C# 06658

USPS-NALC ARBITRATION PANEL
SOUTHERN REGION
WILLIAM J. LeWINTER, ARBITRATOR

IN THE MATTER OF ARBITRATION BETWEEN UNITED STATES POSTAL SERVICE (Durham, North Carolina) -AND- NATIONAL ASSOCIATION OF LETTER CARRIERS (Branch No. 382)	Case No. S4N-3P-D 19737 Record Closed: August 15, 1986 Arbitrator File No. 1172

OPINION AND AWARD

Representing the Employer:
Jim Carter
Superintendent of Postal Operations

Representing the Union:
Robert M. Harkinson
Regional Administrative Assistant

William J. LeWinter
Arbitrator
5001 Collins Avenue, Suite 14B
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Preliminary Statement

On March 26, 1985, the Union filed a written grievance on behalf of Brenda L. Malloy, alleging the Employer violated the parties' collective bargaining agreement by issuing a Notice of Removal without just cause and in violation of the procedures of the National Agreement. The parties, being unable to resolve the matter, assigned it to arbitration. Hearing was held before William J. LeWinter, Panel Arbitrator, at Durham, North Carolina, on June 26, 1986, at which time the parties were accorded full opportunity to present witnesses for direct and cross examination and such other evidence as was deemed pertinent to the proceedings. At the hearing, the parties agreed that grievant would be re-examined by a doctor, and the arbitrator should hold the

record open pending receipt of the doctor's report. By letter, the arbitrator was informed that the proposed examination was not held and requesting decision on the merits. The record was closed on August 15, 1986. From the evidence adduced at the hearing, the arbitrator makes the following:

Findings of Fact

Grievant was originally hired by the Employer on May 16, 1981. Until the removal, she has never been the subject of disciplinary action. The events leading to her removal apparently started with a telephone call to Forest Hills Station, grievant's work location, from a patron who was worried because grievant had remained in her locked vehicle for a long period. J. C. McCrary, grievant's immediate supervisor, testified that he had no knowledge of the incident, but was told by the Station Manager that grievant had told the Station Manager she was afraid of being attacked by dogs. The incident was denied by grievant.

On August 28, 1984, McCrary was directed to go out on the street, find grievant and return her to the station. After returning, grievant was informed she had to report to the Area Medical Director, Dr. Trader, for a fitness for duty examination. Grievant was put on Administrative Leave. She was examined by Dr. Trader on August 30, 1984. There was no discussion by Dr. Trader with grievant as to the nature of the examination or the purpose thereof. Dr. Trader desired a confirmation on his diagnosis of paranoid-schizophrenia. He testified he was unable to find a proper doctor for the evaluation in the local area. Accordingly arrange-

ments were made with Joseph W. Weiss, MD, a psychiatrist with Guilford Psychiatric Associates, P.A.

Beginning December 11, 1984, a series of letters from grievant to Postmaster Callis indicates that grievant had met with the Postmaster on one or more occasions. She had yet to be told that her continuing Administrative Leave status related to a psychiatric problem, having been informed only that she had "non-job related medical problems". Grievant had consistently claimed she was the victim of harassment by her co-workers and supervisors, apparently in collusion. The Postmaster told her she would investigate. The letters complain concerning failure to act on the investigation or her medical status, claiming the delay was injuring her ability to defend any charges which may be filed. On November 24, 1984, grievant wrote the Postmaster she had secured a private doctor for a physical examination. After seeing her private doctor, grievant first learned that there was psychiatric involvement. Her doctor had called Dr. Trader to determine what the problem was. She had never been given any diagnosis by Dr. Trader.

The next examination, arranged by Dr. Trader with Dr Weiss, was held December 21, 1984. A report was made to Dr. Trader. No report was given grievant. It was determined that further psychological testing was to be performed and and appointment was arranged with J. Gary Hoover, Ph.D., a Practicing Psychologist, also a member of Guilford Psychiatric Associates, P.A., for January 18, 1985. A

report was made to Dr. Trader, but grievant was given no copy or information. Based on the two subsidiary examinations and his own, Dr. Trader made a Fitness for Duty Report to Postmaster Callis on February 22, 1985. Grievant was not given a copy of the Report. The report states:

> Ms. Malloy is a thirty-one year old employee who was seen on fitness for Duty Examination, August 30, 1984. Purpose of examination was to determine if Ms. Malloy could suitably perform her duties as city carrier. She reportedly has been delivering mail late, wrong, or not at all. She has been overheard talking to herself and answering herself. When asked if she knew the purpose of examination, Ms. Malloy stated she was told it was to determine if she was over worked. She stated, however, she had thought the real reason was to determine if she was paranoid about her fellow workers.
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> Ms. Malloy stated she has been working in her position for three years. She stated she is not physically overworked, but acts the way she does when under stress. She stated the administration is placing stress on her because of the strange way she acts when she is working. She stated her strange reactions are in keeping with the stress that is placed on her. She also stated she acts strange because other employees talk about her on the side but will not talk to her directly. She, therefore, will tell them what she wants them to know by talking to herself. She admitted occassionally answering herself, but not "as another person". Ms. Malloy also stated that some postal employees will follow her and howl like a dog. Some will say to her, "Aren't you afraid of dogs?" She admitted she does not see people following her or howling but knows the people by their voices and states some people have identified themselves.
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> Ms. Malloy stated she has had crying fits in public because of being made nervous. She stated that some Postal employees would come to the outside of her house and talk to her through a microphone. According to her, these people would say through the microphone that "she stinks". She indicated that this has contributed to her nervous stomach. She also indicated that people would be behind bushes. She stated she called the police and then the employees would ride in a van. She also related that her neighbors have complained of noise in the neighborhood.
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> Ms. Malloy related that some people have said, "we are going to get her". She stated her supervisor said this. She indicated that all this has made her nervous. Ms. Malloy said some people have stated they were soldiers. She also said some people had a shoot-out when she was working her route. She also said someone broke windows out of her postal vehicle.
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> In regard to her work, Ms. Malloy stated that at times she may get triple the normal volume of mail to carry. She stated she thinks she is a normal carrier. She also stated some woman thinks she is a normal carrier. She also stated some woman complained of not getting her mail, but then asked how did the woman know she was supposed to get mail that day. She stated that when she cases her mail correctly, someone around the corner will give a signal to another person to rearrange the mail. She stated she has seen this done. Ms. Malloy also stated that if someone is friendly to her, she suspects them of being a spy for the

rest. She admitted not having any close friends and does not trust any of the other employees. She stated that if she had any friends, the others might try to take it out on these friends. Ms. Malloy also stated she does not trust her relatives because she has heard them discussing her and saying she is insane.

Ms. Malloy admitted threatening others but stated she did this by verbalizing to herself. She indicated that she thinks the other employees feel that "she stinks". She stated she has threatened to shoot some of the employees for harrassing her. She related that on one occassion, she took a baseball bat to a park to look for the harrassers.

Ms. Malloy stated she first began to hear voices five years before her interview for the postal position. At this time, voices were saying "she stinks", or that "we will get her". She stated she has not discussed voices with other employees but did discuss voices with her family; and her family is reported to have said she was "nuts". She stated she actually ran over a dog about a month ago and that the dog was in front of her car.

Past history reveals the employee reportedly to have had rickets as a child. As an adult, she admitted having a "nervous stomach" and has symptoms of pain, nauseau, and constipation. she also reported having gastritis. She is not on any kind of medication for this condition. Occassionally, sinusitis has been present.

Family history revealed that several persons in Ms. Malloy's family have reportedly had mental disorders. She stated that her mother is living well but is mentally ill at home. father is dead of unknown cause. She has three sisters and one brother who are living well. Two maternal uncles reportedly have mental illness.

Her social history reveals that she has never been married. She stated she had been living with a grandmother until January, 1984. She moved because the grandmother wanted her to do so and that she (Ms. Malloy) did not want people harrassing the neighborhood. She stated she graduated from Duke University in 1975 with a major in physical therapy.

Review of systems is non-contributory except for previous presence of ear infections and sinusitis, and frequent urination because of use of beverages containing caffeine.

Physical examination revealed blood pressure 120/90; pulse 64; respiration 18; temperature 97; weight 11 3/4; height 5' 1 3/4". Urinalysis was normal except for low specific gravity. Patient's entire physical examination was essentially unremarkable. Eyes, ears, nose, and throat were normal to examination. Neck was normal; lungs were clear to auscultation. Heart revealed normal size, normal heart sounds and normal rhythm. Abdomen was soft without evidence of tenderness nor masses. Extremities revealed no evidence of loss of motion, nor swelling. Neurological examination revealed the biceps reflexes to be 3+. Knee-jerk reflexes were physiological.

The impression after the examination was that Ms. Malloy had a paranoid type of schizophrenia. It was not thought that she was dangerous, but with her history of having made threats, the opinion was that she should not work until further evaluation. The recommendation was that he have consultation with psychiatrists and psychologists.

This recommendation was communicated to Mrs. Betty Jones in Raleigh, North Carolina. Several attempts were made by me to make an appointment with different psychiatrists in the Raleigh-Durham area, but these attempts were unsuccessful An appointment was then arranged with Dr. Joseph W. Weiss. Enclosed are psychiatric consultations by Dr. Weiss and psychological consultation by Dr. J. Gary Hoover.

After my examination and the psychiatric and psychological consultation, it is the opinion that Ms. Malloy is not suitable at this time for employment in the Postal Service. A program of psychiatric treatment and appropriate follow-up is recommended.

On an unspecified date prior to March 5, 1985, grievant's supervisor, Mr. McCrary, at directions of his superiors, filed a Request for Discipline wherein he requested Removal on the following grounds:

"Erratic behavior in office and on Route.

Sent for Fitness for Duty exam

Results from exam show she is medically unsuitable."

Mr. McCrary testified that his sole information concerning the mater was an oral directive from his superiors that grievant was medically unsuitable for her job. He has seen no medical reports. The Request for Discipline was concurred in by Postmaster Collins on March 5, 1985, solely on the basis of the report of Dr. Trader.

On March 14, 1985, Supervisor McCrary issued a written, Notice of Removal to grievant effective April 22, 1985. The following is the basis of the removal:

CHARGE: Unable to Perform the Duties of Your Position

Specifically, on August 30, 1984, you were given a fitness for Duty Examination by J. D. Trader, M.D., Area Medical Officer, United States Postal Service. this examination had been requested in accordance with Part 864.3 of the employee and Labor Relations Manual. Based on Dr. Trader's examination, a recommendation was made that you should have consultation with a psychiatrist and psychologist. You were evaluated at Guilford Psychiatric Associates in Greensboro, North Carolina on December 21, 1984 and January 11, 1985 by Joseph W. Weiss, M.D. and J. Gary Hoover, Ph.D. respectively. Based on the fitness for Duty Examination, including the psychiatric and psychological consultations, it is the opinion of the Postal

Service that you are unable to perform the duties of your position as a City Letter Carrier.

A Step 1 grievance meeting was held on march 20, 1985. In attendance was Mr. McCrary, grievant and her Steward. Mr. McCrary denied the grievance and a Step 2 written grievance was filed March 26, 1985, claiming violations of Articles 1, 2, 3, Secs. 2 and 5, 13 and 16, Sec. 1. The Union made demand for copies of medical reports and other records which the Employer failed or refused to supply. the matter went through Steps 2 and 3 and came before Panel Arbitrator P. M. Williams at Case No. S4N-3P-D 5628 on August 27, 1985. In an Opinion and Award, dated August 28, 1985, Arbitrator Williams, after setting for the the above Notice of Removal, stated:

> The parties agree that timely hearings were held at Steps 1, 2 and 3. They also agree however that despite a request having been by the Union's representative for copies of the medical records at Step 2, the records have never been made available it it. And this is true even though its Step 3 Appeal stated that Articles 13, Sections 1, 2, and 3 and Article 31 of the National Agreement had been violated. It said the Employer's Step 2 official responded to the request for the records by stating something to the effect that, "They (the records) were private communications between the doctors and the Post Office, which would not be disclosed to the Union." The Employer did not deny the claim or the statement.
>
> At the outset of the hearing the Union requested permission to file a Motion to Dismiss, claiming the matter should be resolved against the employer for its failure to follow the terms of the National Agreement insofar as providing it (the Union) with the information necessary for the grievant to be appropriately and adequately represented. The Employer opposed the motion.
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> After much discussion between the parties and the undersigned it was agreed that the purpose and intent of the parties at the national level regarding the grievance-arbitration process had not been met in this instance by the Employer at Step 2, nor was its error corrected at Step 3 as it should have been. It was agreed therefore that the matter should be remanded to Step 2 for review. It was also agreed the Union should have a reasonable time for the grievant to be physically and emotionally evaluated by competent medical authority suitable to her.
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> It was further agreed that the Step 2 hearing should be deferred until such time as she had a reasonable opportunity to secure appointments and be evaluated by specialists in the field of psychiatry and psychology for the purpose of show-

ing medical conclusions that are contrary to what has apparently been given to the Employer by its medical advisors.

Pending further processing of her grievance to its final conclusion the grievant shall remain in her present non-pay status, without prejudice however to her being made whole at a later time.

In the event the grievance is not resolved at either Step 2 or Step 3, and thereafter is appealed to arbitration again, it shall not be presumed that the matter should be assigned to the undersigned for it is not his intent to retain jurisdiction of the matter.

On the basis of the entire record in this case the undersigned makes the following

AWARD

The grievance is remanded to Step 2 in accordance with what is expressed above.

The matter was returned to Step 2. On October 15, 1985, to prepare for the Step 2 meeting, the Union made demand for information including the medical reports and information requested during the prior proceedings. This was not supplied to the Union except for a Request for Discipline, the Concurrence, a statement from a customer on the route, and the Supervisor's summary of Step 1.

On October 16, 1985, grievant was examined, at her own request, by Dr. Mindy Oshrain, Resident in Psychiatry, Duke University. Dr. Oshrain reports the examination and concluded:

DIAGNOSTIC IMPRESSION/ASSESSMENT: It is my impression, given Ms. Malloy's history, that she may be experiencing the symptoms of schizophrenia of the paranoid type. She has had, at my recommendation, a complete history and physical at the Medical Outpatient Clinic here at Duke; this exam failed to identify another etiology for your symptoms.

Given the late onset of her illness and the relatively circumscribed nature of her symptomology, I feel that Ms. Malloy might benefit markedly from neuroleptic medication, which could possible alleviate these symptoms.

RECOMMENDATION: I have recommended to Ms. Malloy a therapeutic trial of neuroleptic medication, during which time I would be willing to work with her to examine the benefits and risks of such therapy. At the current time, she has decided

not to undertake such a trial, but I have let her know that should she desire to do so, I will be willing to be her physician.

On January 24, 1986, Dr. Oshrain wrote the Union representative, in part:

> At the end of 12/85, Ms. Malloy again contacted me regarding a medication trial, and we met to discuss the possible benefits and risks. The latter may be significant, as they are potential longterm, irreversible side effects of neuroleptic medication. Thus, I would recommend medication only when absolutely essential.
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> At the present time Ms. Malloy reports a decrease in the symptoms for which I initially recommended medication. She is thus hesitant to take medication. I cannot therefore evaluate her clinical response to a therapeutic trial, nor recommend any particular course for work at this time. In order to make a recommendation, I would also need more information regarding her work situation.
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> ***

The hearing was held and Employer presented Mr. McCrary, Dr. Trader and Postmaster Callis. The grievant testified on her own behalf. The testimony previously described, will also be included as required in the Opinion. During the hearing, the parties agreed that the record remain open pending a follow-up examination of grievant. The arbitrator was given the following information by the Union which was apparently sent to the Employer without contest from the Employer:

> The grievant kept her appointment with Dr. Weiss of Greensboro. She was on time, and when the doctor saw her he said that because of his examining the grievant before for the Postal Service he could not be involved further unless the Postal Service, Dr. Trader, requested him to.

Since the results of the follow-up examination were to be used only if I ruled that the discharge was invalidated, the Union requested that I continue and render decision. The record was thereupon closed as of August 15, 1986.

Contract Provisions

ARTICLE 13

ASSIGNMENT OF ILL OR INJURED REGULAR WORK FORCE EMPLOYEES

Section 1. Introduction

A. Part-time fixed schedule employees assigned in the craft unit shall be considered to be in a separate category. All provisions of this Article apply to part-time fixed schedule employees within their own category.

B. The U.S. Postal Service and the Unions recognizing their responsibility to aid and assist deserving full-time regular or part-time flexible employees who through illness or injury are unable to perform their regularly assigned duties, agree to the following provisions and conditions for reassignment to temporary or permanent light duty or other assignments. It will be the responsibility of each installation head to implement the provisions of this Agreement within the installation, after local negotiations.

Section 2. Employee's Request for Reassignment

A. Temporary Reassignment

Any full-time regular or part-time flexible employee recuperating from a serious illness or injury and temporarily unable to perform the assigned duties may voluntarily submit a written request to the installation head for temporary assignment to a light duty or other assignment. The request shall be supported by a medical statement from a licensed physician or by a written statement from a licensed chiropractor stating, when possible, the anticipated duration of the convalescence period. Such employee agrees to submit to a further examination by a Public Health Service doctor or physician designated by the installation head, if that official so requests.

B. Permanent Reassignment

1. Any ill or injured full-time regular or part-time flexible employee having a minimum of five years of postal service, or any full-time regular or part-time flexible employee who sustained injury on duty, regardless of years of service, while performing the assigned duties can submit a voluntary request for permanent reassignment to light duty or other assignment to the installation head if the employee is permanently unable to perform all or part of the assigned duties. The request shall be accompanied by a medical certificate from the United States Public Health Service or a physician designated by the installation head giving full evidence of the physical condition of the employee, the need for reassignment, and the ability of the employee to perform other duties. A certificate from the employee's personal physician will not be acceptable.

2. The following procedures are the exclusive procedures for resolving a disagreement between the employee's physician and the physician designated by the USPS concerning the medical condition of an employee who has requested a permanent light duty assignment. These procedures shall not apply to cases where the employee's medical condition arose out of an occupational illness or injury. On request of the Union, a third physician will be selected from a list of five

Board Certified Specialists in the medical field for the condition in question, the list to be supplied by the local Medical Society. The physician will be selected by the alternate striking of names from the list by the Union and the Employer. The Employer will supply the selected physician with all relevant facts including job description and occupational physical requirements. The decision of the third physician will be final as to the employee's medical condition and occupational limitations, if any. Any other issues relating to the employee's entitlement to a light duty assignment shall be resolved through the grievance arbitration procedure. The costs of the services of the third physician shall be shared by the Union and the Employer.

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Section 4. General Policy Procedures

A. Every effort shall be made to reassign the concerned employee within the employee's present craft or occupational group, even if such assignment reduces the number of hours of work for the supplemental work force. After all efforts are exhausted in this area, consideration will be given to reassignment to another craft or occupational group within the same installation.

B. The full time regular or part-time flexible employee must be able to meet the qualifications of the position to which the employee is reassigned on a permanent basis. On a temporary reassignment, qualifications can be modified provided excessive hours are not used in the operation.

C. The reassignment of a full-time regular or part-time flexible employee to a temporary or permanent light duty or other assignment shall not be made to the detriment of any full-time regular on a scheduled assignment or give a reassigned part-time flexible preference over other part-time flexible employees.

D. The reassignment of a full-time regular or part-time flexible employee under the provisions of this Article to an agreed-upon light duty temporary or permanent or other assignment within the office such as type of assignment, area of assignment, hours of duty, etc., will be the decision of the installation head who will be guided by the examining physician's report, employee's ability to reach the place of employment and ability to perform the duties involved.

E. An additional full-time regular position can be authorized within the craft or occupational group to which the employee is being reassigned, if the additional position can be established out of the part-time hours being used in that operation without increasing the overall hour usage. If this cannot be accomplished, then consideration will be given to reassignment to an existing vacancy.

F. The installation head shall review each light duty reassignment at least once each year, or at any time the installation head has reason to believe the incumbent is able to perform satisfactorily in other than the light duty assignment the employee occupies. This review is to determine the need for continuation of the employee in the light duty assignment. Such employee may be requested to submit to a medical review by the United States Public Health Service or by a physician designated by the installation head if the installation head believes such examination to be necessary.

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ARTICLE 15
GRIEVANCE-ARBITRATION PROCEDURE

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Section 3. Grievance Procedure--General

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

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ARTICLE 16

DISCIPLINE PROCEDURE

Section 1. Statement of Principle

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.

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Section 5. Suspensions of More Than 14 Days or Discharge

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

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Section 7. Emergency Procedure

An employee may be immediately placed on an offduty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee, the emergency action taken under this Section may be made the subject of a separate grievance.

Section 8. Review of Discipline

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

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

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Issue

Did the Employer violate the National Agreement by the removal of grievant? If so, what is the remedy?

Discussion

An admission was rendered in this case by the Employer as set forth in the prior Opinion and Award of Arbitrator Williams. That admission was never denied at the hearing and bears repeating:

> After much discussion between the parties and the undersigned it was agreed that the purpose and intent of the parties at the national level regarding the grievance-arbitration process had not been met in this instance by the Employer at Step 2, nor was its error corrected at Step 3 as it should have been. It was agreed therefore that the matter should be remanded to Step 2 for review. It was also agreed the Union should have a reasonable time for the grievant to be physically and emotionally evaluated by competent medical authority suitable to her.

The defect complained of in the prior decision, resulting in a resubmission of this case to Step 2, continued unabated to

the hearing in this case. The Union demanded to know the facts contained in the doctors' reports in management's hands. These were denied to it. Such knowledge is an absolute necessity for the proper representation of the grievant. Indeed, the facts show in this case that the requirement for a Fitness for Duty Examination and the subsequent removal proceeding and all actions taken thereafter occurred without ever informing grievant that the basis was mental inability to perform her job. Until grievant's personal doctor entered the picture, management totally obscured the basis of its actions. Not only did this prevent proper defense by the grievant and her representatives, but may have caused her harm, or placed her in a position where medical treatment was delayed and grievant might not then have been able to improve sufficiently for reemployment.

As far back as December 21, 1984, the Employer was informed by Dr. Weiss, its psychiatric consultant that grievant was "extremely paranoid at this time." Further, Dr. Weiss stated, "There is a substantial risk, indeed, of Ms. Malloy's acting out on her paranoid delusions in what could be a potentially harmful manner." The doctor's report further states:

> Unfortunately, I believe the prognosis for Ms. Malloy is probably very guarded due to the length of time her delusions have existed, as well as her general lack of insight and resistance to treatment. There is potential that with appropriate psychiatric treatment, her psychosis may remit and she could function in a limited capacity. However, this would involve a position in which there would be minimal contact with the public or co-workers and would require ongoing monitoring of her behavior.

The Employer, through Dr. Trader, continued delay through

February 22, 1985 until Dr. Trader's report was sent to the Postmaster. Even at this time, some potential was recognized, for Dr. Trader concludes his report stating, "A program of psychiatric treatment and appropriate follow-up is recommended." This was purposely hidden from grievant. From the evidence in this case, the first indication of a problem with psychiatric potential was not given grievant until her physician contacted Dr. Trader.

It is not conceivable that Employer's actions demonstrated in this case represents the agreement of the parties. It is apparent that Employer's actions were taken solely with the intent of ridding itself of grievant as an employee and protecting its actions in the event of arbitration or other litigation. There was no disclosure of material facts as required by Article 15 of the National Agreement.

Failure to notify grievant or her representatives of the basis of this removal cannot be justified on the grounds of grievant's mental condition. Grievant testified at the hearing. She appears to be fully conversant with her problem by this time. She knows she has delusions. She has demonstrated reasoning powers. Her prime course for improvement would be through the utilization of neuroleptic medication. However, the evidence demonstrates that she has been advised that such medication has "significant" risks. Such medication can well result in "irreversible side effects" which would diminish grievant's mental capacities. The grievant has obtained a job as a dish washer and is

apparently performing in that capacity. Her physician reports improvement in her psychosis. Grievant's testimony indicates that without some indication that the risk in taking the proffered medication would result in a job benefit, she is hesitant to undertake the risk. This is not the testimony of an individual to which explanation would have been futile. Whether grievant's mental condition has been damaged by lack of knowledge for a long period of time would be an exercise in the rankest form of conjecture; however, the purposeful denial of information with which grievant could defend herself and act in a proper manner as to treatment, is a denial of basic due process and fair treatment that is part of the parties' bargain.

As stated above, the denial of information was admitted to be in violation of the National Agreement when this case was first heard by Arbitrator Williams. That violation continued unabated. It certainly did not ripen into compliance with the collective bargaining agreement. The parties agreed, during the initial arbitration procedure before Arbitrator Williams, that the case would be set back to Step 2. This gave the Employer the opportunity to rectify the prior failures. It failed to do so.

The failure to render information to the Union is not the only defect in this case. Another problem was engendered by the method of termination. The testimony demonstrates that the immediate supervisor, Mr. McCrary, requested the removal and thereafter issued the Notice of

Removal upon direct orders from his superiors. He had no decisional opportunity and was not engaged in the making of the removal decision. I have ruled on such matters before as exemplified in Case No. E1T-2D-D 15285:

> ...The deciding factor is whether the supervisor issuing the discipline makes the decision, or if it is made for him. In the former situation, the discipline is valid. In the latter, it is not.
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> A problem has developed when the discipline originates at a NSC and is delegated to the local office. Many arbitrators have held that this infringes on the right of management to issue the discipline because it renders the first step of the grievance procedure totally ineffective. Under those circumstances, it is hard to conceive that the "immediate supervisor" constituting the first step of the grievance procedure in Article 15 has the real authority that the grievance procedure requires.
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> In deciding a case under the 1978 National Agreement, Arbitrator Holly states in Case No. S8N-3F-D 9885:
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> > In the instant case, the appropriate representatives met at Step 1, but a serious question arises regarding the supervisor's authority to settle the grievance. Can one realistically assume that the supervisor had authority to settle the grievance in this situation where the removal action had been initiated by the Sectional Center Director of Employee and Labor Relations? Obviously not, and the Step 1 procedure was no more than a charade.
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> > ***
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> > These procedural defects cannot be overlooked as being insignificant. They are of serious concern because they are in violation of both the letter and spirit of the National Agreement, and importantly, they deprive the grievant of his rights to due process. In the absence of due process, the grievance must be sustained without any consideration of its substantive merits.
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> In addition, Arbitrator Zumas, in Case No. E1R-2F-D 8832 and Case No. E1N-2U-D 7392, held that it is implicit in Article 16, Section 8, that the issuing supervisor must decide on the discipline <u>before</u> securing concurrence. Concurrence is to apply to the supervisor's decision, not the other way around.

Not only was the concurrence rendered ineffective by the procedure of termination in this case, but the grievance procedure was affected. As further stated in the above quoted Opinion:

> (When the issuing supervisor is directed to issue the discharge) it brings into play the logic of Arbitrator Holly. It hardly seems likely that the immediate supervisor would have real authority to settle the matter at Step 1. This is most important in this case, because the immediate supervisor is presented as the

person proposing the discipline by his issuance of the Notice to Remove. He was the logical and required official to approach at Step 1 of the grievance procedure. Accordingly, in this case, Step 1 was a "charade".

The failure of due process and violation of procedure must render the removal invalid regardless of whether there was just cause for it. The procedural aspects of the National Agreement are as much a part of the agreement as the right of removal for cause. The Employer's violations must prevent the removal.

The question of remedy, however, presents a serious problem. The evidence demonstrates that at the time of the removal grievant was sufficiently ill that her continued presence in the workplace as a carrier could have resulted in harm to herself, others or Postal property. She did hallucinate and could, according to Dr. Weiss, become a threat of violent action turned toward those she believed were out to get her. There were many alternatives that could have been followed rather than termination. She could have been removed from the workplace on emergency suspension, and with proper transfer of information could have been in a situation where she was on sick leave or leave without pay.

None of these things were done. Her status at the time of removal was Administrative Leave. Logic requires that that status must continue once the discharge procedure has been invalidated. Management has had numerous opportunities from the time of the removal to review its actions. Accordingly, grievant shall receive back pay from the time of being placed in a non-pay status. The period of back pay

must be limited however.

The evidence demonstrates that while grievant suffers from paranoid schizophrenia, she is not an unreasoning person. Indeed, if grievant demands return to work, she must demonstrate she can operate under a work situation. During the period of her examinations by the Area Director physician and the referrals to the psychiatrist and the psychologist, grievant demonstrated sufficient reasoning ability that she must have understood the Employer was looking at the mental condition. She may have believed management was part of a conspiracy to harm her, but she also demonstrated the ability to know that she could see the Union and how to protect her rights. She had no right merely to sit back and let damages grow. This is especially true after she secured Union representation.

Management was held liable for its violations in failing to render information. Grievant must be responsible for her actual knowledge. I cannot rule that the actual knowledge would have exculpated management under this fact situation. Accordingly, I ruled the discharge invalid. In looking at damages, however, grievant's knowledge affects the remedy.

From all the correspondence entered into evidence, it is clear that following grievant's visit to her personal physician on November 24, 1984 and his contact with Dr. Trader, she was aware of psychiatric inability to work as being the basis of her problem. When the Employer failed to

give the necessary information, it was grievant's duty, or that of her representative, to see that some medical representation occurred on her own visitation to her own physician. The record demonstrates that after the grievance was returned to Step 2, the Union made requests of reinstatement with treatment and/or to a position which would not involve much contact with others. There is no evidence that after the denial of the requested information prior to the first appearance of this case before Arbitrator Williams any such discussions were held or that any effort was made to mitigate damages.

From the evidence it seems reasonable that even had grievant seen her own psychiatrist the Employer most likely would have persisted in the removal. The reason I limit the damages to the time when grievant should have taken the physician of her choice, is that she has also failed to follow a course of treatment that would render her employable.

The evidence appears to demonstrate that there is improvement in grievant's condition since the time of removal. At the earlier period, however, she presented a danger. She demonstrated that she is fully aware that her condition is such that she should be following a treatment protocol without which she has been told that her psychosis threatens her ability to function. In such cases, the Employer is not bound to maintain her in a pay position at work. She testified that there is risk involved in neuroleptic medicine which she might have accepted if she were assured she would

have her job back. She cannot be given such guarantees. Dr. Oshrain's reports indicate that the medication would be given under a trial basis so as to limit the question of risk. If it does not work, management has the right to remove her if done properly. If it does work, she is still an employee and can institute procedures to return to work. The evidence is not convincing, at this stage, that grievant is so ill that she cannot be considered as being able to be placed medically in a position where she can work if properly controlled by her medical treatment. In such cases the agreement permits replacement to the work place.

Again, grievant has demonstrated a lack. At the end of the hearing, it was agreed that the proceedings be delayed until grievant be examined to determine her present status. She had an appointment with Dr. Weiss. The Union informed the arbitrator that Dr. Weiss would not involve himself because he had been retained by the Employer and had not been requested by the Employer to make the examination. Grievant demonstrated no intent to return to Dr. Oshrain for either an evaluation or treatment.

From the above, I believe the grievant showed sufficient ability to reason and understand her rights and obligations as an employee guided by her representative and taken some medical course by the original third step of the grievance procedure. The record does not disclose the date of the third step held prior to the arbitration before Arbitrator Williams. Accordingly, I direct that such date be de-

termined by the parties and that grievant be paid back pay to that date. Since her status was Administrative Leave, the amount of pay shall be computed as to what she would have been paid had the Administrative Leave pay been continued in the same manner as it was being paid at the time it was discontinued. This should include any contractual increases she would have received if the Administrative Leave had been so continued.

As to grievant's employment status, she shall be in a Leave Without Pay status until it can be determined whether she is an employee that can reasonably be returned to the workplace, now or after medical treatment; or until the Employer takes proper action under the National Agreement to change that status.

AWARD

The grievance is sustained. Grievant shall be reinstated to the status of an employee on leave without pay in accord with the principles set forth in the foregoing Opinion. The grievant shall receive back pay from the time Administrative Leave pay was terminated until the first third step grievance proceeding in accord with the principles set forth in the foregoing Opinion.

Respectfully submitted,

William J. LeWinter

William J. LeWinter, Arbitrator
Dated: November 21, 1986