

C-24445

A + B

REGIONAL ARBITRATION PANEL

In the Matter of the Arbitration
Between
UNITED STATES POSTAL SERVICE
And
**NATIONAL ASSOCIATION OF LETTER
CARRIERS, AFL-CIO**

) **GRIEVANT:** Monica Gutierrez
(
) **POST OFFICE:** Miami, Florida
(
) **USPS CASE NO:** H98N-4H-D 02127224 &
H98N-4H-D 02178459
) **NALC CASE NO:** MIA 2001 1041/1042
(
) **NALC GTS NO:** 09-04/419
)

BEFORE: Raymond L. Britton, *Arbitrator*

APPEARANCES:

For the U.S. Postal Service: Thomas J. Blum

For the Union: Santos Luyanda

Place of Hearing: U.S. Post Office

Date of Hearing: December 4, 2002 & April 10, 2003

Record Closed: June 4, 2003

AWARD:

For the reasons given, the grievance is sustained, and the remedy requested by the Union granted.

Date of Award: July 3, 2003

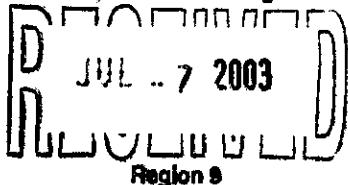
Raymond L. Smith

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**VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS**

**Matthew Rose, NALC
National Business Agent**



ISSUES

1. Whether management had just cause to place the grievant on suspension on March 21, 2002, under the Emergency Procedure provision of Article 16.7 of the National Agreement? If not, what is the appropriate remedy?
2. Whether management had just cause to issue the grievant a Notice of Removal on May 29, 2002, based on the Charge of Improper Conduct? If not, what is the appropriate remedy?

HISTORY OF THE PROCEEDINGS

The parties failed to reach agreement on this matter and it was submitted to arbitration for resolution. Pursuant to the contractual procedures of the parties, the undersigned was appointed as Arbitrator to hear and decide the matter in dispute.

At the commencement of the hearing, it was stipulated by the parties that this matter was properly before the Arbitrator for decision and that all steps of the arbitration procedure had been followed and that the Arbitrator had the authority to render the decision in this matter. At the hearing on December 4, 2002, it was agreed that this matter would be continued at a future date. The hearing was continued on April 10, 2003, and at the close of the hearing, the parties agreed to file Post-Hearing briefs with the Arbitrator no later than June 3, 2003. Transcripts of the hearing prepared by Albert C. Weir, ER were received by the Arbitrator on December 11, 2002, and April 20, 2003, respectively. Both the Post-Hearing briefs filed by the United States Postal Service (hereinafter sometimes referred to as "Employer") and that filed by the National Association of Letter Carriers, AFL-CIO (hereinafter referred to as "Union") were received by the Arbitrator on June 4, 2003.

SUMMARY STATEMENT OF THE CASE

Monica Gutierrez (hereinafter sometimes referred to as "Grievant") was hired as a part-time flexible (PTF) City Letter Carrier on May 6, 2000, at the Snapper Creek Station of the Miami Post Office. On March 20, 2002, the Grievant was arrested by the Economics Crime Unit of the Metro Dade Police Department on charges of Grand Theft 3rd, Forgery and Criminal Use of ID (Joint Exhibit No. 2). On March 21, 2002, Malcolm D. Rohan, Supervisor, Customer Service, in a memorandum to Monica Gutierrez, Re: Emergency Placement - 16.7, stated, in relevant part, as follows (Joint Exhibit No. 3):

You are hereby notified that you were placed in a non-duty non-pay status effective March 21, 2002 in accordance with Article 16.7 of the National Agreement until further notice.

The reason for this action is as follows:

As a result of an on going Postal Service Investigation, it is alleged that by retaining you on duty may result in loss of U.S. Postal Service mails or funds.

You have the right to file a grievance under the U.S.P. – NALC Revised Dispute Resolution Process within fourteen (14) calendar days of your receipt of this notice.

On May 29, 2002, Mac Rohan, Supervisor, Customer Service, in a memorandum to Monica Gutierrez, Letter Carrier, stated, in relevant part, as follows (Joint Exhibit No. 2):

You are hereby notified that you will be removed from the Postal Service on July 29, 2002. The reason for the action is:

YOU ARE CHARGED WITH IMPROPER CONDUCT, AS OUTLINED BELOW.

An investigation has revealed the following:

On March 20, 2002, you, along with Eduardo L. Correa, were arrested by Metro Dade Police for Grand Theft 3rd degree, Forgery and Criminal Identity Theft.

On February 18, 2002, you and Eduardo Correa came into Rooms to Go, located at 18722 S Dixie Highway, Miami, FL. You applied for and received pre-approved credit of \$5,500 in the name of Shelly V. Plata. You presented a Florida drivers license under the name of Shelly V. Plata and completed the application including the date of birth of April 30, 1976 and social security number 589-28-5724 under the same name. You and Mr. Correa purchased several pieces of furniture totaling \$4,733.87. On February 20, 2002, you and Mr. Correa returned to Rooms to Go and purchased an additional \$777.08 of furniture in the name of Shelly V. Plata. On February 26, 2002, most of the furniture was delivered to 10501 SW 108th Avenue #112. The furniture was received and signed for by you. The victim, Shelly V. Plata, filed a police report after being advised that you had obtained credit at Rooms to Go in her name (Shelly V. Plata).

On March 20, 2002, you and Mr. Correa returned to Rooms to Go to pick up the last pieces of the purchased furniture where both you and Mr. Correa were arrested. During an interview following your arrest, you admitted to the theft and provided a sworn written statement. Within your statement, you described the sequence of events in regard to your improper actions as follows:

"On Sunday, February 17th, I was at Borders Bookstore on 107th Avenue and Kendall Drive and found a wallet containing one Social Security and two ID cards. I took them and told a male friend that I was going to return it to the address, but he told me not to do it. Afterwards, my friend said we should go to Rooms to Go to buy some furniture and he said he was going to foot the bill for me. The credit was verified and approved and we got the furniture. Later on, we went to another furniture store and the credit was not approved - Furniture for Less. Soon after, he took me to a video store to get two celluars and we got them."

When you were questioned on this matter during the investigatory interview, you stated your current mailing address and refused to respond to further questions. When you were shown a Miami Dade Police Department statement form and asked if you had completed it, you replied "yes".

It is your responsibility to conduct yourself during and outside of working hours in a manner which reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that Postal personnel be honest, reliable, trustworthy, courteous, and of good character and reputation. Your improper actions outlined above demonstrate that you cannot be trusted to be honest. The Postal Service is not obligated to, nor can we afford to, employ individuals who cannot be trusted. Your continued employment would serve to discredit the Agency and adversely affect the efficiency and economy of the Postal Service.

You have the right to file a grievance under the USPS-NALC Revised Dispute Resolution Process within fourteen (14) calendar days of your receipt of this letter.

*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 ELM, Section 436. (COPY ATTACHED)*

* * *

Grievances were filed with respect to the issuance of the Emergency Suspension and Removal actions of the Employer and were processed through the grievance procedure without resolution and ultimately appealed to arbitration.

Provisions of the National Agreement entered into by and between the Employer and the Union effective November 21, 2001, and to remain in full force and effect to and including 12 midnight November 20, 2006, considered pertinent to this dispute by the parties are as follows (Joint Exhibit No. 1):

ARTICLE 15

GRIEVANCE-ARBITRATION PROCEDURE

Section 1. 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 Union 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.

Section 2. Grievance Procedure--Steps

Informal Step A

(a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. This constitutes the Informal Step A filing date. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union representative. During the meeting the parties are encouraged to jointly review all relevant documents to facilitate resolution of the dispute. The Union also may initiate a grievance at Informal Step A within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance. In such case the participation of an individual grievant is not required. An Informal Step A Union grievance may involve a complaint affecting more than one employee in the office.

(b) In any such discussion the supervisor shall have authority to resolve the grievance. The steward or other Union representative likewise shall have authority to resolve the grievance in whole or in part. The local parties are not prohibited from using the Joint Step A Grievance Form to memorialize a resolution reached at an Informal Step A Meeting. No resolution reached as a result of such discussion shall be a precedent for any purpose.

If no resolution is reached as a result of such discussion, the Union shall be entitled to file a written appeal to Formal Step A of the grievance procedure within seven (7) days of the date of the discussion. Such appeal shall be made by completing the Informal Step A portion of the Joint Step A Grievance Form. At the request of the Union, the supervisor shall print his/her name on the Joint Step A Grievance Form and initial, confirming the date of the discussion.

Formal Step A

- (a) *The Joint Step A Grievance Form appealing a grievance to Formal Step A shall be filed with the installation head or designee. In any associate post office of twenty (20) or less employees, the Employer shall designate an official outside of the installation as the Formal Step A official, and shall so notify the Union Formal Step A representative.*
- (b) *Any grievance initiated at Formal Step A, pursuant to Article 2 or 14 of this Agreement, must be filed by submitting a Joint Step A Grievance Form directly with the installation head within 14 days of the date on which the Union or the employee first learned or may reasonably have been expected to have learned of its cause.*
- (c) *The installation head or designee will meet with the steward or a Union representative as expeditiously as possible, but no later than seven (7) days following receipt of the Joint Step A Grievance Form unless the parties agree upon a later date. In all grievances at Formal Step A, the grievant shall be represented for all purposes by a steward or a Union representative who shall have authority to resolve the grievance as a result of discussions or compromise in this Step. The installation head or designee also shall have authority to resolve the grievance in whole or in part.*
- (d) *At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Articles 17 and 31. The parties' representatives may mutually agree to jointly interview witnesses where desirable to assure full development of all facts and contentions. In addition, in cases involving discharge either party shall have the right to present no more than two witnesses. Such right shall not preclude the parties from jointly agreeing to interview additional witnesses as provided above.*
- (e) *Any resolution of a grievance in Formal Step A shall be in writing or shall be noted on the Joint Step A Grievance Form, but shall not be a precedent for any purpose, unless the parties specifically so agree or develop an agreement to dispose of future similar or related problems. If the grievance is resolved, a copy of the resolution will be sent to the steward and the supervisor who initially were unable to resolve the grievance.*
- (f) *The Formal Step A decision is to be made and the Joint Step A grievance form completed the day of the meeting, unless the time frame is mutually extended. The Union may appeal an impasse to Step B within seven (7) days of the date of the decision.*
- (g) *Additions and corrections to the Formal Step A record may be submitted by the Union with the Step B appeal letter within the time frame for initiating the Step B appeal with a copy to the management Formal Step A to the management official. Any such statement must be included in the file as part of the grievance record in the case.*

* * *

ARTICLE 16 DISCIPLINE PROCEDURE

Section 1. Principles

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

such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

Section 2. Discussion

For minor offenses by an employee, management has a responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered discipline and are not grievable. Following such discussions,

there is no prohibition against the supervisor and/or the employee making a personal notation of the date and subject matter for their own personal record(s). However, no notation or other information pertaining to such discussion shall be included in the employee's personnel folder. While such discussions may not be cited as an element of prior adverse record in any subsequent disciplinary action against an employee, they may be, where relevant and timely, relied upon to establish that employees have been made aware of their obligations and responsibilities.

Section 3. Letter of Warning

A letter of warning is a disciplinary notice in writing, identified as an official disciplinary letter of warning, which shall include an explanation of a deficiency or misconduct to be corrected.

Section 4. Suspensions of 14 Days or Less

In the case of discipline involving suspensions of fourteen (14) days or less, the employee against whom disciplinary action is sought to be initiated shall be served with a written notice of the charges against the employee and shall be further informed that he/she will be suspended. A suspended employee will remain on duty during the term of the suspension with no loss of pay. These disciplinary actions shall, however, be considered to be of the same degree of seriousness and satisfy the same corrective steps in the pattern of progressive discipline as the time-off suspensions. Such suspensions are equivalent to time-off suspensions and may be cited as elements of past discipline in subsequent discipline in accordance with Article 16.10.

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 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/her discharge to the Merit Systems 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/her 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.

Section 6. Indefinite Suspension - Crime Situation

A. The Employer may indefinitely suspend an employee in those cases where the Employer has reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed. In such cases, the Employer is not required to give the employee the full thirty (30) days advance notice of indefinite suspension, but shall give such lesser number of days of 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.

B. The just cause of an indefinite suspension is grievable. The arbitrator shall have the authority to reinstate and make the employee whole for the entire period of the indefinite suspension.

C. If after further investigation or after resolution of the criminal charges against the employee, the Employer determines to return the employee to a pay status, the employee shall be entitled to back pay for the period that the indefinite suspension exceeded seventy (70) days, if the employee was otherwise available for duty, and without prejudice to any grievance filed under B above.

D The Employer may take action to discharge an employee during the period of an indefinite suspension whether or not the criminal charges have been resolved, and whether or not such charges have been resolved in favor of the employee. Such action must be for just cause, and is subject to the requirements of Section 5 of this Article.

Section 7. Emergency Procedure

An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance.

Section 8. Review of Discipline

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

In 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.

Section 9. Veterans' Preference

A preference eligible is not hereunder deprived of whatever rights of appeal are applicable under the Veterans' Preference Act. If the employee appeals under the Veterans' Preference Act, however, the time limits for appeal to arbitration and the normal contractual arbitration scheduling procedures are not to be delayed as a consequence of that appeal; if there is an MSPB appeal pending as of the date the arbitration is scheduled by the parties, the grievant waives access to the grievance-arbitration procedure beyond Step B.

Section 10. Employee Discipline Records

The records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years.

Upon the employee's written request, any disciplinary notice or decision letter will be removed from the employee's official personnel folder after two years if there has been no disciplinary action initiated against the employee in that two-year period.

(Additional provisions regarding the removal of Transitional Employees can be found in Appendix B.)

POSITIONS OF THE PARTIES

The Position of the Employer

It is the position of the Employer that just cause existed for placing the Grievant on suspension on March 21, 2002, under the Emergency Procedure provision of Article 16.7 of the National Agreement and that it had just cause to issue the Grievant a Notice of Removal on May 29, 2002, based on the Charge of Improper Conduct. The Employer contends that the Grievant admitted that she had engaged in the conduct as outlined in the May 29, 2002, Notice of Removal and that her conduct violated the Postal Service's ethics regulations, as well as Section 666.3 of the Employee and Labor Relations Manual. The Employer contends that no due process arguments can be raised by the Union as the Union failed to raise any due process arguments at Step B of the grievance procedure.

The Position of the Union

The Union takes the position that the actions taken by the Employer against the Grievant are without just cause. The Union contends that the Grievant was arrested for various charges for which she has been found not guilty by the courts and should be allowed to return to work. On April 10, 2002, the Grievant was referred to the pre-trial diversion program and upon completion of the program, all charges against her were dropped by the State. The Union contends that no nexus exists between the Grievant's arrest and her employment and no adverse publicity resulted from the incident. The Union contends that the Grievant made no admission of guilt and the discipline imposed on the Grievant was based solely on a Postal Inspector's and police report, in which the Employer wrongfully claims the Grievant made an admission of guilt. The Union contends that the discipline imposed was in retaliation for the Grievant having been involved as a key witness in a sexual harassment case in which her station manager was found guilty and terminated. The Union further contends that there were procedural defects committed by management, which deprived the Grievant and the Union of their due process rights.

OPINION

Initially for consideration by the Arbitrator are the challenges made by the Union to the placement of the Grievant on a 16.7 emergency suspension and the subsequent issuance to her of a Notice of Removal after the Grievant was arrested by the Metro Dade Police for charges outlined in the Notice of Removal. These actions of management are claimed by the Union to have been procedurally defective and without just cause as they deprived the Grievant and the Union of their rights of due process.

In response, the Employer maintains that the Union is proscribed from raising any due process arguments at the arbitration hearing since such arguments were not included by the Dispute Resolution Team as issues sent forward to arbitration in the joint Step B decisions. The Arbitrator finds this contention of the Employer to be without merit for the inclusion of the words "due process" in the parties Step B decisions in Joint Exhibit Nos. 2 and 3 are, in his judgment, sufficient to raise the question of due process in the instant arbitration. That the Dispute Resolution Team did not expressly include due process in the issues sent forward to arbitration in its joint Step B decisions is for similar reasons found by the Arbitrator to be unmeritorious and accordingly cannot properly serve to bar the due process arguments raised by the Union in arbitration. Nor can the Arbitrator agree with the contention of the Employer that since the parties' advocates mutually agreed to the definition of the two issues before him, as defined above, this confirms the absence of any due process issue to be decided in these grievances. For due process is generally recognized as implicit in the determination of just cause.

Customer Service Supervisor, Mac Rohan, placed the Grievant in a non-duty, non-pay status effective March 21, 2002, under Article 16.7 "Emergency Procedure" of the National Agreement. Rohan's actions were based on information that he received from the Postal Inspection Service on March 21, 2003, that the Grievant had been arrested and involved in a Third Degree Grand Theft Felony. The Inspection Service was conducting an

investigation at that time and inquired of Rohan as to whether the Grievant had reported to work that day. Later on that day, the Inspection Service called back and informed Rohan that the Grievant was also involved in identity theft and was not to be allowed to return to work or to be on the premises until the investigation was completed. At that time, the Inspection Service also requested the assistance of Rohan in performing an investigation on other employees within the Snapper Creek station due to theft of mail. The Postal Inspection Service's Investigative Memorandum regarding the Grievant's March 20, 2002, arrest for Grand Theft 3rd Degree, Forgery and Criminal Identity Theft was forwarded to postal management on April 15, 2002 (Joint Exhibit No. 2). After receipt of the Investigative Memorandum, Supervisor Rohan consulted with Labor Relations and subsequently made his request for discipline on May 15, 2002. The Grievant was given a Pre-Disciplinary interview on April 25, 2002, but she received no Pre-Disciplinary interview prior to her placement in a non-duty status under 16.7.

Among the procedural deficiencies claimed by the Union to have prevented the Grievant from being afforded her rights of due process during the grievance procedure is that the Grievant was refused the right to be present at the Informal Step A hearing. It is urged by the Union that management's refusal to allow the Grievant to be present at the Step 1 hearing was in direct violation of the principles and intent of the provisions set forth in Article 15, Section 2. (a) of the National Agreement, which state, "Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause." It is additionally provided therein that "The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union representative."

The Employer denies that the Grievant's due process rights were violated by disallowing her reentry to the Snapper Creek station for the Step 1 grievance meeting. In this connection, the Employer references the testimony of Steward Rodriguez, who agreed on cross-examination that management has the right to deny an employee access to a postal facility when management believes that the individual may violate the sanctity of the mail.

It is contractually recognized that the Grievant at Step 1 is entitled to a fair hearing and the right to explain with her immediate supervisor the reasons for her conduct. As indicated by the record, the Grievant went to the Post Office to be present during the Step A Informal Hearing, but was not permitted to enter the building. In disallowing the Grievant entry onto the Postal premises, the Grievant was deprived of her right to be heard at what is considered to be a critical step of the grievance arbitration procedure. This refusal by Area Manager Molina to grant the Grievant access to the premises of the Post Office to attend the Step 1 hearing was, in the judgment of the Arbitrator, improper as it constituted a denial of her contractual rights.

In attempting to enter the Postal premises for the purpose of attending the first step hearing, the Grievant was not endeavoring to return to the workroom floor where the sanctity of the mails could possibly be compromised, but only to return to the office to be present at the Informal Step A meeting. The Grievant was entitled to this contractual right and was prejudiced by not being allowed to provide testimony as to the circumstances of her arrest at the Step A Informal hearing.

There is no evidence that other arrangements were considered in order to assure that the Grievant would have the opportunity to be present at the first step grievance meeting and her fundamental procedural rights preserved. That, as pointed out by the Employer, Rodriguez testified that he had the opportunity to meet with the Grievant off site regarding her grievance does not satisfactorily fulfill the requirements of a Step 1 meeting. Noteworthy, it seems to the Arbitrator, is the language in Article 15, Section 2 (a), which focuses on the required presence of the Grievant at the Step 1 meeting while the presence of the employee's steward or Union representative is left to the discretion of the employee.

Based on the above findings, it is deemed by the Arbitrator to be unnecessary to this opinion that he address the merits of this matter or that he further consider the procedural arguments of the Union with respect to the knowledge and authority of management's Step A Informal and Formal Designees to resolve this matter, whether an independent and objective investigation was conducted or whether the Grievant was apprised or made aware of the specific rule or regulation that she allegedly violated.