

C-28016

REGULAR ARBITRATION PANEL

In the Matter of Arbitration)
) Grievant: Jerry Williams
)
) Post Office: TAC-Parkland BR P1
)
)
UNITED STATES POSTAL SERVICE) Case No: E01N-4E-D 07052585
(hereinafter "USPS"))
)
)
)
and)
)
)
NATIONAL ASSOCIATION OF)
LETTER CARRIERS, AFL-CIO)
(hereafter "NALC"))
)

BEFORE: Janice S. Irving, Arbitrator

APPEARANCES BY:

USPS:

Corinne Loprinzi
Labor Relations Specialist
Western Area
11855 NE Glenn Widing Dr.
Portland, OR 97220-9057

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VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS

NALC:

Coby Jones, Trustee
210 Queen Anne Avenue N, Rm. 111
Seattle, Washington 98109

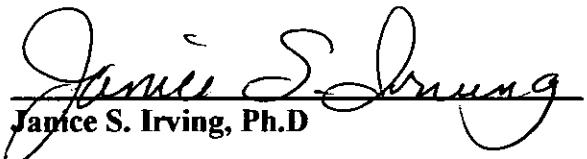
Place of Hearing:

USPS
Tacoma P&DF, Admin. Bldg.
4001 S. Pine, Room 118
Tacoma, WA 98413

Date of Hearing: May 11, 2007

AWARD: The grievance is sustained. The Grievant is to be reinstated in his job as a mail carrier with full back pay, minus interim earnings, and any benefits he lost as a result of his discharge.

Dated: May 25, 2007
Compton, CA


Janice S. Irving, Ph.D.

BACKGROUND

This Arbitration proceeding was convened by the parties pursuant to Article 15, Section 4, B.2, of the National Agreement between the United States Postal Service and National Association of Letter Carriers, AFL-CIO. The grievance that led to this proceeding stem from Management issuing a Notice of Proposed Removal, dated December 13, 2006 charging Misrepresentation of Your Physical Abilities and Making False Statements in an Official Investigation.

The record from the Arbitration hearing comprises testimony from four (4) witnesses called by the USPS, and three (3) witnesses called by NALC. In addition to the witnesses there were eight (8) Exhibits entered by the parties. There were seventeen (17) Arbitration Awards submitted.

Both parties gave closing statements telephonically. The hearing officially closed on May 15, 2006.

I tape-recorded the hearing solely as an extension of my personal notes and not as an official record.

ISSUE

Was the Notice of Proposed Removal (NOPR) dated December 13, 2006 issued to the Grievant charging him with "Misrepresentation of Physical Ability" and "Making False Statements in an Official Investigation" for just cause? If not, what is the appropriate remedy?

CONTRACT PROVISIONS

Employee and Labor Relations Manual (ELM.)

436 Back Pay

436.1 Corrective Entitlement

An employee or former employee is entitled to receive back pay for the period during which an unjustified or unwarranted personnel action was in effect that terminated or reduced the basic compensation, allowances, differentials, and employment benefits that the employee normally would have earned during the period.

For purposes of entitlement to employment benefits, the employee is considered as having rendered service for the period during which the unjustified or unwarranted personnel action was in effect.

436.2 Limitations

Limitations to corrective entitlements are as follows:

- a. Any amount that the employee earned in a new employment or in an enlarged part-time employment to replace Postal Service employment must be determined and offset against the amount of the reimbursement to which he or she would be entitled.
- b. Back pay is allowed, unless otherwise specified in the appropriate award or decision, provided the employee has made reasonable efforts to obtain other employment, as follows (see also 436.42g).
 - (1) Job applicants not hired by the Postal Service must immediately make reasonable efforts to obtain other employment.
 - (2) Separated employees, or employees on indefinite suspension, are allowed 45 days before they must make reasonable efforts to obtain other employment.
Exception: Postal Service employees eligible for veterans' preference are not required to make reasonable efforts to obtain other employment while pursuing an administrative appeal with the Merit Systems Protection Board (MSPB).
- c. No back pay is allowed for any period during which the person was not ready, willing, and able to perform the duties of the postal position.
- d. Leave that is recited as a result of the corrective action may not exceed the maximum amount of leave to which the employee was eligible.
Exception: Postal Service employees eligible for veterans' preference are entitled to uncapped annual leave restoration if a removal is reversed or modified by the Merit Systems Protection Board (MSPB).
- e. The employee is not entitled to (1) increases in pay resulting from deferment of step increases due to unsatisfactory service or (2) salary increases resulting from ranking action.
- f. Any claim made by a postal employee or his or her authorized agent or attorney for back pay must be submitted to the appropriate office within 6 full years after the date the claim first accrued.

436.3 Corrective Action

The installation head or other appropriate authority determining that a previous decision was unjustified or unwarranted initiates and directs the corrective action to be taken to ensure appropriate earnings to the employee for the period affected.

436.4 Documents in support of claim

436.41 Statements by Local Official

The following must be provided:

- a. The local official must provide a tabulation of the number and type of pay hours with which the employee should have been credited during the back pay period, including any annual or holiday leave taken as follows:
 - (1) Overtime hours and/or night differential, as applicable, are determined by averaging the number of hours that other employees of the office with the same employment status were assigned during the back pay period.
 - (2) If the claim is for a part-time flexible employee, a tabulation must be provided that shows the number and type of pay hours the employee experienced for a full 13 pay periods prior to the separation or suspension. If the back pay period is less than 1 full pay period, only a 6-pay-period tabulation is required.
- b. The local official must provide a statement indicating whether the employee is entitled to the following during the back pay period.

- (1) Premium pay (see 434).
- (2) Change in pay rate or salary schedule.
- (3) Step increase and date effective.
- (4) Change in leave category and date effective.
- (5) Other changes in pay of a general application.
- c. The local official must provide a statement indicating that had the employee not been suspended or removed he or she would have worked the hours as reported.
- d. The local official must provide a statement showing that monies earned by the employee for other employment during the period covered by the corrected action must be deducted, provided the earnings were from work that replaced the lost postal employment (see 436.2a).

436.42 Statements by Employee

The following must be provided:

- a. The employee must provide a statement signed by the employee agreeing or disagreeing to the hours shown in 434.1b if the employee does not agree, the basis for the disagreement should be explained.
- b. Where the original action resulted in separation or suspension, the employee must furnish the following:
 - (1) The employee must provide a statement on whether or not any income was earned during the back pay period. If any outside earnings were received, provide information on whether the earnings were from a part-time job held at the time of removal, in a new employment, or in an enlarged part time employment obtained to replace the postal employment. In either case, a statement from the employer showing the record of hours worked and gross earnings during the back pay period is necessary.
 - (2) If the employee was already working in a par-time job at the time of removal or suspension, the employer should include the employee's record of employment for the 6-month period prior to the removal or suspension.
 - (3) If outside earning were from self-employment, the claimant must provide an affidavit stating the amount earned during the back pay period. If such employment existed before the back pay period, the earnings must also be stated for 13 pay periods prior to the back pay period.
 - (4) The employee must provide a statement on whether or not the employee received any unemployment compensation, and if so, state the amount received and the state that made the payments.
- c. The employee must provide a statement that the employee was ready and able to perform his or her job during the back pay period. If not, state inclusive dates not ready and able, and the cause by which incapacitated or unavailable. The employee may request payment of sick or annual leave as appropriate and to his or her credit, for the period of incapacity or unavailability during the back pay period.
- d. Where the original action resulted in separation or indefinite suspension and no outside employment was obtained for all or any part of the back pay period, the employee must furnish the following:
 - (1) If the back pay period is 45 days or less, the employee is not required to certify or to provide documentation in support of efforts to secure other employment during this period.
 - (2) If the back pay period is more than 45 days and does not exceed 6 months, the employee must provide a statement certifying the reasons why outside employment was not obtained for all parts of the back pay period that exceeds the first 45 days.
 - (3) If the back pay period is more than 6 months, the employee must provide documentation in support of efforts to secure other employment for all parts of the back pay period that exceed the first 45 days.
- e. On health benefit coverage, the employee should state whether he or she desires (a) to enroll in any plan, the same as a new employee, or (b) to have the prior enrollment reinstated retroactive to the date it was terminated.
- f. Where the original action resulted in denial of employment with the Postal Service, the individual must provide documentation in support of his or her efforts to secure other employment for all parts of the back pay period. The individual must also provide a statement of earnings during the back pay period as required by 436.42

4336.43 Life Insurance Coverage

An employee who is retroactively restored to duty with full back pay (or the decision, award, or settlement agreement provides for life insurance coverage during the back pay period) has his or her life insurance coverage in effect at the time of removal or indefinite suspension, if any, reinstated retroactively to the date of termination. An employee who was initially denied employment may elect either to have life insurance coverage as a new employee

or to have the coverage begin retroactively to the date employment was denied. Employees may elect to have life insurance coverage or to increase their life insurance coverage in effect at the time of removal or indefinite suspension under any of the following circumstances:

- a. If an open season for life insurance occurred during the back pay period, the employee may elect coverage or additional coverage, as permitted during the open season.
- b. An employee who had basic insurance coverage only at the time of the removal or indefinite suspension may elect optional life insurance coverage under Option B-Additional life insurance coverage at the time of removal or indefinite suspension may elect to increase the number of multiples of Option B and/or Option C-Family coverage, provided the employee meets the provisions of 535.91.

436.5 Erroneous Separation for Retirement

436.51 Explanation

An individual who separates under optional (voluntary) retirement before meeting both age and service requirements is considered erroneously separated. In such cases, the Office of Personnel management (OPM) usually disallows the retirement application and requests the Postal Service to retroactively restore the employee to the active rolls as of the date of the erroneous separation. If the date on which the applicant would attain the age and/or service requirements has already passed and the time span for attaining eligibility is rather short, e.g., 30 days or less. OPM may administratively place the employee in a LWOP status from the date of the erroneous separation to the date on which the minimum service or age requirement is attained.

436.52 Corrective Action

OPM's letter requesting the Postal Service to restore the employee to the rolls will indicate that the employee "may be entitled to back pay covering the period from the date of the erroneous separation to the date the employee is restored to the rolls." Before any action is taken on OPM's letter, the employee's service record must be verified. If the reason for the erroneous separation is based on age, records must be verified to ascertain the employee's correct birth date. After the retirement separation is established as erroneous, the employee must be contacted promptly and action taken to restore him or her to the rolls.

In these erroneous optional retirement cases, the back pay is calculated so that employees receive the same amount as they would have received in civil Service annuity payments or Federal Employee Retirement basic annuity payments.

435.6 Interest on Back Pay

436.61 Purpose

This section establishes procedures for paying interest that the Postal Service is obligated to pay pursuant to the law, court order, arbitration or federal agency decision, national labor agreement, or Postal Service settlement agreement. This section does not create any Postal Service obligation to pay interest on back pay claims.

436.62 Availability of Interest

Interest is paid on back pay only under the following circumstances:

- a. Decisions – awards resulting from legally binding determinations by courts of law, administrative agencies, or the grievance and arbitration process. They are handled as follows:
 - (1) Merit systems Protection Board (MSPB). Interest is paid automatically by the Accounting Service Center (ASC).
 - (2) Equal Employment Opportunity Commission (EEOC). Interest is paid automatically by the ASC.
 - (3) National Labor Relations Board (NLRB). Interest is paid automatically by the ASC.
 - (4) Court Decision. Interest is not paid unless specifically awarded in the decision.
 - (5) Arbitration Decision. Interest is paid automatically for arbitration decisions that award back pay for a disciplinary suspension or removal for employees represented by the National Postal Mail Handlers' Union (NPMHU) for cases heard after February 20, 1991, and for employees represented by the National Association of Letter Carriers (NALC) and the American Postal Workers' Union (APWU) for cases heard after June 12, 1991.

Note: For arbitration decisions that are unrelated to a disciplinary suspension or removal, interest is not paid unless it is specifically required by the award.

436.63 Determination of Rate of Interest

When interest is paid on back pay, the interest rate is determined as follows:

- (a) Decisions (see Exhibit 436.63a):
 - (1) Merit systems Protection Board (MSPB). The rate of interest is based on the veterans' preference eligibility of the employee.

- (a) For veterans' preference eligible employees, the rate of interest is calculated using the Internal Revenue Code Overpayment Rate (see 26 U.S.C. 6621(a)(1). Computation methods for applying the rate of interest are as found in 5 CFR 550.806.
- (b) For non-veterans' preference eligible employees, the rate of interest is calculated using the Federal Judgment Rate (see 28 U.S.C. 1961).
- (1) Equal Employment Opportunity Commission (EEOC). Interest is paid at the Internal Revenue code overpayment Rate (see 26 U.S.C. 6621(a)(1) Computation methods for applying the rate of interest are as found in 5 CFR 550.806.
 - (1) National labor Relations Board (NLRB). Interest is paid at the Federal Judgment Rate (see 28 U.S.C. 1961).
 - (2) Court Decisions. Interest is paid at the Federal Judgment Rate (see 28 U.S.C. 1961).
 - (3) Arbitration Decisions. For arbitration decisions that award back pay for disciplinary suspension or removal, interest is paid at the Federal Judgment Rate (see 28 U.S.C. 1961).
- Note: For arbitration decisions unrelated to disciplinary suspension or removal, interest is not paid unless specifically required by the award.
- (b) Settlements (see Exhibit 436.63b):
- (1) Merit systems Protection Board (MSPB). The rate of interest for MSPB causes is bases on the veterans' preference eligibility of the employee.
 - (a) For veterans' preference eligible employees, the rate of interest is calculated using the Internal Revenue Code Overpayment Rate (see 26 U.S.C. 6621(a)(1). Computation methods for applying the rate of interest are found in 5 CFR 550.806.
 - (b) For non-veteran's preference eligible employees, the rate of interest is calculated using the Federal Judgment Rate (see U.S.C. 1961).

661.2 Application of Postal Employees

1. Prohibition against fraud or false statements in a government matter (18 U.S.C. 1001)

665.16 Discharge of Duties

Employees are expected to discharge their assigned duties conscientiously and effectively.

665.16 Behavior and Personal Habits

Employees are expected to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal employees be honest, reliable, trustworthy, courteous, and of good character and reputation. The Federal Standards of Ethical conduct referenced in 662.1 also contain regulations governing the off-duty behavior of postal employee. Employees must not engage in criminal, dishonest, notoriously disgraceful, immoral, or other conduct prejudicial to the Postal Service.

NALC-USPS Joint Contract Administration Manual (JCAM)

Article 16 Discipline Procedure

16.1 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 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.

Just Cause Principle

The principle that any discipline must be for "just cause" establishes a standard that must apply to any discipline or discharge of an employee. Simply put, the "just cause" provision requires a fair and provable justification for discipline.

"Just cause" is a "term of art" created by labor arbitrators. It has no precise definition. It contains no rigid rules that apply in the same way in each case of discipline or discharge. However, arbitrators frequently divide the question of

just cause into six sub-questions and often apply the following criteria to determine whether the action was for just cause. These criteria are the *basic* considerations that the supervisor must use before initiating disciplinary action.

- “Is there a rule”? If so, was the employee aware of the rule? Was the employee forewarned of the disciplinary consequences for failure to follow the rule? It is not enough to say, “well, everybody knows that rule,” or, “We posted that rule ten years ago.” You may have to prove that the employee should have known of the rule. Certain standards of conduct are normally expected in the industrial environment and it is assumed by arbitrators that employee should be aware of these standards. For example, an employee charged with intoxication on duty, fighting on duty, pilferage, sabotage, insubordination, etc., may be generally assumed to have understood that these offenses are neither condoned nor acceptable, even though management may not have issued specific regulations to that effect.
- Is the rule a reasonable rule? Management must make sure rules are reasonable, based on the overall objective of safe and efficient work performance. Management’s rules should be reasonably related to business efficiency, safe operation of our business, and the performance we might expect of the employee.
- Is the rule consistently and equitably enforced? A rule must be applied fairly and without discrimination. Consistent and equitable enforcement is a critical factor. Consistently overlooking employee infractions and then disciplining without warning is improper. If employees are consistently allowed to smoke in areas designated as *No Smoking* areas, it is not appropriate suddenly to start disciplining them for this violation. In such cases, management loses its right to discipline for that infraction, in effect, unless it first puts employees (and the unions) on notice of its intent to enforce that regulation again. Singling out employees for discipline is usually improper. If several similarly situated employees commit an offense, it would not be equitable to discipline only one.
- Was a thorough investigation completed? Before administering the discipline, management must make an investigation to determine whether the employee committed the offense. Management must ensure that its investigation is thorough and objective. This is the employee’s *day in court* privilege. Employees have the right to know with reasonable detail what the charges are to be given a reasonable opportunity to defend themselves *before* the discipline is initiated.
- Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee’s past record? The following is an example of what arbitrators may consider an inequitable discipline: If an installation consistently issues five-day suspensions for a particular offense, it would be extremely difficult to justify why an employee with a past record similar to that of other disciplined employees was issued a thirty-day suspension for the same offense. There is no precise definition of what establishes a good, fair, or bad record. Reasonable judgement must be used. An employee’s record of previous offenses may never be used to establish guilt in a case you presently have under consideration, but it may be used to determine that appropriate disciplinary penalty.
- Was the disciplinary action taken in a timely manner? Disciplinary actions should be taken as promptly as possible after the offense has been committed.

Corrective Rather than Punitive

The requirement that discipline be “corrective” rather than “punitive” is an essential element of the “just cause” principle. In short, it means that for most offenses management must issue discipline in a “progressive” fashion, issuing lesser discipline (e.g., a letter of warning) for a first offense and a pattern of increasingly severe discipline for succeeding offenses (e.g., short suspension, long suspension, discharge). The basis of this principle of “corrective” or “progressive” discipline is that it is issued for the purpose of correcting or improving employee behavior and not as punishment or retribution.

SUMMARY OF CASE

The Grievant was issued a Notice of Proposed Removal dated December 13, 2006 for "Misrepresentation of Your Physical Abilities" and "Making False Statements in an Official Investigation."

The Grievant is a full-time regular City Letter Carrier of the Parkland Station of the Tacoma WA Post office. The Grievant was involved in a hit and run accident on September 18, 2006, while delivering mail. On September 19, 2006, the Grievant called in to the Parkland Station that he was unable to work, Manager Roberts telling the Grievant that he would need to go to the doctor, advising him to pick up the necessary paperwork (CA-17) for the doctor to complete. On the Grievant's return to the Parkland Station from the doctor with the required paperwork, reviewing the paperwork Manager Roberts noting that the Grievant's doctor had listed stringent physical restrictions. Then, Manager Roberts determining that there was no work available within the Grievant's restrictions.

Station Manager Roberts testifying that on that same day September 19, 2006, on two separate occasions he witnessing the Grievant exhibiting physical activity inconsistent with his doctor's restrictions. It was at this time that Manager Roberts sought the assistance of the Office of the Inspector General, who proceeded to conduct surveillance videos of the Grievant during the period of October, 2006. On November 8, 2006, the Grievant was interviewed by agents of the OIG and on November 17th and December 1st, 2006, Manager Roberts conducted investigative interviews with the Grievant, and on December 13, 2006 the Grievant received a Notice of Proposed Removal, and a timely grievance was filed on December 29, 2006. On January 17, 2007, the Grievant received a Letter of Decision.

Throughout the enfolding of the medical history and reports of the OIG Agents and Management, there is an inference of fraud and duplicity on the part of the Grievant. The Grievant is charged with misrepresenting his physical abilities and making false statements in an official investigation.

POSITION OF THE PARTIES

USPS:

The Postal Service argues that this is a discipline case and the burden rests with the Postal Service to prove the proposed adverse action was for “just cause”. The Postal Service contends that the principles of “just cause” were applied when issuing the Notice of Proposed Removal to the Grievant. The Postal Service further contends that the Grievant was afforded a timely and thorough investigation by both the OIG Agents and the Postal Service, and was given opportunities to provide explanations to possibly mitigate the seriousness of his actions and exceeding his medical limitation while on COP. The Postal Service argued that the charges of misrepresentation of physical abilities and making false statements were evident. The Service finally contends that the disciplinary action was taken in a timely and appropriate manner. The Service respectfully request the grievance be denied in its entirety.

NALC:

The Union alleges the Postal Service did not have “just cause” to issue the Notice of Possible Removal. The Union contends that allegations against the Grievant are based on their belief that the Grievant engaged in dishonest conduct. The Union contends that a proper investigation did not occur based on the charges. The Union states that Management did not prove that the Grievant acted as charged. They further contend the discipline was not timely, as the Office of the Inspector General did not record their surveillance until two weeks following the Grievant’s accident. The Union’s final contention on the charges was that the discipline was punitive rather than corrective. The Union asks that the Notice of Possible Removal be rescinded and removed from all files and records, and that the Grievant be reinstated to his former position with back pay, benefits, and seniority.

DISCUSSION

After reviewing the record, it is concluded that the Postal Service did not meet its burden of proof of proving that the Grievant misrepresented his physical abilities and made false statements during an official investigation. This conclusion is based upon a review of the evidence provided regarding the egregious charges that the Grievant engaged in deceitful, false and perfidious acts. In that instance, the Arbitrator is not persuaded that the Grievant failed to tell his doctor, who examined him of his true physical abilities; failed to act within his restrictions while off duty; and failed to tell the OIG Agent the truth about his physical activities within his restrictions. Of great concern is the Postal Service's lack of proof when they sought assistance of the Office of the Inspector General because they became suspicious of the Grievant's limitations. Of a greater concern is the Postal Service's lack of proof other than the Manager's belief while observing the Grievant exhibiting physical activities that were inconsistent with his doctor's restrictions. In order to prove a charge of Misrepresentation of Physical Abilities and Making False Statements in an Official Investigation, the Postal Service must prove beyond a reasonable doubt that the Grievant deliberately engaged in deceitful, false and perfidious acts. Moreover, a charge of misrepresentation requires that there must be a (1) misrepresentation (2) as to a fact (3) which was false and known to be false (4) falsity (5) made for the purpose of inducing the party to rely on it (6) which it did reasonably did rely (7) in ignorance of its falsity (8) to its injury (*Murry v. Xerox Corp...*). Nonetheless, it is not logical based on the above elements of misrepresentation that the Grievant misrepresented his physical abilities and based on that misrepresentation he failed to return to work for the purpose of profiteering. The Grievant was found by his doctor as capable of returning to limited duty with restrictions. Consequently, the

Postal Service did not see fit to accommodate his work restrictions. Finally, the issue of intent to commit fraud must turn on the Grievant's state of mind and his conduct of motivation. It is concluded that a charge that involves questions of moral turpitude, such as stealing, fraud or falsification require that the Postal Service prove conclusively that the Grievant deliberately engaged in dishonest conduct.

As part of the worker's compensation fraud investigation, the OIG Agents conducted surveillance videos of the Grievant's physical behavior between October 19, 2006 and October 20, 2006. On October 19, 2006 he was observed driving his son to the Tacoma Mall Plaza building which was approximately eighteen (18) miles from the Grievant's home with a drive time of twenty-three (23) minutes, waiting in his car for over one (1) hour. The Grievant was again observed on October 20, 2006 doing routine maintenance on his truck for one (1) hour and observed changing the tail light, side mirrors, and lifting up the hood and bending over to look underneath. According to the OIG Agent's report, the Grievant admitted driving, stating that he should not have done this, but said that he felt well enough at the time. Additionally, the report detailed that the Grievant admitted doing maintenance, but did not realize he was violating his medical restrictions. After the OIG Agent interviewed the Grievant he was instructed to write a sworn statement. He stated in pertinent part...that he had not intentionally, knowingly, or purposely violated his restrictions.

The OIG Agent's Memorandum of Interview was submitted to the Postal Service on November 8, 2006. A review of the OIG Agent's interview shows that the Grievant was asked if he ever acted outside of his restrictions while he was off work due to his injury, he answered "No". Although his response was "No", it did not constitute that his statement to the OIG Agent regarding his restrictions was false because the evidence did not indicate that the Grievant's physical activities of

driving and doing maintenance work on his truck impacted his physical capability to return to work. Additionally, the Grievant's statement that he did not realize he was violating his medical restrictions must be viewed in context of a reasonable mind because his actual activities, as caught on surveillance video, were not sufficient to show that the Grievant deliberately attempted to mislead the OIG Agent. Further, it must be pointed out that the requirement needed to sustain a charge of making a false statement must be conclusive. Nonetheless, he stated he could not change his son's appointment to the doctor so he drove him as a last resort.

This conclusion becomes even more recognized because the Postal Service's primary evidence was surveillance videos of the Grievant's everyday activities. Moreover, the Grievant driving his son to the Tacoma Mall Plaza only exceeds his work restrictions by some eight (8) minutes. A review of the PS Form CA17 for the period October 3, 2006 to October 24, 2006, in the box marked 'other' (describe), it states, "no commercial driving". The Grievant was not barred from driving his personal vehicle, nor does changing the lights on his truck indicate that these activities were sufficient to demonstrate a falsity. No evidence was offered that the Grievant's doctor barred him from driving his personal vehicle, or from performing routine maintenance on his truck because these activities might impact his injury.

Further, undisputed is the Grievant's statement that his physician told him to move around in order to get his blood flowing.

The conclusion is that the instances in which the Grievant was observed in physical activity does not contradict that he was not following his doctor's instructions, nor does it constitute he had misrepresented his physical abilities to his doctor.

It is clear, when viewing the surveillance video, it does not show that the Grievant engaged in strenuous tasks repeatedly, nor was there direct OIG Agent testimony that he did so.

The Grievant believed in the truth of his statements even though there is an inference of untruthfulness because of Manager Roberts opining his personal belief as to the Grievant's veracity. However, Manager Roberts' belief is only a verbal assertion which is not sufficient evidence to determine the Grievant acted as charge.

The Postal Service has argued misrepresentation of physical abilities on the basis of a reasonable inference might be drawn from the facts in evidence that the Grievant was lying about his physical capabilities. While circumstantial evidence by itself can be sufficient to support a charge of misrepresentation and making a false statement, but the quantum proof must be beyond a reasonable doubt. The circumstantial evidence in this case simply does not support a conclusion that the Grievant's representations to Dr. Kaufman were false statements relating to his true physical ability. Dr. Kaufman never testified, nor was she interviewed, regarding this matter. No evidence was offered that the Grievant's physical limitations and medical condition were false.

Concerning the claim that the Grievant exceeded his work restrictions while off duty could only be supported or corroborated by his doctor. Moreover, it is well established that medical certification of work restrictions by the Grievant's doctor is determinate, if the Postal Service chooses not to refute it with current medical evidence of its own. No one from the Postal Service nor the OIG Agent attempted to interview the Grievant's doctor, Dr. Laura Kaufman. Only a medical examination could have determined if the Grievant was misrepresenting his true physical ability, and because of the misrepresentation he failed to report to work when he was physically able to do so.

It must be noted that after each follow up visit the Grievant's doctor indicated that he was capable of performing limited duty with restrictions. Yet, the record shows that the Grievant was not offered a limited duty, nor were there contacts made in an effort to find work for the Grievant.

While there is no history of any prior elements of discipline in the Grievant's record. There are inferences of dishonesty in this instant case because the Notice of Proposed Removal lists that he had two (2) prior OWCP claims. The record shows from the testimony of Manager Roberts that he did not know the outcome, which suggests that he did not properly examine these claims which is a clear indication of an inadequate investigation. One claim was withdrawn, and the other claim was never pursued.

After reviewing the record it shows that the Postal Service did not consider the Grievant's intent or conduct motivation. Consideration must be given to the fact that the Grievant, in his belief did not realize he was violating his medical restrictions, stating that the doctor told him to move around in order to get the blood flowing and the main injury his doctor was focused on was his light-headedness and not an issue with lifting.

Based on the Grievant's statement, there is no question that the Grievant thought he was acting according to his doctor's instructions.

On the second charge there was not sufficient evidence to support the findings that the Grievant made false statements during an official investigation, there was not sufficient evidence to the record that the Grievant deliberately misled or attempted to mislead the OIG Agents.

In reviewing the Memorandum of Investigation the evidence shows that the report was constructed in a manner that made the allegations appear as facts. Moreover, in reviewing the OIG Agent's raw notes compared to their submitted report there were serious deficiencies, which shows that they were very selective

about what material to include and what material to exclude. The OIG Agent's report was very subjective on the part of the writer. This conclusion is based on the evidence found in the raw notes of the OIG Agent who detailed the Grievant as stating that, "*I order pizza, Probably I shouldn't have done, but I did*". Comparing this statement to what was written in the OIG Agent's submitted report dated November 8, 2006, it shows the Grievant stating that... 'there was nobody else that could take his son to the appointment and it was the last couple of days of his restriction'. Williams did acknowledge that he shouldn't have done this... This evidence indicate that the phrase 'I shouldn't have done' was relating to the ordering of a pizza not an acknowledgement that the Grievant shouldn't have done this and 'this' was driving his son to the appointment at the Tacoma Mall Plaza. Further, this evidence indicates that the OIG Agent's submitted report was much more likely written to achieve a certain result.

In sum, when an employee is found able to return to limited duty work with restrictions and the Postal Service believes otherwise, they had every opportunity to controvert the claim and call into question the legitimacy of the injury. Moreover, there was every opportunity to challenge the Grievant's doctor's findings by agreeing to send the Grievant for a Fitness for Duty. No evidence was offered that the Postal Service ever challenged the legitimacy of the Grievant's physical abilities from a medical standpoint. The evidence supports that the Grievant's physician directed him to report to limited duty with restrictions, but no work was made available within the Grievant's limitation.

Therefore, the Postal Service's case is inconclusive due to insufficient evidence to show deceit or a willful intent to defraud. The primary evidence of the surveillance video did not establish the proof needed to show misconduct by the Grievant as charged. Also, Agent Winder's failure to appear at hearing to be cross-examined by the Grievant renders his detailed report as hearsay evidence,

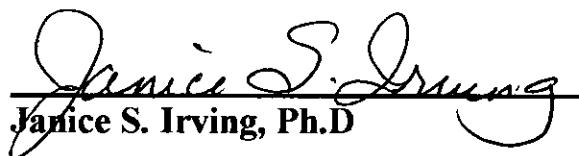
because the Sixth Amendment affords the Grievant the right to confront his accusers. The Arbitrator did not find that the purported violations of the Grievant's work restrictions measures against his everyday activities constituted that the Grievant has misrepresented his physical abilities and made false statements during an official investigation. The Grievant simply followed his physician's prescribed course of treatment and returned to full duty when his physician was assured that he could do so without subjecting himself to further injury.

Therefore, it is concluded that the Postal Service did not have "just cause" to terminate the Grievant.

AWARD

The grievance is sustained. The Grievant is to be reinstated in his job as a mail carrier with full back pay, minus interim earnings, and any benefits he lost as a result of his discharge.

Dated: May 25, 2007
Compton, CA


Janice S. Irving, Ph.D