REGULAR ARBITRATION PANEL C# 08975

In the Matter of Arbitration	GRIEVANT: R. Hauck
between	
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	POST OFFICE: Butte, Montana
and	CASE NO.: W7N-5K-D 8461
UNITED STATES POSTAL SERVICE	

BEFORE: Professor Carlton J. Snow

APPEARANCES: Mr. Jim Edgemon

Mr. Wayne L. Eggiman

PLACE OF HEARING: 701 Dewey Boulevard

DATES OF HEARING: November 29, 1988
March 30, 1989
March 31, 1989

HEARING CLOSED: May 6, 1989

AWARD:

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer had just cause to issue the grievant a Notice of Proposed Removal on April 29, 1988 and a Letter of Decision on May 17, 1988. The grievance is denied. It is so ordered and awarded.

DATE OF AWARD: 6-26-89

Carlton J. Snow
Professor of Law

IN THE MATTER OF ARBITRATION)
)
BETWEEN)
)
NATIONAL ASSOCIATION OF LETTER) ANALYSIS AND AWARD
CARRIERS, AFL-CIO)
) Carlton J. Snow
AND) Arbitrator
)
UNITED STATES POSTAL SERVICE)
(Case No. W7N-5K-D 8461))
(R.Hauck Grievance))

I. INTRODUCTION

This matter came for hearing before the arbitrator pursuant to a collective bargaining agreement between the parties effective from July 21, 1987 until November 20, 1990. A three day hearing occurred on November 29, 1988, March 30, 1989, and March 31, 1989, at the postal facility in Butte, Montana, located at 701 Dewey Boulevard. There were approximately twenty-eight hours of hearing. Mr. Jim Edgemon, National Business Agent, represented the National Association of Letter Carriers. Mr. Wayne L. Eggiman, Director of Human Resources, represented the United States Postal Service. Mr. Jim Williams assisted Mr. Edgemon, and Mr. Jim Squires assisted Mr. Eggiman.

The hearings proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The arbitrator tape-recorded the proceedings as

an extension of his personal notes. The advocates fully and fairly represented their respective parties.

On the first day of hearing in this matter, the Employer challenged the procedural and substantive arbitrability of the dispute with respect to the Employer's May 17, 1988 Letter of Decision. According to the Employer, the matter had not been properly appealed by the Union. On March 30, 1989, however, the Employer withdrew all challenges to the arbitrator's jurisdiction and stipulated that all matters before the arbitrator in this dispute had been properly submitted to arbitration. The parties authorized the arbitrator to retain jurisdiction for ninety days after issuance of a report in the matter. The arbitrator officially closed the hearing on May 6, 1988, after receipt of the final post-hearing brief in the matter.

II. STATEMENT OF THE ISSUE

The parties stipulated that the issue before the arbitrator is as follows:

> Does just cause exist, as required by Article 16 of the National Agreement, for the Notice of Proposed Removal issued the grievant on April 29, 1988, as well as the Letter of Decision issued the grievant on May 17, 1988? If not, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 2 - NON-DISCRIMINATION AND CIVIL RIGHTS

SECTION 1. STATEMENT OF PRINCIPLE

The Employer and the Unions agree that there shall be no discrimination by the Employer or the Unions against employees because of race, color, creed, religion, national origin, sex, age, or marital status.

In addition, consistent with the other provisions of this Agreement, there shall be no unlawful discrimination against handicapped employees, as prohibited by the Rehabilitation Act.

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.

ARTICLE 19 - HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

ARTICLE 35 - EMPLOYEE ASSISTANCE PROGRAM

SECTION 1. PROGRAMS

The Employer and the Unions express strong support for programs of self-help. The Employer shall provide and maintain a program which shall encompass the education, identification, referral, guidance and follow-up of those employees afflicted by the disease of alcoholism **and/or drug abuse.** When an employee is referred to **the EAP** by the Employer, the **EAP staff** will have a reasonable period of time to evaluate the employee's progress in the program. The program of labor-management cooperation shall support the continuation of the **EAP** at the current level. In addition, the Employer will give full consideration to expansion of the **EAP** where warranted.

IV. STATEMENT OF FACTS

In this case, the Union has challenged the Employer's decision to discharge the grievant for stealing and cashing a check that was in the mail he had been assigned to deliver. The parties disagree about the grievant's state of mind when he stole the check. There, however, are a number of facts which are not in dispute.

The grievant became an employe of the Postal Service in Butte, Montana on July 9, 1984. On July 1, 1986, management placed him on Restricted Sick Leave. But prior to the events leading to the removal in this case, the grievant never had been disciplined. Nor did he have a criminal record.

During his employment as a letter carrier, the grievant had five accidents. They occurred between the dates of

January 17, 1986 and March 16, 1988. (See, Employer's Exhibit Nos. 35-39). The accident on March 16, 1988 caused the grievant to lose work time, and he has not yet been released to return to work. (See, Employer's Exhibit Nos. 14-19).

On March 10, 1988, the grievant removed a check payable to M.F. Riley from the mails. The check was for $106.50. Mr. Riley had lived in an apartment complex for the elderly on the grievant's mail route. (See, Employer's Exhibit No. 5). On March 8, 1988, Mr. Riley died, and the grievant had signed a "change of address" order for Mr. Riley on March 9, 1988. On March 14, 1988, the grievant endorsed and, then, cashed Mr. Riley's check at Buttrey's Grocery Store in Butte, Montana.

On March 19, 1988, the manager of Buttrey's called the Postmaster in Butte and reported that the grievant had cashed a check that was not payable in his name. Mr. Wilkinson, the Postmaster, contacted Mr. Guptill, Superintendent of Postal Operations, who in turn contacted Postal Inspector Richard Koss.

In the ensuing investigation, Messrs. Guptill and Koss interviewed the grievant at his home on April 5, 1988. During the interview, Inspector Koss completed a "personal history data" form for the grievant. (See, Employer's Exhibit No. 4). Inspector Koss testified that, in response to one of the questions on the form, the grievant said he was not a drug addict or an alcoholic. (See, Employer's Exhibit No. 4). The

grievant at first denied stealing and cashing the check. He, however, admitted the theft in a later interview.

On April 6, 1988, the grievant departed his home and left behind a note for his wife. He put his rifle in his truck and drove toward Elkhorn, Montana. Later that evening, he admitted himself to Ridgeview Hospital for treatment. He reported to medical personnel there that he had attempted suicide. The grievant was sent by ambulance to the St. James Community Hospital emergency room at approximately 7:30 P.M. that evening where he received 60 c.c.'s of Ipecac in order to induce vomiting. At 8:30 P.M., medical personnel pumped the grievant's stomach. He, then, was discharged from the emergency room and returned to the Ridgeview Treatment Center at approximately 10:30 P.M. that evening.

At the Ridgeview Center, personnel diagnosed the grievant as suffering from acute chronic alcoholism, opiate dependency, and Valium dependency. He underwent detoxification and entered the in-patient treatment center. During his stay at the facility, he contacted Superintendent of Postal Operations Guptill who spoke with him at the treatment center. The grievant was discharged from the Ridgeview Center on May 9, 1988. After his discharge from the Center, he participated in After Care treatment, attended Alcoholics Anonymous meetings, and worked at the Alano Club, a meeting place for recovering alcoholics. The grievant also made restitution for the amount of the stolen check.

On April 11, 1988, Inspector Koss issued an Investigative

Memorandum concerning the grievant's alleged theft of mail. On April 29, 1988, Supervisor Brasier issued the grievant a Notice of Proposed Removal, sending it both to the grievant's residence as well as the Ridgeview Treatment Center. Mr. Guptill reviewed and concurred in that decision. The grievant, then, requested an opportunity to speak with Postmaster Wilkinson and met with him and Mr. Guptill on May 6, 1988. Union Representative Elsberg, along with Dr. Allison of the Ridgeview Center, were also in attendance. At that meeting, the grievant stated that he had been treated for alcoholism. He, however, denied drinking while at work. On May 17, 1988, Postmaster Wilkinson issued a Letter of Decision that confirmed the grievant's removal.

On May 20, 1988, the grievant was arraigned in a federal district court for violating Title 18 U.S.C., Section 1709 (theft of Mail). The court deferred sentencing the grievant and placed him on probation for three years with several conditions. Among the conditions was a requirement that the grievant serve 200 hours of community service, participate in an after care program for chemical dependency, and submit to random urinalysis tests. Since September of 1988, the grievant's urinalysis tests have been negative except for drugs prescribed for his back pain.

On May 10, 1988, the Union grieved the Notice of Proposed Removal; and on May 25, the Union grieved the Employer's Letter of Decision. At Step 2, the parties consolidated the two grievances; and management has denied them. When the parties were unable to resolve their differences, the matter

proceeded to arbitration.

V. POSITION OF THE PARTIES

A. The Employer:

The Employer contends that it had just cause to remove the grievant for stealing and cashing a check that belonged to a postal patron. The Employer maintains that, if it is to retain its position of trust with the public, its employes must conform to the highest standards of personal honesty. As a letter carrier, the Employer maintains that the grievant was in a highly visible and influential position. Accordingly, when he stole a patron's check and the event received publicity, the Postal Service sustained serious harm, according to management. It is the position of the Employer that, in stealing from a customer, the grievant committed the worst possible offense for a postal employe. In the opinion of the Employer, such conduct is intolerable and merits removal.

It is the belief of the Employer that the grievant's claim of alcoholism failed to mitigate the offense in this case. First, management contends that the grievant did not show sign of alcoholism before his theft, and his many inconsistencies before and during the arbitration hearing allegedly made him a noncredible witness. It is the position of the Employer that the grievant simply concocted his "chemical dependency" story as a means of retaining his job.

Second, it is the position of the Employer that, even if the grievant's bout with alcoholism is authentic, it failed to mitigate the seriousness of his misdeed in this case. The gravity of his crime allegedly outweighs any mitigation that alcoholism or drug dependency might provide. Finally, the Employer maintains that, at earlier steps in the grievance procedure, the Union never argued that the grievant should be reinstated as a means of accommodating his alleged chemical dependency handicap. Because the Employer had no notice that issues involving the Rehabilitation Act would be raised, it is the position of the Employer that the Union should be barred from asserting such a theory of the case in arbitration.

B. The Union:

The Union maintains that the Employer failed to establish just cause for removing the grievant most particularly because management failed to consider serious mitigating circumstances in this case. According to the Union, the grievant has suffered from alcoholism and drug addiction for many years. The effects of that abuse showed themselves clearly when the grievant stole and cashed a check from the mails, according to the Union. In fact, the grievant allegedly would not have stolen the check except for the effects of the drugs and alcohol he consumed during the relevant time period. Accordingly,

it is the Union's contention that, because the grievant is committed to maintaining sobriety, he never again will commit similar acts. The Union maintains that the grievant already has undergone successful rehabilitation and now is a recovering alcoholic. Therefore, removing him would be punitive and not corrective in the view of the Union.

The Union also maintains that there are other mitigating circumstances in the case. According to the Union, the Employer knew or should have known that the grievant was an alcoholic. In view of its contractual obligation to assist employes in their struggle against chemical dependency, the Union maintains that the Employer should have confronted the grievant with his drinking problem. Instead, the Employer allegedly was extremely lax toward alcoholism as it manifested itself in the Butte, Montana facility. The Union suggests that, rather than helping the grievant defeat his disease, management actually encouraged it. It is the position of the Union that the Employer's conduct now causes it to bear partial responsibility for the grievant's alcohol related misdeed.

Moreover, the Union argues that Article 35 of the parties' agreement requires management to give favorable consideration to the grievant's effort at self-help in any disciplinary action. The Employer allegedly failed to consider the grievant's defense of alcoholism in this case. Given that contractual violation, management's decision to remove the grievant allegedly could not have been for just cause.

Finally, the Union contends that the Employer has agreed

not to discriminate unlawfully against handicapped employes. It is the position of the Union that alcoholism is a handicap and that the grievant is a qualified handicapped individual. Accordingly, absent an undue hardship on the Employer, management allegedly is obligated to offer reasonable accommodation to the grievant. It is the contention of the Union that, given the grievant's excellent prospects for continued sobriety, reinstatement is a reasonable accommodation and will inflict no undue hardship on management. Thus, the Union argues that, in failing to give the grievant an opportunity to return to work, the Employer has failed to comply both with the parties' collective bargaining agreement as well as the Rehabilitation Act.

VI. ANALYSIS

A. A Preliminary Procedural Issue:

This is a case about an employer's duty to accommodate an employe in response to problems of chemical dependency. What are the boundaries of that duty? How far does the duty to accommodate extend before it collides head-on with other public policies? Before facing that issue, a threshold procedural matter must be resolved.

At the arbitration hearing, management called the grievant as its first witness. The Union vigorously objected, and the arbitrator ruled at the hearing that the grievant would

not be compelled to testify until the Employer had put forth a prima facie case in support of the grievant's removal. The Employer strongly objected to the ruling and requested an opportunity to submit a post-hearing brief on the issue, which request the arbitrator granted.

Although the arbitrator received no post-hearing brief on this issue, it is a matter which has been raised and must be addressed. It is well established in arbitration that, as a general rule, the grievant need not testify until a prima facie case has been established against him or her. (See, for example, General Industries, Inc., 82 LA 1161, 1164 (1984); Arizona Aluminum Company, 78 LA 766 (1982); and Report of the New York Tri-Partite Committee, Proceedings of the Nineteenth Annual Meeting, National Academy of Arbitrators, 99, BNA Books (1967)).

The reason for this rule is sound. Management has acted to remove an employe and, when challenged, should be expected to explain its decision. Such an explanation should not present the grievant as the chief witness against the grievant. In a removal case, the Employer has the burden of proof, and "burden of proof" is a term connoting two distinct meanings.

One aspect of "burden of proof" refers to the burden of going forward with the evidence, that is, producing evidence to support a particular decision. Some scholars have referred to this as the "production burden." (See, McNaughton, "Burden of Production of Evidence," 68 Harv. L. Rev. 1382, 1384 (1955)). In reality, this burden more accurately could be

described as the risk of nonproduction. Management has borne the responsibility of furnishing evidence which justified its decision of removal. In arbitration, the Employer has the burden of producing evidence to show the reasonableness of its decision, and the party with this burden that fails to offer persuasive evidence in arbitration will not prevail. In other words, the "production burden" imposes on one party the risk of the consequences of the nonproduction of evidence.

By permitting the Employer to call the grievant in a removal case as its first witness, in effect, shifts the burden of production to the Union. This causes the Union to bear the risk of the consequence of the nonproduction of evidence. Accordingly, it has been traditional among arbitrators, in the absence of special circumstances, to require an employer to make a prima facie case (one with sufficient internal consistency to justify management's action) before requiring a grievant to testify as a part of an employer's case in chief. The Employer in this case has presented no reason for the arbitrator to change his earlier ruling with regard to this matter.

B. Linkage Between Just Cause and Chemical Dependency:

The Union has challenged the propriety of the grievant's Notice of Proposed Removal as well as the Letter of Decision. Mr. Brasier, the grievant's supervisor, charged the grievant with (1) mistreatment of mail by "removing mail from proper mail distribution channels; (2) opening mail which included a check made out to Maurice Riley on your route; and (3) cashing the check for your personal use." (See, Union's Exhibit No. 1(DD). According to Mr. Brasier, the grievant's actions violated the Domestic Mail Manual, the Employee and Labor Relations Manual, and the Code of Ethics for Government Service. Additionally, he stated that:

> Your conduct has breached the trust placed in you by Butte Postal Management and fellow employees. Your conduct also is a breach of the requirements of honesty, trustworthiness, and reliability from employees. If these standards are not continually imposed, the Postal Service could not promote the efficiency of the Service, would lose credibility with the public, and would not be entrusted to handle the valuable personal and business correspondence that is processed daily throughout the nation. (See, Union's Exhibit No. 1(DD)).

In his Letter of Decision, Postmaster Wilkinson stated:

> You admitted to Inspector Koss, Terry Guptill and to me personally that you stole the check from the mails. You also admitted that you signed and cashed the Riley check to pay your bills.
>
> I have carefully considered the mitigating factors stated in your verbal response to me on May 6, 1988, that your theft was due to alcoholic and drug problems. You referred to a "drinking problem" in your verbal response to me, but you did not present any evidence as to the existence of drug or alcohol dependency at the time of misconduct at issue. * * * For these reasons, I find no substance to your claim of mitigation due to drug or alcohol problems.

> I conclude that you did what you were charged with doing, thus adversely affecting the efficiency of the Service in that your conduct brings into question your trustworthiness and reliability as a carrier in safeguarding the security and sanctity of the mail.
>
> I have decided not to modify the proposed penalty in view of the fact that the seriousness of the charge far outweighs mitigating factors. Carriers must be of the highest integrity. Proper treatment, security, and sanctity of the mail has a high priority in the efficiency of the Service. Carriers must avoid any action which might result in or create the appearance of mistreatment of mail matter. You admitted removing mail from the mailstream, taking a check, endorsing and cashing it for your personal gain. These actions disqualify you and cast grave doubts on your trustworthiness and the efficiency of the Service. Accordingly, your removal action will be effective June 6, 1988. (See, Union's Exhibit 2(DD).

The point of providing an extended review of the Employer's statement of reasons for the removal is to highlight the fact that the Employer concluded (1) the grievant was not an alcoholic and (2) he committed a crime that disqualified him from working in this industry.

The grievant admitted the theft of mail. Consequently, there can be no challenge to the truth of the charges against him. Nor has the Union argued that the grievant's misconduct was not sufficiently serious to warrant removal or that there was no nexus between his misconduct and the ability of the Employer to carry out its mission. Rather, the Union's pivotal contention is that the grievant stole and cashed the check because of his alcoholism and drug dependency, conditions for which he now has undergone successful treatment.

It is the contention of the Union that the parties' agreement requires management to give favorable consideration

to the grievant's rehabilitative efforts. Moreover, it is the position of the Union that the grievant's alcoholism gave rise in management to an obligation reasonably to accommodate him in his struggle with the disease. By failing to consider the mitigating factor of chemical dependency and the grievant's substantial effort at self-help, the Employer allegedly has violated the agreement between the parties. Accordingly, it is the conclusion of the Union that the grievant's discharge was not for just cause.

Courts and arbitration decisions have made clear that, if an employe can establish alcoholism as a cause of his or her misconduct and that the employe has taken affirmative steps to be rid of the disease, such facts may mitigate any discipline imposed by an employer. More importantly, the parties have codified these principles in their collective bargaining agreement. For example, Article 3 has charged the Employer with making appropriate disciplinary decisions. Article 16 has adopted the principle of disciplie based on just cause. Finally, the parties have agreed in Article 35 to treat alcoholism as a disease and to look favorably on efforts at rehabilitation. Article 35 states:

> The Employer and the Unions express strong support for programs of self-help. The Employer shall provide and maintain a program which shall encompass the education, identification, referral, guidance and follow-up of those employees <u>afflicted by the disease of alcoholism and/or drug abuse</u>.
>
> <u>An employee's voluntary participation in such programs will be considered favorably in disciplinary action proceedings</u>. (See, Joint Exhibit No. 1, pp. 101-102, emphasis added).

Construing these provisions together, it is clear that the Employer has retained the right to discharge an employe for serious offenses, including theft. This managerial right, however, has been limited by the Employer's agreement to administer discipline correctively and not punitively. Furthermore, the Employer explicitly has recognized alcoholism and drug addiction as diseases. Discharging an employe for having a disease has an appearance of punitiveness if there are no special circumstances. As a result, some arbitrators and courts have concluded that an employer owes an employe an opportunity to be rehabilitated through a drug or alcohol treatment program. (See, for example, United States Postal Service and NALC, Case No. W4N-5R-D 35514, Exhibit H in the Union's Post-hearing Brief; Armstrong Court Company, 56 LA 529).

Additionally, because a chemically dependent employe may be a "qualified handicapped individual" within the meaning of the Rehabilitation Act of 1973, failure to accommodate an employe by providing an opportunity for rehabilitation may constitute discrimination forbidden by Article 2 of the parties' collective bargaining agreement. (See, for example, Whitaker v. Board of Higher Education, 461 F. Supp. 99 (E.D.N.Y. 1978), Exhibit P of the Union's Post-hearing Brief). The Fourth Circuit Court of Appeals recently has ruled that an agency is required to offer an alcoholic worker in-patient treatment before firing him or her. (See, Rodgers v. Lehman, CA4, No. 88-2028, March 9, 1989). There, however, are

boundaries to an employer's duty to accommodate a chemically dependent employe. For example, an employer has a legitimate interest in protecting itself from future harm. Additionally, the relationship between an employe's job and his or her misconduct may be such that the employe's continued employment raises serious concerns about public policy. In other words, while an employe's alcoholism and subsequent rehabilitation clearly are relevant to the propriety of the individual's removal, they do not provide an automatic basis for reinstatement. Rather, they are factors to be considered in the "just cause" determination.

The point of this litany has been to clarify what is at issue in this case. In view of the basis for the Employer's decision, there are two primary issues to be resolved in the case. First, it must be decided whether or not the Employer had a reasonable basis for deciding that the grievant actually suffers from alcoholism or drug dependency. Second, if he does, what effect should that fact have on the decision to remove him?

C. Is the Grievant Chemically Dependent?

A central focus at the arbitration hearing was on whether or not the grievant actually suffered from chemical dependency at the time of his removal. Who is or is not an alcoholic is not always easily defined. The World Health Organization has defined persons with alcohol addiction as "those excessive drinkers whose dependence on alcohol has attained such a degree that it shows a noticeable mental disturbance or interference with their bodily or mental health, their interpersonal relationships, and their smooth social and economic functions, or who shall prodromal (forerunner) signs of such development." (See, USA Today, 27 (July, 1980)). The Employer has argued in this case that the grievant raised the malady of alcoholism as a late defense and that there is insufficient evidence to substantiate his claim. Although the Employer has raised a number of legitimate ambiguities with respect to this issue, there is clear and convincing evidence that the grievant's struggle with alcoholism is real.

There are a number of diagnostic criteria which help identify an alcoholic. One source has observed that:

> Substance abuse is established by such indicators as long term use, repeated intoxication, and impairment of social and occupational functioning. Substance dependence is present if the individual develops a "tolerance" for the substance, requiring greater and greater doses to achieve the same effect, and suffers "withdrawal" effects when usage stops. (See, Denenberg, Alcohol and Drugs, 58 (1983)).

There are a number of reasonable diagnostic criteria to test the reasonableness of management's decision in evaluating

whether or not an employe is an alcoholic. For example, has the employe shown signs of a physiological dependency on a foreign substance, such as withdrawal seizures or noticeable tremors. Another physiological sign in some people is vascular engorgement of the face or nose. There also are psychological signs of substance dependency, such as marital disruption, unusually frequent references to drinking alcohol, and productivity problems. (See, Brubaker, "Alcoholism in Industry," Health Nursing, 25:7-10 February, 1977).

The Union presented clear and convincing evidence that the grievant has been chemically dependent. There was unrebutted testimony that the grievant has come from a family of alcoholics and that he, himself, began drinking when he was fourteen years of age. After sustaining a back injury, he began taking prescription drugs which he combined with alcohol in increasing quantities. It was unrebutted that he had experienced some alcohol-related problems while working for a former employer. When he began working for the Postal Service, he hid his need to drink alcohol.

The grievant maintained that, prior to the theft, he had been drinking more than a pint of liquor a day and also taking some drugs. During that time period, he testified that he often was intoxicated while on the job and also experienced a number of blackouts. He stated that he had consumed large amounts of drugs and alcohol the night before he stole the check. After stealing it, he had three scheduled days off and continued to drink and take drugs. Accordingly, he

believed he was under the influence of alcohol when he cashed the check.

The grievant stated that, after being confronted with the theft by Inspector Koss, he decided to commit suicide. The next day he removed approximately forty-five pills from his medicine cabinet and loaded his hunting rifle. The grievant wrote a suicide note to his wife and consumed approximately fifteen of the pills. He proceeded to a store and purchased two quarts and a six-pack of beer, after which he drove to Elkhorn, Montana and consumed pills and liquor as he proceeded down the road. Somewhere on this journey he ran his truck off the road.

The grievant testified that he attempted to return his vehicle to the road but, in response to a combination of physical exertion and chemicals, began to regurgitate. At that point, he attempted to shoot himself but barely missed the top of his head. A traveler came along at this time and attempted to discourage the grievant from any further suicide attempts. Eventually, unidentified travelers helped the grievant return his vehicle to the road, at which time he drove himself to Ridgeview Hospital to receive medical assistance. Evidence submitted by the parties generally corroborated the grievant's physical and mental state when he entered the hospital. Dr. Allison, Medical Director of the Division of Chemical Dependency at St. James Hospital, treated the grievant at the Stress Unit of Ridgeview Hospital and testified at the arbitration hearing about tests he gave the

grievant. According to Dr. Allison, the grievant attested to a heavy daily usage of drugs. He demonstrated a typical dependency profile on the MMPI examination as well as the Jellenek test. The grievant also had a history of acute pancreatitis, a debilitating disease common to alcoholics. (See, Union's Exhibit No. 9). Dr. Allison gave his expert opinion that the grievant is an alcoholic who has been constantly impaired for several years. (See, Union's Exhibit No. 6).

Evidence submitted to the arbitrator also supported the grievant's testimony about his attempted suicide. Hospital records indicated that, when admitted to the hospital, the grievant appeared intoxicated and critically ill. The grievant was transported by ambulance to the St. James emergency room where the nurse told the physician on duty that it was critical for the grievant to be seen. He was given Ipecac syrup to induce vomiting. When that proved to be unsuccessful, hospital personnel pumped his stomach. Medical reports showed that the type of drugs recovered from the grievant's stomach were the type he testified he took during his suicide attempt. (See, Union's Exhibit No. 39). The police report established that the grievant's rifle had been found in his truck. (See, Union's Exhibit No. 5). Although the truthfulness of the grievant's statements with respect to his suicide attempt does not directly relate to whether or not it was reasonable for management to decide the grievant is not an alcoholic, it does lend credence to his other testimony.

Evidence submitted by the Employer failed to undermine a conclusion that the grievant is an alcoholic. For example, there was conflicting evidence with respect to whether or not the grievant displayed symptoms of alcoholism at work. The parties used the same facts to reach opposite conclusions. Using the criterion of absenteeism as an indicium of alcoholism, the Employer concluded that the grievant had shown no problem with an inability to report to work. Management contended that there was no pattern of absenteeism and that, in fact, the grievant worked a good deal of overtime. The Employer also pointed out that the grievant had accumulated a sick leave balance of 266 hours at the time of his removal. (See, Employer's Exhibit No. 32).

On the other hand, the grievant testified that he often missed work because of drugs and alcohol abuse and that he worked overtime when possible in order to obtain funds to maintain his chemical dependency. The grievant's supervisor conceded that the grievant had been placed on Restricted Sick Leave in June or July of 1986. (See, Union's Exhibit No. 25). Supervisor Guptill testified that he accepted the grievant's explanations of his absences as related to war service injuries, but it is equally plausible that the absences were caused by the grievant's alcohol and drug abuse.

Supervisors Brasier and Skinner also testified that the grievant had shown no problem with tardiness, and Mr. Brasier did not believe that the grievant took excessive annual leave. The grievant, on the other hand, testified that he had been

tardy approximately four times a month and simply changed his work card to reflect the hour at which he should have reported. He testified that he had been cautioned about expanding his lunch hour but never had been disciplined for doing so. He also testified that he had been drinking before having several accidents at work. (See, Employer's Exhibit Nos. 36-39). While there was some support for a conclusion that the grievant did not have work performance problems caused by alcoholism, it was equally plausible that he was experiencing alcohol related attendance and safety problems and that he was clever in concealing the cause of his problem.

The arbitrator also received conflicting evidence about the level of the grievant's performance. According to the grievant's supervisors, he was a totally satisfactory worker. Ms. Skinner testified that she received about as many complaints on the grievant as she did on other employes. The Employer also pointed out that the grievant never had been denied a periodic step increase.

On cross-examination, however, Supervisor Guptill conceded that he probably had received a complaint from every manager about the grievant's route. Supervisor Brasier also acknowledged that numerous other carriers had complained about the grievant's mis-deliveries and that, in fact, he had spoken to the grievant about it several times. According to Mr. Noctor, a T-6 who carried the grievant's route on his days off, he consistently found the grievant's route to be "in a mess" and complained to supervisors about it. Ms. Rowe,

who also occasionally carried the grievant's route, testified about the same kind of problem.

Mr. Norbury, a 204-B temporary supervisor when the grievant was hired, testified that he had received a number of complaints from customers about the grievant's route during his probationary period. The complaints suggested that the grievant was not meeting time demands, was irregular in his delivery times, and simply was not doing a first rate job. The grievant testified that he knew he was not doing a good job and recognized that he often mis-delivered the mail. It is reasonable to conclude that the grievant might have been able to " get by" in his job, despite being affected by drugs and alcohol.

Evidence about whether or not the grievant operated while in an "alcoholic haze" was also jumbled. No one smelled alcohol on the grievant, but he testified that he tried to drink beverages that could not be smelled and masked the odor with mints. Mr. Guptill stated that he never saw the grievant's speech slurred or a stumbling gait, but there was evidence that the grievant talked freely and often went forward to a supervisory area, something that struck other employes as peculiar. Likewise, Messrs. Noctor and Norbury as well as Ms. Rose described the grievant as variously "dazed" or as "staring past me," or as seeming to be remote and uncaring. In other words, management maintained that the grievant showed no visible signs of intoxication, while the grievant maintained that he hid them well.

The parties also disagreed about the grievant's psychological disposition. Although there are signs of vascular engorgement in the grievant's face, all supervisors testified that the grievant's appearance was presentable and his demeanor agreeable. But the parties conceded that the grievant also has a "rough" appearance and that he looks considerably older than a man of forty-six years. There was also unrebutted evidence that the grievant had quarreled with postal patrons and on occasion had used profane language to curse them.

The point of reciting these tales with regard to the grievant's alcoholic symptoms is to make clear that the evidence was ambiguous and might have supported a conclusion of no alcoholic disability as well as a conclusion that the grievant is a chronic alcoholic. Witnesses for the Employer described the grievant as a "loner," and it is plausible that he hid his disease well. Although he displayed some obvious symptoms, management was unwilling to confront him with the data it had. In view of the medical evidence submitted to the arbitrator indicating that the grievant is chemically dependent, it is reasonable to conclude that the grievant is an alcoholic. Evidence to the contrary simply is not compelling.

The arbitrator also recognizes that there are numerous inconsistencies in the grievant's testimony, and the Employer has argued that such ambiguities must cast doubt on the grievant's credibility. For example, in a neurosurgical consultation on March 30, 1988, the grievant told his doctor that he had stopped drinking some fifteen years earlier. (See,

Employer's Exhibit No. 18). The same information is contained in another medical report. (See, Employer's Exhibit No. 16). This statement is consistent with what the grievant told Inspector Koss and Supervisor Guptill during the investigatory meeting on April 5, 1988. (See, Union's Exhibit Nos. 1(JJ) and (KK)). Management has concluded that such statements undermine the grievant's current assertion that he is an alcoholic.

Moreover, when the grievant met with Mr. Wilkinson on May 6, 1988, he stated that his substance abuse had not caused him to steal the check. He also stated that he had done no drinking of alcoholic beverages on the workroom floor. At the hearing, however, the grievant changed his testimony in both respects. The Employer maintains that, because the grievant had completed the rehabilitation program at Ridgeview Center before the meeting on May 6, he should have been honest about such details. Furthermore, he should have been honest by the time of the arbitration hearing at which point he changed his testimony with respect to whether he was drinking at the time of his accidents. It is the position of the Employer that such inconsistencies show the grievant is not a reformed alcoholic but merely has put forth alcoholism as a fabricated defense to his removal.

The contradictions that disturbed the Employer, however, may be explained by the concept of denial. Dr. Allison testified that the tendency to deny a drinking problem is symptomatic of alcoholism. He testified that such a pattern of

denial usually continues until some catastrophic event forces an individual to admit that he or she has a problem with substance abuse. The process of drug and alcohol rehabilitation, in large part, is a process of growing to be more honest with one's self and with others. It is reasonable to conclude that inconsistent statements made by the grievant were the result of a pattern of denial and that his later statements, after a period of considerable rehabilitation, reflect an increasing ability to be honest.

Finally, the Employer has argued that there are substantial flaws in the grievant's version of his suicide attempt. First, the grievant allegedly testified that he left his home between 1:10 and 1:20 P.M. on April 6, 1988, and that this statement conflicts with the police report which established that his wife last saw him at 1:30 P.M. (See, Union's Exhibit No. 5). He also contradicted his own statement wih regard to when he first took pills, saying on November 29, 1988 that he took drugs as he left the gas station and on March 31, 1989 that he took them in his basement before leaving home. Second, the Employer has maintained that, had the grievant ingested everything he claimed to have consumed, he should have registered a higher level of drugs and alcohol in his system. He allegedly would have been unable to attempt to get his vehicle back on the road. Arguably, he should have died. Moreover, he would have experienced more documentable symptoms during detoxification. Third, despite the grievant's testimony that he had regurgitated on his clothing, was

intoxicated, and had run his vehicle off the road, the police report mentioned nothing unusual about his appearance or any damage to his vehicle.

Many of the inconsistencies are inconsequential and could reflect the poor memory of an alcoholic. With respect to the grievant's test results at the hospital, it is completely plausible that the grievant survived the incident because he had developed a high tolerance toward drugs, regurgitated extensively, and had his stomach pumped. With regard to the grievant's symptoms during detoxification, it is reasonable to conclude that a person's physical response to that experience is completely individual. The arbitrator has been given no good reason to question the expert judgment of Dr. Allison, and he concluded that the grievant was chemically dependent. Finally, the police report of the incident confirmed some of the grievant's testimony and failed to disprove the rest. In summary, none of the inconsistencies pointed out by the Employer disproved the grievant's contention that he is an alcoholic. Although there are ambiguities with regard to the grievant's chemical dependency, the weight of the evidence supports a conclusion that, in fact, he does suffer from alcoholism. The more pressing issue is determining how that condition should affect the Employer's decision to remove the grievant in this case.

D. The Impact of Alcoholism on a Removal for Theft:

Although evidentiary issues in the case were complicated, far more vexing is working out the relationship between the grievant's misdeed and his malady. As a matter of policy, theft in the workplace must be confronted. But people are more important than policy, and policy must be fashioned to serve human needs. At the same time, individual accountability must be required. It has been necessary to work through these abstractions in terms of their impact on the life of this individual human being.

The Union has argued that the grievant'a alcoholism and subsequent efforts at self-help mitigate his offense to the point of making reinstatement appropriate. According to the Union, the concept of just cause requires reinstatement when four elements have been established. First, the employe must be an alcoholic and fully accepts that fact. Second, the individual must demonstrate that he or she has obtained treatment, with a reasonable prospect of success. Third, the employe must have communicated these facts to the Employer in a manner that would allow an evaluation of their validity. Finally, the employe must demonstrate that alcoholism caused his or her misconduct, so that by abstaining from substance abuse, the employe's work deficiencies should disappear. (See, Exhibit H in the Union's Post-hearing Brief).

As previously determined, there was sufficient evidence to establish that the grievant is an alcoholic and drug addict. Details that the grievant told tumbled out in pieces

and described a life breaking under unbearable strain. But there was evidence that he has undergone treatment and has a reasonable chance of success. He, in effect, took a mud bath and splashed about indecorously in full view of the community, but he also publicly has "owned" his misdeeds and participated in activities such as Alcoholics Anonymous meetings.

According to Dr. Allison, the grievant is not antisocial and is unlikely to repeat his misconduct as long as he remains unintoxicated. Moreover, except for a statement by Dr. Jacobson that he smelled alcohol on the grievant's breath on August 16, 1988, there has been no report of his using alcohol or drugs since being discharged from Ridgeview Hospital. (See, Employer's Exhibit No. 19). On the contrary, Mr. Corbett, the grievant's probation officer, testified that the grievant has complied with all terms of his probation and that weekly urine tests show the grievant to have been drug-free since September 21, 1988. Likewise, there was substantial evidence showing that the grievant had performed considerable community service and that he is growing gradually more honest about his disability.

It also is reasonable to conclude that the grievant communicated his alcoholism and treatment in a timely manner. He asserted his alcoholism as a defense at least at Step 2 in the grievance procedure, and the Employer had ample opportunity to investigate whether or not the grievant was an alcoholic, and whether he had undergone successful rehabilitation. Finally, the Union showed clear linkage between the grievant's

misconduct and his chemical dependency. Dr. Allison suggested that drug abuse affects an individual's judgment and reduces inhibitions toward dangerous or immoral conduct. Dr. Allison opined that the grievant was not in his "right mind" when he stole and cashed the check which led to his removal. A preponderance of the evidence suggested that the grievant's substance abuse laid the groundwork for his misconduct.

This conclusion, however, does not end the inquiry. Some offenses are not easily mitigated. It is recognized that in many situations an employe who has committed "dischargeable acts" because of chemical dependency and who later undergoes treatment for the disease should receive an opportunity to be rehabilitated. Some courts have required federal agencies to give an opportunity for rehabilitation before discharging employes when poor performance has been caused by alcoholism. (See, for example, McElrath v. Kemp, D.C. D.C., No. 88-3198, March 22, 1988).

Arbitrators long have made use of "last chance" reinstatements in an effort to give an opportunity for rehabilitation. (See, for example, Barnes Drill Company, 62 LA 875 (1974); and Menasha Corp., 71 LA 653 (1978)). The fact remains that some grievous misdeeds may be mitigated with great difficulty.

The grievant's offense was theft of mail. Such an offense violates not only norms of acceptable conduct in society but also numerous administrative and statutory

regulations as well as the collective bargaining agreement itself. The Employer's reason for existence is to handle the property of others, and the grievant's misconduct slashed at the heart of the Employer's reason for being. Accordingly, it has been necessary in this case to balance the interest of competing principles, namely, tolerating theft and accommodating handicapped employes.

Adding harm to the grievant's misdeed was the publicity it received. Butte, Montana is a relatively small community, and there was newspaper publicity about the grievant's misconduct. (See, Employer's Exhibit Nos. 33 and 34). There was unrebutted testimony that the Employer had received several inquiries from customers who had not received checks in the mail, and they wondered if the grievant might have stolen them. Mr. Noctor learned from his mother, someone who is not a postal employe, that the grievant had stolen the check. When asked if any of the people where his mother lived talked about the incident, Mr. Noctor stated:

> They all talked about it. They made a joke whenever I'd deliver down there. 'Did you steal my check?' or they said they were missing a check, 'Where is my check? Did you steal it?'

To make a system work and grow, the Employer requires a high degree of public confidence in the sanctity of the mail; and the grievant could not have committed a more serious industrial crime, apart from deliberately destroying life.

It also must be recalled that, while Dr. Allison testified that the grievant's chances of remaining sober are good, he also recognized a substantial possibility that the grievant

could suffer a relapse in his struggle to be free of chemical dependence. In other words, the doctor made clear that there is no guarantee the grievant would not steal again if reinstated. It must be emphasized that the grievant's offense in this case was not absenteeism, poor performance, or even insubordination. A "last chance" reinstatement arguably would be appropriate in such cases. It is recognized that the grievant in this case has undergone rehabilitative efforts and has expressed genuine remorse as well as a willingness to make restitution, but they have not outweighed the Employer's need to protect itself from the substantial harm his misconduct has caused.

E. A Matter of Public Policy:

There are cases in which public policy prohibits returning an employe to the workplace. A relatively recent United States Supreme Court decision is instructive in this regard. In the Misco case, the employer discharged an employe who operated hazardous machinery after management concluded that he used marijuana. (See, Misco, Inc., 108 S. Ct. 364 (1987)). An arbitrator reinstated the employe. A court of law, then, refused to uphold the arbitration decision because it conflicted with a public policy against permitting an employe to operate dangerous machinery while under the influence of drugs.

The Supreme Court has made clear that it will not enforce an arbitration decision that is contrary to public policy. (See, W. R. Grace & Company, 461 U.S. 757, 766 (1983)). What the Court will seek is a well-defined and dominant public policy made clear by laws and legal precedents. The Court wants something more than general considerations of supposed public interests. It is the arbitrator's belief that these public policy exceptions are rare, but they do occur. In Delta Airlines, Inc., for example, an arbitrator reinstated a pilot who had been discharged for being intoxicated on duty. (See, C.A. 11, No. 87-8839 (December 8, 1988)). The Court refused to uphold the arbitrator's decision on the ground that piloting an airplane while intoxicated is specifically prohibited by law.

The point is that the grievant's misconduct in this case was not merely wrong in itself. In and of itself, it was morally wrong for the grievant to steal; but numerous arbitration cases can be cited in support of the proposition that there is forgiveness for even moral wrongs in the workplace and that an employe should receive an opportunity to be rehabilitated. But there is an added dimension in this case because the grievant's employment as a postal worker has made his misdeed illegal. In deciding to engage in the misconduct for which he has been discharged, the grievant was making not only a personal moral decision but an employment decision as well. He engaged in conduct that specifically has been prohibited by federal statute. (See, U.S.C.A. § 1709, tit. 18).

Because mail theft is integral to the performance of the grievant's duties as a letter carrier, his continued employment would violate a well-defined statutory public policy.

The Union has argued, however, that management's drug and alcohol policy at this particular facility was so lenient as to amount to co-dependent behavior. The Union has maintained that the Employer not only failed to investigate alcohol abuse among its employes or actively to encourage employes with clear-cut substance abuse problems to seek help from the Employee Assistance Program but also that management failed to discipline employes when they committed alcohol related misconduct. As a consequence, these alleged failings permitted the grievant's addictions to continue unabated, according to the Union. In other words, the Union has argued that the Employer must bear partial responsibility for the grievant's crime and that this fact should mitigate his removal.

The arbitrator received some evidence to suggest that a general drinking problem has existed among employes at the Butte, Montana facility, that the Employer was aware of this fact, and that it responded inappropriately to the situation. A number of witnesses suggested that the Employer's response to drinking at the facility was particularly lax. Some evidence suggested that several employes have been drunk on duty. One witness maintained that employes had even been permitted to drive postal vehicles while under the influence of alcohol. One employe testified that he had reported to work while "drunk."

There was also testimony that management on several occasions had gone into the community searching for employes who had not reported to work because they were intoxicated or overcoming the effects of consuming liquor. One employe testified that several supervisors had called for him at his home on various occasions and brought him to work, despite the fact that he was intoxicated. There also was testimony from supervisors that there had been no "stand up " talk with regard to the Employee Assistance Program prior to the time of the grievant's theft of mail.

While the charges and countercharges with regard to this issue were unsettling, the evidence submitted to the arbitrator failed to overcome several problems. Even if it is conceded that there was (or is) a "drinking" problem in the Butte, Montana office, the arbitrator received no objective evidence showing that management knew the grievant was one of those affected by this problem. By the grievant's own admission, he was unusually good at hiding his problem. It is not reasonable to expect the Employer to investigate a possibility that an employe has a problem with alcohol when there is no obvious reason for doing so.

Assume, however, that management knew of the grievant's alcoholism and drug dependency. It might logically follow that the Employer must bear some responsibility for his continued addiction. It, however, does not logically follow that management also must bear responsibility for the grievant's theft of mail. Even if the grievant had been confronted with

his problem of chemical addiction, there is no assurance that he would have sought professional assistance. Even if he had sought help, there is no way of knowing that he would have been successfully rehabilitated. A lax attitude in the workplace toward alcohol consumption clearly would mitigate misconduct such as absenteeism or drinking on the job or insubordination. But the connection between the Employer's alleged failure to address the grievant's problem in this case and his decision to steal mail simply is too attenuated and cannot excuse his act.

Assume, however, that management could be assigned part of the blame for the grievant's theft of mail. Such an apportionment of blame for the Employer still does not address the public policy issue. Were management partly responsible, it might well be reasonable to make the Employer shoulder the burden of a troubled employe. The public, however, should not be required to bear the risk of losing mail because the grievant suffered a relapse and again resorted to theft in order to support his addiction.

The Union has argued that Article 35 of the parties' collective bargaining agreement supports mitigation of the grievant's removal in this case. Article 35 of the parties' agreement is clear about the fact that:

> An employee's voluntary participation in such [rehabilitation] programs will be considered favorably in disciplinary action proceedings. (See, Joint Exhibit No. 1, p. 102).

The Union has argued that management failed to give any favorable consideration to the grievant's rehabilitative efforts.

Moreover, the Employer failed to do so because it did not believe that the grievant's bout with alcoholism was real. The Union has maintained that the Employer rejected the grievant's claim of alcoholism without sufficiently investigating it and that management should be required to accept his contetion that he is troubled with alcoholism. The point the Union has stressed is that management's basis for the grievant's removal was inaccurate and, accordingly, not supported by just cause.

Evidence submitted by the Union established that management, in fact, discounted the grievant's claims of alcoholism without sufficient investigation. Supervisor Brasier admitted that he knew before the Step 1 meeting about the fact that the grievant was at Ridgeview Hospital undergoing treatment for alcoholism. Yet, he conducted no investigation into any possible connection between that fact and the grievant's misconduct. Similarly, Mr. Guptill who knew of the grievant's suicide attempt and subsequent admission to the St. James Stress Unit, failed to investigate the claim of alcoholism. Finally, Mr. Wilkinson was aware at the May 6, 1988 meeting with the grievant that Dr. Allison was from the St. James facility. Despite the opportunity to ask the doctor questions about the grievant's claim of addiction, Mr. Wilkinson asked him nothing. The Employer clearly had a duty to investigate the grievant's claim or to have accepted his contention that he was a recovering alcoholic.

Recognizing that duty, however, does not make it logical

to conclude that the grievant's removal was without just cause. Supervisor Brasier testified that, in light of the nature of the grievant's offense, his decision would have been the same even had he accepted the grievant's claim of alcoholism. Mr. Wilkinson testified that, in light of the serious nature of the misconduct, he did not consider the removal punitive, even if the grievant had been an alcoholic. The point to be emphasized is that there were two bases for the Employer's removal of the grievant. First, management maintained that alcoholism did not cause the theft, and management's second reason for the termination was that the infraction was so serious it could not be mitigated by alcoholism in any event. Although the Employer's failure to investigate removed the first basis for the discharge, the second reason remained intact.

The arbitrator also completely agrees with the Union that the Employer had a duty to consider favorably the grievant's attempts at rehabilitation. In many situations, management's failure to do so would have removed the justification for a disciplinary decision and would have provided the basis for the grievant's reinstatement. But as another arbitrator has observed, "favorable consideration under Article 35 by no means guarantees an employe who has undertaken treatment after removal notice automatic reinstatement." (See, p. 25 of Exhibit H in the Union's Post-hearing Brief, emphasis added). In this particular grievance, the Employer maintained that it would have removed the grievant even if the Employer

had believed that alcohol directly caused the employe's misdeed. In other words, even though the Employer gave the grievant's defense little consideration, this fact did not harm the grievant. The Employer's ultimate decision in the case was based on a legitimate concern for the security of the mail, and that consideration warranted the grievant's removal.

F. An "Undue Hardship":

The Union also has argued that the grievant's alcoholism makes him a qualified handicapped employe within the meaning of Sections 503 and 504 of the Rehabilitation Act of 1973. (See, Exhibit P of the Union's Post-hearing Brief). The purpose of the Rehabilitation Act of 1973 is to help handicapped individuals assume a full role in society. It protects handicapped individuals from discrimination because of their handicap in a variety of employment decisions. Section 501(b) of the Rehabilitation Act requires federal employers to provide reasonable accommodation for handicapped individuals. EEOC regulations also require reasonable accommodation for qualified handicapped individuals. (See, 29 C.F.R. § 1613.704).

The Union has argued that reinstatement of the grievant is a reasonable accommodation to his disease and that, because Article 2 of the collective bargaining agreement

forbids unlawful discrimination against handicapped employes, management's failure to reinstate the grievant would violate the parties' collective bargaining agreement. The Employer has responded that, because the Union did not advance this contention during earlier steps of the grievance procedure, it should not be permitted to rely on such an argument at this stage. The contention has merit.

It is not the role of an arbitrator to alter the promises of the parties. The parties have agreed that at Step 2:

> The Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. (See, Joint Exhibit No. 1, p. 60).

Similarly, the parties have agreed at Step 3 that "each party's representative shall be responsible for making certain that all relevant facts and contentions have been developed and considered." (See, Joint Exhibit No. 1, p. 62). The parties have developed a procedure for processing disputes which states that:

> Where the parties' representatives mutually conclude that relevant facts or contentions were not developed adequately in Step 2, they shall have authority to return the grievance to the Step 2 level for full development of all facts and further consideration at that level. (See, Joint Exhibit No. 1, p. 62).

These and other provisions demonstrate a commitment to full disclosure in the grievance procedure. The arbitrator, however, has been unable to find any reference in the "moving papers" to Article 2 or to any contention that the Employer engaged in unlawful discrimination with regard to the grievant. At the same time, the Richardson case taught that a

postal employe who had been removed after a criminal conviction for assault would not be permitted to pursue a claim under the Rehabilitation Act of 1973 because there was no connection between his alcoholism and the loss of his job. Since the employer discharged him for his criminal misconduct and not because of his alcoholism, the Rehabilitation Act gave him no defense. (See, Richardson v. United States Postal Service, U.S.D.C. D.C., No. 84-3648, June 29, 1985)).

The parties have agreed in Article 2 that "there shall be no unlawful discrimination against handicapped employees, as prohibited by the Rehabilitation Act." (See, Joint Exhibit No. 1, p. 4). Moreover, the Employer has issued regulations that provide guidelines for reasonable accommodation and has incorporated those regulations into the collective bargaining agreement pursuant to Article 19. (See, Exhibit U of the Union's Post-hearing Brief). Even if the grievant had a right to pursue a claim under the Rehabilitation Act of 1973 and its amendments in 1978, the duty of reasonable accommodation is limited to situations in which accommodation will not impose an "undue hardship" on the Employer.

The Union has requested that the arbitrator find the Employer to be in violation of "both contract and law" by not reasonably accommodating the grievant. (See, Union's Post-hearing Brief, p. 90). Both contract and law have incorporated the concept of undue hardship on the Employer. The Court has described the issue this way:

> In the employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question. When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable accommodations" by the employer would enable the handicapped person to perform those functions. Accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on a grantee, or requires "a fundamental alteration in the nature of the program." (See, School Board of Nassau County v. Arline, 107 S. Ct. 1123 (1987)).

In other words, if reasonable accommodation can be accomplished without undue financial and administrative burtdens, a federal employer is expected to make reasonable accommodations to the physical or mental limitations of an applicant. The basic idea has been incorporated into administrative regulations of the Employer which state that "reasonable accommodation made for the benefit of one employee or a group of employees should not impact negatively upon other areas within the installation or result in unreasonable cost." (See, p. 5 of Exhibit U in the Union's Post-hearing Brief).

In this particular case, the proposed accommodation, namely, reinstatement would expose the Employer to a considerable risk that the might suffer a relapse and again woudl steal from the mails. This is a risk that would attend the grievant's reinstatement no matter what position to which management assigned him. Such an accommodation also would require management to accept the burden of any adverse publicity that might result from the reinstatement itself as well as from any relapse the grievant might suffer. For the Employer to continue the employment of an individual known in

the community as a thief of the very product handled by the Employer could impact negatively on the public's trust of the Postal Service and could affect management's ability to carry out the mission of the Employer. Accordingly, the nature of the proposed reinstatement would go beyond reasonable accommodation.

In conclusion, the arbitrator is in agreement with the Union that stronger steps should have been taken to address the issue of drug and alcohol abuse in the Butte, Montana facility. That conclusion, however, has not shifted the responsibility for the grievant's theft to the Employer. The grievant brought his addiction to the Postal Service with him when he began his employment. His chemical dependency, coupled with a courageous effort to overcome the problem, would in many circumstances warrant giving him a last chance to prove that he is a reliable employment. When the grievant stole a check from the mails, however, he stepped beyond the point at which management was required to retain him as an employe or to accommodate his addiction to drugs and alcohol.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer had just cause to issue the grievant a Notice of Proposed Removal on April 29, 1988 and a Letter of Decision on May 17, 1988. The grievance is denied. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: 6-26-89