

C-22909

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration)	GRIEVANT:	Richard C. Henton
between)	POST OFFICE:	Oklahoma City OK
UNITED STATES POSTAL SERVICE)	USPS CASE NO:	G98N-4G-D 01183540 (Merits)
and)	NALC CASE NO:	016851
NATIONAL ASSOCIATION OF LETTER)		
CARRIERS, AFL-CIO)		
)		
)		

BEFORE: Michael E. McGown, *Arbitrator*

APPEARANCES:

<i>For the U.S. Postal Service:</i>	J.P. Turner
<i>For the Union:</i>	Roger W. Bledsoe
<i>Place of Hearing:</i>	U.S. Post Office
<i>Date of Hearing:</i>	November 16, 2001
<i>Date of Award:</i>	December 24, 2001
<i>Relevant Contract Provision:</i>	Article 16
<i>Contract Year:</i>	1998
<i>Type of Grievance:</i>	Discipline/Removal

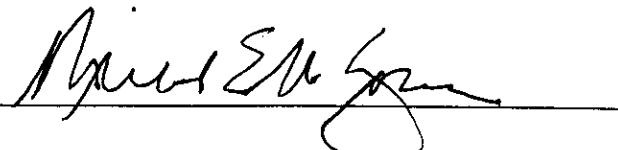
AWARD SUMMARY:

For the reasons given, the grievance is sustained and the Employer directed to offer reinstatement to the Grievant in accordance with the terms of this Award.

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VICE PRESIDENT'S OFFICE
N.A.L.C. HQQRTRS., WASHINGTON, D.C.



ISSUE

Can the charge of *Repeated Failure to Comply with a Management Directive* be proven by preponderant evidence? Assuming the charge is sustained, was the selected penalty of discharge a violation of the terms/conditions of the National Agreement?

SUMMARY STATEMENT OF THE CASE

The United States Postal Service (hereinafter referred to as "Employer") and the National Association of Letter Carriers, AFL-CIO (hereinafter referred to as "Union") failed to resolve this grievance and appointed the Arbitrator to hear and decide the matter. At the Hearing, the parties agreed that the grievance was properly before the Arbitrator, that all steps of the arbitration procedure had been followed, and that the Arbitrator had the authority to render the decision.

Richard C. Henton (hereinafter sometimes referred to as "Grievant") is a Letter Carrier at the Westside Station of the Post Office in Oklahoma City, Oklahoma. On May 9, 2001, Customer Service Supervisor Marilyn Watson issued to the Grievant a Notice of Proposed Removal (Joint Exhibit No. 2):

This is advance written notice that it is proposed to remove you from the Postal Service no sooner than 30 calendar days from the date of your receipt of this letter.

This action is based on the following reason(s):

Charge 1: Repeated Failure to Comply with a Management Directive

By notice dated July 25, 2000 you were directed to report to Dr. Boyd Lester for a fitness-for-duty examination. The examination was scheduled for August 3, 2000. You reported to Dr. Lester's office, however, you refused to be formally examined. Thereafter, by notice dated December 20, 2000 you were directed to report to Dr. Jim Allen for a fitness-for-duty examination, which was scheduled for January 4, 2001. In this notice you were advised as follows:

You are advised that obstructing a fitness-for-duty examination by refusing to answer questions or to otherwise refuse to submit to the examination is tantamount to failing to report for the examination. Handbook EL-311 (Personnel Operations) provides as follows: Part 343.34, "Failure to report for a fitness-for-duty examination without acceptable reasons is just cause for disciplinary action. Repeated refusal is grounds for separation."

You reported to Dr. Allen's office shortly before 4:00 p.m., which was nearly an hour past your scheduled examination time of 3:00 p.m. However, you insisted on having a third party in the examination room. You also insisted on taping the examination. Inasmuch as your demands were contrary to normal protocol, Dr. Allen advised you that he would have to contact the Postal Service's Contract Medical Officer, Dr. Perry Taaca, to straighten out this issue before proceeding. During this visit, you also refused to sign the standard release to provide the examination results to the Postal Service's Contract Medical Officer. You stated to Dr. Allen that you would not give permission to release information to the Postal Service because they didn't need it and you didn't have a contract with "them".

Subsequently, by notice dated February 16, 2001 you were directed to report to Dr. Herman Jones for a fitness-for-duty examination. This examination was scheduled for February 22, 2001 and contained the same warnings regarding your compliance obligations. You failed to report for this examination. Thereafter, you asserted that you had not received notice of this examination until you received your Certified letter on February the 23rd. However, a notice of the Certified letter along with a letter sent by regular mail were placed in your mail box prior to the examination date. Nonetheless, in order to

remove any doubt regarding proper notice, you were scheduled for yet another fitness-for-duty examination. This examination was set for March 16, 2001. By notice dated March the 6th you were directed to report for this examination. This directive reiterated your compliance obligations as well as the consequences for failure to comply. You reported for this examination. However, when Dr. Jones attempted to administer the MMPI.2 psychological test, you refused to take the test. Your asserted reason for this refusal was that it would exceed the time specified in your fitness-for-duty notice. Because of the critical need to perform the psychological testing phase of the examination, Dr. Jones advised you that he would request a second appointment for this purpose. A follow-up appointment was made for March the 22nd. On March the 19th, a notice dated March the 16th directing you to report for this follow-up testing was delivered to your mail box along with a Certified left notice. This notice also advised you of your duty to report for the appointment as well as the consequences for failure to comply. However, you failed to report for the scheduled appointment. To date you have failed to proffer any reason for your failure to comply with this directive. Nor have you provided any acceptable reason for your failure to comply with any of the foregoing directives. You are charged accordingly.

Your conduct as described herein is aggravated by the fact that a psychological examination/risk assessment was deemed to be warranted in order to properly assess your suitability for continued employment and to determine an appropriate response to your behavior pattern. And during a substantial period of this time, because of the legitimate concerns in this regard, you were carried in a non-duty with pay status. This as well as the fitness-for-duty appointments represented a considerable expense to the Postal Service. Throughout this entire process, you continually and unnecessarily frustrated and obstructed the Postal Service's legitimate efforts to obtain a professional evaluation of your ability to carry out assigned duties as well as the potential for injury to self or others.

Your actions as described above are found to be contrary to, but not limited to, the following Postal Service regulations, in pertinent part:

*Employee and Labor Relations Manual (ELM 16) parts 864.32 & 666.51
Handbook EL-311 (Personnel Operations) part 343.34
Methods Handbook M-41 (City Delivery Carriers Duties and Responsibilities) part 112.21*

In addition, the following elements of your prior record have been considered in arriving at a decision in this matter:

1. *By notice dated January 17, 2001, you were issued a notice of 7 calendar-days suspension for AWOL.*
2. *By notice dated January 12, 2001, you were issued a notice of 14 calendar-days suspension for Violation of the Code and Standards of Conduct Required for Postal Employees.*
3. *By notice dated May 2, 2000, you were issued a notice of 7 calendar-days suspension for Violation of the Standards of Conduct Required for Postal Employees.*
4. *By notice dated December 20, 1999, you were issued a Letter of Warning for Improper Conduct/Disrespectful Conduct Towards a Manager.*

On June 8, 2001, the Grievant discussed this matter with his supervisor and the Step A Meeting was held on June 15, 2001. At that time, management made the following contentions:

"... Mr. Henton had every opportunity to complete the FFD but failed to cooperate in all respects, which violates EL-311 343.34, ELM 864.32 & 665.51 and the Handbook M-41 112.21. Mr. Henton is

also a short-term employee with an atrocious disciplinary record, which has also attributed in determining just cause for removal.

After meeting at Step B, the parties filed the following statement on June 22, 2001:

DECISION

The Dispute Resolution Team has decided to declare an impasse. The NALC National Business Agent may appeal this grievance to arbitration within fourteen days (14) days after receipt of this joint report.

EXPLANTION

The grievant has been in an off duty status since January 5, 2001. The grievant was issued a Notice of Proposed Removal, dated May 9, 2001, by certified mail with a postmark of May 11, 2001. The grievant signed for the notice on May 29, 2001. The notice stated that it is proposed to remove the grievant from the Postal Service no sooner than 30 calendar days from the date of your receipt of this letter. The charge was for repeated failure to comply with a management directive. A Letter of Decision—Removal, dated June 7, 2001 was then sent to the grievant. The letter, signed by George Frame, Postmaster, Oklahoma City, stated "Based on the foregoing it is my decision that your removal is required in order to promote the efficiency of the service. Your removal will be effective June 11, 2001."

Management Contentions

Management contends the grievance is untimely due to the fact that the Notice of Proposed Removal was mailed by regular and certified mail, to the grievant on May 11, 2001. The file included a certificate of mailing and a certified mail receipt, both postmarked May 11, 2001. The notice informed the grievant that he and/or his representative may review the material relied on to support the reasons for the notice at the Westside Station. The notice informed the grievant that he and/or his representative may answer the proposal within 10 days from receipt of the letter, either in person or in writing or both, before George Frame, Postmaster, between 8:00 a.m. and 4:00 p.m., Monday through Friday at 320 SW 5th St., Oklahoma City, OK. The grievant did not respond to the Proposed Removal notice, nor did his representative. The removal was effective June 11, 2001, 30 days after the Notice of Proposed Removal was mailed to the grievant's home address of record. The Management Step A representative contends the grievant had a right to file a grievance by May 30, 2001 as the NALC had the same right under Article 15.2.a of the National Agreement. The grievance was file on June 8, 2001. The union contends the discipline is untimely. That event's happened as far back as August 3, 2000. However, the length of time, demonstrates Management's continued efforts to allow the grievant due process. During this period, Management gave the grievant numerous directives to attend and cooperate with a fitness-for- duty examination. The grievant chose to obstruct each examination by either not reporting for the exam or refusing to cooperate.

Management contends the grievant repeatedly failed to comply with a Management Directive. By notice dated July 25, 2000 the grievant was directed to report to Dr. Boyd Lester for a fitness for duty examination. The exam was scheduled for August 3, 2000, at 12:45 p.m. The grievant reported to Dr. Lester's office, however, he refused to be formally examined. Included in the file was a letter from Dr. Boyd Lester, M.D. stating he refused to be formally examined. In the letter addressed to Dr. Taaca, USPS Medical Officer, Dr Lester quotes the grievant, "I did not know this was a fitness for psychological reasons. I will answer any questions which are written. I know the legal implications of what this means because of my daughter." The doctor goes on to say the evaluations could not be completed due to insufficient information on the evaluation sheet. The grievant failed to cooperate in the examination. The grievant was then directed by notice dated December 20, 2000 to report to Dr. Jim Allen for a fitness for duty examination, which was scheduled for January 4, 2001, at 3:00 p.m. until 5:00 p.m. In the notice the grievant was advised as follows:

You are advised that obstructing a fitness for duty examination by refusing to answer questions or to otherwise refuse to submit to the examination is tantamount to failing to report for the examination. Handbook EL-311 (Personnel Operations) provides as follows: Part 343.34, "Failure to report for a fitness-for-duty examination without acceptable reasons is just cause for disciplinary action. Repeated refusal is grounds for separation."

The grievant arrived at Dr. Allen's office shortly before 4:00 p.m., which was nearly an hour past the scheduled examination time of 3:00 p.m. The examination was scheduled to be a two-hour appointment. In addition, the grievant insisted on having a third party present in the examination room and insisted on taping the examination. In Dr. Allen's written report dated January 6, 2001, he states, "Although he was late, when I invited him into the office he said his representative would accompany him. I noted he also had what seemed to be a tape recorder. I explained that it was not my understanding in my contact with you that there would be a third person in the room, and that I would need to call you and get this straightened out." The doctor was unable to reach the postal service medical doctor, therefore, he apologized to the grievant saying he thought it best not to see them at this time. The grievant was given the doctor's information form and informed it could be taken with him and brought back if he returned. The grievant stayed and filled it out and gave it back to the receptionist. However, he refused to sign the section giving permission for the doctor to give information to the payer, (i.e. the USPS) saying he would not give permission to release information to them (i.e., you) as they didn't need it and he didn't have any contract with them. Once again, refusing to cooperate.

In a letter dated February 16, 2001, the postmaster directed the grievant to attend another scheduled Fitness-for-Duty Examination/Risk Assessment. It was scheduled for Thursday, February 22, 2001, at 1:00 p.m. until 3:00 p.m. with Dr. Herman Jones. The letter was sent certified mail with a notice left on Tuesday, February 20, 2001. The item was signed for on Friday, February 23, 2001 by the grievant. The grievant failed to report as scheduled. Normal procedure is to send one notice certified mail and a copy by regular mail to ensure the addressee receives the notice in a timely manner. It is apparent that in an effort to avoid cooperating with the fitness-for-duty examination, the grievant intentionally picked up the certified copy after the date of the appointment. In the letter, it was noted that the grievant was previously scheduled for a fitness-for-duty examination on August 3, 2000 and that he failed to cooperate in the examination. Also noted was a rescheduled appointment with another doctor on January 4, 2001, which he once again obstructed the Postal Service's legitimate efforts to conduct the examination/assessment to determine his suitability for continued employment.

The grievant was sent another letter, dated March 6, 2001, notifying him of another Fitness-for Duty Examination/Risk Assessment scheduled for Thursday, March 15, 2001 at 10:00 a.m. until 12:00 p.m. with Dr. Herman Jones. The grievant was again advised that obstructing a fitness-for-duty examination by refusing to answer questions or to otherwise refuse to submit to the examination is tantamount to failing to report for the examination. In addition, he was again informed that repeated refusal is grounds for separation.

The grievant kept his appointment with Dr. Jones on the March 15. His union representative accompanied him, as agreed. However, according to Dr. Taaca, he brought a list of demands that he reviewed with Dr. Jones but ultimately chose to abandon the interview at the 12:00. During the interview Dr. Jones requested that he complete an MMPA.2 as part of his evaluation. He refused saying that his request exceeded the time specified on his documentation. The doctor then informed him he would request completion of a second appointment. The appointment was scheduled for Thursday, March 22, 2001, at 1:00 p.m. until 4:00 p.m. (MINIMUM). The notice of scheduled appointment again, informed him of the possible consequences of not reporting for a fitness-for-duty examination. In a letter from Dr. Jones, dated April 2, 2001, he states "Mr. Henton did not return for the 3/22/01 appointment." Included in the file are two statements confirming delivery of a certified notice and a regular letter, both from the USPS for Richard Henton, 2413 NW 48th St. on March 19, 2001. The first

statement is from Chris Long, stating he took letters out to Tony Monger to be delivered. The second was from Tony Monger stating he delivered the regular letter and left notice on the certified letter.

The file included a letter written by Mr. Henton addressed to Perry Taaca, M.D., dated March 19, 2001. The grievant writes that he attended the FFD exam with Dr. Herman Jones on Thursday, March 15, 2001. In his own words he describes the demands he said would have to be met prior to the evaluation beginning. The grievant states in this letter, "Also be advised that any further examinations or further examination related activities will have to be postponed until after I receive your written response." He goes on to threaten Dr. Taaca with "full legal recourse as allowed by law."

The grievant has been an employee of the United States Postal Service since approximately December 19, 1998. However, he continuously failed to follow directions from numerous managers throughout his career. Instead he made demands on the service. Dr Orren Dale, Employee Workplace Intervention Analyst, for the USPS, interviewed him and states he has engaged in repeated workplace confrontations with management. Dr. Dale conducted interviews with co-workers and managers. Complaints by fellow employees which include following other carriers on the route, disruptive behavior, aggressive and bullying conduct, angry outburst, extremely poor work performance, intimidation of coworkers, and belligerence warrant his being scheduled for the FFD examination. The grievant has clearly failed to cooperate and has obstructed every effort for a fitness-for-duty examination to be performed. The removal of the grievant is warranted. The following elements of the grievant's prior record were listed as considered in arriving at the decision to remove the grievant from the postal service:

1. *Notice of 7 calendar-days suspension for AWOL, notice dated January 17, 2001. As a matter of record, the 7-day suspension was reduced to a Letter of Warning by the DRT on June 14, 2001.*
2. *Notice of 14-calendar-days suspension for Violation of the Code and Standards of Conduct Required for Postal Employees, notice dated January 12, 2001.*
3. *Notice of 7-calendar-days suspension for Violation of the Standards of Conduct Required for Postal Employees, notice dated May 2, 2000.*
4. *Letter of Warning for Improper Conduct/Disrespectful Conduct Towards a Manager, notice dated December 20, 1999.*

Union Contentions

The removal is without just cause. The charge of "Repeated failure to comply with a management directive" is misrepresentative of the facts, as presented in the grievance file.

Management's contention of the grievance being untimely is without merit. The grievant signed for the certified letter on May 29, 2001, yet management states the grievant only had the right to file a grievance up to May 30, 2001. That "it maybe presumed that both parties received "constructive delivery" as of May 16, 2001. This has no significance to the reality of the grievance/arbitration system found in Article 15 of the National Agreement. Management cannot offer any proof the grievant saw or read or was aware of the removal except for their belief that there was a "constructive delivery" and therefore the grievant and the union is responsible for an unopened and unsigned for letter. This is improper.

Management's Step A official writes the grievant "had every opportunity to complete the FFD, but failed to cooperate in ALL aspects." The original FFD (Fitness for Duty exam) was scheduled for August 3, 2000. The grievant reported as instructed for a medical exam, there was no mention of a psychological exam. The next mention of any action taken by management for the exam to be rescheduled was in a letter dated December 20, 2000. This is 135 to 140 days after the first examination. It appears the grievant's station manager, in August of 2000, did not have a problem with the grievant's "cooperation" in not taking the "psychological" test. There is certainly no mention of it in the grievance file. To include the August date as a failure to comply with a management directive is untimely.

The grievant reported for the January 4, 2001 exam. He was accompanied by a union representative, who wrote in her statement that directions to the Dr.'s office did not include the suite number or even a phone number for the grievant to call the Dr.'s office (management's Step A representative did not dispute this). That his station manager delayed the grievant, once again not disputed by management's Step A representative. How was the grievant failing to cooperate in ALL aspects at this time? The union representative further states the form the grievant was asked to fill out "appeared to be a standard release form, the type that gives Doctors offices access to ALL of the person's medical records." Also that the form "had space for the insurance information." If the Postal Service ordered the FFD then why was it necessary for the grievant to include his own personal insurance information. Additionally the union representative states they "arrived around 3:35 or so", not at 4:00 PM and certainly not the 1 hour and 50 minutes the District Medical officer claimed in his cc mail to Linda Young, O.D. Curry and Bonnie Nevels.

In Dr. Allen's letter to the District Medical Officer, he states "he also had what seemed to be a tape recorder". The Dr. makes no mention in this letter of the grievant insisting on taping the examination, as the Letter of Discipline asserts. There is no other statement included in the file from Dr. Allen and no other documentation that supports management's claim that the grievant insisted on taping the exam. Therefore this claim of taping the exam appears to be a misrepresentation of the facts as they actually happened. There is no mention anywhere of instructions to the grievant that he could not have a third party accompany him for the examination. Dr. Allen's letter states upon being unable to reach the District Medical Officer by phone, because (as he explained to the grievant and his representative) "it was not my understanding in my contract with you (District Medical Officer) that there would be a third person in the room and that I would need to call you and get this straightened out." The doctor stated to the grievant and his union representative that he "thought it best not to see them at this time."

The grievant was again scheduled for a FFD on February 22, 2001, a Thursday. The letter instructing the grievant to report for this FFD was dated February 16, 2001, a Friday. This was to a different doctor, the third doctor for the third FFD, at a different location. Additionally, the letter quotes Handbook EL-311 (Personnel Operations) section 343.34, which refers to failing to report for FFD's. However, the grievant had reported to each of his prior FFD's. It also states that "repeated refusal is grounds for separation." How could the grievant have repeated refusals to report to a FFD if he had reported to both of the two that were previously scheduled? Management dates the letter February 16th and now states the grievant failed to report to the scheduled FFD. Management is fully aware the grievant signed for the certified letter on February 23rd. Management created this by failing to give a proper amount of time for the letter to arrive before the scheduled FFD. The union must state the obvious, the letter for the third FFD talks about failing to report to FFD's and that "repeated refusal is grounds for separation." Was management attempting to create a reporting failure by being unreasonable in the amount of time allowed for the delivery of the letter? How could the grievant report to an appointment when he didn't even know about it? Why did the Postal Service not send the certified letter to the grievant's address instead of his father's.

The grievant did report to the March 16, 2001 FFD, as stated in the Notice of Proposed Removal. However, the actual date of the FFD was March 15, 2001. He was scheduled to be there from 10:00 AM until 12:00 PM (noon). The three (3) FFD's he was aware of he reported to. Where was his failure to cooperate in all aspects, as asserted by management's Step A representative? After reporting to the FFD, the grievant discussed the FFD with the doctor and answered several questions, cooperating fully with the doctor. The doctor asked the grievant if he would take the MMPI-2 exam and the grievant said yes, however the test takes about approximately 2 hours to complete (650 questions). The time limit, given by management in the instructions of the FFD appointment letter, would not allow the test to be completed. The doctor stated another appointment would be requested.

Again, the Postal Service sent out a certified letter concerning the scheduling of a FFD this time for March 22, 2001, a Thursday. Again, the letter was dated the 16th (a Friday) and again the grievant received the letter on the 23rd (also a Friday). However, again the Postal Service sent the certified letter to the address of the grievant's father. Who really was failing to cooperate in this scenario?

Management refers to the letter mailed from Dr. Orren Dale to Dr. Perry Taaca, dated August 2, 2000. In it Dr. Dale speaks of complaints from fellow employees, repeated workplace confrontations, disruptive behavior, etc. Management states Dr. Dale conducted interviews with co-workers and managers. The Union's Step A representative made a request to the Postmaster of Oklahoma City, via a January 25, 2001 letter, to "provide any documentation to support his allegations." Additionally, in the same letter Dr. Dale refers to the grievant's "observed pattern of poor performance, workplace conflict, contentious relationships with co-workers, and apparent difficulty in controlling his temper. Please provide documentation that supports those claims."

The Postmaster replied, in a letter dated March 12, 2001, that he

"was not aware of the letter from Dr. Dale to which you refer. I don't know what documentation Dr. Dale may have been privy to in this regard. However, the descriptive behavior you listed regarding Mr. Henton's behavior in the work environment is certainly consistent with the feedback I receive from Station personnel."

The second request for documentation was answered in the same letter. The Postmaster writes

"I believe the various corrective actions taken by Station Management to address Mr. Henton's conduct and behavior adequately document and lend support to Dr. Dale's concerns. Since Dr. Dale is no longer with the Postal Service, I'm unable to express with particularity all the concerns as well as the underlying evidence he may have had in this matter."

Management includes the August 2, 2000 letter but fails to allow the Union the statements, notes or any documentation used to support that letter's credibility. While the Postmaster made an effort to personally answer the information requests made by the Union Step A representative, he failed to provide the necessary information that would allow the Union to properly defend the grievant from the allegations brought forth in Dr. Dale's letter. This is a further violation of the grievant's due process rights.

The discipline quoted in the Notice of Proposed Removal is improperly quoted. The 7-day suspension dated January 17, 2001 has been reduced to a Letter of Warning. The 14-day suspension, dated January 12, 2001 is in adjudication, and there is no letter from management stating the 7-day suspension dated May 2, 2000 has or has not been reduced.

The grievant is not at fault, management is. Management denied the grievant his due process rights, failed to show just cause when issuing this Removal, and failed to follow the guidelines set forth in the handbooks and manuals (EL-860, 2000-7) as stated in the Union's Step A contentions.

* * *

On June 29, 2001, arbitration was requested.

The Arbitrator reviewed the articles of the applicable National Agreement (Joint Exhibit No. 1) considered pertinent to this dispute by the parties; however, in the interest of brevity, the provisions are not reproduced here.

POSITION OF THE PARTIES

The Position of the Employer

It is the position of the Employer that after the Grievant engaged in workplace episodes that required police assistance, management directed the Grievant to undergo a psychological fitness-for-duty examination. Five different examinations were scheduled, but the Grievant failed to complete the examination process. After the Grievant failed to report for the last such examination, management concluded that it had just cause to remove the Grievant for violation of the provisions cited in the Notice of Proposed Removal.

The Position of the Union

The Union takes the position that just cause does not exist for the removal of the Grievant. The Union contends that, from the outset, management failed to inform the Grievant of the reason for the fitness-for-duty examination and failed to provide him with accurate and timely notice of his appointments. The Union maintains that, in light of the procedural errors and untimeliness of management's actions, the Notice of Proposed Removal should be rescinded.

OPINION

On July 25, 2001, a Hearing was held in Oklahoma City at which time the Arbitrator was presented with the timeliness issue raised by the Employer at Steps A and B. On August 24, 2001, the Arbitrator concluded that the grievance was timely filed. This Hearing was convened to consider the merits of the grievance.

The Employer's first witness, Herman E. Jones, is a neuropsychologist with the University of Oklahoma Health Sciences Center. He was contacted by Dr. Perry T. Taaca, Medical Director for the USPS Oklahoma District, for the purpose of evaluating the Grievant. Dr. Jones stated that he had his initial meeting with the Grievant on March 15, 2001. According to the testimony of Dr. Jones, the Grievant cooperated with the interview portion of the examination; however, when the Grievant was asked to complete the MMPI.2 questionnaire, he said that he could not do so because it would require more than the time allotted for the appointment. Dr. Jones stated that he told the Grievant a request would be made of Dr. Taaca for a second appointment. The second appointment was scheduled for March 22; however, the Grievant did not return.

Wayne Seamans testified that he was formerly the Acting Customer Service Manager at the Village Station and supervised the Grievant. He recalled that on January 4, 2001, the Grievant was scheduled for a fitness-for-duty examination and returned from the street at approximately 2:15 p.m. He and the Grievant engaged in a conversation concerning the Grievant's intention to use an LLV to drive to the appointment; Manager Seamans instructed the Grievant to use his personally owned vehicle, which the Grievant declined to do because he did not have a driveout agreement. Manager Seamans stated that he finally told the Grievant to "go to the doctor or go home or I will call the police." According to Manager Seamans, the Grievant became "somewhat hostile" and left to go to the Wal-Mart. Manager Seamans summoned the police, who brought the Grievant back to the Village Station. The Grievant did not leave the Station until after 3:00 p.m., the time set for his appointment. Manager Seamans also recounted an incident that transpired two weeks earlier, in mid-December. Upon returning from lunch, he asked the Grievant why he was still in his vehicle although the mail had already been pulled down. The Grievant yelled at him and then went inside the Station to call his Union representative. Manager Seamans could not recall whether the Threat Assessment Team was called as a result of either incident, although he remembered that a pre-disciplinary interview was conducted concerning the January 4 incident. Manager Seamans stated that it was he who requested a fitness-for-duty examination for the Grievant.

Dick Schweitzer, an Employee & Workplace Intervention Analyst, has been employed by the Postal Service for 23 years. He related that he was assigned to the Oklahoma City area in January 2001 and learned that there were some "issues" between the Grievant and postal management. He testified that he tried to help the Grievant and intercede for him; he met with both the Grievant and the Union; and he was instrumental in obtaining the Grievant's consent to undergo a fitness-for-duty exam and in delaying or preventing disciplinary measures from being taken against the Grievant.

Labor Relations Specialist O.D. Curry testified concerning his involvement in this matter and identified a number of exhibits that make up a portion of the record of this matter. Specialist Curry drafted the notice addressed to the Grievant instructing him to appear for a fitness-for-duty examination on August 3, 2000, as well as subsequent documents concerning the later appointments. He admitted that the first notice did not inform the Grievant that a psychological examination had been scheduled. In reviewing the documentation prepared, Specialist Curry identified one document that apparently was not sent to the Grievant because it misstated the date of the scheduled appointment. During cross-examination, Specialist Curry stated that he never telephoned the Grievant to verify the appointments. He conceded that the Grievant in all likelihood did not receive notice of the February 22 appointment until February 23. When asked about the delay from July to December for rescheduling a fitness-for-duty exam, Specialist Curry noted that the Oklahoma District was awaiting the arrival of a replacement for Orren Dale, the Employee & Workplace Intervention Analyst.

The Employer's final witness was Customer Service Supervisor Marilyn Watson, who issued the Notice of Proposed Removal, and who was assigned to the Westside Station in February 2001. According to Supervisor Watson, the Grievant had recently been converted to full time status and assigned to a position at the Westside Station on January 27, 2001, although since he was on administrative leave, he was not reporting to that Station. Supervisor Watson reviewed the files from the Village Station and discussed the situation concerning the Grievant with Specialist Curry, Union President Don Landis, and Village Station Supervisor Eddie Glasgow. She was familiar with the Grievant because she had supervised him at the Village Station when the regular supervisor was off duty. She conducted a pre-disciplinary interview with the Grievant and Union President Landis, although she could not recall when it occurred; she did not request a fitness-for-duty exam. During the pre-disciplinary interview, the Grievant told her that he did not keep the March 22 appointment because he did not receive the notice until March 23. Supervisor Watson was nevertheless unable to explain why the Notice of Proposed Removal that she signed stated that the Grievant had "failed to proffer any reason for your failure to comply" with the directives to report for the fitness-for-duty exam.

At this point in the Hearing, the Employer rested its case and requested a brief recess. During the recess, the Arbitrator examined the record of the proceedings and the documentary evidence presented. The Employer framed the issue by asking the question, "Can the charge of *Repeated Failure to Comply with a Management Directive* be proven by preponderant evidence?" Notwithstanding the thoroughness of the presentation made by the Employer's Advocate, it was quite apparent to the Arbitrator that the question could only be answered in the negative.

A review of the facts presented reveals the following: The Grievant was instructed to report to Dr. Boyd Lester for a fitness-for-duty exam on August 3, 2000. However, as noted by Specialist Curry, the Grievant was not informed that this was a psychological evaluation. Actually, it is still unclear to the Arbitrator, for the notice to the Grievant is not entitled "Fitness-for-Duty Examination/Risk Assessment" and the notice begins with the words "In order to determine your medical suitability . . ." Nevertheless, Dr. Lester's letter to Dr. Taaca states that the Grievant refused to be formally examined, claiming "I did not know this was a fitness for psychological reasons." Accordingly, it is apparent that something that occurred in Dr. Lester's office led the Grievant to believe—rightly or wrongly—that the exam was intended to be psychological. It is important to note, however, that the Grievant did not fail to appear for the examination.

Five months later, a second examination was scheduled for January 4, 2001, with James Allen, a psychiatrist. According to testimony recounted earlier herein, the Grievant had a dispute with his supervisor concerning the mode of transportation to be employed. Nevertheless, Dr. Allen's letter reports that the Grievant arrived for the two-hour appointment at "almost 4:00 p.m." Dr. Allen's letter relates that the Grievant, accompanied by a Union representative, had difficulty locating the office. Dr. Allen did not anticipate a third person would be in the interview room, and after failing to reach Dr. Taaca by phone, Dr. Allen wrote that he "apologized to Mr. Henton and Ms. Wilson, saying I thought it best not to see them at this time . . ." Thus, though late in arriving, the Grievant did report for the exam, which was subsequently terminated by Dr. Allen. While the Notice of Proposed Removal claims—without attribution—that the Grievant "insisted on having a third party in the examination room [and] on taping the examination . . ." the letter from Dr. Allen in no way indicates that the Grievant made these demands.

The third examination, scheduled for February 22, 2001, with Dr. Herman Jones, has also been reviewed herein, as a result of Dr. Jones' testimony. A few additional notes concerning this event are appropriate. First, the notice contained in the file instructs the Grievant to report on "Tuesday, February 22, 2001," although February 22 fell on a Thurs-

day this year. Specialist Curry testified concerning this point of confusion, and it is possible that the letter was corrected prior to being mailed. The letter indicates that the appointment is scheduled for two hours, and it notes that the evaluation will be "medical (psychological)." The letter provides the name of the building, the suite number, the street address, and the doctor's phone number. Unfortunately, the letter is dated February 16, a Friday, and the Grievant did not sign for the letter until the following Friday, February 23, a day after the appointment.

The fourth examination was scheduled for two hours on March 15, 2001, also with Dr. Herman Jones. Notice to the Grievant was dated March 6, and the Grievant reported as directed. It was at this exam that the Grievant indicated to Dr. Jones, as the latter's memorandum states, "that this request [completion of the MMPI.2 questionnaire] exceeded the time specified on his documentation and he declined to undertake the testing." The memorandum notes that a second appointment for the MMPI.2 evaluation would be requested, but it is not clear from Dr. Jones' memorandum whether the Grievant intended to return for this second appointment. As it happens, the letter notifying the Grievant of the second appointment scheduled for Thursday, March 22, was mailed on Friday, March 16; it is not clear from the record presented when he received this notice, although notes from a Union interview with Supervisor Watson suggest that he did not receive it until Friday, March 23.

In the Notice of Proposed Removal, the Grievant's actions were "found to be contrary to, but not limited to, the following Postal Service regulations, in pertinent part:"

Part 864.32 of the Employee and Labor Relations Manual (Joint Exhibit No. 5):

Management can order fitness-for-duty examinations at any time and repeat them, as necessary, to safeguard the employee or co-worker. Specific reasons for the fitness-for-duty should be stated by the requesting official. In cases of occupational injury or illness, the district injury compensation control office may request an examination in the course of monitoring an injury compensation case (see 545.44).

Part 666.51 of the Employee and Labor Relations Manual (Joint Exhibit No. 6):

Employees must obey the instructions of their supervisors. If an employee has reason to question the propriety of a supervisor's order, the individual will nevertheless carry out the order and immediately file a protest in writing to the official in charge of the installation, or appeal through official channels.

Part 343.34 of Handbook EL-311 (Personnel Operations) (Joint Exhibit No. 2):

Failure to report for a fitness-for-duty examination without acceptable reasons is just cause for disciplinary action. Repeated refusal is grounds for separation.

Part 112.21 of the Methods Handbook (M-41; City Delivery Carriers Duties and Responsibilities) (Joint Exhibit No. 8):

Obey the instructions of your manager.

Does the record presented demonstrate that the Grievant violated any of the foregoing? Did the Grievant repeatedly fail to comply with a management directive? The answer to both questions is "No." Even viewing the record in the light most favorable to the Employer, there is no probative evidence that the Grievant's conduct ran afoul of the M-41 and ELR provisions cited. With respect to the Handbook EL-311 stricture that requires an employee to report for a fitness-for-duty exam or face discipline, the record indicates that the Grievant did report for three of the five scheduled appointments; as for the remaining two, the Grievant maintained that he did not receive timely notice, which, arguably, is an acceptable reason for failure to report.

The Arbitrator is not unaware of the Grievant's prior disciplinary record, cited in the Notice of Proposed Removal. It appears that one or more of these citations may now be in error, due to subsequent events. Nevertheless, it is

also apparent that the Grievant's previous conduct justifies the Employer's decision to seek a comprehensive psychological fitness-for-duty examination, and the Grievant has an obligation to comply with that directive and cooperate with the physician conducting the examination. Accordingly, while the Notice of Proposed Removal will be rescinded, reinstatement will be required only after the Grievant successfully completes a psychological fitness-for-duty examination performed within ninety (90) days following the date of this Award, unless the Employer chooses to waive this requirement.

If the Employer elects to require the psychological fitness-for-duty exam as a condition of reinstatement, then within thirty (30) days following the date of this Award, the Employer and the Union will obtain a list of board certified psychiatrists, select a psychiatrist to perform the examination, and schedule the examination. Once the examination is scheduled, the Employer will promptly notify the Grievant by regular and certified mail at both of the addresses listed on his Form 1216 (Employee's Current Mailing Address); the Employer will also mail a copy of the notice to the Union at both its local office in Oklahoma City and its regional office in Pueblo, Colorado. Because the record demonstrates that the Grievant has not been fully cooperative with the Employer's efforts to obtain a fitness-for-duty examination, and in recognition of the prior expense incurred by the Employer, it is hereby ordered that the cost of the fitness-for-duty examination be borne by the Union; the Employer will bear the cost of the Grievant's clock time during the examination.

The Grievant should, of course, recognize that it is his own recalcitrance toward the evaluating physicians that has contributed most substantially to the issuance of the Notice of Proposed Removal. Under these circumstances, back pay is not warranted and is specifically excluded from this Award, except for payment for the thirty-day period following the issuance of the Notice of Proposed Removal. The Grievant should clearly understand that if he 1) refuses to submit to a psychiatric fitness-for-duty examination; 2) fails to keep an appointment with the selected physician; 3) does not complete the examination; or 4) refuses to accept and comply with any recommendations or conditions specified by the examining physician for his reinstatement, then the Employer's obligation hereunder will terminate.