Sisters and Brothers, 2017

I am honored to come before you as the Western Region National Business Agent for the Motor Vehicle Services. I am grateful for your support in re-electing me to a second term, and will do my best to continue to serve the interests of the Western Region Motor Vehicle Craft members.

Once again, I would like to express my gratitude to my Director, Mike Foster, and Assistant Director Javier Pineres for their direction, guidance, and consul, and support that they have provided. The Motor Vehicle Craft is very lucky to have such dedicated, competent leaders.

I would also like to thank my Regional Coordinator Omar Gonzalez, for the help and support that he has given me throughout the years.

These three have helped and guided me in many ways.

During the last few years, I have had a chance to meet all the craft directors in the Western Region, and have grown to know them all. I truly appreciate the contributions to the craft that they have made.
I have also met many shop stewards. Shop stewards keep the craft alive policing the contract and filing grievances continuously to protect the interests of the Motor Vehicle Craft. The stewards and directors are at the front lines, and fight the battle daily to protect our rights, and advance our interests. I appreciate the job that they do, for the Motor Vehicle Service Craft.

As for our Craft members, I cannot express enough pride and admiration for the hard-working members of the Motor Vehicle Craft. We have some of the best, most talented mechanics in the business. Our drivers are some of the safest drivers in the transportation industry.

We are the most scrutinized craft in the Postal System. We drive the largest, most dangerous vehicles on the roads, and are responsible for transporting millions of dollars of cargo.

We can be disqualified from working due to a variety of reasons. We can be disqualified for Safety concerns, Health reasons, questionable driving records; whether it's on the job or private driving records.

We are the only craft that is constantly randomly drug tested, and we still have one of the lowest positive drug test rates in the country; public or private □

We must be re-certified medically at least every 2 years, with some drivers being re-certified every 3 months.

We can be disqualified from driving for sleeping problems, high blood pressure, diabetes, vision loss, hearing loss, Epilepsy, unsafe driving, and accidents, □ Our accidents are not looked upon as accidents; they are looked upon as disciplinary issues.

Any one of these issues can result in a driver losing his right to drive, and his job, yet we continue to perform day after day, year after year.

No one is complaining, this is the profession that we have chosen, and despite these challenges we have high morale, and a high degree of pride in our profession.

We will continue to give the public the professional service that they have been accustomed to for all these years while continuing to fight for our jobs and protect our interests.

The Motor Vehicle Craft is the heartbeat of the Postal Service. They will never find a better bargain than us.

In the last year, I have been very busy resolving thousands of step 3 and direct appeal grievances. This has resulted in a tremendous reduction in cases waiting resolution at the step 3 level, and has eliminated all backlogs as I promised that I would try to do at the last Craft conference.

There currently is no backlog in the entire Western Region Motor Vehicle craft for step 3 or direct appeal grievances. I now meet with my step 3 counterparts once a month, and at that once a month meeting, we meet on all grievances filed that month.

In addition, all discipline cases in the Western Region, have been either met on and resolved or scheduled for arbitration.

While we do not have any backlog of direct appeal or step 3 grievances, do have approximately 288 arbitration cases in my 11 states.

Because there can only be 3-4 arbitration cases per month completed at the most, reducing the arbitration list is a very slow process. While I can get rid of 50-75 cases per month at step 3 and direct appeal throughout the area, I can only do a very small amount of arbitrations each month. That is why we constantly try to resolve the cases at the lowest level, and then go back and try to pre-arb cases constantly.

I have taken a few cases to arbitration, and I would like to tell you about a few.

CASES:

THE CASE OF THE MISSING REGISTRY MONEY
Removal

The first case involves a case where a driver collected $144,446.74 in registry money. She signed for the accountable registry items, and put them in the back of her truck. She was supposed to return to her P&DC to drop off the registry, but instead she deviated from her route and went to another station to close out that station because she was running late. When she returned to P&DC and opened the back door, she found that the registry had disappeared from her truck. A check of her truck log showed that She falsified her daily truck log, by stating on it that she had returned to her P&DC and dropped off the registry and left it on the dock.

Management then jumped to the conclusion that just because she had accepted $144,000 in registry, signed for it, and the money disappeared, that it was somehow the grievants fault that the money was gone.

An OIG investigation was started, and the OIG determined that the grievant deviated from her route, lied about it, falsified her truck report to cover it up, stole $144,446.74 of registry money, lied multiple

times to the OIG during various investigations, and failed to follow proper procedures when handling accountable items.

The grievant was issued a notice of removal based upon failure to follow proper procedures in handling accountable items. Management claimed that if she had properly returned to the station and dropped off the registry before going on the final closeout, all the money would not be missing.

The OIG spared no expense, in investigating this woman, and they were determined to find out what happened to the money.

The grievant was scared to death of the OIG inspectors who threatened her with imprisonment, and impoundment of all her property. Every time they threw out a "could this have happened", she said it could have happened that way. As a result, the OIG said she gave 5 different lies of what had happened to the money.

When the Union explained to the OIG that this station had a history of being robbed, and just 3 months earlier a driver left the station, and looked in the rear-view camera while driving down the street, and saw a arm reach across and lower the tailgate, while the truck was doing 30 MPH.

When she pulled over in a safe place, the tailgate was down, and the door was open. She had a empty truck so nothing was taken on that attempt.

The OIG did not care, and instead of concentrating on the true robbers, wasted all of their time trying to persecute this 58-year-old grandmother.

At arbitration, the Service made a big deal out of the missing money. They were very upset that $144.446.74 had not been recovered that the grievant had signed for, and felt she was responsible for the money.

The good thing about arbitration is that to win, you must prove your contentions. In discipline cases, the burden of proof is on management.

They had to prove that there was just cause to remove the grievant.

We presented a well-known defense argument of: Just because the money is gone, don't mean I took it!", and maintained that even though $144,000 was missing, it was not a removable offense because there was not any evidence that the grievant had anything to do with the missing money.

The grievant transported the registry as she normally did, and the service could not prove any theft.

She was charged with failure to handle accountable funds properly.

At arbitration, we could show that the grievant had not been charged with theft, so no matter what they though had happened to the money, she had not been charged for it, so theft charges were not on the table.

The service also made a big deal out of her failure to return to the station and dropping off the registry as her scheme required, and falsifying her daily truck report, to cover up not returning to P&DC to drop off the money as required, and putting on her truck report that she had left the registry on the dock.

She was not charged with falsification.

They also made a big deal out of all the lies she told the OIG, which they attributed to her trying to cover up the theft.

Only problem was that they did not charge her with lying either. They talked for great lengths about all the lies they felt that she told, and the OIG report listed 5 different stories about what happened to the money, but the service failed to charge her with lying.

The only thing she was charged with was failing to follow proper procedures in handling accountable items by deviating from her route.

At arbitration, we could prove that deviating from a route was a common occurrence among drivers, and that the punishment has never been removal for deviating.

The fact that this deviation has resulted in the loss of $144,000,00 was beside the point.

The grievant had 27 years of honorable service, without any discipline, and as such, she was entitled to due process and just cause protections, and any discipline had to be corrective in nature, rather than punitive, no matter how much money was missing.

Theft could require removal on a first offense, failing to follow proper procedure could not, and any discipline for this offense requires the discipline to be progressive.

The arbitrator agreed that there was just cause to issue discipline, but removal was too severe for this offence of breaking a procedural policy.

The grievance was sustained and the arbitrator returned the grievant to her job, with the removal being rescinded and changed to a suspension.

As for the missing $144,000.00; The Search Continues

CASE 2

THE CASE OF THE HONEST WEED SMOKER
Removal

In this case, one morning I was walking the beach in Hawaii, preparing to get into the beautiful waters of Mala-Kaha-Hanna beach to do some snorkeling, when I received a call from a MVS director. He stated that he had a mechanic that had a weed card issues by the state, and he smoked regularly, and was going to tell management about it.

I told him that I did not think that a good idea, and that he should at least wait until he had all the weed out of his system, but the grievant told them anyway. Subsequently he was sent down for a drug test the next day.

I don't have to tell you what happened next. The grievant tested positive, was given a removal and offered a LCA.

Now most would think that under these circumstances the grievant would be happy to sign a LCA and come back to work, but the grievant saw it differently.

The grievant refused the LCA and remained fired.

I have been trying to figure out a way to help you understand this man, and I have to just say it outright. The man had nuts of steel.

1. He had a 2-month-old newborn baby
2. He volunteered to management that he smoked weed
3. He volunteered that he had the weed card for 7 months, and smoked every day for the last 7 months
4. He tested positive, and was fired
5. He was offered his job back if he signed a LCA
6. He refused the LCA
7. As his case went through the grievance procedure, he was offered his job back with a LCA agreement several times
8. He refused the LCA all times, despite advice from everyone to accept

All of this was done under the belief, that he had a right to smoke weed.

Management had their share of problems in this case also. For one, the manager, in his haste to punish the grievant was a one-man band.

He ordered the drug test, He put the man on emergency suspension, He ordered the removal, he did the step one and step two on both disciplines, he was involved in every step of this action up to the point where there was nobody left to say no to any of his actions. He did everything but find the bloody glove.

We felt that we had enough fatal procedural flaws to win the case outright, but we also had a strong case to win this case on its merits.

As we all know we all fall under the USPS drug and alcohol policy. In this drug policy, the guidelines are set forth in a document called a USPS Drug Policy management instruction. Management instruction MI-720-2010-1 is the controlling document for Motor Vehicle Craft Safety Sensitive employees.

Appendix F of this MI has a provision in it, that controls what happens with a positive drug test. After any positive drug test, the medical officer is required to ask the grievant if there is a medical reason for the positive test.

If there is a medical reason, the test is then considered a negative test. In this case, the employee had a medical condition, and had been prescribed medical marijuana for this condition.

The grievant had stated that he had been smoking for the last 7 months due to this medical condition.

At arbitration, the service strenuously objected, claiming that the federal government does not recognize medical marijuana as a legal drug, despite what the state laws are.

We never claimed that the drug was legal, we knew it was not legal, that's how he got the positive drug test.

We agreed the drug was not legal, and not recognized by the federal government, but we were not talking about the drug, legal or illegal, we were talking about a medical condition.

The service could not grasp our argument, that the MI stated that if there was a medical condition, the test must be considered negative. They wasted all their time arguing that a safety sensitive employee could not use prohibited drugs under any circumstances.

We did not dispute that fact, we simply argued that if there is a medical reason the employee is using the drug, the test must be considered negative.

We could show that there are circumstances when it is permissible to use prohibited drugs. Such as when under a doctor's care, such as 4 hours before you start a tour.

Management then made a big deal out of their offering the grievant a last chance agreement as the MI requires, and the grievant refusing it.

We argued that if the test was negative, he did not need a LCA, and it would be ridiculous to sign a 5 year LCA because of a negative test.

At arbitration, we reminded the arbitrator that he was not there to make judgments on the grievants medical condition or treatment, he was there to enforce the written rules, regulations, and procedures of the CBA.

Lucky for us, the arbitrator could see past the management hysteria, and he decided this case based on the written agreement in the Management Instruction. The arbitrator agreed that the Management Instruction was the controlling document in this case, and that the grievant did have a medical condition, so the test was considered negative.

The arbitrator stated in his decision, that there was more than enough evidence that the case was fatally flawed by the one-man band manager, and the grievance could be sustained on procedural violations, but he stated that he wanted to rule on the merits so that there could never be any contentions by management, that the case was decided on a technicality.

He rescinded the removal, ordered management to return the grievant back to work within 10 days to his normal position, with full back pay and benefits, and no loss of seniority.

The Case of the Flying Broom
Emergency Suspension
14-Day Suspension

On September 25, 2015, Grievant William Butler, a Lead Mechanic at the Huntington Beach Postal VMF, became upset after noticing fellow Mechanic Julian Merino spilling soapy water and cleaning solution into his work area while in the process of cleaning his adjacent area. By all accounts, as Mr. Merino was mopping his area, some of the water splashed out of the bucket and into Grievant's bay. What happened next is disputed by the parties. According to Management, Grievant threw a shop broom at Mr. Merino, hitting him in the head and yelling, "Why do you have to make a mess with the mop?" Mr. Merino responded loudly, "What is your deal?" and accused Grievant of throwing a broom at him, hitting him in the back of his head. The grievant denies throwing a broom at Mr. Merino and says Merino may have knocked his broom over while cleaning.

Loud voices were raised by both and, according to testimony of Lead Technician Mike Ferguson, a verbal altercation began to escalate between the Grievant and Mr. Merino. Mr. Ferguson quickly intervened to de-escalate the situation by intercepting Grievant as he was walking toward Mr. Merino's area and escorted Butler out of the building behind his bay. Mr. Ferguson then proceeded back inside and escorted Mr. Merino outside the building, where the situation de-escalated quickly. Both Grievant and Mr. Merino returned to their work areas without further incident, completed their work, and checked out after cleaning their work areas.

Lead Tech Ferguson testified that in the absence of a supervisor, he was in charge of the facility when the verbal altercation occurred. Mr. Ferguson did not observe Grievant throw a broom at Mr. Merino but did hear loud comments being made by both Butler and Merino and as the Lead Tech in charge, acted quickly to de-escalate the situation. He did not write a report or feel that the incident was an emergency since both Butler and Merino had settled down after being separated and there were no further verbal exchanges by either. Neither Grievant nor Mr. Merino were acting in an aggressive manner when they returned after cooling off.

VMF Manager Sgarlata first became aware of the incident 2 days later on September 27, 2015 when Mr. Merino texted him on Sunday and complained of the altercation. Mr. Sgarlata concluded that an emergency placement of Grievant was in order. Mike Ferguson was in charge as the "Acting Group Leader" when the incident occurred but did not file a report. According to Mr. Sgarlata, the VMF was closed Saturday and Sunday and he could only issue Grievant an emergency suspension on Monday, when Butler arrived at work. Manager Sgarlata placed Butler on an emergency off-duty suspension for his alleged physical confrontation with Mr. Merino and being in violation of the District's Zero Tolerance Policy.

Mr. Butler was also given a 14-day suspension for this alleged physical confrontation, but the Service rescinded the 14-day suspension on the morning of arbitration.

Mr. Butler does not deny that a verbal altercation occurred between he and Mr. Merino when Merino was spilling soapy water from his mop bucket into Grievant's work area. Mr. Butler testified that he did not throw a broom at Mr. Merino, but did ask him to clean up his mess. Butler and Mr. Merino became loud and exchanged words, which stopped once Lead Tech Ferguson interceded and escorted both men outside the building and to opposite areas to cool off. Both men later returned to the building, cleaned

their areas, and went home. Grievant was upset but, followed the instructions of Lead Tech Ferguson, and did not have any further contact with Mr. Merino.

Management Position:

Management based their decisions to discipline the grievant on the seriousness of the allegation, and Manager of VMF Ernest L. Sgarlata, placed Grievant on a 16.7 on September 28, 2015. Grievant was not at work on September 26 and 27, 2015 as those were his off non-scheduled work days. Management had no access to the Grievant until the following Monday morning (September 28, 2015) when Grievant arrived at work to clock in. Butler was called into Manager Sgarlata's office where he was then placed out on a 16.7. Grievant had not clocked into work, as his timecard had been removed prior to his arrival that morning, and he was therefore unable to clock in. At the time, Grievant was placed in an emergency off-duty suspension, he was provided with the reasons for Management's immediate action, including allegations of threat to self or others. While the Union may argue that the action taken was not immediate and that Management did not have Just Cause to invoke Article 16.7, the provision clearly states that only an allegation is required.

Union Position:

The Employer has taken the extraordinary step of placing an employee on Emergency Suspension without any proof of an actual violation. This emergency placement is based on an unsubstantiated hearsay accusation of an alleged incident of misconduct. The burden of proof on discipline cases lies with the Service.

When the Service presents a case that cannot meet any of the provisions of Just Cause, they assume a heavy burden. The principle that any discipline must be for "Just Cause" establishes a standard that must apply to any discipline of an employee, including Article 16.7, as stated by National Arbitrator Mittenthal in Case No. H4N-3U-C 55637 (pg. 9, line 1).

Simply put, the Just Cause provision requires a fair and provable justification for discipline. The Service is content to rely on a belief that "only an allegation is required" to send an employee home, even if an emergency placement occurs 65 hours after the allegations of misconduct.

While the Service keys in on the word "allegation," it overlooks the rest of Article 16.7 where it clearly states that the employee must be "immediately" placed on an off-duty status by the employer, and overlooks the principles of Article 16.1 which states that, "No employee may be disciplined or discharged except for just cause."

In this case, the Service has failed on both counts. For Just Cause to be considered, the Service had to prove that the Grievant made a threat, and was injurious to self or others,

The Service did not present any evidence in support of the allegation that was intended to be abated under Article 16.7. Further, the Service had to show that the Grievant was immediately placed off-duty in an emergency suspension, but it has failed to do so.

On June 29, 2017, Grievant was given a 14-day suspension. The Service has unilaterally reduced this 14-day suspension to a non-disciplinary official discussion that Mr. Butler has not yet received.

Decision

The Service has failed to show, even under a preponderance standard of proof, that the alleged verbal altercation involving Grievant and Mr. Merino rose to a level constituting a "threat to self or others" under Article 16.7 or under the District's published policy of "Zero Tolerance."

In order to sustain invocation of Article 16.7, rather than Article 16 (Discipline Procedures -Notice and Investigation), the burden is placed on Management to show at least preliminarily, that the allegation is credible and that actions were immediately taken to prevent destruction of Postal property or physical injury to self or others.

Here, Management's case is problematic because it was unable to show that the verbal exchange between Merino and Butler rose to a level of threat contemplated under Article 16.7, since Lead Tech Ferguson quickly intervened to de-escalate the situation. Neither the Grievant or Mr. Merino continued to escalate or yell at each other after being escorted to separate areas to cool off.

Accordingly, the Arbitrator finds that Management failed to establish the prerequisites necessary to invoke provisions of Article 16.7. Management's concerns could have been more appropriately addressed under Article 16 (General Discipline Procedures) with an investigation of the incident that occurred on September 25, rather than invoking Article 16.7 on September 28, 2015. The Union's grievance is hereby sustained.

Denver Pay Anomaly

Because of the difficulty in recruiting qualified trained professional drivers, the Postal Service in many cities have claimed that they cannot hire Postal Support Employees (PSE) drivers at the contractual rate, so they hired them at a higher rate of pay.

In an attempt to correct this problem, the Postal Service and the Union entered into a Pay Exception memorandum of understanding agreement allowing management to hire and pay employees at an elevated rate. These pay exceptions had to be requested by management, and concurred by the Union, and then signed by both management and the union, to be valid.

After this program started, many times management set a pay rate and hired new employees with a salary exception, and on other occasions they gave new employees pay exceptions without concurrence from the Union.

The union filed multiple grievances throughout the nation protesting this procedure of not getting the necessary concurrence from the National MVS Director.

As a result of the pay exceptions some locals had a two and sometimes three tiers pay rate for PSE's. Some make 16, while others working in the same unit, doing the same work make 22 dollars or more per hour. The pay exceptions were specific and applied only to the new hires requested in the pay exceptions.

On June 6, 2014 the parties attempted to correct this multi-tier pay situation by entering into a MOU :
MOU: Re: Resolution of Postal Support Employee (PSE) Salary Exception Issues.
The pertinent parts of this MOU state:

3 Whenever a PSE PVS driver salary exception is requested by the Postal Service in the future, all PSE PVS drivers who are of the same craft, level, and installation shall be granted the same salary exception. This new salary increase will become effective at the beginning of the pay period which occurs 2 pay periods after the APWU has agreed to the salary exception.

4 Whenever PSEs are granted a salary exception, and thereafter converted to career within the same craft and level, they shall be granted a starting hourly rate that is not less than the hourly rate immediately prior to career conversion.

The parties soon found that by putting out one fire, they had created an even larger fire.

Many senior employees had previously been converted to career without the benefit of the pay exception, and had been hired on at the contractually mandated pay rate. This created a situation where Career employees with higher seniority, were working with PSEs who made more than them, and upon conversion to Career, these PSEs were granted a starting hourly rate that was not less than the hourly rate immediately prior to career conversion.

The provisions of the MOU placed the newly converted lower seniority Career employees at a higher rate of pay than senior employees.

In an effort to resolve this issue, the parties created an addendum to the MOU.

MOU: Addendum to Memorandum of Understanding dated June 6, 2014, Titled Re: Resolution of Postal Support Employee (PSE) Salary Exception Issues

This MOU addresses this situation where postal support employees (PSE's) that have been granted a salary exception, were converted to career within the same craft and level, and received a starting salary rate in accordance with the June 6, 2014 MOU, and there are within the same installation career employees in the same craft and level, that were previously converted to career without a salary rate exception.

The parties agree that:

1. *Limited to those installations where the situation described above exists,* ***any career employee*** *in the same craft and level that is senior to the newly converted PSE, but receiving a lower salary rate, will be placed in a pay step with a salary rate not less than the rate established for the newly converted PSE that was granted a special salary rate exception. In installations where more than one salary exception has been granted, the most recent PSE salary exception will apply.*

Denver had 37 employees that were being paid less than someone with lower seniority, and grievances were filed. After years of fighting, we were finally able to resolve this grievance completely.

SETTLEMENT

The parties agreed that this issue was the result of a ministerial and/or administrative error in implementing the MOU. Therefore, the people on the attached list will be compensated as follows:

Those employees from line 1 through line 31 will have their pay adjusted to $51,118 (if the employee on line 33 is not already at $51 ,118 it is agreed his pay will be adjusted to that figure as well), and employees named on lines 31-37 will have their pay adjusted to $49,312., both effective at the beginning of the pay period which occurred 2 pay periods after the signing of the June 6, 2014 MOU RE: Resolution of Postal $support Employee (PSE) Salary Exception issues.

Also, to avoid future pay anomaly issues, any step increases that have occurred from the date of the 2nd pay period after the signing of the MOU referred to above through the signing of this settlement, shall be included in the pay adjustment. This also means that future step increases will not be frozen for reasons related to this issue.

It is also understood that the appropriate TSP contributions will be made to these employees' accounts from these pay adjustments.

As a result of this settlement, every driver on the list was jumped up to Level 8/O, and paid the difference in pay dating back to June 2014. They also had a provision that forced the Service to give all step increases when due.

This resulted in a total payout to the 37 drivers of Denver of $600,864.

The Case of the Abolished Work
Sub-Contracting

In this case the Union believed the U.S. Postal Service (Service) violated several provisions of the Article 32 of the Collective Bargaining Agreement, (CBA), when they gutted Postal Vehicle Service (PVS) runs by taking work from the PVS and subcontracting this work out of the Portland Oregon Motor Vehicle facility, and giving this work to Highway subcontractors.

The service gave this work to the subcontractors without giving proper notification to the union at the local or national level, or following the required steps of Article 32, mandated in the Collective Bargaining Agreement. The Union contends that failure to produce this information constitutes a fatal flaw in contracting out this PVS work.

This case originates at the Portland P & DC facility. On March 27, 2013, Brenda Jackson, Manager of Transportation of the Portland P&DC, gave notice to the union that she would be abolishing 7 MVS routes. The reason stated for these abolishment's was that "USPS reorganization is continuing to bring our operations in line with service and demand."

What Ms. Jackson failed to mention was that the Service had already given this work to HCR contractors the day before on March 26, 2013, and had already added the work of these 7 duty assignments on to permanent HCR Contract 970L2 without any notification to the union at the local or national level in violation of both Article 32.1 and Article 32.2 of the Collective Bargaining Agreement. The Service claimed that they were not required to give notification or anything else to the Union, because the addition of these 7 runs was temporary, and therefore were not covered by Article 32.

The Union argued that management was required to submit a Statement of Service that contained specifics about new scheduled installation of service, and any work that was previously done by PVS. The service was required to give the Union information that would include the following in a concise summary form:

1. A statement of service including frequency, time of departure and arrival, annual mileage, and proposed effective date of contract.

2. Equipment requirements. If not comparable to standard USPS equipment available at that facility, the reasons therefore along with the cubic foot justification are to be provided.

3. A statement as to whether the proposed contract is a renewal of an existing contract and/or a partial or completely new contract solicitation.

4. For contract renewals, the current contractual cost is to be provided along with any specifics, if the terms of the renewal are modified to whatever degree.

5. ***If the new contract solicitation replaces in part or in whole existing Postal Vehicle Service (PVS) service, specifics as to the existing PVS service are to be provided as to the span of operating time, equipment utilized, annual cost, how the PVS employees impacted will otherwise be utilized and the projected United States Postal Service cost for subcontracting the work in question.***

The service failed to provide any necessary information to the union in accordance with Article 32, and as a result, the union never had the opportunity to investigate and present evidence that the work or any parts of the work could have been performed in-house much more efficiently and much less expensively.

Throughout this grievance procedure, management has claimed that there is no Article 32 violation, and that the service was under no obligation to comply with the provisions of Article 32 because management considered Highway Contact 970L2 a temporary contract.

We had evidence to prove that HCR 970L2 is, and has always been a permanent contract, making it subject to the provisions of Article 32.

Even if 970L2 had been a temporary contract, the service would have still violated Article 32 of the CBA, by continuing this so called temporary contract for over 4 years, in violation of Supplying Principals and Practices for Mail Transportation Purchasing 8.2.6.2: guidelines insofar as it relates to Temporary Contracts.

In the end, the Service had no choice. Portland had surrounded them, and at every turn their defenses, and explanations were disproved. After canceling two different arbitration dates, both on the day of arbitration, the Service settled the case, and agreed to cancel the sub-contractor's agreement, and return the work on the seven abolished runs to the Portland craft.

They also agreed to pay the Craft $1.2 Million Dollars.

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UNITED STATES POSTAL SERVICE
REGULAR ARBITRATION PANEL

In the matter of Arbitration	)	
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UNITED STATES POSTAL SERVICE	)	Grievant: Susana Sanchez
	)	
and	)	Post Office: LA P&DC
	)	
	)	USPS Case: F10V-1F-D 15375598
AMERICAN POSTAL WORKERS	)	
UNION, AFL-CIO	)	
	)	APWU Case No: MV20122954

BEFORE: Fred D. Butler, Arbitrator

APPEARANCES:

For the U.S. Postal Service:	Angela Harris Labor Relations Specialist United States Postal Service 7001 So. Central Ave, Room 354 Los Angeles,CA 90052
For the American Postal Workers Union: AFL-CIO	Jerome Pittman National Business Agent American Postal Workers Union 150 E. Colorado Blvd,Suite 208 Pasadena, California 91105
Place of Hearing:	LA P& DC
Date of Hearing:	September 14, 2016
Date of Decision:	November 14, 2016
Relevant Contract Provision:	Articles 16
Contract Year:	2010-2015
Type of Grievance:	Discipline

Award Summary:

The Postal Service did have just cause to discipline the Grievant but failed to follow the just cause provisions of progressive discipline.

FRED D. BUTLER, Arbitrator

I.
INTRODUCTION

This matter involves the USPS (Management) decision issue a Notice of Removal to Susana Sanchez on September 22, 2015 for allegedly failing to follow proper procedure.

The Union filed a grievances on her behalf contending that Management lacked just cause to issue the proposed removal action. Therefore, the Removal action violates the National Agreement.

On September 14, 2016 at Los Angeles, CA, the following parties appeared before me in an arbitration hearing, pursuant to the agreement between the United States Postal Service ("Management") and the American Postal Workers Union ("Union").

Representing Management was Angela Harris, Labor Relations Specialist. Appearing, as witnesses on behalf of Management were Andrew Ramsey, Transportation Supervisor, Alfonso Villaenor Manager Transportation and Tony Yu, Special Agent, OIG.

Representing the Union was Jerome Pittman, National Business Agent. Appearing as witnesses on behalf of the Union was Winthrop Jones, Shop Stewart and Sonya Sanchez, Grievant.

The parties were afforded full opportunity for examination, cross-examination of witnesses and introduction of relevant exhibits.

The parties introduced four (3) joint exhibits at the hearing, JE-1, the USPS/APWU Contract for 2010/2015, JE-2, The xxx dated and JE-3,the moving papers in this action.

II.
ISSUE PRESENTED

The issue before the Arbitrator is as follows:

Did the Postal Service have just cause to issue a Notice of Removal to Grievant for failure to follow proper procedure? If not, what is the appropriate remedy.

III.

RELEVANT CONTRACT PROVISIONS AND REGULATIONS

The relevant contract provisions, in pertinent parts, are outlined below.

ARTICLE 16.DISCIPLINE PROCEDURE

Section 1. Principles

In the administration of the Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause . . .

ARTICLE 19. HANDBOOKS AND MANUALS

Those parts of all handbooks, manual and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by the Agreement. . .

IV.
STATEMENT OF FACTS

The Grievant, Susana Sanchez has been a postal employee for more than 27 years and is a Motor Vehicle Operator assigned to the LA P& DC.

On June 1, 2015 the Grievant was assigned to pick up registry bags containing remittances for Pico Heights station Green Mead Finance Station and Augustus Hawkins Stations. It was reported that the registry bags from these locations contained at least $143,246.00 in cash.

The procedure for handling the remittance for these locations at the time was to return to the LAP&DC after the pick up from the PICO station to drop them off before proceeding to the other stations.(JE2, pg.76)

On this date, the Grievant deviated from this procedure and did not return to the LAP& DC after pick up from Pico Station. Instead She proceeded directly to the Green and Augustus Hawkins Station.

The Grievant testified that she was late and due to traffic decided to deviate. She also testified that she had been doing this for some time with the knowledge of her supervisor Andrew Ramsey. Mr . Ramsey denied this in rebuttal.

Notwithstanding this, the Grievant indicated on her daily log that she followed the procedure and indicated on her time sheet that she did in fact make the drop to the LAP&DC after picking up the registry from the PICO Station (JE 2, pg.77)

Once at the LAP&DC, the Grievant states that she became aware that the registry bags were missing. She reported that the bags were missing when she returned to the P&DC and reported this to two Transportation Supervisors.

On June 15, 2015 the matter was referred to the Office of Inspector General for further investigation. From the period June 15, 2015 to July 24,2015. the Inspector General Investigated this matter and interviewed six potential witnesses including the Grievant. The Grievant denied taking the registry bags and was administered a lie detector test, which she passed. However it was determined to be inconclusive.

On September 1,2015 Management conducted an Investigative Interview. The Interview was conducted by Andrew Ramsey, Transportation Supervisor. The Grievant was represented by Barbara Evans, APWU.

The Grievant stated that she believed that the registry bags were stolen and that even though the doors to the truck were closed, she believes that they were taken out of her truck. The Grievant also stated that she did not recall whether or not she wrote on the PS Fro 4572 that she went to Greenmead station directly from Pico station.

On September 22, 2016 Management issued a Notice of Removal to the Grievant for Failure to Follow Proper Procedures in Handling Accountable items. The Notice states in pertinent parts;

> Management was recently informed that on June 1, 2015 registry bags containing remittances for Pico Height Station , Greenmead Finance Station, and Augustus Hawkins Finance Station totaling $144,466.74 were missing. . . . to date, these remittances have not been recovered. You were identified as the person who picked up all three remittances on June 1, 2015.
>
> The Notice further states:
>
> However when you were subsequently questioned by an agent from the Office of Inspector General about the missing registry bags, you provided at least five different versions of events regarding the registry bags that are contradictory to witness statement and surveillance video.
>
> According to you route schedule you were supposed to return to the GMF dock after your pick-up of mail and registry and registry bag from Pico Station. However, you stated that you went directly to Greenmead Station in Watts from Pico Station.
>
> Finally the Notice states:
>
> Your responses in the investigative interview are unacceptable. You failed to prove a reasonable explanation for not properly handling the registry

> bags. . . . You denied taking the money contained in the registry bags for our own personal use. Nonetheless, you signed for all three registry bags, thereby taking responsibility for its contents. Had you not deviated from your route, the Pico Station remittances would have been received in the registry Section at the LAP&DC as expected. After reviewing your MVS daily log for June 1, 2015,I noticed that you falsified the log by indicating that you returned to the GMF at 17:20 after leaving Pico Station at 16:25. This act causes me to doubt your integrity, due to the fact that you stated in the interview that you did not return to the GMF after leaving Pico Station.

On October 7,2015 the Union filed a Grievance on behalf of the Grievant, which was denied. The Union filed a Step 2 Grievance which was denied on December 22,2015. The matter was referred to Arbitration on December 23,2015.

V.
POSITION OF THE PARTIES

Management Position

It is Management's position that it had the requisite just cause to issue the Notice of Removal.

Management contends that this case is about the Grievant's failure to follow proper procedure in handling accountable items. More specifically when she deviated from her work schedule and failed to properly handle accountable items. She admitted this. This unauthorized deviation resulted in the loss of funds. Therefore, she is in violation of Section661.2 of the ELM.

Management also states that the Employee Labor Relations Manual Section 511.43 requires that all employees maintain their assigned schedule.

The Grievant was well aware of the proper procedure to follow after picking up registry bags. Other employees have been disciplined for deviating from their routes.

Management did not rely on the OIG investigation but conducted its own independent investigation and the notice of removal was issued 21 days later.

Finally the Union attempted to presented accusations that the Grievant was robbed and attempted to compare an action taken against a similarly situated employee where there was a verified robbery. This amounts to new argument which is new

evidence and is barred under the national Agreement.

Finally, the Union received information that it requested in a timely manner.

Management requests that the Grievance be denied.

Management submitted as support for its position the following Decisions/Awards. Namely USPS & NALC, case No NC-E-11359(1984)Benjamin Aaron, Arbitrator; USPS & APWU, case No. WR 2528(1979)William E. Rentfro, Arbitrator.

Unions Position

The Union contends that Management violated the National Agreement when it did not first place the Grievant on Emergency Placement before removing her for failure to follow proper procedure.

They contend that the usual procedure in this situation would be for a driver to be placed in Emergency placement status immediately while the service determines whether retaining her on duty would result in a loss of funds or mail. They state that if Management had "we would not be here today." Instead, the Grievant was allowed to continue to work for 67 days without being placed in this status. That this action was taken 67 days after this event was flawed.

The Union also contends that the Grievant did not receive advance notice of charges and should have remained on the job or on the clock.

The Union states that the discipline was not timely, and that there was not a thorough investigation

There was no consistent and equitable enforcement. The Shop Stewart testified of other discipline reduced to a official discussion.

If Ms. Sanchez is not charge with being involved in the robbery, and not charge with falsifying official documents, this is simply a case of not following proper procedure in handling because she deviated from her route, the punishment does not fit the crime.

The Union is not taking the position that she is without fault. However the Grievant has had 27 years of honorable Service.

The Union request that the Grievance be granted.

The Union submits the following Decisions/Awards in support

of its position. Namely USPS & NALC & APWU, Case No. H4N-3U-C 58637 (1990) Richard Mittenthal,USPS, Case No. J06C-43-D 11170152(2012)Margo R. Newman

VI.
DECISION

The Union raises an argument regarding whether or not a 16.7 should have been taken prior to instituting Removal action. 16.7 is Emergency Procedure where an employee may be immediately placed on an off-duty status by the Employer under certain conditions as described in the that Article.

While this may be an interesting argument by the Union. A 16.7 action is not before this arbitrator. In addition even if this argument had merit, there is no record of this argument being set forth during the grievance process and cannot be raised for the first time in arbitration.

The Union also states that the notice of Removal was issued to her before a thorough and completed investigation. Therefore, the Notice of Removal was untimely.

A review of the evidence in this case reveals that these issues do not have merit.

The record shows that an investigation was completed with Management on September 1, 2015. In addition the OIG completed its investigation July 24, 2015. Both dates precede the Notice of Removal

The question of whether or not the Grievant received all compensation due her as a result of the Notice of Removal was not discussed in detail. Leaving this Arbitrator to believe that this was an administrative matter that would be resolved between the parties.

The Union raised the issue of equitable enforcement and attempted to introduce testimony on the discipline imposed on a different employee. In addition the Union attempted to offer testimony by a Union Official without a showing of proof relative to his independent knowledge of discipline. Management's objection was sustained in reference to both of these issuses.

The Supervisor who had the responsibility for such discipline testified on rebuttal that discipline has been equitable. This testimony was accepted as credible.

As to the question of the failure of Management to provide information based on a timely information request. Once again the record clearly shows that Management did respond to the

Union request.

As to the merits, the Grievant was charged with Failure to Follow Proper Procedures in handling Accountable Items.

A review of the facts in this matter, the Grievant's own testimony and the record, these charges cannot be seriously challenged by the Grievant or the Union.

On June 1, 2015 the Grievant was assigned to pick up registry bags containing remittances for Pico Height station Green Mead Finance Station and Augustus Hawkins Stations. The procedure for handling the remittance for these location was to return to the LAP&DC after the pick up from the PICO station to drop them off before proceeding to the other stations.(JE2, pg.76)

The Grievant deviated from this procedure and did not return to the LAP& DC. She proceeded directly to the Greenmead and August Hawking Station. In addition, the Grievant indicated on her daily log that she followed the procedure indicating that she did in fact make the drop to the LAP&DC after picking up the registry from the PICO Station (JE 2, pg.77)

That was not true.

The Union raises the Just Cause standard. Namely was the discipline timely and was a thorough investigation completed. As stated above it is determined by the Arbitrator that both these standards were met. The same applies to whether there was a rule and was it equitably enforced. Once again those standards were met.

However the question of the severity of the Discipline requires a further analysis.

The Grievant is being charged with a violation of procedure. That this violation may have resulted in the loss of funds from the postal was shown. In that regard it is circumstantial to state that somehow the Grievant absconded with the registry bags.

Evidence is circumstantial when it does not directly prove the existence of a fact, but gives rise to a logical inference that such facts exist. Management believes that the "postal Service must necessarily rely upon circumstantial evidence. That is rule for the handling of mail must be strictly observed. Only by doing so can employees avoid being suspected of wrongdoing" USPS and NALC, Case No B-141-75N(1976) Roberts Arbitrator. This could be seen as a deterrent to any intentional wrongdoing.

However in this case, the Grievant was not accused on any wrong doing with the exception of failing to follow procedure. While the Grievant gave conflicting explanations to the OIG about the circumstance. None of these appear to deny the fact that she deviated from the procedures on that day.

The Grievant was not charged with theft and denied taking funds for her personal use While there is no doubt that the Grievant's alleged mishandling of the registry bags by not dropping them off as directed is a violation of the procedure is a serious infraction but is not in and of itself proof of theft.

Lying about it, in this arbitrators opinion is equallyi as serious. The Grievant indicated on her time sheet that the reported back to the GMF after leaving Pico Station. That was false. That was extremely important given the mature of the drop. Understandably Management does not want to have Employees who falsify documents working for them.

Nonetheless, Article 16 requires that discipline be corrective in nature, rather than punitive. As Arbitrator Buckalew states in Case No. B00C-4B-D 03091937 . . . "due process promised by Article 16 and just cause, does not permit Management to remove an employee for minor infractions where the removal in fact is based on the belief . . .that the employee was a thief who could not be caught." Article 16 requires that discipline be corrective in nature, rather than punitive.

While the shock value of a loss of $144, 000 is not to be taken lightly. However when compared to the long term affect of proper due process, it pales that standard. The Grievant is a 27-year employee with no discipline being cited and should have been afforded progressive discipline as required under a just cause standard. While progressive discipline would not be required for a theft violation, it is appropriate for charges of violating a procedure.

Therefore the grievance is granted in part and the removal actions of the Postal Service are reversed.

Management possesed just cause to discipline the Grievant but not remove her.

AWARD

The Grievant shall be reinstated to her employment effective upon the date of this Award. Without loss of seniority after that date. From the time of effective date of the removal to the time of her reinstatement shall be reflected as a long time served suspension. This time served suspension shall be substituted in place of the removal. Grievant is

awarded back pay for the period in excess of the date of this Award.

Dated: FRED D. BUTLER, Arbitrator

JEFFREY W. JACOBS
ARBITRATOR – MEMBER OF THE NATIONAL ACADEMY OF ARBITRATORS

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March 13, 2017

Mr. Jerome Pittman
APWU
150 East Colorado St.
Suite 208
Pasadena, CA 91105

Mr. Daniel Toth
USPS – Labor Relations Specialist
4949 East van Buren St.
Room 247
Phoenix, AZ 85026-9998

RE: USPS CASE No's: E10V-4E-C 16143412 and E10V-4E-D 16110243
APWU CASE No MVS 02116 & MVS 02016
Grievance heard Albuquerque, NM January 20, 2017

Dear Mr. Pittman and Mr. Toth:

I enclose the Decision and Award in the above matter. I will send the billing to the appropriate offices by separate mailing and e-mail. I have sent this as a PDF and Word document by e-mail and hard copy to each of you and to the LR Center.

Let me know if the parties have any additional questions or concerns. Once again, it was pleasure working with you; I look forward to doing so again.

Very truly yours,

Jeffrey W. Jacobs

JWJ:fsj
Cc: Labor Relations Service Center
arbawards@apwu.org
Manager of Collective Bargaining and Arbitration – USPS
Mr. Tony McKinnon – Dir. Industrial Relations
Chris Johnson – Mgr. Labor Relations
Ms. Mary Hercules
Ms. Sharon Stone - APWU

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration:	Grievant:	William Willis
Between	Post Office:	Albuquerque, NM
UNITED STATES POSTAL SERVICE	USPS CASE No:	E10V-4E-C 16143412 E10V-4E-D 16110243
and		
AMERICAN POSTAL WORKERS UNION	APWU CASE No:	MVS 02116 & MVS 02016

BEFORE: JEFFREY W. JACOBS, ARBITRATOR

APPEARANCES:

For the U.S. Postal Service:	Daniel Toth
For the Union:	Jerome Pittman
Place of hearing:	1135 Broadway Blvd. NE, Albuquerque, NM
Date of hearing:	January 20, 2017
Date of submission of post-hearing briefs:	February 28, 2017
Date of Award:	March 13, 2017
Relevant Contract provision:	Article 16
Contract Year:	2011-2016
Type of grievance	Emergency placement pursuant to Article 16.7; removal

AWARD SUMMARY

With regard to the emergency placement, that grievance is SUSTAINED.

With regard to the notice of removal, the grievance is SUSTAINED. The grievant is to be reinstated to his former position with the Service within 10 calendar days of this decision with full back pay, subject to the mitigation set forth herein, and all contractual benefits including seniority.

Dated: March 13, 2017

Jeffrey W. Jacobs, Arbitrator

ISSUE

Did Management violate Article 16.7 of the National Agreement by placing the grievant in an off-duty status on February 17, 2016? If so, is the remedy requested by the union appropriate?

Did management violate the National Agreement in the issuance of a Notice of Removal dated March 10, 2016 for violation of the Postal Service Standards of Conduct? If not, is the remedy requested by the union appropriate?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3 MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

A. To direct employees of the Employer in the performance of official duties;

B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;

C. To maintain the efficiency of the operations entrusted to it;

D. To determine the methods, means, and personnel by which such operations are to be conducted;

E. To prescribe a uniform dress to be worn by designated employees; and

F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

ARTICLE 15

GRIEVANCE-ARBITRATION PROCEDURE

Section 5. Arbitration

A. General Provisions

6. All decisions of an arbitrator will be final and binding. All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event, may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator. Unless otherwise provided in this Article, all costs, fees, and expenses charged by an arbitrator will be shared equally by the parties.

ARTICLE 16

Section 1 – Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

Section 5. Suspensions of More Than 14 Days or Discharge

In the case of suspensions of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days.

Thereafter, the employee shall remain on the rolls (nonpay status) until disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance arbitration procedure. A preference eligible employee who chooses to appeal a suspension of more than fourteen (14) days or his/her discharge to the Merit Systems Protection Board (MSPB) rather than through the grievance-arbitration procedure shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement or through exhaustion of his/her MSPB appeal. When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the Employer is not required to give the employee the full thirty (30) days advance written notice in a discharge action, but shall give such lesser number of days advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

Section 16.7 Emergency Procedure

An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance.

SELECTED RELEVANT PROVISIONS OF THE JCIM

ARTICLE 16 – DISCIPLINE AND DISCHARGE

Just cause principle

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

"Just cause" is a "term of art" created by labor arbitrators. It has no precise definition and contains no rigid rules that apply in the same way in each case of discipline or discharge. However, arbitrators frequently divide the question of just cause into six sub questions and often apply the following criteria to determine whether the action was for just cause. These criteria are the basic considerations that the supervisor must use before initiating disciplinary action: (The full explanations will be omitted here but the JCAM contains explanatory language for guiding the decision on whether just cause exists):

- Is there a rule?
- Is the rule a reasonable rule?
- Is the rule consistently and equitably enforced?
- Was a thorough investigation completed?
- Was the severity of the discipline reasonably related to the infraction itself and in line with discipline that is usually administered, as well as to the seriousness of the employee's past record?
- Was the disciplinary action taken in a timely manner?

ARTICLE 16.7 - EMERGENCY PLACEMENT

The purpose of Article 16.7 is to allow the Postal Service to place an employee in an off-duty status immediately in the specified "emergency" situations. When an employee is placed in an off-duty status pursuant to Article 16.7, and a timely grievance over the placement is denied at Step 2, the union may appeal the grievance directly to arbitration in accordance with Article 15.2, Step 2(h). This includes disciplinary as well as non-disciplinary actions taken under the provisions of Article 16.7. When these issues are appealed to arbitration, they will be heard on regular arbitration panels.

WRITTEN NOTICE – EMERGENCY PLACEMENT

Management is not required to provide advance written notice prior to placing an employee in an off-duty status under Article 16.7. However, the employee is entitled to written notice stating the reasons for such placement within a reasonable time frame.

RELEVANT PORTIONS OF THE EMPLOYEE AND LABOR RELATION MANUAL

665.24 Violent and/or Threatening Behavior

The Postal Service is committed to the principle that all employees have a basic right to a safe and humane working environment. In order to ensure this right, it is the unequivocal policy of the Postal Service that there must be no tolerance of violence or threats of violence by anyone at any level of the Postal Service. Similarly, there must be no tolerance of harassment, intimidation, threats, or bullying by anyone at any level. Violation of this policy may result in disciplinary action, including removal from the Postal Service.

RELEVANT PORTIONS OF THE MANAGEMENT INSTRUCTION – JOINT EX. 4

Prohibitions on Alcohol/Drug Use and Possession – page 2-3

A covered employee may not report for or remain on duty in a position requiring the performance of safety-sensitive functions when the employee uses controlled substances, except when he/she is under a doctor's care and the doctor advises the employee in writing that the prescribed substance does not adversely affect the driver's ability to safely operate a commercial motor vehicle.

Reasonable Suspicion – page 4

Reasonable suspicion alcohol and drug testing is conducted when a trained management official observes that the behavior or the appearance of a safety sensitive employee is characteristic of and consistent with alcohol and//or drug use. Management will use the Reasonable Suspicion testing checklist (see Appendix B) as an aid in determining if reasonable suspicion testing is justified.

Appendix B – Reasonable Suspicion Testing Checklist – page 11-12

Must order a reasonable suspicion test if one of the following is observed during the course of duty:

- I smelled an odor consistent with alcoholic beverages on the covered employee
- The covered employee was sleeping on the job
- The covered employee struck another person
- The covered employee struck company equipment/vehicle with an object …
- The covered employee was driving a vehicle or operating machinery erratically …
- The covered employee swayed back and forth when standing still
- The covered employee weaved or had to continually catch balance when walking
- Other (Please specify)

Must order reasonable suspicion test if two or more of the following are observed during the course of duty:

- The covered employee refused to respond when spoken to

- The covered employee yelled at people for no reason
- The covered employee was constantly arguing with coworkers
- The covered employee made persistent errors on the job
- Other (please specify)

***

In the instance of item 4 above, if the employee tests positive for alcohol, follow Appendix C or D as appropriate. If the employee tests negative for alcohol, the employee should be placed in a non-duty status without pay (See Article 16.7 of the National Agreement), while waiting for the results of the drug test.

Appendix F – Notification of a Positive Drug Test Following Reasonable Suspicion or Post-Accident Testing – Page 17

2. Management has the employee contact the MRO as soon as possible. The MRO informs the employee that he/she has tested positive for drugs and determines if there is a medical reason for the positive test. **If there is a medical reason, the test counts as a negative test.** ... (Emphasis added).

3 Management will immediately place the employee on "emergency non-duty status, without pay" according to Article 16,.7 of the National Agreement on the basis of a report of a positive drug test result from the MRO and the MRO determination that the employee is unfit for duty because of the positive drug test. ...

***

7 Following any necessary investigation, the supervisor will determine what additional action should be taken as follows:

a. Discipline up to and including a last chance agreement may be given in accordance with normal disciplinary procedures administrated in accordance with Article 16 of the National Agreement. Supervisors should consult with Labor Relations on proposed disciplinary action.

b. If offered, the employee must sign a "last chance agreement," which will include the following provisions:

1. The Employee agrees to an evaluation by a SAP at the first available appointment
2. The employee agrees to follow the treatment and rehabilitation recommendations of the SAP and understands that she/she must successfully complete the treatment and rehabilitation regimen
3. The employee must pass a re-evaluation by the SAP, who will provide his/her recommendations to the MRO for approval.
4. The employee must pass a return-to-duty evaluation by the MRO
5. The employee must pass a return-to-duty drug test
6. The employee agrees to unannounced follow-up testing to be determined by the MRO and the SAP for a period not to exceed 60 months

7. The employee agrees that any positive drug test during the follow up period including random, for cause, or post-accident tests, will be the basis for removal from the Postal Service.

8. If the employee declines to sign a "last chance agreement" or does not successfully complete all of the terms of the "last chance agreement," management should consider removing the employee from the Postal Service.

POSITIONS OF THE PARTIES

POSTAL SERVICE POSITION

The Postal Service, Service or USPS, took the position that there was just cause for the emergency placement and the removal based on the grievant's actions and the positive test for THC herein. In support of that position the Service made the following contentions:

1. The Service asserted that the grievant tested positive for THC, the operative chemical in marijuana after a reasonable suspicion test done in February 2016. The grievant admitted that he was under a doctor's care and had a medical card for the medical marijuana and acknowledged that he had used it in the recent past when he spoke to his manager on February 4, 2016. There was thus reasonable suspicion for a drug test the following day.

2. The Service asserted that there was no reason to go through the checklist in Management Instructions, Appendix B to determine if there was reasonable suspicion for the test, as the grievant told his manager he was using marijuana – which is illegal under federal law, notwithstanding state law to the contrary.

3. The Service also noted that it has a well-publicized rule against drug use of any kind and that the grievant was aware of this rule. The grievant is a mechanic and is required as a condition of his employment to operate large vehicles on occasion. Thus, the need to assure safety is imperative. The mere fact that the grievant does not operate vehicles often is not material – he must maintain a Commercial Driver's license, CDL, as a condition of employment and drug use is prohibited in order to maintain that license.

4. The management held a so-called "stand-up" in early February 2016, which is a meeting of the employees with management to go over rules and expectations of the position. In that meeting the management outlined yet again the need to maintain a drug free workplace and informed the grievant, as well as the rest of the crew, that drug use is strictly prohibited. It was only then in response to this meeting that the grievant came forward – even though he had apparently been using the medical marijuana for some time prior to that.

5. There was further no question that the test was positive and that all appropriate procedural and medical safeguards were used to protect the sample and assure the accuracy of the test. The Service pointed out that the union did not assail the accuracy of the test and that there was thus no dispute that the grievant tested "positive" for THC.

6. Further, the Service asserted that when asked about this marijuana use, the grievant was less than forthright in his answers to his manager and refused to state when the last time he used marijuana prior to the interview, See joint exhibit 3 at page 25-27 and pages 22-24 for the typed version. The manager testified that he was angered by the grievant's lack of forthrightness about this and that he had lost trust in the grievant.

7. With regard to the 16.7 placement, the Service asserted that this was entirely proper since the grievant had tested positive for an illegal substance. Further, the delay of a few days did not render the placement void. The grievant was sent for the test on February 5th and was allowed to work in a modified capacity for a few days pending the test results. During that time the grievant was off for a few days, there was a holiday and the grievant took a day for a leave. Thus, it was not until February 16th that he returned and could be sent home on emergency placement. The Service asserted that the mere fact that he was not sent home immediately pending the test results should not be held against the Service despite the language of Appendix B of the Management Instruction at page 12.

8. Moreover, the fact of the positive test, once it was received, provided ample basis for the emergency placement. The grievant is in a safety sensitive position, not only responsible for occasionally operating large commercial vehicles but also for their maintenance and safe operation. The Service outlined what it termed the obvious risk that someone who is impaired in any way fixing the brakes or other safety systems on such large and potentially dangerous vehicles. It was thus imperative that the grievant not be allowed to work on these vehicles after testing positive.

9. The Service countered the claim that there was a violation of the process in issuing the emergency placement. The union pointed to the provisions of Appendix B and argued that the grievant should have been immediately put on emergency placement "while waiting for the results of the drug test." The Service noted that this only applies if there was a test for alcohol and that test came back negative. The Service asserted that this situation was governed by Appendix F which provides as follows; requires that "management will "immediately" place the employee on 'emergency, off duty status without pay ... on the basis of a report of a positive drug test." Thus, it is not until the positive drug test comes back from the lab that it is appropriate to place an employee on 16.7 placement. That was done here and given the holiday and the grievant's request for time off, the placement was done as timely as possible.

10. The Service asserted that while there were discussions about a last chance agreement, LCA, the Service gave the grievant his chance to sign it but he turned that down. Now it is too late and the Service has recanted the offer to sign an LCA and retain his employment. The Service asserted that the arbitrator should not impose an LCA given the grievant's initial refusal to sign it.

11. The Service's position in this matter was thus quite simple – the grievant tested positive for marijuana – marijuana is an illegal drug under federal law and prohibited by Postal Service rules. The grievant was well aware of this rule yet used it despite that knowledge and did not come completely clean with his management about his use.

12. The Service also countered the union's claim that there was a fatal procedure error due to the management being both the issuing official and the person who did the step 1 and 2 meetings. The Service argued that the facts speak for themselves and that there was no dispute about the underlying facts here – the grievant tested positive for an illegal drug. Such procedural safeguards are in place to assure that the underlying factual basis for discipline are accurate. Here there is no question that they are, Further, there was a concurring official and no evidence of a "command decision" issued to discipline the grievant at all here.

13. The Service cited several prior arbitrations in support of its position on both the Article 16.7 placement and the removal herein. In *USPS and NPMHU*, E06M-1E-D 12202551 (McReynolds 2013) the arbitrator upheld the discharge of an employee who used marijuana and further ruled that his participation in the Arizona medical marijuana program did not shield him from the consequences of violating federal law and postal regulations.

14. In *USPS and APWU*, C90V-1C-D 96013977 (Zobrak 1996) the removal was upheld and the grievant denied a last chance based on the ruling that a last chance agreement was not required under the facts and circumstances of that case. The arbitrator also found that the employee was a safety sensitive employee with a CDL who could pose a risk to the public if he were to use marijuana while driving.

15. In *USPS AND APWU*, J98V-1J-D 02061016 (Klein 2002) the arbitrator upheld a removal for marijuana use following a positive test during a random screen for his driver's license.

16. The Service also submitted several other awards, i.e., *USPS and NALC*, B90N-4B-C 94027390 (Snow 1996); *USPS and NALC*, H8N-5B-C 17682 (Aaron 1984); *USPS and NALC*, NC-E-11359, (Aaron 1984); *USPS and NALC*, H8N-5L-C 10418 (Mittenthal 1990) for the proposition that new argument may not be introduced and considered at the hearing. The Service argued that the union made new arguments at the hearing that should not be considered.

17. Further the Service cited *USPS and NALC*, S0N-3U-D 8445 (Lurie 1992) and *USPS and APWU*, W4C-5C-D 17344 (Levak 1986) for the proposition that the grievant here was given due process and afforded all his rights under the grievance procedure. The Service further argued that the manager followed all the applicable provision of Appendix F and that the union failed to comply with various provisions of Article 15 in which it has the obligation to fully develop its arguments. The union is not allowed to make vague references to a document but wait until the hearing to be specific about which of those provisions it is relying on for its defense to discipline.

18. The Service asserted that the grievant tested positive and refused the offer of a last chance agreement until it was too late. He was given every opportunity to sign that last chance agreement but decided that he was unable or unwilling to live with and comply with the requirements set forth in the agreement. By the time he decided otherwise, the Service contends that the management had lost faith in the grievant's trustworthiness and indeed even his honesty in not coming clean with when he used marijuana the last time. Thus, the manager changed his mind, which is his prerogative under the Management Instructions and declined to re-offer the last chance agreement. The grievant should thus be removed from the Postal Service.

The Service seeks an award denying the grievances in their entirety.

UNION'S POSITION

The union took the position that there was not just cause for the grievant's emergency placement and removal. In support of this position the union made the following contentions:

1. The union raised a number of procedural and substantive defenses. The union first asserted that the manager violated the procedural safeguards of Article 15 by being the individual who issued he Article 16.7 emergency placement, the Notice of Removal, and wrote both letters, he held the day in court and heard the Step I and Step II grievance meetings and denied them both. The union asserted that there was no one in the process who could have stepped in to provide a more reasonable look at this entire situation. By the time the matter got to the concurring official, all of the facts had been determined by the same person and the decision was effectively made.

2. The union also asserted that there were no grounds for a reasonable suspicion test. The union pointed to the Management Instruction at page 4 and cited the provisions specifically covering reasonable suspicion testing. Even though the grievant informed his manager that he had a medical marijuana card and was under the care of a physician for that drug, there was no evidence of "behavior or the appearance of a safety sensitive employee ... characteristic of and consistent with alcohol or drug use."

3. There was thus no "emergency" or any basis for the Article 16.7 placement. There was no risk to the public or to other workers. Further, an emergency placement must occur" immediately" but did not in this case. See, *USPS and APWU*, H4N-3U-C 58637 (Mittenthal) where the arbitrator ruled as that for Article 16.7 to be properly invoked "the employee is ' immediately' placed on non-duty, non-pay status. He does not have a right to remain, for any period of time, "on the job or on the clock at the option of the Employer." Here, the grievant was allowed to remain at work for an hour or more. Thus, the Service failed to comply with the immediacy provisions of Article 16.7.

4. Further, the union pointed to the apparent inconsistency between Management Instruction at page 12 and at page 17. And noted that management must "immediately" place the employee on the basis of a positive drug test, yet they did not here.

5. Page 12 of the Management Instructions speaks to a different circumstance, i.e. where there is an alcohol test, which was not done here, and the need to wait to place a person on Article 16.7 leave only after a negative alcohol test while awaiting the results of a drug test. That scenario was not presented here and the service's placement under Article 16.7 was therefore inappropriate.

6. The union pointed to Appendix B and the list of characteristics and behaviors that the manager should have gone through to determine if reasonable suspicion testing was appropriate yet he admitted that he did none of these and never even consulted appendix B. The mere fact that someone has a medical card does not prove impairment and impairment, as described by Appendix B, is the necessary basis and condition precedent to a reasonable suspicion test. Here those directives were not followed.

7. Further, the union asserted, that even though the actual test showed the presence of THC, the clear provisions in Appendix F (and E for that matter) require that if there is there is a medical reason for the positive test, "the test counts as a negative test."

8. There is no dispute that the grievant had a medical card, see Joint Exhibit 3 at page 29-30. There was thus ample basis for a medical reason for tee positive test and the test should thus have never been "counted" as a positive test. The grievant has a medical condition for which he uses medically prescribed marijuana and has a medial card for that very purpose.

9. Further, it is only when there is a positive test that the rest of Appendix F comes into play. As discussed below, there thus should never have been any basis of the "offer" of a last chance agreement and no basis for discipline whatsoever.

10. The union asserted that the provisions of Management Instruction Appendix B were violated with regard to the emergency placement. The directive requires that the "the employee should be placed in a non-duty status ... while waiting of the results of the drug test. That was not done here. The grievant was allowed to remain in a paid status for several days following the test. The Service did not even follow its own policies here.

11. The union also asserted that the Service could accommodate the grievant's restrictions, if any due to his use of medical marijuana. There are several individuals in the department who do not have CDL's and who are not required to drive as part of their jobs. The Service noted that for the interim time between the test and the results of the test here, the grievant was placed in a modified job that did not require that he drive commercial sized vehicles as part of his job.

12. Further, the union argued that the last chance agreement, LCA, is an offer of settlement in essence and is done in response to a positive test that counted as a positive test. This test should have been counted as a negative and the LCA should never have been offered.

13. Even though the parties discussed an LCA as a resolution of the issue, and at first the grievant did not want to sign it, citing the provisions set forth above that called for his test to be counted as a negative test, but later decided to sign it in order to keep his job, does not control the result. The union argued that the Management Instruction given this result and settlement discussions surrounding an LCA should not be considered.

14. The union also argued that the grievant is a long time, excellent employee who was described by his manager, the same person who fired him as a "helluva mechanic." He should be allowed to continue being that for the US Postal Service.

15. The union cited several prior arbitrations in support of its position as follows: The union first argued that there was in effect a command decision in this case since Mr. Cordova was "judge jury and executioner." He conducted the investigation, made the decision to remove the grievant and handled the step 2 meeting, in effect placing himself in the position of affirming his own decision. The union argued procedure defects should prove fatal o the Service's case without even reaching the merits of the underlying action. See, *USPS and NALC*, E1R-2F-D 8832 (Zumas 1984) where the arbitrator reinstated the employee without considering the merits of the dispute. There the employee was denied fundamental due process where the manager conducted the investigation made no actual decision to terminate the employee but agreed with those above him who did. Based on that fact, the arbitrator ruled that the manager had failed to carry out the proper responsibility to fully investigate the matter.

16. In *USPS and APWU*, E06C-4E-D 07329112 (Hauck 1008) the Service failed to follow proper procedure in removing an employee. The facts there showed that there was a command decision made with which the immediate supervisor simply concurred – not the other way around as required by Article 16. There, the Step 1 supervisor could not reasonably be expected to overturn a decision made by a higher authority. Here, the union argued that the manager was in the position of reviewing his own decision and could not reasonably be expected to change it.

17. In *USPS and APWU*, J00C-4J-D 07122017 (Kenis 2007) the arbitrator found that a manager who had taken on multiple and conflicting roles in the disciplinary process violated due process rights under Article 168 and overturned the discipline. She stated that the manager "acted as the prosecution, judge and jury. This is simply too many hats for one managerial individual to wear. Due process requires independent managerial examination and Grievant was not afforded that right." The union argued that this is precisely what occurred here. See also, *USPS and APWU*, J11C-4J-D 12024788 (Stallworth 2013) for a similar result. Here the very person who testified that he had lost faith in the grievant and who had made the decision to remove him could not be expected to conduct a fair hearing.

18. The union argued too that the Service brought up new arguments in its case at the hearing and cited *USPS and NALC*, NC-E-11359 (Aaron) and *USPS and APWU*, H00T 111-D 06078411 (Hoffman 2006) for the proposition that such new arguments cannot be considered for the first time at the hearing.

19. The essence of the union's case is that there was no basis for the emergency placement. There was no basis for a reasonable suspicion test since the manager never consulted the required checklist in the Management Instructions. Further, the emergency placement was defective in that it was not immediate as required. With respect to the removal, the union argued that the clear provisions of the Management Instructions show that where there is a medical reason for the use of marijuana, a test that shows positive for THC does not count as a positive test. Thus, there was no basis for the removal or the offer of the last chance. The grievant has conceded that he will discontinue marijuana and find alternate forms of treatment. The union also raised a number of procedural issues as set forth above.

The union seeks an award reinstating the grievant with all back pay, seniority and contractual benefits and to be made whole in every way.

MEMORANDUM

FACTUAL BACKGROUND

The grievant is a mechanic at the Albuquerque, NM facility. The evidence showed that he is a very good mechanic and that he has no prior record of discipline on his record.

There was some dispute about whether the grievant is a safety sensitive employee. The evidence showed that generally he works on vehicles but does not typically drive them even though he holds a CDL to do so if he has to. There was evidence that other employees at his level do not hold CDL's and are not required to drive as part of their jobs even though some of those employees are in the process of obtaining their CDL's.

The overall record showed that the Service could accommodate any need for the grievant to perform the essential functions of his job without need to drive the large commercial vehicles operated by the Service.

The evidence showed that the grievant has a medical condition and is under the care of licensed physicians who have tried other medications and treatment for his condition without success. They did prescribe medical marijuana for him and the grievant indicated that this treatment helps him considerably. There was no evidence whatsoever that he has never used it while on duty or possessed it while on duty. There was further no evidence of impairment within the making of the checklist provided at Appendix B of the Management Instructions.

There was evidence that the parties have established policies against drug use on duty and that the Management Instructions are part of that plan to prevent drug abuse on duty. There was evidence to support the union's claim that the manager who made the operative decisions in this case did not consult the Management Instruction to determine if reasonable suspicion testing was appropriate nor did he comply with those provisions.

The basis for the test in this case was that the grievant came to his manager after a "stand up" discussion and advised him that he was prescribed marijuana and had been using it for some time. The grievant testified credibly that he simply wanted the manager to know about it.

The manager determined to have the grievant tested the following day. The grievant complied with the test and the test was positive for THC, the operative chemical in marijuana. The evidence showed that this was consistent with medically authorized use of marijuana. The grievant also testified credibly that if the Service wants him to quit using it he will discuss alternative treatments with his doctors.

The manager placed the grievant on emergency placement after learning of the positive test even though the grievant was allowed to work for a period of time after the test itself. The manager then decided to conduct a day in court and asked the grievant about his marijuana use. The grievant freely admitted to it but did not tell the manager the last time he used it. While this could have been answered more forthrightly there was no evidence that the grievant was attempting to hide any sort of use on duty or on work premises.

The manager made the decision to remove the grievant from the Service as well. This was concurred in b a reviewing official and there was no hard evidence of a command decision as alleged by the union. There were some issues though in the manner in which the grievant's due process rights were handled. The manager was the investigating official, made the decision to place the grievant in the 16.7 emergency placement and to remove him. He was also the person who handled the step 2 grievance. This scenario was troubling and may well have provided grounds for overturning the discipline independently, as some of the cases cited by the union have ruled. Here though the matter can be decided on the merits based on an examination of and the application of the provisions of the Management Instructions as they relate to these unique facts.

As noted, there was no evidence of any use or possession of marijuana while on duty or on premises. There was no evidence of actual impairment or danger posed by the use of the drug while the grievant was at work. The grievant testified credibly that if his use of medical marijuana is "an issue" for the Service, he will cease its use and have his doctor prescribe another medication to treat his symptoms.

The parties spent much time discussing the offer of a last chance agreement. Under the provisions of the Management Instructions set forth above such a last chance agreement may be offered – it does not appear to be mandatory. However as discussed below, the offer of a last chance agreement is premised on there being a "positive test." Here, the actual test showed positive results but the overall record clearly showed that there was a medical reason for that to be the case and under the management Instructions, the test "does not count" as a positive test.

It is against that factual backdrop that the analysis proceeds.

THE UNION'S CLAIM OF VIOLATIONS OF ARTICLE 15 AND PROCEDURAL PROBLEMS.

The union raised a number of procedural arguments and asserted that the manner in which this was handled violated the procedural protections of Article 15. The union asserted that the manager was the person who requested the test, did the day in court, made the decision to place the grievant on Article 16.7 placement, authored the emergency placement notice and the notice of removal and heard and denied both the Step 1 and 2 grievance meeting. The union asserted that his actions made it impossible for anyone in the process to have stepped in and said "no" to the action. The union pointed to the provisions of Article 15 and argued that these procedural errors are fatal to the Service's case here and that the involvement of this one individual so tainted the process as to undermine the protections guaranteed by Article 15.

The manager was involved at virtually every step – certainly those in the early stages when more could have been done to determine the nature and extent of any actual impairment or restrictions, if any on the grievant's employment. Certainly too, the involvement of one individual can at time be considered problematic and as the union's cited cases showed, prove fatal to a case of discipline against an employee.

On this record, given the determinations made above regarding the application of the Management Instruction and the other factors in his case, it was not necessary to make a factual determination of whether the manner in which this case was handled procedurally was fatal to the Service's case. The determination the merits, was, as noted above, that the Service failed to follow its own Management Instruction and should frankly have considered the test, even though positive for THC, as a negative test - just as the instructions. A determination on the merits of such a case is generally preferable to a determination on a "technicality." For those reasons, this analysis need go no further.

EMERGENCY PLACEMENT

Article 16.7 provides as follows:

> An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves ... intoxication (use of drugs or alcohol), ... or where the employee may be injurious to self or others.

There was no evidence on this record that the grievant was in danger of being injurious to himself or others as the result of his positive test. There was no evidence of actual impairment nor any signs that the employee would be a danger. There was no evidence of intoxication at the time the decision was made to put the grievant on emergency placement.

Further, while the Service argued that he is in a safety sensitive position requiring that he be removed immediately, the facts did not support this claim on this unique record. The sole reason for the test was the grievant's acknowledgment that he uses medical marijuana to alleviate the symptoms of a medical condition. Further, while some of his duties could require him to drive vehicles, there was substantial evidence that this could easily be accommodated if there were ever any issue regarding his use of marijuana and that other employees could drive if there was ever any doubt or question as to the grievant's ability to drive.

The union raised several points with respect to the manner in which the placement was done. First, there was a significant period of time between the time of the test and the placement. More to the point there was also a period of time between when the results of the test became known and when the decision to impose the emergency placement was done. These factors belie the notion that there was emergency or that the grievant was a risk to the public or other employees.

Frankly, generally a positive test would give the Service the right to send the employee out on an Article 16.7 placement, but the Service still must comply with the procedural requirements to do that and establish that there is adequate reason to send the employee out and put the employee in a non-pay status. As noted above, there were defects in the timing of this under both the provisions of Article 16.7 as well as the Management Instruction to warrant overturning the decision to pace the employee on emergency placement.

Further, the Management Instruction also provides an exception to the general rule against reporting for or remaining on duty for those circumstances when the employee is under a doctor's care and where the doctor has advised in writing that the prescribed substance does not adversely affect the employee's ability to safely operate a motor vehicle. See Management Instruction at page 3.

Here, the grievant clearly had a medical card indicating that he was under a doctor's care. There was sufficient evidence on the record as a whole in this matter to show that there was a "medical reason" for the use of marijuana. There was no evidence one way or the other if the doctor had advised if the use of medical marijuana would or would not adversely impact the grievant's ability to safely operate a motor vehicle. On these facts, it was incumbent on the Service to inquire as to that latter fact before placing the grievant on emergency placement and removing him. That was not dine here.

There was no evidence that this inquiry was ever made. While this may not be required in all cases on different facts, it was here and the record did not reveal that any effort was made to inquire as to this latter fact or to determine if the grievant's use of marijuana would adversely affect his ability to perform his job. Given that the Service bears the burden of proof on the Article 16.7 placement and the removal, this was a factor considered in the union's and grievant's favor as well.

Thus, on this record there was insufficient evidence to support the emergency placement. We next turn to whether there was cause for a Notice of Removal or other discipline based on the facts presented.

NOTICE OF REMOVAL

This analysis is of course closely tied to the discussion above regarding the emergency placement. As noted above, there was evidence that the grievant tested positive for THC but no evidence of impairment as a result. There was also ample evidence that the grievant takes marijuana solely for the purpose of dealing with his medical issues and does so with the approval and supervision of a medical provider.

The analysis of this can be shortened considerably by noting the provisions of Appendix E and F, that where there is evidence of a medical reason for the use of a drug, "the test counts as a negative test." It was also clear that pursuant to this policy, the rest of the provisions regarding a last chance agreement are triggered only where there is evidence of a positive test within the purview of the policy. The union's assertion on these unique facts thus had merit.

Accordingly, on these facts there was insufficient evidence to support the removal. That coupled with the clear and credible claim by the grievant that he will cease the use of marijuana and ask his physicians for alternate treatment options, fully supported the union's claim in support of sustaining the grievance.

THE CDL

There was discussion at the hearing regarding the impact of the medical marijuana card on the grievant's CDL. The record revealed that the grievant must have a CDL as a condition of employment. There was no evidence that he had lost his CDL nor any evidence regarding the impact of his use of medical marijuana on that CDL. Neither was there much evidence on whether the Service could accommodate any such restrictions – although there was evidence that individuals working in a similar position as mechanics do not have CDL's yet they remain employed by the Service. On this record, it is not only not necessary to determine what that impact might be but is outside of the arbitrator's jurisdiction to make any such determination.

Whether the grievant can maintain his CDL was not before me at this time. There was no evidence that he had lost his CDL or that the Service could not accommodate any restrictions on driving, if any, due to use medical marijuana use. Further, the grievant testified credibly that if his use of medical marijuana was a problem in the future either for the Service or the DOT regarding his CDL, he would cease its use and ask his physicians for an alternate medicine to treat his medical condition. On these facts, this was convincing evidence of the grievant's good faith. More importantly, the question here is whether there was just cause under the National Agreement between the parties for the 16.7 placement or the removal. As discussed at some length herein; there was not.

THE CASES CITED BY THE PARTIES

The Service relied on a number of cases for the removal. The McReynolds case was reviewed but showed a very different set of facts. There the employee possessed and used marijuana on Postal premises while he was on duty.[1] Literally none of those facts were present here. The grievant never possessed or used marijuana on postal premises and was not shown to be unable to perform his duties due to his use of it in the past. That case, while having some similarities, was quite different.

[1] Arbitrator McReynolds noted that the employee admitted bringing marijuana onto postal premises to smoke it "in numerous occasions." See slip op at page 5. Here there were no such facts at all.

Likewise, the Zobrak case was also different in that the grievant was a motor vehicle operator whose main job duty was to drive. Based on the impairment found there after a random test, the arbitrator upheld the removal. Here the facts showed that as discussed above, that the grievant is only very occasionally required to drive a vehicle and can perform the essential functions of his job without having to.

The evidence here showed too that there was no evidence of impairment and that the need to drive could be accommodated. Also, as noted above, the grievant has already indicated his willingness to change medications in order to save his job. Further, the Zobrak case was decided in 1996, well before the legalization of marijuana in New Mexico and well before the promulgation of the policy set forth above that allows for the use of medical marijuana. The facts there showed that the employee was not only not under any sort of medical direction to take the marijuana; he was apparently using it recreationally, but that he continued to drive postal vehicles after the test was administered knowing that he had ingested that drug. The arbitrator reasonably found that facts "most troubling." Slip op at page 7. Here no such facts were present and significantly there was no reference to the sort of provision in Management Instructions set forth above.

In the Klein arbitration from 2002 there was again no evidence of a medical card for the employee in question. It was also apparent that his job was to drive vehicles and that no accommodation would have been possible without radically changing the very nature of his work. Here those facts did not exist.

Further, it is important to note that while the Service argued throughout this matter that there is a "zero-tolerance" for any drug use, the provisions at Appendix F – Notification of a Positive Drug Test Following Reasonable Suspicion or Post-Accident Testing – Page 17 above that clearly says that if there is a medical reason such a positive test results "counts as a negative test." There was clear evidence that this is what the Service has in its own Management Instructions handbook and whether one agrees with it or not, the simple fact remains that it is there and belies the notion that there is a true "zero-tolerance" for drug use. There are clearly circumstances where a positive drug test does not count as a positive test – and thus does not trigger the remainder of the provisions of Appendix F calling for the last chance agreement and the other conditions set forth in that document.

As discussed above, both parties made allegations of new evidence and other procedural deficiencies in the processing of the case. After a thorough review of the evidence introduced at trial and the documents in the case file, it was determined that neither party's assertions of violations of the "no new evidence" rule under Article 15 and various cases cited by the parties were founded. Each party had the opportunity to understand the evidence and arguments of the other side and no prejudice was shown to either party as the result of the way in which this case was processed.

REMEDY

As noted above, this case presented a very different case from those presented by the Service. Neither was this a case where the employee tested positive without evidence of medical authorization nor one in which there was impairment or use/possession on duty. Accordingly, the removal is overturned in its entirety on these facts.

The remaining issue is to determine the remedy. Here there was no just cause for the removal and the grievant must therefore be reinstated. The grievant is to be reinstated to his former position within 10 calendar days of this award with full back pay, subject to mitigation of damages for any government unemployment benefits or wages/salary earned in the interim. The union and the grievant shall provide any appropriate documentation to verify such interim earnings for purposes of calculation of the back pay. In addition, the grievant shall be entitled to any and all contractual benefits in the interim herein including seniority. The arbitrator will retain jurisdiction of this matter to determine any issues with respect to the remedy so ordered.

AWARD

With regard to the emergency placement, that grievance is SUSTAINED.

With regard to the notice of removal, the grievance is SUSTAINED. The grievant is to be reinstated to his former position with the Service within 10 calendar days of this decision with full back pay, subject to the mitigation set forth herein, and all contractual benefits including seniority.

Dated: March 13, 2017
USPS and APWU – E10V-4E-C 16143412; E10V-4E-D 16110243.2017

Jeffrey W. Jacobs, arbitrator

REGULAR ARBITRATION WESTERN PANEL

In The Matter of Arbitration Between UNITED STATES POSTAL SERVICE, Employer, -and- AMERICAN POSTAL WORKERS UNION, AFL-CIO, Union.	Grievant: William J. Butler Post Office: Huntington Beach, CA USPS Case No. F10V-4F-D 15379505 APWU Case No. 151241

BEFORE: Claude Dawson Ames, Arbitrator

APPEARANCES:

For the Postal Service:	James M. Anderson, Labor Relations Specialist
For the Union:	Jerome Pittman, National Business Agent
Date of Hearing:	July 7, 2017
Date of Briefs:	July 22, 2017
Date of Award:	July 30, 2017
Contract Provisions:	Article 16.7
Contract Year:	2011 - 2015
Type of Grievance:	Discipline (Emergency Suspension)

AWARD SUMMARY

The Postal Service did not have Just Cause to Emergency Suspend Grievant William Butler for an incident that occurred several days prior to invoking Article 16.7. The Grievant shall be made whole for all lost wages and the Emergency Placement removed from the Grievant's personnel records. The Union's grievance is sustained.

/s/ *Claude Dawson Ames*
CLAUDE DAWSON AMES, Arbitrator

I.

BACKGROUND

On September 25, 2015, Grievant William Butler, a Lead Mechanic at the Huntington Beach Postal VMF, became upset after noticing fellow Mechanic Julian Merino spilling soapy water and cleaning solution into his work area while in the process of cleaning his adjacent area. By all accounts, as Mr. Merino was mopping his area, some of the water splashed out of the bucket and into Grievant's bay. What happened next is disputed by the parties. According to Management, Grievant threw a shop broom at Mr. Merino, hitting him in the head and yelling, "Why do you have to make a mess with the mop?" Mr. Merino responded loudly, "What is your deal?" and accused Grievant of throwing a broom at him, hitting him in the head. Grievant denies throwing a broom at Mr. Merino and says Merino may have knocked his broom over while cleaning, but Butler did become upset when Mr. Merino started spilling soapy water and cleaning solution in his bay area.

Loud voices were raised by both and, according to testimony of Lead Technician Mike Ferguson, a verbal altercation began to escalate between the Grievant and Mr. Merino. Mr. Ferguson quickly intervened to de-escalate the situation by intercepting Grievant as he was walking toward Mr. Merino's area and escorted Butler out of the building behind his bay. Mr. Ferguson then proceeded back inside and escorted Mr. Merino outside the building, where the situation de-escalated quickly. Both Grievant and Mr. Merino returned to their work areas without further incident, completed their work, and checked out after cleaning their work areas.

Lead Tech Ferguson testified that in the absence of a supervisor, he was in charge of the facility when the verbal altercation occurred. Mr. Ferguson did not observe Grievant throw a broom at Mr. Merino but did hear loud comments being made by both Butler and Merino and as the Lead Tech in charge, acted quickly to de-escalate the situation. He did not write a report or feel that the incident was an emergency since both Butler and Merino had settled down after being separated and there were no further verbal exchanges by either. Neither Grievant nor Mr. Merino were acting in an aggressive manner when they returned after cooling off.

VMF Manager Sgarlata first became aware of the incident on September 27, 2015 when Mr. Merino texted him on Sunday and complained of the altercation and concluded that an emergency placement of Grievant was in order. Mike Ferguson was in charge as the "Acting Group Leader" when the incident occurred but did not file a report. According to Mr. Sgarlata, the VMF was closed Saturday and Sunday and he could only issue Grievant an emergency suspension on Monday, when Butler arrived at work. Manager Sgarlata placed Butler on an emergency off-duty suspension for his alleged physical confrontation with Mr. Merino and being in violation of the District's Zero Tolerance Policy.

Mr. Bulter does not deny that a verbal altercation occurred between he and Mr. Merino when Merino was spilling soapy water from his mop bucket into Grievant's work area. Grievant denies throwing a broom at Mr. Merino, but did ask him to clean up his mess. Butler and Mr. Merino became loud and exchanged words, which stopped once Lead Tech Ferguson interceded and escorted both men outside the building and to opposite areas to cool off. Both men later returned to the building, cleaned their areas, and went home. Grievant was upset but, as instructed by Lead Tech Ferguson, he did not have any further contact with Mr. Merino.

II.

ISSUE PRESENTED

The issue presented for resolution is:

Did Management have Just Cause to place Grievant William Butler on an Emergency Placement in a non-duty/non-pay status on September 28, 2015?

If not, what is the appropriate remedy?

III.

RELEVANT CONTRACT LANGUAGE

Article 16 Section 7. Emergency Procedure
An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or whether the employee may be injurious to self or others. The employee shall remain on the rolls (non-pay status) until

> disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance.

IV.

POSITIONS OF THE PARTIES

A. Employer's Position:

The Postal Service had Just Cause to place William Butler on an emergency suspension pursuant to Article 16.7 after Grievant became visibly upset with fellow Mechanic Julian Merino because some soapy water had splashed out of a bucket while Merino was mopping and spilled into Grievant's bay. Grievant then threw a shop broom at Merino, hitting him in the head, and he yelled out, "Why do you have to make a mess with the mop?" Merino noticed that the shop broom handle was pointed in Grievant's direction, indicating that the broom was thrown by Grievant.

Due to the seriousness of the allegation, the Manager of VMF Ernest L. Sgarlata, placed Grievant on a 16.7 on September 28, 2015. Grievant was not at work on September 26 and 27, 2015 as those were his off non-scheduled work days. Management had no access to the Grievant until the following Monday morning (September 28, 2015) when Grievant arrived at work to clock in. Bulter was called into Manager Sgarlata's office where he was then placed out on a 16.7. Grievant had not clocked into work, as his timecard had been removed prior to his arrival that morning, and he was therefore unable to clock in. At the time Grievant was placed in an emergency off-duty suspension, he was provided with the reasons for Management's immediate action, including allegations of threat to self or others. While the Union may argue that the action taken was not immediate and that Management did not have Just Cause to invoke Article 16.7, the provision clearly states that only an allegation is required.

This Arbitrator has already ruled on a similar type of case in Concord, CA (F06N-4F-D 11388011 dated June 4, 2013), in which he stated the following:

> The fact that the Grievant was not available for immediate placement in an off duty status after the altercation does not prohibit Management from taking the appropriate and proactive measure to protect postal employees upon his return to work. The purpose of Article 16.7 is to prevent such potential disruption from occurring in the

workplace. Accordingly, the Union's grievance challenging Management's placement of the Grievant in an Off Duty Status concerning his physical assault on a fellow postal employee is denied.

The Service requests that the emergency placement be affirmed and that the Union's grievance be denied.

B. Union's Position:

The Employer has taken the extraordinary step of placing an employee on Emergency Suspension without any proof of an actual violation. This emergency placement is based on an unsubstantiated hearsay accusation of an alleged incident of misconduct. The burden of proof on discipline cases lies with the Service. When the Service presents a case that cannot meet any of the provisions of Just Cause, they assume a heavy burden. The principle that any discipline must be for "Just Cause" establishes a standard that must apply to any discipline of an employee, including Article 16.7, as stated by National Arbitrator Mittenthal in Case No. H4N-3U-C 55637 (pg. 9, line 1). Simply put, the Just Cause provision requires a fair and provable justification for discipline. The Service is content to rely on a belief that "only an allegation is required" to send an employee home, even if an emergency placement occurs 65 hours after the allegations of misconduct. While the Service keys in on the word "allegation," it overlooks the rest of Article 16.7 where it clearly states that the employee must be "immediately" placed on an off-duty status by the employer, and overlooks the principles of Article 16.1 which states that, "No employee may be disciplined or discharged except for just cause." In this case, the Service has failed on both counts. For Just Cause to be considered, the Service had to prove that the Grievant made a threat was injurious to self or others, if not immediately removed from the workplace.

The Service did not present any evidence in support of the allegation that was intended to be abated under Article 16.7. Further, the Service had to show that the Grievant was immediately placed off-duty in an emergency suspension, but it has failed to do so. On June 29, 2017, Grievant was given a 14-day suspension. The Service has unilaterally reduced this 14 day suspension to a non-disciplinary official discussion that Mr. Butler has not yet received.

V.

DECISION

A well stated purpose of Article 16.7 is to allow the Postal Service to place an employee in an off-duty status immediately in a specified "emergency" situation. Under specified emergency procedures set forth in Article 16.7, an employee may be placed on an off-duty status (without pay) by the Service while remaining on the rolls where the allegations involve intoxication, "pilferage ... and in cases where, retaining the employee on duty may result in damage to postal property" or, as alleged here; where the employee may be injurious to self or others. According to Management, Grievant's emergency placement in an off-duty status on September 28, 2015 warranted such an emergency placement by VMF Manager Ernest L. Sgarlata for an alleged incident occurring on September 25, 2015, and was just and proper. The emergency action taken by Manager Sgarlata was both immediate and appropriate after learning of the incident between Grievant and fellow Mechanic Julian Merino.

The Union disagrees with Management's position and argues that Grievant's emergency placement was not immediate, as required under Article 16.7 when the alleged incident occurred on September 25, 2015, and because there was no specified emergency situation. The Union does not dispute that a verbal confrontation occurred between Grievant and Julian Merino, but Lead Tech Ferguson intervened and escorted both employees out of the building in opposite directions which de-escalated the incident. The employees were allowed to finish their duties and complete their tours without further intervention by Lead Tech Ferguson. The Union maintains that there was no actual emergency which warranted imposition of Article 16.7 by VMF Manager Ernest L. Sgarlata on September 28, 2015.

The Arbitrator concurs with the Union's position. After careful consideration and review of the evidence presented, arguments, post-hearing briefs and parties arbitrable authorities, the Arbitrator finds for the Union. Management at the Huntington Beach VMF did not have Just Cause to invoke Article 16.7 and to emergency place Walter Butler off-duty in a non-pay status on September 28, 2015.

The Service has failed to show, even under a preponderance standard of proof, that the alleged verbal altercation involving Grievant and Mr. Merino rose to a level constituting a "threat to self or others" under Article 16.7 or under the District's published policy of "Zero Tolerance." In order to sustain invocation of Article 16.7, rather than Article 16 (Discipline Procedures -Notice and Investigation), the burden is placed on Management to show at least preliminarily, that the allegation is credible and that actions were immediately taken to prevent destruction of Postal property or physical injury to self or others. Here, Management's case is problematic because it was unable to show that the verbal exchange between Merino and Butler rose to a level of threat contemplated under Article 16.7, since Lead Tech Ferguson quickly intervened to de-escalate the situation. Neither the Grievant or Mr. Merino continued to escalate or yell at each other after being escorted to separate areas to cool off.

The Arbitrator finds that the testimony of Lead Tech Ferguson is very credible and commends Mr. Ferguson for his leadership skills in quickly interceding, once he recognized that Butler and Mr. Merino needed to be separated, and given time to cool off. The Arbitrator also recognizes the authority of Lead Tech Ferguson as the person in charge in the absence of a Management Supervisor and will defer to his on site discretion, in not filing an official report of the incident or informing VMF Manager Sgarlata. According to Mr. Ferguson's testimony, once Butler and Merino returned to their work areas after cooling off, neither yelled or escalated the altercation and there was no need for an emergency off-duty placement of either employee.

VMF Sgarlata entered the picture much later on September 27, 2015, after receiving a text from Mr. Merino which formed his basis for invoking Article 16.7 on September 28, 2015, when Grievant arrived for duty. But what was the emergency on September 28, 2015 that existed and which Manager Sgarlata was attempting to immediately prevent? The record indicates that Butler did not physically threatened Mr. Merino during their verbal altercation when he yelled, "Why do you have to make a mess with the mop bucket?" Nor are there any independent witnesses to corroborate Mr. Merino's claim that Butler threw a broom at him, as opposed to Merino, knocking it over himself. If a threat was made by either party, it was a threat clearly made by Mr. Merino

in violation of the Zero Tolerance Policy, when Merino yelled at Mr. Butler, "You're lucky I don't knock you out." Mr. Merino later affirmed his threat against Mr. Butler in a signed written statement given to Management on the morning of September 28, 2015. The evidence record indicates that it was Mr. Merino and not Mr. Butler, who appeared to be the real threat.

Accordingly, the Arbitrator finds that Management failed to establish the prerequisites necessary to invoke provisions of Article 16.7. Management's concerns could have been more appropriately addressed under Article 16 (General Discipline Procedures) with an investigation of the incident that occurred on September 25, rather then invoking Article 16.7 on September 28, 2015. The Union's grievance is hereby sustained.

AWARD

The Postal Service did not have Just Cause to Emergency Suspend Grievant William Butler for an incident that occurred several days prior to invoking Article 16.7. The Grievant shall be made whole for all lost wages and the Emergency Placement removed from the Grievant's personnel records. The Union's grievance is sustained.

Respectfully submitted,

Dated: July 30, 2017

/s/ *CLAUDE DAWSON AMES*
CLAUDE DAWSON AMES, Arbitrator

UNITED STATES POSTAL SERVICE

PRE-ARBITRATION SETTLEMENT

GATS No. E10V-1E-C 15186712
Local No. 15335
Denver CO

The undersigned parties agree that the following terms represent a complete settlement of the grievance referenced above.

The parties agree that this issue was the result of a ministerial and/or administrative error in implementing the MOU. Therefore, the people on the attached list will be compensated as follows:

Those employees from line 1 through line 31 will have their pay adjusted to $51,118 (if the employee on line 33 is not already at $51,118 it is agreed his pay will be adjusted to that figure as well), and employees named on lines 34-37 will have their pay adjusted to $49,312., both effective at the beginning of the pay period which occurred 2 pay periods after the signing of the June 6, 2014 MOU RE: Resolution of Postal Support Employee (PSE) Salary Exception Issues. Also, to avoid future pay anomaly issues, any step increases that have occurred from the date of the 2nd pay period after the signing of the MOU referred to above through the signing of this settlement, shall be included in the pay adjustment. This also means that future step increases will not be frozen for reasons related to this issue.

It is also understood that the appropriate TSP contributions will be made to these employees' accounts from these pay adjustments.

Employees who are named on lines 2-31 shall receive the lump sum payment, if they have not already done so, described in item (4) of the April 3, 2015 "Addendum to MOU dated June 6, 2014, Titled RE: Resolution of Postal Support Employee (PSE) Salary Exception Issues." (NOTE: It is the undersigned parties belief that no employee from line 2 through line 31 of the attached chart has received this payment. If any of these employees have received this payment, management shall present evidence of that payment to the union).

These terms represent a complete settlement of grievance E10V-1E-C 15186712 (Local no. 15335).

Ken Glassburner
Labor Relations Specialist
Western Area

Jerome Pittman
NBA
APWU- MVS craft

UNITED STATES
POSTAL SERVICE

GRIEVANCE SETTLEMENT - PRE-ARBITRATION

USPS NO.: 13182828, 13153466, 14396128, 15431286, 14331516
GRIEVANCE: PDX614013, PDX605713, PDX614214, PDX600715, PDX620814
GRIEVANT: Class Action
CRAFT: MVS
LOCATION: Portland OR

As a final and complete settlement of the subject grievances, and without prejudice to the position of the Union or the United States Postal Service in this or any other case, and with the understanding that this settlement shall not be cited by the parties in the future for any reason except to enforce its terms, the resolution below has been entered into by the parties.

The Postal Service abolished seven MVS routes (DX-124, DX-233, DX-130, DX-350, DX-353, DX-356, and UT-9). The majority of the work performed on these routes was then subcontracted without providing the due consideration required by Art. 32. These changes were effective 4-13-13. The Service will pay employees designated by the union a total lump sum of one million, two hundred thousand dollars, subject to normal withholding.

Ten percent (one hundred twenty thousand dollars) of the total lump sum will be withheld by the Postal Service, to be disbursed to employees designated by the union. Those designations will be made within 4 months of the date of this settlement.

The parties agree that the list of trips below reflects the service points and original times of the trips to those service points. These trips will be returned to the MVS craft as soon as practicable, but not more than 70 days after the signing of this agreement. It is agreed that management may adjust the arrival and/or departure times of these trips.

The parties mutually agree that this settlement fully resolves the grievances indicated above; any other grievances at any Step of the grievance arbitration process which pertain to the issue of the work included in the seven listed routes; grievances involving requests for information related to this work; all grievances held in abeyance for the outcome of any grievance pertaining to the work in question; and any and all claims that the APWU asserted or could have asserted, in any forum, with regard to this work.

The parties further agree that the cases on the attachment, which had been held in abeyance pending the outcome of 14396128, will be taken out of abeyance and met on at Step 3 of the grievance process.

C Beebe 8-18-17
Chris Beebe Date
USPS

Jerome Pittman 8/18/17
Jerome Pittman Date
APWU

Service Point	ARR	DEP	Original Rt.
MT HOOD DDC	0100	0115	DX-124
MT HOOD DDC	0300	0400	DX-124
MT HOOD DDC	0550	0615	DX-124
PARKROSE	0630	0645	DX-124
STAPLES INKDROP	0700	0715	DX-124
MT HOOD DDC	1130	1145	22233
AMF - PORTLAND	1255	1310	22233
ATA	1320	1330	22233
ATA	1510	1525	22233
ATA	1740	1800	22233
MT HOOD DDC	1550	1610	32350
MT HOOD DDC	1805	1825	32350
MT HOOD DDC	1940	2000	32350
AMF - PORTLAND	2155	2230	32353
STASH TEA	1620	1630	32353
DESERT VIKING	1600	1610	32356
DANNER BOOTS	1630	1640	32356
US BANK	1650	1710	32356
ATA	2000	2010	34313 (From UT-9)
THS	2015	2100	34313 (From UT-9)

GATS #	Local #
17102461	PDX621316
17102428	PDX622116
17102422	PDX624016
17102400	PDX621716
17102363	PDX620916
17102361	PDX623216
17102340	PDX623616
17102322	PDX620516
16528122	PDX616616
17277839	PDX645816
16488523	PDX616016
16488541	PDX615616

C Beebe 8-18-17

Chris Beebe Date
USPS

Jerome Pittman 8/18/17

Jerome Pittman Date
APWU