

C-24273

A+B

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration \*  
\*  
\*  
between \*  
\* GRIEVANT: Bailor  
\*  
UNITED STATES POSTAL \* POST OFFICE: Lexington, NC  
\*  
\*  
and \*  
\* USPS Case No. C98N-4C-D 02124548 GTS  
\* C98N-4C-D 02044482 *Pre-Arb. 55a57*  
\* C98N-4C-D 02144155  
\* (No GTS or DRT No. was provided)

BEFORE: KEITH POOLE, ARBITRATOR

APPEARANCES:

For the U.S. Postal Service: Janis Layne

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MAY 27 2003

For the Union: Jeffrey Perrotta

VICE PRESIDENT'S  
OFFICE  
NALC HEADQUARTERS

Place of Hearing: Lexington, NC

Dates of Hearing: September 6, October 15 and 16, 2002

Date of Award: May 10, 2003 (Briefs and Citations submitted)

Relevant Contract Provision: Article 15, 16, 17 and 31

Contract Year: 1998

Type of Grievance: Emergency Procedure and Discharge

**AWARD SUMMARY:**

The grievance regarding the Emergency Procedure is granted. The Service did not demonstrate that retaining the grievant could result in loss of postal property or funds.

Charge 1 of the Removal is dismissed because the Service did not demonstrate the grievant made a false statement. Charge 2 is sustained. The evidence shows the grievant improperly received OWCP monies based on his representation that he was only capable of limited duty while at the same time he was working for the Davidson County Sheriff's

Department without any limitations. Charge 3 is sustained. The evidence shows the grievant was doing physically unrestricted work for the Davidson County Sheriff's Department at the same time he was working for the Post Office under physical restrictions. Charge 4 is dismissed because the Service failed to provide the Union with information necessary and relevant to representing the grievant on this charge until the second day of hearing, thereby violating Articles 17 and 31. Based on the circumstances, the appropriate remedy for this violation is dismissing Charge 4. Charge 5 is dismissed because the Service did not demonstrate the grievant failed to cooperate with his Supervisor.

The penalty of discharge is appropriate for Charges 2 and 3. Accordingly, the discharge is sustained and the grievances regarding the Notice of Proposed Removal and the Letter of Decision are denied.

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Keith Poole

## **AWARD AND OPINION**

### Introduction

In 1989, Robert Bailor began working as a letter carrier at the Lexington, North Carolina installation. On June 28, 1996, with the knowledge and consent of the USPS, Mr. Bailor took the oath of office as a Reserve Deputy Sheriff for Davidson County, and, with the knowledge and approval of the Service, he began work as a Reserve Deputy Sheriff for Davidson County during his off duty time. The Sheriff's Department of Davidson County has primary jurisdictional responsibility for all of unincorporated Davidson County and secondary jurisdictional responsibility for incorporated Davidson County. This means the Davidson County Sheriff's Department is responsible for enforcing the law and conducting the investigations into any misdemeanors or felonies which occur in unincorporated Davidson County.

The basic duties of the Deputy Sheriff's position are set forth in the Inexperienced Law Enforcement Officer Essential Job Functions. (See Joint Exhibit 2-A, p. 39. According to this document, this position requires "a high level of physical ability to include, vision, hearing, speaking, flexibility and strength." A Reserve Deputy Sheriff is responsible for arresting individuals with force, if necessary, including the subduing of resisting suspects. For this purpose, a Reserve Deputy Sheriff is issued a sidearm. A Reserve Deputy Sheriff is responsible for operating a law enforcement vehicle and going out on patrol in the vehicle alone. While in the vehicle the Deputy Sheriff is responsible for the apprehension of speeders in all weather conditions. In addition, while on patrol a Deputy Sheriff must respond to calls including domestic disturbances, assault, burglary, breaking and entering, and larceny. A Reserve Deputy Sheriff is responsible for pursuing fleeing suspects and performing rescue operations which may involve quickly entering and exiting law enforcement vehicles, lifting, carrying and dragging heavy objects,

climbing over and pulling up one's self over obstacles, jumping down from elevated surfaces, climbing through openings, jumping over obstacles, ditches and steams, crawling in confined areas, balancing on uneven or narrow surfaces and using bodily force to gain entrance through barriers. A Reserve Deputy Sheriff must be proficient in the use of handguns, shotguns and other agency firearms under conditions of stress that justify the use of deadly force. A Reserve Deputy Sheriff performs searches of individuals and vehicles which may involve feeling and detecting objects, walking for long periods of time, detaining people and stopping suspicious vehicles and persons. (See Joint Exhibit 2-A, p. 39).

In 1997, Mr. Bailor injured his back while working on the job. This back injury became progressively worse. Effective March 17, 2000 Mr. Bailor was working with the following restrictions:

|                         |                                 |
|-------------------------|---------------------------------|
| Lifting/Carrying        | Less than 35 pounds 4 hours/day |
| Sitting                 | 4 hours/day                     |
| Standing                | 4 hours/day                     |
| Walking                 | 6 hours/day                     |
| Climbing                | 1 hour/day                      |
| Bending/Stooping        | 1 hour/day                      |
| Twisting                | 4 hours/day                     |
| Reaching/Pulling        | 1 hour/day                      |
| Reaching Above Shoulder | 6 hours/day                     |
| Driving a Vehicle       | 6 hours/day                     |

On August 12, 2000 Mr. Bailor had surgery for his back condition and as a result, was out of work from August 15, 2000 through September 8, 2000. In anticipation of this surgery, Mr. Bailor submitted a CA-7 Form which is a claim for compensation from the Office of Workers' Compensation. This form was prepared on August 12, 2000. In Section 2 of that form, Mr. Bailor requested compensation from "August 18, 2000" to "present". In Section 3 of this form, Mr. Bailor stated that was not working outside his federal job during the period for which he claimed compensation (August 18-present).

On August 28, 2000 Mr. Bailor's treating physician, Dr. Victoria Neave completed a CA-17. According to Dr. Neave, Mr. Bailor could only work for two hours a day at the USPS beginning on September 11, 2000 and he was subject to the following limitations:

|                         |                                    |
|-------------------------|------------------------------------|
| Lifting/carrying        | Less than five pounds, 2 hours/day |
| Sitting                 | 2 hours/day                        |
| Standing                | 2 hours/day                        |
| Walking                 | 2 hours/day                        |
| Climbing                | 0 hours/day                        |
| Bending/stooping        | 0 hours/day                        |
| Twisting                | 0 hours/day                        |
| Pulling/Pushing         | Less than 5 pounds, 2 hours/day    |
| Reaching above shoulder | 2 hours/day                        |

From September 11, 2000 until October 16, 2000, Mr. Bailor worked under the August 28, 2000 CA-17. During this period, Mr. Bailor worked for two hours a day at the Lexington installation answering phones and doing other similar light duty, and he spent six hours a day receiving therapy and doing rehabilitation to recover from his surgery.

On October 16, 2000 Dr. Neave prepared a CA-17 which stated Mr. Bailor had the following limitations:

|                         |                                  |
|-------------------------|----------------------------------|
| Lifting/Carrying        | Less than 35 pounds, 4 hours/day |
| Sitting                 | 4 hours/day                      |
| Standing                | 4 hours/day                      |
| Walking                 | 1 hours/day                      |
| Climbing                | 2 hours/day                      |
| Bending/Stooping        | 2 hours/day                      |
| Twisting                | 0 hours/day                      |
| Pushing/Pulling         | Less than 60 pounds/2 hours/day  |
| Reaching above Shoulder | Less than 35 pounds. 4 hours/day |
| Driving a Vehicle       | 4 hours/day                      |

From October 17, 2000 forward Mr. Bailor worked under the October 16, 2000 CA-17. During this period, he worked limited duty for six hours a day and spent two hours a day receiving therapy and doing rehabilitation to recover from his surgery.

The logs for the Davidson County Sheriff's Department show that Mr. Bailor continued working as a Reserve Deputy Sheriff while working on limited duty at the USPS. These logs show Mr. Bailor worked the following days and hours:

|                    |            |
|--------------------|------------|
| July 12, 2000      | 6.0 hours  |
| July 13, 2000      | 6.0 hours  |
| July 15, 2000      | 12.0 hours |
| July 16, 2000      | 12.0 hours |
| July 19, 2000      | 12.0 hours |
| July 22, 2000      | 12.0 hours |
| August 4, 2000     | 12.0 hours |
| August 5, 2000     | 12.0 hours |
| September 11, 2000 | 3.0 hours  |
| September 12, 2000 | 2.0 hours  |
| September 15, 2000 | 2.5 hours  |
| September 20, 2000 | 2.5 hours  |
| September 21, 2000 | 2.5 hours  |
| September 22, 2000 | 2.5 hours  |
| October 18, 2000   | 6.0 hours  |
| October 20, 2000   | 6.0 hours  |
| October 21, 2000   | 12.0 hours |

|                  |            |
|------------------|------------|
| October 23, 2000 | 6.0 hours  |
| October 24, 2000 | 6.0 hours  |
| October 26, 2000 | 12.0 hours |

The Davidson County Sheriff's Department also keeps logs of all calls which each officer is assigned while out in patrol in a car.<sup>1</sup> According to the log of all calls, Mr. Bailor had the following types of calls on the dates identified:

|                    |            |                |
|--------------------|------------|----------------|
| August 13, 2000    | 0813 hours | Animal call    |
| August 13, 2000    | 1359 hours | Vehicle stop   |
| August 13, 2000    | 1548 hours | Direct traffic |
| August 13, 2000    | 1621 hours | Civil Dispute  |
| September 15, 2000 | 1419 hours | Assault        |
| October 18, 2000   | 1844 hours | Burglar alarm  |
| October 18, 2000   | 1907 hours | Civil Dispute  |
| October 18, 2000   | 1939 hours | B&E-occurred   |
| October 18, 2000   | 2136 hours | Domestic       |
| October 18, 2000   | 2233 hours | Domestic       |
| October 18, 2000   | 2301 hours | Domestic       |
| October 21, 2000   | 2010 hours | Domestic       |
| October 21, 2000   | 2012 hours | Burglar alarm  |
| October 21, 2000   | 2021 hours | Domestic       |
| October 21, 2000   | 2025 hours | Civil Dispute  |
| October 23, 2000   | 1817 hours | Larceny        |
| October 23, 2000   | 1839 hours | B&E-occurred   |
| October 23, 2000   | 2122 hours | Vehicle Stop   |
| October 23, 2000   | 2211 hours | Warrant Served |
| October 24, 2000   | 2120 hours | Burglar alarm  |
| October 24, 2000   | 2152 hours | Burglar alarm  |
| October 26, 2000   | 1839 hours | Larceny        |
| October 26, 2000   | 2029 hours | Civil Dispute  |

In December, 2000 Postmaster Brown requested an investigation based on information that Mr. Bailor was working as a Reserve Deputy Sheriff while on limited duty. On July 17, 2001 Inspector Rutledge completed an Investigative Memorandum which the Lexington, North Carolina installation received on July 20, 2000. On December 6, 2001 Inspector Rutledge conducted an inspection interview with Robert Bailor. Also present were Union Steward Pirone and C.R.A. Oliver Redd. Immediately after this interview, Supervisor Bozeman gave Mr. Bailor a notice of Emergency Suspension which was effective immediately. According to the December 6, 2001 letter, Mr. Bailor was charged with falsifying documents and inappropriately obtaining benefits from the USPS and the Office of Workers' Compensation. Based on this the Service concluded, "There is reasonable cause to believe that retaining you in a duty status may result in damage to United States Postal Service property, loss of mail or fund, or where

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<sup>1</sup> Officers go out on patrol in cars by themselves.

you may be injurious to yourself or others." The Union grieved this Emergency Procedure.

A second Investigative Memorandum was prepared dated January 29, 2002.

On February 20, 2002 Supervisor Bozeman conducted an investigatory interview. Those present were Mr. Bailor, Union Steward Pirone, and Supervisor Bozeman.

On March 19, 2002, the Service issued a Notice of Proposed Removal to Mr. Bailor. The basis for the proposed removal was Improper Conduct, and five specific charges were cited. The first charge was making a false statement on the Department of Labor, Office of Workers Compensation Form (CA-7) dated August 12, 2000 in which Mr. Bailor stated that he had no outside employment. The second charge was improperly accepting OWCP benefits from September 11 through September 29, 2000 and from October 2 through October 13, 2000 while working as a Reserve Deputy Sheriff for Davidson County. The third charge was working without medical restrictions as a Deputy Sheriff for Davidson County while claiming and working under severe medical restrictions at the Service. The fourth charge was providing false information to the Postal Inspectors on the December 6, 2001 interview regarding the restrictions under which he worked at the Davidson County Sheriff's Department and regarding the information provided to Dr. Neave. The fifth charge was failing to cooperate with the investigation of Supervisor Bozeman by withholding exculpatory evidence. The Union filed a grievance regarding this Notice of Proposed Removal.

On April 16, 2002 the Service issued a Decision letter stating it intended to remove Mr. Bailor effective April 25, 2002. The Union grieved the Decision letter.

The parties agreed that all three grievances would be combined. The undersigned arbitrator was selected to hear all three grievances. The first day of hearing was held on September 6, 2002. Subsequent hearing days were held on October 15 and 16, 2002. At the hearing, the parties agreed all grievances were arbitrable and grievable. Each party was ably represented and given a full opportunity to call witnesses, cross-examine witnesses, and submit any relevant evidence. At the hearing, the parties agreed they would submit post-hearing briefs and citations. These briefs and citations were submitted in a timely manner.

### ISSUES

Was the Emergency Procedure in Violation of Article 16, Section 7?

Was the termination of Mr. Bailor for just cause and if not, what is the appropriate remedy?

### POSITION OF THE PARTIES

The Service's position is as follows: The Emergency Procedure was consistent with the requirements of Article 16, Section 7. The removal was for just cause. The

grievant falsified the CA-7 because he was working in a non-federal job during the period he received OWCP benefits. The grievant received checks from OWCP covering the period September 11 through September 29, 2000 and October 2 through October 13, 2000 while at the same time he was working as a Deputy Sheriff for Davidson County with no restrictions. The grievant lied to the Service regarding his physical condition and the work he was capable of doing. From September 18 through the end of October, 2000 the grievant was working for the Service under significant medical restrictions but during this same time he worked as a Deputy Sheriff for Davidson County with no medical restrictions. The grievant did not honestly answer the questions of the Inspector when interviewed and the grievant failed to cooperate with his immediate supervisor at the investigatory interview.

The Union's position is as follows: The Emergency Procedure did not comply with the requirements of Article 16, Section 7. The removal is contrary to the principles of due process because the Service did not conduct a thorough and impartial investigation and because Supervisor Bozeman assumed the grievant was guilty. The Service violated Articles 17 and 31 when it failed to produce information relevant and necessary to the representation of the grievant which the Union had properly requested.

The Union also argues the removal was not for just cause. The grievant did not falsify the CA-7 because he did not work for either the USPS or Davidson County during the period covered by the CA-7. There was nothing improper about the grievant receiving the funds from OWCP in addition to his salary from the Davidson County Sheriff's Department. OWCP stated in a letter this was permissible. The Postal Service was aware that the grievant was working for the Davidson County Sheriff's Department and never questioned this arrangement. Further the Service never charged the grievant with violating his medical restrictions. There is no evidence that the grievant actually performed any duties as a Deputy Sheriff during the period in question which were inconsistent with his medical restrictions.

There is no evidence which supports the charge that the grievant made a false statement to the Inspector. The charge that the grievant failed to cooperate with his immediate supervisor during the investigatory interview is without merit. The grievant fully cooperated. The Union stated that it would not immediately produce certain exculpatory documents which the supervisor requested. The Union was within its rights not to produce these documents and the Service cannot hold the grievant responsible for the Union's actions.

## OPINION

### A. The Emergency Procedure

Article 16 covers Disciplinary Procedures. Article 16, Section 5 states that when the Service believes disciplinary action involving a suspension of more than fourteen days or discharge is appropriate, the employee is entitled to receive advance written notice of the charges and to remain either on the job or on the clock for a minimum of

thirty days. Article 16, Section 6 and Section 7 are the exceptions to the general rule contained in Article 16, Section 5. Article 16, Section 6 states that where the Service has reasonable cause to believe an employee is guilty of a crime for which a sentence or imprisonment can be imposed, the Service is not required to give the full thirty days notice but shall give such lesser number of days notice as is reasonable under the circumstances. Article 16, Section 7 provides that an employee may be placed in immediate off-duty status without pay if the allegation involves intoxication, (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, "or 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 himself or others."

The first grievance before me involves the Emergency Procedure which was implemented pursuant to Article 16, Section 7. The letter dated December 6, 2001 charged Mr. Bailor with falsifying documents and inappropriately obtaining benefits from OWCP and the USPS. Based on these charges, the letter concluded it was necessary to place the grievant in an off-duty, non-pay status because "There is reasonable cause to believe that retaining you in a duty status may result in damage to United States Postal Service property, loss of mail or funds, of where you may be injurious to self or others." For the reasons which follow, I conclude the Emergency Procedure violated Article 16, Section 7 and therefore the grievance regarding the Emergency Procedure is granted.

Article 16, Section 7 is an exception to the general principle contained in Article 16, Section 5 that employees will receive thirty days written notice during which time they will remain either on the job or on the clock. Since it is an exception to the general rule, it is construed narrowly.

It is undisputed that Postmaster Brown referred the matter giving rise to the Emergency Procedure to Inspection in December of 2000. The Inspection Memorandum was completed on July 17, 2001 and the Lexington, NC office received the Inspection Memorandum on July 20, 2001 as documented by the round stamp identifying receipt. Over five months later on December 6, 2001 the Inspection Service conducted an interview of Mr. Bailor regarding the matters contained in the Inspection Memorandum. Mr. Bozeman, the grievant's immediate supervisor, was not present at this interview. Immediately after the interview, Supervisor Bozeman gave Mr. Bailor the Notice of the Emergency Procedure dated December 6, 2001 which was effective December 6, 2001.

Supervisor Bozeman was not in the room when the Inspector conducted his interview of Mr. Bailor on December 6, 2001. Since Supervisor Bozeman gave the grievant the December 6, 2001 Notice of Emergency Procedure right after the inspection interview was completed, Supervisor Bozeman did not know what took place during that interview. Therefore, it follows that Supervisor Bozeman did not rely on that inspection interview in issuing the Emergency Procedure and his December 6, 2001 Notice of Emergency Procedure relied on the Investigative Memorandum which the Lexington post of duty had received on July 20, 2001. In reaching this conclusion I also note that there is

no reference in the December 6, 2001 Notice of Emergency Procedure to the inspection interview conducted on that day. These facts show the Postal Service "sat" on this matter for over five months. Such inactivity is inconsistent with the Service's argument that an Emergency Procedure was required.

The conclusion that an Emergency Procedure was not appropriate finds support from other aspects of this case. According to the December 6, 2001 letter, the Service was concerned that permitting Mr. Bailor to work would result in "damage to United States Postal Service Property, loss of mail or funds, or where you might be injurious to yourself or others." Nothing in Mr. Bailor's alleged misconduct suggests that leaving him on duty could result in damage to USPS property, loss of mail or injury to anyone. The misconduct which Mr. Bailor allegedly engaged in was unrelated to funds. There was no evidence that Mr. Bailor at any time in his entire career or during the period giving rise to the charges against him had ever mishandled or lost funds. The record shows that he properly handled funds from July 20, 2001 when the Lexington post of duty received the Investigative Memorandum through December 6, 2001 when he was placed in an off-duty non-pay status.

Based on this record, I find the Service has failed to demonstrate the facts necessary under Article 16, Section 7 to justify an Emergency Procedure. Accordingly, I find the Emergency Procedure violated Article 16, Section 7 and the grievance is granted.

But for the improper Emergency Procedure, Mr. Bailor would have been on the rolls in a pay status and would have continued on the rolls until thirty days after the date of the letter giving him Notice of Proposed Removal. (Article 16, Section 5 provides that an employee who receives a Notice of Proposed Removal shall remain on the rolls in a pay status for thirty days and thereafter shall remain on the rolls in a non-pay status.) Since the letter containing the Notice of Proposed Removal was dated March 19, 2002, Mr. Bailor is entitled to back pay and all other benefits for the period beginning December 7, 2001 and ending thirty days after March 19, 2002.

#### B. The Removal

##### 1. Duty to Provide Information-Article 17 and 31

Article 17, Section 3 states in its relevant portion that stewards may request and shall obtain access to review documents, files and records necessary for processing a grievance. Article 31 states in its relevant portion that Service will make available for inspection by the Union all relevant information necessary for the enforcement of the collective bargaining agreement and that upon request the Service will furnish the information provided the Union agrees to pay reasonable costs.

In this case, Charge 4 in the letter containing the Notice of Proposed Removal alleged that Mr. Bailor provided the inspector with false information during the December 6, 2001 interview. Union Steward Pirone requested the inspector's notes by a

certified letter.<sup>2</sup> This letter went unanswered, and this information was not provided until the second day of the hearing after the issue had been raised at the hearing.

Since Mr. Bailor was charged with providing false information at the December 6, 2001 interview with the inspectors, the information requested-the inspector's notes of the interview- was necessary and relevant to defending Mr. Bailor from the charge that he had provided the inspectors with false information at the interview. In a Fourth Step Agreement involving Case No. E90N-1E-93046888 (July 14, 1997), the parties addressed this very issue. In that letter the parties agreed that "it appeared the notes and tapes relied upon to prepare the investigative memorandum should have been made available to the Union." This case fully supports my conclusion that the information requested was necessary and relevant.

The Service argues that it did ultimately provide the information in question and therefore, any violation was cured. For the reasons which follow, this argument is not persuasive. The purpose of the provisions cited above in Articles 17 and 31 is to ensure the Union can use the information in the grievance procedure and to ensure the Union has this information for representing the grievant before an arbitrator, should that be necessary. By waiting until the second day of the hearing to provide the requested information, the Service prevented the Union from making effective use of this information in the grievance procedure or at the hearing.

Having determined that the Service violated Articles 17 and 31 when it failed to provide the inspector's notes in a timely manner, the next issue is what is the appropriate sanction. In this case, the inspector's notes were central to the issue of whether Mr. Bailor had provided false information at the December 6, 2001 interview. Those notes could very well have provided material which would either completely or partially exonerated Mr. Bailor of this charge. These notes could have been of tremendous assistance to the Union in conducting its cross-examination of the Inspector who had conducted the interview and who was responsible for Charge 4.

Since the notes were central to the Union's efforts to defend Mr. Bailor against this charge and since the failure to provide the notes was a clear violation of Articles 17 and 31, I conclude that the only appropriate and meaningful remedy is to dismiss Charge 4 in its entirety. Any lesser remedy would allow the Service to rely on Charge 4 and would have the effect of rewarding the Service for its failure to provide necessary and relevant information which was central to a charge in a termination case. No lesser sanction would provide a meaningful remedy for the contract violation.<sup>3</sup>

For all of these reasons, Charge 4 in the letter containing the Notice of Removal is

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<sup>2</sup> Union Steward Pirone testified credibly that he had asked for the Inspector's notes after the interview was completed and that he had telephoned the Inspector and left a message on his answering machine requesting a copy of the notes.

<sup>3</sup> In reaching this conclusion, I note that even when there is no contractual obligation to provide information, arbitrators have routinely held that the failure to provide relevant information or call a relevant witness will give rise to a negative inference that the information or witness would undercut the position of the non-disclosing party.

dismissed.

The Union also requested clock rings which the Service did not provide. Unlike the request for the notes of the Inspector, there is no basis for concluding that the clock rings were necessary and relevant to the representation of the grievant. The specific hours which the grievant worked in any particular day are not in contention because they are not relevant to the fundamental issue which is whether the grievant's work at the Davidson County Sheriff's Office was consistent with the limitations under which he worked at the Postal Service. Accordingly, I conclude the Service's failure to provide this information did not violate Articles 17 and 31.

## 2. Due Process

The Union argues that the Service violated the grievant's Due Process Rights and therefore the grievance should be sustained. In support of this argument, the Union cites the following:

1. The Service did not conduct a thorough and impartial investigation. The Investigative Interview contained statements regarding the facts of the case which were wrong. For example, the first Investigative Memorandum incorrectly stated when Mr. Bailor received compensation from OWCP and the second Investigative Memorandum incorrectly stated when Mr. Bailor worked at the Davidson County Sheriff's office. Since the emergency suspension and the removal were based exclusively on the Investigative Memorandums, the suspension and removal should be overturned.
2. Supervisor Bozeman was not objective and discounted all of the evidence which supported Mr. Bailor's innocence. Further, Supervisor Bozeman testified under oath that he believed Mr. Bailor was guilty until proven innocent and that the burden of proof lies with the Union. Supervisor Bozeman refused to watch a video which the Union presented in defense of Mr. Bailor.

For the reasons which follow, these arguments are not persuasive.

The Service has an obligation to conduct a thorough and impartial investigation; but, this does not mean the Service must conduct a perfect investigation completely free of any errors. The Union is correct in stating that there were erroneous statements regarding certain facts in the First and Second Investigative Memorandums. Both of these mistakes were corrected in the letter containing the Notice of Proposed Removal. The investigation in this case was considerable and the file compiled was substantial. The fundamental facts were laid out correctly and most of the testimony at the hearing was consistent with the facts contained in the Investigative Memorandums.

What is a thorough and impartial investigation is often in the eye of the beholder. In most arbitrations, the parties either disagree regarding the facts or the proper interpretation of the facts. This disagreement standing alone does not mean that the Service has failed to conduct a thorough and impartial investigation. In this case, the

hearing went three days, but there was very little evidence which was not contained in the Investigative Memorandums.

Based on these findings, I conclude the investigation was consistent with the requirements of due process.

The next issue is whether Supervisor Bozeman's conduct violated the principles of due process. As I understood Supervisor Bozeman's testimony, he was stating that once the Service had presented a *prima facie* case in support of the discharge the Union had the burden of proof. I did not understand his statement to mean that he thought the Union had the ultimate burden of proof. Therefore, I do not believe his testimony was inconsistent with the principles of due process.

In a discharge case, it is predictable that the Union would disagree with the Supervisor regarding the evidence. That disagreement standing alone does not prove the Supervisor was biased. A supervisor can be honestly wrong just as a union steward can be honestly wrong. Here, the record shows that when the Union made reference to exculpatory documents during the investigatory interview, Supervisor Bozeman requested the documents and the Union refused to provide them. The record shows that Supervisor Bozeman took extensive notes of the February 20, 2002 investigative interview which he conducted. These notes address the issues and show Supervisor Bozeman was very familiar with the materials contained in the two investigative memorandums. Given this record and given the absence of evidence demonstrating bias, I conclude the Union has not demonstrated a violation of the principles of due process.

### 3. The Merits

#### a. Charge 1

Charge 1 alleges that the grievant made a false statement when he completed his Form CA-7 for the United States Department of Labor. On August 12, 2000 the grievant completed and signed this form. In Section 2 of this form, he requested compensation from 8-18-00 to the "present". (A copy of this form is attached as Exhibit A and is incorporated by reference.) Section 3 of the form asks, "Have you worked outside your federal job during the period(s) claimed in Section 2?". The grievant checked the box stating "No". The Service alleges that the grievant's statement was false because he was employed as a Deputy Sheriff for Davidson County from January 1, 2000 through December 31, 2000. The Union argues that Mr. Bailor answered truthfully because he did not work outside his federal job during the period claimed in Section 2.

The resolution of this issue depends on what was the period claimed in Section 2 but that period is unclear. The grievant stated the period was from 8-18-00 to the "present". Normally, the word "present" would refer to the time when the grievant completed the CA-7 but in this case that would not make any sense because the grievant filled out the form on August 12. Obviously, the period covered is not 8-18-00 to 8-12-00. A review of the record reveals there is no information regarding this point in the

Investigative Memorandums or the grievance file. At the hearing, Mr. Bailor testified that when he wrote down "present" he meant when he returned to work on September 11, 2000.

To prove falsification, one must prove a party knowingly made a statement with the intention of deceiving. Falsification can be proven either by an admission or it can be inferred from the evidence. Here, there is no admission and based on my review of the record, I conclude for the reasons which follow, falsification cannot be inferred.

OWCP is a specialized area, and this was the first time Mr. Bailor had filled out a CA-7 form. Mr. Bailor filled out the form in question on August 12, 2000 before he had the surgery. Since the form was filled out prior to the surgery, Mr. Bailor would not have known when he could return to work because he could not know how quickly he would recover from his surgery. Under these circumstances, it is plausible that Mr. Bailor would have written the word "present" to mean when he returned to work.

In fact, Mr. Bailor returned to work on September 11, 2000. The record shows Mr. Bailor did not work as a Deputy Sheriff for Davidson County from August 12, 2000 through September 10, 2000. So, if the term "present" means when Mr. Bailor was out of work due to his surgery, his statement on the CA-7 form was accurate. For the Service to prove this charge, the Service must demonstrate that the term "present" refers to a period beyond September 10, 2000. Based on the facts in the record, the Service has not proven this critical point. Second, since Mr. Bailor filled out the form prior to the surgery, he did not know when he would recover sufficiently from the surgery to return to work or when he would start working again as a Deputy Sheriff. Mr. Bailor could only make a false statement if he knew these facts. Accordingly, I conclude the Service has not met its burden of proving Mr. Bailor made a false statement because the Service has not shown the statement was made with the intention of deceiving.

In its brief, the Service argues that the statement was false because Mr. Bailor received compensation for the period September 11, 2000 through September 29, 2000 and for the period October 3, 2000 through October 13, 2000 and Mr. Bailor also worked for the Davidson County Sheriff's Department during this period. This fact does not prove the grievant made a false statement. First, the Service has not proven when the grievant wrote the word "present" he was referring to October 13, 2000. Second, the evidence shows it was the Service which used the CA-7 to file for benefits during these time periods. According to Mr. Bailor, he received two checks from OWCP but the time periods which were covered and the reasons for the payments were not included with the checks.<sup>4</sup> While this record certainly raises questions, it falls well short of proving the necessary elements of falsification.

b. Charge 2 and Charge 3.

These two charges are related. Charge 2 alleges that the grievant improperly accepted benefits from OWCP at the same time that he was doing unrestricted

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<sup>4</sup> The checks were not contained in the investigative memorandums or the grievance file.

work as a Deputy Sheriff for Davidson County. Charge 3 alleges that the grievant did physically unrestricted work as a Deputy Sheriff for Davidson County at the same time he was working under medical restrictions for the Service.

It is undisputed that when the grievant returned to work after his surgery, he had significant medical restrictions placed on what he could do. According to the CA-17 which Dr. Neave prepared, the grievant had the following restrictions:

|                         |                                    |
|-------------------------|------------------------------------|
| Lifting/carrying        | Less than five pounds, 2 hours/day |
| Sitting                 | 2 hours/day                        |
| Standing                | 2 hours/day                        |
| Walking                 | 2 hours/day                        |
| Climbing                | 0 hours/day                        |
| Bending/stooping        | 0 hours/day                        |
| Twisting                | 0 hours/day                        |
| Pulling/Pushing         | Less than 5 pounds, 2 hours/day    |
| Reaching above shoulder | 2 hours/day                        |

These restrictions were in place from September 11, 2000 until October 16, 2000. During this period, Mr. Sailor worked for two hours a day at the Lexington installation answering phones and doing other similar light duty, and he spent six hours a day receiving therapy and doing rehabilitation to recovery from his surgery.

According to the logs of the Davidson County Sheriff's Office, Mr. Sailor worked as a Deputy Sheriff for Davidson County on the following dates.

|                    |           |
|--------------------|-----------|
| September 11, 2000 | 3.0 hours |
| September 12, 2000 | 2.0 hours |
| September 15, 2000 | 2.5 hours |
| September 20, 2000 | 2.5 hours |
| September 21, 2000 | 2.5 hours |
| September 22, 2000 | 2.5 hours |

On September 15, 2000 the logs for the Davidson County Sheriff's Department state the grievant went out in a car and at 1419 hours was assigned to answer a call regarding an assault.

On October 16, 2000 Dr. Neave prepared a CA-17 which stated Mr. Sailor had the following limitations:

|                  |                                  |
|------------------|----------------------------------|
| Lifting/Carrying | Less than 35 pounds, 4 hours/day |
| Sitting          | 4 hours/day                      |
| Standing         | 4 hours/day                      |
| Walking          | 1 hours/day                      |
| Climbing         | 2 hours/day                      |
| Bending/Stooping | 2 hours/day                      |

|                         |                                  |
|-------------------------|----------------------------------|
| Twisting                | 0 hours/day                      |
| Pushing/Pulling         | Less than 60 pounds/2 hours/day  |
| Reaching above Shoulder | Less than 35 pounds. 4 hours/day |
| Driving a Vehicle       | 4 hours/day                      |

These restrictions were in place from October 16, 2000 forward. During this period, the grievant worked as a Deputy Sheriff for Davidson County. According to the logs of the Davidson County Sheriff's Office, the grievant worked on the following days:

|                  |            |
|------------------|------------|
| October 18, 2000 | 6.0 hours  |
| October 20, 2000 | 6.0 hours  |
| October 21, 2000 | 12.0 hours |
| October 23, 2000 | 6.0 hours  |
| October 24, 2000 | 6.0 hours  |
| October 26, 2000 | 12.0 hours |

According to the logs of the Davidson County Sheriff's Department, Mr. Bailor was assigned the responsibility for answering the following calls:

|                  |            |                |
|------------------|------------|----------------|
| October 18, 2000 | 1844 hours | Burglar alarm  |
| October 18, 2000 | 1907 hours | Civil Dispute  |
| October 18, 2000 | 1939 hours | B&E-occurred   |
| October 18, 2000 | 2136 hours | Domestic       |
| October 18, 2000 | 2233 hours | Domestic       |
| October 18, 2000 | 2301 hours | Domestic       |
| October 21, 2000 | 2010 hours | Domestic       |
| October 21, 2000 | 2012 hours | Burglar alarm  |
| October 21, 2000 | 2021 hours | Domestic       |
| October 21, 2000 | 2025 hours | Civil Dispute  |
| October 23, 2000 | 1817 hours | Larceny        |
| October 23, 2000 | 1839 hours | B&E-occurred   |
| October 23, 2000 | 2122 hours | Vehicle Stop   |
| October 23, 2000 | 2211 hours | Warrant Served |
| October 24, 2000 | 2120 hours | Burglar alarm  |
| October 24, 2000 | 2152 hours | Burglar alarm  |
| October 26, 2000 | 1839 hours | Larceny        |
| October 26, 2000 | 2029 hours | Civil Dispute  |

On its face, this information demonstrates that Mr. Bailor did unrestricted work for the Davidson County Sheriff's Department which was inconsistent with the medical limitations which he presented to the Service and under which the Service employed him.

The Union argues that the logs regarding the calls answered are not definitive because Major Dallas Hedrick of the Davidson County Sheriff's Department testified that sometimes the 911 operators do not accurately key in the information. I do not doubt that there are occasional errors, but the record of the grievant's activity is so voluminous

that even after one takes into account the possibility of occasional mistakes, it is clear the grievant went out on patrol in a car and was assigned the normal law enforcement duties of a Davidson County Deputy Sheriff.

The Union argues that the grievant informed the Davidson County Sheriff's Office of his restrictions, and he testified that the work he did for the Davidson County Sheriff's Office was consistent with this medical restrictions. For the reasons which follow, the record does not support these arguments.

There is no documentary evidence in the record that the grievant informed Davidson County that he had any limitations on the work he could do during the calendar year 2000. Major Dallas Hedrick testified that if the Davidson County Sheriff's Department had known the grievant had medical limitations, he would not have been assigned this work. There is a letter from Captain Shoaf of the Davidson County Sheriff's Office dated April 30, 2001 stating that the Sheriff's office had learned that Mr. Bailor had surgery in the year 2000 and therefore they wanted documentation from Mr. Bailor's physician that he could perform the duties of a Deputy Sheriff. Contrary to the grievant's assertion, this letter does not prove that the grievant notified the Davidson County Sheriff's Office during calendar year 2000 that he had medical limitations. What this letter shows is that the Davidson County Sheriff's Office would not let the grievant work as a Deputy Sheriff until it was clear he had no medical limitations. This letter is completely consistent with Major Hedrick's testimony. The logs of the Davidson County Sheriff's Office show that the grievant went out on patrol and answered calls for larceny, civil disputes, burglary, breaking and entering and was required to serve a warrant. Such work is part of the normal duties of a Deputy Sheriff. This entire record points to one conclusion-Mr. Bailor worked as a Deputy Sheriff without any limitations during the period from August 12, 2000 through October 28, 2000.

I find Major Hedrick's testimony particularly persuasive because I do not believe a law enforcement agency would assign an individual with medical limitations such duties. To do so would put the individual with the limitations at risk, it could put innocent people at risk if the medical limitations prevented the individual from performing his duties. If the Deputy Sheriff failed to do his duties properly as a result of the medical limitations, it would expose the Davidson County Sheriff's Office to massive legal liability. Therefore, I conclude the grievant never informed the Davidson County Sheriff's Department that he had any medical limitations and I conclude the grievant held himself out to the Davidson County Sheriff's Department as fully capable of performing all the duties of the Deputy Sheriff's position.

These facts support the Postal Service's argument that the grievant misrepresented his medical limitations to the Postal Service.

It is undisputed the grievant had medical limitations from September 11 through September 22 which stated he could only work two hours a day at anything. The Davidson County Sheriff's Department logs show the grievant worked for the Davidson County Sheriff's Office for three hours on September 11, 2000, for two hours on

September 12, 2000, for 2.5 hours on September 15, September 20, 21 and 22.

It is undisputed the grievant had medical limitations under he which worked six hours a day for the Service covering the period October 18 through October 26, 2000. The logs of the Davidson County Sheriff's Department show the grievant worked six hours on October 18, 20, 24 and 24 and 12 hours on October 21 and 26.

These facts support the Postal Service's argument that grievant misrepresented his medical limitations to the Postal Service because the number of hours which the grievant worked on the above dates was inconsistent with the medical limitations which he presented to the Postal Service.

The Union argues that although the grievant did go on patrol and answer calls the actual work done was not inconsistent with the grievant's medical limitations. In support of this contention, the Union notes that the grievant testified that all of the work done was consistent with his medical limitations, the doctor stated the work done was consistent with the grievant's medical limitations and the Service did not provide any evidence to the contrary. This argument is not persuasive for the reasons which follow.

The issue is not whether the actual work done was inconsistent with the medical limitations. The issue is whether the grievant was honest with the Postal Service regarding his medical limitations. When the grievant went out on patrol, he held himself out as being capable of the doing the full range of duties contained in the position description for a Deputy Sheriff. That position description requires "a high level of physical ability to include, vision, hearing, speaking, flexibility and strength." The specific duties of the position include arresting individuals with force if necessary and the subduing of resisting suspects. For this purpose, a Reserve Deputy Sheriff is issued a sidearm. A Reserve Deputy Sheriff is responsible for operating a law enforcement vehicle including the apprehension of speeders in all weather conditions. A Reserve Deputy Sheriff is responsible for pursuing fleeing suspects and performing rescue operations which may involve quickly entering and exiting law enforcement vehicles, lifting, carrying and dragging heavy objects, climbing over and pulling up one's self over obstacles, jumping down from elevated surfaces, climbing through openings, jumping over obstacles, ditches and steams, crawling in confined areas, balancing on uneven or narrow surfaces and using bodily force to gain entrance through barriers. A Reserve Deputy Sheriff must be proficient in the use of handguns, shotguns and other agency firearms under conditions of stress that justify the use of deadly force. A Reserve Deputy Sheriff performs searches of individuals and vehicles which may involve feeling and detecting objects, walking for long periods of time, detaining people and stopping suspicious vehicles and persons.

These duties are completely inconsistent with the medical limitations which the grievant presented to the Postal Service and fully support the Service's argument the grievant misrepresented his medical condition. If the grievant was capable of performing the full range of duties of a Davidson County Deputy Sheriff, he was capable

of working eight hours a day as a letter carrier with no restrictions.<sup>5</sup>

Further, in evaluating whether the grievant honestly represented his condition to the Postal Service, it should be remembered that while it is the doctor who prepares the CA-17 form which contains the medical limitations, the doctor relies extensively upon the patient for information in preparing the CA-17. Knowing this, I find it highly significant that the physical therapist who conducted a Functional Capacity Examination of the grievant in October, 2000 was not aware that the grievant was working for the Davidson County Sheriff's Department and I find it highly significant that the grievant's doctor was unaware that he was working as a Deputy Sheriff in a physically unrestricted status for the Davidson County Sheriff's Department during the period for which she had placed him on physical restrictions. This evidence contradicts the grievant's testimony that he had informed the Davidson County Sheriff's Office of his medical restrictions. This evidence raises questions regarding the grievant's credibility and it supports the Service's argument the grievant did not honestly represent his condition.

The Union argues that the Postal Service knew the grievant was working as a Deputy Sheriff and therefore waived any objections. For the reasons which follow this argument is not persuasive.

The record shows the Postal Service knew and consented to the grievant working for the Davidson County Sheriff's Department starting in 1996. There is no evidence that the Postal Service knew Mr. Bailor had held himself out as capable of performing the full range of duties of the Deputy Sheriff's position after his surgery or that the Postal Service in any way consented to his working for Davidson County without limitations.

The Union argues that no specific rule exists which states it is improper to do restricted work for the Postal Service while working unrestricted as a deputy. The Union is correct no specific rule exists, but there is a general obligation of honesty which employees of the Postal Service owe the Service and which is set forth in the Standards of Conduct and the Code of Federal Regulations. This obligation of honesty includes the obligation to accurately disclose their physical condition and it includes the obligation to submit medical limitations which are accurate to the best of an employee's knowledge and belief.

The Union also argues that Mr. Bailor did not receive any OWCP compensation while he was working for the Davidson County Sheriff's Department and therefore, Charge 2 was not proven. The record shows that Mr. Bailor received OWCP compensation for the period September 11 through September 29, 2000 and October 2 through October 13, 2000. The Sheriff's log shows that Mr. Bailor worked at the Davidson County Sheriff's Office on September 11, 12, 15, 20, 21, and 22. It further

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<sup>5</sup> The grievant's personal physician, Dr. Neave, testified that she was not clear the full duties of a deputy sheriff were inconsistent with the grievant's medical limitations. After reviewing the requirements of a deputy sheriff cited above, I conclude there is no question that the full duties of a deputy sheriff are inconsistent with the grievant's medical limitations. To the extent the testimony of Dr. Neave can be viewed as stating these duties were not inconsistent with Mr. Bailor's medical limitations, I conclude Dr. Neave's testimony was not persuasive.

shows that on September 15, 2000 he was on patrol and was assigned a call regarding an assault. This record demonstrates Mr. Bailor received OWCP benefits while doing unrestricted work on September 15, 2000. This record demonstrates that Mr. Bailor exceeded the two hour medical limitations by working at the Davidson County Sheriff's Office on September 11, 12, 15, 20, 21 and 22 while receiving OWCP payments.

In its brief, the Union states that OWCP sent the grievant a letter dated February 20, 2002 stating that based on the grievant's letter of February 1, 2002, no offset was required concerning his earnings with the Davidson County Sheriff's Department. The Union argues this letter absolves the grievant of any wrongdoing for improperly obtaining monies from OWCP. This argument is not persuasive.

The OWCP letter was a response to the grievant's letter of February 1, 2002. That letter did not include certain material information regarding the grievant's situation. Specifically, the February 1, 2002 letter did not state that the grievant was working at the Davidson County Sheriff's Department without any limitations at the same time he was working under restrictions for the Service and collecting compensation from OWCP. Had OWCP been aware of this material information, OWCP might very well have responded differently. Therefore, I do not consider the OWCP letter of February 20, 2002 conclusive.

Based on this record, I conclude the Service has met its burden of proof on Charges 2 and 3.

c. Charge 5

Charge 5 alleges that the grievant failed to cooperate with Supervisor Bozeman's investigation because information was withheld which could have been exculpatory, "When I asked for the opportunity to make copies, your representative refused to provide them on the pretense that a decision had been made about your employment.".

In this language, the Service acknowledges that it was the Union Representative who failed to provide certain information which would have supported the grievant's position that he was innocent of the charges contained in the Notice of Proposed Removal. In this particular case, I am not prepared to hold the grievant responsible for the acts of the Union. First, the information in question was exculpatory. To the extent this information was withheld, it only harmed the grievant. Article 15 addresses this situation and it states that failure to fully disclose information in the grievance procedure bars a party from relying on that information at the hearing. There is a significant difference between failing to provide information which is exculpatory and failing to provide information which is not exculpatory. Second, it was the Union which refused to provide the information and the grievant relied in good faith on the Union's advice. Given these facts, I conclude Charge 5 should be dismissed.

#### D. The Penalty

Having determined that the Service proved Charges 2 and 3 but that Charges 1, 4 and 5 must be dismissed, the next issue is what is the appropriate penalty for the violations of Charges 2 and 3.

One of the basic tenets which both the Service and the Union have repeatedly endorsed is the principle of "A Fair Day's Work for a Fair Day's Pay." The Standards of Conduct state employees will be "honest, reliable, and trustworthy". When an employee improperly takes limited duty, the Service must pay another employee to do the employee's work. The result is additional unnecessary costs and expenses for the Service. In addition, employees may be forced to work unwanted overtime. When Mr. Bailor held himself out as only capable of working limited duty, while working unlimited duty for the Davidson County Sheriff's Department, Mr. Bailor violated his obligation to provide a fair day's work for a fair day's pay and he violated his obligation to honestly state his work limitations. These are serious offenses which go to the heart of his employment.

In *USPS and National Postal Mail Handlers*, H98N-1H-D 01028016 (September 13, 2002) Arbitrator Linda Byars concluded that discharge was an appropriate penalty for an employee who misrepresented his physical limitations. In reaching this conclusion, Arbitrator Byars reasoned that such a misrepresentation is significant.

In *USPS and NALC*, H98N-4H-D 01222641 (March 1, 2002) Arbitrator Britton determined the grievant had misrepresented the severity of his job-related injury and therefore, discharge was an appropriate penalty.

These decisions fully support the Service's position that discharge is appropriate in these circumstances. No decisions were submitted in which an employee was found guilty of a similar offense and had the discharge mitigated.

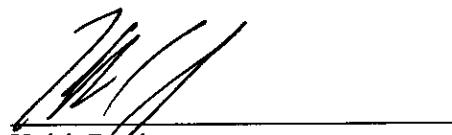
For these reasons, I conclude that discharge is an appropriate penalty.

#### AWARD

The grievance regarding the Emergency Procedure is sustained. The grievant is entitled to back pay and all other benefits for the period beginning December 7, 2001 and ending thirty days after March 19, 2002.

Charge 1 and Charge 5 are dismissed as unproven. Charge 4 is dismissed as a result of the Service's failure to provide relevant and necessary information. Charges 2 and 3 are sustained. Given the severity of the offenses committed, the penalty of discharge is appropriate for Charges 2 and 3. Accordingly, the grievances regarding the discharge are denied. Arbitrator will retain jurisdiction for thirty days for the sole purpose of resolving any questions regarding the remedy.

This 10<sup>th</sup> day of May, 2003.



Keith Peole  
Arbitrator