UNITED STATES POSTAL SERVICE
Labor Relations Department
475 L'Enfant Plaza, SW
Washington, DC 20260-4100

OCT 28 1988

ARTICLE 19
SECTION ELM
SUBJECT
EXECUTIVE ORDER
5396

Mr. Lawrence G. Butchins
Vice President
National Association of
Letter Carriers, AFL-CIO
100 Indiana Avenue, N.W.
Washington, D.C. 20001-2197

Re: Class Action
Cincinnati, OH 45234
B4N-4F-C 11641

Dear Mr. Butchins:

On August 30, 1988, we met to discuss the above captioned grievance.

The issue in this grievance is whether a disabled veteran can be disciplined for using sick leave while receiving treatment at a VA hospital.

After reviewing this matter, it was mutually agreed that no national interpretive issue is present in this case. The parties at this level agree that Executive Order 5396, dated July 3, 1930, does apply to the Postal Service and that absences meeting the requirements of that decree cannot be used as a basis for discipline.

Accordingly, we agreed to remand this case to the parties at Step 3 for further processing, including arbitration if necessary.

Please sign and return the enclosed copy of this letter as your acknowledgment of agreement to remand this case.

Time limits were extended by mutual consent.

Sincerely,

William J. Downes
Director, Office of
Contract Administration

Lawrence G. Butchins 10/28/88
Lawrence G. Butchins
Vice President
National Association of
Letter Carriers, AFL-CIO

Executive Order

Special Leaves of Absence to be Given Disabled Veterans in Need of Medical Treatment

With respect to medical treatment of disabled veterans who are employed in the executive civil service of the United States, it is hereby ordered that, upon the presentation of an official statement from duly constituted medical authority that medical treatment is required, such annual or sick leave as may be permitted by law and such leave without pay as may be necessary shall be granted by the proper supervisory officer to a disabled veteran in order that the veteran may receive such treatment, all without penalty in his efficiency rating.

The granting of such leave is contingent upon the veteran's giving prior notice of definite days and hours of absence required for medical treatment in order that arrangements may be made for carrying on the work during his absence.

HERBERT HOOVER

THE WHITE HOUSE,
July 17, 1930.

[No. 5396]

50 A

RECEIVED By
MEMPHIS FIELD OFFICE, USPS
JUN 21 1979

UNITED STATES POSTAL SERVICE
Washington, DC 20260

AREA: AG:mlg

DATE: Feb. 2, 1979

LABOR LAW DIVISION
LAW DEPT.

SUBJECT: Executive Order 5396

TO: Ed Morgan
Assistant Postmaster General
Government Relations

This responds to the November 17, 1978, request from your office that we determine the applicability to postal employees of Executive Order 5396, which provides that special leaves of absence shall be granted to disabled veterans in need of medical treatment.

Whether the Postal Service is legally bound by an executive order is largely a function of the authority under which the order is issued. In short, if an executive order is issued pursuant to a statute which is not applicable to the Postal Service, it appears that the order is also not applicable. In this regard, we note that although E.O. 5396 does not cite the authority under which it issued, it seems probable that the Order was issued pursuant to the general authority granted the President in personnel matters under title 5, United States Code. As the Postal Service is generally exempt from the provisions of title 5, pursuant to 39 U.S.C. §410(a), it appears, therefore, that E.O. 5396 is not applicable to the Postal Service.

However, determination of the application of E.O. 5396 also requires consideration of 39 C.F.R. §211.4(c), which provides in pertinent part:

> Except as they may be inconsistent with the provisions of the Postal Reorganization Act, with other regulations adopted by the Postal Service, or with a collective bargaining agreement under the Postal Reorganization Act, all regulations of Federal agencies other than the Postal Service or Post Office Department and all laws other than provisions of revised Title 39, United States Code, or provisions of other laws made applicable to the Postal Service by revised Title 39, United States Code, dealing with officers

and employees applicable to postal officers and employees immediately prior to the commencement of operations of the Postal Service, continue in effect as regulations of the Postal Service. [Emphasis supplied.]1/

As subchapter 1-4 of Chapter 630 of the Federal Personnel Manual incorporates E.O. 5396, it could be argued that the Postal Service must comply with that order, as set forth in subchapter 1-4, by virtue of the carryover effect of 39 C.F.R. §211.4(c).

In our view, however, the regulations contained in subchapter 1-4 of Chapter 630 of the Federal Personnel Manual appear to be inconsistent with the leave regulations recently adopted by the Postal Service and incorporated in collective bargaining agreements and, therefore, are no longer applicable to postal employees. In this regard, it is our understanding that Chapter 510, Leave, of the Employee and Labor Relations Manual was intended to supersede all leave regulations formerly applicable to postal employees and, in essence, to "preempt the field" in the area of leave regulations. Accordingly, in our judgment, E.O. 5396 is no longer applicable to the Postal Service by virtue of 39 C.F.R. §211.4(c).

It should be noted, however, that the fact that E.O. 5396 is not applicable to the Postal Service is of little practical consequence. Section 513.32e. of the Postal Service's Employee & Labor Relations Manual provides that a disabled veteran is granted leave - sick leave, annual leave or, if necessary, leave without pay - for medical treatment if the employee submits a statement from medical authority that treatment is required and, when possible, gives prior notice of the definite number of days and hours of absence.

Sherry Cagnoli

Sherry Cagnoli
Supervisory Attorney
Office of Labor Law

1/ See also 39 U.S.C. §1005(f).

Lib 50 B

SENIOR ASSISTANT POSTMASTER GENERAL
EMPLOYEE AND LABOR RELATIONS GROUP
Washington, DC 20260

December 6, 1977

Mr. Rickie L. Garmon
Administrative Assistant
Disabled American Veterans
807 Maine Avenue, SW
Washington, DC 20024

Dear Mr. Garmon:

This is in response to your letter of October 18th; we regret the delay, which was unavoidable.

The Postal Service firmly supports Executive Order 5396, and we will carefully investigate and rectify any failure of Postal management to adhere to the Executive Order.

We have investigated the complaint submitted by Mr. Longstreeth, President of the American Postal Workers Union in Pittsfield, MA.

As you know, Section 721.431(d) of the Postal Manual states that leave "...shall be granted to disabled veteran employees so that they may receive treatment." The employee's obligation is to give "...prior notice of definite days and hours of absence required so that arrangements may be made for carrying on the work during his absence." The employee must also present "...an official statement from duly constituted medical authority that medical treatment is required...."

The key issue in this case, as we see it, is that leave is to be granted so as to permit the disabled veteran employee to receive treatment. In the case at hand, the employee wanted sick leave so that he could go home and get some rest prior to his scheduled medical treatment. The Sectional Center Manager/Postmaster of Pittsfield has assured me that if the employee's V.A. appointment had been scheduled during his work tour, then sick leave would have been granted, as is the case with other disabled veterans. Also, if annual leave or leave without pay

had been requested for the rest period, every effort would have been made to comply.

We regret that a more favorable decision cannot be rendered in this case, but the Postal Service has an obligation to deliver the mail with dispatch and at the lowest possible cost to the American public. Many of the employees granted sick leave must be replaced by employees working overtime and by Flexible Schedule employees called in to cover absences. Thus, sick leave cannot be granted lightly and without full justification.

To reiterate, the employee's request for sick leave would have been approved had his V.A. appointment fallen within his scheduled work tour.

Thank you for bringing this complaint to my attention.

Sincerely,

James V. P. Conway

bcc: Mr. Masters
Mr. C. Scialla, Northeast Region
J. C. Gildea, Labor Relations
Regional Directors, E&LR, All Regions

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION

Grievant: DAVID J. SILVA

Post Office: BOSTON GMF

Case No.: B98C-1B-D 00004729
BO99-01402

Before: RANDALL M. KELLY, Arbitrator

Appearances:

For the United States Postal Service:

DENNIS TARMEY, Labor Relations Specialist
YVONNE E. MATTOX, Supervisor, Distribution Operations

For the Union:

STEPHEN A. ALBANESE, National Business Agent
DAVID J. SILVA, Grievant

Place of Hearing: Boston GMF, Boston, Massachusetts

Date of Hearing: February 23, 2000

Date of Award: March 27, 2000

Relevant Contract Provisions: Articles 2 and 16

Contract Year: 1998-2000

Type of Grievance: Discipline

AWARD SUMMARY

1. That for reasons set forth herein, the matter is arbitrable;

2. That for reasons set forth herein, the Grievant, David Silva, did not violate the terms of the Removal Settlement-Last Chance Agreement dated March 9, 1999;

3. The Grievant is to be reinstated with back pay subject to the terms of the ELM governing such back pay; and

4. The reinstatement is to be pursuant to the terms of the Removal Settlement-Last Chance Agreement dated March 9, 1999 and

it is reinstated effective with the date the Grievant is reinstated; and

5. The grievance is sustained.

Randall M. Kelly, Arbitrator

Issue:

The parties were not able to agree upon an issue. In fact, the Service has raised a threshold issue of arbitrability. The Last Chance Agreement signed by the Grievant on March 9, 1999 contains a provision that gives management the "sole unreviewable discretion" in determining whether the Grievant fulfilled or failed to comply with the terms of the LCA. According to the Service, this means that the Grievant has waived his right to arbitration of his reimposed removal. The Union disagrees.

The parties agreed to allow me to resolve that issue and if I find the matter arbitrable, resolve the issue on the merits.

On the merits, the Service proposed that the issue be whether the Grievant violated the terms of the Last Chance Agreement? The Union proposed, Were the Service actions in removing the Grievant consistent with the terms of the Last Chance Agreement? If not, what shall be the remedy?

Charges:

The NOTICE OF REMOVAL REINSTATED WITHOUT RIGHT OF APPEAL dated September 20, 1999 states the reason for the Removal as follows:

> On 10/9/98 you were issued a Notice of Removal based upon your failure to be regular in attendance in violation of the Employee and Labor Relations Manual, Section 666.81.
>
> On 3/9/99, you entered into a Last Chance Agreement along with your union representative and management in a last chance attempt to retain your position with the Postal Service, which read in pertinent part as follows:
>
> "I will not incur more than eight (8) unscheduled emergency or unexpected, approved absences, nor exceed a cumulative total of sixty-four (64) hours of unscheduled leave (any partial days absence will constitute a separate absence so that in the event absences are consecutive, they will be counted as individual absences)"
>
> "It is also agreed that the effective date of my removal from

the Postal Service will be held in abeyance for one year from the date of this agreement provided I fulfill all the conditions of this settlement."

"I understand that approved but unscheduled absences, if in violation of the stipulations above, will be the basis for the setting of a new effective date of removal with no right of appeal."

Thereafter, a review of your record reveals that you have violated the above terms of the agreement by having been absent on unscheduled absences on the following occasions, exceeding the number of allowable unscheduled absences within said agreement:

DATE	HOURS	LEAVE TYPE
3/31/99	8	EAL
4/6/99	8	SAL
5/6/99	8	SAL
7/13/99	8	S/L
8/10/99	8	S/L
8/13/99	8	S/L
8/14/99	8	S/L
8115/99	8	S/L
8/16/99	8	S/L
8/21/99	8	S/L

Therefore, based upon the foregoing you are seen to have violated the last chance opportunity afforded you and you shall be removed from the Postal Service without any further right of appeal, per the agreement.

Background Facts and Circumstances of the Dispute:

The Grievant was employed as a Full-time Clerk in the Boston GMF beginning in August, 1984.

On March 9, 1999 (all dates hereinafter are 1999 unless otherwise indicated), he agreed to a Removal Settlement-Last Chance Agreement in settlement on his Notice of Proposed Removal dated October 9, 1998 (Jt. Exh. 3). Among the substantive terms thereof, the Grievant agreed that he would incur more than eight "unscheduled emergency or unexpected approved absences, nor exceed a cumulative total of sixty-four (64) hours of unscheduled leave" and that if he did so, the removal could be reinstated. There is

an exception for "any legally protected absence" that would extend the period of abeyance/probation. As noted, the LCA contains a provision that gives management the "sole unreviewable discretion" in determining whether the Grievant fulfilled or failed to comply with the terms of the LCA.

As of August 16, the Grievant had incurred nine unscheduled absences (and a tenth on August 21). His Supervisor, Yvonne Mattox, reimposed the Removal on September 20 (pp. 5-6 of Jt. Exh. 2).

The Grievant filed a timely grievance protesting his Removal and the Union pursued it through the contractual grievance procedure (Jt. Exh. 2). The matter, not being resolved, is properly before me for final and binding arbitration pursuant to the terms of the National Agreement between the parties.

OPINION

The REMOVAL SETTLEMENT-LAST CHANCE AGREEMENT BETWEEN USPS AND FULL-TIME CLERK DAVID SILVA, dated March 9, 1999, provides as follows:

> It is mutually agreed by all signatories below that the Notice of Proposed Removal dated 10/9/98 issued to me was for just cause and was to protect the interests of the Postal Service, and was not issued for any discriminatory reasons. It is also agreed that the effective date of my removal will be held in abeyance for one (1) year from the date of this agreement provided I fulfill all the conditions of this settlement. If I do fulfill all the conditions of this settlement, this removal shall be rescinded after the expiration of the abeyance period. . . .
>
> I understand that I am hereby placed in a "LAST CHANCE" probationary status for the term of this agreement, and I am required to fulfill all the rules and regulations of Postal employment with particular emphasis on the requirement to be regular in attendance, and the stipulations included in this agreement.

* * *

I will not incur more than eight (8) unscheduled emergency or unexpected approved absences, nor exceed a cumulative total of sixty-four (64) hours of unscheduled leave (any partial days absence will constitute a separate absence so that in the event absences are consecutive, they will be counted as individual absences). An unscheduled absence (e.g. emergency annual, sick leave, leave without pay, tardiness, failure to report/remain for overtime or Holiday as scheduled, etc.) is any absence not requested and approved by management in advance on Form 3971. I fully understand that while an unscheduled absence may be approved, that said approval is for pay purposes only. I understand that approved but unscheduled absences, if in violation of the stipulations above, will be a basis for the setting of a new effective date of removal with no right of appeal even though the approved absences may be caused by unexpected or emergent conditions. I further agree that the period of abeyance/ probation will be extended beyond the probationary period on a day for day basis for any legally protected absence and all scheduled absences, other than choice (non-choice annual leave, taken during the abeyance/probation period (a scheduled absence being an absence requested and approved in advance). This agreement does not however, preclude management from taking appropriate administrative action when necessary for extended or excessive unscheduled absences outside the agreement.

I will be required to substantiate all unscheduled absences with administratively acceptable documentation immediately upon return to duty from same, or as otherwise determined by management. Failure to provide the required documentation, or to call and notify management in advance of any unscheduled absence will result in the administrate determination of my being AWOL and in violation of this agreement.

* * *

The Clerk Union (APWU) and I hereby withdraw any all appeals and grievances related to the Notice of Proposed Removal being settled by this agreement, and any other appeals/ grievances regarding any other past elements of discipline pending at this time, including all pending EEO complaints.

I understand that I have received my right to a 30 day notice of removal and if I violate any of the terms of this agreement a new effective date of my removal will be set with no thirty (30) day advance notice requirement. I recognize this as a "LAST CHANCE" opportunity for me to fulfill the requirements of employment with the Postal Service. I understand that this agreement is a final and binding resolution of all existent appeals related to the Removal

> action above and that, although I may have Appeal rights through the Merit Systems Protection Board, Unemployment, courts, and Grievance/arbitration procedures this settlement constitutes my voluntary waiver of said appeal rights for any reimposition of this removal action based upon a breach of any of the conditions of the agreement. I understand and accept that management retains the sole unreviewable discretion in determining whether I have fulfilled or failed the stipulations of this agreement.
>
> This agreement is entered into of my own free will, without coercion, unlawful influence or bad faith by the Postal Service, the Clerk Union or any party in reaching this settlement agreement. I fully understand that I did not have to agree to any of its contents and have initialed the sections of this agreement which I have read, fully understand and approve of its contents and did so with the freedom to negotiate any of its terms prior to signing off, initialed; and that I am sober and free from impairment due to any drug as I review and sign this agreement while of sound mind and body.
>
> The preceding paragraphs represent the entire "Last Chance Agreement" (LCA) between the signatories. The LCA is the complete and final expression of the rights and responsibilities of the respective parties. Any evidence (oral or written) of statements made by either party prior to or contemporaneous with the signing of the LCA which vary or contradict the agreement are expressly excluded. Any subsequent alteration, modification and/or deletion, must be reduced to writing, agreed to by all parties and signed by all parties to be considered enforceable (Jt. Exh. 3).

As can be seen, the conditions are strict. Substantively, the Grievant agreed that he would not incur more than eight unscheduled emergency or unexpected approved absences, nor exceed a cumulative total of sixty-four hours of unscheduled leave. Further, any partial days absence would count as a separate absence so that in the event absences are consecutive, they are counted as individual absences. The only real exception is for "any legally protected absence", which would extend the probation period but not count as an unscheduled absence, and scheduled absences, such as vacation.

The most stringent provision, however, is that:

> I understand and accept that management retains the sole unreviewable discretion in determining whether I have fulfilled or failed the stipulations of this agreement.

The agreement also has a zipper clause effectively preventing any changes. Finally, the Grievant gave up his appeal rights under MSPB and grievance/arbitration.

The Service argues that it has determined that the Grievant failed to fulfill or failed the stipulations of the agreement and that that is the end of the matter. In another situation, I might well agree with that position, as have some Regional Arbitrators. See, Case No. B94N-4B-D 96066492 (NALC Case; Arbitrator Thomas F. Sharkey, 1997) (dealing with this exact language) and Case No. B90M-4B-D 93013604 (Mail Handlers case; Arbitrator Thomas F. Carey, 1993).

However, this case raises substantial issues of law and public policy which supersede management's discretion and the Last Chance Agreement and which served to obviate the need to determine whether the Service was arbitrary and capricious when it reimposed this Removal.

Factually, the Grievant testified that he is a Disabled Veteran with a 30% service connected disability in the form of schizophrenia (U. Exh. 2). He was, in fact, hired by the Service with full knowledge of his condition after its Medical Officer reviewed his condition and approved his hiring in 1984 (U. Exh. 2). The Grievant testified that he has continued his treatment since his release from the service.

The Grievant agreed that two of the unscheduled absences with which he was charged were not "legally protected absences". To

wit, March 31 was caused by car trouble and May 6 was for acute gastritis (p. 10 of Jt. Exh. 2). However, he testified that the other seven absences were for treatment of his service connected medical condition. And, based on documentation presented, his Supervisor, Yvonne Mattox, agreed.

Thus, he presented notes from the Veteran's Administration Hospital for a psychiatric evaluation on April 6 (p. 11 of Jt. Exh. 2); for a visit to the VA Evaluations Clinic on July 13 (Mattox actually testified that she sent him home on July 12 because he did not appear well) (pp. 8 and 9a of Jt. Exh. 2); on August 10 (p. 8 of Jt. Exh. 2); on August 13 through 16 ("He has had to stay away from work for the past four days (8/13-16) due to his condition for which Dr. Krieger is treating him.") (p. 7 of Jt. Exh. 2); and on August 21 (p. 9b of Jt. Exh. 2).

Supervisor Mattox testified that she charged him with unscheduled absences for those days because he did not inform her in advance that he would be seeking treatment on the days in question. According to Mattox, she became aware that he had a military related condition, but that since the absences were not covered by FMLA and there was no advance notice, they were unscheduled. Mattox testified that she understood that veterans were required to give prior notice to have their absences for treatment to be protected. The Grievant brought in doctors' notes, but did not make arrangement before hand to be absent.

This raises one of the substantial issues in this matter. The original Executive Order No. 5396 was issued by President Herbert Hoover in 1930. It provides:

> Special Leaves of Absence to be Given Disabled Veterans in Need of Medical Treatment
>
> With respect to medical treatment of disabled veterans who are employed in the executive civil service of the United States, it is hereby ordered that upon presentation of an official statement from duly constituted medical authority that medical treatment is required, such annual or sick leave as may be permitted by law and such leave without pay as may be necessary shall be granted by the proper supervisory officer to a disabled veteran in order that the veteran may receive such treatment without penalty in his efficiency rating.
>
> The granting of such leave is contingent upon the veteran's giving prior notice of definite days and hours of absence required for medical treatment in order that arrangements may be made for carrying on the work during his absence (Jt. Exh. 3).

The Executive Order is still followed in Federal agencies and the parties explicitly agreed that it applied to the Postal Service in a Step 4 decision in 1988 (Jt. Exh. 3). They also agreed "that absences meeting the requirements of that decree cannot be used as a basis for discipline" (*Ibid.*).

At some point, the Service incorporated the provisions of the Executive Order into the ELM in Section 513.32. Under "Conditions", the ELM provides:

> If employees (1) present a statement from a duly authorized medical authority that treatment is required, and (2) <u>when possible,</u> give prior notice of the definite number of days and hours of absence. (Such information is needed for work scheduling purposes.) (emphasis added) (Jt. Exh. 3).

As can be seen, the ELM essentially eliminates the absolute requirement of the Executive Order that the veteran provide advance notice of the days and hours of treatment.

The Grievant testified that his condition is such that it affects him from day-to-day, i.e., on days when he wakes up anxious and paranoid he cannot work and so takes himself into the

VA Clinic. His is not a condition which lends itself to regular, scheduled treatment. Based on his diagnosis (and Mattox's own experience on July 12), there is no reason to doubt this.

It is clear that the Service is covered by the terms of Executive Order 5396 and that it applies as amended in the ELM. Thus, the Grievant's seven documented absences were "legally protected absences" for treatment of his service related disability.

The question is whether this means that the matter is arbitrable despite the provisions of the Last Chance Agreement that the Grievant has waived his right to arbitration. This requires an analysis of the laws and a review of the arbitral principles involved.

First, the Service is covered by several federal laws prohibiting discrimination against the handicapped. Indeed, Article 2 of the National Agreement provides, "there shall be no unlawful discrimination against handicapped employees, as prohibited by the Rehabilitation Act." More specifically, the Service is required by law to implement an Affirmative Action Program "to promote Federal employment and advancement opportunities for qualified disabled veterans" (5 Code of Federal Regulations, Part 720). This means that discrimination against disabled veterans is prohibited in the Postal Service and, to a certain extent, overrides contractual arrangements between the parties, here, a Last Chance Agreement among the Service, the Grievant and the Local Union. Indeed, it could be argued that Article 2 of the National Agreement overrides this LCA.

The debate over whether an arbitrator should apply "external law" to supersede contractual provisions has been characterized as "well-argued and ongoing", with contributions on both sides from some of the most respected names in arbitration. See, Bonnie G. Bogue, *Melding External Law with the Collective Bargaining Agreement*, in Arbitration 1997 The Next Fifty Years, Proceedings of the Fiftieth Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books, 1998) 82-100, Note 2. There is no need to detail the debate here. However, one of the areas on which there is some consensus is that an arbitrator should issue an award that directs a party to engage in unlawful conduct. Carlton J. Snow, *Contract Interpretation*, in The Common Law of the Workplace, National Academy of Arbitrators, ed. St. Antoine (BNA Books, 1998) 76-77.

Based on my analysis of the Executive Order, the federal laws involved, the National Agreement and the ELM, it is my conclusion that to sustain the removal of the Grievant for violation of the LCA would have the result of directing the Service to engage in unlawful conduct, i.e., discrimination against an employee for exercising his rights as a disabled veteran. In other words, it would violate public policy (as embodied in the Executive Order) to allow the Service to remove the Grievant for exercising those rights.

Accordingly, I find the matter arbitrable. I further find that the Grievant did not violate the terms of the Removal Settlement-Last Chance Agreement dated March 9, 1999. He is to be reinstated with back pay subject to the terms of the ELM governing

such back pay. Finally, the reinstatement is to be pursuant to the terms of the Removal Settlement-Last Chance Agreement dated March 9, 1999 and it is reinstated effective with the date the Grievant is reinstated.

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE and AMERICAN POSTAL WORKERS UNION	**Grievant:** GERARD J. HANSEN **Post Office:** BOSTON AMC **Case No.:** B98C-1B-D 99292364 BO99-01652

Before: RANDALL M. KELLY, Arbitrator

Appearances:

For the United States Postal Service:

JAMES H. RYAN, Labor Relations Specialist
ROBERT SPENCER, Technical Advisor
WILFRED LESSARD, Supervisor, Distribution Operations
CARLA HUTCHEONS, Contract EAP Counselor

For the Union:

STEPHEN A. ALBANESE, National Business Agent
GERARD J. HANSEN, Grievant

Place of Hearing: Boston GMF, Boston, Massachusetts

Date of Hearing: March 15 and October 30, 2000
Written Closing Arguments submitted December 1, 2000

Date of Award: February 16, 2001

Relevant Contract Provisions: Article 16 and ELM

Contract Year: 1998-2000

Type of Grievance: Discipline

AWARD

1. That for reasons set forth herein, the Notice of Proposed Removal dated September 10, 1999 was not issued to the Grievant, Gerard J. Hansen, for just cause because the absences cited in the NOPR were for the treatment of his military service related disabilities pursuant to ELM §513.32 e. (the "Hoover Act"); and

2. That the Grievant is to be reinstated effective March 15, 2000 conditional on passing a fitness for duty examination, enrollment

in EAP and continuing treatment for his alcoholism as directed by EAP.

Randall M. Kelly, Arbitrator

Stipulated Issue:

Was the Notice of Proposed Removal dated September 10, 1999 issued to the Grievant, Gerard J. Hansen, for just cause? If not, what shall be the remedy?

Charges:

The Notice of Proposed Removal dated September 10, 1999 states the reason for the Removal action as follows:

> Charge: FAILURE TO BE REGULAR IN ATTENDANCE-AWOL
> Specifically, you have failed to meet the requirements of your position as described in section 666.81 of the Employee and Labor Relations Manual (ELM), which states: "Employees are required to be regular in attendance".
>
> A review of your record from June 13, 1999 through August 24, 1999, reveals the following absences:
>
> [the Grievant was continuously absent from June 14 to August 24, 1999]
>
> Your demonstrated lack of dependability in reporting when scheduled indicates that you are not meeting the basic requirements of your position.
>
> By your actions, you are in violation of the following sections of the Employee and Labor Relations Manual:
>
> [Section 666.81 and Section 666.82]
>
> In addition, the following elements of your past record will be considered in arriving at a decision if the charge is sustained:
>
> 1. You were issued a 14-day suspension on May 14, 1999, for Unsatisfactory Attendance (Suspension served and settled on 6/3/99 without any further right of appeal)
>
> 2. You were issued a 14-day suspension on June 14, 1998, for Unsatisfactory Attendance (Served and settled per agreements dated 10/2/98 and 2/5/99 without any further right of appeal)
>
> 3. You were issued a 7-day suspension on March 27, 1998, for

Unsatisfactory Attendance (Served and settled per agreements dated 10/2/98 and 2/5/99 without any further right of appeal)
4. You were issued a Letter of Warning on November 21, 1997 for Unsatisfactory Attendance (Settled per agreements dated 10/2/98 and 2/5/99 without any further right of appeal) (pp. 4-6 of Jt. Exh. 2).

Background Facts and Circumstances of the Dispute:

The Grievant, Gerard J. Hansen, was employed as a Clerk in the Boston AMC, beginning in 1974.

As described in the Notice of Proposed Removal, he had a history of attendance related discipline leading to the instant Notice of Proposed Removal on September 10, 1999 (all dates hereinafter are 1999 unless otherwise indicated).

The Union filed a timely grievance on the Grievant's behalf protesting his Removal and pursued it through the contractual grievance procedure. The matter, not being resolved, is properly before me for final and binding arbitration pursuant to the terms of the National Agreement between the parties.

OPINION

The Grievant admittedly had a history of poor attendance at least as far back as 1992. He does not challenge the fact that he was continuously absent from June 14 to August 24 and did not provide documentation in a timely manner to justify his absence. He did not respond to written requests from the Service to report or send documentation. The Service has made out a case for the removal of the Grievant based on being Continuously AWOL without providing administratively acceptable documentary evidence to justify his absence.

However, the case is really about whether the Grievant's

absences have to be excused under the Hoover Act, i.e., Executive Order 5396 and the implementing regulations contained in the ELM, or not. The parties stipulated that the Grievant had military service related disabilities, although the Service represented that it did not know the nature of the disability. SDO Wilfred Lessard testified that he had had administrative responsibility for the Grievant since 1997. In reviewing the Grievant's files, he found that the Grievant had been referred to EAP on three occasions. The final occasion, in 1997, Lessard referred him. He also testified that he was never aware that the Grievant had a problem with alcoholism. The only condition in the Grievant's file was migraine headaches. He admitted that he had heard "floor rumors" that the Grievant had a drinking problem, but he never asked.

The Grievant testified that he was in the Marines from 1968 to 1970. Upon leaving the service, he was adjudged a Disabled American Veteran with a 30% disability for a nervous disorder, migraines and post traumatic stress disorder. He has been regularly treated for his conditions at the local Veterans' Affairs Hospital.

And, probably because the Grievant had worked at the AMC for so long and because his poor attendance seemed to be a continual problem, his actual medical condition and the fact that it was a service related disability became lost. I cannot blame Supervisor Lessard for attempting to get the Grievant to come to work on a regular basis and his frustration when the Grievant did not or could not do so. However, a review of the Grievant's history and

particularly a review of his attempts at rehabilitation beginning in June, 1999 show that removal is not the appropriate discipline here.

First, as noted, it is undisputed that the Grievant suffers from chronic service related disabilities and has since he was hired by the Postal Service in 1974. During the 1980's his conditions affected his attendance and he was sent by Personnel for fitness for duty examinations in 1983, 1987 and 1988 (U. Exh. 1). All three physicians found him fit for duty as a Clerk when he is asymptomatic, but found that his absences were due to his two (unnamed) chronic medical conditions attributable to his service related disability. All three included a guarded prognosis. For example, Dr. Craig Zwerling, a Service Medical Officer, wrote in 1987:

> I anticipate that he may continue to be absent from work due to the service connected condition and his other medical condition because the Veteran's Administration has been unable to adequately control these conditions over the past 17 years. When he is well, he should be able to work safely and efficiently perform the full duties of a Postal Clerk. When his conditions flare up, I expect that he will be unable to work. In view of his poor response to treatment in the past, I am unable to predict the frequency of attacks in the future, but would be surprised if they were to disappear.

But, the results of those examinations were either lost or never shared with line supervision and I believe Supervisor Lessard when he testified that he was not aware of the Grievant's medical conditions other than migraine headaches. Be that as it may, the Service as an institution was aware of the Grievant's service related medical conditions and the continuing need for treatment.