Grievance Investigation

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Conducting Appropriate Interviews and Documenting Your Grievance at Steps 1 & 2

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FORWARD & ACKNOWLEDGMENTS

This booklet is the joint work product of the officers and stewards of the Four State Caucus of Minnesota, North Dakota, South Dakota and Wisconsin. It is designed to place into a single readily accessible format a strategic outline for officers and stewards to use in investigating and documenting a wide range of grievances. It was never intended to be all-inclusive, but rather to serve as the starting off point for the investigation of your specific grievance. The documentation checklists and suggested interview questions will give you a good place to begin your investigation. Your ideas and the specific facts of your grievance will then lead you to the additional information through which you can develop the entire grievance package.

It is critically important to fully develop your grievance at the lowest level. The National Agreement, itself, envisions that both parties will fully develop all of their arguments and share available documentation by Step 2. The purpose of this requirement is to facilitate more grievance resolutions at the lower steps. While that may be, at times more conceptual than realistic, it nonetheless remains our ultimate goal. Because the parties have become more and more skilled in raising procedural "blocking" arguments at arbitration, it has become increasingly important that all arguments and documents be shared at Step 2 and that such sharing or excange becomes a documented part of the record. This has become even more important with the changes in the 1998 Agreement which now require many grievances to be appealed directly from Step 2 to arbitration, bypassing Step 3 where the Union previously could "perfect" a grievance which had merit but still needed further development. From the very first time you begin your grievance file, even before you discuss it at Step 1, start to think of developing your grievance in such a way as to make it "arbitration ready."

Thanks to *Dan Kranz, Minneapolis Area Local President*, with whom the first seeds of this project originated,to *Central Region Coordinator Leo Persails* who authorized and encouraged it's undertaking, and to *National Business Agent Greg Poferl*, who provided indispensable input, editing and guidance. A great big and special "thank you" goes out to the locals who contributed to this outline by submitting timely suggestions as to either appropriate subject areas or documentation requirements. They did so on short notice and despite busy schedules. The Greater Northland Area Local, Milwaukee Area Local, Northeastern Wisconsin Area Local, Rochester Area Local, Oshkosh Area Local, and St. Paul Area Local all submitted invaluable contributions.

An even more "special" acknowledgment goes out to the following Union brothers and sisters who took time out of their busy schedules (yes, right during 1999 local negotiations) to attend a "Four State" planning session on April 9-10, 1999, in Bloomington, Minnesota, in which many of the details for this package were thoroughly discussed: ***Dave Meier, Randy McQuown, Dick Price and Jodi Schneider (Oshkosh Area Local), Paul Rodgers and Terry Dobbelaere (Mankato Area Local), John Durham (Fargo Area Local), Dan Kranz, Don Sevre, Mark Pietsch and Mark Eberhart (Minneapolis Area Local), Michael Kaehler and Jim Gully (St. Cloud Area Local), Dick Haefner (Rochester Area Local), Joyce Richards (Wisconsin APWU), Steve Raymer and Martin Mater (Madison Area Local), Pat McCann, Dawn Bengston, Al Vance, and Don Tambarino (St. Paul Area Local), Dale Enk and April Hafemann (Milwaukee Area Local), Todd Fawcett and Delorr Pickering (Greater Northland Area Local), Mike Bohanon (Twin Cities PDC Local), Guy Stanke and Cindy Bochanyin (Wausau Area Local) and Willie Mellen (Minnesota Postal Workers Union)***. They all worked tirelessly and contributed willingly. If their work product helps you at all in better preparing your grievance, then their efforts were worth it.

Special credit must be given to *National Business Agent Jeff Kehlert*, from whose publication, *Defense vs. Discipline, Due Process and Just Cause in Our Collective Bargaining Agreement, A Strategy Book*, major portions of the chapters in this publication on "Investigating and Documenting Disciplinary Grievances" we openly admit having liberally plagiarized. We truly hope that he will appreciate our borrowing from his exemplary work as the high praise it is certainly intended to convey.

As indicated, this is, hopefully, not a final product, but just the first installment of still bigger and better things yet to come. As you process your grievances you will almost certainly discover additional arguments, documents, interview ideas, or National Agreement citations which should be included in future additions of this publication. Perhaps you can suggest another topic (chapter) which could be outlined. Please send your suggestions to National Business Agents John Akey or Lyle Krueth. We will do our best to periodically update and re-publish this outline for your benefit.

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PART II - INVESTIGATING AND DOCUMENTING DISCIPLINARY GRIEVANCES

INTRODUCTION

Any discussion of grievance processing must begin with and emphasize this basic element: WE MUST RAISE OUR ISSUES AND ARGUMENTS IN SPECIFIC DETAIL NO LATER THAN IN THE WRITTEN STEP 2 APPEAL. We must share available documentation and evidence no later than the Step 2 discussion. The last real chance to add to or correct the record is our Additions and Corrections. Never rely on being allowed to introduce something later. 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.

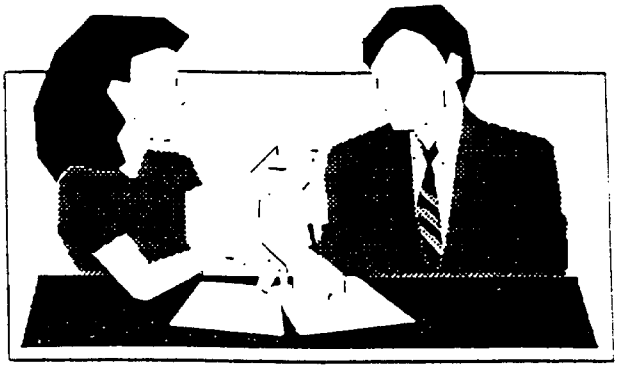
Step 2 is the "full disclosure" stage of our grievance/arbitration procedure. We have a contractually required obligation to raise our issues and arguments in detail in our Step 2 appeal

and at the Step 2 meeting. Should we fail to raise those arguments or provide documentation at Step 2, management will be expected to argue that 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--have been 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 procedural 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 fully develop our arguments through thorough grievance investigation and processing, we will see many valuable Union issues and evidence excluded by arbitrators and deny ourselves the opportunity to fully defend our members or to prove our case.

The Importance of Interviews

Perhaps the most important tool the Union has at its disposal--and one of the currently least used in developing solid well researched cases in both discipline and contract cases--is our ability under Articles 17 and 31 of the Collective Bargaining Agreement to interview witnesses during the course of grievance investigations. All potential witnesses should be thoroughly interviewed and their responses carefully recorded so as to "lock in" testimony which may develop at the arbitration hearing. While written statements should always be collected whenever possible, they are certainly no substitute for an effective interview. The witness usually selectively recalls such evidence as she wishes to remember when writing a statement. With a well thought out interview the steward can hope to draw out the "rest of the story." It is particularly important to interview hostile bargaining unit or management witnesses before higher ups get to them to tailor or restructure their recollection of events. Rest assured, that this will almost always occur. Timely interviews can not only limit the damage, they can actually turn the tables by calling the witness' credibility into question at the hearing. The



immediate supervisor should almost always be interviewed *before* the Step 1 discussion. This establishes the record before we start to lay out our case and perhaps coach the supervisor on what might be a safer answer. There is no substitute for a good interview. But your interview will be wasted without a detailed written record.

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 information."

Using 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. Even when those answers do not help our case, they can help us prepare for management's arguments. Too often, Union advocates do not know prior to the hearing what management witnesses and managers themselves will testify to at the hearing. There is no substitute for preparation. Union interviews done at the earliest steps--prior to Steps 1 or 2--will enable the Union to better prepare for management arguments at the hearing and/or discredit the less than truthful management witness.

Once interviews are conducted, the steward (with his or her detailed notes) 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.

Document! Document! Document!

It is never enough just to make the most eloquent arguments or make factual assertions. The burden is always on the Union in contractual cases, and often shifts to the Union when we raise affirmative defenses in discipline cases, to prove our case. How do we meet our burden of proof? The simple answer is: through plain hard work!

Proper completion and utilization of the Step 2 Appeal, Additions & Corrections, and Step 3 Appeal is always important. However, it is the steward's efforts at Steps 1 and 2 in interviewing witnesses, obtaining statements and securing documentation which prove the assertions we have made which will ultimately make our case at arbitration. Documents are a critical element of that proof. Unlike witness statements, they will not change under management pressure or become hazy with the passage of time. The tale documents tell never waivers.

We need documents to prove every element of our case. Everybody in your office knows Sue White's seniority is July 17, 1977. But the arbitrator won't. What would prove it? Your seniority list, or maybe a Form 50. As you can see there is often more than one document which can be used to prove a particular fact. Get the best one(s). If in doubt get several documents. A decision can be made later as to which one(s) to use.

What parts of your case do you need to document? Analyze your argument carefully. What are you trying to prove? What facts do you have to establish to get there? For instance, in the case of an overtime desired list violation you might need to prove: 1) that non-OTDL clerks were used for overtime (OTDL, clock rings, overtime authorization); 2) that OTDL clerks were available and not used (OTDL, clock rings, overtime authorizations); 3) that the OTDL clerks were qualified to perform the work (witness statements, training records).

Once you determine the documents you will need to prove each element of your case, submit a Request for Information requesting these documents. Always use a written Request for Information. Keep copies of your request. If the information is not forthcoming, you will have evidence of the request. Raise the issue of the denied information in the current grievance.

You should also <u>always file a separate grievance concerning the denied information</u>. Technically this should not be necessary. However, management always argues that the Union's failure to file a new grievance indicates a lack of concern or that the requested information wasn't necessary. Too many arbitrators have been fooled by this argument. Protect your case. File an Article 17 and 31 grievance on the denied information.

Share your documentation with management at Step 2. Article 15, Section 2, Step 2(d) envisions a full cooperation in the sharing of facts, contentions and documentation at Step 2. Every document which supports your case <u>must</u> be shared with the Employer at Step 2. If it isn't,

don't be surprised if an arbitrator refuses to consider it. The purpose of the grievance procedure is to develop all of the facts and resolve as many cases as possible *at the lowest level*. Perry Mason theatrics such as saving evidence to surprise a witness at the last minute of the court room drama may be good theater - but at arbitration they won't be accepted. Share all relevant documents which support your case.

Occasionally you will receive documents which hurt your case and support management's position. You are not obligated to share those documents. It's up to management to discover them and produce them to prove it's case. However, don't throw them away. Keep them in the file, clearly marked as "not shared" with management. If management fails to produce them at either Step 1 or 2 note that fact in your file. That will help your advocates prepare for any management surprises at arbitration.

Keep records of all documents shared with management at Step 1 or Step 2. Mark each document with date and time shared and with whom. Keep a list of each document shared with management. Note whether management requested a copy or only reviewed the document. Keep the same record of each document management shares with you and always request copies. It is a good idea to list all documents shared at Step 2 in your Additions and Corrections.

If management refers to a document during discussion or in their Step 2 grievance discussion, determine whether you have received a copy. If not, immediately submit a Request for Information.

Always be on alert for new documents or possibilities of documentation which might support your case. Discuss your case with other stewards and officers. Often times, based upon their experience in other grievances, they will have suggestions as to possible alternatives you can explore to document your case.

Requesting documentation can be expensive. Article 31, Section 3 makes it clear that "the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining" the documentation. Although the first 100 pages and first 2 hours research time are free, large information requests can still incur a significant cost. Are there reasonable alternatives? Would it work to request to "review" certain documents and only request copies of the specific ones you decide are necessary? What about requesting information in an alternative format, such as on a computer disk? Where there is a will, there usually is a way.

Whatever format you choose, the important thing is - for every fact at issue find supporting documentation. Share that documentation at Step 2. And then, document the fact that the information was shared. Document! Document! Document!

Finding the Violation

Once you have gathered all of your facts, reviewed and collected available documents, and interviewed potential witnesses, there is still one critical and all-important task which remains. *Do you have a grievance?* What Article and Section of the Agreement was violated? What provision of your Local Memorandum of Understanding? What handbook or manual? There is no question that you have a complaint. You know that because you have a member who is complaining. But do you have a grievance? Not every complaint is a grievance. In order to have a grievance we must be able to point to a particular section of the National Agreement or the Local Memorandum of Understanding, or to a provision from a specific handbook or manual which was violated.

If you can't find a specific provision which covers your situation - don't give up easily. Talk to other officers and stewards. Seek the guidance of your National Business Agents. But - if after your best efforts, it still is determined that there was no violation, then you have a difficult but important job to do. Fully explain to the grievant, why his or her complaint just isn't grievable.

If you do have a grievance but it is denied at Step 1 (imagine that happening) your Step 2 Appeal must contain reference to the specific Article(s) of the National Agreement or LMOU you are citing as having been violated. You must point out any handbook or manual citations you are relying upon. When citing your LMOU, labor/management minutes, or USPS handbooks or manuals, etc., include copies of the relevant citations in your grievance file and be prepared to share them with management. The presence of these documents will become even more critical at Step 3 or at arbitration.

Looking Ahead

In the chapters which follow we will be reviewing a number of possible issues which you may confront in the grievance procedure. For each issue we have attempted to suggest the basic arguments you can use, interview subjects and questions you might consider, and possible documentation you should obtain.

While we have attempted to be thorough in our work, the list of issues, possible arguments, interview questions, and documentation suggestions are not intended to be all inclusive. This is truly a work in progress. As you discover new issues, develop new arguments, devise new interview techniques, or determine new documentation possibilities, you too can contribute to this project. The true test of Unionism is not in individual talents but in our collective abilities. By sharing your ideas with others we can all more effectively represent our membership.

Part I

Investigating and Documenting

Contractual Grievances

CHAPTER 2

THE ISSUE: POSTMASTERS OR SUPERVISORS PERFORMING BARGAINING UNIT WORK IN 1.6.B OFFICES

THE DEFINITION

Postmasters and supervisors in offices with fewer than 100 bargaining unit employees are prohibited from performing bargaining unit work unless it falls within one of the five (5) enumerated exceptions in Article 1.6.A or when the duties are specifically included in their position description.

THE ARGUMENT

As a general rule, postmasters and supervisors in offices with less than 100 bargaining unit employees are also prohibited from doing bargaining unit work. This is still the general rule, even though the additional "position description" exception has been added. If management claims that the work performed falls within one of the enumerated exceptions in 1.6.A or is included in the postmaster's or supervisor's position description the burden is on the employer to establish the applicability of that exception.

Generally, all distribution functions and window work are accepted as exclusively bargaining unit work. Other work, such as timekeeping, administrative duties, etc., may not always be exclusively bargaining unit work. However, if we can show that it has historically been performed by clerks in an office we have a strong case for arguing that it should not be shifted to supervisors.

Most often, postmasters or supervisors in a 1.6.B office will assert their position description as the qualifying exception. Most such position descriptions will contain a phrase which goes something like this: "May personally handle window transactions and perform distribution tasks as the workload requires." This is not a *carte blanche* permitting the postmaster to perform as much bargaining unit work as she desires. The work should still only be performed when "the workload requires." In other words, if there is a clerk available, then the clerk should be performing this work. Management may not regularly and routinely schedule themselves to perform bargaining unit work without first giving consideration to the availability of clerks to perform this work.

The parties have agreed that where supervisors perform bargaining unit work in violation of Article 1.6.A, the appropriate remedy is compensation (at the appropriate rate) to the craft employee(s) who would otherwise have performed that work. We should argue that the same remedy is appropriate for 1.6.B violations. In fact, most arbitrators do find this to be the appropriate remedy. A cease and desist remedy is usually appropriate only when the supervisor's performance of bargaining unit work was truly unusual and/or the work performed was *de minimis* (e.g., a small or insignificant amount).

THE INTERVIEW(s)

Bargaining Unit Witnesses

- What supervisor was it and exactly what did you observe them doing? For how long and when (dates and times)
- Have you said anything to the supervisor? If so, what and when?
- Who else was present and may have witnessed the postmaster's performance of our work? Craft employees? Other supervisors?
- Have you witnessed this supervisor doing similar work in the past? If so, when? Where?
- Would you be willing to write a statement and/or testify at an arbitration if that should be necessary?
- Has the amount of bargaining unit work performed by the supervisor or postmaster changed significantly? Is she doing more or less of our work?
- Have your hours increased or decreased?
- Were there clerks available to do this work or does the postmaster only do bargaining unit work when no other clerks are available?
- Have past supervisors or postmasters performed similar amounts of bargaining unit work? More work or less work?
- Have you ever been sent home before the distribution is completed and does the postmaster continue distributing mail after you leave?
- Are you window qualified? Scheme qualified? What other training have you had?

- Do you ever serve as a 204-B? If so, when you do, what bargaining work do you do? Are there other clerks available who could have been scheduled to do this work?

Whenever possible get a written and signed statement from each witness. Ask the employee to be as specific as possible about the exact times and specific work that he observed being performed. Be sure that the employee understands that they may someday be called as a witness for arbitration.

The Postmaster or Supervisor

- How much bargaining unit work do you do each day?
- Why is it necessary for you to do this work? What alternatives have you considered?
- Is it appropriate for you to be doing this bargaining unit work? If so, why?
- How much bargaining unit work is expected from you by your office's budget or by your supervisors?
- What are your clerks' schedules?
- What are your window hours?
- Who performs your morning distribution? How often to you assist and for what period of time?
- Are any clerks ever sent home before all of the distribution (first and third class) is completed? How do you find time to get the rest of this finished by yourself?
- Do you ever work the window? If so, how often and for what period of time?
- Why don't you schedule a clerk to do this work?
- Has any management official ever instructed you to perform this work? Do you understand that it is expected that you perform a certain amount of bargaining unit work each day? If so, how much?
- If you didn't do this work, who would do it?
- With all of the bargaining unit work you are doing, how do you possibly find time

to do your postmaster duties?

- Have you given any consideration to scheduling a craft employee to do this work? If not, why not?
- Are your craft employees qualified to do this work?
- What provision in your position description includes performance of this work? Can you give me a copy of your position description?
- Would you mind giving me a signed statement?

Do not anticipate many supervisors agreeing to provide statements. However, what does it hurt to ask? You will be able to come up with many more appropriate questions which are particular to each office and fact situation. Take good notes during your interview. Once higher level management gets their hands on their subordinate, their story is going to change dramatically.

THE DOCUMENTATION

Witness statements & interviews (establish who does what and when - particularly, what hours does the Postmaster work and what time does she spend performing distribution or working the window?)

- Clerk seniority list
- Clerk work schedules (at least 6 months)
- Clock rings, time cards (both sides) or ETC printout (at least 6 months) for all clerks, FTR, PTF, and PTR as well as any casual, TE, loaner or cross craft hours
- Supervisor/Postmaster statements or interviews
- Function 4 / Workload-Work hour analysis
- Work hour budgets (last several years)
- Any written instructions or admissions regarding performance of clerk work
- Supervisor/Postmaster position descriptions
- Bargaining unit employees' position descriptions

- General data sheets for Post Office (at least last 3 years)
- PS Form 3930 (Operational Analysis Form)
- Window hours for Post Office

THE AGREEMENT

- National Agreement, Article 1.6.B
- National Agreement, Article 19
- USPS Handbook, EL-202

CHAPTER 3

THE ISSUE: PAST PRACTICE - FIVE MINUTE WASH UP

THE DEFINITION

A reasonable amount of wash up time is granted to employees who work with dirty or toxic materials through Article 8 of the National Agreement. Article 30 of the National Agreement gives the Union the right to negotiate additional or longer wash-up periods for all employees. Many installations allow some amount of time for a wash up period for their employees. The actual amount of wash-up time is subject to the grievance procedure. Where no specific LMOU provision exists, the past practice in the office determines the length of the wash-up time that is allowed each employee.

THE ARGUMENT

The employees in the installation have enjoyed a five minute wash-up period prior to going to lunch and prior to going home for a long period of time. Management has unilaterally ended the long standing past practice without any discussion with the Union. Article 5 of the National Agreement prohibits the Employer from taking a unilateral action without discussion with the Union.

5 Elements of a Past Practice

a) clarity and consistency
b) longevity and repetition
c) acceptability
d) underlying circumstances
e) mutuality

To establish a past practice, the claimed practice must meet the following conditions: 1) clarity and consistency, 2) longevity and repetition, 3) acceptability, 4) underlying circumstances and 5) mutuality. The fact that supervision allows the employees to leave the work area and take the 5 minutes wash-up time demonstrates the acceptability. It must be clear to all involved where the employees are going five minutes prior to clock out time. In this case, the Union must prove that the past practice of 5 minutes wash-up is a long standing past practice. Senior employees can testify to the fact that the past practice has been in place for a long period of time. Examine your facts carefully. Is everyone taking the five (5) minute wash-up? Are they using the time to wash-up or for other purposes?

THE INTERVIEW(s)

The Postmaster/Supervisor

- How long has management allowed the employees to take a 5 minute wash-up prior to lunch and ending tour?
- Were all employees allowed to take the 5 minute wash-up?
- Did you allow your employees to leave the work room floor and wash up?
- Did you discuss this wash-up time with any of your employees?
- Did you attempt to discipline any of your employees for leaving the work room floor?
- Why did you decide to end the wash up time privilege?
- Who told you to end the 5 minute wash up time?
- How did you end the wash up past practice?
- Did you discuss the action with the Union?
- Were notices posted to advise employees of the change in past practice?
- Did you attempt to eliminate the wash up language in the last local negotiations?
- Did you attempt to change the wash up language in the last local negotiations?
- What is the language regarding wash up in the LMOU?

The Employees

- How long have your worked here?
- How long have you had a 5 minute wash up time?
- How did you become aware of the 5 minute wash up practice?
- Has anyone in management ever mentioned the 5 minute wash up?
- How much time is necessary for wash up in this office?

- What special circumstances make the 5 minute wash up necessary?
- Until recently has anyone in management ever challenged the 5 minute wash up?
- What were you recently told about the wash up period?

THE DOCUMENTATION

- Witness statements or interviews
- Supervisor interviews or statements
- LMOU provisions
- Notes from service talks, etc. where past practice was previously recognized or announcement of change was made
- Labor-Management minutes / written instructions, etc.
- Any management documents expressing a recognition of past practice
- Correspondence regarding management's intent to change practice
- Any proposals from either party during local negotiations on wash up

THE AGREEMENT

- National Agreement, Article 5
- National Agreement, Article 8.9
- National Agreement, Article 30
- LMOU

CHAPTER 4

THE ISSUE: CONTINUOUS USE OF CASUALS

THE DEFINITION

Casual employees are intended to be used as a limited term supplemental workforce. They should not be used on a continuous year-round revolving door basis.

THE ARGUMENT

Article 7, Section 1.B.1 says, "Casual employees are those who may be utilized as a limited term, supplemental work force, but may not be employed in lieu of full or part-time employees. Casuals were intended to be short term employees, hired to fill specific needs, such as a temporary heavy workload or leave period, for a specific, intermittent or limited time period or any other situations where the need for supplemental help occurs. Where the identified need and workload is for other tha supplemental or short term employment, the use of career employees is intended. When management uses casuals in the same assignments on a year-round, continuous basis, they are using casuals in lieu of career employees (full or part-time) who should be occupying those assignments.

THE INTERVIEW(s)

The Supervisor/Manager

- How many casuals are you currently using? How long have you been using casuals?
- What work are the casuals doing?
- How are the casuals scheduled? Isn't it true that this is the same way part-time flexibles would be scheduled?

- Why are these casuals needed?

- Wouldn't it be more efficient to use career employees, such as part-time flexibles or full-time regulars?

- What efforts have you made to get additional career help?

- Who decided that you should use casuals instead of additional career employees?

- Are these casuals pretty much used year round or is there a significant fluctuation in your need for casuals?

- Weren't several career duty assignments in your section recently reverted?

Bargaining Unit Employees

- How long have you worked in this unit?

- Do you know or recognize these casual employees (Jones, Smith, Doe, Erickson, et al)?

- Which ones have you worked with?

- How are they assigned/scheduled? The same as career employees? Differently? In what ways?

- In what ways is the work performed by casuals the same as (different from) the work performed by career employees in this unit?

THE DOCUMENTATION

- Casuals' clock rings or time cards

- Witness statements or interviews

- Work schedules

- PS Forms 50 for each casual

- Management justification/authorization to hire casuals (paperwork usually has been submitted to Personnel

- Supervisor interviews or statements
- Cumulative workhours or overtime report
- Chart or graph casual workhours over at least a 6 month period
- Explanation of operation numbers casuals are clocked into

THE AGREEMENT

- National Agreement, Article 7.1.B.1

CHAPTER 5

THE ISSUE: CASUALS IN LIEU OF PART-TIME FLEXIBLES

THE DEFINITION

Casuals should not be used where part-time flexibles are qualified and available to perform the work at the straight time rate.

THE ARGUMENT

Article 7, Section 1. B.2 obligates the Employer to "make every effort to insure that qualified and available part-time flexible employees are utilized at the straight time rate prior to assigning such work to casuals. It doesn't matter whether the casual worked more or less hours than the part-time flexible in a particular day or in the service week. If, during a particular time frame when management used casuals, one or more part-time flexibles were qualified and available to perform that work at the straight time rate, they must be used.

THE INTERVIEW

- What work did casual employee Smith perform between 1600-2000 on March 3, 1999?
- Isn't part-time flexible Jones qualified to perform that work?
- What hours did part-time flexible Jones work on March 3, 1999?
- Since Jones worked only from 1900-2400, why wasn't she used from 1600-1900 to perform the work performed by Smith?
- What efforts, if any, do you make to schedule part-time flexible employees for up to eight (8) hours before scheduling casuals to work?

THE DOCUMENTATION

- PTFs' Clock Rings / Time Cards

- Casuals' clock rings / time cards
- PS Forms 50 for casuals
- Training records showing qualification
- Work schedules (both PTF's and casuals)
- 3971's (PTFs' request to be excused)
- Witness statements or interviews
- Supervisor statements or interviews
- Graph or chart PTF and casual workhours showing PTF availability at straight time when casuals worked
- PTF seniority list
- Explanation of operation number reflected in clock rings
- Training records or other documentation demonstrating that PTF's were qualified to perform this work

THE AGREEMENT

- National Agreement, Article 7.1.B.2

CHAPTER 6

THE ISSUE: CROSSING CRAFTS, OCCUPATIONAL GROUPS, AND/ OR WAGE LEVELS

THE DEFINITION

Management may not normally make cross-craft or cross-occupational group assignments unless there is an insufficient workload in the losing craft and an unusally heavy workload in the gaining craft.

THE ARGUMENT

The circumstances under which cross-craft or cross-occupatinal group assignments may be appropriate are very limited. Article 7 is a general prohibition against such assignments with very limited exceptions. If management claims an insufficient workload in one craft and an unusually heavy workload in another, the burden shifts to the Employer to prove those claims. Management may not make such assignments solely to avoid overtime in one craft or occupational group.

THE INTERVIEW

- What work did Letter Carrier Smith perform on Wednesday between 0700 and 0900?
- Isn't (distribution of parcel post) normally Clerk Craft work in this office?
- Who made the decision to make this cross-craft assignment?
- Why did you decide to use Letter Carrier Smith to perform this Clerk Craft work?
- Why couldn't you have used Clerks to perform this work?
- Wasn't one of your major concerns the fact that you would have had to bring in a Clerk on overtime?
- How much overtime did the Letter Carrier Craft work on the day in question?
- How much overtime was worked in the Clerk Craft on that day?

THE DOCUMENTATION

- Position description(s) of employees assigned across crafts, occupational groups or levels
- Position description(s) of employees normally performing this work
- Clock rings of employees assigned across crafts, occupational groups or levels
- Clock rings or work hour summary for all members of craft working in APWU craft or occupational group (overtime level in losing craft or occupational group)
- Clock rings or work hour summaries in gaining craft (overtime level in gaining craft)
- PS Forms 1723 [Assignment Order] if used
- PS Form 1230 A or B if used [usually in smaller offices]
- Mail volume reports
- Identify or document work available in employee's own craft
- Witness statements or interviews
- Supervisor interviews or statements
- Light / limited duty job offer (if applicable)
- Medical restrictions of employee (if any) being assigned across craft lines
- Transfer hours report

THE AGREEMENT

- National Agreement, Article 7.2
- National Agreement, Article 13
- National Agreement, Article 19
- Employee & Labor Relations Manual, Part 546

CHAPTER 7

THE ISSUE: MAXIMIZATION OF PART-TIME FLEXIBLES TO FULL TIME

THE DEFINITION

Management must maximize the number of full-time regular duty assignments and minimize the number of part-time flexible assignments.

THE ARGUMENT

Article 7, Section 3.B requires that the Employer "maximize the number of full-time employees and minimize the number of part-time employees who have no fixed schedule in all postal installations." (However, it should be noted that this language does not create any new rights in those offices which have 200 or more man years of employment [80-20 offices].) Where we can demonstrate that part-time flexibles are working assignments that could be full-time positions, the burden properly shifts to management to demonstrate why a full-time regular duty assignment would not be possible. There is no requirement that we must consider only the hours of a single part-time flexible in order to show the existence of a potential full-time regular duty assignment. Most arbitrators will permit the Union to combine PTF hours because to do otherwise would be to permit the Employer to manipulate part-time flexible schedules in order to circumvent their general obligation to maximize full-time regulars.

In larger offices (those with 200 or more employees) the Employer's obligation is to maintain an 80% full-time workforce. In addition, wherever a single part-time flexible works eight (8) hours within ten (10) on the same five (5) days in the same assignment each week over a six (6) month period, this demonstrates the need for converting the assignment to a full-time position. [Article 7.3.C] Furthermore, when a part-time flexible has performed duties within his craft and occupational group (not necessarily the same assignment) within an installation at least 40 hours per week (8 within 9 or 8 within 10 as applicable), 5 days a week over a period of six months (again, not necessarily the same 5 days) a part-time flexible must be converted to full-time status. [Maximization Memorandum of Understanding]

THE INTERVIEW

- Isn't it true that a full-time regular duty assignment with these hours and off-days could be made to work in this office?
- Who do you have to get authoization from in order to create additional full-time regular duty assignments?
- Have you attempted to get additional full-time regular duty assignments? What happened?
- Why wouldn't a full-time regular duty assignment work?
- What changes would be necessary in order to make a full-time regular duty assignment possible?

Often times, the Postmaster in a small office may be our best ally in a case of this type. They know how important another full-time regular duty assignment is to their part-time flexibles and they want to create the best situation for their employees. Even though they know it would be possible to create another FTR duty assignment their superiors are the ones blocking it. As a result, if handled properly, they will often provide us with valuable assistance.

THE DOCUMENTATION

- Clock rings / time cards for all PTF's, casuals, loaners, TE's, cross-craft, etc.
- Graphs - showing at least 6 months, PTF hours and identifying FTR assignments [Remember - if grievance is not resolved at lower steps you will need to continue requesting time cards or clock rings and graphing them until the case is arbitrated. Plan to be in this one for the long haul.]
- PTF seniority list
- Listing of current FTR duty assignments in section or office, including position descriptions, off days and hours
- PS Forms 3971 (leave counts towards maximization as long as it was not taken solely for that purpose)
- Witness statements or interviews

- Supervisor interviews or statements
- Weekly work schedules

THE AGREEMENT

- National Agreement, Article 7.3
- National Agreement, Maximization MOU

CHAPTER 8

THE ISSUE: CONSECUTIVE OFF DAYS

THE DEFINITION

Employees are entitled to work schedules with consecutive work days (and consecutive off days). Split duty assignments with split off days must be minimized.

THE ARGUMENT

Article 8.2.C requires that "[a]s far as practicable the five days [of a full-time regular employee's work week] shall be consecutive days..." What this means is that the Employer must make every effort to avoid split off days and where it must post a position without consecutive off days, the burden shifts to the employer to show why doing so was not "practicable." Employees have a considerable interest in working a consecutive day work week and the Employer must shoulder an equally considerable burden in demonstrating why this is not "practicable" or "doable." Simply avoiding overtime or convenience of scheduling excuses will usually not be enough. The Employer must show that some significant service consideration required the change.

THE INTERVIEW

- Didn't this duty assignment previously have consecutive off days?
- Who made the decision to change it to split off-days?
- Why was this duty assignment changed to split off-days?
- What consideration, if any, was given to retaining some form of consecutive off days?
- Was your sole reason for making this change an attempt to reduce overtime on Mondays?
- Has your overtime decreased on Mondays?
- What change has occurred in your overtime on the other days of the week?

- How many other split off day duty assignment do you have posted in this section?

THE DOCUMENTATION

- Previous job posting
- New job posting or notice to employee/union of intent to abolish and repost
- Clock rings / time cards
- Witness statements or interviews
- Supervisor interviews or statements
- Overtime records (by day of week)
- Mail volume reports or other documentation of workload by day of week
- Delayed mail reports, if any
- Position description
- LMOU provisions
- Documentation as to other duty assignments in the section or office (how many are currently consecutive off days and how many are split?)
- Casuals and PTF's work schedules

THE AGREEMENT

- National Agreement, Article 8.2.C
- LMOU

CHAPTER 9

THE ISSUE: OVERTIME ASSIGNMENTS

THE DEFINITION

Full-time employees not on the overtime desired list (OTDL) may not be required to work overtime unless all available employees on the OTDL have worked up to twelve (12) hours in a service day or sixty (60) hours in a service week.

THE ARGUMENT

The overtime provisions in Article 8 and your LMOU are intended to protect employees who do not wish to work overtime from having to do so whenever possible while giving those employees who wish to work overtime the opportunity to do so. Management cannot require non-OTDL employees to work overtime unless they have first maximized the utilization of available and qualified OTDL employees. Management may not bypass available OTDL employees and require non-OTDL employees to work overtime solely to avoid the payment of penalty overtime.

THE INTERVIEW

- What work did not the non-OTDL employees perform on overtime?
- Haven't you been told by your superiors to avoid penalty overtime at all costs?
- Isn't the main reason you sent the OTDL employees home after two (2) hours because they would have thereafter gone into a penalty overtime status?
- There is no dispute that the OTDL employees were available and qualified to perform the work in question (other than their penalty status), is there?
- Were there any reasons other than your concerns about penalty overtime which precluded your using the OTDL employees up to twelve hours instead of requiring the non-OTDL employees to work?
- Did you make the decision to send the OTDL employees home after 10 hours or were you told to do so?

- Isn't it true that if the OTDL employees had been used for an additional two hours it would still have been possible to meet the critical dispatch?

THE DOCUMENTATION

- Overtime Desired List
- Seniority list
- Clock rings / time cards
- Overtime authorization (PS Form 1261)
- Dispatch schedules
- Witness statements or interviews
- Supervisor interviews or statements
- 3971's for any employees excused
- Position description of employee doing work
- Position description of bypassed employee
- LMOU provisions
- Work schedules
- Training records or documentation establish qualification of bypassed employee

THE AGREEMENT

- National Agreement, Article 8.5
- LMOU

CHAPTER 10

THE ISSUE: ABSENT WITHOUT APPROVED LEAVE (AWOL)

THE DEFINITION

Absent without approved leave (AWOL) is a non-pay status resulting from a management determination that no kind of leave (paid or unpaid) can be granted, either because (1) the employee did not obtain advance authorization or (2) the employee's request for leave was denied.

THE ARGUMENT

The Postal Service's leave policy still must be administered on an equitable basis, considering both the needs of the Employer and the welfare of the individual employee. The supervisor may not arbitrarily, capriciously, or discriminatorily disapprove leave, thus placing the employee in an AWOL status. Nor may every disapproved request for annual leave or sick leave automatically be charged as AWOL. If the supervisor, for instance, is satisfied that a request for annual leave is legitimate, but the employee has insufficient annual leave, the request should be approved but recorded as LWOP. Or, if a request for sick leave is warranted but not compensable under the sick leave provisions, the employee should be given the option to convert the request to annual leave or LWOP, instead of automatically being charged AWOL. Similarly, not every leave request for which advance authorization was not obtained may be charged as AWOL. The leave provisions anticipate that occasional requests for unanticipated annual leave or sick leave will occur. Even a blanket policy that all no-calls or late calls are to be charged AWOL would be inappropriate. Undoubtedly, many no-calls will turn out to warrant an AWOL determination. However, each case must be examined on it's own merits. For example, where an employee was incapacitated and notified the employer as soon as she was able to do so, sick leave would be appropriate rather than AWOL.

THE INTERVIEW

- Why was the grievant determined to be AWOL?
- Who made the decision?
- Is everyone who calls in late automatically AWOL?

- Is this policy that everyone who fails to call in before their scheduled start time is automatically AWOL in writing somewhere?
- You did understand, didn't you, that grievant was in the hospital this morning and didn't have access to a phone until two (2) hours after her tour began?
- Would it have made any difference if you would have known this?
- Is there anything grievant could have done or submitted to get you to change your mind and approve sick leave for the two (2) hours before she called in?

THE DOCUMENTATION

- PS Form 3971 (leave slip)
- Medical/emergency evidence or documentation
- Grievant's statement or interview
- Witness statements or interviews
- Supervisor interviews or statements
- Call-in records
- Employee's PS Form 3972
- Discipline notice if issued
- Documentation or statements as to other employees treated differently

THE AGREEMENT

- National Agreement, Article 10
- National Agreement, Article 19
- LMOU
- Employee & Labor Relations Manual, Part 510

CHAPTER 11

THE ISSUE: DENIED ANNUAL LEAVE

THE DEFINITION

Annual leave is an earned benefit. Employees earn annual leave each year and they are entitled to use that earned leave either for scheduled vacations, incidental scheduled leave or emergency situations.

THE ARGUMENT

Some annual leave is guaranteed by the Agreement. Most LMOU's have provisions on vacation scheduling guaranteeing employees certain rights to approved annual leave for their scheduled vacations. Some LMOU's even provide for guaranteed incidental leave up to certain fixed percentages during the year. These are negotiated rights to use an earned benefit and management may not deprive employees of this right. Once annual leave is approved it must be honored except in serious emergency situations.

All requests for incidental annual leave other than those guaranteed under the Agreement must be approved or disapproved by the supervisor. Where no specific procedures are spelled out in the parties LMOU, the supervisor's decision must not be arbitrary or capricious. It also may not be discriminatory and must be equitable, considering on a case-by-case basis both the needs of the service and the welfare of the individual employee.

THE INTERVIEW

- It appears that you are the supervisor who disapproved Johnnie Wilson's request for annual leave. Is that correct?
- Why did you disapprove it?
- Were there any specific needs of the Service which factored into your decision?
- You didn't happen to ask Johnnie why he needed this annual leave, did you?
- Why didn't you feel that would be necessary?

- As I understand it, you had decided that no additional annual leave would be granted on Wednesday, so it really didn't matter at all what Johnnie's reason for requesting leave was, did it?

- Is this policy that no more than two (2) people may be off on annual leave a written instruction from your superiors or is it one you have adopted on your own?

- Are there ever any exceptions to this policy?

THE DOCUMENTATION

- PS Form 3971 denying the leave request

- LMOU provisions

- Vacation calendar or leave book

- Seniority list

- Grievant's statement or interview

- Witness statements or interviews

- Supervisor interviews or statements

- Time cards / clock rings

- Employee's PS Form 3972

- Employee's annual leave balance (check stub or computer print out)

- Work schedule and other PS Forms 3971 for day in question

- Documentation and statements as to other employees who may have been treated more favorably

THE AGREEMENT

- National Agreement, Article 10
- National Agreement, Article 19
- LMOU
- Employee & Labor Relations Manual, Parts 510 & 512

CHAPTER 12

THE ISSUE: DENIED SICK LEAVE

THE DEFINITION

Sick leave is an earned benefit. Employees earn sick leave each year and they are entitled to use that earned leave when they are incapacitated or unable to work because of an injury or illness. In addition, employees may use sick leave to care for an incapacitated family member (parent, spouse or child).

THE ARGUMENT

Sick leave is an earned benefit. Sick leave insures employees against loss of pay if they are incapacitated for the performance of their duties because of illness, injury, pregnancy or medical treatment. When possible sick leave is to be requested and approved in advance. However, in unexpected illness/injury situations the employee must notify appropriate postal authorities as to their illness/injury and expected duration of absence. The supervisor is responsible for approving/disapproving each sick leave request. Such approval may not be unreasonably, arbitrarily or capriciously denied. Medical documentation may only be required when the absence is for more than three (3) days, when the employee is on restricted sick leave, or when the supervisor has a legitimate reason to suspect abuse.

Under the Dependent Care Memo, employees are entitled to use up to 80 hours of sick leave each year to care for incapacitated family members (spouse, parent, or child). Such requests for sick leave are subject to the normal documentation requirements for sick leave.

THE INTERVIEW

- Why did you disapprove Mary's request for sick leave?
- Didn't Mary call in before her tour to indicate she would be unable to work because of her cold?
- So as I understand it, you just don't feel that Mary's cold was severe enough to incapacitate her?
- Other than that belief on your part do you have any other basis for believing that

Mary was able to work?

- Under what circumstances do you believe sick leave is appropriate?
- Why did you request medical documentation?
- Under what circumstances is it appropriate for you to request medical documentation?
- Why don't you believe it was appropriate for Mary to use sick leave to care for her sick child?

THE DOCUMENTATION

- PS Form 3971 denying leave request
- Medical documentation
- Call-in records
- Grievant's statement or interview
- Witness statements or interviews
- Supervisor interviews or statements
- Employee's PS Form 3972
- Restricted sick leave records
- Documentation or evidence as to "blanket policy" existing as to medical documentation requirements
- FMLA or dependent care sick leave documentation
- Employee's sick leave balance (check stub or computer print out)
- Documentation or statements as to employee's treated more favorably

THE AGREEMENT

- National Agreement, Article 10
- National Agreement, Article 19
- Employee & Labor Relations Manual, Parts 510 & 513

CHAPTER 13

THE ISSUE: RESTICTED SICK LEAVE

THE DEFINITION

Employees may only be placed on restricted sick leave in accordance with the strict requirements of the Employee & Labor Relations Manual. Management's action may not be arbitrary, must be for the reasons specified and must follow the procedures spelled out in the handbook.

THE ARGUMENT

There are two (2) possible reasons for placing an employee on restricted sick leave. Supervisors who have evidence that an employee is abusing her sick leave may immediately place her on the restricted sick leave list. "Abuse" means using sick leave for reasons other than incapacitation. It does not mean using too much sick leave. There is no minimum sick leave balance which determines excessive use. When an employee is placed on restricted sick leave because they are considered to have used sick leave to frequently, ELM 513.37 spells out a very specific procedure including a number of reviews, discussions with the employee, and opportunities to correct the alleged deficiency which the Service must follow. This process entails some 9 months. Before the employee may be placed on restricted sick leave the following steps must occur: 1) establish an absence file; 2) review the absence file by both the supervisor and higher level management; 3) review of absences and sick leave usage with employee; 4) review of the next quarters absences; 5) if there has been insufficient improvement, meet with the employee and advise him that if there is no improvement during the next quarter, the employee will be placed on restricted sick leave; 6) if there is no improvement, the employee may then be placed on restricted sick leave. If this complete procedure is not followed, an employee may not be placed on restricted sick leave for alleged over-use of sick leave.

THE INTERVIEW

- Were you the supervisor responsible for placing grievant on restricted sick leave?
- Would it be fair to say that you were unhappy with the amount of sick leave grievant has been using during the past few months?
- Is it true then, that the grievant was placed on restricted sick leave because he had used an excessive amount of sick leave?

- Were there any other reasons why you placed grievant on restricted sick leave.
- Other than your suspicions, do you have any evidence at this time indicating the grievant was not actually incapacitated on each of the occasions he requested sick leave?
- On what occasions have you reviewed grievant's attendance with him?
- On what occasions prior to placing grievant on restricted sick leave have you discussed the possibility of restricted sick leave and its consequences with grievant.
- Did you ever tell grievant that if he did not improve his attendance within the next 90 days he would be placed on restricted sick leave.
- Do you have a minimum sick leave balance which you believe triggers consideration for restricted sick leave?

THE DOCUMENTATION

- Notice of placement on restricted sick leave
- PS Forms 3971
- PS Forms 3972
- Medical documentation
- Witness statements or interviews
- Supervisor interviews or statements
- Copy of quarterly listing
- Employee's discipline records, if any
- Grievant's sick leave balance (check stub or computer print out)
- Check employee's OPF for attendance awards, etc.
- FMLA documentation

THE AGREEMENT

- National Agreement, Article 10
- National Agreement, Article 19
- Employee & Labor Relations Manual, Part 513

CHAPTER 14

THE ISSUE: REQUIRING MEDICAL DOCUMENTATION FOR ABSENCES OF 3 DAYS OR LESS

THE DEFINITION

For periods of absence of three (3) days or less, management may accept the employee's statement explaining the absence and request for sick leave. Medical documentation may be required only when the employee is on restricted sick leave or when the supervisor has a reasonable basis to believe it is necessary in order to protect the interests of the Postal Service.

THE ARGUMENT

The supervisor's request for medical documentation may not be arbitrary or capricious. It must be based upon a legitimate belief that real interests of the USPS must be protected. Generally, this would mean that the supervisor must have some reason to believe that the employee may not actually be incapacitated as claimed. A history of discipline for attendance might be one consideration. A pattern of requesting sick leave in conjuction with off days or pay days might be another. Any evidence of possible abuse would certainly raise legitimate suspicion. If the employee had previously been denied annual leave and then called in for sick leave this might be another. Absent any of these conditions, we would argue that the supervisor's request was arbitrary and a violation of the Agreement. No blanket policy requiring everybody to call in on certain days, etc., is permissable. Appropriate medical documentation should be requested at the time of the call-in, not later, and most certainly should never be requested after the employee's return to work. Where medical documentation is requested in violation of the ELM, the appropriate remedy would be compensation for any medical expenses, time spent in getting the documentation, mileage and any other out-of-pocket expenses.

THE INTERVIEW

- Why did you instruct Sarah to provide medical documentation to support her 2 day request for sick leave?
- Is Sarah on restricted sick leave?
- Do you have any evidence that Sarah has abused her sick leave or requested sick leave when she was not actually incapacitated?

- What, if anything, did you review before you decided to require medical documentation?
- To your knowledge, were any other employees required to provide medical documentation under similar circumstances?
- Isn't it true that Sarah has never been disciplined for attendance?
- Had she previously requested annual leave for these two days?

THE DOCUMENTATION

- Medical documentation
- Medical bill, receipt or canceled check
- Record of mileage
- Receipts or documentation of other expenses
- Witness statements or interviews
- Supervisor interviews or statements
- PS Forms 3971
- PS Forms 3972
- Restricted sick leave records
- Any related discipline or AWOL charges
- Documentation or statements regarding other employees treated more favorably

THE AGREEMENT

- National Agreement, Article 10
- National Agreement, Article 19
- Employee & Labor Relations Manual, Part 513

CHAPTER 15

THE ISSUE: ADVANCE SICK LEAVE

THE DEFINITION

Employees who have exhausted their sick leave and suffer from a serious disability or ailment are entitled to request the advance of up to 240 hours of sick leave. Such requests must be supported by appropriate medical documentation and provided there is reason to believe the employee will be able to return to work and be able to repay the advance. such requests may not be unreasonably denied.

THE ARGUMENT

Advance sick leave is provided for in ELM 513.5. The fact that an employee has exhausted their sick leave is not a basis for denying advance sick leave. By definition all applicants for advance sick leave will have exhausted their sick leave. So long as the employee has exhausted his sick leave, can reasonably be expected to return to work and repay the advance, and supports the request with appropriate medical documentation of a serious medical condition, the installation head may not arbitrarily deny the request. Simply put, the installation head must have a reasonable basis for doing so and must be able to explain it.

THE INTERVIEW

- As postmaster or installation head, you are responsible for approving or disapproving all requests for advance sick leave, isn't that correct?
- Did you disapprove the grievant's request for advance sick leave?
- Was the request accompanied by appropriate medical documentation?
- Was there any reason to believe that grievant would not recover and be able to return to work?
- Why did you disapprove the grievant's request for advance sick leave?
- Do you have any evidence that grievant abused his sick leave or is your major concern simply that he has used too much sick leave and should have saved more

over the years?

- Have you ever approved any requests for advance sick leave? If so, for whom and when?
- Have you ever disapproved any requests for advance sick leave? If so, for whom and when?
- How did their situation differ from the grievants?

THE DOCUMENTATION

- Request for advance sick leave
- Medical documentation
- Management's denial of advance sick leave request
- Grievant's statement or interview
- Supervisor interviews or statements
- PS Forms 3972
- Previous discipline for attendance
- Restricted sick leave list
- Medical documentation for any serious illness which used up significant amounts of sick leave
- PS Forms 3971 showing annual leave or LWOP actually used for absence
- All advance sick leave requests and action taken (regardless of craft) for previous 12 months

THE AGREEMENT

- National Agreement, Article 10
- National Agreement, Article 19
- Employee & Labor Relations Manual, Part 513

CHAPTER 16

THE ISSUE: ACT OF GOD LEAVE

THE DEFINITION

When groups of employees are prevented from working or reporting to work by community disasters (such as storms, fire, or flood) which is general rather than personal in scope and impact the installation head should approve "Act of God" Administrative Leave.

THE ARGUMENT

Not every storm is an "Act of God" as that term is used in the Employee & Labor Relations Manual (ELM). Only when the storm rises to the level of a community disaster can it qualify. It must prevent groups of employees from working or reporting to work. When all these things occur, employees are entitled to the "Act of God" administrative leave benefit as spelled out in ELM 519. "Act of God" leave is a contractual entitlement. While the Employer does have discretionary authority to approve or disapprove administrative leave within the specific confines of ELM 519, "Act of God" administrative leave is not subject to the arbitrary or capricious whim or discretion of management. The installation head is required to determine whether the employee's absence was due to the storm, or whether he or she could have reported to work with reasonable diligence.

THE INTERVIEW(s)

Postmaster/Installation Head

- Are you the management official responsible for determining whether to approve "Act of God" leave in this installation?
- Why did you disapprove "Act of God" leave for employees who requested it during the last storm?
- Isn't it true that almost 85% of our employees were unable to make it to work because of the storm?
- What percentage of employees do you believe would need to be prevented from

reporting to work to constitute a "group"?

- Have you ever approved "Act of God" administrative leave?
- If so, how did that situation differ from this one?
- If not, what do you envision would be necessary for a storm to rise to the level of community disaster warranting the approval of "Act of God" administrative leave?
- Do you have any reason to believe that the employees who called in could have made it to work if they had used reasonable diligence?
- Are employees expected to put their lives at risk in order to get to work? In your mind, what does constitute reasonable diligence in that regard?
- Do you expect your employees to comply with the instructions of authorities regarding the safety of using the highways?

The Employee(s)

- Where, specifically, do you live and what routes to you normally travel to get to work?
- What was the weather like as best you recall on Monday?
- What efforts did you make to get to work?
- What advice or reports from local authorities were you aware of?
- Do you have tapes of any TV or radio reports?
- Who did you talk to when you called in?
- What kind of leave did you request?
- What were you told when you called in?
- In what ways, if any, was this storm different from most winter storms?
- Did you or any family members travel anywhere at all on Monday? If so, what was it like?
- What instructions, if any, have you been given by management about safety and

winter driving conditions?

THE DOCUMENTATION

- Newspaper accounts
- Television or radio accounts (videotapes or tape recordings)
- State, local, or federal declarations of emergency
- Witness statements or interviews for each employee (method of transportation usually used, routes taken, efforts made, and problems encountered)
- Supervisor interviews or statements
- Cancellations of USPS services (letter carriers / rural carriers / MVS or contract routes, etc.
- Truck arrival and departure records
- Machine run times / MODS / volume reports / tour condition reports
- LMOU provisions on curtailment
- Prepare map showing all employees who made it and those who didn't
- Public transportation records (were, airports, city buses, taxi cabs, etc. running?)
- Weather Service reports
- Highway Patrol or local authority road condition reports
- List of all employees identifying those who made it and those who didn't (including start time)
- PS Forms 3971 for each employee who called in

THE AGREEMENT

- National Agreement, Article 10
- National Agreement, Article 19
- National Agreement, Article 30
- LMOU, Item 3
- Employee & Labor Relations Manual, Part 519

CHAPTER 17

THE ISSUE: FAMILY & MEDICAL LEAVE ACT VIOLATION

THE DEFINITION

Qualified employees are entitled to up to twelve weeks of approved FMLA protected leave during each leave year, when such absences are necessitated by the employee's own incapacitation, or the incapacitation of the employee's spouse, child, or parent, due to a serious medical condition, or as the result of the birth or adoption of a new son or daughter. When properly documented and requested such leave requests must be approved and may not be the subject of discipline or other adverse action.

THE ARGUMENT

Family and Medical Leave is protected by the law and by the Contract. Enacted by statute, and further developed through Department of Labor Regulations as well as ELM 515, FMLA leave is a protected right. Properly submitted and documented requests by eligible employees for FMLA protected leave may not be denied. The law, and postal regulations, requires that the employee make the Employer aware that he is requesting leave for an FMLA covered condition. The employee does not have to specifically request FMLA leave to invoke the protection of the Act. The law requires, and the Postal Service has acknowedged, that no employee may be disciplined for using FMLA protected leave.

THE INTERVIEW

- Do you have any reason to believe that Charlie is not eligible for FMLA leave?
- Didn't Charlie submit documentation from his child's physician on an appropriate APWU Form supporting his request for leave?
- Were there any parts of that form which were not completely filled out or which you could not understand?
- Why did you disapprove Charlie's request for FMLA protected leave?
- It is my understanding that you approved the leave, "not FMLA." Is that correct?

- Do I understand correctly that you will not approve FMLA protected leave unless the physician's documentation includes a diagnosis and prognosis?

- Is it your understanding that you are entitled to receive and review the physician's prognosis and diagnosis? If so, on what do you base that understanding?

- Do I also understand that the other reason for your denial was because Charlie's six year old son was in the hospital and not at home where Charlie might be needed for his care?

THE DOCUMENTATION

- PS Forms 3971

- FMLA documentation (APWU forms, WH-381, or medical documentation)

- Management correspondence with the employee's doctor

- Copies of all documents given to employee by supervisor

- Grievant's statement or interview

- Supervisor interviews or statements

- Any additional or more detailed medical information

- Copies of specific portions of FMLA regulations cited as being violated

- Previous years work hours to show 1250 hours worked

- Check bulletin boards for appropriate postings

- WH-380

- Call-in records

- PS Form 3972

THE AGREEMENT

- National Agreement, Article 10
- National Agreement, Article 19
- Employee & Labor Relations Manual, Part 515

CHAPTER 18

THE ISSUE: HOLIDAY SCHEDULING VIOLATION

THE DEFINITION

As many full-time and part-time regular employees as possible must be excused from working on a holiday or day designated as their holiday. They cannot be required to work until after management has utilized all available and qualified part-time flexibles, casuals, transitional employees, and volunteers to the maximum extent possible including the use of overtime where necessary.

THE ARGUMENT

Article 11 is intended to protect full-time and part-time regular employees from working their holiday whenever possible. It requires that the Employer determine the numbers and categories of employees needed to work the holiday in advance and that a schedule be posted by Tuesday of the preceding service week. Article 11 and the Local Memorandum of Understanding determine the exact "pecking order" to be used in each office. Casuals and PTF's should be required to work, including overtime, before anyone can be drafted on their holiday. All volunteers, both holiday and overtime (including penalty), should be given the opportunity before anyone is required to work their holiday.

Employees are not necessarily guaranteed to work their bid schedule when scheduled to work the holiday. The posted holiday schedule should include their start time or hours of work and that is the schedule they are entitled to work. If, after the posting deadline, management changes that schedule the employee is eligible for out-of-schedule premium. Employees who report to work are subject to workhour guarantees in Article 8. While employees may waive those guarantees in cases of personal emergency or illness, management should not solicit volunteers to leave early. If conditions change after the posting, management may cancel some or all of the scheduled employees (prior to their reporting) without incurring any guarantees. On the other hand, management is prohibited from "playing it safe" by routinely overscheduling and then cancelling as the holiday approaches. If, because of changing conditions, additional employees must be added after the Tuesday posting deadline, the overtime desired list selection procedures, and not the LMOU holiday "pecking order," apply.

THE INTERVIEW

- Who made the determination as to the number and categories of employees needed to work on the Presidents' Day Holiday?
- On what did you base this determination?
- What efforts, if any, did you make to maximize the number of employees who could be excused on their holiday or designated holiday?
- For how many hours did you schedule available casuals?
- For how many hours did you schedule available part-time flexibles?
- Why didn't you consider scheduling the PTF's or casuals for overtime?
- Didn't full-time regular clerk Roberts volunteer to work his off day on Monday?
- Was there any reason Roberts was not scheduled other than the fact that he would have been on penalty overtime?
- Who approved PTF Clooney's request for annual leave for Monday? What was the reason for the request?
- Do I understand correctly that casual employee Phillips cannot work on Mondays because of his other job?
- What time on Wednesday were FTR's Alexander and Johnson as well as PTR Wendell added to the schedule? Do you know why they were omitted in the first place?

THE DOCUMENTATION

- Holiday schedule
- Holiday volunteer list
- Seniority list
- Clock rings / time cards / ETC reports
- Mail volume reports / present holiday and previous holidays

- Past holiday schedules
- Witness statements or interview
- Supervisor interviews or statements
- LMOU pecking order
- Work schedules for PTF's and casuals
- Staffing comparisons between normal workdays and holiday
- PS Forms 3971 for any employees excused early
- PS Forms 1723 for 204-B's

THE AGREEMENT

- National Agreement, Article 11
- National Agreement, Article 30
- LMOU, Item 13

THE ISSUE:DENIED LIGHT DUTY

THE DEFINITION

Any full-time regular or part-time flexible employee recuperating from a serious illness or injury is entitled to request light duty work. Such requests must be supported by appropriate medical documentation and be submitted in writing to the installation head. The Employer must give the greatest consideration to such requests and make every effort to locate and provide appropriate light duty work.

THE ARGUMENT

The Employer is obligated to make "every effort" to find light duty work for requesting employees. They must give the "greatest consideration" to each request. This is a very substantial obligation. The employee must submit a written request supported by appropriate medical documentation. Once this happens the burden shifts to management to show what efforts were made to find light duty work within the employee's restrictions. It is not enough to simply assert that no work is available. Management must demonstrate the extent of their effort to find available work. This effort must be timely. In most cases it should not take more than one or two days to process a light duty request and locate available work. If no work can be found the Employer must notify the employee in writing, stating the reasons why no work could be found. The absence of a written denial is often found, by itself, to be a sufficient basis for sustaining a denied light duty grievance.

THE INTERVIEW

•Were you the management official responsible for determining that there was not light duty work available for grievant within his restrictions?

•Exactly what did you do to try to find light duty work for grievant?

•Did you keep any records of who you talked to or what they said?

•What was the hold-up that made it take 10 days before grievant was told no work was available?

•How did you notify grievant that no work was available? Did you telephone him or what?

•Are Customer Service employees permitted to work light duty in Mail Processing?

•Did you consider crossing crafts to find a light duty assignment?

•I notice that Mary Sheely was recently given a light duty assignment. Was that because she was injured on the job?

THE DOCUMENTATION

•Request for light duty

•Medical documentation

•Written denial of light duty

•LMOU light duty provisions

•Grievant's statement or interview

•Witness statements or interviews

•Supervisor interviews or statements

•Names/evidence of employees given light duty within the past year

•Names/evidence of employees denied light duty within the past year

•Evidence of work available within grievant's restrictions

•3971's

THE AGREEMENT

•National Agreement, Article 13
•National Agreement, Article 30
•LMOU, Items 15-17

CHAPTER 20

THE ISSUE: DENIED INFORMATION

THE DEFINITION

Upon request, the Employer is required to permit the Steward to review files, documents and other records relevant to a possible grievance and to provide copies of such documents where needed.

THE ARGUMENT

Whenever management denies information in the form of documentary evidence or witness access for interviews, our due process rights to conduct investigations 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, or, for that matter, to determine whether to continue processing 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 a disciplinary case through full development of all defense arguments.

Under the Collective Bargaining Agreement, the Union has contractual rights to all relevant evidence including witnesses. Denial of that information seriously compromises our ability to represent our membership and each denial must be properly challenged. 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 any burden of proof it may have.

The Union must argue that the withheld information would have proven - if it had been produced - precisely what the Union contended the information would have revealed. Perhaps just as important, we should demand that because of management's failure to provide requested information, even when that information is made available, because it was denied at the lower steps it can no longer be introduced to support management's case.

2. Lowest Possible Step Resolution Fatally Damaged

Resolution of grievances at the lowest possible step is the cornerstone of the Grievance/Arbitration procedure. When management denies access to the Union of relevant information, then full development of all the facts, arguments, and defenses cannot be achieved. Without such full development and without everything being placed before the parties for discussion, there is no real probability of resolving the grievance at the lowest possible step.

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.

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 the information denial.***

   In that grievance, request as a remedy:
   (1) The information be provided so long as such access is given prior to any grievance step meetings 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) correspondence 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 Original Grievance's Step 2 Appeal, or Additions and Corrections.**

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 and/or additions and corrections.

Specifically citing a violation of Articles 15, 17, and 31 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.

Management, when it denies any evidence, violates the Collective Bargaining Agreement and creates very strong due process breaches. Ironically, the arguments management creates by denying us information are often more beneficial to our case than would be the information had it been obtained.

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 no such notation. Further, the interview can strengthen our case when management supports its denials through responses. Some examples are:

- You did deny the information?
- You have the information requested on the Request for Information in your possession?
- Isn't it possible that that information could have been helpful to the Union in deiding whether the pursue this grievance?
- If this Letter Carrier was provided limited duty work in the Clerk Craft why wouldn't her medical restrictions be relevant?
- 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 DOCUMENTATION

- Request for Information

- Management's denial

- All follow-up correspondence or requests

- Moving papers of the original grievance

- Any documentation which may show either the existence or relevance of the requested information

- Supervisor's interview or statement

- Correspondence/documentation showing status of appeal of information denia under NLRB dispute resolution Memorandum of Understanding

THE AGREEMENT

- National Agreement, Article 15
- National Agreement, Article 17
- National Agreement, Article 31
- National Agreement, Article 3

CHAPTER 21

THE ISSUE: DENIED STEWARD RELEASE

THE DEFINITION

Management may not unreasonably deny a properly submitted request from the steward to be released to investigate or adjust grievances, or to investigate a problem to determine whether a grievance exists.

THE ARGUMENT

Management may not determine in advance what time the steward reasonably needs to investigate a grievance. Management may ask the steward seeking to be released to estimate the amount of time which the steward anticipates will be required. Management may delay the release of a steward during a period which will unnecessarily delay essential work. However, the burden is on the Employer to show what the workload is and why the steward could not have been released, including why a replacement could not have been found. Management may inquire as to the general nature of the grievance but cannot demand specifics. Normally, there should be no delay in releasing the steward. Only in very rare circumstances should the steward's release be delayed beyond two (2) hours. When management must delay the release of the steward, the supervisor must inform the steward of the reasons for the delay and the anticipated alternative release. While stewards are not permitted to continue working into overtime for the sole purpose of processing grievances, management also cannot refuse to release a steward solely because she is in an overtime status.

When management's unreasonable denial of steward's time becomes an issue, it is always a good idea to submit your request for steward's time in writing. Include specific documentation as to the number and general nature of grievances you are working on. This will enable you to better document your grievance.

THE INTERVIEW

- Why did you deny Steward Olsen's request for steward duty time yesterday?
- What, exactly, was the pressing workload at the time?
- What alternatives did you consider other than denying Olsen's steward time?

- What other supervisors did you check with to see if they could provide a replacement?

- Why didn't you explain to Steward Olsen why her release must be delayed? Do you believe an explanation would have been appropriate?

- Wasn't there an alternative time before the end of Olsen's tour during which you could have arranged to release her? Why didn't this happen?

- Why didn't you explain to Steward Olsen when an alternative release time would be arranged? Don't you believe such an explanation would have been appropriate?

- You have indicated that Ms. Olsen is not providing you sufficient information about the grievances she is investigating. What specific information do you believe you are entitled to?

- What part of the Contract do you believe entitles you to that specific information?

- You told Steward Olsen that she could only be released for 20 minutes. Have you determined that 20 minutes is sufficient time to investigate this type of grievance? On what do you base that determination?

- Did you consider asking Ms. Olsen to estimate how much time she believed would be necessary?

THE DOCUMENTATION

- Request for Steward's duty time

- Management's denial

- Documentation as to number and general nature of grievances pending

- More specific information on each of these grievances (moving papers, time limits, nature of documentation to review, etc.)

- Grievant's statement or interview

- Steward's statement or interview

- Supervisor's interview or statement

- Time cards / clock rings / ETC. reports
- Documentation of previous denials of steward time / grievances / settlements
- Mail volume and/or overtime reports
- Leave records

THE AGREEMENT

- National Agreement, Article 17

CHAPTER 22

THE ISSUE: LETTERS OF DEMAND - SECURITY VIOLAIONS

THE DEFINITION

The National Agreement and the handbooks and manuals require management to provide adequate security for all employees responsible for postal funds. Adequate security has been defined by arbitrators as a burglary-resistant facility and reasonable procedures and means to protect valuables. Clerks must report security violations when they occur on the APWU form or a note to the supervisor. These notifications must be retained until at least the next audit to prove that the clerk did notify management of the alleged security violations.

THE ARGUMENT

In window shortage cases that involve alleged security violations, the Union must prove that the violation did exist. Security violations can occur in a variety of ways. There are three references in the Financial Handbook (F-1) that require management to change the combination on the vault or safe when someone who knows the combination leaves the unit. This includes managers and any member of the bargaining unit. Key checks must be done on an annual basis. This requires the supervisor to take the keys of the window clerk and accompanied by the window clerk check all these keys in all locks in the window area. This includes all the drawers and compartments in the screen line, all other containers that window clerks use to store stamp stock, and the spaces used in the vault or safe to store the stamp stock of the window clerk overnight. It is not permissible to allow the window clerk to conduct their own key check. The F-1 Handbook requires the supervisor to conduct this key check, however, the supervisor is not allowed to conduct this key check without the window clerk going with the supervisor. The supervisor is required to conduct a semi-annual check on the duplicate key envelope (3977). This verification is done by the supervisor without the presence of the clerk. This check is to insure that the envelope is sealed, the flaps are signed by the window clerk and the supervisor and the names of the window clerks witnesses are on the form 3977. Management is required to keep an inventory or log of both the key check and the 3977 verification. The Union should request a copy of at least the last two key check logs and the last two 3977 inventories. We need to insure that these are completed as prescribed in the F-1 Handbook.

The union must investigate whether unauthorized people are in the window area. The rural carriers are the ones that continually violate this requirement. Rural carriers are not to be allowed behind the window clerks. If they must mail parcels when they return from the route or conduct other window business, they should be advised by management that they are required to get in the

line in front of the window clerk and conduct their business or utilize the services of the accountable clerk. They are not allowed in the window area. The Union must check the security of the clerk's cash and stamp drawers when they are locked in the screen line. Can these drawers be opened by pushing down on them? Are locks worn so badly that the drawer can be opened by any key? Is there a common key available to all window clerks to lock their valuables in the screen line? If so, is there an opportunity for someone to make a duplicate key and have access to all window clerks' accountabilities when they are stored in that work station? The Union should insure that the locks and keys are changed when a window clerk takes over a window credit. Sometimes the keys are not turned in or the window clerk has a duplicate key and if the locks are not changed, access to the credit can be gained by the window clerk that last had the credit.

The requirement to provide adequate security does not end with the window clerk and their window credit. Management is required to provide adequate security for the handling of registered mail either by the registry clerk or the accountable clerk or the window clerk. A secure compartment or vault must be provided to store registers and a system must be in place to provide for the required signatures when registers are moved through the mail processing system.

THE INTERVIEW

- When Jane left the window unit was the vault combination changed?
- When supervisor I. Dontknow left the window unit was the vault combination changed?
- When was the last key check completed?
- Did you do the key check?
- If so, did you check all keys in all locks in the window area?
- When was the last key envelope (form 3977) check completed?
- Did you find any discrepancies with the form 3977?
- Do you have access to the grievant's IRT access code?
- Is the access code stored in a sealed form 3977?
- Are the drawers and compartments in the screen line worn enough to allow access without a key?

- Does the grievant have adequate storage space in the vault?
- Can the grievant store all the accountable items in the vault overnight?
- Are there unauthorized employees in the window area?
- Is the building secured to prohibit the public from entering the building?
- Has the grievant or other window clerks turned in security violations?
- If so, what have you done to correct those violations?
- How frequently are the IRT's cleaned by maintenance?
- Have the window clerks reported sticky keys or some other malfunction of the IRT?
- Has the disc for the window clerk crashed?
- If so, how were the entries reconstructed?
- Have you had any complaints about the grievant's work at the window?
- Does the grievant exercise reasonable care in the performance of his/her duties?

THE DOCUMENTATION

- Letter of Demand
- PS Forms 3368 (stamp credit examination report)
- PS Forms 3294 (previous, current and recount audits)
- PS Forms 3369 (assigned credit receipt)
- PS Forms 3356 (stamp requisition bulk quantities)
- PS Forms 1628 (key inventory)
- PS Forms 3958 (supervisor's record of stamp stock)
- PS Forms 571 (report sent to postal inspectors for shortage/overage over $100)

- PS Forms 1908 (trust and suspense account adjustments sent from accounting)
- PS Forms 1412 (daily financial report) for audit period
- Money Orders, if applicable
- PS Forms 17 (stamp requisition) for audit period
- Security violation reports
- Grievant's statement or interview
- Supervisor's interview or statement
- PS Forms 3977 (property inventoried and examined)
- Duplicate key inventory
- Work orders for all repairs or replacement of IRT, locks, etc.
- Most recent financial audit for facility (usually done by Postal Inspectors)
- POS system problems logbook
- Records of shortages/overages for other clerks and/or main stock

THE AGREEMENT

- National Agreement, Article 28
- National Agreement, Article 19
- USPS Handbook, F-1

CHAPTER 23

THE ISSUE: LETTERS OF DEMAND - PROCEDURAL ISSUES

THE DEFINITION

There are many procedural issues involved in a letter of demand. The most prominent was the appeal rights as quoted in the "old" Financial Handbook (F-1). The F-1 Handbook was changed by management and the Union has challenged that change that eliminated the specific appeal language. However, until the challenge is resolved we must use the language from the current Financial Handbook which does not contain that same specific language. The vast majority of the procedural issues are contained in the letter of demand. We must review the letter of demand closely to insure that all the required language is contained in it. Article 28 requires that in advance of any money demand the employee must be informed in writing and the demand must include the reasons therefore. The letter of demand must meet the following basic requirements; it must be in writing, it must be signed by the Postmaster or his/her designee, it must notify the employee of the existence, nature and amount of the debt, it must specify the repayment options available to the employee. If the letter of demand does not conform to these requirements, it is procedurally defective and we must raise that issue at all steps of the grievance procedure. In addition, the audit must be conducted no less frequently than once every four months. This issue must also be raised at all steps of the grievance procedure.

THE ARGUMENT

A. The Collection Procedure. Management is required to issue a letter of demand to an employee prior to starting a collection action for the funds. The Financial Handbook (F-1) requires that any demand must be in writing and signed by the Postmaster or designee. In some instances management may notify the data center of the existence of a debt. The data center will establish an accounts receivable for the employee. The computer system in effect at the data center will develop a notification to the employee of the accounts receivable in place at the data center. This bill or notification does not meet the requirements of a letter of demand. Therefore, our grievant should be advised not to pay the requested amount until they receive a letter of demand from the Postmaster.

B. The Repayment Options. The repayment options outlined in the letter of demand must meet the requirements of the Financial Handbook (F-1). The "voluntary" payroll deductions must be in the amount of 15% or more of the employee's biweekly disposable pay. The Postmaster may approve a smaller repayment option if the employee's repayment schedule bears a reasonable relationship to the size of the debt and the

employee's ability to pay. Many letters of demand have the words "hardship" in them. That description is not contained in the Handbook and would be a procedural defect in the letter of demand. Involuntary deductions cannot exceed 15% of an employee's disposable pay during any one pay period. Article 28 of the National Agreement prohibits the collection of funds for any size debt if a grievance is filed or a petition is filed pursuant to the Debt Collection Act. The grievance must be disposed of before any collection procedures can begin.

C. The Signature Issue. The Employee and Labor Relations Manual (ELM) requires the Postmaster or his/her designee to sign all letters of demand. The Financial Reporting Handbook (F-1) also requires the Postmaster or his/her designee to sign all letters of demand. In most cases in offices of any size, the window supervisor or the customer services supervisor signs the letter of demand. Management argues that this is the most logical person to assume that responsibility as they are the management person responsible for the window unit. The Administrative Support Manual (ASM) however requires the delegation of that authority to be officially documented. The better reasoned arbitrators in our area consistently rule that the designation must be in writing and if it is not, then the grievance is sustained. Seldom can management produce a letter delegating that authority from the Postmaster to the window supervisor or station manager.

D. The Late Audit Issue. Article 28 requires that the accountability be audited at least every four months. The audit history (form 3368) will reveal the dates of the audits and the date the next audit is due to be conducted. The grievant's paperwork should support the form 3368. Management consistently waits until the very last day of the four month period to conduct the audit. Then, if they miss the day, they attempt to blame the employee by saying he or she was on annual leave or unavailable. That argument does not convince many arbitrators. Arbitrators have stated that the employer controls the schedule of the employees and also controls the auditing procedure. There is no excuse for a delay beyond the four month period.

THE INTERVIEW

- Did you attempt to collect any money from the grievant?
- Did you issue a letter of demand?
- Did you (supervisor) sign the letter of demand?
- Do you have a letter delegating that authority from the Postmaster to you?
- When was the last audit conducted?

- What was the date of this audit?
- Did the grievant request a second audit?
- If so, did you do the second audit or did a different supervisor conduct the second audit?
- Did you enter the closing amount from the previous days form 1412 to the audit sheet?
- Was the audit done away from the window in a secluded area?
- Were there any interruptions during the audit?
- Did both you and the grievant count the stock individually?
- Do you allow the window clerks to verify their stock orders away from the window?
- Are the window clerks required to use form 17 for stock exchanges?
- Are the deposits counted back in the presence of the clerk?
- Is the form 1412 initialed to verify the deposit amount?
- Are the window clerks using the "error correct" on the IRT at the end of the day?
- If so, are the amounts of the "error corrects" significant?
- Does the grievant do good job as a window clerk?
- Does the grievant exercise reasonable care in the performance of his/her duties?

THE DOCUMENTATION

- Letter of Demand
- PS Forms 3368 (stamp credit examination report)
- PS Forms 1412 (daily financial report) for audit period

- PS Forms 3369-(assigned credit-receipt)
- PS Forms 3294 (previous, current and recount audits)
- Money Orders, if applicable
- PS Forms 17 for audit period
- Security violation reports
- Grievant's statement or interview
- Supervisor's interview or statement
- PS Forms 3977 (properly inventoried and examined)
- Duplicate key inventory
- Written delegation of authority for supervisor to sign letters of demand
- Work orders for all repairs to IRT, locks, etc.
- Canceled checks / voluntary payroll decuctions / involuntary payroll deductions showing collection took piace
- Documentation of any efforts to collect while grievance is processed

THE AGREEMENT

- National Agreement, Article 28
- National Agreement, Article 19
- Employee & Labor Relations Manual
- USPS Handbook, F-1

CHAPTER 24

THE ISSUE: FAILURE TO POST 204-B'S BID ASSIGNMENT AFTER 4 MONTH DETAIL

THE DEFINITION

The duty assignment of a clerk detailed to a nonbargaining unit position in excess of four months shall be declared vacant and shall be posted for bid.

THE ARGUMENT

When management details a bargaining unit employee to a 204-B position for more than four (4) months they have forfeited that employee's right to his bid assignment. The National Agreement requires that the 204-B's duty assignment be declared vacant and that it be posted for bid. PS Form 1723 controls when determining the length of the detail. If the employee comes back to the craft early, an amended Form 1723 should be completed. Management is obligated to provide the Union with copies of every Form 1723 for 204-B details. To the extent possible these copies should be provided in advance of the detail. The employee is prohibited from returning to the craft solely to circumvent this reposting requirement?

THE INTERVIEW(S)

The Supervisor

- How long has John been a 204-B?
- Why haven't you been providing the Union with all of his PS Forms 1723?
- Was it your understanding that John came back to the craft last week because he was getting close to the four (4) months which would have caused his job to be reposted?
- Who did you replace him with as an acting supervisor?
- Was there any particularly heavy mail volume or other pressing need why John was needed back in the craft?

- Did John remind you about his need to go back to the craft to protect his job or were you keeping track of the length of his detail?

- How long did you tell John he needed to stay in the craft in order to "break" his four (4) months to protect his job? Will he be returning to his 204-B assignment after that?

The 204-B

- Hi John. I guess it was pretty lucky that somebody noticed that you needed to get back in the craft in order to protect your bid. Were you keeping track or did somebody remind you?

- What did Supervisor Johnson tell you? Did she suggest how long you needed to stay in the craft before you returned to your 204-B assignment?

- Did you discuss this with anyone else in management?

- Was it your idea to come back or did Ms. Johnson suggest it?

- What did she say, exactly?

- Would it be fair to say then that the only reason you came back to the craft for Monday was to keep your bid from being posted?

THE DOCUMENTATION

- PS Forms 1723

- Clock rings (back up documentation - remember - PS Forms 1723 are controlling)

- 204-B statement or interview

- Witness statements or interviews

- Supervisor interviews or statements

- 204-B's bid duty assignment

- Seniority list

THE AGREEMENT

- National Agreement, Article 37.3.A.8

CHAPTER 25

THE ISSUE: REVERSION OF DUTY ASSIGNMENTT

THE DEFINITION

When a vacant Clerk Craft duty assignment is under consideration for reversion, the local Union President must be given an opportunity for input prior to a decision. The decision to revert or not to revert must be made within 28 days and if the duty assignment is reverted a notice must be posted advising of the action taken and the reasons why it was done.

THE ARGUMENT

While management has a right under the Agreement to revert vacant duty assignments that are no longer needed, the local Union President must be given an opportunity to provide input before a decision to revert is made. This must be a real opportunity for input, not a charade. That doesn't mean that management must always follow the Union's advise but they must listen to and consider the Union's input. If they do decide to revert a vacant duty assignment, management must then post a notice. That notice must indicate that the duty assignment is being reverted and state the reasons for this action.

THE INTERVIEW

- When did you decide to revert Job #12?
- Your letter to local Union President soliciting his input appears to be dated two (2) days after that. Was this just a courtesy to let him know what you were doing?
- Since you had made up your mind beforehand, there really wasn't anything the local President could have said that would have meant anything, was there?
- What specifically were your reasons for reverting this duty assignment?
- What date was the job reverted?

THE DOCUMENTATION

- Assignment change vacating position - showing effective date
- Notice to Union of consideration for reversion and solicitation of input
- Posted notice of reversion
- Local President's statement or interviews about input provided or efforts made to do so
- Supervisor interviews or statements
- PTF / casual workhours (time cards / clock rings) showing work continues to be done
- PTF / casual work schedules
- Witness statements or interviews
- Overtime records

THE AGREEMENT

- National Agreement, Article 37.3.A.2

CHAPTER 26

THE ISSUE: DENIAL OF BID TO PERMANENT LIGHT/LIMITED DUTY EMPLOYEE

THE DEFINITION

Handicapped employees are as interested in bidding as any other employee. The reasonable accommodation process is triggered each time an employee with a disability is under consideration for such an opportunity.

THE ARGUMENT

Management often tries to apply the so-called "Burrus Memo" (or 6 month medical documentation requirement which originated therein) to bids submitted by employees on permanent light/limited duty. This is not appropriate. It applies only to "temporary" light or limited duty employees. Provided that we can establish that the permanent light/limited duty employee is a "qualified handicapped" employee they are entitled to reasonable accommodation pursuant to Article 2 and the Rehabilitation Act. Handicapped employees are as interested in promotions, preferred bid assignments and conversion to FTR status as any other employee. The reasonable accommodation process is triggered each time an employee with a disability is under consideration for such an opportunity. We must prove that grievant is a "qualified handicapped" employee and that she can perform the "core duties" of the specific bid assignment, either with or without accommodation. We must show what accommodation would be necessary in order to permit her to perform these duties and that such accommodation would be reasonable. The burden is on the Employer to establish that such an accommodation would be unduly burdensome.

THE INTERVIEW

- Why was Paula denied her bid on the window clerk assignment?
- How familiar are you with Paula's medical condition and her restrictions?
- Who determined that those restrictions were severe enough to prevent Paula from working the window?
- I guess there really isn't much question that Paula is handicapped is there?

- What consideration did you give to perhaps modifying the job slightly so that Paula could do it even with her restrictions?
- Your main concern seems to be Paula's lifting restrictions isn't that right?
- Isn't it true that there always at least two window clerks working at Xerxes Station?
- Then it shouldn't really cause a big problem if Paula got assistance from the other clerk when necessary to lift the really heavy packages should it?
- What about maybe giving her a special cart of some type so she wouldn't have to lift the packages but could just slide them off the counter? What would that cost?
- What other alternatives did you consider?
- Why didn't you talk to Paula? Don't you think she might have had some good ideas about how she could possibly do this job?
- Did anyone prepare the Management Checklist on Reasonable Accommodation?
- Why not?

THE DOCUMENTATION

- Job Posting
- Bidders list / employee's bid card
- Seniority list
- Grievant's statement or interview
- Supervisor interviews or statements
- Medical documentation / restrictions
- Evidence as to handicapped status
- Accommodation checklist (EL-307) - if used

- Position description and qualification standard
- Current light/limited duty assignment
- Documentation or statements concerning other similarly situated employees provided or denied accommodation
- Specific suggestions from the employee as to accommodation believed to be needed

THE AGREEMENT

- National Agreement, Article 37
- National Agreement, Article 2
- National Agreement, Article 19
- USPS Handbook, EL-307

CHAPTER 27

THE ISSUE: 204-B WORKING BARGAINING UNIT OVERTIME IMMEDIATELY BEFORE OR IMMEDIATELY AFTER 204-B DETAIL

THE DEFINITION

Acting supervisors (204-B's) must not be used in lieu of bargaining-unit employees for the purpose of bargaining-unit overtime.

THE ARGUMENT

The parties have agreed numerous times at Step 4 that employees detailed to 204-B positions will not perform bargaining-unit overtime either immediately before or immediately after such detail unless all available bargaining-unit employees have been utilized. For purposes of determining the beginning and ending of the detail, the PS Form 1723 is controlling. Where a 204-B has been detailed for several weeks, they cannot work in the bargaining unit on their intervening off-days for overtime.

THE INTERVIEW

- Why did 204-B Jensen come back to the bargaining unit last Saturday?
- Did you complete an amended PS Form 1723? Was a copy given to the Union?
- Why didn't you maximize the OTDL before letting Jensen work overtime in the craft?

THE DOCUMENTATION

- PS Forms 1723
- Time cards/clock rings/ETC Report showing bargaining unit overtime for 204-B and availability of OTDL employees

- Overtime authorization (PS Form 1261)
- Witness statements or interviews
- Supervisor interviews or statements
- 204-B interview or statements
- Seniority list
- Overtime desired list
- Applicable qualification records

THE AGREEMENT

- National Agreement, Article 1.6
- National Agreement, Article 8.5
- National Agreement, Article 37.3.A.8

Part II

Investigating and Documenting Disciplinary Grievances

CHAPTER 28

THE ISSUE: LETTER OF WARNING / SUSPENSION/ REMOVAL - ATTENDANCE

THE DEFINITION

All employees are expected to maintain their assigned schedule and to make every effort to avoid unscheduled absences. In addition, employees must provide acceptable evidence for their absences when required. Although it is not part of ELM 510's leave regulations as incorporated by Article 10, management will also cite the ELM 666.81 requirement that employees "be regular in attendance."

THE ARGUMENT

All discipline must be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause. For minor infractions, such as attendance irregularities. management has a responsibility to discuss such matters with the employee before resorting to discipline. "Regular in attendance" is a vague and uncertain term. The employee deserves to be cautioned as to the expectations of management.

Although it is now routinely accepted by arbitrators that employees may be disciplined for excessive absenteeism, even where such absences have been approved by their supervisors, and even where due to legitimate emergencies or incapacitation, such discipline still is subject to all the tests of just cause and must be progressive or corrective instead of punitive. (See succeeding chapters for discussion of many of the just cause and procedural defenses.)

In addition to these procedural and/or just cause defenses, examine the merits carefully. Why was the grievant absent? Is there a pattern? Is there anything in the record to suggest a problem, such as chemical or alcohol dependency which isn't being discussed. Not only are these legitimate issues which must be raised with management, they are also legitimate issues which must be discussed with the grievant.

Many absences are legitimate and cannot be avoided. Be prepared to document our claims. Are they FMLA protected? Or should they have been, if properly documented? Perhaps the employee needs to be educated so as to protect himself from further discipline through appropriate documentation. While dependent care leave is also provided for in the Agreement it differs from FMLA in that it can be subject to discipline. Of course, some dependent care leave also qualifies for FMLA protection.

THE INTERVIEW

- How did you happen to issue this Letter of Warning to Tommy?
- Did someone suggest that it would be appropriate?
- When was the last time you discussed Tommy's attendance with him prior to issuing this LOW?
- Have you ever given Tommy an official job discussion on his attendance?
- What exactly does "just cause" mean to you?
- What does "regular in attendance" mean to you?
- How many absences would it take to "irregular in attendance"?
- When did you discuss your concept of "regular in attendance" with Tommy?
- For which of these absences that you have cited did Tommy submit ica documentation?
- Wouldn't it be more "corrective" to give Tommy another job discussion or mayb a Letter of Warning instead of suspending him for seven (7) days?
- Don't you think that losing a weeks pay is rather punitive?
- What do you think that Tommy could do, given his current medical condition, satisfy your attendance expectations?
- Have you discussed these possibilities with him?
- Do you think there may be any other problems which may be the real reasons Tommy's unacceptable attendance? What have you done to explore th possibilities?

These are just a few of the possible questions you can pose to the supervisor in investigatin attendance discipline. Let your imagination go and explore every avenue. Additionally, n forget that your interview of the grievant may be the most important of all. Why is he mis so much work? What does he indicate is the problem? What is the real problem? What c done about it? Don't wait for the removal to begin to explore the real problems)lv attendance deficiency cases. Management is often reluctant to confront the employee an employee is often satisfied to accept the suspension - thus getting more time off work rathe

deal with the causes of their absenteeism. If the steward doesn't force the employee to confront the real problem we'll just be back again in a short while defending the next progressive step of discipline.

THE DOCUMENTATION

- Discipline notice (and decision letter where applicable for MSPB eligible)
- All prior discipline notices cited as past elements
- Discipline proposal (if used)
- Grievant's statement
- Supervisor's interview
- PS Forms 3971
- PS Forms 3972 (current and for at least 2 prior years)
- PS Form 3956, medical unit slips
- Medical documentation
- Settlements and/or grievance files for all prior discipline
- Discussion date (supervisor's notes if possible)
- Request for information ("everything relied upon")
- Review grievant's OPF (any favorable awards/documents)
- FMLA documentation (if applicable)
- Documentation of any legitimate emergencies
- Supervisor's notes/records of investigation and day in court

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 10
- National Agreement, Article 19
- Employee & Labor Relations Manual, Parts 510, 512, & 513

CHAPTER 29

THE ISSUE: LETTER OF WARNING / SUSPENSION / REMOVAL - MISCONDUCT

THE DEFINITION

The Employee & Labor Relations Manual contains a Code of Conduct applicable to all postal employees. In addition, the Employer has any number of published or posted work rules with which the employees are expected to comply. Furthermore, certain types of misconduct, such as hitting the boss or theft are so commonly understood as being prohibited that they may result in discipline even without specific published work rules.

THE ARGUMENT

All discipline must be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause. Discipline for alleged misconduct is subject to all the tests of just cause and must be progressive or corrective instead of punitive. (See succeeding chapters for discussion of many of the just cause and procedural defenses.)

The first test is defending discipline for alleged misconduct must be: can the Employer prove that the alleged misconduct occurred? What evidence exists? What exculpatory evidence exists for our side? The very best defense still is the "I just didn't do it" defense. Interview all potential or alleged witnesses. Get statements whenever possible. Just because management already has gotten a statement doesn't mean you should fail to interview this witness. Maybe they forgot something or slanted their statement the way they thought management would want them to. What do they say now? Get the facts. All of the facts.

In any case never fail to also examine all of the elements of just cause and other procedural defenses available, as well.

THE INTERVIEW

- I see you issued this notice of removal to Susie TooGood. Why did you decide to do that?

- Why not a suspension or a letter of warning? Did anyone suggest that a removal

may be inappropriate?

- What exactly did you understand happened?
- On what did you rely in determining that?
- Who did you interview? What other witnesses do you understand might be possible?
- What documents did you have available?
- Did you complete this discipline proposal or did someone send it to you for your signature? What parts, if any, did you complete?
- What prior discipline record did you review before you decided to issue this discipline? Can you give me copies of each of those?
- What does just cause mean to you?
- Do you consider this discipline corrective or punitive and why?
- Who did you consult with before issuing this notice of removal?
- Wouldn't it be fair to say that once you received the Postal Inspector Investigative Memorandum you knew that it was "expected" that Susie would removed?
- Since you had the I.M. it really wasn't necessary to do any other investigation v it?
- Why didn't you call the employee in for a pre-disciplinary interview? Was th any explanation they could have given that could have changed the outcome?
- Are you aware of any other employees who have been charged with sir infractions?
- Isn't it true that several of them weren't removed?
- What do you understand was different in those cases?

There are any number of additional questions which the attentive steward will immediate ic as appropriate based upon the specific allegations of their case and potential issues r h r identified. Be sure to review the tests of just cause in Chapter 30 as well as the othe fir procedural or due process defenses discussed below. Are any of them applicable in your

THE DOCUMENTATION

- Discipline Notice (and decision letter where applicable for MSPB eligible)
- Prior discipline notices cited as past elements
- Grievant's statement and/or interview
- Witness statements and/or interviews
- Supervisor's interview
- Posted or published work rule alleged to have been violated
- Any other applicable employee work rules
- Postal Inspector's Investigative Memorandum with all Exhibits
- All documents, records or exhibits being relied upon as evidence
- Settlements and/or grievance files for all cited past discipline
- Discipline proposal or request for discipline, if used
- Review grievant's OPF for commendations or awards
- Request for information ("everything relied upon")
- Supervisor's notes/records of investigation and day in court

THE AGREEMENT

- National Agreement, Article 16

CHAPTER 30

THE ISSUE: JUST CAUSE

THE DEFINITION

All discipline must meet the basic tests of Just Cause.

THE ARGUMENT

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." (Emphasis added.)

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 past record?
>
> Was the disciplinary action taken in a timely manner?"

The best way to develop solid defenses vs. disciplinary actions is to specifically utilize 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 relayed 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 no, 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 operations?
   - 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?** (see also, Chapter 37)
   - 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 detail in Chapter 32.

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 others 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 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? (see also, Chapter 36)

- 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. Both the issuing supervisor and reviewing and concurring higher level authority should be interviewed. <u>These interviews should take place before the Step 1 is discussed</u>.

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.

THE DOCUMENTATION

- Discipline notice
- Prior discipline notices cited as past elements
- Grievant's statement and/or interview
- Witness statements and/or interviews
- Supervisor's interview
- Posted or published work rule alleged to have been violated
- Any other applicable employee work rules
- Postal Inspector's Investigative Memorandum with all exhibits
- All documents, records or exhibits being relied upon as evidence
- Settlements and/or grievance files for all cited past discipline
- Discipline proposal or request for discipline, if used

- All available documentation as to other employees/supervisors who have been treated differently after similar infractions

THE AGREEMENT

- National Agreement, Article 16.1
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 31

THE ISSUE: PREDISCIPLINARY INTERVIEW

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;
3. Presented with the alleged evidence the intended discipline is based upon; ***and***
4. Asked for his/her side of the story. This is the employee's "Day-in-Court".

THE ARGUMENT(s)

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 the discipline will be, the charge the discipline is based upon, the evidence supporting the intended discipline 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. However, if there is no in person interview, we must then argue that the employee has not been presented with the employer's evidence.

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 prepared 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 PRE-DISCIPLINARY 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 definitions: official discussions or investigative interviews and the pre-disciplinary interviews as discussed above.

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.

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 offices 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.

INVESTIGATIVE 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, I 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 you 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.

BOTH 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 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 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 the last absence cited and your submission of the request for disciplinary action?

- Did you have contact with employee Doe regarding the possibility of discipline between the last absence cited and your submission of the request for discipline?

- The 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 illicit 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 that 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 proving management violated its obligation to the pre-disciplinary interview as due process.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- Grievant's statement and/or interview
- Steward's statement and/or interview
- Supervisor's interview and/or statement

THE AGREEMENT

- National Agreement, Article 16.1
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 32

THE ISSUE: INVESTIGATION PRIOR TO DISCIPLINE

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, reviewing video tapes 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 investigation" obligation. It is not enough to simply read letters and rush to judgement. 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 INVESTIGATIONS 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 balance all of the facts, all of the evidence, and all existing mitigating factors in determining whether to initiate discipline and how severe it should be.

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 and concur in the result. Many of the example questions 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 scheduled/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 disciplinary actions and 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 interview the Postal Medical Officer prior to initiating the Notice of Removal?
- 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 call the grievant's personal physician to attempt an interview 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 video tape prior to initiating the Notice of Removal?

- You did not attempt to review the video tape prior to initiating the Notice of Removal?
- You did not review the audio tape prior to initiating the Notice of Removal?
- You did not attempt to review the audio tape 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?
- You did not interview the grievant 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 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 the management's recreation at arbitration.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- Grievant's statement and/or interview
- Steward's statement and/or interview
- Supervisor's interview and/or statement
- Witness interviews and statements

- Request for Information seeking "all information, interviews and documentation relied upon"
- Management's response
- Postal Inspector's Investigative Memorandum and exhibits

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 33

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 just the initiating manager or the reviewing authority--the employee is entitled to due process from both and anything less 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 Doe thus there can be no true review and concurrence for Level 16 Manager Jones' "action".

In other cases, the higher level manager, say 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 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 officials 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"* Supervisor

- 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 you 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 designated 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 Post 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?
- Who 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 disciplinary action?

- Did you interview anyone prior to concurring with this disciplinary action?

- Did supervisor Jones provide 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 who 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 the 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 DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline
- Supervisor's interview and/or statement
- Reviewing authority's interview and/or statement

THE AGREEMENT

- National Agreement, Article 16.8
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 34

THE ISSUE: AUTHORITY TO RESOLVE THE GRIEVANCE AT THE LOWEST POSSIBLE STEP

THE 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. Simple reality says that he didn't have the authority to overrule his superior.

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 at 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 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 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 basic principle of Article 15 is commitment of the parties to 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. This makes Step 1 or Step 2 a "sham."

THE INTERVIEW

Many of the same 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 their grievance does not exist. There will even be instances in which lower level supervisors 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? MDO? 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 by 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.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- Supervisor's interview and/or statement
- Higher level authority's interview and/or statement
- Correspondence or records
- Step 1 discussion notes

THE AGREEMENT

- National Agreement, Article 15
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 35

THE ISSUE: DENIAL OF INFORMATION

THE DEFINITION

Management denies information to the Union which we deem relevant and necessary for determinating 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 investigations 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 a disciplinary case through full development of all defense arguments.

Under the Collective Bargaining Agreement, the Union has contractual rights to all relevant evidence including witnesses and management creates one of our most successful due process 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 its Just Cause burden of proof.

> **Example:** Management denies the Union access to the attendance records of the issuing supervisor and several 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 the 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. The Union must argue that the withheld information would have proven - if it had been

produced - precisely what the Union contended the information would have revealed.

2. Lowest Possible Step Resolution Fatally Damaged

Resolution of grievances at the lowest possible step is the cornerstone of the 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 Article 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 the information denial.**

   In that grievance, request as a remedy:

   (1) The information be provided so long as such access is given prior to any grievance step meetings 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) correspondence 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 Grievance's Step 2 Appeal**

   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 Articles 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.

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 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 no such notation. Further, the interview can strengthen our case when management supports its denials 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 DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used

- Request for information
- Management's denial of information
- All follow-up correspondence or requests
- Documentation/correspondence of appeal through NLRB Dispute Resolution Process in accordance with Memorandum of Understanding
- Any documentation which may show either the existence or relevance of the requested information
- Supervisor's interview or statement

THE AGREEMENT

- National Agreement, Article 15
- National Agreement, Article 17
- National Agreement, Article 31

CHAPTER 36

THE ISSUE: TIMELINESS OF DISCIPLINE

THE DEFINITION

The 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.

THE INTERVIEW

Like the interview for "past elements not adjudicated" found in Chapter 40, 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 the 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 DOCUMENTATION

- Discipline notice

- Discipline proposal or request for discipline, if used

- Attendance records, correspondence, Investigative Memoranda, or other documents which establish time lines of management's becoming aware of alleged infraction

- Grievant's statement and/or interview

- Supervisor's interview and/or statement

- Steward's statement and/or interview

THE AGREEMENT

- National Agreement, Article 16

- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 37

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 administrates a disciplinary action, a critical facet of our investigation must be whether or not the grievant is being treated in a disparate or different manner than other employees. Should other employees, regardless of craft, have similar attendance records and/or similar progressive disciplinary histories, or have committed similar infractions, then such 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 employee 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, then we have established management has failed to meet one of the critical tests of Just Cause.

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 supervisor's 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 DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- All documentation, grievance records, etc., regarding any other employees or supervisors who have been treated more favorably after committing similar infractions
- Requests for information for additional documentation
- Management's response
- Follow-up correspondence and/or grievances if information is denied
- Witness' statements and/or interviews

- Grievant's statement and/or interview
- Supervisor's interview and/or statement
- Steward's statement and/or interview

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 38

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-law and constitutional (Fifth Amendment) prohibition against a second prosecution after a first trial for the same offense. People v. Wheeler, 271 Cal.App. 205, 79 Cal.Rptr. 842, 845, 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 identical infraction/fact circumstance or record of absences. Black's Law Dictionary defines Res Judicata as:

> "Res Judicata. A matter of 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 along with 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 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 DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- Previous discipline notices
- Moving papers of previous discipline grievances
- Previous settlements and/or arbitration awards
- Grievant's statement and/or interview
- Supervisor's interview and/or statement
- Steward's statement and/or interview

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 39

THE ISSUE: DISPARATE ELEMENTS OF DISCIPLINE RELIED UPON FOR PROGRESSION

THE 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 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 his interview, we are building the foundation for our disparate elements of record argument.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- All cited discipline notices
- Moving papers of grievances for cited discipline notices
- Grievant's statement and/or interview
- Supervisor's interview and/or statement
- Steward's statement and/or interview

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 40

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" pending 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 waiting 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 lessor discipline being adjudicated, then the Union's argument is that the arbitrator must consider any "live", unadjudicated past elements of discipline in the removal notice as non-existent. 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 provides for deferment of the validity determination on all discipline until adjudication. Because of that deferment, management's reliance on unadjudicated discipline creates a due process argument in the grievant's favor that a record unadjudicated cannot be held against an employee in subsequent disciplines.

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 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?

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

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used

- All cited discipline notices
- Moving papers of grievances for cited discipline notices
- Grievant's statement and/or interview
- Supervisor's interview and/or statement
- Steward's statement and/or interview

THE AGREEMENT

- National Agreement, Article 15
- National Agreement, Article 16
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 41

THE ISSUE: MODIFIED PAST ELEMENTS OF DISCIPLINE MUST BE CITED IN MODIFIED STATE IN SUBSEQUENT DISCIPLINE

THE DEFINITION

The citation of modified disciplinary actions in their original form as elements of past record 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 cites 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 the 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 justify its action through inclusion of 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 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?

- Did you know Mr. Doe's fourteen-day suspension had been reduced to seven days?
- 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 DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- All cited discipline notices
- Moving papers of grievances for cited discipline notices
- Settlements of previous discipline grievances
- Request for Information seeking management's copies of past discipline cited in discipline notice
- Management's response
- Grievant's statement and/or interview
- Supervisor's interview and/or statement

- Steward's statement and/or interview

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 42

THE ISSUE: OFF DUTY MISCONDUCT AND THE "NEXUS" REQUIREMENT

THE DEFINITION

Some nexus or connection between off-duty misconduct and postal employment must exist for Just Cause to be present when an employee is disciplined due to off-duty misconduct.

THE ARGUMENT

Generally, to establish nexus the record must establish that the misconduct is somehow materially job-related, i.e., that a substantive nexus exists between the employee's crime and the efficiency and interests of the Service. Such a nexus may be demonstrated through:

a: Evidence that the crime has materially impaired the employee's ability to work with his fellow employees.

b: Evidence that the crime has impaired the employee's ability to perform the basic functions to which he is assigned or is assignable.

c: Evidence that the employee's reinstatement would compromise public trust and confidence.

d. Evidence that the employee is a danger to the public or customers.

Additionally, the record must establish that the Service has fairly considered the seriousness of the specific misconduct in light of mitigating and extenuating circumstances.

The Union argument in an off-duty discipline case--usually a removal or indefinite suspension-crime case--is straightforward--that management had 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 the 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 using 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 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:

- Robert Green's conduct occurred off the clock?
- Robert Green'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 Robert Green in the newspaper? What newspaper? When?

- Do you have these articles?
- Did you hear about Robert Green on the radio? What radio station? When?
- Do you have audio tapes of these reports?
- Did you see Robert Green on television? What television station? When?
- Do you have videotapes of these reports?
- Did you receive customer complaints about Robert Green's continued employment? From whom? Names? In writing? When?
- Do you have these written customer complaints?
- Did Robert Green 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 Robert Green's behavior off the clock?
- What evidence did you rely upon connecting Robert Green'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 DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- Postal Inspectors' Investigative Memorandum and exhibits
- Police reports
- Indictment and other court records
- Newspaper stories, tapes of radio or TV accounts

- Request for Information seeking all documentation or information relied upon by management
- Management's response
- Grievant's statement and/or interview
- Co-workers' statements and/or interviews
- Supervisor's interview and/or statement

THE AGREEMENT

- National Agreement, Article 16

CHAPTER 43

THE ISSUE: EMERGENCY SUSPENSION - 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.

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.

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 DOCUMENTATION

- Emergency placement notice
- Discipline proposal or request for discipline, if used
- Grievant's statement and/or interview
- Witness' statements and/or interviews
- Supervisor's interview and/or statement
- Postal Inspector's Investigative Memorandum and exhibits
- Threat Intervention Team reports

THE AGREEMENT

- National Agreement, Article 16.7
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 44

THE ISSUE: EMERGENCY SUSPENSION - 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 and since there is no written reason, a required reason as set forth in 16.7 cannot exist.

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 DOCUMENTATION

- Request for Information seeking copy of emergency placement notice and management's response

- Discipline proposal or request for discipline, if used
- Grievant's statement and/or interview
- Witness' statements and/or interviews
- Supervisor's interview and/or statement
- Postal Inspector's Investigative Memorandum and exhibits
- Threat Intervention Team Reports

THE AGREEMENT

- National Agreement, Article 16.7
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 45

THE ISSUE: EMERGENCY SUSPENSION - 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 violent 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 work stations 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 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, say an hour (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 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 areas 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?
- 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 DOCUMENTATION

- Emergency placement notice
- Discipline proposal or request for discipline, if used
- Grievant's statement and/or interview
- Witness' statements and/or interviews
- Supervisor's interview and/or statement
- Postal Inspector's Investigative Memorandum and exhibits
- Threat Intervention Team reports

THE AGREEMENT

- National Agreement, Article 16.7
- National Agreement, Article 19
- USPS Handbook, EL-921

CHAPTER 46

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. Or, the employee may be out on an Emergency Suspension and management provides a thirty day notice period but fails to return grievant to an "on the job or on the clock" status during this period. Management has failed to provide the required 30 day advance notice either on the job or on the clock. Management has violated Article 16.5 of the Collective Bargaining Agreement and issued a procedurally defective Notice of Removal.

THE INTERVIEW

Since the date of the Removal's issuance and its effective date will most likely not be in dispute, the interview again 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 this. Some examples are as follows:

- Your removal is dated 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? Why?

- 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 MDO? The Plant Manager?
- If this removal had been your decision you would have made sure the 30 day rule was properly followed?
- Who was responsible for not providing the 30 day notice?

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

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- Supervisor's interview and/or statement
- Clock rings or time cards
- Grievant's statement and/or interview

THE AGREEMENT

- National Agreement, Article 16.5
- National Agreement, Article 19
- USPS Handbook, EL-921