

C#08779

A+B

REGULAR REGIONAL ARBITRATION PANEL

In the Matter of Arbitration > GRIEVANT: C. Smith
>
between > POST OFFICE: La Habra, CA
>
UNITED STATES POSTAL SERVICE > CASE NO. W7N-5C-D 9956
> W7N-5C-D 9957
and > W7N-5C-D 10996
>
NATIONAL ASSOCIATION OF LETTER >
CARRIERS, AFL-CIO >
)

BEFORE: JAMES T. BARKER, ARBITRATOR

APPEARANCES:

For the U. S. Postal Service: Sandra Guerra

For the Union: William Heintz

Place of Hearing : 1001 W. Imperial Highway, La Habra, CA

Date of Hearing : February 14, 1989

Briefs Filed : March 14, 1989

AWARD: The grievance is sustained. Procedural due process was denied the grievant. Back pay is awarded. Reinstatement is conditioned upon outcome of psychiatric physical fitness for duty examination.

OPINION AND AWARD

The Issues

The parties were unable to agree upon the issues.

The Postal Service poses the issues as follows:

Was the change of leave status (Emergency Suspension) from Administrative Leave to Leave Without Pay effective July 15, 1988 for just cause? [W7N-5C 9956]

Is the Notice of Proposed Removal-Separation Disability dated July 26, 1988 moot since it was superceded by a second notice? Is it properly before the Arbitrator? [W7N-5C-D 9957]

Was the removal prompted by the Notice of Pro-

posed Removal-Separation Disability dated September 16, 1988 supported by Letter of Decision dated October 26, 1988 for just cause? [W7N-5C-D 10996]

If not, what is the appropriate remedy?

In substance, the Union frames the issues:

Was the Removal of Charles Michael Smith in W7N-5C-D 9957, and the Emergency Suspension W7N-5C-10996 and W7N-5C-D 9956 for just cause and in accordance with the provisions of the National Agreement and applicable rules and regulations?

And if not, what is the proper remedy?

Upon the entire record and consideration of the briefs timely filed by the respective parties, the Arbitrator finds the issues framed by the Postal Service the most appropriate to a resolution of this case.

Discussion

1. Background

I

At times pertinent herein the grievant was a full-time letter carrier assigned to the La Habra Post Office. He was initially employed in November 1971 but left the employ of the Postal Service several times. On June 20, 1983 he was again employed and was assigned to the La Habra Post Office where he was serving at Level 5, Step H at the time of his removal.

II

The record establishes that commencing in October 1987 management became aware of problems in the grievant's attendance and behavior while on duty. Postmaster Freddie Jackson received a

letter dated December 8, 1987, from Robert T. Lewis, Ph.D. stating that the grievant was under his care for psychological treatment for a condition arising from cumulative stress and strain. Dr. Lewis additionally stated that the grievant was "currently totally disabled" and that he was "certifying his disability beginning December 3, 1987 and ending December 11, 1987." Thereafter, by letter dated December 11, 1987 Dr. Lewis informed Postmaster Jackson that the grievant was still under his care and that he was extending his disability through January 1, 1988.

Separately, at a prior time, on October 1, 1987, Norman Stokley, Superintendent at the La Habra Post Office, observed the behavior of the grievant in connection with an earthquake which had occurred during morning duty hours. As the senior officer on duty Stokley took the initiative in effectuating evacuation and issuing necessary orders relating to the safety and security of personnel. Despite Stokley's direct orders to the grievant not to re-enter the building, the grievant sought to do so and had to be physically restrained by Stokley. Stokley testified that the grievant tried several times to re-enter the building in the immediate aftermath of the earthquake, and in the course of events insisted that, notwithstanding, he was going back in the building. Stokley testified that during the incident the grievant approached him in an excited and angry state and cursed. Stokley described the grievant as "pretty much out of control." Stokley

called Postmaster Jackson at home and conveyed this information to him.

The grievant testified he was concerned with the welfare of his daughter and desired to enter the building to retrieve the keys to his car in order to join his daughter.

The grievant also testified that he consulted Dr. Lewis for the first time "right after the earthquake", and "two or three times" thereafter. The last such consultation was in April 1988.

According to the grievant's further testimony he had visited a psychologist, Dr. Graham, before the earthquake, and he conceded that while in the Army he had reacted to his brother's death in Vietnam by going AWOL and this had led to his General Discharge from the Army.

According to the additional testimony of Stokley, at approximatley this period of time the grievant was almost daily leaving his case, singing and talking loudly, loitering, making gestures and seeking to gain attention through humming. Stokley characterized the grievant's behavior as "unstable".

On December 11, 1987, the grievant came to the Post Office and handed to Supervisor Joe Rofe an envelope with the names "Fred, Norm, Joe and Phil" written on it. The envelope contained a newspaper clipping relating to a recent incident involving a disgruntled US Air employee who had recently been discharged and who had smuggled a gun aboard a PSA flight and had killed the supervisor who had terminated him, as well as himself and others aboard. On the envelope Rofe added the notation: "Carrier stated

this is why he does not come to work". This material was presented to Jackson who testified that this material caused him to become concerned because he knew the grievant was receiving stress treatment from Dr. Lewis.

On December 18, while he was on sick leave, the grievant came to the La Habra facility. According to the testimony of Jackson, the manner in which he behaved caused Jackson to instruct Supervisor Rofe to require the grievant to leave the building. Jackson testified he became "frightened" for himself, other supervisors and carriers and for the grievant's own well-being.

Thereafter, Jackson dispatched by certified mail a letter to the grievant dated December 18, 1987, containing the following:

This is to advise you that due to the status of your work situation and because your presence in the work place continues to be disruptive, you are not to enter the work floor for any reason. If you wish to review your file and/or personnel folder, you must call me and make an appointment.

The letter also informed the grievant that Dr. Lewis' December 11 letter extending treatments to January 1 had been received, and informed the grievant also that he would be "be advised by letter from this office of [his] date to return to work."

Also by letter of the same date the grievant was informed that because of his "behavior as an employee here at the La Habra Post Office" he had been scheduled for an evaluation by Dr.

Jerffrey Robbins, M.D. "to determine whether you are fit for duty as a letter carrier."

Stokley testified that he had a confrontation with the grievant in the office at a time after he had been instructed not to enter Postal premises and the grievant threatened to "get even" with those in management "who had caused all of his problems." The grievant testified he went to the office seeking an explanation after receiving a letter that "they were going to fire me".

Stokely also observed the grievant parking and loitering in the parking lot of the Post Office and in December 1987 observed him drive into the parking lot and out again.

Jackson testified that one of his clerks presented him with twenty-three PS Forms 4314-C Consumer Cards which the clerk reported had been handed to him by the grievant. Eleven of the cards variously requested the termination of Supervisors Stokley, Rofe and Phil Ernst, and for the termination of Postmaster Jackson.

Jackson also testified that prior to December 31, 1987 while walking on Postal premises enroute to a nearby restuarant the grievant ran up to him, pointed his finger at him and stated that he was the reason he, the grievant, was "out on the street." Jackson testified the grievant approached to within eighteen inches of him, gestured with his hands, appeared violent and angry. Jackson testified that he was "frightened" and told the grievant to "get out of my face or I'll knock you on your ass."

The grievant testified that this was a chance meeting while he was enroute to the doughnut shop. He had not received any pay for several weeks and "demanded" to know what was taking so long. He conceded that both participants "got loud".

He further testified that during this entire period he had felt anger and frustration and that he believed it was a "stupid" reason to fire him because he had "yelled during the earthquake". He added that he had had a bad year involving a recent move to the community and his mother's death.

III

On or about January 7, 1988 Jackson received a telephone call from Dr. Robbins indicating that his evaluation would be that the grievant was unfit for duty.

Jackson dispatched a letter to the grievant informing him that as of January 11, 1988 he was being placed on administrative leave without loss of pay "...until your evaluation report for fitness for duty has been received."

On January 14, 1988, Dr. Robbins issued his report of the psychiatric evaluation which he had performed on December 31, 1987. The summary concluded that the grievant "...poses a potential danger to others and is not capable of carrying out his duties as a mail carrier. He is in need of treatment which should definitely include anti-psychotic medication. There is a possibility that with such medication he could eventually return to work. As of this time he is totally disabled, however. I do

not believe that talking psychotherapies alone will be effective."

A copy of this report was forwarded by Jackson to Paulette Starks, Manager, Safety & Health. She reviewed the report and authorized the preparation and dispatch of an option letter.

Thereafter, a letter dated January 20, 1988 was dispatched to the grievant informing him that the medical report of his fitness for duty examination had indicated he was not capable of carrying out his duties as a City Carrier, and stating that it had been determined that he is currently unable to perform his duties with the Postal Service. He was offered the option of applying for Disability Retirement, resignation with a deferred annuity or resignation and withdrawal of all retirement monies.

The grievant responded by telephone to Starks, seeking information on applying for disability. The information was dispatched.

On February 4, 1988, the grievant signed a written instrument giving permission to the Union to review, or obtain any medical records pertaining to him. Subsequently, Starks received a written request from the Union for a copy of Dr. Robbins' report. The request was dated February 11, 1988, and signed by William Heintz. On February 18, Starks acknowledged receipt of this request and instructed the Union to obtain a signed release from the grievant. Starks was informed by Heintz on February 29 that he had secured the grievant's release.

Starks testified that she did not immediately release Dr. Robbins' report because medical records, and particularly psychiatric records, are confidential and their release can be detrimental to the patient. She testified that only a qualified physician can interpret the report. She cited ELM 568.322 g. She testified further that she had received a memorandum from the Medical Director, Western Region, stating that the grievant's psychiatric fitness for duty examination may be released upon proper authorization by the employee to his private physician only.

Accordingly, by letter to the grievant dated March 10, Starks stated that she had been authorized to release his fitness for duty report to his private physician. The letter added: "Copies can then be secured from your private physician for the Union..." The grievant was requested to supply the name and address of the physician to whom the report should be released. The grievant supplied the name and address of Dr. Lewis.

On March 24, 1988, Starks dispatched to Dr. Lewis "...a copy of the report for your perusal and decision of further dissemination."

Several days later, on April 4, the Union, through Heintz made a second request for the grievant's fitness for duty report.

In a memorandum from Max Morelock, Manager, Labor Relations, to Heintz, dated April 21, Starks letter of March 10 to the grievant was referenced, as follows: "Paullette [Starks] wrote a letter to Charles Smith and told him to get the Robbins report

and deliver it to you. Can this satisfy the attached request?
Call me if you need anything more."

IV

On April 6, 1988, the grievant was scheduled for a complete psychiatric evaluation with Sarkis T. Arevian, M.D. The grievant was informed that this examination was "...to determine whether or not you are able to perform all the duties of a City Carrier." This examination had been recommended by Dr. Farid.

On May 5, 1988, Starks received a comprehensive medical evaluation of Dr. Lewis. This report was dated January 11, 1987, and was submitted in support of the grievant's request for disability retirement.

Subsequently, the report of Dr. Arevian was issued and received by Starks. The report is dated May 26, 1988. The report contained the following recommendation:

In view of the fact that Mr. Smith is not interested in psychotherapy and is not a good candidate for therapeutic treatment, which would be the best recommendation for him - to be involved in a long term psychotherapy and deal with some of the issues that underlie his personality disorder - due to the fact that we cannot do the above, I recommend that Mr. Smith not return to his present post office job. He should either retire or possibly transfer to another post office job, with lower stress level - perhaps one in the country.

There followed a series of communications between Jackson, Starks and Dr. Farid resulting in instructions to Jackson that the grievant should be retained in his present administrative leave with pay status pending a full evaluation by Dr. Farid. However, this was followed by a memorandum from Dr. Farid to

Starks stating: "Based on the psychiatric reports most recently Dr. Arevian's, it appears Charles Smith has psychiatric problems that require prolonged treatment and that make him unfit for duty as carrier."

2. The Emergency Suspension W7N-5C-D 9956

On July 12, 1988, Jackson notified the grievant that effective Friday, July 15, 1988, he would no longer be in an administrative leave status but would be placed in a Leave Without Pay status. The notification added:

This action is being taken based on the most recent Fitness-for-Duty report dated May 26, 1988 in which Dr. Sarkis Arevian found you physically unable to perform the duties of your position.

A grievance was filed and denied Step 1 meeting was held on August 3.

A Step 1 decision was rendered on August 4 denying the grievance and rejecting the Union's contention that the placement of the grievant in LWOP status constituted an Emergency Suspension violative of the grievant's Article 16 rights to thirty (30) days notice. The Union further contended the action was based upon a medical report and its interpretation rather than the intent of the emergency provisions of the agreement. The Union challenged the just cause basis for the action.

The grievance was appealed to Step 2 where the same challenges to the action were lodged. Subsequently, on September

6, 1988, an appeal to Step 3 was taken and the action challenged on the principal procedural grounds that:

The Employer has failed to provide information as requested which renders this appeal incomplete. The Union reserves the right to, upon receipt of the documentation, to add, delete, or amend its contentions and/or corrective action.

The Union reiterated the contentions defined in its Step 2 appeal.

By letter dated November 8, 1988, to William Young, National Business Agent of the Union, Max Morelock addressed this grievance in context of grievances concerning the Notice of Proposed Removal-Separation Disability dated July 26, 1988, and asserted that both grievances were now moot "since the proposed removal has been superseded by a Notice of Proposed Removal-Separation Disability dated September 16, 1988, as well as a Letter of Decision dated October 26, 1988.

2. The July 26 Notice of Proposed Removal-Separation
W7N-5C-D 9957

Philip Ernest, Supervisor, Delivery and Collection at La Habra issued a Notice of Proposed Removal-Separation Disability under date of July 26, 1988. Postmaster Jackson was the concurring official. The notice provided thirty days notice of proposed removal of the grievant for inability to perform his assigned duties of a city carrier. The diagnosis and prognosis of Dr. Robbins and that of Dr. Arevian deriving from their respective psychiatric evaluations of the grievant were cited. The notice stated that the proposed removal action was being

taken "...to promote the efficiency and preserve the integrity of the service." Jackson testified that efficiency was promoted by not having to be concerned with disruptions of the work force in the performance of their duties, and the avoidance of scheduling, replacement and staffing problems implicit in the grievant's inability to perform his duties.

Through oversight at the station level no letter of decision was issued.

The Union timely grieved the issuance of the Notice of Removal and it appears to have been jointly considered with the Emergency Suspension grievance at the August 3 Step 1 meeting. The issues raised by the Union and the decisions of the Service essentially mirrored those attending the Emergency Suspension grievance.

Following the Step 3 Decision of November 8, 1988, rendered by Max Morelock with respect to both grievances, as set forth above, William Heintz issued a Letter of Corrections & Additions challenging the contention of the Service that the Proposed Removal/Separation Disability was moot. In connection therewith the Union contended that the removal notice was not rescinded, the grievant was still in a non-pay status," with no back pay to be issued from July 12, 1988". The Union asserted that the grievant had been denied due process and deprived of his right to review material relied on to support reasons used in the notice.

Jackson testified a request for documentation, including the report of Dr. Robbins', was made by the Union at Step 2. He did

not have the report, although he had received it in January and had forwarded it to the Division.

3. The September 16, Notice of Proposed Removal-Separation
W7N-5C-10996

This notice was issued by Ernest and Jackson was the concurring official. In essential aspects this Notice repeated the rationale, basis and reasons for the removal action as set forth in the earlier notice, but in a somewhat more detailed fashion. Moreover, the opening paragraph of this notice declared:

This letter supersedes the previous Notice of Proposed Removal dated July 26, 1988.

On September 20, the Union requested a copy of the reports of Dr. Robbins and Dr. Arvian. This request was signed by William Heintz and appears to have been submitted in connection with the Step 1 meeting on the grievance that was timely filed. The grievance challenged the removal action both on substantive and procedural grounds, and encompassed issues raised with respect to the earlier grievances, including failure to provide copies of the medical reports, as set forth above. The Union reiterated these challenges throughout the grievance process.

A Letter of Decision was issued on October 26, 1988 removing the grievant from the Postal Service effective November 4, 1988.

The grievant did not respond in person or in writing to the Notice of Proposed Removal.

The grievance challenging the removal action was denied at each step, with the Step 3 Decision issuing January 5, 1989.

Jackson testified that he had reviewed the medical reports in preparation for his concurrence with the removal action. He testified also that he did not make the reports available to the Union and that the decision with respect thereto was made at the Division level.

In the meantime, Starks had received an explicit declaration from Dr. Farid that the psychiatric records "...may not be released except to a designated physician of the employee." Dr. Farid stated further, "Disclosure of these records are "Restricted", as they might be harmful to the employee."

On September 2, Heintz wrote a letter regarding the release of the medical information. By letter dated September 12, 1988, Starks responded requesting Heintz, as the grievant's representative, to name a physician to release his medical information. Starks cited this as a necessity for release of such information. She added:

Since psychiatric evaluations are restricted information that could adversely affect the individual if improperly disclosed, my guidance for release of this information comes from the Regional Medical Director. As I mentioned in my August 29, 1988 letter, I was authorized to release the information to Mr. Smith's physician.

Subsequently, pursuant to the September 21, 1988 written request of Heintz to "review medical evidence relating to Charles Smith's removal", he was permitted to review the medical records in the office of Starks. He was allowed the time desired and was not proscribed from making notes of the content of the documents.

The Position of the Parties

1. The contentions of the Postal Service

The Postal Service contends that the grievant was properly placed in an Leave Without Pay (LWOP) status and subsequently removed from the Service for just cause.

It is the view of the Service that the grievant's behavior and attendance problems warranted the decision of management to require a Fitness for Duty examination and to undertake an evaluation to determine whether the grievant was fit for duty as a letter carrier.

In this regard, the Service avers that as early as December 18, 1987, the behavior of the grievant was sufficient to warrant emergency placement in off-duty status. The Service cites the "...or where the employee may be injurious to self or others" provision of Article 16, Section 7 as the enabling language. However, notes the Service, it elected to place the grievant on administrative (paid leave) until a medical evaluation could be obtained, rather than placing him in a without pay status as permitted by Article 16.7.

From this premise, the Service argues that the initial medical opinion of Dr. Robbins issued on January 14, 1988 would have supported the emergency suspension predicated on safety considerations of employees at the La Habra Postal facility, but management awaited the results of a second medical opinion confirming the report of Dr Robbins.

The Service further contends that, in exercising the emergency suspension procedure effective July 15, 1988, management was clearly within the contractual provisions of Article 16.7, and did not act until it had conclusive reports that the grievant was potentially dangerous to others at the work location. It is the contention of the Service that Section 5 of Article 16 applies only to situations outside those listed in Section 7.

Turning to contentions raised by the Union during the grievance steps and at the arbitration hearing, the Service asserts that a Notice of Proposed Removal was first issued to the grievant on July 26, 1988, but through an oversight of local management this Notice was not followed within approximately 30 days with a Letter of Decision by the Postmaster. However, notes the Service, a second Notice of Proposed Removal was issued on September 16, 1988 containing clear language stating that his second notice superceded the previous notice. This second notice, avers the Service, was followed by a timely issued Letter of Decision, and the subsequent removal of the grievant.

The Service contends that no harm to the due process rights of the grievant occurred from the reissuing of the Notice of Proposed Removal since a proposed action had no actual adverse effect on the grievant's status of employment, and the grievant was given opportunity to respond to the second Notice of Proposed Removal. The correction of the defect in the initial process did not result in a vitiation of any rights accorded the grievant and

has no impact on the conclusion that the grievant is not fit for employment.

Moreover, with respect to the claimed denial of due process resulting from the refusal to release to the Union the Fitness for Duty reports, the Service contends, in effect, that Section 568.322,g. of the Employee and Labor Relations Manual governs the procedure to be followed in dealing with request for release of medical information, and the Union was placed on notice as early as April 1, 1988 concerning the policy of releasing information through the grievant's attending physician. It is the further contention of the Service that it complied with those ELM provisions and took the additional step of permitting the representative of and Advocate for the Union full permission and opportunity to review the FFD reports. Additionally, contends the Service, it remains unexplained why the Union did not obtain a copy of the medical records from the grievant's personal physician, since the grievant had signed a release to allow the Union representative to obtain his medical records pursuant to an action initiated in the first instance by the Service.

In sum, it is the position of the Postal Service that it, (1) provided full due process to the grievant, (2) retained the grievant in pay status beyond period required, (3) provided the grievant with options, (4) was neither capricious nor arbitrary in seeking his removal and (5) his removal was for just cause and based on the grievant's psychological unfitness to perform the duties of his position.

2. The contentions of the Union

The Union contends that the Service failed to meet its burden of just cause.

In this regard the Union asserts that the initial Notice of Removal was not rescinded and is here applicable, whereas the second Notice of Removal is "non-existent" and a nullity. From this contention, the Union avers, in substance, that, as the Service failed to conform to the procedural requirements with respect to the first Notice of Removal, failed to issue a Letter of Decision with respect thereto, did not answer the grievance in a timely manner and withheld information that was relied on in issuing the removal notice, the action of the Service was without just cause.

A principal contention of the Union is founded upon the assertion that the handling of these matters was procedurally defective and that these procedural defects are of sufficient gravity to cause the grievances to be sustained.

The Union challenges the actions of the Service in assertedly failing to provide the Union with copies of the examining physicians' reports after repeated requests of the Union for all pertinent documents pertaining to these cases. It is the Union's contention that this withholding of information is contrary to the provisions of Article 31, Section 3 of the National Agreement which clearly places on the Service the mandated obligation to supply information to the Union.

With reference to this contention, and in context of the instant cases, the Union argues that all requested documents were not made available to the Union, or were made available belatedly and after all internal steps of the grievance procedure had been exhausted. In substance, relying on various opinions and awards submitted to this Arbitrator, the Union stresses that the obligation of full disclosure and prompt availability of medical records is fully applicable and important here because the instant removal is based on physical inability to perform the duties of the job.

Furthermore, the Union renews its objection to the offer and receipt into evidence of various Postal Service exhibits either because they relate to medical reports mentioned for the first time at the arbitration hearing, or because they are not germane and are prejudicial to the grievant in that they were not used as a basis for his removal or his emergency suspension.

Finally, the Union contends that, arguendo and in any event, the medical reports which were finally provided at the arbitration hearing indicate that "with proper therapy the grievant is a salvagable employee." In this regard the Union states in its brief, "The evidence is not convincing, at this stage, that the grievant is so ill that he can not be considered as being able to be placed medically in a position where he can not work if properly controlled by his medical treatment."

The Union seeks rescission the the removals and emergency suspension, reinstatement of the grievant, and a make whole order together with interest.

Analysis

I

The threshold question in this arbitration is whether the process of removing the grievant from employment in the Postal Service was accompanied by procedural defects prejudicial to the grievant and denied him due process.

It is concluded that procedural due process was denied the grievant and that the defects were not cured by giving the Union a form of circumscribed, limited access to the psychiatric evaluation reports of Dr. Robbins and Dr. Arevian.

The issue going to the heart of any procedural bar to the actions of management challenged by these consolidated grievances is that concerning the purported failure of the Service to accomplish a timely release of the psychiatric medical information serving as the catalyst for the emergency suspension and the removal actions. Not in dispute here is the principal expressed at the National Level arbitration that the language of Article 15 requiring that all of the facts and arguments relied upon by both parties must be fully disclosed before the case is submitted to arbitration should be strictly enforced. E.g. Case No. H8N-5B-C 17682, decided by Arbitrator Benjamin Aaron, April 12, 1983 and Case No. N8-W-0406, decided by Arbitrator Richard Mittenthal, September 21, 1981.

Consideration of the Employee & Labor Relations Manual, 568.322 g. in context of Article 15, Section 2, Article 17, Section 3 and Article 31, Section 3 is essential to a determination of whether the Service failed to comply with concept of full disclosure.

ELM 568.322 g. pertains to information available to licensed physicians and provides:

The Medical Officer makes available a full report of the medical evidence in the employee's file (including a copy of the reported behavior irregularities or evidence of unsatisfactory service) only to a licensed physician, named in writing for that purpose by the employee or his representative.

Article 15, Section 2 requires the Service at Step 2 to make a full and detailed statement of facts and contractual provisions relied upon and mandates full cooperation of the parties to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31.

In pertinent part, Article 17, Section 3 provides that the properly certified representative "...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..."

Article 31, Section 3 provides that the Service "...will make available for inspection by the Union all relevant information necessary for...administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance..."

It may reasonably be argued that the principal and policy of full disclosure addressed in Articles 15, 17 and 31 is sufficiently flexible to accomodate reasonable limitations, including procedures designed to protect the confidentiality of medical records of individual employees. ELM 568.322 g. appears to be a manifestation of a rule of reason fashioned with due regard to the sensitivity and privileged nature of pshyciatric records and reports.

Notwithstanding, the National Agreement contains no provision differentiating medical records from other records and information, or extending a cloak of secrecy or privilege to those records. See Case No. A-C-276, decided by Arbitrator James J. Willingham, December 11, 1972; see also Fourth Step Settlement in Case No H7N-1P-C 2187, dated November 16, 1988. Thus, upon request, the Union became entitled to access to the records for review and determination relevant to the processing of the grievance. See Opinion and Award of Arbitrator William J. LeWinter, Case No. S4N-3P-D 19737, decided November 21, 1986.

Clearly, the pshyciatric evaluation reports of Dr. Robbins and Dr. Arevian were central to the suspension and removal actions. The Union correctly argues that since the removal action was based upon the grievant's physical inability to perform the duties of the job without hazard to himself and others, it became critical and essential that access to the documents be accorded. The form and degree of access to the reports themselves is perhaps open to question in the context of this particular case.

But the short answer here is that on February 4, 1988, the grievant had signed a release declaring, "I am giving permission to Branch 110-NALC, to review, or obtain any medical records concerning myself", and this became a matter of record with Postal Management. This was an enabling action which removed any reasonable impediment to providing medical records to the Union, save the Service's own internal rules and policy grounded in concern of harm to the employee. While the Service felt understandably constrained to act cautiously and responsibly in this matter, and although, under Article 19, ELM 568.322 g. is given status, nothing therein inconsistent with the provisions of the National Agreement may stand. Further, the record shows that copies of the reports in question were made available to the Postmaster (as well as Paulette Starks, Manager, Safety & Health Services) and the Service advanced no convincing rationale why confidential and sensitive medical information available to responsible members of management should become "restricted" from forthwith disclosure to a "properly certified" representative of the Union, such as William Heintz, known by management to be fully involved in the processing of the pending grievances. As observed by Arbitrator J. Fred Holly with respect to a factually distinguishable procedural question arising in Case No. S8N-3D-D-34092, decided February 15, 1982, "Local parties simply do not enjoy the right to ignore clear and unambiguous provisions of the National Agreement. Neither do the parties have the right

to adopt and follow procedures which do not conform to clear-cut provisions of the National Agreement.

The evidence discloses efforts on the part of the Union to obtain direct access to the medical report of Dr. Robbins, and other medical records not particularized, commencing February 4, 1988, within a month of the action placing the grievant on administrative leave with full pay. Considering the sensitive nature of the report of Dr. Robbins, and the internal administrative, deliberative and evaluative process generated by the Union's request for access, the reply of the Service and its efforts to strike an accomodating balance, must be viewed as a good faith effort to meet the Union's request, within the spirit and parameters of the policy of the Service regarding the release of sensitive medical reports.

But again, the grievant had authorized release to the Union of medical records in possession of and relied upon by the Service. The evidence contains no indication that this authorization was ever countermanded, and, indeed, the full implication to be drawn from the evidence is that the grievant remained throughout the extended grievance process involving three contested actions fully supportive of the efforts of the Union to obtain release of the information. The error compounded by the Service was its persistence throughout the entire process, including the aftermath of the second removal action, in preconditioning Union receipt of the reports of Dr. Robbins and Dr. Arevian, an error not eradicated by according the Union

access to the actual reports only belatedly and under conditions that diminished their value as an ingredient and attribute in the grievance/arbitration process. In light of the policy of full disclosure and exchange of information mandated by the provisions of the National Agreement, the Service was in no defensible position to superimpose its notions of propriety or to be paternalistic. Disciplinary or removal actions predicated upon medical records emanating from psychological fitness for duty examinations are not unique in the Service, and if the parties have seen fit to remove disclosure of psychiatric reports and evaluations from the general reach of Articles 15, 17 and 31 of the National Agreement, the indication of this is not to be perceived from the four corners of that Agreement, and no National Arbitration Award has been cited in support of such.

It is apparent that in the interval of these events the Union was impeded from achieving optimum insight into the diagnosis and prognosis, first of Dr. Robbins, and later, of Dr. Arevian. It is true that the parties were delving in an area in which practitioners skilled in psychiatry and psychology recognized the potential for harm to the grievant should he become privy to evaluations and commentary unattended by the presence or intermediation of a qualified physician or practitioner. They were also contending with disclosure of psychiatric medical information mandating caution and a high degree of circumspection. The caution and judicious approach exhibited by Postal management was perhaps justified in the

abstract, but under the contractual provisions embedded in the National Agreement the Service could not legitimately shield disclosure or undue delay access. Neither was the Service free to impose a restricted form of review and access materially impeding the Union's legitimate right of review, evaluation, consultation with trained experts in the field of psychiatry and psychology, or other legitimate uses in connection with the instant grievances.

The record is silent as to the follow-up actions taken by the grievant and, through him, by the Union, in seeking access to the report first, of Dr. Robbins and later of Dr. Arevian, through the auspices of Dr. Lewis. But this is irrelevant because the Union had the right to have the reports furnished directly by the Postal Service and not be subordinated to the judgment of a third party. By virtue of the course taken by the Service, the Union was deprived of the opportunity to deliberate the content, diagnoses, prognoses and conclusions of the reports, and use the reports in aid of more effectively grievance processing, as delineated above. Whether the end result would have been different is beside the point and speculative. The point is that the Union was entitled to the reports and with them in hand could have better evaluated the course to be pursued in the interests of the grievant. Contrary to the contention of the Service the procedure of providing the medical report to the grievant's personal physician for release at the discretion of the physician

does not meet the requirements of the National Agreement. The rights of the grievant were prejudiced to a material degree.

II

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

Normally, consideration of the merits would be unnecessary, but where, as here, remedial implications are enmeshed with the substantive merits of the action taken, a discussion of the merits is fully warranted.

This is not a typical case of removal for cause, and there exists a substantial body of testimony of record, not based on the denied medical reports, from which it may be concluded that the Service acted both prudently and correctly under the National Agreement in placing the grievant on administrative leave pending definitive fitness for duty reports bearing on the grievant's fitness to perform the duties of a city carrier and to work side by side with other Postal employees without jeopardizing the safety of the work place. Moreover, in addition to the observed conduct of the grievant at the work place, Postal management had received both the oral summary from Dr. Robbins and written medical diagnoses of Dr. Lewis, the grievant's psychologist, information coming legitimately into its possession and not subject to the procedural defect deriving from non-disclosure, justifying the emergency action taken. In short, local management

had ample basis on January 7, 1988 for putting the grievant on administrative leave with pay, pending receipt and careful review of the fitness for duty examination report.

Moreover, the combination of the grievant's behavior over the period preceding July 15, 1988, and the content of the medical reports of Dr. Robbins, Dr. Arevian and Dr. Lewis, formed a substantial basis for invoking the emergency procedure of Article 16, Section 7 on the ground that the grievant may be injurious to himself and others. In the circumstances, arguendo and placing aside the denial of procedural due process here present, there existed no requirement that the Service continue the grievant on paid administrative leave, or that a thirty day notice be given before the AWOP status could commence. The Service is correct in its contention that the thirty day notice period is not applicable to the instant emergency suspension.

The suspension was timely followed by the July 26 Notice of Proposed Removal, which became deficient by reason of the failure of local management to issue a Letter of Decision.

Contrary to the Union, the Notice of Proposed Removal dated September 16, 1988 effectively superseded the previous deficient proposed removal and had efficacy as an action taken by management to correct the defect arising as a consequence of the oversight in failing to issue a Letter of Decision. Clearly, as asserted by the Service, this oversight, while giving rise to a procedural deficiency, was correctable and curable, and did not impact the underlying basis for the removal, namely that the

grievant lacked the ability to perform the assigned duties of a city carrier.

III

The denial of due process above discussed, however, deprived the emergency suspension and removal action dated September 16, 1988, and the Letter of Decision, dated October 26, 1988, of just cause. These actions are rescinded. It is unnecessary to rule on the alleged procedural defect deriving from the failure of the Service to issue a Step 2 Decision in the course of the various grievances.

The Arbitrator denies the motion of the Union to exclude from evidence and consideration the medical reports of Dr. Robbins and Dr. Arevian, as well as other related documents. In the context of this arbitration these may be considered and accorded the weight believed appropriate by the arbitrator.

For the purpose of fashioning an appropriate remedy in this matter the Arbitrator must remain cognizant that the report of Dr. Robbins and Dr. Arevian contain the statements attributed to them in the Notice of Proposed Removal-Separation Disability, dated September 16, 1988. Nor may he ignore the content and conclusions contained in the January 11, 1987 report of Dr. Lewis.

Thus, the Arbitrator finds that the body of medical opinion present in this record lends substantial support to the conclusion that at all relevant time prior to September 16, 1988, and at time of the effective date of the removal action, November

4, 1988, the grievant was unable to perform the duties of a city carrier.

Accordingly, the forthwith reinstatement of the grievant is not ordered. Rather, reinstatement of the grievant to his position as a city carrier will be required only upon certification of a qualified psychiatrist issued pursuant to a full and complete psychiatric fitness for duty examination finding (1) the grievant mentally able to perform all the duties of a city carrier, (2) the grievant's reinstatement will not be injurious to himself or others and, only in the event both (1) and (2) are answered in the affirmative, (3) returning the grievant to duty at the La Habra Post Office as contrasted to an assignment otherwise in the employ of the Postal Service would not adversely affect his capacity to achieve a satisfactory social adjustment.

The conclusions and recommendations of this psychiatric fitness for duty examination as to (1), (2) and (3) above shall be binding upon the grievant, the Union and the Postal Service. The failure of the grievant to accept and abide by the recommendations shall terminate the obligations of the Postal Service under this Award; whereas the failure of the Postal Service to conform to the recommendations, including a good faith effort to implement recommendations issued pursuant to (3) above, to the extent possible and permissible under the terms of the National Agreement, shall continue its back pay obligation.

The psychiatric fitness for duty examination shall be performed by a qualified psychiatrist chosen by mutual agreement

of the parties or, failing agreement, pursuant to one chosen under the procedure described in Article 13, Section 4, subsection G of the National Agreement governing the selection of a third physician. This alternative is specified merely as a practical and convenient method of selection imposed by this arbitration award.

The refusal of the grievant to submit to this fitness for duty examination shall terminate his right to reinstatement with the Postal Service.

As an alternative to this examination, the grievant may choose to exercise one of the three options contained in the option letter issued over the signature of Paulette Starks, dated January 20, 1988, and, if the option of applying for Disability Retirement (if applicable) is chosen, the grievant may reactivate the initiative previously taken in this regard.

The grievant shall be immediately and forthwith placed on administrative leave with pay and shall be reimbursed for all loss of pay from July 15, 1988 to the date of his restoration to pay status. No award of interest is made. He shall lose no seniority as a result of the removal action taken.

The grievant shall be retained in paid administrative leave status pending completion of the psychiatric fitness for duty examination process encompassing the examination, the issuance of the evaluation and report by the physician, and for a reasonable period thereafter to allow for consideration of the report by the

parties and their effectuation of its recommendations administratively.

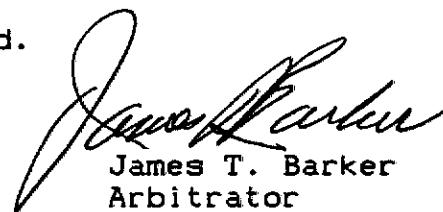
If a period of therapeutic treatment and/or psychotherapy is directed as a precondition to the grievant's return to duty, the responsibility and/or obligation of the Postal Service under the National Agreement with respect to the duty and pay status of the grievant may be resolved through agreement of the parties, or may be made separately grieved under the provisions of the National Agreement.

If not accomplished heretofore, a copy of the Psychiatric Evaluation report of Dr. Robbins, dated January 14, 1988, and a copy of the report of Dr. Arevian, dated May 26, 1988, shall be immediately be dispatched to William Heintz, Senior Vice-President of the Union.

This Arbitrator retains jurisdiction for a period of ninety (90) days for the purpose of addressing remedial issues pertaining hereto should one or both of the parties request.

AWARD

The grievance is sustained.



James T. Barker
Arbitrator

Coronado, California
April 3, 1989