concurrence meeting take place?
- ✓ Were you present when Postmaster Sims reviewed and concurred?
- ✓ Did you leave Postmaster Sims the removal for review and concurrence in his mail receptacle?
- ✓ You don't know what his review consisted of do you?
- ✓ You don't know what information he reviewed do you?
- ✓ You don't know whether Postmaster Sims reviewed any information other than the disciplinary notice do you?
- ✓ As far as you know, Postmaster Sims only reviewed the disciplinary notice and nothing else?
- ✓ Did Postmaster Sims speak to employee Doe, who is being removed prior to concurring?
- ✓ What Level are you?
- ✓ What Level is the concurring official?

For Concurring Official:

- ✓ Who presented this removal to you for concurrence?
- ✓ Was it presented in person?
- ✓ What documents were presented with the removal notice?
- ✓ Was the proposal presented before the actual notice of removal was formulated?
- ✓ What documents did you review prior to concurring?
- ✓ What did you speak with regarding the removal prior to concurring?
- ✓ Did you speak with employee Doe, Who is being removed prior to concurring?
- ✓ Didn't you think it important to speak with employee Doe prior to concurring?
- ✓ Did supervisor Jones speak with employee Doe prior to concurring?
- ✓ Who did supervisor Jones speak with prior to initiating this discipline?
- ✓ Was a pre-disciplinary interview conducted by supervisor Jones before this action was initiated?
- ✓ Do you know whether or not supervisor Jones interviewed anyone prior to initiating this discipline action?
- ✓ Did you interview anyone prior to concurring with this disciplinary action?
- ✓ Did supervisor Jones provides you with any information when he sought review and concurrence from you?
- ✓ What information did supervisor Jones provide you with when he sought review and concurrence?
- ✓ Did you meet with supervisor Jones prior to concurring?

- ✓ Did you question supervisor Jones prior to concurring?
- ✓ Did you ask supervisor Jones whether or not he had conducted a pre-disciplinary interview with employee Doe prior to initiating the removal?
- ✓ Did you ask supervisor Jones what documents were reviewed prior to his initiation of the removal?
- ✓ Did you ask supervisor Jones whom he had interviewed or spoken to regarding employee Doe prior to initiating the removal?
- ✓ What information did supervisor Jones review before he initiated the discharge?
- ✓ Did you ask supervisor Jones what information he reviewed before he initiated discharge?

The questions asked of both the alleged initiating supervisor and alleged higher-level authority will be very revealing and crucial to the establishment that proper review and concurrence does not exist. Many of the questions can be asked of both individuals and by changing elements within the questions serious breaches in credibility can be uncovered. Cross-checking questions when dealing with these two major protagonists of the disciplinary process will almost certainly reveal differing answers, which prove due process violations. Many of the questions will also be useful in arguing the lack of investigation issue.

Without the interviews--and this cannot be overemphasized--management will be able to patch up the violations and, at arbitration, the true nature of the discipline's initiation, actual authority in issuance, and whether or not true review and concurrence occurred will be lost to the Union as due process arguments and violations.

THE ARBITRATORS

Higher Level Review and Concurrence, which has historically been a major due process requirement, is second only to the pre-disciplinary interview as a compelling due process Just Cause issue. The arbitral history is as follows:

ARBITRATOR JONATHAN DWORKIN CASE NO. C4C-4C-D 20367
DENVER, COLORADO FEBRUARY 2, 1987 PAGES 23-25

ARBITRATOR NICHOLAS H. ZUMAS CASE NO. E1R-2F-D 8832
FLEETWOOD, PENNSYLVANIA FEBRUARY 10, 1984 PAGES 5-6

ARBITRATOR WAYNE E. HOWARD CASE NO. E7C-2B-D 9220
NEW HOPE, PENNSYLVANIA MAY 23, 1989 PAGE 6

ARBITRATOR GEORGE V. EYRAUD, JR. CASE NO. SOC-3A-D 9758
ARLINGTON, TEXAS NOVEMBER 6, 1992 PAGES 11 - 12 1-12

CHAPTER 5

THE ISSUE

AUTHORITY TO RESOLVE THE GRIEVANCE AT THE LOWEST POSSIBLE STEP

DEFINITION

A lower level manager discusses a disciplinary grievance at Step 1 or 2 AFTER a higher-level manager either issued the discipline or actually made the decision to issue.

THE ARGUMENT

An offspring of the Higher Level Review and Concurrence due process issue is whether the manager discussing the resultant grievance for the discipline has actual authority to resolve the grievance. Often a lower level manager--possibly the issuing supervisor--meets the Step 1 of the Grievance/Arbitration process. That manager may have been instructed by the Tour MDO, Plant Manager, or Postmaster to issue the discipline. If so, then no reasonable expectation can exist that that lower level manager has or will have true independent authority to resolve the grievance. It is not a reasonable expectation to believe a subordinate will overturn the decision of his boss.

Through interviews and investigation, it may be determined that the alleged higher-level concurring official was the impetus behind the issuance of the discipline.

While management may claim the lower level supervisor initiated and issued, the steward has ascertained that in reality the decision to initiate and issue was that of the higher-level manager--not the lower level supervisor. Now the grievance is presented at Step 1 with the lower level supervisor. That manager cannot reasonably, or in any way in reality, be expected to possess the actual authority to resolve the case at Step 1. Such authority requires a measure of independence and that independence simply does not exist in the USPS management structure when the true decision comes from the top to a lower level.

Once a lower level manager without the authority required by the Collective Bargaining Agreement discusses a grievance and inevitably issues a denial, the due process rights of the grievant and of the grievance--and of the Union--for full, fair lowest possible step resolution are lost forever. This breach cannot be repaired. If independent authority does not exist, then it cannot be created.

THE COLLECTIVE BARGAINING AGREEMENT

Language in Article 15, Sections 1, 2, and 3 are utilized in support of the Union's position whenever a manager does not possess the true authority to resolve a grievance at the lowest step:

ARTICLE 15 GRIEVANCE-ARBITRATION PROCEDURE

Section 2 Grievance Procedure Steps

Step 1

(b) In any such discussion the supervisor shall have authority to settle the grievance.

Step 2

(c) The installation head or designee in Step 2 also shall have authority to grant or settle the grievance in whole or in part.

Section 4. Grievance Procedure – General

A. The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognizes their obligation to achieve that end.

ARTICLE 19's EL-921

“Supervisor’s Guide of Handling Grievances”

It is the responsibility of local management to resolve as many grievances as possible at Step 1. When grievance has merit, you should admit it and correct the situation. You are a manager--you must make decisions--don't pass the buck. Your decision on a grievance should be based on the facts of the situation and the provisions of the National Agreement. You should listen to the employee or union's grievance and make sure of the facts.

The basic principle of Article 15 is commitment of the parties of the lowest possible step resolution as stated in Article 15.4A. That principle cannot be achieved whenever higher-level managers take actions and the charade of lower level managers discussing grievances occurs.

THE INTERVIEW

Many of the questions the steward uses in his investigation of the higher-level review and concurrence issue will be revealing and pertinent to our argument that authority to resolve does not exist. There will even be instances in which lower level supervisors will admit they have no authority because they “were ordered” or the decision “came from the top.” The following examples will assist in eliciting beneficial responses:

- ✓ You did not initiate a request for discipline?
- ✓ You normally do initiate a request for discipline?
- ✓ The Notice of Removal was prepared by personnel/labor relations and presented to you for your signature?

- ✓ You knew nothing of this action prior to being presented with the prepared notice?
- ✓ You really don't know much about the circumstances leading to this action do you?
- ✓ What did you know prior to issuing the removal?
- ✓ What manager does know about the circumstances?
- ✓ This really came from up the chain of command?
- ✓ From who?
- ✓ You signed it because you are employee Doe's immediate supervisor
- ✓ You will be meeting at Step 1 because you are employee Doe's immediate supervisor?
- ✓ What Level are you?
- ✓ What Level is the Postmaster? MOD? Plant Manager?

QUESTIONS FOR STEP 1 MEETING (NOT BEFORE)

- ✓ Can you resolve this?
- ✓ Could you resolve this if you wanted to?
- ✓ You can't really resolve this or attempt to resolve it because the Postmaster made the decision?
- ✓ This removal really came from the Postmaster to you, isn't that correct?
- ✓ Since this wasn't your decision, you can't really seriously consider resolving it can you?
- ✓ They don't expect you to resolve this since it wasn't your decision?
- ✓ (Why are you) You are stuck with discussing this when the Postmaster made the decision?

With regard to this last group of questions, be careful to not tip your hand too much until you **are actually discussing the grievance at the grievance meeting**. If you do, you may see management change who is going to meet with you. Even if the Postmaster did issue the notice and is going to meet with you; it does not mean the real decision was made with the Postmaster. Often, and especially in cases involving the Postal Inspection Service, the decision comes from the district and/or labor relations or even through pressure from the Postal Inspection Service. The local Postmaster may still be willing to admit he had nothing to do with actually making the decision to issue the discipline and/or wanted no part in it.

In instances in which there is no evidence that a decision came from a higher level to a lower level, a due process breach may still be found. The steward—whenever possible—should attempt to discuss a grievance at Step 1 with a **lower level manager** than the issuing supervisor. Once such discussion occurs, we include in our Step 2 appeal the

contention that lower level manager Jones cannot reasonably be expected to possess the authority to overturn or modify a boss' (higher level manager's) decision.

THE ARBITRATORS

Arbitral authority on the issue of authority to resolve at the lowest step is often intermixed with the higher-level review and concurrence issue since that is where the issue most often manifests itself.

The best of these decisions are quoted below:

ARBITRATOR J. FRED HOLLY CASE NO. S8N-3F-D 9885
LITTLE ROCK, ARKANSAS MAY 20, 1980 PAGES 6-7

ARBITRATOR DENNIS R. NOLAN CASE NO. S4N-3A-D 37169
DALLAS, TEXAS MARCH 6, 1987 PAGES 5-6

ARBITRATOR IRVIN SOBEL CASE NO. S4N-3P-D 14150
GREER, SOUTH CAROLINA APRIL 7, 1986 PAGES 13-15

ARBITRATOR G. ALLAN DASH, JR. CASE NO. E4C-2M-D 36491& 37089
CLARKSBURG, WEST VIRGINIA APRIL 21, 1987 PAGES 14-15

CHAPTER 6

THE ISSUE

THE DENIAL OF INFORMATION

DEFINITION

Management denies information to the Union necessary for determination as to whether or not a violation exists or for grievance investigation/processing.

THE ARGUMENT

Whenever management denies information in the form of documentary evidence or witness access for interviews, our due process rights to conduct our investigation in grievance processing are violated. In the course of an investigation to determine whether to file a grievance or for evidence gathering in support of a grievance, the Union has the right to access all relevant information. Often, management denies the Union access to documents, records, forms, witnesses, etc. This denial by management constitutes a very serious due process breach, which prevents the best possible defense in disciplinary cases through full development of all defense arguments.

Under the Collective Bargaining Agreement, the Union has a contractual right to **all** relevant evidence **including witnesses** and management creates one of our most successful defenses when it denies us access to information. Should management deny information, then several arguments are born:

1. Negative Inference Created

The negative inference argument is best defined as a presumption that the evidence withheld by management would either prove the Union's case or seriously damage the employer's ability to meet their Just Cause burden of proof.

Example: Management denies the Union access to the attendance records of the issuing supervisor and other craft employees in the course of the Union's investigation into an attendance-related removal. The negative inference drawn is that examination of those attendance records for the supervisor and other craft employees would reveal disparate or unfair treatment to the grievant. The act of withholding by management casts shadow and doubt on the reasons for the withholding—that management does not want to let the facts be known, as those facts will damage management's case.

2. Lowest Possible Step Resolution Fatally Damaged

Resolution of grievances at the lowest possible step is the cornerstone of Article 15's Grievance/Arbitration procedure. When management denies access to the Union of relevant information, then full development of all the facts, arguments, Collective Bargaining Agreement reliance, and defenses cannot be achieved. Without such full development and without everything being placed before the parties for discussion at the lowest possible step, there can, in actuality, be no real probability of lowest possible step resolution of a grievance. Thus, Article 15.3's basic principle is violated and with it the due process right of both the grievant and grievance to benefit from the possibility of lowest possible step resolution.

3. Defenses Denied Development

Articles 15, 17, and 31 all provide the Union the ability to fully develop all the facts through evidence gathering to ensure every available argument and defense is set forth on behalf of the grievant. When management denies the Union access to relevant information, it prevents the Union from formulating and ultimately providing the best possible defense. Such denial violates the basic due process right of the Union to defend an employee against discipline and an employee's basic due process right to the best possible defense.

Management will often attempt to provide the Union information after a particular step in the Grievance/Arbitration procedure. Our position, whether we accept access to the tardy data or not, must be that the due process violation cannot be corrected as the lowest step for possible resolution is forever gone through the passage of time and the Collective Bargaining Agreement's time limits. Nor should we accept remands to a prior step for further discussion with the information to which we were originally denied access. Such a remand will negate our due process argument for denial of information.

Depending upon the case, a remand may be considered if it is coupled with an agreement to make the employee whole for the period through the remand date if loss to the employee has occurred. Such an agreement would have to be weighed versus the value of the due process argument and the harm the loss has had to the grievant.

In arbitration, we must argue that denial of evidence at any stage of the Grievance/Arbitration procedure precludes the presentation of that evidence at the arbitration hearing. Due to management violations of Articles 15, 17, and 31, and management's denial of due process to the Union, grievance, and grievant, it would be wholly inappropriate and unfair for an arbitrator to even be exposed to denied information.

When Information is Denied

When a request for access to information is denied, we must ensure that the “hook is set” through very deliberate action. That action includes:

1. FILE AN ADDITIONAL GRIEVANCE CITING ARTICLES 15, 17 AND 31 ON INFORMATION DENIALS.

In that grievance, request as a remedy:

- (1) The information be provided so long as such access is given prior to any grievance step meeting and,
- (2) Should the information not be provided prior to any grievance step meeting, that the original grievance be sustained?

Although it can be argued an additional grievance is neither necessary nor reasonable under our Collective Bargaining Agreement, many arbitrators will ask the question and let management off the hook if the Union did not file the repetitive grievance.

2. CORRESPOND WITH FOLLOW UP REQUEST FOR INFORMATION

Follow the initial Request for Information with a personalized letter taking the Request for Information form to a more specialized level. In this manner, an arbitrator will notice the Union made a persistent, “second effort” to obtain the information. It is a good idea to submit at least two (2) correspondences in addition to the original Request for Information prior to the Step 2 meeting. At least one of the two should be to the immediate superior of the addressee to the original Request for Information. In this way we can point out to the Arbitrator we were making every effort including affording a higher-level manager the opportunity to rectify the lower level supervisor’s failure.

3. INCLUDE DENIAL OF INFORMATION REFERENCE IN DISCIPLINARY GRIEVANCES STEP 2 APPEALS

Following the full disclosure commitment of the parties in Article 15 and our responsibility to present fully developed grievances at Step 2 (as far as possible) we must ensure that each bit of information we are denied access to during our attempted investigation is referenced as part of our contentions in our Step 2 appeal. We must cite the violations of Article 15, 17, and 31 and argue the three major due process arguments: Negative inference, fatal damage to lowest possible step resolution and development of defenses denied.

Specifically citing the Articles’ 15, 17’ and 31 argument in our Step 2 appeal will prevent management from successfully arguing that the denial of information issue is a new argument and not proper for consideration by the Arbitrator.

Remember; request ALL data you believe to be relevant. We then determine what we will use and discard. Management, when it denies any evidence, violates the Collective Bargaining Agreement and creates very strong due process breaches. Many times, the arguments management creates by denying us information are far more beneficial to our defense than would be the information had it been obtained.

THE COLLECTIVE BARGAINING AGREEMENT

Articles 15, 17, and 31 are the Collective Bargaining Agreement authority, which clearly requires management to provide the relevant and necessary information for grievance processing and violation determination:

ARTICLE 15 GRIEVANCE ARBITRATION PROCEDURE

Section 2 Grievance Procedure Steps

Step 2:

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

Article 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.

ARTICLE 17 REPRESENTATION

Section 3. Rights of Steward

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 request shall not be unreasonably denied.

ARTICLE 3.1 UNION-MANAGEMENT COOPERATION

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.

THE INTERVIEW

While most arguments on information denials will seem self-evident based upon review of management comments on the requests for information, coupled with a “denial” signature or initials, the interview is crucial when there is not such notation.

Further the interview can strengthen our case when management supports its denial through responses.

Some examples are:

- ✓ You did deny the information?
- ✓ You have the information requested on the Request for Information in your possession?
- ✓ You relied on that information in issuing the removal?
- ✓ You interviewed Postal Inspector Arnold prior to issuing the Notice of Removal?
- ✓ You did not provide access to Postal Inspector Arnold to the Union?
- ✓ Doesn't Article 17.3 give the Union access to witnesses?
- ✓ Are you saying Postal Inspector Arnold is not relevant to the Union's grievance?
- ✓ What Collective Bargaining Agreement article did you rely upon in denying the Union access to Postal Inspector Arnold?

Denial of information is often a Catch- 22 for management and our interview process enables management to really damage their defense of the denial. The interview also ensures management is prevented from presenting some innovative excuse for the denial at arbitration. We not only want proof of denial for our Step 2 appeal, but we want to cement management's reasons for denial. This will greatly enhance our pursuit of this due process violation.

THE ARBITRATORS

Arbitrators have provided excellent language on the issues related to denial of information and in some cases' overturned disciplinary actions in their entirety solely on that basis:

ARBITRATOR CARL F. STOLTENBERG CASE NO. E4T-2A-D 38983138986
PHILADELPHIA, PENNSYLVANIA OCTOBER 4' 1988 PAGES 13-16

ARBITRATOR JOSE P. SIREFMAN CASE NO. N7C-IN-D 0027177
PATERSON' NEW JERSEY MARCH 18, 1994 PAGES 1 I-13

ARBITRATOR RANDALL M. KELLY CASE NO. A9OC-4A-D 94009758
ISLAND HEIGHTS' NEW JERSEY NOVEMBER 7, 1994 PAGES 4-6

ARBITRATOR RANDALL M. KELLY CASE NO. A9OC-IA-D 94005201 & 94011159
TRENTON, NEW JERSEY MAY 10, 1995 PAGES 6-11

ARBITRATOR JOSEPH S. CANNAVO, JR. CASE NO. N7C-IN-C 33753
NEW BRUNSWICK, NEW JERSEY JANUARY 30' 1996 PAGE 5

CHAPTER 7

THE ISSUE

NEXUS (CONNECTION) BETWEEN OFF-DUTY MISCONDUCT AND USPS EMPLOYMENT

THE DEFINITION

There must exist a nexus or connection between off-duty misconduct and Postal employment for Just Cause to exist when an employee is disciplined due to off-duty misconduct. Many arbitrators apply the following guidelines for demonstration of the nexus:

ARBITRATOR ROBERT W. MCALLISTER CASE NO. C4C-4B-D 37415 8' 37416
DETROIT, MICHIGAN FEBRUARY 22,1988 PAGES I I-12

THE ARGUMENT

The Union argument in an off-duty discipline case--usually a removal or indefinite suspension--crime case--is straightforward--that management has failed to prove any nexus or connection between an employee's off-duty conduct and that employee's Postal employment. No matter what the employee has done off-duty, we must put forth our argument that that conduct has nothing whatsoever to do with the employee's employment. The charge could involve drug use, drug trafficking, violence, theft or a multitude of other serious offenses. Regardless of the charge, unless there can be established a nexus between conduct away from the clock, the job and employment our position is Just Cause cannot exist.

This is not to say that we will be successful in every defense utilizing the nexus argument; we will not. Arbitrators often excuse themselves with decisions wrapped with "moral judgment" or "societal concerns". It is also evident that some Arbitrators will view increasingly serious offenses with less and less emphasis on the nexus principle.

Despite these pitfalls, we must ensure that the due process nexus protection is pursued and developed to the fullest--in every case. We must ensure that our own personal opinions concerning particular offenses are never factors in our pursuit of the nexus argument. Remember, provisions of the Collective Bargaining Agreement permit the hiring of individuals with criminal histories. Further, managers are not necessarily treated so summarily as are our own Union members when off-duty misconduct occurs.

'Our jobs as stewards and arbitration advocates are to provide the best possible defense. The nexus argument is a major required element in providing that defense.

THE COLLECTIVE BARGAINING AGREEMENT

The USPS often utilizes language in Chapter 6 of the Employee and Labor Relations Manual in prosecution of off-duty conduct cases:

EMPLOYEE AND LABOR RELATIONS MANUAL

661.3 Standards of Conduct

Impeding Postal Service efficiency or economy.

Affecting adversely the confidence of the public in the integrity of the Postal Service.

661.53 Unacceptable Conduct

No employee will engage in criminal, dishonest, notoriously disgraceful or immoral conduct, or other conduct prejudicial to the Postal Service. Conviction of a violation of any criminal statute may be grounds for disciplinary action by the Postal Service, in addition to any other penalty by or pursuant to statute.

661.55 Illegal Drug Conduct

Illegal use of drugs may be grounds for removal from the Postal Service.

666.2 Behavior and Personal Habits

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

The Collective Bargaining Agreement itself does not provide for a required nexus, however, in a National Level Arbitration Award, the USPS itself recognized the necessity of a nexus between USPS employment and off-duty misconduct for Just Cause to be achieved:

**ARBITRATOR SYLVESTER GARRETT CASE NO. NC-NAT-8580
NATIONAL AWARD SEPTEMBER 29, 1978 PAGES 31-32**

THE INTERVIEW

It is important to establish (1) that no nexus existed, and (2) that there was no reliance on a nexus by the issuing supervisor and concurring official when the case is being investigated at the earliest stages. Management advocates will invariably attempt to establish some post disciplinary nexus at arbitration--even though the issuing supervisor probably hadn't a clue as to what the nexus principle was--much less what nexus may have existed--when the discipline was initiated and issued. Even if a management advocate can produce newspaper article after newspaper article stating the disciplined employee's name, Post Office of employment, etc., at arbitration--if the issuing supervisor did not rely upon those articles, then there was no nexus when the discipline was initiated and issued. However, without clear establishment of what the supervisor relied upon and what reasoning was behind the decision to discipline -- through the interview--then management will testify at the arbitration hearing all about the nexus that is then claimed to be the reason the action was initiated.

The interview is as important in a nexus case as it is in any element of due process and Just Cause. Some examples of the interview in a nexus case are as follows:

- ✓ Mr. Doe's conduct occurred off the clock?
- ✓ Mr. Doe's conduct occurred off the premises?
- ✓ Were you present when this alleged misconduct occurred?
- ✓ How did you find out about this misconduct?
- ✓ Did you read about Mr. Doe in the newspaper? What newspaper? When?
- ✓ Did you have these articles?
- ✓ Did you hear about Mr. Doe on the radio? What radio station? When?
- ✓ Do you have audiotapes of these reports?
- ✓ Did you see Mr. Doe on television? What television station? When?
- ✓ Do you have videotapes of these reports?
- ✓ Did you receive customer complaints about Mr. Doe's continued employment?
- ✓ From whom? Names? In writing? When?
- ✓ Do you have these written customer complaints?
- ✓ Did Mr. Doe make any arrangements for the sale (which occurred off the clock) while he was at work?
- ✓ What evidence do you have of such arrangements? Taped telephone calls? Taped conversations?
- ✓ You based this removal solely on Mr. Doe's behavior off the clock?
- ✓ What evidence did you rely upon connecting Mr. Doe's conduct to his postal job?
- ✓ We must limit management's ability to justify a discipline after the fact through establishment of a post discipline nexus. In this regard, the interview may be our only tool.

THE ARBITRATORS

From the National Level award previously cited regional arbitrators have expressed, improved and honed the nexus principle into one of the most important due process protections for employees under our Collective Bargaining Agreement. Those decisions have become the standard for the expression of the principle:

ARBITRATOR BERNARD CUSHMAN CASE NO. E7C-2A-D 6987 & 8134
LANGHORNE, PENNSYLVANIA APRIL 3, 1989 PAGES 17-20

ARBITRATOR J. FRED HOLLY CASE NO AC-S-21,846-D
BIRMINGHAM, ALABAMA MAY 9, 1978 PAGES 4-6

ARBITRATOR J. FRED HOLLY CASE NO. AC-1 7,233-D
BIRMINGHAM, ALABAMA OCTOBER 18,1977 PAGE 5

ARBITRATOR JOHN C. FLETCHER CASE NO. COC-4Q-D 11991
CENTRALLA, ILLINOIS MARCH 17, 1993 PAGES 9-13

CHAPTER 8

THE ISSUE

TIMELINESS OF DISCIPLINE

THE DEFINITION

That issuance of discipline must be reasonably timely in relation to the date of the alleged infraction or the date of the last absence cited.

THE ARGUMENT

While there is no defining line in our Collective Bargaining Agreement which states, "Discipline must be issued within 30 days of the infraction or last absence cited", a general rule of reason applies that 30 days is the normal standard as the time frame for issuing discipline. This is not to say that discipline issued beyond 30 days will automatically be deemed procedurally defective by an arbitrator. But once disciplinary issuance goes beyond that 30 days, the Union's argument becomes increasingly stronger that the Just Cause test of timeliness is defective and violated.

Management Claims of Delay When Postal Inspection Service is investigating

Delays in issuing discipline are sometimes blamed by management due to ongoing Postal Inspection Service investigation or "waiting for the Postal Inspection Service Investigative Memorandum." While there may be some consideration given to such reasons from management by arbitrators, the Union must still pursue the timeliness issue. Often times, the Investigative Memorandum will reveal the Postal Inspection Service's investigation actually ended by a particular date--long before final presentation of the Postal Inspection Service Investigative Memorandum to Postal management. Other times, although the Postal Inspection Service and management claim an ongoing investigation was continuing, the facts will not support such a continuation or delay in management's issuance of discipline. We do know that management relies heavily--sometimes 100%--on the Postal Inspection Service Investigative Memorandum (another due process issue found in Chapter 3) but there will be instances in which the Investigative Memorandum is only a small part of management's decision and issuance of discipline. In any event, a management claim of delay due to the Postal Inspection Service Investigative Memorandum receipt must not, in and of itself, deter our due process pursuit.

Review of the disciplinary notice, the fact circumstances, and the time lapse between the alleged infraction or last absence and disciplinary issuance will reveal whether or not a timeliness argument exists and how vigorously that due process argument should be pursued.

THE COLLECTIVE BARGAINING AGREEMENT

Under the Just Cause definition of Article 19's EL-921, the last element or test of just cause is found:

ARTICLE 19's EL-921

'Supervisor's Guide to Handling Grievances'

- ✓ Was the disciplinary action taken in a timely manner?

Disciplinary actions should be taken as promptly as possible after the offense has been committed.

THE INTERVIEW

Like the interview for "past elements not adjudicated" found in Chapter 13, the interview for timeliness of discipline will not be dispositive of fact circumstances so much as intent, involvement, and authority. We must try to uncover why a delay occurred, who was involved in the delay and whether the issuing supervisor actually had any say in causing or preventing the delay.

Examples are:

- ✓ When did you make the decision to initiate disciplinary action?
- ✓ When did you finish gathering all the facts, which went into your determination to initiate disciplinary action?
- ✓ When did you last make contact with the Postal Inspection Service regarding Mr. Doe?
- ✓ When did you receive the Postal Inspection Service Investigative Memorandum?
- ✓ What information did the Postal Inspection Service Investigative Memorandum reveal to you other than what you already possessed prior to receiving Investigative Memorandum?
- ✓ What caused the five week time period from Mr. Doe's last absence and your initiation of the request for discipline?
- ✓ You could have initiated this discipline sooner than you did?
- ✓ You were only told of the decision to remove two days before your issuance?

The interview in timeliness argument circumstances becomes valuable due to its ability to limit later revisions by management for untimely initiation and/or issuance of discipline.

Again, questions on timeliness can reveal lack of involvement, intent, and authority of the issuing supervisor.

Like most people, many supervisors do not want to be blamed for that which they were not responsible. If a timeliness delay in conjunction with the Just Cause element is the subject of interview questions, it is probable a supervisor not responsible for the delay may reveal much helpful information on other aspects of the issuance of the discipline.

THE ARBITRATORS

While not setting a definitive benchmark for untimely discipline, the reasoning and determinations of these arbitrators is helpful in support of our argument:

ARBITRATOR LINDA DILEONE KLEIN CASE NO. E7C-ZA-D 31987
PHILADELPHIA, PENNSYLVANIA JANUARY 23, 1992 PAGE 6

ARBITRATOR J. FRED HOLLY CASE NO. AC-S-16,222-D
NATIONAL AWARD AUGUST 8, 1976 PAGES 4-6

ARBITRATOR WALTER H. POWELL CASE NO. E7C-ZA-D 28934
PHILADELPHIA, PENNSYLVANIA APRIL 2, 1991 PAGES 7-8

ARBITRATOR CARL A. WARNS, JR. CASE NO. AB-S 10,642-D
LOUISVILLE, KENTUCKY MAY 22, 1976 PAGES 6-7

ARBITRATOR ROBERT W. MCALLISTER CASE NO. COC-4L-D 16172
FOX VALLEY, ILLINOIS MARCH 15, 1993 PAGE 47

CHAPTER 9

THE ISSUE

DISPARATE TREATMENT

THE DEFINITION

Issuance of discipline in a manner, which is different, and/or unfair, and/or inequitable.

THE ARGUMENT

Whenever the USPS administers a disciplinary action, a critical facet of our investigation must be whether or not the grievant is being treated in a disparate--different--manner than other employees and/or supervisors. Should other employees have--regardless of craft--similar attendance records and/or similar progressive disciplinary histories, or have committed similar infractions, then other employees should have been subject to similar, if not the same, discipline as the grievant. The standard also applies to supervisors--although the USPS will strenuously object to comparison of a craft grievance to a manager. Notwithstanding any position taken by management that comparisons to supervisors and/or employees from other crafts is irrelevant, we must fully develop all comparisons to uncover evidence of disparate treatment. If we can establish our grievant is treated unfairly, with disparity, we have established management has failed to meet one of the critical tests of Just Cause.

THE COLLECTIVE BARGAINING AGREEMENT

While disparate treatment is not found in Article 16, it is found in Article 19s EL- 921, "Supervisor's Guide to Handling Grievances":

- ✓ Is the rule consistently and equitably enforced?
- ✓ If a rule is worthwhile, it is worth enforcing' but be sure that it is 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.
- ✓ 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 5day 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.

The Postal Service feels that unless a penalty is so far out of line with other penalties for similar offenses as to be discriminatory, the arbitrator should make no effort to equalize penalties. As a practical matter, however, arbitrators do not always share this view. Therefore, the Postal Service should be prepared to justify why a particular employee may have been issued a more severe discipline than others.

THE INTERVIEW

Either before our initial review of others' records and/or circumstances or after our review, the interview is valuable in establishing whether the supervisor issuing the discipline even checked others' records/circumstances (this again goes toward the supervisor's involvement and investigation), has any knowledge of disparity or rejected any evidence uncovered. Usually, an issuing supervisor will make no effort to ensure disparity does not exist. If the supervisor makes no effort, then the investigation is flawed. If the supervisor has no knowledge yet disparity exists, then the Just Cause test is not met. If the supervisor uncovered evidence of disparity and rejected it, we want to ensure the supervisor admits the same--and establish the test is not met. Some disparate treatment questions are as follows:

Prior to issuing the discipline did you compare the grievant's attendance record to other employees?

To other supervisors?

To your own record?

Are you aware of other employees having records similar to the grievant's? Worse?

Are you aware of other supervisors having records similar to the grievant's? Worse?

Is your own record similar to the grievant's? Worse?

You found records similar to the grievant's--were those employees also disciplined?

You found records similar to the grievant's--were those supervisors also disciplined?

You did not treat the grievant the same as other employees are treated under similar circumstances? With such records?

As previously stated, getting the supervisor's testimony through interviews at the earliest possible stage will enable us to limit editorial deviation of that same supervisor in arbitration.

THE ARBITRATORS

Authority from arbitrators gives us our best support for disparate treatment arguments-- including utilizing treatment of managers for comparisons:

ARBITRATOR G. ALLAN DASH, JR. CASE NO. NC-E-12055D
ALEXANDRIA, VIRGINIA JULY 14, 1978 PAGE 12

ARBITRATOR JOSEF P. SIREFMAN CASE NO. N7C-IN-D 0027177
PATERSON, NEW JERSEY MARCH 18, 1994 PAGES 10-11

ARBITRATOR MARK L. KAHN CASE NO. J9OC-4J-D 95070296
BENTON HARBOR, MI MARCH 18, 1996 PAGE 14

ARBITRATOR ARTHUR R. PORTER CASE NO. C4C-4U-D 33711
DENVER, COLORADO NOVEMBER 7g 1987 PAGE 4

ARBITRATOR ANDREE Y. MCKISSICK CASE NO. C9OC4C-D 95048650
WILMINGTON, DELAWARE AUGUST 6, 1996 PAGES 9-10

ARBITRATOR JOSEPH S. CANNAVO, JR. - CASE NO. A9OC-IA-D 95020409
HACKENSACK, NEW JERSEY JANUARY 17, 1997 PAGES 22-24

ARBITRATOR JACQUELIN F. DRUCKER CASE NO. C9OT-IC-D 95034191
LEHIGH VALLEY, PENNSYLVANIA APRIL 11, 1996 PAGES 26-28

CHAPTER 10

THE ISSUE

HIGHER LEVEL CONCURRING OFFICIAL AS STEP 2 DESIGNEE

THE DEFINITION

When the same manager--i.e. the Postmaster--acts as the Article 16.8 Higher Level Reviewing and Concurring Official and the Grievance/Arbitration procedure's management designee at Step 2.

THE ARGUMENT

The EL-921, "Supervisor's Guide to Handling Grievances", provides for a division of duties between the Article 16.8 Higher Level Reviewing and Concurring Official and the Grievance/Arbitration procedure Step 2 designee.

In this way, the grievant and grievance receive a more impartial review of the grievance at Step 2. It is not reasonable to expect a manager who had reviewed and concurred in a notice of removal can then separate himself from that role to independently and objectively discuss the grievance at Step 2. Further, the real possibility of resolution from that Step 2 manager cannot be expected to exist. The EL- 921 contemplated such a dilemma and its intent provides for the separation of the Higher Level Reviewing and Concurring Official and Step 2 designee into two individuals so some semblance of impartiality may exist.

THE COLLECTIVE BARGAINING AGREEMENT

Language in Article 16, Section 8, Article 15, Section 2 Step 2(a), and Article 19's EL-921 support argument on separation:

Article 15 GRIEVANCE-ARBITRATION PROCEDURE

Section 2 Grievance Procedure Steps

Step 2:

- (a) The standard grievance form appealing to Step 2 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 Step 2 official, and shall so notify the Union Step 1 representative.

Article 16 DISCIPLINE PROCEDURE

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 associate post office 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.

Article 19's EL-921

"Supervisor's Guide to Handling Grievances"

Therefore' it is crucial that the supervisor not only take good notes during the Step 1 discussion but also advise both the reviewing authority and the designee for Step 2 that a grievance has been filed. Since the reviewing authority thoroughly reviewed the proposed discipline before it was initiated' that person will be a key source of information for management's Step 2 designee. There must be a clear channel of communication between these two individuals.

D. Role of the Step 2 Designee

The reviewing authority looks at the proposed discipline before it is imposed and concurs with the proposed action' based on the facts supplied by the supervisor.

On the other hand' the Step 2 designee must look at both sides of the coin in an effort to resolve the grievance at the local level.

A situation may arise where the Step 2 designee finds the discipline either unwarranted or too severe, based on the facts and evidence presented at the Step 2 discussion. If so the Step 2 designee should thoroughly discuss the case with the supervisor involved before rendering a decision. Step 2 designees must not handle grievances as though they were "rubber stamping" decisions that have already been made. Also' the Step 2 designee must not accept without question all statements of facts or opinions by other management personnel regarding the case' nor assume automatically that the statements of facts or opinions forwarded by the union or grievant are fabrications or highly biased. Statements of facts by either party should always be documented.

Except to check out new facts which may be presented at the Step 2 discussion, the Step 2 designee will not have to develop management's case if the reviewing authority and supervisor involved have done their homework. The primary responsibility of the Step 2 designee is to review the case to determine whether just cause exists for discipline and, if so, whether the degree of discipline is appropriate.

THE INTERVIEW

Questions regarding this issue prior to the Step 2 meeting may trigger a management decision to re-designate the Step 2 designee and thus negate our argument on the two roles assumed by the same individual. Based upon knowledge of the individual(s) involved, resolution history, and nature of the discipline, a decision must be made as to whether or not the Union wants to attempt to influence a change in designation. Perhaps the Union believes a real chance for resolution would exist if the designation was changed. If that were so, then an interview bringing out our position that no division is a due process violation may result in the desired re-designation. If it did not, the due process issue would still exist. If the Union believes a re-designation would not result in resolution, then an interview would only provide management an opportunity to re-designate and forestall the Union argument on the issue. In that case, it would be most beneficial to raise the issue at Step 2 in writing with the designee who was also the Higher Level Reviewing and Concurring Official. Should that manager attempt to cancel the Step 2 meeting (unlikely), and then our position would be that that was the Step 2 meeting with the Step 2 designee. We would not meet again and would appeal to Step 3 with our due process argument intact.

In the event we attempt to orchestrate a change of designation, the following are some interview examples:

- ✓ You were the Higher Level Reviewing and Concurring Official on Mr. Doe's removal?
- ✓ You also are to be management's Step 2 designee for the grievance on Mr. Doe's removal?
- ✓ Are you aware that the EL-921 requires the Higher Level Reviewing and Concurring Official and Step 2 designee to be two separate individuals?
- ✓ Are you aware that the separation provides check and balance due process to the grievant?
- ✓ Are you aware you are creating a procedural defect for management by assuming both roles?
- ✓ Are you aware there is arbitral history supporting the Union on this issue?

We know the basic principle of Article 15 is to resolve grievances at the lowest possible step. It may seem contrary to that principle if we knowingly meet with a manager at Step 2 who was the Higher Level Reviewing and Concurring Official and who we have reasonable expectation will deny the case. However, when developing defenses, we must utilize each at our disposal and the reality is that this defense will in most cases prove much more valuable than the slim possibility of resolution by a re-designated manager at Step 2.

THE ARBITRATORS

The following excerpts support our position on the EL-921's separation of Higher Level Concurring Official and Step 2 designee:

ARBITRATOR ROSE F. JACOBS CASE NO. N7C-1 R-D 39209 & NOC-I R-D 1037
BUFFALO, NY DECEMBER 4, 1991 PAGES 24-27

ARBITRATOR WILLIAM F. DOLSON CASE NO C7C-4G-D 2798
INDIANAPOLIS, INDIANA AUGUST IO, 1988 PAGE 12

CHAPTER 11

THE ISSUE

DOUBLE JEOPARDY / RES JUDICATA

THE DEFINITION

An Employee is disciplined twice based upon the same fact circumstances. This is prohibited by the principle of Double Jeopardy.

An employee is disciplined again following resolution of grieved discipline for the same infraction/fact circumstances. This is prohibited by the principle of Res Judicata.

THE ARGUMENT

An employee may only receive discipline once for an infraction. Any time an employee is disciplined twice, that employee is subject to “double jeopardy”. Black’s Law Dictionary defines Double Jeopardy as: Double jeopardy. Common and constitutional (Fifth Amendment) prohibition against second prosecution after a first trial for the same offense. *People v. Wheeler*, 271 Cal.App. 205.79 Cal. Prtr. 842, 271 C.A.2d 205. The evil sought to be avoided is double trial and double conviction, not necessarily double punishment. *Breed et al. V. Jones*.421 U.S. 519.95 S.Ct. 1779.44 L.Ed.2d 346.

An employee receives a letter of warning for “failure to be Regular in Attendance”. A month later, the employee receives a seven-day suspension for the same charge. In the suspension notice of the 11 absences cited, 8 were also cited in the prior letter of warning. The employee is being disciplined twice for what are essentially the same fact circumstances and instances of attendance irregularity. This violates the Double Jeopardy principle.

The principle of “Res Judicata” is also applicable in disciplinary instances in that once an employee receives discipline and the matter is resolved through resolution with the Union, the employee may not be disciplined again for the same infraction/fact circumstances or record of absences. Black’s Law Dictionary defines Res Judicata as:

Res Judicata: A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. *Matchett v. Rose*, 36 Ill. App.3d 638.344 N.E.2d 770. 779.

An employee receives a letter of warning for “Failure to be Regular in Attendance.” A grievance is filed and resolved reducing the Letter of Warning to an official discussion. A month later the employee receives another letter of warning citing the same absences and additional occurrences. Resolution of the prior discipline bars management from disciplining the grievant for the previously cited record--this is the Res Judicata principle.

The principles of Double Jeopardy and Res Judicata often are interrelated and both should be cited when management issues discipline based upon that which was previously resolved and/or when management disciplines twice for the same infraction/fact circumstances.

THE COLLECTIVE BARGAINING AGREEMENT

No language exists in our Collective Bargaining Agreement, which specifically addresses Double Jeopardy or Res Judicata. However, the aforementioned principles from Black's Law Dictionary should be cited.

THE INTERVIEW

As with many of our due process interviews, this interview under Double Jeopardy/Res Judicata will not so much establish the fact that Double Jeopardy/Res Judicata exists as establish the intent of the supervisor as well as his role, involvement, and investigation:

- ✓ You issued Mr. Doe a fourteen-day suspension one month ago citing the same absences you now have cited in this Notice of Removal?
- ✓ Were you aware you had cited these absences previously when you included them?
- ✓ You intended to discipline Mr. Doe twice for these absences?
- ✓ You did not intend to discipline him twice?
- ✓ You did not check the record carefully enough?
- ✓ You were given the Notice to sign and did not believe the record included previously disciplined absences?
- ✓ You believed because the suspension had been reduced to a letter of warning that Mr. Doe had not received enough punishment for the absences?
- ✓ You believed another discipline citing the same absences would better correct Mr. Doe's attendance irregularity?
- ✓ You rescinded and reissued this removal because the Union made you aware Mr. Doe was being disciplined again based upon absences for which he had already received discipline?
- ✓ You knew the previous discipline was resolved with the Union, yet you issued further discipline based upon the same infraction?

THE ARBITRATORS

Arbitral references is clear that the Double Jeopardy/Res Judicata principles protect the basic due process right of an employee to expect only one discipline per infraction/compilation of record thus enabling the employee and Union to defend against that action to a conclusion:

ARBITRATOR LAWRENCE R. LOEB CASE NO. C9OC-I C-D 940 17643
HARRISBURG, PENNSYLVANIA NOVEMBER 15 1994 PAGES 8-16

ARBITRATOR LINDA DILEONE KLEIN CASE NO E7C-2A-D 31987
PHILADELPHIA, PENNSYLVANIA JANUARY 23, 1992 PAGE 5

ARBITRATOR JAMES E. RIMMEL CASE NO. E7T-2P-D 28213
MERRIFIELD, VIRGINIA OCTOBER 12, 1991 PAGES 16-18

ARBITRATOR JOHN C. FLETCHER CASE NO. COC-4M-D 12920 & COC-4M-D 16271
COLEMAN, MICHIGAN MAY I, 1993 PAGE 9

ARBITRATOR THOMAS F. LEVAK CASE NO. WIC-5A-D 23695 8t WIC-5A-D 23696
BARROW, ALASKA OCTOBER 11, 1984 PAGE 11

ARBITRATOR GERALD COHEN CASE NO. C4C-4H-D 5831
KANSAS CITY, KANSAS FEBRUARY 21, 1986 PAGE 8

CHAPTER 12

THE ISSUE

DISPARATE ELEMENTS OF DISCIPLINE RELIED UPON FOR PROGRESSION

DEFINITION

When management relies upon elements of discipline--not of a like nature—to create a progressive disciplinary history against an employee.

THE ARGUMENT

An example of this issue is as follows: An employee has a letter of warning and a seven day suspension for “Failure to Meet the Attendance Requirements of the Position”. Now the employee receives a fourteen-day suspension for parking in a supervisor’s parking space. A disciplinary history of attendance is in a category separate from instances of “misconduct” or “offenses”. So too would be a disciplinary history for out of tolerance results due to a window clerk’s overage/shortages. Neither the attendance nor the overages/shortages can reasonably be considered misconduct--or offenses--and these, at least, reasons for discipline must not be lumped with misconducts or offenses in any progressive disciplinary history.

THE COLLECTIVE BARGAINING AGREEMENT

While there are no specific language requiring different disciplinary progressions based upon disciplinary category, the following language will support our position:

ARTICLE 16 DISCIPLINE PROCEDURE

Section 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.

ARTICLE 19’s EL-921

“Supervisor’s Guide to Handling Grievances”

B. Disciplinary Procedures

The main purpose of any disciplinary action is to correct undesirable behavior on the part of an employee. All actions must be for just cause and, in the majority of cases; the action taken must be progressive and corrective.

If minor offenses occur, discussion with the employee may be effective in correcting deficiencies. In such a case] let the employee know what the problem is. Be specific. Cite examples and let the employee know what is expected. You have a responsibility to encourage employees to correct their shortcomings. Let the employee talk--an interchange may be all that is needed. Follow up to make sure the discussion was effective. If the employee corrects the shortcomings after this discussion, let it be known that you appreciate the improvement.

What happens if the employee's behavior does not improve? A second discussion is sometimes advisable, or formal disciplinary action may be initiated through the issuance of a letter of warning or suspension. Remember, your job is to handle disciplinary actions so they are corrective and not punitive.

In suspending an employee, use extreme caution in convincing yourself that the penalty is appropriate for the offense. Progressively longer suspensions may be in order to correct a situation. When these fail' discharge should be considered. Before you take such action' review thoroughly:

- ✓ Is it for just cause?
- ✓ Have we made attempts to correct the employee's behavior?
- ✓ Have we taken prior progressive disciplinary action?
- ✓ Is the decision based upon objectivity and not emotionalism?

Remember, however' certain offenses may warrant discharge without prior progressive discipline.

E. Investigation

As previously discussed¹ when an employee commits an offense, which seems to warrant discipline, the supervisor must avoid rushing into a disciplinary action without first investigating. The need for an investigation to meet our just cause and *proof* requirements is self-evident. However, the employee's past record must also be checked before any disciplinary action is considered. This is obviously necessary if we are to abide by the principle of progressive discipline.

F. Items for consideration in assessing discipline include but are not limited to:

The past record of the employee; and/or other efforts to correct the employee's misconduct.

THE INTERVIEW

The interview should be used to establish that the supervisor gave no consideration to the disparate nature of the past disciplinary record of the employee versus the current “offense” or record or occurrence. The interview should also draw the supervisor into a position where we are assisted in establishing the punitive intent of such coupling of disparate elements of record. Some examples are as follows:

- ✓ When you formulated the Notice of Removal, you included the past elements of discipline cited on page 2?
- ✓ And none of those elements of record were related to either Charges 1 or 2 in your Notice of Removal?
- ✓ Has Mr. Doe ever been disciplined in the past for an offense similar to Charges 1 or 2?
- ✓ You didn’t consider any past elements of discipline related to Charges 1 or 2 did you?
- ✓ These charges--1 and 2- have no prior disciplinary history of a similar nature on which they were based?
- ✓ If these past elements were unrelated what role did they play in your disciplinary decision?
- ✓ If the grievant has never been disciplined for any infraction even remotely related to Charges 1 or 2, how can this removal for Charges 1 or 2 be considered progressive by you?

Through this interview, we are building the foundation for our disparate elements of record argument.

THE ARBITRATORS

Management will argue the Collective Bargaining Agreement does not provide for “Similar Nature” progression and Article 16 does not. However, there is arbitral support for the Union’s position that disparate “offenses” in some cases--and attendance discipline--should be categorized and progressively disciplined separated. Those decisions establish the basis for our stronger arguments:

ARBITRATOR ROBERT B. MOBERLY CASE NO. ACS26762D
COLUMBIA, SOUTH CAROLINA MARCH 22, 1979 PAGE 9

ARBITRATOR WAYNE E. HOWARD CASE NO. E7N-2N-D 569
CINCINNATI, OHIO MARCH 31, 1988 PAGES 8-9

ARBITRATOR A. HOWARD MYERS CASE NO. AC-S-22,451-D
HOUSTON, TEXAS JULY II, 1978 PAGE 6

ARBITRATOR ANDREE Y. MCKISSICK CASE NO. C9OC-4C-D 95042199
PITTSBURGH, PENNSYLVANIA AUGUST 20, 1996 PAGES 13-15

ARBITRATOR ELLIOTT H. GOLDSTEIN CASE NO. C7C-4D-D 7711
CHICAGO, ILLINOIS MAY 3, 1989 PAGES 11-13

CHAPTER 13

THE ISSUE

PAST ELEMENTS OF DISCIPLINE NOT ADJUDICATED YET RELIED UPON IN SUBSEQUENT DISCIPLINE

THE DEFINITION

When management issues discipline and in that disciplinary notice it includes, as an employee's past record, elements of discipline which are still in the Grievance/Arbitration process and "live" for adjudication.

THE ARGUMENT

Whenever management issues discipline and bases that action on elements of discipline record not yet finalized, management does so at its own peril. For example, management issues a fourteen day suspension for "Irregular Attendance" and for progressive disciplinary purposes, relies on two previously issued actions; a seven day suspension and a letter of warning. Both of these disciplines were also issued for irregular attendance, but neither has been adjudicated, that is, both were grieved, have not been resolved, and are awaiting arbitration. Management, in relying on these non-adjudicated past elements of the grievant's record, is gambling that the disciplines will be upheld and not modified or overturned either through grievance resolution or in arbitration. Should, for instance, the letter of warning be upheld in arbitration, but the seven day suspension be overturned, then management would have an employee with a fourteen day suspension pending discussion in the Grievance/Arbitration procedure, or pending arbitration, with only a letter of warning as a past element of progressive discipline. In that case, the Union is arguing that, at worst, the fourteen-day suspension should be a seven and any discussion or resolution of the fourteen day should really be discussion or resolution of a seven day down to a lesser penalty. At arbitration, the Union must address the fourteen day as a seven day and argue that the arbitrator must view, at the least, that the fourteen should be a seven and any reduction by the arbitrator should be from seven days down; not from fourteen days down.

In those instances in which, say, a removal is heard before an arbitrator prior to "live" past elements of lesser discipline being adjudicated, then the Union's argument is that the arbitrator must consider any "live", un-adjudicated past elements of discipline in the removal notice as non-existence. The reasoning being that without knowing the final adjudication and with the challenge(s) to the elements of discipline being live, the employee may not suffer as if those elements were actually part of the employee's record. Although the employee has been issued the discipline and although the employee has served the prescribed penalties of those actions, the propriety of the actions has not been determined. Our Collective Bargaining Agreement does not provide for deferment of the validity determination until adjudication. Because of that deferment, management's reliance on un-adjudicated discipline creates a due process argument in the grievant's

favor that a record un-adjudicated cannot be held against an employee in subsequent disciplines.

THE COLLECTIVE BARGAINING AGREEMENT

While there is not specific language in the Collective Bargaining Agreement prohibiting management from including past elements not yet adjudicated in the Grievance/Arbitration procedure, there is language regarding management's responsibility to investigate prior to issuing discipline. Steward investigations often will reveal the issuing manager has no clue as to whether elements of past record cited have or have not been adjudicated. When this occurs, the adjudication argument spills over into the lack of investigation argument.

The following Collective Bargaining Agreement provisions should prove useful when arguing lack of adjudication and consideration of those past elements.

ARTICLE 19's EL-921

Supervisor's Guide to Handling Grievances"

E. Investigation

As previously discussed, when an employee commits an offense, which seems to warrant discipline, the supervisor must avoid rushing into a disciplinary action without first investigating. The need for an investigation to meet our just cause ant! proof requirements is self-evident. However, *the employee's past record must also be checked before any disciplinary action is considered.* This is obviously necessary if we are to abide by the principle of progressive discipline. (Emphasis added)

F. How Much Discipline

Items for consideration in assessing discipline include but are not limited to:

The past record of the employee; and/or other efforts to correct the employee's misconduct. (Emphasis added)

THE INTERVIEW

The Local Union's grievance records will tell the steward what elements of discipline have not yet been adjudicated. Questions concerning the past record will assist more in the areas of failure to investigate, lack of first hand knowledge, and the involvement in issuance of the discipline.

Some examples are:

- ✓ You checked the employee's past record prior to issuing this discipline?
- ✓ Were all these past elements adjudicated?
- ✓ Were any of these past elements adjudicated?
- ✓ What was the final disposition of the (date) letter of warning? 7 day-suspension?
- ✓ 14-day suspension?
- ✓ You don't know what the final disposition will be for the suspension dated?
- ✓ You included a past record of discipline which you are not sure will exist when this removal is heard in arbitration?
- ✓ You were aware when you included these past elements that they had not been adjudicated?
- ✓ You relied on the past record of disciplinary actions you included in this removal in making your decision to initiate discipline?
- ✓ If you did not rely upon the past record of disciplinary actions cited, why did you include them?

Again, interview questions will greatly assist in determining the true involvement-issuing supervisor.

THE ARBITRATORS

Arbitral reference supports our position on consideration and reliance of elements of discipline not adjudicated:

ARBITRATOR BERNARD CUSHMAN CASE NO E7C-2A-D 36112
PHILADELPHIA, PENNSYLVANIA SEPTEMBER 6, 1991 PAGES 12-13

ARBITRATOR DENNIS R. NOLAN CASE NO. S4N-3A-D 37169
DALLAS, TEXAS MARCH 6, 1987 PAGES 6-7

ARBITRATOR PAUL J. FASSER CASE NO. MC-S- 0874-D
MEMPHIS, TENNESSEE JUNE 18, '1977 PAGE 74

ARBITRATOR LINDA DILEONE KLEIN CASE NO E7T-ZB-D 28220
SOUTHEASTERN, PENNSYLVANIA APRIL 8, 1991 PAGES 6-7

CHAPTER 14

THE ISSUE

**MODIFIED PAST ELEMENTS OF DISCIPLINE MUST BE CITED
STATE IN SUBSEQUENT DISCIPLINE**

THE DEFINITION

IN MODIFIED

The citation of modified disciplinary actions in their original form as elements of past records relied upon and included in subsequent discipline.

THE ARGUMENT

Management often cites past disciplinary actions as elements of record, which were considered in taking a subsequent disciplinary action. In doing so, management may cite a fourteen-day suspension even though that fourteen-day suspension was reduced to seven days previously. Another example would be management citing a “fourteen day suspension reduced to seven days” thereby including the modification of seven days and the original fourteen-day.

A National Level Step 4 interpretive decision requires only management’s inclusion of the modified discipline, not original discipline. Inclusion of both or of only the original is a violation of the parties’ mutual agreement in the Step 4 decision.

Further, inclusion of the full discipline demonstrates punitive intent rather than a corrective attempt because management is attempting to booster justification for its action through inclusion of a more severe discipline when it does not exist. Should management claim it was unaware of the modification, then management admits it failed to conduct a thorough, objective, and fair investigation before initiating and issuing discipline. Based upon the Step 4, it must also be argued the disciplinary notice is fatally and procedurally defective and in violation of the Step 4.

THE COLLECTIVE BARGAINING AGREEMENT

Article 15 provides for interpretation of our Collective Bargaining Agreement by the parties:

ARTICLE 15 GRIEVANCE-ARBITRATION PROCEDURE

SECTION 2 Grievance Procedure Steps

Step 3:

- (e) If either party's representative maintains that the grievance involves an interpretive issue under the National Agreement, or some supplement thereto which may be of general application, the Union representative shall be entitled to appeal an adverse decision to Step 4(National level) of the grievance procedure.

Step 4:

- (a) In any case properly appealed to this Step the parties shall meet at the National level promptly, but no event later than thirty (30) days after filing such appeal in an attempt to resolve the grievance . . . The decision shall include a adequate explanation of the reasons therefore,

The Step 4 Interpretive Decision for Case No. H7C-NA-C 21 dated August 17, 1988, states:

This is in response to the issues you raised in your letter of December 18, 1987, And Step 4 grievance (H7C-NA-C 21, dated June 29, 1988) concerning the maintenance of employee disciplinary records, as well as the Step 4 grievance (H4C-5R-C 43882) challenging the management practice of including the past element listings of disciplinary actions the original action issued and the final action resulting from modification of the original action.

In full and final settlement of all disputes of these issues it is agreed that:

3. In the past element listings in disciplinary actions, only the final action resulting from a modification disciplinary action will be included, except when modification is the result of a "last chance" settlement, or if discipline is to be reduced to a lesser penalty after an intervening period of time and/or certain conditions are met.

THE INTERVIEW

Like the interview for “past elements not adjudicated”, the interview here will reveal intent, involvement, and investigation on the part of the supervisor:

- ✓ You included this discipline record in the Notice of Removal?
- ✓ Prior to initiating and issuing this removal, did you check Mr. Doe’s past discipline record?
- ✓ You included it anyway? Why?
- ✓ When you checked Mr. Doe’s past discipline record, how did you check it?
- ✓ With whom did you check?
- ✓ You considered the fourteen-day suspension, is that correct?
- ✓ If you did not consider the fourteen-day suspension, why did you include it?
- ✓ You relied in this Notice of Removal on past elements, which were modified after their original issuance?
- ✓ You knew about the modification and still cited the original discipline?

Questions like these can be revealing and may trap the supervisor into responses, which uncover lack of investigation, or involvement and/or punitive intent.

THE ARBITRATORS

Efforts to procure the arbitral history in support of our argument are continuing.

CHAPTER 15

THE ISSUE

PLACEMENT IN OFF-DUTY STATUS OUTSIDE REASONS IN ARTICLE 16.7.

THE DEFINITION

Whenever management places an employee in Off-Duty Status utilizing the Emergency Procedure of Article 16.7 for a reason other than those specifically negotiated into Article 16.7 by the parties.

THE ARGUMENT

Management cannot, in accordance with Article 16.7 of the Collective Bargaining Agreement, properly place an employee on emergency off-duty status if such placement is for a reason other than one of those specifically included in article 16.7. Examples of improper reasons for Emergency Placement in Off-Duty Status would be insubordination conduct unbecoming an employee, failure to follow instructions, or no work performed.

THE COLLECTIVE BARGAINING AGREEMENT

Any reason for Emergency Placement in Off-Duty Status outside the six stated reasons included in Article 16.7 is a violation of the Collective Bargaining Agreement.

ARTICLE 16 DISCIPLINE PROCEDURE

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 US. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The employees 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, the emergency action taken under this Section may be made the subject of a separate grievance.

THE INTERVIEW

Clear establishment of the reasons for Emergency Placement in Off-Duty Status should come from the required written notice soon after the Emergency Placement. However, in instances in which the reasons as stated in that notice are not clear, the interview becomes the necessary tool to establish the crucial point that Emergency Placement was not imposed for an Article 16.7 reason:

- ✓ You placed Mr. Doe in off-duty status for insubordination?
- ✓ He refused to report to the window area?
- ✓ He refused your direct order?
- ✓ He threatened you?
- ✓ What did he say?
- ✓ Who else was present?
- ✓ He did not threaten you?
- ✓ Mr. Doe refused to perform any work?
- ✓ You placed him off the clock for that reason? Any other reasons?

It is important to close the door on management efforts to revise their reasons for Emergency Placement in Off-Duty Status, which will occur at arbitration. If “Insubordination” is the stated reason in writing for the Emergency Placement in Off-Duty Status a management advocate will attempt to expand on that term to include “threat”, “dangerous to self or others” or some reason under 16.7. Insubordination, in particular, can have varied slants in its meaning.

THE ARBITRATORS

The following excerpts clearly set forth the 16.7 inclusion principle:

ARBITRATOR BARBARA ZAUSNER TENER CASE NO. N7C-IN-D 20350
PATERSON, NEW JERSEY FEBRUARY 14, 1990 PAGES 2-3

ARBITRATOR LAWRENCE L. LOEB CASE NO. C9OC-IC-D 94058330
PITTSBURGH, PENNSYLVANIA MAY 31, 1995 PAGES 13-16

ARBITRATOR BERNARD CUSHMAN CASE NO. C9OC-4C-D 93009256 & 93009254
PHILADELPHIA, PENNSYLVANIA JUNE 27, 1994 PAGES 26-27

ARBITRATOR NICHOLAS H. ZUMAS CASE NO. B9OC-IB-D 95037817
NORTH READING, MASSACHUSETTS JANUARY 9, 1996 PAGES 7-8

CHAPTER 16

THE ISSUE

PLACEMENT IN OFF-DUTY STATUS WITHOUT POST PLACEMENT WRITTEN NOTIFICATION

THE DEFINITION

Whenever management places an employee on off-duty status under Article 16.7, management is required to notify the employee in writing of the reasons and date of said placement within a reasonable period of time following the Emergency Placement in Off-Duty Status.

THE ARGUMENT

Arbitrator Mittenthal in a National Level arbitration case set forth the principle that management is required to issue a written notification to an employee following an Emergency Placement in Off-Duty Status stating the reasons for the placement. Without this mandatory, written notice, management's placement is procedurally defective in that the emergency placement does not comply with Arbitrator Mittenthal's National Level award. In addition, since there is no written reason, a required reason as set forth in 16.7 cannot exist.

THE COLLECTIVE BARGAINING AGREEMENT

Article 15 provides for National Level arbitration, which is binding upon the parties in interpretive matters. This creates a bridge connecting Article 16.7 with Arbitrator Mittenthal's award:

ARTICLE 15 GRIEVANCE-ARBITRATION PROCEDURE

Section 5 Arbitration

D. National Level Arbitration

1. Only cases involving interpretive issues under this Agreement or supplements thereto of general application will be arbitrated at the National Level.

ARTICLE 16 DISCIPLINE PROCEDURE

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, the emergency action taken under this Section may be made the subject of a separate grievance.

The National Arbitration decision states:

ARBITRATOR RICHARD MITTENTHAL CASE NO H4N-3U-C 58637&H4N-3A-C 59518
DALLAS, TEXAS AUGUST 3, 1990 PAGES 11-12

THE INTERVIEW

In this circumstance, our interview simply solidifies the violation of the National Award:
You placed Mr. Doe off the clock on (date)?
You did not send him a written notification of your reasons for this Emergency
Placement in Off-Duty Status?
Aren't you required to send him such a notice?

THE ARBITRATOR

ARBITRATOR RODNEY E. DENNIS CASE NO. H9OC-4H-D 95050424
ABBEVILLE, ALABAMA FEBRUARY 28, 1996 PAGES 7-10

CHAPTER 17

THE ISSUE

PLACEMENT IN OFF-DUTY STATUS AFTER TIME LAPSE BETWEEN INCIDENT AND ACTUAL PLACEMENT

THE DEFINITION

Whenever management invokes the Article 16.7 emergency procedure for Emergency Placement in Off-Duty Status, that placement, by definition, is to occur immediately--without delay.

THE ARGUMENT

Again, it was Arbitrator Mittenthal in a National Level award that defined the Article 16.7 Emergency Placement in Off-Duty Status as an immediate action, which would occur without hesitation or delay. The usual purpose of the Emergency Procedure was for immediate diffusion of a possibly volatile situation--as an emergency. Management, on the other hand, often misapplies the emergency procedure. An example would be Supervisor Jones witnesses a heated verbal altercation between two employees at 7:30 a.m. Jones then orders employee Smith to work in the box mail section and employee Doe to work distributing parcels. The two workstations are approximately 70 feet apart and separated by Letter Carrier cases. He further instructs the two employees to have no contact with one another. At 11 a.m. the Postmaster reports for duty at which time Supervisor Jones relates what occurred at 7:30 a.m. After consultation, either the Postmaster or Supervisor places both employees off the clock through utilization of Article 16.7. This is a procedurally defective Emergency Placement in Off-Duty Status. The immediate dismissal intent of Article 16.7 is not in existence at 11:00 or 11:15 a.m. The Supervisor must have utilized 16.7 at the time the altercation occurred; not hours later.

Once a reasonable time period has elapsed, i.e., more than ten or fifteen minutes (although a shorter period could be argued), the suspension of employee(s) cannot properly fall under Article 16.7. Since other suspensions of, for example, seven or fourteen days must occur after ten day notification, any "emergency" suspension would be procedurally defective and in violation of Article 16 of the Collective Bargaining Agreement.

THE COLLECTIVE BARGAINING AGREEMENT

The definition of an emergency found in Article 3 of the Collective Bargaining Agreement supports our position that 16.7 cannot be properly imposed after a delay.

Article 3 MANAGEMENT RIGHTS

F. Emergency Situations

.. i.e.. An unforeseen circumstance or a combination of circumstances, which calls for immediate action in a situation, which is not expected to be of a recurring nature.

ARTICLE 16 DISCIPLINE PROCEDURE

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, the emergency action taken under this Section may be made the subject of a separate grievance.

In addition to the above referenced language, there is the defining National Level decision of Arbitrator Mittenthal in Case No. H4N-3U-C 58637 & H4N-3A-C 59518:

ARBITRATOR RICHARD MITTENTHAL CASE NO. H4N-3U-C 58637&H4N-3A-C 59518
DALLAS, TEXAS AUGUST 3, 1990 PAGES 10-11

THE INTERVIEW

Developing the reasoning behind delays in an Emergency Placement in Off-Duty Status will protect the Union and grievant against management conjured reasoning at a later time. Although time records will reflect when an employee was actually placed off duty, the time frame of the decision is crucial because slight delays such as trips to the lavatory, locker room, etc., may be used as management excuses for lack of immediacy.

The interview is our excellent tool to nail down the facts:

- ✓ What time did the incident occur?
- ✓ Were you present during the incident?
- ✓ Did you witness the incident?
- ✓ Did you instruct the employees to separate work area following the incident?
- ✓ You did not send them home when the incident occurred?

- ✓ How long after the incident did you send them home?
- ✓ What other information did you obtain between the time of the incident and the
- ✓ Emergency Placement in Off-Duty Status, which affected your decision?
- ✓ What subsequent incident occurred after the first incident, which affected your decision to place them in Emergency Off-Duty Status?
- ✓ At what time did you make the decision to place them in Emergency Off-Duty Status?
- ✓ Did the Postmaster tell you they should be placed in Emergency Off-Duty Status?
- ✓ Did the Postmaster agree that they should be placed in Emergency Off-Duty Status?
- ✓ Status?
- ✓ Since you did not witness the incident, did you speak to each employee before the Emergency Placement in Off-Duty Status?
- ✓ Why didn't you immediately place them in Emergency Off-Duty Status?

Determining the reasoning and time frames for the incident, the delay and the decision will prove the difference between a successful due process argument and a failed one when the Emergency Placement in Off-Duty Status is not immediate.

THE ARBITRATOR

Since most Emergency Placements are imposed with little, if any, delay, arbitral support is not extensive. Here is one decision:

ARBITRATOR GEORGE R. SHEA, JR. CASE NO. N7V-IW-D 14106
SYRACUSE, NEW YORK AUGUST IO, 1989 PAGE 7

CHAPTER 18

THE ISSUE

30-DAY ADVANCE NOTICE FOR REMOVAL.

THE DEFINITION

The Collective Bargaining Agreement requires management to provide advance written notice of charges in removal instances and 30 days either on the job or on the clock prior to the removal taking effect. (In cases in which the employer has reasonable cause to believe guilt for a crime the 30-day notice is not required.)

THE ARGUMENT

Often management fails to provide the required 30 days notice. As an example, management issues an employee a Notice of Removal for Failure to Meet the Attendance Requirements of the position or for "Insubordination". In the Notice issued on May 1, management states the employee will be removed on May 29. Management has failed to provide the required 30-day advance notice with 30 days either on the job or on the clock. Management has violated Article 16.5 of the Collective Bargaining Agreement and issued a procedurally defective and violative Notice of Removal.

THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 16 DISCIPLINE PROCEDURE

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. (Emphasis Added)

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.

There is also a National Level Step 4 interpretive decision, which clarifies when the 30 days notice requirement, commences. The decision for case no. H4N-4A-D 30730 states: The issue in this grievance is whether the day of receipt of a notice of discipline should be included as part of the required minimum period of notice to the employee.

We further agreed that for purposes of computing the period of notice required in advance of the imposition of various disciplinary measures, such notice period shall be deemed to commence on the day following the date upon which the letter of notification is received by the employee.

THE INTERVIEW

Since the date of the Removal's issuance and its effective date will most likely not be in dispute again, the interview will focus most on the supervisor's involvement, role and knowledge of the removal provisions for which he is responsible. In the event there is a dispute as to the date of issuance our questions should resolve same. Some examples are as follows:

- ✓ Who was responsible for not providing the 30-day notice?
- ✓ Your removal is date May 1 --did you issue it on May 1?
- ✓ If not, on what day did the grievant receive the Notice of Removal?
- ✓ Do you have proof of receipt by the grievant?
- ✓ Following the grievant's receipt he was not kept either on the job or on the clock for 30 days?
- ✓ Are you aware of the 30-day requirement?
- ✓ Did you include this effective date in the removal?
- ✓ Who did?
- ✓ Did you check the removal after you received it from the Postmaster? Labor Relations? The MOD? The Plant Manager?
- ✓ If this removal had been your decision you would have made sure the 30-day rule was properly followed?

As with all interviews provided in this Handbook, the steward's orchestration is the key to eliciting the most favorable responses.

THE ARBITRATORS

Arbitral support on this due process issue is mixed. We have had Arbitrators overturn removals with full back pay while others upheld the removal while paying the employee for the 30-day period. In any event, our pursuit of the argument and violation must be without exception.

ARBITRATOR GERALD COHEN CASE NO. C4V-4E-D 8648
CANTON, OHIO APRIL 2, 1986 PAGES 11-13

ARBITRATOR GERALD COHEN CASE NO. CIC-4J-D 142
OSHKOSH, WISCONSIN JUNE 30, 1982 PAGES 8, 9-12

ARBITRATOR FRANCES ASHER PENN CASE NO. C7C-4M-D 20972
FLINT, MICHIGAN JUNE 14, 1990 PAGES 5-7

ARBITRATOR LAMONT E. STALLWORTH CASE NO. COC-4B-D 16323
TROY, MICHIGAN JULY 15, 1993 PAGE 13

ARBITRATOR SUSAN BERK CASE NO. COC-4C-D 94011593
MEDIA, PENNSYLVANIA SEPTEMBER 19, 1994 PAGES 19-20

CHAPTER 19

THE ISSUE

STATEMENT OF BACK PAY MITIGATION INCLUDED IN NOTICES OF REMOVAL & NOTICES OF INDEFINITE SUSPENSION CRIME SITUATION

THE DEFINITION

Whenever management issues a notice of removal or notice of Indefinite Suspension-Crime Situation to an employee, that disciplinary letter must include a statement informing the employee that any back pay they may be entitled to is subject to scrutiny as to what efforts the employee made in seeking work.

THE ARGUMENT

A National Level pre-arbitration agreement between the APWU and USPS requires each Notice of Removal and Notice of Indefinite Suspension-Crime Situation to include the back pay notification. Should either disciplinary notice fail to include the notification, two arguments arise:

1. The disciplinary notice is fatally, procedurally defective and must be nulled.
2. Should the employee be granted back pay through a subsequent settlement or arbitration award, then that back pay is not subject to scrutiny as to whether the employee sought employment?

Argument #1

Many arbitrators may not hold that failure to include the mandatory notification renders a discharge or Indefinite Suspension-Crime Situation null and void. That does not diminish the Union's responsibility to raise and pursue the argument in our effort to provide the best possible defense and leave no argument undeveloped. Moreover, the failure by management to include the mandatory notification will only assist other Union arguments such as the degree of the supervisor's involvement and actual role in the issuance.

Argument #2

Should the arbitrator not be persuaded as to the null and void nature of the notice, the Arbitrator may very well be persuaded that failure to provide the mandatory notification directly affects the employee's back pay entitlements. Without notification, which is required, an employee cannot be held to the obligation to mitigate under Part 436 of the Employee and Labor Relations Manual. Had there been no agreement of the parties for notification, and then the general rule of implied knowledge for each employee would apply. However, with the party's agreement on inclusion, the logical conclusion is no employee who is not informed may be held responsible for failure to mitigate.

THE COLLECTIVE BARGAINING AGREEMENT

Language found in the Employee and Labor Relations Manual is referred to in the Pre-Arbitration agreement:

EMPLOYEE AND LABOR RELATIONS MANUAL

436.22 Back pay is allowed, unless otherwise specified in the appropriate award or decision. Decision provided the employee has made reasonable efforts to obtain other employment except that the employee is not required to make such efforts during the first 45 days of the back pay period. This 45day period does not apply to individuals who were denied employment with the Postal Service (see 436.428). (Emphasis Added)

In addition to the Employee and Labor Relations Manual, the aforementioned National Level resolution in Case No. H4C-NA-C 82 states:

3. 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. (Emphasis Added)

THE INTERVIEW

To establish lack of knowledge and/or involvement of the issuing supervisor and the alleged higher-level concurring official, we must normally conduct an interview.

However, due to the nature of this argument--the procedurally defective notice--management, if they are informed of the defect prior to Step 2, will probably rescind the defective notice and reissue a corrected one. Once we make an appeal to Step 2 in writing and include the argument in that appeal, management is severely limited in its ability to correct the defect.

A detailed analysis of the principles behind management's limitation to rescind and reissue based upon information provided by the Union as part of a Step 2 is found in arbitration Case No. C9OC-1 C-D 94017643. In that decision, Arbitrator Loeb addressed the issue of management reissuing a defective notice through its utilization of the Union's grievance appeal to Step 2 as the engine. That decision is found under the Double Jeopardy/Res Judicata chapter of the Handbook.

In this particular due process issue, no interview should be done prior to the Step 2 appeal and since Step 2 is our "full disclosure" step, none would be provided for the thereafter.

THE ARBITRATOR

There is no present arbitral history on this issue in support of our argument.

