REGULAR ARBITRATION PANEL

In the Matter of Arbitration	)	
	)	Grievant: V. Reilly
between	)	
	)	Post Office: Bellmawr, NJ P&DC
United States Postal Service	)	
	)	Case No: C00C-1C-D 05132381
and	)	
	)	
American Postal Workers Union	)	

Before:	GEORGE R. SHEA, Jr.
Appearances:	
For United States Postal Service:	T. Hensel
For American Postal Workers Union:	M. Gallagher
Place of Hearing:	Bellmawr, NJ
Date of Hearing:	May 3, 2006
Date of Post Hearing Submissions:	na
Date of Award:	May 22, 2006
Relevant Contract Provisions:	Article 15, 16, 19
Contract Year:	2000-2004
Type of Grievance:	Discipline (Removal)

AWARD SUMMARY

For the reasons more fully set forth in the attached Opinion, the Arbitrator determines that the Service did not have just cause to place the Grievant in an Emergency Placement status on or about June 20, 2005 or issue her the Notice of Proposed Removal on or about June 29, 2005 or issue her the Letter of Decision implementing that Removal on or about July 22, 2005. The Arbitrator, therefore, (a) sustains the grievance, (b) reinstates the Grievant to her prior Postal employment and (c) awards the Grievant full restitution of any pay, benefits or status lost by her as a result of the contested Emergency Placement and Removal.

George R. Shea Jr

George R. Shea, Jr.

OPINION

STATEMENT OF PROCEEDINGS:

The Union, in accordance with the Parties' National Agreement [Agreement], appealed the above captioned matter to arbitration. The undersigned was designated as the Arbitrator to hear and decide the matter. The Arbitrator held a hearing on and at the previously captioned date and location. The Parties' representatives appeared and the Arbitrator provided them with a full and fair opportunity to be heard, to present evidence and argument and to examine and cross examine witnesses.

The Service called C. Alston as its witness. The Union called V. Reilly as its witness.

BACKGROUND:

1. June 21, 2005: The Service, in the person of C. Alston [Disciplining Supervisor] with the concurrence of T. Oswald, issued V. Reilly [Grievant] a notice of Emergency Placement. The Service indicated that the Emergency Placement was founded on the fact that the Grievant was claiming sick leave while working for the Internal Revenue Service and that her retention in an active duty status could result in the loss of Postal resources. (J-#2, pages 7-8)
2. June 29, 2005: The Service, in the person of C. Alston [Disciplining Supervisor] with the concurrence of T. Oswald, issued V. Reilly [Grievant] a Notice of Proposed Removal [Removal]. The Service, in the person of T. Oswald, issued a Letter of Decision, dated July 22, 2005, implementing the Removal. The Removal was based upon the Charge that the Grievant had engaged in "Improper Conduct" which allegedly violated Sections 513.312, 661.42, 666.2 and 666.6 of the Service's Employee and Labor Relations Handbook [ELM]. ELM Section 513.312 prohibits an employee in a "sick leave status"

from engaging in any gainful employment unless prior approval has been given by an appropriate authority. ELM Section 661.42 prohibits an employee from engaging in any outside employment or activity which is not compatible with his/her full and proper discharge of Postal duties or which impairs the employee's ability to perform those duties. ELM Section 666.2 prohibits an employee from engaging in activities on or off the job which reflect unfavorably on the Service. ELM Section 666.6 requires employees to cooperate in any Postal investigation. (J-#2, page 5)

ISSUE:

The Parties agreed to the following statement of the issues before the Arbitrator:

Did the Service have just cause to place the Grievant in an Emergency Placement status on or about June 20, 2005? Did the Service have just cause to issue the Grievant a Notice of Proposed Removal on or about June 29, 2005 and to issue a Letter of Decision implementing that Removal on or about July 22, 2005. If not, what shall be the appropriate remedy?

FACTS:

The events regarding this matter were described in the testimony of the Parties' witnesses and in the documentary evidence offered by the Parties. Based upon his review of that evidence, including his personal observation of the witnesses during their testimony, the Arbitrator determines that the preponderance of that evidence supports the following findings of fact.

1. V. Reilly is a veteran of two years of active duty with the U.S. Air Force and is a preferred eligible Postal employee. Commencing in March of 1987, she was employed by the Internal Revenue Service [IRS] and continued to be so employed until sometime in 2004. Her IRS employment required her to work between the hours of 8:00 am and 4:30 pm. The Grievant

described her IRS employment as sedimentary. The Grievant was actively employed also by the U.S. Postal Service [Service / Employer] between January 2001 until the issuance of the contested Removal in 2005. Her Postal employment required her to work between the hours of 8:00 pm and 4:30 am. The Grievant described her Postal employment as a Flat Sorter Operator as physically demanding.

2. 2003-2005: During this period, the Grievant suffered from arthritis, tendinitis and carpal tunnel syndrome. She applied for and the Service granted her FMLA protection for absences attributed to these conditions. At the time the Service issued the contested Emergency Placement and Removal, the Grievant was working a Light Duty Assignment at her Postal employment.

3. February 2, 2003 - March 7, 2004 During this period, the Grievant on the twenty-six occasions enumerated in the Notice of Proposed Removal dated June 29, 2005, requested and received leave from the Postal Service.[1] The Grievant on these occasions or on the following work day worked at her IRS employment. (J-#2, pages 1-4 and J-#2, pages 26-41)

4. June 20, 2005: The Service, in the person of C. Alston, held a pre-discipline interview of the Grievant. The Grievant was accompanied by her Union representative at the interview. Notwithstanding the supervisor's assurance that criminal charges would not be filed against her by the Postal Service, the Grievant, upon the advice of her representative, declined to respond to the supervisor's questions during the interview. (J-#2, page 25)

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[1] The Grievant requested and received leave without pay on sixteen of these occasions, paid annual leave on four of these occasions and paid sick leave on the seven remaining dates. The Grievant identified FMLA illness as the reason for all of these absences.

POSITIONS OF THE PARTIES:

American Postal Workers Union, AFL-CIO [Union]

The Union maintained that the Service did not have just cause to issue the Grievant the Emergency Placement; in that, the Service did not establish the existence, at the time it made the contested Placement, of the requisite conditions for an Emergency Placement pursuant to Section 16.7 of the Agreement.

The Union further maintained that the Service did not have just cause to issue the Grievant the contested Removal; in that, the Service failed to establish that (a) the Grievant knowingly violated a clear, promulgated rule restricting her use of sick leave (b) the Service afforded the Grievant the procedural and substantive due process protections required by the just cause standard, the Agreement or the law during its investigation of the charge upon which the Removal was based.

Based upon these factual assertions and contractual contentions, the Union requested the Arbitrator: (a) sustain the grievance, (b) reinstate the Grievant to her prior Postal employment (c) award the Grievant full restitution of any pay, benefits or status lost by her as a result of the contested Emergency Placement and Removal.

United States Postal Service [Service]

The Service maintained that it had just cause to place the Grievant in an Emergency Placement status and to issue her the Notice of Proposed Removal. Initially, the Service maintained that Section 16.7 of the Agreement provides it with the authority to place the Grievant immediately in an Emergency Placement status when, as in this matter, there is a high probability that her continued presence in the work place would result in the loss of Postal property or funds.

The Service further maintained that it had just cause to issue the Grievant the contested Removal; in that, the evidence supports

the findings that (a) the Service had rules regarding the Grievant's use of Postal sick leave while working for another employer (b) the Grievant knew or should have known of these restrictions, (c) the Grievant violated these rules and (d) the Grievant's violation of these rules was an offense of such magnitude as to merit summary discharge from her Postal employment.

Finally, the Service maintained that it complied with the procedures mandated or sanction by the Agreement when it placed the Grievant in the Emergency Placement status and issued the contested Removal.

Based upon these factual assertions and contractual contentions, the Service requested the Arbitrator deny the grievance.

DISCUSSION:

Emergency Placement:

Section 16.7 of the Agreement authorizes the Service's Emergency Placement of an employee.[2] An Emergency Placement of an employee is an act of discipline when it is imposed for reasons which would otherwise subject that employee to discipline pursuant to another section of Article 16 of the Agreement. In the instant matter, the Arbitrator finds the contested Placement of the Grievant was disciplinary in nature.

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[2] Section 16.7 "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." (Emphasis added by Arbitrator)

The Service's obligation to meet the requirements of the just cause standard when issuing an Emergency Placement is modified only to the narrow extent necessary to effectuate the immediate action authorized by Section 16.7 of the Agreement. In consideration of the nature of the Grievant's alleged misconduct and the Service's ability to deny any paid leave requested by the Grievant, the Arbitrator determines that the Service failed to establish the applicability of Section 16.7 to the Grievant's alleged misconduct or a reasonable basis for its determination that her immediate removal from an active employment status was necessary to avoid damage to Postal property or the loss of Postal funds. The Arbitrator, consequently, determines that the Service did not have just cause, as applicable to actions taken pursuant to Section 16.7, to place the Grievant into an Emergency Placement status.

Notice of Proposed Removal:

The evidentiary record [Record] establishes that the Grievant was absent from her Postal employment on illness related leave on the days enumerated in the contested Removal. The Record also establishes that the Grievant was engaged in gainful employment on the day of or the day after her absences from her Postal duties, albeit, during hours which did not coincide with the hours of her Postal employment schedule. The Record does not establish the Service's contentions that the Grievant misrepresented her physical condition on her requests for sick leave and was physically capable of performing the physical tasks of her postal employment on the days she applied for and received sick leave from the Postal Service.

The Arbitrator cannot agree with the Service's assertion that the restrictions of ELM Section 513.312 are so obvious and self evident as to be known to employees without benefit of specific

notice of them.[3] The prohibitive language itself recognizes that such activity is not malum per se, as it may be authorized by an appropriate authority. The Arbitrator similarly cannot agree that the language of ELM Section 513.312 states a clear, non-ambiguous and absolute prohibition on the Grievant's use of sick leave while remaining actively employed with another employer during a time period contiguous with the hours she is on sick leave granted by the Postal Service.

The language of Section 513.312 is ambiguous by reason of its failure to define the term "sick leave status". The term "status" could be defined as the entire twenty-four hour day during which the Grievant took sick leave and was absent from the tour of duty of her Postal employment, as argued by the Service. Alternatively, the term could be defined as the actual hours the Grievant is on sick leave and absent from her Postal employment, as argued by the Union.[4] Finally, the term could be define as the day or hours the Grievant is on sick leave but not include either the day or hours when she is absent from her Postal employment on paid annual leave or unpaid leave.

The Record does not establish that the Service provided the Grievant with notice of the existence of the prohibition stated in the ELM Section 513.312 or the scope of its intended application. In the absence of such notice and in consideration of the alternative meanings which reasonably could be attributed to ELM Section 513.312, the Arbitrator determines that the Service did not

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[3] Section 513.312 of the ELM provides the following: "An employee who is in a sick leave status may not engage in any gainful employment unless prior approval has been granted by appropriate authority."

[4] Dumont v. Veterans Administration (1981) MSPB

establish it had just cause to discipline the Grievant on the charge that she violated that Section of the ELM.

The Arbitrator further determines that the Record does not establish the factual basis of the charge that the Grievant's IRS employment was incompatible with her Postal employment or impaired her mental or physical ability to perform her Postal employment in violation of ELM Section 661.42 or, in the circumstances of this matter, that her taking Postal sick leave represented dishonesty or poor moral character in violation of ELM Section 666.2, as charged by the Service.

The Service also charged the Grievant with a violation of ELM Section 666.6, by reason of her failure to respond to her supervisor's questions during the pre-discipline interview of June 20, 2005.

It is generally accepted that a proper investigation of the charges precipitating discipline includes the employer's pre-discipline interview of the charged employee.[5] Such interviews have two very distinct components.

The first component involves the employer's obligation to present the charges and supporting evidence to the employee who is to be discipline. This component provides the employee with the opportunity to respond to, defend against and clarify the charges. It further provides the employee with the opportunity to contest, qualify or explain the evidentiary foundation of the charges and to provide the disciplining official with any evidence of mitigation of the charged offense. Finally, this component allows the employee to assess the incriminating implications, if any, of the interview. In the opinion of the Arbitrator, the employer does not have just

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[5] See Koven, Adolph M. & Smith, Susan L. Just Cause, the Seven Tests 2nd Ed. BNA Publications (1992) at pages 162 - 166 and Cleveland Bd of Education 470 U.S. 532 (1985)

cause to discipline the employee for declining to avail himself/herself of these opportunities.

The second component of the pre-discipline interview, which may be part of the employer's more comprehensive administrative investigation, provides the employer with the opportunity to interrogate the employee in order to ascertain his/her knowledge of and involvement in the acts or omissions which are the basis of the discipline. Arbitrators and the courts have held that the employee has a contractual or legal obligation to co-operate with the employer's administrative investigation. This obligation includes the employee's duty to respond truthfully to the employer's relevant questions, even if such responses may lead to the discipline of the employee or to the filing of criminal charges against him/her.[6]

The employer's right to inquire of the employee and the employee's corresponding obligation to respond are not absolute. If the employee has a reasonable personal belief that either component of the pre-discipline interview may expose him/her to discipline and requests Union representation during the interview, the employer is required to delay or suspend its questioning until such representation is provided.[7]

In the event, the interview also involves the potential exposure of the employee to criminal charges, the public employer's right to inquire of its employee is further limited by the employee's constitutional right against self incrimination. In such

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[6] See George Kalkines v. The United States 200Ct.Cl 570 (1973); Beilan v. Board of Education 357 U.S. 399; Slochower v. Board of Education 350 U.S. 551; also Koven, Adolph M. & Smith, Susan L. Just Cause, the Seven Tests 2nd Ed. BNA Publications (1992) at pages 185-197; also Employee and Labor Relations Manual [ELM] Section

[7] J. Weingarten v. NLRB 420 U.S. 251 (1975)

circumstances, the employer is legally required to notify the employee that (a) the interrogation may elicit responses which could expose him/her to criminal prosecution, (b) the employee has a constitutional right to remain silent[8] (c)the employer intends to discharge the employee if he/she refuses to respond to the its inquiries and (d) the information involuntarily provided by the employee and the investigative fruits of that information may not be used in a criminal prosecution of the employee on related criminal charges.[9]

The legal issues raised in such situations are many and complex. The "Use Immunity" granted to the employee by the courts in subsequent or concurrent criminal proceedings is not self executing. The evidentiary exclusion of this "Coerced Evidence" must be initiated by the employee\defendant in the criminal proceeding. It is premised upon the defendant's ability to establish that (a) the evidence was involuntarily disclosed in a situation of disciplinary coercion or (b) the employer failed to comply with the "Garrity Notification" requirements. The "Use Immunity" exclusion of such "Coerced Evidence" may be further limited by reason of the propriety, scope, nature and relevancy of employer's questions and the corresponding attributes of the employee's responses to those questions and the employee's proper preservation of his/her constitutional right or privilege.[10]

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[8] Miranda v. Arizona, 384 U.S. 436, 464-465

[9] The Court designated this evidentiary exclusion "Use Immunity". Garrity et al v. New Jersey 385 U.S. 493 (1967) It should be noted that this "Use Immunity" is substantially different from immunity from criminal prosecution..

[10] Garrity et al v. New Jersey 385 U.S. 493 (1967; Brown v. Mississippi 297 U.S. 278

The Court in Kalkines v. U.S. (570; 473 F2d 1391) determined that, in the absence of the employer's notification to the employee of the safeguards established by the Court in Garrity v. New Jersey (385 U.S. 493), a public employer may not discipline, discharge or remove an employee from his/her public employment based upon the charge that employee failed to cooperate in the employer's administrative investigation when that investigation may expose an employee to criminal prosecution.[11] In the context of this legal labyrinth, the Court in Kalkines v. US further held that it would be reasonable for an employer to delay or suspend its interrogation of an employee when he/she requests the presence of his/her attorney during the interview.

In consideration of the provisions of Articles 3 and 16 of the Agreement, the Arbitrator determines that when the Service disciplines an employee for a violation of ELM Section 666.6, the just cause standard requires the Service to establish that it provided the employee with the notification required by the Garrity and Kalkines decisions.[12] In the opinion of the Arbitrator, the absence of such proof in this matter, is fatal to the Service's claim that it had just cause to Remove the Grievant for a violation of ELM Section 666.6

Based upon the findings and reasoning set forth in this Opinion, the Arbitrator makes the attached Award.

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[11] George Kalkines v. United States 200CtCt , 570; 473 F2d 1391 (1973)

[12] The Arbitrator determines the supervisor's statement to the Grievant that the Postal Service did not intend to press criminal charges against her based upon the facts of this matter does not meet the notice requirements imposed by the Garrity and Kalkines Courts.

REGULAR ARBITRATION PANEL

In the Matter of Arbitration	)	
	)	Grievant: J. Nwankpah
between	)	
	)	Post Office: Bellmawr, NJ P&DC
United States Postal Service	)	
	)	Case No: C00C-1C-D 05164426
and	)	
	)	
American Postal Workers Union	)	

Before:	GEORGE R. SHEA, Jr.
Appearances:	
For United States Postal Service:	M. Gallagher
For American Postal Workers Union:	I. Morris
Place of Hearing:	Bellmawr, NJ
Date of Hearing:	May 3, 2006
Date of Post Hearing Submissions:	May 17, 2006
Date of Award:	May 22, 2006
Relevant Contract Provisions:	Articles 15, 16, 19
Contract Year:	2000-2004
Type of Grievance:	Discipline (Removal)

AWARD SUMMARY

For the reasons more fully set forth in the attached Opinion, the Arbitrator determines that the Postal Service did not have just cause to issue J. Nwankpah [Grievant] the Notice of Removal dated August 4, 2005. The Arbitrator, therefore, (a) sustains the grievance, (b) reinstates the Grievant to his prior Postal employment and (c) awards the Grievant full restitution of any pay, benefits or status lost by him as a result of the contested Removal.

George R. Shea, Jr.

OPINION

STATEMENT OF PROCEEDINGS:

The Union, in accordance with the Parties' National Agreement [Agreement], appealed the above captioned matter to arbitration. The undersigned was designated as the Arbitrator to hear and decide the matter. The Arbitrator held a hearing on and at the previously captioned date and location. The Parties' representatives appeared and the Arbitrator provided them with a full and fair opportunity to be heard, to present evidence and argument and to examine and cross examine witnesses.

The Service called J. Hu [Disciplining Supervisor] as its witness. The Union called J. Nwankpah [Grievant] and S. McGovern (Shop Steward) as its witnesses. The Parties' representatives further agreed that if they had called B. Cowley and L. Benberry both individuals would have testified consistent with their respective written statements. (J-#2 pages 11-4 Cowley and J #2, pages 14-15 Benberry)

BACKGROUND:

1. August 4, 2005: The Service, in the person of J. Hu [Disciplining Supervisor] with the concurrence of V. Rago issued J. Nwankpah [Grievant] a Notice of Removal [Removal]. The Removal was based upon two Charges. The first charged that the Grievant had engaged in "Improper Conduct" which allegedly violated "Sections 661.2, which prohibits deceitful activity in personal actions ... 665.11, which requires employees to uphold the policies and regulations of the USPS, 665.13 which requires employees to discharge their duties conscientiously, 665.16, which requires employees to be honest, trustworthy and to behave in a manner that does not reflect adversely upon the USPS or other behavior prejudicial to the USPS." (J-#3, page

4) The Second charge the Grievant with "Failure to cooperate in an official postal investigation in violation of ELM Section 665.3.

ISSUE:

The Parties agreed to the following statement of the issue before the Arbitrator:

Did the Postal Service have just cause to issue J. Nwankpah [Grievant] the Notice of Removal, dated August 4, 2005?[1]

FACTS:

The Parties' representatives agreed to the following statements of Stipulated facts:

1. The Grievant's claim for Continuation of Pay/Compensation, dated June 10, 2005, was denied and the Grievant repaid all the compensation he received pursuant to that claim.

The events regarding this matter were described in the testimony of the Parties' witnesses and in the documentary evidence offered by the Parties. Based upon his review of that evidence, including his personal observation of the witnesses during their

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[1] The Service's advocate declined to agree to a statement of the issue which would authorize the Arbitrator to render a remedy in this matter, if a contract violation was found to exist. The Arbitrator finds, even in the absence of such specific authorization, that he has authority to grant an appropriate remedy in the instant matter pursuant to his general contractual remedial authority. This authorization includes the right to award damages, as warranted, to remedy past contract violations and to prevent similar future violations. (Gamser, NC-S-5426; Mittenthal, H4N-NA-27 (1986); United Steelworkers of America v. Enterprise Wheel & Car Corp. 80 S.Ct. 1358, 1361 (1960) and the specific authority set forth in Sections 16.1 and 16.6.B. of the Agreement.

testimony, the Arbitrator determines that the preponderance of that evidence supports the following findings of fact.

1. J. Nwankpah [Grievant] was initially employed by the Service on or about July 8, 1995. At times relevant to this matter, he was a Full-Time Regular employee (Mail Processor) assigned to the Bellmawr, NJ P&DC. He worked under the direct supervision of J. Hu. The evidentiary record [Record] does not indicate that prior to the issuance of the contested Removal he had received any discipline.
2. May 30, 2005: The Grievant, while working at his assigned Flat Sorter Machine, processed mail from a container marked as containing mail which contained Bio-Hazardous material. Based upon their inspection of the mail processed by the Grievant, Postal managerial and supervisory personnel made a determination that the Grievant had not been exposed to any bio-hazardous material. The Grievant worked the remainder of his scheduled work day and part of his work day on Monday, May 31, 2005. The Grievant's non-scheduled days were Thursday, June 2 and Friday, June 3, 2005. He worked Saturday, June 4, 2005.[2]
3. June 4, 2005: The Grievant was medically examined at the Cooper Hospital, retained over night and discharged on June 5, 2005.
4. June 5, 2005: Cooper Hospital issued the Grievant a medical note indicating that he could return to work in three days. (J-#4, page 15)
5. June 6, 2005: Dr. Sexton examined the Grievant and issued a medical note which stated that "Patient developed acute

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[2] The Record is unclear as to whether the Grievant worked on June 1, 2005. The Disciplining Supervisor testified that he did work, however, the Notice of Removal charged the Grievant had been absent from work from June 1, 2005 until July 19, 2005. (J-#3, page 1)

bronchitis on the job by being in contact with biohazard (sic) material. This is job related and [he] should be out of work 45 days." (J-#4, page 16)

6. June 10, 2005: The Grievant completed a CA-1 Form Employee's Notice of Traumatic Injury and Claim for Continuation of Pay /Compensation [COP claim]. The Grievant described the injury as pain and coughing blood and other. (J-#4, page 7) The Service, in the person of Hu, challenged the claim. (J-#4, page 8)
7. June 15, 2005: Dr. Sexton completed a Duty Status Report for the U.S. Department of Labor, which indicated that the Grievant could not engage in any work related activity until July 20, 2005. (J-#4, page 17) The United States Postal Inspection Service [Inspection Service] commenced its investigation of the Grievant's COP claim. (J-#4, page 2)
8. July 18, 2005: The Inspection Service, in the person of Inspector Stock, issued an Investigative Memorandum to the Manager of the Bellmawr, NJ P&DC. (J-#4)

POSITIONS OF THE PARTIES:

American Postal Workers Union, AFL-CIO [Union]

The Union maintained that the Service, which has the burden of proof in this matter, failed to establish the factual basis of Charge One of the Notice of Removal. The Union further argued that, in the circumstances of this matter, the Service did not have the contractual or legal right to discipline the Grievant pursuant to the charge that he violated Section 665.3 of the Employee and Labor Relations Manual [ELM]; in that, the results of the Postal Service's administrative investigation could have exposed the Grievant to criminal prosecution.

Based upon these factual assertions and contractual contentions, the Union requested the Arbitrator: (a) sustain the

grievance, (b) reinstate the Grievant to his prior postal employment (c) award the Grievant full restitution of any pay, benefits or status lost by him as a result of the contested Notice of Removal.

United States Postal Service [Service]

The Service maintained that it had just cause to issue the Grievant the contested Notice of Removal; in that, the evidentiary record [Record] established that the Grievant made false statements regarding his exposure to bio-hazardous material in the work place, applied for and received COP benefits based upon these false statements in violation of the ELM sections cited in the contested Removal. The Service further maintained that it issued the contested Removal in accordance with procedures sanctioned or mandated by the just cause standard and the Agreement, including its proper investigation of the charges, a pre-discipline interview of the Grievant and obtaining the concurrence required by Section 16.8 of the Agreement. Finally, the Service argued that the Grievant's proven offense is of such magnitude as to warrant his summary dismissal / Removal from his postal employment.

Based upon these factual assertions and contractual contentions, the Service requested the Arbitrator deny the grievance.

DISCUSSION:

The Arbitrator determines that Disciplining Supervisor had personal knowledge independent of the Inspection Service's Investigative Memorandum of the incident of May 30, 2005, the claim forms filed by the Grievant regarding his perceived exposure to Bio-hazardous material in the work place and the medical documentation upon which he based his COP. The Arbitrator determines that a proper investigation of this evidence did not

require the Supervisor to conduct an independent investigation of these elements of the Investigative Memorandum subsequent to her receipt thereof.[3] The Arbitrator further determines that the Service provided the Grievant with an opportunity of a pre-disciplinary interview and that the Grievant declined to avail himself of this opportunity. The Arbitrator, accordingly, determines that the Disciplining Supervisor conducted a proper investigation of the charges contained in the contested Removal.

Charge One: Improper Conduct:

The Record does not contain sufficient direct evidence to support a finding that the Grievant knowingly made any false statements, misrepresentations or concealment of fact to obtain the COP benefits.

The Record does not contain direct evidence which establishes that the Grievant was not experiencing chest pain or was not coughing up blood, as stated in his COP application. The Record similarly does not support a finding that the Grievant was not examined by medical professionals or that their diagnosis of his condition was not the one stated in the medical documents submitted to the Service and the Department of Labor by the Grievant.

The crux of the Service's contention in this matter is that the Grievant was not exposed to bio-hazardous material in the work place and that he falsely claimed to his treating medical professionals, the Service and the Department of Labor that he was and that this exposure resulted in a pulmonary condition which prevented him from returning to work. The uncontested direct evidence in this matter supports the Service's contention that the

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[3] The Arbitrator notes that the Investigative Memorandum contains certain factual errors not adopted by the Disciplining Supervisor in her Notice of Removal, i.e. the date of the alleged exposure and the identity of the Disciplining Supervisor.

Grievant was not exposed to a piece of mail containing bio-hazardous material which apparently had been present in the container from which the Grievant worked mail on May 30, 2005.

The Service primarily relied upon circumstantial evidence to establish the other factual elements of Charge One.[4] This circumstantial evidence consisted of the Grievant's conduct before and after the filing of his COP claim on June 10, 2005. This conduct consisted of reporting to work after the alleged exposure, the seeking of a second medical opinion from his own physician and his engagement in physical activities allegedly more strenuous than his Postal employment during the time he was receiving COP benefits. The Service also relied upon hearsay evidence given by the Grievant's treating physician regarding statements allegedly made to him by the Grievant which would be inconsistent with the Grievant's statements in his COP claim. The doctor was not available at the Hearing nor was the Inspector who took the doctor's statements. The Grievant, however, testified at the Hearing both under direct and cross examination and denied making the statements attributed to him by his medical doctor. Given the hearsay nature of the evidence relied upon by the Service, the Arbitrator must credit the Grievant's direct testimony as being the more reliable account of what transpired between the Grievant and his physician during the latter's June 2005 examinations and interviews.

In the instant case, the Arbitrator observes that the Grievant did process mail from a container which was labeled as containing

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[4] Arbitrators, including this Arbitrator, have held that the parties may rely on circumstantial evidence to support their factual assertions in arbitration. To have probative worth, however, the circumstantial evidence offered must show, with a fair degree of probability, the facts for which it is offered as proof. The probative value of the circumstantial evidence is diminished, when two or more inferences may be drawn from the evidence.

Bio-hazardous material and believed that he was exposed to such material, even if indirectly. The Grievant testified, without contradiction, that he was diagnosed with a pulmonary condition, including hemoptysis, subsequent to May 30, 2005, which could be compatible with such exposure (U-#4) and was told to remain out of work by his treating physician.(J-#4, page 16 and 17) The Arbitrator is not persuaded that the circumstantial evidence relied upon by the Service in this matter shows with a fair degree of probability that the Grievant knowingly made false statements to his treating physician or in his claim for COP benefits, as alleged by the Service.

The Service's failure to establish the factual basis of Charge One is fatal to its claim that it had just cause to issue the Grievant the contested Removal based upon this charge.

Charge Two: Failure To Cooperate in an Official Postal Investigation:

The Service also charged the Grievant with a violation of ELM Section 665.3, by reason of his failure to respond to his supervisor's questions during the pre-discipline interview of July 28, 2005.

It is generally accepted that a proper investigation of the charges precipitating discipline include the employer's pre-discipline interview of the charged employee.[5] Such interviews have two very distinct components.

The first component involves the employer's obligation to present the charges and supporting evidence to the employee who is to be discipline. This component provides the employee with the opportunity to respond to, defend against and clarify the charges.

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[5] See Koven, Adolph M. & Smith, Susan L. Just Cause, the Seven Tests 2nd Ed. BNA Publications (1992) at pages 162 - 166 and Cleveland Bd of Education 470 U.S. 532 (1985)

It further provides the employee with the opportunity to contest, qualify or explain the evidentiary foundation of the charges and to provide the disciplining official with any evidence of mitigation of the charged offense. Finally, this component allows the employee to assess the incriminating implications, if any, of the interview. In the opinion of the Arbitrator, the employer does not have just cause to discipline the employee for declining to avail himself/herself of these opportunities.

The second component of the pre-discipline interview, which may be part of the employer's more comprehensive administrative investigation, provides the employer with the opportunity to interrogate the employee in order to ascertain his/her knowledge of and involvement in the acts or omissions which are the basis of the discipline. Arbitrators and the courts have held that the employee has a contractual or legal obligation to co-operate with the employer's administrative investigation. This obligation includes the employee's duty to respond truthfully to the employer's relevant questions, even if such responses may lead to the discipline of the employee or to the filing of criminal charges against him/her.[6]

The employer's right to inquire of the employee and the employee's corresponding obligation to respond are not absolute. If the employee has a reasonable personal belief that either component of the pre-discipline interview may expose him/her to discipline and requests Union representation during the interview, the

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[6] See George Kalkines v. The United States 200Ct.Cl 570 (1973); Beilan v. Board of Education 357 U.S. 399; Slochower v. Board of Education 350 U.S. 551; also Koven, Adolph M. & Smith, Susan L. Just Cause, the Seven Tests 2nd Ed. BNA Publications (1992) at pages 185-197; also Employee and Labor Relations Manual [ELM] Section

employer is required to delay or suspend its questioning until such representation is provided.[7]

In the event, the interview also involves the potential exposure of the employee to criminal charges, the public employer's right to inquire of its employee is further limited by the employee's constitutional right against self incrimination. In such circumstances, the employer is legally required to notify the employee that (a) the interrogation may elicit responses which could expose him/her to criminal prosecution, (b) the employee has a constitutional right to remain silent[8] (c)the employer intends to discharge the employee if he/she refuses to respond to its inquiries and (d) the information involuntarily provided by the employee and the investigative fruits of that information may not be used in a criminal prosecution of the employee on related criminal charges.[9]

The legal issues raised in such situations are many and complex. The "Use Immunity" granted to the employee by the courts in subsequent or concurrent criminal proceedings is not self executing. The evidentiary exclusion of this "Coerced Evidence" must be initiated by the employee\defendant in the criminal proceeding. It is premised upon the defendant's ability to establish that (a) the evidence was involuntarily disclosed in a situation of disciplinary coercion or (b) the employer failed to comply with the "Garrity Notification" requirements. The "Use Immunity" exclusion of such "Coerced Evidence" may be further limited by reason of the propriety, scope, nature and relevancy of

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[7] J. Weingarten v. NLRB 420 U.S. 251 (1975)

[8] Miranda v. Arizona, 384 U.S. 436, 464-465

[9] The Court designated this evidentiary exclusion "Use Immunity". Garrity et al v. New Jersey 385 U.S. 493 (1967) It should be noted that this "Use Immunity" is substantially different from immunity from criminal prosecution..

employer's questions and the corresponding attributes of the employee's responses to those questions and the employee's proper preservation of his/her constitutional right or privilege.[10]

The Court in Kalkines v. U.S. (570; 473 F2d 1391) determined that, in the absence of the employer's notification to the employee of the safeguards established by the Court in Garrity v. New Jersey (385 U.S. 493), a public employer may not discipline, discharge or remove an employee from his/her public employment based upon the charge that employee failed to cooperate in the employer's administrative investigation when that investigation may expose an employee to criminal prosecution.[11] In the context of this legal labyrinth, the Court in Kalkines v. US further held that it would be reasonable for an employer to delay or suspend its interrogation of an employee when he/she requests the presence of his/her attorney during the interview.

In consideration of the provisions of Articles 3 and 16 of the Agreement, the Arbitrator determines that when the Service disciplines an employee for a violation of ELM Section 665.3, the just cause standard requires the Service to establish that it provided the employee with the notification required by the Garrity and Kalkines decisions.[12] In the opinion of the Arbitrator, the absence of such proof in this matter, is fatal to the Service's

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[10] Garrity et al v. New Jersey 385 U.S. 493 (1967; Brown v. Mississippi 297 U.S. 278

[11] George Kalkines v. United States 200CtCt , 570; 473 F2d 1391 (1973)

[12] The Arbitrator determines the supervisor's statement to the Grievant that the Postal Service did not intend to press criminal charges against him based upon the facts of this matter does not meet the notice requirements imposed by the Garrity and Kalkines Courts.

claim that it had just cause to Remove the Grievant for a violation of ELM Section 665.3 [13]

Based upon the findings and reasoning set forth in this Opinion, the Arbitrator makes the attached Award.

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[13] The analysis of the employer's and employee's rights and obligations in an administrative investigation which has criminal implications set forth in this opinion is also set forth in the matter designated as C00C-1C-D 0513281 which was heard by the Arbitrator in conjunction with this matter on May 3, 2006.