

REGULAR ARBITRATION PANEL

C#10215

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| In the Matter of Arbitration |) | GRIEVANT: A. Vollbrect |
| between |) | |
| NATIONAL ASSOCIATION OF |) | POST OFFICE: Stockton, CA |
| LETTER CARRIERS |) | |
| and |) | |
| UNITED STATES POSTAL SERVICE |) | CASE NO.: W7N-5H-D 17639 |

BEFORE: Professor Carlton J. Snow

APPEARANCES: Mr. Christopher Geary

Mr. Dale Hart

PLACE OF HEARING: Stockton, California

DATE OF HEARING: April 27, 1990

AWARD:

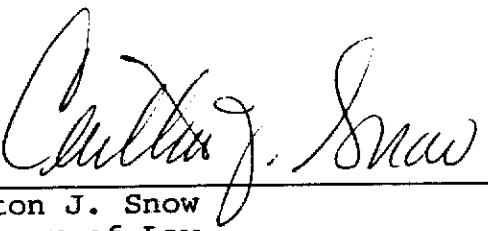
Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer did not have just cause for issuing the grievant a Notice of Removal dated September 12, 1989. By not complying with contractual obligations reasonably to accommodate the grievant within his present craft, the Employer violated Articles 2 and 13 of the parties' collective bargaining agreement.

The grievant shall be reinstated with full backpay for the time he would have worked had the agreement not been violated, minus any interim earnings. Any disputes about the grievant's substantive eligibility for temporary light duty assignment shall be resolved pursuant to Article 14.4(G) of the parties' agreement. If the grievant is determined to be permanently unable to perform duties of a Letter Carrier, the Employer reasonably shall accommodate the grievant within the Letter Carrier craft.

The arbitrator shall retain jurisdiction of this matter for ninety days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

August 3, 1990

Date



Carlton J. Snow
Professor of Law

IN THE MATTER OF ARBITRATION)
BETWEEN)
NATIONAL ASSOCIATION OF) ANALYSIS AND AWARD
LETTER CARRIERS)
AND) Carlton J. Snow
UNITED STATES POSTAL SERVICE) Arbitrator
(Case No. W7N-5H-D 17639)
(A. Vollbrect Grievance))

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from July 21, 1987 to November 20, 1990. A hearing occurred on April 27, 1990 in a conference room of the Postal Facility located at 3131 Arch Airport Road in Stockton, California. Mr. Christopher Geary, Labor Relations Representative, represented the United States Postal Service. Mr. Dale P. Hart, Regional Administrative Representative, represented the National Association of Letter Carriers.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The arbitrator tape-recorded the proceeding as an extension of his personal notes. The advocates fully and fairly represented their respective parties.

The parties agreed that the matter properly had been submitted to arbitration and that there were no issues of substantive or procedural arbitrability to be resolved. The parties authorized the arbitrator to retain jurisdiction in the matter for ninety days from date of the report. They elected to submit post-hearing briefs, and the arbitrator officially closed the hearing on June 11, 1990, after receipt of the final brief in the matter.

II. STATEMENT OF THE ISSUE

The parties authorized the arbitrator to state the issue, and it is as follows:

Did the Employer remove the grievant for just cause? If not, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 2 - NON-DISCRIMINATION AND CIVIL RIGHTS

Section 1. Statement of Principle

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

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

ARTICLE 13 - ASSIGNMENT OF ILL OR INJURED REGULAR
WORKFORCE EMPLOYEES

Section 1. Introduction

A. Part-time fixed schedule employees assigned in the craft unit shall be considered to be in a separate category. All provisions of this Article apply to part-time fixed schedule employees within their own category.

B. The U.S. Postal Service and the Unions recognizing their responsibility to aid and assist deserving full-time regular or part-time flexible employees who through illness or injury are unable to perform their regularly assigned duties, agree to the following provisions and conditions for reassignment to temporary or permanent light duty or other assignments. It will be the responsibility of each installation head to implement the provisions of this Agreement within the installation, after local negotiations.

IV. STATEMENT OF FACTS

In this case, the grievant has challenged the decision of the Employer to remove him for failing to meet requirements of his position as a letter carrier. In October of 1983 while the grievant was on a four-year tour with the Marines, he had a serious motorcycle accident. As a result, he suffered a serious hip injury, a broken elbow, a gouged knee, and a head injury. His elbow and hip injuries required extensive medical treatment, including use of metal plates and bolts. Due to his injuries, the grievant received a ten percent military disability, subsequently raised by the Veteran's Administration to forty percent. In October of

1984, the grievant received an honorable discharge from the Marines.

In November of 1985, the grievant received a career appointment in the U.S. Postal Service. When he applied for employment, he gave the Employer his medical history. The parties submitted a 67 page exhibit containing medical information the Employer received with the grievant's application for employment. This document detailed the grievant's medical history and contains copies of his military health records from April, 1980 until his discharge in October of 1984. The medical information provided by the grievant to the Employer in conjunction with his application for employment was complete and lengthy.

After commencing his employment, the grievant sustained an injury while casing mail. Upon returning to work, the Employer assigned the grievant to light duty. He subsequently requested a permanent light duty assignment. After a Fitness for Duty examination, the Employer concluded that the grievant was not qualified to perform the duties of a full-time regular carrier. Management offered the grievant one of three options in order for him to continue his employment or to face removal. The grievant declined to exercise any of the options and the Employer terminated his employment relationship with the U.S. Postal Service. The grievant challenged the decision of the Employer by filing a grievance. When the parties were unable to resolve their differences, the matter proceeded to arbitration.

V. POSITION OF THE PARTIES

A. The Employer

The Employer contends that removal of the grievant for failing to meet physical requirements of a Letter Carrier position and for failing to accept one of the available job options proposed for him by management constituted just cause. It is the belief of the Employer that management accommodated the grievant by providing him with a light duty assignment for fourteen months. The Employer argues that there is a limit to the accommodation required under the parties' agreement and that, in this case, the limit has been reached. According to the Employer, it fulfilled its contractual obligations to the grievant by offering him three options, none of which he accepted.

The Employer maintained that the grievant's request for an assignment to permanent light duty caused him to be scheduled for a Fitness for Duty examination and that this procedure was in accordance with Section 342.51 of the EL-311 Personnel Handbook. It is the position of the Employer that results of the grievant's Fitness for Duty examination, as well as his medical history, were all properly reviewed by management in accordance with Section 862.2 of the Employee and Labor Relations Manual. Based on these data, management decided that the grievant was unfit to perform the work responsibilities of a Letter Carrier. The Employer also contends that the grievant is ineligible for permanent light duty because he has accumulated less than five years with the Employer and

was not suffering from an on-the-job injury. Accordingly, he failed to meet criteria of Article 13.2(B)(1) for reassignment to permanent light duty, according to the Employer. It is the belief of the Employer that the grievant has not presented himself as a handicapped employe but that, even if he is eligible for protection under the Rehabilitation Act, management offered him work he could perform and satisfied its obligations under the Rehabilitation Act as well as the parties' collective bargaining agreement.

B. The Union

The Union contends that the Employer's decision to remove the grievant violated the parties' collective bargaining agreement because there was no just cause for the decision. It is the belief of the Union that the Employer's decision was unreasonable and not based on accurate data. According to the Union, medical evidence shows that the grievant is capable of fulfilling his duties and that the Employer has violated not only the parties' agreement but personnel manuals as well and ignored relevant evidence.

It also is the belief of the Union that the Employer has violated Article 2 of the National Agreement by removing the grievant. The Union argues that the grievant is a qualified handicapped employe entitled to the protection of the Rehabilitation Act. According to the Union, the Employer failed in

its effort to accommodate the grievant, and the three options offered the grievant allegedly were not sufficient to meet the requirement that the Employer attempt to accommodate his handicap. According to the Union, the Employer has not established any undue hardship or burden if it continued to accommodate the grievant in his present craft. The Union also argues that, even if the Employer actually were unable to provide work for the grievant in his present craft, it had an obligation to seek work for him in another craft.

VI. ANALYSIS

A. Revisiting the Factual Context of the Dispute

When the grievant completed an application for employment with the U.S. Postal Service, he was asked:

Do you have any medical disorder or physical impairment which would interfere in any way with the full performance of the duties of the position for which you are applying?

The grievant responded affirmatively to this question. (See, Joint Exhibit 62, p. 1, question 5). The grievant made clear in his application for employment that he had fractured his ulna and right femoral neck. He also advised management that he had had several fingers surgically replaced. Likewise, he was clear about the fact that he had filed a disability claim with the United States Government and that he had received a forty percent rating as a result of a motorcycle accident.

A doctor examined the grievant as a result of his employment application with the U.S. Postal Service. The physician completed Section F of the Certificate of Medical Examination, PS Form 2485, a section to be completed by the examining physician. In that report, Dr. Craig noted that the grievant's upper extremities were abnormal. This was approximately a month before management hired the grievant. The doctor concluded that the grievant had no limiting conditions for the job. He, however, failed to complete the following questions: "(1) is there a service-connected disability? (2) If 'yes,' what is the percentage of disability? and (3) will the disability interfere with the performance of the employee's duties?" (See, Joint Exhibit No. 59, p. 4).

Management also received a copy of the initial evaluation for the grievant done by the Military Medical Board in November of 1983. The evaluation noted in its diagnostic summary that the grievant had (1) a fracture of the right femoral neck (open reduction and internal fixation); and (2) a comminuted fracture of the right ulna (Olecranon), involving the articular surface (open reduction and internal fixation). The Board recommended at the time that the grievant be returned to six months of limited duty. The limited duty was to preclude prolonged standing, walking, and climbing. (See, Joint Exhibit No. 62, p. 20).

According to the grievant, the Employer also received a copy of a second evaluation of the Military Medical Board which was completed approximately six months later. In this

evaluation, the Board stated that the grievant "is handicapped in that he is unable to perform prolonged standing, walking, and climbing or lifting with the right arm." (See, Joint Exhibit No. 9, p. 3). This copy of the document was not round dated as were other copies of medical documents which the Employer received prior to hiring the grievant and which were jointly submitted at the arbitration hearing.

It, however, is undisputed that the Employer received the results of several physical examinations from orthopedic surgeons conducted after the grievant's serious motorcycle accident. On April 13, 1984 (approximately 18 months before the grievant applied for employment with the Postal Service), he had been examined at an orthopedic clinic. The report of the examination concluded that the grievant had (1) a residual slight shortening of the right hip and hardware which will need to be extracted at a later date due to his young age; (2) residual lowered range of motion of the right hip, with the observation that the grievant might develop traumatic arthritis at a later date; and (3) residual lowered flexion of the elbow. (See, Joint Exhibit No. 62, p. 29).

After reviewing the grievant's application, the Employer, on November 18, 1985, gave the grievant a career appointment. The grievant worked as a Distribution Clerk until February 6, 1986, when he resigned from the Postal Service, after deciding to move his family from southern California to northern California. Some of the functional requirements for the position of Distribution Clerk are: (1) heavy lifting up to 70 pounds; (2) moderate carrying, 15-44 pounds;

(3) reaching above the shoulders; (4) the use of fingers; and (5) standing eight to ten hours, climbing, use of legs and arms. (See, Joint Exhibit No. 59). The grievant, then, reapplied and received reinstatement in the Postal Service as a Letter Carrier. This occurred on June 7, 1986.

The grievant worked as a Letter Carrier in the Stockton Post Office without any significant problems until May of 1988. At this time, the grievant's assignment was Route 510. While casing mail, the grievant "pulled" his back and, subsequently, requested an hour of help on his route. According to the grievant, his supervisor denied the request and advised the grievant to consult a doctor if he was unable to complete his assigned route.

A doctor at the Veterans' Administration in Martinez examined the grievant and advised him to take two weeks away from work, telling him to request light duty on returning to work. Following the doctor's instructions, the grievant submitted a request for light duty on May 5, 1988. (See, Joint Exhibit No. 55). The Employer instructed the grievant to submit a more detailed medical certification before his request for light duty could be properly evaluated. (See, Joint Exhibit No. 54). The grievant complied with the instructions and submitted more medical certification on May 16, 1988. (See, Joint Exhibit No. 53). The Employer approved an extended absence for the grievant from May 2 through May 31, 1988. When he returned to work, management granted him a light duty assignment not to exceed his limitations. (See, Joint Exhibit No. 47). The grievant filed an Office of

Workers' Compensation Programs claim. Based on the grievant's failure to provide adequate medical documentation to support the claim, it was denied on November 14, 1988. (See, Joint Exhibit No. 34(A)).

The grievant remained on light duty from June 10 through December 30, 1988. During this six month period, his medical restrictions fluctuated slightly; but for the most part the grievant was restricted to (1) no lifting over 40 pounds; (2) intermittent bending, pushing, and pulling two hours a day; (3) continuous standing only four hours a day; (4) work up to eight hours a day, 40 hours a week. The Employer was able to provide the grievant with light duty work throughout this period of time. According to the grievant, he was performing most, if not all, of his normal carrier duties while on light duty. The Employer recognized that providing light duty work for the grievant was not a problem because the grievant's restrictions could be met by providing him with regular carrier work while insuring that the weight of his satchel did not exceed the weight limit. (See, Joint Exhibit No. 39).

On November 14, 1988, the grievant injected a new element into his case. He requested permanent light duty work. He did so because his physician had informed him that his condition would not improve. (See, Joint Exhibit No. 35). The grievant had learned from a doctor at the Veterans' Administration in Martinez that his restrictions would be permanent because his job with the U.S. Postal Service had aggravated

injuries he had received from his accident while in the military. Accordingly, the grievant submitted a request for permanent light duty work and resubmitted a second request for such work on December 30, 1988. In response, the Employer requested that the grievant undergo a Fitness for Duty examination. (See, Joint Exhibit Nos. 31 and 32).

Dr. Cahill, a physician contracted by the Employer, gave the grievant a Fitness for Duty examination on April 6, 1989. Dr. Cahill's written report, which the Employer received on April 17, 1989, presented the following conclusion:

I believe that [the grievant] will be able to perform the job as a reserve mail carrier. At the present time, his vascular necrosis of his right hip is of such severity that I do not believe that he could perform an 'all walking' route. Although the patient indicates that he could perform his job for the mail reserve route, it is possible that if he were to develop arthritis and subsequent hip pain, he might need to limit his walking further such that he would only drive a truck. (See, Joint Exhibit No. 17, p. 5).

On receiving Dr. Cahill's report, management asked its medical officer, Dr. William G. Arbonies, to review the report and to present a recommendation in the case. Dr. Arbonies presented the following conclusion:

I have reviewed the Fitness for Duty report of [the grievant]. He has a severe disability involving his hip. By his own admission he has difficulty walking eight hours due to his back and hip pain. He is at risk in developing arthritis due to his vascular necrosis. He is not fit for duty as a mail carrier. (See, Joint Exhibit No. 28, emphasis added).

The grievant remained on light duty status as a reserve mail carrier, pending the results of his Fitness for Duty examination. His restrictions at the time were: (1) intermittent

lifting four hours a day; (2) continuous walking four hours a day; (3) no continuous sitting, bending, pushing, pulling, grasping, standing, twisting, climbing, and reaching above shoulders, eight hours a day; (4) lifting 40 pounds; and (5) available to work eight hours a day, 40 hours a week. (See, Joint Exhibit No. 25). On July 13, 1989, Ms. Phyllis Libby, Station Manager, offered the grievant a light duty assignment from May 17, 1989 to May 17, 1990. (See, Joint Exhibit No. 23). According to the grievant, he believed he had accepted this offer when he signed a form on July 13, 1989. The grievant, however, had failed to check the appropriate box on the form that indicated his acceptance of the assignment. (See, Joint Exhibit No. 23). Instructions on the form asked that a signer indicate either acceptance or rejection.

On August 2, 1989, the grievant received a letter from Ms. Vesik, Manager of Employment and Training, informing him that his medical file had been reviewed by the Division Medical Officer and that he was not medically qualified for the position of full-time, regular letter carrier. Ms. Vesik noted that the grievant's request for permanent light duty had been denied and that he had several options. She listed three, namely:

- (1) Request reassignment to other craft positions for which you are qualified and eligible.
- (2) Resign from the Postal Service; or
- (3) Apply for disability retirement. (See Joint Exhibit No. 14).

Ms. Vesik informed the grievant that, if he did not respond by August 12, 1989, his employment status with the U.S. Postal Service would be severed.

The grievant declined to accept any of the options proposed by Ms. Vesik. Consequently, on August 18, 1989, the Employer issued the grievant a Notice of Proposed Removal for failing to accept one of the options in view of his inability to perform his duties. Ms. Libby, Station Manager, stated in her removal notice to the grievant that:

Since you have not chosen to exercise any of the options available to you, and in light of your inability to perform the essential functions of your position, I have no alternative but to propose your removal from the Postal Service. (See, Joint Exhibit No. 12, p. 1).

At the arbitration hearing, Ms. Libby testified that she had proposed the grievant's removal because he had refused to accept her offer with respect to conditions for continued employment in the U.S. Postal Service, and his condition was not getting any better. When asked why she did not order the grievant into another craft, she stated that it was not what he wanted; and she never considered ordering him into the Clerk craft.

B. The Contractual Context

The fundamental issue in this case is whether or not the Employer complied with contractual requirements in attempting to accommodate the grievant's medical limitations. The Employer removed the grievant in this case because he failed to accept one of the three options made available to him after management determined that he was medically unfit for duties of a letter carrier. The Notice of Removal to the grievant stated management's conclusion that there was no other alternative but removal.

The parties have agreed in their collective bargaining agreement that employes are to be discharged for just cause. (See, Joint Exhibit No. 1, p. 70). The requirement of just cause might be met in the case of an employe who was removed for being unable to perform the duties of his or her position if the Employer established that such a decision was consistent with management's obligation to promote and maintain the efficiency of the operation. (See, Joint Exhibit No. 1, p.4). In order to promote such efficiency, however, the removal would also have to be consistent with management's agreement to accommodate employes who are temporarily or permanently unable to fulfill the duties of their position.

The facts of this case must be analyzed within the context of Articles 2 and 13 in the parties' collective bargaining agreement. Article 13 of the agreement sets forth guidelines for the parties to follow in fulfilling their obligation to aid and assist employes who, through illness or injury,

are unable to perform their regularly assigned duties and who have requested temporary or permanent light duty assignments. Article 2 of the agreement prohibits discrimination against handicapped employes and incorporates the Rehabilitation Act by reference. The labor contract states:

Consistent with the provisions of this Agreement, there shall be no unlawful discrimination against handicapped employees, as prohibited by the Rehabilitation Act. (See, Joint Exhibit No. 1, p. 4).

The grievant may be protected by both Articles 13 and 2 of the parties' agreement. Since the parties submitted conflicting medical evidence to the arbitrator, it is necessary to determine the application of each article. Assuming at this point merely for sake of discussion that the grievant either was temporarily or permanently unable to perform his duties, the grievant arguably had rights under Article 13 of the agreement. It covered the assignment of ill or injured regular work force employes. The Union also has contended that the grievant is a "qualified" handicapped employe who is eligible for additional protection under Article 2, incorporating rights of the Rehabilitation Act.

Articles 13 and 2 of the parties' agreement reflect their concern about impaired employes. An individual who is a "qualified" handicapped employe would be eligible for protection under both articles. It was the Employer's burden in the case to establish that the grievant, in fact, was physically unable to perform the duties of his position as a letter carrier. Even if the grievant was unable to perform the job, the Employer also needed to establish that it complied

with applicable contractual provisions of the labor contract with respect to the Employer's obligation to accommodate temporarily or permanently disabled employes. The Employer has obligated itself to "make every effort" to assign an ill or injured employe within the employe's craft or occupational group. (See, Joint Exhibit No. 1, p. 48). The Employer also agreed to comply with mandates of the Rehabilitation Act. Arguably, however, before the Employer's obligation under Article 13 arises, an employe must comply with procedural requirements under the contractual provision. The Employer's obligation under Article 2 would arise when management became aware of an employe's status as a "qualified" handicapped employe or had sufficient information from which such a status could be inferred.

C. Compliance with Procedural Requirements

Assuming for purposes of discussion that the grievant was temporarily unable to perform his assigned duties, the parties' agreement imposed on him certain procedural requirements for requesting light duty. The labor contract required the grievant to submit a written request to the installation head for temporary reassignment to light duty. It was necessary for the request to be supported or accompanied by a medical statement from a licensed physician. The request needed to include, if possible, a statement of the duration of the

grievant's convalescence period. (See, Joint Exhibit No. 1, p. 46).

The grievant complied with contractual procedural requirements for requesting a temporary assignment to light duty. He submitted a written request on June 2, 1988, accompanied by medical certification. (See, Joint Exhibit Nos. 48 and 49). Management granted him a light duty assignment from June 10 through June 24, 1988. (See, Joint Exhibit No. 47). Before this light duty assignment expired, the grievant submitted another medical status report on June 20, 1988. It indicated that his doctor had advised him to extend his light duty until July 22, 1988. (See, Joint Exhibit No. 46). Although the grievant did not submit a written request with this medical statement, the Employer granted the extension. This pattern persisted. The grievant continued to receive extensions on his light duty assignment as he submitted new medical statements. Management received several medical statements from him, with slightly varied work restrictions, from June 20 to November 14, 1988. In each case, the Employer extended and modified the grievant's light duty assignment. Accordingly, it is reasonable to conclude that the parties in this case made it a practice, after the initial request for light duty, of approving the grievant's request on the basis of a doctor's certificate alone. This fact makes it reasonable to conclude that the grievant fully complied with procedural requirements for requesting light duty.

Then came the request for permanent light duty. On

November 14, 1988, the grievant relied on Article 13.2(B) of the National Agreement to request a permanent light duty assignment. The Agreement states:

Any ill or injured full-time regular or part-time flexible employee having a minimum of five years of postal service, or any full-time regular or part-time flexible employee who sustained injury on duty, regardless of years of service, while performing the assigned duties can submit a voluntary request for permanent reassignment to light duty or other assignment to the installation head if the employee is permanently unable to perform all or part of the assigned duties. (See, Joint Exhibit No. 1, p. 46).

The provision is clear in its requirement that an employee, having a minimum of five years of service or one who sustained an on-the-job injury must submit a request for permanent reassignment to the installation head. The request must be accompanied by a medical certificate from the United States Public Health Service or a physician designated by the Employer. A certificate from an employee's personal physician is not acceptable. It is clear that the grievant failed to meet the procedural requirement for requesting permanent reassignment because he submitted only a medical certificate from a physician at the Veterans' Administration Center in Martinez. Since, however, the Employer considered the request and made no effort to acquaint the grievant with the need for another medical certificate, it is reasonable to conclude that the Employer waived its right to assert this procedural defect.

The Employer denied the grievant's request for a permanent light duty assignment, and the Union has challenged management's

decision by pursuing the case to arbitration. At first blush, the grievant did not appear to be eligible for permanent light duty assignment under Article 13.2(B)(1) of the parties' agreement. His medical documentation indicated that his injury resulted from a preexisting condition aggravated by his work, rather than from the result of an on-the-job injury. Nor does he have five years of service. (See, Joint Exhibit No. 35). Accordingly, Article 13.2(B)(1) has not provided a basis for decision-making in this case. It, however, is unclear (due to conflicting medical opinions) whether the grievant is permanently or temporarily unable to perform the duties of his letter carrier position. Consequently, it is necessary to analyze the application of Article 13.2(A) of the parties' agreement. This is the provision that covers temporary reassessments.

D. The Bargain of the Parties with Respect to Reassignment

The parties have agreed that a person recuperating from a serious injury and temporarily unable to perform assigned duties may request a temporary assignment to light duty, and they have carefully described the appropriate general attitude of managers when processing such requests. The parties have agreed that every effort will be made to reassign qualified employees. Article 13.2(C) of the National Agreement states:

Installation heads shall show the greatest consideration for full-time regular or part-time flexible employees requiring light duty or other assignments, giving each request careful attention, and reassign such employees to the extent possible in the employee's office. When a request is refused, the installation head shall notify the concerned employee in writing, stating the reasons for the inability to reassign the employee. (See, Joint Exhibit No. 1, p. 47, emphasis added).

There is no duty on management actually to furnish a light duty assignment. At the same time, the Employer took on a "good faith" obligation to try to find a light duty assignment. The concept of "good faith" performance of a promise is based on fundamental notions of fairness, and evasions clearly violate this duty. (See, for example, Daitch Crystal Dairies v. Neisloss, 190 N.Y.S.2d 737 (1959). Courts have construed the obligation of "good faith" performance to mean that a party must be prepared to take affirmative steps in order to achieve goals consistent with the contractual undertaking. As one court has observed, a party "must not only not hinder his promisor's performance, he must do whatever is necessary to enable him to perform." (See, Kehm Corp., 93 F. Supp. 620 (Ct. Cl. 1950)).

The Employer has bound itself to give a request for light duty work "the greatest consideration" and "careful attention." In Article 13.4(A), the parties have highlighted general policies to be followed with respect to reassigning ill or injured employees. The parties have agreed that:

Every effort shall be made to reassign the concerned employee within the employee's present craft or occupation group, even if such assignment reduces the number of hours of work for the supplemental work force. After all efforts are exhausted in

this area consideration will be given to reassignment to another craft or occupational group within the same installation. (See, Joint Exhibit No. 1, p. 48, emphasis added).

The Employer did not comply with its obligations under this contractual provision. Ms. Libby, Station Manager, proposed the grievant's removal, and she testified that she did so because he did not select one of the three options she made available to him. Recall that he could choose to:

- (1) Resign; or
- (2) Apply for disability retirement; or
- (3) Request a reassignment to the Clerk Craft, where his medical restrictions could be accommodated.

The Employer believed that Ms. Libby's options satisfied its contractual obligation to the grievant. Article 13.4(A), however, clearly required the Employer initially to concentrate its efforts on accommodating the grievant within his present craft or occupational group. If the Employer could provide light duty for the grievant in his present craft, then it was obligated to make every effort to do so.

What management failed to prove in this case was that the grievant could not be accommodated within his present craft of Letter Carrier. The grievant had been working light duty assignments as a letter carrier and as a reserve letter carrier for fourteen months prior to his removal. The arbitrator received no evidence indicating that conditions at the Calaveras Station had changed in a way that limited the grievant's existing light duty assignment as a Reserve Letter Carrier. Although Mr. Valine, Area Manager, testified about

several automation goals of the Employer, he also conceded that he did not know whether or not those goals were inconsistent with the grievant's assignment because he was unaware of the grievant's specific duties at the Calaveras Station. At the same time, Ms. Libby, Station Manager, testified that there had been no reduction in the workload at the Calaveras Station and that the same volume of work remained there as before the time the grievant had been removed. Additionally, management had offered the grievant a light duty assignment from May 17, 1989 through May 17, 1990. (See, Joint Exhibit No. 23). These facts support a conclusion that the Employer could have accommodated the grievant by allowing him to remain in the light duty position he had been working for the past four or five months, and that position was in his present craft as a letter carrier. At a minimum, the evidence established that management did not show the greatest consideration for the grievant or exhaust all efforts in his behalf.

Nor did the option given the grievant of a voluntary reassignment to the Clerk craft fulfill the Employer's contractual obligation of accommodation. Assuming that the grievant was substantively eligible for protection under Article 13.2(A), removal of the grievant in this case was without just cause. It is not the role of the arbitrator to evaluate the prudence of the bargain struck by the parties in Article 13 but, rather, to interpret and construe their contractual intent. They are careful negotiators, and they have been clear about the fact that "every effort" will be

made by management to reassign an employe within his or her present craft or occupational group, even if the assignment causes a reduction in working hours for members of the supplemental workforce. The Employer had a good faith obligation to exhaust every possibility within the craft and, then, to consider another craft, something that has not occurred in this case.

E. Impact of the Rehabilitation Act

1. Meaning of a "Qualified Handicapped Person"

The Union has maintained that the grievant is a "qualified" handicapped employee who is entitled to protection of the Rehabilitation Act. The parties have incorporated the Act into their collective bargaining agreement and have made clear the appropriateness of evaluating relevant disputes between them within the context of this legislation. Sections 503 and 504 of the Rehabilitation Act have prohibited discrimination against "qualified handicapped individuals." The Rehabilitation Act has defined a "handicapped" person as "any person who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment." (See, 29 U.S.C. 706(7)(B) (1982)). A "major life activity," of course, includes a person's work.

The grievant in this case had known physical impairments as a result of a serious motorcycle accident in the military. The Employer has argued that the grievant never identified himself as a "handicapped" person. The Employer, however, received medical documentation which clearly described the permanent nature of the grievant's injuries and the residual effects of those injuries. Management knew these facts before the grievant received a career appointment in the Postal Service. For example, the Employer received the written report of a medical examination performed on April 13, 1984 which set forth the following conclusions:

- (1) Residual slight shortening of right hip and hardware which will need to be extracted at a later date due to his young age;
- (2) Patient will have residual lowered range of motion of the right hip and may develop some traumatic arthritis at a later date; and
- (3) Will have residual lowered flexion of elbow.

(See, Joint Exhibit No. 62, p. 29).

Moreover, the grievant told the Employer on the employment application that he had sustained a physical impairment which might interfere with his performance. He was candid about the fact that he had received a forty percent military disability as the result of a motorcycle accident. (See, Joint Exhibit No. 62, p. 1, § A, question No. 5, and p. 1(B), § E, question No. 7(b)). Although the examining physician who filled out Section F of the grievant's employment

application stated that he had no limiting conditions, management had received other medical documentation and sufficient information to infer that the grievant had a record of a physical impairment which could limit his ability to work for the Employer.

The grievant had an obligation to make the Employer aware of any handicap or to make management aware of factors from which it would have been able to infer his handicap. (See, e.g., Brink, 4 M.S.P.R. 358 (1980)). The grievant clearly fulfilled this requirement even before the Employer hired him, and he affirmed such information by submitting medical status reports with his request for permanent reassignment to light duty. Those medical reports showed that, as a result of serious injuries he received from the accident in the military, his condition had been aggravated by work and would be permanent. Accordingly, it is reasonable to conclude that the Employer had a contractual obligation to consider the grievant's request for permanent light duty in a manner that was consistent with its obligations under Article 2 of the agreement, incorporating the Rehabilitation Act. From an evidentiary standpoint, the Employer argued that, because the second evaluation of the grievant's disability by the Military Board (expressly stating that the grievant was handicapped), had not been "round-dated," management had not received this document from the grievant. (See, Employer's post-hearing Brief, 1). The argument failed to be persuasive, but even accepting the argument would not alter the conclusion in

this case. The Employer clearly had before it the necessary medical data needed to determine that the grievant had a physical impairment which could affect his ability to work.

2. The Matter of Making Reasonable Accommodation

Section 501(b) of the Rehabilitation Act required the Employer to provide reasonable accommodations for the grievant if he could perform the essential functions of the position with reasonable accommodation. (See, Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981)). As the U.S. Supreme Court has stated, "when a handicapped person is not able to perform the essential functions of the job, the Court must also consider whether any 'reasonable accommodations' by the Employer would enable the handicapped person to perform those functions." (See, School Board of Nassau County v. Arline, 107 S. Ct. 1123 (1987)). In other words, even if a handicapped person might not be able to perform some essential function of the job, he or she is considered to have met the appropriate test if the job can be performed after reasonable accommodation has been made. In other words, the Rehabilitation Act does not permit an employer to disqualify an individual until after considering how a job might be modified to accommodate that person.

The contractual duty of reasonable accommodation in this case required the Employer to investigate ways in which

the grievant could overcome his difficulties in performing the assigned work. The Rehabilitation Act has made clear that fulfilling the duty of reasonable accommodation might include (1) making facilities accessible to and useable by handicapped persons; and (2) job restructuring, modifying work schedules, and, in appropriate circumstances, acquiring and modifying equipment itself. (See, 29 C.S.R. 1613.704(d)). The Employer had a contractual obligation to make reasonable accommodation for the grievant if all that stood between him and the job was the Employer's failure to make such accommodation. If the barriers faced by an individual are surmountable, the Employer had an obligation to attempt to accommodate that person, unless the accommodation imposed undue financial or administrative burdens.

3. The "Essential Functions" Test

Interwoven with the duty of reasonable accommodation is the "essential functions" test. The Employer would not have a duty to accommodate a handicapped individual who, although reasonably accommodated, still could not perform essential functions of the position. As the Court stated, "in the employment context, an otherwise qualified person is one who can perform 'the essential functions' of the job in question." (See, School Board of Nassau County v. Arline, 107 S. Ct. 1123 (1987)). In this case the grievant would have been able

to perform essential functions of the Letter Carrier position if he had been reasonably accommodated by the Employer. The grievant satisfactorily has been able to complete his light duty assignments, and the duty to accommodate may include restructuring the job, even if such restructuring might create a position which the Employer would consider to be light duty. (See, 29 C.F.R. § 1613.704; 34 C.F.R. § 104.12(D)). In Gallagher v. U.S. Postal Service, it was determined that an employe who meets the definition of a handicapped person under the Rehabilitation Act must be reasonably accommodated even in the context of a light duty assignment. "Even if the accommodations sought by the appellant were to result in the appellant's having a position that the agency would define as light duty, this result would not negate the agency's obligation to restructure the appellant's job." (See, 86 F.M.S.R. 5174, May 23, 1986).

Evidence submitted by the grievant in this case established that he is capable of performing essential functions of the Letter Carrier position after reasonable accommodation has been made. The grievant successfully had been performing his light duty assignments from June of 1988 until his removal in September of 1989. He testified that he cased and carried most of the route management assigned him to work while on a light duty assignment and did so without any problem. The Employer argued that the grievant admitted he was unable to case mail without resulting aggravation of his preexisting condition. (See, Employer's Post-hearing Brief, p. 1). This,

however, mislabeled the grievant's statements. He merely described the precipitating event which caused him to seek medical attention and stated that he "pulled his back" while casing mail at the East Stockton Station. He never testified that he was unable to case mail because of a preexisting physical impairment. In fact, he testified without contradiction that he cased mail throughout the period of his light duty assignments. There was no rebuttal to his assertion.

The Employer also argued that the grievant was unable to lift 70 pounds, a requirement of a Letter Carrier. His weight limitation at the time of his removal was 40 pounds. At the same time, Ms. Libby, Station Manager, and Ms. Vesik, Manager of Employment and Training, testified that, while this is an essential function of a Letter Carrier position, it is possible to make adaptation. Satchel carts can be provided employees to relieve carriers from the physical burden of carrying heavy loads of mail, and they made clear that carriers with physical impairment were given priority in the assignment of satchel carts. Additionally, Ms. Libby testified that there is a 35 pound limit placed on regular carriers when their load must be carried for a sustained period of time. It must also be remembered that the Employer offered to reassign the grievant to a Clerk position, a position which has the same lifting requirement. There was no showing why it would be possible to accommodate an inability to lift 70 pounds as a clerk but not as a letter carrier.

The Employer also maintained that the grievant was unable

to work an "all walking" route and that this fact made him unable to perform the essential functions of a letter carrier. Yet, although the grievant might not be able to walk an "all walking" route for eight hours a day, he has been working a variety of routes while on light duty; and he testified without contradiction that he had been able to complete them fully without complications. It must be stressed that the grievant's testimony to the effect that he had been able to case and carry all routes assigned to him while a reserve mail carrier on light duty at Calaveras Station went unrefuted. Accordingly, it is reasonable to conclude that the grievant is a qualified handicapped person entitled to the protection of Article 2, Section 1 of the parties' collective bargaining agreement.

4. The Matter of Undue Hardship

It previously has been stated, if an employe is unable to perform essential functions of a job as it exists, an employer may have an obligation to make reasonable accommodations that would permit the employe to perform the essence of a reformulated job. The grievant has shown that he was able to accomplish an effective performance of the job after reasonable accommodation had been made. The Employer, then, was placed in the position of proving that any such reasonable accommodation would constitute an undue hardship by imposing

significant costs on the Employer or by causing some major shift of job duties. Factors customarily considered in determining whether or not an undue hardship exists include (1) size of the agency, including the number of employes and the size of the budget; (2) the type of agency operation, including the composition and structure of the work force; and (3) the nature and cost of the accommodation. (See, 29 C.F.R. § 1613.704; 45 C.F.R. § 84.12(c); and 41 C.F.R. § 60-741.6(d)).

The Employer failed to present evidence of an undue hardship. The grievant had been accommodated with light duty assignments from June of 1988 until his removal in September of 1989, and he performed satisfactorily. The Employer provided no evidence to suggest that there no longer were temporary light duty positions available to which the grievant could have been assigned or that management could not reasonably accommodate the grievant without undue hardship. Ms. Libby had offered the grievant a light duty contract from May 17, 1989 to May 17, 1990. (See, Joint Exhibit No. 23). Although the Employer argued that it met its affirmative obligation to accommodate the grievant by offering him Clerk craft work commensurate with his restrictions, the argument failed to be persuasive. In view of the fact that the grievant could have been reasonably accommodated in the Letter Carrier craft without undue hardship, the Employer had an obligation to pursue that avenue before considering the possibility of accommodations in another craft. This is the

teaching of both Articles 2 and 13 in the parties' agreement. Evidence supports a conclusion that the Employer did not consider the possibility of accommodating the grievant within his present craft, and Ms. Libby also made clear that it was unknown whether or not the Employer could have continued to supply the grievant with light duty assignments as a Letter Carrier.

F. Conflicting Medical Evidence

The Employer removed the grievant in this case because he failed to accept any of three options made available to him, after management concluded that he was unable to perform the duties of a letter carrier. It is unnecessary in the case to determine whether or not the Employer was correct in its determination about the ability of the grievant to perform the duties of his position as a letter carrier because, assuming that management was correct, the Employer still failed to comply with contractual obligations of accommodation to ill or injured employes who request light duty. Evidence submitted to the arbitrator established that the grievant was a qualified handicapped employe eligible for protection under the Rehabilitation Act and also that the grievant activated his rights pursuant to Article 13 of the parties' agreement.

It is recognized that there was conflicting medical evidence with respect to the grievant's ability to perform the duties of a letter carrier. Dr. Cahill, a physician

contracted by the Employer, conducted a Fitness for Duty examination of the grievant and concluded that he was capable of performing the duties of a Reserve Mail Carrier. (See, Joint Exhibit No. 17, p. 5). The Employer submitted Dr. Cahill's written report to the Division Medical Officer, Dr. Arbonies, and he concluded that the grievant was unfit for duty as a mail carrier. Both doctors had been designated by the Employer.

Was it reasonable for the Employer to disregard the results of an examination conducted by a physician it designated? The Union contended that such disregard violated Articles 5 and 19 of the parties' agreement by unilaterally eliminating Section 864.31 of the Employee and Labor Relations Manual. (See, Union's Post-hearing Brief, p. 20). This argument, however, failed to be persuasive. While Section 864.31 of the ELM requires a Fitness for Duty examination to be used to determine whether an employe is able to perform the duties of his or her position, it does not require the Employer categorically to accept the determination. For example, if the results of a Fitness for Duty examination conflict with the medical report from an employe's personal physician, the parties are required to resolve the issue through application of Article 13.4(G) and provide for a third opinion. The Union's interpretation of Section 864.31 of the ELM is overly broad in this case.

On the other hand, the Employer is bound by the covenant of good faith and fair dealing, and it is not acting in good

faith for the Employer to accept only those medical opinions from its designated physicians which it determines are in its best interest. Although it is not the arbitrator's role to decide which medical opinion was medically correct, it should be noted that the report submitted by Dr. Cahill came after a thorough examination of the grievant. Dr. Arbonies never examined the grievant but only evaluated Dr. Cahill's report and the medical history of the grievant. Nor did Dr. Arbonies write an extensive report of his observations as did Dr. Cahill. There is authority in such cases for the proposition that the examining physician's evaluation deserves greater weight. (See, Ignacio v. U.S. Postal Service, 35 M.S.P.R. 55, 62 (1987)).

Dr. Cahill declared that the grievant was fit for the position of Reserve Mail Carrier, and he did not recommend any work restrictions, except that the grievant not be asked to perform on an "all walking" route. (See, Joint Exhibit No. 17, p. 5. While Dr. Cahill's report is not without ambiguity, the doctor had been given instructions by the Employer to determine if the grievant was capable of performing the full duties of a city carrier. The doctor had been provided with a job description for the position of a City Carrier. (See, Joint Exhibit No. 21). The grievant testified without rebuttal that he described his duties to Dr. Cahill, and Dr. Cahill concluded that the grievant would be able to perform the duties of a Reserve Mail Carrier. Nor did he place any work restrictions on the grievant. The grievant's current

medical certificate, however, limits the grievant to (1) four hours of intermittent lifting; (2) four hours of continuous walking; and (3) a weight restriction of no more than 40 pounds. It also states that the grievant should return to light duty. (See, Joint Exhibit No.24. The point is that the conflict between Dr. Cahill and the grievant's personal physician can only be resolved through an application of procedures set forth in Article 13.4(G) of the parties' agreement.

AWARD

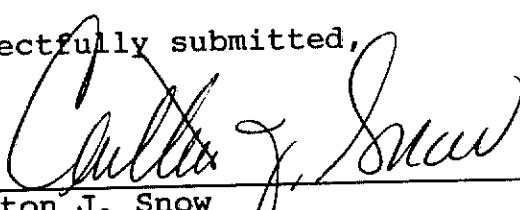
Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer did not have just cause for issuing the grievant a Notice of Removal dated September 12, 1989. By not complying with contractual obligations reasonably to accommodate the grievant within his present craft, the Employer violated Articles 2 and 13 of the parties' collective bargaining agreement.

The grievant shall be reinstated with full backpay for the time he would have worked had the agreement not been violated, minus any interim earnings. Any disputes about the grievant's substantive eligibility for temporary light duty assignment shall be resolved pursuant to Article 14.4(G) of the parties' agreement. If the grievant is determined to be permanently unable to perform duties of a Letter Carrier, the Employer reasonably shall accommodate the grievant within the Letter Carrier craft.

The arbitrator shall retain jurisdiction of this matter for ninety days from the date of the report in order to resolve any problems resulting from the remedy in the award.

It is so ordered and awarded.

Respectfully submitted,



Carlton J. Snow
Professor of Law

Date: _____