C # 10489

REGULAR ARBITRATION PANEL

In the Matter of Arbitration	GRIEVANT: James McCann, Jr.
between	POST OFFICE: Woodbridge, VA
UNITED STATES POSTAL SERVICE	CASE NO. E7N-2P-D 24653
and	NALC CASE NO. 3606
NATIONAL ASSOCIATION OF LETTER CARRIERS, ALF-CIO	

BEFORE: Bernard Cushman, Esq., ARBITRATOR

APPEARANCES:

For the Postal Service:
Alfred A. Pope

For the Union:
Patrick J. Nolan

Place of Hearing: Merrifield, Virginia

Date of Hearing: November 15, 1990

AWARD:

There was just cause for the removal of the Grievant. The grievance is denied.

Dated: December 7, 1990

Bernard Cushman

Bernard Cushman, Arbitrator

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	) GRIEVANT: James McCann, Jr.
and	) POST OFFICE Woodbridge, VA
	) CASE NO. E7N-2P-D 24653
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OPINION AND AWARD

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Both parties were offered full opportunity to present evidence and to examine and cross examine witnesses. At the conclusion of the hearing both parties submitted oral argument. The entire record, including the oral arguments, has been carefully considered by the Arbitrator.

THE ISSUE

1. Is the grievance arbitrable since the Grievant subsequent to the appeal to arbitration on May 10, 1990, filed an appeal with the Merit Services Protection Board which was denied on the ground that the Grievant was not a veteran?

2. If arbitrable, was the Grievant, James McCann, Jr., removed for just cause? If not, what shall the remedy be?

RELEVANT CONTRACTUAL PROVISIONS

Article 16, Discipline Procedure

Section 1. Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol) incompetence, failure to perform work as requested, violation of the terms of the 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.

EMPLOYEE AND LABOR RELATIONS MANUAL (ELM)

870 Employee Assistance Program (EAP)
871 Introduction
871.1 Purpose

871.11 The Postal Service recognizes that alcohol and drug abuse are serious health problems which can adversely affect an employee's job performance as well as personal life. Both alcohol and drug abuse result in the altering of mood and consciousness by intoxication, stimulation, or sedation. In addition, alcohol and drug abuse can affect an employee's ability to meet employment requirements. These conditions, when untreated, can cause deterioration of physical and mental health and can result in early death.

871.12 The Employee Assistance Program (EAP) has been established primarily to help postal employees in their efforts to recover from alcohol and drug abuse, thereby eliminating the harmful effects they may have on the individual's employment and personal life. EAP also continues our obligation under the various collective-bargaining agreements to provide a program for employees afflicted with the disease of alcoholism. The program is not intended to alter or amend any of the rights or responsibilities of postal employees or of the Postal Service itself.

871.23 The EAP is a formal, nondisciplinary program designed to assist employees in recovering from alcoholism and drug abuse through evaluation, counseling, and/or referral to outside experts.

871.3 Policy

871.31 Participation in EAP is voluntary and will not jeopardize the employee's job security or promotional opportunities. Although voluntary participation in EAP will be given favorable consideration in disciplinary action, participation in EAP does not prohibit disciplinary action for failure to meet acceptable standards of work performance, attendance, and/or conduct problems. Further, participation in EAP does not shield an employee from discipline or prosecution for criminal activities.

871.32 Employees are encouraged to seek assistance through participation in EAP. All inquiries from employees, as well as participation in EAP, are held in confidence and subject only to the exceptions described in 874.4.

DISCUSSION, FINDINGS AND CONCLUSIONS

At the outset of the hearing, the Postal Service moved for dismissal of the grievance for lack of jurisdiction. The Postal Service asserted that the grievance was not arbitrable because the Grievant, James McCann, Jr., had filed an appeal with the Merit Systems Protection Board (MSPB) and that pursuant to Article 16, Section 9, of the Agreement and Section 2 of a Memorandum of Understanding dated March 3, 1988, between the Postal Service and the Union, the Grievant waived access to arbitration.

The Grievant was issued a Notice of Removal dated September 27, 1989. A Step 1 grievance was filed on October 12, 1989. The grievance was denied at Step 1 on October 13, 1989, and was duly appealed to Step 2. A Step 2 decision was rendered denying the

grievance on December 29, 1989. After appeal to Step 3 dated November 15, 1989, the Step 3 decision denying the grievance was issued on December 27, 1989. The Union appealed to arbitration on January 22, 1990. On May 10, 1990, the Grievant filed an appeal with the MSPB. On June 14, 1990, MSPB issued an Initial Decision by Administrative Judge Roy J. Richardson finding that MSPB did not have jurisdiction because the Grievant failed to show that he was a "veteran" for purposes of 5 U.S.C. 2108. The Administrative Law Judge held that the time period of the Grievant's service in the Navy from June 23, 1980 to July 30, 1984, did not bring the Grievant within the scope of the rights afforded under the statute for veterans. The Grievant did not appeal that decision.

Article 16, Section 9, of the Agreement provides:

> Section 9. Veterans' Preference
>
> A preference eligible is not hereunder deprived of whatever rights of appeal such employee may have under the Veterans' Preference Act; however, if the employee appeals under the Veterans' Preference Act, the employee thereby waives access to any procedure under the Agreement beyond Step 3 of the grievance-arbitration procedure.

The Postal Service and the Union entered into a Memorandum of Understanding dated March 3, 1988, which provided:

> I. As general principles, the parties agree that the purpose and intent of Article 16, Section 9 is:
>
> A. To afford preference eligible employees, because of their status under the Veterans' Preference Act, a choice of forums in which to obtain a resolution on the merits of certain adverse employer actions set forth in Chapter 75 of Title 5, U.S. Code (e.g., suspension of more than 14 days, discharge), and

B. To prevent situations in which the Employer is required to defend the same adverse action before the MSPB and in the Grievance-Arbitration procedure.

II. In accordance with the principles stated in I, above, the following procedures shall be applied:

A. A preference eligible employee may both file a grievance and appeal to the MSPB, as appropriate, and the Union shall be entitled, at its discretion, to pursue a grievance so filed to arbitration. However, the union will be deemed to have waived access to arbitration in any of the following circumstances:

1. If at the time that the union appeals the grievance to arbitration, the grievant also has an appeal pending before the MSPB. (Postmark will constitute the date of appeal to arbitration; Postmark will also constitute date of withdrawal of appeal to the MSPB).

2. If the grievant appeals the matter to the MSPB at anytime after the union appeals the matter to arbitration. (Postmark will constitute the date of the MSPB appeal);

3. If the MSPB issues a decision on the merits;

4. If at any time the MSPB begins a hearing on the merits;

5. If at any time the employee requests the MSPB to issue a decision on the record without a hearing and the MSPB has closed the record; or

6. If at any time the employee and the Employer resolve the MSPB appeal through settlement.

III. In notices in which the Postal Service advises employees of their right to appeal to the MSPB, the following statement shall be included:

> You have the right to file an MSPB appeal and a grievance on the same matter. However, if the MSPB issues a decision on the merits of your appeal, if an MSPB hearing begins, if the MSPB closes the record after you request a decision without a hearing, or if you settle the MSPB appeal you will be deemed to have waived access to arbitration. Further, if you have an MSPB appeal pending at the time the Union appeals your grievance to arbitration, of if you appeal to the MSPB after the grievance has been appealed to arbitration, you will be deemed to have waived access to arbitration.

> IV. If the Postal Service erroneously advises an employee that he or she is entitled as a result of veterans' preference to appeal to the MSPB and if MSPB declines jurisdiction, the employee or the Union shall be entitled to initiate a grievance within 14 days from receipt of notice that the MSPB has dismissed the appeal for lack of jurisdiction. (Receipt of notice shall be presumed to have occurred 5 days from the date of the letter dismissing the appeal). If a grievance had previously been initiated, and if the grievance is pending at the time the MSPB dismissal notice is received, the Union shall be entitled to continue processing the grievance.
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> V. At the Step 3 discussion of a grievance, the Union representative and the USPS representative each have an obligation to inform the other of the existence of a companion MSPB appeal.

The question presented is whether the filing of an appeal with MSPB by a non-veteran whose appeal is denied for lack of jurisdiction because he is deemed a non-veteran since his period of military service did not qualify him for the right of appeal constitutes a waiver of the Grievant's right to arbitration under the collective bargaining agreement between the parties.

The Arbitrator holds that such a filing does not constitute a waiver within the scope of the Article 16, Section 9, of the Agreement. That provision by its express terms applies only to preference eligibles. MSPB held that the Grievant was not a preference eligible. Hence, Section 9 of Article 16 does not apply.

Article 15 contains a very broad grievance definition.

> A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of

> an employee or of the Unions which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

The right to arbitration is similarly broad. Arbitration applies to any grievance which is not settled in the grievance procedure. Article 15, Step 3, (d) provides:

> (d) The Union may appeal an adverse decision directly to arbitration at the Regional level within twenty-one (21) days after the receipt of the Employer's Step 3 decision in accordance with the procedure hereinafter set forth; provided the Employer's Step 3 decision states that no interpretive issue under the National Agreement or some supplement thereto which may be of general application is involved in the case.

Article 16, Section 9, is an exception to a broad contractual right and, accordingly, should be narrowly construed. Moreover, the teaching of the Supreme Court's decisions in the Steelworkers' trilogy as stated in United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, is that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

The Postal Service argues that the mere fact that a grievant files an "appeal" to MSPB waives arbitration. The mere act of filing, according to the Postal Service, is enough. The short answer to that contention is that such a result only applies if the filer is a preference eligible.

The Postal Service also points to the Memorandum of Understanding as supporting its view of Article 16, Section 9. The Memorandum is one which is likewise limited in scope to preference eligible employees. The Memorandum of Understanding does not embrace non-veteran grievants. It is only grievants who are also preference eligibles who waive their otherwise applicable arbitration rights by appealing to the MSPB. The Memorandum of Understanding applies only to Article 16, Section 9, and its scope is limited to that Article.

The Postal Service says that the purpose of Section 9 of Article 16, as well as the Memorandum of Understanding, is to prevent situations in which the Postal Service is required to defend the same adverse action both before the MSPB and in arbitration. That is true, but the purpose was limited in scope to preference eligibles.

The Postal Service also points out that it advised the Grievant that he did not have rights of appeal to the MSPB under the Veterans' Preference Act. That the Grievant was mistaken in his belief that his period of military service entitled him to access to MSPB does not affect the fact that he turned out to be a non-veteran for purposes of appeal to the MSPB. The contract grants a non-veteran the right to arbitration and contains no such exception as to non-veterans as is found in Section 9. The Arbitrator understands the desire of the Postal Service to be free from the need to defend one action in two forums. Rights to arbitration, however, have been established by the Agreement. Rights to appeal to the MSPB have been established by Congress.

The Arbitrator has carefully considered the arbitration decisions filed with the Arbitrator which the Postal Service urges are decisions which support its position. In none of these cases was the grievant a non-veteran and those cases are therefore quite distinguishable.

The Arbitrator finds that the grievance before him is arbitrable. The Motion to Dismiss is denied.

THE MERITS OF THE GRIEVANCE

We turn then to the merits of the grievance.

The Grievant was first employed by the Postal Service on August 30, 1986, as a Distribution Clerk. On April 22, 1988, a Notice of Removal was issued to the Grievant for failure to maintain his work schedule and absence without leave. The Form 50 dated August 24, 1988, states that the Grievant was removed for those reasons effective May 25, 1988. The Grievant claimed that he resigned. In any event, he was thereafter in July 1988 assigned a position as City Carrier in which position he was employed at the time of the events here in dispute. The Grievant stated that he became a City Carrier because he wanted an outside job.

On September 27, 1989, a Notice of Removal was issued to the Grievant by Elvin F. Hadley, Superintendent Stations and Branches at Woodbridge, Virginia. The Notice of Removal stated:

> You are hereby notified that you will be removed from the U.S. Postal Service thirty days after receipt of this letter. The reason for this action is:

You are charged with failure to meet satisfactory attendance requirements. You have failed to report for work as scheduled on the following dates:

August 3, 1989	8.00 HRS	AWOL
August 4, 1989	8.00 HRS	AWOL
August 5, 1989	8.00 HRS	AWOL
August 8, 1989	.25 HRS	TARDY
August 9, 1989	.16 HRS	TARDY
August 11, 1989	8.00 HRS	AWOL
September 1, 1989	8.00 HRS	SICK LEAVE
September 16, 1989	8.00 HRS	AWOL
September 20, 1989	8.00 HRS	AWOL
September 21, 1989	8.00 HRS	AWOL
September 22, 1989	8.00 HRS	AWOL
September 23, 1989	8.00 HRS	AWOL
September 25, 1989	8.00 HRS	AWOL
September 26, 1989	8.00 HRS	AWOL

In addition the following elements of your past record have been considered in arriving at this decision:

1. You were given a letter of warning dated January 19, 1989 for failing to meet acceptable attendance requirements.

2. You were given a suspension of fourteen days (reduced to seven days) dated May 22, 1989 for failure to meet satisfactory attendance requirements.

3. You were given a suspension of fourteen days dated August 1, 1989 for failure to meet satisfactory attendance requirements.

If this action is overturned on appeal, back pay will be allowed, unless otherwise specified in the appropriate award or decision, only if you have made reasonable efforts to obtain other employment during the relevant non-work period. The extent of documentation necessary to support your back pay claim is explained in the Employee Labor Relations Manual, section 436. Copy attached.

You have the right to file a grievance under the Grievance/Arbitration procedure set forth in Article 15 of the National Agreement within fourteen (14) days of your receipt of this notice.

Elvin Hadley, the Grievant's supervisor since July of 1988 when the Grievant was employed as a Carrier, issued the Notice of Removal. Hadley testified that he issued the Notice of Removal because of the Grievant's poor attendance, including both failures to come to work and lateness which according to Hadley began earlier and never did improve. Hadley testified that sometimes when the Grievant was absent, the Grievant called in and sometimes he did not. Hadley testified further that he often discussed the Grievant's poor attendance with the Grievant. Hadley stated that he had asked other Carriers to assist the Grievant with his attendance problems, particularly with regard to transportation. In December 1989 he referred the Grievant to the Employee Assistance Plan to assist the Grievant with his problems after he had been unsuccessful after many attempts to help the Grievant. The Grievant claimed in August of 1989 that he could not report for three days because of problems with traffic tickets, but failed to produce any satisfactory documentation, nor did the Grievant produce any documentation for the period from September 16 to September 26, 1989, during which period the Grievant stated that he was kept in a detention center.

The record shows that the Grievant was given progressive discipline for failure to meet attendance requirements, a Letter of Warning dated January 19, 1989, a seven day suspension of May 22, 1989, and a fourteen day suspension on August 1, 1989. There is no evidence that this discipline was ever grieved.

The Grievant's attendance record was indeed a poor one. The grievance stated that "there may be a possibility that Mr. McCann was not afforded the full opportunity available to his (sic) through EAP to correct his personal problems contributing to his poor attendance." At the hearing, however, the Union contended that not only was the Grievant not afforded an adequate opportunity to correct his personal problems through the EAP, but also that the circumstances surrounding his absences were such as to warrant a second chance.

The Grievant testified that he did have attendance problems but felt they were excusable because of his personal circumstances which he contended caused his irregularity in attendance. These problems centered about his concerns for his son. According to the Grievant, a child was born to his girl-friend in September of 1986. The Grievant was not sure whether the child was his. After some six months and blood tests, it was ascertained that he was indeed the father of the child. Once assured of his paternity, he was troubled for his son's welfare because his girl-friend who had custody of their son lived in a drug infested area. There was tension over this situation for a substantial period of time until the matter was finally worked out through the mediation of relatives, and his son is now with the Grievant's aunt. At the time he felt quite alone since his parents were separated, and his uncle with whom he had a close relationship died. This situation, including the custody battle, affected him emotionally and psychologically so that his attendance suffered. The Grievant

stated further that he felt he had to make a choice between his son and his job and chose his son.

The Grievant stated that he discussed his situation with Supervisor Hadley and did go to the EAP counselors for help. The Grievant felt that he did not obtain any meaningful help from the counselors who seemed primarily interested in whether he had a drug or alcohol problem. During the 30 day notice period for his removal, EAP Specialist Turner did comfort him on some occasions but did not suggest that the Grievant attend a parenthood course and give him some brouchures until the 30 day notice period of the Notice of Removal. As a result the Grievant did enroll in a parenthood course in Bethesda despite the pendency of the Notice of Removal.

The Grievant also testified that he always called in when he did not report for work. The Grievant testified that the absences of August 3, 4, and 5, 1989, were occasioned by the issuance to him by the police of tickets because he had no proper tags on his car. He had falsified decals on his tags. The police told him he must park his car until he got the situation straightened out. According to the Grievant, he so informed Supervisor Hadley and said he would be out a couple of days. The Grievant testified that two tickets which were placed in evidence related to these August absences. Hadley testified that the Grievant produced no documentation to support his story. Inspection of the tickets produced by the Grievant showed that the tickets were not for August 3, 4, and 5, 1989, as testified to by the Grievant, but

were for June 27, 1989. This contradiction and other contradictions in his testimony adversely impact on the Grievant's credibility, and his explanation of these absences is not credited.

The Grievant further testified that during the period from September 16 to September 26 he was incarcerated in the Detention Center. He stated that the police stopped him for "driving without a helmet," took him to the station and ascertained that his driver's license had been suspended and that there was a warrant for the Grievant's arrest in Charles County. The Grievant testified that he asked to have someone "call the job." The record indicates that the fact that he was in the Detention Center was entered on Form 3971.

On cross examination the Grievant testified that he had no attendance problems prior to those stated in the Notice of Removal. However, the record shows that he did indeed have attendance problems resulting in the issuance of the April 22, 1988, Notice of Removal. Again, the Grievant's credibility is impaired by this contradiction.

The Arbitrator has found that the Grievant's absenteeism record was poor and unacceptable. His excuses do not constitute acceptable mitigation. In any event, a discharge for excessive absenteeism if factually supported is a discharge for just cause. The Grievant has a lengthy history of excessive absenteeism. His personal problems, like illness, do not preclude management's right to terminate for excessive absenteeism. As has been said by many Postal Service arbitrators, including this one, at some

point, the employer must be able to terminate the services of an employee who is unable to work with an acceptable level of regularity even despite the fact that inability to work is due to illness. See Case No. AB-S-6102-D, Vera D. Bugg (Arbitrator Holly), Pamela Allen (APWU and USPS, October 21, 1977, Arbitrator Meyers), Susan Smith, AC-S-12,796-D (Arbitrator Cushman). The realities of economic survival and the demands of efficiency require that an employer be able to depend upon reasonable regularity of employee attendance in order to plan and perform his work schedule. Where reasonable standards of work attendance cannot be met due to the physical inability of the employee, termination by the employer is warranted.

The Union contended that the EAP counselors did not render the Grievant adequate assistance, and that therefore there was not just cause to remove the Grievant. That contention is without merit.

As testified to by EAP Specialist Turner, the primary obligation of EAP is to deal with alcoholism and drug abuse. Those employees with other problems after discussions are referred to outside agencies. It is noted that Section 871.12 of the ELM provides:

> 871.12 The Employee Assistance Program (EAP) has been established primarily to help postal employees in their efforts to recover from alcohol and drug abuse, thereby eliminating the harmful effects they may have on the individual's employment and personal life. EAP also continues our obligation under the various collective-bargaining agreements to provide a program for employees afflicted with the disease of alcoholism.

> The program is not intended to alter or amend any of the rights or responsibilities of postal employees or of the Postal Service itself.

And, Section 871.23 provides:

> 871.23 The EAP is a formal, nondisciplinary program designed to assist employees in recovering from alcoholism and drug abuse through evaluation, counseling, and/or referral to outside experts.

It does not appear that the Grievant's absences were due to any failure of the EAP counselors.

The Arbitrator cannot fault the Postal Service's determination that in the case of this Grievant experience outweighs any hope for improvement in his attendance. There was just cause for the removal of the Grievant.

AWARD

There was just cause for the removal of the Grievant. The grievance is denied.

Dated: December 7, 1990

Bernard Cushman

Bernard Cushman, Arbitrator